

**ROCHELLE BRYANT v. U.S. Government Accountability Office**

**Docket No. 10-03**

**Date of Decision: February 1, 2012**

**Cite as: Bryant v. GAO, Docket No. 10-03 (2/1/12)**

**Before: Susan R. Winfield, Administrative Judge**

**Headnotes:**

**Credibility**

**Merit System Principles/Violation**

**Non-selection**

**Prohibited Personnel Practice**

**DECISION AND ORDER**

**PERSONNEL APPEALS BOARD  
U.S. GOVERNMENT ACCOUNTABILITY OFFICE  
WASHINGTON, D.C.**

<b>ROCHELLE BRYANT,</b> <b>Petitioner</b>	)	
	)	
<b>v.</b>	)	<b>Docket No. 10-03</b>
	)	
<b>UNITED STATES GOVERNMENT</b> <b>ACCOUNTABILITY OFFICE,</b> <b>Respondent</b>	)	<u>February 1, 2012</u>
	)	

**DECISION AND ORDER**

**I. INTRODUCTION**

Petitioner, Rochelle Bryant, alleges that the Government Accountability Office (GAO, the Agency, or Respondent) committed a prohibited personnel practice, in violation of a law, rule or regulation implementing a merit system principle when her supervisor did not select her for promotion to either of two PT-III Budget Analyst positions in the Budget Office in 2010. Petitioner claims that her supervisor, India Jenkins, was obliged under 5 U.S.C. §2302(b)(12) and GAO Order 2335.6 (Competitive Selection Plan for Administrative Professional and Support Staff) (Dec. 1, 2004) to make the promotion decisions impartially, based on the candidates' relative knowledge, skills and abilities, in a fair and open competition.<sup>1</sup> Ms. Bryant argues that Ms. Jenkins'

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<sup>1</sup> In a Decision dated July 11, 2011, I granted the Agency's motion for summary judgment on other claims raised by Ms. Bryant in her initial Petition. These claims were that: (1) Petitioner's supervisor violated section (b)(6) of 5 U.S.C. §2302 by giving preferential treatment to one of the promoted co-workers; (2) the supervisor violated section (b)(10) of this statute by refusing to select Petitioner in retaliation for her previous challenges to her performance evaluations; and (3)

explanations for her promotion decisions were incredible, inconsistent and unsupported by the evidence, requiring a conclusion that they were a pretext for her failure to abide by the merit system principle and implementing Order.

Petitioner claims that she was the best-qualified candidate for the promotion and that her supervisor conceded as much in a conversation they had after the selections were made. Petitioner's Initial Post-Hearing Brief (Pet. Init. Brief) at 17. Petitioner further claims that her supervisor was motivated to deny her a promotion because she had challenged two of her annual performance assessments prepared by Ms. Jenkins. *Id.* at 18 n.15; *see also* Hearing Transcript (TR) 7-8, 29, 31.

Ms. Bryant asks this Board to find that the Agency committed a prohibited personnel practice and direct that GAO make her whole through one of three means. First, she suggests that GAO should cancel the promotions, repost the vacancies and make new selections. Recognizing that cancellation of the promotions would be unfair to the selectees, "who are innocent of any wrongdoing," Pet. Init. Brief at 17, Petitioner secondly suggests that the Board order the Agency to place her into a PT-III position, retroactive to the selection date of 2010 with back pay, interest and accompanying retirement benefits. Thirdly, Petitioner suggests that the Board order that GAO pay her "front pay at the PT-III Analyst pay level until such time as a PT-III position for which [she] is qualified becomes available, retroactive to the selections at issue, with attendant back pay, interest, and agency retirement plan contributions." *Id.* at 17-18.

GAO responds that Petitioner fails to cite a law, rule or regulation that was violated and that implements a merit system principle. Respondent's Opposition to

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the Agency violated section (b)(12) of the statute because the vacancy announcement for the positions in question failed to contain all of the necessary criteria on which candidates would be evaluated.

Petitioner's Initial Post-Hearing Brief (Resp. Opp.) at 2. The Agency claims that Order 2335.6, Ch. 3, ¶5(b)(1) merely restates, but does not implement, the merit system principle at issue. Respondent's Post-Hearing Brief (Resp. Brief) at 16. GAO contends further that, even if we conclude that the Order implements the principle, Ms. Jenkins' testimony was neither incredible, inconsistent, or unsupported by the record evidence. GAO contends that Ms. Jenkins recognized that all five candidates for the two promotion positions were deemed "best qualified," but that the two selectees were better qualified than were the remaining three, including Ms. Bryant. *Id.* at 6-8. The Agency argues that Petitioner's comparative analysis of her own qualifications, as compared with those of the two selectees, is self-serving and irrelevant to the question whether Ms. Jenkins committed a prohibited personnel practice in her decision to promote the two co-workers. *Id.* at 8. Lastly, the Agency argues that Ms. Jenkins' statement to Ms. Bryant that she was the best-qualified candidate for the position was a slip of the tongue, not an accurate reflection of her views of the respective qualifications of the candidates. *Id.* at 25-26.

The evidentiary hearing in this matter took place on July 26-27, 2011. Both parties were represented by counsel and had the opportunity to present evidence in support of their respective positions. A verbatim transcript was made of the hearing. The parties filed post-hearing briefs and responses on September 14 and October 18, 2011.

For the reasons set forth below, I find that Ms. Bryant has not established by a preponderance of the evidence that GAO committed a prohibited personnel practice in making selection decisions in 2010 for the two PT-III Budget Analyst positions.

## II. FACTS

1. At all times relevant, Petitioner, Rochelle Bryant, was employed at GAO as a PT-II Budget Analyst. Her direct supervisor was India Jenkins, the Budget Director.

Joint Stipulation of Facts (JS) ¶¶1, 2.

2. In August 2008, GAO posted vacancy announcements for two Budget Analyst PT-III positions for competitive application. JS ¶3. Ms. Bryant was among the employees who applied for promotion to this position. India Jenkins selected someone other than Petitioner for the position and advised Petitioner of her non-selection. JS ¶4. Ms. Bryant did not challenge her non-selection because she thought the selection process was conducted fairly.<sup>2</sup> TR 389-91.

3. A PT-II Budget Analyst works with a number of teams and offices within GAO assisting them in identifying their budget needs and executing and tracking those budgets throughout the year. A PT-III Budget Analyst has similar duties, but is expected to have a more comprehensive understanding of the Agency's overall budget and to work more independently and collaboratively than the PT-II Analysts. A PT-III Analyst is expected to lead projects and teams of staff and do more comprehensive work on multiple components of the budget. TR 64-65, 77-81, 323.

4. In December 2008 or January 2009, Ms. Bryant filed her first challenge to her annual performance appraisal written by Ms. Jenkins. Petitioner denies that her non-selection in 2008 had anything to do with her performance appraisal challenge. TR 386-87, 399, 404-05; *see* Petitioner's Exhibit (P.Ex.) 5.

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<sup>2</sup> Petitioner specifically cited the fact that there had been interview panels employed. TR 389. In the 2010 selection process, Petitioner complained that Ms. Jenkins did not read or compare applications, resumes or questionnaires and she did not utilize interview panels. *See* TR 389-91.

5. In 2010, GAO posted two additional Budget Analyst PT-III positions for competitive applications in Vacancy Announcement GAO-10-CASO-0560-08. In addition to completing an on-line application, applicants were required to submit a resume and complete a questionnaire. *See* Joint Exhibit 1 (J.Ex. 1).

6. Ms. Bryant and four others, including Shelia Patrick and Donald Morrison, applied for the positions and were all certified by the Human Capitol Office (HCO) as “best qualified.” JS ¶6; TR 109-10; P.Ex. 19.

7. Ms. Jenkins consulted the HCO and was advised that because she directly supervised all of the best-qualified applicants, she was not required to review their applications or on-line submissions. Ms. Jenkins made her selections without reviewing the applications, resumes, or questionnaires, based on her extensive knowledge of the applicants and their work. TR 106-08.

8. On May 25, 2010, Ms. Jenkins selected Shelia Patrick and Donald Morrison for the PT-III positions. *See* P.Ex. 19.

9. When Ms. Bryant asked why she was not selected, Ms. Jenkins told her that “out of the five applicants, [Petitioner] was the most qualified, but [she was] not selected.” TR 389, 416-19. Ms. Bryant then asked Ms. Jenkins if she had just said that Petitioner was the “best qualified;” Ms. Jenkins responded: “Yes, but that’s not what I meant to say.” TR 411, 432-34. Ms. Jenkins explained that she meant to say that Petitioner was among the best qualified, but was not *the* best. According to Ms. Jenkins, all five candidates were highly qualified; Ms. Bryant was well qualified, but she was not the best qualified. TR 432-34.

10. Ms. Jenkins explained that the reasons for her selection of Mr. Morrison were that he had worked in a number of areas in the Budget Office which gave him a broad-based knowledge of the Agency; he worked well independently; he had good judgment; he worked well collaboratively; he had good analytical skills and a high level of productivity. TR 141-42.

11. Ms. Jenkins explained that the reasons for her selection of Ms. Patrick were that she had a broader knowledge of the budget; she worked well independently; she had good judgment; she showed lots of initiative; and she had high productivity. TR 142-43.

12. Ms. Jenkins stated that she did not select Petitioner because she did not have as broad a knowledge of the budget and did not show as much initiative. Otherwise, she conceded that Petitioner was equally competitive with the other candidates. TR 144. According to Ms. Jenkins, Ms. Bryant also displayed initiative and had Agency-wide experience, but not as much as Ms. Patrick and Mr. Morrison. Ms. Jenkins testified:

There were five staff who were listed on the cert[ification of best-qualified candidates], all of whom are very capable staff. So trying to decide which two, and knowing that it might be the last positions that we'd be able to offer for a while I think made it especially difficult.

TR 183, 434.

13. In August 2007, Mr. Morrison came to the Budget Office on a detail from the International Affairs and Trade Team (IAT) at GAO.<sup>3</sup> His prior experience included audit engagements for various federal agencies, conducting interviews and writing reports of interviews. When he began the detail, Mr. Morrison was assigned to work on

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<sup>3</sup> According to Ms. Jenkins, she selected Mr. Morrison for the detail to the Budget Office based on information from his Managing Director that he was a good writer with good analytical skills. Ms. Jenkins assigned Mr. Morrison to streamline the budget and to write portions of the budget submission to Congress. TR 120-21.

GAO's budget submission to Congress. This involved drafting various sections of the submission, including a statement of how GAO strategically planned its resources; what GAO's budget resources were in the prior fiscal year and what was planned for the upcoming year. In addition, Mr. Morrison drafted the transmittal letter for the then Acting Comptroller General, including a summary of the level of funding GAO was requesting, a summary of GAO's staffing needs, a statement of recent significant reports by GAO and awards received by the Agency. TR 120-22. Mr. Morrison also drafted a Budget-In-Brief, which was a brief, summary explanation of the submitted budget. He also drafted Congressional testimony for the Acting Comptroller General, attended the hearings, and drafted a synopsis of the hearings for the benefit of GAO managers. TR 215-34.

14. In mid-2009, Mr. Morrison's detail ended and he took a position as a permanent PT-II Budget Analyst in the Budget Office. TR 234-35. He was given responsibility for writing standard operating procedures (SOPs) for the Budget Office. This required that he learn every procedure and draft an SOP after determining whether the subject of the SOP was relevant to the work of the Budget Office. He and his team received an award for their work in this area. Mr. Morrison was also responsible for the Agency-wide training account. TR 238-44.

15. According to Ms. Jenkins, Mr. Morrison showed initiative in several areas: He created a Highlights Page for the budget submission, summarizing the main points of the submission; he rearranged the transmittal letter making it easier to locate the Agency's funding requests; and he developed the Budget-in-Brief, a short synopsis of the Agency's budget submission. TR 180-82.

16. Shelia Patrick began working in the Budget Office in 2002. TR 259. At various times early in her career she had responsibility for the Agency-wide training and travel standard accounts. TR 289-92, 302. Beginning in 2006, she had primary responsibility for maintaining the Budget Office database, including preparation of all reports as requested by management. TR 292-302. In addition, Ms. Patrick was tasked with comparing the GAO budget requests with those of other legislative branch agencies. TR 267-70. On a monthly basis, Ms. Patrick also prepared operating plans based on data submitted to her from various GAO units. The operating plans were sent to Congress setting forth information about what the Agency intended to spend during a fiscal year. Included in the operating plans were a year-to-year comparison of funds used; a resources availability report – an analysis of the current program allocations versus the resources actually expended; and a comparison of the Agency’s planned spending with what was requested (the requirement program). TR 271-305. Ms. Patrick was the primary Analyst who was, in her own words, “the keeper of the numbers” for the Budget Office. TR 301. She kept track of “what numbers were being changed and why.” *Id.*

17. According to Ms. Jenkins, Ms. Patrick’s work on the database exposed her to information from all of the teams, offices and staff across the Agency. She was responsible for tracking every funding request from initiation to final approval and for producing monthly comparative reports as requested. TR 144-53.

18. According to Ms. Jenkins, Ms. Patrick showed initiative when she worked on streamlining the budget process, using different tools for automating data, and when she worked on various report modules. Ms. Jenkins lauded Ms. Patrick’s willingness to

volunteer to work outside of her normal duties to improve the way in which data could be used to provide needed and requested information. TR 153-62.

19. Ms. Bryant has been a Budget Analyst with GAO since 2005. JS ¶1. She has over twenty years of experience in financial management. Before becoming a Budget Analyst, she was a Budget Clerk and a Budget Assistant. She became a Budget Analyst in 1991 for a private contractor, then was a Business Financial Manager for the Architect of the Capitol. TR 319-21. At GAO, Ms. Bryant tracked reprogramming requests from the budget accounts to which she was assigned. In 2006, she was given Agency-wide responsibility for re-engineering various budget processes for which she received an award. The project, however, was eventually shelved before it was completed. TR 324-29, 341.

Also beginning in 2006, Petitioner was assigned to be the liaison for the Performance and Accountability Report (P&A) team that was responsible for Agency-wide tracking of the Agency's success in meeting its strategic plan goals, its mission and its budget. TR 329-36. Ms. Bryant also worked on the Performance Plan which was a forward projection of the Agency's performance that was included in the budget submission to Congress. TR 336-38. After Mr. Morrison was selected for the promotion to the PT-III position in 2010, he took over this responsibility from Petitioner. TR 337.

20. Ms. Bryant demonstrated initiative through her volunteer work, including her work helping to produce the Agency's website, her work with the GAO Chapter of

Blacks in Government (BIG) and her work in the Agency's Diversity Office.<sup>4</sup> TR 337-58.

21. According to Ms. Bryant, she had a "high level" understanding of the budget process. TR 371. She claimed to be "a borderline expert" based on her work experience and training. *Id.*

22. When she was not selected for one of the promotions in 2010, Petitioner spoke to Ms. Jenkins about it. She recalls that Ms. Jenkins said that she was "the best qualified" candidate of the five applicants, but that she was not selected. Petitioner claims that she asked Ms. Jenkins to repeat this, which Ms. Jenkins did three times. TR 414-17. However, when Ms. Jenkins tried to explain why Petitioner was not selected, despite being the best qualified, Ms. Bryant stated that she "tuned her out" and did not listen. TR 421; *see* TR 451-52.

23. Petitioner challenged her performance assessments that were prepared by Ms. Jenkins in 2008, 2009 and 2010. TR 380-86; *see* P.Exs. 5, 7. Each time she challenged her assessment, at least some of her challenges were upheld and the assessments were modified in her favor. TR 387-88.

24. Petitioner claims that Ms. Jenkins did not select her for promotion in 2010 because she successfully challenged her performance assessments. Petition ¶4.

Concerning these challenges, Ms. Jenkins testified:

[T]hat's her right, staff challenge ratings. . . . It's her right to challenge the rating if she disagrees with it and several staff, too, I mean it's just the nature of the process.

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<sup>4</sup> Petitioner conceded that her work with BIG and in the Diversity Office was not related to her work as a Budget Analyst. TR 394-95. She also conceded that her supervisor, Ms. Jenkins, did not know about all of her volunteer work. TR 406-08.

TR 207. Ms. Jenkins explained that she did not consider the challenges when she made her selections in 2010. TR 208.

### III. CONTENTIONS OF THE PARTIES

#### A. Petitioner's Arguments

Ms. Bryant argues that GAO is obligated to adhere to the merit system principle contained in 5 U.S.C. §2301(b)(1) that states: “[S]elections and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.” She contends that GAO implemented this merit system principle in its Order 2335.6, Ch. 3 ¶5(b)(1), which requires that the selecting official “consider[] all candidates impartially in accordance with merit principles.” Pet. Init. Brief at 4; *see* J.Ex.3.

5 U.S.C. §2302(b)(12) makes it a prohibited personnel practice for an agency to:

take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

Petitioner argues that Ms. Jenkins’ promotion decisions in 2010 were not based on the comparative skills, knowledge and abilities of the applicants and, therefore, GAO committed a prohibited personnel practice under 5 U.S.C. §2302(b)(12). Ms. Bryant maintains that the selection process employed by her supervisor in 2010 involved personnel actions (promotions) that violated a rule (Order 2335.6) implementing a merit systems principle (§2301(b)(1)); and that such an action constituted a prohibited personnel practice as set forth in section 2302 of Title 5 U.S.C. (section (b)(12)). Pet. Init. Brief at 4.

Petitioner claims that Ms. Jenkins considered an improper factor in making her selection decisions – that is, Petitioner’s frequent successful challenges to her annual performance appraisals. TR 7-8, 21-21; *see* P.Exs. 5, 7. She alleges that proof that Ms. Jenkins considered an improper factor in making her promotion decisions is the fact that she gave numerous false and inconsistent statements explaining why she made the selections that she did. Ms. Bryant further asserts that her comparative qualifications were such that she should have been selected for one of the promotions. Pet. Init. Brief at 4-6.

#### B. GAO’s Arguments

GAO responds that Ms. Bryant fails to prove her claim by a preponderance of the evidence for several reasons. First, the Agency claims, Petitioner does not cite a law, rule, or regulation that implements the merit system principle contained in section 2301(b)(1). GAO argues that Petitioner’s reliance on Order 2335.6, Ch. 3 ¶5(b)(1) is insufficient because that provision does not implement a merit system principle; rather it merely recites that selecting officials should “consider all candidates impartially in accordance with merit system principles.” Respondent’s Post Hearing Brief (Resp. Br.) at 1-2. In addition, GAO contends, the record does not support a finding that Ms. Jenkins acted in violation of the merit system principle that she make her selections only on the basis of comparative merit. The Agency argues that there is no evidence that Ms. Jenkins utilized any factor other than merit in making her promotion decisions. In particular, she did not consider Ms. Bryant’s previous challenges to her performance assessments. *Id.* at 26. Lastly, GAO argues that Petitioner’s self-assessment of her

comparative skills, knowledge and abilities is irrelevant to the issue whether there was a prohibited personnel practice under 5 U.S.C. §2302(b)(12). Resp. Opp. at 8-9.<sup>5</sup>

#### IV. STATUTORY FRAMEWORK

5 U.S.C. §2301(b)(1) provides:

Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and *selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.* (Emphasis added.)

5 U.S.C. §2302(b)(12) makes it a prohibited personnel practice for an agency to take a personnel action if such would violate “any law, rule or regulation implementing, or directly concerning, the merit system principles contained in [5 U.S. Code § 2301].”

31 U.S.C. §732 requires that:

(a) The Comptroller General shall maintain a personnel management system. . . .

(c)The personnel management system shall –

- (1) include the principles of section 2301(b) of title 5;
- (2) prohibit personnel practices prohibited under section 2302(b) of title 5;
- (3). . .
- (4) ensure that officers and employees of the Office are appointed, promoted, and assigned only on the basis of

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<sup>5</sup> GAO also argues that in order for a party who disputes a non-selection to prevail, she must demonstrate a “qualifications gap” that is “great enough to be inherently indicative of” improper intent on the employer’s part.” *Holcomb v. Powell*, 433 F.3d 889, 897 (D.C. Cir. 2006). Petitioner argues that this test does not apply in the instant matter because it is not a Title VII claim, but that even if it did, she has demonstrated that her qualifications are superior to those of both selectees. I conclude that the qualifications gap test does not apply in this case because it does not involve a claim of discrimination. *See id*; *Lasley v. GAO*, PAB Dkt. No. 08-02 (May 28, 2009) *aff’d* Jan. 20, 2010, at 40; *see also Taydus v. GAO*, PAB Dkt. No. 07-03 (Jan. 13, 2009) at 6.

merit and fitness, but without regard to those provisions of title 5 governing appointments and other personnel actions in the competitive service;

GAO Order 2335.6, Chap. 1, ¶4 states:

The GAO Personnel Act of 1980 provides that employees of GAO are appointed, promoted, and assigned on the basis of merit, irrespective of race, religion, color, national origin, sex, non-disqualifying disability, sexual orientation, political affiliation, marital status, or age. *Consideration for change to a higher level is based on job-related skills, knowledges [sic], abilities, performance, and potential for development, so that employees selected will be those who are among the best-qualified and who will contribute most to meeting GAO's responsibilities.*

(Emphasis added).

Chapter 3, ¶3 of this Order provides in part:

b. Requirement for Rating and Ranking. After basic eligibility has been determined, further rating of applicants against the KSAs [(knowledge, skills, and abilities)] for the job will be conducted as follows:

(1) If there are 10 or fewer qualified candidates, all of the candidates may be referred to the selecting official for final consideration irrespective of the cutoff score. However, the selecting official may request that applicants be rated and ranked regardless of the number of eligible candidates.

(2) If there are more than 10 qualified candidates for a vacancy, they must be evaluated against the KSAs and ranked to determine the best-qualified candidates.

(3) A rating panel, HCO staff, or another knowledgeable management designee(s) may perform the candidate evaluation. . . . The selecting official may not conduct this evaluation or be part of a rating panel.

c. When Panels are Used.

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(2) Evaluation Procedures.

(a) When candidates are rated and ranked, the evaluation criteria used are expressed in a crediting plan<sup>6</sup> resulting from a job analysis of the position to be filled. HCO staff will develop crediting plans for positions to be announced.

(b) Candidates are rated on the extent to which they demonstrate possession of each KSA. Each rater independently rates each candidate on each KSA by reviewing all information provided and matching all information on each candidate with the appropriate level of each KSA in the crediting plan. The crediting plan assigns a score to each level and the combined scores on each KSA are added together to obtain a final score for each candidate.

(c) If the rating is done by a HCO specialist or other knowledgeable rating official rather than by a panel, candidates are given only one rating for each KSA.

Chapter 3, ¶ 4 of this Order provides:

- a. After all candidates [for promotion] have been assigned points under the crediting plan, they are listed in descending order of their point scores. A cut-score is established to identify the best qualified.
- b. All candidates at or above the cut-score must be referred [to the selecting official].
- c. The names of the best qualified candidates are listed alphabetically on the appropriate form and issued to the organization.

Chapter 3, ¶ 5(b)(1) provides:

The selecting official makes the selection(s) as expeditiously as possible and considers all candidates impartially in accordance with merit principles.

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<sup>6</sup> Chapter 1, ¶ 5h. defines a “Crediting Plan” as a “plan that measures each qualified candidate’s qualifications against each evaluation criterion identified for the vacancy. Candidates are given a score representing how well they measure against each criterion. The scores on each criterion are then combined for each candidate and the best qualified candidates are identified according to a specific ranking plan.”

## V. ANALYSIS AND DISCUSSION

5 U.S.C. §2302(b)(12) makes it a prohibited personnel practice for an agency to take a personnel action if such would violate any law, rule or regulation implementing, or directly concerning, the merit system principles found in 5 U.S.C. §2301.<sup>7</sup> In enacting this provision, Congress intended “to make unlawful those actions which are inconsistent with merit system principles, but which do not fall within the [other] categories of personnel practices.” House Comm. on Post Office & Civil Service, Legislative History of the Civil Service Reform Act of 1978, H.R. Doc. No. 2, 96<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 1486-87 (1979).

To establish a violation of 5 U.S.C. §2302(b)(12), three elements must be proved by a preponderance of the evidence: 1) a personnel action was taken or not taken; 2) the taking of or failure to take the action violated a civil service law, rule or regulation; and 3) the law, rule or regulation violated implements or directly concerns a merit system principle. *37 Named Petitioners v. GAO*, PAB Dkt. Nos. 09-01, 09-06 through 09-41 (Mar. 31, 2010) at 10; *Taydus v. GAO, supra* at 3; *Turner v. GAO*, PAB Dkt. No. 08-01 (Sept. 25, 2008) at 17-19; *Tekeley v. GAO*, PAB Dkt. No. 06-16 (Aug. 9, 2007) at 26; *Davis v. GAO*, PAB Dkt. Nos. 00-05, 00-08 (Jul. 26, 2002) at 34, *aff'd*, Jul. 11, 2003; *Special Counsel v. Brown*, 61 M.S.P.R. 559, 567 (1994); *Special Counsel v. Byrd*, 59 M.S.P.R. 561, 579 (1993), *aff'd*, 39 F.3d 1196 (Fed. Cir. 1994) (Table).

There is no dispute that Petitioner has established the first element of her claim. The promotions at issue were personnel actions taken by the Agency. The dispute in this case is whether Petitioner has proved the second and third elements of her claim, that is, whether the challenged promotion decisions violated GAO Order 2335.6 and whether

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<sup>7</sup> This Board has jurisdiction over such claims under 31 U.S.C. §753(a)(2).

GAO Order 2335.6 implements or directly concerns the merit system principle that promotions should be made on the basis of comparative merit of the candidates.

The Government Accountability Office Personnel Act of 1980 (GAOPA) established an independent personnel system for GAO and its employees. Pub. L. No. 96-191 §3(c)(1)(2), 94 Stat. 27 (1980). The GAOPA provides in 31 U.S.C. §732:

(a) The Comptroller General shall maintain a personnel management system. . . .

(b) The personnel management system shall –

- (1) include the principles of section 2301(b) of title 5;
- (2) prohibit personnel practices prohibited under section 2302(b) of title 5;

\* \* \*

- (4) ensure that officers and employees of the Office are appointed, promoted, and assigned only on the basis of merit and fitness, but without regard to those provisions of title 5 governing appointments and other personnel actions in the competitive service.

A. GAO Order 2335.6 Implements a Merit Systems Principle

The question presented is whether GAO Order 2335.6 implements the merit system principle in 5 U.S.C. §2301(b)(1) that promotions must be made on the basis of comparative merit. The term “implement” means “to carry out, accomplish, fulfill or give practical effect to, in the context of a manifest purpose or design, to prevent conduct which directly and substantially ‘undermines’ the merit system principles and the ‘integrity’ of the merit system.” *37 Named Petitioners v. GAO, supra*, at 21-22; *Davis v. GAO*, PAB Dkt. Nos. 00-05 and 00-08 (Jul. 11, 2003) (*en banc*) at 16; *Special Counsel v. Department of Veterans Affairs*, 75 M.S.P.R. 219, 222 (1997); *Joseph v. Devine*, 19 M.S.P.R. 66, 69 (1984); *Wells v. Harris*, 1 M.S.P.R. 208, 243 (1979); *see also, In re*

*Implementation*, 14 M.S.P.R. 145, 146-47 (1982). It applies to a provision that “prescribe[s] processes and procedures that were deliberately designed to accomplish a specific result.” *Special Counsel v. Harvey*, 28 M.S.P.R. 595, 601-02 (1984), *rev’d on other grounds*, 802 F.2d 537 (D.C. Cir. 1986). A law, rule, or regulation “directly concerns” a merit system principle when its connection to such principle is “clear.” *Id.* at 602 n.13; *Turner v. GAO*, *supra*, at 17-18; *see 37 Named Petitioners v. GAO*, *supra*, at 10.

GAO Order 2335.6, dated December 1, 2004, is entitled “Competitive Selection Plan for Administrative Professional and Support Staff.” The Competitive Selection Plan establishes a process and a set of procedures for identifying, rating and comparing candidates for promotion among administrative professional and support staff at GAO. Chapter 1, ¶4a provides: “. . . Consideration for change to a higher level is based on job-related skills, knowledges [sic], abilities, performance, and potential for development, so that employees selected will be those who are among the best-qualified and who will contribute most to meeting GAO’s responsibilities.” Pursuant to Chapter 3, ¶4, applicants for promotion must be evaluated on the basis of their knowledge, skills and abilities and are assigned points under the crediting plan which is defined under Chapter 1, ¶5 as a “plan that measures each qualified candidate’s qualifications against each evaluation criterion identified for the vacancy.” Candidates are then given a score that represents how well they measure against each criterion. The scores on each criterion are then combined for each candidate and the best-qualified candidates are identified according to a specific ranking plan. Then all candidates are ranked to determine who are the “best-qualified” candidates. Chapter 3 defines how candidates should be evaluated

and ranked before being referred to the selecting official for a decision. The selecting official is then explicitly required to make the promotion decision impartially, expeditiously and in accordance with merit system principles. Chap. 3, ¶5b.

GAO's argument that this Order merely restates, but does not implement, the merit system principle is not persuasive. The clear import of the Order, viewed in its entirety, is to put into mandatory effect the statutory requirements of 31 U.S. Code § 732 – that GAO maintain a personnel management system that: (1) includes the principles of § 2301(b), (2) prohibits personnel practices prohibited under section 2302(b), and (3) ensures that officers and employees are promoted only on the basis of comparative merit and fitness. The Agency is correct that the merit system principles are not self-executing. *Cole v. OPM*, 71 M.S.P.R. 70, 72 (1996), *aff'd*, 108 F.3d 1395 (Fed. Cir. 1997).

Nonetheless, I conclude that GAO Order 2335.6 implements the merit system principle of merit-based selection because it establishes a practical system for promotions that is designed to prevent conduct that would undermine the merit system principles and the integrity of the merit system. I further conclude that this Order directly concerns this merit principle because it is clearly connected to it.

B. GAO Order 2335.6 is a Rule or Regulation

I am also satisfied that GAO Order 2335.6 is a “rule or regulation” for purposes of 5 U.S.C. §2302(b)(12) analysis. I find that it meets the definition of a “rule” provided in 5 U.S.C. §551(4):

the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.

*See Davis v. GAO, supra*, at 12-13; *Special Counsel v. Byrd, supra*, at 580; *cf. Mitchell Energy & Dev. Corp. v. Fain*, 311 F.3d 685, 688 (5th Cir. 2002) (adopting Administrative Procedure Act definition of “rule” finding that statement of Secretary of Labor regarding state unemployment compensation systems was rule for purposes of ERISA federal savings clause).

Here, the Order is clearly an Agency statement designed to implement GAO’s statutorily mandated promotion system within its personnel system. It clearly describes the Agency’s promotion procedures and practices. Thus, it is a rule for purposes of §2302(b)(12) analysis. We have held other Agency Orders to be regulations and rules for 2302(b)(12) purposes. *See, e.g., Davis v. GAO, supra* at 13 (1997 Performance Appraisal System for Band I, II, and III employees considered to be a rule for §2302(b)(12) purposes).

Since GAO Order 2335.6 is a rule implementing a merit systems principle, a personnel action taken in violation of Order 2335.6 would comprise a prohibited personnel practice.

C. Did Petitioner Prove a Violation of GAO Order 2335.6?

Ms. Bryant argues that she was not selected, despite being the best-qualified candidate for the position, in violation of the merit system principle that selections should be based on an impartial comparison of candidates’ knowledge, skills, and abilities. Pet. Init. Brief at 1. She argues that she had demonstrably greater knowledge, skills and abilities in the work of a Budget Analyst and that her non-selection was motivated by her supervisor’s dissatisfaction with her complaints about her performance appraisals. TR 7-

8, 21-27. GAO denies these claims, arguing that although Petitioner was well-qualified and was placed on the “best-qualified” list of candidates, her non-selection was based solely on the selecting official’s determination that the two selectees were better suited to the positions. Resp. Brief at 1-2.

1. Credibility of the Selecting Official

At the evidentiary hearing, the Personnel Appeals Board Office of General Counsel (PAB/OGC) on behalf of the Petitioner examined the selecting official at length about why she selected Shelia Patrick and Donald Morrison for the promotions. TR 144. Although Petitioner argues that Ms. Jenkins made numerous inconsistent and false statements about her reasons for making her selections, the record does not support such claims. Ms. Jenkins testified at the hearing that in two areas, both Mr. Morrison and Ms. Patrick seemed better prepared to take on the added responsibilities of the promotions. Ms. Jenkins cited their broader Agency-wide knowledge and experience and their initiative as the two primary reasons for her selections.<sup>8</sup> I found her testimony on this point to be credible after considering her demeanor and behavior on the witness stand; her manner of testifying; her apparent character – that is, that she impressed me as truthful throughout her testimony; her memory and recollection of the events surrounding her selection; the fact that her decision was supported by Pamela LaRue, her immediate supervisor;<sup>9</sup> and her lack of any apparent bias against Petitioner or in favor of the

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<sup>8</sup> In answer to a question that I posed to Ms. Jenkins at the hearing, however, she conceded that Petitioner was equally competitive as the selectees in all areas other than their breadth of knowledge of the Agency-wide budget issues and initiative. TR 144.

<sup>9</sup> Ms. LaRue testified that she had some familiarity with the work of the PT-II and PT-III employees. TR 18-19. She testified that she “had exposure to all of [the promotion candidates] at some point or other and their ability to do higher level, broad GAO-wide work. And the two that stood out as most competent to me were those two [Patrick and Morrison].” TR 37-38.

selectees. *See, Marshall v. GAO*, PAB Dkt. No. 92-04 (Sept. 30, 1993) (*en banc*) at 31-32; *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 459-62 (1987).

PAB/OGC claims that at her deposition, Ms. Jenkins cited several factors in support of her selection of each person that she did not repeat at the hearing. Pet. Init. Brief at 4-5. According to Petitioner’s counsel, Ms. Jenkins allegedly claimed at her deposition that Mr. Morrison was selected because of a number of qualities and experiences, including: his analytical, writing and communication skills (including his work on GAO’s testimony and budget submission to Congress); his productivity, collaboration, independence and initiative; and his broader knowledge of the budget process.<sup>10</sup> *Id.* at 4. Likewise, Petitioner’s counsel argues that Ms. Jenkins claimed at her deposition that Ms. Patrick was selected because of a similar number of qualities and experiences, including: her analytical and communications skills, her productivity,

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Petitioner cites my comment at the hearing that Ms. LaRue’s approval of the selections was irrelevant. In context, what I said was that it was irrelevant what Ms. LaRue was looking for in a selectee. The colloquy was:

MR. MACK: What qualifications were you looking for, what qualities were you looking for in a selectee?

MR. DUNN: Objection, she’s not the selecting official, Your Honor.

MR. MACK: But Your Honor, she just testified that she approved of the selections.

THE ADMINISTRATIVE JUDGE: And it doesn’t matter that she did, it’s irrelevant. The objection’s sustained. The Comptroller General might have approved, but it wouldn’t matter, that’s not the selecting official.

TR 44. In sustaining the objection, I misspoke. My intent was to sustain the objection because the question called for Ms. LaRue’s assessment of what she might have been looking for in a selectee. However, since she was not the selecting official, the question called for irrelevant information. That is not to say that Ms. LaRue’s approval of the selections was irrelevant.

<sup>10</sup> Ms. Jenkins also repeated some of these characteristics at the evidentiary hearing. She testified in response to the question: “[W]hy did you pick Mr. Morrison for the PT-III position?” that he had “broad knowledge of the Budget Office and the budget process; . . . [he] works very well independently and collaboratively; . . . [he] has a high level of initiative; . . . [he] exercises good judgment, works well independently and . . . collaboratively.” TR 141-42.

collaboration, focus, initiative and broader knowledge of the budget process.<sup>11</sup> *Id.*

Petitioner maintains that Ms. Jenkins testified at her deposition that in all of these areas, the selectees were comparatively stronger than Petitioner was. *Id.* at 6.

Petitioner further states that at her deposition, Ms. Jenkins cited Ms. Patrick's work on the Information Systems and Technology Services (ISTS) team and her work with a Congressional committee as reasons for her selection. *Id.* at 9. Petitioner argues that at the evidentiary hearing, Ms. Jenkins omitted both of these experiences when she explained why she selected Ms. Patrick. *Id.* at 6.

At the hearing, PAB/OGC did not confront Ms. Jenkins with these alleged inconsistent statements or omissions, nor was she given an opportunity to explain any differences in her sworn testimony.<sup>12</sup> Because of Petitioner's failure to confront Ms. Jenkins with these alleged inconsistencies, I am not in a position to assess whether there

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<sup>11</sup> Ms. Jenkins repeated some of these characteristics at the evidentiary hearing. She explained her selection of Ms. Patrick as being based on her "broader knowledge of the budget, . . . [s]he worked well independently, she exercised good judgment, she displays a lot of initiative and she has high productivity." TR 142-43, 164.

<sup>12</sup> Petitioner claimed in her Opposition to the Motion for Summary Judgment that these inconsistencies occurred, but she did not fairly raise this claim at the hearing. Ms. Jenkins was not confronted at the hearing with the alleged inconsistency between her deposition testimony that her selections were based on a number of factors and her testimony at the evidentiary hearing that her selections were based on two factors: initiative and collaborative skills. At the conclusion of Ms. Jenkins' testimony on rebuttal at the hearing, Petitioner's counsel asked her a question or two about her failure to testify at her deposition that she told Petitioner that she made her selections on the basis of initiative and collaborative skills. TR 450-53. This exchange, however, was limited to what Ms. Jenkins told Petitioner in the conversation about why she was not selected. It did not address the purported differences between the reasons Ms. Jenkins gave for her selections at her deposition and the reasons she gave at the hearing. Because Petitioner did not adequately confront Ms. Jenkins with the alleged inconsistencies between her testimony at her deposition and the evidentiary hearing, Ms. Jenkins did not have a fair opportunity to explain herself if she wished to do so. *See, Pollard v. Fennell*, 400 F.2d 421 (4<sup>th</sup> Cir. 1968) ("Counsel should be permitted to interrogate a party or a witness on the basis of his deposition about apparent inconsistencies between his testimony in court and his testimony on deposition with regard to all matters relevant to the issues at trial"); Fed. R. Civ. P. 32(a)(2). I accordingly did not accept Petitioner's arguments about inconsistencies in Ms. Jenkins' testimony when deciding this case.

were inconsistent statements made and, if so, what impact they may have had on Ms. Jenkins' credibility at the hearing. It further appears that Ms. Jenkins repeated several of the same factors at the hearing as she reportedly did at her deposition. *See*, nn. 8, 10-12, *supra*.

Ms. Bryant's contention that Ms. Jenkins testified inconsistently on the number of factors that went into her promotion decisions was simply unproven. However, even if I accepted this assertion as proven, I find that the discrepancies and omissions are insignificant and would not establish that Ms. Jenkins relied on an improper factor when making her selections. It would only mean that Ms. Jenkins did not cite at the evidentiary hearing the precise same qualifications and experiences for each selectee in support of her promotion decisions as she did at her deposition. Ms. Jenkins clarified at the hearing that although both selectees had many qualifications for the job, they were only distinguished above Ms. Bryant in the two areas that were identified. I, therefore, do not find these reported discrepancies or omissions to be meaningful inconsistencies that combine to undermine Ms. Jenkins' credibility at the hearing. Her failure to repeat every detail at the hearing that she mentioned at her deposition or in an affidavit does not, in my view, lead to the conclusion that she was untruthful. *Alexander v. U.S.P. S.*, 116 M.S.P.R. 329 (2011), 2011 MSPB LEXIS 1348 at \*\*15 ("Minor inconsistencies can be expected when witnesses testify to events that are nearly a year old"); *Brown v. Defense Logistics Agency*, 65 M.S.P.R. 436, 443 (1994), *aff'd*, 67 F.3d 319 (Fed. Cir. 1995); *Box v. U.S.P.S.*, 51 M.S.P.R. 401, 404 (1991).

Despite her claims that Ms. Jenkins testified inconsistently and falsely, Ms. Bryant does not challenge the fact that the selectees had all of the experiences that Ms.

Jenkins mentioned either at her deposition or at the hearing. Although she challenges whether the selectees were more qualified than herself and minimizes the significance of the selectees' experiences, Petitioner does not argue, for example, that Mr. Morrison did not have analytical or writing skills, or that Ms. Patrick did not have Agency-wide experience with the ISTS team or with the Congressional committee. *See* Pet. Init. Brief at 7-10.

Accordingly, I first find that Petitioner has not established that there was an inconsistency between Ms. Jenkins' testimony at the hearing and on an earlier occasion. Secondly, I find that even if an inconsistency had been proved as alleged, this would not diminish Ms. Jenkins' credibility on the issue of the basis on which she made her promotion selections. I am persuaded that Ms. Jenkins testified truthfully at the hearing that the reason why she selected Mr. Morrison and Ms. Patrick was that they had broader-based Agency-wide experience and because they both showed more initiative than did Petitioner. Her testimony is supported by ample evidence in the record as discussed below. I am further persuaded that Ms. Jenkins did not consider any improper factor in making her selections.

2. Petitioner's Self-Assessment and Comparative Analysis

Ms. Bryant attempts to self-assess and compare her work experiences with those of the selectees. She complains that when Mr. Morrison first came to the Budget Office with no budget experience, Ms. Jenkins gave him assignments that exposed him to Agency-wide budget issues.<sup>13</sup> Pet. Init. Brief at 7-8. In making this complaint, however,

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<sup>13</sup> Petitioner initially complained that Ms. Jenkins committed a prohibited personnel practice by giving preferential assignments to the two selectees in violation of 5 U.S.C. §2302(b)(6). I previously granted summary judgment on that issue. *See* Decision on Motion for Summary Judgment (Jul. 11, 2011).

Petitioner concedes that these assignments gave Mr. Morrison the broad Agency-wide experience that Ms. Jenkins could properly consider when she made the selection decisions.

Petitioner does not dispute Mr. Morrison's testimony or that of Ms. Jenkins about his Agency-wide experience or the ways in which he showed initiative.<sup>14</sup> Mr. Morrison worked on GAO's budget submission to Congress drafting a statement of the Agency's strategic plan for its resources and information about its budget resources versus its planning. He drafted the transmittal letter for the Acting Comptroller General that accompanied the budget submission, including a summary of the Agency's requested funding, staffing needs, significant reports and awards received. He created and drafted a summary explanation of the Agency budget, Congressional testimony for the Acting Comptroller General and a synopsis of the hearing for Agency managers. In addition, he wrote standard operating procedures (SOPs) for the Budget Office that required that he learn every procedure Agency-wide for which he and his team won an award. He was also responsible for the Agency-wide training account. *See Findings of Fact (FOF) ¶¶13-15.*

On the issue of initiative, the evidence showed that Mr. Morrison created a Highlights Page for the budget submission, which was a summary of the principal points of the submission. He also rearranged the transmittal letter that accompanied the budget submission, making it easier to locate the Agency's appropriation requests. He also developed the Budget-in-Brief, a short synopsis of the Agency's budget submission. *Id.*

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<sup>14</sup> Petitioner challenges how much initiative Mr. Morrison showed and argues that she showed more than he did. *See Pet. Init. Brief* at 11-12.

Ms. Bryant likewise did not dispute the testimony of Ms. Patrick or Ms. Jenkins about the former's Agency-wide experience or the ways in which she displayed initiative.<sup>15</sup> Ms. Patrick was responsible for maintaining the Budget Office database containing all of the financial data needed to prepare management reports. Ms. Patrick prepared monthly operating plans from information submitted from each unit at the Agency. She defined herself as "the keeper of the numbers" for the Agency. Ms. Patrick's work on the database exposed her to information from all of the teams, offices and staff at GAO. She tracked funding requests and produced reports as requested. Ms. Patrick developed an efficient way to track the Agency's travel costs while participating in the International Organization of Supreme Audit Institutions (INTOSAI). TR 171-74. This is an international group of organizations similar to GAO. She also suggested changes in the Financial Planning Database (containing funding information about all of the GAO units) based on corresponding changes made to the Budget Database. TR 174-76. In addition, Ms. Patrick improved the way ISTS gathered data for the "Budget Call" (the system by which each unit submitted budget requests to the Budget Office). TR 292-97. According to Ms. Jenkins, Ms. Patrick's work was "kind of a quality control check" on what the Budget Analysts were doing. TR 148; FOF ¶¶16-18.

Ms. Bryant also worked on Agency-wide projects, including one to re-engineer all of the Budget Office processes.<sup>16</sup> She had primary responsibility for the Agency-wide

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<sup>15</sup> Petitioner challenges some of the ways in which Ms. Patrick allegedly showed initiative. She claims that Ms. Patrick herself disputed some of Ms. Jenkins' testimony about work that she did that showed her initiative. Nonetheless, Petitioner does not dispute that Ms. Patrick performed many of the tasks that demonstrated initiative. Petitioner largely argues that her experiences were greater than those of Ms. Patrick.

<sup>16</sup> This was the project that she testified was shelved and not implemented. TR 341.

travel and training budgets. TR 325. She was also given responsibility for devising a new method for allocating funds in the Agency-wide travel account.<sup>17</sup> Petitioner's Agency-wide experiences also included working on the Performance and Accountability (P&A) Report and the Agency Performance Plan. The P&A report was an annual report mandated by Congress that required GAO to track its spending programs and ensure that they were aligned with GAO's strategic plan. The Performance Plan was an annual report to Congress of the Agency's anticipated use of appropriated funds.<sup>18</sup> FOF ¶¶19-21.

Ms. Bryant claims that neither Mr. Morrison nor Ms. Patrick displayed more initiative than she did. Pet. Init. Brief at 11-16. She minimizes Mr. Morrison's initiative as related largely to the budget submission to Congress. She claims that the only initiative that Ms. Patrick showed was her volunteerism, mostly on projects that were a part of her routine assignments. Petitioner claims that Ms. Jenkins testified falsely when she stated that Ms. Patrick volunteered to work on a project identifying the budget and costs incurred by the Controller's Office, yet, according to Petitioner, Ms. Patrick denied working on such a project. Likewise, Petitioner cites Ms. Jenkins' testimony at the

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<sup>17</sup> Ms. Jenkins, however, testified that Petitioner's suggestions required significant revisions before they were usable: "[T]he detail of how it would be implemented in the [A]gency was different than what she had proposed, but the basic concept was the same." TR 179. Petitioner disputed this testimony. See TR 179, 193-95; Pet. Init. Brief at 15. I credit the supervisor's testimony on this point.

<sup>18</sup> Petitioner argued that since these assignments were transferred to Mr. Morrison after he was promoted, Ms. Jenkins was not credible when she claimed that Mr. Morrison had better Agency-wide experience than Petitioner did before the selection. Pet. Init. Brief at 8. This conclusion does not follow. The fact that Mr. Morrison assumed responsibility for this work after being promoted may mean that Ms. Bryant was performing work exactly as a PT-III might do it on these assignments before the selections were made. It might also mean that Ms. Bryant was performing this work as a PT-II, but that Mr. Morrison has since worked on these assignments in a different way, at a higher level, than had been done before. There is insufficient evidence in the record to reach the conclusion that Ms. Bryant proposes.

hearing that Ms. Patrick suggested changes to the budget database that would allow the Budget Office to produce directly from the database information regarding GAO's spending as compared with its strategic goals. According to Petitioner, Ms. Patrick testified that she did not work on any project related to spending and GAO's strategic goals. I am satisfied that these claimed differences in testimony are not dispositive. The basic fact remains that Ms. Jenkins selected Ms. Patrick because of her superior experience with Agency-wide projects and her superior initiative.

The evidence demonstrates that Ms. Bryant was clearly well-qualified for the promotion as were both Mr. Morrison and Ms. Patrick. It further demonstrates that Ms. Jenkins might have selected any two of these three candidates based on their relative knowledge, skills and abilities. Thus, Ms. Jenkins had "discretion to choose among equally [well] qualified candidates, provided the decision [was] not based upon unlawful criteria." *Texas Department of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981); *Chenareddy v. GAO*, PAB Dkt. No. 70-701-17-85 (Aug. 20, 1987) at 8; *see Clarke v. GAO*, PAB Dkt. No. 05-03 (May 17, 2006), *aff'd* Dec. 8, 2006. Ms. Jenkins considered the relative qualifications of the candidates in a fair, open, and impartial process. In order to establish a prohibited personnel practice, Petitioner would have had to prove that the selecting official relied on an improper factor in making her promotion decisions. The record evidence in this case demonstrates that Ms. Jenkins selected Mr. Morrison and Ms. Patrick solely on the basis of her assessment of their relative KSA strengths. There is no evidence that she showed any preference or favoritism toward either of the selectees or that she violated the procedures established for making promotion decisions. *See Special Counsel v. Byrd, supra* at 581.

Ms. Bryant testified to her length of service, the number of training courses that she took, and the occasions on which she volunteered as evidence that she had significantly broader Agency-wide experience and initiative than both of the selectees. But, her perception of her qualifications is “irrelevant” to this decision. *Talavera v. Fore*, 648 F.Supp. 2d 118, 136 (D.D.C. 2009), *rev’d on other grounds*, 638 F.2d 303 (D.C. Cir. 2011). Clearly, seniority is not dispositive on the issue of who is best qualified for a promotion. *See Barnette v. Chertoff*, 453 F.3d 513, 516-17 (D.C. Cir. 2006). Likewise, the number of training courses that an employee takes does not necessarily correlate to one’s qualifications for a promotion. For example, someone new to the budget process could have taken a number of courses concerning the process, but nonetheless, never acquire sufficient practical experience to merit a promotion. In this case, Petitioner took numerous courses pertaining to the budget process, but was not deemed to have more initiative or Agency-wide experience than the others. *See P.Exs. 16-18*. The fact that Petitioner took many more training classes than either of the selectees does not prove that her non-selection was the result of partiality or consideration of anything other than comparative merit.

As for her volunteerism, I am again not convinced that one can qualitatively compare instances of volunteerism to determine relative displays of initiative. Petitioner does not suggest a principled basis on which to compare her work on the Budget Office webpage, for example, with Mr. Morrison’s work on the Congressional submissions or Ms. Patrick’s modifications to the database. Despite her self-serving assessment of her credentials and qualifications, Petitioner’s own assessment does not prove her case. The issue remains whether she has proved that the selecting official failed to impartially

consider the promotion candidates' knowledge, skills and abilities and whether she utilized an improper factor in making the selections. I am convinced that she has not.

Ms. Bryant also relies on a statement – actually a misstatement – that Ms. Jenkins made after the selections were announced. Both Petitioner and Ms. Jenkins agree that when Petitioner asked why she was not selected, Ms. Jenkins stated: “you were the best qualified ... but not selected.” TR 416. When Petitioner asked Ms. Jenkins if she had just said that she was the best-qualified for the position, Ms. Jenkins, realizing her misstatement, stated: “I did say that, but that was not what I meant to say.” TR 433. Ms. Jenkins explained that she meant to say that Petitioner was well-qualified, but not the best. TR 432-34. Petitioner insists that Ms. Jenkins meant what she said at first, despite her immediate correction. TR. 389-90, 411. Ms. Bryant concedes, however, that she “tuned [Ms. Jenkins] out” when the latter tried to explain her mistake. TR 411. I am unpersuaded by Petitioner’s argument. I carefully observed Ms. Jenkins when she testified about this conversation. She recalled it clearly and testified that she made a slip of the tongue when she called Petitioner “best-qualified.”<sup>19</sup> What complicates this conversation, even beyond the slip of the tongue, is the fact that the list of candidates that was referred to Ms. Jenkins was called a “best-qualified” certification. So technically, everyone on the list was “best-qualified” from among the total pool of applicants, but not as compared with each other. That Ms. Jenkins immediately corrected the misimpression she gave to Ms. Bryant is both telling and convincing. I am satisfied that Ms. Jenkins’

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<sup>19</sup> I put no stock in Ms. Jenkins’ definition of her misstatement as a “Freudian slip.” TR 434. I took that merely to mean that she had misspoken, rather than what Petitioner argues: that she inadvertently told Petitioner the truth about her selection decision.

misstatement was no more than an unfortunate slip of the tongue that Petitioner overstates in her effort to meet her burden of proof.

Lastly, Petitioner argued at the outset of this case that the true motivation behind Ms. Jenkins' selections was her animus toward Petitioner for having challenged several performance appraisals in the past. TR 7-8, 21-27.<sup>20</sup> The record, however, shows that when Petitioner was not selected for promotion in 2008, she had not yet filed her first challenge. By definition, then, her first appraisal challenge was not the cause for her non-selection in 2008. Indeed, Petitioner conceded that the 2008 selection process was fair and was not affected by the result of any performance appraisal challenge. TR 389-91. By 2010, although there were a few successful challenges made by Petitioner, it does not appear that these challenges significantly changed her performance appraisals in any given year. I find that Ms. Jenkins received and resolved each appraisal challenge in the routine course of her work and that she did not have any animus toward Ms. Bryant as a result of the challenges. This is supported by the fact that Marsha Johnson, the person who was selected in 2008 for the same level of promotion, had successfully challenged one of her performance appraisals, while Petitioner had not. TR 208. Also, Sharon Alvis, who was not selected for the promotions in 2010, had never challenged any of her performance appraisals. TR. 209. The facts simply do not support an inference or a conclusion that Petitioner's challenges to her performance appraisals had anything to do with her non-selection.<sup>21</sup>

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<sup>20</sup> It appears that Petitioner has not argued this issue in her post-hearing briefs.

<sup>21</sup> The Agency argues that by allowing Petitioner to present proof about her performance challenges, I allowed Petitioner to present a retaliation claim. However, I entered judgment for the Agency on this claim on the Agency's motion for summary judgment. *See* n.1, *supra*.

In sum, I do not find that Petitioner has proved by a preponderance of the evidence that Ms. Jenkins committed a prohibited personnel practice as defined under 5 U.S.C. §2302(b)(12). She does not prove that Ms. Jenkins made promotion decisions in 2010 that were in violation of GAO Order 2335.6, that is, based on a factor other than the comparative knowledge, skills, and experience of the candidates referred to her after a fair and equitable screening process. In particular, I do not find that Petitioner's challenges to her performance appraisals had any impact on Ms. Jenkins' promotion decisions.

#### VI. JUDGMENT

Judgment is hereby entered in favor of the Government Accountability Office on Count III of the complaint.

#### **SO ORDERED**

Date: February 1, 2012

\_\_\_\_\_/s/\_\_\_\_\_  
Susan R. Winfield  
Administrative Judge

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Petitioner was permitted to introduce evidence of the performance challenges only as evidence of her claim that they formed the basis on which Ms. Jenkins made her promotion decisions.

## NOTICE—BOARD REVIEW

This Decision will become final on March 2, 2012 unless a request for review by the full Board is filed by one of the parties within fifteen (15) days of service of this Decision [by February 16, 2012], or unless the full Board, prior to March 2, 2012, decides to review the Decision on its own motion. *See* 4 C.F.R. §§28.87, 28.4.

In the alternative, either party may, within ten (10) days of service of this Decision [by February 13, 2012], file and serve a request for reconsideration with the Administrative Judge who rendered this Decision. The filing of such a request will toll the commencement of the fifteen-day period for filing a notice of appeal with the full Board, pending a decision by the Administrative Judge on the request for reconsideration.

The original and five copies of a notice of appeal requesting review by the full Board shall be filed with the Board in person or by commercial carrier at the office of the Board, or by mail (addresses listed below). When filed by mail, the postmark shall be deemed to reflect the date of filing. The party filing the request shall serve a copy of the notice of appeal on all other parties. Within twenty-five (25) days following the filing of a notice of appeal requesting review by the full Board, the appellant shall file and serve a supporting brief. The brief shall identify with particularity those findings or conclusions in the Initial Decision that are challenged and shall refer specifically to the portions of the record and the provisions of statutes or regulations that assertedly support each assignment of error. The responding party shall have twenty-five (25) days, following service of appellant's brief, to file and serve a responsive brief. Within ten (10) days of service of appellee's responsive brief, appellant may file and serve a reply brief.

The Board may grant a request for review when it finds that:

1. The findings in the Decision are unsupported by substantial evidence in the record viewed as a whole; or
2. New and material evidence is available that, despite due diligence, was not available when the record was closed; or
3. The Decision is based on an erroneous interpretation of statute or regulation; or
4. The Decision is arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; or
5. The Decision is not made consistent with required procedures and results in harmful error.

*See* 4 C.F.R. §28.87.

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