STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2024S019**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

PETERSON I. BATAILLE,
Complainant,

v.

DEPARTMENT OF PUBLIC SAFETY,
Respondent.

Administrative Law Judge (ALJ) Keith A. Shandalow conducted the evidentiary hearing in this matter on April 29 and 30, 2024, through Google Meet. The record was closed on May 1, 2024. Complainant Peterson I. Bataille appeared representing himself. Respondent Department of Public Safety, Colorado State Patrol (Respondent or DPS), was represented by Eric W. Freund, Senior Assistant Attorney General. Respondent's advisory witness was Ingrid Barrier, DPS's Chief Human Resources Officer.

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 October 30, 2023 decision to remove him from the eligible employment list for a Colorado State Patrol Executive Security Branch Security I (Security Officer I) position (the Position) pursuant to the State Personnel Director's Administrative Procedure 4-39(C)(6) constituted unlawful discrimination and retaliation in violation of the Colorado Anti-Discrimination Act (CADA).

Respondent argues that its decision to remove Complainant from the employment list was proper and did not constitute unlawful discrimination or retaliation. In addition, Respondent contends that Complainant misrepresented his employment history, which would have resulted in Complainant failing a background check even if Respondent had offered him the Position. Respondent requests that its decision be affirmed and that Complainant's appeal be dismissed with prejudice.

During the evidentiary hearing, after the close of Complainant's case-in-chief, Respondent moved to dismiss Complainant's claims pursuant to Colorado Rule of Civil Procedure 41(b)(1), which provides, in pertinent part:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without

> waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render judgment until the close of all the evidence.

Upon consideration, the ALJ granted Respondent's motion as to Complainant's retaliation claim on the grounds that Complainant failed to state a *prima facie* case of retaliation in violation of CADA. Accordingly, Complainant's retaliation claim will not be addressed in this Initial Decision.

The ALJ took the motion with respect to Complainant's discrimination claim under advisement, pending the presentation of all the evidence. This Initial Decision renders that motion moot.

For the reasons discussed below, the ALJ determined that Respondent discriminated against Complainant on the basis of race in violation of CADA. Under normal circumstances, Respondent's October 30, 2023 action in removing Complainant from the employment list for the Position would be rescinded. However, Complainant's material misrepresentations about his employment experience, which he included in his multiple applications for the Position, preclude Respondent from considering Complainant qualified for the Position. Therefore, Complainant can be afforded no remedy for Respondent's discriminatory action.

ISSUES

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

2. Did Complainant's applications for the Position include misrepresentations about Complainant's employment history and, if so, what are the consequences of such misrepresentations?

I. FINDINGS OF FACT

Complainant's 2020 Applications and Employment

1. Complainant is an African-American resident of Colorado.

2. On April 18, 2020, Complainant submitted an application for the Position, within the work unit that "provides 24-hour security at the State Capitol and Capitol Complex, and security for the Governor, First Family, visiting dignitaries, and public demonstrations."

3. The description of the Position is as follows:

> Positions ensure that state buildings are secure 24 hours a day seven days a week. Conduct interior and exterior security tours of state buildings. Identify unauthorized personnel and problems such as fire, water leaks, vandalism, etc. Interact with authorities and tenants in emergency situations. Provide services to tenants that include; [sic] unlocking doors, after hour escorts to a private vehicle, flying ceremonial flags. Operate the magnetometers and x-ray screening machines at the Judicial Building and the State Capitol. To provide a safe and secure environment for all tenants and the general public who work or visit state-operated building [sic] within the Capitol Complex.

4. Such personal characteristics as honesty, integrity, reliability, trustworthiness, and judgment are essential for those individuals who are employed in the Position.

5. Security Officers with the Executive Security Branch are required to be available during all shifts: morning, swing, and graveyard.

6. On his April 18, 2020, application for the Position, Complainant reported a felony, domestic violence, and a misdemeanor.[1] Complainant also listed employment with a company named Geo Ice from February 2019 to the present.

7. The parties did not offer evidence concerning the outcome of Complainant's April 18, 2020 application other than the fact that Complainant was not offered the Position. No evidence was offered establishing that Complainant was interviewed for this Position at that time.

8. Complainant worked at Geo Ice from January 2018 to August 2020. Complainant's employment was terminated because he was a defendant in a domestic violence case and his attendance in court precluded his attendance at work.

9. Complainant worked for two months as a Youth Services Specialist I at Gilliam Youth Services Center for the Colorado Department of Human Services (CDHS), from September 8, 2020 to November 11, 2020.

10. In late October 2020, Complainant stopped appearing for work, ostensibly because of the COVID pandemic. On December 1, 2020, the Assistant Director at Gilliam Youth Services Center sent a notice to Complainant stating that Complainant voluntarily resigned effective November 11, 2020.

11. Complainant's resignation was coded in the State's personnel tracking system as a negotiated resignation in lieu of discipline.

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[1] Respondent did not offer any evidence indicating that it considered Complainant's criminal history in assessing his suitability for the Position.

12. On October 16, 2021, Complainant submitted another application for the Position. On this application, Complainant indicated that he was a current CDHS employee, but listed dates of employment as August 2020 to November 2020, a contradiction that Complainant did not explain. Complainant omitted Geo Ice as a former employer.

13. On October 21, 2021, Lori Chavez, a DPS Human Resources (HR) Business Partner, sent Complainant an email scheduling him for an interview on October 26, 2021, at 7:00 a.m.

14. On or about October 26, 2021, Complainant was interviewed for the Position but was not offered the Position.

15. On July 15, 2022, Complainant submitted another application for the Position. On this application, Complainant indicated that he worked for the Department of Corrections (DOC) as a Youth correctional officer from August 2018 to November 2020 and the reason for his leaving that position was "medical reasons, due to covid." He indicated that he was a current CDHS employee, and listed dates of employment as August 2020 to November 2020. He included Geo Ice as a former employer, with dates from January 2018 to August 2020, with the reason for leaving "administrative leave."

16. On July 20, 2022, Complainant submitted another application for the Position. On this application, Complainant indicated that he worked for the DOC as a Youth correctional officer from August 2018 to November 2020 and the reason for his leaving that position was "medical reasons, due to covid."

17. On July 29, 2022, Complainant submitted an application for a Colorado State Patrol Program Assistant in the Executive Security Unit. In his application, Complainant indicated that he worked for the DOC as a Youth correctional officer from August 2018 to November 2020 and the reason for his leaving that position was "medical reasons, due to covid." He indicated that he was a current CDHS employee, with dates of employment from August 2021 to November 2021. No evidence was offered to indicate that he was interviewed for this position.

18. On August 2, 2022, Ms. Chavez informed Complainant that he was scheduled for an interview for the Position on August 11, 2022 at 8:30 a.m.

19. Complainant was interviewed for the Position on August 11, 2022.

20. On September 9, 2022, Ms. Chavez informed Complainant that the Position was offered to another applicant "who better met the specific needs of the role." The notice also informed Complainant that he remained on the eligible employment list for the Position.

21. On October 16, 2022, Complainant submitted another application for the Position. On this application, he indicated that he worked for the DOC as a Youth

correctional officer from August 2018 to November 2020 and the reason for his leaving that position was "medical reasons, due to covid."

22. On November 10, 2022, Complainant submitted another application for the Position. On this application, he indicated that he worked for the DOC as a Youth correctional officer from August 2018 to November 2020 and the reason for his leaving that position was "medical reasons, due to covid." He included Geo Ice as a former employer, with dates from January 2018 to August 2020, with the reason for leaving "administrative leave." Complainant answered "no" to the application statement, "I am currently a Colorado state resident, possess a valid Colorado driver's license, and at least 18 years old." He also indicated that he was a current CDHS employee, with dates of employment from August 2021 to November 2021. He wrote, "Able to rehire probation as [sic] been meet the term to rehire and there was a discrimination file [sic] I'm a protected class under state law in [sic] federal law."

23. On November 14, 2022, Ms. Chavez sent Complainant an email asking if his response to the question about whether he was a Colorado state resident and possessed a valid Colorado driver's license was an oversight. If it was an oversight, Ms. Chavez asked Complainant to re-submit his application. He did not do so.

24. On November 15, 2022, Complainant's application was rejected on the grounds that he did not meet a condition of employment, presumably his apparent representation that he was not a Colorado resident and did not possess a valid Colorado driver's license.

Complainant's December 2022 Applications for the Position

25. On December 21, 2022, Complainant submitted another application for the Position. On this application, Complainant indicated that he worked for the DOC as a Youth correctional officer from August 2018 to November 2020 and the reason for his leaving that position was "medical reasons, due to covid." He indicated that he was a current CDHS employee, with dates of employment from August 2021 to November 2021, adding that he was able to be rehired because he met probation.

26. On December 29, 2022, Complainant submitted another application for the Position. On this application, Complainant indicated that he worked for the DOC as a Youth correctional officer from August 2018 to November 2020 and the reason for his leaving that position was "medical reasons, due to covid." He indicated that he was a current CDHS employee, with dates of employment from August 2021 to November 2021, adding that he was able to be rehired because he met probation.

27. On December 31, 2022, Complainant submitted another application for the Position. On this application, Complainant indicated that he worked for the DOC as a Youth correctional officer from August 2018 to November 2020 and the reason for his leaving that position was, "I had covid in [sic] left due of [sic] my safety and prevent others from getting it." He indicated that he was a current CHDS employee, with dates of

employment from August 2021 to November 2021, adding that he was able to be rehired because he met probation.

28. On January 6, 2023, Ms. Chavez informed Complainant that he was scheduled for an interview on January 18, 2023 at 10:30 a.m.

29. Complainant requested a change in the interview date. On January 12, 2023, Ms. Chavez informed Complainant that his interview was changed to January 19, 2023 at 10:30 a.m. Complainant did not appear for his January 19, 2023 interview.

30. On January 23, 2023, Ms. Chavez notified Complainant via email that, "I regret to inform you that due to non-attendance at the scheduled interview on 1/19/2023 for the position of Colorado State Patrol Executive Security Branch Security Officer I at Department of Public Safety, your application is considered withdrawn from consideration."

<u>Complainant's January 2023 Application for the Position</u>

31. On January 23, 2023, Complainant submitted another application for the Position. On this application, Complainant indicated that he worked for the DOC as a Youth correctional officer from August 2018 to November 2020 and the reason for his leaving that position was ""I had covid in [sic] left due of [sic] my safety and prevent others from getting it." He indicated that he was a current CHDS employee, with dates of employment from August 2021 to November 2021, adding that he was able to be rehired because he met probation.

32. On May 1, 2023, Ms. Chavez sent Complainant an email informing him that Respondent "has determined to remove your name from the employment list" for the Position. The basis for the determination was "Failure to be appointed after at least three referrals and interviews for vacancies with the same appointing authority who is removing the person from the employment list, within an eighteen (18) month period. Rule 4-28 C6." Ms. Chavez made the decision to send out this notice.

33. At the time of this notice, Complainant had not been referred three times and interviewed unsuccessfully three times for the Position within an 18-month period.

34. Ms. Chavez's citation to "Rule 4-28 C6" was an error. Although the language of the provision was the same, the correct citation at that time was State Personnel Director's Administrative Procedure 4-39(C)(6).

<u>Complainant's September and October 2023 Applications for the Position</u>

35. On September 18, 2023, Complainant submitted another application for the Position.

36. Later on September 18, 2023, Ms. Chavez sent Complainant an email informing him that Respondent "has determined to remove your name from the employment list" for the Position. The basis for the determination was "Failure to be appointed after at least three referrals and interviews for vacancies with the same appointing authority who is removing the person from the employment list, within an eighteen (18) month period. Rule 4-28 C6 [sic]." Ms. Chavez made the decision to send this notice out.

37. At the time of this notice, Complainant had not been referred three times and interviewed unsuccessfully three times for the Position within an 18-month period.

38. Ms. Chavez's citation to Rule 4-28 C6 was an error. The correct citation at that time was State Personnel Director's Administrative Procedure 4-39(C)(6).

39. On October 1, 2023, Complainant emailed Ms. Chavez alleging that members of the "black race" were hired less frequently by DPS and requesting documentation related to the discretionary removal of his application from consideration. This was the first time that Ms. Chavez was made aware that Complainant was African-American.

40. On October 1, 2023, Complainant submitted another application for the Position. On this application, he indicated that he worked for the DOC as a Youth correctional officer from August 2018 to November 2020 and the reason for his leaving that position was "Coherence voluntary discharge due to medical reason." On the application, Complainant changed the reason for leaving Geo Ice to "Relocate."

41. On or about October 4, 2023, Complainant telephoned Ms. Chavez and objected to being removed from the Position's eligible employment list because he had interviewed only two times, not three. Ms. Chavez checked NeoGov, the HR hiring portal, and realized she had mistakenly concluded that the rejection of Complainant's November 11, 2022 application was a rejection based on an interview rather than a rejection based on Complainant's failure to appear for his interview. Ms. Chavez concluded, correctly, that the State Personnel Director's Administrative Procedure upon which she relied in removing Complainant from the employment list did not apply. Ms. Chavez understood that an applicant could be removed from the employment list only if the applicant had actually interviewed for a position rather than just not appearing for an interview.

42. Ms. Chavez acknowledged her mistake to Complainant, apologized, and indicated that she would schedule him for an interview for the Position. Complainant accused Ms. Chavez of being a racist and hung up on her.

43. Complainant's phone call so upset Ms. Chavez that she called Anastasiya Schomaker, Respondent's Deputy HR Officer, and Ms. Chavez's second-level supervisor, to inform her of the phone call.

44. On October 4, 2023, Ms. Chavez sent an email to Complainant notifying him that he was scheduled for an interview on October 12, 2023 at 7:30 a.m.

45. Complainant appeared for his interview for the Position on October 10, 2023, two days early.

46. Respondent accommodated Complainant's wish to be interviewed on October 10, 2023. Security sergeants Freddie Southwell, an African-American male, and Nurlegain Kaudinov, a Caucasian male, interviewed Complainant. They used a standard set of questions that posed hypothetical scenarios designed to assess an applicant's judgment.

47. In response to the questions posed to him during the interview, Complainant failed to provide detailed answers, and most often responded by stating that he would handle a posed hypothetical scenario by "following the policy."

48. During the interview, Complainant also indicated that he would not be available for the day shift because of his parental obligations.

49. Sgts. Southwell and Kaudinov decided not to recommend that Complainant advance to the next stage of the hiring process for two primary reasons: (1) Complainant's expressed inability to work the day shift because of his parental duties, and (2) Complainant's responses to the interview questions provided insufficient detail and his responses to the effect that he would follow policy did not provide a sufficient basis for an assessment of Complainant's judgment.

50. The interviewers gave their interview notes to Security Captain William Kulp and informed him of their recommendation that Complainant not advance to the next stage of the hiring process. Captain Kulp informed Ms. Chavez of the non-selection decision.

51. On October 13, 2023, Ms. Chavez informed Complainant via email that the department decided not to offer Complainant the Position. The notice included Complainant's appeal rights.

52. Complainant did not appeal the non-selection decision.

53. On October 13, 2023, Complainant once again alleged discrimination in an email to Ms. Chavez.

54. On October 23, 2023, Complainant submitted another application for the Position. On this application, Complainant indicated that he worked for the DOC as a Youth correctional officer from August 2018 to November 2020 and the reason for his leaving that position was "Coherence voluntary discharge due to medical reason."

55. On October 28, 2023, Complainant submitted another application for the Position. In this application, Complainant indicated that he worked for the DOC as a Youth correctional officer from August 2018 to November 2020 and the reason for his leaving that position was “Coherence voluntary discharge due to medical reason.”

56. On October 29, 2023, Complainant sent Ms. Chavez an email alleging discrimination and retaliation.

57. On October 30, 2023, after consulting with Captain Kulp, Ms. Chavez sent Complainant an email informing him that Respondent “has determined to remove your name from the employment list” for the Position. The basis for the determination was “Failure to be appointed after at least three referrals and interviews for vacancies with the same appointing authority who is removing the person from the employment list, within an eighteen (18) month period. Rule 4-28 C6.”

58. On October 30, 2023, State Personnel Director’s Administrative Procedure 4-39(C)(6) provided that an applicant’s name was subject to discretionary removal from an employment list for, “Failure to be appointed after at least three referrals and interviews for vacancies with the same appointing authority, who is removing the person from the employment list, within an eighteen (18) month period.”

59. At the time of the October 30, 2023 notice, Complainant had not been referred three times and interviewed unsuccessfully three times for the Position within an 18-month period.

60. Ms. Chavez’s citation to Rule 4-28 C6 was an error. The correct citation at that time was the State Personnel Director’s Administrative Procedure 4-39(C)(6).

61. If Respondent had offered the Position to Complainant, and Complainant accepted the offer, Respondent would then conduct a background investigation that would include a review of Complainant’s employment and criminal history.

62. On October 30, 2023, Complainant filed his petition for hearing with the State Personnel Board arising from Ms. Chavez’s October 30, 2023 notification that Complainant had been removed from the Position’s employment list, which initiated the current matter. Complainant alleged discrimination based on race and retaliation under CADA.

63. On November 14, 2023, ALJ McCabe referred Complainant’s petition to the Colorado Civil Rights Division (CCRD) for an investigation of Complainant’s discrimination and retaliation claims.

64. On January 22, 2024, the CCRD issued a No Probable Cause opinion, concluding that Complainant failed to establish probable cause that Respondent discriminated or retaliated against him in violation of CADA.

65. Complainant appealed CCRD's No Probable Cause opinion and this matter was set for an evidentiary hearing.

II. HEARING ISSUES

A. RACE DISCRIMINATION IN VIOLATION OF CADA

Complainant alleges that he was discriminated against by Respondent on the basis of his race, African-American, in violation of CADA. He alleges racial discrimination was the reason for Respondent's October 30, 2023 decision to eliminate him from the Position's eligible employment list.

CADA and the Board's rules mandate that employment decisions be made without discrimination on the basis of race, among other protected categories. *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 . . . 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 Cty., 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 he belongs to a protected class. Second, the employee must prove that he was qualified for the job at issue. Third, the employee must show that he suffered an adverse employment decision despite his 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 Nat. 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 Rts. Comm'n 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.").

1. Complainant Established A *Prima Facie* Case of Race Discrimination

In this case, Complainant established a *prima facie* case of discrimination on the basis of race. As an African-American who met the minimum qualifications for the Position, he met the first two prongs of a *prima facie* case of race discrimination. Respondent's decision to remove him from the employment list for the Position was an adverse employment action, and establishes the third prong of a *prima facie* case of race discrimination.

For the fourth prong of a *prima facie* case of race discrimination, Complainant must establish that the circumstances permits 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)).

In addition, as discussed in more detail in Section II.A.3., below, the following facts support the inference of race discrimination: Three times within a six-month period, Respondent mistakenly informed Complainant that he would not be considered for the Position because he had applied and had been interviewed three times within 18 months and was not hired. At the time of the third removal from the employment list – October 30, 2023 – Ms. Chavez knew that Complainant was African-American and knew, or should have known, that Complainant had not been interviewed for three times for the Position within an 18-month period. These facts permit an inference of unlawful discrimination, thus establishing the fourth prong of a *prima facie* case of unlawful discrimination.

Complainant established a *prima facie* case of unlawful discrimination on the basis of race in violation of CADA. The burden of production now shifts to Respondent to offer legitimate, nondiscriminatory reasons for its decision to remove Complainant from the employment list for the Position. *See*, *Big O Tires, Inc.,* 940 P.2d at 401.

2. Respondent Provided Legitimate, Nondiscriminatory Reasons for Its Decision

Respondent offered legitimate, nondiscriminatory reasons for its October 30, 2023 decision to eliminate Complainant from the Position's employment list. Respondent contends that Ms. Chavez, in good faith, mistakenly concluded that Complainant was subject to removal from the employment list pursuant to the State Personnel Director's Administrative Procedure 4-39(C)(6). Respondent alleges that, because Ms. Chavez bears a heavy workload, and because Complainant submitted application after application, her mistake was understandable and was in no way motivated by racial bias.

The discussion must now focus on evidence that Respondent's purported legitimate, nondiscriminatory reason was pretextual.

3. The Evidence Establishes that Respondent's Purported Legitimate, Nondiscriminatory Reasons for its Decision were Pretextual

The courts have recognized a number of categories of evidence of pretext. Generally, to show that an employer's proffered nondiscriminatory reasons for an adverse employment action are 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 v. Penske Transp. Services, Inc.,* 220 F.3d 1220, 1230 (10th Cir. 2000).

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 ...").

The preponderance of the evidence establishes that Respondent's purported legitimate, nondiscriminatory reasons for its October 30, 2023 decision to remove Complainant from the employment list for the Position was pretextual.

The evidence indicates several concerning irregularities in the manner in which Respondent handled Complainant's many applications for the Position. No less than three times within a six-month period did Respondent, through the agency of Ms. Chavez, notify Complainant, mistakenly, that pursuant to the applicable provision, he was removed from the employment list for the Position. State Personnel Director's Administrative Procedure 4-39 (C)(6) provides that a job applicant can be discretionarily removed from an employment list for "Failure to be appointed after at least three referrals and interviews

for vacancies with the same appointing authority, who is removing the person from the employment list, within an eighteen (18) month period." This was the State Personnel Director's Administrative Procedure upon which Ms. Chavez relied when she sent employment list removal notice to Complainant on May 1, 2023, September 18, 2023, and October 30, 2023. However, Complainant did not interview three times for the Position without success within an 18-month period. Respondent established only three interviews for the Position: October 26, 2021, August 11, 2022, and October 10, 2023. There were not three interviews for the Positon within an 18-month period. State Personnel Director's Administrative Procedure 4-39 (C)(6) was misapplied. At the time of the third removal from the employment list, Ms. Chavez knew that Complainant was African-American and knew, or should have known, that Complainant had not been referred and interviewed for the Position three times within an 18-month period. This implies that the wrongful removal from the employment list on October 30, 2023 was an intentional act.

In addition, Ms. Chavez made the decision to remove Complainant from the employment list – and not the appointing authority, as is required under State Personnel Director's Administrative Procedure 4-39 (C)(6). In fact, the Appointing Authority, Brandon Means, testified at the hearing that he had nothing to do with this matter until Complainant filed his petition for hearing on October 30, 2023. Therefore, the basis for Respondent's decision to remove Complainant from the employment list was incorrect.

These irregularities and noncompliance with the applicable regulation support a determination that Respondent's purported legitimate, nondiscriminatory reasons for its decision to remove Complainant from the employment list for the Position on October 30, 2023, were a pretext for unlawful discrimination on the basis of race in violation of CADA.[2]

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[2] At hearing, Complainant attempted to refer to his October 2023 non-selection for the Position as evidence of a pattern of discriminatory animus. Because Complainant did not timely file a petition for hearing to address this issue with the Board, the Board lacks jurisdiction to consider the issue. Rather, information concerning Complainant's September – October 2023 application, interview, and rejection, could potentially serve as probative evidence concerning Complainant's discrimination claim. *Haynes v. Level 3 Commun., LLC*, 456 F.3d 1215, 1223 (10th Cir. 2006). However, for a position that required employees to be available on a 24-hour basis, Complainant indicated that he could not work the day shift due to his parental responsibilities. In addition, Complainant's answers to the questions posed to him during his October 10, 2023, interview with Sgts. Southwell and Kaudinov lacked detail and knowledge of appropriate responses to hypothetical situations he was asked to consider. Sgts. Southwell and Kaudinov testified credibly about Complainant's poor responses to interview questions during his October 10, 2023 interview. Their notes, taken contemporaneously during the interview, substantiate their conclusions that Complainant's responses provided insufficient detail and relied too heavily on the simple, non-responsive answer that Complainant would follow policy when dealing with hypothetical factual scenarios. In short, Complainant's September – October 2023 application, interview, and rejection do not support a finding of a pattern of unlawful discrimination.

B. THE AFTER-ACQUIRED EVIDENCE ISSUE

At the hearing, Respondent established by a preponderance of the evidence that Complainant misrepresented his experience and the reasons for his prior separation from employment with CDHS. Respondent discovered this information after Complainant was no longer considered for the Position. Respondent alleges that, even if Respondent had selected Complainant for the Position, he would not have passed the background check, which would have revealed his many application misrepresentations.

Complainant provided materially false information on his applications, which were rife with inaccuracies and misrepresentations. Complainant falsely stated his work experience with past State employers as lasting 27 months instead of the actual two months. Complainant also falsely portrayed the reasons for his separation from State employment as being medically related instead of the actual reason of a negotiated resignation in lieu of discharge. He alleged that he had successfully passed his probationary period when he hadn't. He also misrepresented the reason for his separation from employment at Geo Ice. Geo Ice terminated his employment because of Complainant's non-attendance while attending his domestic violence trial. In his applications, he represented that he left Geo Ice for "relocation" or for "administrative leave." He alleged that he was employed by DOC, when he was actually employed by CDHS. His misidentified his dates of employment with CDHS.

That discovery of Complainant's misrepresentations about his employment history included in his applications for the Position invokes the "after-acquired evidence doctrine" to shield Respondent from liability.

> The after-acquired evidence doctrine shields an employer from liability or limits available relief where, after a termination, the employer learns for the first time about employee wrongdoing that would have caused the employer to discharge the employee. . . . Where the employee's misconduct consists of resume fraud, the after-acquired evidence doctrine affords an employer a defense if the employer would not have hired the employee if it had known of the fraud. . . . The after-acquired evidence doctrine has its foundation in the logic that an employee cannot complain about being wrongfully discharged because the individual is no worse off than he or she would have been had the truth of his or her misconduct been presented at the outset.

Crawford Rehab. Services, Inc. v. Weissman, 938 P.2d 540, 547 (Colo. 1997) (internal citations and quotation marks omitted).

Complainant's employment history misrepresentations were material and would have caused Respondent to withdraw any job offered to Complainant, if Complainant had reached that final stage of the hiring process. Honesty and integrity are central values of DPS and its Executive Security Team. Complainant's material misrepresentations establish that Complainant lacks those values that are essential to Respondent's mission.

CONCLUSIONS OF LAW

1. Respondent discriminated against Complainant on the basis of race in violation of the Colorado Anti-Discrimination Act.

2. Complainant's employment history misrepresentations preclude Respondent from considering Complainant qualified for the Position.

ORDER

Under normal circumstances, Respondent's decision to remove Complainant from the employment list pursuant to State Personnel Director's Administrative Procedure 4-39(C)(6) would be rescinded and Respondent would be ordered to place Complainant on the eligible employment list for the Position, if one exists, or if such a list is generated in the future. That would have been the appropriate remedy for Respondent's discriminatory decision to remove Complainant from the eligible employment list for the Position. However, as discussed above, Complainant's material misrepresentations on his applications for the Position preclude Respondent from considering Complainant qualified for the Position. Therefore, Complainant can be afforded no remedy for Respondent's discriminatory action.

Dated this 17th day	/s/ [redacted] ______________________
of June 2024,	Keith A. Shandalow, Administrative Law Judge
at Denver, Colorado	State Personnel Board
	1525 Sherman Street, 4th Floor
	Denver, CO 80203

APPENDIX A

WITNESSES TESTIFYING AT HEARING (IN ORDER OF APPEARANCE)

Complainant's Case-in-Chief

Lori Chavez

Nurlegain Kaudinov

Freddie Southwell

Peterson Bataille

Respondent's Case-in-Chief

Lori Chavez

Brandon Means

Anastasiya Schomaker

William Kulp

Peterson Bataille

Complainant's Rebuttal

Peterson Bataille

APPENDIX B

EXHIBITS OFFERED AND ENTERED INTO EVIDENCE AT HEARING

Complainant's Exhibits: D, D1, D2, D3, D4, D5, D6, D7, D8, D10, D13, D15

Respondent's Exhibits: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 15, 16, 17, 27, 28

CERTIFICATE OF SERVICE

This is to certify that on the **17th** day of June 2024, I electronically served a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** as follows:

Peterson I. Bataille

Eric W. Freund, Esq.
Senior Assistant Attorney General
Eric.Freund@coag.gov

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).