

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

KRISTINA LANOUE,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS, LIMON CORRECTIONAL FACILITY,

Respondent.

Administrative Law Judge Hollyce Farrell held the hearing in this matter on December 13, 2004, and January 24 and 31, 2005, at the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado. Assistant Attorney General Valerie Arnold represented Respondent. Respondent's advisory witness was Al Estep, the appointing authority. Complainant appeared in person on January 24, 2005, and by telephone on January 31, 2005, and was represented by Brian K. Stutheit.

MATTER APPEALED

Complainant, Kristina Lanoue (Complainant or Lanoue) appeals her administrative termination by Respondent, Department of Corrections (Respondent or DOC). Complainant seeks reinstatement, back pay and benefits, attorney fees and costs and placement in a different facility.

For the reasons set forth below, Respondent's action is **rescinded**.

ISSUES

1. Whether Respondent's administrative termination of Complainant was arbitrary, capricious or contrary to rule or law;
2. Whether attorney fees are warranted.

FINDINGS OF FACT

General Background

1. Complainant was employed by Respondent as a Security Officer II at the Limon Correctional Facility. Complainant held that position until the date of her administrative termination, September 30, 2004.
2. Complainant was a certified employee who began working for Respondent in 1992.
3. Al Estep is the warden at Limon Correctional Facility, and was at all times relevant to this appeal, Complainant's appointing authority.

Complainant's 2001 Back Injury

4. Complainant sustained an injury to her lower back after falling at work on December 2, 2001.
5. Complainant filed a worker's compensation claim as a result of that injury. Her primary treating physician for that injury was Dr. John Fox.
6. Complainant was off work for about one month following her injury. When she returned to work, in early January of 2002, she worked in a light duty position in the control center for about one month.
7. On February 5, 2002, Xann Linhart, a family nurse practitioner, who worked under Dr. Fox's supervision, released Complainant to work with no restrictions. Complainant was not yet at maximum medical improvement¹ (MMI) for her back injury when Linhart released her to return to work.
8. Although Complainant would sometimes miss medical appointments, she continued to see medical providers for her back injury after she returned to work.
9. After February 5, 2002, Complainant performed her regular job duties with no difficulty until the time of her termination.
10. Complainant's annual and semi-annual performance evaluations reflect that she was performing at the "satisfactory" or "commendable" level after her December 2001 injury.

¹ Maximum medical improvement occurs when a patient's condition has reached a plateau and will not improve with additional medical treatment.

11. Complainant fully performed the physical duties of her job after February 5, 2002 when she was released to work with no restrictions. This included doing pack-outs² and laundry, which involves pushing very heavy laundry carts weighing from 150 to 200 pounds when full of sheets. The laundry carts were even heavier when they contained blankets. Complainant's co-workers felt they could rely upon Complainant for back up if an emergency arose.
12. Complainant had a heel spur on one of her feet which required surgery in August of 2003.
13. Dr. Fox was Complainant's primary physician for her foot injury. With respect to the foot injury, Dr. Fox released Complainant to return to work with no restrictions on October 9, 2003.
14. In the workers' compensation system, it is necessary for an injured employee to reach MMI in order for the case to be closed.
15. Complainant was placed at MMI on March 6, 2003, for her December 2001 back injury. She was given a 17% impairment rating.³
16. Marilee Kincaide is a Risk Management Specialist for DOC working in DOC's Human Resources office. Kincaide was the case manager for Complainant's worker's compensation case, and followed Complainant's medical care following Complainant's work-related back injury.
17. In a workers' compensation case, DOC asks the primary treating doctor what a patient's restrictions are after that patient has reached MMI. DOC requests this information to determine if the employee can still perform the essential functions of his or her job. It is important for DOC to have this information for the safety of the employee, the employee's co-workers, the inmates, and the public.

Complainant's FCE

18. On August 25, 2003, over five months after Complainant was placed at MMI, and working with no restrictions or problems for over a year and a half, Kincaide wrote to Dr. Fox asking him to answer "yes" or "no" to eight questions regarding Complainant's ability to perform certain physical job tasks.
19. Dr. Fox initially answered the letter by requesting that Complainant be referred for a Functional Capacity Evaluation (FCE) so that Complainant's physical capabilities could be assessed.

² Pack-outs occur when an inmate is moved to segregation and all of his belongings are placed into a footlocker. The footlockers can weigh up to 200 lbs. A correctional officer never lifts a box without the assistance of another officer.

³ An impairment rating is not indicative of job restrictions; it is a rating compiled after a doctor performs range of motion testing on a patient. It is possible for a person to have an impairment rating, but no work restrictions.

20. An FCE is a three- to four-hour diagnostic tool wherein an individual is put through a number of physical tests to determine what his or her physical capabilities and restrictions are.
21. Complainant went to her FCE appointment on November 24, 2003. When Complainant arrived, the person who was testing her, Kim McDermott, an exercise physiologist, asked Complainant for the physical requirements of her job.
22. Complainant described, to the best of her ability, what she understood the physical requirements of her job to be. Based on Complainant's description of her duties, McDermott and the physical therapist who authored the FCE report regarding Complainant determined that Complainant's job fell in the "medium" level physical demand category.
23. After an FCE is completed, it is sent to the patient's primary treating physician who then determines what the patient's physical restrictions are. The persons conducting the FCEs do not determine a patient's work restrictions; they provide the report to the primary doctor who makes the final interpretation regarding restrictions.
24. A copy of Complainant's FCE was sent to Dr. Fox, DOC and the workers' compensation insurance carrier on or about November 26, 2003.
25. When Kincaide saw the FCE report, she saw that the job description Complainant gave to McDermott did not match the formal job description for a correctional officer. Thus, Kincaide faxed a copy of the official job description to McDermott on November 26, 2003.
26. After McDermott received the formal job description from Kincaide, she recompiled the FCE using the physical requirements indicated in the job description, rather than the requirements listed by Complainant.
27. The official job description for correctional officer indicates that the job is in the "very heavy work" physical demand category, rather than in the "medium work" physical demand category.
28. McDermott recompiled the FCE using the official description of Complainant's position that Kincaide provided on or about January 8, 2004.
29. The recompiled FCE, which was based on the same tests as the original FCE, indicated that Complainant's capabilities were not adequate for the job of correctional officer.
30. The revised FCE report was sent to Dr. Fox on or about January 8, 2004, but Fox did not realize that it was a revised report.

31. After Dr. Fox received both of the FCE reports, he answered the eight questions in Kincaide's August 25, 2003 letter by writing, "Please see complete FCE dated November 24, 2003," but Dr. Fox did not circle "yes" or "no" to the eight questions.
32. Dr. Fox's response was not adequate for Kincaide because she is not qualified to interpret FCE results; instead she relies on the doctor to make the interpretations and provide restrictions for the patient. Accordingly, Kincaide asked Dr. Fox to circle direct responses to each of her eight questions.
33. Dr. Fox did provide "yes" or "no" answers to each question on January 6, 2004. Dr. Fox circled "no" in response to three questions. Those questions were whether Complainant, in Dr. Fox's medical opinion, was able to "strictly, consistently and fully perform" the following tasks without accommodation: 1) "Exert in excess of 100 lbs. of force occasionally, to move objects, including the human body, 2) Exert in excess of 50 lbs. of force frequently to move objects, and 3) Exert in excess of 20 lbs. of force consistently to move objects."
34. Dr. Fox answered "yes" to the remaining five questions including Complainant's ability to "Control others – seize, hold, subdue, restrain violent, assaultive or physically threatening persons, defends oneself or prevent injury."
35. Dr. Fox based his answers solely on the first page of the revised FCE report where "medium work" was checked in the Physical Demand Category portion of the report. Later, when Dr. Fox looked at the entire FCE and the individual test results (which were the same in both FCE reports), he revised his opinions regarding Complainant's physical abilities to perform the essential functions of her job.

Complainant's Involuntary Leave

36. Dr. Fox completed a report entitled "Physician's Report of Worker's Compensation Injury" on February 3, 2004, which indicated that Complainant had permanent restrictions based on the FCE.
37. After confirming her determination that Complainant could not perform the essential functions of her job with others at DOC, Kincaide called Estep on February 5, 2004, and told him that Complainant did not meet the physical requirements of a correctional officer.
38. Kincaide provided Estep with a copy of the February 3, 2004 Physician's Report of Compensation Injury Form.
39. When Estep received the information from Kincaide, he requested Complainant to come to his office on February 5, 2004. Estep explained to Complainant that her physical restrictions prevented her from performing the essential functions of her job. Complainant was walked out of the facility on February 5, 2004 against her wishes and has not been allowed to return since that date.

40. Before Complainant met with Estep on February 5, 2004, she was asked to sign a new Position Description Questionnaire (PDQ). The new PDQ was related to Complainant's shift rotation, and was not related to her removal from the facility.
41. Complainant was required to use her annual leave and sick leave after she was informed that she could not perform the essential functions of her job.
42. After Complainant exhausted her annual leave and sick leave, she was placed on FML (Family Medical Leave). Complainant received short-term disability benefits for six months.
43. Complainant filed a grievance regarding her removal from her position. However, DOC did not consider the grievance because Complainant was on leave. A DOC Administrative Regulation mandates that an employee grievance be suspended if the employee is off work due to health reasons or administrative leave. Because Complainant never returned to work, her grievance was not ever considered.
44. Complainant is concerned that if she ever returned to the Limon Correctional Facility the inmates would now identify her as a person with a weak back and she could be targeted.
45. If Estep had been provided with something indicating that Complainant could return to work with no restrictions during the time she was on FML, he would have allowed her to return to work.

March 1, 2004 Medical Certification Form

46. On March 1, 2004, Fox completed a form entitled "State of Colorado Medical Certification Form." Question 5(b) on that form asks, "If able to perform *some* work, is the employee able to perform the essential functions (see attached description of tasks from the employer)?" In response to that question, Dr. Fox checked, "Yes." The form allowed Dr. Fox to list any essential functions Complainant was unable to do, but he listed none.
47. This new form provided documentation that Complainant was able to perform the essential functions of her positions.
48. The March 1, 2004, State of Colorado Medical Certification Form is the same document as the February 3, 2004 document but in a different format for FMLA purposes.
49. Anna Marie Campbell, ADA's DOC's coordinator, sent Dr. Fox a copy of Complainant's official Position Description Questionnaire (PDQ) on February 20, 2004. Additionally, Dr. Fox was provided with a listing of the essential functions of Complainant's position by Kincaide's August 25, 2003 letter. Thus, Dr. Fox was aware of the essential functions of Complainant's job when he completed the Medical Certification Form on March 1, 2004.

50. DOC's Human Resource office received a copy of the March 1, 2004 Medical Certification Form on March 9, 2004.
51. Upon receipt of the March 1, 2004 Medical Certification Form, DOC had notice that Complainant should be reinstated to her position.
52. Kincaid was aware of the March 1, 2004 Medical Certification Form, but disregarded it because DOC had "previous information."
53. DOC's Human Resource office did not provide a copy of the March 1, 2004 Medical Certification Form to Estep. The most recent information Estep had was the February 3, 2004 Physician's Report of Worker's Compensation Injury. Estep was not aware that the March 1, 2004 Medical Certification Form existed until it was presented during the hearing on Complainant's appeal.

Pre-termination meeting

54. On September 22, 2004, Complainant attended a pre-termination meeting via tele-conference with Estep, Limon Correctional Facility Staff Services Coordinator LeEllen Eastwood, Kincaide, and Anna Marie Campbell, DOC's ADA Coordinator.
55. The purpose of the meeting was to discuss an appropriate determination of Complainant's employment with DOC.
56. During that meeting, Complainant was told that her paid leave (annual and sick) had exhausted on March 6, 2004; her short-term disability benefits exhausted on August 30, 2004; and her FML would exhaust on September 29, 2004.
57. During the September 22, 2004, pre-termination meeting, Estep stated on numerous occasions that the February 3, 2004 Physician's Report of Worker's Compensation Injury was the most recent medical information in DOC's possession. At one point during the meeting, Estep stated, "Based on the information that we received from your doctor in two--of February of '04 which indicated your permanent restrictions is what got us to where we are at now. Okay, so based on that document, unless, you know, there is something out there we haven't seen yet, that we need to reevaluate, then we are going to stay with this document of 2/04."
58. At no point during the meeting did Kincaide mention the existence of the March 1, 2004 Medical Certification Form even though she was aware of it. Instead, she confirmed Estep's statements that the February 3, 2004 Physician's Report of Worker's Compensation Injury was the most recent medical report DOC had regarding Complainant.
59. Complainant was not aware of the March 1, 2004, Medical Certification Form at the time of the September 22, 2004 pre-termination meeting.

60. Following that meeting, Estep wrote a letter to Complainant dated September 30, 2004. In that letter Complainant was informed that she had exhausted all of her leave and was unable to return to work. Accordingly, Complainant was informed, Estep was separating Complainant from her job at DOC.
61. In that same letter, Estep informed Complainant, “The most recent medical information supplied by your physician (i.e., Physician’s Report of Workers Compensation – Work Status Form completed by Dr. John Fox on February 3, 2004) indicates that you have permanent restrictions which prevent you from performing the essential functions of your assigned position (Corrections/Youth/Clinical Security Officer II).”
62. Estep copied the September 30, 2004, letter to Kincaide and others at DOC.
63. Estep did not have all of the relevant medical information concerning Complainant when he administratively terminated Complainant on September 30, 2004.
64. Estep relied on Kincaide, as Complainant’s case manager, to provide him with information regarding Complainant’s medical condition and based his decision upon the medical information she provided to him.
65. DOC’s practice is to give weight and deference to the treating doctor’s opinion when determining whether an employee can perform the essential functions of his or her position.
66. When Dr. Fox, the treating physician, provided the March 1, 2004 Medical Certification Form, Kincaide disregarded it and did not send it to Estep.

Graveyard Shift

67. Complainant primarily worked the graveyard shift after her December 2001 back injury.
68. Complainant preferred the graveyard shift because it best fit her schedule and her children’s schedules. Complainant also preferred the graveyard shift because she received a higher rate of pay when she worked that shift because of a shift differential.
69. While the graveyard shift had less inmate contact than the other shifts, Complainant was not on that shift to accommodate any physical restrictions.
70. Graveyard shift became a training shift at Limon Correctional Facility, and more senior employees served in it on a rotation basis.
71. Complainant was rotated to day shift effective January 1, 2004, and worked dayshift until she was removed from the facility on February 5, 2004. Complainant fully performed the work on day shift without restrictions.

PPCT Training Course

72. All correctional officers at Limon are required to complete a Pressure Point Control Tactics (PPCT) training course on an annual basis.
73. PPCT training teaches correctional officers a form of self-defense wherein they utilize certain pressure points to stun an inmate without injury.
74. Complainant completed a PPCT training course on May 13, 2002, approximately three months after returning to work from her December 2001 back injury.
75. In June of 2003, Complainant went to a PPCT training course. When she got there, a person conducting the training was handing out forms. One of the forms asked participants to indicate whether they had any physical limitations. Complainant checked "yes."
76. In previous years, Complainant had indicated on the form that she had a shoulder injury, and later a back injury, and was not prevented from completing the training. In June of 2003, when Complainant completed the form she was also waiting to have surgery for the bone spur on her foot. Complainant was worried that she would further injure her foot when she kicked a bag, which was a requirement of the PPCT training.
77. Complainant listed her shoulder, her back and her foot on the form. When Complainant refused to fill out the form saying she had no physical limitations, she was sent home from the training.
78. When Complainant came back from having surgery on her foot, she asked about completing the PPCT training, but was never sent.
79. Complainant was never disciplined for failing to complete the training. Moreover, her Performance Review Form from the period of April 1, 2003, to September 30, 2003, indicates that Complainant was a "Commendable" employee. No mention is made in that Review Form about Complainant's failure to complete the PPCT training.
80. The issue of the PPCT training was not raised during Complainant's September 22, 2004, pre-termination meeting, nor was it mentioned in the September 30, 2004 letter informing Complainant that she was being administratively terminated.
81. Complainant's failure to complete PPCT training in 2003 was not related to her administrative termination.
82. Complainant timely filed her appeal.

DISCUSSION

I. GENERAL

A. Burden of Proof

In this *de novo* proceeding, the Complainant has the burden to prove by preponderant evidence that the administrative termination was an action that is arbitrary, capricious or contrary to rule or law. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. HEARING ISSUES

B. The agency's action was arbitrary, capricious, or contrary to rule or law.

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused 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; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised 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. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

DOC administratively terminated Complainant pursuant to Director's Administrative Procedure P-5-10, 4 CCR 801. That Procedure provides the following: "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 separated by written notice after pre-separation communication. The notice must inform the employee of appeal rights and the need to contact PERA on eligibility for retirement. No employee may be administratively separated if FML or short-term disability leave (includes the 30-day waiting period) apply or if the employee is a qualified individual with a disability who can be reasonably accommodated without undue hardship. When an employee has been separated under this procedure and subsequently recovers, a certified employee has reinstatement privileges."

In this case, P-5-10 did not apply because Complainant was able to return to work. DOC's Human Resource office had the March 1, 2004 Medical Certification Form from the treating doctor, Dr. John Fox, which indicated that Complainant could perform the essential functions of her job. Although Kincaide testified that DOC was required to rely solely on Dr. Fox's opinions and that Dr. Fox's opinions were "crucial" to DOC's decisions regarding Complainant, she failed to provide that important medical report to Estep, the appointing authority, before he made his decision to administratively terminate Complainant. Kincaide's filtering of Complainant's medical information prevented Estep from giving candid and honest

consideration to all of the relevant evidence before he exercised his discretion. Kincaide's decision to filter the information provided to Estep was, at best, careless and ignores the significant reliance which DOC, by her own testimony, typically places on reports such as Dr. Fox's March 1, 2004 Medical Certification Form.

Kincaide provided no explanation for failing to provide the report from Dr. Fox, other than she decided to go with "previous information." Without reason, Kincaide disregarded the information from Dr. Fox that would clear Complainant to return to work, even though, by her own testimony, the March 1, 2004 Medical Certification Form was the same as the February 3, 2004 Physician's Report of Worker's Compensation Injury, just in a different format. Kincaide did not exercise reasonable diligence and care by failing to provide Fox's March 1, 2004 Medical Certification Form to Estep. Moreover, there was no credible evidence presented that Complainant was unable to fully perform her job duties after she was released to return to work with no restrictions on February 5, 2002.

Respondent, by virtue of Kincaide's failure to provide a copy of the March 1, 2004, Medical Certification Form to the appointing authority, failed the test set forth in *Lawley*, *id.* Therefore, DOC acted arbitrarily and capriciously in terminating Complainant.

C. Complainant is not entitled to move to a different facility.

Complainant requests that she be allowed to move to a different facility. She argues that the inmates at Limon Correctional Facility will know, as a result of her removal from the facility, that she has a back injury and may target her in some way. She is also concerned that she can no longer trust the administration at Limon Correctional Facility, and that she will be working "under a microscope." Complainant provided no evidence that the inmates at Limon will target her; this is merely speculation on her part. Moreover, there is no evidence that Estep, or anyone else at Limon, took any unfair actions towards Complainant. The withholding of the March 1, 2004 medical report was done at DOC's Human Resource office, not the facility. Thus, there is no evidence to support a finding that Complainant needs to be moved to a different facility.

D. Attorney fees are warranted in this action.

Attorney fees are mandated if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule R-8-38, 4 CCR 801. The party seeking an award of attorney fees and costs shall bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule R-8-38(B), 4 CCR 801. A groundless personnel action is defined "as an action or defense in which it is found that despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action or defense." Board Rule R-8-38(A)(3). An award of attorney fees and costs is proper as long as a determination of groundlessness has a reasonable basis in law and fact. *Hartley v. Department of Corrections, Division of Correctional Services*, 937 P.2d 913 (Colo. App. 1997).

Given the above findings of fact an award of attorney fees is warranted. Complainant's administrative termination was groundless. Estep acted in good faith based on the information

he had when he made his decision to terminate Complainant. However, Estep was not the sole DOC actor. DOC's Human Resources office had a medical report (the March 1, 2004 Medical Certification Form) which indicated that Complainant could perform the essential functions of her job. DOC's Human Resources office had the report for six months before Complainant was terminated, but never provided a copy of it to the appointing authority. The appointing authority testified that if he had seen anything releasing Complainant to return to work during the time she was on leave, he would have allowed Complainant to return to work. DOC failed to produce any competent evidence as to why the March 1, 2004 Medical Certification Form, which indicated Complainant could perform the essential functions of her job, was withheld from Estep and why it failed to correct Estep's misunderstanding that the February 3, 2004 Physician's Report of Worker's Compensation injury was the most recent medical report in DOC's possession.

CONCLUSIONS OF LAW

1. Respondent's action was arbitrary, capricious, or contrary to rule or law.
2. Complainant is entitled to an award of attorney fees and costs.

ORDER

Respondent's action is **rescinded**. Complainant is reinstated with full back pay and benefits, effective March 9, 2004, less applicable offsets. Complainant's request to move to a different facility is denied. Respondent is to pay Complainant's reasonable attorney fees and costs incurred in bringing this action.

Dated this ____ day of March, 2005

Hollyce Farrell
Administrative Law Judge
1120 Lincoln Street, Suite 1420
Denver, CO 80203
303-764-1472

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 1/2 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 SERVICE

This is to certify that on the _____ day of _____, 2005, 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:

Brian Stutheit, Esquire
Stutheit & Gartland
1520 W. Canal Court, Suite 210
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and in the interagency mail, to:

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Andrea C. Woods