

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2011B033

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

KATHLEEN APODACA,

Complainant,

vs.

DEPARTMENT OF REVENUE, LIQUOR ENFORCEMENT DIVISION,

Respondent.

Administrative Law Judge Denise DeForest held a hearing in this matter on December 6 and 22, 2010, and January 28, 2011, at the State Personnel Board, 633 - 17th Street, Courtroom 6, Denver, Colorado. The record was closed by the ALJ on the last day of hearing. Assistant Attorney General Micah Payton and First Assistant Attorney General Vincent Morscher represented Respondent. Respondent's advisory witness was Laura Harris, Division Director for the Liquor Enforcement Division and Complainant's Appointing Authority. Complainant appeared and was represented by Colin E. Moriarty, Esq.

MATTER APPEALED

Complainant, Kathleen Apodaca (Complainant) appeals her termination of employment by Respondent, Department of Revenue, Liquor Enforcement Division (Respondent). Complainant seeks reversal of the disciplinary action, reinstatement to her position of Administrative Assistant and an award of damages, including an award of attorney fees and costs.

For the reasons set forth below, Respondent's disciplinary action is **rescinded**.

ISSUES

1. Whether Complainant committed the acts for which she was disciplined;
2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
3. Whether the discipline imposed was within the reasonable range of alternatives

available to the appointing authority; and

4. Whether attorney fees are warranted.

FINDINGS OF FACT

Introduction and Background:

1. Complainant was certified to the position of Administrative Assistant III within Respondent's Liquor Enforcement Division. In this position, Complainant handled liquor license applications. Complainant received the license applications and administratively processed them for issuance or renewal. If the license request was for a renewal, Complainant was able to issue the renewed license by completing the administrative processing steps. As the Administrative Assistant III, Complainant also distributed work to other administrative assistants in her office. Complainant's office also issues the liquor enforcement signs requiring individuals to be 21 years of age.

2. Complainant's work did not involve any inspection or investigation duties.

3. Complainant worked for the Liquor Enforcement Division for 13 years prior to her termination. Complainant's work reviews were generally positive and reflected fully competent work. Complainant had no prior corrective or disciplinary actions.

Grand Opening Night at Sopapillas:

4. Ashia Vigil owns a Mexican restaurant and bar, Sopapillas. Sopapillas is an establishment that is licensed by Respondent, and Ms. Vigil holds that license. Ms. Vigil was assisted in running the operation by her mother, Tammy Pacheco. Ms. Pacheco also cooked for the restaurant.

5. On July 17, 2010, Sopapillas hosted a Grand Opening Night event. This event involved hiring a band and hosting a large celebration with music, dancing and drinking on the outdoor patio, and food in the restaurant. The event attracted a good number of customers, and the restaurant and bar were busy all through the evening.

6. Complainant picked up a friend, John Powers, and the two of them decided to attend the Grand Opening Night event at Sopapillas. They arrived at Sopapillas late, probably after 11 PM. When Complainant and Mr. Powers arrived, the outdoor tables were all taken. They decided to sit in two chairs that were associated with a table already occupied by other parties.

7. Mr. Powers went to the bar to purchase two beers. He paid for the beers in cash. When it was time for the second round of beers, he provided Complainant with a \$10 bill and Complainant went to the bar to purchase two beers and two shots.

8. While Complainant was standing in line for the beer and shots, she noticed that the bartender was faithfully checking the IDs of the other patrons. When Complainant was purchasing the beer and shots, she told the bartender that he was doing a good job checking the IDs. She paid for her beers and shots, and returned to where Mr. Powers was sitting.

9. When the cooking in the kitchen slowed down for the night, Ms. Pacheco went out to the patio area to bus tables. While she worked on a table near Complainant, Complainant realized that Ms. Pacheco was a friend of hers with whom she had gone to high school, and whom she hadn't seen in approximately 20 years. Complainant greeted Ms. Pacheco, and the two of them socialized for a period of time.

10. Ms. Pacheco told Complainant that she and her daughter owned Sopapillas. Ms. Pacheco took Complainant for a short tour of the restaurant area, including a number of photographs of family members hanging on the wall in the restaurant area. Ms. Pacheco also introduced Complainant to some of the staff and to Ms. Vigil. Ms. Vigil had no substantive conversation with Complainant that evening.

11. While Ms. Pacheco and Complainant were socializing, Ms. Pacheco asked Complainant what she was doing for a living. Complainant told her that she worked for the state liquor enforcement office that was located not far from the restaurant. When Complainant and Ms. Pacheco were touring the restaurant, Complainant pointed out the age restriction signs on the wall and told Ms. Pacheco that she issues those signs.

12. Earlier in the day of the Grand Opening Night event, one of the band members had secreted an alcoholic drink in a bag and tried to take it into the restaurant with him. An Edgewater police officer had noticed the bag, and told Ms. Pacheco and Ms. Vigil that the band member could not have alcohol on the premises in that manner, and that such an activity could cause a problem for Sopapillas' liquor license. Ms. Vigil and Ms. Pacheco removed the alcohol in the bag from the premises. The fact that a worker could create a problem for Sopapillas' liquor license had alarmed Ms. Pacheco.

13. Ms. Pacheco decided that Complainant's presence at the Grand Opening Night event was a good chance for her to remind the staff about how important it was to obey the liquor rules. Ms. Pacheco told staff members and her mother, outside of Complainant's hearing, that Complainant was from liquor enforcement and they needed to be on their best behavior in following the rules. Ms. Pacheco, however, was not under the impression that Complainant was an inspector or investigator for liquor enforcement. She told her mother and the Sopapillas' staff that Complainant was from liquor enforcement in order to scare them into being careful to obey the liquor rules.

14. After the short tour of the restaurant, Complainant returned to the table on the patio where Mr. Powers was sitting. Complainant and Mr. Powers decided to leave

Sopapillas at close to closing time.

15. On the way out of the parking lot at the end of the evening, Ms. Pacheco again saw Complainant. Ms. Pacheco asked Complainant if the staff was doing OK. Complainant looked around and told Ms. Pacheco that it looked fine to her. As Complainant left the parking lot, Ms. Pacheco pointed out Complainant to her daughter, Ms. Vigil, and told Ms. Vigil that Complainant was her friend who worked for liquor enforcement. Ms. Vigil asked Ms. Pacheco how they had done, and Ms. Pacheco told Ms. Vigil that everything was fine. Complainant did not comment specifically to the owner, Ms. Vigil, that the staff at Sopapillas was doing everything correctly and doing a good job as far as security and ID checking were concerned.

Ms. Vigil Inquires About Complainant's Actions:

16. Ms. Vigil concluded, based upon what she had been told by her mother, Ms. Pacheco, that Complainant was inspecting her restaurant when Complainant visited during the Grand Opening Night event.

17. Ms. Vigil knew that liquor license inspections did not occur in the manner in which Complainant was acting. Ms. Vigil decided to bring the matter to the attention of the Liquor Enforcement Division.

18. Ms. Vigil visited the Complainant's office several days after the Grand Opening Night event in order to pay her taxes. While she was in the office, she asked office staff for some type of certificate to show that she had passed inspection. This request prompted a discussion with office staff as to what had occurred. Ms. Vigil remembered that her mother had referred to Complainant as Kathleen or Kathy. With that information, it was not difficult for staff to discover that Ms. Vigil was speaking about an inspection allegedly performed by Complainant.

19. After considering the matter for approximately a week, office staff referred the matter to Complainant's supervisors on July 27, 2010.

Investigation:

20. At the time that Ms. Vigil reported her contact with Complainant, Donald Pace was the Field Operations Supervisor and Acting Chief of Investigations. Mr. Pace was informed of Ms. Vigil's allegations and immediately assigned the matter to Respondent's investigations supervisor, Brian Small.

21. Mr. Small initially and briefly interviewed Ms. Vigil on the phone on July 27, 2010, and then conducted an in-person interview of Ms. Vigil on July 30, 2010.

22. Ms. Vigil initially told Mr. Small that, at one point of the night, Complainant

had asked for free drinks to be served to her table, and that Ms. Vigil had authorized the drinks but was angered by the request. When Ms. Vigil was interviewed in person, however, she told Mr. Small that a staff member had approached her and said that the table wanted free drinks, and that she had authorized the drinks but didn't know if they were served. Mr. Small's investigative report then notes: "Vigil then made an odd comment to me saying, 'I am not sure if it was a joke, I don't know all the details, I didn't focus on that.'" When Complainant's Appointing Authority, Laura Harris, later reviewed this portion of the investigative report, she noted in the margin "trying to create a defense for Kathleen." Ms. Harris disregarded any confusion that Ms. Vigil indicated she had about the provision of free drinks because she believed that Ms. Vigil was trying to defend Complainant.

23. Mr. Small's report then described in three paragraphs that Ms. Vigil had told him that she wasn't sure if the table thought that, because the restaurant was giving was other free things from the distributor such as Jagermeister shorts and hats, they should be able to get free drinks as well. When Ms. Vigil was talking about the Jagermeister paraphernalia with Mr. Small, she was confusing a different night that the restaurant had been hosting a Jagermeister promotion with the events of the Grand Opening Night.

24. Ms. Vigil also reported to Mr. Small that Ms. Pacheco had previously told Ms. Vigil that Complainant was an investigator in order to scare Ms. Vigil. Ms. Vigil did not tell Mr. Small that she was told directly by Complainant that Sopapillas was doing everything correctly and that she was doing a good job as far security and ID checking were concerned. She did not tell Mr. Small that she vividly remembered Complainant's specific comments to her.

25. Mr. Small searched for, but never located, a bartender working on the Grand Opening Night event who confirmed that a table had asked for free drinks that night, or that Complainant had asked for free drinks that night.

26. Mr. Small interviewed Tammy Pacheco about the events of the Grand Opening Night and Complainant's actions.

27. Ms. Pacheco told Mr. Small that the whole problem was a misunderstanding and it was her fault. She told Mr. Small that Complainant had recognized her while they were out on the patio on Grand Opening Night, and that she had realized that she knew Complainant from high school.

28. Ms. Pacheco told Mr. Small that she had learned that Complainant worked for liquor enforcement while she and Complainant were socializing. She reported to Mr. Small that she had asked Complainant if Complainant was there checking on them. Complainant had denied this and said that she was there with a friend and was off-duty. Ms. Pacheco also reported to Mr. Small that Complainant had pointed out the liquor enforcement signs that were posted and had told Ms. Pacheco that she had issued those

signs.

29. Mr. Small considered Ms. Pacheco's version of events to be suspect because she was defending and minimizing Complainant's actions. He also discounted her events because her version of events was inconsistent with Ms. Vigil's version of events. After Ms. Pacheco told Mr. Small her version of events, Mr. Small told Ms. Pacheco that her version of events was inconsistent with Ms. Vigil's version of events. Ms. Pacheco became more excited and began to raise her voice. At that point in her interview, Mr. Small told her that lying to the police was a criminal offense.

30. Mr. Small also recorded in his investigative report that Ms. Pacheco had told him that she believed that her daughter had just misunderstood what had been said. Mr. Small noted, "[w]hen I confronted Pacheco that Ashia [Vigil] had made it pretty clear of what had been said, Pacheco said, 'I don't know what she said, because I wasn't there.'" Later, when Ms. Harris reviewed the investigative report, she noted that she thought Ms. Pacheco's statement that Pacheco wasn't there contradicted an earlier statement by Ms. Pacheco in which she began telling Mr. Small her version of events by saying, "I don't know what you were told, but I will tell you because I was there."

31. Mr. Small also interviewed Nicole Aguinaldo, who was with Ms. Vigil when Ms. Vigil went to Respondent's office. Mr. Small reported that, when describing Ms. Vigil's conversation with Respondent's office staff, Ms. Aguinaldo "kept saying that Ashia [Vigil] 'had heard' that Kathleen was doing the things that she described. Aguinaldo stressed that Ashia 'had heard' several times even adding verbal emphasis to the 'had heard' each time."

32. Ms. Harris also authorized Mr. Small to investigate additional information that she learned from Complainant on August 2, 2010, concerning Complainant's relationship to the Lakeview Lounge and the Platinum 84 Club.

33. Mr. Small interviewed Jack Simon at the Lakeview Lounge. Mr. Simon told Mr. Small that he knew that Complainant worked for Liquor Enforcement. When asked how he knew that, Mr. Simon said that he couldn't recall how he knew where Complainant worked, but that she had been coming in to the bar for a long time and that she may have said something over the course of the years. Mr. Simon also told Mr. Small that he was in the process of buying the Lakeview Lounge from Jerry Golder, that he had had a conversation with Complainant about which forms he needed to complete a stock ownership program, and that Complainant "had only told him what forms he needed." Mr. Simon told Mr. Small that his brother is a CPA and had told him that he would be better off buying the stock of the corporation. Mr. Simon said that Complainant had informed him that buying the stock of the corporation would be "much cheaper." Mr. Simon told Mr. Small that he had had this conversation with Complainant about the cost of a stock transfer after he had already decided to do the stock purchase.

34. Mr. Small also interviewed Bob Nelson, the Entertainment Director for Platinum 84 Gentlemen's Club. Mr. Nelson told Mr. Small that he had a conversation about two weeks earlier with a woman who was with the uncle of the general manager of the club. Mr. Nelson told Mr. Small that he had asked the woman what she did for a living, and that the woman had told him that she worked for Liquor Enforcement. Mr. Nelson told Mr. Small that the woman had not volunteered the information to him but only answered his question. Mr. Nelson agreed that he had bought this woman a drink but had done so because the uncle of the general manager was at the table and he bought drinks for the entire table.

Complainant Is Placed On Administrative Leave:

35. By letter dated August 2, 2010, Ms. Harris placed Complainant on administrative leave pending the outcome of the investigation.

36. Complainant was not told of the specific nature of the allegations against her. She was told that the "Division has received information that you've allegedly engaged in conduct that is contrary to personnel rules and the Executive Department Code of Ethics."

37. The letter placing Complaint on administrative leave provided seven prohibitions to Complainant, including that she was not to initiate any communication with Department of Revenue employees (with exceptions for contacting Ms. Harris and Human Resources), and that she was "not to conduct any type of outside inquiry into this matter, and you are not to contact any liquor licensees."

38. The administrative leave letter also included this recommendation: "I strongly recommend that you refrain from visiting establishments that hold liquor licenses."

Complainant's Second Visit to Sopapillas:

39. On August 6, 2010, Complainant and a friend were at the Taco Bell next to Sopapillas. Complainant's friend wanted to visit a waitress at Sopapillas. Complainant and her friend went to Sopapillas.

40. While at Sopapillas, the waitress who knew Complainant's friend decided to buy the friend and Complainant a beer. The waitress used her own money to purchase the beers. Complainant did not reject the beer.

Board Rule 6-10 process:

41. Ms. Harris issued Complainant a Board Rule 6-10 meeting advisement letter dated August 9, 2010. In this letter, Ms. Harris informed Complainant of five allegations related to her visit to Sopapillas:

- a. "You advised the liquor licensee's staff that you were an agent for state Liquor."
- b. "You advised the staff that [it] was your job to visit licensed establishments and assess their compliance."
- c. "You advised one or more staff that you had been observing their activities that evening and stated that you believed that they were checking ID's and otherwise in compliance with liquor code requirements."
- d. "You advised one or more staff that you visit bars on Saturdays to do these assessments, and that the licensee had passed your review."
- e. "Either you, or members of your party, requested free alcohol beverages from the licensee's staff after you had been clear that you were acting in some official manner for the Liquor Enforcement Division."

42. The Board Rule 6-10 meeting was set for three days after the letter was issued. This timing provided Complainant with less than a day to prepare for the meeting. Shortly before the scheduled meeting, Ms. Harris and Complainant talked about whether the meeting should be rescheduled. Complainant decided to go forward with the meeting as announced.

43. The Board Rule 6-10 meeting was held on August 12, 2010. Complainant attended the meeting without a representative. Respondent was represented by Ms. Harris and Respondent's Human Resources Director, Nancy Brown. The meeting was recorded.

44. The Board Rule 6-10 meeting covered more topics than announced in the August 9, 2010 letter advising Complainant of the meeting. Complainant was answered questions about her interactions with other licensed establishments such as the Lakeview Lounge and the Platinum 84 Club. Complainant was also asked about the visit that she had made to Sopapillas after she had been placed on administrative leave.

45. After the Board Rule 6-10 meeting, Complainant submitted a letter discussing her actions, along with a signed written statement from John Powers, dated August 18, 2010.

46. The written statement from Mr. Powers discussed how Mr. Powers and Complainant decided to go to Sopapillas on the Grand Opening night. Mr. Powers also explained that he had paid for their drinks that night and that he had not asked for a free drink that evening. He stated that he did not hear Complainant tell anyone that she was an

inspector or investigator for Respondent while they were at Sopapillas. Mr. Powers also described that he and Complainant had gone out to places together in the last eighteen months, and that he had not seen Complainant talk about her job to anyone or asked for free drinks when the two of them were out.

47. Ms. Harris disregarded the information provided by Mr. Powers because she concluded that he and Complainant were likely to be dating, given that they go out socially and Mr. Powers paid for Complainant's drinks. Ms. Harris' assumption was incorrect. Mr. Powers and Complainant were not dating.

48. Ms. Harris also decided that Mr. Powers' statement should be disregarded entirely because he had stated: "I wasn't with Kathleen every single moment of the evening, but we weren't apart for very long at any one time, maybe three minutes at the most." Ms. Harris concluded that Mr. Powers' time estimation must be incorrect, given that Complainant had been taken on a tour of the restaurant by Ms. Pacheco at some point in the evening and Ms. Harris decided that the tour must have taken more than three minutes. Ms. Harris concluded that the fact that time estimate was wrong meant that the rest of the statement was, therefore, unreliable.

Complainant's Acceptance of A Free Drink At The Platinum 84 Gentleman's Club:

49. Prior to the events at Sopapillas, Complainant had socialized with a man who worked as a bartender at the Platinum 84 Gentlemen's Club, Rick Young. Complainant spent time at the Platinum 84 Club on two occasions. The second occasion occurred in late July 2010. During this second visit, Mr. Young introduced Complainant to a manager at the club, Bob Nelson. Mr. Nelson joined a group of individuals, including Mr. Young and Complainant, at a table during this visit.

50. Mr. Nelson learned through a conversation with Complainant that she worked for liquor enforcement. He had asked Complainant what she did for a living and she told him where she worked. Mr. Nelson then told Complainant that some of the staff had complaints about what a particular investigator from liquor enforcement did when he visited the club. Mr. Nelson referred to this investigator as acting badly while at the club. Complainant did not report this conversation about the investigator to her immediate supervisors. Complainant eventually told her Appointing Authority, Laura Harris, of this allegation during a meeting with Ms. Harris on August 2, 2010, concerning the impending investigation into the events at Sopapillas.

51. Later, when the drinks which had been ordered arrived, Mr. Nelson told Complainant and others at the table to allow him to buy the round. Complainant had intended to pay for the drinks, but she accepted Mr. Nelson's offer to buy that round of drinks.

Complainant's Actions At The Lakeview Lounge:

52. Complainant socialized at a neighborhood bar called the Lakeview Lounge. Complainant knew the owner of the bar, Mr. Golden. Mr. Golden had dropped off his liquor license renewal forms to Respondent's office in the past, and he knew that Complainant worked for Respondent. Other staff at the Lakeview Lounge also knew that Complainant worked for Respondent.

53. In December 2009, Complainant handled the license renewal for the Lakeview Lounge. Complainant did not report any conflict of interest to her supervisors before she processed the renewal.

54. In the months prior to Complainant's termination, one of the employees of the Lakeview Lounge, Mr. Simon, was in the process of buying the bar from Mr. Golden. Mr. Simon had received advice from a family member that he should consider purchasing the stock of the corporation that owned the bar, rather than buying the bar itself. Mr. Simon understood that it would be cheaper for him to purchase the stock.

55. Mr. Simon asked Complainant about the forms he would need to complete the purchase of stock. Complainant told him how to find those forms on Respondent's website. She also commented to him that the licensing fee for a purchase of stock would be cheaper than the fees associated with the purchase of the bar.

Termination Letter:

56. By letter dated August 27, 2010, Ms. Harris terminated Complainant's employment with Respondent effective September 7, 2010.

57. Ms. Harris founded her decision on Board Rule 1-13 and Executive Order D 001 99 – Executive Department Code of Ethics. Ms. Harris concluded that Complainant had "engaged in activity that is directly incompatible with the duties and responsibilities of your rank and position with the Liquor Enforcement Division." Ms. Harris also concluded that Complainant had "accepted items of monetary value from a regulated entity that could have resulted in preferential treatment and a loss of complete independence and impartiality."

58. Ms. Harris agreed that Complainant's actions and acceptance of items of value "may not have directly caused preferential treatment or loss of independence and impartiality," but found that the reasonable inference that such a loss of independence may occur is sufficient to support disciplinary action because the actions would have an adverse effect on the public's confidence in the integrity of state government.

59. Ms. Harris found that Complainant had committed the following acts warranting discipline:

a. Complainant “made a point to tell Tammy Pacheco...that [she was] an employee of liquor enforcement.” Ms. Harris concluded that the correct response under the rules and code of ethics was not to tell any licensed establishment who she worked for but to simply state that she worked for the Department of Revenue.

b. Complainant “allowed Tammy Pacheco to formally broadcast the identity of your employer to her staff when she purposely assembled all of them to meet you.” Ms. Harris concluded that Complainant had been vague about her specific duties and the level of her job authority, and that “given your lack of clarity from the onset, any person uneducated in our practices would assume that you had some level of inspector authority given the manner in which Pacheco portrayed you to her staff.”

c. Aisha Vigil had stated that Complainant “commented to her directly that they were doing everything correctly and doing a good job as far as security and ID checking” and that Ms. Vigil “vividly remembers” Complainant’s comments to her.

d. Complainant had admitted in her August 18, 2010 letter that she had commended the bartender at Sopapillas on his attentive ID checking. Complainant had also said during the Board Rule 6-10 meeting that the bartender was part of the group to which she had been introduced as part of liquor enforcement. “Therefore, it is reasonable that he and other staff would conclude that your comment regarding ID checking was offered in an official capacity as an assessment of their liquor code compliance.”

e. Ms. Pacheco’s question and Complainant’s response while Complainant was departing Sopapillas “confirmed that your actions created an impression of authority that is outside the scope of your position.... It is therefore understandable that Pacheco would advise Vigil that you had given them a passing review, which ultimately led Vigil to mention to another liquor enforcement staff member that she had ‘passed your review.’”

f. “Ms. Vigil stated that she vividly remembers that someone from her staff came to her that evening and advised that parties from your table requested free alcohol beverages. Vigil knew that you were seated at this table and felt compelled to comply because of your position. My conclusion that you accepted items of monetary value (free alcohol beverages), or solicited the same, is based on Ms. Vigil’s vivid recollections, the totality of the circumstances, and the lack of any written receipts to the contrary.”

g. Complainant and a friend visited Sopapillas on August 6, 2010. Ms. Harris concluded that this visit was done after ignoring “my strong

recommendation that you refrain from visiting licensed establishments while you [were] on administrative leave.”

h. During the August 6, 2010 visit to Sopapillas, a waitress that knew the friend that Complainant was with bought a beer with her own money for the friend and for Complainant.

i. Complainant had, within the previous sixty to ninety days, visited the Platinum 84 Club. During this visit, the manger, Bob Nelson, had learned either from Complainant or a friend that Complainant worked for liquor enforcement. He then told Complainant about another liquor enforcement employee, an investor, that he found to be offensive and inappropriate. Complainant did not report the conversation to her supervisors or division management.

j. On a second visit to the Platinum 84 Club, Ms. Nelson had offered to buy Complainant and her companion a drink. Complainant initially refused but decided not to argue and permitted Mr. Nelson to purchase the drink for her.

k. Complainant had a long standing friendship with the employees and owner of the Lakeview Lounge. The prior owner, Jerry Golden, and Jack Simon, the employee arranging to purchase the bar from Mr. Golden, both knew that Complainant worked for liquor enforcement. Mr. Simon and Complainant “discussed the specific state forms that he would need for the purpose of filing a report of corporate ownership changes. He admitted that you told him that it would be much cheaper to purchase the business in this matter, rather than choose the alternative method of a transfer of ownership. Your job duties do not include providing licensees or potential applicants with legal advice on how to avoid liquor licensing fees. These actions are [inappropriate] and incompatible with your administrative position.”

l. On December 11, 2009, “you approved and processed the liquor license renewal application filed by Lakeview Lounge. You have not filed a conflict of interest statement with me.”

m. Ms. Harris found that Complainant’s statement that she doesn’t advertise that she works for liquor enforcement was not true. “My conclusion has to be, based on the totality of the information collected, you most certainly do, either directly or through friends and acquaintances. Our interviews with the licensees at Lakeview Lounge and Platinum 84, as well as your own statements, demonstrate a consistent pattern of developing relationships with liquor licensees that involves revealing information about your position with the division.”

60. Complainant filed a timely appeal of her termination with the Board.

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; C.R.S. §§ 24-50-101, *et seq*; *Department of Institutions v. Kinchen*, 886 P.2d 700, 707 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 4 CCR 801, and generally includes:

- (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) false statements of fact during the application process for a state position;
- (4) willful failure or inability to perform duties assigned; and
- (5) final conviction of a felony or any other offense involving moral turpitude.

A. Burden of Proof.

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. *Kinchen*, 886 P.2d at 707-8. The Board may reverse Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. C.R.S. § 24-50-103(6).

II. HEARING ISSUES

A. Complainant committed only nine of the acts for which she was disciplined, and only two of those acts constitute a violation of the applicable standards of conduct.

(1) Factual Allegations Supported By Sufficient Evidence:

One of the essential functions of a *de novo* hearing process is to permit the Board's administrative law judge to evaluate the credibility of witnesses. *See Charnes v. Lobato*, 743 P.2d 27, 32 (Colo. 1987) ("An administrative hearing officer functions as the trier of fact, makes determinations of witness' credibility, and weighs the evidence presented at the hearing"); *Colorado Ethics Watch v. City and County of Broomfield*, 203 P.3d 623, 626 (Colo.App. 2009) (holding that "[w]here conflicting testimony is presented in an administrative hearing, the credibility of the witnesses and the weight to be given their testimony are decisions within the province of the presiding officer").

Once the credibility of the witnesses and the weight of the evidence were determined, there was credible evidence supporting only nine of the factual allegations in Complainant's termination letter:

- 1) Complainant informed Tammy Pacheco that she worked for liquor enforcement;
- 2) Complainant complimented the bartender at Sopapillas on his checking of IDs;
- 3) Complainant visited Sopapillas a second time after she had been placed on administrative leave and after receiving a recommendation that she not go to licensed establishments;
- 4) Complainant accepted a free beer from an employee at Sopapillas on August 6, 2010;
- 5) Complainant did not report the complaint by a manager of Platinum 84 about another of Respondent's employees until she was told of the allegations against her;
- 6) Complainant told Jack Simon where to find the paperwork for a stock ownership transfer, and that a stock ownership transfer was cheaper than the license for buying the bar;
- 7) Complainant did not file a conflict of interest form on the Lakeview Lounge when she processed its license renewal in 2009;
- 8) Complainant accepted a free beer from a manager at Platinum 84; and
- 9) Complainant permitted licensees to be aware of her status as an employee of the liquor enforcement division.

The other factual allegations accepted by Ms. Harris were not supported by credible evidence at hearing. Respondent failed to prove by a preponderance of evidence that Complainant allowed Ms. Pacheco to broadcast her connection with liquor enforcement to the staff at Sopapillas, or that Complainant said or was insinuating that she was an inspector or investigator for Respondent. Respondent did not demonstrate that Complainant made any comment more than social greetings to Ms. Vigil during her visit to Sopapillas.

The evidence at hearing demonstrated persuasively that Ms. Pacheco was never

under the impression that Complainant was a liquor investigator or inspector. The evidence supported that Ms. Pacheco, however, used Complainant's presence for Ms. Pacheco's own purposes, and that Ms. Pacheco had purposely presented Complainant as a liquor enforcement inspector or investigator to others.

The evidence at hearing also persuasively demonstrated that neither Complainant nor Mr. Powers asked for a free beer while at the Grand Opening Night festivities at Sopapillas. The only evidence that Respondent found during its investigation to support the free drink allegation was Ms. Vigil's statement that the table at which Complainant was sitting asked for free drinks. Ms. Vigil tempered her statements to Mr. Small, however, by admitting to some uncertainty over the request itself, and added her uncertainty as to whether free drinks had actually been provided. Respondent's further investigation did not find any support for this allegation. The testimony at hearing, on the other hand, persuasively demonstrated that Complainant had been sitting at a table which included others not in her party, that Ms. Vigil was uncertain in her recollection as to whether the request had even occurred on Grand Opening night and, most importantly, that Mr. Powers had paid for the drinks. Complainant's testimony that she had not requested free drinks from the staff at Sopapillas was also credible.

Finally, Respondent's overall conclusion that Complainant was demonstrating a "consistent pattern" of actively advertising to liquor establishments that she works for liquor enforcement is not a defensible conclusion given the facts of this case. The evidence supports that there were liquor licensees and bar employees who knew that Complainant worked for Respondent, but that these instances were either related to Complainant's work in Respondent's office or a result of Complainant's social relationships. These instances do not form a consistent pattern of developing relationships with licensees that involved revealing her status as one of Respondent's employees.

The next step in the Board's analysis is to examine whether the supported facts constitute violations of applicable standards of conduct.

(2) Respondent's Standards of Conduct:

Respondent based its decision on two standards of conduct: Board Rule 1-13 and the ethics rule defined by Executive Order D – 001-99.

Board Rule 1-13 states, in relevant part:

No employee is allowed to engage in any outside employment or other activity that is directly incompatible with the duties and responsibilities of the employee's state position, including any business transaction, private business relationship, or ownership. The employee is not allowed to accept outside compensation for performance of state duties. This includes acceptant of any fee, compensation, gift, reward, gratuity, expenses, or other thing of monetary

value that could result in preferential treatment, impediment of governmental efficiency or economy, loss of complete independence and impartiality, decision making outside official channels, and disclosure or use of confidential information acquired through state employment. Incompatibility includes reasonable inference that the above has occurred, may occur, or has any other adverse effect on the public's confidence in the integrity of state government....

(B) An employee shall give advance notice to the appointing authority and take necessary steps to avoid any direct conflict between the employee's state position and outside employment or other activity.

In a similar vein, Executive Order D-001-99 requires that all employees of the Executive Department::

- (2)(c) Shall not use public office to bestow any preferential benefit to anyone related to the officer, appointee, or employee by family, business or social relationship;...
- (e) Shall not accept any compensation, gift, payment of expenses or any other thing of value which would influence him or her to depart from the faithful and impartial discharge of his or her duties;
- (f) Shall not accept any compensation, gift, payment of expenses or any other thing of value as a reward for official action taken;...
- (i) Shall not knowingly engage in any activity or business which creates a conflict of interest or has an adverse effect on the confidence of the public in the integrity of government;
- (j) Shall carry out all duties as a public servant by exposing corruption or impropriety in government whenever discovered...

(3) Application Of The Standards of Conduct To The Facts:

Complainant's acceptance of free beer from an employee or manager of a licensee fits within the prohibitions of Board Rule 1-13, in that it is the acceptance of a gift or other thing of monetary value that could result in preferential treatment, or result in an adverse effect on the public's confidence in the licensing system. The problem is not that others know where Complainant works. Friends and acquaintances will often know where someone works, whether or not that individual tells them the information directly. The problem is that, once a licensee (or an employee of a licensee) knows the information, it is not necessarily a social gesture to provide free drinks to the state employee. This is the type of action that reasonably would be construed by members of the public, or by

licensees, as creating an undue influence on the state employee, or as coercive on the part of the state employee. Respondent has, therefore, demonstrated in this case that there were two violations of Board Rule 1-13 by Complainant.

The remainder of the sustained factual allegations, however, do not constitute violations of Board Rule 1-13 or Executive Order D-001-99.

It does not violate either of these standards for an employee of any agency merely to tell people where he or she works. Respondent additionally did not introduce at hearing any standard of conduct or policy statement which creates a different rule for the office staff of the liquor license enforcement branch.

Respondent also did not produce any persuasive reason to believe that Complainant's complimenting of the bartender on his checking of IDs, or her answer to Ms. Pacheco's final question to her at the end of the evening, was improper under Board Rule 1-13 or Executive Order D-001-99. Respondent originally found these activities to be improper because they were part of the allegation that Complainant was telling people that she was conducting a liquor enforcement activity or inspection. Once the facts established that it was Ms. Pacheco telling the staff that Complainant was conducting some type of enforcement activity and not Complainant, Complainant's relatively innocent comment to the bartender, and her parting conversation with Ms. Pacheco, cease to fit within the prohibitions of Board Rule 1-13 or Executive Order D-001-99.

Respondent did not prove that Complainant's decision to visit Sopapillas on August 6, 2010, violated any standard of conduct. This action does not fit within the ethics rules at all. Even if one assumes that Respondent intended to charge Complainant with another type of rule violation, it would be difficult to find a rule that was violated here. The letter placing Complainant on administrative leave did not inform Complainant of the specifics of the allegations against her. It did not tell her that she must avoid Sopapillas. The letter also did not prohibit Complainant from going to licensed establishments, although Ms. Harris strongly recommended that she not go. Complainant's decision to drop in at Sopapillas after she had received a general recommendation not to go to licensed establishments is not a violation of a standard of conduct for Complainant.

Respondent's contention that Complainant violated the ethics rules by failing to report the comments of the manager at Platinum 84 also does not fit within the ethics rules. The complaints were not ones of corruption or impropriety that must be exposed, pursuant to Executive Order D-001-99. Respondent also did not introduce any special rule or standard of conduct which required office staff to make such disclosures. It is not surprising that Respondent's supervisory staff would like to know of such comments so that they can address the issues, but that desire is not the same as finding a violation of a disciplinary standard in this case.

In a similar manner, it is not a violation of the ethics rules for Complainant to have

told Jack Simon where to find the paperwork to complete a stock transfer, or to confirm for him that stock transfers were less costly than the cost of the license if he were to buy the bar. The various costs of governmental licenses are not, and should not be, secrets from the public. This was not the release of confidential information implicating either Board Rule 1-13 or Executive Order D-001-99.

Finally, Respondent has not persuasively demonstrated that there was the type of direct conflict of interest here which required Complainant to avoid the conflict by notifying Respondent that she socialized with the employees at Lakewood Lounge before she processed its liquor renewal license. Moreover, Respondent did not introduce any departmental policy guidance or policy on this issue so that staff would understand that the department has a special rule as to when it considers socializing to cross the line into a conflict of interest requiring the notification of supervisors.

B. The Appointing Authority's action was arbitrary, capricious, and contrary to rule or law.

(1) Arbitrary and capricious action analysis:

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).

The majority of Respondent's case against Complainant was founded upon the assumption that Ms. Vigil's information about what Complainant did and said while at Sopapillas was correct, and that all of the contrary information offered by Complainant, Mr. Powers, and the other witnesses interviewed during Respondent's investigation process were not to be believed.

Candid and honest consideration of the evidence before Respondent with regard to the events at Sopapillas, however, should have led to an understanding that Ms. Vigil's assertions were either contradicted or not supported by other witnesses. Moreover, candid and honest consideration of the other witnesses' statements in this matter should have led Respondent to be far more wary of accepting Ms. Vigil's assertions at face value.

Additionally, Respondent's interpretation of how Complainant's actions implicated the applicable ethical standards were often based upon unreasonably harsh interpretations of the evidence, and led Respondent to conclusions that reasonable persons looking at

that evidence would not have reached. Complainant, for example, did not offer Mr. Simon legal advice on how to avoid liquor licensing fees. She told him where to find the forms for a transfer of stock ownership, and she confirmed that the licensing cost of performing a transfer of stock ownership was significantly less than the licensing cost for the more typical process for the purchase of a bar. Reasonable men fairly and honestly considering this evidence would not have reached the conclusion that Complainant was offering legal advice or that such actions violated the ethics rules.

Respondent's conclusion Complainant violated Board Rule 1-13 when she accepted free drinks from the employees of licensees was not an unreasonable understanding of the evidence or the ethics rules. Respondent's conclusion that the rules were violated in those two instances was not arbitrary or capricious.

Respondent's similar conclusions on all of the other charged activities, however, represent a failure to give candid and honest consideration to the evidence before it, and demonstrated unreasonable interpretations of the evidence such that reasonable men honestly and fairly considering the evidence would reach contrary conclusions.

(2) Application of Board Rule 6-2:

Board Rule 6-2, 4 CCR 801, provides that "[a] certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper." Complainant has no prior discipline or corrective actions in her employment with Respondent. Respondent did not present any information which would demonstrate that progressive discipline was achieved in this case.

The rule, of course, does not demand progressive discipline in every case. There is an exception within the rule permitting immediate discipline, including termination, for serious or flagrant actions.

The only credible allegations in this case which provide a reasonable foundation for discipline are that Complainant accepted two free drinks from licensed establishments. The question, therefore, is whether the acceptance of these two drinks is sufficiently serious or flagrant to warrant the imposition of immediate discipline, rather than impose the corrective action required by Board Rule 6-2.

The nature of the violations in this case were not so serious or flagrant so as to warrant immediate discipline. The issue with Complainant's performance is that she accepted free beer from the employees of licensed establishments while she was on her personal time. This activity implicates Board Rule 1-13 sufficiently to warrant the imposition of some form of correction. The actions are not so flagrant or serious, however, as to warrant the imposition of immediate discipline, particularly termination.

Respondent's decision not to take corrective action given these facts is, therefore,

contrary to Board Rule 6-2.

C. Termination Was Not Within The Range of Reasonable Sanctions Available.

Board Rule 6-9, 4 CCR 801, requires that an appointing authority is to weigh the facts of the incident as well as an employee's information and prior performance in making a decision on the level of discipline to impose. See Board Rule 6-9 ("The decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act... type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances").

The credible evidence at hearing demonstrated that the Appointing Authority did not pursue her decision thoughtfully and with due regard for the circumstances of the situation as well as Complainant's individual circumstances, as required by Board Rule 6-9. The decision to terminate Complainant's employment was made only after the Appointing Authority unfairly dismissed the mitigating evidence available to her, credited demonstrably incorrect interpretations of evidence such as that Complainant or her party requested free drinks while at the Grand Opening Night event, imposed requirements on Complainant not founded in the applicable rules, and blamed Complainant for providing correct information on license fees to a member of the public. The only credible evidence of misconduct was the acceptance of two free drinks from the owners or employees of a regulated entity, accepted while Complainant was socializing at these establishments. There was no evidence of an effect on Complainant's job performance, and no prior discipline or corrective actions on this or any other issue. Termination of employment is not within the reasonable range of available sanctions under such circumstances.

D. An award of attorney fees and costs is warranted in this action.

(1) Awards of attorney fees and costs:

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. C.R.S. § 24-50-125.5; Board Rule 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 8-38(B)(3).

A groundless personnel action is one 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..." Board Rule 8-38(A)(3). Frivolous actions, on the other hand, are actions "in which is it found that no rational argument based on the evidence or law is presented." Board Rule 8-38(A)(1).

It was not an error for Respondent to take Ashia Vigil's complaint seriously, or to

conduct an investigation into Ms. Vigil's information. Ms. Vigil presented information to Respondent that she sincerely believed to be true, and that information, if it had been true, would have constituted a breach of the standards of conduct applicable to Respondent's employees.

The warning signs that Ms. Vigil's information was not correct, however, appeared early in Respondent's investigation. Mr. Small interviewed Ms. Pacheco and Ms. Aquinaldo; both told him, in different ways, that Ms. Vigil's information was only second-hand and that Ms. Vigil had not been given the correct story. Ms. Vigil herself was then interviewed in person, and her statements reflected some doubt about key allegations, and also reflected that the source of her information in key areas was Ms. Pacheco. Mr. Small was also never able to confirm the key allegation concerning the request for a free drink through any other witness.

After the Board Rule 6-10 meeting, Respondent also knew that Complainant denied asking for, or receiving, a free drink at Sopapillas during the Grand Opening Night event, and that Mr. Powers said that he had paid for the drinks that he and Complainant had during that event. All of the doubt expressed by Ms. Vigil, however, and all of the contrary information presented by Ms. Pacheco, Complainant, and Mr. Powers were dismissed out of hand as not worthy of belief or even of further investigation. This pattern of accepting inculpatory second-hand information as the truth, and then dismissing all of the contrary or exculpatory first-hand information, meant that Respondent's case against Complainant with regard to her actions at Sopapillas during the Grand Opening Night event was fundamentally without competent evidence to support it at hearing. In other words, Respondent's entire case concerning Complainant's actions during the Grand Opening Night event was groundless under Board Rule 8-38(A)(3).

The other allegations against Complainant, with the exception of the two sustained counts of accepting free drinks, were infirm for a different reason. Respondent's finding that Complainant violated the applicable ethics codes when she did not adhere to a "strong recommendation" from Ms. Harris, when she failed to file a conflict of interest statement when the Lakeview Lounge renewal arrived, when she discussed the location of forms and the comparative licensing costs with Mr. Simon, when she failed to report Mr. Nelson's complaints about another of Respondent's employees, and when she told friends and acquaintances where she worked, all stretch the applicable ethics codes beyond a rational reading. These other allegations, therefore, fit the definition of frivolous claims under Board Rule 8-38(A)(1).

In short, the only two claims that had a competent evidentiary basis as well as a rational basis in the applicable law were the two counts of accepting free drinks from licensees or employees of licensees. These two counts are not, however, sufficient to support termination of Complainant's employment. The rest of Respondent's claims against Complainant were either groundless or frivolous.

Under such circumstances, Complainant is entitled to an award of attorney fees and costs sufficient to cover the fees and costs related to defending against these infirm allegations, with the exception of the two sustained allegations, because Respondent's grounds for terminating Complainant's employment were groundless or frivolous under Board Rule 8-38.

(2) Complainant's request for other damages:

Complainant has also requested that the Board provide her with compensation for damages in addition to an award of attorney fees and costs. The Board's power to provide monetary relief to an employee is an equitable remedy related to the Board's authority to reverse a disciplinary decision of an appointing authority. The Board's remedy for an improperly discharged employee is make whole relief, i.e., to "equal, to the extent practicable, the wrong actually sustained" by the employee. *Department of Health v. Donahue*, 690 P.2d 243, 250 (Colo. 1984). In identifying the legal wrong sustained, the Board's ultimate goal is to "do no more than place [the employee] in the same situation she would have occupied" if her rights under the personnel rules had not been violated. *Id.* The chosen remedy should not "bestow[] ... an economic windfall vastly disproportionate to the legal wrong sustained by [the employee]." *Id.*

In this case, the legal wrong sustained by Complainant was the improper termination of her employment. To place Complainant into the same employment situation she would have occupied if she had not been terminated requires that Complainant be reinstated to her prior position, and that she be awarded full back pay from the date of her termination along with either the benefits or the monetary value of the benefits she would have earned from state employment during the same period. Complainant's back pay shall be "offset for any substitute earnings or unemployment compensation received by her during this period of time," *Donahue*, 690 P.2d at 250, but with the cost of expenses incurred in seeking other employment deducted from the offset. *Lanes v. State Auditor's Office*, 797 P.2d 764, 767 (Colo.App. 1990). Complainant also shall be awarded statutory interest on any monetary amount to be paid to her. *Lanes*, 797 P.2d at 767.

CONCLUSIONS OF LAW

1. Complainant committed only two of the acts for which she was disciplined.
2. Respondent's disciplinary action was arbitrary, capricious, and contrary to rule or law.
3. The discipline imposed was not within the range of reasonable alternatives.
4. Attorney's fees and costs are warranted for that portion of the litigation addressing the disciplinary allegations that were not sustained at hearing.

ORDER

Respondent's disciplinary action is **rescinded**. Complainant is reinstated to her previous position with full back pay and full benefits from the date of the termination of her employment, offset for any substitute earnings or unemployment compensation received by Complainant during this period of time, and the with cost of expenses incurred in seeking other employment deducted from the offset. Respondent may issue Complainant a corrective action for accepting two free drinks from employees or owners of regulated entities. Attorney fees and costs related to litigation concerning the allegations not sustained at hearing are awarded.

Dated this 14th day of March, 2011.


Denise DeForest
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. Section 24-4-105(14)(a)(II) and 24-50-125.4(4) C.R.S. and Board Rule 8-67, 4 CCR 801. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Board Rule 8-70, 4 CCR 801. 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 referred to above. 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

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-72, 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.

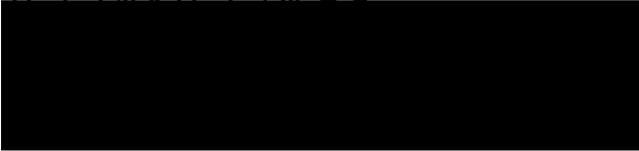
PETITION FOR RECONSIDERATION

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 14th day of March, 2011, I electronically served true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** as follows:

Colin Moriarty



and

Micah Payton



Andrea C. Woods