

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2025S037

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

AVA MARIE HEATH,
Complainant,

v.

DEPARTMENT OF CORRECTIONS,
Respondent.

The State Personnel Board conducted an evidentiary hearing in this matter on April 21-22, 2025. Complainant appeared by video conference with counsel, Greg Givens, Esq. Respondent appeared by video conference, by and through counsel, Senior Assistant Attorney General, Jacob Paul, Esq. and Assistant Attorney General Monica Manning, Esq. Respondent's advisory witness, Daniel Lake, Inspector General, was also present. A list of the exhibits admitted into evidence and the witnesses who testified at hearing is attached as an appendix.

MATTER APPEALED

Complainant contends that Respondent's decision not to select her for the position of Criminal Investigator IV (the Position) was discriminatory on the basis of age or sex in violation of the Colorado Anti-Discrimination Act (CADA). As relief, she requests appointment to the Position, back pay including PERA contributions, interest, and attorney's fees and costs.

Respondent, the Department of Corrections (DOC) contends that its selection decision was not discriminatory. Respondent requests that its decision be affirmed, and this matter be dismissed with prejudice.

For the reasons discussed below, Respondent's action is **affirmed**.

PRELIMINARY ISSUES

The parties participated in a prehearing conference on April 20, 2025 by and through their respective attorneys. The parties stipulated to the confidentiality of Complainant's Exhibits K and M, as well as Respondent's Exhibits 9, 10, 13, and 21. Respondent's verbal motions to close the hearing during any testimony related to DOC's Background Standards and to redact the Administrative Law Judge's decision regarding the Background Standards are denied.

ISSUES TO BE DETERMINED

Was DOC's decision not to select Complainant for the Position discriminatory based on age and/or sex?

FINDINGS OF FACT

History and Background Standards

1. Complainant is female.
2. Complainant worked as a Criminal Investigator II with the Office of Inspector General (OIG) from May of 2016 to March of 2024. During part of this time, she managed the Background Investigation Unit (BIU), which screens applicants for employment with DOC.
3. The Background Standards, which govern applicants' eligibility for employment, include a provision that "any significant sustained work-related suspensions, reprimands, or demotions in the last three (3) years will be cause for ineligibility."
4. OIG has always considered corrective actions to be reprimands. Corrective actions are more serious than verbal reprimands and confirming memorandums because they are a step in the progressive discipline process.
5. During her time with OIG, Complainant disqualified or approved the disqualifications of applicants due to corrective actions.
6. In July of 2004, OIG amended the Background Standards to add the following provision: "[n]egative employment history with any State Agency . . . will deem the applicant ineligible. Duration will depend on the totality of the circumstances."
7. The BIU considers corrective actions to be negative employment history under the new standard.

Complainant's Corrective Actions

8. In April 2024, Complainant moved to the Colorado Department of Labor and Employment (CDLE) as a Compliance Investigator II.
9. On July 18, 2024, CDLE issued a Notice of Corrective Action stating that Complainant was "not working the hours that [she] represented and that [she was] consistently underperforming on tasks that are clearly outlined in [her] position description." Among other things, CDLE stated that Complainant failed to complete a training.

10. Complainant filed a Step I grievance regarding this Corrective Action.
11. On July 26, 2024, the CDLE issued a second Notice of Corrective Action stating that Complainant was “working overtime without authorization and without logging hours and [she] was working on a personal device.” Among other things, CDLE stated that Complainant did not create an accessible signature block for her emails as previously instructed.
12. Complainant intended to file a grievance regarding the second Corrective Action but went out on leave on August 1, 2024. Instead of returning from leave to CDLE, Complainant requested a voluntary demotion to a Criminal Investigator III position.
13. Complainant was under the impression that her voluntary demotion to a new position ended the grievance process for both Corrective Actions, so she did not pursue it further.

The Selection Process

14. OIG posted a job opening for the Position with an opening date of September 11, 2024. There were two openings included in this posting – one in Cañon City and one in Crowley County.
15. The posting indicated that all applicants were required to pass a background investigation, integrity interview, and psychological evaluation.
16. Complainant submitted her application for the Position on September 24, 2024. She was 57 years old at the time of her application.
17. On October 4, 2024, OIG notified Complainant that she met the minimum qualifications for the Position. On the same date, OIG notified compliant that she was one of the six top candidates placed on the referral list for the Position.
18. On October 15, 2024, a Panel consisting of OIG Chief Inspectors Michael Barnett, Stacey Pray and William Claspell interviewed Complainant.
19. The interview consisted of nine questions. The Panel asked all the candidates the same questions.
20. For the first question, the Panel asked Complainant whether she would accept a starting salary of \$6,939 per month. Complainant stated her belief that she would be entitled to a higher salary under the step-pay program due to her previous time in the job series.
21. Complainant did not make a favorable impression during the interview compared to other candidates. In particular, she was unable to fully respond to a question asking the candidates to list three exceptions to the requirement for a search

warrant. She was also unable to fully identify the legal requirements when executing an order for non-testimonial identification. The Panel expected better answers from someone with Complainant's experience.

22. Immediately following the interview, Complainant participated in a skills test. In one exercise, she was asked to complete an affidavit for a search warrant, which she failed to do because, in her opinion, there was insufficient probable cause for the warrant. Complainant did not submit anything in writing justifying this opinion or otherwise explaining why she did not complete the search warrant. In another exercise, Complainant was asked to package a letter from an inmate as evidence. She failed to package it correctly and instead took notes on the back of the letter.
23. Following the skills test, Complainant participated in an integrity interview. The interview was conducted by Heather DeLaurentis, Criminal Investigator II, who asked questions according to a standard script. All candidates were asked the same questions, although there could be additional follow-up as needed.
24. During the integrity interview, Complainant disclosed the CDLE's July 18 and 26, 2024 Corrective Actions. Complainant stated that the first Corrective Action was due to not being proficient in Google Suite and for missing a training, and the second Corrective Action was due to a non-compliant email signature and for working off duty without authorization.
25. After completing the interview, DeLaurentis filled out the Integrity Interview Questionnaire form.
26. Stephanie Tiffany, Background Supervisor and Technician V, reviewed the Integrity Interview Questionnaire form and determined that Complainant was ineligible for the Position because the two Corrective Actions constituted negative employment history with a state agency.
27. Tiffany believed that the recency of Complainant's Corrective Actions, as well as the fact that there were two within a very short period, rendered Complainant temporarily ineligible for employment by DOC. Tiffany did not read the Corrective Actions because she believed Complainant's description of them during the integrity interview was sufficient to make her decision.
28. Tiffany's decision to deem Complainant ineligible was reviewed by Adams, as he does in all cases where an applicant is deemed ineligible. Adams agreed that Complainant's two Corrective Actions in a short amount of time were disqualifying, although he did not read them.
29. On October 23, 2024, Tiffany sent Complainant a letter informing her that she was deemed ineligible for the Position.

30. Lake was not involved in the decision to deem Complainant ineligible for the Position. Adams informed Lake of the decision after it had been made so that Lake would know not to give Complainant further consideration.
31. Separate from the background process, the Panel recommended to Lake that he hire JP and RM based on their interviews and skills tests.¹ All three Panel members were “on the same page” regarding this recommendation.
32. The Panel made its recommendation without any input or pressure from Lake.
33. After reviewing their applications, Lake decided to adopt the Panel’s recommendation and hire RM and JP.
34. RM is a male who is under the age of forty. JP is female who is over the age of forty. While her exact age was not provided, her application materials indicate she was in high school in 1999 and in college in 2000.
35. After RM and JP’s selection, Human Resources reviewed and made salary recommendations to Lake. Lake then made the final decision regarding their starting salaries.
36. Complainant timely appealed her non-selection for the Position.

ANALYSIS

A. Complainant’s Discrimination Claim

CADA prohibits an employer from taking any adverse action against an employee on the basis of sex or age. C.R.S. § 24-34-402. To establish a *prima facie* case of discrimination:

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).

¹ The initials of non-parties are used to protect their privacy.

Complainant Established a *Prima Facie* Case of Discrimination

As to the first element of a *prima facie* claim of discrimination, Complainant is female and over the age of forty. She is a member of a protected class based on sex and age. Complainant has therefore established the first element of a *prima facie* claim of discrimination on the basis of sex and age.

As to the second element of a *prima facie* claim of discrimination, Complainant met the minimum qualifications for the Position based on the review of her application. She was qualified for the job at issue. Complainant has therefore established the second element of a *prima facie* claim of discrimination on the basis of sex and age.

As to the third element of a *prima facie* claim of discrimination, Complainant was not selected for the Position, which is an adverse employment action. Complainant has therefore established the third element of a *prima facie* claim of discrimination on the basis of sex and age.

As to the final element of a *prima facie* claim of discrimination, an inference of discrimination may be established if there is a substantial age difference between a complainant and the successful candidate. See *George v. Ute Water Conservancy Dist.*, 950 P.2d 1195, 1198 (Colo. App. 1997). A ten-year age difference is substantial. *Id.* at 1198-1199, citing *Hartley v. Wisconsin Bell, Inc.*, 124 F.3d 887 (7th Cir.1997). In this case, one of the candidates who was hired was under the age of forty. The other selected candidate, JP, graduated high school in 1999 or 2000. Assuming she graduated at the typical age, JP is approximately 44 years old, which is more than ten years younger than Complainant's age of 57. This is a substantial difference, which allows an inference of discrimination. Complainant has therefore established the final element of a *prima facie* claim of discrimination on the basis of age.

However, of the two selected candidates, one was female. Since this 50% sex ratio reflects the general population, there is no inference of discrimination based on sex. Complainant has not presented any evidence or arguments that would otherwise establish such an inference. Complainant has therefore failed to establish the final element of a *prima facie* claim of discrimination on the basis of sex. As a result, the sex discrimination claim will not be addressed in the remainder of this Initial Decision.

Respondent Presented Legitimate Reasons for Its Non-Selection of Complainant

If an employee establishes a *prima facie* case of discrimination, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Colorado Civil Rights Comm'n v. Big O Tires, Inc.*, 940 P.2d 397, 401 (Colo. 1997).

Here, DOC provided two reasons for its non-selection of Complainant: 1) Complainant was temporarily ineligible for employment based on the Background Standards because of the recent Corrective Actions imposed by the CDLE; and 2) even

if she had been eligible, she would not have been selected due to her poor performance in the interview and skills test compared to the two selected candidates. These are legitimate reasons for Complainant's non-selection for the Position that are not related to age discrimination.

Complainant Failed to Establish that the Reasons for Her Non-Selection Were Pretext

"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 is 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). This requires a showing that "that the tendered reason for the employment decision was not the genuine motivating reason, but rather was a disingenuous or sham reason." *McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125 (10th Cir. 1998) (citations omitted).

Here, DOC's witnesses Tiffany, Adams, and Lake credibly testified that corrective actions have always been disqualifying as a reprimand under the previous Background Standards and are now also disqualifying as negative employment history under the new Background Standards. Their testimony is supported by evidence that multiple job applicants over the last two years have been disqualified due to reprimands and/or corrective actions. Their testimony is further supported by Complainant herself who testified that she disqualified applicants during her tenure with the OIG due to corrective actions, although she did not think it was warranted in her case.

Complainant testified that she did not think the corrective actions in her case were disqualifying because they did not rise to the level of misconduct. However, the Background Standards mandate the temporary disqualification of applicants due to any negative employment history, not just misconduct. It should be noted that while some of the grounds for disqualification under the Background Standards are discretionary (may deem the applicant ineligible), disqualification for negative employment history is not, as "Negative employment history with any State Agency, or Law Enforcement/Correctional Agency – public, private, or contracted – **will deem** the applicant ineligible (emphasis added)." Similarly, "any significant work-related reprimands or demotions in the last three years **will be** cause for ineligibility (emphasis added)." Lake testified that any corrective action within 6-12 months of the application is an automatic disqualification, irrespective of whether it was for performance issues or misconduct. Complainant's two Corrective Actions, followed by a voluntary demotion, constitute negative employment history and/or work-related reprimands.

Complainant argues that Tiffany or Adams should have reviewed the Corrective Actions before Complainant was deemed ineligible for employment. However, in addition to the fact that the disqualification for negative employment history with a state agency is

not discretionary under the Background Standards, Tiffany testified that Complainant's description of the substance of the Corrective Actions was sufficient, particularly since there were two Corrective Actions within a very short period of time. In any event, review of the Corrective Actions reveals that the underlying issues went beyond just missing a training, a non-compliant e-mail signature, and working off duty without authorization, as described by Complainant. In fact, the Corrective Actions raise serious issues as to Complainant's basic competence and accountability. Had Tiffany or Adams reviewed the Corrective Actions, it probably would have confirmed their decision to deem Complainant ineligible for employment with DOC.

DOC deemed Complainant ineligible for employment based on objective Background Standards. There is no evidence in the record that this decision was pretextual. On the contrary, Complainant was treated the same as any other applicant with a negative employment history. It should be noted that Complainant's disqualification is temporary, and that she may reapply at any time, which is evidence against age discrimination.

Even if Complainant had not been deemed ineligible, the Panel recommended two other candidates based on the interviews and skills test. Complainant was unable to fully answer interview questions regarding the Colorado exceptions to the requirement for a search warrant and for executing an order for non-testimonial identification. While Complainant may have more experience than the selected candidates, her inability to answer these very basic interview questions rightfully concerned the Panel. In addition, she failed the portion of the skills test that required her to complete an affidavit for a search warrant based on a hypothetical fact pattern. Complainant also failed the portion of the skills test that required her to package a letter from an inmate as evidence. She also took notes on the letter, which would have destroyed its evidentiary value. Again, Complainant's demonstrated inability to perform fundamental skills required for the Position, despite her lengthy experience, is a legitimate business reason for DOC's selection of other candidates.

Complainant argues that she was not selected because her age and experience meant that she would receive a higher salary than the posted starting salary of \$6,939 per month under the state's step-pay program. However, there is no evidence in the record that Tiffany and Adams, who deemed Complainant ineligible, or the Panel, who recommended other candidates, had any concern regarding salaries. On the contrary, salaries were determined by Human Resources and Lake only after the selection process had been completed.

DOC chose not to select Complainant for the Position because she was deemed ineligible and because the Panel recommended other candidates. Given that Complainant failed the interview, the skills tests, and the background check, she has not proven by a preponderance of the evidence that DOC's reasons for its decision were pretextual.

B. Attorney's Fees and Costs

The Board is authorized to award attorney fees and costs if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment, or was otherwise groundless. C.R.S. § 24-50-125.5. A groundless personnel action is one in which it is found that "despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action. . ." Board Rule 8-33(C). Frivolous actions, on the other hand, are actions in which it is found that "no rational argument based on the evidence or law was presented." Board Rule 8-33(A). A personnel action made in bad faith, that is malicious, or that was a means of harassment "means that it was pursued to annoy or harass, made to be abusive, stubbornly litigious, or disrespectful of the truth." Board Rule 8-33(8).

DOC's decision to select two candidates for the Position other than Complainant was not frivolous, groundless, malicious, in bad faith, or a means of harassment. Complainant is therefore not entitled to attorney fees and costs.

CONCLUSIONS OF LAW

Based on the above analysis, this ALJ concludes that DOC's decision not to select Complainant for the position of Criminal Investigator IV was not discrimination on the basis of sex or age.

ORDER

IT IS THEREFORE ORDERED: that Respondent's decision not to select Complainant for the position of Criminal Investigator IV is affirmed, and this appeal is dismissed with prejudice.

Dated May 28, 2025 by:

/s/ [REDACTED]—
Charlotte A. Veaux
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 May, 2025, I electronically served a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** as follows:

Greg E. Givens, Esq.
greg@givenslawpc.com

Jacob W. Paul, Esq.
Senior Assistant Attorney General
jacob.paul@coag.gov

Monica Manning, Esq.
Assistant Attorney General
monica.manning@coag.com

_____

APPENDIX

Complainant's Witnesses:

Ava Marie Heath
Danny Lake, Inspector General
Darren Adams, Criminal Investigator IV
Heather DeLaurentis, Criminal Investigator II
Stephanie Tiffany, Background Supervisor

Complainant's Admitted Exhibits: B-D, F, S, L

Respondent's Witnesses:

David Mixer, Human Resources Analyst IV
William Claspell, Criminal Investigator V
Michael Barnett, Criminal Investigator V

Respondent's Admitted Exhibits: 1-21

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS:

To abide by the decision of the Administrative Law Judge ("ALJ").

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).

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. 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).