STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2008S010**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DONNA WILSON,

Complainant,

vs.

REGENTS OF THE UNIVERSITY OF COLORADO, UNIVERSITY OF COLORADO AT COLORADO SPRINGS,

Respondent.

Administrative Law Judge Denise DeForest held the hearing in this matter on August 17, 2009, at the State Personnel Board, 633 - 17th Street, Courtroom 6, Denver, Colorado. The record was closed on September 1, 2009, by written order after submission of a written closing argument by Complainant. Special Assistant Attorney General and Managing Associate University Counsel Patrick T. O'Rouke and Jenny Watson, Research Associate, represented Respondent. Respondent's advisory witness was Thomas Christensen, Respondent's Dean of the College of Letters, Arts and Sciences and the appointing authority who hired a Program Assistant I in May of 2007. Complainant appeared and was represented by Ian D. Kalmanowitz, Esq.

MATTER APPEALED

Complainant, Donna Wilson ("Complainant") appeals the selection process used by Respondent for a Program Assistant I position as arbitrary, capricious or contrary to rule or law. Complainant also challenges the selection process as a form of unlawful discrimination on the basis of age. Complainant seeks reinstatement to University employment through placement into the Program Assistant I position, back pay and benefits, and attorney fees.

For the reasons set forth below, Respondent's selection process is overturned and the decision of the appointing authority **reversed and remanded**.

ISSUES

1. Whether Respondent's selection process was arbitrary, capricious, or contrary to rule or law;

2. Whether attorney fees are to be awarded.

FINDINGS OF FACT

General Background

1. Complainant was hired by Respondent as an Administrative Assistant III in May of 1997. In September of 2000, Complainant accepted a position as a Program Assistant I.

2. Complainant's Program Assistant position provided administrative support to two departments in the College of Letters, Arts and Sciences ("College"): the Visual and Performing Arts Department ("Visual Arts") and the Geography and Environmental Sciences Department ("GES"). Visual Arts had a large number of adjunct instructors and small grants that created a large administrative workload. During Complainant's tenure as the Program Assistant for Visual Arts, the administrative assistant assigned to Respondent's Gallery of Contemporary Art resigned her position and the administrative duties were also assigned to Complainant.

3. The workload for Complainant's position was quite large because of the administrative demands of the Visual Arts, and Complainant's workload was significantly higher than the other comparable Program Assistant positions. Complainant spoke with the Dean's office about the heavy workload and the problems that such a workload created for her. There were also discussions between the chair of GES and the College Dean's office about reallocating the GES portion of the work, but no change was made to the position during Complainant's employment.

4. Complainant's performance reviews during the time she held the Program Assistant I position were never lower than a commendable rating, and she was often rated as an outstanding performer. Complainant's supervisors described her as cheerful, affable, and personable, and her work as professional.

5. Complainant's mother died in 2004 or 2005 and Complainant became the caretaker for her elderly father. Complainant's work did not suffer, but those working around her noticed that she was not as accommodating or as happy as she had been previously.

6. Complainant was frustrated that the College had not found a way to lessen her unequal workload. Complainant left Respondent's employment for what she expected would be a less demanding position at the Colorado Department of Corrections at the end of July 2005. In her resignation letter, Complainant told the College Dean's office that "[f]or the past two and one-half years I have found myself concentrating on getting the work done in a timely manner rather than getting the job done well. This is very contrary to both my personality and my work ethic."

7. When Complainant left her position at the end of July 2005, the College Dean's office assigned a Program Assistant, Sheryl Botts, to spend her lunch hours attempting to keep up with the important tasks for the Department. Ms. Botts had difficulties keeping up with administrative tasks for the Department, and it eventually required her to spend 30 overtime hours completing the necessary administrative tasks. She was surprised to find that the Department's purchasing card ("A-card") report for July of 2005 had not been done, even though the A-card information would not have been due to be submitted to Complainant until the end of the month in July of 2005. Ms. Botts also had to do the paperwork for the adjunct instructor hiring for the upcoming semester. The Department chair, Dr. Steven Jennings, who had not been in the office much during the summer months, had not yet provided all of the necessary information on adjunct instructor hiring to Complainant prior to the end of July of 2005. The lack of completed paperwork for the adjunct instructors created the need for Ms. Botts to complete a significant amount of work very quickly so that the adjunct instructors were ready to start their teaching assignments for the fall semester. Ms. Botts also believed that more filing should have been done.

8. Dr. Jennings later concluded that Complainant did not complete all of her work before she left. That conclusion was not recorded in any performance documentation. The review documentation that Complainant received on July 29, 2005, rated her work as outstanding.

9. After Complainant left her position with Respondent, Respondent decided to split the administrative duties in Complainant's old position so that there was a Program Assistant working only for Visual Arts.

10. In April of 2007, the College advertised a vacancy for a Program Assistant I position in the Political Science and GES Departments. (Stipulated Fact)

11. Although this was a newly created position and served one department for which Complainant had not previously performed services, namely the Department of Political Science, it encompassed substantially the same duties as Complainant had performed in her prior employment as a Program Assistant I working for the Visual Arts and GES Departments. (Stipulated Facts)

12. The Program Assistant I position was posted as a Promotional/Transfer position. (Stipulated Fact) The position number of this specifically announced position was 400563.

13. Complainant applied for the Program Assistant I position. (Stipulated Fact)

14. Complainant was 58 years old at the time she applied for the Program Assistant I position. (Stipulated Fact)

15. When Complainant filed her application for the Program Assistant I position, she was told by staff in Respondent's human resources office that her application may not be accepted. On April 3, 2007, Complainant sent an email to Chancellor Pam Shockley-Zalabak asking for clarification on University policy regarding reinstatements. Associate Vice Chancellor Susan Szpyrka responded to Complainant's email on April 6, 2007. Associate Vice Chancellor Szpyrka assured Complainant that Complainant's application was being considered to be a reinstatement application. Ms. Szpyrka explained that the process permitted the appointing authority to choose to interview both the reinstatement applications and candidates from the promotional/transfer employment list, or to only consider the referrals from the employment list.

16. Selection for the Program Assistant I position started with a review of the applications to determine whether the applicants met the minimum qualifications for the position and were eligible to be considered for either promotion or transfer, or as reinstatement candidates. One of the applicants was found not to be eligible to be a promotion, transfer, or reinstatement application, and the applicant was notified that she was not being considered for the position.

17. College Dean Thomas Christensen, the appointing authority for the position, decided that reinstatement candidates would be considered for the position in addition to the promotion / transfer employment list referrals.

18. The College was provided with a total of five names as referrals for the Program Assistant I position. Three of the names were of current employees who had met the minimum qualifications for the position and had been placed on a promotion/transfer employment list. Two applicants referred to the Department were former employees who had held Program Assistant I positions in the past and were now reinstatement candidates: Deanna Ely and Complainant.

19. Dean Christensen delegated the authority for interviewing and for making hiring recommendation to Professors Jim Null and Robert Larkin, the then-current chairs of the Departments of Political Science and GES.

20. Professor Larkin decided to conduct a highly informal polling of some of the professors within GES who had been present when Complainant was employed

as that Department's program assistant. Professor Larkin talked briefly to individual professors and asked them if they wanted Complainant to return.

21. Professor Larkin was not opposed to Complainant returning. Professor Larkin concluded from speaking with several professors, however, that the Department would be better off trying someone new in the position. The prior chair of the Department, Dr. Jennings, believed that Complainant's work, while fine until the end of her tenure, had suffered at the end and that Complainant had left the Department without work completed and should not be re-hired. Professor Larkin made the decision not to allow Complainant to interview for the Program Administrator I position on the basis of his understanding that at least some faculty members were not supportive of her return.

22. Respondent's human resources section was asked if the hiring committee had to interview all of the reinstatement candidates, and the advice offered by the human resources section was that the hiring committee did not need to interview the reinstatement candidates. Professor Larkin informed Professor Null that the hiring committee would not be considering Complainant's application.

23. The hiring committee interviewed the four remaining candidates, including the other reinstatement candidate, Ms. Ely. The committee recommended that Ms. Ely be offered the position. Dean Christensen agreed with the recommendation and offered Ms. Ely the position.

24. At the time she was hired, Ms. Ely was 44 years old. Ms. Ely had previously worked as a Program Assistant I for the University's Facilities Services Department, and had not worked in that position for the College.

25. Complainant was not provided with any notification that her application had been referred for consideration, and then had been rejected from consideration. Complainant was not provided with any reason explaining why she had not been permitted to interview for the Program Administrator I position.

26. Complainant filed a timely appeal of Respondent's decision not to interview or hire her with the Board.

DISCUSSION

I. GENERAL

In this non-disciplinary appeal, Complainant bears the burden to prove that Respondent's selection process was arbitrary, capricious, or contrary to rule or law. *See Velasquez v. Department of Higher Education*, 93 P.3d 540, 542 (Colo.App. 2003)(noting that "[e]xcept as otherwise provided by statute, the proponent of an order shall have the burden of proof" in an administrative hearing," and that "the proponent of an order" is the

person who brings forward a matter for litigation or action;" holding that in a non-disciplinary dismissal appeal, the employee carries the burden of persuasion) Complainant has also raised a claim of unlawful discrimination on the basis of age. Complainant bears the burden of such a claim. *Lawley v. Department of Higher Education,* 36 P.3d 1239, 1247-48 (Colo. 2001).

II. HEARING ISSUES

A. The Appointing Authority's disciplinary action was arbitrary and capricious, and was contrary to rule or law.

1. Respondent's selection process did not violate CADA:

The Colorado Anti-Discrimination Act ("CADA") prohibits unlawful discrimination on the basis of age: "It shall be a discriminatory or unfair employment practice ... [f]or an employer to refuse to hire.... any person otherwise qualified because of ... age..." C.R.S. 24-34-402(1)(a).

In order to prove intentional discrimination under CADA, a complainant must establish, by a preponderance of the evidence, a *prima facie* case of discrimination. The factors of a *prima facie* case of intentional discrimination are: (1) that the complainant belongs to a protected class; (2) that the complainant was qualified for the position; (3) that the complainant suffered an adverse employment decision despite his qualifications; and (4) that the circumstances gave rise to an inference of unlawful discrimination. *Lawley,* 36 P.3d at 1247- 48. Although the burden of proof always remains on the complainant, the employer has the burden of producing an explanation to rebut a *prima facie* case of discrimination: that is, the employer must provide a non-discriminatory explanation for its action. *Lawley*, 36 P.3d at 1248. A nondiscriminatory reason is one that is not prohibited by the Colorado Anti-Discrimination Act, namely, a reason that is not based on factors such as disability, race, creed, color, sex, age, national origin, or ancestry. *St. Croix v. University of Colorado Health Sciences Center*, 166 P.3d 230, 236 (Colo.App. 2007).

If the employer articulates a legitimate, non-discriminatory reason for the adverse employment decision and provides evidence to support its legitimate purpose, the presumption created by the employee's *prima facie* case is rebutted and drops from the case. *Lawley, 36 P.3d at 1248.* If the employer meets its burden of producing a legitimate reason for the adverse employment action, the employee must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for the adverse employment action were in fact a pretext for discrimination. The employee may use the evidence already in the record as part of his or her *prima facie* case and need not present additional evidence in every case. *Id.* Pretext may be demonstrated by establishing that "a discriminatory reason more likely motivated the employer or ... that the employer's proffered explanation is unworthy of credence." *Bullington v. United Airlines, Inc.*, 186 F.3d 1301, 1317 (10th Cir. 1999), *overruled on other grounds, National R.R.*

Passenger Corp. v. Morgan, 536 U.S. 101, 117 n. 11, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002).

Although a *prima facie* case combined with disproof of the employer's explanation does not prove intentional discrimination as a matter of law, it permits the fact finder to infer intentional unlawful discrimination. *See Randle v. City of Aurora*, 69 F.3d 441, 452 (10th Cir. 1995). On the other hand, a finding of pretext does not necessarily compel the conclusion that discrimination is the true cause for the disputed action. A fact finder is not required to find discriminatory animus from pretext, and each case will rest on an evaluation of the facts of that case as to whether discrimination should be inferred. *See Randle*, 69 at 451 n. 14 and n. 15; *Ingels v. Thiokol*, 42 F.3d 616, 622 n. 3 (10th Cir. 1994)("Pretext may support a factual conclusion of discrimination but it does not compel such a conclusion. Pretextual reasons may be offered for reasons other than to conceal a discriminatory motivation"), *abrogated on other grounds*, *Martinez v. Potter*, 347 F.3d 1208, 1210 (10th Cir. 2003).

In this case, the parties have stipulated to the conclusion that Complainant has presented a *prima facie* case of age discrimination, given that 58-year old Complainant was not selected for a position for which she was well-qualified while a woman who was significantly younger, and who had less experience with the specific duties of the position, was hired for that position.

The parties have also stipulated that Respondent has presented a presumptively legitimate reason for failing to interview Complainant. The analysis, accordingly, turns to whether Complainant has shown that the reason offered by Respondent is merely a pretext for age discrimination.

"If the employer succeeds in meeting its burden of production, that is, it asserts a non-discriminatory reason for the adverse employment decision, the factfinder cannot find unlawful discrimination without further consideration of the evidence presented, including credibility determinations. Assuming the employer offers evidence sufficient to sustain the proffered legitimate purpose, the employee cannot prevail in reliance solely upon the *prima facie* case. In that instance, 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." *Bodaghi v. Department of Natural Resources*, 995 P.2d 288, 298 (Colo. 2000).

Other than the evidence of the age disparity between Complainant and Ms. Ely, however, there was no persuasive evidence presented at hearing that Complainant's age was a factor in any stage of the proceeding. Respondent produced persuasive and credible evidence at hearing that the decision to not permit Complainant to interview was made because the prior chair of GES, Dr. Jennings, had not been happy with the work that

he believed should have been done when Complainant left her position in July of 2005.[1] Whether or not this was a reasonable or legitimate reaction by the prior chair is not the test. The question is whether Dr. Jennings believed that Complainant was responsible for a problem and should not therefore be re-hired, or whether this explanation is mere pretext for a discriminatory motivation. The credible evidence at hearing was that Dr. Jennings indeed held this belief and that his motivation was not one of unlawful discrimination on the basis of Complainant's age. *Piercy v. Maketa*, 480 F.3d 1192, 1200 (10th Cir. 2007)(holding that "[e]ven a mistaken belief can be a legitimate, non-pretextual reason for an employment decision").

As a result, Complainant has presented insufficient evidence to support a finding of pretext and of unlawful discrimination on the basis of her age. Complainant, therefore, has not presented sufficient evidence to prevail on her claim of unlawful discrimination under C.R.S. § 24-34-402. Respondent's decision to not to hire Complainant was not a violation of CADA.

2. Respondent's selection process was arbitrary, capricious, and contrary to rule or law:

a. Respondent's decision to ignore Complainant's application resulted in an arbitrary and capricious hiring process:

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley,* 36 P.3d at 1252.

Respondent permitted an informal poll of personal opinions to substitute for a fair and open consideration of Complainant's work history and capabilities. In a merit-based hiring process, decisions should be made on the basis of the tests of competence and evaluations of experience. *See* C.R.S. §24-50-112.5(1)(b)("Appointment and promotions to positions shall be based on job-related knowledge, skills, abilities, competencies, behaviors, and quality of performance as demonstrated by fair and open competitive examinations"). Allowing Dr. Jenning's untested and undocumented opinion that Complainant was responsible for problems in the Department to trump any examination of

[1] Respondent argued at hearing that Complainant had also been rejected from consideration because she was thought to be a disgruntled, complaining, and poor performing employee who was eager to leave Respondent's employment. The credible and persuasive evidence at hearing, however, did not support these arguments.

her record constitutes a failure to give candid and honest consideration to Complainant's application and the evidence Respondent was expected to use to hire a Program Assistant I. *Lawley, supra.*

Respondent conducted this hiring process without providing Complainant an opportunity to interview. The interview is the necessary and appropriate forum for a candidate to discuss her experience and qualifications with the hiring committee. The process utilized meant that the committee also did not review Complainant's application at all. Such a lack of information constitutes a neglect or refusal to procure the information Respondent was by law permitted to consider in making a merit-based hiring decision. *Lawley, supra.*

Finally, Respondent's use of informal discussions of the opinions of the staff to substitute for an actual evaluation of Complainant's work history as documented by her references, performance evaluations, and other legitimate means deeply affects the legitimacy of the conclusions reached by the hiring committee. Further, Respondent applied this process to only one of the five referred candidates, which created an unfair and unequal process for Complainant. Reasonable men fairly and honestly considering the evidence that Respondent should have considered in this process would have reached contrary conclusions as to Complainant's suitability to be interviewed as a candidate. *Lawley, supra.*

Complainant, therefore, has presented sufficient evidence at hearing to show that the hiring process for the Program Assistant I position has met the criteria under *Lawley* as an arbitrary and capricious hiring process.

b. <u>The decision not to interview or contact Complainant violated state rule as to the procedures to be followed after referral</u>:

Respondent had five referrals to consider for the position of Program Assistant. Three of those referrals came from the promotion/transfer employment list that was generated in response to the job posting. Two of those referrals were eligible reinstatement candidates.

Respondent's procedure in presenting a total of five candidates to the hiring committee was permissible under the applicable rules because an appointing authority "may consider transfers, non-disciplinary demotions and reinstatements before or along with employment lists." Director's Procedure 4-7, 4 CCR 801.

Once the referrals are made, the expectation created by the rules governing selection is that all of the referred candidates will be notified of their referral and given an opportunity to contact the department to set up an interview with the appointing authority (or other delegated individuals). Director's Procedure 4-24, 4 CCR 801 ("Upon receipt of a request to fill a vacancy, referral of the three highest-ranking candidates will be made from the appropriate eligible lists. All those referred must be notified of such, including contacts

for the interview"). Director's Procedure 4-13, 4 CCR 801, also requires that "applicants for specifically announced positions must be notified whether they qualify."

The rules also require that, if a referred candidate is interested in obtaining an interview, that candidate will be interviewed. Director's Procedure 4-25, 4 CCR 801, requires that "all those who respond to a referral should be interviewed in compliance with state and federal law." This rule takes as its predicate that all those who respond to a referral notice to ask for an interview will be interviewed.[2]

In this case, the unilateral decision to remove Complainant from contention without first notifying her that she had qualified for consideration for this specifically announced position, and then had been referred to the appointing authority as an eligible reinstatement candidate, violated Director's Procedures 4-13 and 4-24. Additionally, Respondent's decision not to interview Complainant, given her clearly expressed interest in obtaining that interview to the HR Department, violated Director's Procedure 4-25.[3] Complainant has presented sufficient evidence to find that Respondent's interview process in this matter was contrary to rule or law.

B. Available remedies are limited to a remedy of the legal wrong sustained by Complainant.

The standard for creating an appropriate remedy is to place an employee into the

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[2] As the testimony at hearing demonstrated, the terms "referral" and "referral lists" have been used by Respondent's human resources office to refer only to the list of promotional and transfer candidates who were eligible to be considered for the position. This definition does not find its root in state statute or Board Rule, and it is too narrow a definition to adequately capture the expectations for the hiring process. In this case, five candidates were referred to Respondent for consideration, of which three were on the promotion/transfer employment list and two were eligible reinstatement candidates. The fact that Respondent had the discretion to initially choose whether to consider reinstatement candidates along with the promotion/transfer employment list does not also allow Respondent to treat one reinstatement candidate with the employment list referrals and disregard the other reinstatement application. Once the decision was made to include reinstatement candidates, those two eligible reinstatement candidates were then referred for consideration and should haven been treated in the same manner as the other referred candidates.

[3] The syntax in Director's Procedure 4-25 creates some ambiguity as to the meaning of the phrase "should be interviewed in compliance with state and federal law." The interpretation of that sentence that is most compatible with the overall structure of the selection process rules, as well as consistent with the remainder of the text of Director's Procedure 4-25, is that a referred applicant who expresses an interest in being interviewed will be interviewed in a manner which comports with the various requirements that state and federal law place on hiring interviews. For example, it would not comport with federal law to talk to a female applicant about her childbearing plans during a hiring interview. Such an interpretation of the rule language applies the plain meaning of the terms, and harmonizes the rule with the body of rules on selection. *See Halverstadt v. Department of Corrections*, 911 P.2d 654, 657 (Colo.App. 1995)(holding that the interpretation of Board rules on retention require that "the entire article at issue should be considered to reach a meaningful understanding of layoff and retention proceedings" and should also construe the words and phrases "according to their familiar and generally accepted meaning"). The language of Director's Procedure4-25 does not allow appointing authorities to refuse to interview referred candidates who have requested an interview.

same situation he or she would have been in the absence of the unlawful action by their employer. "Any remedy fashioned [by the Board] in this case should equal, to the extent practicable, the wrong actually sustained" by the employee. *Department of Health v. Donahue*, 690 P.2d 243, 250 (Colo. 1984)(holding that a remedy which reinstated a probationary employee to her position and provided her back pay beyond her probationary term was improper because the "appropriate remedy, under these circumstances, should do no more than place Donahue in the same situation she would have occupied if her right to a predisciplinary meeting had not been violated"). *See also Beardsley v. Colorado State University*, 746 P.2d 1350, 1352 (Colo.App. 1987)("A public employee in a wrongful discharge case is not entitled to an award that bestows an economic windfall vastly disproportionate to the legal wrong that he has sustained")(internal quotation omitted); *Rodgers v. Colo. Dept. of Human Services*, 39 P.3d 1232, 1236 (Colo.App. 2001)(applying *Beardsley*).

While the hiring process in this case has been amply demonstrated to have been arbitrary, capricious and contrary to rule or law, the reversal of the results of the hiring process does not immediately equate to a decision that Complainant would have been offered the position if she had been allowed to interview. Any employee holding a position for which a selection appeal has been filed is kept in trial service status until the completion of that selection appeal. *See* Board Rule 4-28, 4 CCR 801 ("The trial service period must not exceed six working months, except as provided in the 'Time Off ' chapter or when there is a selection appeal pending"). By operation of this rule, Complainant may still be placed in the Program Assistant position.

There is also ample precedent for awarding placement into a position as the remedy in the appropriate case. *See Bodaghi,* 995 P.2d at 295 (noting that the Board ordered Bodaghi to be promoted into the position that he had been denied from assuming because of unlawful discrimination on the basis of his national origin); *Cunningham v. Department of Highways*, 823 P.2d 1377, 1383-84 (Colo.App. 1991)(holding that "remedial orders entered pursuant to such authority [to remedy discrimination] must bear a reasonable relationship to the statutory violation found to have occurred" and approving the Board's placement of Cunningham into a position previously denied to him because of a history of unlawful discrimination based upon Cunningham's race).

The facts of the case, however, do not support that, but for Respondent's faulty selection process, Complainant would have been offered the position. An appointing authority has the discretion to choose among those candidates who have been referred for hiring. There was insufficient evidence presented to hold that Complainant was so obviously the best candidate that Respondent's only rational choice would have been to select her.

In the absence of a clear showing that Complainant has been kept from a position that would have otherwise been offered to her, a remedy of an award of the position itself would be in excess of the legal wrong sustained by Complainant and would create a windfall to Complainant. *See Donahue*, 690 P.2d at 250 (holding that the chosen remedy

"bestows on Donahue an economic windfall vastly disproportionate to the legal wrong sustained by her, and we accordingly disapprove it").

In this case, the undersigned is not convinced that Complainant has shown that she would have been offered the position except for Professor Larkin's decision to use the informal poll to disqualify her from any consideration. The appropriate remedy to the legal wrong sustained by Complainant in this matter is to permit Complainant to compete fairly for the position.

C. An award of attorney fees is not warranted in this action.

Complainant has requested an award of attorney fees and costs. Attorney fees are warranted in a Board case only if a personnel action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. C.R.S. § 24-50-125.5; Board Rule 8-38, 4 CCR 801. The party seeking an award of attorney fees and costs shall bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule 8-38(B)(3).

In this matter, Complainant was denied an opportunity to interview with the hiring panel on the basis of a highly informal poll of the personal feelings of selected staff members, combined with an incorrect understanding that Respondent was permitted to eliminate Complainant from contention without an interview.

Respondent's selection process and selection decision, however, cannot be said to have been made frivolously, in bad faith, maliciously, or as a means of harassment. Respondent's motivation in deciding that the department would benefit more from a new candidate rather than re-employ Complainant's services, while too casual a decision to withstand scrutiny under the Board's rules, was not a case of harassment, bad faith, or a decision made frivolously or maliciously. The decision was also supported by at least some credible facts presented at hearing and, therefore, was not a groundless decision. *See* Board Rule 8-38(A)(3)(defining a groundless personnel action as one "in which it is found that despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action or defense"), 4 CCR 801. As a result, an award of attorney fees is not warranted in this matter.

CONCLUSIONS OF LAW

1. Respondent's selection procedure was arbitrary, capricious, and contrary to rule or law.

2. An award of attorney fees is not warranted.

ORDER

Respondent's selection process for position umber 400563-LAS/ Political Science & Geography and Environmental Studies Department Program Assistant I is **overturned**. Respondent is to re-open consideration for the position, and is to interview Complainant as a referred reinstatement candidate along with referrals from appropriate employment lists. Given the passage of time since the original recruitment process, Respondent may utilize an existing employment list or may find it necessary to assemble a new applicant pool.

Attorney fees and costs are not awarded.

Dated this 16th day of October, 2009.

[redacted]

Denise DeForest
Administrative Law Judge
633 – 17th Street, Suite 1320
Denver, CO 80202
303-866-3300

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Section 24-4-105(14)(a)(II) and 24-50-125.4(4) C.R.S. and Board Rule 8-67, 4 CCR 801. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Board Rule 8-70, 4 CCR 801. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline referred to above. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.); Board Rule 8-68, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the record on appeal in this case is $50.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-72, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule 8-75, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the ALJ's decision. Board Rule 8-65, 4 CCR 801.

CERTIFICATE OF SERVICE

This is to certify that on the 16th day of October, 2009, I electronically served copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** addressed as follows:

Ian D. Kalmanowitz, Esq.
[redacted]

Patrick T. O'Rouke, Esq.
[redacted]

[redacted]
Andrea C. Woods

(rev'd. 5/07)