Leo G. Clarke v. U.S. Government Accountability Office

Docket No. 05-03

Date of Decision: December 8, 2006

Cite as: Clarke v. GAO, No. 05-03 (12/8/06)

Before: Mary E. Leary, Administrative Judge

Headnotes:

Age Discrimination

Abuse of Discretion

Appeals to the Full Board

Constructive Discharge

Discretion of Administrative Judge

Evidence

Harmful Error/Reversible Error

Non-selection

Race Discrimination

Retirement

DECISION ON PETITIONER'S APPEAL FROM THE INITIAL DECISION OF THE ADMINISTRATIVE JUDGE

This matter is before the Personnel Appeals Board (PAB or the Board) on Petitioner's timely appeal from the May 17, 2006 Initial Decision (ID) of the Administrative Judge (AJ). The Initial Decision denied Petitioner/Appellant's request for monetary relief arising from allegations that Respondent/Appellee U.S. Government Accountability Office (GAO or the Agency) discriminated against him due to his race (African-American) and age (55). In his Petition, Petitioner alleged that the Agency discriminated against him when he applied, and was not selected, for promotion to senior analyst Band II in October 2001; and that the non-selection was part of a pattern of discrimination against African-Americans at GAO. He further contended that his subsequent retirement in January 2002 constituted a constructive discharge. Petitioner broadly challenges the Initial Decision and requests review of his case by the full Board.

The evidentiary hearing took place on September 14 and 15, 2005 and was continued on January 20, 2006 due to witness unavailability.

The Board affirms the Initial Decision denying Petitioner's request for monetary relief and finds that Petitioner failed to demonstrate that he was discriminated against because of race or age; failed to establish that his non-selection was part of a pattern of discrimination; and failed to establish that his retirement constituted a constructive discharge.

I. Factual Background

The facts of this case, set forth by the Administrative Judge in greater detail in the Initial Decision, are summarized below:

Petitioner, Leo G. Clarke, III, began his employment at GAO in 1970 as a management analyst. TR I/111.[1] He was promoted to GS-12 and converted to a Band I evaluator (full performance) when GAO changed its system to Bands. TR I/111-12. In October 2001 and until his retirement in January 2002, Petitioner was a full performance Band I analyst on the Defense Capabilities and Management (DCM) team and had worked as a Band I evaluator on issues for the National Aeronautics and Space Agency (NASA) in the National Security and International Affairs Division (NSIAD), DCM's predecessor unit. TR I/112, 138; TR II/2.

On October 26, 2001, GAO issued Vacancy Announcement DCM 02-2 for two Band II senior analyst positions in DCM. TR II/4-5; R.Ex. 16 at 8. GAO employees Agency-wide with at least one year of experience as Band I analysts were eligible to apply. TR I/45; TR II/5. The promotion process was governed by GAO Order 2335.8 (Merit Selection Plan for Analyst and Specialist Positions) (Oct. 1, 2001).[2] R.Ex. 17.

Under Order 2335.8, a promotion panel was not required when fewer than 10 employees applied for a specific vacancy announcement in a unit. Ch. 2 ¶7.b.2; TR I/25-26, 31-34. In that case, all applicants in the unit were forwarded to the selecting official for consideration. TR I/25-26. Under the terms of the Order, in such circumstances the unit head designated who was "best qualified" (BQ) and was required to so designate only those "judged highly qualified for promotion based on his/her experience." Order 2335.8, ch. 2 ¶7.b. "BQ" for promotion panels was defined as those employees "judged most ready for promotion and most competitive with

[1] TR I is the hearing transcript for September 14, 2005. TR II is the transcript for September 15, 2005. TR III is the transcript for January 20, 2006. Page numbers follow the transcript number, *e.g.,* TR I/16. Exhibits will be referenced by "R.Ex." for Respondent's Exhibits and "P.Ex." for Petitioner's Exhibits.

[2] References in this case are to the October 1, 2001 version of Order 2335.8. The Order was most recently modified on May 24, 2006. The Board notes that under today's Order, panels are employed to establish a ranked list of candidates, regardless of the number of applicants. The panel chair, in consultation with the panel, identifies the best qualified from the ranked list. *See* Order 2335.8, ch.4 ¶2.a. (May 24, 2006).

others being assessed by the panel." *Id.* at ¶9. Thus, under the relevant order, BQ designation by a panel constituted a relative ranking while BQ designation by the unit head did not.[3]

Petitioner applied for promotion to Band II in October 2001 in response to Vacancy Announcement DCM 02-2. TR I/126; P.Ex. 4; Petition (May 5, 2005) ¶2. Three other Band I analysts within DCM applied for the promotion: Marjorie Pratt (African-American, over 40); Stephen Boyles (White, over 40); and James Lawson (White, under 40). R.Ex. 12; Ex. A, Race & Age Data.[4] There were fewer than 10 applicants from DCM. Accordingly, no promotion panel was convened. TR II/8-9; Order 2335.8, ch. 2 ¶7.b.2; R.Ex. 12. The Referral List stated, "if no panel was held and all qualified applicants were referred, check this space." The space was checked and all four DCM applicants were listed. TR II/8; R.Ex. 12.

The selecting official was Henry L. Hinton, Managing Director of DCM. As selecting official, Mr. Hinton also received a separate Referral List/Selection Certificate listing six additional Band I analysts who applied from teams other than DCM. TR II/9; R.Ex.13. The box was also checked on this Referral List, indicating that all qualified applicants from outside DCM were being referred—namely, Johana Ayers (White, under 40); Lara Carreon (Hispanic, under 40); Raymond Denmark (White, over 40); Judy Lasley (African-American, over 40); Andrew Pauline (White, under 40); and Wendy Wierzbicki (White, under 40). R.Ex. 13; Ex. A.

Mr. Hinton received an application package from the human capital manager for each of the individuals who were referred both from inside DCM and from other teams. TR II/10. He reviewed the application packages against GAO performance standards for Band II analysts. TR I/46; TR II/10-14; Order 2335.8, ch. 2 ¶11. The Merit Selection Plan for Analyst and Specialist Positions (October 1, 2001) required selecting officials to "select from the BQ candidates based on their judgment of how well each candidate is likely to perform at the band level being considered." *Id.* at ¶11.a.

---

[3] The AJ found that an "employee could acquire the BQ designation either: (A) by means of a promotion panel, which evaluated applicants' relative qualifications and designated those employees as BQ who were most ready for promotion; or (B) when fewer than 10 employees on a team sought promotion to Band II, those individuals automatically were designated as BQ and thus could apply for outside openings." ID, Finding of Fact (FOF) #11 (*citing* Order 2335.8, ch. 2 ¶7; TR I/25-26, 31-32). Where there were fewer than 10 applicants in a unit, they were forwarded to the selecting official for consideration. However, in such circumstances, the unit head designated who was best qualified and was required to designate as BQ only those judged highly qualified for promotion based on his/her experience. Order 22335.8, ch. 2 ¶7.b.

While there may be conflicting or confusing testimony on this issue, the practice would have favored the inclusion of Petitioner and other applicants who were referred to the selecting official from pools of fewer than 10 employees. Based on the record evidence, once the applicants were referred, the selecting official properly reviewed the performance appraisals and applications packages. This issue is discussed more fully below.

[4] Exhibit A was submitted with Respondent's Corrected Post-Hearing Brief pursuant to the representation of counsel at the evidentiary hearing. It provides race and age data for the applicants who applied for DCM 02-2.

Mr. Hinton conducted a relative ranking of candidates considering how they would perform at the Band II level. TR II/13. In making selections for promotions to Band II, Mr. Hinton looked at indications that the individual had shown an ability to succeed at the next level using the performance standards then in effect—not just for an indication that the individual exceeded expectations as a Band I. TR II/13-14; *see* Order 2335.8, ch. 2 ¶11.a. According to Mr. Hinton, Band IIs bear increasing responsibility for major segments of the work, including serving as evaluators-in-charge (EICs). TR II/6. Mr. Hinton's criteria for assessing applicants for Band II promotions include "exceptionally strong planning skills, exceptionally strong data analysis, communication skills, ability to function within a team and that could think independently and get the work done in the [assigned] time frames." TR II/6-7. The ability to supervise is important for a Band II—although generally not exercised at the Band I level. Band IIs are responsible for part of GAO's strategic plan as well as the tactical plan in response to Congressional clients. TR II/7.

In all, there were ten applicants for the two vacancies for the Band II senior analyst positions in DCM pursuant to Vacancy Announcement DCM 02-2, which was issued on October 26, 2001. Each applicant's performance appraisals were submitted with the respective application for promotion. The chart below shows the respective ratings on each applicant's most recent performance appraisal for the 2000-2001 period. R.Exs. 1-10.

Applicant 2000-2001	Meets Expectations	Exceeds Expectations	Outstanding	Race/Age
Johana Ayers			6	White/Under 40
Wendy Wierzbicki		2	5	White/Under 40
Leo Clarke	1	3	2	African-American/Over 40
Applicant 4		4	2	African-American/Over 40
Applicant 5		3	3	White/Under 40
Applicant 6		1	5	White/Over 40
Applicant 7	3	2	1	White/Under 40
Applicant 8		2	5	Hispanic/Under 40
Applicant 9	4		2	White/Over 40

Applicant 10	1	4	1	African-American/ Over 40

Order 2335.8 (ch. 2 ¶11.a) stated that "[s]electing officials should select from the BQ candidates based on their judgment of how well each candidate is likely to perform at the band level being considered."[5] Mr. Hinton compared the application packages for each of the above candidates and selected Johana R. Ayers and Wendy Wierzbicki. TR I/47-48, 53; TR II/14.

Johana Ayers worked in the Acquisition and Sourcing Management (ASM) team from 1998 to 2001. R.Ex. 2; TR I/61-62, 70. Her performance appraisal for the relevant period, 2000-2001, reflected the highest possible rating in all six dimensions in which she was rated—planning, data gathering/documentation, data analysis, written communication, oral communication, and teamwork. R.Ex. 2 at 4. The narrative indicated that she was a "master" at completing difficult and complex analyses under challenging timeframes; always delivered a very polished presentation; was a role model in her dealing with others; and consistently displayed all the qualities necessary for effective, constructive working relationships across organizational boundaries. R.Ex. 2 at 5-6. Ms. Ayers also worked concurrently on engagements in which she assumed primary responsibility when the senior analyst was promoted to assistant director. TR I/62, 83-85. Ms. Ayers received an Assistant Comptroller General Award—a Division-wide recognition, and a Meritorious Service Award—a GAO-wide recognition. Ms. Ayers has an advanced degree from George Washington University and has experience in recruiting and mentoring staff. TR I/48-49, TR II/14-16. *See also* R.Ex. 2.

Wendy Wierzbicki worked for the Physical Infrastructure (PI) team in 2001. R.Ex. 3 at 2. Her performance appraisal for 2000-2001 included ratings of "outstanding" in five areas—planning, data gathering/documentation, data analysis, oral communication and teamwork. She was also rated as "exceeds expectations" in written communication and in supervision. R.Ex. 3 at 8. Her written products were consistently clear and well organized. She clearly and succinctly presented information in oral briefings. She made major contributions to several assignments and successfully took on increasing levels of responsibility. The narrative accompanying her 2001 ratings credited her with building a database rather than using large cumbersome spreadsheets, independently writing an excellent first draft where the design matrix and project plan were approved with virtually no revisions, and identifying potentially serious weaknesses in HUD's process for approving lenders. Her rating for 2000 reflected six months of experience at GAO with ratings of "outstanding" in four dimensions—data gathering/documentation, data analysis, oral communication, and teamwork. R.Ex. 3 at 2-10. She received a rating of "exceeds expectations" in planning and written communication. She also received an Assistant Comptroller General Award. TR II/15, 18. Additionally she had supervisory experience at the Band I level and had prior experience as a team leader and supervisor at the Department of the Navy. TR II/17.

---

[5] The merit selection process is a relative ranking system where candidates are compared against each other in the group being evaluated, but not against established benchmarks. The comparison is done on the basis of the candidates' performance, experience, and, to a lesser extent, education, training, awards, professional development, and the possession of the knowledge, skills and abilities required at the next level. Order 2335.8, ch. 2 ¶8.c.

Petitioner's application package contained his performance appraisals for three rating cycles immediately prior to October 21, 2001. R.Ex. 1. His ratings for 2000-2001 included one "meets expectations" (written communication); three "exceeds expectations" ratings —planning, data analysis, and oral communication; and two "outstanding" ratings—data gathering/documentation and teamwork. R.Ex. 1 at 2. His appraisal for 1999-2000 included the same distribution. R.Ex. 1 at 11. His appraisals from 1998 through 2001 contained no basis for evaluation of Petitioner's supervisory skills. The narrative portion of the 2000-2001 appraisal stated that Petitioner exceeded expectations in job planning; prepared effective job management plans on all his assigned tasks and assisted in maintaining the paperwork for his assigned jobs; was outstanding in gathering data and documentation; and that his clear organization and indexing of work papers helped insure ease of referencing the final products. R.Ex. 1 at 3. Petitioner received a spot award of one day off both in 2000 and 2001, a cash spot award of $200 in 1999, and annual merit pay increases until he had reached the ceiling for Band I. TR I/133-36.

Marjorie Pratt, an African-American over 40 years of age, and an analyst in DCM in 2001, also applied for the vacancies in 2001. She worked at GAO from 1972 until her retirement in January 2006. TR III/3. She testified that she had witnessed subtle race discrimination and favoritism over the years at GAO, and that age becomes a deterrent to promotion as well. TR III/5-9, 30; *see* R.Ex. 22 at ¶9. She believed that she and Petitioner were discriminated against in the selection process at issue herein, but had no knowledge as to who else applied or their qualifications. TR III/15, 20-21; R.Ex. 22 at ¶6. She worked her way up from secretary into the analyst ranks and eventually reached the earnings ceiling for Band I. TR III/3-5, 17-18. She admitted that there "probably were" White Band Is who never were promoted to Band II. TR III/26; R.Ex. 22 at ¶9.

On December 17, 2001, Mr. Hinton sent letters to Ms. Ayers and to Ms. Wierzbicki offering them promotion to Band II. TR II/14, 22; R.Ex. 14 at 1; R.Ex. 15 at 1. However, each also received an offer for promotion from her respective home team, ASM and PI. They each accepted the offer from the home team rather than the offer from Mr. Hinton for promotion in DCM. TR I/72; TR II/22. After they declined the offers, Mr. Hinton then chose not to fill the positions advertised in DCM 02-2. TR II/22-23. Pursuant to Order 2335.8, a selecting official may choose not to fill an announced position. Ch. 2 ¶11.a. Mr. Hinton believed that the other candidates could not successfully perform at the next level and meet expectations. TR II/23.

When Petitioner was not selected, Mr. Hinton met with him and explained that he thought other candidates distinguished themselves above Petitioner. TR I/57-58. Mr. Hinton also explained that he believed applicants for promotion should have "demonstrated results in the areas of planning, conceptualization, [and] written and oral communications." TR I/58. Mr. Hinton further informed Petitioner that he needed to improve in written communication. TR I/129.

Petitioner retired from GAO in January 2002 after more than 30 years of service. TR I/111, 175. He testified that he did not view the retirement as voluntary, but rather, believed he was not recognized for his accomplishments and that, "no matter what [he] did [he] was not going to be promoted" within GAO. TR I/140. He believed that by not promoting him, Mr. Hinton had effectively told him "in so many words" to leave the Agency. TR I/176.

II. Initial Decision

In his Petition, Petitioner alleged that he was discriminated against due to his race (African-American) and his age (55), when he applied for and was not selected for the position of senior analyst, Band II, due to the withdrawal of the October 2001 vacancy announcement after the individuals selected for the positions declined the offers. He further alleged that the non-selection was part of a pattern of discrimination against African-Americans within DCM and at GAO as a whole. Petitioner also claimed that his retirement in January 2002 constituted a constructive discharge. Petitioner sought $300,000 in compensatory damages, back pay, front pay at the Band II level through "mandatory retirement age at 65," and attorney's fees.

In the Initial Decision, the AJ found that Petitioner is a member of a protected class based on race and age and was not selected for promotion despite meeting the basic requirement for eligibility and having a composite performance assessment predominantly in the "exceeds expectations" range. The two openings were offered to two individuals who were under 40 and White. ID at 26.

The AJ found that GAO's proffered explanation for the decision to extend offers to Ms. Ayers and Ms. Wierzbicki was reasonable as was the Agency's decision to cancel the promotion when the two candidates declined the offers. ID at 28. The application packages of Ms. Ayers and Ms. Wierzbicki are fully consistent with the conclusion that they were considerably above the other applicants' packages. While two other applicants' appraisals approached those of Ms. Ayers and Ms. Wierzbicki, a review of the entire packages supports the Agency's conclusion as to where to draw the line supporting their selection. *Id*. Accordingly, the AJ concluded that GAO established a legitimate, nondiscriminatory basis for its selections.

The AJ also found that a review of the application packages shows that the composite ratings of four applicants, two of whom were not African-American and who were under 40, were higher than Petitioner's. The ratings for Applicants 6 and 8 were significantly higher than Petitioner's; Applicant 5 was higher; and Applicant 4 was marginally higher. *Id*. at 31. Based on the record evidence, the AJ found that the application packages supported Mr. Hinton's drawing a line where he did and declining to fill the positions rather than filling them with applicants whom he viewed as performing in the middle of Band I. *Id.* at 31. Further, the AJ found that Petitioner offered no documentary evidence to show that he was equally as or more qualified than either Ms. Ayers or Ms. Wierzbicki, did not testify to that effect, and did not provide evidence of a direct comparison of his credentials with their credentials. ID at 28-29.

To establish a *prima facie* case of discrimination with respect to the promotion after Ms. Ayers and Ms. Wierzbicki declined the offers, Petitioner must establish that despite his qualifications he was rejected and "someone filled the position or the position remained vacant and the employer continued to seek applicants." *Hayslett v. Perry*, 332 F.Supp.2d 93, 99 (D.D.C. 2004) (citations omitted). The AJ concluded that with respect to the withdrawal of the promotion opportunities, Petitioner did not establish a *prima facie* case. ID at 31. He also concluded that Petitioner failed to prove that he was treated disparately when the Agency subsequently withdrew the vacancy announcement, and failed to rebut the Agency's legitimate reasons for withdrawing the vacancy announcement. *Id.*

The AJ further found that Petitioner introduced no data as to promotion rates of African-Americans in comparison to non-protected groups at GAO, but rather snapshots of composition by Band level for several consecutive years. ID at 33. While Petitioner and Ms. Pratt each testified that they thought their careers did not advance due to discriminatory reasons, the AJ concluded that the testimony did not suffice to establish that the non-promotion here at issue was discriminatorily based. *Id.*

Finally, the AJ found that an employee's decision to retire is presumptively voluntary; this presumption can be overcome by a showing that an agency proposed or threatened an adverse action against the employee, or caused the retirement "by creating working conditions so intolerable for the employee that he or she is driven to involuntarily resign or retire." ID at 34 (quoting *Shoaf v. Department of Agriculture*, 260 F.3d 1336, 1341 (Fed. Cir. 2001)). The AJ concluded that however discouraged Petitioner may have been about the prospect of future promotion, this did not establish conditions so untenable that a person could reasonably view the circumstance as forcing one to leave. ID at 35.

III. Analysis

On appeal, Petitioner asserts that the AJ erroneously excluded evidence regarding the past and present record of discriminatory and differential employment at GAO based on race, national origin, and age, found in the PAB Report, Promotion of Banded Employees (1991-1995). Petitioner also asserts that the AJ erroneously determined that Petitioner and one other African-American received their "best qualified" rating automatically rather than having earned them and challenges the AJ's Order denying Petitioner's request to call Michelle Hamilton to testify on that issue. Petitioner further contests the ID's findings of fact relating to the evidence on Petitioner and Ms. Pratt and the collective impact of the process employed by Mr. Hinton, the selecting official.

The Board's regulations provide that on appeal the full Board may review the record *de novo*. 4 C.F.R. §28.87(g) (2004). However, the Board will not ordinarily overturn "demeanor-based credibility determinations made in the initial decision." *Id*. The Board will also consider whether new and material evidence is available; or whether the initial decision is based on erroneous interpretation of statute or regulation; or whether the initial decision is arbitrary, capricious or an abuse of discretion or otherwise not consistent with law; or the decision is not made consistent with required procedures and results in harmful error. *Id*.

A. "Best Qualified" Status of Petitioner

Petitioner's assertion that the AJ erroneously found that he and one other African-American received their "best qualified" or "BQ" designations automatically is based on the AJ's finding that an "employee could acquire the BQ designation either: (A) by means of a promotion panel, which evaluated applicants' relative qualifications and designated those employees as BQ who were most ready for promotion; or (B) when fewer than 10 employees on a team sought promotion to Band II, those individuals automatically were designated as BQ and thus could apply for outside openings." ID, Finding of Fact (FOF) #11 (*citing* Order 2335.8, ch.2 ¶7; TR I/25-26, 31-32).

The AJ concluded that when there were fewer than 10 applicants in a unit, they were all forwarded to the selecting official for consideration. ID, FOF #9. This conclusion, as well as that contained in FOF #11 as to "automatic" designation as "BQ," is based upon the testimony at the evidentiary hearing and documentary evidence in the record.[6] For example, Chief Human Capital Officer Jesse Hoskins testified as follows (TR I/30-31):

> Q: Can you just describe when a panel is held and when a panel is not held?
> A: A panel generally is held when there are ten or more applicants applying for a promotion.
>
> Q: And when there are fewer than ten, is there any requirement for a panel to be held?
> A: There's no requirement for a panel to be held.

Mr. Hoskins also differentiated between applicants from within the unit of the vacancy and those outside of the unit advertising the position (TR I/31-32):

> Q: If . . . four applicants within DCM applied for a promotion, would there have been any requirement to hold a panel?
> A: No.
>
> Q: Now, let's assume people from outside of DCM wanted to apply for that same DCM promotion opportunity. Would those applicants have to have been determined to be best qualified?
> A: They would have had to be on their team's BQ list. Now other teams might have been in the same kind of situation where they had ten or less candidates applying. They would be considered BQ.
>
> Q: So even if no panel is held sometimes you can apply outside your team?
> A: You can apply outside your team, that's right.
>
> Q: Is that a loophole in the process?
> A: I think it might be.
>
> Q: Because it doesn't tell the other team that there was a panel engaged in assessing the applicants for that team.
> Q: They are notified as BQ simply because they were fortunate enough not to have ten or more applicants apply for the position?
> A: Yeah.

Mr. Hoskins answered a few more questions posed by Petitioner's counsel in an effort to secure clarification (TR I/33-34):

---

[6] Petitioner references deposition testimony of Henry Hinton as well as an affidavit of Mr. Hinton supplied during the course of the EEO investigation in his Brief on appeal. *See* Appellant's Brief in Support of Review by the Full Board at 2, 5, 11-12. Neither Mr. Hinton's deposition, nor the EEO Record of Investigation, are part of the record before the PAB. *See* 4 C.F.R. §28.59.

Q: The question of how many applicants and a relationship to best qualified is what I want to hone in on. If there were eight applicants and five of them were outside DCM, they could be best qualified over where they were working in GAO?
A: That's correct.

Q: So, for purposes of this competition they should have been certified by their team that they were best qualified.
A: That's correct.

Q: If they were best qualified.
A: I'm using best qualified in terms of those that met whatever assessment or not assessment was used based on our policies. So they could have ended up on a list either through a panel assessment or because the numbers were less than ten, they would still be eligible to apply to another team.

The Referral List/Selection Certificates state: "The following applicants were found to be best qualified for the above promotion opportunity(ies) and their paperwork is attached. If no panel was held and all qualified applicants were referred, check this space."[7] R.Exs. 12, 13. The selecting official—Mr. Hinton—provided testimony to the same effect as Mr. Hoskins' statements. In describing the Referral List/Selection Certificate for applicants from within the DCM team (R.Ex. 12), and the check mark detailed below, Mr. Hinton testified that the check mark indicated that "we had at the time less than ten people; a merit selection panel was not needed and that the names would be forwarded to me for consideration." TR II/8. He added that since there was no panel in this instance, he did not receive a best qualified list. *Id.* at 9. As to the Referral List/Selection Certificate for outside applicants, Mr. Hinton understood that the check mark implied that the outside applicants had been designated as BQ by their home units and thus were eligible to apply for the promotions under consideration. *See* FOF #15; TR II/9-10; R.Ex. 13.

At the time of the vacancies here at issue, the governing GAO Order provided that when a promotion panel was not required because of fewer than 10 applicants, the unit head made the BQ determination and was required to rate as "best qualified" only those judged "highly qualified" for promotion based on his or her experience. Order 2335.8, ch.2 ¶7.b. In contrast, promotion panels made BQ determinations based upon a relative ranking of candidates, *i.e.*, a "BQ" designation applied to those candidates "judged <u>most ready</u> for promotion and <u>most competitive with others being assessed</u> by the panel." *Id.*, ch.2 ¶¶8, 9 (emphasis added).

Based on the record herein, there is no evidence as to whether there were applicants who did not get referred with either the DCM or external list because they did not meet the minimum qualifications for the promotion opportunity. Because of the small number of applicants, a relative ranking of the applicants on the Referral Lists/Selection Certificates was not necessary before referral of the qualified individuals to the selecting official.

[7] The space was checked on the Referral List/Selection Certificate for the four internal DCM candidates (R.Ex. 12) and on the Referral List/Selection Certificate for the six external candidates (R.Ex. 13).

The AJ reviewed Mr. Hoskins' testimony and the evidence of record to reach the conclusion that when fewer than 10 individuals (meeting the minimum qualifications) in a unit applied for a promotion to Band II, they were designated as BQ and thus were automatically in the group being considered for promotion within the unit and could apply for outside openings. Respondent's Exhibits 12 and 13 reflect and confirm this practice. Moreover, the record reflects a reasoned, fact-based differentiation of the candidates in the process of considering the applications here at issue. The Human Capital Office forwarded all ten candidates to the selecting official. At that point, Mr. Hinton reviewed all the applications and determined that there were only two candidates who were capable of handling the responsibilities of the Band II positions.

Finally, Petitioner's appeal attempts to inject significance into the fact that the application packages for himself and Ms. Pratt began with a cover page entitled Application for Consideration Merit Selection Plan (GAO Form 501). Relying on these cover sheets, Appellant's Brief argues that only these two applicants were rated "best qualified." Appellant's Brief at 9. In section one of the relevant cover sheets—initial screening—there is a check mark next to the statement, "You are qualified for the position and your application has been forwarded to the selecting official;" and another checkmark next to the statement, "You were rated among the best qualified." In the latter section, the other option was to check "You were not among the best qualified." *See* R.Ex. 1 at 1 (Petitioner's application); P.Ex. 9 (Form 501, Marjorie Pratt).

As the Agency correctly points out, this cover sheet designation is not of consequence in this matter for a number of reasons. The testimony and exhibits establish that all of the applicants were designated as BQ, either because of the small number of applicants within DCM or the requirement to "BQ" in the home unit before applying as an outside candidate. Moreover, Mr. Hinton testified that he did not receive the form 501s with the application packages and thus they were not part of his consideration process. He considered all application packages that were forwarded to him. He explained a reasoned approach to the decision to extend two particular offers and to withdraw the vacancies when the two offers were declined, based on the contents of the application packages (summary statements, appraisals, awards histories).

B. AJ's Denial of Request to Call Witness

Petitioner asserts that the AJ committed error because he denied Petitioner's request to add Michelle Hamilton as a witness. The AJ's scheduling order required the Parties to submit witness and exhibit lists by August 31, 2005. Order of June 17, 2005. Ms. Hamilton was on the Agency's witness list, but the Agency chose not to call her. Following two days of testimony on September 14 and 15, 2005, the matter was continued due to witness unavailability. Two of Petitioner's witnesses—Marjorie Pratt and Fred Lundgren—were unavailable on the scheduled hearing dates. Subsequent to a December 1, 2005 Order to resume the hearing for the testimony of Ms. Pratt and Mr. Lundgren on January 20, 2006, Petitioner filed a Notice of Additional Witness, seeking to add Michelle Hamilton, whose testimony he had planned to obtain on cross examination, but was unable to do so as the Agency did not call Ms. Hamilton. GAO promptly submitted its Opposition to the Notice.

On December 13, 2005, the AJ denied Petitioner's request, correctly stating that the record was left open for the limited purpose of hearing the testimony of witnesses who were unavailable to testify on the previous hearing dates. Respondent's Response to Petitioner's Appeal (R.Brief), Ex. F. Under the Board's regulations (4 C.F.R. §28.63(a)), the record shall be closed at the conclusion of the hearing unless the AJ allows the record to stay open for evidence previously identified and only for that purpose. Once the record is closed, no additional evidence shall be accepted "except upon a showing that new and material evidence has become available which was not available despite due diligence prior to the closing of the record." 4 C.F.R. §28.63(b).

Petitioner failed to make the requisite showing under 4 C.F.R. §28.63 for reopening the record. The evidence—testimony of Ms. Hamilton—was previously available, and the record was left open for the limited purpose of obtaining the testimony of two previously identified and unavailable witnesses. Petitioner failed either to name Ms. Hamilton on his list of witnesses before the hearing or to request her testimony before the record was closed but for the testimony of witnesses Ms. Pratt and Mr. Lundgren. Accordingly, the AJ correctly denied Petitioner's request to call Ms. Hamilton as a witness when the hearing resumed on January 20, 2006. *See* TR I/192-194; TR II/31.

C. The Alleged Exclusion of Evidence

Petitioner asserts that the AJ committed reversible error by erroneously excluding evidence regarding the past and present record of discriminatory and differential employment at GAO based on race, national origin, and age, as found in the Personnel Appeals Board Report, Promotion of Banded Employees (1991-1995). *See* Appellant's Brief at 1, 5. In support of this allegation, Petitioner's Brief on appeal cites the hearing transcript from September 14, 2005 at pages 15 through 19. At that point in the hearing, Petitioner showed a witness an excerpt from a report issued by the Personnel Appeals Board and analyzing data from 1991 to 1995. Petitioner's counsel then said: "Admittedly, this data is almost a decade old. It was the most recent thing that we could find." TR I/16. However, Petitioner had requested and received during discovery, similar documents that show the racial breakdown of GAO employees in 2001. Having received it after submission of the list of exhibits, but nearly two weeks prior to the hearing, Petitioner did not amend his list of exhibits. TR I/17-19. The AJ nevertheless allowed the relevant statistical data from 2001 over the objection of counsel for the Agency. P.Ex. 1; TR I/17-21. This excerpt from the PAB Report, Promotion of Banded Employees (1991-1995), was the only exhibit offered by Petitioner in support of this allegation. TR I/14-19. Accordingly, this allegation is without merit.

D. Other Evidentiary Challenges

Petitioner's contentions that the AJ failed to require Jesse Hoskins, the Agency's Chief Human Capital Officer, to specifically testify as to the equal employment opportunity profile within DCM and GAO as a whole from October 2001 to present are unfounded. During Mr. Hoskins' testimony, Petitioner asked him to supply the data showing the racial distribution of African-American employees in Bands I through III, breaking out African-Americans by gender, and African-American males over age 40. TR I/14-15. The AJ, over the objection of Agency counsel, allowed Petitioner to introduce GAO-provided data showing the Agency's employee

composition by both race and age at each Band level from 1997-2005.[8] *See* TR I/17-21; P.Ex. 8. The charts show the demographics at each Band level for African-Americans, Asians, Hispanics, Whites and American Indians. Mr. Hoskins testified that he had recently compared GAO's demographics with the civilian labor force by occupation nationwide because that is GAO's recruiting source. As for African-Americans, Mr. Hoskins testified that GAO was "in real good shape." TR I/21-22. Further GAO records requested by Petitioner demonstrate that in October 2001, more than seventy-five percent (75%) of all Band II analysts were age 40 and over. *See* P.Ex. 8.

Once the Agency credibly established the legitimate business reasons for its selections and subsequent cancellation of the vacancy announcement, the burden of proof shifted to Petitioner to demonstrate that GAO's stated business reason is a pretext. Petitioner asserts that the AJ failed to require the Chief Human Capital Officer to testify as to the equal employment opportunity profile within DCM and GAO as a whole in October 2001. However, Mr. Hoskins responded to all Petitioner's questions, including supplementing Petitioner's Exhibit 8, and Petitioner did not solicit more detailed information from Mr. Hoskins on this issue. Accordingly, Petitioner's assertions are unfounded and Petitioner failed to meet his burden of proof in this regard.

Petitioner contends that the AJ ignored the evidence concerning Mr. Clarke and Ms. Pratt, the two African-American applicants from the DCM team who were ranked "best qualified" and referred to Mr. Hinton, the selecting official.[9] Petitioner further asserts that the AJ ignored the collective impact of the process Mr. Hinton used which resulted in not selecting applicants who were not White or under the age of forty (40). Petitioner's allegations in this respect challenge the AJ's crediting of Mr. Hinton's testimony regarding his "highly unusual method of selecting employees" where Mr. Hinton testified that he "looks for indications that the individual has shown ability to succeed at the next level." Petitioner argues that "[a]bsent a crystal ball, it is difficult to imagine how Mr. Hinton could know so much about the future success and performance of individuals he did not bother to interview of [sic] the positions." Appellant's Brief at 3. GAO Order 2335.8 (ch. 2 ¶11) specifically required the selecting official to "select from the BQ candidates based on their judgment of how well each candidate is likely to perform at the band level being considered." Thus, Mr. Hinton's method of selection was not "highly unusual" but <u>required</u>. *Id*.

The AJ found that Petitioner was performing solidly as a Band I analyst, achieving assessments in the middle of the range and some recognition in the form of spot or cash awards for his work. ID, FOF ##32, 34. Both his work and his personality on the job were appreciated. TR III/40-41; TR I/97-98; TR II/19. However, when he was not selected for the Band II position, Petitioner retired.

---

[8] *See also* Order of Feb. 3, 2006 (explaining that GAO supplied data for 2002-2005 immediately after the hearing as a follow-through from Petitioner's Exhibit 8, and that the Court Reporter had inaccurately listed the additional exhibit as Exhibit 1 rather than Exhibit 8).

[9] Four DCM candidates were referred as BQ. *See* R.Ex. 12 and discussion in Section IIIA, *supra*.

E. Petitioner's Retirement

A decision to retire is presumed to be voluntary. *Shoaf v. Department of Agriculture*, 20 F.3d 1336, 1341 (Fed. Cir. 2001). To establish involuntariness on the basis of coercion, an employee is required to show: (1) the agency effectively imposed the terms of the employee's resignation or retirement; (2) the employee had no realistic alternative but to resign or retire; and (3) the employee's resignation or retirement was the result of improper acts by the agency. *Id*. In evaluating involuntariness, these elements are viewed "from the perspective of the reasonable employee confronted with similar circumstances." *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1330 (Fed. Cir. 2006) (*en banc*). Most resignations and retirements are not constructive removals, and "'the doctrine of coercive involuntariness is a narrow one'." *Id.* (quoting *Staats v. USPS,* 99 F.3d 1120, 1124 (Fed. Cir. 1996)). Indeed, "'the fact that an employee is faced with an unpleasant situation or that his choice is limited to two unattractive options does not make the employee's decision any less voluntary'." *Id.*

Clearly Petitioner in this case had the opportunity to successfully continue in his Band I analyst position had he chosen to do so. The AJ found that Petitioner's perception of limited opportunity for promotion is not tantamount to a constructive discharge. ID at 35 (citing *Downey v. Isaac*, 622 F.Supp. 1125, 1132 (D.D.C. 1985)). The AJ correctly held that Petitioner's claim that he was constructively discharged when he retired cannot stand, as Petitioner failed to establish that the retirement was involuntary or that the Agency's actions improperly caused his retirement.

CONCLUSION

The Initial Decision is supported by substantial evidence in the record viewed as a whole. Petitioner has failed to show that the Decision was inconsistent with law; an erroneous interpretation of statute or regulation; arbitrary, capricious or an abuse of discretion; or not consistent with required procedures resulting in harmful error.

For the foregoing reasons, the decision of the Administrative Judge is affirmed.

SO ORDERED.