

**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**RALPH S. NOLAN,**

Complainant,

vs.

**DEPARTMENT OF CORRECTIONS,**

Respondent.

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Administrative Law Judge G. Charles Robertson commenced hearing on July 2, 2001. The evidentiary hearing was held on October 26, 2001; November 19 and 28, 2001; and December 5, 2001 before Administrative Law Judge Kristin F. Rozansky at the offices of the State Personnel Board, 1120 Lincoln, Suite 1400, Denver, Colorado. Subsequent to the hearing the Complainant was to submit citations to legal authority referenced in his closing argument. When those citations were not submitted, the record was closed on December 17, 2001. Respondent was represented by Assistant Attorney General Hollyce Farrell. Respondent's Advisory Witness for the proceedings was Jeaneene Miller. Complainant appeared and represented himself.

**MATTER APPEALED**

Complainant, Ralph S. Nolan ("Complainant" or "Nolan") alleges age discrimination in the selection and examination for five GPV positions with Respondent, Department of Corrections ("Respondent" or "DOC").

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

**ISSUES**

1. Whether Complainant was discriminated against on the basis of his age in the selection and examination process for the GPV positions.
2. Whether attorney fees are warranted.

## **FINDINGS OF FACT**

1. Complainant was born on September 27, 1946 and, at all times relevant to this action, has been over the age of 50.
2. Complainant began working for the Department of Corrections in September 1986.
3. As an appointing authority, Jeaneene Miller ("Miller") has promoted fourteen people over the age of 50 and twenty-eight people over the age of 40.

### **Testing for Parole Manager Position**

4. In late 1999, Thomas Coogan, then Director of Adult Parole Services, requested a posting for a number of vacant Parole Manager positions. Some of the positions had been vacant for more than six months, with one position being staffed on an acting basis for longer than six months in violation of § 24-50-114(1), C.R.S.
5. Initially, when the Parole Manager positions were posted, the positions required a minimum of two years of supervisory experience. Because there were going to be too few candidates for the number of anticipated openings, Coogan requested that only one year of supervisory experience be the minimum requirement.
6. When the positions were reposted with the lowered supervisory experience requirement, at least five additional applicants applied.
7. As part of the application process, the announcement for the positions stated that applicants were to submit resumes and management plans.
8. Complainant and his wife, Kelly Messamore ("Messamore"), were both applicants and worked on their resumes and management plans together.
9. There was no indication in the position announcement that applicants must not work with other applicants on resumes and management plans.
10. Ultimately there were three Parole Manager positions that needed to be filled. Those positions were in Denver, Westminster and Colorado Springs. Therefore, under the "Rule of Three" for referrals on multiple vacancies (three candidates for the first job posted and one additional name for each additional job to be filled), the top five ranked applicants would have been eligible for referral.
11. At the time of the Parole Manager exam, Warren Rahn ("Rahn") had filled the Westminster position on an acting basis for eleven months.

12. After written and oral exams in early 2000, Messamore was ranked first, Leslee Waggener (“Waggener”) ranked third, Rahn was ranked fourth and Complainant was ranked fifth. All four of them were eligible for referral for an interview for one of the three positions.
13. After the exams had been given, but prior to the issuance of the referral list, Coogan contacted Leslee Waggener and Mike Miles, asking them if they would be interested in a Parole Manager position in Colorado Springs.
14. William Fitzgerald, then Deputy Director for Adult Parole Division, requested and received a referral list from Rick Tompkins for the Parole Manager exam. Upon receipt, Fitzgerald had an assistant begin contacting the candidates to schedule interviews.
15. Prior to contacting all of the interviewees or conducting any interviews, Dr. Mary West, Deputy Director for DOC, told Coogan, who was retiring, that the person replacing him would be making the hiring decisions for the Parole Manager positions. That person had not yet been appointed.

### **Combining of Adult Parole and Community Corrections Divisions**

16. When John Suthers became Executive Director of DOC, he authorized a task force to conduct a study and prepare a report on guidelines and efficiencies with regards to DOC. The task force was composed of seven DOC managers, including Miller, and was chaired by Miller. Of the six remaining managers, five reported to Miller. Tom Creago was the only person who did not report to Miller.
17. One of the goals of the task force was to regionalize programs for better continuity between the various services, more accountability to accomplish the goals and missions of the various divisions and in order to give better control over personnel, budget, etc.
18. Prior to preparing the report, recommendations were reported to Executive Director Suthers and Dr. West. Only those recommendations approved by them were included in the task force’s June 30, 2001 report.
19. One of the recommendations in the task force’s report was to combine the Divisions of Adult Parole and Community Corrections. In addition, it was recommended that the positions of Parole Manager and Community Program Administrator be combined. The suggestion to combine the positions came from Creago.
20. Prior to combining the positions, there were four Parole Manager positions and two Community Program Administrator positions. In combining the two types of positions, no positions were eliminated and the need to hire additional Community

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Program Administrators in the outer lying areas was eliminated because of the combination.

21. Miller was appointed the Division Director of the new combined Adult Parole/Community Corrections Division.

22. Some of the differences between the two divisions were as follows:

- a. The Division of Adult Parole had supervision of parolees who had been inmates and were then released to the Parole Board. The division also administered the Interstate Compact regarding parolees. The Division of Community Corrections supervised inmates who were serving their sentences through community corrections programs. The division also supervised the community reintegration program for the Youth Offender Services Division.
- b. Parolees supervised by the Division of Adult Parole were released from their parole by the Parole Board. Inmates supervised by the Division of Community Corrections were released by local community corrections boards.
- c. The statutes governing the two divisions were in different articles in Title 17 of the C.R.S., with the exception of the YOS program, which is in Title 16 of the C.R.S.
- d. The Division of Adult Parole directly allocated funds to providers, based upon the location of the parolees. Providers for community corrections programs were and are selected by the local community corrections boards, after reviewing recommendations by DOC. The providers submit their billings to the boards, which in turn submit them to DOC.

### **Combining of Parole Manager and Community Corrections Supervisor positions**

23. Miller assisted with formulating the new job descriptions for the General Professional V ("GPV") positions. One of the skills that Miller wanted the new GPV managers to have was the ability to manage multiple programs.

24. On May 5, 2000 Miller held a meeting with all the Adult Parole supervisors, and Tim Hand from Community Corrections, who was acting manager of the south region of Adult Parole. Complainant was present at that meeting.

25. At this meeting, Miller announced that the divisions of Adult Parole and Community Corrections would be combined into one division. She then stated that a number of people would be retiring in the near future and that the reins would need to be passed to "younger officers." She urged everyone to apply for the position and, in preparing for the exam, to talk to Kim Monchek about budgetary issues.

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26. During the meeting, Miller explained that, given the combining of the two divisions, the duties and the knowledge base for the manager positions had changed and, therefore, there would be a new classification, General Professional V (GPV), combining the Parole Manager and Community Program Administrator positions. She then stated that she would be voiding the existing eligibility list for the Parole Manager positions and testing for the new GPV positions. Some of the people present, including Messamore and Nolan, expressed opposition to voiding the existing eligibility list.
27. During the discussion about opposition to voiding of the list, Miller suggested that, given the volume and complexity of the manager's positions in Denver, that those positions not be combined and that the Denver Parole Manager position be filled from the existing eligibility list. Those present opposed this suggestion and voted that if the Parole Manager eligibility list was to be voided, they would rather that no positions be filled from the list prior to it being voided.
28. On May 6, 2000, Miller learned that there were concerns being expressed about the selection and examination process for the Parole Manager positions, including:
- a. Two of the applicants, Leslee Waggener and Mike Miles, had been interviewed by Coogan, prior to the referral of the eligibility list, and asked if they would take the Colorado Springs position if it were offered to them. There was a perception that candidates were being preselected for positions without consideration being given to all of the referred candidates.
  - b. Many people who applied were unaware that the Colorado Springs position was vacant as it was not included in the announcement, so they were not coding their applications for the Colorado Springs position and, therefore, were not being considered for that position.
  - c. Two of the applicants, Complainant and Messamore had worked together on the management plan, which was submitted as part of their individual application packets.
  - d. A former parole manager was on the selection panel and was perceived as being unfair.
  - e. Rahn had been an acting Parole Manager for longer than six months and, therefore, had a competitive advantage in the exam.
  - f. Coogan had promised the Denver Parole Manager position to Complainant.
29. After investigating the allegations concerning the Parole Manager test, Miller concluded that the test had been compromised and this was an additional reason to void the Parole Manager referral list. Miller's decision was based upon Coogan's calls to Waggener and Miles, which created a perception of pre-interviewing.

30. Miller's decision to void the Parole Manager list was initially based upon the combining of the two divisions and the attendant change in the duties of the managerial positions. However, after concluding that the Parole Manager test had been compromised, she decided that this was an additional reason to void the Parole Manager referral list.

### **Westminster Office Meeting**

31. In late May 2000, Miller visited the Westminster Adult Parole office to discuss with the employees the pending combination of the Adult Parole and Community Corrections Divisions. She made this visit after the decision was made to test for the GPV positions rather than utilize the Parole Manager referral list.

32. At the time of Miller's visit to the Westminster, Rahn had been the acting Parole Manager for the office for over thirteen months. Messamore and Rahn were both Parole Supervisors in the Westminster office and supervised Parole Interns.

33. Earlier that day, a group of women in the office came to Messamore and said that Rahn had a sexist policy with regards to his Parole Interns. The interns Messamore supervised were all males and she had told them that they could work alone. All of Rahn's interns were female and he had told them that they had to have a senior officer with them.

34. During a meeting with all of the employees to discuss this issue, Rahn told them that it was inappropriate to go to Messamore, rather than him, as it ignored the "chain of command." He then told them that because of Miller's pending visit that day, they needed to take a break and "go fix makeup."

35. When Miller arrived at the Westminster office, the atmosphere was very tense. She discussed the changes in DOC, including the combining of the Adult Parole and Community Corrections divisions and the vision for the future of the newly combined division. She told them that she viewed DOC management as having three tiers, "fledglings," "soaring eagles," and "old buzzards."

36. After Miller's meeting with the Westminster staff, Messamore requested a private meeting with Miller to discuss a sexual discrimination issue in the Westminster office. Present at the meeting were Fitzgerald, Rahn, Messamore and Miller.

37. During the private meeting, Miller told Rahn that he should call everyone together and apologize for his comments. She then made the comment to Rahn that she often felt like an "old buzzard" who had had her feathers plucked. Her intent was to ease the tension within the private meeting.

### **Selection and Examination for GPV Positions**

**a. Preparation of Exam for GPV Positions**

38. Rick Tompkins, an HR Specialist from DOC's Personnel Division, prepared and administered the exam for the GPV positions.
39. In preparing the test, Tompkins consulted with subject matter specialists, including Miller, Bill Fitzgerald, Cathy Walker, Carl Sagara and Kelly Monchek about the contents of the exam. Miller told Tompkins that she wanted managers skilled in strategic planning.
40. The exam was an assessment center exam in which applicants would do presentations and role-plays. Such an exam is an observation exam – the panel members only observe the exercises rather than asking a set group of questions. The answer key given to the panel members lists factors that the panel should be looking for in the exercises.
41. In preparing for the exam, many of the applicants spoke with Monchek about budget, management plans and decision items. Messamore met with Monchek and later discussed that meeting with Complainant. Complainant cancelled his meeting with Monchek.

**b. Selection Panel for GPV Positions**

42. Miller had input into the background of who would or would not be on the panel, not into who were the actual panel members. Because of the allegations of unfairness of a former parole manager on the previous Parole Manager exam, she told Tompkins that she did not want to have any former parole employees on the panel.
43. Tompkins obtained the names of potential panel members from Sagara in Community Corrections, Maurice Williams of the Department of Human Services, Bob Cantwell from Colorado Bureau of Investigations and some wardens of various DOC facilities.
44. There were nine panel members, all selected by Tompkins. He did not discuss with Miller who were the panel members.
45. One of the panel members, George Burke, was a former Director of Program Development for Williams Street Center, a facility that had contracts with DOC through the Division of Community Corrections. His current organization has contracts with both Adult Parole and Community Corrections. In the past Burke had given Colorado Avalanche tickets to Tim Griffin, one of applicants for the GPV positions. Burke was not on any of Griffin's selection panels.

46. If Tompkins had known about the Avalanche tickets from Burke to Griffin, he would have disqualified Burke from rating Griffin on the basis of an appearance of impropriety.
47. Kim Dempewolf, a panel member, worked for a facility that had contracts with DOC through Community Corrections. She told Rick Tompkins that she knew many of the candidates that would be applying for the position, including Complainant. She had had more contact with two applicants from the Community Corrections Division, Hand and Griffin.
48. Mary Kanan is a contract hearing officer for the Community Corrections Division. She knew the applicants who were affiliated with Community Corrections. She did not tell Rick Tompkins that she knew them but, given her position, it was understood that she would know the Community Corrections applicants.
49. Burke, Dempewolf and Kanan were all contacted by Rick Tompkins to be on the selection panel for the GPV positions. None of them are aware of how Tompkins got their names.
50. One of the applicants who was ultimately hired, Timothy Griffin, had a working relationship with three of the panel members – Burke, Dempewolf and Kanan. Dempewolf was on one of his panels. He did not tell Tompkins about these relationships.
51. Rick Tompkins provided the panel members some training on the morning they served on the panel. They were given a binder containing a job description, history of the assessment procedures and the exercises they would be scoring. They were also trained on disqualification procedures.
52. Each panel member was given an answer key that they used to keep track of the various responses. At the end of the day, all of the panel members came together to discuss each applicant. The group as a whole then ranked the various applicants.
53. The panel members did not interview and/or score each and every candidate nor did they serve the entire time with the same panel members. Applicants picked numbers randomly and then were blindly assigned to panels based upon those numbers.
54. The morning of the GPV assessment exam, Tompkins also spoke to the applicants as a group, explaining the process to them, including how to disqualify any panel members, and providing the applicants with a list of the panel members. At that time, Complainant pointed out that none of the panel members were in Adult Parole and that some of them were in the Community Corrections field.

55. Complainant did not ask that any of the panel members be disqualified. On the previous Parole Manager exam, he had asked to have one person disqualified.

56. During the discussion of the various applicants, none of the panel members discussed any applicant's age.

**c. Hiring for GPV Positions**

57. Half of the applicants for the GPV positions were over the age of 50 but none of them were interviewed or appointed. The oldest applicant from the former Community Corrections Division was 44.

58. The GPV exam was more in depth than the Parole Manager exam. It had more emphasis on budget and included questions on Community Corrections and YOS.

59. The GPV exam had a presentation exercise and a role playing exercise, an interpersonal exercise about a supervisor who had an employee with performance issues. The applicants played the role of the supervisor who was meeting with the employee. For that exercise, factors that were looked for by the panel were persuasiveness and the ability to talk to and listen to staff.

60. Complainant scored in the 80's on both exams. Complainant's final exam scores on the two exams were within a point or two of each other. On the GPV test he performed well on the budget section of the exam and poorly on the interpersonal role playing exercise. According to the selection panel rating Complainant's interpersonal exercise, Complainant was abrupt, cut off the employee and was not empathetic.

61. Prior to combining the Parole Manager and Community Program Administrator positions, there were three Parole Manager vacancies – Denver, Westminster and Colorado Springs. At the time of the announcement of combining the positions in May 2000, there were three GPV vacancies. At the time of the referral and hiring in August 2000, there were five GPV vacancies.

62. The five GPV vacancies were filled by Hand (D.O.B. 4/12/61); Holzworth (D.O.B. 5/29/65); Griffin (D.O.B. 1/02/54); Messamore (D.O.B. 2/19/66); and Waggener (D.O.B. 5/17/57). At the time of being referred and then hired in late summer of 2000, their ages were Hand (39); Holzworth (35); Griffin (46); Messamore (34); and Waggener (43).

63. Tim Hand is the GPV manager who is in charge of the YOS program, but other GPV supervise small portions of the YOS program.

64. In terms of background, Hand and Holzworth have experience in the area of community corrections, Griffin has experience in both areas and Messamore and Waggener have experience in parole.

65. Complainant seeks revocation of the selection and examination process for the GPV positions.

## **DISCUSSION**

### **A. Complainant was not discriminated against on the basis of his age.**

Age discrimination is prohibited in Colorado. § 24-34-402, C.R.S. and Board Rule R-9-3, 4 CCR 801. In this proceeding, the Complainant has the burden of proof to show that he was discriminated against on the basis of his age. *Bodaghi v. Dep't of Natural Resources*, 995 P.2d 288 (Colo. 2000). Initially, Complainant must establish by a preponderance of the evidence a *prima facie* case of discrimination. *Colorado Civil Rights Commission v. Big O Tires*, 940 P.2d 397 (Colo. 1997). The elements of a *prima facie* case include a showing that (1) Complainant belongs to a protected class; (2) Complainant was qualified for the job at issue; (3) Complainant suffered an adverse employment decision despite his qualifications; and (4) the evidence supports an inference of unlawful discrimination. See *id.* at 400-01. Once the *prima facie* case is established, there is a presumption that Respondent unlawfully discriminated against Complainant. See *id.* at 399. The burden of production then shifts to Respondent to provide a legitimate non-discriminatory reason for the adverse employment decision. *Bodaghi*, 995 P.2d at 297. The Complainant must then show that such presumptively valid reason(s) is false, a pretext for discrimination, and is not worthy of credence. *Big O Tires*, 940 P.2d at 401.

#### **1. Complainant has made a prima facie case of discrimination.**

Complainant has made a *prima facie* case of age discrimination. It is undisputed that he is over the age of 40 and, therefore, is within the protected class of older workers. 29 U.S.C. § 631(a)(1). There was no disputed evidence that Complainant met the minimum qualifications for the GPV positions. Complainant suffered an adverse employment decision in that he was on the referral list for the Parole Manager positions but the list was eliminated, thereby eliminating his opportunity to interview for the positions. Finally, Miller's remarks could support an inference of age discrimination. The testimony regarding Miller's remarks ranged from a perception of no discrimination at all to the possibility of her remarks referring to either age or level of experience to a blatant statement of discrimination. Given the context of the discussion, the pending retirement of many supervisors and the need to train future supervisors, the remarks could be taken to refer to the need for DOC to plan for the future so that there would not be a shortfall of managers. However, the phrasing was poorly worded and could support an inference of discrimination. Therefore, Complainant has made a *prima facie* case of age discrimination and the burden shifts to Respondent to rebut the

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presumption of age discrimination.

## **2. Respondent has rebutted the presumption of discrimination.**

Respondent rebutted the presumption of age discrimination by presenting credible evidence that there was a legitimate, non-discriminatory reason for eliminating the Parole Manager referral list and testing for the new GPV positions. The DOC was searching for ways to run more efficiently. By combining the Adult Parole and Community Corrections programs, certain administrative and/or overlapping functions could be combined resulting in a more efficient and economic program.

Respondent put on substantial and credible evidence that given the combining of the two sections, DOC wanted the newly appointed managers to have a broader base of knowledge than the Parole Managers. This is a logical conclusion, given some of the differences between the two divisions, including the difference in statutes and releasing authorities (the local community corrections boards for inmates and the Parole Board for parolees). It is typically a preference of both organizations and their employees to prefer managers who possess management skills and who have an understanding and working knowledge of the duties being carried out by the employees they are supervising.

In order to accomplish the goal of managers with a broader base of knowledge, it was necessary to test for those skills. Simply using the Parole Manager referral list or reopening the list and allowing additional applicants to test for Parole Manager positions would not have accomplished this goal. The Parole Manager test had been prepared prior to the combining of the two divisions. It did not take into account any of the services provided by the Community Corrections Division. While it is apparent that some of the people on the Parole Manager referral list had a working knowledge of Community Corrections, that knowledge, under the state personnel system's selection and examination process, had to be measured and demonstrated.

Miller's decision to eliminate the Parole Manager referral list was made and announced before she had any knowledge of the complaints about the selection and examination process for that list. However, once she heard of the complaints, investigated them and consulted with DOC's personnel division, it became an additional reason for eliminating the list. There were complaints that many of the applicants were unaware that the Colorado Springs Parole Manager position was vacant and that Coogan was discussing that position with only some of the applicants. It was, at best, inappropriate for Coogan to "pre-interview" any applicants prior to receiving a referral list and conducting formal interviews of the referred candidates. The perception of the pre-interviews of just a few of the candidates is that only those people will be considered for the Colorado Springs position. Miller appropriately spoke with Coogan and the two candidates he pre-interviewed and reached the conclusion that those pre-interviews tainted the selection and examination process for the Parole Manager positions. This was an additional reason for eliminating the referral list.

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Respondent has provided a legitimate non-discriminatory reason for eliminating the Parole Manager referral list and testing for the new GPV positions.

**3. Complainant has failed to show that Respondent's proffered reason was a pretext for discrimination.**

Complainant has failed to meet his burden of proof by failing to show that Respondent's reason for eliminating the Parole Manager referral list and testing for the new GPV positions was a pretext for discrimination or false. From the evidence presented by the Complainant, it appears that he is alleging pretext in three areas – Miller's animus as represented by her statements; the composition of the GPV selection panel; and the rationale for combining the Parole Manager and Community Corrections Positions.

Miller's comments, at the May 5, 2000 meeting and in responding to Warren Rahn's comments do not rise to the level of age discrimination. Her comment about it being "time to pass the reins to the younger officers" must be considered in the context of DOC's wave of retirements. There was no credible evidence presented that she stated that officers who were chronologically older needed to retire and make way for the chronologically younger officers. Rather, the evidence shows that she made a statement of fact, that the older officers were retiring. The closest evidence to showing that this was a discriminatory comment was the testimony of one witness that the statement "may" be taken to mean either age or experience level. No witness stated that it was understood by those present that she meant the comment in a discriminatory fashion. Given the context of the discussion, the number of future vacancies that would need to be filled, it is more probable that Miller was commenting that with the retirement of the more experienced officers, it was time for less experienced officers to step into these positions and take charge.

Miller's comment in response to Messamore's statement about Rahn's treatment of his interns was heedless. Her choice of phrasing did not show the care and consideration that it is hoped that managers would demonstrate in the workplace. However, it was not a comment made in the context of who should be filling the new GPV positions, the basis for eliminating the Parole Manager referral list or the areas to be tested for the GPV test. It was a stray comment, made in response to a tense situation being presented to her as a new supervisor. Under the "stray remarks" doctrine, such comments, when they are not made in connection with the adverse employment decision being contested, are not an indication of discrimination. *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526 (C.A.10 (Colo.) 1994). If such comments were to be taken as an indication of animus, then it should also be noted that Miller has appointed over forty people over the age of forty, fourteen of those people being over the age of fifty.

Complainant also argued that the selection board was stacked in favor of  
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candidates from Community Corrections, thereby implementing Miller's age discrimination animus. However, Complainant did not present any credible evidence that Miller selected any of the nine selection panel members. Miller simply requested that no current employees of DOC be on the panel. There was nothing to show that she stated a preference for people within the Community Corrections field or for people who preferred younger candidates. Rick Tompkins, who was in charge of assembling the panel, contacted various individuals requesting potential panelists names. There was no evidence that he consulted with Miller before selecting the final panelists. Without a connection between the selection of the final panelists and Miller, it is difficult to make a connection between her alleged discriminatory animus and the GPV selection panel.

Of the nine members of the selection panel, Complainant showed that three of them had some type of connection with Community Corrections. Of those three panelists, only one should have possibly been disqualified – George Burke. However, if disqualified, he should only have been disqualified from rating Tim Griffin, to whom he had given the Avalanche tickets. The evidence showed that he did not rate Griffin. The only way for Burke to show favoritism, therefore, would have been if he had rated the applicants he evaluated in such a fashion that it would have skewed the ratings in favor of Griffin. Given the checks and balances in place, including the rating of the applicants by the selection panel, as a whole, there was no credible evidence to show that Burke was able to affect the ratings in favor of Griffin.

With regards to Mary Kanan and Kim Dempewolf,, the remaining two panelists, Complainant did not present any credible evidence that either of them had a bias or demonstrated that bias in their evaluation of Community Corrections candidates. It should be noted that Complainant had been involved in the examination process for a position before and had at that time disqualified a panelist. He was familiar with the disqualification procedures and chose not to use them in the GPV exam.

Finally, there was no evidence that Griffin, Kanan and Dempewolf skewed the scoring in favor of Community Corrections candidates. On the contrary, Messamore and Waggener had backgrounds in the adult parole field. Griffin who was also hired for one of the GPV positions had a background in the fields of both community corrections and adult parole. The remaining two GPV positions were filled with individuals having backgrounds in community corrections. Therefore, the balance among the areas of adult parole and community corrections was evenly split.

Complainant's third argument that Respondent's reason for eliminating the Parole Manager's list was pretextual is that it was unnecessary to create the new GPV position, that the Parole Manager candidates would have been able to adequately fulfill the GPV duties. However, as stated above, this ignores the discretion given to appointing authorities to define a position's duties. Board Rule R-1-6, 4 CCR 801. In this matter, the overwhelming evidence showed that the two areas were different and that the GPV position required a broader base of knowledge, encompassing the Adult Parole and the Community Corrections fields. Miller, as the appointing authority,

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wanted managers who would be able to supervise multiple programs, both as managers skilled in managing employees and managers with the knowledge base to understand the work of those they were supervising.

For example, one of the areas tested for in the GPV test was interpersonal skills. As set forth above, it is reasonable to expect that managers should possess some interpersonal skills. A manager in the state personnel system is expected to deal appropriately with those state employees he or she supervises. Interpersonal skills are an integral part of such supervision. Without them there can often be low morale, lack of cohesiveness or purpose, decreased efficiency and poor implementation of the agency's mission. Complainant did not present any evidence that such skills had been adequately tested for in the Parole Manager exam. On the other hand there was evidence that a substantial element in the GPV exam was a role-playing exercise covering how a candidate would handle an employee with poor performance issues. Throughout the hearing witnesses repeatedly stated that Complainant is viewed as having a substantial knowledge base. However, as stated previously, in order to be an effective manager, interpersonal skills are an important requirement for successful managers. It was in this area that Complainant did poorly in the testing process.

Complainant argued against Respondent's combining of the positions by stating that the difference in salaries between the positions is only \$4. This is unpersuasive. There are many positions throughout the state personnel system that have salaries within a few dollars of each other. That does not necessarily mean that the skills required for the positions are the same, merely that the pay scales are similar. The classification system used in Colorado's state personnel system balances two concerns. On the one hand there is a broad classification of positions that require certain basic skills. On the other hand, managers, by defining a job, are given a certain amount of flexibility of what type of knowledge base they wish to have in individual positions. Board Rule R-1-6, 4 CCR 801.

Finally, it is noted that if Miller had used the Parole Manager referral list of five candidates, at the time she hired for the GPV positions, she would have probably had an "incomplete referral." Whenever there is a vacant position, an appointing authority receives the top three candidates names. Colo. Const. art. XII, § 13(5). However, if there is more than one vacancy, then an additional name is added to the original list of three for each additional vacancy. Director's Procedure P-4-17, 4 CCR 801. By doing so, an appointing authority receives a "complete" referral and may have a choice among three candidates for each vacancy. For example if A, B, C and D are referred for two vacancies, then after one of them is selected for one position, there are still three candidates for the remaining position. This procedure allows applicants to focus their energies on only one application, eliminates the necessity of applicants having to take a multitude of exams for the same types of positions and provides appointing authorities with three qualified candidates for each and every vacant position. In this matter, there were three vacant Parole Manager positions. Therefore, five names were referred. However, once the two divisions were combined, there were five vacant GPV positions.

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If Miller had utilized the original referral list, she would have had an incomplete referral. While each of the referred candidates, including Complainant, would have been appointed to the GPV positions, Miller would have been given none of the discretion appointing authorities are allowed under the Colorado Constitution to select from the top three qualified candidates for a position.

Complainant has failed to show that Respondent's proffered reason for eliminating the Parole Manager referral list was a pretext for age discrimination. There is nothing in the record to indicate that the combining of the Adult Parole and Community Corrections divisions, and subsequent creation of the GPV positions in place of the Parole Manager and Community Program Administrator positions, was a pretext for age discrimination. The divisions were combined as part of an effort to streamline costs within DOC. The combination of divisions was the driving force behind the combining of the Parole Manager and Community Program Administrator positions, not age discrimination.

**B. Attorney fees are not warranted in this action.**

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule R-8-38, 4 CCR 801.

Given the above findings of fact an award of attorney fees is not warranted.

**CONCLUSIONS OF LAW**

- 66.1. Respondent did not discriminate against Complainant on the basis of his age.
2. Attorney's fees are not warranted.

**ORDER**

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

Dated this 28th day of January, 2002.

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Kristin F. Rozansky  
Administrative Law Judge  
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Denver, CO 80203

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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. 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. 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 the Board does not receive a written notice of appeal 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 1/2 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 SERVICE**

This is to certify that on the \_\_\_\_\_ day of January, 2002, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Ralph S. Nolan  
6259 Devinney Circle  
Arvada, Colorado 80004

and by courier to:

Hollyce Farrell  
Assistant Attorney General  
Employment Law Section  
1525 Sherman Street, 5<sup>th</sup> Floor  
Denver, Colorado 80203

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Marcella Von Thun