

HELEN D. FAUNTLEROY; JANE D. TRAHAN; CLEMENTINE H. RASBERRY v. U.S. General Accounting Office

Docket Nos. 46-701-15-84; 47-701-15-84; 48-701-15-84

Date of Decision: September 9, 1988

Cite as: Fautleroy, et al. v. GAO, Docket No. 46-701-15-84 (9/9/88)

Before: Jonathan E. Kaufmann, Vice-Chair, For the Board

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DECISION

BEFORE THE
PERSONNEL APPEALS BOARD
U.S. GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C.

HELEN D. FAUNTLEROY)	
Petitioner)	
v.)	
U.S. GENERAL ACCOUNTING OFFICE)	Docket No. 46-701-15-84
)	
Respondent)	
JANE D. TRAHAN)	Docket No. 47-701-15-84
v.)	
Petitioner)	
U.S. GENERAL ACCOUNTING OFFICE)	
)	
Respondent)	
CLEMENTINE H. RASBERRY)	Docket No. 48-701-15-84
)	
Petitioner)	
v.)	
U.S. GENERAL ACCOUNTING OFFICE)	
)	

DECISION

Introduction

These consolidated cases are before the PAB on the motion of Petitioners to reopen and reconsider the decision of the Presiding Member finding that Petitioners were not the victims of unlawful discrimination when they were not ranked as best qualified for promotion under Respondent's promotion system. In a decision issued September 25, 1987, the Presiding Member ruled that Petitioners failed to carry their ultimate burden of proof that their nonselection for promotion to the next highest grade was the result of racial discrimination. In their motion for

reconsideration, Petitioners argue that the Presiding Member's decision is arbitrary, capricious, an abuse of discretion, otherwise inconsistent with the law, and unsupported by substantial evidence.

I. Factual Background

In 1983, Respondent implemented a new promotional system for its professional staff. The new system, the Merit Selection Plan (MSP), called for employees to be selected for promotion based on their relative rankings as determined by a management review panel. The management review panel consisted of higher ranking professionals, supervisors, and subject matter experts from the employee's unit or division. The management review panel was appointed by the head of each unit or division.

Employees seeking promotion under the MSP were ranked on the basis of an application "package" of documents which consisted of a summary of all of the assignments and work completed by the employee during a specified period of time; an overall narrative assessment of the employee's performance and accomplishments during the period; the employee's performance appraisals for a specified period of time and/or specific assignments; and a profile or resume prepared by the employee which included the employee's work experience, education, training, outside activities and awards. The panel assigned numerical scores to each employee in the various categories of assessment; the scores were subsequently tallied and combined; a cutoff score was chosen; and those employees with the highest composite score were given the designation "best qualified," and placed on a list

reflecting same. The MSP promotional process occurs but once a year, and each year, new MSP evaluations are made and new best qualified lists are generated. Promotions are made throughout Respondent's workforce from these lists each year, and an employee cannot be considered for promotion without being on the limited best qualified list.

Petitioners were employed in the summer of 1983 in the now-defunct Federal Personnel and Compensation Division (FPCD). Petitioners Helen Fautleroy and Clementine Rasberry were GS-13 Evaluators seeking promotion to GS-14; Petitioner Jane Trahan was a GS-14 Evaluator who sought promotion to GS-15. In August 1983, the management review panel was convened in the FPCD, who considered the Petitioners and 35 other candidates for promotion. In October 1983, after finding that they had not been selected for the best qualified list, each of the Petitioners filed complaints of discrimination with Respondent's Civil Rights Office.

Respondent's Civil Rights Office completed its investigation of Petitioners' complaints on June 15, 1984. On that date, Respondent issued its Final Agency Decision finding that Petitioners had not been discriminated against. Earlier, in May 1984, Petitioners appealed their complaints to the PAB General Counsel. The PAB General Counsel, after an investigation, elected to represent Petitioners. After extensive discovery and motion pleading, an evidentiary hearing was held in December 1986, after which each side filed post-hearing briefs.

On September 25, 1987, the Presiding Member issued his

decision in this case. The Presiding Member found that Petitioners had not proved a case of racial discrimination in their nonselection for the best qualified list for promotion. The Presiding Member found that Petitioners had proved that the MSP was subjective, and noted that subjective procedures are frequently used to mask discriminatory practices, but that such was not the case here. The Presiding Member found that Petitioners did make out a prima facie case of disparate treatment.

The Presiding Member ruled that, using statistics, the Petitioners had made out a prima facie case of promotion discrimination under both the disparate treatment and disparate impact models, by showing that whites were selected to the best qualified list at a rate twice that of blacks. However, the Presiding Member ruled that, while Petitioners' statistics were useful, they did not provide enough information to bolster their claim of discrimination. The Presiding Member found that Petitioners' anecdotal evidence was unpersuasive in giving meaning to Petitioners' statistics, and otherwise reinforcing their case.

The Presiding Member, in analyzing Petitioners' claims under the disparate impact model, found that the MSP was subjective and that the panel members were given no meaningful instructions on how to rate candidates on the basis of relative qualifications. However, the Presiding Member found no basis on which to conclude that the selection process was invalid merely because it was subjective, and that the ranking factors used by Respondent

suggest job relatedness.

The Presiding Member concluded by finding that, although Petitioners had established a prima facie case, they failed to meet their ultimate burden of proving discrimination. The Presiding Member reasoned that, even had Petitioners been able to prove discrimination, Respondent would still have had an opportunity to show by a preponderance of the evidence that, even absent discrimination, Petitioners would not have been selected for promotion. The Presiding Member ruled that, concurrently, with the dissolution of the unit, in fact, such a showing had been made by Respondent, when it offered evidence that none of the individuals selected as best qualified over Petitioners were promoted, and, therefore, Petitioners were entitled to no relief, even had they been able to prove discrimination.

II. Analysis

A. Petitioners' Motion to Reconsider

Petitioners allege that the Presiding Member's decision is arbitrary, capricious, an abuse of discretion, otherwise not consistent with law, and not supported by substantial evidence. Petitioners allege that the Presiding Member failed to identify all of the issues raised by their case, specifically as relates to the MSP having a discriminatory impact on all blacks, and that Petitioners alleged discrimination in promotion as well as in not making the best qualified list. Petitioners argue that the Presiding Member's failure to recognize the claim of Agency-wide promotion discrimination diminished the significance of Petitioner's un rebutted statistics. Petitioners also allege that

Respondent submitted no evidence of the validation of the MSP. Petitioners further argue that the fact that there were no promotions in Petitioners' division is irrelevant, because but for Petitioners' failure to make the best qualified list, they would have been eligible for promotion in other divisions of GAO. Petitioners argue that the evidence on record proves conclusively that the MSP was subjective, that it was not administered according to any written standards, and that the panel members admitted to being untrained in using the MSP for ranking purposes. Thus, Petitioners reason, the evidence points to only one conclusion: that the MSP is a highly subjective process that had an adverse impact on black professionals at the GS-13/14 level, and Respondent did not rebut such a showing.

Petitioners contend that the Presiding Member made several serious errors of law in his decision. First, Petitioners argue that the Presiding Member misapplied the burdens of proof by requiring Petitioners to prove that they would have received the promotions but for discrimination, when it is actually Respondent's burden to rebut a presumption of discrimination by proving that, even absent discrimination, Petitioners would not have been promoted. Petitioners cite Day v. Mathews, infra, and Segar v. Smith, infra, as authority for their argument. Petitioners also argue that the Presiding Member improperly analyzed the standard of proof as regards both the disparate treatment and disparate impact theories, with the result of imposing an incorrect burden on the Petitioners. Petitioners contend that the Presiding Member failed to correctly identify

the burden that shifted to Respondent under each theory, such that Petitioners' inferences by way of statistics were rendered meaningless. Petitioners argue that once they established a prima facie case of adverse impact, the burden that should have shifted to Respondent was one of showing the business necessity of the MSP. Petitioners maintain that Respondent did not carry this burden, and that the evidence of record shows conclusively that the MSP was never properly validated.

B. Standard of Review

We review the Presiding Member's decision under the provisions of 4 C.F.R. Section 28.25(c), which provides that the Board may reopen, reconsider, and ultimately reverse a decision of a Presiding Member when it is established that:

- (1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or
- (2) The decision of the Hearing Officer is based on an erroneous interpretation of statute or regulation;
- (3) The decision is arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;
- (4) The decision is not made consistent with required procedures; or
- (5) The decision is unsupported by substantial evidence.

In reviewing the Presiding Member's decision, we must first insure that the Presiding Member discerned and applied the proper legal standard. Then we review the Presiding Member's factual findings and his application of the legal standard to the facts

found. Anderson v. City of Bessemer, 470 U.S. 564 (1985); Cuddy v. Carmen, 762 F.2d 119 (D.C. Cir.), cert. denied, 106 S.Ct. 597 (1985). Our review of the Presiding Member's factual findings is under the clearly erroneous standard. Id.; Chen v. GAO, 821 F.2d 732 (D.C. Cir. 1987). If we find that the Presiding Member failed to analyze the evidence under the correct legal standard, we may find reversible error. Pullman-Standard v. Swint, 456 U.S. 273 (1982). We need not reach the question of the correctness of the Presiding Member's factual findings if he applied an erroneous legal standard in reaching his decision. Kelley v. Southern Pacific Co., 419 U.S. 318, 323 (1974).

If, however, we conclude that the Presiding Member utilized the proper legal standard, we must then decide if the decision itself is supported by substantial evidence on the record viewed as a whole. The substantial evidence test is particularly relevant here. Substantial evidence has been defined as:

"More than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. Labor Board, 305 U.S. 197, 229. Accordingly, it "must do more than create a suspicion of the existence of the fact to be established...." Labor Board v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300.

Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951). In applying the substantial evidence test in this case, we first look to the elements of the charges Petitioners sought to prove at hearing, and then to the quantum

of proof required to sustain Petitioners' allegations. In so doing, we are mindful of the fact that we may not simply substitute our judgment for the judgment of the Presiding Member, but must, instead, carefully consider the findings and conclusions of the Presiding Member. Chen v. GAO, supra. As long as the Presiding Member's decision is plausible when the record is viewed as a whole, we may not reverse the decision of the Presiding Member, even though we are personally convinced that we would have weighed the evidence differently had we been deciding the case. Anderson v. Bessemer City, 470 U.S. at 574. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Id.

1. The Disparate Treatment Analysis

Traditionally, claims of disparate treatment discrimination are evaluated under the process enunciated by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and refined in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). It is these two cases which set the standards for the order and burden of proof in individual cases of employment discrimination. U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983). Under the McDonnell Douglas-Burdine analysis, plaintiff carries the initial burden of establishing a prima facie case of discrimination. Once the prima facie case has been established, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employment action. If the employer succeeds in carrying this

burden, the plaintiff must then prove by a preponderance of the evidence that the employer's explanation was a mere pretext for discrimination. McDonnell Douglas, 411 U.S. at 802; Burdine, 450 U.S. at 252.

The prima facie case method under McDonnell Douglas-Burdine is intended to be a "sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." Furnco Construction Corp. v. Waters, 438 US. 567, 577 (1978). In order to establish a prima facie case of discrimination under the McDonnell Douglas-Burdine standard a plaintiff must show by a preponderance of the evidence that he "applied for an available position for which he was qualified, but was rejected under circumstances which give rise to an inference of discrimination." Burdine, 450 U.S. at 253. Once the plaintiff makes out a prima facie case, he sets up a legally mandatory, rebuttable presumption that the employer discriminated against him, and the employer can only rebut this presumption "by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." 450 U.S. at 254 and n.7. The employer must establish his legitimate reasons through the introduction of admissible evidence sufficient to justify a judgment on the merits. Id. at 255. If the defendant meets this burden, the plaintiff must be given a fair and full opportunity to demonstrate that the employer's proffered explanation is pretextual. The plaintiff may show pretext directly by proving discriminatory motive on the part of the defendant, or

indirectly, by showing that the proffered justification is unworthy of belief. 450 U.S. at 255-256. The ultimate burden of proving intentional discrimination remains at all times with the plaintiff. Id. at 253. If the plaintiff carries this ultimate burden of proving discrimination, the defendant must be given a final opportunity to prove by clear and convincing evidence that, even absent discrimination, the same employment decision would have been made. Hopkins v. Price Waterhouse, 825 F.2d 458, 470-71 (D.C. Cir. 1987).

The Presiding Member found that Petitioners established a prima facie case under the McDonnell Douglas-Burdine formula by showing that they were members of a protected class, that they were qualified for and sought promotion to a higher grade, and that, notwithstanding their qualifications, they were rejected, while persons of similar qualifications not of the Petitioners' protected group received more favorable consideration. The Presiding Member correctly noted that Petitioners' statistics were sufficient to create an inference of discriminatory treatment, International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977), and that Petitioners had created a rebuttable presumption of intentional discrimination under the McDonnell Douglas model.

Having found that Petitioners had established a prima facie case, the Presiding Member next considered Respondent's stated reasons for Petitioners' nonselection to the best qualified list and ultimate nonpromotion. Respondent's articulated justification for Petitioners' failure to make the best qualified

list is simply that Petitioners' scores on the MSP assessment process were not high enough to warrant their selection as best qualified. In other words, Respondent asserts that Petitioners' nonselection was the result of their relative rankings on the MSP in comparison to the highest-ranked candidates.

After hearing all of the evidence, the Presiding Member proceeded to the ultimate factual issue in the case, Aikens, supra, and determined that Petitioners had failed to carry their ultimate burden of proving that their nonselection for the best-qualified list and nonpromotion to the next highest grade was the result of intentional discrimination. The Presiding Member found that Petitioners' evidence regarding their performance ratings, time in grade, and qualifications for promotion was insufficient to carry Petitioners' ultimate burden of proving intentional discrimination or that Respondent's stated reasons for Petitioners' nonpromotions were pretextual. The Presiding Member went on to rule that, even had Petitioners proved discrimination, Petitioners would not have been entitled to the relief they sought--promotion to the next grade--because the evidence of record showed that none of the individuals certified as best qualified was promoted.^{1/}

1/ The Presiding Member cites Day v. Mathews, 530 F.2d 1083 (D.C. Cir. 1976) (per curiam) both as requiring Petitioners to prove that, but for Respondent's discrimination, they would have been promoted, see decision, p. 14, and requiring Respondent to prove that, even absent discrimination, Petitioners would not have been promoted. Decision, p.27. We do not think Day is applicable here, where there is no finding of discrimination, but are unsure, in any event, how Day is to be applied in light of later holdings by the D.C. Circuit. See, e.g., Toney v. Block, 705 F.2d 1364 (1983).

2. The Disparate Impact Analysis

In a disparate treatment claim the allegation is that a defendant intentionally based an employment decision on illegal grounds, such as the race, sex, religion, etc. of the plaintiff. See, Teamsters, supra, 431 U.S. at 335 and n.15. However, the disparate impact analysis is premised on a showing that an employer's utilization of a facially neutral employment policy or practice has a substantially adverse (disparate) impact on members of a protected class, notwithstanding the equal application of the policy or practice to all similarly-situated individuals.

The disparate impact case is also subject to a tripartite order and burden of proof. The plaintiff has the initial burden of establishing a prima facie case by proving that a specified employment policy or practice has an adverse impact on the members of plaintiff's protected class. The burden of proof then shifts to the employer to prove the business necessity of the practice. In order to show business necessity, the employer ordinarily must show that the practice is job related, that is, the practice bears a "manifest relationship to the job in question." Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971). In a case involving a selection device, or as here, a promotion system, business necessity may be shown by demonstrating that the system or practice is an accurate predictor of success on the job. Id.; Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). If the employer can show

business necessity, the burden shifts back to the plaintiff to show that there are alternatives to the personnel practice which would accomplish the same goal with a lesser discriminatory impact. Griggs v. Duke Power Co., 401 U.S. at 432. In a disparate impact case, intent is irrelevant. Teamsters, 431 U.S. at 336 n.15.

Statistics showing that a particular employment practice or selection criterion screens out blacks at a significantly higher percentage than whites is sufficient to establish a prima facie case under the disparate impact model. Hazelwood School District v. United States, 433 U.S. 299, 307-08 (1977); Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984), cert. denied sub. nom. Meese v. Segar, 471 U.S. 1115 (1985).

The Presiding Member ruled that the MSP was a neutral employment device under the law, and that Petitioners' statistical evidence showing that whites were recommended for the best-qualified list at a rate almost twice that of blacks was sufficient to establish a prima facie case of disparate impact.^{2/} Thus, the burden was shifted to the Respondent to show that the MSP satisfies the business necessity requirement, i.e, "[h]as a

^{2/} Petitioners, in their motion to reopen and reconsider, included a 10/23/87 memorandum from the Comptroller General as evidence that the MSP continues to have a disparate impact. Assuming, arguendo, the propriety of our considering this memorandum, it makes no difference because, on this record, there is substantial evidence to support the finding of the Presiding Member that the Respondent proved the business necessity of the MSP, as hereinafter discussed.

manifest relationship to the job in question." Dothard v. Rawlinson, 433 U.S. 321, 329 (1977), citing Griggs v. Duke Power Co., 401 U.S. at 432.

Respondent's evidence that the MSP is job related consisted of testimony by a testing expert and a personnel specialist to the effect that the MSP in fact measures the skills, knowledges and aptitudes requisite for the position of evaluator. Respondent also introduced a validation study which showed the MSP to be job related. Petitioners attempted to rebut Respondent's showing with evidence that the MSP is excessively subjective and that the persons serving on the management review panels had not been properly instructed on how to evaluate the candidates, such that the MSP could not be validated in accordance with the EEOC Uniform Guidelines on Employee Selection Procedures.

The Presiding Member found that the MSP was clearly subjective, to the effect that there was no way of ascertaining whether or not the best qualified candidates were actually selected. However, the Presiding Member ruled that there was no basis on which to find that the MSP is invalid purely because of the presence of subjectivity. The Presiding Member found that the assessment criteria used by Respondent in the MSP were job related, and thus concluded that the Petitioners had also failed to meet their ultimate burden of proving discrimination under the disparate impact analysis.

Respondent argues that the disparate impact analysis cannot

be applied to systems that do not utilize objective criteria in the screening process. However, the District of Columbia Circuit has long applied the disparate impact theory to hiring and promotion systems using subjective criteria. Palmer v. Shultz, 815 F.2d 84 (1987); Krodel v. Young, 748 F.2d 701 (1984); Segar v. Smith, *supra*; Trout v. Lehman, 702 F.2d 1094 (1983). And the Supreme Court has put the entire issue to rest in Watson v. Fort Worth Bank & Trust, ___ U.S. ___, 108 S.Ct. ___ (1988), when it held that the disparate impact analysis can be applied to all employment systems relying on subjective criteria.

Petitioners attack the Presiding Member's decision in two other ways. First, Petitioners allege that the Presiding Member erred in failing to address the Petitioners' contention that the MSP has an adverse impact on all of Respondent's black employees. Petitioners argue that the failure of the Presiding Member to recognize that the MSP had an agency-wide disparate impact lessened the significance of Petitioners' unrebutted statistics. Second, Petitioners allege that the Presiding Member erred in failing to recognize that their claim related not only to being denied certification to the best qualified list, but also to being denied promotion to the next higher grade level.

As regards the latter issue, that of Petitioners' claim of failure to be promoted, we find that the Presiding Member adequately addresses the issue. The Presiding Member ruled that Petitioners' failure to make the best qualified list was not shown to be the result of discrimination. It is undisputed that

placement on the best qualified list was a condition precedent to eligibility for promotion. If Petitioners were not discriminatorily denied placement on the best qualified list, then, ipso facto, their denial of promotion to the next grade level cannot be considered discriminatory, based solely on their failure to make the best qualified list. Moreover, Petitioners' arguments, in the light of our view of the record as a whole, offer little which persuades us that the Presiding Member's finding that Petitioners were not discriminatorily denied best qualified status is clearly erroneous. Anderson v. City of Bessemer, 470 U.S. at 574.

With respect to Petitioners' argument that the Presiding Member gives insufficient weight to the Petitioners' evidence of the adverse impact of the MSP, we are not persuaded that the Presiding Member's evaluation of the evidence is clearly erroneous. The Presiding Member correctly states that Petitioners' statistical evidence is significant enough to establish a prima facie case of discrimination under the disparate treatment theory. Petitioners seem to argue that the only method by which their statistics can be rebutted is with more statistics. However, a statistical prima facie showing of disparate impact can be rebutted in two ways. One, as Petitioners correctly argue, is for Respondent to offer statistical evidence that is more refined, accurate, or valid than that offered by Petitioners. Teamsters, 431 U.S. at 339-40. The other is by showing that the employment practice

causing the disparate impact is job related. Washington v. Davis, 426 U.S. 229, 246 (1976); Griggs, 401 U.S. at 431. Here, Respondent chose to attempt to rebut Petitioners' prima facie case, not with statistics, but with evidence that the challenged employment practice (the MSP) is job related.

The Presiding Member found that the MSP is job related and, therefore, not discriminatory. A finding of discrimination or no discrimination is a finding of fact, and entitled to appropriate deference on appellate review. Anderson v. City of Bessemer, 470 U.S. at 573. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Id. The Presiding Member's determination cannot be overturned unless we conclude that it is based on an account of the evidence that is utterly implausible. Hopkins v. Price Waterhouse, 825 F.2d at 465.

We conclude that the record evidence, when viewed as a whole, contains substantial evidence to support the Presiding Member's determination that Petitioners failed to carry their ultimate burden of proving discrimination under either the disparate treatment or disparate impact theories. Petitioners offered no evidence probative of the issue of discriminatory intent, an absolute prerequisite to a finding of discrimination under the McDonnell Douglas-Burdine formula. Aikens, supra at 715. The Presiding Member correctly noted that none of Petitioners' anecdotal evidence was relevant to their showing of discriminatory intent, nor dispositive of Petitioners' burden of

showing pretext. Moreover, the Respondent offered evidence which showed that some of the whites on the best qualified lists had higher performance appraisals than Petitioners. Respondent also put on evidence to show that some whites having more time in grade and more experience than Petitioners nevertheless did not rank as high on the MSP evaluation as Petitioners, which is evidence that the ranking process applied to blacks and whites more or less equally. Also, there was clear evidence on the record that even if the lowest score given to Petitioners by each member of the ranking panel was thrown out, the Petitioners would still not have made the best qualified list. Thus, even if there was some subjective racial bias on the part of one or two of the members of the management review panel, the scores they gave to Petitioners were not sufficient to disturb the overall rankings. Thus, we find that there is substantial evidence on the record viewed as a whole to support the Presiding Member's finding that Petitioners failed to carry their ultimate burden of proving their nonselection to the best qualified list and ultimate nonpromotion to the next highest grade level, was the result of intentional discrimination.

We are equally persuaded of the correctness of the Presiding Member's finding under the disparate impact theory. Petitioners' statistics proved the disparate impact of the MSP process. Respondent averred that the disparity did not result from illegal discrimination, but from the Petitioners' rank order on the MSP, which Respondent claimed to be job related. The

Presiding Member found that the criteria utilized in the MSP ranking process were job related. We find substantial evidence on the record to support the Presiding Member's finding in that regard. Several of Respondent's witnesses testified that the MSP is job related. We do not find the testimony of Respondent's witnesses in support of the MSP inherently incredible. Nor do we find error in the Presiding Member's decision to give weight to the testimony that the MSP is job related. Petitioners offered no evidence that the criteria used in the MSP ranking process were invalid, nor that the screening criteria were not job related. Petitioners argue only that the MSP was not validated according to the EEOC Uniform Guidelines on Employee Selection Procedures. However, the EEOC Guidelines refer to objective tests, and not to subjective criteria. See Washington v. Davis, supra; Griggs v. Duke Power Co., supra. And even tests using objective criteria may not be required to be professionally validated. Watson v. Ft. Worth Bank, supra, citing New York City Transit Authority v. Beazer, 440 U.S. 568, 587 n.31 (1979).

Petitioners also argue that the MSP process is inherently discriminatory because it is excessively subjective. However, the concept of excessive subjectivity applies to systems where the subjective opinion of an employee's supervisor is given controlling weight in the promotional decision (See, Rowe v. General Motors, 457 F.2d 348 (5th Cir. 1972); Woodbury v. New York City Transit Auth. 832 F.2d 764, 771 (2nd Cir. 1987)), or where the promotional process is tainted by the biased views of

the rating panel. Hopkins v. Price Waterhouse, supra. Here, there was no evidence put on the record that any of the panel members had a biased view towards Blacks, and it is clear that supervisory appraisals constituted only one of several criteria on which the candidates were evaluated.

Finally, the Petitioners could have offered their own evidence that there were alternative measures for evaluating employees that would have achieved the same results as the MSP but with a lesser discriminatory impact. See, Albemarle Paper Co. v. Moody, 422 U.S. at 425. This the Petitioners failed to do, and by doing so, they failed to carry their ultimate burden of proving that the MSP was discriminatory in violation of Title VII.

Accordingly, the decision of the Presiding Member is affirmed. Our affirmance of the ultimate conclusions reached by the Presiding Member, however, is not to be taken as agreement with all of the comments made in his decision. In several particulars, we disagree.

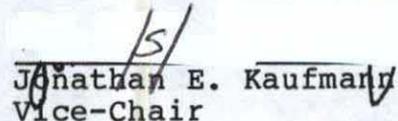
One such area of disagreement concerns the comment made that the argument over "who was better qualified ... is not terribly relevant in this case." See footnote 7 of the decision, at page 15. It is relevant and, indeed, the Presiding Member admitted considerable evidence on the issue and made a finding based upon such evidence, namely that Petitioners and the individuals selected by the promotion panel were "all qualified". Ibid. We have reviewed the evidence and conclude that it shows just that,

and no more. Had Petitioners succeeded in demonstrating that they were better qualified than those selected, their case would have been considerably strengthened. Their failure to do so, and the fact that the Presiding Member did receive and consider such evidence, reduces this comment to the category of harmless error.

We also believe that the Presiding Member incorrectly minimized the ability of the Petitioners to bid on jobs agency-wide. See decision, pages 16-17. Again, however, this falls in the category of harmless error, since we affirm his finding that Petitioners did not meet their burden of proving that racial discrimination motivated their nonselection for the best qualified list, thereby rendering them ineligible to bid on jobs in units other than their own.

To the extent that the decision may miscast the burden of proof as to statistics, as the Petitioners argue (and see footnote 9 of the decision at page 20), some clarification is necessary. It is our view that once a Petitioner makes a prima facie case of discrimination by the use of statistics, as here, the burden is upon the Respondent to refine or rebut them, if this is the method used by the Respondent to defend itself. Here, as we have noted above, Respondent made no attempt to challenge the statistics. Instead, it claimed that the MSP was job related; and this claim was accepted by the Presiding Member and we find it is supported by substantial evidence.

September 9, 1988


Jonathan E. Kaufman
Vice-Chair

JUDICIAL REVIEW

This is a final decision of the Personnel Appeals Board, and pursuant to 31 U.S.C. §755, any final decision of the Board regarding subsections (1), (2), (3), and (7) of 31 U.S.C. §753(a) may be appealed to the United States Court of Appeals for the circuit in which the Petitioner resides or to the United States Court of Appeals for the District of Columbia within 30 days after the date the Petitioner receives notice of the final decision from the Board.

Alternatively, the Petitioner may seek a trial de novo in the appropriate United States District Court, pursuant to Title VII of the Civil Rights Act of 1964, as amended, by filing a complaint with such District Court within 30 days after the date the Petitioner receives notice of the final decision from the Board.