

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

STEPHEN HARRISON,
Complainant,

vs.

COLORADO DEPARTMENT OF HUMAN SERVICES, FACILITIES MANAGEMENT,
Respondent.

Senior Administrative Law Judge (ALJ) Denise DeForest held the commencement hearing on October 18, 2013, and the evidentiary hearing in this matter on December 5, 2013 and January 30, 2014, at the State Personnel Board, 1525 Sherman St., Courtroom 6, Denver, Colorado. The record was closed on March 11, 2014, after written closings had been filed and the record had been reviewed for the inclusion of personal information associated with the applicants. Bradford C. Jones, Assistant Attorney General, represented Respondent. Complainant appeared and represented himself.

MATTER APPEALED

Complainant appeals Respondent's decision that he should not be interviewed in the third and final round of the selection process for the position of Equipment Operator III (EO III). Complainant argues that Respondent's decision constituted unlawful age discrimination, and asks for an order that he should be employed in the position and provided other relief as determined by the ALJ.

The Department of Human Services, Facilities Management (Respondent) argues that the EO III selection process was performed fairly and without unlawful discrimination, and that Complainant's application did not warrant his inclusion in the final group of ten applicants for the position. Respondent asks that the selection process be upheld.

For the reasons presented below, the undersigned ALJ finds that Respondent's selection process is **affirmed**.

ISSUE

1. Whether Respondent's decision to reject Complainant's application at Step 2 of the selection process for an EO III position was an unlawful act of age discrimination under the Colorado Anti-Discrimination Act.

FINDINGS OF FACT

1. The position of Equipment Operator III (EO III) was designed as part of Respondent's Southern District Facilities Management operations to operate heavy equipment for infrastructure repair and installation. In late 2012, an EO III position was vacant and a recruitment process begun to fill the position.

Job Announcement and Job Description:

2. The job announcement for the EO III position opened the position for competition on November 20, 2012 and closed the application period on November 30, 2012.

3. The job announcement for the EO III position provided a description of the types of machinery that the employee would be expected to handle and the types of maintenance or installation jobs to be performed:

Equipment to include but not limited to John Deere 310 E backhoe, Case 1835 Skidsteer, John Deere 544 frontend loader, Ditchwitch trencher, Elgin street sweeper. Systems to include but [not] limited to steam line repair, water main distribution, sewer line networks, underground electrical, storm water management requirements, spill prevention and countermeasure control procedures, snow removal within the guidelines of state and federal regulation. This position also provide[s] full grounds maintenance services to include: care of lawns, shrubs, flowers, and trees.

4. The duties of the job were more fully explained in the following paragraph. The job announcement provided ten bulleted sentences which described specific types of work, such as "[s]now and ice removal from roadways, parking lots and sidewalks using trucks with snow blowers and sanders, utility vehicle with blade and sander, snow blowers, hand shovels."

5. The minimum qualifications for the job consisted of "[t]hree (3) years of experience operating equipment appropriate to the work assignment." The description of the minimum qualifications requirement also included in bolded print: "**Experience must be clearly documented in your application to include the types of heavy equipment you have operated.**" There was no educational requirement associated with the minimum qualifications.

6. The EO III job announcement also included an additional warning that the determination of minimum qualifications would be made on the basis of the work experience section of the application, and not on the basis of any attachments such as a resume. Applicants were told in bolded print: **Do not use “see resume” or “see attached” statements on your application.**

7. The job description also included a list of nine statements of required knowledge, skills and abilities. These skills included such items as knowledge of excavation standards as established by OSHA, EPA, and the state Department of Health, and knowledge of building, construction, materials, methods, and tools involved in construction or repairs “as stated in [the] job announcement duties statements.”

What Applicants Were Told About The Selection Process:

8. The EO III job announcement described the selection process as having three steps:

Step 1 – Minimum Qualification Review: An HR Analyst will review your application against the minimum qualifications in this announcement. Candidates will be notified by email regarding the status of this review once the position closes. Candidates meeting minimum qualifications will move to Step 2.

Step 2 – Upon meeting the minimum qualifications, the next phase of the exam process may consist of a structured application evaluation against the listed duties and preferred qualification and [may] be the only exam depending on the number of applicants qualified for this position. Please be aware this structured application evaluation is a passive exam based solely upon the information provided in the Description of the Job and Qualifications section of your application. Therefore, it is imperative that you provide extensive detail on this section of your application relevant to the position being filled.

Sep 3 – Depending on the number of qualified applicants in the pool, the top ranking candidates from the structured application review may be invited to participate in a written exam and/or structured interview. Only the top three ranking candidate[s] from the final exam process will be referred to the appointing authority upon completion of the selection process.

The Application Form:

9. The application form was designed to be completed online through the NeoGov web site, although there was also an option offered which allowed applicants to submit an application on paper.

10. The on-line NeoGov application form required applicants to provide contact and identifying information, including the month and date of birth. The form did not ask for a year of birth.

11. The Education section of the application asked the applicant to specify start and end dates for colleges that were attended. An applicant was not required to enter information into this section. If no information was entered, the application form would note “[Unspecified Start] – [Unspecified End]” in the place where the date information would be located.

12. The Work Experience section followed the Education section. The Work Experience section included a space for the job title and employer name and address. The entry also required applicants to list the dates that they held the positions. Applicants could not leave out the dates of employment because the job announcement made clear that the applicants were to be evaluated for minimum qualifications and other purposes based upon the number of years that each applicant had performed specific duties.

13. The online NeoGov version of the application also provided a section where the applicant could attach documents.

14. The final two segments of the online application provided an applicant’s answers to questions included on the application form. The first segment included four agency-wide questions that applicants were expected to answer, such as whether the applicant was a veteran or current state classified employee. The last segment included an applicant’s answers to 13 supplemental questions. These supplemental questions included such topics of whether the applicant was a current resident of the state, possessed a Colorado commercial driver’s license, and was willing to work any shift, holidays and weekends.

15. By the time of the close of the application period, there were 62 applicants. Complainant was one of the applicants who had applied by the close of the application period.

Second Stage Evaluation Process:

16. All applications were reviewed to determine if the minimum qualifications for the position had been met. This Step 1 review was conducted by Kathryn Romero from Respondent’s Office of Human Resources, Southern District.

17. Ms. Romero found that 33 applicants met the minimum qualifications and were qualified to move on to Step 2 of the application process. Complainant’s application met minimum qualifications.

18. The second step of the process referred the 33 applications to a group of three staff experts for those staff to score and rank the applications.

19. The three staff experts were Jeff Zupancic, Gary Baca, and Douglas Herr. All three men had either served as the supervisor for the EO III position or had supervised a very similar position in Respondent's operations.

20. The three staff experts met on December 13, 2012, to review and score the 33 applications being considered in Step 2 of the application process. Each reviewer reviewed and scored all of the applications individually and did not compare their scores with the other staff experts.

21. The scoring system asked each staff expert to assign a rating of one through five to each skill area that was being rated. A score of one meant that the applicant had shown no experience in the skill area. A score of two was to be awarded if the applicant had shown between 1 and 23 months of applicable experience. A score of three was awarded if the reviewer found that the applicant had demonstrated 24 to 35 months of applicable experience. Scores of four were to be awarded for demonstrations of 36 to 47 months of experience, while a top score of five was to be awarded for 48 or more months of applicable experience.

22. The staff experts were instructed by HR to evaluate each application using the scoring system. Each of the three evaluators was to look for an applicant to describe what kind of work had been done with what type of equipment. When a job description contained such a description, the applicant was then given credit for the months claimed for that job.

23. The review form for each application included places to score each applicant on 26 types of specific experiences, such as "work experience in excavation using heavy equipment – front-end loader," "work experience in installation/maintenance of underground utility repairs using heavy equipment – skid-steer," or "work experience in maintaining detention ponds."

24. The system of evaluation required each staff expert to review each application in detail and to determine how many points were to be awarded on each of the 26 areas of experience. If, for example, a staff expert was looking at the skill category of "work experience in maintenance of flowers," he would examine the application for a description of work that expressly referenced that it included the maintenance of flowers. If the application did not expressly reference that type of work, the applicant would score a 1 in that category. If a job description included that the applicant had maintained flower beds, then the rater would look at the number of months that the applicants had worked in that job. If the applicant had worked that job for a total of, for example, 24 months, then the applicant would be rated as a "3" in that category.

25. The 26 areas of experiences were divided into four overall competency areas: excavation, installation and maintenance of underground utility repairs, snow and ice removal, and grounds maintenance. The scores awarded by each staff expert were

totalled in each of the four overall categories, and the average for that section was calculated. As a result, the end product for each staff expert was the averaged scores in each competency area. This meant that each staff expert created four rating averages for each application.

26. These four averaged rating scores for each applicant were then entered into a program by staff in the HR office, and the top overall scorers for Step 2 were determined.

27. The application forms reviewed by the staff experts in Step 2 had been redacted of the applicant name, address, email and phone information, and reference names. Applicants were referred to by a Person ID number that had been assigned to them. The application forms that were reviewed included the information on education and work experience, references, and the applicant's answers to the four agency-wide questions and 13 supplemental questions. Other attachments that may have been offered by the applicant as part of his application were not included in the second stage evaluation process.

The Top Ten Applicants from Step 2:

28. After the average scores created by each staff expert on each applicant in Step 2 had been tallied by HR, the top ten scoring applicants were referred to the third and final round of the selection process.

28. Person ID 14605689 ("#689") –

a. #689 provided an application which listed a graduation date from high school in 1976. #689 also included work descriptions which included examples of prior duties and the specific equipment used for such duties, such as:

Stack hay, load hay on semi flatbed with loader or skid steer...Use graders, blade and skid steer for road maintenance... Excavation for underground utility repairs using heavy equipment such as front end loaders, skid steer loaders, trenchers, backhoe. Installation and maintenance of underground utilities using heavy construction equipment (end loaders, skid steer loaders, trenchers, backhoe) and restore to original landscape...

b. The Step 2 scoring process for #689 were reasonable evaluations of the information he had provided in his application form. Applicant #689's scores were high enough that he was placed into the group of ten applicants to interview in Step 3.

29. Person ID 8247853 ("#853") –

a. Applicant #853's application noted that he had attended community college in 1988, and his earliest listed job experience was from 2003. #853's job descriptions included work descriptions such as:

Operate water truck, farm equipment, and earth mover to prep soil for backfill at building site... Operate backhoe to repair and maintain water/sewer lines, clean ditch[es],etc.. Operate backhoe to install, repair water lines...

b. The Step 2 scoring process for #853 were reasonable evaluations of the information he had provided in his application form. #853's scores were high enough that he was placed into the group of ten applicants to interview in Step 3.

30. Person ID 9103380 ("#380") –

a. #380's application noted that the applicant had been in high school in 1972. The applicant included a lengthy description of a job at Fitzsimmons Army Hospital that he held for almost 16 years. He described the position as one where he had performed multiple functions, including the operation of a "bat wing mower". During the winter, he stated that he was a "snowplow operator keeping streets clean of ice and snow. After snows had melted I cleaned the streets with the Elgin street sweeper." This applicant had also, among other listed functions, "[m]aintained trees and shrubs by trimming and using a chipper to dispose of limbs and branches" and had listed that he had maintained flowerbeds.

b. The Step 2 scoring process for #380 were reasonable evaluations of the information he had provided in his application form. #380's scores were high enough that he was placed into the group of ten applicants to interview in Step 3.

31. Person #9156069 ("#069") –

a. # 069's application was filed as a hard copy of the application. Applicant #069 listed his education as including a driving school that he attended beginning in 1979. #609's descriptions of his prior work included references to performing plumbing with a back hoe excavator, using graders and excavation equipment to grade roads, and maintaining grounds with various pieces of equipment.

b. The Step 2 scoring process for #069 did not include many areas with scores above 1. When #609 had experience in a specific listed skill category, however, his score was a 5 because of his years of experience. The resulting average scores for #069 were reasonable evaluations of his work history. #069's average scores were high enough that he was placed into the group of ten applicants to interview in Step 3.

32. Person ID 9113807 (“#807”) –

a. Applicant #807 did not list any dates for his high school education. His earliest job description dates were dated from 1998. Applicant #807 included as part of his job duties such explanations as:

“Maintain irrigation system with trencher throughout the facility... Snow and ice removal from roadways, parking lots and sidewalks using trucks with snow plows and sanders, utility vehicle with blade and sander, snow blowers, hand shovels.”

#807 also included in his description of past job duties such items as “[e]xcavation for underground utility repairs, using heavy equipment, such as front end loaders, skid steer loaders, trenchers, backhoe. Also used street sweeper for the maintenance of parking lots, Maintenance and repairs of roadways and parking lots using tampers, rollers, demo saw, jack hammers.”

b. The Step 2 scoring process for #807 included overall average scores of 2.69 from two of the staff experts. The third staff expert, Mr. Zupancic, knew this applicant and had supervised him. Mr. Zupancic provided #807 with a series of “5” ratings that unreasonably inflated the average score to an overall average of 4.71. #807’s scores were high enough that he was placed into the group of ten applicants to interview in Step 3.

33. Person ID 10791308 (“#308”) –

a. Applicant #308 included information that he graduated from high school in 1980. His job descriptions included 15 years in grounds maintenance and supervision. In his description of his work, however, #308 did not often link the use of specific equipment to a specific type function or task. Applicant #308’s descriptions included such items as “[r]esponsibility for maintenance and repair of roadways, parking lots, and sidewalks, requiring demolition and repair. Equipment including jack hammers and streetsweepers, etc.”

b. The Step 2 scoring process for #308 rated him very highly, even though his application did not include many examples of specific equipment used for specific types of tasks. These scores were unreasonable given the lack of detail offered in #308’s application. #308’s scores were high enough that he was placed into the group of ten applicants to interview in Step 3. Applicant #308, however, declined the interview and did not move forward with his application.

34. Person ID # 13502347 (“#347”) –

a. Applicant #347 included information that he had worked as an Equipment Operator in two prior jobs. He described his work including such information as, “[e]xcavated trenches for the installation of underground and overhead power utility lines using a backhoe, digger derek/line truck and bucket truck,” and “[r]emoved snow and ice from job sites using vehicles with blade, snow blowers, and shovels.”

b. The Step 2 scoring process for #347 were reasonable evaluations of the information he had provided in his application form. #347’s scores were high enough that he was placed into the group of ten applicants to interview in Step 3.

35. Person ID # 9942667 (“#667”) –

a. Applicant #667 listed the start of his college attendance as occurring in 1980. Applicant #667 also included that he had spent over 12 years as an EO III for the Colorado Department of Transportation and almost five years as a heavy equipment operator for an excavation company.

b. The Step 2 scoring process for #667 were reasonable evaluations of the information he had provided in his application form. #667’s scores were high enough that he was placed into the group of ten applicants to interview in Step 3.

36. Person ID # 11968753 (“#753”) –

a. Applicant #753 answered Supplemental Question #8 with a series of descriptions of types of equipment he had operated, such as “backhoe / track excavator – John Deere 310, 410” with associated tasks. The tasks that #753 associated with the backhoe entry included his description of work: “excavate for underground utilities to include: water main, sewer, gas, electrical, irrigation, fiber optic and telecommunications...” #753’s answer to Supplemental Question #8 also provided an estimate of the number of years that he had performed the tasks he had listed with the described equipment. In the case of the backhoe/excavation entry, for example, #753 estimated that he had 20+ years of experience.

b. The Step 2 scoring process for #753 were reasonable evaluations of the information he had provided in his application form. #753’s scores were high enough that he was placed into the group of ten applicants to interview in Step 3. Applicant #753 was the candidate who was ultimately hired for the position of EO III.

37. Person ID # 12840645 (“#645”) –

a. Applicant #645 listed his high school graduation date as 1978. He included various references to equipment he had used in various jobs, such as “[o]perate forklift to load and unload supply trucks with paint and materials,” and “[m]ove heavy loads of construction equipment parts using a forklift or a wheel loader.” Applicant #645 had also spent more than 15 years as an equipment operator and mechanic for a private company.

b. The Step 2 scoring process for #645 were reasonable evaluations of the information he had provided in his application form. #645’s scores were high enough that he was placed into the group of ten applicants to interview in Step 3.

Complainant’s Application:

38. At the time of the selection process for the EO III position, Complainant was over 50 years old.

39. Complainant included two entries in his education description. Complainant did not include the years he had attended the schools, and his application form noted “[Unspecified start] – [Unspecified End]” as his years of attendance.

40. Complainant included job descriptions for six jobs that he had held. The earliest of the six jobs was as an instructor teaching water and wastewater topics at Red Rocks Community College of Denver. Complainant worked in this position from March of 1981 through March of 1984. From this entry, it was apparent that Complainant must be over 50 years of age at the time of his application.

41. Complainant's other job experiences often involved water-related projects and supervisory work. Complainant had been, for example, a regional water superintendent for the City of Florence, a Director of Utilities for the Pueblo West Metropolitan District, a Parks Manager for a town in Arizona, and a testing equipment operator for a mobile equipment testing company in Arizona.

42. Complainant did not provide a significant amount of detail about any of his prior jobs because his work experience was extensive and he had held many types of positions through the years.

43. Complainant's descriptions of his work generally did not include references to the specific equipment that he used for specific types of tasks. In his equipment operator position description, for example, Complainant stated only, “[o]perate mobile equipment testing modifications and evaluating equipment performance as needed.”

44. Complainant answered the Supplemental Questions associated with the application form. Supplemental Question number 7 asked: “[s]elect the best option that identifies the number of years of work experience you have in Equipment Operator III related field.” Complainant selected the option for “4 or more years.”

45. Supplemental Question number 8 asked: “[d]escribe your experience with operating heavy equipment, include the type of equipment and include the number of months and or years.” Complainant’s answer was:

Logging / Lumber / Dump Haul Truck & log loader (crane) – 9 years
– family business.

Forklift/pallet lift Coors 3 years, Lumber 9 years.

Front end loader, dump truck ruck crane & backhoe, extend-hoe 15
years in City Florence, 3 years Pueblo West.

Agricultural Tractor / hay baler / swather / staker Kremmling Ranch
/TPG in AZ.

46. Complainant attached several items to his application form in NeoGov. One of those items was a list that Complainant had created which named specific types of equipment he had used in each of his jobs. This attached document was not reviewed by the staff experts in Step 2. Even if this attachment had been considered, the fact that the equipment list was not associated with specific types of tasks meant that Complainant would not have received experience credit in the rating of his application.

47. Complainant’s other attachments included statements of military service and driver’s license information. Complainant’ driver’s license copy showed that Complainant was born in July of 1951. Complainant’s attachments to his application form were not made available to the Step 2 staff experts.

48. When the three staff experts rated Complainant’s application as part of Step 2, the raters reasonably gave Complainant low scores because of the lack of specifics describing work with the type of equipment used in the EO III position.

49. In the excavation category, Complainant’s scores averaged 1, 1.2 and 1.2. In the snow and ice removal category, Complainant averaged a score of 1.0 from all raters. In the category of underground utility repair, Complainant was scored at 1.0 by all raters. In the category of Grounds Maintenance, Complainant was given an average score of 1.67 by one rater, and scores of 1.0 by the other two raters.

50. Given the lack of detail regarding the work Complainant performed with specific types of equipment, the average scores compiled by the staff experts were reasonable evaluations of the information contained in Complainant’s application.

Complainant's Appeal:

51. Complainant's overall score on the Step 2 evaluation process did not place him as one of the top ten candidates for the EO III position.

52. Complainant was notified by email on December 13, 2012, that he would not be advancing to the Step 3 selection round. Complainant filed a timely appeal of his non-selection with the Board, alleging age discrimination.

53. On July 18, 2013, the Board granted Complainant a hearing on the issue of age discrimination.

DISCUSSION

I. CLAIMS AND BURDEN OF PROOF

As the proponent of the order in this matter, Complainant bears the burden of proof on his claim of unlawful age discrimination. C.R.S. § 24-4-105(7).

The Board may reverse or modify Respondent's decision if the action is found to be contrary to law. C.R.S. § 24-50-103(6). In this case, the only question to be decided is whether the rejection of Complainant's employment application violated the Colorado Anti-Discrimination Act.

II. HEARING ISSUES

Complainant argues that Respondent's failure to select him for the position of Equipment Operator III was the result of impermissible age discrimination.

Colorado Anti-Discrimination Act:

The Colorado Anti-Discrimination Act (CADA) provides that, "[i]t 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). Interpretations of the analogous federal statute, the Age Discrimination in Employment Act (ADEA), constitute persuasive authority for understanding what actions constitute unlawful age discrimination under CADA. *George v. Ute Water Conservancy Dist.*, 950 P.2d 1195, 1198 (Colo.App. 1997). See also Board Rule 9-4 ("Standards and guidelines adopted by the Colorado Civil Rights Commission and/or the federal government, as well as Colorado and federal case law, should be referenced in determining if discrimination has occurred").

An employee alleging intentional discrimination must prove that "age was a 'determinative factor' in the employer's action toward him." *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1547 (10th Cir. 1988)(interpreting the ADEA). "Age need

not be the sole reason for the employer's act, but [the claimant] must show that age 'made a difference' in the employer's decision." *Id.*

Under this statute, intentional discrimination may be proven by either direct evidence or indirect evidence. *George*, 950 P.2d at 1197. Direct evidence is "[e]vidence, which if believed, proves [the] existence of [a] fact in issue without inference or presumption." *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1207 (10th Cir. 1999).

Direct evidence of discrimination, however, is rare. *Bodaghi v. Dept. of Natural Resources*, 995 P.2d 288, 296 (Colo. 2000). See also *Colorado Civil Rights Comm. v. State By And Through School Dist. No. 1, Bent County*, 488 P.2d 83, 87 (Colo.App. 1971)("Such discrimination is generally subtle and covert, and direct evidence of discrimination can otherwise rarely be presented. A finding of discrimination can usually only be based upon deduction from a series or pattern of seemingly innocent acts taken together and viewed as a totality")(internal citations omitted). Claimants most often pursue discrimination claims by employing indirect evidence of discrimination and by utilizing the three-part test adopted for such cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S.Ct. 1917, 1824 – 25, 36 L.Ed.2d 668 (1973) and its progeny. See *George*, 950 P.2d at 1197 (applying the three-part test to age discrimination claims under CADA).

McDonnell Douglas Procedure:

When an employee does not have direct evidence that the failure to hire him was an act of unlawful age discrimination, the employee may instead present a *prima facie* case of discrimination. A *prima facie* case requires that the employee demonstrate: 1) that the complainant belongs to a protected class; 2) that the complainant was qualified for the job at issue; 3) that, despite his other qualifications, the complainant suffered an adverse employment decision e.g., a demotion or discharge or a failure to hire or promote; and 4) that the circumstances give rise to an inference of unlawful discrimination. *George*, 950 P.2d at 1197.

Establishment of a *prima facie* case of discrimination creates a presumption of unlawful discrimination, requiring a defendant to come forward with evidence "to show a legitimate, nondiscriminatory reason for the challenged action." *Cooper*, 836 F.2d at 1547. "The defendant need not persuade the court that it was actually motivated by the proffered reasons, but satisfies its burden merely by raising a genuine issue of fact as to whether it discriminated against [the employee]." *Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1454-55 (10th Cir. 1994).

After the employer has offered its explanation, the employee has an opportunity to rebut the evidence offered by the employer. The employee retains the ultimate burden of persuasion, which "he may carry directly by proving that age was more likely than not a determinative factor in the employment decision, or indirectly by establishing that the employer's proffered explanation is mere pretext." *Cooper*, 836 F.2d at 1547.

Complainant's *Prima Facie* Showing:

There was little dispute at hearing that Complainant had presented evidence meeting the first three elements of a *prima facie* showing of age discrimination.

Complainant was over 60 years of age when he applied for the position of EO III in 2012. That age places Complainant in the protected class of applicants for employment over the age of 40. There was no dispute at hearing that Complainant met the minimum qualifications for the position of EO III. Complainant was, therefore, qualified for the EO III position. There was also no dispute at hearing that Complainant was not selected for the EO III position, and that his application score did not qualify him for the final selection round. These decisions constitute adverse employment decisions by Respondent.

The dispute at hearing concerned whether there were any circumstances that warranted a finding that the fourth element of a *prima facie* case had been met. Respondent took the position that age could not have been a factor in the second stage of the selection process because that review was a paper review, Complainant's birth year was not made part of the application process, and that even his birth date (without the year) had been redacted from the application forms that Respondent's subject matter experts reviewed.

The absence of birth year information, however, does not eliminate a reviewer's ability to estimate the age of an applicant. The minimum qualifications for EO III had no educational minimum qualification requirement. The application form, however, still asked applicants to list the date of their attendance dates and graduation dates from schools. More importantly, the job application form and instructions specifically required applicants to disclose the dates of employment for any position that was to be evaluated for job skills. An applicant who lists a full-time work history dating back to the early 1980's, such as was true for Complainant, would also be disclosing that he was at least in his 50's.

Complainant testified that his experience with the job functions at issue for the EO III position was substantial, and that his rejection should not have been on the basis of inexperience. Yet the rating of his application appeared to show that Complainant had been evaluated with virtually no experience in any of these areas. Under such circumstances, Complainant has met the requirements for a *prima facie* showing of age discrimination.

Respondent's Non-Discriminatory Reason For Its Non-Selection of Complainant:

Respondent provided evidence at hearing that its selection team had evaluated each application for statements indicating that types of equipment of interest to the process had been used by the applicant for specifically identified tasks. Under this system, Complainant's general statements that his work had involved certain types of equipment but without specification as to the type of work that the equipment was used

to perform were given no weight, and thus Complainant's rating scores were low. Respondent's description of its selection process provided it with a non-discriminatory reason for the outcome of the EO III selection process.

Complainant's Ultimate Burden of Proof:

The ultimate question, of course, is whether Complainant has met his burden of proof in showing that his age was a determinative factor in the decision not to select him for the EO III position or in proving that the reasons offered by Respondent were a pretext for discrimination.

A claimant demonstrates pretext by showing either "that a discriminatory reason more likely motivated the employer or ... that the employer's proffered explanation is unworthy of credence." *Rea*, 29 F.3d at 1455 (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207 (1981)). The complainant "need not prove [that Respondent's] reasons were false . . . or that age was the sole motivating factor in the employment decision. Rather, the plaintiff must show that age actually played a role in [Respondent's] decisionmaking process and had a determinative influence on the outcome." *Rea*, 29 F.3d at 1455 (internal citations and quotations omitted).

Complainant argues that the system of selection described by Respondent should not be found to be a credible description for a number of reasons. Complainant pointed to internal discrepancies within the results of the selection process, such as when the supervisor for candidate scored Applicant #807's application significantly higher than was warranted by the job descriptions offered in his application. Complainant also argued that the descriptions of the selection processes offered by the staff experts who testified at hearing should not be found to be credible because the witnesses appeared to have been coached and, additionally, were not entirely consistent in their descriptions of the selection process. Finally, Complainant disputed that selection according to the way described by the subject matter experts who testified in the case would be a logical method to find the best candidate. Complainant argued that such a system would merely reward applicants who copied the text from the job announcement into their job descriptions.

None of Complainant's arguments present sufficient evidence of pretext to warrant a finding that Respondent did not use the system that it described in making the selection for EO III, or provide evidence that Complainant's age played a role in the selection process.

One of the essential functions of a *de novo* hearing process is to permit the Board's administrative law judge to evaluate the credibility of witnesses. *See Charnes v. Lobato*, 743 P.2d 27, 32 (Colo. 1987)("An administrative hearing officer functions as the trier of fact, makes determinations of witness' credibility, and weighs the evidence presented at the hearing"); *Colorado Ethics Watch v. City and County of Broomfield*, 203 P.3d 623, 626 (Colo.App. 2009)(holding that "[w]here conflicting testimony is

presented in an administrative hearing, the credibility of the witnesses and the weight to be given their testimony are decisions within the province of the presiding officer"). In this case, the staff experts who testified were credible witnesses. Inconsistencies among their versions of events were relatively minor and were the type of inconsistencies to be expected when witnesses testify about the same event, particularly after the passage of months.

Complainant correctly noted that the selection process was not entirely carried out in the manner described by Respondent's witnesses. There were two identified anomalies in the manner that the final round candidates were selected.

First, the supervisor of one of the applicants rated that applicant (#807) very highly when the information presented in the application itself did not reasonably support such high ratings. Second, the content of Applicant #308's job descriptions did not often explain how he had used various pieces of equipment for specific tasks, and yet his application was rated very highly by all of the subject matter experts. These discrepancies were errors in the way that Respondent carried out the selection process.

These two discrepancies in the selection process, however, do not mean that the overall system used to select the final round of candidates was not as had been described by the raters. These were anomalies in the way the criteria for selection were applied, and not indications that the staff experts who testified were not credible witnesses.

The mere presence of anomalies also does not immediately translate as evidence of unlawful discrimination. In any selection process, it would be an odd result if the selection criteria had been applied in a perfectly even manner. *Cf. Rhea*, 29 F.3d at 1458 ("[T]he law does not require, nor could it ever realistically require, employers to treat all of their employees all of the time in all matters with absolute, antiseptic, hindsight equality"). The question on review of a selection process with anomalies is whether those differences suggest or indicate that a discriminatory animus was in effect. In this case, however, the presence of these two anomalies in the selection process does not provide any indication that Complainant's application rating was downgraded in whole or in part because of his age.

Complainant's arguments about the usefulness of a selection process that depends upon an examination of resumes for specific wording is also not persuasive. While there are many reasonable ways to evaluate a group of applicants, using a method where applicants are told that they need to explain how they used various pieces of equipment, and then the application materials are examined for that information, is not an unreasonable or unfair system. This type of examination has the added benefit of being relatively easy to explain and to demonstrate if there is an appeal of the selection process.

In the end, the totality of the circumstances does not indicate that Complainant's age played any role in the decision not to interview him in the final selection round.

Complainant's application, while containing a fair amount of information about a variety of jobs, generally did not explain many of the basics concerning his work. When tasks that were of interest in this selection process were mentioned, Complainant often did not specify if he had performed these tasks or had supervised the tasks. When Complainant did list equipment, it was most often divorced from any description of how that equipment had been used by Complainant. The selection system that was in place for this process required that those details be present if Complainant's application was to be successful. Under such circumstances, the rating of Complainant's application below the cut-off for the final round of selection was not an unreasonable result.

Additionally, when the apparent ages of the ten successful applicants are examined from the information available in the redacted applications utilized in Step 2, it appears that six out of the ten applicants who moved to Step 3 were about 50 years of age or older. Two of the applicants had disclosed that they had graduated from high school in the early to mid-1970's, and four others had experiences which made them appear to be about or at least 50 years of age. Complainant's application also made him appear to be in his 50's. These circumstances do not support that Complainant's age was taken into account in reaching the result in this case.

Complainant has not shown that Respondent's explanation of its selection system was merely pretext for discrimination or that his age played a role in the selection process. Complainant, therefore, has not carried his burden of persuasion to demonstrate that the result of this EO III selection process was a violation of the Colorado Anti-Discrimination Act.

CONCLUSIONS OF LAW

1. Respondent's decision to reject Complainant's application for the EO III position was not a violation of the Colorado Anti-Discrimination Act.

ORDER

Respondent's decision to reject Complainant's application as part of the EO III selection process is **affirmed**. Complainant's appeal is dismissed with prejudice.

Dated this 25th day
of April, 2014 at
Denver, Colorado.



Denise DeForest
Senior Administrative Law Judge
State Personnel Board
1525 Sherman St., 4th Floor
Denver, CO 80203
(303) 866-3300

CERTIFICATE OF MAILING

This is to certify that on the 25th day of April, 2014, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Stephen Harrison

[Redacted] e

Bradford C. Jones

[Redacted]

[Redacted]

Andrea Woods

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

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 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.