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

WILLIAM H. GAGE,	)	
Appellant (Employee),	)	
	)	
v.	)	**Case No. 00-AC-21(CV)**
	)	
OFFICE OF THE ARCHITECT OF THE CAPITOL,	)	
	)	
Appellee (Employing Office).	)	
	)	

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

DECISION OF THE BOARD OF DIRECTORS

William H. Gage, an African American, ("appellant"), appeals only from that portion of the Hearing Officer's Decision and Order, dated April 25, 2001, concluding that the Office of the Architect of the Capitol ("appellee") did not racially discriminate against him with respect to his application for the position of Assistant Superintendent of the Capitol Building, GS-1601-13/14, ("Capitol Position").[1] For the reasons set forth below, the Board affirms the Hearing Officer's Decision.

I.

The appellant entered the appellee's employ in June 1997. In February 1998, he was promoted to the position of Supervisory Service Compliance Specialist (GS-1601-12) in the House Office Buildings, a position he still occupies. [H. O. Decision, Finding No. 2].[2] During the latter part of 1999, the appellant applied for four promotional opportunities through the appellee's Human Resources Management Division. The Division's Acting Chief, Ms. Medlin

[1]The Hearing Officer also concluded that the record contained no evidence to establish that the appellee contemporaneously filled three other contested vacancies with persons less qualified than the appellant. [H.O. Decision, Finding No. 8]. The appellant asserts that only the Capitol Position is the subject of his appeal. [appellant's brief, page 2].

[2]The Hearing Officer's factual findings shall be referenced as numbered in his decision. His conclusions of law will be referenced to decision page numbers.

(Caucasian), determined that the appellant was not minimally qualified[3] for one position at the Supreme Court and the two positions in the House office buildings. The selectees for those positions were one African American and two Caucasian individuals. [H.O. Decision, Finding No. 8]. Those selections are not in issue in this appeal. *See, footnote 2, supra.*

Appellant's application for the Assistant Superintendent of the Capitol Building vacancy ("Capitol Position"), which is the subject of this appeal, was processed entirely by Ms. Scriber, an African American and a subordinate of Ms. Medlin. In reviewing the appellant's application package, Ms. Scriber concluded that neither the appellant's prior military experience nor his experience with the appellee satisfied the required one-year specialized GS-12 level experience for the Capitol Position. In seeking to favor the appellant (Ms. Scriber and the appellant formerly were residential neighbors), Ms. Scriber sought the judgment of her colleague, Mr. Cortez. However, Mr. Cortez also believed that the appellant was not minimally qualified. Before finding the appellant not minimally qualified Ms. Scriber did not discuss the matter with her supervisor, Ms. Medlin. Ms. Scriber did find as minimally qualified Mr. Donald Keith White (Caucasian), who was ultimately selected for the Capitol Position. [H.O. Decision, Findings 10-15].[4]

Subsequent to learning that the appellee had rated him as not minimally qualified for the aforementioned four vacancies, appellant had several conversations with Ms. Medlin, and a meeting with Ms. Medlin and her supervisor, Mr. Suarez (Hispanic). Unpersuaded by their explanations, the appellant sought the assistance of his Congressman, who wrote to the appellee. The appellee responded with a letter drafted by Ms. Medlin, explaining why the appellant's application did not support a rating of minimally qualified. [H.O. Decision, Findings 18-19].

Ms. Medlin acknowledged at the hearing that Ms. Scriber's qualification review sheet evaluating the appellant's application was "not well completed" and contained "a lot of inconsistencies and irregularities".[5] The Hearing Officer found that Ms. Scriber lacked adequate training to perform her job properly and he provided examples: (1)she did not know how to evaluate the appellant's military experience; and (2) she was unfamiliar with the "Add-on" qualifications rule that would have allowed the appellant's experience with the appellee to satisfy the subject position's one-year specialized experience requirement. [H.O. Decision, Finding Nos. 11-13 &22].

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[3] 2A finding of *minimally qualified* allows an applicant further promotion consideration. [H.O. Decision, No. 9].

[4] Twenty-five persons applied for the Capitol Position vacancy. Ms. Scriber rated 17 applicants as qualified and 8 applicants as non-qualified. Mr. White was selected from the qualified group. The record does not disclose the racial composition of the applicant pool. [Hearing Exhibit No. 1].

[5] Ms. Medlin testified, without contradiction, that she did not directly or indirectly review Ms. Scriber's work on the subject merit promotion action before it was certified to the selecting official. [Transcript ("Tr"), p. 64].

The appellant presented the hearing testimony of Ms. Greene, a GS-14 Management and Program Analyst at the Federal Aviation Authority, whom the appellee employed during the mid-1990's in its merit promotion function. The Hearing Officer credited her conclusions that based upon her evaluation of appellant's military experience and the proper application of the *Add-on* Rule, that the appellant was minimally qualified for the Capitol Position. The Hearing Officer further found, upon Ms. Greene's testimony, that the selectee, Mr. White, "was given an unfair improper advantage in the competition for the Capitol position". Ms. Greene opined that Mr. White's documented experience was not qualifying and he had been advantaged "[t]hrough unofficial, non-competitive placement, contrary to the [Architect's] merit selection policy".[6] Ms. Medlin's hearing testimony acknowledged that Mr. White had gained an unfair advantage over other applicants because those "Acting" assignments were undocumented; however, she did not believe that those irregularities should prejudice Mr. White regarding his promotion to the Capitol Position. [H.O.Decision, Finding Nos. 20-25].

II.

Relying upon McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Hearing Officer concluded that the appellant met his burden of establishing a *prima facie* showing of discrimination by proving: (1) he is a member of a protected group (African American); (2) he applied for and was qualified for a job that the employer was seeking to fill; and (3) that the appellee rejected his application and awarded the job to a less qualified candidate who is not a member of the appellant's protected class. [H.O. Decision, pp. 14-16]. The Hearing Officer then applied the second prong of McDonnell Douglas Corp. v.Green,, which requires an employer to articulate a legitimate non-discriminatory explanation for its action. The appellee submitted that Ms. Scriber, who found that the appellant was not minimally qualified and that Mr. White was so qualified, "genuinely and honestly believed that those were true and correct qualification determinations". The Hearing Officer accepted this "genuinely held belief" defense citing Willis v. Marion County Auditor's Office, 118 F.3d 542, 548 (7th Cir. 1997). The Hearing Officer found that Ms. Scriber was mistaken in her qualification determinations, "probably due to inadequate training and the press of an excessive workload [but] she genuinely believed them". He also found that her qualifying of Mr. White was nothing "other than an honest, albeit erroneous call, particularly since his application essentially showed that, for the preceding 22 months, he had held, on an 'acting' basis, the very job sought to be filled and the one immediately above it". [H.O. Decision, pp. 16-17].

The Hearing Officer, while accepting the appellee's explanation, concluded, *arguendo***,** that even if he rejected the appellee's explanation as pretextual, he still would not infer discrimination based upon this record. In this regard, the Hearing Officer noted that the record lacked even a hint of racial animus or discrimination, that an African American found the appellant not to be minimally qualified, and that the one non-minority, Ms. Medlin, "played no crucial role with respect to qualifying applicants for the Capitol position". The Hearing Officer

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[6] Mr. White's merit promotion application referred to his experience and accomplishments as "Acting Assistant Superintendent" and "Acting Deputy Superintendent" of the Capitol Building. [Complainant's Exhibit no. 12].

criticized the performance of appellee's human resources operation but noted that Title VII of the Civil Rights Act of 1964, while prohibiting discrimination, "does not guarantee that all of an employer's personnel decisions will be correct or even fair". [H.O. Decision, pp.17-20].

III.

The appellant argues on appeal that the Hearing Officer should have found discrimination essentially because: (1) Ms. Medlin had a legal duty and obligation to audit the work of an incompetent subordinate, Ms. Scriber, who mis-evaluated the appellant as not qualified for the Capitol Position;[7] (2) Ms. Medlin improperly ratified Ms. Scriber's determination;[8] (3) the successful candidate, Mr. White, committed serious impropriety by including false qualifying information on his application;[9] (4) Ms. Scriber's good faith belief is irrelevant because Ms. Medlin was really the decision maker;[10] (5) the Hearing Officer considered defenses of inadequate training and workload that the appellee never offered;[11] and (6) the Hearing Officer, throughout his conclusions of law, has shown "an obvious bias in favor of the [appellee]. He has made conclusions that are supported with half-truths and outright false acts."[12]

The appellee characterizes appellant's appeal as containing "an abundance of sweeping charges". The appellee counters that evidence of discrimination of any kind is "glaringly absent" from the record.

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[7] Appellant presented no case law in support of his contention that such alleged *negligent supervision* may evidence racial discrimination.

[8] This contention apparently refers to Ms. Medlin's participation at a meeting with the appellant and the appellee's human resources director after the filling of the Capitol Position.

[9] The appellant does not contend, nor does the record disclose, that Ms. Scriber knew or suspected that Mr. White had mis-characterized his qualifications at the that time that she evaluated his application.

[10] The record contains no evidence disclosing that Ms. Medlin had any role regarding the evaluation of the appellant's qualifications for the Capitol Position until after the position had been filled. See footnote 8, supra and Hearing Transcript p. 64.

[11] Ms. Medlin testified that her office was in a workload crisis when it considered the appellant's Capitol Position application due to its skeleton staff of 3 and its need to fill vacancies consequent to appellee's 72 employees who elected early retirement or buyouts in October 1999. [Hearing Transcript, pp. 84-86].

[12] Appellant supports this allegation only by his disagreement with certain of the Hearing Officer's findings.

IV.

Under section 406(c) of the Congressional Accountability Act ("CAA"), "[t]he Board shall set aside a decision of a hearing officer if the Board determines that the decision was -

(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)]

"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)].

This appeal raises the ultimate question of whether the appellee's explanation for finding the appellant not qualified for promotion constitutes a pretext, ruse or subterfuge to mask unlawful racial discrimination.

The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times on the plaintiff. See McDonnell Douglas Corp. v. Green, *supra,* and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Once a defendant articulates some legitimate non-discriminatory reason for its challenged action, the burden shifts back to the plaintiff, who must demonstrate that the defendant's explanation is but a pretext for discrimination.. See St. Mary's Honor Society v. Hicks, 509 U.S. 502 (1993) and Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000); Swanks v. Washington Metro. Area Transit Auth., 179 F.3d 929 (D.C. Cir. 1999); Ruiz, et al. v. A.B. Chance Co., 234 F.3d 654, 671-2 (Fed. Cir. 2000). Accordingly, the plaintiff must allege more than a dispute over the facts upon which the challenged action was based. The plaintiff must put forth evidence which demonstrates that the employer did not "honestly believe" in the proffered non-discriminatory reason for its adverse employment action. See Braithwaite v. Timken, 258 F.3d 488, 494 (6th Cir. 2001); Carpenter v. Federal National Mortgage Association, 174 F.3d 231, 237 (D.C. Cir. 1999); Fischbach v. District of Columbia Dept. of Corrections, 86 F.3d 1180, 1183 (D.C. Cir. 1996).

The testimony of appellant's witness, Ms. Greene, while establishing the appellee's errors in evaluating the appellant's qualifications and those of the selectee, Mr. White, shed no light on why the appellee so erred. The Hearing Officer, based upon the hearing testimony of appellee's responsible employee, Ms. Scriber, and the workload hardships her office was then operating under, concluded that Ms. Scriber "genuinely believed" in her qualification determinations. He further found that Ms. Scriber had made "an honest, albeit erroneous call ". The Hearing Officer declined to infer discrimination, noting "[T]here is not a hint of racial discrimination in this record". [H.O. Decision, pp. 16-20].

The Hearing Officer's rationale is supported by the case law.

> If in truth an agency's or an employer's verified, detailed and documented inefficiency, absent any discriminatory animus, accounts for results that nonetheless appear at first glance to be the

> product of discrimination, it would be the height of unfairness to infer fallaciously such a discriminatory animus. We do not mean to condone inefficiency; we simply cannot punish it under Title VII. With solace, we note: the phrase "to raise a shield of inefficiency," no matter how well factored and documented, does not translate automatically as "to fend off a claim of discrimination;" a claimant may show pretext. Hazel Hill v. Mississippi State Employment Service, et al., 918 F.2d 1233, at 1239-1240 (5th Cir. 1990).

In Fischbach v. D.C. Department of Corrections, 86 F.3d 1180 (D.C. Cir. 1996), the Court of Appeals stated:

> At this point, the district court seems to have lost its compass. Even if a court suspects that a job applicant "was victimized by poor selection procedures" it may not "second-guess an employer's personnel decision absent demonstrably discriminatory motive." Milton v. Weinberger, 696 F.2d 94 (D.C. Cir. 1982). Once the employer has articulated a non-discriminatory explanation for its action, as did the District here, the issue is not "the correctness or desirability of [the] reasons offered ...[but] whether the employer honestly believes in the reasons it offers." McCoy v. WGN Continental Broadcasting Co., 957 F.2d 368, 373 (7th Cir. 1992). See also Pignato v. American 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").
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> 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 Parker v. HUD, 891 F.2d 316, 322 (D.C. Cir. 1989); if the employer made an error too obvious to be unintentional, perhaps it had an unlawful motive for doing so . . . .
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> See also Carpenter v. Federal National Mortgage Association, 174 F.3d 231, 236 (D.C. Cir. 1999).

"Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951). The Hearing Officer, based upon substantial record evidence,[13] found that the appellee rendered honestly held, albeit erroneous, qualification assessments of the appellee and the successful applicant, Mr. White, for the Capitol Position vacancy. The Hearing Officer reached this result through his careful balancing and weighing of the evidence, credibility assessments, and application of the applicable legal principles. The Hearing Officer emphasized that the appellee's staffing specialists, such as Ms. Scriber, were not properly trained specifically in making the determinations that harmed the appellant and unduly advantaged the successful candidate (e.g., evaluating military experience and temporary duty detail assignments; and application of the "Add-on Rule"). [H.O. Decision,

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[13] The hearing testimony of Staffing Specialists Scriber & Cortez and their supervisor, MS. Medlin.

p. 19].

While another fact finder conceivably might have drawn contrary inferences when reviewing this record *de novo*, that certainly is not the Board's role under the substantial evidence standard. In any event, racial discrimination Title VII liability cannot rest solely upon a judge's determination that an employer misjudged the relative qualifications of admittedly qualified candidates. See Fischbach v. D.C. Dep't of Corr., *id.,* 86 F.3d at 1183. A judge's role is to find and remedy unlawful discriminatory hiring practices and not to act as a "super personnel department" that second guesses employer's business judgments. See Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs., 165 F.3d 1321, 1330 (10th Cir.1999), cert. denied, 528 U.S. 815 (1999).

We do not believe that the record contains evidence warranting a finding that the appellee's articulated legitimate non-discriminatory explanation for not promoting the appellant was a "phony"one. See Fischbach v. D.C. Dep't of Corr., *id.,* 86 F.3d at 1183. Such evidence may include, but is not limited to, the following: prior treatment of the plaintiff; the employer's policy and practices regarding minority employment (including statistical data); disturbing procedural irregularities (e.g., falsifying or manipulating hiring criteria); and the use of subjective criteria. See Simms v. Oklahoma ex rel.Dep't of Mental Health & Substance Abuse Servs, 165 F.3d 1321, at 1328.

The appellant entered the appellee's employ in June 1997 and he received his first promotion in February 1998. His four unsuccessful promotion applications, including that raised in this appeal, occurred in the latter part of calendar 1999. [H.O. Decision, pp. 1-2]. Accordingly, the appellee's prior treatment of the appellant does not support a finding of pretext. Moreover, the record is devoid of evidence identifying any incriminating appellee policy or practice regarding minority employment, disturbing procedural irregularities [14], or the use of subjective criteria.[15]

The Board particularly notes that the record contains no evidence disclosing how the appellee, in respect to the other applicants for the Capitol Position, credited their prior military experience and applied the "Add-on Rule". Such evidence might have disclosed whether the

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[14] The Hearing Officer found that the Staffing Branch, on a non-discriminatory across-the board- basis, failed to provide the appellant and all other applicants with written notice concerning the outcome of the vacancy announcements, as required by the appellee's policy. [H.O. Decision, pp. 3-4].

[15] Staffing Specialist Scriber applied the published U.S. Office of Personnel Management's X-118 standards in assessing the qualifications of the appellant and the other applicants for the Capitol Building position. [H.O. Decision, Finding No. 9]. Ms. Scriber's misapplied those standards in not crediting the appellant's prior military experience and by not affording him the benefit of the "Add-on" experience-qualifying rule. While such errors may be construed as constituting *subjective* criteria, there is no evidence that her misinterpretations were disparately applied to applicants on the basis of race or upon any other proscribed basis.

appellee acted consistently on a non-racial basis in making those determinations or if the appellee applied them in a racially disparate manner. Moreover, no comparative evidence was presented disclosing whether improperly credited undocumented detail experience, such as that accorded to the successful applicant, was denied to similarly situated African American applicants. Such evidence, if presented, might have been highly probative. However, it was the appellant's burden to produce such evidence under the McDonnell Douglas paradigm. .See St. Mary's Honor Society v. Hicks, 509 U.S. 502 (1993) ; Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000); Swanks v. Washington Metro. Area Transit Auth., 179 F.3d 929 (D.C. Cir. 1999); Ruiz, et al. v. A.B. Chance Co., 234 F.3d 654, 671-2 (Fed. Cir. 2000).[16]

V.

The Board, for the reasons set forth above, affirms the Hearing Officer's decision.

It is so ordered.

Issued, Washington, D.C. : November 14, 2001

[16] The Hearing Officer, while concluding that the appellee did not racially discriminate against the appellant, opined that "[W]hat [the appellee] did in [the appellant's] case was not right". [H.O. Decision, p. 20]. There is no indication that the appellant exercised his rights under any applicable grievance procedure to pursue his claims alleging violation of appellee's merit promotion system.