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

PETER SHEEHAN,	)	
	)	
Appellant,	)	
	)	
v.	)	**Case Number: 08-AC-58 (CV, RP)**
	)	
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 case is before the Board of Directors ("Board") pursuant to a petition for review filed by Peter Sheehan ("Appellant" or "Sheehan"), an employee with the Office of the Architect of the Capitol ("AOC" or "Appellee"). Sheehan seeks review under Section 5.03(d) of the Procedural Rules of the Office of Compliance ("OOC"), of the March 10, 2010, decision by Hearing Officer Warren R. King. After an evidentiary hearing, the Hearing Officer found that Sheehan had not supported his claims of retaliation or retaliatory hostile work environment. The Appellant timely filed a petition for review of the Hearing Officer"s Decision and Order, and supporting brief. The Appellee filed a brief in opposition to the petition for review.

The Board has duly considered the Hearing Officer"s Decision and Order, and the parties" filings. The Board finds that the Hearing Officer"s findings and conclusions are amply supported by substantial evidence. For the reasons that follow, the Board affirms the Hearing Officer"s decision that the AOC had not retaliated against Sheehan because of his protected activity, and had not created a retaliatory hostile work environment, in violation of Section 207(a) of the Congressional Accountability Act ("CAA").

I. Background and Procedural History

Sheehan was hired as a temporary painter in the Senate Office Buildings" Paint and Refinishing Shop ("the paint shop"), and during his tenure, he applied for three permanent positions in the paint shop, one as a painter, another as a refinisher, and a third as shop supervisor. He was not selected for any of the positions.

In May and June 2009, following counseling and mediation, Sheehan filed a Complaint and an Amended Complaint, respectively, with the OOC alleging that his non-selection for these

positions was in retaliation for his having engaged in various activities that he alleged were protected by Section 207(a).[1] Two of these activities are said to be protected by the "opposition" clause of Section 207(a), and another by the "participation" clause of that section.

In a prehearing ruling, the Hearing Officer granted AOC's motion to dismiss Sheehan's allegation that his non-selection for the refinisher position was retaliatory. Sheehan does not contest that ruling.

In his Decision, the Hearing Officer similarly determined that Sheehan had not carried his burden of establishing that his non-selection for the supervisory position was retaliatory. For the reasons set forth in his decision, we affirm this finding. We also affirm his determination that Sheehan failed to establish that his non-selection for the permanent painter position was in retaliation for his having engaged in activity protected by the "participation" clause of Section 207(a).

With respect to the remaining allegation by Sheehan that he was denied a permanent painter position because of his "oppositional" activity, for the reasons described below, we affirm the Hearing Officer's findings and conclusions.

II. Standard of Review

The Board's standard of review for appeals from a Hearing Officer's decision requires the Board to set aside a decision if the Board 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). The Board's review of the legal conclusions that led to the Hearing Officer's determination is *de novo*. *Nebblett v. Office of Personnel Management*, 237 F.3d 1353, 1356 (Fed. Cir. 2001).

III. Analysis

A. Applicable Principles

As the Hearing Officer observed, Sheehan was required to demonstrate that: (1) he engaged in activity protected by Section 207(a); (2) the employing office took action against him that was "reasonably likely to deter" future protected activity; and (3) a causal connection existed between the two. See *Solomon v. Office of the Architect of the Capitol,* 02-AC-62 (RP), at p. 5 (December 7, 2005). See also*, McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973). If this evidentiary burden is satisfied, the burden shifts to the employing office to rebut the presumption of retaliation by articulating a legitimate non-discriminatory reason for its actions. *Solomon,* supra, at p. 5; *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981); *McDonnell Douglas*, supra, 411 U.S. at 802, 93 S.Ct. at 1817. The employee retains the ultimate burden of persuasion and may prove intentional retaliation by demonstrating that the employer's proffered legitimate

[1] Section 207(a) of the Act provides that: "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 Act, 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 Act."

reason was false and that retaliation was the "true reason" for the employing office's actions. *Burdine*, 450 U.S. at 256, 101 S.Ct. at 1089.

The Hearing Officer determined that Sheehan had failed to carry his burden of establishing that he was denied a permanent painter position in reprisal for his having engaged in protected oppositional activity.

B. Sheehan's theory of violation.

Sheehan's claim to have been the victim of unlawful retaliation may be summarized as follows:

On April 30, 2007, during a lunch break in the paint shop, two painters, McMullin and Tippins, ridiculed one of the temporary painters, Sidney McMahan, who is African-American, in a manner that implied that McMahan was gay. Sheehan and another painter, Billy Hudson, were present and observed this inappropriate behavior. Sheehan said nothing on this occasion, but Hudson told McMahan that he should file a complaint with the OOC. McMullin and Tippins thereupon left the room.

This so-called "gay bashing" incident occurred against a background of animosity that was prevalent among some of the paint shop employees. Hostile exchanges between various individuals were not uncommon, and had often resulted in complaints to the shop supervisors. Hudson, who had worked as a permanent painter since 2000, was involved in more than his fair share of such incidents.

In September 2007, a petition was signed by 20 painters accusing Hudson of a laundry list of misdeeds including verbal bullying, hostile bumping of fellow painters, and the uttering of age-related and ethnic epithets. Sheehan was among the signers of the petition, but he testified that he immediately regretted signing and told a fellow painter, who was not the drafter of the petition, that he wanted his name removed. The petition was presented to AOC's Equal Employment Opportunity and Conciliation Program ("EEO/CP"). Sheehan's name had not been removed from the petition.

Before the Hearing Officer, Sheehan alleged that he engaged in protected oppositional activity both when he signed the petition and when he asked to have his name removed. Thus, as the Hearing Officer observed, Sheehan argues that, by signing, he became an "active participant and instigator of an investigation to be conducted by EEO/CP of the charges brought against . . . Hudson," and Sheehan "also maintains that in recanting he 'was advocating for . . . Hudson' . . . because of Hudson's advocacy and support for McMahan [in advising McMahan to file an OOC complaint.]" Sheehan's contention is that supporting Hudson in this manner was protected activity because the shop supervisors were implicated in the anti-Hudson petition drive, and that by befriending and refusing to comply with warnings to stay away from Hudson, and by attempting to withdraw his support for the petition, he was opposing an unlawful AOC practice – namely, an effort to punish and get rid of Hudson because he had told McMahan he should file an OOC complaint back in April.

The Hearing Officer rejected Sheehan's allegations of retaliation on two independently sufficient grounds -- namely, that he failed to make out a prima facie case of retaliation, and that, in any event, AOC provided legitimate reasons for its selection of applicants for the permanent painter position, reasons that Sheehan failed to show were pretextual. We now address these findings.

C. The Hearing Officer's finding that the decision makers lacked knowledge of Sheehan's alleged protected activity is supported by substantial evidence.

Applying the settled principle that a complainant must show that the employer was aware of the protected activity, the Hearing Officer found that Sheehan "has failed to establish the requisite knowledge on the part of the decision makers on any of the retaliation counts."

Thus, the Hearing Officer found that Sheehan failed to show that Shop Supervisor Jon Steadman and Assistant Shop Supervisor Jack Sypult were involved in the circulation of the anti-Hudson petition, or that they were even aware of the petition until after it had been presented to EEO/CP. He further found no evidence that the shop supervisors knew either that he had signed the petition or that he had attempted to withdraw his signature. Finally, he found no evidence that the supervisors knew that Hudson had advised McMahan to file an OOC complaint.

These findings are fully supported by the record, and we affirm them. As the Hearing Officer concluded, Sheehan's claims "all fail because [he] has not established, by a preponderance of the evidence, that the decision makers were aware of the asserted protected conduct when they chose to select applicants other than [Sheehan] for the painter and supervisory vacancies. … [N]o causal connection was proven because a 'decision maker cannot have been motivated to retaliate by something unknown to him,'" quoting *Brungart v. BellSouth Telecomm, Inc.,* 231 F.3d 791, 799 (11th Cir. 2000), cert. den., 532 U.S. 1037. [2]

In his brief to the Board, Sheehan presents several arguments in support of his contention that the Hearing Officer erred in finding that AOC lacked the requisite knowledge of his alleged protected oppositional activity. Two of these arguments warrant further discussion.

a. The Strawderman claim.

Within the AOC organization is a unit described in the record as the Employee Advisory Council, headed by a William Strawderman, whom Sheehan claimed was a part of AOC management. Strawderman worked at the "power plant," at some distance from the Senate buildings, in an administrative unit that is not part of the Senate Office Buildings. The mission of this unit is not entirely clear, but the record suggests that it is a place employees can go to air their concerns and receive assistance with at least some degree of confidence that the matters discussed will not be reported to their supervisors. This role of confidant is supported by the testimony of Sheehan and Hudson, who both testified that they requested that Strawderman act as their representative during interviews conducted by AOC's EEO/CP office.

In October 2007, Sheehan wrote a letter to Strawderman complaining that he had been a "witness to and the victim of systematic abuse, on the job aggression and vicious bullying," as well as

[2] The Hearing Officer also rejected Sheehan's claim to have been the victim of retaliation as a result of his refusal to "disassociate" from Hudson. In the Hearing Officer's words, "there is no credible evidence that Sypult ever gave any indication that he was of the view that Sheehan, or any other employee, ought not to associate with Hudson." Although Sheehan testified that Sypult had warned him not to associate with Hudson, Sypult denied having told anyone not to associate with Hudson, and the Hearing Officer specifically credited Sypult's denial. We find no basis in the record for overturning this credibility determination.

"cronyism that enables unfair and unjust hiring and promoting practices" in the paint shop. Sheehan offered his "services" in a "joint effort to stop these [practices]" and asked for Strawderman's help. At the bottom of the letter Sheehan wrote: "My identity must be kept anonymous!" The letter did not mention Hudson, McMahan, or the petition, although Sheehan testified, somewhat equivocally, that during a follow-up meeting with Strawderman, which Hudson also attended, Hudson and the McMahan matter were discussed.

Sheehan claims that AOC was on "actual" or "constructive" notice of his protected oppositional activity because of Strawderman's putative management position. We find no merit to this contention.

The law is settled that an employee cannot prove unlawful retaliation without showing that the employer's decision makers knew of the employee's protected activity (or were influenced or manipulated by others who knew). See *Goldsmith v. City of Atmore,* 996 F.2d 1155, 1163 (11th Cir.1993) ("[I]n a case involving a corporate defendant the plaintiff must show that the corporate agent who took the adverse action was aware of the plaintiff's protected expression . . .."); *Manning v. Chevron Chemical Co. LLC,* 332 F.3d 874, 883 (5th Cir. 2003) (To establish a causal connection in a retaliation case, the employee must first show that the decision maker was aware of the protected activity); *Alexander v. Wisconsin Dept. of Health and Family Services,* 263 F.3d 673, 688 (7th Cir. 2001) (Inability to provide "evidence that any of the actors involved in his suspension . . . had any knowledge of his [protected activity] before his suspension" . . . prevents "any such inference [of retaliation] to be drawn from the timing of his suspension.").

Sheehan does not dispute the Hearing Officer's finding that the decision makers in this instance were the paint shop supervisors, and there is no evidence that Strawderman communicated with anyone in the Senate Buildings management, much less with Sypult or Steadman, about any matters involving Sheehan and Hudson, or any other subject. In addition, because of Strawderman's apparent role as a trusted employee advisor as well as Sheehan's emphatic request that his remarks to Strawderman remain anonymous, there is no reasonable basis for inferring that Sypult or Steadman were apprised of Sheehan's meeting with Strawderman or that it played any role in the selection of the permanent painters more than two months later.

b. The "symbiotic relationship" claim.

Sheehan argues that a symbiotic relationship existed between the shop supervisors and the painters who signed the petition. This relationship, says Sheehan, was "based on resisting the discriminatory [sic] allegations of McMahan supported by Hudson and Sheehan …." As a result of this relationship, his argument goes, the anti-Hudson motives of the petition-signers is "fairly attributable" to Appellee. The relationship is said to be symbiotic because Assistant Shop Supervisor Sypult and the petition signers shared the same objective of protecting their employment status against the threat posed by McMahan's complaint before the OOC, which Hudson and Sheehan would presumably support with testimony.

This argument lacks merit for several reasons.

First, there is no substantial evidence of a symbiotic relationship between the shop supervisors and the petition-signers. Eighteen of the 20 signers were not involved in the McMahan "gay bashing" incident and therefore had no conceivable reason to silence Hudson in order to protect

their job status. For all that appears, their support for the petition reflected, instead, a genuine concern that Hudson was disrupting their workplace.[3] Indeed, far from acting in concert or in common cause with Sypult, the record shows that the proponents of the petition took pains to "keep the supervisors out of it," presumably because the petition itself was an implied rebuke to Sypult and Steadman. The petition was submitted, not to the shop supervisors, but rather, to AOC's EEO/CP office, in an apparent effort to pressure AOC to do something about a situation that had been festering for a long time, and which the shop supervisors had been unwilling or unable to control.

Second, even if knowledge of the actions of the petitioners were "fairly attributable" to the shop supervisors, as Sheehan claims, the only knowledge that could be attributed was that a petition had been presented that targeted Hudson. The substance of the petition itself was entirely silent on the subject of Sheehan's alleged oppositional activity, and could not have provided the shop supervisors with any knowledge of this activity.[4]

Finally, as the Hearing Officer expressly found, both shop supervisors "credibly testified that they had nothing to do with the preparation of the complaint against Hudson [and] did not become aware of it until it had been submitted to the EEO-CP when they were interviewed by an employee of that office about the complaint." Sheehan has simply failed to impeach this finding.[5]

For these additional reasons, we affirm the Hearing Officer's finding that AOC's decision makers were unaware of Sheehan's oppositional activity when the permanent painter selections were made, and that Sheehan has failed to present a prima facie case of retaliation.

D. Even if knowledge of Sheehan's alleged protected activity had been shown, no inference of retaliatory motive would be warranted.

In any event, assuming AOC's decision makers had known both that Hudson had advised McMahan to file an OOC complaint and that Sheehan had "recanted" his support for the anti-Hudson petition, Sheehan would still be unable to make out a prima facie case of retaliation. His

[3] In this appeal, Sheehan is critical of the Hearing Officer for characterizing the petition as a response to Hudson's having been a mere "distracting force over the last couple years," when in fact, according to Sheehan, the actual charges leveled against Hudson in the petition involved more serious "allegations of violence in the workplace [and] allegations of discrimination based on the race and national origin of Hispanics . . .." This argument persuaded the Hearing Officer that the petition itself was protected oppositional activity, but it defeats Sheehan's claim to have engaged in protected activity by "recanting" his signature, because if the purpose of the petition was to oppose an alleged AOC policy of tolerating race and national origin discrimination, withdrawing support for the petition amounted merely to *abandoning* oppositional activity rather than engaging in a new and different form of oppositional activity.

[4] The petition would have revealed Sheehan's *support* for the petition, but Sheehan does not claim retaliation based on his *signing* the petition, but rather, on his unsuccessfully attempting to *revoke* his signature.

[5] Sheehan asserts that because the Hearing Officer failed to resolve an alleged conflict in the evidence as to when the anti-Hudson petition was signed, all of his credibility determinations are suspect. We do not agree. Whether the petition was signed on September 4, the date that appears on the petition, or on September 14, when Sheehan claims he signed, is immaterial to any issue presented in this case, and the Hearing Officer's failure to address this matter is of no consequence.

theory of violation is that he was a victim of retaliatory animus for supporting Hudson, yet there is no basis in the record for inferring that this support had anything to do with his non-selection for the permanent painter position.

Sheehan's core contention -- that the shop supervisors were motivated by animus both toward Hudson for supporting McMahan and toward Sheehan for supporting Hudson – is simply not sustainable on this record. As the Hearing Officer observed, "there was no proof that either Sypult or Steadman held something against Sheehan because of his association with Hudson or McMahan." And both Sypult and Steadman, whom the Hearing Officer found to be entirely credible witnesses, categorically denied that Hudson or McMahan had anything to do with the permanent painter selections.

In these circumstances, we find no basis for inferring that AOC retaliated against Sheehan because he recanted his support for the anti-Hudson petition and remained Hudson's friend.

E. The Hearing Officer's alternate finding that AOC presented legitimate reasons for its permanent painter selections, which Sheehan failed to show were pretextual, is also supported by substantial evidence.

The Hearing Officer found that even if Sheehan had made a prima facie showing of retaliation, AOC "still prevails . . . because it supplied legitimate non-retaliatory reasons for its actions." Thus, according to the Hearing Officer, both Sypult and Steadmen "testified that quality was important and they [chose] the best applicants for the [painter] job." He found their testimony "with respect to the reasons they [chose] the successful applicant[s] to be completely credible."

These 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 records." *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Accord *McBeth v. Social Security Administration,* 244 Fed.Appx. 369, 373, 2007 WL 2045851 (Fed. Cir. 2007) (Because the ALJ "was present to hear and observe the demeanor of the witnesses [citation omitted]," his credibility findings are entitled to deference "unless they are 'inherently improbable or discredited by undisputed evidence or physical fact' [citation omitted]"). We find nothing in the "cold record" in this case that warrants overturning these dispositive credibility determinations.

Sheehan contends that the Hearing Officer's credibility findings are flawed because Sypult and Steadman gave inconsistent testimony as to the qualifications of Sheehan and other applicants for the permanent painter position. He points out that while Sypult testified that those selected were substantially better qualified than Sheehan, Steadman described the choice between the various applicants as "kind of a toss-up." Sheehan fails to acknowledge, however, that elsewhere in his testimony, Steadman agreed that the four selected were the best qualified for the positions. Although the two men may have differed to some degree in their assessments of individual applicants, there is no basis for overturning the Hearing Officer's determination that they "were very familiar with the work of all the applicants and I believed their testimony that they selected those they considered to be the most qualified applicants. [Sheehan] has offered no credible evidence to the contrary."

Sheehan also claims that he had an "AVUE" rating of 96, which was higher than any of the other applicants for the permanent painter position, and that Sypult was aware of his AVUE score. Sheehan argues that his AVUE score shows that he was the most qualified applicant and that his non-selection was retaliatorily motivated. Sheehan further asserts that the Hearing Officer improperly denied his request to compel AOC to disclose the AVUE scores of other applicants.

We do not agree with these contentions.

AVUE is an internet site that AOC and other employers use to facilitate the hiring and promotion process. Job applicants are required to complete an online questionnaire concerning their qualifications, and AVUE assigns each applicant a score based on the information provided. Applicants with a score of 90 or above are then screened further by AOC's Human Resources Division ("HR") and a list of "highly qualified" applicants is created. HR then provides an alphabetical list of highly qualified applicants to the selecting officials who make the actual selections. AVUE scores do not appear on the list and the selecting officials are ordinarily unaware of the AVUE scores of individual applicants that make the list. As Sypult testified, he and Steadman received a "list of people that made the cert [list] for this position and what we do is we pick the ones that we feel suited for the job."

The record thus supports AOC's position that the purpose of the AVUE ratings is to serve as an initial screening mechanism to determine which applicants meet certain threshold requirements, and that it is the selecting officials who then determine from among this group who is best qualified for the position. AVUE ratings are of particularly little value where, as here, the shop supervisors are intimately familiar with the skills of many of the applicants on the final list, and have personally supervised their work. In this very instance, all four applicants selected for the permanent positions had served as temporary painters for many months under their direct supervision. In these circumstances, we find that Sheehan's AVUE score and the scores of other highly qualified applicants were irrelevant to the final selection process, and we agree with AOC that the Hearing Officer properly denied Sheehan's request to compel AOC to produce their scores. [6]

For these additional reasons, we affirm the Hearing Officer's determination that, even if Sheehan had made a prima facie showing of retaliation, Appellee presented legitimate non-retaliatory reasons for selecting applicants other than Sheehan.

F. Sheehan failed to show that AOC created or condoned a retaliatory hostile work environment ("HWE").

The Hearing Officer rejected Sheehan's claim that AOC created a retaliatory HWE, on two grounds. First, he concluded that because the predicate acts upon which Sheehan relies to

[6] AOC's personnel manual states that an applicant is entitled to know his or her own AVUE score, but specifically provides that "[r]atings/scores of other applicants" are "NOT available."

Sheehan also contends that two of the four applicants selected had fewer years' experience as painters, but the shop supervisors could obviously accord greater weight to their personal observations of the work performance of the applicants than to the work experience they had claimed in their applications. Sheehan makes other claims of a similar nature, none of which support his contention that the reasons given by the shop supervisors for selecting applicants were a pretext for retaliation.

support his claim of retaliatory HWE are the same allegations of retaliation that he found to lack merit, "the hostile work environment counts must also fail for the same reasons." We agree with the Hearing Officer. See, e.g., *Noviello v. City of Boston,* 398 F.3d 76, 93 (1st Cir. 2005) (an essential element of a claim of retaliatory hostile work environment is proof that the actions "stem from a retaliatory animus").[7]

The Hearing Officer also concluded, in the alternative, that Sheehan "presented no credible evidence that he was subjected to harassing conduct that could reasonably [be] construed as severely and pervasively hostile because of his claimed protected activity," citing *Harris v. Forklift Systems Inc.,* 510 U.S. 17, 23 (1993). In *Steven Patterson v. Office of the Architect of the Capitol,* 08-AC-48 (RP) (June 23, 2010), we left open the question whether the analysis set forth in *Harris,* which involved a claim of *discriminatory* HWE, is also an appropriate analytical framework for addressing *retaliatory* HWE claims. We need not decide that question in the instant case. Nor need we determine whether, under a *Harris* analysis, the Hearing Officer properly concluded that AOC's actions, if found to be retaliatory, were not sufficiently severe or pervasive to create a retaliatory hostile work environment.

Finally, in his brief to the Board, counsel for Sheehan alleges that the Hearing Officer engaged in "a kind of duplicity" and that his decision "suggests a motive – political, personal or otherwise – other than a desire to reach the right result." These allegations are completely unwarranted. In its brief, Appellee requests that these remarks be stricken. While we deny this request, we agree with counsel for Appellee that "[s]uch inappropriate, *ad hominem* attacks have no place within proceedings before the Office of Compliance, nor should they appear in any pleading filed by a member of the bar." Counsel is admonished to refrain from future baseless attacks on the integrity of the agency's Hearing Officers.

ORDER

Pursuant to Section 406(e) of the Congressional Accountability Act and Section 8.01(d) of the Office of Compliance Procedural Rules, the Board affirms the Hearing Officer's merits determination of no violation in this matter.

It is so ORDERED.

Issued, Washington, D.C. on January 21, 2011

[7] It is arguable that a hostile work environment existed in the Senate paint shop because of the disruptive and aggressive conduct of some of its painters, which Appellee seemed reluctant or unable to suppress. In order to establish a violation of the CAA, however, Sheehan was required to establish, not merely that Appellee condoned a work environment that was "hostile" in some generic sense, but rather, that Appellee created or condoned a *retaliatory* HWE based on efforts to punish him for engaging in activity protected by the opposition or participation clauses of Section 207. No such showing can be made on the record in the instant case.