

HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO

Appeal Nos. 09-02

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

SHANNON KANAN, Appellant,

v.

Agency: Department of Parks and Recreation, and the City and County of Denver,
a Municipal corporation.

INTRODUCTION

For purposes of these Findings and Order, Shannon Kanan shall be referred to as "Appellant." Department of Parks and Recreation shall be referred to as "Department" or "Parks and Rec." The City and County of Denver shall be referred to as "City." They will be referred to collectively as "Agency." The Rules of the Career Service Authority shall be abbreviated as "CSR" with a corresponding numerical citation.

A hearing on this appeal was held October 9, 2003, before Robin R. Rossenfeld, Hearing Officer for the Career Service Board. Appellant was present and was represented by Cheryl Hutchison, AFSCME. The Agency was represented by R. Craig Hess, Assistant City Attorney.

The Hearing Officer has considered the following evidence in this decision:

The following witnesses were called by and testified on behalf of the Appellant:

Appellant, William Culkin, George Martinez, Theresa Rush, Juan Marsh, William G. Petersen

The following witnesses were called by and testified on behalf of the Agency:

None.

The following exhibits were offered and admitted into evidence on behalf of the Appellant:

A (pp. 2 -4), B, C, K

The following exhibits were offered and admitted into evidence on behalf of the Agency:

None.

The following exhibits were admitted into evidence by stipulation:

None.

The following exhibits were offered but not admitted into evidence and therefore not considered in this decision:

None

NATURE OF APPEAL

Appellant is appealing the Agency's failure to promote her into the Recreation Supervisor position at Washington Park Recreation Center. She alleges age, sex and race discrimination and retaliation. She seeks a promotion into the Recreation Supervisor position at Stapleton Recreation Center, with appropriate back pay for the entire period of discrimination, and for all promotional interviews before the Department to be conducted for an appropriate period of time by independent, unbiased, and non-discriminatory interviewers who are not employed by the Department.

ISSUES ON APPEAL

Whether the failure to promote Appellant to the Recreation Supervisor position was discriminatory or retaliatory?

If the failure to promote Appellant was discriminatory or retaliatory, what remedy is available?

PRELIMINARY MATTERS

The Agency filed a Motion to Dismiss the grievance appeal for failure to state a cause of action. The Hearing Officer dismissed this case because Appellant did not provide any specific information as to the basis of her discrimination claims in her response to the Agency's Motion or in any other prehearing documents. Appellant appealed the dismissal to the Board, which reversed the dismissal and ordered a hearing on the merits of the discrimination claims.

Prior to the commencement of the hearing on the merits, the Agency filed a Motion *in Limine*. The Agency sought to limit this case to the 2001 denial of promotion and to foreclose Appellant from presenting any evidence of the underlying circumstance in a denial of a promotion in 2000. The Agency based this request upon the fact that Appellant's appeal of the denial of the promotion in 2000 had been dismissed by a Hearing Officer as untimely and that dismissal affirmed by the Career Service Board. The Hearing Officer ruled that, while reference could be made to the existence of the 2000 promotion proceeding, Appellant's failure to appeal that denial estopped her from litigating any claims arising from the earlier promotion denial.

FINDINGS OF FACT

1. Appellant is a white female, 55 years of age. She has worked for Parks and Rec since 1972. She currently is a Recreation Coordinator, a position she has held since 1989. She has attended college and other training. She has a certification in cardio-pulmonary resuscitation. She initiated the Stapleton Recreation Center Double Dutch team, established a youth gardening program for inner city youth, and has worked in other youth programs.

2. Parks and Rec held a promotional examination and interview for Recreation Supervisor for the Washington Park facility on November 20 and 21, 2001. Appellant was one of thirteen persons who applied for the promotion.

3. The examination and interview consisted of a written portion and presentation. Candidates were given fifteen minutes to draw their resume, depicting significant events, accomplishments and people in their lives. Then the candidates were given ten minutes to make a verbal presentation about the drawing. This portion of the examination was worth 50 points, which included a maximum of 10 points for completing the exercise, 10 points for following instructions, 10 points for verbal skills, 10 points for confidence, and 10 points for a sense of humor. After that, candidates were asked two questions. Candidates had ten minutes to answer, "Why do you feel you are the best candidate to become the Washington Park Recreation Supervisor?" This question was worth 30 points, divided as to 10 points for references to related education, experience, supervisory skills and trainings, 5 points for related ability to maintain positive communications, as independent thinker with an ability to compromise and support supervisors, peers, staff, department and division goals, 5 points for visiting the Center and talking to the staff, and not being hesitant to make appropriate changes when necessary, and 10 points for expressing a willingness to do what it takes to get the job done within the policies, rules and regulations and expressing a willingness to work long hours and weekends. The final scored question was to describe the candidate's conflict management style and give a specific example of handling a difficult situation well. This 20 point question was scored with a maximum of 10 points for referring to a balance between fair, equitable treatment and direct appropriate actions when necessary, 5 points for a solid example of addressing true conflict with multiple aspects to consider, and 5 points for mentioning the need for people in leadership positions to address conflict well. Ten minutes was provided for this question. The remaining 5 minutes were designated for non-scoring questions. (See, e.g., Exhibit B8-9)

4. Appellant's interview was scheduled for 1:00 to 1:45 p.m. on November 20. Appellant appeared for the examination and interview approximately 15 minutes late. Therefore, she did not have the full time appropriated to complete the resume exercise.

5. Appellant did not call the interviewers to tell them she was running late nor did she explain why she was late or apologize when she arrived at the examination and interview. As set out below, the interviewers noted her tardiness and failure to provide an explanation and considered it an indication that Appellant was not really interested in the promotion.

6. William Culkin, who was the successful candidate for the promotion, is a White male, aged 49. He has a Bachelors Degree from University of Denver and a teacher certificate from University of Colorado at Denver. He has several certificates in areas of coaching and instruction and CPR/first aid. (Exhibit K) Mr. Culkin started working with the City in 1989 as a part-time Recreation Instructor. He then became a full-time Recreation Instructor, then Recreation Coordinator. He became Assistant Supervisor at the Hiawatha Davis Center, after applying for that position three or four times, just a few weeks before promoting to the Recreation Supervisor position at Washington Park. During his tenure, he has run Summer in the Parks, the Summer Scholars program and after school programs, such as "Through the Eyes of a Child" art project, which he created while he was working for the Department part-time. He was also responsible for the creation of the City-wide youth track team program. Because he was not successful in his earlier interviews for the Assistant Supervisor positions, Mr. Culkin went to Theresa Rush for interview skills assistance, as service Ms. Rush provides to

all interested candidates.

7. George Martinez, one of the interviewers, is Recreation Manager, a position he has held since 1989, except for the period of 2000 until July 2003, when he was Co-Deputy Manager. He is a Hispanic male. He is 54 years old. His top candidate for the promotion was Mr. Culkin, who scored a total of 92 points. Cheryl Branch, a 45 year old White female was his second highest candidate. Appellant ranked fifth on his list, with a score of 89. (Exhibit A-2) Mr. Culkin received full points for his resume exercise and full points for his conflict management question response. Mr. Culkin lost points on the first question because he did not visit the Washington Park Center prior to the interview. (Exhibit B10-11) Appellant received 45 points for the resume exercise, losing points because she was late and time was a factor, limiting her ability to complete the exercise. She received 28 points for the first question, and 16 points for the last question. Mr. Martinez testified that the conflict situation Appellant discussed actually showed her placing herself in danger and not properly addressing the conflict situation.

8. Mr. Martinez was unaware of the ages of the top five candidates for the position.

9. Mr. Martinez brought a discrimination case against the department years ago and won.

10. Mr. Martinez feels that the November 2001 interview was one of the most fair interview processes he has seen in thirty years of working at the Department.

11. Mr. Martinez explained that if the candidate with the highest composite score is not picked for the promotion, it is necessary to write a justification as to why the panel thought that a lower scoring candidate was the better candidate. Regardless of who is picked, Mr. Martinez stated, it is still necessary to explain the decision to the Deputy and Manager.

12. The fact that Appellant was fifteen minutes late to the interview did not "sit well" with Mr. Martinez. He stated that, "if one is interested in a promotion, if the job is important, then you arrive on time."

13. Mr. Martinez chose Mr. Culkin as the top candidate because he had more education, and supervisory experience and better conflict resolution skills than the other candidates.

14. Mr. Martinez was not aware that Appellant had previously brought a case against the Department and knew of no "settlement offer" disputes involving Appellant in November 2001. He stated that his decision was not based upon retaliation for not taking the settlement offer, or her race, gender or age.

15. Theresa Rush as a 54 year old Black female. Her husband and grandfather are both White. She is the Recreation Manager. She was Acting Co-Deputy Manager in the fall of 2001 or 2002. She was the person responsible for developing the resume exercise question for the examination.

16. Cheryl Branch, a White female, age 45, was Ms. Rush's top scorer with 87 points. Mr. Culkin was her second highest ranking candidate, along with Sid Shuck (White male, age 42), each with 84 points. Scott Smeeton (White male, age 43) was fourth, with 83 points. Appellant was fifth, with 79 points. (Exhibit A-4)

17. Ms. Rush stated that Appellant lost points for the resume exercise because she was late and did not fully complete it. She also lost points because the information she presented during the interview failed to show she was well-rounded and left the impression she lacked administrative skills, diversity in her program background, and ability to work with administration. Ms. Rush stated that she did not look at Appellant's actual resume and based her conclusions upon the information presented by Appellant during the interview. Ms. Rush indicated that Appellant's tardiness for the interview indicated to her that Appellant was not reliable and dependable.

18. Ms. Rush indicated Mr. Culkin was the better candidate because he had better skills, more diversity, able to see the "big picture" needed to move a facility/community forward, and his administrative skills. He was articulate, confident and capable. She also noted that his attendance at post-interview sessions to improve his skills demonstrates to her his desire to achieve a promotion.

19. Ms. Rush testified that she did not know the ages of any of the candidates and that their ages were never discussed by the interview panel.

20. Ms. Rush was aware of the earlier case. She attended a meeting involving Appellant in April or May 2001. None of the other panelists were at the meeting and were never told about it. She stated there had been no settlement offer to Appellant. Her decision was not made in retaliation for Appellant's prior appeal or refusal to settle the case.

21. Ms. Rush denied that her decision as to whom to promote was based upon the age, race or gender of the candidates.

22. Juan Marsh, Operations Manager, has worked for the City for fourteen years. He is a 36-year-old Hispanic male. His wife and father are both White. He was the Department's Acting Human Resources Director from December 2000 through November 21, 2001. He was a member of both 2000 and 2001 interview panels that interviewed Appellant. As Acting Human Resources Director, he had final approval of the questions used.

23. Mr. Culkin and Mr. Smeeton were Mr. Marsh's top scorers, with 94 points each. Cheryl Branch had 92 points. Sid Shuck had 90 points. Appellant was his seventh highest score, with 82 points.

24. It bothered Mr. Marsh that Appellant appeared for the examination late. His notes indicate that she did a "fair" job with the resume exercise, with the statement "rushed due to lateness?" written in his marginalia. He also noted that her presentation was "not very creative." His score sheet indicates that Appellant did not address her education or supervisory skills during her discussion of the question as to why she was the best candidate, she seemed "more interested in individual success rather than Department goals," and she failed to mention that people in leadership positions need to be able to address conflict well. (Exhibit C-9-10)

25. Mr. Marsh believed Mr. Culkin to be the more qualified candidate because of his education, advisory and management experience.

26. Mr. Marsh was unaware of the ages of the top five candidates. He stated that the race, age and gender of the top five candidates was not discussed by the panel members and did not enter into his decision. He was aware of Appellant's previous case, but that his determination in November 2001 was not made in retaliation for her refusal to settle it.

27. William G. Peterson, who has been Recreation Manager since 1987, is a 59 year-old White male.

28. Mr. Peterson testified that there has never been a discussion about the ethnic identity, gender, or age as a qualification for a candidate for a particular recreation center.

29. Mr. Peterson looked at the resumes submitted by the candidates in addition to the information supplied in the resume exercise.

30. Mr. Petersen stated that he felt that Mr. Culkin and Appellant were about equally suited for the Washington Park Recreation Center. However, Appellant's tardiness lost her points in the resume exercise. He also stated that, at the time, as Appellant was late, she should not have been permitted to sit for the examination. He stated that she did not call in to explain why she was late.

31. Mr. Peterson did not know the ages of any of the candidates. He stated that age is not a "real issue" to him.

32. Mr. Culkin received an average score from the panel of 90 points; Ms. Branch had an average score of 89 points; Mr. Smeeton had an average score of 88 points; Mr. Shuck had an average score of 85 points and Appellant had an average score of 84 points. (Exhibit A)

33. Appellant testified at the hearing she was late because of traffic conditions in Lower Downtown, and that she lacked a cell phone to call the testing center. She stated she explained to Ms. Rush why she was late when Ms. Rush came to give her the examination. Ms. Rush gave her fifteen minutes to complete the resume exercise. She stated she felt the resume exercise was unfair because she has a long resume and she was trying to do it in chronological order. She was not concerned that she did not have enough time to draw it. She believed that the Department already had her "real" resume, so it didn't make any difference.

34. Appellant testified that her retaliation claim was against Ms. Rush. It was based upon her belief that, "over time, some things are expressed in somewhat subtle but hostile ways," and this had been conveyed to her during the 2000 through 2001 period. She did not give any examples of how this was conveyed to her. However she stated that she was being retaliated against because she did not agree to drop the (previously dismissed) grievance in exchange for the next supervisory opening.

35. Appellant admitted that the previous grievance had been dismissed and that the Career Service Board denied her request to reopen it. She was unable to explain why there was a settlement offer involving a matter that had already been dismissed.

36. Her gender discrimination claim is based upon her belief that certain gender biases "may have had an effect." Her evidence of gender bias was that Mr. Marsh scored two men higher than Cheryl Branch.

37. Her race discrimination claim is based upon her belief in a pattern and practice of race discrimination. She was unable to give any specific examples of this pattern and practice.

38. Appellant's age discrimination claim is based the fact that she was the oldest

candidate being interviewed and that the youngest panel member scored her substantially below the other panel members. She stated that she wasn't able to say that Mr. Marsh was unable to put aside their age differences in his scoring. Her claim was based upon the fact that he gave her the lowest score of all the panel members.

40. When asked if she felt the panel was acting in collusion, Appellant admitted that the panel's scoring of the examination was accurate, based upon the information they testified to.

DISCUSSION AND CONCLUSIONS OF LAW

The City Charter C5.25 (4) requires the Hearing Officer to determine the facts in this matter "de novo." This has been determined to mean an independent fact-finding hearing considering evidence submitted at the de novo hearing and resolution of factual disputes. *Turner v. Rossmiller*, 35 Co. App. 329; 532 P.2d 751 (Colo. Ct. of App., 1975)

This is an appeal of a grievance of the decision not to promote Appellant. She claims age, race and sex discrimination and retaliation. Therefore, Appellant has the burden of proof.

The requirements for establishing an employment discrimination case were originally set out by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Appellant bears the burden to prove that she was discriminated against on the basis of her being member of a suspect or protected class. The burden then shifts to the Agency to show that there was a *bona fide* business reason for its actions. If the Agency shows a *bona fide* business purpose, then Appellant has to show that the *bona fide* business purpose is pretextual. See also *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Center et al. v. Hicks*, 509 U.S. 502 (1993).

The Colorado Supreme Court adopted the federal standard for discrimination claims for violations of CRS §24-34-402, the Colorado statute covering discriminatory or unfair employment practices, in *Colorado Civil Rights Commission v. Big O Tires, Inc.*, 940 P.2d 397 (Colo. 1997). Discrimination may be presumed by the establishment of a *prima facie* case which shows: 1) that the employee belongs to a protected class; 2) that the employee was qualified for the job at issue; 3) that, despite her other qualifications, the employee suffered an adverse employment decision e.g., a demotion or discharge or a failure to hire or promote; and 4) that the circumstances give rise to an inference of unlawful discrimination.

Appellant is alleging race, gender and age discrimination. They will be dealt with separately.

1. Race discrimination

Appellant has not established her race discrimination claim. The basis of her claim is that three of the four panelists are not White. Therefore, they discriminated against her because she is. There is no merit to this argument. Two of the three persons Appellant assumed are not White actually are of mixed White and Black or Hispanic blood. All five of the top candidates are White. There is no evidence Appellant was not chosen for promotion because of her race. The claim is dismissed.

2. Gender Discrimination

The basis of the gender discrimination claim is that Mr. Culkin, the successful candidate, is male while Appellant is female. The fact that the successful candidate is of the other gender is not sufficient to establish gender discrimination. The panelists credibly testified that they did not consider the gender of any of the candidates when scoring the examination. They looked merely at the experience, skills, training and leadership qualities presented during the interview. The lack of gender bias is also borne out by the fact that the second highest scoring candidate of the five finalists is a female, Cheryl Branch. The gender discrimination case has not been established by the preponderance of the evidence. It is dismissed.

3. Age Discrimination

The Age Discrimination in Employment Act (ADEA), the federal statute that sets the baseline for age discrimination claims, provides in pertinent part that:

It shall be unlawful for an employer ... to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age....

29 U.S.C. §623(a)(1).

The protective provisions of the ADEA are "limited to individuals who are at least 40 years of age." *Ibid.* The ADEA "bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older." *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996). The promulgation of the ADEA was prompted by Congress' "concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). The ADEA commands that "employers are to evaluate [older] employees ... on their merits and not their age." *Id.* at 611 [quoting *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 411 (1985)]. An employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly. *Hazen Paper*, 507 U.S. at 611. *See also*, *Greene v. Safeway Stores, Inc.*, 98 F.3d 554 (10th Cir. 1996)

To prevail in an age discrimination case, an employee "must establish that age was a 'determining factor' in the employer's challenged decision." *Lucas v. Dover Corp., Norris Div.*, 857 F.2d 1397, 1400 (10th Cir. 1988) [quoting *EEOC v. Sperry Corp.*, 852 F.2d 503, 507 (10th Cir. 1988)]. The employee "need not prove that age was the sole reason for the employer's acts, but must show that age 'made the difference' in the employer's decision." *Sperry Corp.*, 852 F.2d at 507 [quoting *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d 1166, 1170 (10th Cir.), *cert. denied*, 474 U.S. 946 (1985)] (emphasis in original).

Under Tenth Circuit precedents, an ADEA claim may proceed by either of two general methods to carry the burden of proof. A party "may attempt to 'meet his burden directly, by presenting direct or circumstantial evidence that age was a determining factor in his discharge.'" *Lucas*, 857 at 1400 [quoting *La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1409 (7th Cir. 1984)]. More typically, a party relies on the proof scheme for a *prima facie* case established in *McDonnell Douglas* and its progeny.

Using the *McDonnell Douglas* approach for the *prima facie* case, Appellant must establish that she is a member of the protected class, that she is otherwise qualified for the position and that another person younger than she was promoted. She has established this. She is over forty, she meets the qualifications, as demonstrated by her being one of the five top scorers, and someone younger, Mr. Culkin, was promoted instead. However, Appellant has not been able to prove the fourth prong of the *McDonnell Douglas* test, that the circumstances surrounding the promotion examinations procedure and decision for which candidate to promote give rise to an inference of unlawful discrimination.

There are several factors that indicate that Appellant's age was not a factor in any of the panelists' decisions: none of the four panelists, three of whom are Appellant's age or older, testified that they considered the age of any of the candidates when scoring the tests; Appellant's tardiness, and failure to offer an excuse or apologize, indicated to the panelists that Appellant was not as interested in the promotion as the other candidates; and, most importantly; what separated Appellant from Mr. Culkin and the other top candidates was that the others, by appearing on time for the examination, were able to give better, more complete responses than Appellant to the question that comprised 50% of the total score.

Given that Appellant was unable to present any evidence of circumstances that could lead to the inference that her age was a determining factor in the decision not to promote her, the *prima facie* case has not been established.

Even if the Hearing Officer were to find that all four requirements for the *prima facie* age discrimination case were established, it is clear that Parks and Rec had a *bona fide* business reason for choosing Mr. Culkin for promotion over Appellant. Again, Appellant's tardiness at the examination caused her to score at a lower level than the other four finalists. Her tardiness, and behavior surrounding that matter, indicated to the examiners Appellant lacked the requisite attitude needed for a Recreation Supervisor, a position requiring commitment to the Center and Department goals. Finally, Mr. Culkin's educational background, professional certifications, administrative skills, and experience in program development, some dating back to his time as a part-time employee with the Department support the conclusion that he was the best choice. All of these criteria considered by the examiners were appropriate factors for the deciding upon Mr. Culkin as the most suitable choice among the top five candidates.

Given that the Department has established a *bona fide* business reason behind its decision, the burden of proof shifts back to Appellant to show pretext. Appellant has not produced any evidence that the reasons given by the four panelists for their choice of Mr. Culkin over her were pretextual in order to hide a discriminatory bias. Appellant has not established age discrimination under the *McDonnell Douglas* test.

Appellant also failed to meet the other test for age discrimination, that age was a "determining" factor in the decision. There was no evidence that any of the panelists ever considered age as a factor, no less making it a "determining" one. The basis of each panelist's decision was Appellant's tardiness, her score on the examination and her administrative skills, experience, education, training, and certifications compared to the other finalists. These are all appropriate factors in reaching a decision as to who is the best qualified candidate for the promotion.

5. Retaliation Claim

Appellant raised a retaliation claim, based upon her alleged failure to accept a settlement offer in an earlier case. This argument also fails. Only Ms. Rush knew of the meeting with Appellant about the earlier case and she stated that it was not a "settlement conference" since there was nothing to "settle." This is substantiated by the fact that Appellant's earlier case had already been dismissed by the Hearing Officer, and affirmed by the Board, by the time the meeting occurred. There is nothing in the record that can lead the Hearing Officer to infer any retaliatory motive in denying Appellant the promotion. The claim is denied.

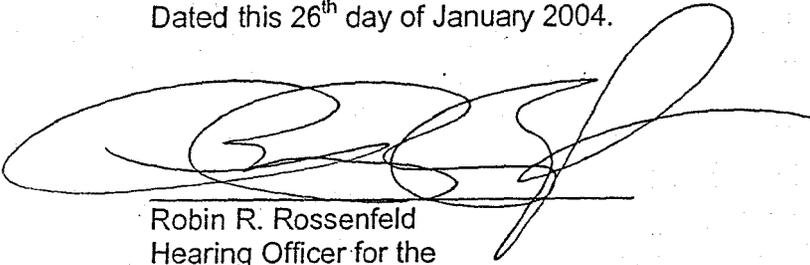
6. Conclusion

Based upon the foregoing, the Hearing Officer concludes that Appellant has failed to produce credible evidence sufficient to support her claims of race, gender, and age discrimination and retaliation in the Department's decision not to promote her to Recreation Supervisor in November 2001. The Hearing Officer also concludes that there is no need to address the question of the available remedy as it is moot.

ORDER

Therefore, for the foregoing reasons, the Hearing Officer DISMISSES the appeal in its entirety with prejudice.

Dated this 26th day of January 2004.



Robin R. Rossenfeld
Hearing Officer for the
Career Service Board