STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2007B070**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DERALD L. GRASMICK,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on June 12 and 13, 2007. The parties presented oral closing arguments on June 14, 2007, the date upon which the record was closed. Assistant Attorney General Joseph Haughain represented Respondent. Respondent's advisory witness was Lou Archuleta, Warden of Fort Lyon Correctional Facility (FLCF). Complainant appeared and was represented by Andrew M. Newcomb, Frank & Finger, P.C.

MATTER APPEALED

Complainant, Derald Grasmick (Complainant) appeals his disciplinary termination by Respondent, Department of Corrections (Respondent or DOC). Complainant seeks reinstatement and the imposition of alternate discipline, and attorney fees and costs.

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 reasonable alternatives available to the appointing authority;
4. Whether attorney fees are warranted.

FINDINGS OF FACT

General Background

1. Complainant commenced employment at FLCF on February 1, 2003, as a Correctional Officer (CO) I. On February 1, 2004 he was certified to his position.

2. All CO's are required by their Position Description Questionnaires to have a valid drivers license.

3. FLCF was opened in 2002 as a special correctional facility for elderly and sick inmates. However, DOC was ultimately unable to staff the facility with the appropriate medical personnel, and the mission of providing special medical services to inmates on-site was abandoned.

4. FLCF still houses a high percentage of elderly and sick inmates. These inmates must receive medical attention off-site, thereby necessitating that they be transported by correctional staff to the medical facilities. These facilities are located in Pueblo, Denver, and other cities, resulting in CO's being away from their post for the entire shift, and sometimes longer.

5. A CO cannot perform inmate transports unless he or she participates in a special transport training process resulting in "transport certification." One of the requirements to perform a transport is possession of a valid driver's license.

6. There are several security levels for transports. One transport officer may perform the lowest level transport. Mid-level transports must be performed by two officers, one driving, the other monitoring the inmate. The non-driver must also possess a valid drivers license in order to have the flexibility to respond to any situation that may arise. For example, one officer may need to remain at the hospital with the inmate while the other officer returns to the prison.

7. Day shift staffing at FLCF includes two "transport officers," because all inmate medical appointments are scheduled during the day shift. This arrangement ensures that there are never staffing shortages on the day shift due to the routine need to perform transports.

8. Complainant worked swing shift during his entire tenure at FLCF. The only transports performed during swing shift are the unanticipated ones, usually of an emergency nature. They occur on a routine basis, but not often enough to warrant the scheduling of a permanent staff transport officer during swing shift.

9. Correctional Officers work either in Housing positions, assigned to the cell houses, or in Security. Security positions are located throughout the facility and include transport duty, perimeter patrol (consisting primarily of driving the

perimeter of the grounds for eight and a half hours); main gate security; and the yard.

10. FLCF swing shift staffing consists of 9 Housing CO's and 5 Security CO's.

11. Complainant was certified as a transport officer and worked Security on the swing shift.

Complainant's Performance History

12. Complainant was given an overall Commendable rating on his performance evaluations for the periods 2004/2005 and 2005/2006. He received the Employee of the Year award for the performance period 2004/2005. This honor is rewarded on the basis of the votes of every employee at the FLCF facility. He was also rated Employee of the Quarter for the fourth quarter in fiscal year 2004/ 2005.

13. Captain Barbero was Complainant's direct supervisor. Complainant regularly volunteered for whatever extra assignment or shift Barbero needed. Barbero considered Complainant to be his "go to guy" and valued him highest among his employees.

14. On November 22, 2005, Complainant arrived at work with the smell of alcohol on his breath. On the previous evening, he had worked on a neighbor's farm to help clear corn stalks, late into the night. After working together, they had drunk beer and whiskey together.

15. On November 23, 2005, having been advised that his conduct on November 22, 2005 violated the DOC Code of Conduct, Complainant was given a copy of the Code. He also signed a statement pledging that he had knowledge of and would "abide by the contents of" the Code.

16. On November 28, 2005, Respondent issued Complainant a Performance Documentation Form for having smelled of alcohol on the job. It stated in part, "Your professionalism can and will be called into question by others when they detect the odor of alcohol. . . Also per our conversation, you indicated that you fully understand the implications of this type of action and ensured me that this will not occur again. You are a very good officer that is respected by many other staff from all areas of FLCF. You are known to stand by and honor what you say and I trust that you will honor your statement that this will never happen again."

November 15, 2006

17. Complainant left work on November 15, 2006, with two days off ahead of him. He viewed it as his "Friday night."

18. On his way home from work, while still in his DOC uniform, he stopped at a drive-through liquor store. Complainant removed his DOC uniform shirt as he proceeded through the drive-through. He purchased a bottle of vodka.

19. Complainant drank 8 ounces of vodka and two beers as he drove the next thirty-six miles towards his home in Rocky Ford. He became very intoxicated.

20. At 11:06 p.m., Complainant was driving on a dirt road portion of Highway 805, when he encountered the scene of a one-car rollover accident. Although a State Trooper had stopped at the accident site and was taking measurements of the accident scene at the time, the Trooper had not illuminated his emergency lights. Complainant did not see the Trooper as he approached.

21. There were two pick-up trucks in Complainant's driving lane, blocking approximately one-third of his lane.

22. As Complainant approached the accident scene, he slowed, and stopped approximately one-half mile from the accident. Then, he drove up to the accident site at approximately ten miles per hour.

23. Complainant nearly hit one of the pick-up trucks as he approached, and swerved away from it in order to avoid a collision.

24. After Complainant parked, the Colorado State Patrol Trooper approached Complainant as he sat in his car. Complainant asked if he could be of any assistance. The Trooper responded that he was taking measurements, and did not need assistance.

25. The Trooper noticed that Complainant's breath smelled of alcohol, his eyes were bloodshot and watery, his speech was slurred, and his hands were shaky. The Trooper ordered him out of his vehicle.

26. Complainant put on his DOC uniform shirt and got out of the car. He was in his full DOC uniform.

27. The Trooper requested Complainant's permission to administer the roadside sobriety tests. Complainant assented. The Trooper administered the tests, and Complainant failed them all, stating to the Trooper several times, "you got me." Complainant also blew into a breathalyzer.

28. The Trooper placed Complainant under arrest, hand cuffed him, and brought him to the Otero County jail. At the jail, Complainant agreed to a chemical test of his blood alcohol level. It was .149 at 12:00 midnight, approximately one hour after he had stopped on Highway 805.

29. The Trooper issued Complainant a citation for Driving a Vehicle While Under the Influence of Alcohol, and Driving a Vehicle with a Blood Alcohol Count of .08 or higher.

30. Complainant contacted Captain Barbero by telephone after he was booked, to advise him of what had occurred. A friend bailed him out of jail.

31. In January 2007 Complainant's license was suspended for one year by the Department of Revenue.

32. On January 29, 2007, Complainant plead guilty to Driving While Ability Impaired (DWAI), and received a sentence of 365 days in jail, with 358 suspended, thereby requiring him to serve seven days in jail. In addition, he was required to attend alcohol education classes and therapy, and to be monitored for sobriety for one year through Antabuse or Vivatrol.

33. Complainant was given a jail sentence because he had two prior DWAI convictions from 1996 and 1982. He served the seven-day jail term in March 2007.

34. Complainant coordinated his jail time with his supervisors and used accrued annual leave for that purpose. Complainant continued to work as a Security CO for approximately two months.

35. In February 2007 a Housing position opened up at FLCF. Complainant applied for the transfer into this position and due to his seniority, Complainant was given the position.

Pre-Disciplinary Meeting

36. On January 31, 2007, Major Mike Romero issued a memo to FLCF Warden Archuleta, informing the Warden that Complainant had plead guilty to DWAI and that his driver's license had been suspended for one year. Romero requested that the pre-disciplinary process be initiated.

37. Warden Archuletta and Complainant set the pre-disciplinary meeting for February 13, 2007. Prior to the meeting, the Warden obtained copies of all court records relating to Complainant's criminal prosecution.

38. On February 13, the Warden attended the pre-disciplinary meeting with DOC's Human Resources Director present as his representative. Complainant attended with Captain Butero as his representative.

39. Warden Archuletta opened the meeting by reviewing some of the State Personnel Board rules governing corrective and disciplinary action. He started

by reading the rule requiring the appointing authority consider written and/or oral information provided by the employee prior to making a final decision.

40. Archuletta asked Complainant to review what had occurred on the night of November 15, 2006. Complainant explained that he stopped to buy vodka at the drive through on the way home from work, and, about a half a mile from his house, he came across a car flipped over in a ditch. He stated that he stopped to see if anyone was in the car and was hurt. He noted that the State Patrol was there, but that because there were no emergency lights on, he was unaware of that when he stopped.

41. Complainant informed Archuletta that the State Trooper smelled the alcohol on his breath, performed the roadside sobriety test on him, and then arrested him.

42. Archuletta asked if Complainant had his DOC uniform on when he purchased the alcohol. Complainant stated that he did not, but that he put his uniform shirt on when he got out of the car because it was cold and he had left his coat at work.

43. Archuletta asked Complainant how much he had drunk. Complainant responded, "A half a pint of vodka." He denied drinking anything else; however, Complainant had informed an alcohol counselor that he also drank two beers in the car.

44. Complainant confirmed his blood alcohol level was .14, and that the legal limit was .08.

45. Archuletta then reviewed the legal status of Complainant's criminal case with him. Complainant confirmed his plea of guilty to DWAI, his sentence of 365 days of jail, all of which was suspended except seven days, and indicated that he had completed 30 of the 52 hours of useful public service.

46. Warden Archuletta told Complainant that he could see how remorseful he was about the incident. He asked Complainant if he had an alcohol problem. Complainant responded, "I don't think so, no sir." In response to several questions about his drinking habits, Complainant indicated he normally drinks a half pint on his Friday night, once a week, and that is all. He stated that he had never lost his license for an alcohol related offense prior to this time.

47. Archuletta asked Complainant, "Have you ever been pulled over for an alcohol related offense?" He responded, "Yes I have, I had a DWAI before, eleven years ago." In fact, Complainant had also received a DWAI in 1982 but did not disclose it at that time.

48. Archuletta asked if his license had been taken in 1996, and Complainant stated that they should have but failed to do so.

49. The Warden pointed out that eleven years ago "[i]t was a much different environment." He acknowledged that at that time, police departments had some discretion on what to do and how to respond to drunk drivers. He emphasized that now there is "just a zero tolerance for that." Complainant agreed, indicating that although the Trooper knew he was only half a mile from his house, "I understand zero tolerance and that's all there is to it."

50. Warden Archuletta then informed Complainant, "the shirt [DOC uniform] is a huge thing for me. . . It's huge because to me that's, we represent, when we're out there you represent me and I represent you so whatever I do impacts all you guys . . ." He explained that the fact Complainant was wearing his DOC uniform at the time of his arrest "really just stands out."

51. The Warden explained that because of the zero tolerance for drinking and driving, "we just can't put up with it." He asked Complainant what he had learned through this experience. Complainant stated that he was not drinking, he had learned there is zero tolerance for drinking and driving; that it is not worth it to drink and drive; and that he needed to be more aware of his surroundings. He stated he should never have put his uniform back on, "but I did. I didn't even know the state patrolman was there. Like I said, I just saw the car flipped over I had no clue." He also pointed out that he had good intentions in stopping to see if anyone needed help; the Warden agreed that was what he would expect a person to do.

52. Complainant stated he had been a good employee, noted he was Employee of the Year for 2004/2005, and acknowledged he had made "a very big mistake." Complainant stated that he was very dedicated to Fort Lyon, always worked doubles and stayed late when asked, had used only four sick days in four years, had good rapport with the inmates, and that he was very professional.

53. Warden Archuletta agreed with Complainant, stating, "I know what your supervisors [say] and by your Captain being here truly I understand . . . all I've heard is good things about you." The Warden explained that as the appointing authority, it was his job to "look at the whole picture" and make the tough decisions.

54. The Warden reiterated, "there's no doubt in my mind your record speaks for itself but again, the other side of it is . . . each and everyone of you guys in that blue shirt represent me as I represent you and so there's an expectation. So those are the things I have to balance."

55. Archuletta confirmed that Complainant had lost his license until January of 2008, then asked if Captain Barbero wanted to say anything.

56. Barbero spoke on Complainant's behalf, noting that since the incident, Complainant has missed no work, comes in early, and stays late whenever

asked. "Getting to work and his work performance is not an issue to me. . . we've talked about what he's done. . . he does express remorse to me on letting the team down, letting his peers down and letting you down Mr. Archuletta. . . I'll just reiterate his work performance is and has never been an issue with me, he's been an outstanding employee."

57. Warden Archuletta responded that Captain Barbero's presence at the meeting was "a tribute to what kind of an employee you are," noting that most captains would not represent an employee at a pre-disciplinary meeting.

58. The Human Resources Director confirmed that Complainant had recently received the ethics and professionalism training, within one year of the November 15 incident.

59. The Warden invited Complainant to provide additional information after the meeting. Complainant did so, drafting a memo to Archuletta after the meeting. He stated that he knew "Drinking alcohol and driving my vehicle was wrong and for what reason, this is no excuse. . . I am extremely thankful I didn't hurt or God forbid kill any [innocent] by stander (sic). . . The last thing in the world that I wanted to do is discredit the Department of Corrections, Ft. Lyon Correctional Facility and the badge I wear with pride. I feel that I let you, Ms. Smith, my fellow officers, my wife and myself down, for that I am truly sorry. I promise you, if given another chance, I will strive to rebuild the bridges I have destroyed. Thank you for you[r] time and consideration in this matter."

Warden Archuletta's Decision

60. The Warden considered Complainant's stellar employment history, and the fact that Captain Barbero had defended him at the pre-disciplinary meeting, as strong mitigation.

61. Warden Archuletta also focused on the fact that CO's take an oath to uphold the laws of the State of Colorado and the Constitution when they become certified peace officers. He felt strongly that the oath taken by CO's represents a commitment not only to uphold those laws, but to abide by them and to be model citizens. He felt that Complainant's actions on November 15 were an egregious violation of that oath, and that Complainant had dishonored the badge.

62. Archuletta felt that there is a public expectation that a uniformed officer will uphold the law, and that Complainant's conduct of drinking and driving and nearly hitting the parked truck, particularly while in uniform, violated that public trust.

63. With respect to Complainant having served seven days in the county jail, the Warden knew from his experience at DOC that inmates share information about CO's and that it was likely the inmates would learn of his time served. This

information would undermine Complainant's authority as a CO. In addition, CO's are expected to act as role models for inmates, most of whom have drug or alcohol problems. To permit a CO who has served jail time for drunk driving to act as a role model for inmates struck the Warden as being impermissible.

64. Warden Archuletta believed that it threatens the integrity of DOC for a CO to drink vodka while driving to the point that he is unable to operate the vehicle safely. He was also concerned about the pattern of Complainant having been convicted of driving while under the influence of alcohol on two occasions.

65. He also concluded that to be arrested in uniform casts Complainant and the department in a negative light and demonstrates poor judgment.

66. At the time of termination, Complainant worked in Housing and was therefore far less likely to be called upon to perform transports. Archuletta did not give considerable weight to the transport issue in deciding to terminate Complainant's employment. He was not interested in even considering the possibility of giving preferential treatment to an employee in Complainant's position.

67. Warden Archuletta concluded that Complainant had violated several provisions of the DOC Code of Conduct, Administrative Regulation (AR) 1450-01, which he concluded Complainant had violated. Those provisions include the following:

- Subsection IV(N): "Any action on or off duty on the part of DOC employees . . . that jeopardizes the integrity or security of the Department, calls into question one's ability to perform effectively and efficiently in his/her position, or casts doubt upon the integrity of DOC employees. . . is prohibited. DOC employees, contract workers and volunteers will exercise good judgment and sound discretion."

- Subsection IV(HH): "All employees . . . shall comply with and obey all DOC administrative regulations, procedures . . ."

- Subsection IV(ZZ): "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 DOC employee, contract worker, or volunteer, or tends to adversely affect public safety, is expressly prohibited as conduct unbecoming, and may lead to corrective and/or disciplinary action."

- Subsection IV(T): "DOC employees. . . will not engage in acts of corruption, bribery, indecent, or disorderly conduct, nor will they condone such acts by other DOC employees . . ."

68. Warden Archuletta determined that Complainant had violated the DOC Code of Conduct in such a serious manner that he would terminate his employment.

69. Warden Archuletta did not consider the disciplinary actions imposed by other DOC appointing authorities for alcohol related offenses. Had he done so, he would have learned that it is unusual for DOC to impose termination on CO's for alcohol related offenses, but that it has occurred on several occasions.

70. Warden Archuletta himself had handled two alcohol related offenses by other DOC employees. On November 30, 2006, Archuletta had issued a corrective action to a maintenance staff worker who had plead guilty to DWAI and was given no jail time and permitted to retain his drivers license. The employee had worked for DOC for nineteen years.

71. In addition, on January 16, 2007, Warden Archuletta issued a corrective action to another Correctional Officer who plead guilty to Driving While Ability Impaired. This officer did not serve jail time and was permitted to retain his driver's license.

72. On March 6, 2007, Archuletta sent Complainant the termination letter. He cited Complainant's violation of the DOC Code of Conduct, Sections IV(N), (HH), (ZZ), and (T). He concluded that Complainant's conduct on November 16, 2006 constituted willful misconduct affected his ability to perform his job satisfactorily.

73. Complainant appealed his disciplinary termination.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined 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 Rule 6-12, 4 CCR 801, and generally includes:

(1) failure to perform competently;
(2) willful misconduct or violation of these or department rules or law that affect the ability to perform the job;
(3) false statements of fact during the application process for a state position;
(4) willful failure to perform, including failure to plan or evaluate performance in a timely manner, or inability to perform; and
(5) final conviction of a felony or any other offense involving moral turpitude that adversely affects the employee's ability to perform or may have an adverse effect on the department if the employment is continued.

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 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

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

Respondent has proven by preponderant evidence that Complainant committed the acts for which he was disciplined. Complainant left work in his uniform, purchased alcohol, and drank to the point of serious intoxication as he drove a thirty-five mile distance. As he approached the accident scene with the intent to assist with the situation, he nearly hit a parked truck, swerving to avoid it. When directed to exit his vehicle, he put on his DOC uniform shift, so that he was in full uniform at the time of his arrest for driving while intoxicated. Complainant's blood alcohol level was nearly twice the legal maximum. Having been previously convicted of driving while under the influence of alcohol, Complainant plead guilty to this charge for a second time, lost his license for a one year period, and served a seven-day jail sentence.

Complainant violated several provisions of the DOC Code of Conduct. Complainant's November 15 conduct and his seven-day jail term jeopardize the integrity of DOC and call into question his ability to perform effectively in a CO position. A CO whom the inmates know to have been an inmate himself is compromised: he lacks the authority to hold himself out as a role model for the inmates. A CO who has served jail time places DOC in a conflict of interest position. The only way to resolve this conflict is to separate the employee from serving as a CO.

Complainant's conduct also brings the DOC into disrepute, reflects discredit upon him as a DOC employee, and demonstrates extremely poor judgment. By taking the oath to become a certified peace officer in the CO position, Complainant committed to uphold and abide by the laws of the State of Colorado. Conviction of drunk driving constitutes a violation of a law that is universally regarded as paramount to public safety.

B. The Appointing Authority's action was not 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; or 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).

Complainant asserts that Warden Archuletta acted in an arbitrary and capricious manner in failing to consider what discipline other appointing authorities had imposed against other CO's for alcohol related offenses. Further, Complainant contends that the record demonstrates termination was an unduly harsh sanction in this case when considered in the context of all disciplinary actions imposed for alcohol related offenses at DOC.

Warden Archuletta was not required by the *Lawley* standard to review the actions taken by other DOC appointing authorities in alcohol related offenses. Alcohol related offense vary considerably. Some are first offenses; others are repeat offenses demonstrating a pattern of conduct that is inherently troubling. Repeat offenses usually, if not always, result in the loss of a driver's license and imposition of a jail term. Warden Archuletta appropriately recognized that on the spectrum of seriousness of alcohol related offenses, this one was at the more serious end of the scale. *Lawley* requires a thorough investigation and a well-reasoned decision making process; the evidence demonstrates that Respondent met this standard in this case.

Additionally, State Personnel Board Rule 6-9 enumerates the factors appointing authorities must consider prior to imposing disciplinary action. 4 CCR 801. Those factors include prior disciplinary and performance history, nature and seriousness of the act, mitigating circumstances, etc. Notably, however, Rule 6-9 does not require a consideration of the actions of other appointing authorities in the same agency, imposed under similar circumstances. Rule 6-9 therefore reflects a Board policy of promoting greater discretion for appointing authorities, rather than less, as urged by Complainant. Lastly, to add a new requirement to Rule 6-9 without the due process afforded by public rulemaking under the Administrative Procedures Act would be improper. *See, Charnes v. Lobato*, 772 P.2d 62 (Colo. 1989).

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

The level of discipline imposed by Warden Archuletta was appropriate, and was well within the range of reasonable alternatives. Consistency in imposing disciplinary action is a critical component of fairness in the personnel system. The record in this case does not demonstrate such inconsistency as to appear that the discipline imposed was unduly harsh or unfair. Warden Archuletta correctly points out that unlike even ten years ago, in today's society, there is zero tolerance for drunk driving. DOC may have had more tolerance for this violation in the past. However, this history does not detract from the appropriateness of DOC's response to this most serious of offenses in this instance. Nor does it commit Warden Archuletta to impose the same discipline determined to be reasonable by other appointing authorities, under different circumstances.

D. Attorney fees are not warranted in this action.

Attorney fees are warranted 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 8-38B, 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 8-38B, 4 CCR 801.

Complainant requested an award of attorney fees and costs. Because he did not prevail in this matter, there is no basis for such an award.

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.
4. Attorney fees are not warranted.

ORDER

Respondent's action is **affirmed**. Complainant's appeal is dismissed with prejudice. Attorney fees and costs are not awarded

Dated this 19th day of July, 2007

Mary S. McClatchey
Administrative Law Judge
633 – 17th Street, Suite 1320
Denver, CO 80202
303-866-3300

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.); Board Rule 8-68, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the record on appeal in this case is $50.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee 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. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 4 CCR 801. 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 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

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 appellant may file a reply brief within five days. Board Rule 8-72, 4 CCR 801. An original and 9 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. Board Rule 8-73, 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. Board Rule 8-75, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. 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 ALJ's decision. Board Rule 8-65, 4 CCR 801.

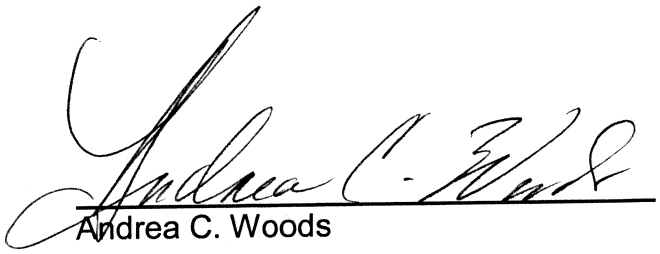
CERTIFICATE OF SERVICE

This is to certify that on the 20th day of July, 2007, 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:

Andrew M. Newcomb, Esquire
Frank & Finger P.C.
29025-D Upper Bear Creek Road
Post Office Box 1477
Evergreen, Colorado 80437

and in the interagency mail, to:

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



Andrea C. Woods