

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2024S051**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

CRAIG ROBERTS,
Complainant,

v.

DEPARTMENT OF PERSONNEL AND ADMINISTRATION,
Respondent.

Senior Administrative Law Judge (ALJ) Susan J. Tyburski held an evidentiary hearing in the above-captioned case on November 18-19, 2024. This hearing was held in the State Personnel Board (Board) courtroom. Throughout the hearing, Complainant appeared in person, representing himself. Respondent appeared through its attorneys, Assistant Attorneys General Amanda Swartz, Esq. and Michael J. Bishop, Esq. Respondent's advisory witness was Sarah Stoner, Contracts and Procurement Director. The record was closed on November 26, 2024, after receiving electronic copies of Complainant's individually marked exhibits, Complainant's written closing argument and Respondent's supplemental authorities.

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

MATTER APPEALED

Complainant claims that Respondent's decision not to select him for a Contract Administrator position was motivated by discrimination on the basis of age. Complainant seeks a front pay award of \$360,000, plus the value of all benefits Complainant would have received for five years if he had been hired by Respondent.

Respondent argues that Complainant did not establish either a *prima facie* case of discrimination or that Respondent's reasons for its selection decision constitute pretext for discrimination.

For the reasons discussed below, Respondent's non-selection decision is **affirmed**.

ISSUES TO BE DETERMINED

Was Respondent's non-selection decision motivated by discrimination on the basis of age? If so, what is the appropriate remedy?

FINDINGS OF FACT

Background

1. At all times relevant to this appeal, Complainant was in his early 60's.
2. On March 22, 2024, Respondent Department of Personnel and Administration (DPA) posted a job announcement for a Contract Specialist/Contract Administrator III position (Contract Administrator position). (Stipulated)
3. The job announcement included the following summary of the duties and responsibilities of the Contract Administrator position:

Serves as purchasing agent for solicitations including, but not limited to, Requests for Proposal (RFP), Documented Quotes (DQ), Invitations for Bid (IFB), Invitations to Negotiate (ITN), and Requests for Information (RFI) as needed to obtain goods and services. This includes, but is not limited to, assisting program managers to develop appropriate Statements of Work (SOW) and/or specifications for solicitations, posting and managing solicitations, and running evaluations. Ensure that all solicitations are completed in accordance with the State Procurement Code and Rules.

Serves as the contract administrator by negotiating contracts, negotiating terms and conditions, and issuing purchase orders for goods and services. Negotiates terms with vendors and ensures that language will be approved by necessary contract approvers (including the Contract Manager, Attorney General, State Controller's Office, Risk Management, OIT, etc.) Must apply State Fiscal Rules and the Colorado Procurement Code and Rules in determining language. Initial negotiation through the final draft and execution of the Contract is the responsibility of this position.

Ensure that contracts and purchase orders are renewed on time and via the appropriate mechanism. Works with Contract Managers to identify and apply the appropriate remedies if a contractor fails to perform.

Provides interpretation of contract terms to managers, other staff and contractor as necessary. Ensures that Divisions are complying with all applicable rules, statutes, and policies including fiscal rules and procurement rules.

Attends appropriate meetings such as Procurement Advisory Council (PAC) and other informational or training meetings as required.

Performs contract audits on an as-need basis for all Division contracts.

Ensures all contract information is current in the Contract Management System (CMS) and all encumbrances are completed correctly in the State's financial system (CORE).

Provides timely contract expiration reports to the Division.

4. On March 25, 2024, Complainant submitted his resume and the required online application to DPA. (Stipulated)
5. Complainant's prior work experience included 16 years as an attorney for Liberty Mutual Insurance Company, 6 years as a Vice President for MasterCard, and almost 11 years as the head of a contract management team overseeing global commercial contracts for McKinsey & Company.
6. In a response to a Supplemental Question on the application for the Contract Administrator position, Complainant stated: "All of my work at McKinsey involved contract drafting and rate negotiations."

Respondent's Interview of Complainant

7. On April 5, 2024, DPA informed Complainant that he had been referred for an interview. (Stipulated)
8. Seven other applicants were also chosen to be interviewed. Each applicant was asked the same eight questions by an interview panel.
9. On April 17, 2024, Complainant interviewed for the Contract Administrator position. The interview panel members included Sarah Stoner, Phil Rollins, Lawrence Ryan and Susanne Reh. The Contract Administrator position works with Ms. Stoner, Mr. Rollins and Mr. Ryan. (Stipulated)
10. None of the members of the interview panel were aware of the applicants' ages.
11. Sarah Stoner is Respondent's Contracts and Procurement Director and the hiring manager for the Contract Administrator position.
12. Phil Rollins and Larry Ryan are Purchasing Agents who perform the same work required by the Contract Administrator position. Mr. Ryan is 76 years old.
13. Susanne Reh is the Program Manager for a newly created state agency, the Public-Private Partnership (3P) Collaboration Unit. As a new agency, 3P required new goods and services and thus would be working closely with the new Contract Administrator.
14. During his interview, Complainant described his work at McKinsey & Company. Complainant was hired to create and manage a contract management group. Complainant did a few RFPs, but that work was usually done by the junior suppliers. Instead, Complainant did hundreds of contract negotiations. Others on his team would perform the basic or administrative research work on the costs.
15. During his interview, Complainant explained that his contract management work mostly involved overseeing his team, rather than performing the "grunt," day-to-day

work. Because of this management experience, Complainant stated that he could serve as a “mentor.”

16. Complainant did not have any experience with the procurement process for a public entity.
17. Complainant stated that the posted pay for the Contract Administrator position was significantly less than he had previously earned and asked about the ability to move beyond the Contract Administrator position.
18. Director Stoner found that, while Complainant had ample experience negotiating contracts, he lacked the necessary purchasing experience. Director Stoner was also concerned that Complainant would not be the “best fit” on a team that required close, collaborative work with State agencies seeking goods and services.
19. Mr. Rollins found that Complainant did not seem to have solicitation experience, seemed very sales driven or oriented, and had not really done the “grunt” work required by the Contract Administrator position.
20. Mr. Ryan found that Complainant’s contract negotiations involved renegotiating existing supplier contracts and rates for private commercial contracts, rather than solicitations for new suppliers for a public entity.
21. Manager Reh was concerned that Complainant felt that the Contract Administrator position was a more junior role than his prior work overseeing a contract management group. Manager Reh found Complainant’s statement that he could serve as a mentor to be “condescending.”

Respondent’s Interview of P.N.

22. P.N¹. was one of the other applicants for the Contract Administrator position. At the time of P.N.’s application, P.N. had been working as a Procurement Ops Specialist for Charter Communications for a year and a half. P.N.’s prior work included paralegal and junior solicitor positions in which P.N. drafted pleadings, as well as agreements and lease documents.
23. P.N. has a Master of Law degree from the University of Colorado in Boulder and a Bachelor of Law from the Auckland University of Technology. P.N. is admitted as a barrister and a solicitor at the Auckland High Court in New Zealand.
24. P.N. is less than 40 years old.
25. On April 17, 2024, P.N. was interviewed by Director Stoner, Mr. Rollins, Mr. Ryan and Manager Reh. During the interview, P.N. emphasized the need for good communication when cooperatively working with others outside the work group. P.N.

¹ Initials are used to protect certain individuals’ privacy, when their identities are not relevant.

has experience with labor solicitations, procurement and goods. P.N. did not have contract negotiation experience, but was very interested in getting this experience. P.N. wanted a position in which P.N. could learn and grow.

26. All four interviewers concluded that P.N. was the best candidate for the Contract Administrator position.

Respondent's Selection Decisions

27. On April 26, 2024, Director Stoner offered the Contract Administrator position to P.N. P.N. stated she could not accept the offer without an increase to the position's salary. DPA chose not to accept P.N.'s counteroffer for a higher salary. (Stipulated)

28. After unsuccessful attempts at reaching a second candidate, J.G., with a potential job offer, Director Stoner closed the recruitment process without hiring anyone. J.G.'s age is unknown.

29. On May 1, 2024, DPA notified Complainant that he had not been selected for the Contract Administrator position. (Stipulated)

30. On May 2, 2024, DPA reposted the Contract Administrator position with a revised job announcement emphasizing the importance of experience in the position's purchasing duties, which many of the candidates, including Complainant, lacked in the first recruitment.

31. On May 3, 2024, Complainant filed a timely Petition for Review of Respondent's non-selection decision, alleging that Respondent discriminated against Complainant on the basis of age. On August 20, 2024, the Board granted an evidentiary hearing to review the non-selection.

32. On June 10, 2024, DPA hired A.B. to fill the revised Contract Administrator position for which Complainant originally applied. A.B. was 55 years old at the time of hiring.

ANALYSIS

Complainant alleges that, in not selecting Complainant for the Contract Administrator position, Respondent discriminated against him on the basis of age in violation of the Colorado Anti-Discrimination Act (CADA). CADA and the Board's rules mandate that employment decisions be made without discrimination on the basis of age, among other protected classes. See C.R.S. § 24-34-402(1)(a); Board Rule 9-3.

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). See also *Johnson v. Weld County, Colorado*, 594 F.3d 1202, 1219 n.11 (10th Cir. 2010) ("Colorado and federal law apply the same standards to discrimination claims"); *Stinnett v. Safeway, Inc.*, 337 F.3d 1213, 1219 (10th

Cir. 2003) (“Colorado has adopted the same standards applicable to Title VII cases when considering claims brought under the [CADA]”).

Complainant’s *Prima Facie* Case of Age Discrimination

Colorado has adopted the U.S. Supreme Court’s framework for analyzing a discrimination claim as outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). See *St. Croix v. Univ. of Colorado Health Sciences Ctr.*, 166 P.3d 230, 236 (Colo. App. 2007). First, Complainant must establish a *prima facie* case of discrimination. To establish a *prima facie* case of age discrimination in violation of CADA, Complainant must show (1) that he belongs to a protected class; (2) that he was qualified for the position at issue; (3) that he suffered an adverse employment decision; and (4) all the evidence in the record supports or permits an inference of age discrimination. *Bodaghi v. Dep’t of Natural Resources*, 995 P.2d 288, 297 (Colo. 2000).

As for the first element of a *prima facie* discrimination case, Complainant states that, at all times relevant to this case, Complainant was over forty years of age. Persons who are at least forty years of age are members of a protected class under CADA. C.R.S. § 24-34-301(1). Therefore, the ALJ finds that Complainant has established the first element of a *prima facie* discrimination case.

As for the second element of a *prima facie* discrimination case, Respondent determined that Complainant was initially qualified for the Contract Administrator position and scheduled an interview with him, thus meeting the second element.

As for the third element of a *prima facie* discrimination case, Respondent’s decision not to select Complainant for a Contract Administrator position constitutes an adverse employment decision, meeting the third element.

As for the fourth element of a *prima facie* discrimination case, Respondent’s initial selection of candidate P.N., who was less than 40 years old, permits an inference of age discrimination. *Bodaghi*, 995 P.2d at 297. While Respondent argues that its interviewers were unaware of any applicant’s age, including Complainant and P.N., the ALJ finds that it is obvious from their respective reported work experience that P.N. was significantly younger than Complainant. Therefore, in selecting a candidate who was younger than 40, Complainant has established a *prima facie* case of age discrimination.

Respondent’s Non-Discriminatory Reasons for Its Non-Selection of Complainant

Upon establishment of a *prima facie* case of age discrimination, Respondent must produce evidence that Complainant’s non-selection was based on legitimate, non-discriminatory reasons. *Bodaghi*, 995 P.2d at 297-298. Once Respondent “articulates a legitimate, non-discriminatory reason” for its non-selection of Complainant “and provides evidence to support that legitimate purpose, the presumption of the *prima facie* case is rebutted, and ‘drops from the case.’” *Bodaghi*, 995 P.2d at 298, quoting *St. Mary’s Honor Center*, 509 U.S. 502, 507 (1993). Complainant must then “demonstrate by competent

evidence that the presumptively valid reasons for [Complainant's non-selection] were in fact a pretext for discrimination." *Bodaghi*, 995 P.2d at 298, quoting *Colorado Civil Rights Commission v. Big O Tires, Inc.*, 940 P.2d 397, 401 (1997). As the Colorado Supreme Court explains:

If the employer ... asserts a non-discriminatory reason for the adverse employment decision, the factfinder cannot find unlawful discrimination without further consideration of the evidence presented, including credibility determinations. Assuming the employer offers evidence sufficient to sustain the proffered legitimate purpose, the employee cannot prevail in reliance solely on the prima facie case. In that instance, the factfinder, giving full and fair consideration to the evidence offered by both sides, proceeds to determine the ultimate question: whether, in light of all the evidence in the record, the employee has proved that the employer intentionally and unlawfully discriminated against the employee.

Bodaghi, 995 P.2d at 298, citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

During the evidentiary hearing, all four of the members of Respondent's interview panel credibly testified concerning their impressions of Complainant and of applicant P.N. All four found that, while Complainant had extensive contract negotiation experience, Complainant lacked essential purchasing experience for a public entity and did not appear interested in doing the necessary day-to-day detailed work required by the Contract Administrator position.

The testimony of Purchasing Agent Ryan was especially persuasive. During his testimony, Mr. Ryan explained the wide array of skills required of purchasing agent work, including working closely with a variety of state agencies to draft Requests for Proposal (RFP), Invitations for Bid (IFB), Invitations to Negotiate (ITN), and Requests for Information (RFI) in order to procure necessary goods and services for the agencies, and coordinating the requirements of all stakeholders during the procurement process. Mr. Ryan credibly testified that his impression from Complainant's interview was that Complainant's contract negotiation experience was limited to renegotiating existing supplier contracts and rates for private commercial contracts, rather than solicitations for new suppliers for a public entity. For these reasons, Mr. Ryan did not find Complainant to be well suited for purchasing agent work.

Similarly, Director Stoner credibly testified that Complainant lacked the necessary purchasing experience for a public entity and believed that Complainant would not be the "best fit" on a team that required close, collaborative work with state agencies seeking goods and services. Mr. Rollins credibly testified that Complainant did not seem to have solicitation experience, seemed very sales oriented, and had not really done the "grunt" work required by the Contract Administrator position. Manager Reh, with whom the new Contract Administrator would need to work closely in procuring necessary goods and

services for a new agency, was concerned that this work involved a more junior role than Complainant's prior work overseeing a contract management group. Manager Reh credibly testified that she found Complainant's statement that he could serve as a mentor to be "condescending." Complainant's comments about the posted pay for the Contract Administrator position being significantly less than he had previously earned also created concerns by the interviewers that Complainant was not a good fit for this position.

In contrast to Complainant, all four interviewers consistently concluded that P.N. displayed the aptitude and enthusiasm for diving in and learning all the necessary details of purchasing agent work. During the interview, P.N. described experience with labor solicitations, procurement and goods, and emphasized the need for good communication when cooperatively working with others outside the work group. P.N. was looking for a position in which P.N. could learn and grow. All four interviewers concluded that P.N. was the best candidate for the Contract Administrator position. For these reasons, Director Stoner offered the Contract Administrator position to P.N.

The ALJ finds that the preponderance of the evidence establishes that Respondent had legitimate, non-discriminatory reasons for its non-selection of Complainant for the Contract Administrator position.

Complainant Failed to Establish That Respondent's Reasons Were Pretextual

Complainant argued that the interviewers were all mistaken about his willingness and ability to learn the necessary skills for purchasing agent work. However, a non-discriminatory reason is one that is not prohibited by CADA. If an employer provides an honest explanation for an adverse employment action, the fact that the action was based on mistaken information does not render the explanation for the action pretextual. See *St. Croix v. Univ. of Colorado Health Sciences Ctr.*, 166 P.3d 230, 242 (Colo. App. 2007). As discussed above, the ALJ found the testimony of all four members of the interview panel to be credible and their conclusions that Complainant was not well suited for purchasing agent work to be honest. *Id.* In contrast, Complainant failed to establish that Respondent's alleged reasons for its selection decision constituted pretext for age discrimination.

Respondent argues that its ultimate selection of A.B., who is 55 years old and a member of the same protected class as Complainant, further establishes that its non-selection of Complainant was not motivated by age discrimination. A.B. applied for a revised Contract Administrator position posted after Respondent decided not to hire Complainant and closed its initial search. While Respondent's ultimate selection of an applicant who is a member of Complainant's protected class is therefore not dispositive, it does provide additional support for Respondent's argument that it does not discriminate against applicants who are older than 40 years of age. In addition, Respondent's employment of Purchasing Agent Ryan, who is 76 years old and was a respected member of the interview panel, further supports a lack of discriminatory behavior by Respondent.

The ultimate burden of establishing that Respondent engaged in illegal discrimination remains at all times with Complainant. *Bodaghi*, 995 P.2d at 298. After a full and fair consideration of all the evidence in the record, the ALJ finds that Complainant has failed to prove that Respondent intentionally and unlawfully discriminated against Complainant in deciding not to select him for the Contract Administrator position.

CONCLUSIONS OF LAW

Respondent's non-selection decision was not motivated by discrimination on the basis of age.

ORDER

For the above reasons, Respondent's non-selection decision is **affirmed**. Complainant's petition is dismissed from the Board with prejudice and referred to the State Personnel Director to review Respondent's selection process and any other issues that may be within the State Personnel Director's jurisdiction.

Dated this 6th day
Of January, 2025, at
Denver, Colorado.

/s/ [REDACTED]
Susan J. Tyburski
Senior Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203

CERTIFICATE OF SERVICE

This is to certify that on the 6th day of January, 2025, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** and the attached **NOTICE OF APPEAL RIGHTS** addressed as follows:

Craig Roberts
[REDACTED]

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APPENDIX

EXHIBITS

COMPLAINANT'S EXHIBITS ADMITTED: The following exhibits were stipulated into evidence: A, B, H, I, J, K, P, Q, R, S, T, W, A-1, A-2, A-3. The following additional exhibit was admitted into evidence without objection: U. The following additional exhibits were admitted into evidence over Respondent's objection: E, O.

RESPONDENT'S EXHIBITS ADMITTED: The following exhibits were stipulated into evidence: Exhibits 1-16,19. The following additional exhibits were admitted into evidence over Complainant's objection: 17, 18.

WITNESSES

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

Phil Rollins, Purchasing Agent
Sarah Stoner, Contracts and Procurement Director
Craig Roberts, Complainant
Bree Hansen, Human Resources Business Partner
Susanne Reh, Program Manager III
Lawrence Ryan, Purchasing Agent

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).