

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

CHARLES NOCERA,
Complainant,

v.

DEPARTMENT OF REGULATORY AGENCIES,
Respondent.

Administrative Law Judge (“ALJ”) K. McCabe held the prehearing conference on August 31, 2022, and the evidentiary hearing on November 16, 2022, by web conference. The record originally closed on November 16, 2022. The record was re-opened through orders for Respondent to redact exhibits in accordance with Board Rule 8-35(I). On December 8, 2022, Respondent filed exhibits 7, 10, 16, and 17 redacted in compliance with Board Rule 8-35(I). After Respondent’s submission of redacted exhibits, the record remained open following an order providing Complainant an opportunity to submit a written response to Respondent’s request for attorney’s fees and costs. Complainant filed a response to Respondent’s request for attorney’s fees and costs on December 22, 2022. The record closed on December 22, 2022.

Complainant appeared for the hearing. Lucia Padilla, Esq., represented Respondent. Addison Dittrich, Human Resources Specialist, participated as Respondent’s advisory witness.

A list of exhibits admitted into evidence and a list of witnesses who testified at hearing are attached in an Appendix.

PROCEDURAL HISTORY

On December 11, 2021, the State Personnel Board (“Board”) received Complainant’s Petition for Director’s Review seeking review of Respondent’s non-selection of Complainant for a position. Complainant requested as relief, “A comparative analysis of the whole job description and the whole math. To be considered for the position with my qualifications way above the minimums at no cost to Colorado.” Complainant’s Petition for Director’s Review contained a claim of age discrimination.

On December 15, 2021, Complainant’s discrimination claim was referred to the Colorado Civil Rights Division (“CCRD”) for investigation. On December 27, 2021, Complainant filed a charge of discrimination with the CCRD. On July 29, 2022, the CCRD issued an Opinion of No Probable Cause. On August 2, 2022, Complainant timely appealed the No Probable Cause Opinion.

This matter was set for evidentiary hearing following Complainant’s appeal of the No Probable Cause Opinion.

At the evidentiary hearing, Respondent's counsel made a motion to dismiss for failure to demonstrate a *prima facie* case of age discrimination. Respondent's motion is moot as a result of the issuance of this Initial Decision.

In Complainant's closing argument, Complainant requested additional time to gather information and for the decision to be delayed. Complainant's request is denied as it is not timely and did not demonstrate good cause for an extension. Complainant requested extensions in advance of the hearing that were stricken or denied for failure to follow Board Rules and orders. Complainant's final request for extension in advance of the hearing was denied as a result of repeated failure to follow Board Rules and orders and failure to show good cause to delay the evidentiary hearing.

Respondent provided legal authority for an award of attorney's fees in Respondent's Prehearing Statement. Respondent also requested attorney's fees during Respondent's closing argument. Following the evidentiary hearing, Complainant was given an opportunity to respond to Respondent's request for attorney's fees. Complainant filed a response on December 22, 2022.

MATTERS APPEALED

Complainant appeals Respondent's non-selection of Complainant for a position. Complainant alleges Respondent discriminated against Complainant on the basis of age in violation of the Colorado Anti-Discrimination Act ("CADA").

Respondent argues Respondent conducted a minimum qualifications review and comparative analysis based on non-discriminatory factors.

For the reasons discussed below, Respondent's decision not to select Complainant is AFFIRMED.

ISSUES

1. Did Respondent discriminate against Complainant on the basis of age in violation of CADA when it did not select Complainant?
2. Is Respondent entitled to an award of attorney's fees and costs?

FINDINGS OF FACT

1. On August 25, 2021, Respondent posted a job announcement for a part-time Program Assistant I ("Position") in the Colorado Office of Policy, Research & Regulatory Reform ("COPRRR").

2. Prior to posting the job announcement, Brian Tobias, Director of COPRRR, worked with Addison Dittrich, Human Resources Specialist for Respondent, to determine the minimum and preferred qualifications for the Position based upon the knowledge, skills, abilities, and characteristics needed for the Position. Human Resources Specialist Dittrich wrote the job announcement.

3. Selection for the position is not limited to applicants who only meet the minimum and/or preferred qualifications. Respondent can select an applicant who also has qualifications that exceed the minimum and preferred qualifications.

4. Per the job announcement, the minimum qualifications for the Position were:

Four (4) years of para-professional or administrative support service, which must include:

- Working with Microsoft Word and Excel, including organizing and designing reports and spreadsheets for presentation to leadership;
- Providing research and report-writing assistance;
- Compiling data, utilizing databases, and creating documentation and/or reports for review and submission.

5. Per the job announcement, the preferred qualifications for the Position were:

- Bachelor's Degree;
- Experience working in a government agency or public sector;
- Demonstrated experience reading and understanding legislative language;
- Demonstrated intermediate to expert level abilities in Microsoft and Google suite, including document layout and creating informational presentations;
- Adobe Acrobat Pro DC experience;
- Experience conducting legal research;
- Experience assisting with the development, design, and maintenance of informational and educational materials;
- Experience providing support for stakeholder outreach and engagement.

6. The job announcement explained:

Part of, if not the entire, comparative analysis process for this position will involve a review of the information you submit in your application materials; [sic] Therefore, it is paramount that in the experience portion of your application and cover letter, you describe the extent to which you possess the education, experience, and competencies outlined in the job announcement as well as the required and/or preferred qualifications/competencies. You are also encouraged to attach additional documents to that effect. Failure to include adequate information or follow instructions may affect your score and prevent you from competing in subsequent measures to arrive at a top group of applicants.

7. On August 28, 2021, Complainant applied for the Position.

8. Complainant did not include sufficient information in Complainant's application to demonstrate Complainant met the minimum or preferred qualifications listed in the job announcement.

9. The application asked, "What is your highest level of education?" Complainant responded, "Bachelor's Degree."

10. The application included a section for applicants to provide details about their education. Complainant listed a single educational institution. Complainant indicated in the section that he attended the University of Colorado, that he did not graduate, and the degree received was a "Master's."

11. The application included a section for applicants to provide details about their work experience. Complainant listed a single employer, and described his job duties as, "Manage all employees and customers across the US." Complainant listed his dates of employment as January 1983 to August 2021.

12. The application included questions that allowed applicants to explain how they met minimum and preferred qualifications.

13. The application asked, "Please clearly describe with examples how you meet the following minimum qualifications...". The question then listed the minimum qualifications. Complainant responded, "I am more than qualified for determining the data analytics, executing the data analytics and presenting the data analytics."

14. The application asked, "Please clearly describe using examples of how you meet the following preferred qualification: Bachelors' Degree." Complainant responded, "Decades of experience with analytics."

15. The application asked, "Please clearly describe using examples of how you meet the following preferred qualification: Experience working in a government agency or public sector." Complainant responded, "Working with defense contractors."

16. The application asked, "Please clearly describe using examples of how you meet the following preferred qualification: Demonstrated experience reading and understanding legislative language." Complainant responded, "Defense contracts."

17. The application asked, "Please clearly describe using examples of how you meet the following preferred qualification: Demonstrated intermediate to expert level abilities in Microsoft and Google suite, including document layout and creating information presentations." Complainant responded, "Use Microsoft and Google suite daily."

18. The application asked, "Please clearly describe using examples of how you meet the following preferred qualification: Adobe Acrobat Pro DC experience." Complainant responded, "Purchased Adobe Acrobat Pro DC and becoming an expert."

19. The application asked, "Please clearly describe using examples of how you meet the following preferred qualification: Experience conducting legal research." Complainant responded, "Defense contracts."

20. The application asked, "Please clearly describe using examples of how you meet the following preferred qualification: Experience assisting with development, design and maintenance of information and educational materials." Complainant responded, "Created non-profits providing technology to schools, and the documentation that requires."

21. The application asked, "Please clearly describe using examples of how you meet the following preferred qualification: Experience providing support for stakeholder outreach and engagement." Complainant responded, "Provide the work product for numerous companies and

individuals for those companies. Provide the work product for numerous schools and individuals for those schools.”

22. Complainant included a cover letter with Complainant’s application:

To DORA,

My name is Charles A. Nocera and I am applying for the Office of Policy, Research and Reform position. I am not even asking for a salary.

Back in 1983 I started a virtual technology company. Before that I was the CIO at various companies.

I created a second virtual technology company in 1988. Both companies grew, with customers and employees across the US.

Recently, I have created non-profits to bring technology into the schools. I have created a website that normally produces \$3000 per year per grade per school. A number of schools in the JeffCO district utilized this source of funds. Also created a mobile Makerspace used by several schools.

With your help, my next endeavor is to research, reform and create new policy for the insurance industry.

23. Human Resources Specialist Dittrich conducted the minimum qualifications review and determined Complainant’s application did not demonstrate Complainant met the minimum qualifications for the Position.

24. On November 22, 2021, Human Resources Specialist Dittrich sent Complainant an email. Human Resources Specialist Dittrich informed Complainant that Complainant did not meet the minimum qualifications for the position. On the same date, Complainant responded, “I have way more than 4 years of I, II, and III.”

25. On November 23, 2022, Human Resources Specialist Dittrich sent Complainant an email that provided Complainant an opportunity to provide more information demonstrating Complainant met minimum qualifications. On the same date, Complainant responded by email. Complainant wrote:

1983 to the present more than full-time

Enhanced Systems & Services, Inc.

Thousands of documents like the attached for employees and leaders of customers across the US and [sic] well as employees and leaders of Enhanced Systems & Services, Inc. The last document is database definitions where I used SQL to create data analytics for employees and leaders of customers and the company.

Complainant attached three documents totaling more than 700 pages. The documents were two Word documents and an Excel spreadsheet.

26. The Word documents and Excel spreadsheet included formulas and formatting.
27. Human Resources Specialist Dittrich determined the documents were sufficient to show Complainant met minimum qualifications and passed Complainant to the next level of review.
28. Human Resources Specialist Dittrich referred the eight applicants that met minimum qualifications, to Director Tobias for the Comparative Analysis portion of the selection process.
29. Director Tobias conducted the Comparative Analysis.
30. Director Tobias had not met any of the applicants at the time of the Comparative Analysis.
31. Director Tobias reviewed the applications of the eight applicants to see which applicants had the most preferred qualifications. The six applicants with the most preferred qualifications were referred to interview for the Position.
32. During the Comparative Analysis, Director Tobias did not review the formulas and formatting in the 700 pages of documents submitted by Complainant.
33. Director Tobias concluded Complainant's application did not demonstrate Complainant met any of the preferred qualifications.
34. Director Tobias did not refer Complainant for interview because, based upon the applications submitted, six applicants met more preferred qualifications than Complainant.
35. Neither Director Tobias nor Human Resources Specialist Dittrich were aware of the applicants' ages during the minimum qualifications review and Comparative Analysis portion of the selection process.
36. Director Tobias did not factor the applicants' ages into his decision-making.
37. On December 7, 2021, Human Resources Specialist Dittrich notified Complainant by email that Complainant was placed on the eligible list for the position, but was not one of the top six applicants. The email provided Complainant appeal rights.
38. On December 11, 2021, Complainant timely appealed his non-selection for the Position.
39. Complainant is 66 years old.
40. The individual who was selected for the position is 26 years old.

ANALYSIS

A. RESPONDENT DID NOT DISCRIMINATE AGAINST COMPLAINANT ON THE BASIS OF AGE IN VIOLATION OF CADA.

Claims of unlawful discrimination in the selection process fall within the Board's jurisdiction under § 24-50-112.5(4)(C), C.R.S. and § 24-50-125.3, C.R.S. Pursuant to that statute, the type of discrimination claims the Board may hear are those enumerated in CADA, which include discrimination based on age. § 24-34-402(1)(a), C.R.S.

Complainant claims Respondent discriminated against him in violation of CADA on the basis of age. Complainant has the burden to prove by a preponderance of the evidence that Respondent discriminated against him on the basis of his age. *Colorado Civil Rights Com'n v. Big O Tires, Inc.*, 940 P.2d 397, 400-01 (Colo. 1997). CADA provides that it is a discriminatory or unfair employment practice “to refuse to hire” or “to discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of” age. § 24-34-402(1)(a), C.R.S. Age is defined as a “chronological age of at least forty years.” § 24-34-301(1), C.R.S.

To establish a *prima facie* case of discrimination in employment on the basis of one of the protected classes:

First, an employee must show that he belongs to a protected class. Second, the employee must prove that he was qualified for the job at issue. Third, the employee must show that he suffered an adverse employment decision despite his qualifications. Finally, the employee must establish that all the evidence in the record supports or permits an inference of unlawful discrimination.

Bodaghi v. Dep't of Natural Resources, 995 P.2d 288, 297 (Colo. 2000).

As to the first element of a *prima facie* case of discrimination, Complainant is 66 years old. The evidence in the record establishes the first element of a *prima facie* case of discrimination.

As to the second element of a *prima facie* case of discrimination, Respondent concluded Complainant met the minimum qualifications for the Position and placed Complainant on an eligible list for the Position. The evidence in the record establishes the second element of a *prima facie* case of discrimination.

As to the third element of a *prima facie* case of discrimination, Complainant suffered an adverse employment action of non-selection for the Position. Therefore, the evidence in the record establishes the third element of a *prima facie* case of discrimination.

As to the fourth element of a *prima facie* case, Complainant must proffer evidence that supports or permits an inference of unlawful discrimination. *Bodaghi*, 995 P.2d at 297.¹ Under

¹ Respondent made arguments citing *prima facie* elements for age discrimination under federal law. Pursuant to Board Rule 9-4, “In determining whether discrimination or harassment has occurred, the Board shall apply Colorado law, including the standards and guidelines adopted by the Colorado Civil Rights Commission. The Board may refer to federal law in the event Colorado legal standards are unclear.”

The Court in *George* provided:

[T]he federal counterpart to the Colorado Anti-Discrimination Act is the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621, et seq., (1987). ADEA, as does § 24-34-402, prohibits the discharge of an individual based on age.

Under ADEA, the elements of a *prima facie* case are: (1) the complainant was within the protected age group; (2) the complainant was doing satisfactory work; (3) the complainant was discharged despite the adequacy of this work; and (4) a younger person replaced the complainant. (citation omitted).

George v. Ute Water Conservancy Dist., 950 P.2d 1195, 1197 (Colo. App. 1997).

CADA, intentional discrimination may be proven by either direct evidence or indirect evidence. See *George v. Ute Water Conservancy Dist.*, 950 P.2d 1195, 1197 (Colo. App. 1997). “Direct evidence is ‘[e]vidence, which if believed, proves [the] existence of [a] fact in issue without inference or presumption.’ (citations omitted).” *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1207 (10th Cir. 1999). However, as the Colorado Supreme Court has acknowledged, “direct evidence of discrimination is rare.” *Bodaghi*, 995 P.2d at 296. “[E]mployees must often rely on indirect evidence and reasonable inferences to establish a case of discrimination under the *McDonnell Douglas* analysis.” *Id.* Complainant may rely on, “existing conditions from which a fair inference of such discrimination could legitimately be drawn.” See *Colorado Civil Rights Com’n v. State, Sch. Dist. No. 1*, 488 P.2d 83, 87 (Colo. App. 1971).

Complainant failed to present direct evidence of age discrimination.

As to indirect evidence of discrimination, although Respondent hired a 26-year-old person for the Position, all of the evidence in the record does not support or permit an inference of discrimination. There is no evidence in the record that supports Respondent’s non-selection of Complainant for the Position was motivated by age discrimination. Director Tobias credibly testified age was not a factor in the Comparative Analysis process. Director Tobias credibly testified he was not aware of the applicants’ ages during the Comparative Analysis process. Therefore, Complainant did not establish the fourth element of a *prima facie* case of age discrimination.

Complainant argues older, more qualified applicants were excluded from hire or are disproportionately not hired for lower level positions because they are more likely to have qualifications that exceed the qualifications necessary for a position. Complainant did not present evidence to support his argument. Credible witness testimony demonstrates that having more than the minimum qualifications and more than the preferred qualifications does not exclude an applicant from hire. Moreover, neither Complainant’s application nor his evidence at the hearing demonstrates that he exceeded the qualifications for the position and was not selected as a result.

Even if Complainant had established a *prima facie* case of age discrimination, Respondent articulated legitimate, nondiscriminatory reasons for not selecting Complainant for the Position. “When the plaintiff has proved a *prima facie* case of discrimination, the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions.” *Texas Dept. of Comty. Affairs v. Burdine*, 450 U.S. 248, 260 (1981). Respondent did not select Complainant for the Position, because Complainant’s application did not demonstrate he met more preferred qualifications than the other applicants. In fact, Complainant’s application did not demonstrate he met any of the preferred qualifications at all. The job announcement emphasized the importance of detailing how an applicant met minimum and preferred qualifications in the application. Even on a straightforward preferred qualification, whether or not Complainant had a Bachelor’s degree, Complainant’s application provided incomplete and conflicting information.² While Complainant wrote the highest degree obtained was a Bachelor’s degree on one part of the application, he did

The elements of a *prima facie* case of discrimination under CADA are not the same as under the ADEA. “Although the elements are not identical, a *prima facie* case under § 24-34-402, as under ADEA, requires evidence of circumstances from which discrimination may reasonably be inferred.” *George*, 950 P.2d at 1198.

² The information in the educational history section also contradicted itself, indicating that Complainant had not graduated but the degree obtained was a Master’s degree.

not include the degree in his educational history, and responded to the question allowing him to explain how he met the qualification that he had decades of experience. Decades of experience does not demonstrate Complainant had a Bachelor's degree, and made it unclear whether or not Complainant had a Bachelor's degree. Complainant's application did not demonstrate he met the remainder of the preferred qualifications. Respondent had a legitimate non-discriminatory reason for non-selection of Complainant.

Once an employer meets its burden of proffering a legitimate, nondiscriminatory reason for an adverse employment decision, Complainant must "demonstrate by competent evidence" that this articulated reason is "a pretext for discrimination." *Big O Tires*, 940 P.2d at 401. "Pretext can be shown by 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.'" *Morgan v. Hilti, Inc.*, 108 F. 3d 1319, 1323 (10th Cir. 1997).

Complainant did not demonstrate Respondent's legitimate non-discriminatory reason for Complainant's non-selection was pretextual. Complainant failed to demonstrate "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in Respondent's reason for not selecting Complainant. Complainant also failed to demonstrate Respondent's reason for not selecting Complainant was "unworthy of credence." *Id.*

Complainant's questioning of witnesses attempted to raise red flags about the Comparative Analysis based upon the 700 pages Complainant submitted to Respondent. Although Respondent allowed, per the job announcement, for an applicant to submit additional material, the job announcement explained, "Therefore, it is paramount that in the experience portion of your application and cover letter, you describe the extent to which you possess the education, experience, and competencies outlined in the job announcement as well as the required and/or preferred qualifications/competencies." The experience portion of Complainant's application and Complainant's cover letter failed to describe the extent to which Complainant met the preferred qualifications for the Position. It is not reasonable for an applicant to expect an employer to mine 700 pages of documents to determine if an applicant possesses minimum or preferred qualifications for a position, particularly when the application instructs, and provides an opportunity, to directly explain how an applicant meets the minimum and preferred qualifications.

Complainant failed to follow application instruction and to include information in the experience portion of his application and cover letter describing the extent to which he met the minimum and preferred qualifications. As a result, Complainant's application was deficient and did not demonstrate Complainant met the preferred qualifications. Respondent's legitimate business reason for not selecting Complainant is worthy of credence. Complainant did not present evidence that demonstrates Respondent's explanation was unworthy of credence and was pretextual. For all of these reasons, Complainant's claim of age discrimination is without merit.

B. RESPONDENT IS ENTITLED TO AN AWARD OF ATTORNEY FEES AND COSTS.

Section 24-50-125.5(1), C.R.S., provides, in pertinent part:

Upon final resolution of any proceeding related to the provisions of this article, 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, the employee bringing the appeal or the department, agency, board, or commission taking such personnel action shall be liable for any attorney fees and other costs incurred by the employee or agency against whom such appeal or personnel action was taken, including the cost of any transcript together with interest at the legal rate.

A frivolous action is an action for which “no rational argument based on the evidence or law was presented.” Board Rule 8-51(B)(1). Actions that are “in bad faith, malicious, or as a means of harassment” are actions “pursued to annoy or harass, made to be abusive, stubbornly litigious, or disrespectful of the truth.” Board Rule 8-51(B)(2). A groundless action “means that despite having a valid legal theory, a party fails to offer or produce any competent evidence to support the theory.” Board Rule 8-51(B)(3).

Respondent argued in its closing argument that Complainant’s action was groundless. Complainant’s action in this case was groundless as defined by Board Rule 8-51(B)(3). Complainant bore the burden to prove that Respondent discriminated against Complainant on the basis of age. Complainant provided no competent evidence to support a claim of age discrimination in Respondent’s non-selection of Complainant for the Position. Therefore, as discussed below, Complainant’s appeal in this matter was groundless.

The evidence demonstrates Complainant failed to follow application instructions and include the basic information necessary to be successful in the Comparative Analysis. The job posting clearly explained the importance of including enough information in the application to demonstrate the applicant met minimum and preferred qualifications. Complainant did not do this in Complainant’s application, resulting in Respondent not ranking Complainant in the top six candidates for the Position and ultimately not selecting Complainant for the Position. No matter what Complainant’s actual qualifications were, Complainant’s application did not reflect Complainant met the preferred qualifications for the Position. Complainant did not present any competent evidence to overcome the evidence that demonstrated Complainant’s application was deficient, and to support a claim of discrimination.

Further, Complainant demonstrated a general disregard for Board Rules and orders during the hearing process. In terms of presenting competent evidence, Complainant’s most significant failure to comply with Board Rules and orders was a failure to file a Prehearing Statement as required by Board Rule 8-35. The Prehearing Statement provides the Administrative Law Judge and the opposing party the submitting party’s “plan” for the hearing, including a statement of the party’s claims/defenses, a statement of the facts the party believes to be true, the party’s legal arguments/authorities, and the requested relief. See Board Rule 8-35. Complainant deprived not only the other party of his “plan” for the hearing, but also the Administrative Law Judge. Complainant’s opening statement, case presentation, and closing argument did little to fill-in the gaps caused by the failure to file a Prehearing Statement.

Despite the failure to file a Prehearing Statement, Complainant was permitted to call witnesses from Respondent’s witness list. Complainant’s presentation of evidence consisted of calling two witnesses from Respondent’s Prehearing Statement witness list. Complainant elected not to testify. The witnesses called by Complainant supported Respondent’s position that Respondent did not act discriminatorily in the selection process. The witnesses provided no testimony to support a claim of age discrimination. First, credible witness testimony demonstrates minimum and preferred qualifications were set based upon the skills needed for the Position. Complainant did not present any legal authority to support an allegation that setting minimum and preferred qualifications in such a manner was discriminatory. Second, the witnesses also credibly

testified that an applicant who met but had more qualifications than necessary for a position could be hired for a position. In fact, one witness testified that an applicant who had the preferred qualifications and a wealth of other experience could be an ideal candidate for a position. Third, Complainant presented no evidence to support older and more qualified applicants were excluded from selection for the Position. Fourth, Director Tobias credibly testified age was not a factor in the selection decision. Complainant presented no evidence to refute that testimony. Finally, Complainant did not present evidence to prove Respondent discriminatorily evaluated his application because of his age or that Complainant's application demonstrated Complainant met more of the preferred qualifications than the other applicants.

Complainant's written response to Respondent's request for attorney's fees did not present a persuasive argument against an award of attorney's fees, and reiterated statements made by Complainant during the evidentiary hearing.

In this unusual circumstance, where Complainant, the party with the burden of proof, presented no competent evidence to support a claim of discrimination, Complainant's appeal is groundless as defined by Board Rule 8-51(B)(3). As Complainant's action was groundless, Respondent is entitled to an award of attorney's fees and costs pursuant to §24-50-125.5(1), C.R.S. and Board Rule 8-51(B).

Attorney's fees and costs will not be awarded past the conclusion of the evidentiary hearing. No attorney's fees and costs will be awarded for the review and redaction of exhibits prior to or after the evidentiary hearing due to Respondent's failure to redact exhibits in accordance with Board Rule 8-35(l) prior to its submission of exhibits to the Board.

CONCLUSIONS OF LAW

1. Respondent did not discriminate against Complainant on the basis of age in violation of CADA.
2. Because Complainant's appeal was groundless, Respondent is entitled to an award of attorney fees and costs through the date of the evidentiary hearing, less attorney's fees and costs for review and redaction of exhibits as discussed above.

ORDER

Respondent's decision not to select Complainant for the Position is affirmed.

Respondent is awarded reasonable attorney's fees and costs attributable to Complainant's appeal through the date of the evidentiary hearing, less attorney's fees and costs for review and redaction of exhibits as discussed above. Respondent shall file a Bill of Attorney's Fees and Costs no later than January 23, 2023. Complainant shall file a response within 10 days after receipt of Respondent's Bill of Attorney's Fees and Costs.

The State Personnel Director has jurisdiction to review an agency's selection process, including the minimum qualifications review and Comparative Analysis process. See §24-50-112.5(4)(a), C.R.S. and Director's Administrative Procedure 8-76(B). This matter is referred to the State Personnel Director for review of Respondent's selection process.

Dated this 28th day, of
December, 2022, at
Denver, Colorado.

/s/ [REDACTED]

K. McCabe, Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver CO 80203

CERTIFICATE OF SERVICE

This is to certify that on the 28th day of **December, 2022**, I electronically served a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** as follows:

Charles Nocera
[REDACTED]

Lucia Padilla, Esq.
Senior Assistant Attorney General
Lucia.Padilla@coag.gov

Colorado State Personnel Director
Appeals Unit
1525 Sherman Street, 2nd Floor
Denver, CO 80203
DHR_consultingservices@state.co.us

[REDACTED]

APPENDIX

EXHIBITS

COMPLAINANT'S EXHIBITS ADMITTED: The following exhibits were admitted into evidence:
None.

RESPONDENT'S EXHIBITS ADMITTED: The following exhibits were stipulated to and admitted into evidence: Exhibits 1 and 3-21.

WITNESSES

The following is a list of witnesses who testified in the evidentiary hearing:

Brian Tobias

Addison Dittrich

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS:

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is served to the parties. § 24-4-105(15), C.R.S. and Board Rule 8-53(A)(2).
3. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is served to the parties. §§ 24-4-105(14)(a)(II) and 24-50-125.4(4), C.R.S. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline referred to above. *Vendetti v. Univ. of S. Colo.*, 793 P.2d 657 (Colo. App. 1990) and § 24-4-105(14) and (15), C.R.S.
4. The parties are hereby advised that this constitutes the Board's motion, pursuant to § 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. Board Rule 8-53(C). That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. See Board Rule 8-53(A)(5)-(7). For additional information contact the State Personnel Board office at (303) 866-3300 or email at dpa_state.personnelboard@state.co.us.

BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is served to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-54.

ORAL ARGUMENT ON APPEAL TO THE BOARD

In general, no oral argument is permitted. Board Rule 8-55(C).

MOTION FOR RECONSIDERATION

Motions for reconsideration are discouraged. See Board Rule 8-47(K).