

# Venkareddy Chennareddy v. U.S. General Accounting Office

**Docket No. 70-701-17-85**

**Date of Decision: August 20, 1987**

**Cite as: Chennareddy v. GAO (8/20/87)**

**Before: Kaufmann, Presiding Member**

**Disparate Treatment**

## **DECISION OF PRESIDING MEMBER**

Petitioner, Venkareddy Chennareddy, Ph.D. is an Economist, GS-110-13, in the Program Evaluation and Methodology Division (PEMD) of the United States General Accounting Office (GAO). He has been employed in GAO since August 13, 1978. He was promoted to his current position in April 1980. (Tr. 13-28; Petitioner's Exhibit 1; Joint Exhibit 14) He is a male, Asian American, born in India, and was 50 years of age in 1984, the relevant time period. (Tr. 13, 47; Petitioner's Exhibit 1)

In the 1984 promotion cycle, Petitioner applied for seven GS-14 positions under six different announcements:

GGD-85-6, Operation Research Analyst;  
NSIAD 85-5, Operations Research Analyst;  
HRD 85-6, Operations Research Analyst;  
RCED 85-4, Operations Research Analyst;  
RCED 85-5, Economist; and  
PEMD 85-3, Social Science Analyst (2 vacancies)

Petitioner was not selected for any of the seven positions. (Tr. 30-31)

On January 15, 1985 Petitioner filed a Petition for Review with the Personnel Appeals Board challenging the selections in five of the above actions. The petition alleged discrimination under Title VII of the Civil Rights Act, as amended, 2000e et seq., in the following personnel (promotion) actions on the following bases:

1. Position: HRD-85-6 (Human Resources Division) Operations Research Analyst GS-1515-14. Bases: race, color, national origin and age;
2. Position: RCED-5-4 (Resources, Community, and Economic Development Division) Operations Research Analyst GS-1515-14. Bases: race, color, national origin and age;
3. Position: RCED-85-5 Economist GS-110-14. Bases: race, color, national origin and age;

4. Position: PEMD-85-3 (2 positions) Social Science Analyst GS-101-14. Bases: race, color, national origin, and sex.

The hearing in this case was conducted by the undersigned on July 17, 21 and 22, 1986 in Washington, D.C. Both parties were represented by counsel and they were given a full opportunity to examine and cross-examine witnesses and to offer evidence. Each side filed post-hearing briefs.

## I. BACKGROUND AND UNDISPUTED FACTS

During 1984 Petitioner applied for the above-referenced positions. With respect to two of the positions he applied for (GGD-85-6 and NSIAD 8505), Petitioner was not selected for these vacancies but did not contest this before me.

In regard to HRD 85-6, the selecting official was Richard Fogel, Director, Human Resources Division, a white male, 40 years of age at the time he made the selection under this announcement. Mr. Fogel selected William Isrin, a white male, for promotion under HRD 85-6. Mr. Isrin, a native born U.S. citizen was 36 years of age at the time of his selection. Petitioner's name, along with four others, appeared on the best qualified list for this announcement but Petitioner was not selected. (Tr. 254-58; Joint Exhibit 14, p. 6; Agency's Exhibit 1)

J. Dexter Peach, Director, Resources Community and Economic Development Division, a white male, 46 years of age at the time, was the selecting official for the positions under announcements RCED 85-4 and RCED 85-5. Mr. Peach selected Patrick Doerning, a white male, 39 years of age at the time of selection and a native born U.S. citizen, for the position under the announcement RCED 85-4. For the RCED 85-5 position, he selected Mitchell Rachlis, a white male, age 36 years of age at the time of selection and a native born U.S. citizen. Petitioner appeared on the best qualified list for RCED 85-4 (one of six persons listed) and also for RCED 85-5 (one of four persons listed) but was not selected for either position. (Tr. 2-3; Tr. 303-22; Agency's Exhibits 2 & 3; Joint Exhibit 14 p.9-13)

Eleanor Chelimsky, Director, Program Evaluation and Methodology Division, white female, 58 years of age in 1984, was the selecting official for the positions under the PEMD 85-3 announcement. She selected Christine Fossett, a white female, 40 years of age at the time of selection, and Marilyn Mauch, a white female, 51 years of age, at the time, for the two positions. Petitioner was also on the best qualified list for this announcement (one of six listed) but was not selected. (Tr. 1-4, 332-38, Joint Exhibit 11),

## 2. PETITIONER'S POSITION

Petitioner argues that he was the victim of discrimination in four separate promotion actions involving five vacancies. In all five instances, Petitioner alleged that he was discriminated against by reason of his race, color and national origin. In two of the cases, he also alleged sex discrimination (PEMD-85-3). In the other three cases he alleged age discrimination. Petitioner asserts that through the presentation of evidence, he established prima facie basis for his claim. He further claims that the so called legitimate, nondiscriminatory reasons provided by the agency, in each instance, can be challenged and shown to be a pretext to cover the true discriminatory reason for the non-selection.

By testimony and stipulation, Petitioner contends that each element of the prima facie case was met. In this regard, he notes that he is a member of a protected class (Asian-American and born in India) who is also a male, brown in color, and 52 years of age. He applied for each of five positions that he was

exceptionally qualified for, but was not selected. All of the employees who were chosen were white and either females or under the age of 40.

Having established a prima facie case, Petitioner argues that GAO's proffered justification for denying him promotion -- that the persons selected for the various positions were better qualified than Petitioner -- is but a pretext for discrimination. Dr. James Outtz, a qualified expert Industrial Psychologist, testified that Petitioner's qualifications exceeded the qualifications of the other candidates. Dr. Outtz evaluated the candidates in four major categories:

1) educational background, 2) professional publications and research, 3) evaluation based upon quality ranking factors and 4) performance appraisals. (Tr. 208-209). Petitioner claims that based upon the documents reviewed, Dr. Outtz made the following finding:

"...There seems to be a pattern, which is as follows: this pattern indicates that the complainant's [petitioner's] qualifications equaled or exceeded those of the selectee generally in educational background, publications, and in some instances, in quality ranking factors, and that consistently... where there was a difference in favor of the selectee, it was in the area of a performance appraisal." (Tr. 213-214).

Petitioner notes that Dr. Anthony Hill testified that he was employed by the agency to study the BARS (Behavioral Anchored Rating System), a significant part of the performance appraisal system. These studies were of the 1983 and 1984 BARS performance appraisal results for GS-12 evaluators. (Tr. 180). According to Dr. Hill the results of both studies indicated that:

"there are observed differences in the ratings of evaluators based on ethnic/racial group membership....Non-minority evaluators received disproportionately more superior and exceptional ratings than minority evaluators in these job dimensions." (Tr. 186-187).

Dr. Hill further stated that discrimination could be a factor causing differences in the ratings (Tr. 199). In view of this, Petitioner contends that the selecting officials' complete reliance on the performance appraisals effectively discriminated against him.

Further evidence to support him, Petitioner contends, can be found in the Agency's violation of its own procedures. For example, the selecting official in each of the cases in question eliminated the use of panels to consider the relative qualifications of each candidate. Petitioner argues that GAO Order 2335.8 requires the use of panels when three or more candidates apply for a position, as was the case in all of the selections in question. He asserts that GAO abused the provision which allows the Assistant Comptroller General for Human Resources to grant requests for exceptions to GAO Order 2335.8. This exception provision is excessively broad and gives carte blanche authority to modify the merit system. Failure to use the panel system, Petitioner argues, enhances the omnipotence of the selecting officials.

This was evidenced, Petitioner notes, by Mr. Fogel's handling of the HRD selection. For example, Mr. Fogel testified that he assumed all the candidates on the selection certificate were technically competent to be an operations research analyst. (Tr. 262). Because there was no panel, Petitioner asserts that the candidates' qualifications were never reviewed.

An examination of each of the selection processes reveals, Petitioner argues, other serious procedural and substantive errors. In the case of the selection for HRD-85-6, Mr. Fogle testified that he, in effect, turned over the entire selection process to a subordinate, Jim Wright. (TR. 259). Wright stated that he reviewed

the paperwork of all the applicants, interviewed them, and then recommended the person to be selected without providing the selecting official with written comments or discussing his observations with Mr. Fogle. (Tr. 273, 287). Not surprising, Petitioner observes, the selectee, William Isrin, had worked with Mr. Wright for 10 years and had been evaluated by him. (Tr. 277).

With regard to the two RCED positions, Mr. Peach, the selecting official, claimed that Petitioner was not the best qualified for the position. (Tr. 314, 319). Petitioner asserts that Mr. Peach's credibility was called into question because of his failure to consider the borderline rating that one of the selectees, Mr. Rachlis, received on his performance appraisal. (Tr. 328, 329). In contrast, the lowest rating Petitioner has received was fully successful. Petitioner also challenges Mr. Peach's claim that he had difficulty communicating with him (Dr. Chennareddy). He questions how Mr. Peach could remember his interview out of 90 others. As further evidence, Petitioner cites the affidavits of 11 GAO employees and the testimony of 8 witnesses, all of whom stated that they had no problem working and communicating with him. (Jt. Exhs. 1-11).

Petitioner also claimed that the PEMD selecting official, Ms. Chelimsky, violated agency regulations and did not make her selections fairly. In this regard, he noted that Ms. Chelimsky based her decision to not even consider Petitioner because of some memoranda prepared by management officials, Bob Jones, Joseph Delfico and Heber Bouland, that were critical of Petitioner's interpersonal skills. Petitioner notes that while none of these officials testified at the hearing, Mr. Jones and Mr. Bouland had rated his interpersonal skills as either Fully Successful or Superior on his performance appraisals. (Pet. Exhs. 3 and 4). Along with his brief, Petitioner submitted GAO Guidelines that allow supervisors to keep notes on an employee's performance if certain conditions are met. These guidelines require managers to maintain such notes only for personal use and prohibit the circulation of such notes to anyone else, including other supervisors. ("Managers and Supervisors' Guide to Discipline", Attachment 1 to Petitioner's Brief).

Thus Ms. Chelimsky had based her decision on memoranda that she should not have seen. In Stoller v. Marsh, 682 F.2d 971 (1982) the Court of Appeals for the District of Columbia considered a case involving an Army employee who alleged that a career screening panel restricted his promotional opportunities based on false and discriminatory evaluations prepared by his supervisors and placed in his personnel file. Petitioner notes that the Court in Stoller held:

"An unfavorable employment decision resulting from inaccurate, discrimination-motivated evaluations by the employee's supervisors violated Title VII, unless the employee previously had a reasonable opportunity to inspect the personnel file and have the evaluations corrected." (Emphasis added).

In this instance Petitioner had no opportunity to review this file.

Petitioner notes that Ms. Chelimsky testified that she had never seen him act in a hostile fashion or fail to handle relationships smoothly or easily. (Tr. 378-379). This is further supported by the testimony contained in the affidavits and statements made at the hearing. (Jt. Exhs. 1-11). Thus, the memoranda, he argues, played a significant role in his non-selection.

Petitioner also cites the testimony of two witnesses who question Ms. Chelimsky's character and reputation for truth and veracity. Dr. Hill stated that he felt he was discriminated against because of his color. In his view, Ms. Chelimsky viewed minorities as necessary to meet affirmative action requirements but not capable of doing the work. (Tr. 190). Petitioner also points to Dr. Ronald Fishbein, a former employee of Ms. Chelimsky who questioned her reputation for truth and veracity when he stated:

"So I don't know if I could call her a direct liar, but the result was really the same. She could say something one day and mean it that day, and then the next day do a 100 percent about-face or not even remember that she had said something the day before." (Tr. 165).

Based on the above, Petitioner argues that he established a prima facie case and then established that the agency's alleged basis for its actions was mere pretext for discriminatory conduct.

### 3. THE RESPONDENT'S POSITION

Respondent denies that Petitioner was discriminated against on any of the bases alleged or that improper procedures were followed in any of the selections. The evidence, it contends, clearly demonstrates that the selecting officials in question all had legitimate, nondiscriminatory reasons for not selecting Petitioner based upon a comparison of his qualifications with those of each of the selectees. Respondent maintains that Petitioner was not able to show that the avowed reasons were pretextual or establish any grounds for concluding that any of the allegations of discrimination were true.

With respect to the selection process, Sara Cytron, a former Program Manager, testified that the selection for the positions in question were made under the Agency Merit Promotion Plan (MSP). This meant that each candidate, including Petitioner, submitted an employee profile (demonstrating his prior experience, education, training and relevant awards), performance appraisals, a supervisor's assessment of the employee's ability on quality ranking factors, and the employee's statement addressing the quality ranking factors. (Tr. 119, Jt. Exh. 12.)

Respondent notes that, according to Ms. Cytron, when there are a sufficient number of applicants, a panel is convened to review the above paperwork and systematically compare the candidates and develop a list of best qualified candidates for submission to the selecting official. When no panel is convened, the names and relevant documents of all interested candidates are submitted to the selecting official. Petitioner objects that in each of the selections in question no panels were convened and that, in his view, the GAO order on MSP requires the use of panels because the number of applicants in each case exceeded the number of persons who would be certified as best qualified if a panel was held. (Tr. 129-134, 136-141, Jt. Exh. 12)

In this regard Ms. Cytron testified that if a panel were convened in each instance this is what would have occurred: (1) in HRD 85-6 the panel would have selected three of the five candidates for the best qualified list, (2) in RCED 85-4, the field would have been narrowed down from six to three candidates, (3) in RCED 85-5 the number of candidates would have been narrowed from four to three and for the two PEMD 85-3 positions, six applicants would have been reduced to five. According to Ms. Cytron, however, Agency regulations permit an exception to the panel requirement which, during this time, was increasingly employed where a panel would only eliminate two or three names from the referral list. She testified that this policy was adopted by Gregory Ahart, Assistant Comptroller General for Human Resources, pursuant to his authority to grant exceptions, and was later formalized in the 1985 MSP Order (Tr. 127-129, 139-140)

Respondent further argues that Petitioner has not established how the failure to convene a panel worked to his disadvantage. Had a panel been held in each case, Respondent asserts that Petitioner himself could have been eliminated from the certificate. In the absence of a panel, Petitioner was considered with all the other candidates referred for respective selecting officials' consideration.

Once a list of candidates is submitted, Respondent notes that the selecting official has wide discretion in who is selected and how the selection is made. The official may base his or her decision solely on the paperwork submitted, may conduct interviews, and may consult some, all or none of the candidates' supervisors. The selecting official may also delegate some of his authority to another official to review submissions and/or conduct interviews in order to recommend one candidate over others. (Tr. 144-145, 148-154; Jt. Exh. 12).

Respondent contends that a review of each selection reveals that agency policy was followed and the selections are supported by adequate reasons and documentary evidence. With regard to HRD 85-6, Mr. Fogel, the selecting official, relied upon the interview work and recommendation of Mr. Wright. (Tr. 254-260, 271-273) Mr. Wright testified that he was quite familiar with both Mr. Isrin's and Petitioner's work (Tr. 277-278). He stated that he recommended Mr. Isrin based on his experience and performance of duties. (Tr. 278)

Both Mr. Fogel and Mr. Wright stated that they viewed as important duties for the position the ability to do statistical analyses of large scale data sets that are obtained or created within GAO and the ability to interact effectively on a day-to-day basis with the evaluators who originated the data sets. Mr. Wright believed Mr. Isrin had demonstrated the ability since he had observed Mr. Isrin performing those tasks for a number of years, and in particular was mindful of Mr. Isrin's recent work as chief data analyst on GAO's review of the block grants program, which, according to Mr. Wright, "was probably the largest data collection effort in GAO's history." (Tr. 265-266, 297-300). According to Mr. Wright, Petitioner did not seem to have any similar experience and he would not have been his second choice for the position. (Tr. 298,300). Respondent points out that Mr. Wright (age 40) and Mr. Fogel (age 49) were in the same protected age group as Petitioner (Tr. 256,282).

With regard to RCED 85-4 and RCED 85-5, Mr. Peach testified that he considered each applicant's promotion package as well as the results of the interviews he conducted. He further stated that he generally had more detailed background and knowledge about the work assignments performed and contributions made by candidates in his own division. (Tr. 307-11, 316, 319).

Mr. Peach stated that he selected Mr. Doerning and Mr. Rachlis, candidates from his own division, based on information gleaned from their paperwork, the interviews and his personal knowledge of their work performance. He also expressed concern about Petitioner's ability to communicate, citing as an example Petitioner's inability to clearly convey an understanding of the work he performed. (Tr. 312, 215) In making his selection, Mr. Peach stated that he considered the candidates' experience and performance as more relevant than their educational level or quantity of publications. (Tr. 313-314, 320-321) Respondent notes that at the time of the selection Mr. Peach was 46 years old and Petitioner was the only candidate for either position over the age of 40.

As to the PEMD 85-3 selections, Ms. Chelimsky, the selecting official, testified that she did not interview any of the candidates because they were in her division and she considered herself to be familiar with their work. Respondent cites Ms. Chelimsky's statement that she placed greater weight on the candidates' performance as opposed to their advanced academic credentials. (Tr. 339, 341-43) She further testified that in selecting applicants for the GS-14 level positions, she looked for persons with the managerial capability to be a good supervisor. (Tr. 338, 340). In this respect Ms. Chelimsky stated that she selected Ms. Fossett because she had demonstrated extremely good performance over the period, particularly her work on a politically sensitive assignment reviewing the Women's Infant's and Children's Program. (Tr.

341-342). She testified that she chose Ms. Mauch based largely on the very strong recommendation the selectee received from her supervisor, Bryan Keenan, and others. (Tr. 341-322). Ms. Chelimsky stated that she also consulted Petitioner's supervisor, Mr. Bouland, whose comments she characterized as "ordinary". (Tr. 344).

Ms. Chelimsky testified that she eliminated Petitioner from consideration because of concern over his interpersonal skills. (Tr. 346-47, 373). Respondent asserts that support for Ms. Chelimsky's last concern can be found in (1) 1983 meetings with Petitioner, his supervisors and an EEO counselor in which it was recommended that Petitioner take a course in interpersonal relations, (2) a comment in Petitioner's performance appraisal that he would benefit from stress management, (3) difficulties in obtaining a requested transfer for Petitioner and (4) description of his behavior by other observers. (Tr. 348-54, 370-71, 394-96; Jt. Exhs. 2, 3, 10 and 14; Pet. Exh. 2).

Respondent concedes that Petitioner has offered sufficient evidence to establish a prima facie case of discrimination. In the above cited evidence, however, Respondent contends that each selecting official has provided legitimate nondiscriminatory reasons for their selections. The burden, therefore, returns to the Petitioner who must establish that these reasons were pretextual in nature and that the real reason for the actions was discrimination.

Respondent argues that the evidence the Petitioner put forward to prove pretext was either faulty or unpersuasive. For instance, Petitioner's witness unilaterally established four criteria for judging each candidate that included factors that were not deemed pertinent by the rating officials such as (1) whether candidates had PHD's, (2) who had the most published articles and (3) their evaluations on quality ranking factors. Dr. Outtz then weighted each of these factors as being equivalent to each candidate's performance appraisal. (Tr. 209-218) He acknowledged that he never interviewed any of the candidates. (Tr. 220-224) Instead, he relied on an arbitrary formula whereby he determined, in many of the instances, that the Petitioner was superior to the selectee because he had published more articles and had a PHD. In so concluding, Respondent asserts that Dr. Outtz effectively ignored the significantly higher performance appraisals that the selectees received, and the supervisory nature of the jobs for which the parties were competing.

Respondent further claims that Petitioner failed to offer any valid statistical evidence of discrimination. At the hearing, Petitioner had Dr. Charles Mann, a statistician, testify about his analysis of the GAO-wide promotions of GS-14 evaluators. Under cross examination, Dr. Mann stated that his finding that a statistically significant number of minorities was not being selected was based on the assumption that the number he used represented different minority candidates rather than several different applications from a smaller total number of minority applicants. Respondent notes that Dr. Mann admitted that if the numbers were based on the latter situation, then his statistical analysis was not pertinent (Tr. 238-243). Bert Harris, from the Office of Civil Rights, testified that the figures Dr. Mann used represented numbers of applications (13) rather than actual minority applicants (8) (Tr. 396-403). Based on Dr. Mann's admission, Respondent asserts that Petitioner's statistics are of no value in raising an issue of adverse impact or proving a claim of disparate treatment.

Respondent also challenges the pertinence of Dr. Hill's testimony. It notes that the study referred to by Dr. Hill involved the review of GS-12 evaluator and evaluator related employees subject to BARS (Tr. 175-185). While the studies noted that differences in the ratings for minorities and non-minorities existed, it made no finding as to the reason for the differences (Tr. 198-199). In addition, Respondent asserts that

the studies did not review the ratings of GS-13 employees, which would be more applicable to the Petitioner.

#### 4. DISCUSSION AND ANALYSIS

Petitioner contends that he was denied a promotion because of discriminatory conduct on the part of the selection officials. The order and burden of proof in an individual case of employment discrimination was first set forth by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). 1) The plaintiff must make out a prima facie case; 2) then the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason, thus rebutting the plaintiff's prima facie case; 3) if rebuttal is established, the burden shifts back to the plaintiff to show that the employer's articulated reason is mere pretext, or unworthy of credence. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

In order to establish a prima facie case where promotion is at issue, Petitioner must show the following:

1. That he belongs to a protected group;
2. That he was qualified for and applied for an existing promotion;
3. That he was denied the promotion; and
4. That other employees of similar qualifications who were not members of the protected group were promoted at the time Petitioner's request for promotion was denied.

See, Valentino v. U.S. Postal Service, 674 F.2d 56 (D.C. Cir. 1982); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

In addition to the above showing, the courts, in age discrimination cases usually require that the plaintiff show that there was a relationship between the adverse action and age. That is, the plaintiff is required to provide some evidence which creates an inference of discrimination. See, Toussaint v. Ford Motor Co., 581 F.2d 812, 815 (10th Cir. 1978). Statistical evidence of discriminatory conduct or direct or circumstantial evidence of discriminatory intent will suffice to show that age was a factor in the decision by the employer, and thus, will cement the prima facie case.

To rebut the prima facie case, the "defendant must present with clarity and reasonable specificity a legitimate, nondiscriminatory reason" for not promoting the Petitioner. Valentino, supra. The employer's rebuttal burden is not one of persuading the Court or proving by objective evidence that the person promoted was more qualified than Petitioner, i.e., that Petitioner's objective qualifications were inferior to those of the promotee. "Rather, the employer has discretion to choose among equally qualified candidates, provided the decision is not based on unlawful criteria. The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 258-259 (1981). Once the plaintiff has articulated a prima facie case, the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions. Id.

Once defendant has articulated a legitimate, nondiscriminatory reason for Petitioner's non-selection, the Petitioner can only prevail by showing that defendant's proffered reasons are pretextual and that discrimination was the real or most likely cause for the action. McDonnell Douglas; Burdine; Aikens v. U. S. Postal Service Board of Governors, 460 U.S. 711 (1983). Here, Petitioner has alleged that he was discriminated against in five separate promotion actions on the basis of race, color, age, national origin and sex. There is no dispute that Petitioner was qualified for the positions in question, each of which was to the GS-14 level. Petitioner made the "best qualified" (BQ) list for each of the positions, which means that, according to objective standards, his qualifications placed him among the highest-ranked five or six persons applying for each position.

Nor is there any dispute that Petitioner established a prima facie case, according to the McDonnell Douglas criteria. Petitioner applied for an existing vacant position, was qualified, was rejected, while each position was filled by a person not of Petitioner's race, color, or national origin and either his sex or age.

In reply to the presentation of a prima facie case, Respondent, through its selecting officials, must articulate legitimate, nondiscriminatory reasons for choosing each of the selectees rather than Petitioner. In the case of RCED 85-6, Mr. Fogle and Mr. Wright emphasized their need to fill the vacancy with someone that could provide assistance to staff members working on HRD assignments particularly in the area of statistical analysis and use of graphics. Because of the need to communicate on a day-to-day basis with the staff, both Mr. Fogle and Mr. Wright cited the need for the selectee to have good interactive as well as technical skills. Each testified that they were familiar with the selectee's work and considered him to be highly experienced in the area of statistical analysis and graphics. Mr. Wright praised Mr. Isrin's good interaction skills and noted that Petitioner was far less experienced than the selectee in these areas (Tr. 259-260, 277-280, 298). Mr. Wright also commented that he was surprised at one of Petitioner's responses during the interview which, to the interviewer, indicated either a "cavalier attitude" toward the job or a failure to "read the signal" in the question.

With regard to RCED 85-4 and 85-5, Mr. Peach testified that he reviewed each application package, the applicant's representation of their own experience and the performance evaluations, and interviewed about 90 individuals. (Tr. 311). He stated that he recalled in his interview with Petitioner that he found Dr. Chennareddy to be unclear about the kinds of contributions he had been making. (Tr. 312). Mr. Peach asserted that the RCED 85-4 selectee, Mr. Doering, had communicated clearly in his interview, had performed well within his unit and that the position being filled required a lot of technical assistance, which placed a premium on communication skills. (Tr. 314-315). As to RCED 85-5, Mr. Peach testified that he selected Mr. Rachlis based on his performance evaluation, the interview and the work projects he had successfully completed while working in the selecting official unit. (TR. 320). Mr. Peach stated that age was not a factor in his selection and that he was 46 years old at the time he made the selection. (Tr. 321-322).

With regard to the two PEMD selections, Ms. Chelimsky stated that since these vacancies involved the filling of GS-14 positions, she reviewed the applicants for technical quality, performance and managerial capability. (Tr. 338-340). She testified that she was generally familiar with the work of PEMD applicants and therefore did not interview them. (Tr. 341). Chelimsky further stated that she selected Ms. Fossett because of her outstanding performances on a number of important projects with which she was familiar. Similarly, she noted that she had received a lot of positive feedback from her staff regarding the performance of the other selectee, Ms. Mauch. (Tr. 342-343). She stated that she had consulted Petitioner's supervisor, Mr. Bouland, and his comments were "ordinary" and "there was no clamor that he

be promoted". (Tr. 344). Ms. Chelimsky also stated that she had met with her managers, who told her that Petitioner had trouble dealing with other staff members, and that when she met with Petitioner about this, he became agitated. (Tr. 350-1)

In the above testimony, each of the selecting officials has articulated a reason for not selecting Petitioner that does not involve race, sex, age or any other discriminatory basis. Under the McDonnell-Douglas test, the burden shifts back to Petitioner, who must establish that the articulated, legitimate nondiscriminatory reasons are pretextual and the real basis for the action was discrimination.

In trying to establish pretext, Petitioner presented the testimony of Dr. Outtz to show that Dr. Chennareddy was better qualified than the selectees. In reaching this conclusion, Dr. Outtz relied on his own formula for effectively "grading" each of the selectees. There was no indication, however, that such a formula was either required by the MSP or used by any of the selecting officials. Under GAO order 2335.8, Chapter 4 (1)(b) it simply states: "Selecting officials may select any candidates referred, based on their judgment of how well each candidate is likely to perform at the grade level being considered" (emphasis added). The vacancies in question were all GS-14, high-graded positions requiring supervisory and/or leadership skills. According to the selecting officials, the ability to orally communicate and the most recent performance appraisals were most important in reaching their decisions. Dr. Outtz acknowledged that he did not interview any of the candidates and thus was not in the same position as the selecting officials to reach a judgment. This, in my view, is particularly telling given the concerns about the candidates' oral capabilities. In his own written analysis, Dr. Outtz concluded that the selectees, with the exception of Mr. Rachlis, had better performance appraisals than Petitioner (Pet. Exh. 9). While Dr. Outtz characterizes Mr. Rachlis' and Petitioner's appraisals as about equal, Mr. Rachlis received a "superior" for oral communication while Petitioner received "fully successful" (Pet. Exh. 2 and Jt. Exh. 19). In addition Petitioner's application package includes a notation that he would "benefit from training in communication skills and stress management." (Pet. Exh. 2)

In reaching his overall conclusions, Dr. Outtz relied on educational background and quantity of articles to tip the balance in favor of the Petitioner. Agency witnesses, however, persuasively argued that at the GS-13 level, educational background was not so important (i.e. all qualified applicants have adequate educational training), and that performance is more significant for these positions. Respondent also noted that the quantity of articles tells the reviewer nothing about quality and it may have no relevance to the work that needs to be performed for the vacancies that were in question. Based on the most recent appraisals and the selecting official's assessment of the candidates oral skills, it appears that Petitioner did not have superior qualifications.

Petitioner attempted to challenge the validity of the performance appraisal system through the testimony of Dr. Hill regarding BARS. The studies relied on, however, concerned GS-12 evaluators, while Petitioner and selectees were all GS-13's (Pet. Exhs. 6 and 7). Dr. Hill also acknowledged that the studies did not reach any conclusions regarding differences found among various groups (Tr. 198-199). Petitioner did not offer any appropriate statistical analysis for reaching any specific conclusion from the findings in these studies. Petitioner, in fact, presented no statistical evidence regarding patterns of age or sex discrimination. He submitted some statistical evidence on race discrimination through Dr. Mann's testimony. This latter evidence was rebutted by a GAO witness who established that Dr. Mann's findings were premised on incorrect information (Tr. 396.-401; AG. Exh. 8). Petitioner did not even mention it in his brief.

In citing procedural irregularities, Petitioner relies heavily on the selecting officials' failure to use rating and ranking panels. Chapter 4(1)C of GAO Order 2335.8 states that selecting officials "may" designate a panel when there are more than 3 qualified applicants rather than specifically requiring a panel. Petitioner, moreover, acknowledged the authority of the Assistant Comptroller General for Human Resources to grant exceptions to the use of panels, but objected to what he viewed as excessive use of this exception. In response, Ms. Cytron testified persuasively that it was not cost effective to use the intensive panel system to eliminate one or two qualified candidates, and the agency had changed the MSP in 1985 after receiving numerous requests for exceptions during the prior years (Tr. 127-29, 139-140).

Even assuming panels had to be convened, Petitioner offered no explanation as to how this practice discriminates against minorities in general, or him as a minority in particular. Similarly, he failed to explain the discriminatory impact of the other practices that he found objectionable. For instance, Petitioner is understandably concerned about Mr. Fogle's delegation of the selection process to Mr. Wright, and his subsequent selection of Mr. Isrin, a close associate of Mr. Wright, without the benefit of any written or even an oral report. While the regulations do not appear to preclude the delegation of the selecting official's review of candidates, the processing of this selection suggests almost an abdication by Mr. Fogle of his obligation to make the selection. Nevertheless, Petitioner has not indicated how minorities in general or he, as a minority, in particular, was discriminated against by this practice. At best, it appears that everyone, no matter what race, age or sex, other than the selectee, was disadvantaged. While this may not be the way that the drafters of the MSP intended the selection process to work, it still does not create a basis for Petitioner to succeed on a claim of discrimination.

This same problem exists with Petitioner's challenge of Mr. Peach's credibility. On this point, Petitioner relies on the fact that Mr. Rachlis received a borderline rating for one objective in a 1983 appraisal. In the most recent appraisal (1984) before the selection, however, Mr. Rachlis received superior for this same objective, seemingly indicating that he had resolved any problems he was having performing in this area. This leaves only Petitioner's challenge of Mr. Peach's memory concerning their interview together. Even assuming, arguendo, that this raises a concern regarding his credibility (which, absent other evidence, it does not), Petitioner still has failed to establish any link to discrimination.

Petitioner went to the greatest length to challenge the validity of Ms. Chelimsky's testimony. With regard to her PEMD selections, the focus was on race and sex discrimination rather than age. Petitioner did not offer any statistical evidence nor did he cite specific incidences to support his grounds. On paper, moreover, both of the selectees had better overall performance appraisals than Petitioner. Thus, the prime reason given by Ms. Chelimsky for her selections is supported by the selection packages.

Petitioner instead challenged Ms. Chelimsky's character through the testimony of Mr. Fishbein and Dr. Hill. In Mr. Fishbein's case, he was a former employee who was disgruntled about Ms. Chelimsky's inability to deliver on promises concerning the direction of her division. His comments about the changing of her views from day-to-day is not, as he described it, evidence of lying. In my view, assertions that she changed her opinion on a given matter, even if true, do not mean that her judgment on another matter, merit selection, is necessarily called into question. There is also no evidence to tie this in to discriminatory motive or intent.

While Dr. Hill testified of the alleged, commonly held view that Ms. Chelimsky discriminates against minorities, he could offer no specific evidence to support this opinion. In contrast to this, Curtis Groves, Jr., another black male who worked for Ms. Chelimsky, denied, in an affidavit, that he ever was

discriminated against. While he stated that he objected to her perceived practice of playing favorites, he also acknowledged that her favorites included females and males (Jt. Exh. 11). Dr. Hill did not offer any specific incidents or supporting evidence to show that his perception, rather than Mr. Groves', was the more accurate view.

Finally we come to Petitioner's contention that Ms. Chelimsky improperly used a "secret file" as a basis for her selection decisions. Petitioner tried to establish the significance of this by citing Stoller. That case involved an Army employee who claimed that he had been discriminated against by reason of his religion when, he alleged, supervisors had placed incorrect evaluations in his file, which resulted in his failure to be promoted. The Court held that for Stoller to prevail he must prove that his supervisors "prepared materially false or inaccurate evaluations, that they were motivated by illegal discriminatory reasons and these evaluations resulted in his failure to be promoted." 682 F.2d at 981. Putting aside the question of whether the two memos constitute a "secret file", none of the necessary elements cited by the court appear in the case at bar. One of the memos at issue was prepared by Joseph Delfico summarizing a meeting he and Petitioner had with Ms. Chelimsky. (Ag. Exh. 6). The other involved notes about Petitioner's alleged "upset and anxious" conduct over a 4-week period. (Ag. Exh. 7) With regard to the standards enunciated in Stoller, Ms. Chelimsky stated that the Delfico memo accurately reflected their meeting (Tr. 355). More importantly, Petitioner failed to offer any evidence to establish that either the author of the memos or Ms. Chelimsky were somehow motivated by discriminatory intent.

Instead of presenting evidence on the criteria, Petitioner argued, in effect, that the memos were significant because they imparted information that Ms. Chelimsky should not have seen, and which adversely affected his chances for promotion. The record disclosed, however, that in the case of the Delfico memo it was a summary of a counseling session which Ms. Chelimsky attended. In the case of the second memo, Ms. Chelimsky stated that Mr. Bouland orally reported on problems he was having with Petitioner as well. (Tr. 353-357). The evidence before me indicates, therefore, that Ms. Chelimsky had independent knowledge of the events related in the memo and that she would have possessed this information even if the documents had not been submitted to her.

Contrary to Petitioner's claim in his brief, Ms. Chelimsky testified to several instances in which she witnessed conduct on the part of Petitioner which, in her view, was not proper for someone who would assume a supervisory position. (Tr. 357, 359-382). While Petitioner may object to Ms. Chelimsky's opinion of his qualifications, the record establishes that these views (whether "correct" or not) are based on actual circumstances and occurrences. He offered no evidence to persuade me that a discriminatory reason actually motivated Ms. Chelimsky.

## 5. FINDINGS

Petitioner has cited five alleged incidences of Agency illegality. In three instances, GAO was allegedly guilty of discrimination by reason of Petitioner's age, race, color and national origin and the other two concerned supposed discrimination based on sex, race, color, and national origin. It appeared to this trier of fact that Petitioner selected these different categories because in three instances younger men were selected, and in the other two women were chosen.

This does not affect Petitioner's ability to enunciate a prima facie claim, which he clearly has done in this case. In response, each of the selecting officials stated legitimate, nondiscriminatory reasons for their selections. The Agency is not required to convince a reviewing body that it chose the better applicant, but merely provide enough evidence which would "allow the trier of fact to rationally conclude that the

employment decisions had not been motivated by discriminatory animus". Valentino, 674 F2d at 60. Respondent has met this burden. Furthermore, there is ample evidence in the record showing that each of the selectees had better performance appraisals than Petitioner. Performance appraisals were cited as the primary criterion considered in each of the selections.

The burden then shifted back to Petitioner, who was unable to offer any pattern or practice or statistical analysis from which discriminatory impact is shown or suggested. The only common thread in these selections, the decision not to use panels, was based on apparent considerations (economy of resources) unrelated to discrimination. Furthermore, Petitioner was not able to enunciate how this decision was discriminatory or ever had an adverse effect on him.

Instead, this Presiding Member is left with a potpourri of allegations involving selecting officials of varying ages and sexes. The allegations against them are without pattern and limited to a few specific aspects of each selection process. At best one could discern a preference on the part of these officials for individuals they knew and worked with. In the case of Ms. Chelimsky, her personal knowledge of Petitioner had a negative impact on his chances to be chosen. This, however, provides no basis for finding discriminatory intent or motivation.

#### 6. ORDER

It is my conclusion that the evidence before me does not support a finding that Petitioner's non-selection was the result of discrimination on the part of Respondent by reason of sex, age, race, color or natural origin. I, therefore, order that the petition be denied.