STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2014G013

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

KATHY STARLING,
Complainant,

v.

DEPARTMENT OF REVENUE, TAX AUDIT AND COMPLIANCE DIVISION,
Respondent.

Administrative Law Judge (ALJ) Tanya T. Light held the commencement hearing on August 7, 2014, and the evidentiary hearing in this matter was held before Administrative Law Judge Pamela Sanchez on November 19, 2014, and November 20, 2014, at the State Personnel Board, 1525 Sherman St., Courtroom 6, Denver, Colorado. The record was closed on July 17, 2015, upon motion of the parties after written submission of legal citations and the record had been reviewed for the inclusion of personal information associated with the applicants. Davin Dahl, Assistant Attorney General, represented Respondent. Mark Schwane, Esq., represented Complainant.

MATTER APPEALED

Complainant appeals Respondent's Step II Grievance Decision holding that she would not be allowed to submit an application for the position of Tax Examiner II (TE II) in the Taxpayer Services Division after the application period had closed. Complainant argues that Respondent's decision was arbitrary or capricious or contrary to rule or law, and constituted unlawful gender discrimination in violation of the Colorado Anti-Discrimination Act (CADA).[1] Complainant asks for an order providing all damages to make her whole, including but not limited to: placement in the TE II position; being given all training opportunities provided to the position; an award of back pay representing a 15% pay increase which Complainant would have earned in the position from the date of the incumbent's placement into the TE II position; front pay in the same amount from the date of judgment to placement in the position; an award of benefits from the date of hire into the position to the date of placement into the position; and an award of attorney fees and costs.

The Department of Revenue, Tax Audit and Compliance Division (Respondent) argues that the TE II selection process was performed fairly and without unlawful

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[1] Complainant did not pursue a claim of age discrimination at hearing and presented no evidence to support such an allegation. As such, Complainant's claim of discrimination based on age in violation of CADA and the ADEA is deemed abandoned and will not be addressed further.

discrimination, that the position was properly posted as a reallocation without irregularities and that Complainant's failure to see that posting and apply for it during the application period was not the result of wrongdoing by Respondent. Respondent asks that the decision to deny Complainant's request to submit an application after the application period had closed be upheld; Complainant's claim of gender discrimination be denied; and Respondent's requests for attorney fees and costs to be granted.

For the reasons presented below, the undersigned ALJ finds that Respondent did not engage in unlawful gender discrimination and that Respondent's decision not to allow Complainant to submit an application for the position of Tax Examiner II after the application period had closed is **affirmed**. This matter should be referred to the State Personnel Director for further action, if appropriate.

ISSUES

1. Whether Respondent's decision to deny Complainant's request to submit an application after the closing of the application period for a TE II position was an unlawful act of gender discrimination under the Colorado Anti-Discrimination Act.

2. Whether Respondent's decision to deny Complainant's Step II grievance requesting to submit an application after the closing of the application period for a TE II position was arbitrary, capricious or contrary to rule or law.

3. Whether either party has established a basis upon which to award attorney fees and costs.

FINDINGS OF FACT

1. Position No. 607, Tax Examiner II (TE II), is part of the Taxpayer Services Division and is the sole representative of that division in the Taxpayer Services Contact Center in Colorado Springs, Colorado.

2. Complainant is a Tax Examiner I (TE I) for the Tax Audit and Compliance Division in the Tax Audit and Compliance (TAC) Center in Colorado Springs and has been employed by Respondent since 1999.

3. The Taxpayer Services Contact Center and Tax Audit and Compliance (TAC) Center located Colorado Springs, Colorado, are in the same location and office space.

History of Tax Examiner II Position (607):

4. In 2010, the TE II position for the Taxpayer Services Division was vacant. At that time, Complainant was working in the Tax Audit and Compliance Division. Complainant informed the Regional Service Center Manager, Paul Jacob, that she was interested in the position.

5. Prior to the position being posted and opened for applications, Keith Lebon was transferred to the Colorado Springs Center from the call center in Lakewood, Colorado. At the time, Mr. Lebon was a Tax Examiner I (TE I) in the Taxpayer Services Division.

6. Mr. Lebon was placed in the position for training purposes for 6 months. As Mr. Lebon was a TE I, the position was downwardly allocated from a TE II position to a TE I position.

7. Mr. Jacob transferred Mr. Lebon from the Lakewood Call Center because he knew that Mr. Lebon was interested in working in Colorado Springs.

8. Mr. Jacob did not take applications for the opportunity to be trained in the TE I position and there is no selection review for training opportunities. There are neither rules nor internal processes for notifying employees when there is a position that will be downwardly allocated for training purposes.

9. Mr. Jacob placed Mr. Lebon in the position to determine if he would fit the position and if he could work in a single person office.

10. Upon determining that Mr. Lebon could perform the necessary work, the position was reallocated from a TE I to a TE II position.

11. Upon being reallocated in 2010, the position was posted and applications were accepted. Mr. Jacob instructed Human Resources that the posting should be limited as it was a reallocation. With a limited posting, there would be a limited number of applicants for the position.

12. Complainant applied for the position and was interviewed.

13. Mr. Lebon was selected for the position and held it until his resignation in September 2012.

14. At the time of giving notice, Mr. Lebon indicated his resignation would not be effective for 2 weeks. A few days after giving that notice, however, Mr. Lebon did not return to work.

15. As a result, Mr. Jacob wanted to get someone in the TE II position quickly. Mr. Jacob asked supervisors in the Denver Center and Lakewood Call Center if they knew of anyone that would be interested in the position.

16. Scott Rakow, who worked in the Lakewood Call Center, offered to fill the position temporarily. Mr. Rakow lived in Colorado Springs and was commuting to the Lakewood Center for work. Mr. Rakow was a TE I at that time and had only been working with Respondent for 6 months.

17. In order to qualify for the TE II position, an applicant is required to have a year of experience working as a TE I.

18. Mr. Jacob decided that Mr. Rakow would be assigned to the Colorado Springs Center for 6 months, which would allow him to gain the required year of experience to be qualified for the TE II Position No. 607.

19. As Mr. Rakow was a TE I, the position would have to be downwardly allocated.

20. At the time this was occurring, Mr. Jacob knew that Complainant was interested in the position.

21. Mr. Jacob anticipated that once Mr. Rakow was assigned to the position for 6 months, he would be the incumbent applying for the position.

22. Mr. Rakow took a voluntary transfer to the Colorado Springs Center.

23. Mr. Jacob did not inform Complainant that the TE II position would be downwardly allocated for training purposes.

24. At the time he was making these decisions, Mr. Jacob did consider that Complainant had expressed interest in the TE II position but did not place her in the position for training because she was in a different division, Tax Audit and Compliance. Mr. Jacob felt it would not benefit Taxpayer Services Division to put someone from another section into that position. It is Mr. Jacob's practice not to cross lines between divisions and he did not discuss placing Complainant in that position with her immediate supervisor, Wayne Link. If Mr. Jacob had placed Complainant into the TE II position in Taxpayer Services, it would have created a TE I opening in the Tax Audit and Compliance Division.

25. On January 4, 2013, Mr. Jacob responded to an email from Complainant inquiring about the TE II position. Mr. Jacob informed Complainant that the position would be open in March or April 2013, which would be approximately six months after Mr. Rakow had been assigned to the position. It was not until this exchange that Complainant learned the position had been downwardly allocated to a TE I for training purposes. As Complainant was a TE I at that time, had she been aware of the change, she could have been considered as a transfer into the position.

26. On April 12, 2013, Complainant emailed Mr. Jacob again asking when the position would be posted. Mr. Jacob responded that he believed it would be posted sometime in April.

27. On May 13, 2013, Complainant again emailed Mr. Jacob asking when the position would be posted. Mr. Jacob replied that it would be posted within a few days.

Mr. Jacob does not have direct control over the date when a position is posted. The position is actually posted by personnel from Human Resources (HR). While Mr. Jacobs completed the forms to have the position posted on May 13, 2013, the request was not signed by all involved and passed on to HR until June 1, 2013.

28. Mr. Jacob's testimony was credible

Job Announcement:

29. Complainant continued to periodically check the NEOGOV website for the posting of the TE II position through the months of March through June 2013. NEOGOV is a website run by a third party vendor. Various personnel from HR work with NEOGOV in posting openings for a number of departments in the state system.

30. The opening for the TE II Position No. 607 in Taxpayer Services was posted on NEOGOV on June 12, 2013, through June 14, 2013. The position was posted as a reallocation. It is standard practice for a position that is a reallocation to be posted for only 3 calendar days in compliance with the Technical Guidance – Job Announcements prepared by the Division of Human Resources in the Department of Personnel & Administration. During those three days, the posting for the opening for TE II Position No. 607 was viewed 51 times on the NEOGOV website.

31. Only one application for the TE II position was received. It was from Mr. Rakow and he was hired for the position.

32. Complainant did not apply for the position as she did not learn it had been posted until she inquired about the job posting on June 17, 2013. Complainant was on the NEOGOV website and had difficulty viewing the posting for three other jobs that were listed. Complainant contacted HR about the problems she was having viewing the other 3 positions and also inquired about the TE II Position No. 607.

33. Complainant spoke with Naomi Nigro, who was working as an HR Specialist on June 17, 2013. In that call, Complainant explained that she could see that there were 3 openings identified but could not see the descriptions for positions. After working with Ms. Nigro, Complainant was able to see the postings for each position. Once that issue was resolved, Complainant informed Ms. Nigro that she wished to apply for the TE II position. Ms. Nigro advised Complainant that the position was closed and Ms. Nigro could not authorize Complainant's late application. Complainant informed Ms. Nigro that she had tried looking for the posting for the TE II position from her state computer and was unable to see it. Complainant argued that as it was a state computer, her late application should be accepted.

34. Ms. Nigro advised Complainant that late applications were not usually accepted unless the NEOGOV website was down and she had no knowledge of the website being down during that time. Ms. Nigro confirmed that the announcement for the TE II position had been posted, that the posting had been viewed multiple times and

that there was one applicant for the position. Ms. Nigro then referred Complainant to Angelita Sims to address her request to submit a late application.

35. Ms. Nigro then spoke with Steve DeGeer, Customer Service Representative Coordinator I for the Governor's Office of Information Technology assigned to the Department of Revenue. Mr. DeGeer had called to confirm that the TE II position was posted. Mr. DeGeer's call was prompted by a conversation he had earlier that day with Complainant where she was explained that she did not see a posting for the TE II Position No. 607 and questioned whether it was actually posted.

36. Complainant also called Angelita Sims, HR Specialist, on June 17, 2013, regarding the posting for TE II Position No. 607. Complainant then requested to be allowed to submit a late application as she had not seen the posting for the position. The decision was made by Angelita Sims and Andrew Gale, HR Director for the Department of Human Resources, not to accept Complainant's late application.

37. Ms. Sims considered that the position had been posted for 3 calendar days in compliance with the Technical Guidelines regarding reallocations. Ms. Sims did not discuss Complainant's qualifications for the position with Mr. Gale when deciding whether to accept a late application, but did advise Mr. Gale of Complainant's identity.

38. Mr. Gale, as HR Director, has discretion to reopen a position and grant an extension for submission of applications. Mr. Gale played no role in the posting of TE II Position No. 607. When Ms. Sims advised Mr. Gale about Complainant's request, he did not feel there was a compelling reason for her late application.

39. Mr. Gale was aware that Complainant stated she did not see the posting and Ms. Sims advised Mr. Gale that Complainant alleged that the website was not operating properly and alleged the position might not have been posted. Ms. Sims confirmed, however, that the position had been viewed multiple times during the posting period. Mr. Gale was persuaded that the position was posted and was visible to the public. As such, Mr. Gale denied Complainant's request to submit a late application. Mr. Gale did not discuss whether to accept a late application with Mr. Jacob.

40. The testimony of Scott DeGeer, Naomi Nigro, Angelita Sims and Wayne Gale was credible.

41. At some point after making the decision, Mr. Gale was aware of Complainant's dissatisfaction with his decision and directed her to commence the grievance process with her supervisor, Wayne Link. In reality, Mr. Link had no authority to remedy Complainant's situation as he could not accept a late application.

42. On June 27, 2013, Complained filed a grievance alleging discrimination on the basis of gender and age and requested to be allowed to apply for the TE II position.

43. On July 8, 2013, Complainant met with her supervisor, Wayne Link, to discuss her grievance. Mr. Link issued his Step I grievance decision stating that he was not in a position to address the issues raised in Complainant's grievance.

44. On July 12, 2013, Complainant filed her Step II grievance with Chris Muntean, Director of Tax Auditing and Compliance Division. The TE II position in question, however, was in the Taxpayer Services Division under Director Eric Myer. Nonetheless, Mr. Muntean met with Complainant and her union representative, Pamela Cress. Mr. Muntean also had several meetings with Complainant and Mr. Gale about her request to submit a late application based on her belief that the position had not been posted on NEOGOV and about reviewing her position within her current unit to determine if it accurately reflected her current position or should be upwardly allocated.

45. On August 7, 2013, Mr. Muntean issued his response to Complainant's Step II grievance stating that he believed TE II Position No. 607 was posted and that the evaluation of whether her current position should be upwardly allocated would continue.[2]

Complainant's Appeal:

46. On August 16, 2013, Complainant appealed the Step II Grievance decision to the State Personnel Board alleging age and gender discrimination. On May 20, 2014, the State Personnel Board upheld the Preliminary Recommendation of the Administrative Law Judge that a hearing be granted regarding Complainant's claims of age and gender discrimination.

DISCUSSION

I. CLAIMS AND BURDEN OF PROOF

As the proponent of the order in this matter, Complainant bears the burden of proof on her claim of unlawful gender 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).

II. HEARING ISSUES

A. Respondent's decision to deny Complainant's request to submit an application after the closing of the application period for a TE II position was not an unlawful act of gender discrimination under the Colorado Anti-Discrimination Act.

[2] Complainant did not appeal the Respondent's ultimate decision that her position as a TE I in the Tax Audit and Compliance Division should not be upwardly allocated.

Complainant argues that Respondent's denial of her request to submit an application for TE II Position No. 607 was the result of impermissible gender discrimination.

Colorado Anti-Discrimination Act:

Disparate treatment "is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of difference in treatment..." *International Bd. of Teamsters v. United States*, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977)(citations omitted).

Complainant's disparate treatment claim arises under the Colorado Anti-Discrimination Act (CADA). Section 24-34-402(1)(a), C.R.S., provides, in relevant part:

> It shall be a discriminatory or unfair employment practice . . . [f]or an employer to refuse to hire, to discharge, to promote or demote, to harass during the course of employment, or to discriminate in matters of compensation against any person otherwise qualified because of...sex...

In most cases, a claimant lacks direct evidence of an employer's discriminatory motivation and must prove the necessary discriminatory intent indirectly by way of inference. Colorado has adopted the following approach, modeled on the Supreme Court's analysis in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), for proving an inference of discriminatory intent.

Initially, the plaintiff must establish a *prima facie* case of discrimination by showing (1) he or she belongs to a protected class; (2) he or she was qualified for the job at issue; (3) he or she suffered an adverse employment decision despite his or her qualifications; and (4) the circumstances give rise to an inference of unlawful discrimination. *Colo. Civil Rights Comm'n v. Big O Tires, Inc.*, 940 P.2d 397, 400 (Colo. 1987).

If the plaintiff 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. If the employer produces such an explanation, the plaintiff 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. *Id.* at 401.

Intentional discrimination is presumed if a plaintiff proves a *prima facie* case unrebutted by an employer's offer of a nondiscriminatory reason for an adverse job action. *See Tex. Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). A nondiscriminatory reason is one that is not prohibited by CADA,

namely, a reason that is not based on factors such as disability, race, creed, color, sex, age, national origin, or ancestry. *See Equal Employment Opportunity Comm'n v. Flasher Co.,* 986 F.2d 1312, 1316 n. 4 (10th Cir.1992); *Bodaghi v. Dep't of Natural Res.,* 995 P.2d 288, 307 (Colo. 2000).

Once such a reason is provided by an employer, however, the presumption of discrimination "drops out of the picture"; at that point, the trier of fact must decide the ultimate question of whether the employer intentionally discriminated against the plaintiff. *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 511, 113 S.Ct. 2742, 2749, 125 L.Ed.2d 407 (1993). The burden of proving intentional discrimination always remains with the plaintiff. *Lawley v. Dep't of Higher Educ.,* 36 P.3d 1239, 1248 (Colo.2001); *Bodaghi,* 995 P.2d at 298.

Plaintiffs typically demonstrate pretext in one of three ways: (1) with evidence that the defendant's stated reason for the adverse employment action was false; (2) with evidence that the defendant acted contrary to a written company policy prescribing the action to be taken by the defendant under the circumstances; or (3) with evidence that the defendant acted contrary to an unwritten policy or contrary to company practice when making the adverse employment decision affecting the plaintiff. *Kendrick v. Penske Transp. Servs.*, 220 F.3d 1220 (10th Cir. 2000). *See also Medina v. Income Support Div., New Mexico*, 413 F.3d 1131, 1136 (10th Cir. 2005)(noting that a plaintiff will generally meet her burden of demonstrating pretext of she demonstrates such weaknesses, implausibilities, inconsistencies, or contradictions in her employer's proffered reason that a reasonable fact finder would find them unworthy of credence)(internal citations and quotations omitted).

Application of These Principles To The Allegedly Discriminatory Act:

Complainant has been able to establish a prima facie claim of unlawful discrimination because she has demonstrated (1) that as a woman she belongs to a protected class; (2) that she was qualified to apply for the TE II position at issue; and (3) that her request to submit a late application was denied, which in turned denied her the opportunity to apply for a promotional position that would constitute an adverse employment decision.

The pivotal question is whether the circumstances presented here give rise to an inference of discrimination. Complainant argued that she did not apply for the TE II position because it was not posted and, in the alternative, because her state computer was not functioning properly and she was unable to see the posting. Position No. 607 for TE II in Taxpayer Services was posted from June 12, 2013, through June 14, 2013. Respondent was able to demonstrate that there were 51 views of that posting during that time period. While it appears there was some miscommunication between Complainant and Mr. DeGeer about the posting, the testimony by Mr. DeGeer, Ms. Nigro and Ms. Sims was credible and persuasive that TE II Position No. 607 was in fact posted on NEOGOV during the period of June 12, 2013, through June 14, 2013.

Complainant's argument that she did not apply for the position because she was unable to see postings from her state computer on NEOGOV on June 17, 2013, is not persuasive. Complainant did not assert that she had difficulty with her computer on a day during which the position was posted and open from June 12, 2013 through June 14, 2013.

Finally, Complainant argues that Regional Service Center Manager, Paul Jacob, knew that she wanted to apply for the TE II position and failed to inform her when it was actually posted. Complainant did not establish that a supervisor, including Mr. Jacob, has a duty or is required by rule to keep an employee informed when a position is actually posted. Mr. Jacob communicated to Complainant when he believed that position would be posted, but in reality he had no control over when that would happen. The position is posted on a third-party vendor website, NEOGOV, and HR prepares the information and obtains all final approvals for setting up the postings for open positions.

The circumstances under which Complainant did not apply for the position, and under which Respondent refused to allow Complainant to submit a late application, do not establish circumstances giving rise to an inference of unlawful discrimination on the basis of gender.

Even assuming that Complainant has established a *prima facie* case of gender discrimination, Respondent has provided several explanations for the refusal by Andrew Gale to accept Complainant's late application. As Mr. Gale testified, it is within his discretion whether to allow a late application. In this case, he did not feel that Complainant had offered a compelling reason for not applying during the period when applications were accepted. There was no problem with the website where the positions were posted. He felt Complainant had simply not seen the posting during the application period and any computer problems Complainant may have experience occurred after the position was closed.

At hearing, Complainant also argued that the history of the position and the fact it was downwardly allocated in 2010 for Mr. Lebon and in 2012 for Mr. Rankow demonstrated a pattern of discrimination. It must first be noted that Complainant did not file a grievance regarding the downward allocation of the position in 2010 or in 2012 for Mr. Rakow. As such, this evidence was only considered to the extent that the downward allocation of the position on those occasions, in combination with the denial of Complainant's request to submit a late application, evidence a pattern of discrimination against Complainant based upon her gender.

The Board does not have jurisdiction over the issue of downward allocations. That is within the purview of the State Personnel Director. Neither party presented any rule or regulation governing the use of the downward allocation mechanism for training purposes or requiring that such a downward allocation be announced and open to all employees to take advantage of the training opportunity. There is no doubt that the use of downward allocation of a position to allow for one individual to be trained without all interested employees being apprised seems contrary to the fundamental principles

underlying the state personnel system allowing for an open and competitive process to obtain qualified individuals. Even as here, where the supervisor making the decision seemed credible in his explanation of the use of this mechanism, it still leaves one with the appearance that the position is being manipulated through downward allocation in a manner that is questionable. As such, this issue will be referred to the State Personnel Director for any further action regarding the history of downward allocation of TE II Position No. 607.

The fact that TE II Position No. 607 was downwardly allocated in 2010 and 2012 does not, however, demonstrate a pattern of gender discrimination toward Complainant. Mr. Jacob's testimony regarding the reason for the downward allocation in 2010 and 2012 was credible and persuasive. In essence, Mr. Jacob was allowing for promotion of personnel from the pool already existing within the Division. Complainant did not refute this explanation or demonstrate that it was merely pretextual.

Complainant has not established that Respondent's denial of her request to submit a late application for TE II Position No. 607 was an act of unlawful gender discrimination or that the downward allocation of that position in 2010 and 2012, in conjunction with that denial, demonstrates a pattern of unlawful gender discrimination. Complainant has failed to meet her burden to establish that Respondent violated CADA under the circumstances presented in this case.

B. Respondent's decision to deny Complainant's Step II grievance requesting to submit an application after the closing of the application period for TE II Position No. 607 was not arbitrary, capricious or contrary to rule or law.

In determining whether an agency's decision is arbitrary or capricious, a reviewing tribunal 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; or 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 v. Department of Higher Education,* 36 P.3d 1239, 1252 (Colo. 2001).

In this case, Respondent exercised its discretion in denying Complainant's request to submit an application for TE II Position No. 607 after the closing date. Before doing so, Human Resources personnel investigated whether there had been any problems with the website upon which the position was announced. In addition, they confirmed that others had been able to view the posting and had done so 51 times during the 3-day period which it was open for applications. Andrew Gale, Human Resources Director, and Angelita Sims, HR Specialist, made the decision not to allow Complainant to submit a late application after consideration of these facts and of Complainant's explanation for failing to submit a timely application. In issuing his Step II

decision, Chris Muntean conferred with Mr. Gale and met with Complainant and her representative. Based on the evidence presented, Respondent used reasonable diligence and care to procure evidence regarding Complainant's grievance and gave candid and honest consideration to such evidence. Complainant has not established that a reasonable person fairly and honestly considering the evidence must reach contrary conclusions. Complainant has not met her burden in establishing that Respondent's decision regarding her Step II grievance was decision is arbitrary or capricious or contrary to rule or law.

C. Neither party has established a basis upon which to award attorney fees and costs.

Board Rule 8-33 provides pursuant to § 24-50-125.5, C.R.S., attorney fees and costs may be assessed against an applicant, employee, or department, upon final resolution of a proceeding against a party if the Board finds that the personnel action from which the proceeding arose, or the appeal of such action was frivolous, in bad faith, malicious, was a means of harassment, or was otherwise groundless.

A. Frivolous means that no rational argument based on the evidence or law was presented;
B. In bad faith, malicious, or as a means of harassment means that it was pursued to annoy or harass, made to be abusive, stubbornly litigious, or disrespectful of the truth;
C. Groundless means despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action or defense.

Both parties requested an award of attorney fees and costs as part of the remedy requested in this case. Respondent presented credible evidence regarding the basis for its actions and decisions. Complainant was sincere in her testimony and her belief regarding the course of events that had transpired. Neither party proceeded in bad faith nor as a means of harassment and both parties had valid legal theories for pursuing their claims. As such, both parties failed to establish any grounds under Board Rule 8-33 for an award of attorney fees and costs. Each party should bear its own costs in this case.

CONCLUSIONS OF LAW

1. Respondent's decision to deny Complainant's request to submit an application for the TE II Position No. 607 after the application period was closed was not a violation of the Colorado Anti-Discrimination Act.

2. Respondent's decision to deny Complainant's Step II grievance regarding the denial of her request to submit an application for TE II Position No. 607 after the application period was closed was not arbitrary or capricious or contrary to rule or law.

3. Each party has failed to establish any grounds under Board Rule 8-33 for an award of attorney fees and costs and should bear its own costs.

ORDER

Respondent's decision not to allow Complainant to submit an application for the position of Tax Examiner II after the application period had closed and Step II decision providing such is **affirmed**. Each party should bear its own costs. Complainant's appeal is Dismissed with Prejudice. This matter is referred to the State Personnel Director for further action, if appropriate.

Dated this **31st** day of **August,** 2015 at Denver, Colorado.

[redacted]

Pamela Sanchez
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 31st day of August, 2015, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

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[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.