

concerning a 1998 promotion opportunity. He is persuaded that he was qualified for each of the 3 promotion opportunities and that the cause of his non-promotion is discrimination.

He alleges that his former supervisor, Vinod Wadwah, was a major factor in the discrimination. He also alleges that the AOC created a hostile work environment and discriminated against him by violations of the Architect of the Capitol Human Resources Act, 40 U.S.C. 166b-7, 108 Stat. 1443 (1994), its letter of commitment to the chairman of the House Office Building Commission on July 5, 1995 and Chapter 335 of its Personnel Manual.

Respondent, the Office of the Architect of the Capitol, identifies Mr. Bajbor as a qualified engineer who works very ably in his preferred field of power systems. The AOC denies any discrimination. It asserts that Mr. Bajbor fails to prove the essential elements of his claim and that only events occurring 180 days prior to December 21, 2000 should be before the Office of Compliance at this time. CAA, §402 (a)

However, the AOC also offered evidence that at all times it exercised fair managerial judgment in selecting persons who best met the needs of the Office. In the time frame referenced by Mr. Bajbor in his complaint, the AOC selected persons whose interests, experience and managerial skills aided it in providing electrical systems for Congress. Mr. Bajbor had limited experience in many areas of concern to the AOC. Most of his experience with the AOC was in power systems. He viewed them as the more important function for the Engineering Division and preferred work in this area. He did not manage multiple projects. He also displayed "opinionated," "rigid" behavior with little interest in administrative matters and was often very critical, expressing strong views about the "inferior" qualifications or work of fellow employees and consultants.

Notwithstanding, when the AOC had need for Mr Bajbor's experience and skills within his area, he was promoted to GS-13 to head a new power systems project. This occurred on February 21, 2001.

Issues

The dispositive issue is whether complainant, Z. Jay Bajbor, has sustained his legal burdens of proof and persuasion under the CAA. He contends, *inter alia*, that he has met the burdens by showing:

- a continuing, discriminatory, retaliatory denial of promotions to GS-13 by the Office of the Architect,
- his age of 74 years and his prior complaint to the Office of Compliance
- unfair comparison of qualifications between himself and others,
- discriminatory inquiry about age and retirement by a supervisor and
- Respondent's failure to comply with its Congressionally imposed duties and its own internal regulations.

These contentions however, raise other questions including:

- inferences if any, which may be drawn from events which pre-date the 180 day time-frame under CAA, §402 (a)
- significance if any, of Respondent's alleged failures to meet Congressional mandates or comply with its own procedures, and
- causal connections, if any, which would establish discrimination under the CAA.

Respondent the Office of the Architect, in its denial of all allegations of discrimination, presents issues involving

- legitimate management reasons for its personnel actions concerning Mr Bajbor,

- promotion of Mr. Bajbor to a GS-13 on February 21, 2001 to head a new project requiring his particular skills
- lack of discriminatory or retaliatory motive,
- absence of "pretext" in its actions and
- jurisdiction over and/or relevance of events before June 24, 2000

Statement of Proceedings

On December 21, 2000, Ziggy Bajbor sought counseling with the Office of Compliance after learning that the Office of the Architect had not selected him for promotion to a GS-13 for vacancy DE-2000-144 & 144a. The counseling and mediation process ended on October 31, 2001.

On January 28, 2002, Mr. Bajbor filed a formal complaint with the Office of Compliance. The Office of the Architect responded on February 11, 2002. Prehearing discovery was extensive and contentious. In addition, during evidentiary hearing, Complainant was afforded opportunity to reargue some issues and to subpoena witnesses who might provide foundations for previously denied discovery.

At the evidentiary hearing, which was convened on March 25, 2002, complainant presented 2 witnesses, himself and Joseph Scuderi, his current supervisor. Respondent presented three witnesses Mr. Scuderi, Linda Anne Poole, acting chief of Employment and Classification and Vinod Wadwah, Mr. Bajbor's prior supervisor. Exhibits including vacancy announcements, applications for vacancies, a chart comparing the experience of vacancy candidates, standards for engineering positions, sections of the AOC personnel manual, E-mail exchanges, Mr. Bajbor's in-grade increases and his publications, copies of Congressional enactments and the

reclassification requests and the evaluation which ultimately resulted in Mr. Bajbor's promotion were received.

The record remained open for the receipt of hearing transcripts and further pleadings by the parties. Each side offered post-trial submissions, which resulted in a correction of the record and the addition of an exhibit. The record remained open until September 16, 2002 when an order closing the record was sent to counsel.

Decision

After considering the evidence and the arguments of counsel, the Hearing Officer finds and concludes that Mr. Bajbor failed to carry his burdens of proof and persuasion on claims of age discrimination, retaliation and hostile work environment. Judgment should be entered for the Office of the Architect of the Capitol and the complaint should be dismissed.

As is more fully set forth in the findings of fact and conclusions of law, Mr. Bajbor is a qualified engineer, but the AOC had legitimate, managerial reasons for selecting another candidate and not promoting him for the vacancy in December, 1999. These reasons were not pretextual. Indeed, when circumstances arose calling for Mr. Bajbor's special experience and skills, he was promoted. Further, there is no evidence which establishes a work place permeated with abusive behavior of older workers. At best there was a single inquiry or two concerning retirements.

Mr. Bajbor's allegations of the AOC's violations of its Human Resources Act and its personnel manual did not result in either direct or circumstantial evidence of discrimination against Mr. Bajbor under the CAA. Neither these alleged violations provide any evidentiary foundation from which reasonable inferences of discrimination under the CAA could be drawn.

No findings are necessary on the validity of the allegations of statutory and regulatory violations by the AOC. Jurisdiction of the Office of Compliance is limited to violations of the CAA and does not extend to other possible causes of action against a government employer.

Finally, it is noted that after evidence was taken in this case, the United States Supreme Court decided National Railroad Passenger Corp. v. Morgan, 122 S.Ct. 2061 (2002). Therein the Court rejected the "continuing violation" doctrine but did not bar an employee from using prior acts of discrimination as "background." This Hearing Officer, therefore, does not strike the evidence concerning alleged prior acts of discrimination, but rather considers it as context and background in which to evaluate the acts about which timely complaint was made.

Findings of Fact:

1. Ziggy Bajbor, age 74, has been employed by the Office of the Architect of the Capitol (AOC) in the Electrical Engineering Division as an electrical engineer GS-12 since March 1988. Transcript of Proceedings, Vol. I (Tr. I), 202.
2. During his 13 years with the AOC, Mr. Bajbor was viewed as an able, qualified engineer and received regular in-grade increases. Tr. IV, 566; Compl. Exs. 18-20. However, between 1998 and 2000, he did not secure a promotion to GS-13 to which he believed he was entitled. Tr. I, 212-221; Tr. II, 260; Compl. Ex. 2, 3, 4.
3. Mr. Bajbor has the basic qualifications for an electrical engineer with the AOC.
 - a. Mr. Bajbor's education and prior experience are unquestioned. He obtained an engineering degree in Poland, worked for 14 years in Poland and Sweden in nuclear research, received a United States professional engineering license, was

employed in the U.S. private sector as a senior supervisory engineer and wrote several scholarly publications. Tr. I, 199-201; Compl. Ex. 6-9.

- b. Mr. Bajbor has over a decade of credible service with the AOC as an electrical engineer. Finding 2, supra.
- c. Mr. Bajbor was qualified for the "short-list" of candidates for any GS-13 vacancy for which he applied. E.g.: Tr. IV, 670-671. He did become a G-13 on February 21, 2001. Compl. Ex. 25.

4. Views differ sharply on whether Mr. Bajbor's particular talent, inclinations and experience qualify him for all types of GS-13 electrical engineering positions with the AOC.

- a. Mr. Bajbor believes that he knows the adequacy of his qualifications and performance without reference to "Standards for Professional and Scientific Positions." Tr. III, 356. He describes his career with the AOC as one of substantial work in a number of areas of electrical engineering. He identifies "large" projects like IMPACC and his important roles in various projects. Tr. II, 203, 211-212, 222-224, 260, 277 and 377.

- b. The AOC evaluates him as a highly qualified electrical engineer in the area of power systems. Tr. IV, 566. His supervisors, however, document a narrow area of interest.

He is usually involved in only 10 to 15 AOC engineering projects while about 5 engineers handled the other 220 projects. Tr. I, 160, 165 and Tr. IV, 601. He does not have extensive experience in electrical sub-systems; his experience and interest are primarily in power systems; his administrative, supervisory and

interpersonal skills are limited Tr. I, 113, 116, 122-125, 144; Tr. III, 466 and Tr. IV, 600, 607, 621, 622, 628, 640.

c. Despite thousands of words on "qualifications," debates on the meaning of "large," "sophisticated systems" and "historical buildings" and comparisons of documents, a clear picture of Mr. Bajbor's limitations in some areas emerges. The AOC is not "degrading" or "smearing" his qualifications as Mr. Bajbor alleges. Tr. II, 279. They appear accurate in finding him "opinionated" and "rigid." Tr. I, 141.

5. Denial of Mr. Bajbor's application for promotion on vacancy DE-2000-144 & 144a in December, 1999 was not tainted by age discrimination or retaliatory motive

a. It is uncontested that Mr. Bajbor had timely notice of the vacancy, filed an application and received the consideration of candidates who meet basic qualifications.

b. Vinod Wadwah and Joseph Scuderi interviewed Mr. Bajbor in the presence of an impartial observer. They used the same questions which had been put to all other candidates. Tr. I, 134-139, Tr. V, 750; Resp. Ex. 17. They kept notes and made a chart of comparative qualifications of the candidates. Comp. Ex. 1.

c. In filling this vacancy, the AOC management was seeking a person who was qualified in and interested in all phases of electrical sub-systems. Tr. V, 752-761. The duties in the vacancy notice required performance of a wide range of duties in several sub-systems and required knowledge of the design and operation of sub-systems. Comp. Ex. 17. Resp. Ex. 23 is one illustration of the scope of the need.

d. William Winston was selected for the vacancy Mr Bajbor was not.

- (1) The reasons for Mr Winston's selection are articulated in the testimony with detailed comparison of the candidates. See e.g. Tr. I, 131-134 and Tr. V, 764-767. In summary, Mr Winston presented a background in many electrical sub-systems. Mr Bajbor with his special interest and experience in power systems did not.
- (2) These reasons given are faithful to AOC's announcement and its goals in filling the vacancy. They are supported by the record which compares the candidates.

e. There is no direct or circumstantial evidence of age bias or retaliation in the selection process.

- (1) No questions were asked about age or retaliation. At least one interviewer did not know about Mr Bajbor's complaint. Tr. V, 770-772; Resp. Ex. 16. In addition, the AOC had given its supervisors EEO training and it had EEO policies in place which were communicated to staff. Tr. IV, 599 and Tr. V 762; Resp. Ex. 18.
- (2) Within 18 months after this selection process, Mr Bajbor was promoted to a GS-13 to head a large power systems project. Mr Wadwah was instrumental in securing the promotion for Mr Bajbor. It was a promotion which matched the AOC needs with Mr Bajbor's interests and talents. Tr. V, 645, 652-654; Resp. Exs. 7 and 9.

f. There is no evidence from which reasonable inferences of discrimination may be drawn in this selection process. At most, Mr. Bajbor and the AOC have different views in the needs of the Office and Mr. Bajbor's skills.

6. Mr. Bajbor was not subjected to retaliatory employment practices by the AOC.

a. The non-selection of Mr. Bajbor for vacancy DE 2000-144 & 144a. It was based on reasonable appraisal of qualifications and needs of the AOC. Finding 5. supra

b. The contextual or background evidence received concerning events preceding June 24, 2000 do not provide a basis for reasonable inferences of discriminatory or retaliatory action by the AOC.

(1) The non-selection of Mr. Bajbor for vacancy 99-03 occurred in circumstances almost identical to those found to be non-discriminatory in Finding 5 above. Mr. Bajbor's skills and experience did not match the qualifications of Mr. Scuderi who had experience in many systems; administrative abilities, managerial skills and appeared to Mr. Wadwah to be 90% more qualified in some systems than Mr. Bajbor. Tr. IV, 670 et seq. and 702.

(2) Mr. Bajbor was not deprived of assignments which might have qualified him for some vacancies. His involvement with power systems to the exclusion of other tasks was of his choosing. Tr. I, 122; Tr. IV, 625, 640

7. The work environment at the AOC was not permeated with discriminatory acts which interfered with Mr. Bajbor's employment.

a. Mr. Wadwah made two inquiries about retirement. Tr. I, 208 and 220

(1) One inquiry was to Mr Robert Matt who was facing termination of his project and thus his employment with the AOC in about 1995. Mr Wadwah made inquiry. Tr. IV, 659-661. Thereafter, Mr Wadwah helped Mr Matt remain with the AOC until his pension vested. Tr. IV, 663-666.

(2) The other inquiry was to Mr Bajbor. Mr Wadwah recalls it as casual conversation at the time of various retirement parties. Tr. IV 667. Mr Bajbor believes that Mr Wadwah was doing this to see how to pay his cards on the upcoming vacancies. Tr. II, 317 and 329.

b. There is no evidence of co-worker harassment about age, no bad jokes, hostility based on age directed to Mr Bajbor. Tr. II, 374 and 404, 406.

c. Mr Bajbor's claims of hostile work environment are not founded in fact. They are conjecture and surmise.

(1) Contrary to the facts, Mr Bajbor concludes that Mr Matt was being "forced out." He is suspicious about other departures. Tr. II, 370-375. He sees a relationship between a retirement inquiry to him and a vacancy announcement which he did not learn about but which was e-mailed to him. Tr. II, 339.

(2) Mr Bajbor also views the "smearing" of his qualifications in the promotion processes as evidence of a hostile work environment. Tr. II, 279.

d. The events described above do not create an atmosphere marked by age discrimination or retaliatory employment practices.

8. Actions of the AOC concerning Mr. Bajbor were not motivated by age discrimination or retaliation for "protected activities."
- a. The AOC consistently tried to obtain an appropriate GS-13 classification for Mr. Bajbor.
- (1) Mr. Wadwah commenced efforts to upgrade Mr. Bajbor and others similarly situated in 1990. His efforts were rejected but were renewed in 1995. Tr. VI, 634-637. Moreover, in the mid-1990's Mr. Wadwah secured the conversion of Mr. Bajbor's position from "temporary" to "permanent." Tr. IV, 662-663.
- (2) When Special Project Engineer, GS-13 positions were created in 1998, Mr. Bajbor did not apply for those positions despite E-mail notification. He filed a complaint with the Office of Compliance which was settled. Tr. II, 339; Resp. Ex. 3.
- (3) Even when Mr. Bajbor was suspicious of AOC motivation and made complaints to the Office of Compliance, several of his supervisors were working for his promotion. E.g.: Tr. II, 349-350 (1998); Tr. IV, 645, 662; Resp. Exs. 7 and 9.
- b. On the occasions when Mr. Bajbor did not receive GS-13 positions for which he applied, there were credible, documented reasons for selecting other candidates who met the needs of the AOC in meeting performing its functions. Findings 5 and 6, supra.
- c. Evidence of a typographical error in a vacancy announcement, posting of job announcement on an E-mail to persons who do not read E-mail and possible

failure of the AOC to comply with some of its statutes and regulations may show failures of a government bureaucracy but they were not connected by evidence or reason to AOC animus toward Mr. Bajbor or persons protected under the C.A.A. by reason of age or protected activity.

- d. The conflict between Mr. Bajbor and his AOC supervisors and the very different judgments about his work and work of the AOC do not permit a factual finding that age discrimination and retaliation resulted.

Conclusions of Law

- I. The Office of Compliance has jurisdiction to hear the allegations of this complaint.
 - a. Complainant's request for counseling on December 21, 2000 was not premature.
 - (1) Respondent informed Complainant of his non-selection for GS-13 vacancy DE 2000 144 & 144a on December 13, 2000
 - (2) Vacancy DE 2000 144 & 144a was filled by the same person who was selected on or before December 13, 2000 when that person began his duties on or about January 23, 2001.
 - b. The grant of an extension of time for counseling by the Office of Compliance from January 22, 2001 and June 7, 2001 did not deprive the Office of Compliance of jurisdiction.
 - (1) Complainant did not receive notification of the end of counseling until June 14, 2001.
 - (2) §402 (b) and 402 (c) of the CAA, 2 USC 1402 (b) and (c) must be read in *pari materia* consistent with the intent of the statute

c Allegations in this complaint about events occurring prior to June 21, 2000 are appropriately before the Hearing Office as background. National Railroad Passenger Corp. v Morgan, 122 S. Ct. 2061 (2002)

2 Complainant does not sustain his burdens of proof and persuasion on his claims of age discrimination, retaliation or hostile work environment in violation of CAA.

a Complainant has not proved age or retaliation as a factor in his non-selection for vacancy DE 2000-144 & 144a

(1) The credible evidence establishes legitimate and non-discriminatory reasons for selecting a candidate other than Complainant. The AOC needed a person with demonstrated skills in many electrical sub-systems Complainant was experienced in and focused on power systems because of his interests and views about their importance

(2) Any possible discriminatory intent in this denial of promotion is outweighed by the AOC record of trying to secure a GS 13 for Complainant and its assistance in achieving a GS 13 position for him on February 21, 2001 without regard to his age or his "protected activity." The February 2001, promotion was a perfect "match" of Complainant's abilities and the needs of the AOC. It was not a pretext.

b. Complainant does not carry his burden of proving retaliatory employment practices

(1) The inference of retaliation which might be drawn from the proximity in time between Complainant's "protected activity" and his non-selection is

outweighed by substantial evidence of the AOC's efforts to secure a promotion to GS-13 for Complainant and its ultimate success.

(2) Evidence of the "causal connection" between Complainant's non-selection and his "protected activity" is unpersuasive.

(a) Persons who made the selection decision were aware of EEO considerations. Both aver that Complainant's application to the Office of Compliance had no part in their decision.

(b) Even while Complainant pursued his second complaint to the Office of Compliance, he was being aided in securing a GS-13 position.

c. Complainant did not prove the existence of a hostile work environment at the AOC.

(1) Hostile work environment requires proof of severe threatening and humiliating conduct which interferes with work performance. That proof is not present in this case.

(2) An inquiry or two about retirement plans falls into the legal category of "stray remarks" and the human category of on-the-job chit chat. The inquiries are not persuasive evidence of a hostile work environment. Neither are the Complainant's speculations about reasons for retirements or his suspicions about the retirement inquiry.

3. Respondent proved legitimate, managerial, non-pretexual reasons for not selecting Complainant for GS-13 vacancies until February 21, 2001.

a. In December 1999 for vacancy DE 2000-144 & 144a, the AOC needed a person with interests and experience in many electric sub-systems. The person selected had the requisite qualifications in several areas. Mr. Bajbor was more one dimensional.

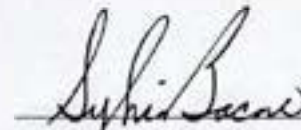
b. In December 1998 for vacancy DE 99-03, a supervisor with managerial and interpersonal skills was needed. Mr. Bajbor had displayed limited interest in administrative matters and lacked interpersonal skills. Further, he was not as senior in service as the candidate selected.

Judgment

Therefore, it is this 17th day of December 2002,

ORDERED that judgment is entered for the Office of the Architect of the Capitol and it is

FURTHER ORDERED that the complaint filed herein on January 28, 2002 is dismissed with prejudice



SYLVIA BACON

Hearing Officer

Certificate of Service

See attached.