STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2014B120

ORDER GRANTING SUMMARY JUDGEMENT and NOTICE OF APPEAL RIGHTS

LIZ HAGEMAN,
Complainant,

v.

DEPARTMENT OF CORRECTIONS, DIVISION OF ADULT PAROLE,
Respondent.

This matter comes before the undersigned upon review of Respondent's Motion For Summary Judgment, filed October 27, 2014; Complainant's Response To Respondent's Motion For Summary Judgment, filed November 12, 2014; Respondent's Motion For Leave To File Reply To Complainant's Response To Motion for Summary Judgment; Reply Incorporated Herein, filed November 13, 2014; Complainant's Motion For Denial of Respondent's Motion For Leave to File Reply To Complainant's Response To Motion For Summary Judgment; Reply Incorporated Herein, filed December 10, 2014; and Respondent's Objection To Complainant's Motion For Denial of Respondent's Motion For Leave to File Reply, filed December 11, 2014.

I. Introduction and Preliminary Determination of the Status of Motions:

This is a case challenging Complainant's administrative discharge from employment as of June 18, 2014, for exhaustion of leave. Complainant has appealed the decision to terminate her employment under Director's Procedure 5-6, and has filed a discrimination claim under the Americans with Disabilities Act (ADA). Respondent now argues that this matter need not proceed to evidentiary hearing because Respondent is entitled to summary judgment on both of Complainant's claims based upon the undisputed facts.

As is true for any summary judgment issue, Respondent's request to dismiss this appeal cannot be granted unless and until it is shown that the admitted facts demonstrate that Complainant cannot prevail at trial. *Kuehn v. Kuehn*, 642 P.2d 524, 526 (Colo. App. 1981). Summary judgment may be granted only if Respondent shows that there is no genuine issue of any material fact and that the agency is entitled to judgment as a matter of law. C.R.C.P. Rule 56(c); *Civil Service Commission v. Pinder*, 812 P.2d 645, 649 (Colo. 1991)(holding that summary judgment is proper only when the pleadings, affidavits, depositions, or admissions show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law).

A. Procedural Issues Concerning the Filing of Sur-Replies -

As part of this exchange of information concerning the appropriateness of summary judgment, Respondent filed for leave to file a reply brief on November 13, 2014. Respondent did not need to file separately for leave to file its Reply because the undersigned had already set out a briefing schedule which permitted the filing of a reply.

Complainant then filed a motion which nominally titled itself as a Motion For Denial for Respondent's Motion For Leave to File Reply. Complainant's Motion For Denial, however, was actually a sur-reply in that it objected to Respondent's reply as containing incorrect information about the factual basis for summary judgment. Respondent then filed its response to Complainant's Motion For Denial, but called that response its Objection. Respondent's Objection, however, addresses the merits of the arguments for summary judgment dismissal and is also a sur-reply on the issue of summary judgment.

While the procedural naming of the last two filings created some confusion, the information contained in those filings was helpful in defining the nature of the dispute in this case. Accordingly, Complainant's request to strike Respondent's Reply is DENIED and Respondent's request to strike Complainant's Motion For Denial is also DENIED. In deciding the summary judgment issue, accordingly, the undersigned has accepted all of the filings and reviewed all of the attachments.

B. Legal Issues to be Decided –

1. Is Respondent entitled to summary judgment on the issue of whether Complainant was properly administratively discharged for exhaustion of leave under the requirements of Director's Procedure 5-6?

2. Is Respondent entitled to summary judgment on the issue of whether Complainant has sufficient evidence to present a *prima facie* case of ADA discrimination with regard to the decision to administratively discharge her in June of 2014?

II. Undisputed Facts:

After review of the parties' submissions on the issue, the undersigned finds that the following statements represent the undisputed facts in this matter:

1. Complainant was employed with the Department of Corrections from November 1, 2003 to June 18, 2014.

2. In December of 2005, Complainant was a Correctional Officer I (CO I). She slipped on some ice while on the job and injured her back. The injury resulted in a permanent partial whole person impairment rating of 22% and resulted in Complainant being unable to continue in her position as a CO I.

3. In July of 2006, Complainant filed a written accommodation request to be transferred to a position in which she would not be required to perform takedowns. In November of 2006, Respondent provided Complainant with an ADA accommodation and placed her into an Administrative Assistant III position.

4. Complainant underwent a fusion of some of the vertebrae in her back in May of 2007. She had a spinal cord stimulator implanted in July of 2012. On December 10, 2013, Complainant underwent surgery to reposition the leads of that device.

5. By the summer of 2013, Complainant's direct supervisor was Diana Brown. Complainant's appointing authority was Kelly Messamore, the Assistant Director, Region IV, Division of Adult Parole.

6. In June of 2013, Complainant was moved to the Garden of the Gods Parole Office in Colorado Springs, CO. This move changed some of Complainant's duties and, her workspace layout. Complainant's work environment also changed in that she had an office in her prior workspace and was moved to an open plan area at her new location.

7. Complainant and Respondent discussed her new workspace needs and utilized the services of a company, Broadspire, to evaluate her new workspace in mid-November of 2013. Broadspire issued a letter dated December 2, 2013, which recommended a series of changes to Complainant's desk area, such as the provision of a new chair to provide better lumbar support, the movement of some file cabinets and Complainant's desk to better utilize her workspace, the addition of a footstool and articulating arms on Complainant's monitors, and Complainant's use of ear filters or plugs to help minimize distracting noise in the open office plan.

8. On December 10, 2013, Complainant underwent surgery on her back. Complainant's use of Family Medical Leave (FML) job protection began on that date.

9. Complainant submitted a Fitness To Return Certificate dated December 13, 2013, from Adam Haeffner, PA-C. Mr. Haeffner provided a series of restrictions for Complainant's movements, including no sitting or standing for more than 4 hours each day, and the need to take frequent unscheduled breaks.

10. Ms. Messamore communicated with Complainant by email dated December 19, 2013, in which she explained Complainant's options:

> I wanted to let you know I spoke with Gladie Miller in risk management and reviewed your fitness to return form. Based on the fitness to return form, which indicates you can not sit for longer than 4 hours per day, if you choose to return to work it would be at the Colorado Springs office for no more than 4 hours per day doing your normal work duties. You also have the option of choosing not to return to work at this time. ... Please let me know if you plan to return to work for the 4 hours per day so I can either write your modified duty

letter or make other arrangements to cover your day-to-day job duties.

11. Complainant replied to Ms. Messamore's email by email on December 22, 2013. In this email, Complainant included an updated Fitness to Return Certificate. Complainant also told Ms. Messamore than she would not be returning to work at that time, given the additional restrictions in the updated Fitness To Return Certificate.

12. Complainant's updated Fitness To Return Certificate was an amended copy of Mr. Haeffner's December 13, 2013 certificate. In the amended certificate, Mr. Haeffner clarified in the notes section that, "due to patient complaints of low back pain and numbness in her legs/feet it is important that she be allowed to reduce her work day to 4 hr MAX and be allowed frequents breaks to sit/stand. Please allow time for travel due to driving adjustment for pain management."

13. On January 16, 2014, Complainant applied for short-term disability through the state's short-term disability benefit program. Complainant's application was granted and her benefits were payable through June 10, 2014.

14. Complainant's physician, Dr. Jeffry Jenks, completed a Return To Work restriction form on or about February 6, 2014, in which he stated that Complainant had permanent restrictions. One of the restrictions was that Complainant could not sit for more than two hours in an eight hour period, including drive time.

15. On March 22, 2014, Complainant's Family Medical Leave Act (FML) job protection was exhausted.

16. On or about May 22, 2014, Complainant's physician, Dr. Matthew Young, issued an opinion that Complainant's disc degeneration in her lower back was severe enough that, among other restrictions related to both Complainant's lower and upper back, Complainant needed to lie down frequently. Dr. Young provided his opinion that Complainant was not able to work because he did not believe that work could accommodate Complainant's restrictions.

17. On June 12, 2014, Complainant exhausted her sick and annual leave.

18. Complainant received a letter dated June 6, 2014 from her appointing authority, Ms. Messamore. Ms. Messamore told Complainant that she was scheduling a meeting to discuss that Complainant's paid leave would be exhausted by June 12, 2014. Ms. Messamore's letter also provided Complainant with instructions on how she could request an Americans with Disability Act (ADA) accommodation for work. Complainant did not ask Respondent for an accommodation.

19. Complainant wanted to work because she wanted to retire from the state at age 65, she enjoyed her work as an administrative assistant, and she needed to support herself. By May and June of 2014, however, Complainant's medical condition had

deteriorated to the point that she was unable to work.[1]

20. On June 16, 2014, Complainant met with her supervisor, appointing authority, and ADA coordinator concerning Complainant's work and leave status.

21. By letter dated June 17, 2014, Complainant's appointing authority informed her of her decision to administratively discharge Complainant. The letter included a statement of Complainant's appeal rights with the Board, and a statement concerning how she could check with PERA about retirement benefits. Complainant's discharge from employment was effective June 18, 2014.

III. Discussion

A. Applicable Legal Standards:

In evaluating whether Respondent can succeed on summary judgment, it is important to start with the legal definition of the two claims at issue.

1. Administrative Discharge Rule:

The standard for administrative discharge is found at Director's Procedure (DP) 5-6:

> If an employee has exhausted all credited paid leave and is unable to return to work, unpaid leave may be granted or the employee may be administratively discharged by written notice following a good faith effort to communicate with the employee. Administrative discharge applies only to exhaustion of leave.
>
> A. The notice of administrative discharge must inform the employee of appeal rights and the need to contact the employee's retirement plan on eligibility for retirement.
>
> B. An employee cannot be administratively discharged if FML or short-term disability leave (includes the 30-day waiting period) apply, or if the employee is a qualified individual with a disability under the ADA who can reasonably be accommodated without undue hardship.

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[1] This understanding of the historical record of this case comes primarily from Complainant's Response To Respondent's Motion For Summary Judgment, paragraph 9. Ironically, it is Respondent who has been arguing that there is a factual dispute over this point. Respondent argued during the briefing of this issue that Complainant had contradicted herself in her deposition and discovery responses, as compared to her summary judgment response, on this issue. After a close review of the parties' filings, however, it is clear that Complainant has acknowledged that she was indeed unable to work by the time her paid leave expired in June of 2014. Complainant's entire argument stems from her allegation that she had requested some type of modification to her new workplace during the period of July through December 2013, and that these requests had not been implemented.

C. A certified employee who has been discharged under this rule and subsequently recovers has reinstatement privileges.

In other words, a showing that DP 5-6 has been met in a process resulting in the administrative discharge of an employee requires the showing of seven elements:

1) that all of the employee's credited paid leave has been utilized;

2) that, at the time all paid leave is exhausted, the employee is not able to return to work;

3) that at the time of termination the employee is not entitled to protection under the Family Medical Leave Act (FML);

4) that at the time of termination the employee is not entitled to the protection of short-term disability leave;

5) that, at the time of termination, the employee is not a qualified individual with a disability under the ADA who can reasonably be accommodated without undue hardship;

6) that there was a good faith effort to communicate with the employee about his or her status prior to any termination of employment; and

7) that the administrative discharge was accomplished by written notice that includes both appeal rights and the need for the employee to contact his or her retirement plan.

2. Americans with Disabilities Act:

The Americans with Disabilities Act (ADA) provides "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

In establishing a *prima facie* case of discrimination under the ADA, an employee must be prepared to show that (1) he is a disabled person within the meaning of the ADA; (2) he is qualified, with or without reasonable accommodation, to perform the essential functions of the job; and (3) he suffered discrimination by an employer or prospective employer because of that disability. *EEOC v. C.R. England, Inc.*, 644 F.3d 1028, 1037 - 38 (10th Cir. 2011). *See also Koessel v. Sublette County Sheriff's Department*, 717 F.3d 736,

742 (10th Cir. 2013).

B. Application of the Legal Standards to the Undisputed Facts:

Respondent's argument is that the undisputed facts demonstrate that Respondent did not administratively discharge Complainant until all of the provisions of Director's Procedure 5-6 were met, therefore warranting judgment for Respondent on that issue. Additionally, Respondent argues that Complainant cannot demonstrate that she was able to perform the functions of her job with or without reasonable accommodation, and therefore Complainant cannot present a *prima facie* case of ADA discrimination.

Once Respondent has identified the factual statements it believes are material to the case and are not in dispute, it becomes necessary for Complainant to "to establish that there is a triable issue of fact. If [Complainant] cannot muster sufficient evidence to make out a trial issue of fact on [her] claim, a trial would be useless and [Respondent] is entitled to summary judgment as a matter of law." *Continental Air Lines, Inc. v. Keenan,* 731 P.2d 708, 713 (Colo. 1987).

1. Compliance with DP 5-6:

This appeal requires that we evaluate whether the requirements of DP 5-6 were met by June 18, 2014.

By that point in time, the undisputed facts show that Complainant had been absent from work for more than six months and was unable to return to work. Her annual and sick leave were exhausted. Her job protection under FML was exhausted in March of 2014, and her job protection while applying for, and receiving, short-term disability benefits had expired in early June 2014. Additionally, Respondent held a pre-termination meeting with Complainant to discuss her status, and it issued a written termination letter containing the required elements of appeal rights and referral to a contact for retirement benefits.

That leaves only one additional factual issue to be determined before deciding whether it is uncontested that the requirements of DP 5-6 were met in this case. Complainant should not have been terminated from employment if she was "a qualified individual with a disability under the ADA who can reasonably be accommodated without undue hardship." DP 5-6.

Respondent asserts that, at the time when Complainant's paid leave was exhausted, Complainant was not able to return to work and did not suggest that there was an accommodation that would allow her to return. Complainant, in turn, does not dispute that she did not request an ADA accommodation during 2014.

Complainant's argument on this point is that Respondent's alleged failure to respond to Complainant's ADA issues during July through December of 2013 warrants denial of summary judgment. Complainant's argument is, in essence, that there is a causal link between what occurred in July through December 2013 with regard to Complainant's new

workspace, and Complainant's eventual complete inability to return to work in 2014.

In evaluating the strength of Complainant's argument, we provide Complainant with all favorable inferences to be reasonably drawn from the evidence. *Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Board*, 901 P.2d 1251 (Colo. 1995). In this case, this standard requires that we assume that Complainant did discuss accommodation requests with her supervisors during the summer and fall 2013 period, and that these accommodations were not placed into effect.

Complainant's argument concerning her alleged requests for accommodation in the summer and fall of 2013, however, does not provide a proper basis to deny summary judgment on her DP 5-6 rule challenge.

DP 5-6 applies to the situation at the time when Complainant's leave and job protection were exhausted. Those events occurred in June of 2014. There is also no dispute that, in June of 2014, Complainant's back issues had progressed to the point that she could not work and was not attempting to find an accommodation. Complainant cannot withstand summary judgment on her DP 5-6 claim by arguing that her condition was different in 2013 and that there were accommodations that may have been available to her prior to her surgery in 2013.

As a result, the undisputed facts demonstrate that, in June of 2014 when the decision on Complainant's status was being made, Complainant was not a qualified individual with a disability under the ADA who could reasonably be accommodated without undue hardship.

The undisputed facts in this case are sufficient to show that Respondent properly applied the requirements of DP 5-6. Under such circumstances Respondent's argument that the DP 5-6 claim is suitable for summary judgment in favor of Respondent is well-grounded in both undisputed fact and the law.

B. ADA Claim:

Complainant's burden on her ADA discrimination claim is to show that (1) she is a disabled person within the meaning of the Americans with Disabilities Act; (2) she is qualified, with or without reasonable accommodation, to perform the essential functions of her job; and (3) that her employer discriminated against her in its employment decision because of her alleged disability. *C.R. England*, 644 F.3d at 1037- 38.

1. The first and third elements of Complainant's ADA claim:

Respondent does not argue that Complainant does not meet the test for being disabled, as that term is used in the ADA. For the purposes of this motion, the undersigned assumes that the catastrophic back issues that Complainant was experiencing in 2013 and 2014 were sufficient to meet the definition of a disability under the ADA. The first element of Complainant's *prima facie* showing, therefore, is met by her

description of her medical issues during that time frame.

The third element of Complainant's ADA claim requires that Complainant present evidence that she has been discriminated against because of her alleged disability.

The element requires that Complainant demonstrate that there has been an act of "discrimination" by Respondent. "Discrimination" under the ADA requires a showing that Complainant "has suffered an adverse employment action because of the disability." *C.R. England*, 644 F.3d at 1038 (internal quotations and citations omitted). While the term "adverse employment action" is liberally construed, the term generally refers only to "acts that constitute a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *C.R. England*, 644 F.3d at 1040. In this case, Complainant has appealed the decision to administratively separate her from employment, which is a sufficiently significant change in employment to meet the test for an adverse employment action.

2. The second element of Complainant's ADA claim:

The second element of the *prima facie* case requires that Complainant be a qualified individual, with or without a reasonable accommodation, to perform the essential functions of the position. This element presents a critical point of contention between the parties.

The burden is on the employee to establish that he or she is qualified for the position at issue. *Koessel*, 717 F.3d 743. A job function is deemed to be essential if "it is fundamental to a position and all employees in the position must perform it." *Id.*

Respondent argues that, in June of 2014, Complainant could not return to work at all and did not propose a way that she may be able to return to work. Respondent argues that these facts are sufficient to demonstrate that Complainant cannot show that she was a qualified individual capable of performing the essential functions of her position, and that her ADA claim, therefore, fails as a matter of law.

Complainant advances several arguments in response.

First, Complainant argues that there were possible accommodations that were not tried, such as an ergonomically adjustable standing work desk[2] or assignment to a remote location for work to eliminate Complainant's commuting time. Complainant, however,

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[2] Complainant identifies this desk as something that was recommended as part of the Broadspire evaluation of Complainant's work area. This desk, however, is not recommended as part of the December 2, 2013 Broadspire report. Instead, the report recommends items to help Complainant sit at her desk, such as a better chair, better armrests, and a footstool. This dispute over the recommendation made in December of 2013, however, does not create a dispute of material fact for Complainant's ADA claim because Complainant's timely-filed ADA claim alleges discrimination in the decision to administratively separate Complainant from employment in June of 2014, and is not a challenge to accommodation request responses in 2013.

does not appear to be arguing that these accommodations would have allowed Complainant to return to work in June of 2014, but only that there were possibilities that were not tried in June of 2014.

Respondent notes that Complainant's doctor had opined that she could not work because there was no accommodation that would be reasonable given Complainant's limitations. In any event, Respondent argues that it was Complainant who was responsible for offering an accommodation proposal if she had one, and that Respondent did not have to guess what might work for her.

Respondent's argument concerning who was responsible to bring up the topic of accommodation is persuasive. It would be an act of unlawful discrimination under the ADA for an employer to fail to "make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an ... employee." 42 U.S.C. § 12112(b)(5)(A). Before an employer has a duty to provide a reasonable accommodation, however, "the employee must make an adequate request [for accommodation], thereby putting the employer on notice..." *C.R. England*, 644 F.3d at 1049(citing cases); *Koessel*, 717 F.3d at 744 (holding that, as a precondition to suit, employees have the burden to request accommodation unless the employer has foreclosed the ADA interactive process through its policies or explicit actions).

The undisputed facts in this case were that, by June of 2014, Complainant's doctor had already opined that there was no reasonable accommodation to allow Complainant to return to work, and Complainant herself did not propose any way to return to work. Complainant's speculation on appeal that there were possible accommodations that could have been tried does not describe any obligation on Respondent's part.

Second, Complainant argues that Complainant made requests that should be considered to be ADA accommodation requests in the summer and fall of 2013 that were not granted before Complainant left for her surgery in December 2013. In essence, Complainant concedes that Complainant was in no position to return to work in June of 2014, but argues that Respondent should nonetheless be held responsible for being on notice as what accommodation Complainant required under the ADA because of ADA accommodation requests made six months (or more) earlier.[3]

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[3] Complainant's argument about Respondent's actions (and inaction) in the summer and fall of 2013 also appears to include a reference to a claim that Respondent violated the ADA in changing Complainant's workspace when Complainant was moved to the Garden of the Gods office and not implementing Broadspire's recommendations. If Complainant is attempting to bring her claim based solely upon a failure to grant her requested accommodations from the fall of 2013, in violation of 42 U.S.C. § 12112(b)(5)(A), it would appear that Complainant is attempting to try an untimely ADA claim. If there was a violation of the ADA, Complainant had ten days from "the alleged [discriminatory] practice" to file with the Board or the Colorado civil rights division [CCRD]." Colo.Rev.Stat. § 24-50-125.3. If Respondent committed a discriminatory act by failing to accommodate Complainant during the summer or fall of 2013, then Complainant had to file her appeal of that discriminatory action at that point in time. The case currently before the Board involves only the alleged discriminatory action of administratively discharging Complainant from employment in June of 2014.

Complainant's argument is not persuasive because it fails to focus on the relevant time frame. Complainant's medical condition was changing over time. Accommodation alternatives that may have been viable in the summer and fall of 2013 were not going to be viable by June of 2014. By June of 2014, Complainant's doctor had already determined that Complainant's need to lie in a prone position was not capable of being accommodated at a work site, and that Complainant was therefore unable to work. When Respondent prepared to meet with Complainant prior to deciding if Complainant would be administratively separated under Director's Procedure 5-6, Complainant was reminded of how to request an accommodation. If her medical situation had changed in the weeks leading up to her administration separation, she had an opportunity to provide a new medical opinion or to propose something that her then-current medical condition would allow. Complainant, however, made no such request. Given the changing circumstances regarding Complainant's back issues, Respondent's prior knowledge of the accommodations that had already been granted to Complainant (or had been discussed) did not provide Respondent with notice of what accommodation Complainant needed in June of 2014.

Under such circumstances, the undisputed evidence is that Complainant was not able to perform the essential functions of her job, with or without accommodation, at the time the decision to terminate her employment occurred in June of 2014. As a matter of law, therefore, Complainant was not a qualified individual with a disability who could be reasonably accommodated to perform her position in June of 2014.

Respondent has, therefore, successfully shown that there is no dispute of material fact concerning Complainant's ADA claim, and that Respondent is entitled to judgment on that claim as a matter of law.

IV. Conclusions of Law:

1. Respondent is entitled to summary judgment on the DP 5-6 claim because the administrative discharge procedure utilized by Respondent fully complied with the requirements of DP 5-6;

2. Respondent is entitled to summary judgment on Complainant's ADA claim because, in June of 2014, Complainant was not a qualified individual with a disability who could be reasonably accommodated to perform the essential functions of her position.

ORDER

Respondent's decision to administratively separate Complainant's employment is **affirmed.** Complainant's appeal is dismissed with prejudice.

Dated this 22nd day of January, 2015 at Denver, Colorado.

[redacted]

Denise DeForest
Senior Administrative Law Judge
State Personnel Board
1525 Sherman St., 4th Floor
Denver, CO 80203
(303) 866-3300

CERTIFICATE OF MAILING

This is to certify that on the 27th day of Jan, 2015, I electronically served true copies of the foregoing **ORDER GRANTING SUMMARY JUDGEMENT and NOTICE OF APPEAL RIGHTS**, addressed as follows:

James R. Koncilja, Esq.
[redacted]

Molly Moats
[redacted]

[redacted]

Andrea Woods

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 electronic record on appeal in this case is $5.00. 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.