

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MERCEDES MAYES,
Complainant,

v.

DEPARTMENT OF HUMAN SERVICES,
Respondent.

Administrative Law Judge (ALJ) Keith A. Shandalow presided over the evidentiary hearing in this matter on March 11-13, 2024, remotely through Google Meet. The record was closed on March 15, 2024. Complainant Mercedes Mayes (Complainant) appeared and was represented by Mark A. Schwane, Esq. Respondent Colorado Department of Human Resources (Respondent or DHS) was represented by Jacob W. Paul, Senior Assistant Attorney General. Respondent's advisory witness was Erin L. Osterhaus, Executive Director of Education for Respondent's Division of Youth Services (DYS).

A list of witnesses who testified at hearing is attached hereto as Appendix A. A list of exhibits offered and admitted into evidence is attached hereto as Appendix B.

MATTERS APPEALED

Complainant alleges that Respondent's decision to not select her for a Teacher III, Assistant Principal position at Respondent's Mount View Academy (the "Position") was a result of sex and race discrimination in violation of the Colorado Anti-Discrimination Act (CADA). As relief, Complainant seeks placement into the Position, back pay and benefits, statutory interest, and reasonable attorney's fees and costs.

Respondent argues that Complainant lacked the necessary experience and skills for the Position and that its decision not to select her for the Position was based on legitimate, nondiscriminatory reasons. Respondent requests that its selection decision be affirmed and that Complainant's appeal be dismissed.

For the reasons discussed below, Respondent's action is **rescinded**.

ISSUES

1. Did Respondent discriminate against Complainant on the basis of sex or race in violation of CADA?

2. Is Complainant entitled to an award of reasonable attorney's fees and costs?

I. FINDINGS OF FACT

Complainant's Background Prior to Hire by Respondent's DYS

1. Complainant is an African-American woman. (Stipulated fact.)
2. Complainant earned a Bachelor's Degree from Colorado State University with a major in English (concentration in Education) and a minor in Ethnic Studies.
3. Complainant taught at Brighton High School from August 2018 through May 2021, teaching 10th Grade English and 11th Grade Advanced Placement Language Arts.
4. Complainant obtained her Colorado Professional Teacher License in May 2021.

Complainant's Experience At Mount View Before Application for the Position

5. The Campus at Mount View consists of three facilities: Willow Point Youth Services Center (YSC), Rocky Mountain YSC, and Betty K. Marler YSC. The Mount View Academy, which is housed in the Betty K. Marler YSC, is the school operated by DYS for the purpose of educating youth committed to the DYS at those facilities. (Stipulated fact.) Mount View Academy will be referred to hereinafter as Mount View.
6. DYS is legally required to provide school education for all youth who are committed to facilities at DYS, including at Mount View. (Stipulated fact.)
7. The population at Mount View is approximately 65% African-American and 20% percent Hispanic.
8. Complainant was first hired by Mount View as a Teacher I (T1) in November 2021. (Stipulated fact.)
9. As a Teacher I (T1) during the 2021-2022 academic year, Complainant created and taught unit plans, voluntarily served as a resource and support for new teachers entering a difficult work environment, worked with the Special Education (SPED) teams, attended SPED meetings with a SPED student's whole team and, after the school day ended, often met with students to discuss issues such as career goals.
10. Complainant developed great relationships with her students.
11. Complainant was promoted to the position of School to Work Alliance Program (SWAP) Coordinator, classified as a Teacher II (T2), in September 2022 and held that position at all times relevant to the selection process at issue in this case. (Stipulated fact.)

12. SWAP prepared students for employment after they transitioned out of Mount View.

13. Complainant's duties as the SWAP Coordinator included working closely with students to prepare them for their transition out of Mount View, working with the Department of Vocational Rehabilitation, and continuing her mentoring of new teachers and students at Mount View. Complainant also served as acting Principal during those times when Mount View's Principal was not present.

14. Brian Dale was hired as the Principal of Mount View in May 2022 and became Complainant's supervisor at that time.

15. Experience as Mount View's SWAP Coordinator constituted good training for the role as Mount View's Assistant Principal.

16. In June 2023, Complainant enrolled in the University of Denver's graduate school, studying for a Master's degree in Educational Leadership and Policy, with Principal licensure.

17. Complainant has performed very well in her position as SWAP Coordinator.

Interactions with Erin Osterhaus Prior to Assistant Principal Application

18. Erin Osterhaus is the Executive Director of Education for Respondent's DYS. (Stipulated fact.)

19. Director Osterhaus did not have much first-hand knowledge of Complainant's job performance as a Teacher I at Mount View or as Mount View's SWAP Coordinator.

20. When Complainant was under consideration for the promotion from Teacher I to the SWAP Coordinator position, Director Osterhaus expressed vague concerns about Complainant's "work ethic."

21. Director Osterhaus reacted negatively to Complainant's conduct during a couple of professional development trainings, criticizing Complainant for returning a few minutes late from lunch along with other colleagues on one occasion, and glaring at her when not hovering over her on another occasion when she perceived that Complainant was not fully engaged in the training.

22. Director Osterhaus has been highly critical of young women who are in the early stages of their careers.

23. Such was the case with Inga Carland, a young woman at the start of her career, who originated the SWAP Coordinator position at DYS during the 2021-2022 academic year. Director Osterhaus was highly critical of Ms. Carland, micro-managed

her, and eventually stopped communicating with her. Ms. Carland felt obligated to leave her position because of the friction she experienced with Director Osterhaus.

Development of Assistant Principal Position Description and Posting

24. In an email about the Position to Jason Vastola, a DYS Program Assistant, on May 15, 2023, Director Osterhaus indicated that Principal Dale, would be the supervisor for the Position, and Jill Sherepita would be the Appointing Authority.

25. Jill Sherepita is the assistant director of the Betty K. Marler YSC. (Stipulated fact.)

26. Prior to the selection process for the Position, Principal Dale had been involved in more than 5 and less than 10 selections. The process had been that he would recommend the successful candidate for a position and would convey a hiring packet to Director Osterhaus. Prior to the instant case, Director Osterhaus always approved Principal Dale's selection.

27. Principal Dale, Director Osterhaus and Amber Holcomb, a Talent Acquisition Specialist in Respondent's Human Resources (HR) department, drafted the Position Description for the Position, along with the minimum qualifications and preferred qualifications for the Position.

28. On June 15, 2023, DHS posted the Position. The posting stated the Position was open for application from June 15, 2023, through July 4, 2023. The job posting stated that the salary for the Position was \$86,916.00 annually and that it would receive a short-staffing temporary pay differential of 3.17% from July 1, 2023 through June 30, 2024. (Stipulated fact.)

29. The Position posting described the Position as follows:

About the Unit:

The work unit exists to educate adjudicated youth in a positive learning environment that fosters high academic expectations, development of 21st century skills, individual responsibility for learning, growth in social emotional development while maintaining a safe setting.

About the Position:

Under the guidance of the campus Principal and in alignment with education office requirements, supervises, plans, and assures educational services to the students, including supervision for the individualizing and integrating of curriculum that meets student needs; facilitating communication between the school program and other programs in the facility; maintaining security, meeting all policy and procedures of the facility; meeting all legally mandated state and federal

standards for education; assure communication to Central Office and stakeholders; assure human resource processes are followed and mentoring occurs for teaching staff. Assistant Principal is a mentor to staff and creates a school where students learn, grow and progress in all areas of education to transition back to the community while assuring understanding of the DYS system.

30. The posting listed the Position's minimum education and experience qualifications as follows:

- Bachelor's degree from an accredited institution in a field of study related to the work assignment
- Current, valid Professional Teacher license issued by the Colorado Department of Education
- Four years of professional experience in an occupational field related to the work assigned to the position
- Colorado Principal License or or [sic] current enrollment in Principal licensing program; Current CDE teaching license

31. Complainant met the minimum qualifications for the Position.

32. The preferred qualifications for the Position were as follows:

- Three years of licensed principal/assistant principal experience in public setting
- Three years supervision of education staff
- Assistant principal, Principal, or Dean experience
- SPED endorsement
- Bi-lingual, English/Spanish

33. Complainant did not possess the preferred qualifications for the Position.

34. The Position posting also included a list of Essential Knowledge, Skills and Abilities:

- Knowledge of effective research-based instructional strategies
- Understandings of classroom-based behavioral interventions
- Able to build rapport with students while maintaining boundaries
- Experience with urban and at-risk populations
- Secondary school experience
- Leadership experience
- Knowledge of special education
- Ability to supervise, coach, and mentor teachers

35. Complainant possessed all of the essential knowledge, skills, and abilities for the Position. She possessed extensive knowledge of effective research-based instructional strategies. She understood, and effectively implemented, classroom-based behavioral interventions. Complainant was very effective at building rapport with students while maintaining appropriate boundaries. She had experience with urban and at-risk populations, both at Brighton High School and Mount View. She taught at the secondary level both at Brighton High School and Mount View. She evidenced leadership abilities while at Mount View. She had a working knowledge of special education laws and policies through her experience as a Teacher I and the SWAP Coordinator at Mount View. Complainant also mentored new teachers and coached them on the challenges of teaching at Mount View.

36. The Position posting also included the following statement: “We are committed to increasing the diversity of our staff and providing culturally responsive programs and services. Therefore, we encourage responses from people of diverse backgrounds and abilities.”

Jill Sherepita Was the Appointing Authority for the Position

37. Director Osterhaus represented that she was the Hiring Authority for the Position.

38. Colo. Const. art. XII, § 13(7) provides, in pertinent part,

The head of each principal department shall be the appointing authority for the employees of his office and for heads of divisions, within the personnel system, ranking next below the head of such department. Heads of such divisions shall be the appointing authorities for all positions in the personnel system within their respective divisions.

39. Pursuant to State Personnel Director Administrative Procedure 1-9, the Appointing Authority possesses the power to hire employees.

40. State Personnel Director Administrative Procedure 1-8 provides, in pertinent part, “An appointing authority may delegate in writing any and all human resource functions, including the approval of further delegation beyond the initial designee.”

41. On July 1, 2021, Anders Jacobson, the DYS Director and thus the DYS Appointing Authority, sent a memorandum to Director Osterhaus, with the subject line reading “Delegation of Appointing Authority,” delegating appointing authority to Director Osterhaus for positions that report directly to her.

42. The Position would not directly report to Director Osterhaus. She was not the Appointing Authority for the Position.

43. On July April 10, 2022, Director Jacobson, as Director of DYS, sent a memorandum to Ms. Sherepita, with the subject line reading “Delegation of Appointing Authority,” delegating appointing authority to Ms. Sherepita for the Betty K. Marler YSC, which included Mount View.

44. Ms. Sherepita was the Appointing Authority for the Position.

Application Process, Initial Assessment, First Round of Interviews

45. Complainant timely submitted an application for the Position in response to the Position posting. (Stipulated fact.)

46. DHS sent Complainant confirmation that it had received her application on July 5, 2023. (Stipulated fact.)

47. On July 4, 2023, DHS closed the job posting for the Position. (Stipulated fact.)

48. DHS evaluated the candidates’ application materials to determine whether the candidates met the minimum qualification as identified in the job posting. (Stipulated fact.)

49. Because her proof of enrollment in a principal licensure program did not upload, DHS initially determined that Complainant did not meet the minimum qualifications. However, once the error was corrected, DHS informed Complainant on July 11, 2023, that she met the minimum qualifications for the Position and her application would proceed to the comparative analysis process for the Position. (Stipulated fact.)

50. DHS next conducted a comparative analysis of the candidates based on their application materials. This analysis consisted of a structured review of the application materials and a ranking of the candidates based on the minimum qualifications, required competencies, and preferred qualifications for the Position. (Stipulated fact.)

51. DHS informed Complainant that her application passed the comparative analysis of the review process on July 25, 2023. (Stipulated fact.)

52. Following the comparative analysis of the candidates, DHS referred six candidates, including Complainant, for a first panel interview, which was conducted remotely. Two candidates dropped out and the remaining four went through the first panel interview. Complainant was interviewed by the panel on August 4, 2023. (Stipulated fact.)

53. This panel consisted of three persons: Principal Dale, Director Osterhaus, and Cyndi Kuhn, Divisional Instructional Coach. (Stipulated fact.)

54. Each candidate was asked the same set of pre-scripted questions.

55. Director Osterhaus asked Complainant a question that was not included in the scripted list of questions asked of all the other candidates. The question addressed the issue of teachers being disengaged during professional development meetings. Complainant believed that the question was asked because Director Osterhaus perceived that Complainant had appeared disengaged during a professional development training they both had attended. The question was an indirect form of criticism of Complainant.

56. In her notes for Complainant's interview, Director Osterhaus noted that Complainant did not have leadership, supervision, or dean experience. For another question posed to Complainant, Director Osterhaus wrote "(didn't really answer the question?)" For another question, Director Osterhaus wrote "didn't make connection?" These negative comments were not included in the interview notes of either Principal Dale or Ms. Kuhn.

57. Following these interviews, the panelists discussed the candidates for the Position. (Stipulated fact.)

58. Principal Dale identified two candidates, one of whom was Complainant, to sit for a second, more informal interview conducted with Principal Dale and other employees. (Stipulated fact.) The other finalist was M.C.¹

59. There was some confusion about whether the selection process should move forward or whether the Position should be reposted as either a Teacher III or a Teacher II position. Director Osterhaus did not believe that either of the final two candidates were right for the Position.

60. Principal Dale decided to move forward to the second round of interviews with the two finalists for the Position.

Principal Dale Recommends Complainant for the Position

61. Two candidates were interviewed in the final round of interviews: Complainant and M.C. The interviews were conducted on August 9 and 10, 2023.

62. After the second round of interviews, Principal Dale made the decision to recommend Complainant for the Position.

63. Principal Dale thought that Complainant possessed the necessary skills for the Position. In addition, Principal Dale believed that having an African-American woman as Assistant Principal would be tremendously valuable, given Mount View's largely African-American population.

64. Principal Dale discussed his decision with Ms. Sherepita, who supported Principal Dale's decision to offer the Position to Complainant.

¹ This individual is referred to by initials only to protect this person's identity and because the identity is not relevant to any issue in this matter.

65. On Friday, August 11, 2023, Principal Dale sent an email to Director Osterhaus and Ms. Sherepita, writing:

I have concluded the formal portion of the interview process for the Assistant Principal position and have been contemplating the best way forward.

I have attached a more detailed analysis including how I will divide up supervision and responsibilities, and interviewers and my thoughts, but if you don't want to read all of that, in summary:

I want to offer the T3-Assistant Principal as written to Mercedes.

I will get her references, but I know they are good because I know who they are, including me.

Eryn, I want to offer her the minimum starting pay range for the T3. Any thoughts are welcome.

66. Principal Dale attached the following document to his email:

The final interviews were held on Wednesday and Thursday. On Thursday, M.C. was also given a tour of the facility. The voluntary interview committee was comprised of 3 teacher and 1 security staff.

Generally, both candidates' interviews went well. Both candidates demonstrated strengths and both have perceived or known challenges for this role. I am addressing only the challenges/concerns.

Concerns from the interview committee were as follows (not an exhaustive list):

For M.C.-

- concern about her experience level - elementary only.
- significant concern about her understanding, even cursory, of our environment.
- significant concern about "White savior" disposition.

For Mercedes-

- concern about the transition from colleague to supervisor.
- interest (not concern) in alignment with me. Consistent messaging and decision-making.
- general concern about the learning curve, time required, and concurrent enrollment in the Principal licensure program. Work-life balance, self-care.

Clearly, Mercedes is the choice of the interview committee. This is primarily due to both personal familiarity and familiarity with the program, and the environment.

My editorial on the record (and these concerns have been shared with Mercedes over the past year in documented supervisions, and are issues of her professional development).

- Dogmatic implementation of her defined best practices.
- Work schedule, meaning being here for the amount of time it would take to be successful in this role. I have addressed this with her as perception of her colleagues, rather than for this role.

Additional significant challenges for Mercedes in this role (not discussed with her, yet).

- Shift from colleague to supervisor.
- Immaturity in a formal leadership role.
- Work time commitment, regardless of Principal licensure program.
- Moving of her office upstairs. She initially (6 months to a year) will share my office space).
- The role of servant leader and instructional coach supervisor.

I have listed a preliminary, incomplete delegation of supervision and responsibilities for the AP below.

I want to offer the T3-Assistant Principal as written, at the minimum salary of \$86,916/yr to Mercedes.

Since the “probationary” status will be for 6 months for her, I will be able to effectively assess the concerns and overall performance within that time frame.

67. As part of this document sent to Director Osterhaus on August 11, 2023, Principal Dale outlined his proposed division of duties and responsibilities for Complainant in her prospective role as Assistant Principal and himself as Principal.

68. Director Osterhaus responded to Principal Dale’s August 11th communication on Saturday, August 12, 2023, emailing the following: “As you know, I don’t think the skills match the requirements for the position. Additionally, you can’t offer her the minimum for the position based on HR feedback and that the T3 role is required to have the same responsibilities of other T3s such as you and Kelly Engberg-Balderston.”

69. At hearing, Director Osterhaus testified that in addition to thinking that Complainant lacked the necessary skills for the Position, she also thought that Complainant's application and interview were not strong. Director Osterhaus's negative assessment of Complainant's application and interview was not shared by the other panelists.

70. Principal Dale responded to Director Osterhaus's email later that day as follows:

I remember our conversation about the level. We felt we had one finalist that possibly did not have the skills for a T3-Principal (Mercedes), and one that might because of serving as an AP (M.C.). So, I recall that we were going to wait until the final interviews were completed, think about it, and decide what to do.

That is what I was describing in my e-mail and attachment.

To go a bit deeper on why I think this is the best strategy is because neither of these candidates have the skills now to serve as a T3-Principal (such as me, as you state). But that is not what we are initially hiring them to do. We are hiring them as an Assistant Principal.

But we want someone who can have the skill level of Principal.

That will be my job, to train and mentor. With Mercedes I will have 6 months of probationary period to make a determination of my success in that critical endeavor.

Since I have been in this position of training before with other APs, I have confidence in myself, and I also have confidence in Mercedes.

With that said, before making an offer to her, I want to very specifically address the concerns that I stated in the attachment to gauge her readiness.

Additional thoughts are always welcome.

71. During the next week, Principal Dale informed Complainant that he wanted to offer her the Position but that he was getting pushback.

72. Director Osterhaus discussed the situation with Maricela Shull, the DYS Director of Operations, and Director Osterhaus's supervisor. Director Osterhaus told Mrs. Shull that she had decided not to select Complainant, or anyone else, for the position. Director Osterhaus shared with Mrs. Shull her belief that Complainant lacked the credentials and experience for the position and that Director Osterhaus had concerns

about Complainant's performance in her current position. One such concern was a missing cell phone of Complainant's.

73. As Complainant explained at hearing, while she was on vacation in New Hampshire, some youths were unsupervised in her office and found her phone and took it. It was recovered after Complainant's return. Another employee was written up because of the incident; Complainant was not.

74. During her conversation with Mrs. Shull, Director Osterhaus characterized the Position posting as a "pilot posting," that was not meant to be filled but which sought to ascertain the kinds of candidates that would apply for such a position.

75. In a subsequent conversation soon thereafter, Mrs. Shull informed Ms. Sherepita that the Position was a pilot posting. Ms. Sherepita did not know what that meant. No one characterized the Position as a pilot posting until after Director Osterhaus decided not to affirm Principal Dale's decision to hire Complainant for the Position.

76. August 18, 2023, Complainant sent an email to Principal Dale and Ms. Sherepita. Complainant wrote:

In short, I recently went through the process of applying and two rounds of interviews for the T3 Mount View Youth Services Assistant Principal position only to be told that this was a "pilot posting" and that it would be reposted as a T2. There was no transparency or communication of this being a "pilot posting" or a posting to gauge types of applicants interested in the position on the job bulletin, during the assessment process, during my two interviews, or when waiting for a final decision. I have not been provided a reason for this unexpected change that came in the final hours, if not minutes, for this job posting being labeled a "pilot" and ultimately for it to be reposted.

I can't help but feel that my being a finalist in the running had an impact on this explanation and decision to call it a "pilot. [sic] I know I was unfairly interviewed due to a personal question about a previous incident involving one of the interviewers. A question that was unrelated to my answers and am highly doubtful was asked of the others who interviewed. I fell this goes against the "people-first approach", accountability, *transparency*, *ethics*, and collaboration that are states as "values" of CDHS on the job bulletin itself. I am hoping that you can direct me on what my recourse is for grieving or appealing this matter.

Any information would be greatly appreciated.

77. On August 23, 2023, Principal Dale informed Complainant via email that she was not selected for the Position.

78. The Position was not filled, and no new position has been posted or filled for an Assistant Principal at Mount View. (Stipulated fact.)

79. On August 29, 2023, DHS formally informed Complainant that she had not been selected for the Position. (Stipulated fact.)

80. Complainant's base salary at the time of the promotional selection process at issue in this case was \$6,022/month. (Stipulated fact.)

81. Complainant timely filed a petition for hearing with the Board.

82. Following the preliminary review process, Senior Administrative Law Judge Tyburski recommended that the Board grant Complainant's petition for hearing. The Board adopted the ALJ's recommendation and this matter was set for hearing.

II. HEARING ISSUES

A. Complainant Established A *Prima Facie* Case of Unlawful Discrimination Based on Race or Sex

Complainant alleges that she was discriminated against by Respondent on the basis of her race, African-American, and her sex, female, in violation of CADA. She alleges race or sex discrimination was the reason for Respondent's decision to not offer her the Mount View Assistant Principal position.

CADA and the Board's rules mandate that employment decisions be made without discrimination on the basis of race or sex. See C.R.S. § 24-34-402(1)(a); Board Rule 9-3 ("Discrimination and/or harassment against any person is prohibited because of . . . race . . . sex . . . or any other protected class recognized under the Colorado Anti-Discrimination Act (CADA). This applies to all employment decisions.").

CADA was drafted to mirror federal anti-discrimination laws and federal case law is frequently used to interpret CADA. See, e.g., *George v. Ute Water Conservancy Dist.*, 950 P.2d 1195, 1198 (Colo. App. 1997). See also *Johnson v. Weld County, Colorado*, 594 F.3d 1202, 1219 n.11 (10th Cir. 2010) ("Colorado and federal law apply the same standards to discrimination claims"); *Stinnett v. Safeway, Inc.*, 337 F.3d 1213, 1219 (10th Cir. 2003) ("Colorado has adopted the same standards applicable to Title VII cases when considering claims brought under the [CADA]").

"Colorado has adopted the following approach [for analyzing discrimination claims based on circumstantial evidence], modeled on the [U.S.] Supreme Court's analysis in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), for proving an inference of discriminatory intent." *St. Croix v. Univ. of Colorado Health Sciences Ctr.*, 166 P.3d 230, 236 (Colo. App. 2007).

“First, an employee must show that [she] belongs to a protected class. Second, the employee must prove that [she] was qualified for the job at issue. Third, the employee must show that [she] suffered an adverse employment decision despite [her] qualifications. Finally, the employee must establish that all the evidence in the record supports or permits an inference of unlawful discrimination.” *Bodaghi v. Dep’t of Natural Resources*, 995 P.2d 288, 297 (Colo. 2000).

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.

Colorado Civil Rights Commission v. Big O Tires, Inc., 940 P.2d 397, 401 (Colo. 1997). See also *Bodaghi*, 995 P.2d at 298 (if the employer produces evidence of a legitimate, nondiscriminatory reason for its action, the factfinder “giving full and fair consideration to the evidence offered by both sides, proceeds to decide the ultimate question: whether, in light of all the evidence in the record, the employee has proved that the employer intentionally and unlawfully discriminated against the employee.”).

In this case, Complainant established a *prima facie* case of discrimination on the basis of both race and sex. As an African-American woman who met the minimum qualifications for the Position and was interviewed for it, she met the first two prongs of a *prima facie* case of race and sex discrimination. Respondent’s decision not to offer her the Position was an adverse employment action, and establishes the third prong of a *prima facie* case of race and sex discrimination.

For the fourth prong of a *prima facie* case of race and sex discrimination, Complainant must establish that the circumstances give rise to an inference of unlawful discrimination. Only a “small amount of proof [is] necessary to create an inference of discrimination.” *Smothers v. Solvay Chems., Inc.*, 740 F.3d 530, 539 (10th Cir. 2014) (quoting *Orr v. City of Albuquerque*, 417 F.3d 1144, 1149 (10th Cir. 2005)); see *Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1216 (10th Cir. 2013) (stating that the plaintiff’s burden at the *prima facie* stage “is not onerous”).

As the Tenth Circuit held, “if a qualified employee who is a member of a historically oppressed racial group is not hired for a job in which a vacancy exists, the failure alone is sufficient to raise an inference of race discrimination at the *prima facie* stage.” *Perry v. Woodward*, 199 F.3d 1126, 1139 (10th Cir. 1999) (citing *Int’l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977)); see also *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1227-29 (10th Cir. 2000).

In addition, as discussed in detail below, the following facts are more than sufficient to add to the inference of race and sex discrimination: the hiring decision was made

without proper authority; and the characterization of the Position as a “pilot posting” was a *post-hoc* justification for the rejection of Complainant’s application for the Position.

Complainant established a *prima facie* case of discrimination on the basis of both race and sex. The burden of production now shifts to Respondent to offer a legitimate, nondiscriminatory reason for its decision not to offer the Position to Complainant.

B. Respondent Provided A Legitimate Nondiscriminatory Reason for Its Decision

Respondent provided a purported legitimate, nondiscriminatory reason for its decision to not offer the Position to Complainant: Director Osterhaus had hiring authority and concluded that Complainant lacked the necessary experience and skills for the Position. Therefore, the discussion must now focus on evidence that this purported legitimate, nondiscriminatory reason was pretextual.

C. Complainant Established Pretext

The courts have recognized a number of categories of evidence of pretext. Generally, to show that an employer’s proffered nondiscriminatory reason for an adverse employment action is pretextual, a plaintiff must produce evidence of such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in employer’s proffered legitimate reasons for its action that a reasonable fact-finder could rationally find them unworthy of credence, and hence infer that employer did not act for the asserted nondiscriminatory reasons. *E.E.O.C. v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 490 (10th Cir. 2006); *Kendrick*, 220 F.3d at 1230.

Pretext can also be established by disturbing procedural irregularities or an employer action contrary to an unwritten policy or contrary to company practice. *Timmerman v. U.S. Bank, N.A.*, 483 F.3d 1106, 1122 (10th Cir. 2007) (“disturbing procedural irregularities surrounding an adverse employment action may demonstrate that an employer’s proffered nondiscriminatory business reason is pretextual”); *Kendrick*, 220 F.3d at 1230 (pretext may also be demonstrated through evidence that an employer “acted contrary to a written company policy ... or contrary to company practice ...”).

In addition, misjudging an employee’s qualifications and job performance may be evidence of pretext. See *Tyler v. RE/MAX Mountain States, Inc.*, 232 F.3d 808, 814 (10th Cir. 2000) (“evidence indicating that an employer misjudged an employee’s performance or qualifications is, of course, relevant to the question whether its stated reason is a pretext masking prohibited discrimination”) (citation and internal quotation marks omitted).

The Tenth Circuit held that pretext may be established by demonstrating that an employer’s proffered non-discriminatory justification is “a post hoc fabrication.” See *Plotke v. White*, 405 F.3d 1092, 1102-03 (10th Cir. 2005). Furthermore, “the presence

of subjective decision-making can create a strong inference of discrimination” *Bauer v. Bailar*, 647 F.2d 1037, 1045–46 (10th Cir. 1981).

Complainant provided more than sufficient evidence establishing that Respondent’s purported legitimate, nondiscriminatory reason for the non-selection of Complainant for the Position was pretextual.

First and foremost, although Director Osterhaus declared that she possessed the hiring authority for the Position, she did not. It is clear that Ms. Sherepita was the Appointing Authority for the Position and, as such, Ms. Sherepita had the authority to make the hiring decision for the Position. No statute, Board Rule, or State Personnel Director Administrative Procedure creates a “hiring authority” position. Although Director Osterhaus may have been told she had hiring authority for education positions within the DYS, and acted accordingly, she did not actually have such authority. Because Director Osterhaus rejected Principal Dale’s decision to offer the Position to Complainant, a decision that was supported by Ms. Sherepita, who actually had the hiring authority as the Position’s Appointing Authority, and Director Osterhaus did so without proper authority, that rejection is essentially null and void. Complainant should have been offered the Position.

Furthermore, Director Osterhaus and Mrs. Shull’s decision to characterize the Position posting as a “pilot posting” after Director Osterhaus’s rejection of Principal Dale’s recommendation to offer the Position to Complainant is a *post-hoc* justification or fabrication, another indication of pretext. The Tenth Circuit has held that pretext may be established by demonstrating that an employer’s proffered nondiscriminatory justification is “a post hoc fabrication.” See *Plotke*, 405 F.3d at 1102-03. That is the case here. The Position posting was never considered a “pilot posting” until after the selection process was terminated by Director Osterhaus’s unauthorized rejection of Complainant’s candidacy. In short, it was a *post-hoc* fabrication and it establishes that Respondent’s purported nondiscriminatory reason for its selection decision was pretextual.

Even if Director Osterhaus possessed hiring authority for the Position, Complainant established by a preponderance of the evidence that Director Osterhaus’s attitude towards Complainant – both before and during the Position selection process -- was consistently negative. This constitutes additional evidence of a discriminatory animus. Taken out of context, Director Osterhaus’s conduct towards Complainant could be viewed as appropriate to someone in Director Osterhaus’s position as Executive Director of DYS Education. However, viewed in the context of Director Osterhaus’s conduct towards Complainant during the selection process for the Position, Director Osterhaus’s conduct towards Complainant is evidence of a consistent pattern of animus that is best understood as arising from Complainant’s protected categories.² Director

² Evidence of Director Osterhaus’s animus towards Complainant is not necessary to establish pretext – the unauthorized rejection of Complainant’s candidacy for the Position and the *post-hoc* fabrication that the Position was a “pilot posting” are sufficient to establish pretext – but constitutes evidence that bolsters the ultimate finding that Respondent unlawfully discriminated against Complainant in violation of CADA.

Osterhaus's critical perspective concerning Complainant's qualifications, experience and skills were not congruent with Complainant's actual qualifications, experience and skills.

Director Osterhaus expressed vague concerns about Complainant's "work ethic" when Complainant's was considered for promotion from a Teacher I to the SWAP Coordinator, a Teacher II position. She overreacted to Complainant's conduct during a couple of professional development trainings, criticizing Complainant for returning a few minutes late from lunch on one occasion, and glaring at her when not hovering over her on another occasion. Complainant also offered evidence that Director Osterhaus was particularly critical of women in the early stages of their careers, as evidenced by the testimony of Inga Carland, a young woman at the start of her career, who originated the SWAP Coordinator position at DYS. Ms. Carland testified that Director Osterhaus was highly and inappropriately critical of her, micro-managed her, and eventually stopped communicating with her. This pattern was repeated in Director Osterhaus's conduct toward Complainant – also a young woman at an early stage of her career.

During the panel interview, Director Osterhaus asked Complainant a question that was not among the pre-approved and pre-scripted questions asked of all other interviewees, a breach of normal procedure and one that was an indirect criticism of Complainant's perceived conduct during a professional development training. The fact that Director Osterhaus acted contrary to policy and practice to indirectly criticize Complainant's conduct supports a finding of pretext. *Plotke*, 405 F.3d at 1102. Director Osterhaus's hostility towards Complainant is further evidenced by the notes Director Osterhaus took during Complainant's first panel interview for the Position. The notes included negative comments that did not appear in the notes of the other two panelists.

In addition, Director Osterhaus's view of Complainant's experience and skill set was based on limited first-hand knowledge and a likely misperception of Complainant's qualifications and experience. "The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981). Principal Dale was much more cognizant of Complainant's experience and skills, and was strongly in favor of offering the Position to Complainant. Director Osterhaus's opposition to Complainant's candidacy for the Position was based on a misapprehension of Complainant's abilities and was belied by the facts of Complainant's not insignificant experience and skills eminently suitable for the Position, as recognized by both Principal Dale and Ms. Sherepita, the Position's Appointing Authority.

III. Remedies

Complainant has requested appointment to the Position, back pay and benefits, and attorney fees and costs.

Remedies authorized under CADA include hiring, back pay, and equitable relief. C.R.S. § 24-34-405(2)(a). The Board may award attorney's fees and costs if "the

personnel action from which the proceeding arose ... was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless.” C.R.S. § 24-50-125.5(1).

A. Appointment as Assistant Principal at Mount View

But for the unauthorized rejection of Principal Dale’s recommendation that Complainant be promoted into the Mount View Assistant Principal position, Complainant would have been so appointed. The Position’s Appointing Authority, Jill Sherepita, concurred in the decision to offer the Position to Complainant. Accordingly, Complainant shall be appointed to the Mount View Assistant Principal position as soon as feasible and, in no event, later than June 1, 2024. Had Complainant been promoted into the Mount View Assistant Principal position in August 2023, she would have had the benefit of Principal Dale’s mentorship. At hearing, Principal Dale testified that he was resigning his position. As of the hearing date, Respondent had not yet hired a replacement for Principal Dale. It is not known whether Mount View now has a Principal. In any event, Respondent shall provide the training and mentorship to Complainant necessary for Complainant to be successful as Mount View’s Assistant Principal.

B. Back Pay and Benefits

Back pay is determined by measuring the difference between a complainant’s actual earnings and the earnings that would have been received, but for discrimination, to the date of judgment. *Black v. Waterman*, 83 P.3d 1130, 1133 (Colo. App. 2003). “A calculation of back pay should include the employee’s base salary amount and pay raises the employee reasonably expected to receive, as well as sick leave, vacation pay, and other fringe benefits, during the back pay period.” *Bonidy v. Vail Valley Ctr. for Aesthetic Dentistry, P.C.*, 232 P.3d 277, 283 (Colo. App. 2010).

Complainant monthly base salary in August 2023 was \$6,022.00. Had she been promoted to the Position, her monthly base salary would have been \$7,243, based on an annual salary of \$86,916.00, a difference of \$1,221 per month. In addition, the Position was to receive a short-staffing temporary pay differential of 3.17% from July 1, 2023 through June 30, 2024. This pay differential would add an additional \$229.60 to the monthly salary. From August 2023 through April 30, 2024, the difference amounts to \$13,055.40.

Accordingly, Complainant’s gross back pay through April 30, 2024 amounts to \$13,055.40. Therefore, Complainant is owed \$13,055.40 in back pay through April 30, 2024. This amount will increase by \$1,450.60 for each month until Complainant is installed as Mount View’s Assistant Principal. This amount is subject to employer PERA contributions, as well as statutory interest of 8% per annum to the date that Complainant is installed as Mount View’s Assistant Principal.

C. Attorney's Fees and Costs

C.R.S. § 24-50-125.5(1), C.R.S., provides, in pertinent part:

Upon final resolution of any proceeding related to the provisions of this article, if it is found that the personnel action from which the proceeding arose ... was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless ... the department, agency, board, or commission taking such personnel action shall be liable for any attorney fees and other costs incurred by the employee ... against whom such personnel action was taken...

A frivolous personnel action is an action for which “no rational argument based on the evidence or law was presented.” Board Rule 8-33(A). Personnel actions that are “in bad faith, malicious, or as a means of harassment” are actions “pursued to annoy or harass, made to be abusive, stubbornly litigious, or disrespectful of the truth.” Board Rule 8-33(B). A groundless personnel action is one in which it is found that “a party fails to offer or produce any competent evidence to support such an action...” Board Rule 8-33(C).

Complainant's application for the Mount View Assistant Principal position was rejected by an individual who lacked the authority to do so. That rejection was rationalized by a *post-hoc* fabrication. Accordingly, Respondent's decision to not select Complainant for the Mount View Assistant Principal position was both frivolous and groundless. Therefore, Complainant is entitled to an award of reasonable attorney's fees and costs.

CONCLUSIONS OF LAW

1. Respondent discriminated against Complainant on the basis of race and sex in violation of the Colorado Anti-Discrimination Act.
2. Complainant is entitled to reasonable attorney's fees and costs.


ORDER

1. Complainant is appointed to the Mount View Assistant Principal position as soon as feasible but no later than June 1, 2024.
2. Complainant shall be accorded the necessary training and mentorship to permit her to be successful as the Mount View Assistant Principal.
3. Respondent shall compensate Complainant with her lost back pay and benefits, for a total of **\$13,055.40 through April 30, 2024**. This amount will increase by \$1,450.60 for each month until Complainant is installed as Mount View's Assistant Principal. Back pay shall be subject to employer PERA contributions, as well as statutory interest of 8% per annum to the date that Complainant is installed as the Assistant

Principal at Mount View.

4. Complainant is awarded reasonable attorney's fees and costs attributable to this litigation. Complainant shall file a Bill of Attorney's Fees and Costs no later than **May 17, 2024**. Respondent shall file a response to the Bill of Attorney's Fees and Costs within 10 days after receipt of the Bill of Attorney's Fees and Costs.

Dated this 29th day
of April 2024,
at Denver, Colorado


/s/  _____
Keith A. Shandalow, Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, Colorado 80203

CERTIFICATE OF SERVICE

This is to certify that on the 29th day of April 2024, I electronically served a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** as follows:

Mark A. Schwane, Esq.
mark@schwanelaw.com

Jacob W. Paul, Esq.
Senior Assistant Attorney General
Jacob.Paul@coag.gov

 _____

APPENDIX A

WITNESSES TESTIFYING AT HEARING (IN ORDER OF APPEARANCE)

Complainant's Case-in-Chief

Brian Dale

Mercedes Mayes

Inga Carland

Respondent's Case-in-Chief

Jill Sherepita

Maricela Shull

Kelly Engberg-Balderston

Cyndy Kuhn

Erin Osterhaus

Complainant's Rebuttal

Brian Dale

Inga Carland

Mercedes Mayes

APPENDIX B

EXHIBITS ADMITTED INTO EVIDENCE AT HEARING

Complainant's Exhibits:

A, B, C, D, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, AA, BB

Respondent's Exhibits:

1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28,
29, 30

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 served to the parties. § 24-4-105(15), C.R.S. and Board Rule 8-53(A)(2).
3. 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 served to the parties. §§ 24-4-105(14)(a)(II) and 24-50-125.4(4), C.R.S. 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. 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. Univ. of S. Colo.*, 793 P.2d 657 (Colo. App. 1990) and § 24-4-105(14) and (15), C.R.S.

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. 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. See Board Rule 8-53(A)(5)-(7). For additional information contact the State Personnel Board office at (303) 866-3300 or email at dpa_state.personnelboard@state.co.us.

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 8-54.

ORAL ARGUMENT ON APPEAL

In general, no oral argument is permitted. Board Rule 8-55(C).

PETITION FOR RECONSIDERATION

Motions for reconsideration are discouraged. See Board Rule 8-47(K).