STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2013B046

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

KIRK FIRKO,
Complainant,

vs.

DEPARTMENT OF PUBLIC SAFETY, COLORADO STATE PATROL,
Respondent.

Administrative Law Judge (ALJ) Denise DeForest held the hearing in this matter on April 10, 11, and 12, 2013, at the State Personnel Board, 633 17th Street, Denver, Colorado. Sabrina Jensen and Davin Dahl, Assistant Attorneys General, represented Respondent. Respondent's advisory witness was Major Barry Bratt, District Four Commander and Complainant's appointing authority. Complainant appeared and was represented by Bernard Woessner, Esquire.

MATTERS APPEALED

Complainant, a certified Corporal with the Colorado State Patrol (Respondent or CSP), appeals the termination of his employment for his actions related to the entry of a home on July 20, 2010, on the grounds that the decisions to discipline him and to impose the corrective action were arbitrary, capricious, and contrary to rule or law. Complainant asks for rescission of the disciplinary action, reinstatement to his position, an award of back pay, and an award of front pay. CSP argues that the termination was properly imposed after Complainant improperly escalated an investigation of a possible DUI accident into a violent struggle over an attempted warrantless entry into a home, and which resulted in the shooting and death of an unarmed civilian. Respondent asks that the discipline be upheld.

For the reasons presented below, the undersigned ALJ finds that Respondent's disciplinary action is **affirmed**.

ISSUES

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

2. Whether Respondent's actions were arbitrary, capricious or contrary to rule or law;

3. Whether the discipline imposed was within the range of reasonable alternatives; and

4. Whether Complainant is entitled to an award of back pay or front pay.

FINDINGS OF FACT

Background:

1. Complainant was hired as a trooper by the Colorado State Patrol (CSP) in June of 2000. He had no armed law enforcement experience prior to being hired by CSP. Complainant attended the standard 22 week CSP training academy for new recruits. His first assignment as a trooper was in Adams County at the Commerce City office.

2. In November of 2004, Complainant transferred to the District Six accident reconstruction team based in Golden. While working on this team, Complainant gained significant experience in accident reconstruction work.

3. In March of 2010, Complainant was promoted to the rank of corporal and transferred to Troop 4A in Grand Junction.

4. In July of 2010, Complainant was serving as a corporal and working road patrol in the Grand Junction area. On July 20, 2010, Complainant had come on duty at 3 PM. He was to work a ten-hour shift that day. Complainant was the shift supervisor for that shift.

5. Trooper Ivan Eugene Lawyer had been a CSP officer and then left the service for a period. By July of 2010, Trooper Lawyer had been reinstated to CSP and had completed a three-week field training period. Complainant served as Trooper Lawyer's field training officer during that three-week field training period. Trooper Lawyer was assigned to Troop 4A and was also working during the evening of July 20, 2010.

6. On July 20, 2010, Trooper Lawyer also had a civilian ride-along passenger with him for the evening, Alex White.

7. CSP Sergeant Chad Dunlap was assigned to the CSP immigration enforcement unit. On the night of June 20, 2010, Sgt. Dunlap was driving back from Denver and had made plans to meet with Trooper Lawyer for dinner as he returned to the Grand Junction area.

Incident of July 20, 2011:

Crash report:

8. CSP dispatch aired a call to Trooper Lawyer that there was a "possible DUI crash" at 2502 South Broadway. The call was made at approximately 7:40 PM. Dispatch informed Trooper Lawyer that a vehicle went into a front yard. The information offered by dispatch included that a male driver was trying to free the vehicle, and that he seemed to be impaired.

9. A few minutes later, dispatch reported that another call from another neighbor had been received. The second call provided dispatch with the license plate of the vehicle. Dispatch informed Trooper Lawyer that the truck was a black Ford pickup, and that one jet ski was involved. Dispatch also informed Trooper Lawyer that the driver and a couple of friends were trying to get the truck out of the yard, and that all appeared to be intoxicated.

10. By approximately 7:44 PM, dispatch had informed Trooper Lawyer that the truck had been removed from the yard and that the individuals had headed south on Glade Park Road, which was a road that was located close to the original address on South Broadway. Dispatch additionally informed Trooper Lawyer that the truck was a black crew cab Ford Ranger pickup

with a trailer and one jet ski on the trailer. Dispatch reported that the occupants of the truck may have lost one of the jet skis in the crash.

11. Trooper Lawyer arrived at the reported address at approximately 7:52 PM. He did not see the pickup truck or trailer upon his arrival at the scene. Trooper Lawyer saw a man on the street waving at him, and he stopped to speak with the man.

12. Complainant was also on patrol at the time the crash was reported. Complainant decided to respond to the call as well. Complainant arrived at the South Broadway address within a minute or so of Trooper Lawyer's arrival.

13. Sgt. Dunlap heard the radio dispatch of Trooper Lawyer to the possible DUI accident. At the time, he was close enough to the South Broadway address to also respond. Once he heard that the individuals had freed the truck and had driven down Glade Park Road, he moved quickly to intercept the truck if it was driving down Glade Park Road. He did not see a truck matching the description provided by dispatch, so he returned to the area of South Broadway and Glade Park Road.

14. Trooper Lawyer talked with the man who had flagged him down. This individual was later identified as Joel Arellano. Mr. Arellano was the neighbor across the street from the yard in which the truck became stuck.

15. Complainant examined the scratches and tire marks that had been left on the road. Complainant was not present when Trooper Lawyer discussed the incident and the description of the driver with Mr. Arellano.

16. Trooper Lawyer was told by Mr. Arellano that the driver was wearing white or light colored plaid shorts and no shirt. Trooper Lawyer did not obtain a name of the individual, a height or weight estimate, or any description of distinguishing features for the male. Trooper Lawyer also did not obtain descriptions of the other males who had gone into the house with the driver. Mr. Arellano pointed out the house that the men had returned to, which was one of the homes in a duplex just around the corner on Glade Park Road.

17. Neither Complainant nor Trooper Lawyer had been told by CSP dispatch or Mr. Arellano that there had been any injury connected to the accident. Complainant could see from the marks on the road and the lawn that the accident was not just a five or ten miles an hour accident, but that the vehicle had, more likely, been travelling at 20 or 30 miles per hour and had rotated during the accident. Complainant knew that it was at least possible that someone may have been injured by being thrown around in the vehicle during the accident. Complainant did not ask dispatch if there had been any information concerning injury. Complainant did not call for paramedics to assist with any potentially injured party.

18. Complainant decided that the next step should be to interview the individuals involved in the accident.

19. Complainant and Trooper Lawyer drove their marked vehicles approximately 50 yards to the front of 103 Glade Park Road and parked across the street from the duplex. The black Ford pickup and the jet ski were parked to the side of the duplex closest to 103 B Glade Park Road. As the officers approached the door for 103 B Glade Park Road, Complainant noted that the hitch of the truck had mud packed into it. Complainant did not see any signs that anyone in the truck had been injured.

20. Trooper Lawyer's ride-along civilian, Mr. White, remained near the police vehicles across the street from the duplex. It was shortly before dark by the time the officers arrived at 103 B Glade Park Road.

21. Complainant and Trooper Lawyer approached the front door for 103 B Glade Park Road. Trooper Lawyer knocked on the door. Complainant then positioned himself so he could see the back of the house as well as the front porch, while Trooper Lawyer used his flashlight to shine a light in the living area through a gap in the curtains on the front window. Trooper Lawyer reported to Complainant that no one was answering the door but he could see a white male with no shirt and plaid shorts in the house. Trooper Lawyer interpreted this to be the driver of the truck because he matched the description provided to him by Mr. Arellano. Trooper Lawyer shouted that it was the police and that the man should come to the door. There was, however, no response at the front door.

22. Complainant then moved to the front porch and pounded more loudly on the front door. Complainant loudly announced that it was the police, that they knew that there was someone inside, and to answer the door. No one inside the duplex responded to the door. Trooper Lawyer left the front porch and went to the back door of the duplex to knock on the back door.

23. Sgt. Dunlap was still in his police vehicle in the area of 103 Glade Park Road. He could see that there was no coverage of the back of the duplex, so he drove around to a spot where he could view the back door. While he was in this position, he saw Trooper Lawyer come around to the back door of the duplex. When Trooper Lawyer was at the backdoor, Sgt. Dunlap decided to drive around to the front to speak with Complainant about what the officers had learned so far.

The Struggle At the Door:

24. Complainant had been trained, and understood, that in order to perform a warrantless entry into a home, he needed both probable cause and exigent circumstances.

25. Complainant had been trained by CSP in how to obtain a search warrant, and had obtained a search warrant for a home in the past. Complainant also understood that, for an exigent circumstance to exist based upon an emergency, he needed to have a reasonable and articulable basis for the emergency, there had to be an immediate crisis, and there could not be just a theoretical case of injury.

27. When Complainant first arrived at the home, the front door was closed. Complainant had no permission to open the door, and had no reason to believe that he had received consent to open the front door. Complainant had not been trained that he could make a lawful warrantless entry of a home to obtain blood alcohol evidence in the absence of a felony crime, such as vehicular assault or vehicular homicide.

28. After Trooper Lawyer had reported to him that someone was inside but not answering the door, and after Complainant's own unsuccessful attempts to obtain an answer at the door, Complainant tried the door knob of the front door and found that the door could be opened.

29. Complainant pushed open the front door to see inside the residence and to make contact with the man Trooper Lawyer had seen inside the residence.

30. When Complainant began to open the door, a small dog that was inside the premises and a male subject inside the home began to run toward the door.

31. The man that Complainant saw was wearing plaid shorts and no shirt. Complainant saw that the man was shaking, had an angry look, and a red flushed face. He had nothing in his hands, and there was nothing apparent in his waistband. Complainant was not in close enough proximity to the man to determine if he was intoxicated.

32. Complainant yelled "police," told the man to come outside, and stepped back from the door. The man tried to grab the dog as the dog ran through the opened doorway. At the point when the man was reaching for the dog, he was partway outside the front door. Complainant attempted to grab the man to arrest him, and the man pulled back inside the home.

33. When the man pulled back into the home, he also started to shut the front door. The dog yelped as the door partially caught it, but the dog was able to continue running out the door.

34. Complainant attempted to stop the man from completing shutting the door by placing his foot in the way. The man was still able to close the door. Complainant and Trooper Lawyer then began kicking the front door to force the door open.

35. The officers broke the door jamb and a part of the door with their kicks. The officers used a piece of the broken door jamb to block the front door from closing completely. As the officers repeatedly kicked at the door, the door would open slightly and the man behind the door would force it nearly shut again.

36. The officers were yelling at the man to come out of the house, and that he was under arrest. The man was yelling that they could not come in without a warrant, and that he didn't need to come out if they didn't have a warrant. The man told the officers to leave. At no time did Complainant or Trooper Lawyer ask if anyone in the home was injured or needed assistance.

37. At one point when the door was partially opened, Trooper Lawyer deployed his OC spray into the opening. The OC spray had no apparent effect on the man behind the front door. As the OC cloud formed at the door, Complainant backed away from the front door and drew his gun. Once Complainant had drawn his weapon, he pointed it at the man inside the duplex and ordered the man to come out.

38. While Complainant and Trooper Lawyer were at the front door of the duplex, Mr. White was standing near the police vehicles across the street. Mr. White saw a man come around the side of the duplex. Mr. White called out to the officers that someone was coming out of the back.

39. Complainant moved to the side of the house, pointed his gun at the man, and ordered him to lie on the ground. The man dropped the cell phone that he had in his hand and complied with the order. Complainant handcuffed him as he lay on the ground. Complainant asked the man who else was in the home. The man told him that there were three other people present in the home. Complainant did not ask the man whether he or anyone in the home was injured or needed assistance.

40. After handcuffing the man with the cellphone and leaving him on the ground in the side yard to the duplex, Complainant returned to the front door of the duplex.

41. Once Sgt. Dunlap saw Trooper Lawyer at the back door to the duplex, he had decided to contact Complainant at the front of the duplex. Sgt. Dunlap drove his vehicle from where he was parked with a view of the back of the duplex to the area across the street from the front of the duplex. When he arrived at the front, he saw both Complainant and Trooper Lawyer at the front door of 103 B Glade Park Road. Complainant was kicking the door and yelling. Complainant had his gun drawn at the time.

42. Sgt. Dunlap realized that the back door was no longer covered. He parked his police vehicle with the other two police vehicles across the street from the duplex, and he entered the front yard of the duplex. As he was exiting his vehicle, Complainant radioed to dispatch that they needed back up. Sgt. Dunlap reported to dispatch that he was on the scene. Sgt. Dunlap decided to go around the duplex on the "A" unit side to reach the back yard. As Sgt. Dunlap was crossing the front yard, Complainant signaled to him that there were people coming out of the back.

43. Shortly after Sgt. Dunlap crossed the front yard, Complainant realized that another man had come out of the back. Complainant moved to the side of the duplex. He pointed his gun at the second man and ordered the man several times to lie on the ground. Once the man was on the ground, Complainant got on top of the man, held the man's arms back, and called for a second set of handcuffs.

44. Sgt. Dunlap's route around the duplex had several barriers that had to be navigated, such as a fence. Before Sgt. Dunlap had arrived at the back of the duplex, he heard Complainant calling for a second set of handcuffs.

45. Trooper Lawyer was yelling orders at the front of the residence while Complainant was ordering the second man out of the duplex to get to the ground. Just as Sgt. Dunlap arrived in the back yard and was about to give Complainant a set of handcuffs, both officers heard a gunshot from the front of the duplex.

46. Sgt. Dunlap threw his set of handcuffs to Complainant and moved to the front corner of the duplex to see what had occurred. The door to the duplex was open and Trooper Lawyer was standing in the doorway. There was a male lying on his right side on the floor in the doorway.

47. Sgt. Dunlap asked Trooper Lawyer if he was ok. Trooper Lawyer confirmed that he was fine.

48. Complainant arrived at the doorway, and saw that the man who had been holding the door shut had been shot once in the chest. Complainant reported to dispatch that shots had been fired and that an ambulance was needed. Complainant told Trooper Lawyer to obtain some gloves from his vehicle and to begin CPR. Trooper Lawyer ran to his vehicle, retrieved gloves, ran back to the duplex, rolled the man on the floor onto his back and began administering CPR.

49. The man who had been shot died at the scene.

50. Within five to ten minutes of the report of shots being fired and the call for an ambulance, at least eight law enforcement officers from CSP, the Mesa County Sheriff's Office, and the

Grand Junction Police Department arrived at the scene of the shooting. Some of the officers helped to secure the scene. Others were assigned to locate civilian witnesses.

51. Complainant and a Mesa County Sheriff's Office deputy swept the duplex for any other individuals. A fourth male was present inside the duplex but had hidden from the officers during the search and was not located until after the search. The two individuals who had been handcuffed outside of the duplex were transported to the Mesa County Sheriff's Office for interviews.

The CIT and Internal Affairs Investigations:

52. The District Four Commander, Major Barry Bratt, was notified of the officer-involved shooting within minutes after the shooting had occurred. Major Bratt requested that a Critical Incident Team (CIT) assemble to conduct its investigation into the shooting. Major Bratt responded to the scene of the shooting and arranged for the weapons of all of the involved officers to be retrieved for safekeeping and testing. Major Bratt also accompanied the involved CSP officers to the Mesa County Sheriff's Office where the CIT interviews were to be held.

53. The CIT protocol provides that law enforcement from jurisdictions other than the jurisdiction of the officers involved in the shooting will conduct a full investigation into the shooting. In this case, the CIT included detectives and other law enforcement personnel from the Grand Junction Police Department and the Mesa County Sheriff's office. The team also included some senior state parole officers.

54. Members of the CIT team applied for and obtained a warrant to search the premises of 103 B Glade Park Road. Crime scene investigators photographed the premises. Members of the team also conducted interviews with various witnesses.

The Background as Determined by the CIT Investigation:

55. The CIT investigation revealed that the decedent was Jason Kemp. He had been the owner of the black Ford pickup and the jet ski that had been involved in the reported accident. Mr. Kemp had been unarmed at the time of the shooting. The subsequent search of Mr. Kemp's home did not reveal any firearms at the home or locate any weapons near him at the time of the shooting.

56. Mr. Kemp and some friends had been floating and jet skiing on the Colorado River shortly before the shooting. Mr. Kemp had been drinking. When the group was returning to Mr. Kemp's home at 103 B Glade Park Road, one of the friends had driven the truck because Mr. Kemp was intoxicated. Neither the friend nor Mr. Kemp, however, could successfully back the truck and jet ski trailer into the parking spot outside of the duplex. When Mr. Kemp tried to back the jet ski into the parking spot, his friends began to heckle him over his inability to park the trailer properly.

57. After Mr. Kemp had failed to successfully back the trailer into the parking spot, Mr. Kemp decided to drive around the block to obtain a different angle. He drove the truck fast enough around the block that the trailer overturned, throwing the jet ski off and resulting in the truck becoming high-centered on a slope in a yard not far from the duplex.

58. When Mr. Kemp's friends saw the accident, they came over to the truck, disconnected the trailer, picked up the jet ski, and reloaded the jet ski onto the trailer. They helped Mr. Kemp free the truck from the hill, and then pulled trailer with the jet ski back to the duplex.

59. The CIT investigation determined that, immediately before the shooting, Trooper Lawyer was continuing to kick at the front door to the residence when the door unexpectedly swung open. Trooper Lawyer lost his balance. He then shot Mr. Kemp once in the chest at close range.

60. There were a number of civilian witnesses to all or part of these events. There were neighbors who had seen the original accident, as well as neighbors who were close by when the officers were attempting to enter the duplex. At the time of the shooting, several children were riding bikes near the duplex. The CIT investigation was able to contact and obtain statements from many of these individuals.

Complainant's Statements During the CIT Investigation:

61. Complainant was interviewed on July 21, 2010 and again on August 20, 2010, by Investigator Danny Norris of the Mesa County Sheriff's Office and Colorado Parole Officer John Coffey. Complainant had a lawyer present with him for both interviews.

62. During his interview on July 21, 2010, Investigator Norris asked Complainant if it had been his intention to take Mr. Kemp into custody at the time when Mr. Kemp came partway out of the door chasing the dog. Investigator Norris recorded Complainant's response as:

> He said it was. I then asked about the justification in the crime and probable cause to take the individual into custody at that time. He answered they established probable cause to take the individual into custody based off his observations, what was aired to dispatch by witnesses, and what the witnesses told Trooper Lawyer when they arrived. He listed the following crimes that they had probable cause for in arresting the individual: careless or reckless driving, failure to report an accident to police, failure to remain at the scene and provide information after damaging property, and potential DUI based on the witness' reports. I asked if there was any indication in his interaction with the individual that he was intoxicated. He said everything happened so fast and they were not in close enough proximity to determine that.

63. During the July 21, 2010 interview, Complainant also explained to Investigator Norris that he believed there may have been an injury, and why he had to act quickly to secure any evidence:

> He volunteered from his prior experience as an accident reconstructionist he was concerned someone may have been injured in the accident, although it was reported as property damage only. He observed markings of centripetal rotation at the scene which he believed may have resulted in someone having been injured at the scene from being thrown around in the car. He also observed heavy gouging and scraping in the pavement and it appeared as though the vehicle went up a pretty steep embankment.
>
> Cpl. Firko also answered because the accident happened in close proximity to where the vehicle ended up and in the time frame from when they were

dispatched they wanted to secure any evidence of a DUI as quickly as possible. He said it was important to secure any potential evidence by getting in and preventing someone from consuming more alcohol.

64. During the interview on August 20, 2010, Complainant was asked to describe his thought processes and decision making in deciding to open the door to the duplex. Investigator Norris recorded his summary of Complainant's responses:

> Cpl. Firko explained his reasoning for opening the door was that he simply wanted to see inside the residence, he said he decided to do this because he knew there were people inside, he knew the individual involved in the accident was in there and he wanted to see inside. He said he felt there was an officer safety concern being that they had no view into the house but the people inside had a view out.
>
> I asked him about his experiences and specifically what he had been trained which justified a warrantless entry into a residence. He responded "exigent circumstances." I then asked him to explain what he meant by exigent circumstances. He responded an officer safety issue or a crime in progress or destruction of evidence.
>
> I asked Cpl. Firko if this was something he has done before. He said he has never forced entry into a residence but has opened doors to see inside. I asked Cpl. Firko if he had been trained or taught opening the door to see inside was an acceptable practice. He responded he has never been trained to do it but felt whenever you got into a situation where that was the only way to see what you had, then you had to take that opportunity in the interest of officer safety.

65. Investigator Norris also asked Complainant if he had considered trying to obtain a warrant rather than forcing entry into the home. Investigator Norris recorded the exchange as follows:

> I asked him if at any point during the situation he thought about obtaining an arrest or search warrant, he said he thought of obtaining a warrant briefly when the individual initially closed the door and requested they get a search warrant. He explained as soon as he considered it Trooper Lawyer attempted to force entry into the residence. He said he then went from thinking search warrant to they had probable cause for a warrantless arrest, he said there was never any discussion between Trooper Lawyer and him regarding a warrant because there was no time for it.

66. The final CIT report was provided to the Mesa County District Attorney for review.

67. The District Attorney decided to convene a grand jury on the shooting. The grand jury indicted Trooper Lawyer in the death of Mr. Kemp. Complainant was charged with counts of criminal trespass and criminal mischief.

CSP Internal Affairs:

68. Major Bratt had asked CSP Internal Affairs to evaluate Complainant's and Trooper Lawyer's performance on July 20, 2010. Capt. Dan Elder was the lead investigator, and participated in the CIT interviews of Complainant and Trooper Lawyer.

69. By report dated January 20, 2011, Capt. Elder filed his findings. He referenced the final report of the CIT investigation, and found that Complainant may have violated seven General Orders:

a) Members will obey the law;
b) Members will obey lawful orders and directions. Orders may appear as, but are not limited to, verbal directives, written directives, memorandums, policies, rules, procedures, goals, mission and vision statements.
c) Members will cooperate and work toward the common goals of the Colorado State Patrol in the most efficient and effective ways possible.
d) Members will conduct themselves so as to preserve the public trust and will utilize their authority appropriately.
e) Members will avoid any conduct that may bring discredit upon, or undermine the credibility of themselves, the Colorado State Patrol, or the police profession.
f) Members will conduct themselves to reflect the highest degree of professionalism and integrity and to ensure that all people are treated with fairness, courtesy, and respect.
g) Members will conduct themselves so that no other person is endangered unnecessarily and will perform only those specialized tasks for which they are authorized and properly trained, or certified.

Administrative Leave and Trooper Lawyer's Trial:

70. CSP policy is to place any officers involved in a shooting on paid administrative leave pending the investigation. Complainant was placed on paid leave as of July 21, 2010.

71. In April of 2009, Major Bratt had been delegated the authority to act as the appointing authority for the CSP staff under his command by the head of CSP, Colonel James Wolfinbarger. At all times relevant to this matter, Major Bratt was Complainant's appointing authority.

72. Once criminal charges were filed against Complainant, Major Bratt placed Complainant on unpaid leave pending the disposition of the criminal charges. Complainant was informed of the change in his leave status by letter dated October 21, 2010.

73. Trooper Lawyer was tried in criminal court and acquitted of the charges. Major Bratt attended the trial.

74. During Trooper Lawyer's trial, Trooper Lawyer testified that Mr. Kemp had assaulted Complainant during the incident. This allegation had not been previously reported during the CIT investigation.

75. Major Bratt decided to re-open the Internal Affairs investigation on this point. He authorized new interviews of Complainant and Trooper Lawyer to determine if such an event had occurred during the incident.

76. Major Bratt determined, after review of the new investigation results, that Trooper Lawyer's statement about Mr. Kemp assaulting Complainant was not true, and that there had been no physical altercation between Mr. Kemp and Complainant.

77. After the charges against Trooper Lawyer were resolved with a not guilty verdict, the District Attorney decided that the charges against Complainant should not move forward.

78. On or about May 25, 2012, the charges against Complainant were dismissed by the District Attorney's office.

79. Once the charges were dismissed, Major Bratt changed Complainant's administrative leave status to leave with pay, effective May 26, 2012. Respondent also repaid Complainant for the authorized pay that had been withheld while Complainant was on administrative leave without pay.

Board Rule 6-10 Process:

80. By letter dated January 10, 2011, Major Bratt notified Complainant of a Board Rule 6-10 meeting scheduled for January 25, 2011. The letter notified Complainant that the subject of the meeting was to discuss allegations of improper actions on July 20, 2010, in violation of the Patrol's General Orders and policies. Once Major Bratt learned that Complainant's counsel was not available on that date, he re-scheduled the meeting for February 3, 2011.

81. On February 3, 2011, Complainant attended a Board Rule 6-10 meeting with Major Bratt. Complainant brought an attorney as his representative, Bernard Woessner. Major Bratt had Diane Dash from the Attorney General's office present at the meeting as his representative. The meeting was taped and transcribed.

82. By the time of the Board Rule 6-10 meeting, Complainant had already received portions of the CIT report. Major Bratt provided Complainant and his counsel with a copy of the report, as well as a copy of the report generated by CSP Internal Affairs (IA) concerning Complainant's actions on July 20, 2010. Major Bratt also provided Complainant and his counsel with time to review the material before beginning the meeting in earnest.

83. Major Bratt provided Complainant with *Garrity* warnings. The *Garrity* warnings explained that Complainant was expected to cooperate with the administrative investigation, and that any failure to answer questions could be treated as insubordination and potentially subject Complainant to termination for failing to cooperate. The warning also explained that the information gathered in the administrative investigation could not be used against Complainant in any criminal prosecution.

84. Complainant explained during the Board Rule 6-10 meeting that he could see from the marks on the road and the lawn that there had been significant rotation on the vehicle during the accident, and that there was still the possibility that someone could have been injured inside the vehicle.

85. Complainant argued that the man he saw in the house when he opened the door fit the profile of a highly intoxicated individual. He also argued that, once the man had almost completely closed the door on the officers, it was necessary to enter the residence because the officers had probable cause to arrest the driver for driving under the influence, hit and run, careless or reckless driving, and failing to report an accident.

86. Complainant told Major Bratt that he believed that the officers had probable cause to arrest the man seen by Trooper Lawyer before Complainant opened the door to the house. Complainant also argued that, given how angry the man in the house seemed, backing off would allow the man time to arm himself and to fortify his position.

87. Major Bratt asked Complainant to explain what gave him probable cause to arrest the man for driving under the influence. Complainant answered that he had probable cause from the fact that the nature of the accident had no logical explanation, and that there was a lay witness at the scene wearing a Grand Junction fire department t-shirt who said that all of the individuals were intoxicated when he viewed them.

88. Complainant confirmed that he had not seen blood or other notable indication of injury in the truck when he examined it on the way to the front door of 103 B Glade Park Road. He also confirmed that he did not have any descriptions of the other males who were associated with the truck.

89. Toward the end of the meeting, Major Bratt asked Complainant a series of questions about potential violations of law or policy. Complainant's answers were that he and Trooper Lawyer behaved properly, followed the law and departmental policy, and did not violate Mr. Kemp's civil rights:

> Bratt: Um, do you think you broke any laws during the incident?
> Firko: No.
> Bratt: Do you think Gene [Lawyer] broke any laws during the incident?
> Firko: No.
> Bratt: Do you think you violated any general orders or policy during the incident?
> Firko: No.
> Bratt: Do you think Gene did?
> Firko: No.
> ...
> Bratt: Um, do you believe Mr. Kemp's civil rights were violated or not?
> Firko: No.
> Bratt: Uh, do you believe Sergeant Dunlap holds any responsibility in this incident?
> Firko: No.

During the Board Rule 6-10 meeting, Complainant did not mention that there had been a lack of training provided to him.

90. Complainant told Major Bratt during the Board Rule 6-10 meeting that he truly believed that he didn't do anything wrong during the July 20, 2010 incident, and that he had attorneys who backed him up on that. Complainant also told Major Bratt that he thought the incident would make him a better law enforcement officer.

91. Major Bratt decided that he should take no administrative action regarding this incident until the criminal cases against Trooper Lawyer and Complainant had concluded. Major Bratt

notified Complainant by letter dated March 24, 2011, that he would be withholding notification of his decision on the disciplinary issue pending the disposition of the criminal charges against Complainant.

Major Bratt's Analysis of the Incident:

93. In order to fully evaluate the July 20, 2010, incident, Major Bratt constructed a series of PowerPoint slides that created a time line of events and information. The slides contained crime scene photos and maps of the area to visually illustrate the events as they unfolded. Major Bratt created the PowerPoint presentation after he had conducted the Board Rule 6-10 meetings with Complainant and with Trooper Lawyer.

94. Major Bratt started with the dispatch of Trooper Lawyer to the scene of a possible DUI crash. He included photos of the divot in the lawn that was the result of the truck's hitch high-centering on the slope, and he noted that the divot was the only actual damage to the victim's property. The photos of the roadway show the marks and scrapes left on the road, as well as evidence of tire tracks on the lawn.

95. Major Bratt then noted that both troopers parked across the street from the Kemp residence.

96. Major Bratt evaluated what Trooper Lawyer and Complainant knew at the time they began their contact with the Kemp residence. His conclusion was that they knew that:

> The suspected driver is a white male with a light colored plaid shorts and no shirt;
> There are two other males assisting the driver, with their descriptions unknown;
> It was suspected by the witnesses, none of whom actually contacted any of the involved parties, that the suspects might be intoxicated.

97. Major Bratt considered two questions at this point: What crimes were known, at this point, to have been committed? Did probable cause exist, at this point, to arrest anyone?

98. In answering these two questions, Major Bratt determined that there were three possible criminal violations at this point: a possible driving violation, a possible hit and run, and a possible Driving Under the Influence (DUI).

99. He also considered whether probable cause existed at that point in time for any of these possible violations. His analysis was that there was no probable cause as of yet because of several deficits in the information that had been initially collected by the officers. The suspect information was limited at the time. The officers had learned that there were several males involved in the incident, and there had yet to be a positive identification of the driver. Major Bratt also concluded that all of the elements of the possible crimes had also not yet been sufficiently established, such as damage and intoxication. Major Bratt did not consider the decision to try to contact the individuals at 103 B Glade Park Road before investigating further to be in error. The contact, however, would be part of an investigation to develop probable cause.

100. Major Bratt next considered the information that Complainant and Trooper Lawyer developed as they approached the front door of 103 B Glade Park Road.

101. Major Bratt indicated in his slides that the accident report completed by the Grand Junction Police Department found dirt packed into the hitch and evidence of a jet ski sliding on the pavement and dirt. Major Bratt noted that Complainant's reference during the investigation to damage on the front of the truck was not supported by any investigation findings. The CIT investigation found that there was rust on the front fender of the truck and paint on the front bumper, rather than evidence of fresh damage to the front of the truck.

102. Major Bratt considered the question, "What was the apparent severity of the accident?" He asked this question because Complainant, and to a lesser extent Trooper Lawyer, raised the issue of injury as one reason to believe that exigent circumstances existed to conduct a warrantless entry into the home.

103. Major Bratt had trained in accident reconstruction as part of his CSP duties before he became part of the command staff. Major Bratt's analysis of the accident was that the severity of the accident appeared to be minor and that the possibility of injury was low. He reached this conclusion because there had been no indication from witnesses of any injuries, and the only property damage outside of Kemp's property was a divot in the yard. Major Bratt also noted that neither trooper closely examined the truck and there had been no inspection of the truck interior for blood or other signs of injury as part of Complainant's and Trooper Lawyer's investigation. He also found that there had been no questioning of suspects at the duplex as to injury, no indication of blood at the residence, and no indication of any injury to Mr. Kemp.

104. Major Bratt then assembled a series of photos to show where Complainant, Trooper Lawyer, and Sgt. Dunlap were located as the two officers began knocking at the front and back doors of the duplex. He noted that at 7:59 PM, Complainant continued to pound on the front door and demand that Mr. Kemp come out, and then tried the front door and opened it.

105. Major Bratt asked four questions about this point in the incident:

> Was there any justification to open the door?
> Did probable cause exist to arrest anyone at this point?
> Did probable cause exist to force entry into the house?
> Did exigent circumstances exist to force entry into the house?

106. Major Bratt examined several cases that define Fourth Amendment law relevant to these questions.

107. He quoted from a 2001 U.S. Supreme Court case, *Kirk v. Louisiana*, which held that warrantless arrest and search inside of a home based on probable cause "that the firm line at the entrance to a house may not be crossed without a warrant, absent exigent circumstances."

108. Major Bratt included several paragraphs of the holdings and analysis from a 1997 Colorado Supreme Court cases on warrantless search and seizure inside of the home, *People v. O'Hearn*. He also quoted the list of seven factors to be considered in the determination of whether a warrantless entry into a home was justified from a 1989 Colorado Supreme Court opinion in *People v. Miller*.

109. Major Bratt also listed the three situations identified in Colorado case law and CSP training in which probable cause and exigent circumstances justified a warrantless entry: 1) the hot pursuit of a fleeing suspect; 2) the risk of immediate destruction of evidence; and 3) a colorable claim of emergency threatening the life or safety of another.

110. After applying the applicable legal standards to the circumstances of the incident at the time Complainant opened the door of the duplex, Major Bratt concluded that there was no justification for opening the door.

111. He also concluded that probable cause did not exist to arrest anyone at that point, with the possible exception of obstruction of a police officer and resisting arrest.

112. Major Bratt concluded that any probable cause that may have existed did not allow forcible entry into the home, and that there were no exigent circumstances present to allow forcible entry into the home. Major Bratt did not find Complainant's argument that he thought there may be injuries to be a credible statement because Complainant had taken no action that was consistent with a belief that there may be injuries.

113. Major Bratt then continued his timeline by noting that Mr. Kemp had told the officers that they needed a warrant, and Complainant responded by telling Mr. Kemp that they didn't need a warrant and that he was under arrest. The officers then used part of the broken door jamb to prevent the door from closing and Trooper Lawyer deployed his OC spray at Mr. Kemp.

114. Major Bratt evaluated how well the officers could see into the home. He concluded that there was sufficient light in the home for both Complainant and Trooper Lawyer to see how Mr. Kemp looked and what he was doing.

115. He continued with the timeline of the incident and noted Complainant's contact with the male who exited the back door of the residence at about 8:00 PM. Major Brat asked two questions at this point: 1) Did either trooper take steps to de-escalate and contain the situation until more help could arrive? and 2) Did either trooper consult or attempt to consult anyone else for advice or assistance?

116. Major Bratt's conclusion was that, despite breaks in the activity at the door with Mr. Kemp, both troopers had returned to the same activity that was not working. Major Bratt also determined from the results of the interviews that Trooper Lawyer was not going to question the decisions of a supervisor because he had experienced negative responses with his captain and Complainant when he had previously questioned a supervisor's decision. Major Bratt also determined that Complainant had reasoned that he had no need to consult with others because he was confident in his decision-making as the shift supervisor that he was doing the right thing.

117. Major Bratt's PowerPoint slides continued into his analysis of Trooper Lawyer's shooting of Mr. Kemp.

118. Major Bratt presented his PowerPoint slides to his supervisor, Lt. Col. Brenda Leffler, and discussed his conclusions with senior CSP staff.

119. There had been a public outcry, particularly in the local press, concerning the shooting and several other incidents that had recently occurred in CSP District Four. Major Bratt and his superiors were aware of a newspaper editorial published in 2012 that had condemned the shooting, and had questioned CSP leadership.

120. During the period in which Major Bratt was investigating the July 20, 2010 incident, Major Bratt's superiors were also considering several leadership issues that had arisen within District Four, including the allegation that at least one Captain within District Four had

established quotas for certain traffic stops. The CSP investigation into the issue began in the late winter of 2011.

Major Bratt's Disciplinary Considerations:

121. Major Bratt was concerned that this investigation of a relatively minor accident had been escalated by the officers' aggressive actions into a physical struggle at the door that eventually resulted in the shooting of an unarmed civilian.

122. Major Bratt concluded that the fundamental Fourth Amendment rule against warrantless entry into a home, absent both probable cause and exigent circumstances, should have been applied by Complainant, and had been violated by Complainant's opening of the Kemp residence door and his attempt to batter down the door. Major Bratt considered the opening of the door to have been completely wrong because Complainant lacked any legal authority to open the door to a residence, and because opening the door was an unsafe act for an officer.

123. Major Bratt considered Complainant's attempt to break down the door to also be without legal authority. He believed that Complainant had not distinguished between a subject who was unresponsive and one who was uncooperative. Major Bratt noted that a resident has the right to refuse entrance to his home. When faced with an uncooperative subject, Major Bratt concluded that an officer must find another way to continue the contact or investigation, such as by talking through the door or having dispatch find a phone number for the residence.

124. He also concluded that Complainant was expected to de-escalate use of force situations, and that Complainant had not attempted to de-escalate this situation when it became clear that Mr. Kemp would not allow access to his home. Major Bratt also concluded that the officers' failure to de-escalate the incident when it became clear Mr. Kemp was not going to consent to entry into his home led to the violation of Mr. Kemp's civil rights.

125. Major Bratt concluded that, as the shift supervisor, Complainant was responsible for setting the overly aggressive tone in response to Mr. Kemp's refusal to permit entry into his home. Major Bratt also considered that, even though Complainant did not shoot Mr. Kemp, his actions in failing to continue his investigation, in obtaining a warrant, or in finding another way to communicate with Mr. Kemp contributed to the shooting.

126. Major Bratt also took into consideration that the consequence of Complainant's failure to de-escalate the situation included a violation of civil rights and the death of an unarmed civilian. Major Bratt concluded that taking actions with such serious consequences justified the imposition of very serious discipline, such as termination of Complainant's employment.

127. Major Bratt also took into account in deciding on the severity of the sanction that Complainant had apparently not changed his mind about the propriety of his decision making, even after reviewing the CIT and internal affairs reports on the July 20, 2010 incident.

128. Major Bratt considered Complainant's performance history with CSP to have been exemplary, given that he had recently been promoted to corporal. He also determined that Complainant had been subject to four prior corrective actions. Major Bratt did not review any letters of commendation that were Complainant's file.

129. Of the four corrective actions that Complainant had previously been issued, three related to a total of four car accidents that Complainant had while on the job. One of the corrective

actions was issued for a statement that Complainant made during the issuance of a warning violation to a motorist. None of the corrective actions related to the subjects at issue in Complainant's actions at 103 B Glade Park Road.

130. Major Bratt did not review Complainant's personnel file in person. The file was located in Denver. Major Bratt had human resources inform him of the contents of the file.

131. Complainant performance history with CSP had been exemplary, with Complainant receiving a number of letters of commendation for work he had performed.

Disciplinary Determination:

132. On or about August 29, 2012, Major Bratt issued a notice to Complainant that there would be a meeting on September 25, 2012, at CSP headquarters in the Denver area to discuss his decision on discipline related to the July 20, 2010 incident. Complainant was living in the Denver area at the time.

133. Major Bratt delivered a disciplinary letter, dated September 25, 2012, to Complainant at the meeting. The letter terminated Complainant's employment effective September 26, 2012.

134. Major Bratt found that Complainant had violated the applicable General Orders and policies of CSP by taking the following actions:

a) You failed to obtain all of the information available to you prior to making contact at the residence. Because of this you were unable to tell with certainty if Jason Kemp had committed any criminal offense. As such, you had no probable cause to arrest him, or anyone else, at the time you approached the residence.
b) No exigent circumstances existed which required immediate entry into the residence. The initial opening of the door, and the subsequent attempted forced entry into the residence exceeded the scope of our authority.
c) Contrary to training, you failed to take any actions which would have been intended to de-escalate the events or contain the incident until more help could arrive.
d) As the supervisor on scene, you failed to take any action which would have been intended to direct, control, or otherwise assist Trooper Lawyer in obtaining a professional, safe, and lawful outcome to this incident.
e) The level of physical force used in this incident was neither reasonable nor necessary and resulted in the death of Jason Kemp.
f) When viewed in totality, your actions were contrary to the training you had received as a member of the Colorado State Patrol, the policies and procedures of this agency, and the constitution you swore an oath to uphold.

135. Major Bratt found that Complainant's actions violated the following General Orders:

a) General Order Number One: Members will obey the law;
b) General Order Number Two: Members will obey lawful orders and directions. Orders may appear as, but are not limited to, verbal directives, written directives, memorandums, policies, rules, procedures, goals, mission and vision statements.

c) General Order Number Five: Members will conduct themselves so as to preserve the public trust and will utilize their authority appropriately.
d) General Order Number Six: Members will avoid any conduct that may bring discredit upon, or undermine the credibility of themselves, the Colorado State Patrol, or the police profession.
e) General Order Number Seven: Members will conduct themselves to reflect the highest degree of professionalism and integrity and to ensure that all people are treated with fairness, courtesy, and respect.
f) General Order Number Eight: Members will conduct themselves so that no other person is endangered unnecessarily and will perform only those specialized tasks for which they are authorized and properly trained, or certified.

136. On the same date that Complainant met with Major Bratt concerning Major Bratt's disciplinary determination, Major Bratt met with his supervisor, Lt. Col. Leffler, and received a corrective action for his leadership and supervision related to allegations that one of the District Four captains had instituted DUI and seatbelt violation quotas. The date of Major Bratt's receipt of his corrective action was chosen because Major Bratt was to be in Denver on that date to speak with Complainant.

137. Complainant filed a timely appeal of his termination from employment with the Board.

DISCUSSION

I. GENERAL

A. Burden of Proof

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 perform competently;
2. willful misconduct or violation of these or department rules or law that affect the ability to perform the job;
3. false statements of fact during the application process for a state position;
4. willful failure to perform, including failure to plan or evaluate performance in a timely manner, or inability to perform; and
5. final conviction of a felony or any other offense involving moral turpitude that adversely affects the employee's ability to perform or may have an adverse effect on the department if the employment is continued.

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 704.

The Board may reverse or modify 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. Complainant committed the acts for which he was disciplined.

One of the essential functions of a *de novo* hearing process is to permit the Board's administrative law judge to evaluate the credibility of witnesses and to determine whether Respondent has proven the historical facts which are the foundation of any disciplinary decision by a preponderance of the evidence. *See Charnes v. Lobato*, 743 P.2d 27, 32 (Colo. 1987)("An administrative hearing officer functions as the trier of fact, makes determinations of witness' credibility, and weighs the evidence presented at the hearing"); *Colorado Ethics Watch v. City and County of Broomfield*, 203 P.3d 623, 626 (Colo.App. 2009)(holding that "[w]here conflicting testimony is presented in an administrative hearing, the credibility of the witnesses and the weight to be given their testimony are decisions within the province of the presiding officer").

In this case, the factual background was thoroughly evaluated through the CIT investigation process. While the parties at hearing often sharply diverged on their interpretation and legal analysis of those facts, the underlying factual information was not often in dispute. There was no significant material dispute, for example, over what the dispatch center told the officers in this case, or what Trooper Lawyer and Complainant knew by the time they were approaching the front door of 103 B Glade Park Road.

As a result, Respondent has successfully demonstrated by a preponderance of the evidence that Complainant has committed the acts for which he was disciplined.

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

The Fourth Amendment to the U.S. Constitution and its Colorado counterpart, Colo.Const. Art. II, Sec. 7, "protect citizens against invasion of their privacy in a variety of settings." *People v. O'Hearn*, 931 P.2d 1168, 1172 (Colo. 1997). "The clearest right is to be free from unreasonable governmental intrusion into one's home." *Id.* at 1173. "Fourth Amendment jurisprudence discourages police officers from showing themselves at the door or window of a person's home to see what may develop because of their presence, such as alarm or retreat by the occupants therein." *People v. Mendoza-Balderama*, 981 P.2d 150, 156 (Colo. 1999).

Unreasonable "physical entry of the home" is the "chief evil" against which the Fourth Amendment is directed. *Payton v. New York*, 445 U.S. 573, 589-90, 100 S.Ct. 1371, 1381-82, 63 L.Ed.2d 639 (1980) See also Payton, 445 U.S. at 590 ("At the very core [pr the fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion").

As one of Respondent's employees, Complainant was expected "to perform his duties and conduct himself in accordance with generally accepted standards and with specific standards prescribed by law ... or any appointing authority." C.R.S. § 24-50-116.

The parties were fundamentally in agreement at hearing that the basic Fourth Amendment standards applied to this case. "In the course of making an investigative inquiry at a person's residence, a police officer is not entitled to walk past the person who opens the door, without obtaining permission to enter." *O'Hearn*, 931 P.2d at 1174. *See also Mendoza-Balderama*, 981 P.2d at 156 ("The warrantless entry into a person's home to conduct a search

of that home constitutes an unreasonable search unless there exists both probable cause and exigent circumstances"); *People v. Miller*, 773 P.2d 1053, 1057 (Colo. 1989)(holding that a warrantless entry of a home requires proof of probable cause and exigent circumstances, and that "[t]hese two requirements are determined by evaluating the facts known at the time of the warrantless entry and search").

Major Bratt's first step in his analysis concluded that Complainant needed both probable cause and exigent circumstances before he opened the door to 103 B Glade Park Road, and before he attempted to force his way into the house. This first step of the analysis is both well-grounded in the law and within the scope of performance expectations for State Patrol officers.

(1) Respondent's interpretations of the applicable standards of conduct are reasonable under the law:

Complainant's primary contention at hearing was that Major Bratt had misconstrued the law and the standards of conduct expected of Complainant with regard to probable cause and exigent circumstances. We turn, accordingly, to an evaluation of whether Major Bratt's interpretations of the applicable standards of conduct were reasonable ones supported by the law.

(a) Complainant had only a general description of a possibly intoxicated driver and limited information on criminal activity, and could not justify probable cause to arrest the man at the door:

Complainant argues that the Major was incorrect in concluding that Complainant failed to have probable cause to arrest the man at the door of 103 B Glade Park Road at the time he was attempting to force entry into the home. He argues that the information provided by dispatch as to a possible DUI accident, the information provided by Mr. Arellano as to the driver of the vehicle and the possibility of intoxication, along with the scrape marks on the road and the divot in the yard, constituted probable cause to arrest the man at the door of 103 B Glade Park Road when he failed to respond to the officers' repeated knocks on the door.

"Probable cause to arrest exists when, under the totality of the circumstances at the time of arrest, the objective facts and circumstances available to a reasonably cautious officer at the item of arrest justify the belief that (1) an offense has been or is being committed (2) by the person arrested." *People v. King*, 16 P.3d 807, 813 (Colo. 2001). *See also People v. Lewis*, 975 P.2d 160, 167 (Colo. 1999)("[P]robable cause to arrest exists where the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a person in believing that the defendant has committed a crime"). "[S]uspicion alone does not amount to probable cause." *People v. Davis*, 903 P.2d 1, 4 (Colo. 1995).

"Probable cause is not measured by a 'more likely true than false' level of certitude but by a common-sense, non-technical standard of reasonable cause to believe, with due consideration being given to a police officer's experience and training in determining the significance of his observations to the ultimate issue of probable cause." *King*, 16 P.3d at 813.

The requirement that there be probable cause to believe the person arrested has committed or is committing the crime "creates a nexus between the suspected crime and the person arrested." *Id.* "This nexus requirement protects people from, among other things, the harmful effects of general warrants, the abolition of which was one of the primary motivations behind the passage of the Fourth Amendment." *Id.* (footnote and internal citations omitted). "The requirement of probable cause has roots that are deep in our history. The general warrant,

in which the name of the person to be arrested was left blank ... perpetuated the oppressive practice of allowing the police to arrest and search on suspicion." *Id.* (internal quotations and citations omitted). "The touchstone supporting police action is the specificity of the information upon which they act." *King*, 16 P.3d at 815 (internal quotation omitted).

Major Bratt noted that the information collected by Complainant and Trooper Lawyer prior to knocking on the door of the duplex on the issue of who may be responsible for any crime consisted primarily of an incomplete physical description of the driver, an accident scene with little information about how the accident occurred, and the suspicion by a neighbor who did not have direct contact with the driver that the driver was intoxicated. This limited information was further diluted in its value by the fact that there were three or four males involved in this incident who had all entered the same house. Neither Complainant nor Trooper Lawyer obtained descriptions of these other males. Without any way to establish a positive identification of one of those males as the driver of the vehicle, Major Bratt considered Complainant's information to be sufficient to prompt an investigation, but not yet sufficient to meet the requirements for probable cause.

Major Bratt's interpretation is consistent with Colorado law on the inability of general descriptions to provide sufficient evidence to support probable cause. *See People v. Lewis*, 975 P.2d 160, 167-68 (Colo. 1999)(holding that the sighting of a person whose general appearance was consistent with the description of a robber, i.e. "a tall black male wearing dark clothing" was not sufficient to establish probable cause, even when the other circumstances of the arrest were taken into account). *See also King*, 16 P.3d at 817 (holding that a description where the only available distinguishing feature was that one of two men had long, light hair, combined with the fact that two men had been sighted at a late hour in a remote place, did not suffice to establish probable cause that the men arrested were involved in criminal activity).

Major Bratt was also concerned that Complainant and Trooper Lawyer had not established all of the elements of the crimes that potentially had occurred. The information on possible intoxication, for example, had not been confirmed by any observation of red eyes, slurred speech, the smell of alcohol, or other more probative indicators of intoxication by the time that Complainant opened the door to 103 B Glade Park Road. The credible and persuasive evidence at hearing established, in fact, that Complainant did not have a chance to evaluate Mr. Kemp's intoxication level at any point during the course of this incident.

Major Bratt's concern that probable cause had not yet been established when Complainant took actions which required that he have probable cause was a reasonable concern based upon the applicable law. It was not error for Respondent to hold Complainant responsible for a failure to develop adequate information to support probable cause before attempting to enter 103 B Glade Park Road.

(b) Complainant did not have exigent circumstances to justify a warrantless entry:

Complainant also argues that his warrantless entry into the duplex was justified by both his concern that the accident had caused injury and his need to preserve blood alcohol content evidence. These explanations touch upon two types of exigent circumstances: 1) the prevention of the immediate destruction of evidence; and 2) the emergency aid exception.

In evaluating whether an exigent circumstance existed, the law requires that an officer's decision be objectively reasonable in light of the facts known at the time of the warrantless

entry. *People v. Miller*, 773 P.2d 1053, 1057 (Colo. 1989). *See also Brigham City v. Stuart*, 547 U.S. 398, 404, 126 L.ed.2d 650 (2006)(holding that, in evaluating whether an officer's actions were "reasonable," the officer's "subjective motivation is irrelevant"; the inquiry is whether the circumstances, viewed objectively, would justify the action taken).

Generally, there are three circumstances under Colorado precedent in which exigent circumstances will justify an otherwise unauthorized entry into a home: 1) the police are engaged in "hot pursuit"; 2) there is a risk of immediate destruction of evidence; and 3) there is a colorable claim of emergency threatening the life or safety of another. *People v. Kluhsman*, 980 P.2d 529, 5334 (Colo. 1999).

Complainant explained to the CIT investigators, during the Board Rule 6-10 meeting, and at hearing that he was, in part, concerned about the preservation of Mr. Kemp's blood alcohol content (BAC) when he attempted entry into the duplex. Complainant contends that the law did not rule out using force to obtain a BAC until the *People v. Wehmas*, 246 P.3d 642 (Colo. 2010) decision was issued in November of 2010. The evidence collected in the CIT investigation and at hearing demonstrated, however, that Complainant had not been taught that such a procedure was available for non-felony crimes and that Complainant did not know of any uses of such a procedure for misdemeanor DUI. Complainant's expert witness at hearing acknowledged that such a procedure would be likely to result in the suppression of evidence because of the Fourth Amendment violation involved. Major Bratt knew of no such approved procedure for CSP officers. Moreover, as the *Wehmas* decision itself acknowledges, the U.S. Supreme Court had long established in *Welsh v. Wisconsin*, 466 U.S. 740, 749, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984) that, even if BAC might dissipate in the time taken to obtain a warrant, a warrantless home arrest cannot be upheld where the state's expressed interest in the offense (as portrayed by the non-criminal penalty at the time) was a minor interest. *Wehmas*, 246 P.3d at 647. Given this line of analysis and precedent, the county court in *Wehmas* suppressed the BAC evidence procured during a warrantless arrest for misdemeanor DUI, and the District Court affirmed the county court's suppression of the evidence as a Fourth Amendment violation. The Colorado Supreme Court reached the same result, albeit on a slightly different analysis. The fact that the *Wehmas* decision was issued several months after the shooting in this case does not persuasively demonstrate that there had been a change in the law after this incident, or in any persuasive way provide authority for Complainant's argument.

Major Bratt's decision that a warrantless entry made to preserve BAC for a misdemeanor DUI charge was not authorized by either Colorado exigent circumstances law or CSP practice and policy was well-grounded on the facts and law developed at hearing.

Complainant additionally argued repeatedly at the CIT investigation stage, the Board Rule 6-10 meeting with Major Bratt, and the hearing in this case that his knowledge as an accident reconstructionist gave him sufficient information to justify involving the emergency aid exception to the warrant requirement.

"The emergency aid exception also requires a 'colorable claim of an emergency threatening the life or safety of another.'" *People v. Pate*, 71 P.3d 1005, 1101 (Colo. 2003). Unlike the other exigent circumstances, the emergency aid exception requires the government "to prove the existence of 'an immediate crisis and the probability that police assistance will be helpful" rather than to demonstrate probable cause of criminal activity. *Id. See also People v. Amato*, 562 P.2d 422, 424 (Colo. 1977)(holding that prior Colorado case law "leave[s] no doubt that obtaining evidence or seizing contraband under the emergency doctrine must involve an immediate crisis and the probability that assistance will be helpful").

"T]he reasonable basis [requirement] allows police to make warrantless entries only when there are facts to support the conclusion that someone's life or safety is seriously threatened. [T]he emergency aid exception does not give police officers *carte blanche* to make a warrantless entry whenever there is a theoretical possibility that another's life or safety is in danger; rather, there must be a colorable claim that another's life or safety is in danger." *Pate*, 71 P.3d at 1011 (internal citations and quotations omitted).

In this case, all that Complainant had before him which suggested injury was the fact that the accident apparently occurred at 20 – 30 miles per hour and involved a rotation of the vehicle when the trailer lost the jet ski. There was no actual evidence of injury noted by Complainant. There was no report of an observation of injury, no blood observed, no damage to the truck that would document an injury, and no visible injury to Mr. Kemp when he was opposing Complainant's efforts at the door. Major Bratt's ultimate conclusion that the indication of injury was nothing more than a theoretical possibility in this case is well-grounded in the facts and the law.[1]

Colorado law also permits a finding of exigent circumstances allowing a warrantless entry into a home to be established outside of the three basic exigent circumstances described in *Pate*. Exigent circumstances to enter a home without a warrant may be justified when seven pertinent factors are considered:

1) a grave offense is involved, particularly a crime of violence;
2) the suspect is reasonably believed to be armed;
3) there exists a clear showing of probable cause to believe that the suspect committed the crime;
4) there is a strong reason to believe that the suspect is in the premises being entered;
5) the likelihood that the suspect will escape if not swiftly apprehended;
6) the entry is made peaceably; and
7) whether the warrantless entry is made at night.

People v. Miller, 773 P.2d 1052, 1057 (Colo. 1989). *See also Wehmas*, 246 P.3d at 648 (applying the exigent circumstances test in *Miller* to the question of whether the physiological changes to blood alcohol levels that occur over time created an exigent circumstance allowing the warrantless entry into a home to preserve BAC in a misdemeanor DUI case; holding that warrantless entries are not authorized for such purposes).

Under the circumstances of this case, only one or two of the described circumstances are arguably present. There was a good reason to believe that the driver of the truck was present at 103 B Glade Park Road. Moreover, the entry into the house happened shortly before dark, but not at night. The most serious crime that potentially had been committed, however, was a misdemeanor DUI, and there was no indication that the driver or anyone else at the home was armed. For the reasons already cited, Complainant had cause to investigate but no probable cause as of the time that he approached the duplex and attempted entry. There was no reason provided which would have made it likely that Mr. Kemp was going to escape. Even

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[1] Major Bratt testified that he did not believe that Complainant had ever considered injury as a possibility because Complainant took no actions consistent with such a belief. Given that the law evaluates the presence of an exigent circumstance claim based upon an objective review of the circumstances, rather than a subjective review of the officer's actual motivations, Major Bratt's credibility finding is not dispositive of the issue.

with only two officers making the initial contact and before the call for additional officers was aired, Complainant was able to detain both of the males who attempted to leave the house out the back door. Finally, the attempted entry was decidedly not a peaceful entry. The description of exigent circumstances provided by *Miller* and related cases does not authorize Complainant's actions in this incident.

Major Bratt's conclusion that Complainant's actions at the door of 103 B Glade Park Road were not justified by exigent circumstances was a reasonable conclusion based upon Colorado law and the facts of this case. Complainant's contention that Major Bratt has misconstrued the law on probable cause and exigent circumstances is rejected as an unreasonable interpretation of the applicable standards of conduct.

(2) Respondent's decision to impose discipline was neither arbitrary nor capricious:

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; or 3) exercised its discretion in such manner after a consideration of evidence before it as to clearly 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).

Major Bratt performed a patient and thorough investigation into the circumstances of Complainant's actions on July 20, 2010. He utilized both the CIT investigation process as well as the CSP Internal Affairs process to provide him with a comprehensive understanding of the incident. He utilized a lengthy Board Rule 6-10 meeting process with both Complainant and Trooper Lawyer to further develop the facts and the decision making on the day in question. Complainant presented no persuasive evidence that there was information that should have been considered by Major Bratt that was not considered.

The evidence at hearing also established that Major Bratt considered all of the material information in his possession concerning each step of Complainant's actions. He acted reasonably and thoroughly when he decided to walk through the available evidence with a focus on each critical point of the incident. By taking this approach to his analysis, he was able to identify what Complainant and Trooper Lawyer knew and saw at each step. This style of analysis allowed Major Bratt to properly evaluate the legal issues in this case. The law focuses the analysis of each issue on the facts known at the time by the officers. The witnesses who testified at hearing about information discovered during the CIT investigation, but which was not known to the officers at the time of the incident, performed an improper and unpersuasive evaluation of the evidence. Major Bratt's decision to parse the information so that he had identified what Complainant and Trooper Lawyer had known at each step allowed Major Bratt to perform a legally sound and persuasive evaluation of the facts. The evidence at hearing established that Major Bratt gave honest and candid consideration to all of the evidence he had before him.

Finally, the evidence at hearing also demonstrated that Major Bratt reached reasonable conclusions based upon his review. There was no persuasive indication that Major Bratt did not take the circumstances faced by Complainant into account in reaching his decision, or that

he held Complainant to an unfair or unreasonable standard of performance. Major Bratt also took the bedrock constitutional importance of the Fourth Amendment into account in evaluating the seriousness of the incident, and such a consideration is necessary and reasonable in this case.

In short, there was no persuasive evidence that Major Bratt's decision to discipline Complainant for his role in the events of July 20, 2010 was an arbitrary or capricious one.

(3) Major Bratt was not incapacitated as an appointing authority:

Complainant argues that Major Bratt's involvement in his own pending disciplinary action made him unfit to decide the issue of Complainant's disciplinary action. This argument is unpersuasive. There is no requirement under Board rules or other authority that would render an appointing authority unable to carry out his duties because of any pending disciplinary investigation. The issue would arise under the rules only if Major Bratt's appointing authority had been limited in some way or suspended for the duration of, or as a result of, the disciplinary investigation. There is no indication in this case that such a limitation was imposed on Major Bratt's authority.

More importantly, any concerns about bias or a willingness to unfairly deal with an employee would be captured within one or more of the three steps of analysis for an arbitrary or capricious action. The disciplinary action, and the process used to reach that decision, must meet the standards to constitute a non-arbitrary and non-capricious personnel action. If Major Bratt had conducted a poor investigation, made unreasonable or unfair judgments, or otherwise reached a conclusion that was poorly supported, such a result would be part of the *Lawley* analysis.

There is no persuasive reason to find that Major Bratt's investigation and his conclusions in this case were in some manner impaired or unfair because of CSP's concurrent investigation into other District Four issues.

(4) Respondent's action was not contrary to rule or law:

(a) Board Rule 6-9:

Respondent's disciplinary action comports with Board Rule 6-9, 4 CCR 801, which requires that a decision to take disciplinary action "shall be based on the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances. Information presented by the employee must also be considered."

Complainant objects to the fact that Major Bratt did not review all of Complainant's personnel file, but depended upon human resources staff to inform him of the contents of the file. The better practice for any appointing authority is to always review the entire file before reaching a final decision on discipline. In this case, however, the Major did request critical portions of Complainant's file be relayed to him by phone. More importantly, Major Bratt considered Complainant's performance prior to the July 20, 2010 incident to be exemplary, and made his decision on discipline with the assumption of a very high level of prior performance. Under such circumstances, there has been no violation of Board Rule 6-9.

Complainant also argues that discipline was imposed because Major Bratt ignored Complainant's mitigating statements during the Board Rule 6-10 meeting.

During the Board Rule 6-10 meeting, Complainant told Major Bratt that he would be an even better officer if permitted to return to his position. Complainant argues that Major Bratt did not take this into consideration when deciding whether to return him to duty. The evidence shows, however, that while Complainant did insist that he would be a better officer because of this incident, Complainant also repeatedly told Major Bratt were that he did nothing wrong. At hearing, Major Bratt expressed his concern that Complainant had not learned the important lessons from the events and may be likely to repeat his missteps because he had refused to acknowledge that his decision making was flawed. Complainant argued at hearing that it was not fair to judge his readiness to return to duty from his denials during the Board Rule 6-10 meeting because he was facing criminal prosecution at the time of the Board Rule 6-10 meeting, and that his denials should be viewed in light of an impending criminal trial.

Complainant's explanations for his denials at the Board Rule 6-10 meeting in this case are not persuasive.

First, Complainant's statements in the Board Rule 6-10 meeting were made after Complainant had been issued a *Garrity* warning. The *Garrity* warning explicitly told Complainant that the statements he made during the administrative investigation could not be used against him in a criminal case. If Complainant had concerns about his performance, he could have expressed them to Major Bratt without those concerns becoming part of any criminal case against him.

More importantly, Complainant did not substantially change his denials at hearing. Complainant offered essentially the same arguments at hearing as he did during the Board Rule 6-10 meeting as to why he felt his actions met the requirements of the Fourth Amendment. Complainant's assurance that he would be a better law enforcement officer is sharply contradicted by his repeated insistence that there was no problem with his actions on July 20, 2010.

There was no violation of Board Rule 6-9 in Respondent's decision that the nature, extent, and seriousness of the violations in the case required the imposition of discipline.

(b) Progressive Discipline:

Board Rule 6-2, 4 CCR 801, provides that "[a] certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper."

Complainant argues that Complainant's performance history does not include a corrective action for sufficiently similar acts that would allow Respondent to impose discipline in this case rather than a corrective action.

Board Rule 6-2, however, does not require that there be a corrective action in every instance prior to the imposition of discipline. In this case, Complainant ignored a fundamental and bedrock constitutional value; that is, the limitation on police action when it involves a warrantless entry into a home. Complainant's aggressive reaction to Mr. Kemp telling him to get a warrant if he wanted to come inside also led to the shooting of Mr. Kemp.

These are acts that are so serious and in such flagrant disregard of the proper standards of conduct that immediate discipline is warranted.

Under such circumstances, Respondent's decision to impose discipline is not a violation of Board Rule 6-2.

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

The next issue is whether termination was within the range of reasonable alternatives available to Respondent. Complainant objected to the reasonableness of the decision to terminate his employment on several grounds.

Major Bratt found that the events of July 20, 2010 were so out of line from what should have occurred, and the consequences of those actions were so severe, that only termination of employment would adequately address the issue. Major Bratt was also concerned that Complainant could repeat his mistakes because he had not accepted that his actions were contrary to law and CSP policy.

Major Bratt's concerns about the importance of the issues raised in this case are well-grounded. The Fourth Amendment is one of the primary limitations placed on the power of law enforcement in this country. Respondent's recognition that CSP's willingness to honor and obey the law, including the limitations placed on law enforcement in the Fourth Amendment, is a critical component to the public trust of the agency.

Complainant contends that he is being punished as if he was the officer who had shot Mr. Kemp. This argument ignores the actions that Complainant took, as a responding officer and as the lead officer, in violating the Fourth Amendment in this case. Additionally, Complainant's argument ignores the problem with Complainant's repeated and consistent denials that he did anything wrong in this incident. By taking such a position, it would be unreasonable for Respondent to conclude that Complainant would not repeat these actions in the future.

Complainant also argues that the sanction of termination was imposed because Major Bratt ignored Complainant's mitigating statements during the Board Rule 6-10 meeting. As explained above, however, Complainant's assertion that he would be a better officer because of this experience rings hollow once Complainant repeatedly denies that there was any problem, and when he blames others for an issues.

At hearing, Complainant argues that it was not fair to judge his readiness to return to duty from his denials at the Board Rule 6-10 meeting because he was facing criminal prosecution at the time of the Board Rule 6-10 meeting, and that his denials should be viewed in light of an impending criminal trial.

Complainant's explanations for his denials at the Board Rule 6-10 meeting are not persuasive.

First, Complainant's statements in the Board Rule 6-10 meeting were made after Complainant had been issued a *Garrity* warning. The *Garrity* warning explicitly told Complainant that the statements he made during the administrative investigation could not be used against him in a criminal case. If Complainant had concerns about his performance, he could have expressed them to Major Bratt without those concerns becoming part of any criminal case against him.

More importantly, Complainant did not substantially change his denials at hearing. Complainant offered essentially the same arguments at hearing as he did during the Board Rule 6-10 meeting as to why he felt his actions met the requirements of the Fourth Amendment. Additionally, Complainant also argued repeatedly at hearing that, if there had been improper actions in this case, he should not be held responsible for those actions. He argued that the law had changed with the issuance of *Wehmas*. He argued that CSP had failed to train him sufficiently. He also argued that the events at 103 B Glade Park Road were Sgt. Dunlap's responsibility rather than his.

None of these arguments constitute mitigating circumstances for Complainant. As Complainant's initial interviews by the CIT investigators show, Complainant was aware of the basic Fourth Amendment requirements of probable cause and exigent circumstances. He understood how to obtain a search warrant. He was also acting as the lead officer on the scene and he made the decisions as to how to investigate the incident and how to respond to Mr. Kemp. Sgt. Dunlap's serendipitous presence in the area was only as a back up, and the sergeant's knowledge of the issues was limited to the radio broadcasts to and from dispatch. It is not reasonable for Complainant to argue that, under such circumstances, Sgt. Dunlap was the responsible officer in this case.

Additionally, there was no persuasive reason presented to find that there was actual confusion in the law on the basic requirements for a warrantless entry into a home when blood alcohol levels are involved. There was no persuasive evidence that Complainant had been taught that it was lawful to make warrantless entry into a home to preserve a blood alcohol content level for a possible DUI. The fact that the Colorado Supreme Court issued an opinion saying precisely that a few months after this incident does not mean that there had been a material change in the law after July 20, 2010, or that there had been confusion in the CSP practice and expectations on this issue prior to the opinion.

Given the seriousness of the conduct at issue in this case, and the life and death consequences resulting from that conduct, termination of employment is within the range of reasonable disciplinary alternatives available to Respondent in this case.

D. An award of back pay or front pay is not warranted.

Complainant has specifically asked for an award of back pay and front pay, in addition to his request to be reinstated.

An award of back pay may be ordered when an employee is reinstated to his position because of a failure of the agency to prove sufficient grounds for termination at hearing. *See Department of Health v. Donahue*, 690 P.2d 243, 250 (Colo. 1984)(holding that, "[a]ny remedy fashioned ... should equal, to the extent practicable, the wrong actually sustained" by the employee). An award of back pay is also a possible equitable remedy when the employee has suffered a violation of his rights in the personnel process used by the agency, even thought reinstatement to the position is not warranted. *See id. Cf. McCoy v. Department of Social Services*, 796 P.2d 77, 79 (Colo.App. 1990)(holding that a back pay award based upon a procedural violation created an improper windfall for the employee when the employee had already been paid all that she was entitled to if no procedural error had occurred). In this case, Complainant is not entitled to reinstatement, and no procedural violation has been identified. Complainant has not, therefore, suffered a legal harm that would warrant the remedy of an award of back pay.

An award of front pay constitutes a different form of remedy than back pay. Front pay is an award of future wages, and it is a form of equitable relief when an employee cannot be placed back into his old position because of the circumstances of the workplace. *Pitre v. Western Electric Co., Inc.*, 843 F.2d 1262 (10th Cir 1988)(holding that front pay "[i]s intended to compensate victims of discrimination for the continuing future effects of discrimination until the victim can be made whole"). *See also Medlock v. Ortho Biotech*, Inc., 164 F.3d 545, 556 (10th Cir. 1999)(holding that front pay is an equitable remedy under a 42 U.S.C. section 1981 claim, and not a form of compensatory damages). Front pay is an appropriate remedy in lieu of reinstatement. *See Bruno v. Western Electric Co.*, 829 F.2d 957, 966 (10th Cir. 1987)(holding that front pay is merely a substitute for reinstatement when reinstatement is not feasible). Given that Complainant's termination from employment has been upheld in this case, front pay is also not an available equitable award in this case.

Complainant is not entitled to an award of either back pay or front pay.

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, and

4. Neither an award of back pay nor front pay is warranted in this case.

ORDER

Respondent's disciplinary action is **affirmed.** The termination of Complainant's employment is affirmed. Complainant's appeal is dismissed with prejudice.

Dated this 31st day of May, 2013 at Denver, Colorado.

[redacted]

Denise DeForest
Administrative Law Judge
State Personnel Board
633 – 17th Street, Suite 1320
Denver, CO 80202-3640
(303) 866-3300

CERTIFICATE OF MAILING

This is to certify that on the 3rd day of June, 2013, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Bernard Woessner

[redacted]

Sabrina Jensen

[redacted]

[redacted]

Andrea Woods

NOTICE OF APPEAL RIGHTS
EACH PARTY HAS THE FOLLOWING RIGHTS

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

RECORD ON APPEAL

The cost to prepare the electronic record on appeal in this case is $5.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

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

BRIEFS ON APPEAL

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

ORAL ARGUMENT ON APPEAL

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

PETITION FOR RECONSIDERATION

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