

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2018S015

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

LORI BAUMGARDNER,
Complainant,

v.

DEPARTMENT OF TRANSPORTATION,
Respondent.

Administrative Law Judge (“ALJ”) Rick Dindinger held a commencement on March 20, 2018, and an evidentiary hearing from August 13 through 15, 2018. Both were conducted at the State Personnel Board, 1525 Sherman Street, Denver, Colorado. Mark A. Schwane, Esq., of Schwane Law, LLC, represented Complainant. Jeanne C. Baak, Esq., Assistant Attorney General for the State of Colorado, represented Respondent.

MATTER APPEALED

Complainant applied unsuccessfully to promote to the position of Transportation Maintenance II (“TM II”) in Kremmling. She disputes her non-selection. Complainant alleges that Respondent discriminated against her on the basis of gender. Complainant seeks placement to a TM II position, an award of back pay and lost PERA contributions, and an award of attorney fees and costs.

Respondent denies Complainant’s allegations and maintains that the selection decision was not discriminatory. Respondent requests that the Board affirm the selection decision.

For the reasons discussed below, the selection decision is **affirmed**.

ISSUES

- A. Whether Respondent discriminated against Complainant in the selection as a result of her gender; and
- B. Whether to award Complainant her reasonable attorney fees and costs.

Complainant’s Prehearing Statement asserts a third issue—whether Respondent’s actions violated rule or law. The State Personnel Director exercises express statutory authority to review appeals of selection decisions pursuant to § 24-50-112.5(4), C.R.S. Under that statute, the State Personnel Director may overturn a selection action that is “arbitrary, capricious, or contrary to rule or law.” In contrast, the Board may exercise its discretion to review selection decisions for discrimination pursuant to § 24-50-125.3, C.R.S. There is no statutory authority expressly granting the Board authority to consider an applicant’s claim that a selection decision was contrary to rule or law. As a result, “[a]ll complaints about the selection and examination process not

involving allegations of discrimination are to be filed with the *director*, while any claims of discrimination with respect to that process must be filed with the *board* or the civil rights division.” *Cunningham v. Dep’t of Highways*, 823 P.2d 1377, 1380 (Colo. App. 1991) (emphasis added); *see also Williams v. Dep’t of Public Safety*, 369 P.3d 760, 770 (Colo. App. 2015) (concluding that the Board does not have authority to review whether a selection decision was arbitrary or capricious).

FINDINGS OF FACT

Background regarding Complainant

1. Complainant started working for Respondent in January 2000.
2. Complainant is a certified state employee.
3. Since her certification, Respondent has classified Complainant as a Transportation Maintenance I (“TM I”) worker. (Stipulated fact.)¹
4. Since September 2004, Respondent has assigned Complainant to its Hot Sulphur Springs patrol. (Stipulated fact.) The Hot Sulphur Springs patrol is in Respondent’s Region 3, Section 6. (Stipulated fact.)
5. Respondent assigns Complainant duties often performed by TM II workers. Nevertheless, the job duties of TM I workers and TM II workers have many overlaps.
6. Complainant has completed all three tiers of Respondent’s Leadership Journey and received all three “coins” signifying completion. (Stipulated fact.)
7. Complainant has obtained an EO III certification; the certification reflects experience and proficiency with operating heavy equipment.
8. Complainant filed a hostile work environment claim with Respondent in September 2013. (Stipulated fact.)
9. Complainant filed a Charge of Discrimination with the Equal Employment Opportunity Commission (“EEOC”) on June 30, 2014. (Stipulated fact.)
10. Respondent issued a disciplinary action to Complainant on February 27, 2015. (Stipulated fact.) The disciplinary action reflects four separate accidents in addition to the accident giving rise to the discipline. Complainant did not appeal the disciplinary action.
11. Respondent issued Complainant performance documentation in 2009 and 2016 to address negative performance related issues.
12. Complainant’s annual performance evaluations reflect overall satisfactory or above performance.
13. In Complainant’s annual performance evaluation finalized on April 26, 2017, Respondent evaluated Complainant in the category of “Workleading and Supervision” with a rank of 4 out of 5

¹ The parties stipulated to certain facts as identified with parentheticals. *See* Joint Stipulations dated August 8, 2018.

stars, "Successful, Occasionally Exceeds." The evaluation states: "Lori has been very helpful in leading this Patrol and she will work to further the success of this Patrol."

Background regarding Region 3, Section 6 and the Hot Sulphur Springs patrol

14. Respondent is divided into five regions and headquarters. (Stipulated fact.)
15. Region 3's Headquarters is located in Grand Junction. (Stipulated fact.)
16. Region 3 has two maintenance sections known as "Section 2" and "Section 6." Region 3 also has other sections that handle Respondent's engineering and administrative responsibilities.
17. Region 3, Section 6 is based out of Craig. (Stipulated fact.)
18. Mark Eike is the Superintendent of Region 3, Section 6. (Stipulated fact.)
19. At the time of the disputed selection, Scott Marsh was the Deputy Superintendent of Region 3, Section 6.
20. Region 3, Section 6 is broken into two areas: the "King Area" and the "John Area."
21. The King Area includes six patrols: Hot Sulphur Springs, Kremmling, Granby, Winter Park, Walden, and Rabbit Ears Pass. (Stipulated fact.) The John Area includes nine patrols.
22. Jason Simpson supervised the King Area. (Stipulated fact.) Mr. Simpson's position is Labor, Trades and Crafts Operations.
23. The following are the TM II promotions and transfers in the King Area since 2008:
 - March 1, 2008: Tom Dickerson promoted to TM II in Kremmling.
 - May 10, 2008: Andy Hugley transferred to TM II in Hot Sulphur Springs from Granby.
 - May 10, 2008: Randy Baumgardner transferred to TM II in Granby from Hot Sulphur Springs.
 - July 2, 2008: Andy Hugley promoted to Transportation Maintenance III ("TM III") over Granby and Hot Sulphur Springs.
 - August 1, 2008: Melvin Conn promoted to TM II in Hot Sulphur Springs.
 - December 12, 2008: Melvin Conn transferred to Granby from Hot Sulphur Springs.
 - December 12, 2008: Tom Dickerson transferred to Hot Sulphur Springs TM II from Kremmling.
 - December 12, 2008: Randy Baumgardner's position was moved to Kremmling TM II.
 - August 22, 2009: Tom Dickerson transferred to Kremmling TM II from Hot Sulphur Springs.

- November 1, 2009: TM II position in Hot Sulphur Springs reclassified to TM I position; Respondent hired Russ Patterson as the TM I.
- May 27, 2014: Charles Carroll promoted to TM II position in Granby.
- October 29, 2016: Doug Brown promoted to TM II position for Rabbit Ears Pass.
- October 21, 2017: Robert Wilson promoted to TM II position in Kremmling.

(Stipulated fact.)

24. Of the fifteen patrols in Region 3, Section 6, all of them have a TM II except for the Hot Sulphur Springs patrol.

25. The Hot Sulphur Springs patrol has not had a TM II assigned to it since September 2009. (Stipulated fact.) In November 2009, Respondent reclassified the TM II position in Hot Sulphur Springs to a TM I position.

26. There are two full-time employees on the Hot Sulphur Springs patrol: Complainant and Russ Patterson. Another employee, David Palmer, works on the patrol during winter months. Respondent also “farmed-out” an employee from Patrol 13 (Rabbit Ears Pass), Tom Kreimier, to work on the Hot Sulphur Springs patrol during the summer of 2018. Respondent also hires temporary help as needed on a seasonal basis, mostly during the winter months. Complainant is the longest employed TM I on the Hot Sulphur Springs patrol.

27. Wagner Kelley is the TM III for the Hot Sulphur Springs patrol and the Rabbit Ears Pass patrol. Mr. Kelley has been Complainant’s supervisor for two years.

The TM II position in Kremmling

28. On July 24, 2017, Respondent posted a job announcement for a TM II position based out of Kremmling. (Stipulated fact.)

29. The TM II position was only open to Respondent’s current, classified employees. (Stipulated fact.)

30. The job posting only lists one minimum qualification as follows: “Three years of experience at CDOT as a Transportation Maintenance Worker I, Equipment Operator III, or equivalent classifications.”

31. The job posting does not list leadership training or EO III certification as a minimum or preferred qualification.

32. The job application included the following question: “Have you been subject to disciplinary action in the last three years of your work experience? If so, please provide details of that disciplinary action. If not, please state ‘N/A.’”

33. Mr. Simpson was the hiring manager for the position.

34. Mr. Simpson approved subject matter experts to serve on an application review panel and on an oral board panel. Mr. Simpson also approved measures for the subject matter experts to use in ranking candidates during such panels.

35. Mr. Eike was the Appointing Authority for the selection decision. (Stipulated fact.)

The applications

36. Mr. Marsh encouraged Complainant to apply for the TM II position in Kremmling. He was aware of Complainant's completion of the Leadership Journey and her EO III certification.

37. Six employees applied for the TM II position: Complainant, JJ, RP, RR, TW, and RW. (Stipulated fact.)² JJ started working for Respondent in 2008; he was working on the Silverthorne patrol. RP started working for Respondent in 2009; he was working on the Hot Sulphur Springs patrol. RR started working for Respondent in 2006; he was working on the Walden patrol. TW started working for Respondent in 2009; he was working on the Kremmling patrol. RW started working for Respondent in 2010; he was on the Strasburg JOA with Region 3 and working out of the Silverthorne Barn on I-70 from Frisco to the Eisenhower/Johnson Tunnels. Other than Complainant, the applicants were all male.

38. At least three of the applicants were members of protected classes. Complainant is female; RR is Hispanic; RW is African-American.

39. Complainant's application states "since there is no TMII at this location, it has been up to me to manage the other TMI's" and also that she performs the "responsibilities of a TMII without the title." Complainant also indicated she had done this for seven years. Further, "I am the person on the 21 patrol who makes a list of jobs needed to be done on our section of highway and delegates how and who needs to get it done."

40. RW's application reflects service as the acting TM II in two of his prior assignments, including a two-month period when he supervised eight individuals including "assigning their daily and weekly job duties." RW's application also states: "I was the Senior TM-I and was responsible for assisting in training/supervision of new employees as well as scheduling and planning daily work activities . . . I maintained inventory . . . I received shipments of supplies."

41. Complainant's application reflects completion of the Leadership Journey. Respondent's Leadership Journey is a three-part training with multiple days of classes and prerequisite courses and readings. Among other topics, the Leadership Journey includes training on communication and interpersonal skills, operations management, and leadership.

42. RW's application reflects attendance at the Camp George Training Academy, which included training in leadership skills, interpersonal skills, and supervisory skills. The ALJ is uncertain regarding the length of RW's Camp George training, of prerequisite courses or readings, or any other particulars.

43. Complainant's application reflects an Equipment Operator III certification (or "EO III certification"). RW's application does not reflect EO III certification. Both Complainant's and RW's applications reflect experience with a variety of light to heavy equipment.

² Pursuant to the Protective Order dated June 25, 2018, the other applicants are referenced by initials.

44. Complainant's application reflects seventeen years as a TM I. RW's application reflects seven years as a TM I or equivalent.

45. On their applications, both Complainant and RW answered "N/A" to the question regarding receipt of a disciplinary action in the last three years.

The referral to interview and the interview structure

46. Respondent's Human Resources analysts determined that each of the six applicants met the minimum qualification.

47. Respondent did not convene an application review panel or an oral board panel because there were only six applicants.

48. Respondent referred each applicant to final interview. A Human Resources employee prepared a referral list of the six applicants in alphabetical order by surname.

49. Respondent held the interviews in Kremmling on August 9, 2017. (Stipulated fact.)

50. Present at the interview were Mr. Marsh, Mr. Simpson, Mr. Dickerson, and Karl Lehmann. (Stipulated fact.) (These four individuals are collectively referred to herein as the "Interview Panel.")

51. At the time of the interview, Mr. Lehmann worked as an Administrator IV (Civil Rights Lead Worker). Mr. Lehmann attended the interview as an "observer" and to uphold fairness in the process.³

52. Mr. Marsh and Mr. Simpson reviewed the applications prior to the interviews. The ALJ is uncertain whether other Interview Panel members reviewed the applications in advance.

53. Applicants were scheduled to arrive 40 minutes prior to their interview. Upon arriving, each applicant received 13 questions to review in advance of the interview.

54. The 13 interview questions were as follows:

- No. 1: What do you think are the most important duties of a TMII?
- No. 2: As a lead worker, what will you do to build rapport, gain trust, and further the concept of teamwork within your patrol and other employees of CDOT?
- No. 3: CDOT is striving to have a safe working environment for our employees. What are some ways you, as a TMII, can promote a safe work environment?
- No. 4: In your own words please define the concept of diversity telling us how you plan to utilize it as a TMII.
- No. 5: As a TMII you may need to resolve various kinds of employee conflicts. With this in mind, please explain or give an example of how you will resolve employee conflicts.
- No. 6: CDOT uses multiple products during snow removal. What products would you use in this situation. Snowing, 15 degrees and rising, some residual pack, forecast for

³ Mr. Lehmann became the Region 3 Civil Rights Manager on February 3, 2018. (Stipulated fact.)

the next day is clear and cold 10 degrees and below. What products at what rates and why?

- No. 7: Proper utilization of equipment is always a concern. What are some things you could do to optimize equipment utilization and describe why this is important?
- No. 8: As a TMI you will be responsible for completing SAP/Work Orders. When do work orders need to be completed by? What entries would you make for deer removal? What does the Y mean in components?
- No. 9: If you have a TMI on your crew and he/she is not performing their duties, what will you do? Please list, in order, the steps you would take to resolve this situation.
- No. 10: A large amount of our time is spent on roadway surface repairs. What types of asphalt products do you have experience with?
- No. 11: As a TMI what can you do to insure quality customer service and what will you do to promote it in patrol maintenance and area projects?
- No. 12: You have planned a brief stop at your patrol barn to get a few more supplies and use the restroom. The phone is ringing and when you answer it you find the caller is very irate about the poor road conditions they have been encountering. The caller is further agitated to find you there, "sitting around and avoiding the repairs that are so obviously needed." How would you respond to this caller?
- No. 13: Why would you be the best candidate for this position?

55. During the interview, the applicants read the 13 questions (or referenced the question number) and provided their answers to the questions.

56. Each applicant had thirty minutes to provide their answers.

57. The Interview Panel did not interact with the applicants as they answered the questions. The Interview Panel did not ask each applicant questions tailored to his or her specific history.

The interviews

58. Respondent interviewed all six applicants.

59. Complainant received the interview questions "30 or 45 minutes before the interview." Complainant reviewed the questions prior to being called into the interview room.

60. Complainant provided copies of her resume to the Interview Panel. She also provided a packet of documents, including references, training records, and other materials. The packet had approximately 135 pages. The parties did not offer evidence regarding whether any of the other applicants brought documents to their interviews.

61. The Interview Panel looked at Complainant's resume but did not review Complainant's packet of documents. Instead, the Interview Panel prompted Complainant to proceed with answering the interview questions.

62. Complainant spent approximately 13 minutes answering the interview questions. Mr. Marsh's notes of Complainant's interview reflect "13 min total." Mr. Lehmann's notes of the interview indicate Complainant started responding to the first question at 1:49 and started responding to the last question at 1:59.

63. RW spent at least 26 minutes answering the interview questions. Mr. Lehmann's notes of RW's interview indicate he started responding to the first question at 1:05 and provided supplemental responses to a question at 1:31. Mr. Marsh testified that RW "used up almost all of his time."

64. As Complainant answered the questions, the Interview Panel did not interact with her. After Complainant finished her answers, Mr. Marsh asked her if she wanted to go over anything a second time.

65. The Interview Panel listened carefully to Complainant and to the other applicants and took notes of the interviews. Those notes reflect the following with respect to Complainant and RW:

Questions	Complainant's Answers	RW's Answers
No. 1. What do you think are the most important duties of a TMII?	<p><u>Dickerson</u>: No TMII at patrol, help the TMIII, document.</p> <p><u>Lehmann</u>: Assumed TM II role, make TM III job easier, people, equipment management.</p> <p><u>Marsh</u>: Whatever I can do to make M3 job easier.</p> <p><u>Simpson</u>: Has assumed TM II, make TM III job easier.</p>	<p><u>Dickerson</u>: Lead by example, people, equipment, safety, 2.0 core values, 14.0 mission, trained, TRF plans, TSA's, communications, document, trust, teamwork, learning patrol, priorities, 3 peaks.</p> <p><u>Lehmann</u>: Lead by example, people, equipment, customers, safety--tail gate, engagements, values--all of them, training, communication, documentation, instill [sic] trust, teamwork, hazards, JSA, work priorities, 3 peaks.</p> <p><u>Marsh</u>: Lead by example, my people, equipment, patrol, safety—2.0 core value, 14.0 model patrol, training of people, tailgate talks, communication—clear verbal or written, document, instill trust, work as team, work priorities, 3 peaks, people, tech, systems.</p> <p><u>Simpson</u>: Lead by example people equipment patrol safety PA 2.0 core 14.0 training, task, safety tailgate TSA's communication being clear document tell TMIII team learn hazards patrol promote 3 peak people tech system.</p>
No. 2. As a lead worker, what will you do to build rapport, gain trust, and further the concept of teamwork within your patrol and other employees of CDOT?	<p><u>Dickerson</u>: Give credit, ask ideas.</p> <p><u>Lehmann</u>: Give credit when due, ask for ideas, be open to other ideas, give sense of ownership.</p> <p><u>Marsh</u>: Give credit, value everyone & their ideas, give ownership.</p> <p><u>Simpson</u>: Give them credit, keep everyone involved, give them a since [sic] of ownership.</p>	<p><u>Dickerson</u>: Creditable [sic], flexible, lead by example, work with other patrols, teamwork, change.</p> <p><u>Lehmann</u>: Lead by example, credible, integrity, flexible/adaptable, help each other, neighboring patrols, acting TM II before.</p> <p><u>Marsh</u>: Lead by example, have integrity, help other patrols, work as team.</p> <p><u>Simpson</u>: Lead by example, integ., flex team, help out w/ patrols, communication, adapt to change.</p>
No. 3. CDOT is striving to have a safe working environment for our	<u>Dickerson</u> : Safety talk weekly, be safe, watch out for each other.	<u>Dickerson</u> : Uphold, PD's, PPE, Rules + procedures, safety tailgates, 9.2 [illegible], equipment utilizations,

<p>employees. What are some ways you, as a TMII, can promote a safe work environment?</p>	<p><u>Lehmann:</u> Regular safety talks, weekly, example of working w/ employees on laydown machine, make it easy to be safe.</p> <p><u>Marsh:</u> Safety talks, talk to people to help them to be safe.</p> <p><u>Simpson:</u> Regular safety talks, co-workers helped Tom K. first, time in the truck watching out for people.</p>	<p>services, MUTCD TRF plans, [illegible], hazards, trainings, document positive or negative, MS4.</p> <p><u>Lehmann:</u> Promote PD 2.0, PD 80.1 PPE, 80.6 vehicle backing, safety tailgate talks PD 9.2, JSA, MUTCD, job site hazards, employee coachings [sic], practice MS4 standards.</p> <p><u>Marsh:</u> Uphold 2.0 for core value, 80.1 PPE, tailgate talks, 9.2 for equipment usage, JSA, mutcd, proper training, document non-compliance, MS4 containment.</p> <p><u>Simpson:</u> Continue 2.0 PD, 80.1 PPE, 80.6 backing, tailgate talks, 9.2 equipment, JSA, mut safety data, locates hazards, talk to them to comply, communicate w/ TM III, use MS4 habits.</p>
<p>No. 4. In your own words please define the concept of diversity telling us how you plan to utilize it as a TMII.</p>	<p><u>Dickerson:</u> Different people, different ways to do things.</p> <p><u>Lehmann:</u> Diff. ideas coming together, 4-5 brains are better, get involvement.</p> <p><u>Marsh:</u> Different people & ideas coming together, faster more efficient [sic].</p> <p><u>Simpson:</u> Different people, diff ideals, come together, 3 F's, get everyone involved.</p>	<p><u>Dickerson:</u> Work with multitude of personalities, treat fairly, equi [sic] training for all, safety.</p> <p><u>Lehmann:</u> Learn to work w/ people, gender/ethnic, strengths/weakness within team, fair/equal, no single out.</p> <p><u>Marsh:</u> Learning to work with people, treat everyone fair, give training.</p> <p><u>Simpson:</u> Work w/ people, different personality, gender, etc., team building, give training, challenge employee.</p>
<p>No. 5. As a TMII you may need to resolve various kinds of employee conflicts. With this in mind, please explain or give an example of how you will resolve employee conflicts.</p>	<p><u>Dickerson:</u> Handled immediately, cautial [sic] conversation, no workplace violence, or harassment, TM III.</p> <p><u>Lehmann:</u> Handled immediately, leadership classes, crucial conversations, involve TMIII or ops if need be.</p> <p><u>Marsh:</u> Handle immediately, crucial conversations, diffuse, workplace & sexual immediate.</p> <p><u>Simpson:</u> Handle immediately, crucial [sic] conversation, defuse, not in crowds, [if I] don't think I can handle [then] use TMIII or LTC OP's.</p>	<p><u>Dickerson:</u> Document, resilution [sic], one on one counsiling [sic], group meetings, take up to higher level if necessary.</p> <p><u>Lehmann:</u> Document, find resolution, 1-on-1 talk, seek who to resolve, group sit down talk, possibly separate people, involve TM III, PD 10.1 more serious.</p> <p><u>Marsh:</u> Document, try to find resoulution [sic], talk to people separately & then together, separate & give different tasks, 10.1 workplace violence.</p> <p><u>Simpson:</u> Document, find resolution, talk to them separate [sic], talk as a group, separate each one, figure out, 10.1 workplace violence.</p>
<p>No. 6. CDOT uses multiple products during snow removal. What products would you use in this situation. Snowing, 15 degrees and rising, some residual pack, forecast for the next day is clear and cold 10 degrees and</p>	<p><u>Dickerson:</u> Apex, sand/slicer 10% / pre wet sand. Blade outpack, snow trap.</p> <p><u>Lehmann:</u> Depends on past weather, many variables, sand/mix, sand 10% Apex, use the grader if need be, know your roads.</p>	<p><u>Dickerson:</u> Salt, sand [illegible], magin [sic], 100 gals [illegible] lane mile.</p> <p><u>Lehmann:</u> Salt/sand to pack 500 lbs/mile, mag chloride first—possible 100 gal/mile, peel it up before colder days.</p> <p><u>Marsh:</u> Salt sand to pack at 500 lb, mag up to 100 [gallons per lane mile].</p>

<p>below. What products at what rates and why?</p>	<p><u>Marsh:</u> 10% sand/slicer, don't really shoot straight mag., grader, wi.d-trap.</p> <p><u>Simpson:</u> Hard to say, if getting warm shoot pack, 10% sand/slicer, 125 sand grader, cutting pack, trap roads.</p>	<p><u>Simpson:</u> 15° rising, salt & sand, 500lbs, mag 100 gal lane mle, sun up.</p>
<p>No. 7. Proper utilization of equipment is always a concern. What are some things you could do to optimize equipment utilization and describe why this is important?</p>	<p><u>Dickerson:</u> Right tool for job, skidd [sic] steer.</p> <p><u>Lehmann:</u> Right tool for job, tandems, skidsteer, loaders [all have] multiple purposes.</p> <p><u>Marsh:</u> Right tool for job, tandems use year around [sic].</p> <p><u>Simpson:</u> Right tool for the job, tandem not [illegible], skid w/ attachments, don't know what you want.</p>	<p><u>Dickerson:</u> PD 9.2 use proper equipment, using older equipment, use it safely.</p> <p><u>Lehmann:</u> P.D 9.2 use for needs—don't ignore old equipment, example of bringing old truck from Strasburg, get miles/hours on all equipment, right equipment for right job.</p> <p><u>Marsh:</u> 9.2--utilize equipment for purpose, use old equipment so it can get replaced.</p> <p><u>Simpson:</u> 9.2 RD, use for what you need, miles/hrs, drove old truck out here, safe and easy.</p>
<p>No. 8. As a TMI you will be responsible for completing SAP/Work Orders. When do work orders need to be completed by? What entries would you make for deer removal? What does the Y mean in components?</p>	<p><u>Dickerson:</u> DER [illegible]. End of week.</p> <p><u>Lehmann:</u> DER, Y = used, before Friday so it can populate.</p> <p><u>Marsh:</u> Friday, DER, Y—used.</p> <p><u>Simpson:</u> DER, Friday WO's, EcVO of week.</p>	<p><u>Dickerson:</u> Every pay work orders, all complete by end of week, 215-Der, Y means stock does not reorder.</p> <p><u>Lehmann:</u> EOD everyday 30 mins-1 hour, released by end of week or Monday morning, 215 DER, Y charges stock material but does not re-order.</p> <p><u>Marsh:</u> Daily, 215-DER, Y—charges out stock, doesn't reorder.</p> <p><u>Simpson:</u> End of everyday, end of the week, release every thing, 215 DER, Y stock material does not re order.</p>
<p>No. 9. If you have a TMI on your crew and he/she is not performing their duties, what will you do? Please list, in order, the steps you would take to resolve this situation.</p>	<p><u>Dickerson:</u> Ask questions in private, no accusing.</p> <p><u>Lehmann:</u> Ask to have private conversation, ask questions, diffuse, don't be accusing.</p> <p><u>Marsh:</u> Crucial conversetion [sic], talk to privately, find out what is going on, not accusing.</p> <p><u>Simpson:</u> Talk, defuse, not be acusing [sic], [illegible].</p>	<p><u>Dickerson:</u> Sit down talk to, look for solution [sic], document, TMIII in loop, additional training, any additional equipment.</p> <p><u>Lehmann:</u> Find out situation, work vs home issue, injury, find solution, document, TMIII involved, addt training, get right tools.</p> <p><u>Marsh:</u> Talk to them find out issue, try to find solution, document, inform M3.</p> <p><u>Simpson:</u> Talk, find out issue, bring into work, bring them up to par, areas safety.</p>
<p>No. 10. A large amount of our time is spent on roadway surface repairs. What types of asphalt products do you have experience with?</p>	<p><u>Dickerson:</u> Asphalt [illegible], hardpatch bulk, bag, crack pouring.</p> <p><u>Lehmann:</u> Hot, screed, distributor, hand patch, bulk, bag, crack repairing—all aspects.</p> <p><u>Marsh:</u> Hauled, screed, dist., hand patch bag, crack pouring.</p>	<p><u>Dickerson:</u> Asphalt, crack seal, [illegible], cold mix, cement, rotomilling, chip seals in past.</p> <p><u>Lehmann:</u> Hot, crack seal, aqua fault, cold mix, pot holes, lay over jobs, cement, roto millings, chip seals.</p> <p><u>Marsh:</u> Hot mix, cold, crack seal, aqua [sic] fault, cement, roto milling, chip seals.</p>

	<p><u>Simpson:</u> Hauled asphalt, sereed [sic], distributor on chip job, crack pouring, bag stuff.</p>	<p><u>Simpson:</u> Aqufalt, crack seal, asphalt, cement, cold patch, roto millings, chip seals.</p>
<p>No. 11. As a TMII what can you do to insure quality customer service and what will you do to promote it in patrol maintenance and area projects?</p>	<p><u>Dickerson:</u> Treat as own highway, reflects on self.</p> <p><u>Lehmann:</u> Treat hwy like own, hwy reflects me, take care of it.</p> <p><u>Marsh:</u> Treat hwy like its my own—take great pride in road.</p> <p><u>Simpson:</u> Treat hwy like my own, take care of it.</p>	<p><u>Dickerson:</u> Pro active, lead by example, prioritize, be safe.</p> <p><u>Lehmann:</u> Proactive, lead by example, address needs, safety, PD 14.0 model patrol.</p> <p><u>Marsh:</u> Be proactive, lead by example, prioritize, safety.</p> <p><u>Simpson:</u> Pro Active, lead by example, safety insteal [sic] into patrol, [illegible], 14.0 vision promote, 3E's model patrol.</p>
<p>No. 12. You have planned a brief stop at your patrol barn to get a few more supplies and use the restroom. The phone is ringing and when you answer it you find the caller is very irate about the poor road conditions they have been encountering. The caller is further agitated to find you there, "sitting around and avoiding the repairs that are so obviously needed." How would you respond to this caller?</p>	<p><u>Dickerson:</u> Talk to people, listen, action (take care of it), tight schedule.</p> <p><u>Lehmann:</u> More talking = calmer, concern = find out where, problem solving, fit into tight schedule.</p> <p><u>Marsh:</u> Talk to them, go fix it.</p> <p><u>Simpson:</u> More you talk the calmer they get, find out and go fix it, talk to them.</p>	<p><u>Dickerson:</u> Stay calm, listen, take appropriate action, refer to TMIII, diplomatic, PD 14, model patrol.</p> <p><u>Lehmann:</u> Appreciate concern, working on it, needed addt supplies, get there when able, possibly direct to TMIII, diplomatic/tactful manner.</p> <p><u>Marsh:</u> Tell them thank you, we had to get supplies, be mad [sic] still send to supervisor.</p> <p><u>Simpson:</u> Tell them mammsir [sic] thank you, then get the stuff toget [sic], reffer [sic] to TM III, don't flare up.</p>
<p>No. 13. Why would you be the best candidate for this position?</p>	<p><u>Dickerson:</u> Like change, redirects, problem solver, challenging with no TM II, does planning, credit cards, supply ordering, little training, knows area, completed EO 3 Training, has all leadership coins.</p> <p><u>Lehmann:</u> Like change, excel at redirection, challenges/problems, used to not having TMII, already done many aspects of job, ordered supplies for years, very little training needed, EO III training, all 3 leadership journey done, great note taking.</p> <p><u>Marsh:</u> Like change, excel at redirection, have done M2 job, credit cards, supplies, very little training.</p> <p><u>Simpson:</u> Like change, wrong brakes accel in redirection, TMIII have been stepping up, she likes that use, one before getting another, completed EO 3 training, 3 leadership coins.</p>	<p><u>Dickerson:</u> Well rounded, take care of equipment, communicate, respective, [illegible] accountable [sic], leadership, avalanche works, work in tunnel, document, work with bridge crew, [illegible], class A w/ hazmat, training, jorneyment [sic] classes.</p> <p><u>Lehmann:</u> Well rounded, over the road exp, team building, respectful, MPA groups, positive assertive way, integrity, good communication, Red Mtn exp, [illegible], asphalt equation, not micromanger [sic], let reigns out, named class/training history, familiar with PDs, Eisenhower control room, wide range of experiences.</p> <p><u>Marsh:</u> Well rounded, respectful, be accountable [sic], 14+ trucking, good communication [sic], good exp.</p> <p><u>Simpson:</u> Well rounding, 14 years over the road, hire people, [illegible] building, [illegible] at time, beging [sic] accountable, [illegible], leadership, RM pass gun school, bridge crew, tunnel, [illegible], class A, style not micio [sic] mang, trust my people.</p>

The interview scores

66. Even though Human Resources advised that rating sheets are “not used at this stage,” Mr. Dickerson, Mr. Marsh, and Mr. Simpson each scored the applicants’ interviews. Mr. Lehmann did not score the applicants’ interviews.

67. Mr. Dickerson, Mr. Marsh, and Mr. Simpson scored the applicants on a scale of 1 to 5. This scale was commonly used by Respondent to score interviewees, including on occasions when Respondent conducted oral board panels.

68. Following the interviews, Mr. Dickerson, Mr. Marsh, and Mr. Simpson totaled their separate scores for a total interview score.

69. The following chart summarizes the scoring done by Mr. Dickerson, Mr. Marsh, and Mr. Simpson:

Applicant	Dickerson	Marsh	Simpson	Total Score	Score Order
RW	3.3	4.25	3.5	11.05	1
JJ	3.3	4.25	3.25	10.80	2
RR	2.8	3.75	3.25	9.80	3
Complainant	2.6	3.25	3.25	9.10	4
TW	2.6	3.25	3	8.85	5
RP	2.5	2.75	2.5	7.75	6

70. As reflected in the chart, RW scored highest on the interview. Complainant scored fourth. Mr. Dickerson, Mr. Marsh, and Mr. Simpson each scored RW higher than Complainant.

Post-interview activities

71. Following the interviews, one or more Interview Panel members called Todd Anderson and possibly another reference. The Interview Panel member(s) made this call (or calls) to inquire about RW and JJ, the two top scoring interviewees. Mr. Anderson is the LTC Ops in Region 3, Section 2. Mr. Anderson had supervised both RW and JJ.

72. Mr. Lehmann's notes reflect “various reference checks give drastic different impressions” of RW. Nobody took notes of the conversation(s) between the Interview Panel member(s) and the reference(s).

73. The Interview Panel informed Mr. Eike that both RW and JJ performed well during their interviews and that RW scored highest. There was differing testimony as to whether the Interview Panel recommended that Mr. Eike select RW or JJ. Regardless, Mr. Eike had concerns with JJ based on Mr. Eike’s prior supervisory experience over him. Mr. Eike asked the Interview Panel to think about their recommendation and call him back.

74. Mr. Simpson and Mr. Dickerson then recommended that Mr. Eike select TW. Mr. Marsh disagreed with the recommendation. Among other concerns, Mr. Marsh did not think it was right to go from the top of the list to the bottom of the list and to pass over three applicants in protected classes. On his part, Mr. Eike was “shocked” about the recommendation to select TW.

75. Mr. Eike then asked Mike Goolsby for advice about the selection process, in particular about instances of selecting someone other than the applicant recommended by the Interview Panel. Mr. Goolsby was the then-superintendent over Region 3, Section 2. During the conversation, Mr. Goolsby mentioned some concerns about JJ handling an interstate patrol. Mr. Goolsby did not provide any specific information about RW.

76. Mr. Eike then conferred for two to three hours with Mr. Dickerson regarding the applicants. Mr. Dickerson was going to be the successful applicant's immediate supervisor. In addition, Mr. Dickerson had worked directly with five of the six applicants. Among many other things, Mr. Eike and Mr. Dickerson discussed Complainant's interview being short, her answers not being very good, communication problems within the patrol, and some of her accidents.

77. During the meeting between Mr. Eike and Mr. Dickerson, Mr. Eike called RW's then-superintendent, John Lorme. Mr. Lorme asked a deputy superintendent, Jered Moupin, to participate in the call. Mr. Maupin stated that RW would do "a really good job" and would "do anything you ask of him."

78. Mr. Eike did not check references for the applicants from Region 3, Section 6 because he had first-hand knowledge of those individuals. In addition, Mr. Eike was focused on the top scoring interviewees.

79. Mr. Eike did not take notes of his conversations with Mr. Goolsby, Mr. Dickerson, Mr. Lorme, or Mr. Maupin.

The selection

80. Mr. Eike selected RW for the TM II position. (Stipulated fact.)

81. Mr. Eike selected RW because he scored highest on the interview and his post-interview inquiry with Mr. Maupin confirmed that RW would do a good job.

Complainant's appeal

82. Respondent notified Complainant of her non-selection on September 25, 2017. (Stipulated fact.)

83. Complainant petitioned the Board for a hearing on September 26, 2017.

Background regarding the promotion of female applicants to TM II

84. From January 1, 2011 through April 3, 2018, Respondent promoted 253 employees to the TM II position.⁴ Of those 253, six were female. In other words, 2.3% of the employees promoted from TM I to TM II were female. During the same timeframe, Region 3 promoted 70 employees to the TM II position. Of those 70, two were female. In other words, 2.8% of the employees promoted from TM I to TM II in Region 3 were female.

⁴ There were 285 TM II openings, but the outcome for 32 of those openings was "None Selected" or "Not Selected." In some of these, it *appears* that the position was somehow filled but for others it *appears* that an incumbent remained in the position or the position was left vacant. Region 3 had seven TM II openings with an outcome of "None Selected" or "Not Selected." Of these seven, no females had applied.

85. From January 1, 2011 through April 3, 2018, there was not a female in the applicant pool for 196 of the 253 promotions. Of the remaining 57 promotions to the TM II position, Respondent promoted six females. In other words, 10.5% of the employees promoted from TM I to TM II were female when there was a female in the hiring pool. During the same timeframe, there was not a female in the applicant pool for 61 of the 70 promotions in Region 3. Of the remaining nine promotions to the TM II position, Region 3 promoted two females. In other words, 22.2% of the employees promoted from TM I to TM II in Region 3 were female when there was a female in the hiring pool.

86. From January 1, 2011 through April 3, 2018, there were three females who applied more than ten times each to promote to TM II. Setting aside the promotional opportunities involving those three female applicants, there were 26 occasions when there was at least one female in the applicant pool. Of those 26 occasions, Respondent promoted five females to TM II. In other words, if one excludes the three females that applied more than ten times to promote to TM II, 19.2% of the employees promoted from TM I to TM II were female when there was a female in the hiring pool.

87. Of the 57 promotions that included a female in the applicant pool, there were 433 discrete applications to promote from TM I to TM II. In other words, an individual applicant had a 13.1% chance of being promoted to TM II when there was a female in the hiring pool.

88. An Investigative Report prepared by Respondent dated November 18, 2013, quotes an undated "CDOT Workforce Staffing" document that contains the following data:

- 26 female TM I's/HEOIII's out of 1000 (2.6%)
- 5 TM II's out of 267 (1.8%)
- 6 TM III's out of 105 (5.7%)
- Since January 1, 2008, 6 females out of 193 (3.1%) have been promoted to a TM II position.

89. According to Susan Rafferty, Respondent's Chief Human Resources Officer, females are underrepresented in Respondent's maintenance division. Ms. Rafferty also testified that women are "fairly represented if you look at the number of women across the state that are available for the positions."

DISCUSSION

I. THE GENDER DISCRIMINATION CLAIM.

Complainant asserts a gender discrimination claim. Claims of gender discrimination fall within the Board's discretionary authority under § 24-50-125.3, C.R.S. Under that statute, the type of discrimination claims the Board may hear are those under the Colorado Anti-Discrimination Act ("CADA"). Under CADA, "[i]t 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, terms, conditions, or privileges of employment against any person otherwise qualified because of . . . sex . . ." §

24-34-402(1)(a), C.R.S. (emphasis added). Additionally, Board Rule 9-3 prohibits discrimination because of a person's gender.

A. Complainant established a *prima facie* case of gender discrimination.

To prove discrimination under CADA, a Complainant must first establish a *prima facie* case of discrimination. *Bodaghi v. Dep't of Natural Resources*, 995 P.2d 288, 297 (Colo. 2000). To establish a *prima facie* case of discrimination on the basis of gender, Complainant must demonstrate that: (1) she belongs to a protected class, (2) she was qualified for the job at issue, (3) she suffered an adverse employment action, and (4) all the evidence in the record supports or permits an inference of unlawful discrimination. *Id.*, citing *Colo. Civil Rights Comm'n v. Big O Tires, Inc.*, 940 P.2d 397, 400-01 (Colo. 1997).

As to the first prong of a *prima facie* case of discrimination, Complainant is a female and belongs to a protected class. As to the second prong, Complainant met the qualification for the TM II position because she had worked as a TM I for more than three years. As to the third prong, Respondent did not select Complainant for the TM II position in Kremmling. This non-selection is an adverse employment action.

The fourth prong of a *prima facie* case of discrimination may be formulated as whether the position was filled by a person outside of the protected class. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993); *see also Reynolds v. Sch. Dist. No. 1*, 69 F.3d 1523, 1534 (10th Cir. 1995) (failure to establish a *prima facie* case because plaintiff "cannot show that the promotion was given to someone of a different race").⁵ Under this formulation, Complainant has established the fourth prong of a *prima facie* case because Respondent selected RW, a male.

Therefore, Complainant meets her burden to demonstrate a *prima facie* case of gender discrimination.

B. Respondent produced a non-discriminatory explanation for its action.

Once the Complainant establishes a *prima facie* case of discrimination in violation of CADA, Respondent must provide a non-discriminatory explanation for not selecting Complainant to the TM II position. *See Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239, 1248 (Colo. 2001). Respondent asserts it selected RW over Complainant based on the applicants' performances during their interviews. Therefore, Respondent asserts a non-discriminatory for the selection decision.

C. Complainant did not meet her burden to prove that Respondent's explanation was pretextual.

Once Respondent produces a legitimate explanation for its action, Complainant has the burden to demonstrate that Respondent's explanation was a sham (or "pretext") for discrimination. *See Big O Tires, Inc.*, 940 P.2d at 401. The Complainant bears the ultimate burden of persuading the trier of fact that she suffered illegal discrimination. *See Cmty. Hosp. v. Fail*, 969 P.2d 667, 675 (Colo. 1998).

⁵ Pursuant to Board Rule 9-4, the Board refers to both Colorado and federal case law in interpreting discrimination cases.

1. The interview was an objective, non-discriminatory basis for distinguishing between the applicants.

Respondent asserts it selected RW over Complainant because he outperformed Complainant during the interview. Mr. Marsh testified that the interview process plays a "huge" part in the selection decision. Mr. Eike testified that interviews are "very important" to weigh the applicants and figure out the top candidate to select. The ALJ believes Respondent's proffered explanation. Complainant herself acknowledged during cross-examination that Respondent uses interviews to select candidates; she also acknowledged that she knew the interview was her opportunity to demonstrate how well she could perform the job.

While certain interview aspects like demeanor are impossible to measure with mathematical precision, the 1 to 5 scale used by the Interview Panel provided an amount of objectivity in scoring each applicants' interview performance. Respondent used the same rating scale to quantify each of the applicants. Using this scale, Mr. Dickerson, Mr. Marsh, and Mr. Simpson each scored RW higher than Complainant.

The interview notes reflect that RW gave better answers to many questions. For example, Question No. 8 asked for the entry code for deer removal. Complainant stated "DER" but RW's more precise answer was "215 DER." Another example is Question No. 9 about an underperforming subordinate. Complainant emphasized talking privately but said nothing about documenting or involving the TM III. Like Complainant, RW responded that he would have a conversation with the subordinate but RW's better answer also included documenting the situation and informing the TM III. A third example is that Complainant did not reference specific policy numbers while RW gave numerous references to specific policies (by policy number) throughout his interview. A fourth example is that Complainant rushed through the interview. In contrast, RW took most of his allocated time to complete it. These examples support the Interview Panel's conclusion that RW outperformed Complainant during the interview.

The questions gave the applicants an equal opportunity to demonstrate their leadership skills (Nos. 1, 2, 3, 4, 5, and 9), safety awareness (No. 3), technical job knowledge (Nos. 6, 7, and 8), experience (Nos. 1 and 10), and customer service (Nos. 11 and 12). The final question afforded applicants a broad opportunity to showcase anything and everything that made them "the best candidate for this position." In addition, the interview format itself gave applicants an identical opportunity to display their oral communication skills. In sum, the questions gave the Interview Panel a job-related basis to fairly evaluate and compare the applicants.

Complainant asserts that Respondent did not follow its "best practices" during the selection process. There are several facts that support this assertion: (a) Human Resources recommended that the interview be "less structured" than an oral board; (b) Human Resources recommended questions personally directed to each applicant; and (c) Human Resources stated that rating sheets are not used at this stage because the Hiring Manager has "a bit more leeway." On the other end of the scale: (a) the structure to the interview enhanced the objectivity of the selection process; (b) if the Interview Panel had asked tailored questions directed to each applicant, there would have been a greater opportunity for subjectivity in evaluating the applicants; (c) Respondent treated each of the applicants equally--Respondent asked each applicant the same questions and afforded each applicant the same opportunity to answer those questions; (d) the scoring quantified each applicants' performance; (e) Amanda Parkhurst-Strout (Human Resources Specialist V) testified that the hiring manager has the prerogative to use a structured interview and "there is nothing wrong or against rules;" (f) Respondent followed an interview procedure that was routinely used in Region 3 for making promotional decisions; and (g) there

was no evidence Respondent violated any of its written policies governing interviews or reference checks. Even if the selection process might have been different, the interview structure and process used here is not a disturbing irregularity. Moreover, there was nothing illegal or contrary to Board Rules in the way Respondent conducted the selection.

Complainant also argues that “best practices” included review of each candidate’s personnel file, but Ms. Parkhurst-Strout’s testimony dispelled that argument. Moreover, the evidence at hearing supports that Appointing Authorities exercise considerable discretion (or “leeway”) in how they select an applicant from among the top six candidates.

Complainant faults Respondent for not taking post-interview notes. Mr. Marsh opined that it was a “best practice” at Respondent to take notes of reference calls. Mr. Marsh’s background, however, did not include working in Respondent’s Human Resources department. Neither of the two witnesses from Respondent’s Human Resources department testified that taking notes during reference calls is a “best practice.” Furthermore, there was no evidence of any written policy at Respondent requiring post-interview notes. Moreover, given that reference calls are made to the “top one, maybe two candidates,” any such notes have zero value in distinguishing the top interviewee (RW) from the fourth scoring interviewee (Complainant). In any event, the supposed irregularities are not disturbing. Again, there was nothing illegal or contrary to Board Rules in the way Respondent conducted the selection.

Complainant faults Mr. Simpson for approving incorrect measures for subject matter experts to use in ranking candidates during an application review panel or an oral board panel. Respondent, however, did not convene an applicant review panel or an oral board panel. These steps were not necessary because only six individuals applied for the TM II position in Kremmling.

Complainant faults Respondent for not calling her references. Here, the Interview Panel only appears to have checked references for the top two interviewees (RW and JJ). Similarly, Mr. Eike’s extensive post-interview inquiries focused primarily on the top interviewees. Respondent does not have any written policies requiring calls to each applicants’ references, let alone a practice of doing so. This makes sense for three logistical reasons: (a) time constraints; (b) sensitivity to unsuccessful applicants--if an applicant is not a top candidate, a reference check might unnecessarily cause the applicant’s existing supervisor to question the applicant’s loyalty or job satisfaction; and (c) a desire not to impose unnecessarily on the reference givers. Ms. Parkhurst-Strout testified that Human Resources recommends reference checks on the “top one, maybe two candidates if they are pretty close.” Mr. Marsh testified that “we always call references on the top two.” Complainant’s assertion lacks merit.

Following the interview, RW scored first and Complainant scored fourth. Mr. Dickerson, Mr. Marsh, and Mr. Simpson separately scored RW higher than Complainant. The interviews were a fair, non-discriminatory manner to differentiate between Complainant and RW. Complainant has not demonstrated that Respondent’s explanation for selecting RW was false or pretextual. Because the ALJ finds that the interview was a legitimate, non-discriminatory basis for distinguishing between Complainant and RW, the ALJ need not consider Complainant’s remaining contentions. Nonetheless, the ALJ addresses those contentions below.

2. Complainant did not prove by a preponderance of the evidence that she was better qualified than RW.

There is no question that Complainant and RW were both qualified for the TM II position in Kremmling. Both applicants’ experience exceeded the minimum qualification of working for

three years as a TM I or equivalent.

Complainant's years as a TM I exceeded RW's time. Complainant started working for Respondent in 2000. RW started working for Respondent in 2010. Complainant, however, did not introduce any evidence to support that years beyond the three year minimum qualification period made her more qualified than RW. Complainant did not introduce any evidence that Respondent weighs an applicant's longevity during the promotional process for TM II. Of import, neither the Board Rules nor the Director's Administrative Procedures provide a correlation between years of service and promotional opportunities. Therefore, Complainant's longer time as a TM I did not make her better qualified than RW.

Complainant's Prehearing Statement asserts that RW had limited experience in mountain regions and that "much of his experience was on a patrol in the eastern plains of Colorado." RW's application, however, indicates that he worked as a TM I on the Silverton Patrol where his duties included "snow plowing and ice removal on Molas and Red Mountain passes." Complainant herself testified that Red Mountain is one of the most treacherous mountain passes in Colorado. Mr. Marsh testified "we've lost at least one, if not two state employees up there through avalanches and driving off the road." RW's application also reflects work at the Eisenhower Johnson Memorial Tunnel, including performing ice and snow removal "using special equipment such as snow plows, sanders, mag chloride tanks, loaders, [and] back hoes." Further, RW indicated on his application that he then-worked "out of the Silverthorne Barn on I-70 from Frisco to the Eisenhower/Johnson Memorial Tunnels." Complainant's assertion is unfounded.

Complainant repeatedly emphasized completion of the Leadership Journey training. RW's application also reflected leadership training. Specifically, "I attended the Camp George Training Academy which included training such as leadership skills, interpersonal skills and supervisory skills." Neither side offered evidence to differentiate the two forms of trainings. As a result, it is impossible to determine which form of training was more robust. In any event, the job posting did not list leadership training as a minimum qualification or even as a preferred qualification. Ms. Rafferty testified that the Leadership Journey generally does not have any formal value in the promotional process.

Complainant also emphasized her EO III certification. RW's application does not reflect such certification. The Equipment Operator and the Transportation Maintenance positions are distinct classifications within the state system. If Complainant had applied to promote to an Equipment Operator, her EO III certification would have been germane. However, the job posting for the TM II position does not list EO III certification as a minimum qualification or even as a preferred qualification. In fact, a comparison of the TM I and TM II position descriptions indicates that the TM II's duties involve *less* equipment operation (25% of total duties) than required of the TM I (35% of total duties). While Complainant's EO III certification probably made her more qualified than RW for an Equipment Operator vacancy, it did not make her more qualified than him for the TM II position at issue in this appeal.

In terms of heavy equipment experience itself, Complainant's application reflects operating snow plows, loaders, 1 tons, tandems, 5000 Pay star, 4 wheel drives, motor graders, brooms, distributors, rollers, tractors, lay down machines, and backhoes. On his end, RW's application also reflects experience on various pieces of equipment, including snow plows, sanders, mag chloride tanks, loaders, back hoes, motor-graders, tractors, street sweepers, and dump trucks. Neither side introduced evidence as to the nature of these pieces of equipment or of their relative importance for the TM II position in Kremmling. The evidence at the hearing does not support a finding that Complainant's heavy equipment experience exceeded RW's.

Complainant stressed her role as an acting TM II. Complainant's testimony and job application is supported by her performance evaluation signed by Mr. Kelley on April 26, 2017. That evaluation rates Complainant with a rank of 4 out of 5 stars, "Successful/Occasionally Exceeds," in the category of "Workleading and Supervision" and states: "Lori has been very helpful in leading this Patrol." On the other hand, Complainant states on that very evaluation that there is "NO M2 on this patrol" (all capitalization in the original) and again "we have no M2 on this patrol." Respondent's witnesses did not support Complainant's contention that she was the acting TM II: (a) Mr. Marsh testified that Complainant and Mr. Patterson were both "doing the same things;" and (b) Mr. McIntosh testified that he (Mr. McIntosh) served as the "acting M II for that patrol." Further, the position descriptions for the TM I position and TM II position reflect significant overlap; it should not be unusual for TM I workers to perform duties that are also performed by TM II workers. On his part, RW's application reflected serving for a two-month period as an acting TM II, serving as a leader of an "Extension Crew," and "served as acting TM-II in the absence of the regular TM II." Complainant did not demonstrate that her TM II experience was greater than RW's. Even if Complainant's acting TM II experience exceeded RW's, the job posting for the TM II did not list such experience as a minimum or preferred qualification.

Complainant had a disciplinary action in 2015 and performance documentation in 2009 and 2016. The 2015 disciplinary action reflects a significant accident history. On the other hand, there was no evidence that RW had a disciplinary record, any performance documentation, or any history of accidents. Moreover, RW's application represents that he had not been subject to disciplinary action in the three preceding years.

In conclusion, Complainant did not prove by a preponderance of the evidence that she was better qualified than RW. To the contrary, some of the evidence supports that RW was more qualified than Complainant.

3. The allegations regarding Respondent's prior treatment of Complainant do not show pretext.

Complainant alleged a scattershot of circumstances to demonstrate pretext. Many of these allegations were of events from years ago or with individuals who were not involved in the disputed selection decision. Most of the allegations are so far removed from the disputed selection decision that they are of questionable probative value.

Complainant alleged past instances of mistreatment by Mr. Hugley. Mr. Hugley supervised Complainant from approximately May 2008 until approximately May 2014. Complainant testified that Mr. Hugley yelled a lot, including for knitting during downtime, and that Mr. Hugley created a hostile work environment, including excluding her from certain projects and trainings like "TM II Days." An Investigative Report dated November 18, 2013, addresses many of these allegations against Mr. Hugley. The parties stipulated to a document listing Complainant's extensive training history; the document dispels the suggestion that Respondent systematically precluded Complainant from training opportunities. Complainant's Prehearing Statement asserts: "[w]hile CDOT determined that Baumgardner's complaints were unfounded, Hugley was subsequently transferred to supervise a different location where he was permanently assigned in May 2014. The transfer resulted from other reports that Hugley's management style was unprofessional." Most important, Complainant did not offer any evidence that Mr. Hugley communicated in any way with the Interview Panel or Mr. Eike about the disputed selection. The ALJ is uncertain if Mr. Hugley even knew about the TM II opening in Kremmling.

Complainant testified that Respondent downgraded her role and frequently assigned her

to traffic flag duties. Complainant did not testify about who supposedly made the decision to downgrade her role or when this might have happened. From the discussion in the 2013 Investigative Report, the downgrading appears to have occurred during the period Complainant was working under Mr. Hugley's supervision. Complainant did not offer any evidence that the Interview Panel or Mr. Eike somehow participated in this downgrading.

Complainant testified that when Respondent gave her a credit card, someone told her "not to go shopping" and that she did not get any training about using the card. Complainant did not testify about who made the "shopping" statement or when it was made. Complainant's Prehearing Statement indicates that the issues with credit card training happened "in or about 2011." If so, Mr. Hugley would have been Complainant's supervisor. In any event, there is no evidence that Complainant filed a grievance or petition for hearing related to anything to do with credit cards or credit card training. Further, as discussed above, a listing of Complainant's training history reflects that Respondent approved and included Complainant in numerous and varied training opportunities throughout the years.

While Complainant offered evidence as to Mr. Hugley's conduct, she acknowledged favorable treatment from her more recent and current supervisors. Complainant testified that working for Mr. Dickerson was "easy, we got along fine." Complainant testified that Randy McIntosh treated her with more respect than Mr. Hugley and Complainant's Prehearing Statement observes that "[u]nder McIntosh's supervision of the patrol, Baumgardner again resumed duties that were generally given to the TM II." Most contemporaneously, Complainant testified that her supervisor for the past two years (Mr. Kelley) treats her "like an equal" and professionally.

Complainant testified that on some days, Mr. Patterson is "very hard to deal with" and "fights against getting stuff done on the patrol." Complainant, however, did not attribute this to sexism. Instead, Complainant attributed the issues between them as stemming from her being an overachiever and him being lazy. Mr. Palmer testified that Mr. Patterson said that Complainant was not his (Mr. Patterson's) boss. Given that Complainant and Mr. Patterson are both TM I workers, such a statement is not particularly bothersome. Mr. McIntosh testified Complainant is Mr. Patterson's "co-worker;" Complainant's position description did not give her supervisory authority over Mr. Patterson or anyone else. Mr. Kreimier testified that Mr. Patterson sometimes trash talks Complainant, referring to her as a "witch" and as "evil." If Mr. Kreimier is believed, Mr. Patterson's references are highly inappropriate. Nonetheless, Complainant did not offer any evidence of any written complaints or grievances against Mr. Patterson. While Complainant testified that she complained about Mr. Patterson playing Sudoku and surfing the internet, Complainant did not testify about complaining about Mr. Patterson calling her derogatory names or of sexism. Most important, Complainant did not offer any evidence that Mr. Patterson somehow obstructed Complainant's application to become a TM II in Kremmling.

Complainant has been rejected for three other TM II promotions. Complainant applied for a TM II in Kremmling in 2008, but Respondent selected Mr. Dickerson. Complainant testified she "wholeheartedly agreed" with that selection. Complainant applied for a TM II in Hot Sulphur Springs in 2008, but Respondent selected Melvin Conn. (This Initial Decision discusses that non-selection below in Section I.C.4.) Complainant applied for a TM II in Granby in 2014, but Respondent selected Charles Carroll. Complainant filed a Charge of Discrimination in June 2014 relating to the Granby non-selection with the EEOC. In September 2014, Respondent filed a 13-page position statement with the EEOC denying Complainant's Charge. The position statement also indicates that Dean Anderson was the then-Superintendent of Region 3. Complainant's Prehearing Statement asserts she "pursued no further action" with respect to her Charge. Complainant did not offer any evidence of filing any appeals to the Board disputing any of the

three prior non-selections. Of import, Mr. Eike was not the appointing authority on those prior non-selections.

Complainant also introduced evidence that the Hot Sulphur Springs patrol has not had a TM II since 2009 and is the only patrol in Region 3, Section 6 without a TM II position allocated to it. Complainant introduced this evidence to show that she acted as the TM II (discussed above) and to argue that Respondent's staffing in Hot Sulphur Springs demonstrated a gender bias. As discussed in the Investigative Report dated November 18, 2013, Complainant made a similar allegation in September 2013. The Report indicates that the then-Region 3 Superintendent reallocated the Hot Sulphur Springs TM II to a TM I because he wanted to eliminate all three-employee patrols "as even one employee absence causes an inability for the patrol to effectively function." Additionally, Mr. Eike testified that Respondent did a statewide optimization study on all of its patrols two to three years ago. The optimization study recommended eliminating the Hot Springs Sulphur patrol and using the existing facilities for sand storage and refilling. Mr. Eike also testified that Respondent has not disbanded the patrol to avoid displacing the Hot Sulphur Springs employees. Also of import, the position description for the TM II position requires leadership over "a minimum of 2 FTE," but the Hot Sulphur Springs patrol only has one full-time, non-temporary employee other than Complainant. Complainant herself testified that generally the Hot Sulphur Springs patrol is made up of her and Mr. Patterson, but that other patrols have more than two employees.⁶ As such, there is more than one credible business reason for Respondent not to allocate a TM II position to Hot Sulphur Springs.

Even if Respondent's business reasons for not allocating a TM II position to Hot Sulphur Springs are somehow suspect, Complainant did not offer any evidence that she requested a position review pursuant to Director's Administrative Procedure 2-7. There has not been a TM II on the Hot Sulphur Springs patrol since September 2009, so there has been ample time to request such a review. Complainant's appeal regarding her non-selection to a position in Kremmling is not the appropriate mechanism under the Board Rules to evaluate the position allocations in Hot Sulphur Springs.

Complainant testified that "Adams" are the persons who have been on the patrol the longest. The ALJ is uncertain as to the purpose of such testimony. Complainant did not introduce any evidence explaining why Respondent referred to the senior patrol members as "Adams" or whether the practice made her uncomfortable. While "Adams" might denote an employee's radio call handle or might simply be a generic term to refer to individuals based on their length of employment, neither side introduced evidence of whether such was the practice. In any event, using codes during communications is not uncommon. There was no evidence that Complainant ever grieved or complained about the practice.

In closing argument, Complainant asserted that certain testimony by Mr. McIntosh demonstrated a gender bias. The supposedly sexist testimony was as follows:

QUESTION: Why was it troubling to you that the moldboard angle didn't line up?

McINTOSH: Because that was a new truck, it was a new plow. It should not have been cockeyed. Somebody had done something to it.

QUESTION: Had you received a report from anyone about any potential damage

⁶ In the same vein, Complainant writes in her annual evaluation from April 2017 that "Over the years positions in this shop have been taken away. Since I've started we have gone from a five man patrol to a two man patrol."

to the truck?

McINTOSH: Not at that time, later these emails did arrive.

QUESTION: And what did you ultimately determine from your investigation?

McINTOSH: Lori ultimately admitted that it was her that was driving the truck when it happened. So, I look at my crew a lot like I do my seven children. Sometimes given the opportunity, they will come forward with the truth instead of . . .

OBJECTION: Object to the characterization. Frankly, it's particularly sexist.

RULING: This witness can testify. If you want to make argument that his testimony is sexist in your closing, you may.

OBJECTION: Thank you.

QUESTION: Please continue your explanation of what you as supervisor, how you as supervisor, handle this situation and what it told you about your crew members?

McINTOSH: So as a supervisor, rather than accusing a individual or a blanket accusation, I try to communicate that to turn yourself for the issue, it's easier than being found out later.

The ALJ disagrees with Complainant's characterization of Mr. McIntosh's testimony. Mr. McIntosh was speaking metaphorically; he was not treating Complainant as his child. Mr. McIntosh was speaking as to his supervisory style with respect to all of his subordinates, not just females. Mr. McIntosh was conveying that he affords subordinates an opportunity to voluntarily take responsibility for their actions. In any event and more importantly, Complainant did not offer any evidence that Mr. McIntosh tainted the Interview Panel or Mr. Eike against Complainant. To the contrary, Mr. McIntosh testified that he did not have any communications with the Interview Panel or Mr. Eike about the TM II position in Kremmling.

In short, the allegations regarding Respondent's prior treatment of Complainant do not support a finding that Respondent's decision to select RW for the TM II position was motivated by a gender animus against females.

4. Complainant's untruthfulness undermines her allegations.

As discussed above, Complainant testified that she applied for a TM II position in Hot Sulphur Springs in 2008 but Respondent selected Mr. Conn. Complainant testified that she asked Mr. Eike about the selection, and Mr. Eike responded saying "the men have families to support." Such a comment is patently offensive and sexist. Complainant's testimony, however, rang untrue. First, there was no evidence that Complainant appealed the 2008 non-selection even though she supposedly had direct evidence of discrimination. Second, Complainant did not report the comment to Respondent until she filed the appeal in this matter, SPB Case No. 2018S015. Third, Complainant filed an internal complaint in 2013 that referenced the lack of equal opportunities for women, men being promoted to TM II, and stating: "How many women have been promoted to this section in the 13 years I have been here . . . 1!" In spite of this, the 2013 internal complaint did not make any reference to Mr. Eike's supposed comment. Fourth, Complainant filed a Charge

of Discrimination with the EEOC on June 30, 2014, following her non-selection for the TM II promotion in Granby. The Charge alleges discrimination based upon sex but omits Mr. Eike's purported comment. Last, Mr. Eike did not recall making such a comment. Even if Mr. Eike made the remark in 2008, it has minimal probative value as to his mindset in 2017. Prejudices and predilections can change dramatically over such a lengthy period

On her application for the TM II position in Kremmling, Complainant incorrectly stated she had not been subject to disciplinary action in the past three years. Rather than acknowledge any issue with her representation, Complainant rationalized it during her testimony on the basis that a traffic court had dismissed the charges against her. Complainant's testimony was unconvincing. First, the job application provided: "Have you been subject to *disciplinary action* in the last three years of your *work* experience? If so, please provide details of that disciplinary action." (Emphasis added.) If Complainant believed that a traffic court decision somehow nullified her disciplinary action, she had the opportunity to provide details of her belief on her application. Instead of offering those details, Complainant unequivocally stated on her application that she had not been disciplined. Second, disciplinary actions issued in the workplace are readily distinguishable from traffic citations issued by law enforcement. The question in the application specifically related to disciplinary actions at work, not traffic citations. Complainant's attempt to conflate the two undermined her credibility. Application fraud is a serious problem; Complainant's failure to take any responsibility for her inaccurate application demonstrates a disrespect for the truth.

Other examples of Complainant's lack of credibility include the following: (a) Complainant testified that "I don't see how you can get any information [out of the interview]." While such a statement might be overlooked as hyperbole, her exaggeration undercut her testimony. (b) Complainant testified that she did not know she could appeal her 2015 disciplinary action. However, page two of the disciplinary action specifically notifies Complainant of her right to file an appeal. That notification is almost immediately above her signature. (c) Complainant signed her Charge of Discrimination with the EEOC in 2014; in signing, she declared "under penalty of perjury" that her statements were "true and correct." Complainant, however, admitted during cross-examination that one of the statements in her Charge was erroneous. (d) Complainant's heavy equipment training log for her EO III certification appeared to be inconsistent with her testimony about being denied opportunities to operate heavy equipment.

In short, Complainant suffered in the area of credibility and this undermined her allegations.

5. Complainant's statistical evidence does not support that Respondent discriminated against Complainant.

As an initial matter, Complainant did not assert that Respondent's practices created a disparate impact on females. Rather, Complainant asserts disparate treatment. See, e.g., Complainant's Response to Motion in Limine at p. 2 (asserting that statistical evidence may be used "to prove pretext in a disparate treatment case") and p. 5 (stating that in this matter, "Complainant has alleged disparate treatment in an administrative hearing under the APA"); see also Complainant's Prehearing Statement at p. 7 (asserting that statistical evidence may be used "to prove pretext in a disparate treatment case").

Complainant offered a 52-page report prepared by Respondent listing every TM II promotional opportunity from 2011 through early April 2018. The report was based on Respondent's records kept on the State of Colorado applicant tracking database, NEOGOV.

Other than laying the foundation for introducing the report into evidence, Complainant did not illuminate what the report supposedly conveys. In particular, Complainant did not provide any explanation regarding how the report supports her own allegation of discriminatory treatment. Complainant did not offer any comparison with other data, for example the Bureau of Labor Statistics, U.S. Census data, or transportation industry data. Complainant did not offer any expert testimony as to how the hiring data supported her non-selection claim. Without the comparative data and without expert testimony, it is near impossible to account for sample size, labor pool variants, and adjust for nondiscriminatory reasons.

To the degree this ALJ's review of the 52-page report is free from mathematical error and other analytical errors, it appears that: (a) there is a huge gender disparity in the number of females promoted to the TM II position; (b) Region 3 promoted a greater percentage of females to TM II than Respondent as a whole promoted females to TM II; (c) in more than 77% of the promotional opportunities to TM II, there was not a female in the applicant pool; and (d) female applicants to promote to TM II in Region 3 had 22.2% rate of selection, which is a higher percentage than each discrete candidate's chance to promote to TM II (13.1%) when there was a female in the hiring pool.

Complainant also offered data from an undated "CDOT Workforce Staffing" that appears in an Investigative Report dated November 18, 2013. The ALJ is uncertain as to whether the information quoted from the "CDOT Workforce Staffing" is apt for 2017. Moreover, the Investigative Report does not present any information about the number of female applicants in the hiring pools for TM II openings.

Moreover, Ms. Rafferty testified that women are "fairly represented if you look at the number of women across the state that are available for the positions." Of note, Ms. Rafferty was Complainant's witness and gave this testimony during her direct examination. Complainant did not offer any evidence to rebut Ms. Rafferty's testimony.

Insofar as the ALJ's calculations and extrapolations are correct, it appears that the gender disparity in the number of females promoted to TM II stems from the low number of female applicants, not from a gender bias against promoting females. If it is true that female applicants have a greater rate of selection to TM II than each discrete candidate's chance of selection, then Respondent's promotional practices appear to measurably benefit female applicants.

6. Conclusion.

After giving full and fair consideration to the evidence offered by both sides, Complainant has not proven by a preponderance of the evidence that Respondent unlawfully discriminated against her in violation of CADA.⁷

⁷ It may appear that there is a discord between this Initial Decision and the ALJ's Preliminary Recommendation dated January 23, 2018. Factual determinations for preliminary recommendations are not binding. This is because determinations during the preliminary review process are based upon information submitted unilaterally by the parties in their information sheets, not on admitted evidence. This Initial Decision is being issued after an evidentiary hearing. That evidentiary hearing was a *de novo* proceeding. During the hearing, both sides were permitted to call witnesses, introduce documents into evidence, and cross-examine witnesses. Also distinct from the preliminary review process, both sides had the opportunity to engage in discovery prior to the evidentiary hearing.

II. REFERRAL TO DIRECTOR.

The State Personnel Director has jurisdiction over appeals of the selection and comparative analysis process. See § 24-50-112.5(4), C.R.S. Complainant requested a Director's Review in her appeal filed on September 26, 2017. The specific matters that Complainant wishes the Director to review appear to be those related to the comparative process used for the promotion decision. Complainant's Prehearing Statement asserts that Respondent's actions violated rule or law. Those matters (and any other allegations regarding the selection process) are hereby referred to the State Personnel Director for further review.

III. ATTORNEY FEES AND COSTS.

Section 24-50-125.5, C.R.S., governs Complainant's request for attorney fees. That statute provides for an award of fees and costs: "if it is found that the personnel action from which the proceeding arose or the appeal of such action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless."

Complainant did not prevail. Therefore, Complainant has not established grounds for an award of attorney fees and costs.


CONCLUSIONS OF LAW

1. Respondent did not discriminate against Complainant in violation of CADA.
2. Complainant is not entitled to reasonable attorney fees and costs.

ORDER

The selection decision is **affirmed**. There is no award to Complainant of her attorney fees and costs. This matter is referred to the State Personnel Director for further review as may be appropriate.

Dated this 25th day
of September, 2018,
Denver, Colorado.



F. J. "Rick" Dindinger II
Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203
(303) 866-3300

CERTIFICATE OF SERVICE

This is to certify that on the 26th day of September 2018, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

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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 8-62, 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 8-65, 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 Rules 8-62 and 8-63, 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 8-64, 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 8-66, 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 8-70, 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 misunderstanding 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 8-60, 4 CCR 801.

