STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2008B018**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DANIEL DOERING,

Complainant,

vs.

DEPARTMENT OF NATURAL RESOURCES,

Respondent.

Administrative Law Judge Denise DeForest held the hearing in this matter on November 13, 2007 at the State Personnel Board, 633 - 17th Street, Courtroom 6, Denver, Colorado. The record was closed on the record by the ALJ at the conclusion of testimony and argument on November 13, 2007. Assistant Attorney General Michael Scott represented Respondent. Respondent's advisory witness was Greg Gerlich, the appointing authority. Complainant appeared and represented himself.

MATTER APPEALED

Complainant, Daniel Doering ("Complainant") appeals his termination by Respondent, Department of Natural Resources ("Respondent" or "Department"). Complainant seeks reinstatement, backpay and benefits, and attorney fees and costs.

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

ISSUES

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

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

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

4. Whether attorney fees are warranted.

FINDINGS OF FACT

General Background

1. Complainant was employed as a Technician III, Fish Culturist, at the Finger Rock State Hatchery Unit ("SHU") near Yampa, CO. Respondent at Finger Rock SHU employed complainant for approximately 18 years. Complainant also lived at Finger Rock SHU.

2. When Complainant started at Finger Rock SHU in 1989, it was a limited and small facility. Complainant helped to build the facility into a fish rearing unit, and took an active role in restoring the unit to usable condition after whirling disease struck the facility. Complainant was also responsible for designing some of the equipment used on the trucks at the facility, and in maintaining that equipment.

3. Finger Rock SHU raises thousands of trout each season in order to meet stocking goals established for approximately 50 stocking sites. Stocking sites include lakes on public or private property.

4. Each stocking site presents its own particular challenges. Some sites are comparatively easy to stock, with concrete boat ramps for the fishery trucks to use to move close to water which is sufficiently deep to allow for stocking. Other sites are quite difficult to stock because the access to these sites does not allow the truck to be brought close to the water's edge or the water is not deep enough around the edge of the water to allow for easy stocking. Respondent's biologists are responsible for maintaining the access for stocking at the sites.

5. A fish culturist will stock a lake according to a schedule established by Respondent. If the access to the stocking site is not workable, the water temperatures are too high, or the water pH level is incompatible, however, the culturists can and should release the fish at another stocking site.

6. In order to be prepared for planting fish in various conditions, the trucks used for stocking carry 25-foot and 50-foot extension tubes on them which permit the user to direct fish further out from the bank and away from areas of vegetation.

7. Normal stocking procedures do not result in the loss of many, if any, fish.

Tiago Lake Stocking Incident

8. On July 3, 2007, Complainant was assigned to stock Tiago Lake. Tiago Lake had a difficult access for stocking. It was not possible to park the stocking truck next to the water, and tube extensions had to be used to deliver the fish to deeper water. The lake also had only a narrow channel of water available running from the bank to the deeper water, and this channel had become narrower and shallower in recent years from added silt. The lily

pads had also become more pervasive in the channel area. This combination of additional silt, a shallow channel, and increased lily pad presence made stocking Tiago Lake an even more difficult proposition than normal.

9. Complainant had stocked Tiago Lake successfully, or had directed others in stocking the lake, on seven or eight occasions in the past and he knew that access was quite difficult. Complainant had previously complained to his supervisors about the access at Tiago Lake, but no changes had been made to the site.

10. Another Finger Rock SHU employee, Mark Haver, was assigned to stock nearby Teal Lake and was slated to go over to Tiago Lake to assist Complainant with the Tiago Lake stocking.

11. Complainant drove a truck with two tanks of fish to Tiago Lake. He performed temperature and pH tests and determined that the fish should be delivered as soon as he could do so and before the lake warmed any further. Complainant decided that he could stock Tiago Lake, even though conditions for stocking were difficult.

12. Complainant did not wait for Mr. Haver's assistance. There were fishermen at the lake and they helped Complainant extend a 25 foot tube extension into the lake. With the use of that extension tube, Complainant had a total of 33 feet from the tank on the truck to the place where the fish would enter the lake. Complainant did not use the 50 foot extension tube that he had with him on the truck.

13. The delivery of the first tank of fish went well. The introduction of the first tank of fish, however, stirred up the silt in the channel. The delivery of the second tank of fish caused many fish to become disoriented and become trapped in the vegetation and murk near the bank. This placed many fish in obvious distress, and eventually resulted in the death of about 500 fish.

14. The death of the fish was the result of Complainant's overconfidence that he could stock the site by himself and under the conditions present at the lake. Complainant did not intentionally kill the fish.

15. Some of the fishermen on the bank were concerned about the problems with the fish. They helped Complainant move at least some of the struggling fish to deeper water. Fishermen also asked Complainant what else they could do. Complainant was wet, tired, frustrated, and angry by this point. He told them that he had tried to obtain better access to the lake in the past and had been ignored, and that they could call the Director of the Colorado Division of Wildlife.

16. The other Finger Rock SHU employee, Mr. Haver, arrived on the scene after the fish had been delivered, and saw that hundreds of fish had been harmed by the stocking. Respondent's policies and procedures require that fish mortalities should be removed and disposed of properly.

17. When Mr. Haver saw the dead fish, he asked Complainant if he wanted Mr. Haver to help him pick up the fish. Complainant told Mr. Haver, no, he thought someone could come look at the scene. Mr. Haver left the site without attempting to clean up the dead fish. Complainant also left the site without attempting to clean up the fish because he was angry and tired.

18. Complainant took the truck back to Finger Rock SHU. Along the road, he encountered his work leader, Mitchell Espinoza. Complainant told Mr. Espinoza that he had had problems at Tiago Lake. Complainant was upset about the access at the lake.

19. Complainant completed his Fish Planting Receipt for the July 3, 2007 stocking by including the following comments: "Loss of about 500 fish. Could not get out to open water due to lily pads and muck. Suggest not stocking until something is done. SAME SHIT, DIFFERENT YEAR! NEED FIELD PEOPLE."

20. On or about July 10, 2007, Mr. Espinoza told Complainant to go back to Tiago Lake and clean up the dead fish. Complainant refused to do so. Complainant told Mr. Espinoza that he wanted biologists to go up there and see the dead fish.

21. On July 10, 2007, Mr. Espinoza took a seasonal employee with him and went to Tiago Lake to clean up the dead fish. Complainant did not go with him and did not participate in the clean-up.

22. Word reached the Denver office that there had been a significant fish kill during the stocking of Tiago Lake. Several citizens called Respondent's main office to report the incident. Complainant's first-line supervisor, David Capwell, also alerted the Denver office of the fact that there had been a significant loss of fish during the fish plant.

Board Rule 6-10 Meeting and Disciplinary Action

23. Respondent's Hatcheries Manager, Richard Kolecki, was notified of the fish kill at Tiago Lake. He considered that the loss of so many fish at a stocking site was a sign that something had gone horribly wrong. He was also concerned that the fish loss at a stocking site would create a bad impression on the fishermen in the area. Respondent is primarily funded through license fees paid by the sportsmen of the state, and a fish kill could undermine the confidence of those license holders in the quality of Respondent's work.

24. Complainant's appointing authority was Gary Gerlich, Aquatic Section manager for Respondent.

25. Mr. Gerlich scheduled a Board Rule 6-10 meeting for July 26, 2007. The notice for the Board Rule 6-10 meeting notified Complainant that Mr. Gerlich wished to discuss four specific topics with Complainant: 1) a failure to follow standard stocking procedures which resulted in the death of several hundred catchable trout; 2) why Complainant had informed

a member of the public that he could call the director of the Colorado Division of Wildlife and then had left the site; 3) why Complainant did not remain at the site to clean up the fish; and 4) why Complainant had failed to return to the site to clean up the area when specifically instructed to do so by his work leader.

26. Mr. Gerlich was joined in the meeting by Mr. Kolecki. Complainant appeared by himself.

27. At the Rule 6-10 meeting, Complainant confirmed for Mr. Gerlich that he had proceeded to stock Tiago Lake without using the 50 foot extension or waiting for help. He told Mr. Gerlich that he was the only person who knew how to plant fish in Tiago Lake, and that, if he were to make the decision again, he would not change what he did. In describing why he did not stay to clean up the fish, Complainant stated that he did not have any place to put dead fish, and that he did not want to have to disinfect his truck. Complainant also told Mr. Gerlich and Mr. Kolecki that he wanted the fish to stay there so that the biologists could see them.

28. Mr. Gerlich considered Complainant's actions at Tiago Lake to be a failure to perform competently because Complainant had used insufficient equipment and assistance to plant the fish, and had not decided to take the fish to another stocking site if he had found Tiago Lake unsuitable for stocking. Mr. Gerlich considered Complainant's failure to clean up the dead fish, even when directed to do so by Mr. Espinoza, to constitute a failure to perform competently and an act of insubordination. Mr. Gerlich considered Complainant's statements to the fishermen that they should call the Director of the Colorado Division of Wildlife to be a failure to perform competently, and willful misconduct.

29. Mr. Gerlich also considered that Complainant's refusal to admit during the Board Rule 6-10 meeting that he should have changed his decisions at Tiago Lake indicated that Complainant's work was no longer trustworthy.

30. Mr. Kolecki and Mr. Gerlich also reached the incorrect conclusion that Complainant had intentionally killed the fish to make a statement. They also considered that Complainant had become verbally abusive with Mr. Espinoza when told to remove the dead fish.

31. Mr. Gerlich reviewed Complainant's personnel file and found that Complainant had a number of previous issues involving inappropriately angry reactions and insubordination.

a. Complainant received a corrective action and performance review on January 17, 2006 from his first-level supervisor, David Capwell, because Complainant had refused to attend mandatory training on conflict management. During the discussion about this corrective action, Complainant had become loud and angry, thrown the corrective action against the wall, stormed out of the room and, on his way out the door, was verbally abusive with *ad hominem* insults about Mr. Capwell.

b. In July 2005, Complainant had been angry when a man with a child had driven up to the Finger Rock SHU shop to ask some questions. Complainant did not believe that the man should have driven beyond the parking lot and down to the shop. As the man was exiting his car, Complainant had come out of the shop and was sufficiently angry about the visit that the man jumped back into his car, rolled up the windows, and locked the car doors. When Mr. Espinoza brought up the issue during Complainant's December 2005 performance evaluation and told Complainant that such a reaction could not occur again, Complainant told Mr. Espinoza that he would take the same approach if the situation presented itself.

c. In March of 2001, Mr. Capwell issued a Corrective Action to Complainant because there had been a series of conflicts between the Finger Rock SHU manager at the time, Toby Mourning, and Complainant, and that Complainant had been very verbally aggressive and threatening with a new employee. Complainant had also expressed a refusal or reluctance to perform tasks assigned to him.

d. In July of 1998, Complainant was issued a Corrective Action and Performance Improvement Plan which addressed an incident in which Complainant had insulted two other employees.

32. Mr. Gerlich determined that termination of Complainant's employment was the appropriate response to the fish kill and Complainant's subsequent actions, particularly in light of Complainant's history of angry reactions and insubordination. He issued a letter dated August 3, 2007 informing Complainant of his conclusions and terminating Complainant's employment as of August 7, 2007.

33. The termination of Complainant's employment also resulted in a requirement that Complainant vacate his residence at Finger Rock SHU. The deadline for Complainant to leave his housing was originally set at five days from August 7, 2007. That date was later extended by Respondent.

34. Complainant filed a timely appeal of his termination with the Board.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; C.R.S. §§ 24-50-101, et seq.; *Department of Institutions v. Kinchen*, 886 P.2d 700, 704 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 4 CCR 801 and generally includes:

(1) failure to comply with standards of efficient service or competence;

(2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
(3) false statements of fact during the application process for a state position;
(4) willful failure or inability to perform duties assigned; and
(5) final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred, and that just cause warranted the discipline imposed. *Kinchen*, 886 P.2d at 708. The Board may reverse Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. C.R.S. § 24-50-103(6).

II. HEARING ISSUES

A. Respondent has not proven that Complainant committed an intentional fish kill or spoke inappropriately to Mr. Espinoza, but did prove that Complainant committed the other acts alleged.

The competent evidence presented at hearing established that Complainant was responsible for a fish kill of about 500 fish which resulted from his decision to plant fish at Tiago Lake in the manner chosen. Complainant was also shown to have informed fisherman on the scene to call the Director of the Division of Wildlife to complain about the access. Complainant also failed to clean up the fish once they had died along the bank, and then refused a direction from his work leader, Mr. Espinoza, to go back to the site and clean up the fish.

Respondent also considered two other factors in its decision to terminate Complainant's employment that were not proven at hearing.

First, Mr. Gerlich and Mr. Kolecki had decided that the fish kill was intentional based upon Complainant's skill and knowledge in stocking lakes, his later statements that he wanted the biologists to come look at the result of their failure to provide adequate access to Tiago Lake, and that he would not do anything different if he had the chance. The preponderance of the evidence at hearing, however, established that the fish kill occurred because Complainant was overconfident in his ability to successfully place the fish into the lake, and not because Complainant intended to kill fish to make a statement.

Second, Respondent alleged that the interaction between Mr. Espinoza and Complainant on or about July 10, 2007, had included verbally aggressive language from Complainant. Mr. Espinoza testified that Complainant refused to go clean up the fish but did not testify as to abusive or improper language. Complainant has denied that his language was inappropriate. No other persuasive evidence was offered on this point. Respondent's allegation that Complainant used very offensive and vulgar language with Mr. Espinoza was not sufficiently supported at hearing by a preponderance of the evidence.

The lawfulness of Respondent's disciplinary decision, therefore, must be considered in light of the conduct that Respondent was able to prove at hearing and without the inclusion of the two unproven factors.

B. The Appointing Authority's disciplinary 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 1239, 1252 (Colo. 2001).

Complainant did not raise any persuasive argument as to why he should not have been subject to discipline for the fish kill or why his subsequent actions proven at hearing should not be viewed as failures to perform competently, or willful misconduct. Complainant argued both at the Board Rule 6-10 meeting and at the hearing that he did not clean up the fish because he wanted biologists to go look at what had occurred. Such a desire on Complainant's part, however, does not excuse Complainant's original mistake in conducting the fish plant in the manner in which he did, his subsequent actions in repeatedly failing to clean up the fish, or his comments to the fisherman on the bank.

Respondent conducted a reasonable investigation of the incident, held a properly noticed Board Rule 6-10 meeting to permit Complainant an opportunity to discuss the incident with Mr. Gerlich, and gave candid consideration of the information that it had developed in that process. Respondent also reached reasonable conclusions concerning the evidence that it collected, and properly decided that Complainant's actions constituted a failure to perform competently, and willful misconduct. As a result, Respondent's decision to discipline Complaint for his actions related to the Tiago Lake fish plant are not arbitrary, capricious or contrary to rule or law.

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

Complainant's primary argument at hearing was that the termination of his employment, and the loss of his home as a result, constituted an excessive response to his actions.

In this case, the primary problem was not that there was a fish kill, although that was certainly not an acceptable result for a fish plant. The bigger problem was in the way that Complainant handled the fish kill. He did not clean up the fish, or arrange for the fish to be removed from the water, even though he was the one responsible for the kill. He was

angry when he told members of the public to complain about the access at the lake to the Director of the Division of Wildlife. He then refused a direct instruction to clean up the fish. Finally, when asked about his decision-making process, Complainant did not acknowledge that he had made mistakes in the way he handled the issue. Complainant seems to have allowed his embarrassment over the fish kill to become unproductive anger and intransigence, and that reaction kept him from making the right decisions in handling the affair. This was also not the first time Complainant had been insubordinate or made poor decisions because he was angry. His prior corrective actions and other performance document show that his angry and insubordinate responses had been the subject of multiple discussions in the past.

It is true that the loss of employment also resulted in the loss of Complainant's housing as well, and that such a result certainly magnifies the practical effect of a decision to terminate a state employee's employment. If good cause exists for the termination in the first place, however, the loss of housing does not change the disciplinary analysis simply because the housing is one of the benefits of the position.

The question before the Board is not one of what level of discipline would the Board impose under these circumstances. The question is whether the appointing authority has considered all of the relevant factors in making a decision on the level of discipline to impose, and whether reasonable persons fairly and honestly considering the evidence would conclude that the offense at issue does not constitute good cause for termination. *See Lawley*, 36 P.3d at 1252. Under the Board's analysis, that standard is analyzed in terms of whether the chosen level of discipline is within the range of reasonable alternatives for the appointing authority.

The credible and persuasive evidence demonstrates that the appointing authority pursued his decision thoughtfully and with due regard for the circumstances of the situation as well as Complainant's individual circumstances. Board Rule 6-9, 4 CCR 801. Complainant's initial performance failure in stocking the lake, combined with his repeated decisions to refuse to clean up the fish as well as his comments to the fishermen at the lake, are significant performance failures for a fish culturist. Termination of employment is within the range of reasonable alternatives available to the appointing authority, given the facts demonstrated at hearing and the nature of Complainant's prior corrective actions.

D. Attorney fees are not warranted in this action.

Complainant has requested an award of attorney fees and costs. Attorney fees are warranted in a Board case if a personnel action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. C.R.S. § 24-50-125.5; Board Rule 8-38, 4 CCR 801. The party seeking an award of attorney fees and costs shall bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule 8-38(B)(3).

The general rule for recovery of attorney fees and costs under the state's analogous

general attorney fee statute, which provides for an award of attorney fees against a party who has brought or defended an action which was "substantially frivolous, substantially groundless, or substantially vexatious," C.R.S. § 13-17-102(4), is that *pro se* litigants are not entitled to an award of attorney fees. *Smith v. Furlong,* 976 P.2d 889, 890 (Colo.App. 1999)(denying a request for attorney fees from a prevailing *pro se* plaintiff, holding that "[w]e perceive no basis under §13-17-102 for an award of attorney fees to a pro se litigants because no attorney fees exist in such situations")(internal quotations omitted). *See also Stevens v. Liberty Loan Corp.*, 421 P.2d 732, 734 (Colo. 1966)(overturning an award of attorney fees pursuant to a contract provision in the absence of proof that the fees were incurred or were paid). Complainant has not presented any evidence that he has incurred or paid any attorney fees in this case, and no attorney appeared before the Board on Complainant's behalf at any juncture in this proceeding. Under the general rule, therefore, an award of attorney fees is not available to Complainant as a matter of law.1

Even if the general rule on *pro se* attorney fee requests is not to be followed by the Board, Complainant has not demonstrated that the personnel action in this matter has met the Board's statutory threshold for such an award. Complainant has prevailed only in his argument that Respondent was incorrect to assert that he had intentionally killed fish, and insufficient evidence was presented to sustain Respondent's conclusion that Complainant's language with Mr. Espinoza was improper. The disciplinary action in this matter has been upheld because the remainder of Respondent's considerations were shown to be supported by a preponderance of the evidence. Accordingly, Complainant has not met the standard in Board Rule 8-38 for an award of attorney fees and costs, even if such an award were available to a *pro se* litigant.

CONCLUSIONS OF LAW

1. Complainant committed most, but not all, of the acts for which he was disciplined.

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

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

4. Attorney fees are not warranted.

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1 A *pro se* litigant who is an attorney representing him or herself is not precluded from obtaining an award of attorney fees under C.R.S. § 13-17-102. *See Zick v. Krob*, 872 P.2d 1290 (Colo.App. 1993)(upholding an award of attorney fees to a self-represented attorney litigant because "[r]eversing the award in this instance would, therefore, defeat the General Assembly's intent by rewarding plaintiffs who have filed otherwise frivolous and vexatious actions merely because the party put to the defense thereof is an attorney"); *Wimmershoff v. Finger*, 74 P.3d 529, 530 (Colo.App. 2003)(applying the rationale of *Zick* to a pro se attorney litigant pursuing fees under C.R.C.P. 107). There is also support in the published case law that attorney fees may be warded even when the attorney is working on a *pro bono* basis. *See In Re Marriage of Swink*, 807 P.2d 1245, 1248 (Colo.App. 1991)(allowing an award of attorney fees for a *pro bono* attorney under C.R.S. §14-10-119). Complainant has not presented any evidence or argument that these exceptions apply in this matter.

ORDER

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

Dated this 28th day of December, 2007.

[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. Section 24-4-105(14)(a)(II) and 24-50-125.4(4) C.R.S. and Board Rule 8-67, 4 CCR 801. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Board Rule 8-70, 4 CCR 801. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline referred to above. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.); Board Rule 8-68, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

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

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

BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-72, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

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

PETITION FOR RECONSIDERATION

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

CERTIFICATE OF SERVICE

This is to certify that on the 28th day of December, 2007, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Daniel R. Doering
[redacted]

and in the interagency mail, to:

Michael D. Scott
[redacted]

[redacted]
Andrea C. Woods

(rev'd. 5/07)