

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JOAO (JOHN) MADRUGA,
Complainant,

v.

DEPARTMENT OF REVENUE,
Respondent.

Administrative Law Judge (ALJ) Keith A. Shandalow presided over the evidentiary hearing in this matter on November 6, 7, and 9, 2023, at the State Personnel Board (Board), 1525 Sherman Street, Denver, Colorado. The record was closed on November 15, 2023. Complainant John (Joao) Madruga (Complainant) was represented by Mark Schwane, Esq. Respondent Colorado Department of Revenue (Respondent or DOR) was represented by Amanda C. Swartz, Assistant Attorney General, and Eric W. Freund, Senior Assistant Attorney General. Respondent's advisory witness was Jacob Finger, Respondent's Human Resources Director.

A list of exhibits offered and admitted into evidence is attached hereto as Appendix A. A list of witnesses who testified at hearing is attached hereto as Appendix B.

MATTERS APPEALED

Complainant appeals Respondent's decision to not select him for a Deputy Director/Chief of Investigations – Sports Betting position with the Division of Gaming in DOR's Specialized Business Group (the Position). Complainant alleges that the decision constitutes discrimination on the basis of national origin in violation of the Colorado Anti-Discrimination Act (CADA).

For the reasons discussed below, Complainant has failed to establish that Respondent discriminated against him on the basis of Complainant's national origin. Therefore, Complainant's unlawful discrimination claim is **dismissed** from the State Personnel Board and **referred** to the State Personnel Director for a Director's review.

ISSUES

1. Whether Respondent discriminated against Complainant based on his national origin in violation of CADA.

2. Whether Complainant is entitled to an award of attorney fees and costs pursuant to Board rule and CADA.

FINDINGS OF FACT

Background

1. Complainant was born in Portugal and emigrated to the United States with his family when he was four years old.
2. Complainant became a naturalized U.S. citizen when he was 14 years old.
3. After serving in the U.S. Army, Complainant served as a sheriff's deputy in Jefferson County, Colorado, for two years.
4. Complainant possesses two master's degrees, one in Business Administration and one in Accounting and Financial Management.
5. Complainant was hired by Respondent's Division of Gaming in 2005 as a Senior Investigator, a position he held until he was promoted to Supervisory Investigator over financial investigations in 2010.
6. Complainant was promoted to the position of Agent in Charge (AIC) in August 2017.
7. At all times relevant to this matter, Complainant has held the position of Agent in Charge (AIC), classified as a Criminal Investigator III, with the Division of Gaming. (Stipulated fact.)
8. Complainant's primary duties as AIC include supervision of the licensing and background investigations sections of the Division of Gaming.
9. At all times relevant to this matter, there were four AICs within the Division of Gaming.
10. In January 2022, Complainant complained to Jacob Finger, who at that time was DOR's compensation director, that Complainant was paid less than the other AICs. Complainant expressed to Mr. Finger that Complainant felt that Dan Hartman, who was then the Director of the Division of Gaming and Complainant's appointing authority, was discriminating against him.
11. Mr. Hartman was not responsible for setting the salaries of the AICs.
12. Respondent took no action on Complainant's wage disparity complaint and Complainant did not grieve or appeal this issue.
13. It was well known within the Division of Gaming that Complainant was of Portuguese descent.

Complainant's Job Performance Evaluations

14. Complainant has met or exceeded his yearly performance evaluations. (Stipulated fact.)
15. In 2021, Complainant's annual job performance was rated as Exceptional, level 3, with Kirsten Gregg, the Division of Gaming's Chief Investigator and Complainant's supervisor, as rater and Mr. Hartman, as reviewer. (Stipulated fact.)

16. In 2022, Complainant's annual job performance was rated as Satisfactory plus, level 2+, as an AIC with Ms. Gregg as rater and Mr. Hartman as reviewer. (Stipulated fact.)

17. In 2023, Complainant's annual job performance was rated as Exceptional, level 5 out of 5, with Ms. Gregg as rater and Chris Schroeder, Mr. Hartman's replacement, as reviewer. (Stipulated fact.)

The Posting and Selection Process for the Position, October 2022 – February 2023

18. Colorado voters approved sports betting in November 2019, and sports betting in Colorado became effective in May 2020.

19. Effective October 7, 2022, DOR posted the Position. (Stipulated fact.)

20. The Position was open to applicants nation-wide.

21. The job announcement included the following description of the Position.

The position is located in The Division of Gaming located in the Lakewood office and provides leadership to a number of professional employees involved in law enforcement, regulation and investigations. The position oversees the licensing function as managed by the Criminal Investigative Supervisors and Program Managers for the Sports Betting and Fantasy Sports programs. The position sets performance standards and establishes goals for these employees and for the functions in which they are involved. This position is expected to interact with industry, other law enforcement and the public. This interaction includes meetings, public speaking and presentations, locally and outside of Colorado. This position's primary duty is program management involving the development and implementation of investigations, monitoring and enforcement systems adequate to achieve the regulatory and enforcement goals of the Division and the State. The position oversees all aspects of criminal investigations, background investigations, and regulatory enforcement, relating to Sports Betting and Fantasy Sports. As the program manager, the position develops staffing and procedures for the operation functions of the section Sports Betting and Fantasy Sports

22. The job announcement listed the following preferred qualifications and competencies:

- Knowledge of Colorado rules and regulations related to Gaming/Sports Betting.
- Analyzing data and developing solutions.
- Experience in maintaining a program budget to meet business operation requirements.
- Experience working with legislature and generation of fiscal notes.
- Excellent interpersonal, communication and public speaking skills.
- Experience in training and change management.
- Experience in writing rules, statutes and legal policies.
- Experience [sic] serving as a liaison with stakeholders
- Experience with rule making processes in a regulated industry.

- Experience supervising administrative investigations in a regulated environment.
- Working closely with senior executives to achieve organizational vision, mission and goals/objectives.
- Experience in investigative review and policy issues within a highly regulated industry is a plus.

23. Complainant timely submitted his application, resume, and supporting documentation for the Position. (Stipulated fact.)

Comparative Analysis

24. Anita McEachern, a human resources analyst, reviewed the applications for the Position to determine if the applicants met the minimum qualifications for the Position and if any of the applicants were entitled to a veterans' preference pursuant to Colo. Const. art. XII, § 15(1)(a)(II), which provides that if a nonnumerical method is used in the comparative analysis of job applicants, applicants entitled to a veterans' preference "shall be added to the interview eligible list."

25. Seventeen applicants met the minimum qualifications and their applications were forwarded for a comparative analysis.

26. The comparative analysis was performed by three subject matter experts (SMEs).

27. The SMEs included Mr. Hartman, charged with making the hiring decision, Matt Heap, a deputy director in the Division who was retiring from the open Position, and Paul Hogan, the chief auditor for the Division. Mr. Hartman was an SME as the individual supervising the Position. Mr. Heap was an SME as the incumbent in the Position. Mr. Hogan was an SME based on 20 years of experience in the Division of Gaming and 30 years in the gaming industry. (Stipulated fact.)

28. Mr. Hartman was known as being occasionally gruff and curt with his subordinates, and may have been more so with Complainant. At least one observer concluded that Mr. Hartman did not like Complainant.

29. In performing the comparative analysis of the applications of those applicants who met the minimum qualifications for the Position, the SMEs focused on experience, job fit, and preferred qualifications.

30. DOR used a non-numeric structured application review to rank the candidates who would receive a panel review. DOR had a "rank" list of candidates which identified 17 candidates total, six of whom were "Yes," another five who were listed as "Maybe," and the remainder as "No." The candidates were identified with an anonymous ID and those candidates receiving a panel interview were ranked according:

1. Kevin Farrington
2. G.G.¹
3. Brett Buckingham
4. Penny Paxton
5. J.W.

¹ Those applicants who were not among the final five candidates are referred to by their initials only.

6. T.M.

Three candidates were provided panel interviews based on veterans' preference:

7. A.C.

8. Jason Van't Hof

9. Complainant

(Stipulated fact.)

31. On November 8, 2022, Complainant received a letter from Ms. McEachern stating that DOR had completed the comparative analysis process for the Position and determined that he had passed all of the required steps and would be placed on the eligible list for the Position. However, she went on to state the following: "While you have been placed on the eligible list, you were not one of the top six candidates placed on the referral list for this position. The State of Colorado Constitution mandates that only the top six candidates on an eligible list may be referred (forwarded) to the hiring manager for final consideration for classified positions." (Stipulated fact.)

32. On November 16, 2022, Complainant filed a petition for hearing with the Board, alleging that Respondent's failure to include him in the top applicants referred for an interview constituted national origin discrimination in violation of CADA. The case was assigned Board number 2023S033.

The Interview Phase of the Selection Process

33. The panel interviews for all the referred and ranked candidates and candidates determined to qualify for veterans' preference, other than Complainant, occurred on November 14 and 15, 2022. (Stipulated fact.)

34. All referred and ranked candidates and candidates determined to qualify for veterans' preference went through a "meet-and-greet" question process followed by a panel interview on November 14 and 15, 2022. Mr. Hartman was not a part of the meet-and-greet or the panel interview. (Stipulated fact.)

35. The meet-and-greet panel was comprised of Miya Tsuchimoto, a Sports Betting program manager, and Jennifer Grounds, a supervisory investigator in Sports Betting.

36. The meet-and-greet panel asked the candidates the same list of questions. None of the panel members took notes.

37. The meet-and-greet panel ranked Mr. Van't Hof and Mr. Buckingham as the two preferred applicants.

38. The interview panel members were Rhea Loney, a sports betting industry representative; Chris Rouze, DOR's Auto Industry Section Director; Bradford Jones, a senior assistant attorney general working with DOR; and Jim Burack, a former director of DOR's Marijuana Enforcement Division. (Stipulated fact.)

39. The interview panel members did not numerically rank any of the interviewed applicants. (Stipulated fact.)

40. The panel interview had a list of questions to be asked of candidates. Only two panel members, Mr. Jones and Mr. Burack, took notes during the interviews. (Stipulated fact.)

41. The panelists assessed the applicants on the following qualities: the ability to make complex decisions in the rapidly developing, fast-paced and evolving area of sports betting; the ability to work with different stakeholders, such as industry members, the legislature; an understanding of the larger regulatory sports betting landscape; and leadership qualities.

42. Mr. Hartman spoke with the panel members after they interviewed the referred applicants. The panelists informed Mr. Hartman that they thought the top four applicants were Kevin Farrington, Brett Buckingham, Penny Paxton, and Jason Van't Hof.

43. By email dated November 18, 2022, Mr. Hartman stated to Ms. McEachern that "I would like to take 4 candidates to the final interview," identifying Jason Van't Hof, Kevin Farrington, Brett Buckingham, and Penny Paxton. These interviews were scheduled for November 29 and December 1, 2022. (Stipulated fact.)

44. The "final interview" consisted of one-on-one interviews between Mr. Hartman and each of the top four applicants.

45. Applicant Jason Van't Hof possessed significant experience in military investigations and leadership, investigations for the National Football League, sports betting, as well as management and broad-based liaison with stakeholders.

46. Applicant Kevin Farrington served as an FBI agent for 25 years and possessed extensive experience in sports betting and investigations.

47. Applicant Brett Buckingham served in the Division of Gaming's Sports Betting unit since its inception in Colorado.

48. Applicant Penny Paxton worked in DOR's Marijuana Enforcement Division and possessed significant experience researching sports betting and recommending improvements thereto.

49. On December 8, 2022, approximately a week after Mr. Hartman conducted the second and final round of interviews, DOR, through Ms. McEachern, notified Complainant that during the analysis, "the Member 4 copy of your DD 214 that you attached to your application materials was reviewed. There were interpretation discrepancies due to the misalignment of the typed dates (Block 12) used to verify the veteran eligibility. Upon review, the HR Director has determined, that due to your Army Basic Active Service Date of January 2, 1992, and the dates that determine eligibility for veterans' preference, you qualify to move forward in our recruitment process. As an eligible veteran you will move forward in the recruitment process to our interview step." (Stipulated fact.)

50. The actual reason Complainant was given a veterans' preference was that another applicant was mistakenly provided a veterans' preference despite the fact that the applicant was an internal candidate for whom the Position would be a promotional opportunity.

51. On December 9, 2022, Complainant was notified that he had been referred for a meet-and-greet and panel interviews, to occur on December 12, 2022. (Stipulated fact.)

52. After he was informed that he would be referred for interviews for the Position, Complainant filed a motion to dismiss Board case number 2023S033. The motion to dismiss was granted.

53. Complainant's interview with the meet-and-greet and interview panels occurred on December 12, 2022. (Stipulated fact.)

54. During Complainant's interview with the meet-and-greet panel, Complainant commented that the higher one goes in the Division, the less one knows. Ms. Tsuchimoto viewed this comment negatively, and it concerned her. In addition, Complainant spoke about licensing, to the exclusion of the compliance and investigations aspects of the Position. Ms. Tsuchimoto expressed her concerns to Mr. Hartman immediately after the meet-and-greet with Complainant.

55. Complainant's interview with the interview panel went well and the consensus was that he was among the top five applicants, although he lacked the experience in Sports Betting possesses by Mr. Buckingham, and was not as familiar with stakeholders on a national basis as was Mr. Van't Hof and Mr. Farrington.

56. Complainant received a second-round interview with Mr. Hartman on December 28, 2022. (Stipulated fact.)

Post-Interview Developments

57. In early January 2023, Mr. Hartman offered the Position to Mr. Van't Hof, who, after a couple of days' consideration, declined the Position.

58. On or about February 7, 2023, DOR made a formal Position offer to Kevin Farrington at the rate of \$129,048/year. The start date was March 27, 2023. However, Mr. Farrington declined the Position offer on February 9, 2023. (Stipulated fact.)

59. On February 9, 2023, K.F. notified Mr. Hartman and Ms. McEachern by email that he declined the job offer for the Position.

60. On February 10, 2023, Complainant was informed by email that the department had "decided to cancel the recruitment." (Stipulated fact.)

61. Effective February 13, 2023, DOR reopened the position of Deputy Director/Chief of Sports Betting – Hybrid for applications. DOR stated in the posting that the "announcement is being extended and will now close at 5:00 PM on March 3, 2023. If you have already applied, there is no need to re-apply." (Stipulated fact.)

62. Complainant filed his notice of appeal on February 17, 2023, which initiated this case. (Stipulated fact.)

63. In January and February 2023, Director Hartman discussed his pending retirement and announced it sometime in February. He retired effective May 5, 2023.

64. Because of Mr. Hartman's imminent retirement, in February 2023, Michael Phibbs, the new Senior Director of the Specialized Business Group, decided to cancel the recruitment for the Position until Mr. Hartman's replacement was hired and in place.

65. On February 28, 2023, Complainant received an email from Ms. McEachern stating that DOR had “decided to cancel the recruitment” for the position as previously posted on February 13. (Stipulated fact.)

66. The Position was not filled.

DISCUSSION

A. Burden of Proof

Complainant brings a claim of national origin discrimination in employment in violation of CADA.

Complainant has the burden of proof for his discrimination claim. See *Bodaghi v. Dep’t of Nat. Resources*, 995 P.2d 288, 297 (Colo. 2000).

B. Complainant’s National Origin Discrimination Claim

CADA prohibits discrimination “in matters of compensation, terms, conditions or privileges of employment against any person otherwise qualified” due to, *inter alia*, that person’s national origin. § 24-34-402(1)(a), C.R.S.

Colorado has adopted the United States Supreme Court’s analysis announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), for evaluating employment discrimination claims. *Colo. Civ. Rights Commn. v. Big O Tires, Inc.*, 940 P.2d 397, 400 (Colo. 1997), *as modified on denial of reh’g* (July 28, 1997). First, a complainant must establish a *prima facie* case of discrimination. *Id.* If the complainant establishes a *prima facie* case of discrimination, the burden of production shifts to the respondent to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Id.* at 401. “Once the employer meets its burden, the complainant must then be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for the employment decision were in fact a pretext for discrimination.” *Id.* Pretext can be shown by “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 nondiscriminatory reasons.” *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir.1997).²

1. Complainant Established A *Prima Facie* Case of National Origin Discrimination

² CADA was drafted to mirror federal anti-discrimination laws and federal case law is frequently used to interpret CADA. See e.g. *George v. Ute Water Conservancy Dist.*, 950 P.2d 1195, 1198 (Colo. App. 1997). CADA claims are often analyzed using the federal anti-discrimination statute, Title VII of the Civil Rights Act of 1964. See *Lawley v. Dep’t of Higher Educ.*, 36 P.3d 1239, 1253–54 (Colo. 2001); *Williams v. Dep’t of Public Safety*, 369 P.3d 760, 771 (Colo. App. 2015). See also *Ward v. Dep’t of Nat. Resources*, 216 P.3d 84, 92 (Colo. App. 2008) (federal law is considered in determining whether discrimination has occurred under CADA). Pursuant to Colorado Civil Rights Commission Rule 10.14(C), interpretations of CADA “shall follow the interpretations and guidance established in State and Federal law, regulations, and guidelines; and such interpretations shall be given weight and found to be persuasive in any administrative proceedings.”

To establish a *prima facie* case of discrimination on the basis of national origin in employment, Complainant must demonstrate that: (1) he belongs to a protected class, (2) he was qualified for the job at issue, (3) he suffered an adverse employment decision despite his qualifications, and (4) all the evidence in the record supports or permits an inference of unlawful discrimination. *Bodaghi*, 995 P.2d at 297.

Complainant is of Portuguese descent, who emigrated to the United States as a child and became a naturalized citizen as a teenager; therefore, he has established his membership in a class protected under CADA: national origin. § 24-34-402(1)(a), C.R.S. Complainant was qualified for the Position, having met the minimum qualifications. He was not selected for the Position, an adverse employment action. Therefore, Complainant has established the first three prongs of a *prima facie* national origin discrimination claim.

To establish the fourth and final prong of a *prima facie* case of national origin discrimination under CADA, Complainant must demonstrate that all the evidence in the record supports or permits an inference of unlawful discrimination. *Bodaghi*, 995 P.2d at 297.

Complainant established that the evidence he proffered permits an inference of unlawful discrimination. First, as Ms. Gregg testified, one would have expected Complainant to be among the top six applicants referred for interviews, given his knowledge and experience in the Division of Gaming. The fact that Complainant was not among the top six applicants following the comparative analysis defies reasonable expectations, and thus raises suspicions. Second, the subjective ranking of the applicants and a dearth of documentation concerning the ranking, can support an inference of discrimination. See *Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1218 (10th Cir. 2002) (“Courts view with skepticism subjective evaluation methods ...”); *Bauer v. Bailar*, 647 F.2d 1037, 1045–46 (10th Cir. 1981) (“the presence of subjective decision-making can create a strong inference of discrimination ...”).

Third, the appearance of irregularity concerning Complainant’s veterans’ preference can support an inference of unlawful discrimination. Initially, Complainant was denied a veterans’ preference, consistent with the Colo. Const., art. XII, §15(5), which provides,

No person shall receive preference pursuant to this section with respect to a promotional opportunity. Any promotional opportunity that is also open to persons other than employees for whom such appointment would be a promotion, shall be considered a promotional opportunity for the purposes of this section.

However, another internal candidate for whom this would be a promotional opportunity was granted a veterans’ preference, and thus an automatic interview opportunity. When this mistake was discovered, Mr. Finger and Ms. McEachern decided that Complainant, who had already filed a petition for hearing with the Board alleging unlawful discrimination in failing to refer him for an interview for the Position, should be referred for an interview as well. However, Ms. McEachern did not communicate the real reason Complainant was afforded an interview; instead, she informed Complainant that he was entitled to a veterans’ preference, but because of anomalies in the Department of Defense form, he was initially denied the preference. Respondent’s handling, or mishandling, of the veterans’ preference in this selection process, supports an inference of unlawful discrimination.

Finally, the manner in which Respondent dealt with the selection process after Mr. Van’t Hof and Mr. Farrington declined their respective offers for the Position, also supports an inference of unlawful discrimination. After Mr. Hartman’s top two candidates were offered the Position but

declined, the eligibility list was cancelled. Then, Respondent re-posted the Position, only to cancel the job search and leave the Position unfilled. The on-again off-again nature of Respondent's actions is an irregularity that may mask a discriminatory intent.

The irregularities discussed above are sufficient to support or permit an inference of unlawful discrimination. Accordingly, Complainant has established a *prima facie* case of unlawful discrimination based on national origin in violation of CADA.

2. Respondent Articulated Legitimate, Nondiscriminatory Reasons for its Decisions

Respondent articulated legitimate, nondiscriminatory reasons for the irregularities in the selection process for the Position and for not selecting Complainant for the Position.

First, Complainant was not provided a veterans' preference because, pursuant to Colorado Const. Art XII, §15(5), the Position was considered a promotional opportunity and therefore Complainant was not entitled to a veterans' preference. The fact that another internal applicant was given a veterans' preference was a mistake that was caused by that employee's application not making clear that the employee was employed by the state. Respondent's reason provided to Complainant for Respondent's change of position regarding his veterans' preference – that there was some ambiguity in the documentation Complainant submitted to qualify for the veterans' preference – was not true, but this misrepresentation, although anomalous, is not probative of a discriminatory animus.

Respondent's witnesses who participated in the selection process for the Position testified credibly that Mr. Van't Hof and Mr. Farrington were the preferred candidates based on their experience and their performance during their meet-and-greet and panel interviews.

Mr. Hartman testified that after Mr. Van't Hof and Mr. Farrington declined the Position, he felt that the remaining candidates were a tier below those applicants, which prompted him to re-post the Position. However, given Mr. Hartman's imminent retirement, Mr. Phibbs, the new Senior Director of the Specialized Business Group, decided that the posting of the Position should be deferred until Mr. Hartman's replacement was in place. And so the posting of the Position was removed and the Position remained vacant.

Therefore, Respondent articulated legitimate, nondiscriminatory reasons for the actions taken by Ms. McEachern, Mr. Finger, the meet-and-greet panel, the interview panel, and Mr. Hartman.

3. Complainant Did Not Establish that Respondent's Decisions Were Pretextual

As noted above, if the employer articulates a legitimate, non-discriminatory reason for the adverse decision and provides evidence to support its legitimate purpose, complainant must be given "a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for the adverse employment decision were in fact a pretext for discrimination." *Big O Tires*, 940 P.2d at 401.

Also as noted above, the courts have recognized a number of categories of evidence of pretext in this area of the law. Generally, to show that an employer's proffered nondiscriminatory reason for an adverse employment action is pretextual, a plaintiff must produce evidence of such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in employer's proffered legitimate reasons for its action that a reasonable fact-finder could rationally find them unworthy of credence, and hence infer that employer did not act for asserted nondiscriminatory

reasons. *E.E.O.C. v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 490 (10th Cir. 2006).

At hearing, Complainant failed to establish by a preponderance of the evidence that there were “such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions” in Respondent’s proffered legitimate, nondiscriminatory reasons for its decisions sufficient to find those reasons unworthy of credence.

Complainant argues that he was the most qualified applicant and Respondent’s failure to select him for the Position is evidence of a discriminatory animus. However, “to suggest that an employer’s claim that it hired someone else because of superior qualifications is pretext for discrimination rather than an honestly (even if mistakenly) held belief, a plaintiff must come forward with facts showing an overwhelming disparity in qualifications.” *Johnson v. Weld Cnty., Colo.*, 594 F.3d 1202, 1211 (10th Cir. 2010) (internal quotation marks and citation omitted). Complainant did not offer facts establishing an overwhelming disparity in qualifications. Respondent’s witnesses testified credibly that Complainant was not clearly the most qualified and best fit for the Position, and the evidence of the qualifications of the other top applicants supports that testimony.

Furthermore, Complainant failed to show that Respondent’s other purported legitimate, nondiscriminatory reasons for its actions were pretextual. Although it may be true, as some witnesses observed, that Mr. Hartman, the appointing authority, did not appear to like Complainant very much, and was often curt towards him, Complainant did not offer evidence that Mr. Hartman’s attitude towards Complainant was based on Complainant’s national origin.

Respondent’s witnesses testified credibly about the mishandling of the veterans’ preference issue and left no doubt that such mishandling was not devised to sabotage Complainant’s application for the Position. In fact, had Respondent denied Complainant an interview based on his veteran’s status and permitted another internal applicant a veterans’ preference, that would have supported a finding of unlawful discrimination. The fact that Respondent did not deny Complainant a veterans’ preference under these circumstances undercuts any argument that Respondent’s mishandling of this issue is probative of unlawful discrimination.

In Complainant’s closing argument, Complainant’s counsel argued that the decision in *Bodaghi* is on point and supports Complainant’s position in this matter. In *Bodaghi*, the complainant, an Iranian-American, was not selected for a position and appealed to the Board. An ALJ conducted a hearing and found that the respondent state agency discriminated against complainant based on his national origin, and the Board adopted the ALJ’s opinion. On appeal, the Court of Appeals reversed, and the matter was appealed to the Colorado Supreme Court. In its decision, the Supreme Court concluded that the Court of Appeals committed two fundamental errors:

First, the court of appeals erred in concluding, contrary to the ALJ, that the successful applicant . . . was more qualified than Bodaghi, when in fact [the successful applicant] did not meet the minimum requirements for the position. Second, the court of appeals erred in concluding that the selection process was “fair and not discriminatorily tainted” when the ALJ concluded otherwise, with more than ample support in the record.

Bodaghi, 995 P.2d at 299.

The *Bodaghi* court added:

An employer “has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria.” [*Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. [248] at 259, 101 S.Ct. 1089 [(1981)]]. However, when an employer rejects an employee who is a member of a protected class for a position for which he is amply qualified, the critical determination is whether the two employees are equally qualified. See *id.* Furthermore, evidence that an employer has misjudged the qualifications of candidates may be “probative of whether the employer’s reasons are pretexts for discrimination.” *Id.* The use of subjective factors supports an inference of pretext when an employer justifies rejection of a minority candidate on the basis of such subjective factors even though the minority candidate is objectively better qualified than the non-minority chosen.

Id. at 300.

The *Bodaghi* case is distinguishable from the instant matter for several reasons. First, the two applicants who were offered the Position not only met the minimum qualifications for the Position, but their qualifications were arguably superior to Complainant’s. There was no evidence that Respondent misjudged the qualifications of any of the applicants, including Complainant’s and the successful applicants. Finally, although the selection process here involved subjective assessments of the applicants, those assessments were not used to justify the non-selection of Complainant, who was not objectively better qualified than the successful applicants. In short, Complainant’s reliance on *Bodaghi* is unavailing.

Complainant did not establish that Respondent’s articulated legitimate, nondiscriminatory reasons for its actions were a pretext for unlawful discrimination. Accordingly, Complainant’s CADA discrimination claim must be dismissed.

C. Complainant is Not Entitled to an Award of Attorneys’ Fees and Costs

Complainant has requested its attorneys’ fees and costs incurred in this litigation.

Board Rule 8-51(B) provides:

Upon final resolution of a proceeding under this Chapter 8, Resolution of Appeals and Disputes, Part A, attorney fees and costs may be assessed against a party if the Board finds that the personnel action from which the proceeding arose, or the appeal of such action was frivolous, in bad faith, malicious, a means of harassment, or was otherwise groundless.

Complainant failed to establish that Respondent discriminated against him in violation of CADA. Respondent’s decision to not select Complainant for the Deputy Director/Chief of Investigations – Sports Betting with the Division of Gaming – Hybrid position was neither frivolous, in bad faith, malicious, a means of harassment, nor groundless. Complainant has not established grounds for an award of attorney fees and costs.

Accordingly, Complainant is not entitled to an award of attorneys’ fees and costs.

CONCLUSIONS OF LAW

1. Respondent did not discriminate against Complainant based on his national origin in violation of the Colorado Anti-Discrimination Act.
2. Complainant is not entitled to an award of attorney fees and costs pursuant to Board rule and the Colorado Anti-Discrimination Act.

ORDER

Complainant's appeal is **dismissed** from the State Personnel Board and **referred** to the State Personnel Director for a Director's review.

Dated this 2nd day
of January 2024,
at Denver, Colorado

/s/ [REDACTED]
Keith A. Shandalow, Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, Colorado 80203

APPENDIX A

EXHIBITS ADMITTED INTO EVIDENCE

Complainant's Exhibits: B, C, Q, R, Z, AA, JJ (over objection), KK, LL (over objection), OO, QQ

Respondent's Exhibits: 1, 2, 3, 4, 5, 6, 7, 8, 10, 16, 17, 18, 19, 20, 21, 22, 23, 26, 27, 33, 35, 37, 38

APPENDIX B
WITNESSES WHO TESTIFIED AT HEARING

John Madruga

Kirsten Gregg

Flavio Quintana

Anita McEachern

Paul Hogan

Miya Tsuchimoto

Jennifer Grounds

Jim Burack

Brad Jones

Dan Hartman

Jacob Finger

CERTIFICATE OF SERVICE

This is to certify that on the 3rd day of January 2024, I electronically served a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** 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 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.

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. 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 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 8-54.

ORAL ARGUMENT ON APPEAL

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

PETITION FOR RECONSIDERATION

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