STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2015G091(C)**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

LYNN A. MICHEL,
Complainant,

vs.

DEPARTMENT OF TRANSPORTATION,
Respondent.

Administrative Law Judge (ALJ) Susan J. Tyburski held the commencement hearing on October 26, 2015, and the evidentiary hearing on May 9, 10 and 11, 2016, in this matter at the State Personnel Board, Courtroom 6, 1525 Sherman Street, Denver, Colorado. The record was closed on May 12, 2016, after the exhibits were reviewed and redacted for inclusion in the record. Complainant appeared and was represented by Mark Schwane. Respondent was represented by Eric Freund, Senior Assistant Attorney General. Respondent's advisory witness was Mark Eike, the hiring authority for the position at issue in this case.

MATTER APPEALED

Complainant, a certified employee, seeks review of Respondent's decision not to select her for the position of Office Manager I, arguing that Complainant was subjected to disparate treatment on the basis of age in violation of the Colorado Anti-Discrimination Act (CADA), § 24-34-401, *et seq.*, C.R.S. Complainant seeks all damages to make her whole, including but not limited to back pay from the date of the final agency decision to the date of hiring for the promotional position of Office Manager I on January 17, 2015; front pay, with yearly pay increases, in the amount of compensation Complainant would have earned had she been promoted to the age of 65; compensatory damages, including but not limited to back benefits, including lost PERA or service credits as a result of not being promoted, and all expense related to seeking other employment. Complainant also seeks an award of attorney fees and costs. Respondent seeks affirmance of its decision not to select Complainant for the Office Manager position, and denial of all relief sought by Complainant.

For the reasons discussed below, Respondent's decision not to select Complainant for the position of Office Manager I is **reversed.**

ISSUES

1. Whether Respondent's decision not to select Complainant for the Office Manager I position was due to discrimination on the basis of age; and

2. Whether Complainant is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

Background

1. The Maintenance Superintendent's Office in Craig, Colorado (Craig office) provides administrative and technical support for the Department of Transportation (DOT) Region 3, Section 6.

2. At all times relevant to this appeal, David Eller was the Region 3 Transportation Director responsible for approximately 550 employees over 15 counties in western Colorado, including the Craig office.

3. Terry Welch was originally hired by Respondent in May 1998, and served as the Office Manager I for the Craig office until she retired, effective January 31, 2015. Her duties included assisting the Superintendent for the Craig office, and managing the office and administrative staff.

4. Complainant was hired as an Administrative Assistant (AA) III in the Craig office in October 2011.

5. Janelle Berner was hired as an AA III in the Craig office in July 2012.

6. On March 3, 2013, the revised description for the AA III position in the Craig office summarized the purpose of this position as follows:

> Provide administrative support by implementing professional standards in communication, answering inquiries from the public and state employees concerning departmental policies, procedures, and general inquiries from the public and state employees concerning departmental policies, procedures, and general road conditions and making referrals to appropriate information sources. Collect, evaluate, collate, and create reports. Complete data entry and track various information and documents in a variety of computer systems. Accurately process invoices, section correspondence, timesheets, personnel and other departmental forms, extra legal permits, general mail, and copies of requested data. This position must provide support to the Deputy Maintenance Superintendent, Office Manager, LTC OPS Is, Field Supervisors, Maintenance Employees, as well as duties previously assigned.

7. The primary duties of the AA III position are office administration, reception, public relations, correspondence, record keeping and file management. The position also requires working knowledge of Microsoft Word, Excel, Access and Power Point. It does not involve any formal supervisory authority.

Ms. Welch's Retirement

8. Ms. Welch served under Superintendant Les Anderson, until Mr. Anderson retired in December 2014.

9. After Mr. Anderson announced his retirement some time in the latter part of 2014, Ms. Welch decided to retire. She started making arrangements to transfer her duties to Ms. Berner so they would be covered when she was gone.

10. Ms. Welch testified that she did not transfer any of these duties to Complainant because Complainant was the time keeper for forty employees, and Ms. Berner only had about six employees to track. Therefore, transferring these duties was an attempt to even out the work load between Complainant and Ms. Berner.

The Posted Position and Application Process

11. In Ms. Welch's absence during the latter part of December 2014, Ms. Berner assisted Mr. Eike and Ms. Livingston to organize and transfer information concerning Ms. Welch's Officer Manager I position onto a new Position Description Questionnaire (PDQ) so that this available position could be posted.

12. On December 26, 2014, the position of Office Manager I for the Craig office was posted as a promotional opportunity, open to all State of Colorado employees, through January 9, 2015. Mr. Eike was the hiring authority for this position.

13. The posted position was described as follows:

> The Office Manager provides administrative and technical support for the Region 3 Maintenance Section 6 office located in Craig, CO. This position develops and establishes standards; monitors and regulates workloads and work flow; evaluates production and authorizes purchases, expenditures, overtime and use of leave for Maintenance Section 6. This position supervises and is accountable for the work of Administrative Assistants and other assigned positions in the unit. The Office Manager reports directly to the Maintenance Superintendent.

14. Prior to submitting her application, Ms. Berner approached Mr. Eike for advice on drafting her resume, asking him "how far back" she should go in listing her work experience, and "what would be applicable" to the Office Manager I position. Ms. Berner's testimony was consistent and credible.

15. Three candidates applied for the Office Manager I position: Janelle Berner, Lynn Michel and Deb Penner.

16. Lynn Livingston from Strategic Workforce Solutions in Denver reviewed the applications submitted by the candidates to determine whether they met the minimum qualifications for the Office Manager I position.

17. All three candidates were found to meet the minimum qualifications for the position and were referred for an interview by Ms. Livingston on January 12, 2015.

Complainant's Qualifications and Training

18. Complainant testified that, as an AA III in the Craig office, she prepared purchase orders; ordered materials for employees; kept track of employees' time sheets; prepared an Excel spreadsheet for the budget; organized "Sharepoint," a web-based program to share information not on Respondent's server; and received training and kept up to date on the use of various software and databases, including CDOT's SAT program, Word, Excel, Powerpoint,

Google Chrome, and Google calendar. Complainant also received training on Family Medical Leave (FML) and workers' compensation.

19. Prior to working as an AA III for Respondent, Complainant worked as an AA III for Red Rocks Community College, where she coordinated tutoring services, used a database to track student who used these services, researched and recommended new software and technology, and supervised student employees. The community college student employees included older, non-traditional students. Complainant's supervisory duties included coordination of employee schedules, monitoring employee performance, and training, coaching and mentoring employees. Complainant held this AA III position from November 2008 through June 2011.

20. Prior to working for Red Rocks Community College, Complainant worked as a Business Office Assistant for Edward Jones from April through August 2007, and as a Customer Service employee for the U.S. Forest Service from February through October 2008.

21. From March 1997 through May 2003, Complainant worked as an Administrative Assistant for Rockwood School District in Missouri.

Janelle Berner's Qualifications and Training

22. When Ms. Berner was hired as an AA III in the Craig office in July 2012, Complainant trained her.

23. Prior to working as an AA III for Respondent, Ms. Berner was a Communications Technician, or a dispatcher, for the Colorado State Patrol from December 1999 through May 2012. She has also served as an Avon Sales Representative since November 2004.

24. In December 2004, Ms. Berner obtained an Associate's degree in "Office Administration / Computers in Business."

25. Prior to working as a dispatcher, Ms. Berner was an office assistant, and then a billing clerk, for The Memorial Hospital and Craig Medical Center from May 1995 through December 1999, with the exception of three months in 1997 when she worked as a secretary/receptionist for MJK Sales and Feed-Elevator in Craig, Colorado.

26. Prior to May 1995, Ms. Berner worked a number of miscellaneous jobs, including retail, restaurant, maid and horse stable work.

The January 15, 2015 Candidate Interviews

27. Mr. Eike asked Stephanie "Dee Dee" Blake, Office Manager for the Grand Junction office, and Kim Wood, Regional Director Program Assistant II, to assist him as subject matter experts in conducting interviews of the candidates.

28. Mr. Eike did not include Ms. Welch on the interview panel.

29. Ms. Welch scheduled the candidate interviews on January 15, 2015, and prepared the packets for the panel members.

30. After seeking input from Ms. Livingston, Ms. Welch prepared the interview

questions for the candidates, and gave them to the interviewers, along with the candidates' applications, cover letters and resumes, on the morning of January 15, 2015.

31. Mr. Eike provided each candidate with a copy of the interview questions, and gave them each twenty minutes to write down their responses. Each candidate was allowed thirty minutes to present her responses to the interviewers, and was instructed to budget her time accordingly. The interviewers could then ask follow-up questions.

32. Karl Lehmann, an employee in the Civil Rights Office in Grand Junction, Colorado, was present and took notes during the January 15, 2015 interviews.

33. Mr. Lehmann's notes indicate that Ms. Berner's interview began at 11:01 a.m. She finished presenting her responses to the interview questions at 11:10 a.m. Ms. Berner testified that she was "very nervous" and went through her answers "quite quickly."

34. Mr. Eike offered Ms. Berner an opportunity to go back over her responses to the interview questions to add more details. The interviewers then asked some follow-up questions. After Ms. Berner responded to the follow-up questions, Mr. Eike asked Ms. Berner if she had any questions about the position, which he answered. Mr. Eike then asked Ms. Berner again if she had anything to add. Ms. Berner's interview ended at 11:27 a.m.

35. Mr. Lehmann's notes indicate that Ms. Penner's interview began at 11:46 a.m. She finished presenting her responses to the interview questions at 12:02 p.m. Mr. Eike and Ms. Wood asked a number of follow-up questions. Mr. Eike then asked if Ms. Penner had any follow-up information to provide or anything else to add. Ms. Penner's interview ended at 12:13 p.m.

36. Mr. Lehmann's notes indicate that Complainant's interview began at 12:29 p.m. She finished presenting her responses to the interview questions at 12:43 p.m. Mr. Lehmann did not note that Mr. Eike offered Complainant an opportunity to go back over her responses to add more details. Complainant asked several questions about the position, which Mr. Eike answered. Mr. Eike and Ms. Wood asked a few follow-up questions. Mr. Lehmann testified that, although his notes do not reflect it, Mr. Eike asked Complainant if she had anything to add to her responses before the end of the interview. Complainant's interview ended at 12:57 p.m.

37. Complainant testified that, during her interview, she was not asked questions about her experience as an AA III, her work experience, her knowledge and use of software applications, or her duties in any of the administrative positions she held. Complainant testified that "no one seemed to be engaged in talking with her," and were mostly busy writing down the answers she gave to the written interview questions.

38. Mr. Lehmann testified that, following the final interview, the interviewers spent 30-45 minutes discussing the candidates' interviews. While he took detailed notes of the interviews, he took no notes during this post-interview discussion, and did not offer any explanation, other than stating he would only write something down during such a discussion if it was a "violation."

39. Ms. Wood testified that the interviewers engaged in approximately ten minutes of discussion following the candidates' interviews, and that this was not an in depth discussion. During this brief discussion, Ms. Wood testified that the interviewers agreed that Complainant's interview performance was the least impressive, and Ms. Berner's interview performance was

the strongest, closely followed by Ms. Penner. Ms. Wood told Mr. Eike that he had "a tough decision to make."

40. Ms. Blake testified that she expected the candidates to "sell themselves" to her, and did not feel that it was her job to ask follow-up questions. She expected Complainant to perform better than she did, and was surprised that Complainant was not more enthusiastic during the interview. Ms. Blake concluded that, of the three candidates, Ms. Berner did the best job of selling herself.

41. Ms. Blake also testified that she believed that Complainant misrepresented her supervisory experience at Red Rocks Community College because she was supervising "students," rather than "an adult work force." She based her understanding of this work on the fact that her daughter is a college student, and did not ask Complainant any questions about this work during Complainant's interview.

42. Ms. Blake testified that the interviewers discussed the candidates' interviews for "a minimum of half an hour" after the interviews ended. She testified that the interviewers agreed that Ms. Berner's interview performance was the strongest, closely followed by Ms. Penner, and that Complainant's interview was the weakest.

43. While the testimony of Ms. Wood and Ms. Blake appeared generally credible, the discrepancies between their descriptions of the length and depth of their post-interview discussion, and Mr. Lehmann's decision not to take any notes of this discussion, raised troubling credibility issues.

44. Mr. Eike testified that, after the final candidate's interview, the panelists took a short break and then reconvened to discuss their assessments of the candidates. Mr. Eike testified that Ms. Wood and Ms. Blake agreed that Ms. Berner did the best job in the interview, followed by Ms. Penner, and that Complainant had the weakest interview performance.

The Selection Decision

45. Mr. Eike testified that he selected Ms. Berner for the Office Manager I position because she wrote the best cover letter and, following the post-interview conclusions of Ms. Wood and Ms. Blake, performed the best in the interview.

46. Mr. Eike did not consider the applicants' respective administrative or supervisory experience, or contact any of the candidates' references, before making his selection decision.

47. On January 16, 2015, Mr. Eike forwarded a promotional salary request and justification for Ms. Berner to David Eller, Region 3 Director. Mr. Eike requested a 15% salary increase for Ms. Berner.

48. Following a salary analysis performed by Ms. Livingston, Mr. Eller approved a salary increase of 12.5%, which Ms. Berner accepted on January 20, 2015.

49. At the time this selection decision was made, Complainant was 61 years old and Ms. Berner was 45 years old.

Complainant's January 20, 2015 Discussion With Mr. Eike

50. On January 20, 2015, at approximately 4:00 or 4:15 p.m., Complainant was verbally informed by Mr. Eike that she was not selected for the Office Manager I position. Mr. Eike told her that he "felt Janelle Berner was a better fit for the office." Complainant asked him if he meant "personality-wise," and he said yes.

51. Mr. Eike then told Complainant that he would be glad to help her find another promotion opportunity, and said, "Well, you have a few good years left." Complainant testified that this comment was like "a slap in the face."

52. Complainant's testimony was clear and consistent, and she was credible.

53. After Complainant filed a grievance, Mr. Eller met with Mr. Eike to discuss Complainant's grievance. Mr. Eller testified that Mr. Eike admitted that, on January 20, 2015, he said to Complainant, "You still have a few good years left in the system." Mr. Eller further testified that Mr. Eike explained that he was trying to encourage Complainant to apply for other available promotions, and said that she still had "a few good years" left to do so. Mr. Eller's testimony was clear, consistent, and credible.

54. During his testimony, Mr. Eike categorically denied making the statement, "You still have a few good years left," described by Complainant and by Mr. Eller. Mr. Eike's denial of this statement was not credible; it contradicted the consistent and credible testimony of Complainant and of Mr. Eller.

Complainant's Grievance

55. Complainant initiated a Step 1 informal grievance with Mr. Eike on January 20, 2015 concerning her non-selection for the Office Manager I position.

56. Mr. Eike met with Complainant on February 17, 2015 to discuss her Step 1 grievance.

57. On February 23, 2015, Mr. Eike issued his Step 1 decision denying Complainant's grievance. In this decision, he addressed Complainant's concerns about the selection of Ms. Berner and the fairness of the selection process. Mr. Eike responded to Complainant's concerns as follows:

> ... I do believe the selection process was fair. Strategic Workforce Solutions in Head Quarters found all three candidates that applied eligible to be considered for the position based on the requirements regarding experience and time with CDOT. All three candidates had varied experience in administrative duties in prior employment that would complement their ability to perform the Office Manager role. As such, all candidates were placed on a referral list for me, the hiring manager, to decide the candidate that is a best fit for the position. A panel of unbiased subject matter experts was assembled to help me evaluate the candidates and provided a unanimous recommendation of which candidate was best suited. I did not make a decision until after the interviews and recommendation from the panel was received. I also understand that you believe Terry Welch, the previous Office Manager, had provided more training to Janelle than yourself. I cannot

> address Ms. Welch's training practices since she is no longer employed by CDOT, but do find it the employee's responsibility to take the appropriate initiative when seeking a new position. After consideration of all aspects in this hiring process, I selected Janelle for the Office Manager position. I believe all three candidates are capable of performing the duties of Office Manager, but made my decision based on the recommendation of subject matter experts and what I feel was the best fit for Section 6.

58. On March 3, 2015, Complainant initiated a formal Step 2 grievance concerning her non-selection for the position of Office Manager I, alleging discrimination on the basis of age. In her grievance statement, Complainant asserts:

> January 20th, 2015 was when Mark told me I didn't get the promotion. During our brief meeting, Mark told me Janelle got the promotion because he felt she was a better fit for the office. I asked him "you mean personality wise?" and he agreed.

59. In her Step 2 grievance, Complainant further states that, during the conversation she had with Mr. Eike on January 20, 2015, Mr. Eike commented "Oh you still have a few good years left."

60. Complainant also asserts, in her Step 2 grievance, that during her Step 1 meeting with Mr. Eike on February 17, 2015, she asked him, "What is it about my personality that he didn't like?" Mr. Eike "replied that we had two totally different personalities and he was the boss so he can choose who he wants to hire."

61. Mr. Eller met with Complainant to discuss her Step 2 grievance on March 16, 2015.

62. On March 31, 2015, Mr. Eller responded to Complainant's Step 2 grievance, explaining that he reviewed the selection process for the Office Manager I position, and concluded that it was fair and unbiased. He denied any additional relief requested by Complainant.

<u>Complainant's Appeals to the Board</u>

63. On January 26, 2015, Complainant filed a petition for review, appealing the decision not to select her for the position of Office Manager I. This petition did not assert a claim of discrimination or any other claim over which the Board had jurisdiction. Therefore, it was dismissed from the Board and referred to the State Personnel Director to review the selection process.

64. On March 11, 2015, the Interim State Personnel Director issued a decision upholding Respondent's selection, explaining:

> While the State Personnel Director administers selection for the state personnel system, Article XII, Section 13 of the Colorado Constitution gives the appointing authority the discretion to appoint any one of the six highest-ranking candidates on the appropriate eligible list, and Rule 1-9 states that appointing authority powers include hiring. Therefore, the jurisdiction to determine the individual to be appointed in this case properly rests with the

appropriate appointing authority at the Department.

65. On March 23, 2015, Complainant filed a second petition that appealed the final decision of the Director affirming the selection process. In this petition, Complainant alleged discrimination on the basis of age.

66. On April 9, 2015, Complainant filed a third petition, timely appealing the final agency decision, dated March 31, 2015, denying her grievance. This petition also included alleged discrimination on the basis of age.

67. On July 9, 2015, ALJ Pamela Sanchez issued a Preliminary Recommendation that Complainant's third petition for hearing be granted.

68. On July 27, 2015, the Board issued an Order upholding and adopting ALJ Sanchez's Preliminary Recommendation, and granting Complainant's petition for hearing.

Complainant's Current Employment

69. Since October 5, 2015, Complainant has worked as an AA III for the Division of Rehabilitation in Durango, Colorado. She lives outside Durango, in Ignacio, Colorado.

70. At the time of the hearing, Complainant was earning $3,486 a month as an AA III.

DISCUSSION

I. THE BOARD HAS JURISDICTION TO HEAR COMPLAINANT'S CLAIM OF DISCRIMINATION ON THE BASIS OF AGE IN THE SELECTION PROCESS.

At the outset of the hearing, Respondent argued that the Board did not have jurisdiction to consider Complainant's discrimination claim because ALJ Sanchez did not include it in the statement of "Issue Before the Board" preceding the "Discussion" section in her July 9, 2015 Preliminary Recommendation. However, this preliminary recommendation must be read and considered as a whole. Despite this omission in the "Issue" section, ALJ Sanchez went on to discuss and analyze Complainant's discrimination claim, and Respondent's response to this claim, at length; determined that Complainant had established a *prima facie* case of age discrimination; met her burden of establishing valid issues that merit a hearing concerning her claim of age discrimination, and recommended that a hearing be granted on this basis.

In its Order granting Complainant's petition for hearing, the Board found "sufficient basis to uphold the Preliminary Recommendation," and "adopted" this recommendation to grant a hearing on Complainant's claim of discrimination on the basis of age in the selection process. For all of these reasons, Respondent's motion to dismiss Complainant's age discrimination claim for lack of jurisdiction was therefore denied.

II. COMPLAINANT ESTABLISHED THAT RESPONDENT DID NOT SELECT HER FOR THE OFFICE MANAGER I POSITION DUE TO AGE DISCRIMINATION.

A. Burden of Proof

Complainant argues that Respondent's failure to select her for the position of Office Manager was the result of age discrimination. As the proponent of the order in this matter, Complainant bears the burden of proof on this claim. § 24-4-105(7), C.R.S.

CADA provides, in pertinent part: "It shall be a discriminatory or unfair employment practice ... [f]or an employer to refuse to hire ... any person otherwise qualified because of ... age..." § 24-34-402(1)(a), C.R.S. Judicial interpretations of the analogous federal statute, the Age Discrimination in Employment Act (ADEA), constitute persuasive authority for understanding what actions constitute unlawful age discrimination under CADA. *George v. Ute Water Conservancy Dist.*, 950 P.2d 1195, 1198 (Colo. App. 1997). Board Rule 9-4 provides: "Standards and guidelines adopted by the Colorado Civil Rights Commission and/or the federal government, as well as Colorado and federal case law, should be referenced in determining if discrimination has occurred."

Under CADA, intentional discrimination may be proven by either direct evidence or indirect evidence. *George*, 950 P.2d at 1197. Direct evidence is "[e]vidence, which if believed, proves [the] existence of [a] fact in issue without inference or presumption." *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1207 (10th Cir. 1999). However, as the Colorado Supreme Court has acknowledged, "direct evidence of discrimination is rare." *Bodaghi v. Dept. of Natural Resources*, 995 P.2d 288, 296 (Colo. 2000). To meet their burden of proof, "employees must often rely on indirect evidence and reasonable inferences to establish a case of discrimination under the McDonnell Douglas analysis ... In fact, circumstantial evidence is often particularly helpful when ... a case turns on vacillating issues such as motive or intent." *Id.* In the absence of direct evidence, a claimant's burden of proof may be met through "evidence of actions" or "existing conditions from which a fair inference of such discrimination [can] legitimately be drawn." *Colorado Civil Rights Com'n v. State, Sch. Dist. No. 1*, 488 P.2d 83, 87 (Colo. App. 1971). The appellate court quoted the following principles to be used in considering whether conditions exist "from which a fair inference of ... discrimination could legitimately be drawn":

> Such discrimination is generally subtle and covert ... A finding of discrimination can usually only be based upon deduction from a series or pattern of seemingly innocent acts taken together and viewed as a totality.

State, Sch. Dist. No. 1, 488 P.2d at 87.

In *Colorado Civil Rights Commission v. Big O Tires*, 940 P.2d 397, 399 (Colo. 1997), the Colorado Supreme Court adopted the analysis outlined by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). To establish a *prima facie* case of age discrimination based on a failure to hire, Complainant must show: (1) that she belongs to the protected class; (2) that she applied for and was qualified for the position; (3) that despite her qualifications she was not hired; and (4) that the Respondent filled the position with someone sufficiently younger to permit an inference of age discrimination or continued to seek applicants from individuals having qualifications similar to those of Complainant. *Enos-Martinez v. Bd. of County Com'rs of County of Mesa*, 10-CV-00033-WJM-DLW, 2012 WL 1144660, at *3 (D. Colo. April 5, 2012) (citations omitted).

If the complainant establishes a *prima facie* case of discrimination, the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employment decision. Once the employer meets its burden, the complainant must then be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for the employment decision were in fact a pretext for discrimination. *Big O Tires*,

940 P.2d at 399. The Tenth Circuit Court of Appeals has held that, in interpreting the ADEA, an employee alleging intentional discrimination must prove that "age was a 'determinative factor' in the employer's action toward him." *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1547 (10th Cir. 1988). The Court explained: "Age need not be the sole reason for the employer's act, but [the claimant] must show that age 'made a difference' in the employer's decision." *Id.*

Subsequent to the Tenth Circuit's decision in *Cooper, supra*, the U.S. Supreme Court held, in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009), that proving a discrimination claim under the ADEA requires "but-for" causation. To succeed in establishing age discrimination, a plaintiff must prove by a preponderance of the evidence that her employer would not have taken the challenged action "but for" her age. *Gross*, 129 S.Ct. at 2351.

The Tenth Circuit Court of Appeals has subsequently clarified that this "but for" standard

> ... does not disturb longstanding Tenth Circuit precedent by placing a heightened evidentiary requirement on ADEA plaintiffs to prove that age was the sole cause of the adverse employment action. Instead, an employer may be held liable under the ADEA if other factors contributed to its taking an adverse action, as long as age was the factor that made a difference.

Jones v. Oklahoma City Public Schools, 617 F.3d 1273, 1277 (2010) (citations omitted). The Tenth Circuit also held that the U.S. Supreme Court's decision in *Gross, supra*, did not overturn precedent in this Circuit that the *McDonnell Douglas* analysis is appropriate for ADEA cases. *Id.*

B. Complainant's *Prima Facie* Case of Discrimination

At the time of the selection decision at issue, Complainant was 61 years old; therefore, she was a member of a protected class of employees 40 years or older, and met the first element of a *prima facie* case of age discrimination. Following her submission of an application for the Office Manager I position, Complainant was determined by Respondent to have met the minimum qualifications. In addition, Mr. Eike admitted, in his Step One grievance response, that "all three candidates," including Complainant, "are capable of performing the duties of Office Manager." Therefore, Complainant has established the second element of a *prima facie* case. Respondent's decision not to select Complainant for the Office Manager I position met the third element of a *prima facie* case.

Finally, Respondent selected Ms. Berner, who was 45 years old. Although Ms. Berner belongs to the same protected class as Complainant, she was 15 years younger, permitting an inference of age discrimination. *O'Conner v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996). Thus, Complainant established the fourth and final element of a *prima facie* case. *Enos-Martinez*, 10-CV-00033-WJM-DLW, 2012 WL 1144660, at *3.

C. Respondent's Non-Discriminatory Reasons for Its Selection Decision

The establishment of a *prima facie* case of discrimination creates "a presumption that the employer unlawfully discriminated against the employee." *Big O Tires*, 940 P.2d at 399. Because Complainant met her initial burden to establish a *prima facie* case of age discrimination, the burden of production shifted to Respondent to establish "some legitimate, nondiscriminatory reason" for its decision not to select Complainant for the Office Manager I position. *Big O Tires*, 940 P.2d at 399.

Mr. Eike, the hiring authority, testified that he discussed the candidates' performances during the January 15, 2015 interviews with his subject matter experts. Both Ms. Wood and Ms. Blake concluded that Ms. Berner's interview was the best, closely followed by Ms. Penner. Mr. Eike testified that, after considering his experts' assessment, he selected Ms. Berner because she wrote the best cover letter and performed the best in the interview. Therefore, Respondent met its burden of articulating "some legitimate, nondiscriminatory reason" for its decision not to select Complainant for the Office Manager I position. *Big O Tires*, 940 P.2d at 399.

D. Complainant's Establishment of Pretext

Once an employer meets its burden of proffering a legitimate, non-discriminatory reason for an adverse employment decision, Complainant must "demonstrate by competent evidence" that this articulated reason is "a pretext for discrimination." *Big O Tires*, 940 P.2d at 401. In *Bodaghi*, 995 P.2d at 298, the Colorado Supreme Court explained:

> The determination that the employer has asserted a non-discriminatory basis for the questioned employment practice does not mean that the employer has successfully rebutted the employee's claims and is therefore entitled to prevail on the ultimate question of whether unlawful discrimination occurred. That determination depends upon the evidence submitted to support the employer's assertion, which itself involves a credibility assessment because the burden of production stage necessarily precedes the credibility assessment stage.

Id., citing *St. Mary's Ctr.,* 509 U.S. at 509. The Court further explained: "The factfinder's disbelief of the reasons put forth by the [employer] (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." *Id.*, citing *St. Mary's Ctr.,* 509 U.S. at 511. Where a *prima facie* case of discrimination is proven and the reasons given for the employment decision are found to be a pretext for discrimination, no additional evidence is required to infer intentional discrimination. *Big O Tires*, 940 P.2d at 401.

In the instant case, the younger candidate selected for the Office Manager I position, Ms. Berner, was provided some unfair advantages over the other two candidates. Because she assisted Mr. Eike in preparing the PDQ for the position to be posted, she was able to review and consider it before it was posted. Mr. Eike also admitted providing Ms. Berner advice about a draft of her resume, which was not provided to anyone else. In addition, Mr. Lehmann's detailed notes of the three interviews indicate that Mr. Eike provided Ms. Berner some assistance or prompting through repeated offers to supplement her responses, especially after she completed her initial answers to the interview questions in only nine minutes. In comparison, the other candidates were only asked, near the end of their interviews, if they wished to add anything.

While Mr. Eike testified that he relied on the post-interview recommendations of Ms. Wood and Ms. Blake, he was the hiring authority and the selection decision was ultimately his. In reaching this decision, he discounted Complainant's lengthy experience as an Administrative Assistant III and supervisory experience at Red Rocks Community College, neglected to contact any of the candidates' references, and did not look beyond the candidates' brief interview performances. When he was subsequently questioned by Complainant about his selection decision during their January 20, 2015 discussion, Mr. Eike did not identify any specific

objective factors involved in this decision; instead, he acknowledged that "personality" was a factor. During the Step I grievance meeting with Complainant, he stated, "we had two totally different personalities," and because he "was the boss," he could "choose who he wants to hire." In his Feb. 23, 2015 response to Complainant's Step 1 grievance, Mr. Eike explained that all three candidates were "capable of performing the duties of Office Manager," but that he selected Ms. Berner "based on the recommendation of [Ms. Wood and Ms. Blake] and what I feel was the best fit for Section 6."

Most importantly, Complainant credibly testified that, during their January 20, 2015 discussion about his selection decision, Mr. Eike told her that she still "had a few good years left." Mr. Eike's supervisor, Mr. Eller, confirmed that Mr. Eike made this statement. Mr. Eller testified in detail about Mr. Eike's explanation that he offered to help Complainant obtain a promotion in another office, and that when he made that statement, he meant she still "had a few good years left in the system." While Complainant may have a potential motive to invent this statement, Mr. Eller, as the appointing authority, does not have a reason to lie about a statement that was potentially against Respondent's interest. This lack of apparent bias renders Mr. Eller's testimony much more credible than Mr. Eike's denial.

Mr. Eike's adamant denial that he made this statement was in direct contradiction to the credible testimony of both Complainant and Mr. Eller; thus, his denial was not credible. Further, it calls into question the credibility of the rest of his testimony, and supports an inference of discriminatory animus. This statement, arising in the context of Mr. Eike's discussion of his selection decision, indicates not only that Mr. Eike was aware of Complainant's age, but that it was in his mind as he was deciding which candidate had the better "personality" and was "the better fit" for his office.

One of the essential functions of a *de novo* hearing is to permit the ALJ to evaluate the credibility of witnesses and other evidence. When conflicting evidence is offered in an administrative hearing, it is the role of the ALJ to assess the credibility of, and weigh, that evidence. See *Charnes v. Lobato*, 743 P.2d 27, 33 (Colo. 1987); *Colorado Ethics Watch v. City and County of Broomfield*, 203 P.3d 623, 626 (Colo. App. 2009). Where a complainant establishes "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence," an inference "that the employer did not act for the asserted non-discriminatory reasons" may be drawn. *Jones v. Okla. City Pub. Sch.*, 617 F.3d 1273, 1280 (10th Cir. 2010), quoting *Jaramillo v. Colo. Judicial Dep't*, 427 F.3d 1303, 1308 (10th Cir. 2005). In addition, evidence that Respondent misjudged the candidates' qualifications, or used subjective factors to justify the selection of a objectively less qualified candidate, may provide support for a finding of pretext for discrimination. *Bodaghi*, 995 P.2d at 300 [citations omitted].

Mr. Eike repeatedly used vague, subjective factors, such as "personality" and "a better fit," to explain his selection of a younger, less experienced applicant instead of Complainant. This younger candidate was provided some advantages, such as Mr. Eike's feedback on her resume before she submitted it and Mr. Eike's repeated offers to supplement her interview responses, that the other candidates were not. Mr. Eike discounted Complainant's more extensive administrative supervisory experience, compared to Ms. Berner. This combination of details, considered in conjunction with Mr. Eike's lack of credibility and his statement to Complainant that she "still had a few good years left" in the context of discussing his selection decision on January 20, 2015, all support a finding of pretext for discrimination. *Big O Tires*, 940 P.2d at 401.

The hiring authority's lack of credibility in advancing legitimate reasons for his hiring decision and his comment concerning her age, combined with the elements of the *prima facie* case established by Complainant, prove by a preponderance of the evidence that Respondent's non-selection of Complainant was due to discrimination on the basis of age. *Id.*; *Bodaghi*, 995 P.2d at 298.

III. COMPLAINANT IS ENTITLED TO AN AWARD OF LOST PAY AND PERA CONTRIBUTIONS TO MAKE HER WHOLE FOR THE LEGAL WRONG SHE SUSTAINED.

Complainant demonstrated that she was denied the Office Manager I position due to age discrimination by the hiring authority. She has since moved to Durango, where she is working in another AA III position for a different agency within the State of Colorado. Justice would not be served by a remedy that would require Complainant to relocate, uproot herself and her family, and replace the current incumbent in the Office Manager I position. Such a remedy would be punitive, rather than just compensation to make her whole. It would also not be reasonable to require Respondent to find an equivalent position in which to place Complainant within a reasonable commuting distance of Complainant's current residence.

To make Complainant whole for the age discrimination she has suffered, Respondent shall provide Complainant a lump sum payment equal to the percentage raise she would have received had she been selected for the Office Manager I position, as well as any additional PERA contributions that would have resulted from this pay increase, with statutory interest. This payment should be calculated from the date of hire of Ms. Berner as Office Manager I through the date of this initial decision, as ordering payment beyond the date of this decision would be speculative. The evidence establishes that Ms. Berner was provided a 12.5% increase of her salary upon her selection in January 2015; therefore, Complainant should receive an amount equivalent to the same 12.5% increase based upon her salary in January 2015. To avoid a windfall, this payment shall be reduced by any salary increase Complainant received in her current or former position since January 2015.

This remedy is within the Board's authority, pursuant to Board Rule 9-6 and § 24-34-405(2)(a), C.R.S. See also *Cunningham v. Dep't of Highways,* 823 P.2d 1377, 1383-84 (Colo. App. 1992). This remedy does not constitute a windfall, but rather makes Complainant whole for the unlawful discrimination she has suffered. *Dep't of Health v. Donahue,* 690 P.2d 243, 250 (Colo. 1984).

In her pleadings, Complainant also requests that she be reimbursed for "all expense related to seeking other employment." However, Complainant did not offer any specific testimony about this expense, and failed to establish that such expense was the result of the age discrimination she suffered. Therefore, this requested reimbursement is denied.

IV. COMPLAINANT IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES AND COSTS.

Attorney fees and costs 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.; Board Rule 8-33. A groundless personnel action is one in which it is found that "despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action..." Board Rule 8-33(C). Frivolous actions, on the other hand, are actions in which it is

found that "no rational argument based on the evidence or law was presented." Board Rule 8-33(A). A personnel action made in bad faith, that is malicious, or that was a means of harassment "means that it was pursued to annoy or harass, made to be abusive, stubbornly litigious, or disrespectful of the truth." Board Rule 8-33(B).

As discussed above, Respondent presented a non-discriminatory reason for its non-selection of Complainant for the position of Office Manager I. While this reason was ultimately determined to be pretextual, it does not rise to the level of a decision that was frivolous or groundless, or that was made in bad faith, maliciously or as a means of harassment. Thus, Complainant is not entitled to an award of attorney fees and costs.

CONCLUSIONS OF LAW

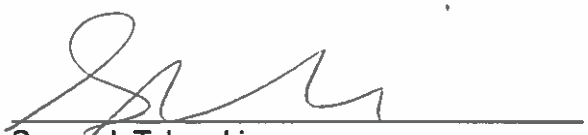
1. In deciding not to select Complainant for the Office Manager I position, Respondent discriminated against Complainant on the basis of age, in violation of the Colorado Anti-Discrimination Act (CADA), § 24-34-401, *et seq.*, C.R.S.

2. Complainant is not entitled to an award of attorney fees and costs.

ORDER

Respondent's decision not to select Complainant for the Office Manager I position is **reversed.** To make Complainant whole for the age discrimination she has suffered, Respondent shall provide Complainant a lump sum payment equal to the 12.5% raise she was denied, as well as any additional PERA contributions that would have resulted from this pay increase, with statutory interest. This payment should be calculated from the date of hire of Ms. Berner as Office Manager I through the date of this initial decision, and shall be reduced by any salary increase Complainant received in her current or former position since January 2015. Attorney fees and costs are not awarded.

Dated this 24th day
of June, 2016.



Susan J. Tyburski
Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203
(303) 866-3300

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

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

RECORD ON APPEAL

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

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

BRIEFS ON APPEAL

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

ORAL ARGUMENT ON APPEAL

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

PETITION FOR RECONSIDERATION

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

CERTIFICATE OF MAILING

This is to certify that on the 24th day of June, 2016, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** addressed as follows:

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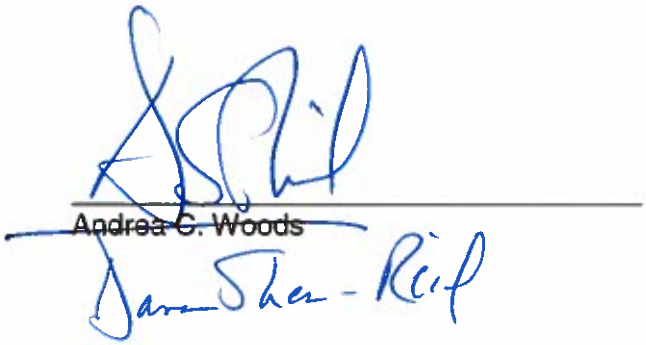

Andrea C. Woods