

OFFICE OF COMPLIANCE
Washington, DC

ORIGINAL

Thomas J. Devlin

Complainant

v.

Case No.: 01-AC-373
(AC, CV)

OFFICE OF THE ARCHITECT
OF THE CAPITOL

Respondent

DECISION AND JUDGMENT

This matter is before the Office of Compliance on allegations age discrimination. Congressional Accountability Act of 1995 (CAA) §201 (a) (2), 109 Stat. 7, 2 USC 1311.

Complainant, Thomas J. Devlin, who is 51 years old asserts that Respondent, the Office of the Architect of the Capitol (AOC), discriminated against him by failing to do a "desk audit" of his position as a GS-8 Building Inspector and by failing to give him a non-competitive promotion to GS-9 Building Inspector based on accretion of duties. He contends that these failures:

give rise to a legally sufficient inference of age discrimination,

violate the AOC Personnel Manual, Ch. 335, 1.8.6 and

-- entitle him to retroactive promotion to GS-9 with all benefits dating back to 1998.

He offers no other indicia of discrimination either by way of specific personal incidents, pattern and practice or promotion of persons younger than himself to the GS-9 Building Inspection vacancies which he sought.

Respondent, AOC, denies any discrimination against Devlin. It relies on Mr. Devlin's evidence and asserts that:

--Mr. Devin knew that "desk audits" were available when seeking non-competitive promotions under AOC personnel procedures and

--Mr. Devlin has never been denied or refused a "desk audit" or a non-competitive promotion.

Respondent also asserts that the Office of Compliance does not have jurisdiction or expertise to do the "desk audit" which is required for the relief requested in this case or award damages dating from 1998.

After considering the evidence, the arguments of counsel and the applicable law, the Hearing Officer finds and concludes that judgment should be entered for the AOC. Mr. Devlin fails to prove a violation of the CAA.

-Mr. Devlin does not establish an "adverse action" by the AOC.

-Even if there were an "adverse action," he does not present either facts or legal theories which establish age discrimination.

--The claims and requests for relief are not within the jurisdiction of the Office of Compliance.

Statement of Proceedings and
Description of Evidence

complaint was filed on July 31, 2002. Response was filed on August 15, 2002. Both met the statutory time limitations.

Reasonable discovery and the commitments of counsel in other Office of Compliance matters required an extension of time for commencement of hearing. Hearing was commenced on October 4, 2002 but was adjourned after opening statements. Delay in appropriations for the Office of Compliance made it inappropriate to proceed.

taking of evidence commenced on December 9, 2002. Complainant presented himself as the only witness. Complainant's exhibits were marked 1-25. All were received without objection except 12, 13, 14, 19, 22, 23 and 24.1/ Respondent did not offer any evidence.

At the close of the evidence, Complainant's request to file a written argument with a copy of Compl. Ex. 21 was granted. Respondent made its closing argument. Time frames for post-hearing submissions were set. The record remained open

1./ The court reporter's min-u-script is not entirely clear on the exhibits, but the Hearing Officer's notes and those of the Hearing Clerk are in agreement.

Respondent's offer to do a "desk audit" on request of Complainant remained open. No deadline was set and matters drifted.

On November 6, 2003, the Hearing Officer was advised by the Office of Compliance that a decision should be filed. Therefore, pursuant to CAA §407 (g) and Office of Compliance Proc. R. 7.16, the following findings of fact and conclusions of law are entered.

Findings of

1. Thomas J. Devlin is employed by the Architect of the Capitol as a GS-8 Building Inspector.^{2/} Compl. Ex. 1
He has a BS degree in industrial arts. Tr. 32
2. Mr. Devlin's career with the AOC began as a part-time employee while in college. He became a full time employee in 1974 and worked in the House Office Building with various job titles earning all promotions and in-grade increases. Compl. Ex. 1; Tr. 32-39
3. In October 1999, Mr. Devlin was almost 48 years old and eligible for an "early out" retirement. Tr. 43.

^{2./} The job title for Mr. Devlin's position was changed from "Senior Service Officer" to "Building Inspector." The change in title did not change grade or entitlements and does not relate to claims of age discrimination.

4. During 1999 and 2000, Mr. Devlin made three efforts to secure a competitive promotion to GS-9 Building Inspector by applying for posted job vacancies
 - a. Mr. Devlin was not selected for any of the vacancies either on the House or Senate side. Tr. 45-51.
 - b. There is no evidence or contention that these vacancies were filled by younger persons. Tr. 113.
5. In the Spring of 2001, Mr. Devlin consulted with Mr. Edwin Lopez in the AOC/EEO office. Mr. Lopez suggested a "desk audit" for non-competitive promotion and arranged a meeting with Mr. Devlin's supervisor, Linda Poole. Tr. 44.
6. In the meeting with Ms. Poole on April 24, 2001, Mr. Devlin expressed his view that he was performing tasks above grade and should be promoted. He did not request a "desk audit" at that meeting. His recollections about whether an audit was discussed at that time differ. Compare Tr. 61 & Tr. 84-85.
7. Mr. Devlin was familiar with "desk audits."
 - a. Despite his assertion that he had never had an audit, Mr. Devlin benefited from and cooperated with an audit in 1981 in circumstances almost identical to those in this case. Compare Tr. 96 and Tr. 97-100

- b. His personal experience with the 1981 audit is not entirely consistent with testimony implying that he needed a job audit brochure in 2001. Comp. Ex. 11; Tr. 96.
8. On August 7, 2001, within four months after the meeting with Mr. Lopez and Ms. Poole, Mr. Devlin sought counseling from the Office of Compliance. Office of Compliance, Certification, August 1, 2002.
- a. Mediation resulted in an agreement with a provision for a "desk audit." Tr. 92.
- b. In December 2001, the AOC did the paper work for a "desk audit." Compl. Ex. 25, 2
- c. In February or March 2002, Mr. Devlin recalls that the agreement was "withdrawn" for reasons not of record. Tr. 93
- d. After the agreement, sometimes referred to as contract, was "withdrawn," Mr. Devlin contacted Mr Zercher by e-mail. Compl. Ex. 17 & 18. The audit process terminated. Tr. 91-94.
- e. For reasons not of record, the mediation ended on May 2, 2002 and notice was received by Complainant on May 3, 2002. Tr. 61 & 83. Certification, Supra
9. Mr. Devlin has not requested a "desk audit." He has not been ordered to participate in a "desk audit." He has

not been refused a "desk audit" by the AOC. Tr. 61 & 83.

10. Evidence concerning Mr. Devlin's performance of tasks at a higher level than his job description without compensation consists of his spread sheets of tasks performed and the job descriptions for the GS-8 and GS-9 positions. Compl. Ex. 8, 9 and 10; Compl. Ex. 5 and 6; Tr. 64-81 and Tr. 109-113.
11. The AOC is prepared to do a "desk audit" whenever Mr. Devlin agrees.
 - a. During pre-hearing proceedings, this offer was made.
 - b. In opening statement this alternative was put forward. Tr. 18-19.
 - c. In closing argument the AOC reiterated "Mr. Devlin has a method open to him to seek relief" and "Mr. Devlin has a right to a 'desk audit' at any time he wishes to ask for one." Tr. 120.

Conclusions of Law

1. Complainant presented his claims to the Office of Compliance in a timely manner.
 - a. Complainant sought the assistance of the Office of Compliance on August 7, 2001 less than 180 days after

his meeting with Mrs. Poole and Mr. Lopez on April
2001

b. Complainant filed this complaint on July 31, 2002,
less than 180 days after receipt of notice of end of
mediation on May 3, 2002.

2. Complainant does not sustain his burdens of proof or
persuasion on claims of age discrimination in violation
of the CAA.

3. There was no "adverse action" by the Respondent, AOC,
against the Complainant Devlin

a. Although Complainant Devlin is in "protected status"
as a person over 40 years of age, the AOC did not
take any "adverse action" against him.

b. On the facts in this case:

(1) The AOC has not caused Complainant Devlin to
experience a diminution of his current pay, job
duties or benefits.

The AOC has not taken any action which has
"materially adverse consequences" on the terms,
conditions and privileges of his employment

c. Complainant Devlin by his own testimony persuades the
Hearing Officer that he has frustrated, for whatever
reasons, the efforts of the AOC to do a "desk audit

4. Even if the action of the AOC were interpreted as an "adverse action," Complainant Devlin does not establish claim of age discrimination.
 - a. The record is devoid of nexus between Mr. Devlin's age and his efforts to secure a GS-9 Building Inspector position
 - b. The requested inferences from the facts of no audit and no non-competitive appointment are too attenuated to constitute proof of discrimination, particularly in light of Complainant Devlin's testimony as noted in the findings of fact
5. The Office of Compliance, on the record in this case, cannot decide issues of entitlement to a non-competitive promotion
 - a. Even if there were some evidence of discrimination which might justify an order to promote or take other personnel action, the record in this case (3 spread sheets and two job descriptions) is not sufficient.
 - b. Complainant Devlin's remedy lies in a "desk audit" and, if favorable, an application for retroactive reimbursements.
6. Complainant Devlin is not entitled to the relief which he requests.

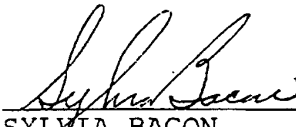
7. Respondent, AOC, is entitled to judgment dismissing the complaint

Judgment

Therefore it is this 18th day of November, 2003

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

FURTHER ORDERED that the complaint filed on July 31, 2002 is dismissed with prejudice.



SYLVIA BACON
Hearing Officer

Certificate of Service

See attached.