STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2009B021**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

GERALD VIGIL,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS, CENTENNIAL CORRECTIONAL FACILITY,

Respondent.

Administrative Law Judge Denise DeForest held the hearing in this matter on January 6, 2009 at the State Personnel Board, 633 - 17th Street, Courtroom 6, Denver, Colorado. The record was closed on the record by the ALJ on the last day of hearing. Assistant Attorney General Michael D. Scott represented Respondent. Respondent's advisory witness was Susan Jones, the appointing authority. Complainant died prior to hearing. The personal representative of Complainant's estate, Karen Vigil, appeared and Complainant was represented at hearing by David G. Berry, Esq.

MATTER APPEALED

Complainant, Gerald Vigil ("Complainant") appeals his termination by Respondent, Department of Corrections ("Respondent"). Complainant's counsel seeks an order reversing Warden Jones' decision to terminate Complainant's employment and awarding back pay and benefits until the date of Complainant's death, as well as attorney fees and expenses.

For the reasons set forth below, Respondent's action is **rescinded.**

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 a Correctional Officer I ("CO I") with Respondent from October 1, 1996 until August 27, 2008. (Stipulated Fact)

2. Complainant had been convicted of Driving While Ability Impaired (DWAI) in 1993, prior to his employment with Respondent. (Stipulated Fact)

3. During the years that Complainant was employed by Respondent, Complainant's performance ratings were consistently satisfactory or commendable. (Stipulated Fact) Complainant's work was well-regarded by the sergeant who directly supervised his work for 12 years, Joseph Martinez, and by the lieutenant in his chain of command at the time of his dismissal from employment, Mark Fairbairn. Complainant had no prior corrective or disciplinary actions in his file.

2007 Incident

4. Complainant was stopped for having no license plate light and a cracked windshield in the early morning hours of December 30, 2007. He was not in DOC uniform at the time. Complainant was arrested for Driving Under the Influence (DUI). (Stipulated Fact) The arresting officer reported that Complainant's blood alcholol level, as measured with a breath test, was at .098.

5. Complainant reported the arrest to his chain of command within a day of its occurrence, as required by Respondent's policies and procedures.

2008 Sentencing

6. Complainant complied with the requirement imposed by his appointing authority, Warden Susan Jones, that he provide her with updates on the status of his criminal case. Warden Jones had been the warden of Centennial Correctional Facility, and Complainant's appointing authority, since October 1, 2007.

7. Complainant pled guilty to Driving Under the Influence (DUI) on or about June 26, 2008. Complainant was given a deferred sentence that included probation requirements. (Stipulated Facts)

8. Complainant did not lose his driving privileges as a result of the DUI conviction. (Stipulated Fact)

9. Complainant's probation included the following provisions: attendance of alcohol

education classes, attendance at a Mothers Against Drunk Driving (MADD) impact panel, 68 hours of alcohol treatment, performance of 60 hours of useful community service, and completing of 20 days of in-home detention that included wearing an ankle monitoring device. (Stipulated Facts)

10. Complainant worked with the lieutenant in his chain of command, Lt. Fairbairn, to identify three weeks in which he could take vacation time in order to serve his in-home detention. The three-week period included a few days when Complainant's vacation time would result in two officers being off at the same time. Normally, a shift which has more than one officer off at a time is shorthanded and the facility may need to provide compensatory time to another officer to fill the shift. The facility often allowed officers to trade days in order to cover periods when the shift would otherwise be shorthanded, and there was a possibility that Complainant could trade days with other officers so that the shift would not be shorthanded during his proposed three week vacation period.

11. Complainant possessed sufficient annual leave to cover his in-home detention period. (Stipulated Fact)

12. The portion of the court's order which included in-home detention required that Complainant wear an ankle monitor during the period he was to be on detention. The ankle monitor is an electronic device that communciates with a box that has been affixed to a telephone line. The box on the telephone line can communciate with the ankle device so long as the ankle device is within range of the box. The practical effect is that, in order to stay in communication with the telephone box, an individual wearing the ankle monitor must stay within approximately 100 feet of the box. The ankle monitor is approximately 2 ½" by 2 ½" in size and is affixed by straps to the wearer's ankle so that it cannot be slipped off. It is designed so that it can be worn under socks and long trousers. The ankle monitor is generally not noticable upon casual viewing.

13. When the ankle monitor is outside of the range of the telephone box, it does not communicate with anything but keeps its own time so that, once it is within range of the telephone box again, it can report the time. The monitoring program allows individuals to set up schedules so that they can be away from the telephone box at certain times to attend clases, go to work, or attend to other approved functions.

14. The ankle monitor bracelet has metal in it and would be detected by the metal detectors that correctional staff pass through upon entry to the facility. In late 2007, at least one other CO I at the Centennial Correctional Facilty had been able to come to work while wearing an ankle monitor. The decision to allow an officer to continue to work while wearing such a device had not been made by Warden Jones.

15. Complainant reported to Warden Jones by email on July 1, 2008, that he had been given a deferred sentence that included 20 days of home detention:

> On June 26, 2008 I appeared in Pueblo County Court Division 2 for Plea and

Sentencing. I was given a one year deferred sentence to include 24 hours of classes, 68 hours of therapy, 20 days of home detention. Lt. Fairbairn and I have found some time between October 06 thru October 27 that could be used for this purpose with your approval. I would utilize my vacation time for fiscal year 2008/2009 to comply with the Court and without impacting the facility in a negative way. Thank you for understanding, as it is my intention to comply with the court and with your approval allow me to maintain my employment at CCF.

Board Rule 6-10 Meeting and Disciplinary Action

16. Warden Jones notifed Complainant that she would hold a Board Rule 6-10 meeting with him on August 20, 2008, concering his DUI conviction and sanctions.

17. Complainant brought Lt. Fairbairn with him to the meeting as his representative. Warden Jones had Physical Plant Manager Phil Defelice present as her representative.

18. At the meeting, Complainant told Warden Jones that, while he had had something to drink that evening, he did not believe that he had been so impaired so as to not be able to drive, and that he believed that the officer was not truthful in his report of the results of the blood alcohol breath test. Complainant reported that he had already completed his assigned alcohol education classes, 56 hours of the community service, and had attended that MADD impact panel. He also clarified that he had a driver's license and had maintained his license since the day he was arrested.

19. Lt. Fairbairn reported to Warden Jones that Complainant was a very reliable employee.

20. Warden Jones reviewed Complainant's performance history and found that his evaluations had been in the satisfactory or commendable range.

21. Warden Jones was concerned that Complainant had not taken responsibility for his actions by blaming the arresting officer for harassing him.

22. Warden Jones was concerned that Complainant should be acting as a role model for younger officers and that having to wear an ankle bracelet does not comport with being a role model as a professional. She was also concerned that Complainant had been arrested and that he had been in the criminal justice system, and that these actions also were not the type of professional law abiding behavior that she expected of role models. The warden was additionally concerned that, should others in the community see Complanaint wearing an ankle bracelet, the fact that one of their officers was known to be wearing such a device would bring the department into disrepute.

23. Warden Jones decided that she would not grant Complainant the three weeks of vacation time to cover his period of in-home detention because she did not believe that in-

home detention was an appropriate reason to grant the request.

24. The Warden also decided that the ankle bracelet could not be brought inside of the facility because it would be a portable communication device that was disallowed inside facilities under AR 300-27.

25. Warden Jones considered that she could suspend Complainant for the period of time he was under home detention, but she thought that Complainant had not taken responsibility for his actions during the Board Rule 6-10 meeting and that a suspension was not severe enough, given that Complainant had been placed on in-home detention for 20 days.

26. The Warden also considered that she could allow Complainant to continue to work for the six weeks before his home detention was ordered, but felt that such a decision did not send the proper message about maintaining a professional appearance and being a professional rule model.

27. By letter dated and delivered on August 27, 2008, Warden Jones terminated Complainant's employment, effective on that day.

28. As the basis for her decision, Warden Jones cited to the DOC Code of Conduct, AR 1450-01, subsections III.N and III.ZZ, which read:

> N. Any actions on or off duty on the part of DOC employees, contract workers, and volunteers that jeopardize the integrity or security of the Department, calls into question one's ability to perform effectively and efficiently in his/her position, or casts doubt upon the integrity of DOC employees, contract workers, and volutneeres, is prohibited. DOC employees, contract workers, and volunteers will exercise good judgment and sound discretion.
>
> ZZ. Any act or conduct, on or off duty, which affects job performance and which tends to bring the DOC into disrepute, or reflects discredit upon the individual as a DOC employee, contract worker, or volunteer, or tends to adversely affect public saftey, is expressly proibited as conduct unbecoming, and may lead to corrective and/or disciplinary action.

Board Appeal

29. Complainant filed a timely appeal of the termination of his employment with the Board. Complainant's appeal was postmarked September 4, 2008, and received by the Board on September 8, 2008.

30. Complainant died on September 8, 2008. (Stipulated Fact)

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 (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. *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. C.R.S. § 24-50-103(6).

II. MOOTNESS ISSUE

Upon learning that Complainant had died after filing his appeal with the Board, the undersigned issued an Order To Show Cause as to why the appeal should not be dismissed. An issue becomes moot when the relief granted by the tribunal would not have a practical effect upon an actual and existing controversy. *Trinidad Sch. Dist. No. 1 v. Lopez,* 963 P.2d 1095, 1102 (Colo.1998).

Complainant's counsel argued that the appeal was not moot beauase there were still matters relating to Complainant's salary and benefits that would be affected by an order of reinstatement, such as whether Complainant would have been covered by the life insurance policy issued on every state employee. Counsel also argued that the matter C.R.S. § 13-20-101. Respondent, in turn, argued that C.R.S. § 13-20-101 applies to courts of record rather than to the Board. Respondent also argued that the property right created by state employment is individual to the employee and cannot be transferred to another and, therefore, the case became moot upon Complainant's death.

The survival statute, C.R.S. §13-20-101, provides, in relevant part:

(1) All causes of action, except actions for slander or libel, shall survive and may be brought or continued notwithstanding the death of the

person in favor or against whom such action has accrued...

(2) Any action under this section may be brought or the court on motion may allow the action to be continued by or against the personal representative of the deceased. Such action shall be deemed a continuing one and to have accrued to or against such personal representative at the time it would have accrued to or against the deceased if he had survived...

Contrary to Respondent's argument, there is no indication in the text of the statute that the provisions are limited to only causes of actions in courts of record or otherwise inapplicable to the quasi-judicial matters before administrative tribunals. *See Black's Law Dictionary, 6th ed.*, at p. 221 (defining "cause of action" to mean "[t]he fact or facts which give a person a right to judicial redress or relief against another").

In the only published case identified that has analyzed the survival statute in an administrative proceeding, *In Re Dick v. Industrial Commission*, 589 P.2d 950 (Colo. 1979), the Colorado Supreme court found that the survival statute did not apply to a claim under the workman's compensation statutes, but not on the basis that the survival statute did not apply to administrative actions. Instead, the court held that that the survival statue was not applicable because "we believe the Workman's Compensation Act governs and negates the survival concept." *Id.* at 951. The court analyzed the workman's compensation statutes and found that the claim for disability at issue in that case had not accrued before the worker's death and were, therefore, lost at the time of his death under the terms of the statute. *Id. Cf. The Estate of Huey v. J.C. Trucking, Inc.*, 837 P.2d 1218 (Colo. 1992)(declining to address the issue of whether the survival statute applies to the worker's compensation claim at issue in the case).

The Board's disciplinary hearing proceedings are held under the authority of two statutory schemes: the hearing provisions within the Board's organic act at C.R.S. §§24-50-125, 24-50-125.3, 24-50-125.4, and 24-50-125.5, and the hearing procedures under the state Administrative Procedures Act, C.R.S. §24-4-105. There is no indication in those statutes that the Board's hearing process negates the survival concept, as was the case with the workman's compensation statutes. The language of the survival statute permitting all causes of action, except those listed, to survive the death of a party applies by its terms to the Board's actions. *See People In The Interest of M.E.W.F.*, 600 P.2d 108, 108 (Colo. App. 1979) ("Any action which is not enumerated as an exception to this statute survives the death of a party").

The remaining question, therefore, is whether this matter is moot. In this regard, the situation before the Board is similar to the situation confronting the appellate court in *Schwartz v. Schwartz*, 183 P.3d 552 (Colo. 2008). Madeline Schwartz had filed for dissolution of her marriage and, while that action was pending, had also filed for a declaratory judgment seeking to determine the validity of an antenuptial agreement between herself and Mr. Schwartz. The trial court rendered judgment setting aside the antenuptial agreement, and Ms. Schwartz appealed that judgment. Ms. Schwartz died

during the appeal and prior to the conclusion of her divorce. The Court of Appeals dismissed the appeal on the grounds that Ms. Schwartz's death mooted the dissolution action and, therefore, the appeal as well.

The Colorado Surpreme Court reversed the dismissal, holding that while Ms. Schwartz's death had mooted the divorce proceeding, there was still a pending legal controversy that would be resolved with the appeal of the declaratory judgment. It found that the valdiity of the antenuptial agreement was still at issue because the husband was seeking to avoid the agreement altogether and to claim an elective share of Ms. Schwartz' estate. Under such circustmances, "there still exists a justicable controversy, despite Madeline Schwartz' death, concerning the trial court's declaratory judgment setting aside the antenuptial agreement, and a ruling by the court of appeals would have a practical legal effect on that controversy." *Id.* at p.554. Accordingly, the appeal was not moot. *Id.*

In this case, while Complainant's death would render some remedies unavailable, there are still issues of his salary and benefits that would depend upon his status as a state employee at the time of his death. Given that the Board's ruling would have a practical and actual effect on an existing controversy over Complainant's status as a state employee, the issue of whether Warden Jones' decision to terminate Complainant's employment was arbitrary, capricious or contrary to rule or law is not moot.

III. HEARING ISSUES

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

There was no dispute at hearing over the essential facts prompting the imposition of discipline in this matter.

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

1. Respondent's Disciplinary Action Ignored Progressive Discipline Required Under Board Rule 6-2

Warden Jones found that Complainant's DUI conviction, as well as the sanctions imposed upon him, violated two provisions of the Code of Conduct, AR 1450-1, subsections III.N and II.ZZ. An arrest and conviction for DUI is the type of violation of the law which can cast some doubt on whether a correctional officer accepts and obeys the lawful restrictions on his conduct . The imposition of sanctions on Complainant, particularly the imposition of a period of home detention, has an impact on facility operations even if that impact is limited to the need to accommodate a three-week vacation period. Warden Jones' conclusion that these actions violated AR 1450-1, Subsection III.N and III.ZZ is not unreasonable.

A finding that there has been a violation of the Code of Conduct, however, does not

end the inquiry. The Board rules also require that an appointing authority utilize progressive discipline in his or her determination of the appropriate action to be taken in response to a Code of Conduct violation.

Board Rule 6-2, 4 CCR 801, incorporates the Board's requirement for progressive discipline. The rule 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.

Complainant's work record was without blemish in terms of prior corrective actions or disciplinary actions. Under the terms of Board Rule 6-2, therefore, a disciplinary action would be warranted only in cases of acts that are "so flagrant or serious that immediate discipline is proper." Warden Jones made no attempt in her termination letter or at hearing to apply this rule or to explain how its terms have been met by her decision to terminate Complainant's employment.

The facts of this matter do not support that the acts committed by Complainant, either in terms of the DUI itself or the sanction imposed by the court, are so flagrant or serious as to warrant immediate discipline rather than a corrective action. There was no evidence presented at hearing that the DUI or the imposition of sanctions had any an impact on Complainant's work. The court's sanctions for the DUI were comparatively mild for a DUI sentence. The only problem created by the sanction that would have any impact on the facility was in deciding how Complainant could take time to cover his 20-day home detention period without leaving his shift with a staff shortage because of other vacation periods.

Respondent's disciplinary action, therefore, was contrary to rule in that it failed to apply the progressive discipline requirements of Board Rule 6-2.

2. <u>Respondent's Disciplinary Action Fails To Take Into Account The Full Circumstances And The Lack of Departmental Policy Making Conviction Of A Crime Grounds For Termination</u>:

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).

Warden Jones testified at several points that she believed that the DUI conviction with a sentence of 20 days of home detention was sufficiently serious to warrant nothing less than termination of Complainant's employment. As her testimony made clear, however, the Warden felt that a conviction involving any sanction, even one as mild as a period of home detenion, would be enough to warrant dismissal because it would mean that the employee was no longer a role model and it would embarrass the department for an employee to be seen in the community wearing an ankle monitor. In this regard, Warden Jones is applying a bright line policy for employment with the Department of Corrections because there are no circumstances involving a sanction of home detention that would not warrant dismissal under her criteria.

There was no evidence presented, however, to support that the Department of Corrections has such a bright line policy of disallowing individuals with DUI (or similar level) convictions from continuing employment as correctional officers. Complainant, in fact, was hired with a DWAI conviction on his record. Warden Jones had to rely upon the general provisions prohibiting conduct unbecoming and requiring good jdugment and sound discretion rather than being able to point to a departmental policy on convictions or the nature of sanctions as support for her decision. There was also evidence that, shortly prior to the incident in this matter, at least one other correctional officer was even permitted to come to work with an ankle bracelet in place. These are all indications that the department has not established the type of bright line policy that Warden Jones has applied in this case.

Instead, the department's policies, as well as Board Rule 6-9, require that an appointing authority is to weigh the facts of the incident as well as an employee's information and performance in making a decision on how to handle such an event, rather than to simply declare that the imposition of a criminal court sanction is embarassing to the department and a violation of the obligation to act professionally and, therefore, the employment is terminated. *See* Board Rule 6-9 ("The decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act... type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances").

Warden Jones' decision to terminate Complainant's employement failed to give candid and honest consideration to Complainant's years of good performance, to the fact that he could have served his period of home detention with no effect on staffing levels if allowed to trade a few days and take his available vacation time, and to the fact that the incident had no effect on Complainant's job performance (such as might happen, for instance, if Complainant had lost his driver's license for a period of time). Additionally, the decision created a bright line standard not found in the department's policies and procedures or allowable under Board Rule 6-9. Accordingly, the appointing authority's decision constitutes arbitrary and capricious action under *Lawley.*

C. The discipline imposed was not within the range of reasonable alternatives.

The credible evidence demonstrates that the appointing authority did not pursue her decision thoughtfully and with due regard for the circumstances of the situation as well as Complainant's individual circumstances, as required by Board Rule 6-9. Even if some discipline was warranted in this matter, it is outside of the range of reasonable alternatives to find that a DUI sentence involving 20 days of home detention is sufficiently serious that the only available sanction was to end the career of a correctional officer whose work has been well-respected over the years and who had no prior corrective or disciplinary actions.

D. Attorney fees are not warranted in this action.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and 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), 4 CCR 801.

The standard for an award of attorney fees requires more than a finding that the appointing authority has acted unreasonably in imposing discipline. Respondent presented rational arguments and competent evidence to support its imposition of a personnel action against Complainant. In addition, there was no evidence that would lead to the conclusion that Respondent imposed the personnel action against the Complainant in order to annoy, harass, abuse, be stubbornly litigious or disrespectful of the truth. Given the above findings of fact, an award of attorney fees is not warranted in this matter.

CONCLUSIONS OF LAW

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

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

3. The discipline imposed was not within the range of reasonable alternatives.

4. Attorney fees are not warranted.

ORDER

Respondent's action is **rescinded**. Complainant 's employment status is reinstated with full back pay and benefits, calculated as if he had worked his normal shifts until and including September 8, 2008. Attorney fees and costs are not awarded.

Dated this 20th day of February, 2009.

[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 23rd day of Feb., 2009, 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:

David G. Berry, Esq.

[redacted]

and in the interagency mail, to:

Michael D. Scott

[redacted]

[redacted]

Andrea C. Woods