

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2017B045

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

KELLY PICKERING,
Complainant,

v.

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

Administrative Law Judge ("ALJ") Rick Dindinger held a commencement on April 17, 2017, and an evidentiary hearing on July 25 and 27, 2017. Both were held at the State Personnel Board, 1525 Sherman Street, Denver, Colorado. The parties filed written closing arguments with the Board on August 7, 2017. Marc F. Colin, Esq. and Carrie L. Slinkard, Esq., of Bruno, Colin & Lowe, P.C., represented Complainant Kelly Pickering. Molly A. Moats, Esq., Senior Assistant Attorney General of the State of Colorado, represented Respondent.

MATTER APPEALED

Complainant, a certified state employee, appeals a 16-hour unpaid suspension on grounds that it was arbitrary, capricious, or contrary to rule or law. Complainant requests that the State Personnel Board reverse the disciplinary action.

Respondent argues that the disciplinary action was not arbitrary, capricious, or contrary to rule or law. Respondent requests that this tribunal affirm the discipline.

For the reasons discussed below, the disciplinary action is **affirmed**.

ISSUES

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

FINDINGS OF FACT

Background

1. Complainant Kelly Pickering served in the United States Navy for 22 years.
2. Complainant began his employment with Respondent in 1994. (Stipulated fact.)
3. Respondent promoted Complainant to Sergeant in February 2011. (Stipulated fact.)

4. As a Sergeant, Complainant supervises the daily operation and personnel of a specific troop or section and plans, organizes, and directs the activities of members within his span of control. (Stipulated fact.)
5. Complainant has received extensive training during his employment with Respondent. This training includes attending the Colorado State Patrol Academy in 1994, Respondent's annual refresher courses, Respondent's training bulletins, tactical firearms training, financial investigation training at Quantico, non-commissioned officer training, and other trainings.
6. Complainant has participated in hundreds of traffic stops both as a Sergeant and Trooper.
7. Complainant's performance history reflects a successful career with Respondent. He is highly proficient.
8. Respondent disciplined Complainant on October 16, 2014. That prior discipline related to certain comments that Complainant made during an in-service class he was instructing at the Colorado State Patrol Academy. The prior discipline did not relate to anything improper with a traffic stop.
9. Major David Santos was Complainant's Appointing Authority for all times relevant to this appeal.
10. Major Santos has worked for Respondent for 24 years. Major Santos has served as an instructor at the Colorado State Patrol Academy, including teaching courses relating to arrest control, Pressure Point Control Tactics, and vehicle contacts.

Events of March 10, 2016

11. On Tuesday, March 10, 2016, Respondent's Investigative Services Section (ISS)/K-9 Unit was conducting a Domestic Highway Enforcement surge operation on the I-25 corridor. (Stipulated fact.) Complainant supervises the K-9 unit.
12. Trooper Justin Richards contacted a Camaro for speeding on Interstate 25 near milepost 74 at approximately 17:20 hours. (Stipulated fact.) Complainant was not present during the initial stop and contact. (Stipulated fact.)
13. The Camaro was occupied by German Anchondo-Gonzales and a juvenile female passenger.¹ (Stipulated fact.) Mr. Gonzales was 23 years old. (Stipulated fact.) The juvenile female was 17 years old.
14. Mr. Gonzales did not have a valid driver's license and the juvenile female did not have identification. (Stipulated fact.) Neither individual's identity could be verified. (Stipulated fact.)
15. At 17:20, Mr. Gonzales told Trooper Richards that he did not speak English and required a translator. (Stipulated fact.) Respondent dispatched Trooper Henriquez to the scene at 17:33 to act as a translator. (Stipulated fact.)

¹ The identity of the female passenger is irrelevant for this Initial Decision. Given that she was a minor as of March 10, 2016, the Initial Decision protects her identity by referring to her as "the juvenile female" or simply the "juvenile."

16. Complainant and Trooper Ryan Cox arrived on scene at approximately 17:44 hours. (Stipulated fact.)
17. As a sergeant, Complainant was the supervisor and senior officer at the scene. (Stipulated fact.) Complainant's supervision of the scene started upon his arrival (17:44) and continued until sometime after Trooper Sloan arrived at the scene (20:02).
18. State Patrol members conducted interviews of both Mr. Gonzales and the juvenile female passenger. (Stipulated fact.) Neither Complainant nor anyone else gave Mr. Gonzales a *Miranda* advisement.
19. During the duration of the stop, there were four to six State Patrol members at the scene, with one continuously assigned to Mr. Gonzales.
20. Trooper Henriquez acted as a translator and interviewed Mr. Gonzales. (Stipulated fact.) Trooper Henriquez also translated questions directed to Mr. Gonzales by other State Patrol members at the scene, including Complainant. (Stipulated fact.)
21. Trooper Cox interviewed the juvenile female. (Stipulated fact.)
22. Complainant coordinated the interview conducted by Trooper Henriquez of Mr. Gonzales and the interview of the juvenile female being conducted by Trooper Cox.
23. Between approximately 17:58 and 18:19, Trooper Cox asked the juvenile female the driver's name and she said she was not sure. (Stipulated fact.)
24. Trooper Cox asked the juvenile female to remove her sunglasses and when she did, there was a bruise on her eye and a small amount of blood in her nostril. State Patrol members also noted bruising and/or marks on the juvenile female's forearm. (Stipulated fact.) The juvenile female initially attributed these injuries to an accident while playing football. (Stipulated fact.) Later she claimed that the injuries were inflicted by Mr. Gonzales' ex-wife. (Stipulated fact.)
25. Between approximately 17:20 and 17:49, Mr. Gonzales reported his name as Mario Rojas. (Stipulated fact.) Mr. Gonzales stated he did not know the juvenile female's name. (Stipulated fact.)
26. At 18:18, Complainant told Mr. Gonzales that the vehicle he had been driving was going to be towed and asked him to contact the owner of the vehicle to determine if he wanted to respond to the scene and remove personal property from the vehicle prior to the tow. (Stipulated fact.) Mr. Gonzales reported that the vehicle owner preferred to have the vehicle towed, indicating that he would collect the car at a later time. (Stipulated fact.) Mr. Gonzales was provided a consent to search form for the vehicle and signed the form as "Mauio." (Stipulated fact.)
27. At approximately 18:18, Complainant attempted to locate a Portable Fingerprint Scanner so that both Mr. Gonzales and the juvenile female could be fingerprinted to determine their true identity. (Stipulated fact.) Complainant learned at approximately 18:18 that the Portable Fingerprint Scanner was not available. Although Complainant planned to take Mr. Gonzales to a facility for fingerprinting, Complainant continued to detain Mr. Gonzales at the scene.

28. At approximately 18:30, State Patrol members discovered that the name provided by the juvenile female did not match her identity based on a photograph of the Colorado ID associated with the name she provided. (Stipulated fact.)

29. At 18:34, State Patrol members showed the juvenile female a photograph of the Colorado ID for the person she was claiming to be. (Stipulated fact.) The juvenile then admitted that the person in the photo was her cousin and not her. (Stipulated fact.) The juvenile began crying and told State Patrol members she was scared. (Stipulated fact.) She then provided her correct name to State Patrol members and said she lied because she had a warrant out for her arrest. (Stipulated fact.) The juvenile further advised that the ankle bracelet she was wearing as a condition of her parole was cut off by one of Mr. Gonzales's friends. (Stipulated fact.)

30. After the juvenile female informed State Patrol members of the warrant for her arrest, State Patrol members moved her to a different location. Specifically, State Patrol members moved the juvenile to the passenger's seat of a patrol car with the door closed and a Trooper standing at the door and another Trooper in the driver's seat.

31. Dispatch confirmed the juvenile female's identity at 18:39. (Stipulated fact.) At 18:42, dispatch confirmed an active felony warrant for the juvenile. (Stipulated fact.)

32. The warrant for the juvenile female's arrest was for Absconding While on Parole.

33. At 18:54, the Pueblo Youth Corrections approved the juvenile female for placement into its facility.

34. State Patrol members arrested the juvenile female. Following the juvenile's arrest, neither Complainant nor anyone else put her in handcuffs. Complainant stated he did not place the juvenile in handcuffs "due to her potential victim status and being a minor."

35. Between approximately 18:30 and 18:39, State Patrol members discovered 0.2582 grams of methamphetamine and a pipe inside a plastic milk bottle in the Camaro.

36. Trooper Richards walked over to the patrol vehicle where the juvenile was in custody and asked her about the methamphetamine.

37. Both the juvenile female and Mr. Gonzales denied ownership of the methamphetamine. (Stipulated fact.) The juvenile told State Patrol members the methamphetamine belonged to Mr. Gonzales, and Mr. Gonzales told State Patrol members the methamphetamine belonged to the juvenile. (Stipulated fact.)

38. At approximately 18:49, Complainant contacted Trooper Sloan of the Smuggling and Trafficking Interdiction Section ("STIS"). (Stipulated fact.) Trooper Sloan was and is a specialist in human trafficking investigations. (Stipulated fact.) Complainant requested that Trooper Sloan respond to the scene to investigate the possibility that the juvenile female was a victim of human trafficking. (Stipulated fact.)

39. Trooper Sloan requested that Complainant keep Mr. Gonzales and the juvenile female at the scene for interviewing.

40. At 18:50, Complainant asked Trooper Henriquez to ask Mr. Gonzales how long he and the juvenile female had been traveling together, to which Mr. Gonzales responded to Trooper

Henriquez that he and the juvenile had been traveling together since the previous Monday. (Stipulated fact.) Mr. Gonzales went on to explain to Trooper Henriquez that they had gone to New Mexico where his ex-wife and kids lived. (Stipulated fact.) Complainant then asked Trooper Henriquez to ask Mr. Gonzales if the injuries to the juvenile had been inflicted by his ex-wife as the juvenile was then claiming and Mr. Gonzales confirmed to Trooper Henriquez that this was indeed the case. (Stipulated fact.)

41. A third-party towed the Camaro away from the scene between 19:22 and 20:19.

42. Complainant stated to Trooper Henriquez: "so we do have human trafficking, absolutely, he is the one who took her out of state, drove her out of state and did his business." Complainant made this statement or something similar at 19:46.

43. At approximately 20:02, Trooper Sloan from STIS arrived on scene. (Stipulated fact.) Sometime after Trooper Sloan's arrival, Complainant briefed Trooper Sloan and turned the scene over to him.

44. At 20:19, Mr. Gonzales fled from the scene of the traffic stop. (Stipulated fact.) At that time, State Patrol members had not yet positively identified him. (Stipulated fact.) State Patrol members had told Mr. Gonzales he was not under arrest but would be transported to a different location so his fingerprints could be scanned. (Stipulated fact.)

45. From the time of the initial traffic stop (17:20) until Mr. Gonzales fled (20:19), Mr. Gonzales was detained at the scene. Trooper Henriquez told Mr. Gonzales that he was being detained. State Patrol members (including Complainant) never told Mr. Gonzales that he was free to leave.

46. Mr. Gonzales ran east through the gas pumps and around the south side of the Corner Convenience Store. (Stipulated fact.) State Patrol members, including Complainant, pursued on foot, yelling for Mr. Gonzales to stop. (Stipulated fact.) Mr. Gonzales ran to a pickup truck attached to a flatbed trailer, jumped in the cab, revved the engine and drove off, turning to the left. (Stipulated fact.) The operator of the truck was under the truck effectuating a repair and was barely able to get out from underneath the truck in response to hearing State Patrol members yelling just as Mr. Gonzales drove off with his truck. (Stipulated fact.) Mr. Gonzales drove the truck towards Trooper Richards, who had just come around the north side corner of the convenience store and who was then armed with a Taser. (Stipulated fact.) Independent eyewitnesses reported that they believed that Mr. Gonzales was trying to run Troopers Henriquez and Richards over, as did Troopers Henriquez and Richards. (Stipulated fact.) In response, Trooper Henriquez fired 16 rounds at Mr. Gonzales and Trooper Richards dropped his Taser, drew his pistol and also fired 5 rounds at Mr. Gonzales. (Stipulated fact.) Mr. Gonzales died of multiple gunshot wounds. (Stipulated fact.)

Events subsequent to March 10, 2016

47. Respondent conducted an Administrative Review. (Stipulated fact.) Sergeant Brian DeLange prepared the Administrative Review. Sergeant DeLange works for Respondent as a Lead Investigator.

48. As part of the Administrative Review, Sergeant DeLange interviewed Complainant on August 10, 2016. (Stipulated fact.)

49. Sergeant DeLange issued the final Administrative Review report on September 8, 2016.

50. The Administrative Review is a 37 page document. Recommendations and findings were issued in connection with the Administrative Review. (Stipulated fact.)
51. The Administrative Review contains a detailed timeline of the events that transpired on March 10, 2016. The timeline states that Trooper Henriquez interviewed Mr. Gonzales from 17:52 to 18:54. The timeline also summarizes Mr. Gonzales's responses during that interview.
52. The Administrative Review discusses several of Respondent's policies. In discussing Policy No. 4.02.0301 (providing that Troopers may "briefly detain" persons during investigative stops), the Administrative Review states: "[w]ithin approximately 45 minutes of the initial stop, the troopers on-scene were investigating a multitude of possible offenses without any disposition on the preliminary and/or subsequent violations. This led to an extremely circular investigation . . ."
53. The Administrative Review does not discuss Respondent's Policy No. 4.01.0601 (requiring handcuffing of juveniles if arrested).
54. The Critical Incident Team, comprised of law enforcement personnel responsible for investigation of officer involved shootings, also investigated the events of March 10, 2016. Following its investigation, the Critical Incident Team issued a report and a two-page written conclusion.
55. In part, the Critical Incident Team's two-page conclusion discusses the road side investigation prior to the shooting. Among other things, the Critical Incident Team's two-page conclusion states: "[t]he team did not address the issue of *Miranda* and a reasonable person should have believed they were detained with a 3 hour contact."
56. On November 16, 2016, the District Attorney for the Tenth Judicial District issued a 15-page Decision Letter relating to the deadly shooting.
57. The District Attorney's Decision Letter analyzes whether the use of deadly force was legally justified. The Decision Letter does not evaluate the length of the detention.
58. On December 14, 2016, Major Santos sent Complainant a Notice of Board Rule 6-10 meeting stating in part that information was received that indicated the possible need to administer corrective or disciplinary action based on allegations of Failure/Neglected/Incompetent to Perform Duties stemming from the March 10, 2016 incident. (Stipulated fact.)
59. On December 20, 2016, Major Santos held a Board Rule 6-10 meeting with Complainant. (Stipulated fact.) There was no evidence at the evidentiary hearing of any procedural deficiencies with the Board Rule 6-10 meeting.
60. Prior to issuing discipline, Major Santos reviewed the following: (a) the Administrative Review prepared by Sergeant DeLange; (b) the report and the conclusion of the Critical Incident Team; (c) conversations with members of the Critical Incident Team about matters reviewed by that team; (d) the Decision Letter issued by the District Attorney; (e) Respondent's General Orders and other policies; and (f) Complainant's personnel file. Major Santos also considered Complainant's statements during the Rule 6-10 meeting.
61. On January 27, 2016, Major Santos issued a formal corrective and disciplinary action to Complainant. (Stipulated fact.) Herein, the "Disciplinary Action."

62. The Disciplinary Action charges that Complainant did not perform competently at the traffic stop and investigation. Among other allegations, the Disciplinary Action faults Complainant for failing to handcuff the juvenile female, failing to arrest (and handcuff) Mr. Gonzales, failing to give Mr. Gonzales a *Miranda* advisement, and detaining Mr. Gonzales for more than a brief period.

63. The Disciplinary Action imposed a 16-hour unpaid suspension amounting to a \$750.61 pay deduction and a loss of 1 hour and 50 minutes of leave or \$85.85. (Stipulated fact.)²

64. On February 1, 2017, Complainant appealed his discipline to the State Personnel Board. Complainant did not grieve the corrective action. (Stipulated fact.)

Respondent's policies and procedures

65. Respondent's Policy No. 4.01.0104, titled "Professional Traffic Contacts and Stops," provides the following: "The trooper has discretion to take the appropriate enforcement action necessary to gain voluntary compliance, promote public safety, protect human life and enhance the public trust. The trooper shall rely on their training, experience and the totality of the circumstances to determine the appropriate enforcement action."

66. Respondent's Policy No. 4.01.0104 provides the following definition: "**Stop** is a seizure with limited detention for the purposes of obtaining a person's name and address, identification, and an explanation of the person's actions." (Bold in original.)

67. Respondent's Policy No. 4.01.0201, titled "Enforcement Actions," provides the following: "Troopers and Port of Entry officers have discretion to take enforcement action necessary to gain voluntary compliance, promote public safety, protect human life and enhance public trust. Troopers and Port of Entry officers shall rely on training, experience and the totality of circumstances to determine appropriate enforcement action."

68. Respondent's Policy No. 4.01.0201 also provides the following: "When determining whether to make a probable cause arrest, troopers will consider the severity of the offense, danger posed by the violator, likelihood that the violator will comply with the promise to appear in court, availability of resources, and local directives regarding availability of sheriff's office jail resources."

69. As it pertains to arrests, Respondent's Policy No. 4.01.0201 provides the following operational procedure when there is a warrant for arrest: "Execute valid warrants." With respect to warrantless arrests, Respondent's Policy No. 4.01.0201 provides: "Troopers may make an arrest based on probable cause for certain petty offenses, as well as misdemeanor or felony violations."

70. Respondent's Policy No. 4.01.0601, titled "Juveniles," provides the following purpose statement: "This policy provides guidelines when enforcement action is taken against a juvenile."

71. Respondent's Policy No. 4.01.0601 provides the following operational procedure when arresting a juvenile: "If a juvenile is arrested and is to be processed, troopers will: (a) Properly handcuff, search, and secure the juvenile in a patrol vehicle prior to transport."

² The Disciplinary Action also prohibited voluntary overtime from February 5, 2017 through March 6, 2017. That overtime would have amounted to 10 hours. (Stipulated fact.) The parties have agreed that Complainant may use that 10 hours at any other time this year.

72. Respondent's Policy No. 4.01.0601 also provides the following policy: "Members will take special precautions when dealing with juveniles to ensure that the least coercive methods are used in addressing any problems."

73. Respondent's Policy No. 4.02.0202, titled "Interview, Interrogation and Access to Counsel," provides the following definition: "**Custody** occurs when a reasonable person in the suspect's position would have understood the situation to constitute a restraint on his or her freedom of movement to the degree associated with a formal arrest." (Bold in original.)

74. Respondent's Policy No. 4.02.0202 also provides: "Courts will consider the totality of the circumstances when deciding if a suspect is in custody and requires Miranda."

75. Respondent's Policy No. 4.02.0202 also states: "Troopers shall issue a Miranda warning to all those in custody immediately preceding the initiation of an interrogation."

76. Respondent's Policy No. 4.02.0301, titled "Criminal Procedures," provides that Troopers interact with the public in one of three general ways—consensual encounters, investigative stops, and arrests. During investigative stops, the person is not free to leave. During investigative stops, "Troopers may briefly detain a person in order to obtain an explanation of their actions."

77. Respondent's Policy No. 4.02.0301 also provides the following definition: "**Arrest** occurs when a person is taken into custody by a trooper that causes a significant restraint of their freedom to leave. An arrest requires probable cause that a crime occurred and that the person in custody committed it." (Bold in original.)

78. Respondent's Policy No. 4.02.0301 also provides the following definition: "**Probable cause** exists when an officer can articulate facts that would lead the officer to conclude that there is a fair probability that a person committed a crime. Probable cause requires more facts and certainty than reasonable suspicion." (Bold in original.)

79. Respondent's Policy No. 4.02.0301 also provides the following definition: "**Stop** is a seizure with limited detention for the purposes of obtaining a person's name and address, identification, and an explanation of the person's actions." (Bold in original.)

80. Respondent's Policy No. 4.02.0301 also provides the following operational procedure: "A trooper may make an arrest without a warrant, based on probable cause [when] the person commits a crime in the presence of a trooper."

DISCUSSION

I. THE ACTS UNDERLYING THE DISCIPLINARY ACTION.

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

Hearings to review disciplinary actions taken by appointing authorities are *de novo* proceedings. *Id.* at 705, 708. At the hearing, “the scales are not weighted in any way by the appointing authority’s initial decision to discipline the employee.” *Id.* at 706. “The employer must bear the burden of establishing just cause for [discipline] by a preponderance of the evidence at the hearing before the Personnel Board.” *Id.* at 708. The judge makes “an independent finding of whether the evidence presented justifies [a disciplinary action] for cause.” *Id.* at 706 n.10; *see also* § 24-4-105(14)(a), C.R.S. (“[I]nitial decision shall include a statement of findings and conclusions upon all the material issues of fact . . .”). If Respondent does not meet its burden of proving the underlying reason for discipline, then Respondent has not met its burden of establishing just cause for the discipline. *Kinchen*; § 24-50-125(2) and § 24-50-125(3), C.R.S. (hearing relates to the disciplinary action taken and the matters specifically charged); *Reeb v. Civil Serv. Comm’n*, 503 P.2d 629, 631 (Colo. App. 1972) (failure to prove charges set forth in the “bill of particulars” requires reversal of discipline).

Reasons for discipline listed in Board Rule 6-12 include:

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 of moral turpitude that adversely affects the employee’s ability to perform the job or may have an adverse effect on the department if the employment is continued.

See also § 24-50-125(1), C.R.S. (listing reasons for discipline, including failure to comply with standards of efficient service or competence); § 24-50-116, C.R.S. (employees shall perform duties and conduct themselves “in accordance with generally accepted standards”).

Respondent charges that Complainant did not perform competently at the traffic stop and investigation on March 10, 2016. Among other allegations, the Disciplinary Action faults Complainant for failing to handcuff the juvenile female, failing to arrest (and handcuff) Mr. Gonzales, failing to give Mr. Gonzales a *Miranda* advisement, and detaining Mr. Gonzales for more than a brief period. As discussed below, Respondent proved by a preponderance of the evidence that Complainant did not perform competently.

A. Complainant failed to handcuff the juvenile female following her arrest.

The Disciplinary Action states: “Neither Gonzales nor the minor were handcuffed despite the minor having a warrant for her arrest.” The Disciplinary Action also states: “when you learned that the minor had a warrant for her arrest and also was in possession of a controlled substance, you failed to require your troopers to properly handcuff, search and secure the minor. Instead the minor was placed into the front seat of a patrol car, with no handcuffs.” Respondent’s Policy No. 4.01.0601 provides the following procedure when arresting a juvenile: “[i]f a juvenile is arrested and is to be processed, troopers will: (a) Properly handcuff, search, and secure the juvenile in a patrol vehicle prior to transport.” This policy does not give State Patrol members discretion as to handcuffing when making arrests.

The juvenile female was arrested during the incident on March 10, 2016. Complainant testified at hearing that the juvenile was arrested. The arrest happened when State Patrol members secured the juvenile in a patrol car after she disclosed the warrant for her arrest. At 18:54, the Pueblo Youth Corrections approved the juvenile for placement into its facility. Despite the arrest, Complainant did not put the juvenile female in handcuffs. None of the State Patrol members at the scene put the juvenile in handcuffs. Complainant's failure to handcuff the juvenile female (or to make sure she was handcuffed) runs afoul of Respondent's Policy No. 4.01.0601.

Complainant offers three reasons for failing to handcuff the juvenile female. During discovery, Complainant explained that the juvenile "was not placed in handcuffs due to her potential victim status and being a minor." During his testimony at hearing, Complainant explained that Respondent's policies provide that when dealing with juveniles, State Patrol members will use "the least coercive methods."

As to the juvenile female's "potential victim status," the juvenile's status as a fugitive transcends her *potential* status as a victim. The juvenile advised State Patrol members that her parole ankle bracelet was cut off. The juvenile's arrest warrant was for "Absconding While on Parole." Complainant knew the juvenile was an "escapee." While Complainant knew the juvenile was a fugitive, he only suspected she was a victim. Under these circumstances, it was not reasonable for Complainant to circumvent Respondent's arrest procedures in Policy No. 4.01.0601. It was not enough to "secure" the juvenile in the patrol vehicle; the arrest procedures require handcuffing, searching, and securing.

As to the female "being a minor," Respondent's Policy No. 4.01.0601 does not exempt minors from handcuffing. To the contrary, Policy No. 4.01.0601 specifically applies to juveniles. The Policy is titled "Juveniles." The Policy provides that "[t]his policy provides guidelines when enforcement action is taken against a juvenile." Policy No. 4.01.0601 mandates handcuffing "if a juvenile is arrested." Therefore, the fact that the juvenile female was "a minor" is not a valid reason for failing to handcuff her. Complainant's explanation demonstrates an abuse of any purported discretion.

As to using "the least coercive methods," the general language in Respondent's Policy No. 4.01.0601 about using the least coercive methods must be read in conjunction with the more specific operational procedure in Policy No. 4.01.0601 about handcuffing juveniles when arresting them. While State Patrol members must generally use the "least coercive methods" when dealing with juveniles, if State Patrol members arrest a juvenile, they must: "[p]roperly handcuff, search, and secure the juvenile." The specific operational procedure clarifies that in the event of an arrest, handcuffing prevails over concerns for delicate treatment. Again, Complainant's explanation demonstrates an abuse of any discretion.

There was no evidence at the hearing of any State Patrol trainings or routine practice that might support disposing of handcuffs when making arrests. The lack of such evidence further supports the conclusion that handcuffing is mandatory when making arrests.

Respondent established that Complainant should have handcuffed the juvenile female following her arrest.³ Complainant's decision to forgo handcuffing the juvenile violates Respondent's policies and is in conflict with her status as a fugitive.

³ The evidence at hearing raises an issue as to whether State Patrol members should have given the juvenile female a *Miranda* advisement prior to asking her questions about the methamphetamine. The Disciplinary Action, however, does not fault Complainant for improperly questioning the juvenile.

B. While Complainant had discretion whether to arrest Mr. Gonzales, the failure to formally arrest Mr. Gonzales contributed to lengthening the detention.

The Disciplinary Action faults Complainant for failing to arrest and handcuff Mr. Gonzales as follows: "at 19:46 hours, Trooper [Henriquez] advised you that he [Henriquez] believed there was human trafficking. You acknowledged this statement, but despite this information, no action was taken to handcuff or arrest Gonzales."

During his cross-examination, Complainant admitted telling Trooper Henriquez something similar to the following: "so we do have human trafficking, absolutely, he is the one who took her out of state, drove her out of state and did his business." Complainant's use of the term "absolutely" indicates he concluded unequivocally that Mr. Gonzales had committed a crime. Complainant also articulated facts to support his conclusion ("he is the one who took her out of state, drove her out of state and did his business"). Complainant's statement reveals he believed there was probable cause to arrest Mr. Gonzales for a human trafficking crime.

Complainant made his statement at 19:46, two hours after he arrived at the scene (17:44). During those two hours, (1) State Patrol members observed a bruise on the juvenile female's eye, blood in her nostril, and bruising and/or scratches on her forearm; (2) the juvenile and Mr. Gonzales gave inconsistent answers to questions about their relationship and activities; (3) the juvenile stated she had consensual sex numerous time and in multiple locations with Mr. Gonzales; (4) the juvenile also stated that she had gone to Santa Fe, New Mexico with Mr. Gonzales; (5) Mr. Gonzales indicated he had picked up the juvenile in Denver and taken her to New Mexico; (6) Mr. Gonzales stated she was a "friend with benefits;" and (7) the juvenile said she did not know Mr. Gonzales' name even though they had spent several days together, traveled out-of-state and had sexual relations. Complainant's statement ("so we do have human trafficking, absolutely") reflects a methodical conclusion.

Even if it would have been best for Complainant to formally arrest Mr. Gonzales for human trafficking, making a warrantless arrest is discretionary. Major Santos testified that State Patrol members have discretion as to whether to arrest a suspect if there is no imminent threat to life. Additionally, Respondent's policies repeatedly give State Patrol members discretion with respect to warrantless arrests. Respondent's Policy No. 4.01.0104 gives Troopers "discretion to take the appropriate enforcement action." Respondent's Policy No. 4.01.0201 provides: "Troopers . . . have discretion to take enforcement action necessary to gain voluntary compliance, promote public safety, protect human life and enhance public trust. Troopers . . . shall rely on training, experience and the totality of circumstances to determine appropriate enforcement action." Another section of Respondent's Policy No. 4.01.0201 provides: "Troopers *may make an arrest* based on probable cause for certain petty offenses, as well as misdemeanor or felony violations" (emphasis added). Respondent's Policy No. 4.02.0301 provides the following procedure: "A trooper *may make an arrest* without a warrant, based on probable cause [when] the person commits a crime in the presence of a trooper" (emphasis added).

The evidence at the hearing did not establish that Complainant's failure to formally arrest Mr. Gonzales falls outside the range of Complainant's discretion. Major Santos' testimony was equivocal on when Complainant *should* have arrested Mr. Gonzales. Despite repeated questioning, Major Santos did not testify that Complainant should have arrested Mr. Gonzales upon reaching his conclusion that we "have human trafficking, absolutely." Major Santos' testimony results in the conclusion that the decision to arrest Mr. Gonzales was discretionary (could), not mandatory (should).

Nonetheless, Major Santos reasonably second-guessed Complainant's decision not to formally arrest Mr. Gonzales. An underlying concern in the Disciplinary Action is the length of Mr. Gonzales' detention. Complainant's decision to forego arresting Mr. Gonzales was one of many decisions Complainant made on March 10, 2016, that prolonged the detention. Other decisions also prolonged the detention (for example, the decision at 18:18 to continue detaining Mr. Gonzales at the scene instead of taking him promptly to a facility for fingerprinting). When taken in isolation, Complainant's decisions may fall within the range of his discretion. However, Complainant's collective decisions (including his decision not to formally arrest Mr. Gonzales) contributed to the stop going past the brief period of time permitted under Respondent's policies for investigative detentions.⁴

C. Major Santos testified that Complainant did not violate Respondent's policies pertaining to *Miranda* advisements. Nonetheless, the failure to give Mr. Gonzales a *Miranda* advisement contributed to lengthening the detention.

The Disciplinary Action faults Complainant for failing to give Mr. Gonzales a *Miranda* advisement. Among other things, the Disciplinary Action states: "you stated your goal was to try to keep Gonzales talking voluntarily, without placing him in custody, so that *Miranda* would not be invoked. At this point, there were a minimum of 6 officers present at the scene. You stated that Gonzales was detained and not free to leave, but was not in custody. Meanwhile, you were arranging for a tow truck to pick up the vehicle Gonzales was driving, and you were arranging for Gonzales to be taken to Pueblo to have him finger printed and properly identified."⁵

Respondent's policies require a *Miranda* advisement when questioning suspects who are in custody. Respondent's Policy No. 4.02.0202 states: "[t]roopers shall issue a *Miranda* warning to all those in custody immediately preceding the initiation of an interrogation." Here, the parties stipulated that State Patrol members conducted interviews of Mr. Gonzales. The issue, therefore, is whether Mr. Gonzales was in custody.

The circumstances support finding that Mr. Gonzales was in custody. In particular, (1) initiation of the contact by law enforcement and not Mr. Gonzales; (2) the length of the detention (a minute short of three hours); (3) the number of State Patrol members at the scene (four to six, with one continuously assigned to Mr. Gonzales); and (4) the Camaro being towed away (at 18:18, Complainant told Mr. Gonzales that the Camaro was going to be towed; a third-party towed the Camaro away sometime between 19:22 and 20:19). Complainant's testimony that Mr. Gonzales remained on the scene voluntarily is dubious: (1) Complainant testified that Mr. Gonzales was being detained; (2) Complainant testified that Trooper Henriquez told Mr. Gonzales that he was being detained; and (3) when Mr. Gonzales attempted to leave the scene, State Patrol members (including Complainant) pursued him and yelled for him to stop. Moreover, Complainant never informed Mr. Gonzales that he could leave the scene.

⁴ This ALJ's analysis would be similar if considering Complainant's failure to arrest Mr. Gonzales for possession of methamphetamine. As to an arrest for possession, Major Santos testified that Complainant had discretion to arrest Mr. Gonzales for possession or to carry the investigation further.

⁵ In a similar vein, the Disciplinary Action states: "[y]our concern was that if you handcuffed Gonzales you would have to give him a *Miranda* advisement, and the handcuffing of Gonzales combined with the *Miranda* advisement could negatively impact any impeding investigation of Gonzales into the human trafficking of the minor;" and "during this traffic stop, Gonzales was in a remote area and his car was going to be towed. You had a minimum of four (4) troopers on scene and at times the scene grew to six (6) troopers. You had one (1) trooper assigned to Gonzales and the trooper was standing between Gonzales and his car."

While the circumstances indicate that Mr. Gonzales was in custody, Major Santos testified that he did not believe Complainant violated Respondent's policies regarding *Miranda* advisements. Complainant's attorney asked Major Santos: "Did Sergeant Pickering violate Colorado State Patrol policy by not giving a *Miranda* advisal to the male driver?" In response, Major Santos testified: "I do not see that, no." Given the Appointing Authority's assessment of his subordinate's compliance with Respondent's policies, the weight of the evidence at the hearing does not support a finding that Complainant violated such policies.

Nonetheless, Major Santos was reasonably concerned with Complainant's failure to give a *Miranda* advisement. Complainant could have given a *Miranda* advisement even if doing so was not mandated by Respondent's policies. Moreover, in the context of any criminal proceeding that might have arisen from the stop, a suspect's constitutional protections would have trumped any consideration of Respondent's internal policies. Perhaps most important, Complainant's failure to give Mr. Gonzales a *Miranda* advisement contributed to the stop going past the brief period of time permitted for investigative detentions.

D. The investigative stop of Mr. Gonzales was too long in duration.

The Disciplinary Action faults Complainant for violating Respondent's Policy Number 4.02.031, titled "Criminal Procedures." Policy No. 4.02.0301 provides that Troopers interact with the public in one of three general ways—consensual encounters, investigative stops, and arrests. Further, Policy No. 4.02.0301 provides that during investigative stops, "[t]roopers may *briefly detain* a person in order to obtain an explanation of their actions" (emphasis added). Among other things, the Disciplinary Action states: "Gonzales was detained and not free to leave, but was not in custody. Meanwhile, you were arranging for a tow truck to pick up the vehicle Gonzales was driving, and you were arranging for Gonzales to be taken to Pueblo to have him finger printed and properly identified. Last, you were on the scene of this stop for approximately 1 hour and 37 minutes." Similarly, "at the end of the stop and after nearly two (2) hours had elapsed from the time of the stop [Mr. Gonzales was not free to leave but remained un-handcuffed]" and "you stated during the R6-10 meeting that at times you would be willing to delay an arrest and a *Miranda* advisement to keep the suspect cooperative."⁶

The detention of Mr. Gonzales lasted approximately three hours. The parties stipulated that Trooper Richards stopped the Camaro at 17:20, Complainant arrived at the scene at 17:44, Trooper Sloan arrived at 20:02, and Mr. Gonzales fled the traffic stop at 20:19. When Trooper Sloan arrived, Mr. Gonzales had been detained for two hours and 42 minutes. Assuming Complainant turned the scene over to Trooper Sloan immediately upon Trooper Sloan's arrival, the issue is whether Complainant (or State Patrol members under his direction) may detain Mr. Gonzales for two hours and 42 minutes as an investigative stop.

Pursuant to Respondent's Policy 4.02.0301, an investigative stop permits Troopers to "briefly detain" individuals that Troopers reasonably suspect have engaged in criminal activity. The term "brief" means "1: short in duration, extent, or length 2 a: concise b: curt, abrupt." Websters Ninth New Collegiate Dictionary (1991). A two hours and 42 minute period is not a "brief" duration. To the contrary, a two hour and 42 minute detention is a lengthy time to spend under police interrogation. An investigative stop lasting two hours and 42 minutes violates Respondent's Policy 4.02.0301.

⁶ The references to "1 hour and 37 minutes" and "two (2) hours" are at odds with the parties' stipulations and appear to be miscalculations.

An investigative stop lasting two hours and 42 minutes also runs contrary to legal precedent. While courts have not established a "bright line" setting a definite time limit on investigatory detentions, the U.S. Supreme Court has noted that it has never held a detention of 90 minutes or longer to be anything short of an arrest. *United States v. Place*, 462 U.S. 696, 709-710 (1983) ("we have never approved a seizure of the person for the prolonged 90-minute period involved here"). See also *People v. Hazelhurst*, 662 P.2d 1081, 1086 (Colo. 1983) (twenty to thirty minute detention waiting for arrival of the chief investigative officer went beyond the ambit of an investigatory stop); *People v. Mickens*, 734 P.2d 646, 649 (Colo. App. 1986) ("the one-and-one half hours between the time defendant was initially contacted and the time he was arrested exceeded the permissible duration of an investigatory stop."); *United States v. Edwards*, 103 F.3d 90, 93-94 (10th Cir. 1996) (finding a 45-minute detention illegal). Complainant does not reference any pertinent case permitting a detention of 90 minutes or longer as an investigatory stop.⁷

The stop at 17:20 related to speeding. Trooper Richards initiated the initial contact. The parties agree that the initial stop was a valid contact.

Early on during the traffic stop, State Patrol members were reasonably attempting to ascertain Mr. Gonzales' true identity. Mr. Gonzales gave his name as "Mario Rojas" but signed a form as "Mauio." Mr. Gonzales did not have a valid driver's license. At 18:18, Complainant attempted to locate a Portable Fingerprint Scanner to positively identify Mr. Gonzales. Complainant learned at approximately 18:18 that the Portable Fingerprint Scanner was not available. Instead of taking Mr. Gonzales to a facility for fingerprinting, however, Complainant continued to detain Mr. Gonzales at the scene.

Between approximately 18:30 and 18:39, State Patrol members discovered methamphetamine and a pipe in the Camaro. At that point, Complainant could have arrested Mr. Gonzales (at a minimum for the crimes of driving without a valid license and without insurance). Alternatively, Complainant could have asked Mr. Gonzales to remain voluntarily at the scene. Complainant did neither. Instead, Complainant prolonged the detention.

At approximately 18:49, Complainant contacted Trooper Sloan and asked him to respond to the scene. While Trooper Sloan requested Complainant to keep Mr. Gonzales at the scene, there is no evidence Trooper Sloan directed Complainant to refrain from arresting, handcuffing, or giving *Miranda* advisements. Regardless of Trooper Sloan's requests, Complainant was in charge of the scene until at least 20:02. At 18:49, Complainant could have arrested Mr. Gonzales, asked Mr. Gonzales to remain voluntarily at the scene, and/or informed Mr. Gonzales that he was free to leave. Instead, Complainant extended the detention.

By 18:54, Mr. Gonzales had explained his actions (albeit not necessarily to everyone's belief). The timeline of events in the Administrative Review states that Trooper Henriquez interviewed Mr. Gonzales for more than one hour, from 17:52 to 18:54. The timeline also

⁷ Complainant references *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985). That case upheld a 16-hour detention of an "alimentary canal" drug smuggler at an international border. The smuggler arrived to the United States on a flight from Bogota, Columbia. Custom officials gave the individual the options of returning to Columbia on the next available flight, consenting to an x-ray of her bowels, or remaining in detention until she produced a monitored bowel movement. The individual chose to remain in detention. *Id.* at 535. In upholding the detention, the Court observed that "since the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border" (*Id.* at 537); "the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior" (*Id.* at 538); and "at the border, customs officials . . . are also charged . . . with protecting this Nation from entrants who may bring anything harmful into this country, whether that be communicable diseases, narcotics, or explosives" (*Id.* at 544). The facts in *Montoya de Hernandez* do not apply to an investigatory stop like the one in this appeal.

summarizes explanations that Mr. Gonzales gave for his actions during that interview. Moreover, the parties stipulated:

At 18:50, Sgt. Pickering asked Trooper Henriquez to ask Gonzales how long he and the underage female had been traveling together, to which Gonzales responded to Henriquez that he and the juvenile female had been traveling together since the previous Monday. Gonzales went on to explain to Henriquez that they had gone to New Mexico where his ex-wife and kids lived. Sgt. Pickering then asked Trooper Henriquez to ask Gonzales if the injuries to the juvenile female had been inflicted by his ex-wife as the juvenile female was then claiming and Gonzales confirmed to Henriquez that this was indeed the case.

Thus, by 18:54 at the latest, the continued detention *on scene* clearly exceeded the purpose of the original stop. *See, e.g.*, Respondent's Policy No. 4.01.0104 (defining "stop" as "a seizure with limited detention for the purposes of obtaining a person's name and address, identification, and an explanation of the person's actions"); Respondent's Policy No. 4.02.0301 ("**Stop** is a seizure with limited detention for the purposes of obtaining a person's name and address, identification, and an explanation of the person's actions") (bold in original).⁸ Nonetheless, Complainant continued to detain Mr. Gonzales at the scene.

As discussed in detail above at pages 11-12, Complainant told Trooper Henriquez: "so we do have human trafficking, absolutely." Complainant made that statement or something similar at 19:46. Despite reaching this conclusion, Complainant did not formally arrest Mr. Gonzales. Instead, Complainant further prolonged the detention.

This ALJ is uncertain as to all that transpired between 19:46 and 20:02 (when Trooper Sloan arrived). Nonetheless, it is clear that Complainant lengthened the detention.

Mr. Gonzales fled at 20:19.

Respondent met its burden by a preponderance of the evidence. The two hours and 42 minutes detention here far exceeds the *brief* period of time permitted for investigative stops.

II. THE DISCIPLINE ADMINISTERED.

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

Major Santos used reasonable diligence and care to procure evidence relating to Complainant's actions on March 10, 2016. Prior to making his decision to discipline Complainant,

⁸ *See also People v. Tottenhoff*, 691 P.2d 340, 343 (Colo. 1984) ("Because a limited seizure of the person is authorized on a standard less than that of probable cause, it must be brief in duration, limited in scope, and narrow in purpose").

Major Santos reviewed the following: (a) the Administrative Review prepared by Sergeant DeLange; (b) the report and the conclusion of the Critical Incident Team; (c) conversations with members of the Critical Incident Team about matters reviewed by that team; (d) the Decision Letter issued by the District Attorney; (e) Respondent's General Orders and other policies; and (f) Complainant's personnel file. The Administrative Review itself is a 37 page document that reflects a thorough investigation of the traffic stop and detention. Additionally, Major Santos held a Rule 6-10 meeting with Complainant and considered the statements made by Complainant during that meeting. While Major Santos might have procured other evidence, his diligence was reasonable.

Major Santos gave candid and honest consideration to the evidence. This is evident by his analysis and discussion in the Disciplinary Action. This is also evident from Major Santos' testimony at the hearing about his evaluation of Complainant's actions. Major Santos, however, might have drafted the Disciplinary Action more carefully. For example, the Disciplinary Action states Complainant did not call "a subject matter expert" but acknowledges that Complainant was waiting "until the scene could be turned over to a STIS member."

Complainant argues Major Santos' decision is inconsistent with reports by the Critical Incident Team, Sergeant DeLange, and the District Attorney. Even if true, this argument does not mean Major Santos failed to give candid and honest consideration to the evidence before him. Instead, it means that Major Santos gave greater weight to other sources. One of those other sources is Complainant's own statements. It is worth noting that Complainant himself does not agree with everything in the reports. For example, the Administrative Review states that the juvenile female "was not arrested," but Complainant testified that the juvenile was arrested.

In any event, Major Santos' decision does not conflict with the reports referenced by Complainant. First, Major Santos was deciding whether to discipline Complainant. Neither of the reports speak to that issue. Second, neither of the reports condone Complainant's failure to handcuff the juvenile female or the length of the investigative stop. As to the Critical Incident Team's two-page conclusion, it specifically observes: "[t]he team did not address the issue of *Miranda* and a reasonable person should have believed they were detained with a 3 hour contact." As to the Administrative Review, it does not discuss Respondent's Policy No. 4.01.0601 (requiring handcuffing of juveniles if arrested). While the Administrative Review discusses Policy No. 4.02.0301 (the policy providing that Troopers may "briefly detain" persons during investigative stops), that discussion lends support to Major Santos' decision. Among other things, the Administrative Review states: "[w]ithin approximately 45 minutes of the initial stop, the troopers on-scene were investigating a multitude of possible offenses without any disposition on the preliminary and/or subsequent violations. This led to an extremely circular investigation . . ." As to the District Attorney's Decision Letter, the decision analyzes whether the use of deadly force was legally justified. The Decision Letter does not evaluate the length of the detention.

Reasonable persons fairly and honestly considering the evidence may reach the same (or even more severe) disciplinary decision as the one made by Major Santos. Complainant's performance failure here is sufficiently flagrant or serious that immediate discipline is appropriate. See Board Rule 6-2; see also § 24-50-125(1), C.R.S. A 16-hour unpaid suspension is on the lower end of the scale of possible disciplines. See, e.g., Board Rule 6-12. The 16-hour suspension here is less severe than the discipline administered to Complainant in 2014 for misconduct that did not affect members of the public. While the misconduct underlying the 2014 discipline is different from the performance issue here, Major Santos testified that both disciplines resulted from conduct that reflects poor judgment. Given the anxiety associated with police detentions, and given the opportunity for law enforcement to use overbearing tactics during long detentions, reasonable persons might conclude that the discipline administered here was

generously lenient. The 16-hour suspension evidences that Major Santos gave considerable value to the many positive aspects of Complainant's lengthy public service.

Major Santos' decision to administer a 16-hour unpaid suspension was not arbitrary, capricious, or contrary to rule or law. This ALJ affirms the discipline administered. § 24-50-125(4), C.R.S. (following the hearing, the Board may affirm, modify, or reverse the action of the appointing authority).

CONCLUSIONS OF LAW

1. Respondent met its burden of showing that Complainant failed to perform competently during the traffic stop on March 10, 2016.
2. Administering the discipline imposed on Complainant was not arbitrary, capricious, or contrary to rule or law.

ORDER

The Disciplinary Action is affirmed.

Dated this 5th day
of September, 2017,
Denver, Colorado.



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

CERTIFICATE OF SERVICE

This is to certify that on the 31 day of September 2017, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

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NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS:

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Section 24-4-105(14)(a)(II) and 24-50-125.4(4), C.R.S. and Board Rule 8-62, 4 CCR 801. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Board Rule 8-65, 4 CCR 801. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline referred to above. *Vendetti v. University of Southern Colorado*, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Board Rules 8-62 and 8-63, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the electronic record on appeal in this case is \$5.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual

payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-64, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-66, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule 8-70, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misunderstanding by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the ALJ's decision. Board Rule 8-60, 4 CCR 801.

