

**STATE PERSONNEL BOARD, STATE OF COLORADO**  
Case No. 2017B001

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**MATTHEW EMERSON,**  
Complainant,

v.

**DEPARTMENT OF PUBLIC SAFETY, COLORADO STATE PATROL ACADEMY,**  
Respondent.

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Administrative Law Judge ("ALJ") Rick Dindinger held the evidentiary hearing in this matter on December 1, 2016, at the State Personnel Board, 1525 Sherman Street, Denver, Colorado. Complainant Matthew Emerson represented himself and attended the entire proceeding. Heather Smith, Esq., Assistant Attorney General of the State of Colorado, represented Respondent. Major Steve Garcia, Complainant's Appointing Authority, served as Respondent's party representative and attended the entire proceeding.

**MATTER APPEALED**

Complainant, a certified employee, appeals the termination of his employment effective July 7, 2016. Complainant argues that the discipline administered was arbitrary, capricious, or contrary to rule or law.

Respondent argues that the disciplinary action was not arbitrary, capricious, or contrary to rule or law. Respondent requests this tribunal affirm the discipline, deny all relief sought by Complainant, and dismiss this appeal with prejudice.

For the reasons discussed below, Respondent's actions are **affirmed**.

**ISSUES**

- A. Whether Complainant committed the acts that resulted in the disciplinary action; and
- B. Whether the discipline administered was arbitrary, capricious, or contrary to rule or law.

**FINDINGS OF FACT**

**The parties stipulated to the following facts:**

1. Complainant Matthew Emerson was employed by Respondent Department of Public Safety, Colorado State Patrol Academy ("CSP"), from October 1, 1997 until July 7, 2016, the date of his disciplinary termination from employment. At the time of his termination, Complainant was employed as Machine Trades III, CSP Armorer.

2. At the time of his termination, Complainant's salary was \$5,124.00 per month.
3. On May 30, 2016, Complainant was at home doing work around his yard when he received a telephone call on his work cell phone at approximately 3 p.m. from his friend, Joseph Jordan. Jordan informed Complainant he was in the area and wanted to stop by and say "hi." Complainant provided Jordan with his address and directions to his house and Jordan arrived a few minutes later.
4. Complainant lives in Lakewood, Colorado.
5. When Jordan arrived at Complainant's house, he brought his dog with him. Complainant also owns a dog.
6. On May 30, 2016, Jordan told Complainant that he had been living in and out of hotels for the past 60 days. Jordan told Complainant that he and his wife had purchased a house in Fremont County that borders state land and had a creek running through it. Jordan told Complainant that he had had numerous break-ins at his new house in Fremont County by "meth heads" or "tweakers." Jordan told Complainant that the Fremont County Sheriff's office had told Jordan that the individuals who had broken into Jordan's house were likely the Kennedy brothers, known drug dealers in the Fremont County area. Jordan told Complainant that he heard the "meth heads" talking outside of his house one night about what they were going to do to him when they broke in.
7. Jordan told Complainant that that he was concerned that three "meth heads" or "tweakers" were following him.
8. Complainant offered to let Jordan and his dog stay at his home, rather than go to a hotel room for the night. Jordan slept in the bedroom above Complainant's garage. Complainant and Jordan went to bed at approximately 9:45 p.m.
9. At approximately 10:30 p.m. on May 30, 2016, Complainant's garage door opened on its own. Jordan heard the garage door open while in the bedroom above the garage.
10. Jordan went to Complainant's bedroom and informed him that the garage door had opened. Jordan believed that the "meth heads" or "tweakers" had followed him to Complainant's house. Jordan acted hypervigilant.
11. Complainant and Jordan, armed with handguns and flashlights, proceeded to "clear" the area. They opened the door from the house into the garage and checked the garage. They checked outside the house. Complainant and Jordan did not find anyone.
12. After clearing the area, Jordan asked Complainant to take him to a hotel. Jordan believed that the "meth heads" or "tweakers" were following him and that they would leave Complainant alone if Jordan was not at Complainant's house.
13. At approximately 11 p.m. on May 30, 2016, Complainant started to drive Jordan to a hotel. On the way to the hotel, Complainant decided that it would be a good idea to drive Jordan to the CSP Armory and leave Jordan, by himself, overnight in the Armory. Complainant believed that the CSP Armory was a safer place for Jordan because there was one way in and one way out.

14. Complainant used his CSP keys and let Jordan enter the Armory. Jordan brought with him his handgun and a shotgun. Complainant got a blanket out of his vehicle for Jordan to use to sleep.

15. Complainant told Jordan that he would return at approximately 7 a.m. and that he was going back to his house to sleep and take care of Jordan's and Complainant's dogs. Complainant gave Jordan Complainant's CSP keys.

16. Complainant's CSP keys provide access to all areas of the building including the firing range and the Armory. Certain firearms in the CSP Armory are locked in a vault and access is by combination lock. Complainant did not give Jordan the code to the combination lock. However, ammunition was available to Jordan in the Armory. With the CSP keys given to Jordan by Complainant, Jordan had access to firearms and ammunition at the firing range. Jordan also had access to the dorm wing of the building where approximately ten cadets were sleeping at the time.

17. Complainant left the Armory to return home at approximately 11:45 p.m. on May 30, 2016, without Jordan.

18. Complainant allowed Jordan to enter the Armory outside of work hours and to have access to CSP materials without approval and without having Jordan complete the appropriate paperwork and security measures.

19. At approximately 12:47 a.m. on May 31, 2016, Jordan attempted to call Complainant on his cell phone and home telephone. Complainant was asleep and did not hear the calls.

20. After not being able to reach Complainant, Jordan called 911 to report that there were three people on the roof of the Armory, attempting to gain entry. Jordan stated that he heard footsteps on the roof and observed flashlights coming through the windows and vents on the ceiling. The information was forwarded to the Denver Regional Communications Center (DRCC) at approximately 12:58 a.m. Sergeant Aulston, Trooper Kessler, Trooper Chavez and Trooper Dieckmann responded to the Armory.

21. Sergeant Aulston contacted Sergeant Joy Grissom, Complainant's supervisor, and advised her of the situation.

22. The responding officers retrieved their long guns and conducted a perimeter search which included securing the Armory and the roof.

23. Sergeant Aulston was concerned that if Jordan already thought there were people on the roof and heard the troopers clearing the perimeter, Jordan would have access to high powered weapons that would put the troopers in danger.

24. Sergeant Aulston knocked on the Armory door and ordered Jordan out. Jordan opened the door and was at gunpoint. Jordan had a gun cleaning rod in his hand and was ordered to drop it. Jordan was advised to put his hands on a table and Trooper Chavez detained Jordan with handcuffs while Sergeant Aulston covered him. Trooper Chavez searched Jordan and Sergeant Aulston cleared the Armory. Sergeant Aulston and the troopers cleared the entire roof.

25. Complainant made contact with Sergeant Aulston at the troop office in Golden, Colorado. Complainant told Sergeant Aulston that Jordan had been very paranoid lately and that Complainant thought the best place to put Jordan was the Armory as it is very secure and would help Jordan's mindset.

26. Complainant told Sergeant Aulston that Jordan had post-traumatic stress disorder.

27. Sergeant Grissom telephoned Complainant at approximately 1:11 a.m. on May 31, 2016. Complainant told Sergeant Grissom that he knew Jordan and he thought Jordan had post-traumatic stress disorder due to his service in military special operations where he had killed many people on classified missions.

28. Complainant admits that his conduct and actions on May 30 and 31, 2016 were grossly incompetent.

29. Complainant's conduct and actions on May 30 and 31, 2016 created a serious and possibly grave environment for the cadets in the academy dorm wing and the troopers who were responsible for clearing the academy grounds while searching for suspects attempting to gain access to the Armory.

30. Complainant's conduct and actions on May 30 and 31, 2016 violated CSP General Orders Nos. 2, 3, 5, 6, 7, 8, and 10.

31. Complainant's conduct and actions on May 30 and 31, 2016 violated CSP Policy 1.03.0305, *Academy Firearms Training Staff*.

32. On May 23, 2014, Complainant received a disciplinary action of a 40 hour suspension as a result of failing to report a missing M16 rifle and providing inaccurate reports to the Federal 1033 program.

33. Major Steve Garcia was Complainant's appointing authority.

34. Complainant was placed on administrative leave by Major Garcia on May 31, 2016.

35. Complainant was provided an Administrative Notification of Allegations on May 31, 2016 by Major Garcia.

36. Complainant was interviewed by Sergeant Brian DeLange on June 9, 2016 as part of an Internal Administrative Investigation.

37. Sergeant DeLange drafted an internal administrative investigation report dated June 9, 2016.

38. Complainant received a letter from Major Garcia dated June 13, 2016, advising him of a meeting pursuant to Board Rule 6-10 scheduled on June 23, 2016.

39. Complainant met with Major Garcia on July 7, 2016 to receive the disciplinary action letter.

**In addition to the parties' stipulations, and based on the evidence at the hearing, this ALJ also finds that:**

40. Sergeant Brian DeLange works for Respondent. Major Garcia instructed Sergeant DeLange to investigate the events of May 30 and 31, 2016. Pursuant to those instructions, Sergeant DeLange conducted an internal investigation. Sergeant DeLange opened his investigation on May 31, 2016, and completed it on June 9, 2016. Sergeant DeLange prepared an internal administrative investigation report of the events.

41. CSP General Orders apply to all employees. The General Orders state that "[a]ny deviation from these orders could result in corrective or disciplinary action, up to and including termination." General Order No. 8 provides that employees "will conduct themselves so that no other person is endangered unnecessarily."

42. Complainant helped author Respondent's Policy 1.03.0305, *Academy Firearms Training Staff* (also known as "Firearm Inspections, Security and Records"). Among other things, that policy provides that firearms must be secured.

43. With the keys that Complainant gave to Mr. Jordan, Mr. Jordan had access to firearms and ammunition at the firing range that included pistols, shotguns, assault weapons, 9 mm submachine guns, and other weapons.

44. During the Rule 6-10 meeting on June 23, 2016, Complainant had a thorough opportunity to respond to the allegations made against him and present mitigating information. Complainant was forthright and honest about his actions. Complainant was also very remorseful about his actions

45. In making his decision to discipline Complainant, Major Garcia considered Complainant's statements during the Rule 6-10 meeting. These include statements acknowledging a breach of security and placing multiple people at risk.

46. There was no evidence at the hearing of any procedural deficiencies with the Rule 6-10 meeting.

47. Prior to making his decision to discipline Complainant, Major Garcia reviewed Complainant's personnel file and performance history. Complainant's history reflected a successful career with Respondent, including commendations and average performance ratings. Major Garcia considered Complainant a loyal employee. As stipulated by the parties, Complainant's personnel file also reflected a 2014 disciplinary action relating to a missing M16 rifle.

48. Prior to making his decision to discipline Complainant, Major Garcia reviewed the following: (a) a statement prepared by Complainant describing the events of May 30-31, 2016; (b) a report filed by Sergeant Aulston dated May 31, 2016, describing his actions in response to the 911 call; (c) a report filed by Trooper Chavez dated May 31, 2016, describing his actions in response to the 911 call; (d) a statement by Sergeant Grissom dated May 31, 2016, of the events of that day and statements made to her by Complainant; (e) the internal investigation report prepared by Sergeant DeLange dated June 9, 2016; (f) the recording of an interview conducted on June 9, 2016, between Complainant and Sergeant DeLange; (g) a computer aided dispatch report of the 911 call; and (h) Respondent's General Orders and other policies.

49. Prior to making his decision to discipline Complainant, Major Garcia considered the nature and seriousness of Complainant's actions. Major Garcia contemplated the possibility of a lesser discipline but ultimately concluded that Complainant's actions were so serious and flagrant that immediate termination was warranted.

50. Major Garcia made the decision to terminate Complainant's employment. Respondent terminated Complainant on July 7, 2016.

## DISCUSSION

### I. THE ACTS UNDERLYING THE DISCIPLINARY ACTION.

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. art. XII § 13(8); *Dep't of Institutions v. Kinchen*, 886 P.2d 700, 704 (Colo. 1994) ("A central feature of the state personnel system is the principle that persons within the system can be subjected to discharge or other discipline only for just cause"); *Colorado Ass'n of Public Employees v. Dep't of Highways*, 809 P.2d 988, 991 (Colo. 1991) ("discharge or other discipline only for just cause"). "Implicit in the requirement that the appointing authority have just cause is that the appointing authority must prove its reasons for [discipline] before a neutral decision-maker." *Kinchen*, 886 P.2d at 708.

Hearings to review disciplinary actions taken by appointing authorities are *de novo* proceedings. *Id.* at 705, 708. At the hearing, "the scales are not weighted in any way by the appointing authority's initial decision to discipline the employee." *Id.* at 706. "The employer must bear the burden of establishing just cause for [discipline] by a preponderance of the evidence at the hearing before the Personnel Board." *Id.* at 708. The Administrative Law Judge makes "an independent finding of whether the evidence presented justifies [a disciplinary action] for cause." *Id.* at 706 n.10; *see also* § 24-4-105(14)(a), C.R.S. ("[I]nitial decision shall include a statement of findings and conclusions upon all the material issues of fact . . ."). If Respondent does not meet its burden of proving the underlying facts as charged in the discipline, then Respondent has not met its burden of establishing just cause for the discipline. *Kinchen*; § 24-50-125(2) and § 24-50-125(3), C.R.S. (hearing relates to the disciplinary action taken and the matters specifically charged); *Reeb v. Civil Serv. Comm'n*, 503 P.2d 629 (Colo. App. 1972) (failure to prove charges set forth in the "bill of particulars" requires reversal of discipline).

Complainant stipulated to the facts underlying the discipline. *See* Complainant's and Respondent's Joint Stipulations filed November 8, 2016 (signed by Complainant). Complainant confirmed his agreement with these Joint Stipulations during the hearing. Further, Complainant indicated his agreement with Respondent's Motion for Partial Summary Judgment filed on November 21, 2016. That motion requested an order finding that "Complainant committed the acts for which he was disciplined." Complainant's written statement of the events also acknowledged many of the facts underlying the disciplinary action. Moreover, Complainant admitted the facts underlying the disciplinary action in both the Rule 6-10 meeting and during the hearing.

In short, Complainant left Mr. Jordan armed and unattended at the Armory. Complainant gave Mr. Jordan keys to the Armory, including keys to a firing range with high powered weapons and ammunition. At the time, Mr. Jordan was suffering from paranoia and hypervigilance; Complainant believed Mr. Jordan had post-traumatic stress disorder. Complainant's actions endangered the lives of multiple people. Complainant's actions violated Respondent's policies.

Respondent met its burden of proving that Complainant committed the acts giving rise to the disciplinary action.

## II. THE DISCIPLINE ADMINISTERED.

The Board may reverse or modify the level of discipline if Respondent's decision is arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S. *See also* Board Rule 6-12(B) ("If the Board or administrative law judge finds valid justification for the imposition of disciplinary action but finds that the discipline administered was arbitrary, capricious, or contrary to rule or law, the discipline may be modified"). In determining whether an agency's decision to discipline an employee is arbitrary or capricious, this Board must determine whether: (1) the agency neglected or refused to use reasonable diligence and care to procure evidence to consider in exercising its discretion; (2) the agency failed to give candid and honest consideration of the evidence before it; or (3) reasonable persons fairly and honestly considering the evidence must reach a contrary conclusion. *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239, 1252 (Colo. 2001).

In deciding to take disciplinary action, Respondent is required to consider "the nature, extent, seriousness, and effect of the act, the error or omission, 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. Information presented by the employee must also be considered." Board Rule 6-9. Moreover, Board Rule 6-2 provides:

A certified employee shall be subject to corrective action before discipline unless the act is so *flagrant or serious that immediate discipline is proper*. The nature and severity of discipline depends upon the act committed. When appropriate, the appointing authority *may proceed immediately to disciplinary action, up to and including immediate termination*.

(Emphasis added.) Disciplinary actions may include dismissal. *See* § 24-50-125(1), C.R.S.; *see also* Board Rule 6-12.

The evidence at the hearing demonstrated that Major Garcia's decision to discipline Complainant was reached after a thorough investigation into the allegations. Sergeant DeLange conducted an internal investigation. Sergeant DeLange's investigation included an interview with Complainant. Moreover, Respondent procured statements or reports from Complainant, Sergeant Aulston, Trooper Chavez, and Sergeant Grissom. Respondent also procured the computer aided dispatch report of the 911 call. Major Garcia held a Rule 6-10 meeting. During that meeting, Complainant had a thorough opportunity to explain his actions and present information.

Major Garcia gave candid and honest consideration to the evidence before him. Prior to making his decision to discipline Complainant, Major Garcia reviewed Complainant's personnel file and performance history. Major Garcia also reviewed the following: (a) a statement prepared by Complainant describing the events of May 30-31, 2016; (b) a report filed by Sergeant Aulston dated May 31, 2016; (c) a report filed by Trooper Chavez dated May 31, 2016; (d) a statement by Sergeant Grissom dated May 31, 2016; (e) the internal administrative investigation report dated June 9, 2016; (f) the recording of an interview conducted on June 9, 2016, between Complainant and Sergeant DeLange; (g) a computer aided dispatch report of the

911 call; and (h) Respondent's General Orders and other policies. Major Garcia testified credibly that he contemplated his decision for several days. Major Garcia's testimony is corroborated by the time between the Rule 6-10 meeting (June 23, 2016) and the date of the disciplinary action (July 7, 2016). Major Garcia consulted with other Majors and with the Chief of the Colorado State Patrol about the decision. There was no evidence at the hearing indicating that Major Garcia rushed to judgment or was disingenuous with the evidence before him.

Reasonable persons fairly and honestly considering the evidence may reach the same disciplinary decision as the one made by Major Garcia. When Complainant left Mr. Jordan at the Armory, Mr. Jordan had a handgun and shotgun. Complainant left Mr. Jordan the keys to the facility thereby giving Mr. Jordan access to high powered firearms and ammunition at the firing range. Major Garcia testified that Complainant's actions endangered the safety of the cadets who were lodging in the dorm wing of the building, the correctional inmate workers who prepare food for cadets during the early hours, troopers who might have encountered Mr. Jordan with his weapons in an unauthorized area, the sergeant and three troopers who responded to Mr. Jordan's 911 call, and to Mr. Jordan himself. Complainant's actions were extremely dangerous even without factoring Mr. Jordan's state of hypervigilance and paranoia. Major Garcia testified that Complainant's actions created a high risk of a "gun battle" at the Armory. By his own statements, Complainant's actions constituted a serious security breach that placed multiple people at risk. Complainant admits that his actions were "grossly incompetent." Complainant's actions violated Respondent's General Orders Nos. 2, 3, 5, 6, 7, 8, and 10, and also violated Respondent's Policy 1.03.0305, *Academy Firearms Training Staff*. Reasonable persons might fairly and honestly conclude from this record that Respondent should terminate Complainant's employment.

Complainant has a disciplinary history. Respondent suspended him for one week in 2014 as a result of his failing to report and account for a missing M16 rifle. While that incident is not identical to the misconduct here, it reflects poor judgment relating to firearms. Major Garcia testified that Complainant's actions caused Major Garcia to have serious concerns about Complainant's ability to make appropriate decisions about firearms.

Complainant expressed remorse about his actions during the hearing and during the Rule 6-10 meeting. Complainant's acceptance of responsibility is praiseworthy. Nonetheless, Major Garcia testified credibly that Complainant's offense was so serious and flagrant that he felt it was necessary to terminate Complainant.

Complainant did not introduce mitigating circumstances. Complainant did not present any exigent circumstances requiring Complainant to take Mr. Jordan to the Armory, let alone that Complainant leave Mr. Jordan unattended at the Armory with the CSP keys.

Therefore, this ALJ concludes that termination of Complainant's employment constitutes a discipline that falls within the range of reasonable alternatives and that it was not arbitrary, capricious, or contrary to rule or law.

#### **CONCLUSIONS OF LAW**

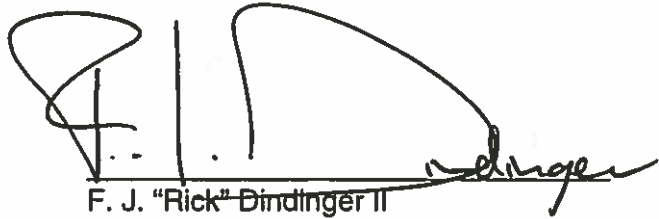
1. Complainant committed the acts for which he was disciplined.
2. The level of discipline administered was not arbitrary, capricious, or contrary to rule or law.



**ORDER**

Respondent's disciplinary termination of Complainant is **affirmed**.

Dated this 19th day  
of December, 2016,  
Denver, Colorado.



F. J. "Rick" Dindinger II  
Administrative Law Judge  
State Personnel Board  
1525 Sherman Street, 4th Floor  
Denver, CO 80203  
(303) 866-3300

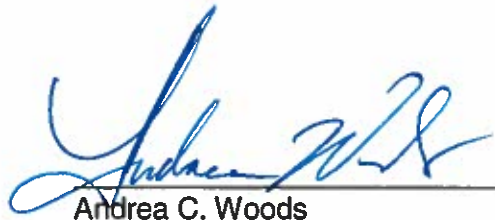
**CERTIFICATE OF MAILING**

This is to certify that on the 19<sup>th</sup> day of December, 2016, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

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*gov*



Andrea C. 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 8-62, 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 8-65, 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 Rules 8-62 and 8-63, 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 8-64, 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 8-66, 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 8-70, 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 8-60, 4 CCR 801.