

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MICHAEL MCCLERNAN,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS, LIMON CORRECTIONAL FACILITY,

Respondent.

Administrative Law Judge Kristin F. Rozansky commenced this hearing on October 31, 2001. At that time Complainant's counsel requested that she be allowed to withdraw from representing Complainant in this action. Complainant did not object. For good cause shown, the imminent hiring of new counsel for Complainant and Complainant's pending military training, the evidentiary portion of the hearing was continued to and held on February 11 and 12, 2002 at the Division of Administrative Hearings, 1120 Lincoln, Suite 1400, Denver, Colorado. Assistant Attorney General Joseph Haughain represented Respondent. Respondent's advisory witness was Associate Warden Mark Broaddus, the appointing authority. Complainant appeared and represented himself.

MATTER APPEALED

Complainant, Michael McClernan ("Complainant" or "McClernan") appeals his termination by Respondent, Department of Corrections, Limon Correctional Facility, ("Respondent" or "DOC").

For the reasons set forth below, Respondent's action is **affirmed**.

PRELIMINARY MATTERS

On February 11, 2002, at the beginning of the evidentiary hearing, Complainant requested a continuance of the evidentiary hearing for an additional month and a half on two grounds: (1) that he had, by letter faxed to the State Personnel Board on December 31, 2001, requested, and not received, a subpoena for Glen Gaylord; and (2) he had not received a response to all his discovery requests.

The administrative law judge reviewed the file and found subpoenas issued on

behalf of the Complainant for a number of witnesses but no request from Complainant for the issuance of a subpoena for Glen Gaylord. Complainant was unable to provide any evidence of filing the request, either a date stamped copy or a facsimile cover sheet. In addition, there was no evidence of Complainant following up on the subpoena request during the six-week period between the time he states he filed the request and the first day of evidentiary hearing.

Complainant alleged that he requested certain discovery from the Respondent and did not receive a response to that discovery. This discovery includes a copy of the tapes of the R-6-10 meeting, a copy of Major Day's personnel file and a copy of Robert Thiede's personnel file from his employment with the City and County of Denver. Respondent argues that all discovery was responded to and, subsequent to Complainant's counsel's withdrawal, sent directly to Complainant on November 1, 2001.

By order dated October 31, 2001, the parties were ordered, in the event of a discovery dispute, to make a good faith effort to confer or attempt to confer with the opposing party in order to resolve all discovery issues, including a perceived failure to produce or answer. In the event either party was unable to resolve a discovery issue through informal means, then the party seeking further discovery was ordered to file a motion with the Board seeking relief within forty-eight hours of conferring with the opposing party and being unable to resolve the dispute. The latest possible date for filing such a motion with the Board was set for November 20, 2001. Complainant did not file any such motion with the Board until the first day of the evidentiary hearing when he stated the reasons for his oral motion requesting a continuance of the hearing. In addition, there was no evidence that Complainant made a good faith effort to resolve these issues.

A review of the discovery request shows that a copy of the R-6-10 tapes and/or a copy of the transcript of the R-6-10 meeting was requested. A copy of the transcript of the R-6-10 meeting was provided to Complainant at the beginning of November 2001. In addition, it is noted in the transcript of the R-6-10 meeting, an exhibit in the hearing on this matter, Complainant brought his own audio recording equipment to the R-6-10 meeting.

With the exception of medical and insurance information and charitable contributions, Respondent provided Complainant with a copy of Major Day's personnel file. Respondent does not have custody or control of Robert Thiede's personnel file from his employment at the City and County of Denver.

The motion for an additional month and a half continuance of the evidentiary hearing was and is **denied**.

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;

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3. Whether the discipline imposed was within the range of alternatives available to the appointing authority;

FINDINGS OF FACT

General Background

1. Complainant worked for DOC as a Correctional Officer I at the Limon Correctional Facility from August 1999 to September 11, 2001.
2. Complainant, at the time of termination, worked in the Recreation unit of the Programs division for the Limon Correctional Facility ("LCF").
3. Complainant's three month performance evaluation as a probationary employee, his transfer performance evaluation for the time period of 8/1/00 to 9/30/00 and his performance evaluation for the time period of 10/1/00 to 3/31/01 all contain references to Complainant's difficulty with interpersonal relations with other staff.
4. A different supervisor wrote each of the performance evaluations referred to in paragraph 3 above.

Incident Involving Sgt. Cordova

5. On November 23, 2000, Complainant was assigned to the Segregation Unit to do a dry cell watch on an inmate who was suspected of ingesting drugs.
6. A dry cell watch is conducted when an inmate is suspected of having contraband. The inmate is put on a twenty-four hour watch and placed in shackles. The inmate is under constant surveillance while on a dry cell watch and his bowel movements are checked for the suspected contraband.
7. Sergeant Susan Cordova works in the Segregation Unit at LCF.
8. Cordova could see Complainant and the inmate from her post, and noticed that the inmate was squirming and that Complainant was not watching him.
9. Cordova went down and told Complainant to keep his eyes on the inmate. When the inmate continued to squirm and Complainant did not watch him, Cordova went down again and asked if Complainant wanted to be relieved. He said no.
10. Cordova pulled Complainant off of the dry cell watch and took him to her office. Once there she told him, in elevated tones, that he needed to conduct a dry cell watch by keeping his eyes on the inmate.

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11. Before Complainant left Cordova's office, he told her that she better watch out. Cordova did not, at that time, take this as a threat.
12. After Cordova and Complainant finished talking, Captain Bauer, the shift commander, talked to Complainant about his interaction with Cordova. Complainant was upset during the discussion because he felt that Cordova had "fronted him off" when she told him he wasn't watching an inmate properly.
13. After talking to Bauer, Complainant and Sergeant Gillis made meals for the inmates.
14. For forty-five minutes after meeting with Cordova and then Bauer, and while in the presence of Gillis and other staff, Complainant talked about Cordova referring to her as "queen lesbian" and "queen lesbian bitch."
15. Gillis told Complainant to stop talking about Cordova in that manner and that he (Gillis) did not want to hear any more.
16. Complainant continued to make disparaging remarks about Cordova's sexual orientation.
17. Bauer, during that shift, heard about Complainant's comments about Cordova and he, again, talked to Complainant. Complainant was still angry with Cordova and unable to concentrate on his duties. In light of his emotional condition, Bauer sent Complainant home two hours before the shift change.
18. Later on that evening, Complainant was seen driving around LCF's parking lot without his lights.
19. Cordova was scared when she learned of Complainant being in the parking lot and, after this incident, requested various staff members walk her out to her car on occasion.
20. Complainant received a corrective action on January 12, 2001 for violating DOC's AR 1450-1, IV, (A), (N) and (ZZ), the Staff Code of Conduct as a result of making derogatory remarks about Cordova; being insubordinate towards her; and his behavior in the parking lot raising safety concerns among several staff members.
21. Under the corrective action, Complainant was required to review DOC's administrative regulations on the Staff Code of Conduct and unlawful discrimination/sexual harassment, attend a Professionalism class, treat all staff in an ethical professional manner and apologize to Cordova in the presence of staff of her choosing.

Confrontation with Lee Martinez

22. On March 26, 2000, Complainant approached Officer Lee Martinez, his roommate and a co-worker, and told Martinez that he had heard that Martinez was talking about him (Complainant).
23. Martinez responded that Complainant shouldn't listen to gossip and that anything Martinez had to say about Complainant he would say directly to Complainant.
24. Complainant suggested to Martinez that they "take it outside."

Comments about Tornowski

25. On January 9, 2001, Complainant, while in the recreation area, made derogatory comments about Tornowski to Officer Cadwallader.
26. Complainant referred to Tornowski as being predatorial and stated "that son of a bitch is out to get me."
27. Complainant received a second corrective action on January 30, 2001 for violating DOC's AR 1450-1, the Staff Code of Conduct, as a result of making these derogatory comments about a fellow staff member.
28. Under the second corrective action, Complainant was required to review DOC's administrative regulations on the Staff Code of Conduct and unlawful discrimination/sexual harassment, attend a Professionalism class and treat all staff in an ethical professional manner.

Incident with Thea Lamb

29. On January 26, 2001, Complainant walked into Thea Lamb's office and shut the door after asking her if it was all right for him to do so.
30. Complainant, pointing at Warden Watkins' door, told Lamb that "they" were after him again, that he was trying to be good but that now "this" had come up.
31. Throughout this interaction, Complainant's demeanor was agitated; he spoke loudly and wrung a hat in his hands.
32. Lamb told Complainant that the Warden did not discuss personnel issues with her, that she only typed the various personnel letters for him.
33. Complainant apologized for taking up her time and left the office.

34. Lamb was concerned for her safety during this incident and was very uncomfortable being alone with Complainant.

July 19, 2001 Altercation

35. Lieutenant Sabec, a COIII, is the Recreational Supervisor at LCF and Complainant's direct supervisor.

36. Major Day is the Programs Manager at LCF and Complainant's second level supervisor. He has worked for DOC for 14 years and has never received a disciplinary or corrective action.

37. Sabec was in charge of preparing Complainant's work schedule and would rearrange Complainant's days off so that he could attend military training.

38. In October 2000, Complainant gave Sabec information on his 2001 military drills schedule. One of drills was scheduled for Saturday and Sunday, July 21 and 22, 2001. Complainant was scheduled to work on July 20, 2001 on swing shift from 12:45 p.m. to 9:15 p.m.

39. During the week prior to the July 2001 military drill, Complainant informed Day that he would be unable to work the swing shift Friday, July 20, 2001 because he had to report to his military training guard group on the evening of Friday, July 20, 2001.

40. Day directed Complainant to speak to Sabec and told Complainant that if Complainant had orders that they would try to accommodate those orders. Complainant subsequently gave Day's secretary a copy of the orders.

41. Subsequent to his conversation with Complainant, Major Day spoke to Lt. Sabec and told him that they would need to accommodate Complainant's request.

42. Complainant was rescheduled to work the day shift on July 20, 2001.

43. On the morning of Thursday, July 19, 2001, Complainant and Major Day were discussing Complainant's schedule. Major Day had heard that Complainant wanted to transfer to security so he asked Complainant if it was true that Complainant wanted such a transfer. Complainant responded that he did want to transfer.

44. Major Day reminded Complainant that he had worked in the towers before, had had problems working there and asked if Complainant would have the same problems working in security again. The problems that Day was referring to were Complainant's claustrophobia and feeling of confinement when working in the towers.

45. Complainant stated that he no longer had those problems. Major Day repeated his question, asking Complainant if he was sure. Complainant responded by erupting and yelling that Major Day could not insult him like that.
46. Major Day tried to calm Complainant, asking him to sit down and talk to him. Complainant continued to be upset and stated that he wanted to talk to the Warden. When Complainant left the conference room, Major Day followed him, yelling to Complainant to return to the room. Major Day then placed his hand on Complainant's arm. Complainant yelled, "you assaulted me, you assaulted me."
47. Lieutenant Jim Fox and Delayne Tornowski, the Administrative Officer for LCF, hearing the yelling, came out of Tornowski's office. Thea Lamb, an administrative assistant for the Warden, also came out of her office when she heard the yelling.
48. After repeated requests to Complainant by Fox, Complainant calmed down and stopped yelling.

July 20, 2001 Altercation

49. On July 20, 2001, the day following the altercation over Complainant's working in the towers, Major Day was walking through the Master Control area; Complainant was approaching from the opposite direction.
50. Complainant looked at Day and said, "I'll be seeing you." Day said, "What?" Complainant responded, "You heard me." Day told Complainant that he took that as a threat and that he was going to talk to Warden Watkins.
51. Day walked through the door towards the Warden's office and Complainant then tackled him behind. Day curled into a fetal position and began to yell. Day's radio and glasses were knocked off. When Day reached for his radio, Complainant grabbed it and began to yell into it that he was being assaulted.
52. A number of officers and staff responded to the sounds of the altercation, including Tornowski, LeEllen Eastwood, (the Office Manager for LCF), and Pam Tyson (an Administrative Assistant for the Associate Warden of LCF). Many of them had heard Day calling for help.
53. When Tornowski, Eastwood and Tyson arrived, they each saw Day on the floor curled up on his left side, Complainant with his knee on Day's side and a radio and glasses on the floor.

54. After Eastwood returned to her office, Complainant stood in her office door, said “it looks like it is starting again” and then left. A few weeks prior to this, Complainant had made comments to Eastwood that he was being persecuted, and she assumed that he was referring to those allegations.
55. A few minutes later, Eastwood heard yelling and went to investigate it. Tornowski was standing at the top of the stairs, facing Complainant who was pacing. Tornowski was telling him to calm down. Complainant was yelling at Tornowski not to touch him.
56. No one, including Tornowski, was touching Complainant or threatening him when Complainant was yelling.
57. At this point the Warden arrived and said, “Michael, we have a bad situation here and I want you to go down to operations and wait for me.” Complainant complied with this order.
58. Day’s version of the events of the assault coincided with the oral and written statements made by Tornowski, Eastwood and Tyson.

R-6-10 Meeting and Disciplinary Action

59. Gerry Gasko, Deputy Director of Prison Operations, gave Associate Warden Mark Broaddus from Sterling Correctional Facility appointing authority over this action.
60. On August 30, 2001, Broaddus held a R-6-10 meeting with Complainant.
61. During the meeting, Complainant denied assaulting Day and stated that Day assaulted him on both Thursday and Friday, July 19 and 20, 2001.
62. Prior to imposing the disciplinary action against Complainant, Broaddus considered the Inspector General’s Investigative Report; Day’s Incident Report on the July 19, 2001 incident; the Incident Reports on the July 20, 2001 incident prepared by Day, Tornowski, Eastwood and Tyson; incident reports filed regarding other incidences involving Complainant and both of Complainant’s prior corrective actions. He also interviewed many witnesses, including Day, Lamb, Fox and Cordova, and found that they presented credibly.
63. Broaddus testified credibly as to his review of the various incident reports, the corroboration of Day’s version of the events with witnesses who arrived soon after the altercation and the comparison of Day’s and Complainant’s disciplinary histories in reaching his conclusion that Complainant was the aggressor.

64. Complainant's version of the assault lacks credibility given his history of difficult interpersonal relations, his two prior corrective actions for abusive behavior, his escalation of aggression in the workplace despite the two corrective actions and the lack of corroboration of any of the witnesses.
65. Broaddus considered a lesser discipline than termination but discarded such an option because of the severity of the incident.
66. By letter dated September 10, 2001, Complainant was notified that his employment with DOC was terminated effective September 11, 2001.
67. Complainant was disciplined for violating the following DOC administrative regulations:
- a. AR 100-29, Violence in the Workplace: "threats, threatening behavior, or acts of violence by anyone will not be tolerated. Violators of this policy will lead to personnel action which may include dismissal, arrest, and prosecution."
 - b. AR 1450-1 (IV)(N), Staff Code of Conduct: "Any action on or off duty on the part of DOC staff that jeopardizes the integrity or security of the Department, calls into question the staff's ability to perform effectively and efficiently in his or her position, or casts doubt upon the integrity of staff is prohibited.
 - c. AR 1450-1 (IV)(JJ), Staff Code of Conduct: "Verbal or physical altercations between staff in the workplace are unacceptable practices. While on duty, staff is required to maintain a considerate, cooperative, and cordial relationship toward fellow staff."
 - d. AR 1450-1 (IV)(ZZ), Staff Code of Conduct: "Any act or conduct, on or off duty, which affects job performance and which tends to bring the DOC into disrepute or reflects discredit upon the individual as a correctional staff, is expressly prohibited as conduct unbecoming, and may lead to corrective and/or disciplinary action."
68. Complainant seeks reinstatement and back pay and benefits.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be terminated for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R-6-9, 4 CCR 801 and generally includes:

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- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
- (3) willful failure or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S. In determining whether an agency's decision is arbitrary or capricious, a court must determine whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. If not, the agency has not abused its discretion. *McPeck v. Colorado Department of Social Services*, 919 P.2d 942 (Colo. App. 1996).

II. HEARING ISSUES

A. Complainant committed the act for which he was disciplined.

The primary challenge in this case is that there were no eyewitnesses to the altercation between Complainant and Major Day. A determination of whether or not Complainant committed the act for which he was disciplined – the July 20, 2001 assault on Major Day - must be based on an assessment of the credibility of the various people testifying about the incident.

The credibility of the witnesses and the weight to be given their testimony are within the province of the administrative law judge. *Charnes v. Lobato*, 743 P.2d 27 (Colo. 1987). In determining credibility of witnesses and evidence, an administrative law judge can consider a number of factors including:

1. A witness' means of knowledge;
2. A witness' strength of memory;
3. A witness' opportunity for observation;
4. The reasonableness or unreasonableness of a witness' testimony;
5. A witness' motives, if any;
6. Any contradiction in testimony or evidence;
7. A witness' bias, prejudice or interest, if any;
8. A witness' demeanor during testimony;
9. All other facts and circumstance shown by the evidence that affect the credibility of a witness.

Colorado Jury Instructions 3:16. The fact finder is entitled to accept parts of a witness's testimony and reject other parts. *United States v. Cueto*, 628 P.2d 1273, 1275 (10th Cir.

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1980). The fact finder can believe all, part or none of a witness's testimony, even if uncontroverted. *In re Marriage of Bowles*, 916 P.2d 615, 617 (Colo. App. 1995).

As set forth in the Findings of Fact, Complainant's version of the events on July 20, 2001 is found not to be credible. This finding is based upon the factors outlined in C.J.I. 3:16; a lack of any corroborating witnesses for Complainant's version of the events; the number of corroborating witnesses for Day's version of the events; Complainant's history of poor interpersonal relations resulting, on occasion, in corrective actions versus Major Day's fourteen years of service without a single corrective or disciplinary action; the escalating aggressive nature of Complainant's reactions to his coworkers and, finally, his behavior in the immediate aftermath of the July 20, 2001 incident.

As set forth in the Findings of Fact, Complainant committed the act for which he was disciplined.

B. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule or law.

Arbitrary or capricious exercise of discretion can arise in only three ways, namely: (a) by neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; (b) by failing to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; (c) by exercising its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Van de Vegt v. Board of Com'rs of Larimer County*, 55 P.2d 703 (Colo. 1936) and *Lawley v. Dep't of Higher Educ.*, No. 00SC473, slip op. (Colo. December 3, 2001).

Associate Warden Mark Broaddus gathered and reviewed all of the written reports by witnesses in this matter and the IG's Report. He reviewed Complainant's disciplinary history and other reports filed by DOC employees in the past regarding Complainant's behavior. He reviewed Complainant's performance evaluations and gave weight to the fact that they were each prepared by a different supervisor and contained a reference to Complainant's poor interpersonal skills. Finally, he conducted interviews with many witnesses and considered the information provided by Complainant in the R-6-10 meeting. He reached his conclusion that Complainant committed the July 20, 2001 assault based upon an assessment of credibility and corroborating evidence. In short, Broaddus used reasonable diligence and care to procure evidence, gave candid and honest consideration to that evidence and arrived at a conclusion that a reasonable person would reach after a review of the evidence.

Complainant violated DOC's administrative regulations, specifically AR 100-29, AR 1450-1 (IV)(N), (JJ), and (ZZ). Such violations are a reason to administer a disciplinary action. Board Rule R-6-9(2), 4 CCR 801.

Respondent did not act arbitrarily, capriciously, or contrary to rule or law in administering disciplinary action.

C. The discipline imposed was within the range of reasonable alternatives

Broadus' decision to take disciplinary action must have been based on the nature, extent, seriousness, and effect of the act, the type and frequency of previous unsatisfactory behavior, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances, with consideration given to the information presented by the Complainant. Board Rule R-6-6, 4 CCR 801.

Complainant had received three performance evaluations that contained negative comments about Complainant's interpersonal relations. Three different supervisors completed those performance evaluations. Complainant had a history of two prior corrective actions for threatening statements made in the workplace during the prior six months. Complainant had not improved his performance despite these corrective actions. Rather he was exhibiting behavior more and more out of control, escalating in violence and aggressive behavior towards fellow staff members.

In a twenty-month period Complainant had moved from making derogatory comments about two fellow staff members (Cordova and Tornowski), to proposing that a dispute be taken outside (Martinez), to assaulting a supervisor (Day). His behavior had moved from verbal abuse to a suggestion to engage in a physical altercation to actually assaulting a supervisor. Such a pattern of behavior indicates a disturbing trend of engaging in steadily escalating violent behavior.

Correctional institutes must be kept free of violent behavior by, at a minimum, staff members, especially correctional officers. Staff relies on each other for their personal safety and in providing a secure correctional facility. They should not have to worry about safety vis a vis another staff member. In addition, if a staff member is violent in the workplace or home, he or she is more likely to use excessive force against inmates. Such an excessive use of force in turn breeds and/or nurtures a cycle of violence amongst inmates, making it difficult to provide a secure correctional facility. In some cases it may result in civil rights violations.

In considering the range of reasonable alternatives, Complainant's history with regards to such incidences should be considered. Board Rule R-6-6, 4 CCR 801. He had received corrective actions for incidences involving violence in the workplace. His performance evaluations reflected that throughout his tenure at DOC he had difficulty in interpersonal relations. Despite the corrective actions and performance evaluations, Complainant does not appear to have learned to control his behavior. In addition, Complainant's actions on July 20, 2001 were dangerous and serious enough to warrant more severe disciplinary action.

The credible evidence demonstrates that the appointing authority pursued his decision thoughtfully and with due regard for the circumstances of the situation as well as complainant's individual circumstances. In light of Complainant's work history, the escalating nature of his actions and the nature of his work environment, the imposition of a termination was within the range of reasonable alternatives.

CONCLUSIONS OF LAW

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

ORDER

Respondent's action is **affirmed**. Complainant's appeal is dismissed with prejudice.

Dated this ____ day of March, 2002.

Kristin F. Rozansky
Administrative Law Judge
1120 Lincoln Street, Suite 1400
Denver, CO 80203
303-764-1400

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. 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), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If the Board does not receive a written notice of appeal 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 1/4 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.

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CERTIFICATE OF SERVICE

This is to certify that on the _____ day of March, 2002, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Michael McClernan
2818 Ridge Glen Court
Colorado Springs, Colorado 80918

and in the interagency mail, to:

Joseph Haughain
Assistant Attorney General
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Andrea C. Woods