

AMENDED INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DENISE BUTERO,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,
STATE BOARD OF AGRICULTURE,
UNIVERSITY OF SOUTHERN COLORADO,

Respondent.

The Initial Decision dated January 22, 2001 contained a typographical error on page 2. It has been corrected in bold typeface. This six-day hearing was held on August 3 and 4, October 5 and 6, and December 6 and 7, 2000 before Administrative Law Judge Mary S. McClatchey. Complainant was represented by Jonathon Wilderman, Wilderman & Linnet, P.C. Respondent was represented by Assistant Attorney General Susan Trout.

PRELIMINARY MATTERS

Witnesses

Complainant called the following witnesses: herself; Sharon Hawkins, Director of Counseling, University of Southern Colorado ("USC"); James R. Tising, Chief of Police, USC; Dennis Naylor, Police Communications Technician, USC; Richard Cumbee, former Vice President for Business Services, USC; Bruce Zimmerman, Director of Auxiliary Services, USC; Michael Igo, Investigator, Colorado Bureau of Investigation; Joseph B. Martinez, Director of the Physical Plant, USC; Donald Ortega, Controller for USC; and Jo Romero, President, Colorado Federation of Public Employees.

Respondent called the following witnesses: Dennis Naylor; Janet Taylor Garber, former Human Resources Specialist, Colorado Department of Personnel; and Stephen Bronn, former Vice President for Finance and Planning, USC.

Exhibits

Complainant's Exhibits A - K, N, O, P, V, W, X, AA, BB, CC, EE, NN - UU, WW and XX were admitted by stipulation. Exhibits L and FF were admitted without objection. Exhibits GG, HH, II, JJ, and KK were admitted over objection. Exhibits LL and MM were offered but not admitted. Complainant withdrew Exhibits D, Y, and Z.

Respondent's Exhibits 2, 6- 9, and 12 - 22 were admitted by stipulation. Exhibits 1 (the first two pages), 4, 5, 10, and 11 were admitted without objection. Exhibits 3 and 23 were admitted over objection.

Procedural Matters.

At the outset of the hearing, Complainant requested that the ALJ rule that Complainant need not present evidence demonstrating a prima facie case ("pfc") of discrimination, since Respondent had conceded that Complainant had presented a prima facie case of discrimination in its Information Sheet, submitted at the Preliminary Review stage of these proceedings. The pfc of discrimination consists of the following: A. she belongs to a protected class; B. she applied for a position for which she was qualified; C. she was rejected; and D. the circumstances give rise to an inference of unlawful discrimination. Colorado Civil Rights Commission v. Big O Tires, Inc., 940 P.2d 397, 400-401 (Colo. 1997). After extensive argument on this issue, the undersigned ruled orally: since the purpose of Information Sheets is to present the party's position if a hearing were held, it is appropriate to hold a party to a legal concession made therein. Here, Respondent did concede that Complainant had presented the pfc of discrimination in her Information Sheet. However, Respondent withdrew that concession in its Prehearing Statement by listing an element of the pfc of discrimination as a Disputed Issue: whether the Complainant was qualified for the sought-after position. Therefore, Respondent's Prehearing Statement put Complainant on notice that Respondent was not stipulating to the pfc of discrimination for purposes of the hearing.

A witness sequestration order was entered.

MATTER APPEALED

Complainant appeals Respondent's decision not to appoint her to the position of Police Communications Technician, alleging that her non-selection was discriminatory on the basis of race (Hispanic) and sex, and was arbitrary or capricious or contrary to rule or law. For the reasons set forth below, Respondent's action is affirmed.

ISSUES

1. Whether Respondent's non-selection of Complainant was arbitrary, capricious or contrary to rule or law;
2. Whether Respondent's non-selection of Complainant constituted intentional race or sex discrimination;
3. Whether either party is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

1. Complainant, Denise Butero, commenced employment at the USC Police Department ("PD") as a Security Guard I on July 1, 1995.
2. In April, 1998, Pam Konz, who held the position of Police Communications Technician ("PCT") in the USC PD, announced she soon would be leaving the position. USC Police Chief James Tising, who was Complainant's immediate supervisor at the time, directed Complainant to cross-train with Konz in order to learn the PCT position.
3. The PCT position is informally known as Parking Manager/Police Dispatcher. The dispatching function includes: receiving and recording PD emergency and routine calls; clarifying each situation to determine need for and level of police or emergency medical response; and retrieving and updating crime reports and background inquiries. The parking management function includes: registering all individuals on campus for parking privileges; supervising several student employees in their enforcement of the parking rules and regulations; collecting parking ticket violations and referring them to Accounting for billing; inputting parking ticket information into the computer; and printing ticket information and copying it for Accounting for billing.
4. From approximately April 1998 through October 1, 1998, the time Konz left the position, Complainant cross-trained in the PCT position. She continued to perform her security guard duties during this time.
5. On October 1, 1998, when Konz left the position, Chief Tising directed

Complainant to perform the PCT position duties on an interim basis. Complainant's job title, classification, and salary did not change, and she continued to perform her security guard duties.

6. Complainant was successful in performing the duties of the PCT position.
7. In addition to finding Complainant's work performance to be excellent, Chief Tising had been a family friend to Complainant for **over ten** years.

NCIC/CCIC Certification.

8. Chief Tising's experience with the PCT position in recent years was such that he felt the computerized crime information systems, NCIC/CCIC ("National" and "Colorado Crime Information Network"), were increasingly important. In fact, he viewed them as minimum qualifications for the position. Use of NCIC/CCIC enables a dispatcher to immediately obtain information on persons and property with whom law enforcement officers come into contact; for instance, confirming the identity of a driver, checking license plates for validity, and checking for criminal history and outstanding warrants for arrest. NCIC/CCIC access provides dispatchers with information to give law enforcement officers that can mean the difference between life and death.
9. Butero obtained NCIC/CCIC certification while performing the PCT position on an interim basis, and used the Pueblo Police Department's computer for that purpose until the USC police department obtained the equipment for it in August of 1999.
10. NCIC/CCIC training can only be obtained via a four-day certification training program offered by the Colorado Bureau of Investigation. Once an individual has completed the certification program, he or she learns the codes necessary for input and retrieval by referencing a book. Only individuals currently employed by law enforcement agencies are eligible to participate in this certification program.

EMT Training.

11. Tising also viewed emergency medical ("EMT") training as an essential skill for the PCT position. Both Konz and Butero had obtained EMT training and certification, and were active in the campus EMT quick response team. He viewed this skill as critical to dispatchers in assessing emergency medical situations and determining what type of emergency response to deploy.

12. Dispatchers have to make quick decisions regarding the type of emergency assistance to send to the scene of an accident or injury. Training in emergency medical assistance is helpful to performing this task.

USC Financial Difficulties in 1998/1999.

13. On October 16, 1998, Chief Tising requested that the PCT position be filled by executing an Authorization to Recruit and Hire form.
14. The President of USC did not sign the Authorization form until February 1, 1999, because of a serious budget shortfall. Low Fall 1998 enrollment figures led to anticipated lower General Fund appropriations, resulting in a Fiscal Year 1999 estimated budget shortfall of \$2 million.
15. In the Fall of 1998, USC imposed a hiring freeze, and asked each major department to prepare a report on how to function at 90% of the current budget level. The PCT position was frozen at this time. Ultimately, 22 positions were eliminated.

Background on Dennis Naylon's Interest in the PCT Position.

16. During the period of USC's financial crisis, it became clear to Dennis Naylon, a supervisor in the USC bookstore, that he would be "bumped" from his position due to his low seniority as a classified employee.
17. Naylon discussed his interest in the PCT position with Vice President for Business Services Richard Cumbee, the appointing authority for the position, and Bruce Zimmerman, Director of Auxiliary Services, Naylon's second line supervisor. They both encouraged him to apply. Cumbee suggested that he speak with Tising.
18. On January 8, 1999, a Friday, Dennis Naylon came to Chief Tising's office to express interest in the PCT position. Naylon told Tising he had discussed the position with Richard Cumbee, the appointing authority for the PCT position. Tising came away from this conversation with the belief that Cumbee had essentially promised Naylon the position.
19. On the following Monday, Tising sent an email to Cumbee, stating,

"Dick: Dennis informed me Friday that he has been given Pams position. I hope that is not a finalized arrangement. I told him several

weeks ago that I would love to have him in a somewhat supervisory guard position. . . Denise has passed the exam for consideration as a police dispatcher and I would like to keep her where she is. I know Bruce has some input, but it should not be allowed to effect the chemistry of this unit." (Sic)

20. Cumbee responded verbally that "any promise would be premature." They also may have discussed the fact that Naylon had had a heart attack, which rendered him inappropriate for a graveyard shift guard assignment.
21. On February 12, 1999, Tising sent a memo to Gloria Trujillo-Sanchez, the USC Human Resources Director, noting that the President had approved filling the PCT position, but that he had been informed by her office that the position is "on hold" with no further explanation. Trujillo-Sanchez never responded to this memo.
22. When Tising received a copy of the March 31, 1999 job announcement for the PCT position, he sent Trujillo-Sanchez a hand-written note stating in part: "3/26/99 - Released without my review. I asked Pers[onnel] (Missie & Gloria) to allow me to review this prior to release. Not complete -- CCIC/NCIC/EMS - J.T."

Process for Filling USC Classified Vacancies: "Nondecentralized" Selection.

23. The Colorado Department of Personnel ("DOP") is statutorily responsible for administering all recruitment and hiring of classified employees in the State of Colorado. Pursuant to delegation agreements, this selection process is normally delegated to the various state agencies, so that they may have complete control over the recruitment and selection of their own classified employees. This system is known as "decentralization."
24. Approximately 20 percent of state agencies, all institutions of higher education, do not exercise this option of decentralization of the selection process. These institutions are called "nondecentralized" agencies. USC is one such nondecentralized institution.
25. The Delegation Agreement between DOP and USC mandates that DOP has exclusive authority over the recruitment, examination, and referral of all candidates for classified positions at USC, as well as over the allocation and reallocation of classes and positions at USC.
26. In concrete terms, this means that every time USC has a classified position

vacant, DOP is responsible for all phases of screening and selection for the position up to and including the point of referring the final three candidates to the appointing authority for consideration.

27. Nondecentralized agencies are free to handle transfers themselves.
28. USC has a policy of attempting to fill vacant classified positions via transfer within the university prior to opening the position up for competitive exam.
29. On March 31, 1999, Trujillo-Sanchez sent out a university-wide Vacancy Announcement for transfers to the PCT position. USC received no applicants from candidates eligible to transfer into the position. Neither Butero nor Naylor was eligible to transfer into the PCT position because it constituted a promotion in pay and status for each of them.

DOP's Involvement in Selecting for the PCT Position.

30. Next, DOP took over the hiring process for filling the PCT position, per standard procedure under the Delegation Agreement. Janet Garber was responsible for the recruitment and selection of all classified staff at USC, and the PCT position was no exception.
31. Garber first drafted the vacancy announcement. Using the transfer job announcement as a draft, she compared it to the Position Description Questionnaire for the PCT position, and assured that it contained the appropriate official DOP "minimum qualifications" for the position. She then published the job announcement.
32. The PCT job announcement contained the following official DOP "minimum qualifications": "one year of experience in police radio/telephone communications equipment operations." If an applicant lacked that experience, he or she was ineligible for the position.
33. Garber received only two applications from candidates that met the minimum qualifications for the PCT position: Butero and Naylor. She therefore determined that a competitive examination was not necessary.
34. On April 29, 1999, Garber forwarded the referral list containing only Butero and Naylor to Richard Cumbee, the appointing authority.

Cumbee's Utilization of an Interview Panel for Filling the PCT Position.

35. Cumbee, on Bronn's suggestion, elected to use an interview panel to give him input into his hiring decision for filling the PCT vacancy. In the past, he had always delegated the interviewing function for USC PD classified positions to Chief Tising. Further, he had always approved of Tising's choice of whom to hire.
36. This time, however, because he knew Naylor was about to lose his job due to university cutbacks, had discussed the position with Naylor, and knew Naylor to be a qualified candidate, he sought the assistance of others in the decision making process.
37. As appointing authority, Cumbee had the discretion to hire straight off the referral list without interviews, to conduct interviews himself, or to delegate interviews to another individual or a panel. The ultimate hiring decision was his alone.
38. Cumbee, Stephen Bronn, Vice President for Finance and Planning, and Chief Tising discussed who should be on the interview panel for the PCT position. They focused on the departments with whom the PCT position has the most contact. In addition to the PD, they decided on Accounting, which collects the parking ticket money and with whom there is a lot of interaction; Physical Plant, since the police often receive reports of campus problems and refer them to the Physical Plant; Auxiliary Services, since Parking Management is an auxiliary service; and Student Affairs, since students are the primary customers of the parking management function. The committee members were: Tising; Joseph Martinez, Planning Manager, in charge of the Physical Plant; Donald Ortega, at that time the Assistant Controller and Director of Student Financial Services (who oversaw Accounting and parking violation collections); Zimmerman, Director of Auxiliary Services; and Sharon Hawkins, Director of the Counseling Center. No one from Student Affairs responded to Cumbee's request for involvement on the committee.
39. On April 5, 1999, Cumbee sent an email to the five members of the PCT interview committee, designating Zimmerman as the chair. The email stated in part:

"The individual [in the PCT position] has a great deal of contact with visitors, students, and staff. The person should be able to explain policies and procedures clearly and calmly and the reasons for them. This may need to be done while someone with a ticket is upset and verbally abusive. The parking manager is usually the first line of appeal and must be able to distinguish when to void tickets and when

not to void them. The Manager must be able to work well with others in the parking/police network such as the plant, accounting, student services, etc. . . The handling of emergency communication for the police in a calm and effective manner is important. The ability to maintain confidences is critical. . . independent decision-making skills, emotional de-escalation skills, writing, managerial accountability and general familiarity with computers should be considered."

40. On Monday, May 3, 1999, Zimmerman sent an email to the committee members copying them on the April 5 email again, stating that interviews of the two final candidates would take place that week, and that Cumbee had requested their decision by Friday, May 7, 1999. Zimmerman requested that each member send him some questions to be asked during the interview so that he could compile them for the interviews. Four members drafted questions for the interviews.

Qualifications of Butero.

41. Butero's qualifications, as reflected in her application for the PCT position which the interview panel reviewed, are as follows:
 - Education: Pikes Peak Community College 1988 - 1991, no degree; University of Southern Colorado, 1996 to present, 15 hours, sociology/psychology major; criminal justice minor.
 - Business or Vocational Training: Police Academy, Pikes Peak Regional Law Enforcement Academy, Pikes Peak Community College, certification received November 23, 1988.
 - Employment History: "Police Communications Tech (Security Guard I)", USC, 10-1-98 to present. Reporting to department head, organize and develop and support all activities relating to police mission, security operations, and parking management. Position is responsible for [computer crime reporting], including NCIC/CCIC, City of Pueblo Domestic Violence Task Force, supervise work-study students and payroll for 8 classified and all work-study positions, temp positions and hourly positions. Dispatch log of all activity, processing of reports, account receivables, purchasing of uniforms and equipment, special events organizations, EMT certification, orientation and basic training of new guards, new student orientation.

- Security Guard I, USC, 7-1-95 to 9-30-98. Foot patrol of buildings and grounds of the campus, reporting all safety issues to dispatcher, taking reports and complaints, writing reports, assisting police officers with investigations, ticketing, traffic control, security of buildings, safety escorts, motor assists.
- Correctional Security Services Officer I, Department of Corrections, Colorado, 1-1-93 - 6-31-95. Housing Unit Officer, ensures safety and security of incarcerated persons; maintains order and supervises inmates; medical escorts and transports; report writing; annually qualified for defense tactics and firearms use; cell checks.
- References: a Pueblo police officer, a Pueblo police department records supervisor, and a flower shop owner (friend).

Qualifications of Naylon.

42. Naylon's credentials listed on his application reviewed by the interview panel members provided the following information:

- Education: Bachelor of Science in Criminal Justice, Florida International University, 1975; Associates Degree in Criminal Justice, Broward Community College, Fort Lauderdale, 1972.
- Business or Vocational Training: Broward Police Academy Police Officer Training, certified in 1970.
- Employment History: Materials Handler II, USC, 11-93 to present. Supervisor of Shipping & Receiving at USC Bookstore. Receive textbooks on computerized system. Use computer for inventory control and generate related paperwork; deal with publishers and freight companies; choose shipping methods; work sales floor assisting customers; supervise and evaluate student employees. Open and close store; make management decisions; on management team; in charge of bookstore security; resolve problems with publishers and shippers.
- Security Guard I, USC. [same as Butero above] and operated radio being dispatched to calls as well as notifying headquarters of situations.
- Prudential Agent, 5-92 to 9-92. Sold insurance and used laptop.
- Manager, B & K Janitorial. Sold janitorial and cleaning supplies; hired

and managed 50 employees; bid jobs.

- Detective, Sergeant and Lieutenant, Hollywood Police Department, Hollywood, Florida, 3-70 to 1-89. Retired Police Lieutenant with over 23 years of law enforcement experience. Supervised various units; commander of uniformed patrol, supervising 40-45 personnel. Scheduled shifts; did time sheets; evaluated employees. Supervised Street Crimes Unit (24-32 plain clothes officers) in high crime area targeting armed robbers, burglars, narcotic violations and prostitutes. Commanded SWAT Team and K-9 Unit. Wrote policy and procedure for Chief of Police and Police Department. In charge of Communications Division, responsible for all emergency/non-emergency calls for service, with four dispatch consoles working at all times (fire/medical console, NCIC/FCIC and two dispatch). Communications Center was an enhanced 911 system receiving all emergency calls from public, over 10,000 calls per months; supervised 45-50 personnel. As Sergeant, supervised uniformed patrol squad; Field Training Supervisor, trained all new officers, recommended officers for hire; Affirmative Action Officer and Recruiter for Police Department. Homicide Detective for four years. Worked as dispatcher assigning personnel to emergency and non-emergency calls for assistance.
- Military Policeman in U.S. Army, 5-67 to 2-70. Responsible for military police desk, twenty-four patrol units. As dispatcher monitored four radios for emergency and general calls for assistance; dispatched fire and medi-vac helicopters.
- Cadet, Hollywood Police Department. Dispatched officers to calls in communications center.
- Summary: years of experience operating a police dispatch console and hand held radio.
- References: Retired Hollywood Florida Police Chief; Retired Major; Police Captain, Golden Beach Police Department, Florida.

Interviews for the PCT Position.

43. The panel held the interviews on May 7, 1999. They received no written information until the time of the interviews, when they received applications with the information contained in Paragraphs 41 and 42, above.

44. Prior to the interviews, Zimmerman knew he wanted to hire Naylor.
45. Prior to the interviews, Tising knew he wanted to hire Butero.
46. The other three panelists appear to have been objective in their approach to the interviews. Neither Ortega, Martinez, nor Hawkins had any discussions regarding the candidates with anyone else prior to the interviews.
47. Zimmerman chaired the interviews. The panel interviewed Butero first. Zimmerman was somewhat formal with Butero. He did not invite her to make an opening statement, but started right in with questions. After Butero answered a question regarding her computer skills, Zimmerman asked her in a sarcastic manner why she had access to Windows 97/98 at work, when he didn't. This strange question put Butero somewhat on edge. Zimmerman also asked Butero why she had listed her current position as "PCT (Security Guard I)," when in fact she still held the position of security guard. He seemed to imply she was attempting to fool the committee in some way. Butero clarified that she sought to highlight for the panel the fact she had been performing the PCT duties for seven months.
48. Butero discussed her computer skills at length, her NCIC/CCIC and EMT training, and the fact that she had been performing the PCT duties for several months.
49. Zimmerman treated Naylor differently than Butero in his interview. He was more friendly, more informal. Zimmerman asked Naylor to begin by making a statement of why he believed he was qualified for the position. Naylor answered by providing a thorough and articulate description of his employment history in law enforcement, his experience in dispatch and supervising dispatch, and how his experience related to the PCT position.
50. Naylor also discussed his extremely successful supervision of student employees in the bookstore, and the fact that his students stayed in their positions until graduation, resulting in low turnover there. He stated that he had worked with computers in the bookstore.
51. All questions drafted by panel members were asked of both candidates. They included questions about working with student employees, computer skills and knowledge of computer systems; how the candidate had handled a problem with a co-worker or supervisor; and what strengths and weaknesses the candidate would bring to the position.

The Panel's Discussion Following Interviews.

52. The discussion following the interviews was at times heated. Tising became angry that Butero's NCIC/CCIC and EMT certifications and experience were not being given adequate consideration. Zimmerman minimized this issue by stating that Naylor could simply update his NCIC/CCIC skills on the job and could learn more about EMT if necessary on the job. Zimmerman and Martinez both raised issues regarding Butero's attitude in dealing with people in their respective departments. Martinez stated that his grounds supervisor had had problems with Butero. Zimmerman stated that his office staff had had problems dealing with Butero. These general allegations, without any detail as to date, time, or place, and the fact that neither Butero nor Tising had been given notice or opportunity to rebut the charges, also angered Tising. Both Tising and Hawkins felt that since the PCT position was responsible for handling students' traffic tickets, it was inevitable that some people would resent the PCT.
53. Zimmerman pushed for Naylor in this meeting, stating that his broad experience in law enforcement could only be an asset to the position and the police department. Martinez and Ortega both agreed that Naylor was better qualified by virtue of his vast experience in the field of law enforcement.
54. Tising stressed the importance of NCIC/CCIC and EMT skills in the position, and the fact that Butero was already certified and fully competent in these areas. Hawkins was also impressed by the fact Butero held these certifications and had been in the job performing it already.
55. Martinez viewed Naylor's experience as a police officer for 27 years as an indication he had a lot of experience in handling different situations that would come up in the PCT position. He believed Butero was also capable of handling the position, but viewed Naylor's experience as rendering him more qualified.
56. Ortega viewed Naylor's strong background in policing and management as very important. He also felt that Naylor's answers to the questions were more detailed and polished than those of Butero. He felt that Butero also did well in the interview.
57. Zimmerman mentioned that Naylor was going to be bumped from his position in the bookstore as a result of the university-wide cutbacks. This was not discussed by the members.

58. At the end of the meeting, Zimmerman asked each member to express his or her preference. Zimmerman, Martinez, and Ortega expressed a preference for Naylor; Tising and Hawkins for Butero. Hawkins testified, however, that she did not have a real preference for either candidate at that point, because she did not have sufficient information to draw a firm conclusion.
59. Hawkins left the meeting feeling the process was flawed. She had chaired and sat on a number of hiring committees for filling faculty and other exempt positions, for which DOP did not perform the initial screening and selecting function. She had therefore been intimately involved in all phases of screening for the position, including reviewing all applications, conducting initial telephone interviews, and checking references, up to the point of producing the list of finalists for the hiring authority. Prior to the PCT interviews, she had always received and reviewed a lot of information on each non-classified candidate prior to conducting an interview. This experience contrasted dramatically with her experience on the PCT interview panel.
60. As Hawkins left the meeting, Zimmerman passed her, and, knowing that Hawkins felt frustrated with the meeting, said to her, "don't feel bad, Sharon, there's a lot you don't know about all of this," or words to that effect. She never learned what he meant by this statement. The record did not disclose what he meant by this statement.
61. Tising was angry after the meeting, and informed Ortega that he knew the position best and that the decision should have been his alone.
62. Zimmerman called Cumbee after the meeting and reported the results of the vote, as well as some pro's and con's regarding each candidate that were raised in deliberation. Cumbee requested that he write and fax him a short letter memorializing the result.
63. In the early afternoon on May 7, 1999, Zimmerman sent Cumbee a memo informing him of the following:

"A committee of five individuals, . . . interviewed Denise Butero and Dennis Naylor for the [PCT] position. They were both excellent candidates. The committee by a three to two decision recommends the appointment of Dennis Naylor to the position."

Cumbee's Decision to Hire Naylor

64. Cumbee considered the following in making his decision to hire Naylor, in addition to the recommendation of the interview panel. First, he considered Naylor's interpersonal and conflict resolution skills to be superior to those of Butero. When Naylor was a security guard, he witnessed his handling of a situation that impressed him very much. He removed a person having a problem from an audience, talked to the person calmly, explained the reasons for having rules, and successfully diffused the situation. Cumbee viewed Naylor's conflict resolution skills as excellent in this situation. He had also received favorable reports about Naylor from students, co-workers, and supervisors. He had asked two students why they worked in the bookstore instead of the physical plant, and both had told him it was because they liked working for Naylor.
65. Cumbee was aware of complaints relating to Butero's treatment of others, talking down to them, not listening. He formed an impression that she was rigid in her application of rules, and was not highly skilled at diffusing uncomfortable situations involving parking fines.
66. Cumbee felt that he would receive fewer complaints about the person in the PCT position if he hired Naylor.
67. Cumbee did not view NCIC/CCIC certification as a minimum qualification for the PCT position because it was a skill that Naylor could easily update on the job.
68. Cumbee felt that both candidates were qualified to handle emergency calls as dispatcher. He felt Butero would handle medical emergencies better, and that Naylor would handle police emergencies better, by virtue of their respective experience.
69. Cumbee felt that Naylor's ability to handle the parking management function of the job, which constituted over 50% of it, far exceeded Butero's. He felt Naylor had good "big picture" skills - when Naylor was a security guard they had discussed the reasons for campus policing, and Naylor commented that parents don't send their kids to college to get arrested, the job of the campus police is to educate kids, keep them out of trouble, and minimize trouble when they do get into it.
70. When asked about Butero's "big picture" skills, Cumbee testified that he viewed her as a rule follower, and not flexible enough to apply rule exceptions as was necessary of the PCT position.
71. Neither Cumbee nor the interview panel checked references of the

candidates. This appears to have been due to the fact both candidates were longstanding USC employees.

72. After Cumbee announced his choice of Naylon, Tising sent him an email stating in part:

"I presume Zimmerman shared with you the fact that I was/am very upset about the selection committee process and behavior. One member openly indicated his dislike for the classified system and his lack of knowledge about the position. Two members used performance/complaints about Denise as justification for their vote(s). How nice to be perceived as an alter boy safe in the sanctuary of the bookstore while my people are on the front line making decisions that are not popular with Mr. Z and Mr. M. If you wanted to hire a police officer why didn't we used the PO job description? Based on my view of the comments of three members, the end result looks like a potential 'mixed motive' case of disparate treatment. But, that's just my opinion."

Butero's Grievance

73. On May 17, 1999, Butero timely filed a grievance alleging, "Appointing Authority and Selection Committee violated Affirmative Action guidelines and procedures. Violations as noted on attached exit interview form. Appointing Authority appointed lesser-qualified white male who did not meet the necessary special requirements for the position. (CCIC/NCIC security clearance)." In her Exit Interview form, Butero indicated she had felt intimidated by Zimmerman's challenges of several of her responses in a demeaning tone; that Zimmerman appeared contemptuous through his verbal and non-verbal behavior; and that the committee had violated the university's Affirmative Action ("AA") policy.
74. Butero requested as relief that an "objective and impartial selection committee comprised of subject matter experts review qualified candidates which are then referred to the Chief of Police for appointment."
75. Butero requested and obtained a meeting the Provost of USC, Dr. Les Wong, wherein she discussed her concerns about the selection process. Wong wrote a memo to the President of USC, Dr. Tito Guerrero, passing on Butero's concerns.
76. Tising heard Butero's grievance at Step I. Cumbee delegated Step II

authority to Bronn.

77. Butero and her union representative, Jo Romero, met with Bronn for the Step II meeting on June 16, 1999. The meeting was long and substantive. Following the meeting, Bronn interviewed Zimmerman, Hawkins, Tising, and Cumbee.
78. Bronn's decision consists of a five-page decision containing detailed findings of fact and conclusions. Bronn's findings and conclusions included the following:
 - The interview committee concluded that both Butero and Naylor were qualified for the position;
 - NCIC/CCIC certification are not minimum requirements of the PCT job;
 - Naylor had supervised the dispatch unit in the Hollywood, Florida Police Department, had been a dispatcher for a military police unit in the U.S. Army, had served as a security guard at USC for a year, and had a bachelor's and associate degree in criminal justice;
 - Butero's dispatch experience was limited to her nine months in the PCT position;
 - Naylor was not "lesser qualified";
 - The interview committee made a reasonable decision in determining that both candidates met the requirements for the position;
 - Cumbee was the appropriate appointing authority, and was within his discretion to use an interview panel and to request a recommendation;
 - Tising never attempted to officially revise the position [to include NCIC/CCIC certification] prior to posting it or during the time it was frozen and prior to the March 31, 1999 announcement;
 - The Police Department had the opportunity to request changes in the position and no change was requested until after the decision was made;
 - The imposition of NCIC/CCIC certification as a minimum requirement by the interview committee would have been inappropriate;

- USC's AA policy did not apply to classified positions such as the PCT position and therefore was not violated;
- There was no evidence of discrimination by the committee or the appointing authority.

79. Bronn denied the grievance and sustained the hiring decision.

Process by Which a Job Description May be Modified.

80. Pursuant to the Delegation Agreement between DOP and USC, the only permissible means by which USC could have modified the "minimum qualifications" for the PCT position to include NCIC/CCIC and EMT certifications would have been to make a formal request to do so. This request would have been in the form of a request to modify the PDQ for the position, and would have automatically initiated a reallocation of the position by DOP. DOP conducts reallocations of USC classified positions, and it is a lengthy process.
81. Tising never submitted a formal request to modify the PCT position to anyone either at USC or DOP. His desire to informally modify the job description on the position announcement, prior to release, while apparently communicated verbally to USC Personnel, never resulted in a formal request to modify the position.
82. No one at USC ever informed Janet Garber at DOP that Chief Tising had informally indicated an interest in including NCIC/CCIC in the job description for the PCT position.
83. Even if Tising had submitted the proper formal request to modify the minimum qualifications for the PCT position to include NCIC/CCIC certification, DOP policy would have precluded such a modification.
84. Pursuant to its "six months or less policy," DOP will not list a skill as a minimum qualification if it can be learned in six months or less. The reason for this rule is to maximum inclusiveness in the selection process. Obtaining the greatest number of candidates who possess the minimum qualifications for a position expands the diversity of the applicant pool.
85. NCIC/CCIC can be learned in far less than six months; therefore, under DOP policy, it could never be listed as a "minimum requirement" for the PCT position. (By way of example, had DOP modified the minimum qualification

for the PCT position to include NCIC/CCIC certification, the applicant pool would have been reduced to one: Butero.)

USC Affirmative Action Policy.

86. USC's Affirmative Action policy does not apply to classified positions. Compliance with the AA policy and with the DOP/USC Delegation Agreement are mutually exclusive. In other words, it would be a violation of the Delegation Agreement for USC to apply its AA policy to the selection of classified positions: the AA policy assumes that USC staff carry out the search and screen functions that only DOP can perform under the Delegation Agreement.
87. For example, the AA policy requires: job announcements must contain 11 specific elements; for every position, a hiring officer gives a search and screen committee a "written charge" containing procedures for soliciting applications, drafting/amending position announcements, drafting recruiting letters, establishing procedures for screening applications, screening applications, and submitting a list of finalists to the hiring officer. DOP performs all of these functions under the Delegation Agreement.
88. Further, a clarifying memo dated July 26, 1996 from USC's Director of Personnel to "All Managers" regarding "Hiring Procedures" confirms that USC's AA policy applies only to contract positions. (Exhibit 23). The memo divides the hiring process into two separate procedures, "classified" and "contract," and describes each step necessary to effectuate each procedure. It states, "If filling a new contract position, . . . b) contact Affirmative Action for search & screen guidelines." (Emphasis in original). It further states, "If filling a classified position," under which there is no reference to Affirmative Action.
89. Complainant seeks the following relief: that Naylon's appointment vacated; that she be placed in the PCT position on an interim basis; that the selection for PCT be in compliance with the USC Affirmative Action Hiring policy; that the position description be revised to include NCIC/CCIC; that an objective and impartial selection committee comprised of subject matter experts review qualified candidates which are then referred to the Chief of Police for appointment; and attorney fees.

DISCUSSION

In this *de novo* proceeding, the burden is on Complainant to prove by preponderant evidence that the Respondent's action was arbitrary, capricious, or contrary to rule or law. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994); Section 24-50-103(6), C.R.S. Complainant also bears the burden of proof on her discrimination claim. Bodaghi v. Department of Natural Resources, 995 P.2d 288 (Colo. 2000).

The credibility of the witnesses and the weight to be given their testimony are within the province of the administrative law judge. Charnes v. Lobato, 743 P.2d 27 (Colo. 1987). It is for the administrative law judge, as the trier of fact, to determine the persuasive effect of the evidence and whether the burden of proof has been satisfied. Metro Moving and Storage Co. v. Gussert, 914 P. 2d 411 (Colo. App. 1995).

A. Respondent did not Discriminate Against Complainant

Complainant alleges that Respondent's non-selection of her was discriminatory on the basis of race and sex, in violation of the Colorado Anti-Discrimination Act, section 24-34-101 et seq., C.R.S. To demonstrate a prima facie case of discrimination (disparate treatment), Complainant must demonstrate: A. she belongs to a protected class (here, Hispanic female); B. she applied for a position for which she was qualified; C. she was rejected; and D. that the circumstances give rise to an inference of unlawful discrimination. Colorado Civil Rights Commission v. Big O Tires, Inc., 940 P.2d 397, 400-401 (Colo. 1997). Once Complainant establishes a prima facie case of discrimination, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employment decision. If the employer meets this burden, the burden shifts back to Complainant to prove that "the presumptively valid reasons for the employment decision were in fact a pretext for discrimination." Id. See also Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1315-16 (10th Cir. 1999).

Complainant has demonstrated a prima facie case of discrimination. She is a member of a protected class, she applied for a position for which she was qualified, and the circumstances of her rejection can raise an inference of discrimination. Those circumstances include the following: a white male whose relevant experience was very dated was hired; the appointing authority used an interview panel for the first time in filling a Police Department position, instead of delegating the hiring process to Tising and signing off in Tising's choice, as he had in the past; the position was frozen for a long time and interviews were conducted in a hurry; Zimmerman treated the candidates somewhat differently in their interviews.

Respondent has also presented a legitimate nondiscriminatory reason for its hiring decision. First, the record reveals that both Naylon and Butero were qualified for the PCT position. They both possessed the minimum requirements for the position.

In fact, the evidence was such that it was reasonable to conclude that Naylon was more

qualified than Butero. In addition to having served as a dispatcher on two separate occasions in his career, Naylon had actually supervised the dispatch center in the Hollywood, Florida police department. He had many years of dispatcher experience; Butero had eight months. The fact that Naylon's experience was so old is irrelevant, given the fact that with a five-day training and some on-the-job use, he would be able to update his skills and become certified in NCIC/CCIC. Naylon had nineteen years of experience in handling all types of police matters as a detective, sergeant, and lieutenant. He had proven leadership abilities that would be useful in the PCT position. In addition, he had served as a security guard for a year at USC, which familiarized him with the dispatch system and many of the situations the PCT position would encounter on the job.

Pretext may be demonstrated by establishing that "a discriminatory reason more likely motivated the employer or . . . that the employer's proffered explanation is unworthy of credence." Bullington, 186 F.3d at 1317. Complainant has failed to meet her burden of proving that Respondent's proffered reasons for hiring Naylon were a pretext for race or sex discrimination against her. As discussed above, in many ways Naylon was actually better qualified than Butero for the PCT position.

Complainant argues that USC's failure to modify the job description to include NCIC/CCIC and EMT certifications demonstrates that the university sought to hire an "unqualified" candidate who did not possess those essential qualifications. However, Findings of Fact #80 to #85 demonstrate that Tising never made the appropriate request to modify the job description, and that even if he had, DOP would never have modified the minimum qualifications to include those certifications. The fact that Naylon would have to attend a five-day certification course for NCIC/CCIC did not render him unqualified for the PCT position. Further, his lack of EMT experience was made up for at least in part by the breadth of his experience in the Army and Hollywood Police Departments in dealing with emergency dispatch issues. And he could broaden his emergency medical training on the job.

Complainant argues that the PCT position required that the applicant be "fully operational" in all job functions, which means that at the time of hire, the individual is fully able to perform all functions listed on the job announcement or job description. Complainant relies on DOP's "Class Series Description" of the PCT position for this argument. (Exhibit WW). It states in part, "This class describes the fully-operational level. Positions . . . retrieve and update crime reports and background inquiries." However, DOP Human Resources Specialist Garber clarified that the sole function of the Class Series Description is for DOP to describe a specific classification, and that the term "fully operational level" merely contrasts the PCT class with the PCT Intern class, which is "the entry level" class. Exhibit WW has no bearing on what the person holding the position must do upon entry into the position. Hence, Naylon was not required to be ready to perform the NCIC/CCIC function the first day on the job, and it was not at all unreasonable to hire him with the expectation he would very quickly obtain this certification.

Another means of demonstrating pretext is by showing that the employer selectively enforced its own rules, "thereby raising the inference that [the employer] selectively enforced its rules" to the detriment of the plaintiff. Spulak v. K Mart Corp., 894 F.2d 1150, 1155 (10th Cir. 1990). Complainant argues that USC violated its Affirmative Action policy in a variety of ways in the interview and selection process, thereby demonstrating that it treated her differently than other candidates.

At hearing, however, the evidence demonstrated conclusively that the University's Affirmative Action ("AA") policy does not apply to classified positions. As Findings of Fact #86 to #88 demonstrate, the AA policy sets forth an intricate set of rules governing the search and screen process which, under USC's Delegation Agreement with DOP, DOP performs. Complainant submitted no evidence that would demonstrate that although DOP conducts all aspects of the search and screen process, the AA policy nonetheless applies to it. Further, there is no evidence that once DOP sends the referral list to the USC appointing authority, the AA policy begins to apply. It is simply nonsensical to conclude that 90% of the AA policy [governing the search and screen activities conducted by DOP] did not apply to filling the PCT position vacancy, but that 10% of the policy does apply once DOP sends the referral list to USC.

The only language in the AA policy that could be interpreted as indicating it applies to classified positions appears on page 1. It states that the Department of Agriculture is dedicated to equal opportunity policies and principles "to recruit, hire, train, transfer, and promote persons in all job classifications, without regard to age, race, [etc.]." (Emphasis added.) However, Exhibit 23 effectively addresses any confusion by clarifying that only "If filling a new contract position" is one to "contact Affirmative Action for search & screen guidelines." With respect to "filling a classified position," no reference to Affirmative Action is to be made.

Complainant points out that the AA policy, dated 1997, states, "These procedures, adopted by Executive Order of the President on July 1, 1997, replace and supersede any and all hiring procedures previously used." Exhibit 23, dated July 26, 1996, does pre-date the AA policy. However, it is not a "hiring procedure." It is a one-page memo clarifying that there are in fact two hiring procedures for University employees to use in filling job vacancies: one for contract positions, for which AA applies, and one for classified positions, for which no reference to the AA policy need be made. Complainant's arguments that USC violated the AA policy therefore must be rejected.

Pretext may also be proven by demonstrating pre-selection. Here, Tising pre-selected Butero, and Zimmerman pre-selected Naylor. They cancel each other out. The other three committee members were objective in their approach to the interviews, considered the information they received without bias, and made a reasonable decision. There was no

evidence that the end result, the vote of 3-2, was the result of pre-selection of the entire committee. Therefore, the vote was not so tainted as to be invalid. Further, to the extent Zimmerman was biased towards Naylor, this bias was based on his desire to assure Naylor retained a position at USC after being bumped due to layoffs, not an impermissible intent to discriminate against Butero based on her race or sex. Complainant also averred that Naylor's February 8, 1999 discussion with Tising, after speaking with Cumbee, demonstrates pre-selection by Cumbee. However, the preponderance of the evidence rebuts this assertion: the three objective members of the interview panel voted 2-1 for Naylor; Cumbee did not "rig" this committee.

Lastly, pretext may be demonstrated by showing general disparate treatment. See Big O Tires, supra. There is no question that Zimmerman was more formal with Butero than with Naylor in the interviews. This evidence is troubling. Zimmerman appears to have intimidated Butero somewhat during her interview. However, all of the panel members testified that Butero did well in her interview, and presented all the information necessary regarding her qualifications, including the fact she had been performing the PCT position for over seven months. Zimmerman's conduct in the interviews did not interfere with Butero's ability to perform well in the interview. Further, as discussed above, Zimmerman's conduct appears to have been motivated only by the fact he knew and liked Naylor, knew he was about to be bumped from his bookstore position, and wanted to assure that Naylor retained a job at USC. There was no evidence that other members of the interview panel treated Butero differently than Naylor, or that those who voted for Naylor were motivated by discriminatory animus towards Butero.

Turning finally to Cumbee's decision making process, Butero has also failed to demonstrate that his "proffered explanation [for hiring Naylor] is unworthy of credence." Randle v. City of Aurora, 69 F.3d 441, 451-52 (10th Cir. 1995). Cumbee presented as a very credible witness. Regarding the dispatcher functions, it was reasonable for Cumbee to conclude that Naylor was highly qualified to be a dispatcher again and simply needed to update his skills. Regarding the parking management functions, Cumbee's personal interactions with Naylor convinced him that Naylor possessed the interpersonal and conflict resolution skills necessary to effectively diffuse situations with angry parking ticket recipients. Cumbee's perception of Naylor was reinforced at hearing, where Naylor presented as a mature, unassuming, easygoing individual. Cumbee was faced with a situation where he had two qualified candidates for the PCT position, Naylor being the all-around better candidate. His choice of Naylor has not been demonstrated to be the result of sex or race bias against Butero.

B. The Action of Respondent Was Not Arbitrary, Capricious, or Contrary to Rule or Law.

In determining whether an agency's decision is arbitrary or capricious, the court must determine whether a reasonable person, considering all of the evidence in the record, would fairly and honestly be compelled to reach a different conclusion. Ramseyer v. Colorado Dept of Social Services, 895 P.2d 1188, 1192 (Colo. App. 1995). Complainant's closing argument addressed the announcement process separately from the selection process. Turning first to the announcement process, Complainant asserts that it was arbitrary and capricious for USC and DOP to fail to modify the PCT job description after Chief Tising made it clear, in his March 31, 1998 note to Trujillo-Sanchez, that he felt it was "not complete -- CCIC/NCIC/EMS." This argument fails for many reasons. First, Trujillo-Sanchez had no authority to modify the job description; that was DOP's sole province. Second, she never informed Garber at DOP of his request. This failure was not arbitrary or capricious: it was Chief Tising's responsibility to initiate the process for modifying the PDQ for the PCT position. Lastly, since Garber was never informed of Tising's desire to modify the job to include the certifications, she cannot be found accountable for having failed to do so. And, even if she had attempted to modify the job's minimum qualifications, DOP policy forbade it.

Turning to the selection process, Complainant argues that it was arbitrary and capricious to assemble the interview committee on such a rush basis, to fail to provide copies of applications to the panel members prior to the interviews, and to conduct no reference or background checks. Cumbee notified the interview panel of their charge in an April 5, 1999 email. On May 3, 1999, Zimmerman sent a follow-up email to the panel members that Cumbee had requested a decision by the end of the week, May 7. While the record did not reveal the reason for this swift turnaround, this time-line in and of itself is not arbitrary or capricious. While it is certainly most desirable to provide interview panelists with the opportunity to review applications prior to interviews, the failure to do this is also not arbitrary or capricious.

Complainant further asserts that it was arbitrary and capricious for Cumbee to fail to consider or act on the NCIC/CCIC certification issue in his decision. It was certainly within Cumbee's discretion to consider the NCIC/CCIC certification issue in his hiring decision; Garber verified this. However, the evidence demonstrated that Cumbee did consider the issue. He testified that NCIC is not a minimum qualification for the PCT position and that it is a skill learned on the job. He also testified that he viewed EMT certification not as a minimum qualification but as something that could also be acquired on the job, as Konz did.

CONCLUSIONS OF LAW

1. Respondent's non-selection of Complainant was not arbitrary, capricious or contrary to rule or law;
2. Respondent's non-selection of Complainant was not made on the basis of

intentional race or sex discrimination;

3. Neither party is entitled to an award of attorney fees and costs.

ORDER

Respondent's action is affirmed and Complainant's appeal is dismissed with prejudice.

DATED this 25th day of
January, 2001, at
Denver, Colorado.

Mary S. McClatchey
Administrative Law Judge
1120 Lincoln Street, Suite 1420
Denver, Colorado 80203

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. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may 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 decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made 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.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. 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 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 2 inch by 11 inch paper only. Rule R-8-64, 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. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF MAILING

This is to certify that on the ____ day of January, 2001, I placed true copies of the foregoing **AMENDED INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Jonathon Wilderman
Attorney at Law
4155 East Jewell Avenue, Suite 500
Denver, CO 80222

and in the interagency mail, addressed as follows:

Susan J. Trout

Assistant Attorney General
Personnel and Employment Law Section
1525 Sherman Street, Fifth Floor
Denver, CO 80203
