STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2006B046**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

RONALD QUINTANA,

Complainant,

vs.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Administrative Law Judge Denise DeForest held the hearing in this matter on May 31 and July 26, 2006 at the State Personnel Board, 633- 17th Street, Courtroom 6, Denver, Colorado. Assistant Attorney General Joseph Haughain represented Respondent. Respondent's advisory witness was Richard Reynolds, the appointing authority in the matter. Complainant appeared and was represented by Kirk P. Brown, Esq. The record was held open until counsel submitted written closing arguments on August 28, 2006, and was closed on August 29, 2006.

MATTER APPEALED

Complainant, Ronald Quintana ("Complainant") appeals his thirty-day suspension by Respondent, Department of Transportation ("Respondent"). Complainant seeks removal of the disciplinary action from his file, restoration of all back pay and benefits, and no further retaliation or discrimination against him.

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

ISSUES

1. Whether Complainant committed the acts for which he was disciplined;

2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;

3. Whether the discipline imposed was within the reasonable range of alternatives available to the appointing authority;

4. Whether attorney fees are warranted.

FINDINGS OF FACT

General Background

1. Ronald Quintana ("Complainant") has worked for the Colorado Department of Transportation ("CDOT" or "Respondent") for over thirteen years. By November 2005, Complainant had been certified to the position of LTC [Labor Trades and Craft] Operations I in CDOT Region 5. The LTC Operations I position is a field area supervisor position. CDOT Region 5 covers activities in the south-central and southwest sections of the state.

2. Complainant is a supervisor for CDOT. He holds one of only four LTC Operations positions under the Region 5 Maintenance Supervisor, and has approximately 30 staff members reporting to him.

November 1, 2005 E-mail:

3. In early November, 2005, Complainant received a series of eleven photos in his work e-mail box from a CDOT manager from another region.

4. The eleven photographs were incorporated as part of one e-mail and not as an attachment. These photos were displayed in the e-mail directly under the words: "COMPLIMENTS OF COPPERTONE! WHEW!!!!!!!!!"

5. The eleven photos are all of one woman. Ten of the photos show her from the front, and one photo shows her from the back. In all of these photos, she is at least topless. Four of the photos show the woman topless and wearing jeans. The rest of the photos show her either with her jeans pulled down suggestively or completely nude. Two of the nude photos show the woman from the front with her legs spread so that her genital area is visible. The reference to Coppertone in the e-mail appears to refer to the fact that the woman has tan except where a bikini top and thong bottom would have been, and the whiteness of her skin in the areas which would be covered with a bikini highlight her breast and genital areas.

6. Complainant agrees that the eleven photos are offensive, objectionable, obscene and of a prurient nature.

7. Complainant thought that one of his subordinates, Ronald Flaugh, would appreciate the photos because Mr. Flaugh had earlier shown Complainant a series of photos involving nudity during a bike rally in Poncha Springs,

CO. Mr. Flaugh is a heavy equipment operator supervised by Complainant, and he also has a work e-mail address.

8. Complainant removed the information in the e-mail that identified who had sent the e-mail to him. He sent the e-mail to Mr. Flaugh at Mr. Flaugh's work e-mail address on the afternoon of November 1, 2005.

November 2, 2005 Forward of the E-mail:

9. On the morning of November 2, 2005, Mr. Flaugh forwarded Complainant's e-mail to the e-mail group "*R1-Engr East Program." This e-mail group included the engineering section in CDOT Region 1, and was sent to approximately fifty individuals. The group included both women and men.

10. The same morning that the e-mail was sent from Mr. Flaugh, Patrick Murray, manager of the help desk at the Information Technology services section, was forwarded a copy by an employee who had received the e-mail and found it to be offensive. Mr. Murray forwarded the e-mail to Diane Gutierrez, Assistant to the Director in Region I, for handling. Ms. Gutierrez forwarded the e-mail to Micki Perez, who handles civil rights issues in the personnel section for CDOT Region I. Ms. Perez realized that the e-mail was from Region 5 employees, and sent it to her counterpart in Region 5 for handling. The appointing authority for Region 5, Richard Reynolds, was provided a copy of the e-mail by his staff.

11. CDOT employee Janet Minter was offended when she viewed the e-mails. She believes that the e-mail had a negative impact on her workplace because it reminded women of how they can viewed so unprofessionally. CDOT employee Steve Rudy was shocked at the receipt of such photos on the CDOT computer system. CDOT employee Bill Schiebel was shocked and offended at the number of people that the e-mail was sent to, and the fact that the list included women employees. (*Stipulated facts*)

Respondent's Computer Use Policies:

12. Respondent's Policy Directive 27.0, "Computer and Internet Use," applies to use of information technology resources provided by Respondent. The policy applies without regard to time, day, or location of the resources.

13. The policy includes, as a prohibited use: "Department information technology resources, including Internet access, shall under no circumstances be utilized to view, or to attempt to view information that is offensive, objectionable, obscene, or of a prurient nature."

14. Policy Directive 27.0 also includes a requirement that employees violating the policy be corrected: "personnel utilizing said resources, including Internet access, for purposes prohibited by this directive, or any purposes that are inconsistent with its intent shall be subject to strict corrective action consistent with existing law and regulation."

Respondent's Sexual Harassment Prevention Policy:

15. Respondent's Policy Directive 603.0, "Sexual Harassment," defines its purpose as "[t]o prevent all forms of sexual harassment at CDOT."

16. Policy 603 explains that Respondent's policy is to "provide and maintain for all employee a work environment free from all forms of sexual harassment..."

17. Policy 603 defines the elements of sexual harassment, and notes that "[s]exual harassment takes many forms, from mild verbal banter to violence or threats of violence." The policy then provides a list of eight examples of sexual harassment. The examples include "sexually suggestive letters, notes, invitations, emails, electronic messages, displays or other written material."

18. The policy also describes various responsibilities, including the responsibilities of Managers/Supervisors:

> A manager/supervisor is responsible for reporting all allegations of sexual harassment to the appropriate appointing authority and headquarters' Internal EO Office... or the regional civil rights manager. Managers/supervisors are also responsible for documenting the allegations and for respecting the privacy of the parties involved.
>
> Mangers and supervisors must take prompt and effective action to prevent incidents of alleged harassment. Consult with the headquarters Internal EO office...or regional civil rights manager for assistance.

19. Policy 603 also provides that "[a]ny employee who violates this policy will be subject to corrective and/or disciplinary action, up to and including termination of the violator."

20. Respondent provides training to its managers and supervisors concerning the need to prevent hostile work environments.

21. Ms. Perez, the Region I civil rights trainer, recognized Complainant's name because he had recently been in a civil rights training class that Ms. Perez had taught.

22. Complainant attended a training session that included discussion of the content and enforcement of Respondent's sexual harassment prevention policy during the week of September 19 – 23, 2005 . The training was part of the "M2020" training class for Respondent's managers and supervisors.

23. Respondent's training on civil rights law included reminders that managers and supervisors have additional responsibilities under the policy because of their authority over subordinates. Ms. Perez had also included the sending of offensive e-mails as an example of the type of conduct that was impermissible in the workplace under Respondent's policies.

Respondent's Values Policy:

24. Respondent has also adopted a CDOT Values Policy in Policy Directive 2.0. This policy lists five values that "will guide the Colorado Department of Transportation and its employees." The five value statements include:

> Integrity – We earn Colorado's trust!
> People – We value our employees!
> Customer Service – We satisfy our customers!
> Excellence – We are committed to quality!
> Respect – We respect each other!

The R 6-10 Meeting the Disciplinary Decision:

25. Complaint's appointing authority, Richard Reynolds, held a Board Rule 6-10 meeting with Complainant on November 21, 2005. (*Stipulated Fact*)

26. At the 6-10 meeting, Complainant admitted that he had previously received e-mails of a similar nature from vendors and other CDOT employees. Prior to the 6-10 meeting, Complainant had gone back to these individuals and told them not to send him inappropriate e-mails in the future.

27. Complainant also presented a written apology for his conduct to Mr. Reynolds. Complainant's apology admitted that he had violated Respondent's internet policy and Respondent's values policy in receiving the e-mails and forwarding them to Mr. Flaugh. Complainant also verbally apologized during the 6-10 meeting and acknowledged that he was ashamed of his actions and that he had damaged his own reputation.

28. Mr. Reynolds asked during the 6-10 meeting for Complainant to provide him with the names of individuals who had previously sent similar materials to Complainant. Complainant provided Mr. Reynolds with the information.

29. Mr. Reynolds considered Complainant's act of forwarding the e-mails to be sufficiently egregious to warrant termination of Complainant's employment, given Complainant's managerial responsibilities. Mr. Reynolds was also concerned that Complainant had admitted to having previously at least received similar e-mails.

30. Mr. Reynolds also considered that Complainant has been a good employee overall. On Complainant's July 1, 2004 – April 20, 2004 performance review, for example, Complainant received an overall rating of "very good," with two areas of "outstanding" performance. In the thirteen years that Complainant has been with CDOT, Complainant has not received any other disciplinary or corrective action.

31. Complainant is Hispanic. Mr. Reynolds did not take Complainant's race or ethnicity into consideration in determining whether to discipline Complainant or in determining the level of discipline.

32. Mr. Reynolds sent Complainant a letter of discipline dated November 23, 2005, imposing a 30-day suspension without pay beginning December 1, 2005 and ending on December 30, 2005. Additionally, Mr. Reynolds required Complainant to provide a written list of CDOT employees and vendors who have sent Complainant similar e-mails in the past, and to produce letters of apology to the approximately fifty individuals who had received the e-mail.

33. As his explanation for Complainant's discipline, Mr. Reynolds wrote:

> The e-mail you sent violated CDOT Policy Directive 2.0 – CDOT Values, CDOT Policy Directive 27.0 – Computer and Internet use, CDOT Policy Directive 603.0 Sexual Harassment, all of our sexual harassment training, as well as basic decency. Ron, I am disappointed that you would participate in this type of activity. Given your position as a field are supervisor, I am extremely disappointed in your poor judgment, and since you stated this was not the first time you had sent this type of e-mail, your failure to put an end to this practice. Your e-mail, which contained numerous pornographic pictures, was not only a violation of a number of CDOT policies, but was very degrading and highly offensive to the individuals who received the e-mail. It was also your responsibility to stop this type of behavior when Ron Flaugh showed you similar pictures taken at a bike rally, and not respond by sending him pornographic photos you thought he would like. You are

a high level supervisor within the CDOT maintenance organization and your actions, behavior, and the lack of appropriate action are inexcusable. Your actions conflict with every one of the CDOT Values. Your actions have negatively impacted the reputation of Region 5, as well as your own reputation.

34. In a separate proceeding, Mr. Reynolds also disciplined Mr. Flaugh. Mr. Flaugh received a 10-day suspension.

35. Mr. Reynolds also sent the information to the appointing authority of the other CDOT manager who had supplied the offensive photos to Complainant. This manager was also disciplined.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Just 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. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

Complainant has also raised a claim of unlawful discrimination on the basis of race or ethnicity. The burden of proof of such a claim remains on the Complainant. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1247-48 (Colo. 2001).

II. HEARING ISSUES

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

Complainant admitted at hearing that he had received the nude photos at his work e-mail, that the photos were offensive, inappropriate, objectionable, obscene and of a prurient nature, and that he sent the photos to one of his subordinates using Respondent's e-mail system. The question raised in this case is one of whether this action violated Respondent's sexual harassment prevention policy and whether the 30-day suspension was excessive or in violation of Respondent's policy. Those issues are addressed below.

B. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule or law.

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 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 at 1252.

Complainant argues that the discipline imposed in this case was arbitrary or capricious because he should not have been found to have violated the sexual harassment prevention policy. Additionally, Complainant argues that his discipline was contrary to law because he was the subject of unlawful discrimination based upon his race or ethnicity, and that his discipline was contrary to rule because it is not the product of progressive discipline.

1. <u>The decision to impose discipline for violations of both the computer and sexual harassment policies was not arbitrary, capricious, or contrary to rule or law</u>:

Complainant admitted at his Rule 6-10 meeting that his actions violated Respondent's computer use policy, Policy Directive 27.0, and that point was not in dispute at any point at the hearing.

Complainant instead challenges whether his actions violated the CDOT sexual harassment prevention policy, Policy 603. He argues that Policy 603 defines sexual harassment as requiring three elements: 1) there must have been conduct, which can include deliberate or repeated offensive comments or gestures of a sexual nature; 2) the conduct must have the purpose or effect of

unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment; and 3) the effect is so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the work environment as hostile or offensive. Under Complainant's argument, his provision of the photos to someone who appreciated their nature, rather than be offended by them, did not create the unreasonable interference with that individual's work performance, did not create a perception of a hostile or offensive work environment and, therefore, did not create a violation of CDOT Policy 603.

Complainant's argument fails to take several factors into account.

First, Complainant is a high level manager for CDOT and, as a manager, has important duties under Policy 603. These additional duties require Complainant to be proactive about ridding the workplace of potentially offensive material: "Managers and supervisors must take prompt and effective action to prevent incidents of alleged harassment." CDOT Policy 603 at page 3. The training that Complainant underwent in September of 2005 emphasized the important role that managers and supervisors have in preventing problems, and not simply reacting to hostile work environment claims once they are made. The requirement that managers take action to prevent the creation of hostile work environments makes sense. A policy that did not require managers to prevent the creation of a hostile work environment would be an untenable under current law and could lead to liability for the state. *See e.g. Hirschfeld v. New Mexico Corrections Department*, 916 F.2d 572, 577 (10th Cir. 1990)(defining employer liability for negligence related to sexual harassment as "failing to remedy *or prevent* a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known")(emphasis added). Complainant violated Policy 603 in failing to rid the workplace of offensive pictures, and most certainly violated his duty under that policy by being a source of offensive pictures.

Second, Complainant ignores the fact that he sent out an e-mail that was actually transmitted to tens of CDOT employees and which offended a number of them. Complainant argues that he was not directly responsible for that particular mailing, and that he did not intend to have that e-mail sent to others beyond his friend who he believed would appreciate nude photos. Complainant presents no persuasive argument, however, as to why his lack of intent to offend creates a difference under the policy. He introduced the offensive photos to a worker in his chain of command using the state's e-mail system, and those photographs offended a number of employees. There is nothing so attenuated about the dissemination of the photos in this case to make it inequitable to hold Complainant responsible for the effect these photos had on his workplace. Complainant's arguments about his lack of intent to offend do not change his responsibility for violating CDOT Policy 603.

Finally, Complainant's argument ignores the necessity of avoiding the potential creation of hostile work environments, rather than simply judging Complainant's behavior as to whether he has created all of the elements of an actionable case of sexual harassment. Policy 603 is not limited to merely defining the elements of sexual harassment. One of primary goals is to identify, and to prevent, the types of actions that could create a hostile work environment.

Complainant may well have sent the photos to another worker who was not offended by them. That, however, is the first step in the recipe for the creation of a hostile work environment for other employees. Knowledge of those photos was never realistically going to stay with only those who were not offended by the photos. Once introduced, these materials are quite likely make their way around the workplace. E-mail makes dissemination – both of the intentional and of the accidental kind – exceedingly easy to accomplish. Dissemination of the materials is even more likely when the boss is giving his explicit approval to the offensive materials. In this case, for example, that dissemination took less than one day to occur.

It is not at all unreasonable, under CDOT Policy 603, to expect Complainant to be vigilant in keeping offensive material out of the workplace. When he instead chose to introduce offensive material into his workplace, even if his intent was only to supply the material to another worker who was not offended by the content, Complainant violated CDOT Policy 603.

Under the circumstances of this case, it is not arbitrary, capricious or contrary to rule or law for Respondent to discipline Complainant for violating both CDOT Policy Directive 27.0 and Policy Directive 603.0.

2. Complainant did not prove that his discipline was the product of unlawful discrimination:

In his appeal, Complainant raised the argument that he had been wrongfully disciplined because of his ethnic origin/ancestry as a Hispanic. Complainant contended that other employees who are not minorities have not been similarly disciplined.

In order to prove intentional discrimination under section 24-34-402, C.R.S., a Complainant must establish, by a preponderance of the evidence, a *prima facie* case of discrimination. The factors of a *prima facie* case of intentional discrimination are: (1) that the complainant belongs to a protected class; (2) that the complainant was qualified for the position; (3) that the complainant suffered an adverse employment decision despite his qualifications; and (4) that the circumstances gave rise to an inference of unlawful discrimination. *Lawley,* 36 P.3d at 1247-48. Although the burden of proof always remains on the Complainant, the employer has the burden of producing an explanation to rebut a *prima facie* case of discrimination: that is, the employer

must provide a non-discriminatory explanation for its action in order to defeat a *prima facie* showing by Complainant. *Lawley*, 36 P.3d at 1248.

The evidence at hearing on the issue of discipline imposed for similar acts was sparse. Mr. Flaugh, the non-managerial employee involved in this issue, was disciplined with a ten-day suspension. There was also testimony that the manager who provided the photos to Complainant was also disciplined, although the extent or nature of that discipline was not introduced at hearing. From the limited information presented at hearing concerning comparable discipline, there was no competent or persuasive evidence suggesting that race or ethnicity played any role in determining that Complainant should be found to be in violation of Respondent's policies. Complainant has, therefore, failed to establish a *prima facie* showing of discrimination. Additionally, even if the sparse evidence presented at hearing was construed as a *prima facie* case of discrimination, the obvious and flagrant nature of the policy violations in this matter provide ample support for the existence of legitimate, non-discriminatory reasons to discipline Complainant.

Complainant has also argued that the amount of his discipline was a product of unlawful discrimination. That issue will be discussed below in section C.

3. Complainant's discipline is not contrary to Board Rule 6-2:

The Board's rules generally require that Respondent impose a corrective action upon a certified employee before imposing disciplinary action. The Board's progressive discipline rule is found at Board Rule 6-2:

> 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.

Complainant argues that Respondent should have responded to this issue by imposition of a corrective action rather than moving immediately to a disciplinary action such as a 30-day suspension.

As the Board's rule expressly recognizes, however, a corrective action is not necessary when an act is "so flagrant or serious that immediate discipline is proper."

In this case, an upper-level supervisor distributed unambiguously pornographic pictures to one of his subordinates using the state's computer system. That is the type of action that any reasonable CDOT supervisor knows

is not only prohibited but also exceedingly harmful to the agency. These actions fit the requirement of being so flagrant and so serious as to permit the imposition of immediate discipline rather than to impose merely a corrective action.

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

Complainant argues that the choice of a 30 day suspension was outside of the reasonable alternatives for four reasons: 1) that the only violation present was a violation of the computer use rules and a 30 day suspension is excessive for that one violation; 2) that the computer policy permits the issuance of a corrective action only for the violation; 3) that the 30 day suspension was imposed for unlawfully discriminatory reasons; and 4) that there is no precedent for a 30 day suspension under the circumstances present in this case.

None of these objections provide a reason to find that the 30-day suspension imposed in this case was beyond the range of reasonable alternatives.

As the findings and discussion in this matter illustrate, Complainant's actions did more than violate Respondent's computer and internet policy. The primary issue here is that Complainant introduced pornographic photos into his workplace and his chain of command, and that fact that Complainant violated Respondent's computer policies in the course of doing so is a secondary consideration. Under such circumstances, imposition of a 30-day period of suspension is not unreasonable.

Respondent's computer and internet policy does refer to the imposition of "strict corrective action" as the remedy for violation of that policy, and Complainant argues that this means that only those remedies listed under the Board's definition of "corrective action" in Board Rule 6-11 can be applied in this case. It is not at all clear that Respondent's policy intended its reference to "strict corrective action" to refer to the definition of corrective action in the Board's rules rather than a more general understanding of the phrase. Given, however, that this is not a case where there is only a violation of the computer and internet policy, it is not necessary to determine whether Respondent's policy limits the remedies for violation. Even if the language in Respondent's computer and internet policy restricted the remedy for violation to corrective actions under Board Rule 6-11, Complainant's flagrant violation of his duties as a manager and supervisor under CDOT Policy 603 would still justify the imposition of a lengthy suspension.

Complainant's argument that the level of discipline was a product of unlawfully discriminatory animus is a variation on his argument that the discipline in this case was the product of unlawful discrimination on the basis of his race or ethnicity. This argument is unpersuasive because Complainant was never able to establish even a *prima facie* showing of discrimination.

Finally, Complainant's argument that there is no precedent for a 30-day suspension under the circumstances of this case is also not persuasive. There was no competent evidence presented at hearing that there has been any specific precedent established as the department's response to this type of issue. Complainant testified that he had performed no research on the department's prior disciplinary responses to the introduction of pornographic material into the workplace, and evidence concerning comparable situations was exceedingly sketchy at best. Additionally, Complainant's argument misses the mark in assuming that there must be some type of precedent in place before Respondent can act. Respondent can impose a level of discipline that is appropriate given the considerations in Board Rule 6-9, 4 CCR 801, and that rule does not require that some type of precedent must first be set.

In the final analysis, Complainant's appointing authority, Mr. Reynolds, properly considered the sending of offensive nude photos thorough the departmental e-mail to be a serious violation of Complainant's managerial and leadership responsibilities which could justify termination from employment. Mr. Reynolds also considered Complainant's long and successful service to CDOT without disciplinary action, and the fact that Complainant admitted his involvement early in the process, as mitigating factors in this case. He decided that a serious suspension would be sufficient. Accordingly, he chose a 30-day suspension period for Complainant. The persuasive evidence in this case demonstrates that the appointing authority pursued his decision after a thorough review of the circumstances of the situation as well as Complainant's individual circumstances. Board Rule 6-9, 4 CCR 801. The choice of a 30-day suspension was within the reasonable range of disciplinary alternatives under these circumstances.

D. Attorney fees are not warranted in this action.

Neither party requested attorney fees in this matter.

CONCLUSIONS OF LAW

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

2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.

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

4. Attorney's fees are not warranted.

ORDER

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

Dated this 12th day of October, 2006.

[redacted]

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. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.); Board Rule 8-68, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the record on appeal in this case is $50.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An appellant may file a reply brief within five days. Board Rule 8-72, 4 CCR 801. An original and 9 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Board Rule 8-73, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule 8-75, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the ALJ's decision. Board Rule 8-65, 4 CCR 801.

CERTIFICATE OF SERVICE

This is to certify that on the 13th day of October, 2006, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Kirk P. Brown

[redacted]

Ronald Quintana

[redacted]

and in the interagency mail, to:

Joseph Haughain

[redacted]

[redacted]

Andrea C. Woods