OFFICE OF COMPLIANCE
LA 200, John Adams Building, 110 Second Street, S.E.
Washington, DC 20540-1999

Gerald Evans and Kevin Paige, Appellants	Case Nos:	13-AC-56 (CV, AG, RP) 13-AC-71 (CV, RP)
v.		
Office of the Architect of the Capitol, Appellee.		

Before the Board of Directors: Barbara L. Camens, Chair; Alan V. Friedman; Roberta L. Holzwarth; Susan S. Robfogel; Barbara Childs Wallace, Members.

DECISION OF THE BOARD OF DIRECTORS

This consolidated appeal is before the Board of Directors ("Board") pursuant to the appellants' petition for review ("PFR") of the Hearing Officer's April 26, 2016 Decision and Order, which found unproven their claims that the Office of the Architect of the Capitol ("AOC") denied them promotion or pay increases to the GS-13 level because of racial discrimination (African American) and in retaliation for opposing racial discrimination and reporting unsafe working conditions covered by the Occupational Safety and Health Act ("OSHAct").

Upon due consideration of the Hearing Officer's Order, the parties' briefs and filings, and the record in these proceedings, the Board affirms the Hearing Officer's decision on all claims.

I. Background

The appellants, along with six other Utility Distribution System ("UDS") team members, encumber the position of Engineering Technician (Mechanical), GS-0802-12, at the AOC's Utilities and Power Plant Operations ("Capitol Power Plant"). In January 2015, following counseling and mediation, the appellants filed their Complaints with the Office of Compliance ("OOC"), which were subsequently consolidated. The consolidated Complaints contained 22 counts alleging racial discrimination; retaliation for opposition to racial discrimination and for opposition to matters made unlawful by the OSHAct; and retaliation for participating in and prosecuting this matter before the OOC. Under each of the foregoing bases the appellants alleged the following acts of discrimination and retaliation: (1) refusal to noncompetitively promote them to a GS-13 Grade based on an accretion of duties; (2) refusal to compensate them

for their performance of higher graded duties than their GS-0802-12 positions; (3) denial of a non-competitive promotion to a GS-13 grade and position pursuant to an audit of their GS-0802-12 current positions; (4) denying them non-competitive promotions to a GS-13 grade and positions by depriving them of an audit independent of the audit conducted on the other GS-0802-12 employees of the UDS Team; (5) denying them a non-competitive promotion to a GS-13 Facility Operations Position; (6) denying them a non-competitive promotion by depriving them of the necessary training and building blocks for a promotion; (7) creation of a racially-based hostile work environment; and (8) removal of their higher graded duties and responsibilities.

In a prehearing ruling, the Hearing Officer denied the AOC's motion for summary judgment as to the appellants' claims of racial and retaliatory discrimination regarding their non-selection or identification for promotion to the GS-13 level as the result of a position classification review finalized and issued in March 2012, but granted the motion as to all other claims.[1] *See* Decision & Order on Respondent's Motion for Summary Judgment (Sep. 2, 2015).

The matter thus proceeded to hearing on October 15-16, and December 1, 2 and 4, 2015. In an April 25, 2016 Decision & Order, the Hearing Officer made the following findings of fact, which, unless otherwise noted, are undisputed:

In November 2007, the AOC selected the appellants as members of an initial nine-member UDS team to work on a temporary assignment in the underground tunnel system of the U.S. Capitol Buildings. The UDS team was composed of two African Americans and seven Caucasians. The mission of the UDS team was to improve and repair the tunnels by eliminating hazards found during a safety inspection by the OOC. The UDS team members received a 25 percent salary differential in recognition of the hazardous nature of their mission. Decision & Order at 2-3.

By November 2011, the tunnel repairs had been completed. On January 17, 2012, the AOC terminated the UDS team's hazardous duty pay differential. Around March 2012, the AOC Chief Operating Officer suggested that an independent position classification audit be conducted by a contractor in response to assertions by UDS team members that they were working at the GS-13 level. The classification review was conducted by a contractor, PMI. PMI's draft report recommended that, of the five Engineering Technicians (Mechanical), GS-0802-12, solely the appellants should be reclassified upwards to Distributed Systems Operations Specialist, GS-1601-13. Subsequently, AOC officials, in several internal emails, took issue with the methodology employed by PMI contract classifier Oliver Lewis, and particularly disagreed with the proposed upward reclassification of the appellants' positions as well as that of an employee in an administrative classification category, who was Caucasian. Lewis acknowledged that upward grading of those positions would be subject to competitive procedures. Accordingly, he omitted the recommendation that the three employees' positions be reclassified from his Final Review, which was issued in March 2012. The appellants objected to the classification review as being inaccurate. Decision & Order at 3-4.

[1] The appellants do not appear to challenge the Hearing Officer's partial grant of summary judgment on review. In any event, we find that the record supports the Hearing Officer's decision.

In the Classification Review, Lewis also recommended that at some future time consideration be given to establishing a generalized classification for all of the Capitol Power Plant that would combine technical engineering support, administrative project management and Contracting Officer's Technical Representatives tasks. Capitol Power Plant management thereafter recommended the establishment of a GS-13 Engineering Technician (Mechanical) Leader position. The recommendation was submitted to the AOC's Position Management Review Board (PMRB), the membership of which includes the AOC's management at the highest levels. The PMRB denied the request for a higher-graded position on the basis that it would create negative organizational precedent by imposing a small span of control (1 supervisor for 7 employees). Decision and Order at 4.

In April 2013, the appellants and one other UDS team member reported a work-related incident to General Engineer Supervisor Dave Willard, to the effect that the UDS Team was not attending to their positions when the Team was "charging up" a steam line. Willard disbelieved that report but the report was later verified after they brought it to the attention of Director Christopher Potter. The appellants testified that on several occasions they complained to management, as well as to Lewis during his position classification audit, that their work tunnels were dangerous under OSHA standards. They also made two reports of unsafe working conditions to the OOC, in 2013 and 2015, respectively. The OOC maintained their anonymity in dealing with the AOC regarding those reports. Decision & Order at 6.

During the first half of 2013, the appellants met with the AOC's EEO officer out of their concern that they were experiencing a hostile work environment and retaliation. The EEO officer provided them information regarding the legal standards for pursuing such claims. The Hearing Officer found no evidence that the AOC was aware of the appellants' EEO contact. Decision & Order at 7.

As discussed below, the Hearing Officer found that the appellants failed to establish that the AOC denied them promotion or pay increases to the GS-13 level because of their race or in reprisal for opposing racial discrimination and reporting unsafe working conditions covered by the OSHAct. The appellants have timely filed a PFR of the Hearing Officer's Decision and Order; the AOC has filed a Response in opposition to the appellants' PFR; and the appellants have timely filed a reply to the AOC's Response.

III. Standard of Review

The Board's standard of review requires it to set aside a Hearing Officer's decision if it determines the decision to be: (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; (2) not made consistent with required procedures; or (3) unsupported by substantial evidence. 2 U.S.C. § 1406(c); *Rouiller v. U.S. Capitol Police,* Case No. 15-CP-23 (CV, AG, RP), 2017 WL 106137, at *6 (Jan. 9, 2017). In making determinations under subsection (c), the Board shall review the whole record, or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. 2 U.S.C. § 1406(d).

IV. Analysis

A. The Board's Analytical Framework for Analyzing Retaliation and Discrimination Claims

On review, the appellants reiterate their claims that the AOC discriminated against them based on race and retaliated against them for engaging in protected EEO and OSH activity. Before addressing the appellants' specific contentions on review, we first clarify the Board's analytical framework for evaluating such claims under the Congressional Accountability Act ("CAA") in cases in which a hearing has been held and the record has been fully developed.

In denying the appellants' EEO and OSH retaliation claims, the Hearing Officer applied the evidentiary standards set forth in *Britton v. Office of the Architect of the Capitol*, 02-AC-20 (CV, RP), 2005 WL 6236944 (May 23, 2005) and *Evans v. U.S. Capitol Police Bd.*, Case No. 14-CB-18 (CV, RP), 2015 WL 9257402, at *6 (Dec. 9, 2015). Decision & Order at 7-8. In *Britton*, we noted that in drafting the CAA, Congress chose not to incorporate verbatim each of the retaliation provisions that exist in the labor and employment laws made applicable by the CAA. *See generally, Rouiller*, 2017 WL 106137, at *9-10. Instead, Congress adopted Section 207(a), which provides:

> It shall be unlawful for an employing office to intimidate, take reprisal against, or otherwise discriminate against, any covered employee because the covered employee has opposed any practice made unlawful by this chapter, or because the covered employee has initiated proceedings, made a charge, or testified, assisted, or participated in any manner in a hearing or other proceeding under this chapter.

2 U.S.C. § 1317.

The Board ultimately adopted a Title VII-based approach to analyze all Section 207 claims. *See Britton*, 2005 WL 6236944, at *7. Therefore, the Board held that to establish a claim for retaliation under the CAA, the employee is required to demonstrate that: (1) he engaged in activity protected by Section 207(a) of the CAA; (2) the employing office took action against him that is reasonably likely to deter protected activity; and (3) a causal connection existed between the two. *Id.*[2] If the employee so demonstrates, the employing office thereafter is required to rebut the presumption of retaliation by articulating a legitimate non-discriminatory reason for its actions. *Evans*, 2015 WL 9257402, at *6. The articulation of a legitimate, non-retaliatory reason for the adverse employment action shifts the burden of proof to the complainant to show that the employer's reason is merely a pretext for unlawful retaliation. *Id.; see Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255-56 (1981).

Similarly, we have held that, to establish a prima facie case of discrimination under Title VII, the employee must show that: (1) he is a member of a protected class; (2) he suffered an

[2] In *Rouiller*, the Board stated that it saw no functional distinction between the "reasonably likely to deter protected activity" standard in *Britton* and the "dissuade[ ] a reasonable worker from making or supporting a charge of discrimination" standard articulated in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 57 (2006). *Rouiller*, 2017 WL 106137, at *10.

adverse employment action; and (3) the action gives rise to an inference of discrimination. *Rouiller*, 2017 WL 106137 *8 (citing *Udoh v. Trade Ctr. Mgmt. Assoc.*, 479 F. Supp. 2d 60, 64 (D.D.C. 2007)). The plaintiff "must carry the initial burden . . . of establishing a prima facie case of racial discrimination." *Id.* (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). If the plaintiff meets this burden, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason" for its action. *Id.* If the employer succeeds, then the plaintiff must "be afforded a fair opportunity to show that [the employer's] stated reason . . . was in fact pretext" for unlawful discrimination. *Id.*

In *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983), however, the Supreme Court held that when, as here, a case is past that stage of the proceedings where the parties have presented their evidence on the discrimination issue, the rebuttable presumption created by the establishment of a prima facie case "drops from the case." The Court stated:

> [W]hen the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the factfinder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the *McDonnell–Burdin*e presumption "drops from the case," and "the factual inquiry proceeds to a new level of specificity." . . . The District Court [is] then in a position to decide the ultimate factual issue in the case. The "factual inquiry" in a Title VII case is "[whether] the defendant intentionally discriminated against the plaintiff." . . . The prima facie case method established in *McDonnell Douglas* was "never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant[;] [t]he district court has before it all the evidence it needs to decide whether "the defendant intentionally discriminated against the plaintiff."

Id. at 714-15 (citations and footnotes omitted).

The Court reiterated this principle in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), stating that once the employer introduced evidence to rebut the employee's prima facie case, "the shifted burden of production became irrelevant." *Id.* at 507. At that point, the "presumption, having fulfilled its role of forcing the [employer] to come forward with some response, simply drops out of the picture," and the trier of fact should decide, on the full record, whether the employee has met her ultimate burden of persuasion that the employer discriminated—a burden which, the Court noted, "remains at all times" with the employee. *Id.* at 507, 511.

The Equal Employment Opportunity Commission ("EEOC") has similarly held that, where the record is complete and a hearing has been held, it is unnecessary to follow the traditional burden-shifting order of analysis; rather, "the inquiry shifts from whether the

complainant has established a prima facie case to whether s/he has demonstrated by a preponderance of the evidence that the agency's reason for its actions was a pretext for discrimination." *Pierce v. Soc. Sec. Admin.*, EEOC Appeal No. 01961642, slip op. at 2 (Feb. 20, 1998); *see also Jeffries v. Dep't of the Treasury*, EEOC Appeal No. 01962760, slip op. at 2 (Mar. 10, 1998) (stating that "where the record is fully developed . . . the factual inquiry can proceed directly to . . . the ultimate issue of whether appellant has shown by a preponderance of the evidence that her termination was motivated by discrimination, and whether the proffered explanation is the true reason for the agency's action or merely a pretext for discrimination.").

Furthermore, in *Brady v. Office of Sergeant at Arms*, a case arising under the CAA, the U.S. Court of Appeals for the District of Columbia held that

> in a Title VII disparate-treatment suit where an employee has suffered an adverse employment action and an employer has asserted a legitimate, non-discriminatory reason for the decision, the district court need not—*and should not*—decide whether the plaintiff actually made out a prima facie case under *McDonnell Douglas.*

520 F.3d 490, 494 (D.C. Cir. 2008) (emphasis in original); *see also, Clendenny v. Office of the Architect of the Capitol*, 2017 WL 627367 *7 (D.D.C. Feb. 15, 2017) (applying *Brady* to retaliation claims under Section 207(a) of the CAA).

Although *Brady* concerned a motion for summary judgment, as did *Clendenny*, the court of appeal's holding applies with equal force to Section 207(a) retaliation or Title VII cases in which a hearing has been held and the record is complete. We therefore hold that, where a hearing has been held and the record is complete, it is unnecessary to follow the traditional burden-shifting order of analysis; rather, the question of whether the employee has established a prima facie case drops from the case, and the inquiry shifts to whether the employee has demonstrated by a preponderance of the evidence that the employing office's proffered reason for its actions was a pretext for retaliation or discrimination.

In this case, the Hearing Officer denied the AOC's motion for summary judgment except as to appellants' discrimination and reprisal claims concerning the position classification review finalized and issued in March 2012; a 5-day hearing followed; and neither party has argued that the record was not fully developed on those claims. Rather than engaging in a burden-shifting analysis, therefore, we instead review the evidence as a whole to determine whether the appellants met their ultimate burden of proving that their non-selection or identification for promotion to the GS-13 level was in reprisal for their EEO or OSH activity or because of their race. As explained below, the Hearing Officer correctly determined that the appellants did not meet their burden.

B. The Hearing Officer Correctly Determined that the Appellants Failed to Establish Their Retaliation Claims.

The Hearing Officer determined that the position classification determination at issue could not have been issued in reprisal for appellants' asserted protected EEO and OSH activity because the determination was issued prior to that activity. Decision & Order at 7-8. We agree.

As stated above, the final review was issued in March 2012. The appellants, however, concede that their protected EEO and OSH activity did not occur until 2013 and 2015. The appellants stated that it was not until the first half of 2013 that they met with the AOC's EEO officer out of their concern that they were experiencing a hostile work environment and retaliation. There is no evidence that AOC management was aware of the appellants' EEO contact, but even if it was aware, there is no dispute that the contact occurred after the contested position classification action in March 2012. HT 120-24; Appellants' Ex. 10. Accordingly, the Hearing Officer correctly concluded that the appellants failed to establish a causal relationship between any protected EEO activity and the contested position classification determination.

We also agree with the Hearing Officer that the appellants fare no better regarding their retaliation claim for opposition to what they considered unsafe working conditions. Decision & Order at 10. It is undisputed that it was not until April 2013 that the appellants and one other UDS team member reported a work-related incident to then General Engineer Supervisor Willard, to the effect that the UDS Team was not attending to their positions when the Team was "charging up" a steam line. HT 136-37, 336-39. The appellants also made two reports of unsafe working conditions to the OOC in 2013 and 2015. HT 87-90, 94, 207, 225, 280, 302; AOC Exs. 23-24. Again, because the position classification preceded the appellants' reports, it could not have been issued in reprisal for the reports. *Id.* To the extent that the appellants claim that their reports to their supervisors in the ordinary course of their remediation duties constituted activity protected by Section 207(a) of the CAA, the record is devoid of evidence that the AOC took any action against them that was reasonably likely to deter such activity, or that such activity was causally connected to the March 2012 position classification determination.

Although the appellants also assert that on several occasions they complained to PMI contract classifier Lewis during his position classification audit that their work tunnels were dangerous under OSHA standards, *see* HT 220-21, the record contains no evidence that AOC decision makers knew of the appellants' complaints to Lewis or were influenced or manipulated by others who knew. To establish a causal connection in a retaliation case, the employee must first show that the decision maker was aware of the protected activity. *See Sheehan v. Office of the Architect of the Capitol,* 08-AC-58 (CV, RP), 2011 WL 332312, at *4 (Jan. 21, 2011) (citing *Goldsmith v. City of Atmore,* 996 F.2d 1155, 1163 (11th Cir.1993); *Manning v. Chevron Chemical Co.,* 332 F.3d 874, 883 (5th Cir. 2003); and *Alexander v. Wis. Dep't of Health & Family Servs.,* 263 F.3d 673, 688 (7th Cir. 2001)). We find no basis in the record for inferring that the AOC was apprised of the appellants' complaints to Lewis or that those complaints played any role in the position classification determination at issue.[3] Furthermore, we reject as

[3] We decline the appellants' invitation to draw an adverse inference, based on the AOC's failure to call Lewis as a witness, that the AOC compromised Lewis's independence. PFR at 12-13. As stated above,

contrary to the foregoing precedent the appellants' suggestion that "notice and knowledge of Petitioners' protected opposition made known to . . . Lewis, as a matter of law, was notice and knowledge made known to Respondent management." PFR at 24-26.[4] Accordingly, the appellants failed to establish that the AOC took action against them in order to deter their protected activity or that any causal connection existed between their protected activity and the March 2012 position classification determination.

C. The Hearing Officer Correctly Determined that the Appellants Failed to Establish Their Discrimination Claims.

As an initial matter, we note that the Hearing Officer stated that the appellants "may prove their race discrimination claim through *direct evidence* of discrimination or inferentially by establishing that they had been *treated disparately* in the position classification process. Decision & Order at 8 (emphasis in original). Similarly, the Board has recognized that discrimination can be proved either with direct or circumstantial evidence. *See, e.g., Rouiller*, 2017 WL 106137, at *8. Title VII, however, makes no distinction between the weight or value to be given to either direct or circumstantial evidence. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99–100 (2003) (recognizing that circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence). As discussed below, the Hearing Officer thoroughly considered the record evidence as a whole and properly concluded that the appellants failed to meet their burden.

First, we agree with the Hearing Officer that two events involving the appellants' immediate supervisor, which occurred after the challenged position classification action, do not establish their discrimination claim. Decision & Order at 8. The first event related to the supervisor disbelieving the appellants when they reported that other UDS team members were not at their posts during a steam startup operation. *Id.* The second involved their supervisor rebuking them for failing to sign in although Caucasian employees were not so required. *Id.* However, as the Hearing Officer found, the appellants' second-line supervisor repudiated that action, had the first-line supervisor apologize to them, and shortly thereafter reassigned him to non-supervisory duties. *Id.* The Hearing Officer concluded that these events were isolated and not episodic in nature, and in any event, concerned a supervisor who had no meaningful role in the challenged position classification outcome. *Id.* We agree that the appellants failed to demonstrate that these events were causally connected in any way to the March 2012 position classification determination.

Lewis is not an AOC employee, and the appellants have failed to explain why they did not call him as a witness.

[4] We also reject the appellants' contention on review that they established their claims under a "cat's paw" theory of liability. PFR at 19-20. Under this theory, if a supervisor performs an act motivated by animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable, even if the ultimate decision maker as to the adverse action did not have a discriminatory animus. *See Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013). Here, however, the appellants have failed to identify any act motivated by improper animus that materially interfered in the PMRB review process or was the proximate cause of the March 2013 position classification determination.

Second, we agree with the Hearing Officer that the appellants failed to establish that they were treated disparately. Decision & Order at 9. It is undisputed that no member of the UDS Team was upgraded to GS-13 in connection with this or any other position classification matter. *Id.* As the Hearing Officer correctly determined, even the PMI draft position classification report upon which the appellants rely and Lewis's subsequent submissions acknowledged that any such upgrading would require competitive procedures. *Id.* Therefore, the appellants and all of their comparators would have been eligible to apply and compete for those GS-13 positions, had they been established.[5] Accordingly, the appellants failed to show that they were passed over for a higher grade position or pay grade. Instead, as the Hearing Officer found, the appellants and all of their comparators were denied that opportunity because none of the positions were ever upgraded. *Id.*[6]

Third, we also agree with the Hearing Officer that the AOC articulated a legitimate and non-discriminatory explanation for its actions through the testimony of its employee and expert witness, John Coghlan, a Human Resources Specialist with 45 years of experience who is currently employed at the AOC Human Capital Management Division and the Employment Classification Branch. Decision and Order at 9; HT 443. Coghlan reviewed the PMI initial draft and summary as prepared by contract classifier Lewis for accuracy and adequacy under 5 U.S.C. chapter 51and found what he considered to be several "fatal flaws" in Lewis's reasoning in proposing GS-13 upgrades for the appellants and a Caucasian employee in another classification, which are summarized in the Decision and Order. *See* Decision & Order at 5; HT 445-709; AOC Exs. 3-10. In finding Coghlan to be "a highly authoritative and credible witness" whose testimony was "persuasive and compelling," the Hearing Officer stated that Coghlan "explained an arcane and technical system cogently and clearly," and that he was "naturally responsive to all questions and plainly sought to elucidate rather than simply advance an agenda to validate Respondent's litigating position." Decision & Order at 6. Although the Hearing Officer found the appellants' testimony regarding their perceived entitlement to a GS-13 upgrade was "no less genuine or sincere," he determined that "they lack the position classification gravitas so convincingly presented by Coghlan." Notwithstanding the appellants' characterization of Coghlin's review as "after-the fact" and his testimony as a "misleading and false narrative," we find no basis to disturb the Hearing Officer's credibility determinations, which find ample support in the record. *Patterson v. Office of the Architect of the Capitol*, 08-AC-48 (RP), 2011 WL 3647157 (July 27, 2011); *Sheehan*, 2011 WL 484745, at *6 (observing that credibility determinations are entitled to substantial deference, because it is the Hearing Officer who sees the witnesses and hears them testify, while the Board and the reviewing court look only at cold

[5] For this reason, the appellants' suggestion also fails that the actions of the AOC prevented them from obtaining promotions. *See* PFR at 28. Furthermore, we note that Lewis first identified the position of Richard Edmonds, a Caucasian, as a GS-13 level position, the AOC challenged this designation, as it later challenged the same designation for the appellants' positions. AOC Ex. 3 at 5, Appellant's Ex. 17.

[6] We find no support in the record for the appellants' claim that the issue of their promotions was presented to the "Promotion Board." PFR at 20. Although there was testimony that the PMRB considered and rejected Lewis's recommendation in his classification review that the AOC create one Engineering Technician Leader position at the GS-13 level, the purpose of the PMRB is to identify positions to be created, not to place employees in certain positions. HT 729; AOC Ex. 11.

records); *Purifoy v. Dep't of Veterans Affairs*, 838 F.3d 1367, 1373 (Fed. Cir. 2016) (credibility determinations are entitled to deference not only when they explicitly rely on demeanor but also when they do so "by necessary implication"); *Palace Sports & Entm't v. NLRB*, 411 F.3d 212, 220 (D.C. Cir. 2005) (observing that the court will not disturb the Board's adoption of an ALJ's credibility determinations unless those determinations are hopelessly incredible, self-contradictory, or patently unsupportable).

Although the appellants strenuously disagree with the AOC's explanation for their non-promotion or non-pay upgrade, they have not shown that explanation to be intentionally false and a subterfuge or ruse to mask racial discrimination. Evidence indicating that an employer misjudged an employee's performance or qualifications is, of course, relevant to the question whether its stated reason is a pretext masking prohibited discrimination. *See Gage v. Office of the Architect of the Capitol*, Case No. 00-AC-21 (CV), 2001 WL 36175210, at *5 (Nov. 14, 2001). Nonetheless, the Board may not "second-guess an employer's personnel decision absent demonstrably discriminatory motive." *Id.* (quoting *Milton v. Weinberger*, 696 F.2d 94 (D.C. Cir. 1982)).[7] Once the employer has articulated a non-discriminatory explanation for its action, as did the AOC here, the issue is not "the correctness or desirability of [the] reasons offered . . . [but] whether the employer honestly believes in the reasons it offers." *Id.* (quoting *McCoy v. WGN Cont. Broad. Co.*, 957 F.2d 368, 373 (7th Cir. 1992)); *see also Pignato v. Am. Trans Air Inc.*, 14 F.3d 342, 349 (7th Cir.1994) ("It is not enough for the plaintiff to show that a reason given for a job action is not just, or fair, or sensible. He must show that the explanation given is a phony reason."). We find no evidence here that the AOC's stated legitimate reasons for its position classification determination were not the actual ones, or that they are a pretext masking prohibited discrimination.

ORDER

For the foregoing reasons, the Board affirms the Hearing Officer's decision to dismiss all claims.

It is so ORDERED.

Issued, Washington, DC, March 13, 2017

[7] Thus, for example, because we find no discriminatory motive in this case, we lack the authority to consider the appellants' contention that Coghlan "substitutes in error the regulations established by the Office of Personnel Management for the Executive Branch of the government for the authority of the Architect of the Capitol pursuant to 2 U.S.C. § 60-l(a) and (b) and merit classification regulations duly promulgated by the Architect of the Capitol pursuant to 2 U.S.C. 183l § (c)(l)(C)." PFR at 10.