

**OFFICE OF CONGRESSIONAL WORKPLACE RIGHTS.
LA 200, John Adams Building, 110 Second Street SE.
Washington, D.C. 20540-1999**

Julia C. Leggett,

Appellant,

v.

The Library of Congress,

Appellee.

Case Number: 20-LC-18 (CV)

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

DECISION OF THE BOARD OF DIRECTORS

The claimant, Julia C. Leggett, filed a claim with the Office of Congressional Workplace Rights (“OCWR”) against her employing office, the Library of Congress (“LOC” or “Library”) alleging that it unlawfully discriminated against her on the bases of her race, color, and national origin when on April 1, 2020, she was not selected for the position of Supervisory Librarian (Acquisitions and Technical Services). The Hearing Officer granted summary judgment for the LOC on the claim.

Upon due consideration of the Hearing Officer’s Order, the parties’ briefs and filings, and the record in these proceedings, we agree with the Hearing Officer that the record does not contain sufficient evidence from which a finder of fact could infer that the LOC engaged in prohibited discrimination when it did not select the appellant for the disputed position. We therefore AFFIRM the Hearing Officer’s Order in its entirety.

I. Background and Procedural History

Unless otherwise indicated, the facts of this case are undisputed. At all relevant times, the appellant, a female of Chinese national origin, was a GS-13 Senior Acquisition and Collections Librarian in the Knowledge Services Group (“KSG”) of the Congressional Research Service (“CRS”), a service unit of the LOC. The appellant’s immediate supervisor was a female of Malaysian national origin.

In February 2020, the LOC posted a vacancy announcement for a GS-15 Supervisory Librarian (Acquisitions and Technical Services) position. After the vacancy announcement was posted, the position’s title was changed to Supervisory Librarian (Acquisitions and Collections) to reflect a prior reorganization. The first vacancy announcement listed the qualification requirements for the position, which included six “knowledge, skills, and abilities” (“KSAs”).

The KSAs were not changed in the updated vacancy announcement. The appellant's supervisor had ultimate discretion over the hiring process and the selection of the "subject matter experts" ("SMEs"), who would serve on the selection panel. According to the LOC's standard merit selection process, the SMEs must assess whether each candidate meets the established KSAs. The appellant's supervisor selected two GS-15 SMEs with significant library experience as section heads. Both panel members had taken the required Library training to serve on a selection panel and had previously served on selection panels for other positions. All three panel members independently evaluated and scored the applicants.

Before the interview stage, candidates are required to complete a self-assessment questionnaire, which is intended to measure the candidate's competencies in the KSAs. The selectee and appellant received 100 and 95.91 points respectively. Under the LOC's merit selection plan, the hiring supervisor may conduct an optional narrative interview as an intermediate step between the self-assessment and interview stages. Here, the supervisor opted to skip the narrative review and refer all viable candidates to an interview.

During the interview, the selection panel asked the same main questions to each candidate as part of the LOC's structured interview process. The responses were evaluated individually with each panel member using benchmarks reflected in the LOC's structured interview guides ("SIGs"). At the conclusion of the interviews, the panel met for a facilitated meeting with a human resources assistant and shared their scores of the applicants. During this meeting, the panel unanimously supported hiring the selectee, a non-Chinese white female.

The appellant thereafter filed a claim with the OCWR alleging that she was not selected for the position because of her race (Asian), color (non-White), and national origin (China). Following a preliminary review of her claim, the appellant requested an administrative hearing on the merits before an OCWR Hearing Officer. Following discovery, the LOC filed a motion for summary judgment on the appellant's claim.

On February 2, 2021, the Hearing Officer granted the LOC's motion for summary judgment in its entirety. Specifically, the Hearing Officer found that while the appellant could establish a prima facie case of discrimination, she failed to establish the existence of a genuine issue of material fact by demonstrating that a reasonable factfinder could conclude from all the evidence that the LOC's asserted non-discriminatory reasons were a pretext for unlawful discrimination. In so finding, the Hearing Officer declined to second-guess the LOC's personnel decisions absent a demonstrably discriminatory motive, and the Hearing Officer determined that the appellant had failed to produce evidence that would permit a factfinder to conclude that her qualifications were plainly superior to those of the selectee.

The appellant has filed a petition for review ("PFR") of the Hearing Officer's order; the LOC has timely filed a brief in opposition to the appellant's PFR; and the appellant has timely filed a reply to the LOC's responsive brief.

II. 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 the 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).

III. Summary Judgment Standard

We review a decision granting a motion for summary judgment de novo. *Torres-Velez v. Office of the Architect of the Capitol*, No. 17-AC-36 (FL, RP, CV), 2019 WL 10784232, at *4 (OCWR Sep. 23, 2019); *Patterson v. Office of the Architect of the Capitol*, No. 07-AC-31 (RP), 2009 WL 8575129, at *3 (OOC Apr. 21, 2009). Summary judgment is appropriate if there are no genuine issues of material fact, and the movant is entitled to summary judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); OCWR Procedural Rule 5.03(d). In determining whether the nonmoving party has raised a genuine issue of material fact, the Board must view the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in that party's favor. *U.S. Capitol Police & Lodge 1, FOP/U.S. Capitol Police Labor Comm.*, No. 16-LMR-01 (CA), 2017 WL 4335144, at *3 (OOC Sep. 26, 2017); see also *Talavera v. Shah*, 638 F.3d 303, 308 (D.C. Cir. 2011).

To defeat a motion for summary judgment, the non-moving party must "designate specific facts showing that there is a genuine issue for trial," *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986), and the moving party can establish its entitlement to judgment by showing the lack of evidence to support the non-moving party's case, *Conroy v. Reebok Int'l*, 14 F.3d 1570, 1575 (Fed. Cir. 1994); *Eastham v. U.S. Capitol Police Bd.*, No. 05-CP-55 (DA, RP), 2007 WL 5914213, at **3-4 (OOC May 30, 2007) (affirming summary judgment when complainant "failed to proffer evidence" that would permit the inference of unlawful conduct required to establish complainant's prima facie case). The non-moving party is required to provide evidence in support of her claims, not merely assertions, allegations, or speculation. See *Solomon v. Architect of the Capitol*, No. 5 02-AC-62 (RP), 2005 WL 6236948, at *8 (OOC Dec. 7, 2005) (holding that at the summary judgment stage, claims must be supported by evidence, which distinguishes a decision on a motion for summary judgment from a decision on a motion to dismiss). However, neither this Board nor the Hearing Officer may make credibility determinations or weigh the evidence. See *Burley v. Nat'l Passenger Rail Corp.*, 801 F.3d 290, 296 (D.C. Cir. 2015).

IV. Analysis

A. Prima Facie Case of Discrimination.

Section 201 of the Congressional Accountability Act ("CAA") governs employment discrimination claims. It provides, in relevant part: All personnel actions affecting covered

employees shall be made free from any discrimination based on (1) race, color, religion, sex, or national origin within the meaning of section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2). 2 U.S.C. § 1311(a). In the absence of direct evidence of discrimination, courts analyze Title VII claims under the procedural framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). Under this framework, the claimant must first establish a prima facie case of discrimination by showing that: (1) she is a member of a protected class; (2) she applied for and was qualified for an available position; (3) despite her qualifications, she was rejected; and (4) either someone filled the position, or it remained vacant, and the employer continued to seek applicants. *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006); *Moss v. Hayden*, No. CV-18-470 (JEB), 2020 WL 4001467, at *4 (D.D.C. July 15, 2020), *appeal dismissed*, No. 20-5256, 2021 WL 1047349 (D.C. Cir. Mar. 2, 2021). The appellant clears this bar because (1) she is of Chinese national origin; (2) she applied for the vacant position; (3) she was not selected; and (4) the position was filled by an applicant who was not a member of her protected class. Accordingly, the analysis proceeds to the next step of the *McDonnell Douglas* framework.

B. Legitimate, Non-Discriminatory Explanation

Next, the *McDonnell Douglas* framework shifts the burden of production to the employer to articulate a “legitimate, nondiscriminatory reason” for the challenged employment action. *McDonnell Douglas Corp.*, 411 U.S. at 802. We agree with the Hearing Officer that the LOC met its burden in this case. In its motion for summary judgment and on review, the LOC stated that the hiring decision was based on the selectee’s “background, knowledge, and experience in acquisition, collection development and management of e-resources, as well as staff supervision and management.” It stated that the appellant’s supervisor hired the selectee because she was the top candidate in all the KSAs and because she demonstrated better qualifications and experience than did the appellant based on the selection criteria. According to the supervisor, the selectee gave specific examples of her experience in each KSA during the interview.

In assessing whether the LOC met its burden to articulate legitimate, non-discriminatory reasons for its decision, the Board considers four factors: (1) whether the employer produced evidence that would be admissible at the summary-judgment phase; (2) whether the factfinder could reasonably find that the employer’s action was motivated by a non-discriminatory reason; (3) whether the employer’s justification is facially credible in light of the proffered evidence; and (4) whether the employer’s explanation is sufficiently clear and specific, such that the claimant has had a fair opportunity to challenge it as pretextual. *Powell v. Am. Airlines*, No. CV 17-1740 (CKK), 2020 WL 3489468, at *5 (D.D.C. June 26, 2020); *see also Figueroa v. Pompeo*, 923 F.3d 1078, 1087–88 (D.C. Cir. 2019); *Moss*, 2020 WL 4001467, at **4-5. As discussed below, the LOC met its burden here.

First, the LOC produced evidence that may be considered at summary judgment in support of its explanation that its hiring decision was based on the selectee’s overall superior qualifications and behavior exhibited during the interview. Among other documentation, the LOC relied on the hiring supervisor’s written justification for selecting the selectee, as well as the written notes and interview-rating forms completed during the interview by the SMEs. It also relied on testimony from members on the hiring panel.

Second, a factfinder who credits such evidence could reasonably determine that the LOC's action was motivated by a non-discriminatory reason — specifically, that the appellant was not selected because she was not “the highest-scoring candidate[] eligible for the vacant . . . position.” *Albert v. Perdue*, No. 17-1572, 2019 WL 4575526, at *4 (D.D.C. 2019); *see also Fischbach v. D.C. Dep't of Corrs.*, 86 F.3d 1180, 1182 (D.C. Cir. 1996) (finding employer's choice of one of two candidates “based solely upon their answers during the interview, as reflected in the score that the interview panel assigned to each applicant” was a sufficient non-discriminatory explanation); *Moss*, 2020 WL 4001467, at *4. Although the appellant disputes the veracity of the selectee's pre-interview self-assessment scores, it is undisputed that the selectee received a higher final interview score than the appellant did.

Third, the LOC's non-discriminatory justification is “facially ‘credible’ in light of the proffered evidence.” *Figueroa*, 923 F.3d at 1088 (quoting *Bishop v. Dist. of Columbia*, 788 F.2d 781, 788–89 (D.C. Cir. 1986)). The selection committee offered the position to the highest-scoring interviewee on all KSAs. The selectee's total rating score was higher than the appellant in all six of the KSAs for the position. The LOC's explanation, therefore, appears reasonable on its face. *See Figueroa*, 923 F.3d at 1088; *see also Moss*, 2020 WL 4001467, at *4; *Albert*, 2019 WL 4575526, at *4 (noting that difference in interview score between two candidates is a legitimate explanation for non-selection).

Fourth, the Library's justification is sufficiently clear and specific to provide the appellant a fair opportunity to challenge it as pretextual. *Figueroa*, 923 F.3d at 1088 (quoting *Segar v. Smith*, 738 F.2d 1249, 1269 n.13 (D.C. Cir. 1984)); *Moss*, 2020 WL 4001467, at *5. As in *Albert*, the LOC set up an interview system with precise rating criteria. *Albert*, 2019 WL 4575526, at *4. The interview panel asked all interviewees the same main questions. Answers were scored on a four-point scale from zero (No Evidence of Experience) to four (Outstanding). According to the SIG rating-forms used during the interview, the selectee's final interview score was 3.4, higher than the appellant's score of 2.3.¹ Since the SIG rating forms show a “precise breakdown between the . . . candidates,” the LOC articulated an explanation that is clear and specific enough for the appellant to respond to it.

In light of the foregoing, we agree with the Hearing Officer that the LOC satisfied its burden of articulating a legitimate, nondiscriminatory reason for the appellant's non-selection.

C. Pretext

Once the employer articulates a legitimate, nondiscriminatory basis for its decision at the summary judgment stage, as the LOC has done here, the presumption of discrimination “simply drops out of the picture.” *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993). To survive summary judgment, the claimant must establish the existence of a genuine issue of material fact by demonstrating that a reasonable factfinder could conclude from all the evidence that the

¹ The panel members' notes indicate that the appellant did not do well during the interview. One SME described the appellant's performance as “exhausted,” failing at times to read “clues to [stop talking],” and that her answers “didn't really match [the] questions.” Handwritten notes during the interview describe the appellant as “breathless,” and “hurried.”

employer's asserted non-discriminatory reasons were a pretext for unlawful discrimination. *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008). Three factors can help a claimant establish the existence of a genuine issue of material fact: (1) her prima facie case; (2) evidence she presents to rebut the employer's non-discriminatory explanations; and (3) any further evidence of discrimination, such as independent evidence of discriminatory statements or attitudes of the employer. *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1289 (D.C. Cir. 1998).

To satisfy her burden, the appellant primarily endeavors to show that she was more qualified than the selectee for the position and, alternatively, that the interview process was unfair. We agree with the Hearing Officer that her efforts do not succeed.

1. Alleged Gap in Qualifications

Although the factfinder must not serve as a "super-personnel department that re-examines an entity's business decisions," it can infer discrimination if the appellant is "significantly better qualified [than the selected candidate] for the job." *Holcomb*, 433 F.3d at 897 (quoting *Barbour v. Browner*, 181 F.3d 1342, 1346 (D.C. Cir. 1999)); *Moss*, 2020 WL 4001467, at *5. In a close case, however, a reasonable factfinder "would usually assume that the employer is more capable of assessing the significance of small differences in the qualifications of the candidates, or that the employer simply made a judgment call." *Aka*, 156 F.3d at 1294. Therefore, in order to justify an inference of discrimination, the qualifications gap must be great enough to be inherently indicative of discrimination. *See Lathram v. Snow*, 336 F.3d 1085, 1091 (D.C. Cir. 2003) (citing a "wide and inexplicable gulf" between candidates); *see also Holcomb*, 433 F.3d at 897.

The appellant contends on review that her qualifications when compared with the selected candidate are decisively superior and indicative of discrimination. For example, she cites her "20 years of direct work experience as a copyright acquisitions specialist" as opposed to Selectee's employment history, which she contends does not show the "same level of acquisitions and technical services experience." She also contends that, after hiring, the selectee "showed a lack of knowledge on CRS acquisitions policies . . . and procedures."

The appellant's contentions fall far short of establishing a "wide and inexplicable gulf" in qualifications for the position. Because the LOC's application cutoff score for referral and interview was 94 points, the selectee and the appellant were objectively qualified for the position with scores of 100 and 95.91 respectively. Indeed, the record supports the LOC's contention that the selectee's qualifications were superior to those of the appellant, as the selectee's total interview rating scores were higher in each of the six KSAs of the position. It is also undisputed that both the appellant and the selectee have master's degrees and worked in GS-14 level positions, and both candidates also have supervisory experience at the LOC. When two candidates are equally qualified in that they both possess the objective qualifications for the position and neither is clearly better qualified, "it is within the employer's discretion to choose among them so long as the decision is not based on unlawful criteria." *Simms v. Oklahoma Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1330 (10th Cir. 1999).

Moreover, an applicant's personal evaluation of her own qualifications and performance is insufficient to rebut an employer's legitimate, non-discriminatory reason for her non-

selection. *See, e.g., Ficken v. Clinton*, 771 F. Supp. 2d 79, 84–85 (D.D.C. 2011); *Jo v. Dist. of Columbia*, 582 F. Supp. 2d 51, 62–63 (D.D.C. 2008) (“[a]lthough Plaintiff clearly values his own credentials and experiences, a plaintiff’s subjective assessment of his own record is largely irrelevant”); *Spelke v. Gonzales*, 516 F. Supp.2d 76, 80-81 (D.D.C. 2007) (noting that the “plaintiff’s subjective self-assessment [of his qualifications] does not defeat defendant’s ‘legitimate, nondiscriminatory reason’ for the non-selection of plaintiff”). Accordingly, a reasonable juror could not infer discriminatory intent either from undisputed evidence in the record concerning the applicants’ respective qualifications for the position or from the appellant’s evaluation of her own abilities.

2. Irregularities in Hiring Process

On review, the appellant also reiterates her contentions below that irregularities in the hiring process create a genuine issue of material fact regarding an inference of discrimination. An employer’s failure “to follow its own regulations and procedures, alone, may not be sufficient to support” the conclusion that its explanation for the challenged employment action is pretextual. *Johnson v. Lehman*, 679 F.2d 918, 922 (D.C. Cir. 1982). However, a claimant can raise an inference that the employing office’s legitimate, nondiscriminatory reason is pretextual if the employer’s deviations from its internal hiring procedures are so irregular or inconsistent with established policy as to make its hiring decision “unworthy of belief.” *Porter v. Shah*, 606 F.3d 809, 816 (D.C. Cir. 2010); *Lane v. Vasquez*, 961 F. Supp. 2d 55, 66 (D.D.C. 2013). Nonetheless, unsupported allegations that the hiring process treated protected-class employees less favorably than non-protected class employees are insufficient to create a genuine issue of material fact regarding an inference of discrimination. *Fields v. Office of Johnson*, 520 F. Supp. 2d 101 (D.D.C. 2007).

Here, the appellant reiterates her claims below that the hiring process failed to comply with the LOC’s Recruitment and Selection Procedures, and that the LOC “did not follow procedural rules on the accuracy of the position description, job analysis, subject matter expert designation, initial screening, and structured interview.” For example, she claims that the selecting official unilaterally developed the KSAs with little input from the SMEs. She further contends that the selected SMEs did not have sufficient acquisitions and technical services knowledge to perform the job analysis. She also claims that the failure to provide the SMEs with position descriptions and the failure to verify the selectee’s self-ratings are evidence of pretext. Moreover, the appellant contends that the hiring panel treated her “differently in the structured interview” by failing to ask her probing questions, rushing her to answer the questions, and criticizing her for not providing enough information. Further, the appellant claims that the LOC failed to completely verify one of the selectee’s three employment references.

These contentions concerning the hiring process are insufficient to establish that they were so irregular or inconsistent with established policy as to make the LOC’s hiring decision “unworthy of belief.” *Porter*, 606 F.3d at 816. Indeed, it is undisputed that the selection panel asked the appellant and the selectee the same main interview questions and independently scored each applicant’s interview responses to each KSA using benchmark anchors. To the extent that the appellant challenges the degree to which the LOC’s interview and selection process in practice followed its interview and selection procedures as written, she has failed to explain how

the hiring process treated protected-class employees less favorably than non-protected class employees. *Vasquez*, 961 F. Supp. 2d at 73; *Fischbach v. D.C. Dep't of Corr.*, 86 F.3d 1180, 1183 (D.C. Cir. 1996), *as amended on denial of reh'g* (July 15, 1996). While the appellant suggests that such conduct was devised to avoid hiring her if she was the most qualified candidate, she failed to produce sufficient evidence to suggest that the process was tainted with discriminatory intent.

The appellant also recites a litany of purely conclusory allegations about the hiring process that purports to show discrimination. For example, she states on review that “we can clearly see that there is a scoring bias on all panel members” in evaluating several KSAs. Under *Fields*, the appellant’s unsupported allegations that the process treated her less favorably is insufficient to create a genuine issue of material fact regarding an inference of discrimination. As such, the appellant failed to create a genuine issue of material fact regarding her claim that irregularities in the hiring process would permit a factfinder to infer a discriminatory motive.

3. Further Evidence of Discrimination.

In support of her discrimination claim, the appellant also points to her supervisor’s alleged comments during a social outing at a restaurant in 2011—nine years before the non-selection at issue in this case—during which she allegedly “expressed her jealousy of Mandarin-speaking Chinese” people. Specifically, the appellant asserts that her supervisor “proudly” told her during the conversation that “one of my great-great grandfathers was a white man who married a Chinese woman from Canton, and that is why my skin color is lighter than the darker skinned Cantonese people in Malaysia.” Further, the appellant claims that her supervisor also expressed her jealousy of Mandarin-speaking Chinese people by saying that “I went to public schools in Malaysia and learned everything in English and Malaysian. The rich families sent their kids to private Chinese schools to learn to speak Mandarin Chinese.”

Remarks can be probative evidence of a supervisor’s discriminatory attitude, at least when they are targeted directly at the employee or are part of a pattern of similar remarks. *Morris v. McCarthy*, 825 F.3d 658, 670 (D.C. Cir. 2016). That is not the case here. On their face, the supervisor’s alleged remarks were not targeted directly at the appellant; they do not concern the personnel action at issue; nor is there any allegation that they were part of a pattern of similar remarks.

Even if the supervisor’s alleged remarks could be construed to be discriminatory in nature, remarks removed in time from the challenged employment action, such as these, carry less weight than remarks made at the time of the employment action. *Iyoha v. Architect of the Capitol*, 927 F.3d 561, 568 (D.C. Cir. 2019) (citing *Morris v. McCarthy*, 825 F.3d 658, 670 (D.C. Cir. 2016)). As stated above, these isolated remarks were alleged to have been made 9 years before the non-selection at issue, at a time when the individual was not the appellant’s supervisor. In light of the foregoing, these remarks, without more, are insufficient to permit a factfinder to infer discrimination.

In sum, the Hearing Officer correctly determined that the appellant has failed to produce any evidence to rebut the LOC’s explanation for hiring the selectee that would permit a

reasonable jury to infer discrimination. *Holcomb*, 433 F.3d at 899. Accordingly, the Hearing Officer properly granted summary judgment to the LOC on this claim.

ORDER

For the foregoing reasons, the Board affirms the Hearing Officer's Order entering summary judgment for the LOC on this claim.

Issued, Washington, DC, September 20, 2021