

**IN THE OFFICE OF
ADMINISTRATIVE HEARINGS**
11 OSP 10308

COUNTY OF WAKE

PURNELL SOWELL,

Petitioner,

V.

NORTH CAROLINA DEPARTMENT
OF TRANSPORTATION, DIVISION
OF MOTOR VEHICLES,

Respondent.

DECISION

This hearing was held before the Hon. Donald W. Overby, Administrative Law Judge, on September 26, 2013 at the Office of Administrative Hearings in Raleigh, North Carolina.

APPEARANCES

Petitioner: Michael C. Byrne
Law Offices of Michael C. Byrne
150 Fayetteville Street, Suite 1130
Raleigh, NC 27601

Respondent: Neil Dalton
Special Deputy Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, NC 27602

WITNESSES

Called by Petitioner: Joseph Gardner, Purnell Sowell, Keith King (for cross examination)

Called by Respondent: Keith King, Amanda Olive, Ronald Kaylor

PRELIMINARY MATTERS

1. Petitioner made a motion to exclude witnesses from the hearing room, which the Court granted. The witnesses were instructed on sequestration issues.

2. The Court previously denied the Respondent's Motion for Summary Judgment.

ISSUE

Whether the Respondent discriminated against the Petitioner on the basis of race in failing to promote Petitioner in two promotional matters.

BURDEN OF PROOF

The burden of proof is on Petitioner to make a prima facie case. The burden of proof is on Respondent to articulate and prove a legitimate, non-discriminatory basis for its adverse employment action against Petitioner. If so done, the burden is on Petitioner to prove that the basis articulated and proved by the Respondent was a pretext for unlawful adverse employment action.

FINDINGS OF FACT

In making the Findings of Fact, the undersigned has weighed all the evidence and assessed the credibility of the witnesses. The undersigned has taken into account the appropriate factors for judging credibility of witnesses, including but not limited to the demeanor of the witness, any interests, bias, or prejudice the witness may have. Further, the undersigned has carefully considered the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case. After careful consideration of the sworn witness testimony presented at the hearing, the documents and exhibits admitted into evidence, and the entire record in this proceeding, the undersigned finds as follows:

1. Petitioner Purnell Sowell, an African-American male, is an employee of DMV's License and Theft Division.
2. The License and Theft Bureau is the police arm of the DMV, and has approximately 203 sworn law enforcement officer positions including the Petitioner who currently holds the rank of Inspector. The License and Theft Bureau is organized into eight districts around the State, each managed by a Supervisor. The position at issue is a Supervisor, (Law Enforcement Manager) position in the Mecklenburg County Office. (T. 18, 32, 36, 46).
3. Petitioner first worked for License and Theft in 1987. Petitioner began as a weight officer and was subsequently promoted to Motor Carrier Officer. Petitioner was promoted to Inspector in 1993. An Inspector is a non-uniformed officer assigned to a particular county. (T. 36-38). Petitioner was an Inspector for ten (10) years.
4. In 2003, Petitioner was promoted to Assistant District Supervisor. In the formerly used military style hierarchy of DMV, this position was known as a "Lieutenant". The Assistant Supervisor supervises the Inspectors and assists the District Supervisor (formerly known as a

“Captain”) in supervising the District. There are eight DMV districts consisting of varying numbers of counties. (T. 38-39).

5. Petitioner served as an Assistant Supervisor for two and a half years. He was then promoted to District Supervisor or “Captain”. District Supervisors supervise DMV districts. The District Supervisor has two Assistant Supervisors (the position previously held by Petitioner as noted) and in total supervises about 33 people and three clerical personnel. (T. 39-40).

6. District Supervisor is the position that is at issue in this contested case. Petitioner held and performed the duties and responsibilities of the District Supervisor position for almost three years. (T. 39-40).

7. While serving as District Supervisor, Petitioner received performance reviews from his superiors and his performance reviews were generally “Very Good” ratings, the second highest on the state scale below “Outstanding”. (T. 41). There is no evidence that Petitioner did not perform the duties of District Supervisor in other than a good and professional manner. Petitioner possessed the skill and ability to perform the duties and requirements of the position as required, and did so.

8. In 2008, Petitioner was terminated from DMV on the alleged grounds of unacceptable personal conduct. T. 42. Petitioner filed a contested case petition challenging the dismissal and a settlement of that case was reached in mediation. (T. 42; Pet. Ex. 2).

9. The terms of the mediated agreement state that Petitioner “shall be eligible to apply for and shall be considered for any promotions within the North Carolina Division of Motor Vehicles on a fair and equitable basis with other candidates for those positions. Petitioner understood that the circumstances of his termination would not be held against him when applying for subsequent promotions. (T. 45).

10. After settlement was reached, Petitioner returned to work at License and Theft. He made multiple attempts to be promoted without success. (T. 45).

11. Keith King is the Deputy Director of the Division of Motor Vehicles [DMV], License and Theft Bureau. DMV is a Division of the N. C. Department of Transportation [DOT]. As the Deputy Director, he was responsible for the promotional process for License and Theft Bureau Supervisors and Assistant Supervisors. (T. 71, 104, 105).

12. In early 2009, the DMV Commissioner, instructed Mr. King to promulgate a new process for the promotion of supervisors in the License and Theft Bureau. Mr. King was charged with creating a policy that ensured promotions would be made in a more uniform, thorough, and documented professional manner than in the past. In doing so, he reviewed the promotional processes and assessment tools being utilized by other State and local CALEA [Commission on Accreditation of Law Enforcement Agencies] accredited law enforcement agencies. (T. 105, 135).

13. The policy drafted by Mr. King was reviewed by both the Office of State Personnel and the Civil Rights Division of DOT.

14. The promotional policy drafted by Mr. King went into effect on December 1, 2009. By policy, the promotional process consisted of both verbal and written components. This policy was approved by the DOT Chief Operating Officer as well as the DOT Human Resources Department and Equal Employment Opportunity Office. The policy and the test questions were approved by the Office of State Personnel and the DOT EEO as well. (T. 105-108; R Ex 1, R Ex 3).

15. All sworn law enforcement officers in the License and Theft Bureau including Petitioner were notified in writing of the new policy on or about December 17, 2009. The policy regarding the promotional process was distributed electronically among the License and Theft Bureau including Mr. Sowell. In addition, hard copies were available within the district offices and supervisors were given written copies. Members were encouraged to print their own copies if they desired. (T. 112-113).

16. The DOT Policy on Merit Based Hiring mandates that hiring be made based upon "job related criteria" and allows for written testing as a selection tool. (T. 109-111; R Ex 2).

17. By policy, all applicants for supervisor must complete all phases of the promotional process in order to be considered for promotional positions. (T. 110-111; R Ex 3 page 2).

18. Since it was the original Beta test, the 2010 promotional process written test had a passing score of 60 percent. The revised 2011 promotional process written test had a passing score requirement of 70 percent. It also had an in-basket exercise, a role-play exercise, and a general panel interview. Applicants with successful passing scores in each phase were encouraged to apply for any available positions that came open. (T. 91, 111).

19. By policy a successful candidate must complete the written examination to continue in the promotional process, and a failing score would disqualify the candidate for that particular promotional process. (T. 112; R. Ex. 3 page 3).

20. A passing score on the written exam may be good for up to 24 months if no new process is put into place. No candidate in the promotional processes in the License and Theft Bureau has ever been allowed to carry forward passing scores from one process to the next. (T. 112-113; R Ex 3).

21. The 2011 revised License and Theft Bureau policy relating to the promotional process again was reviewed by DOT Human Resources, the DOT EEO Office and the Office of State Personnel. These entities found the test questions to be relevant, job related, properly worded and defensible in terms of validity and adverse impact, and to meet all criteria of OSP, and DOT HR and EEO Offices. These entities gave their approval to move forward with the 2011 process as revised in January, 2011. (T. 113-114; R Ex 4).

22. In requesting approval for the test questions, the License and Theft Bureau submitted both the test questions as well as their suggested answers with page references to the answers in the policy manual, which was also included in the submission. (T. 115; R. Ex 5).

23. The promotional process for supervisor was begun in 2011 due to the fact that the available pool for supervisors that had passed the promotional assessment had become too small. (T. 133, 134).

24. Mr. Sowell took the 2011 written test as part of the promotional process for supervisor in January 2011. (T. 115; R. Ex. 5).

25. The multiple choice tests were graded by Deputy Director King who graded the tests without knowing whose individual tests he was grading. Since applicants were required to obtain 70 percent of available points on each test in order to be successful, they would need 35 of 50 correct answers on the multiple choice test. The Petitioner's multiple choice test was graded as a fail since he scored 64 out of a possible 100 points, in that Petitioner had 32 correct answers out of 50 questions. (T. 115-118; R. Ex. 5). Petitioner had passed the previous versions of the multiple choice test.

26. Petitioner was notified in writing on January 31, 2011 that he had failed the multiple choice test and that he was not eligible to continue in the promotional process. (R. Ex. 5).

27. Although the successful candidate for the position had less experience than Petitioner and no experience at the position at issue, he did pass the written test. (T. 119; R. Ex. 6).

28. Although he did not pass the promotional process, Petitioner applied for and was eventually interviewed for the position at issue. He was rated lower by the panel of three interviewers than was the successful candidate, (39 for the successful candidate and 32 for the Petitioner). One of the panel members was African American who also rated the Petitioner lower than the successful applicant, (37.5 for successful applicant and 29.6 for the Petitioner). (T. 120-122; R. Ex's. 9, 10 and 11).

29. The License and Theft Bureau was notified by the DOT EEO Office at the time of the selection of the successful candidate, that black males were not under represented for the position at issue. In conjunction with meeting CALEA standards, the License and Theft Bureau has been successful in recruiting minority candidates. (T. 123, 170; R. Ex. 11).

30. From 2010 to 2012, in all of DMV 13 white males were promoted as opposed to 26 African Americans. (T. 165; R. Ex. 18).

31. Petitioner inquired about his test scores and met with the Deputy Director of License and Theft Jack Coltrane (white male) to discuss his scores. Mr. Coltrane refused to allow Petitioner to review his test work. When Petitioner protested this refusal, Mr. Coltrane responded, "See you in court". Petitioner said that he took from this comment that "there was no way I was going to pass this test no matter how it went." (T. 50-51).

32. When Petitioner re-tested in 2011, he failed both tests. (T. 54). At the time these tests were administered, Ronald "Ronnie" Kaylor (a white male) was the Director of License and Theft.

33. Mr. Kaylor had ordered all applicants to be retested in 2011. (T. 54-55). Although Mr. Kaylor denied giving this order, a memorandum identifying Mr. Kaylor as the source of the retesting order was received into evidence. Other witnesses also identified Mr. Kaylor as the source of the retesting order.

34. Joseph Gardner was the former deputy director of License and Theft. (T. 12). Mr. Gardner related a conversation he had with Mr. Kaylor in the early fall of 2009. This conversation was concerning Petitioner's attempts to obtain promotion to the District Supervisor position. At the time, Mr. Kaylor had the ultimate authority within License and Theft to approve or disprove promotional and hiring decisions. (T. 14).

35. Mr. Gardner stated that he told Mr. Kaylor that while he (Gardner) may have not have agreed with the mediated agreement returning Petitioner to employment with DMV, the agreement was in place, and when Petitioner had held the District Supervisor position previously he had done a good job. (T. 15). Mr. Gardner told Mr. Kaylor that in his observations of Petitioner in the District Supervisor position, the Petitioner was well liked in the area and did a good job cooperating with other agencies. Mr. Gardner said that he told Mr. Kaylor that he "didn't see a reason" why Petitioner should not be promoted and "I felt we were going to have a hard time if he appealed why we didn't [select Petitioner for the position]." (T. 15).

36. Mr. Gardner testified that Mr. Kaylor replied by stating that the Commissioner of Motor Vehicles Mike Robertson (a white male) did not want Petitioner in the District Supervisor position. Mr. Robertson was at the time the highest ranking person in DMV. As such, Mr. Robertson had ultimate authority over who was hired and promoted within DMV. (T. 16).

37. Mr. Robertson did not testify. Mr. Kaylor did not deny making this statement during his testimony for the Respondent.

38. Mr. Gardner contends that Mr. Kaylor told him in this conversation that if the matter of Petitioner's promotion ended up in court, that Mr. Kaylor would "do what I have to do ... if I have to commit perjury, I will say what I have to say basically to keep Mr. Sowell from getting the job." (T. 16-17).

39. Mr. Gardner described Mr. Kaylor's comment as "mind-boggling, to be honest with you. I just didn't believe a law enforcement officer would say that, you know." (T. 17). Mr. Gardner had been a law enforcement officer for over thirty years. In his opinion, integrity is a paramount consideration for all law enforcement officers. He had never heard a fellow law enforcement officer make a comment such as Mr. Kaylor's before. (T. 17).

40. Mr. Gardner opined that at that time the Respondent would probably lose in court if the Petitioner challenged the hiring decision. Mr. Gardner explained that the Petitioner had performed the job in question and that DMV was actively seeking minorities who were underrepresented in DMV management. Mr. Gardner believed that his made promoting Petitioner a "win-win". (T. 17-18).

41. Mr. Gardner expressed his view that he did not think the decision to not promote Petitioner was based on Petitioner's race. (T. 27). On further examination, Mr. Gardner confirmed that he did not know the mindset regarding any racial animus or motivation on the part of Kaylor, Coltrane, or Robertson.

42. It is found as fact that Mr. Gardner's testimony was credible, including his description of Mr. Kaylor's comments. Mr. Gardner had nothing to gain or lose by the outcome of this case and there is nothing of record negatively affecting his credibility.

43. Mr. Kaylor denied saying to Mr. Gardner that he would commit perjury to keep Petitioner from being promoted. (T. 198). Mr. Kaylor testified that he told Mr. Gardner that he would promote "people I trusted." (T. 202).

44. When the Court inquired of Mr. Kaylor whether he trusted Petitioner, Mr. Kaylor gave ambiguous answers, even after being asked the question twice. When the Court asked whether it was fair to say that he would not have promoted Petitioner even if Petitioner had passed the test, Mr. Kaylor likewise gave an ambiguous answer. (T. 203). Mr. Kaylor was evasive and less than straight-forward with the Court.

45. Mr. Kaylor initially contended that he had nothing to do with the decision to order re-tests for the position in 2011. Mr. Kaylor continued to deny involvement in the re-test order even after being shown a DMV memorandum attributing the re-test order to him. (T. 199-200).

46. The Court does not find Mr. Kaylor to be a credible witness on the issues of the origin of the order and the reasons for the re-testing of the promotional applicants and Mr. Kaylor's attributed comment that he would commit perjury to prevent Petitioner from being promoted.

CONCLUSIONS OF LAW

1. The parties are properly before the Office of Administrative Hearings.

2. In interpreting N.C.G.S. § 126-36, the North Carolina Courts look to federal case law addressing federal discrimination statutes for guidance. *See, North Carolina Department of Correction v. Gibson*, 308 N.C. 131,136, 301 S.E.2d 78, 82 (1983).

3. Under the three-part scheme of proof for disparate treatment cases developed by the United States Supreme Court, a plaintiff has the initial burden of establishing a prima facie case of discrimination. *See, McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668 (1973).

4. Under North Carolina law, the prima facie case consists of showing that: 1) the employee is of a certain race and/or gender; 2) the employee failed to win a promotion; and 3) the employee's race and/or gender was a substantial or motivating factor in his/her failure to win the promotion. *Dept. of Correction v. Gibson*, 308 N.C. at 136-137, 301 S.E.2d at 82 (1983). If the employee has made out a prima facie case, the burden shifts to the employer to articulate some legitimate, non-discriminatory reason for the employee's rejection. *Id.* Then if the employer has met its burden, the employee is given the opportunity to show that the stated reasons for the

employer's decision are a mere pretext for discrimination. The burden of proof remains on the employee to prove that the decision was based upon discrimination. *Id.*

5. Petitioner is a male African American. Petitioner failed to win a promotion.

6. The Petitioner has not shown that his race was any part of the reason for his non-selection since he failed an objective written component of the selection process. Whether or not Petitioner can establish a prima facie case, Respondent has non-discriminatory reasons for his non-selection, that is, his failure of the written multiple choice test. *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 960 (4th Cir. Md. 1996). Petitioner has not shown that Respondent's non-discriminatory reasons were not the true reasons for the non-selection. *Id.*

7. The DMV in fact had legitimate, non-discriminatory reasons for promoting the successful applicant instead of Petitioner, that is, the successful applicant passed all of the components of the promotional process and did better in the interview for the position at issue. Since the grader of the multiple choice test did not know whose test he was grading and the test was objective to begin with, it would be difficult for the Petitioner to prove that testing in the manner herein had a "disparate impact" on a particular race. Petitioner has made no such showing.

8. To make out a disparate impact case, Petitioner must identify the specific employment practice that is being challenged. *Anderson v. Westinghouse*, 406 F.3d at 266; see, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994, 101 L. Ed. 2d 827, 108 S. Ct. 2777 (1988) (plurality opinion). Petitioner must then prove causation. He must show that the above-mentioned practices caused a disparate impact on [his race]. *Id.* Petitioner has not identified the challenged employment action nor proved that it caused a disparate impact.

9. The Petitioner's subjective belief that the decision to not promote him was motivated by unlawful discriminatory intent is insufficient to establish a case of discrimination. See, e.g., *Tinsley v. First Union Nat'l Bank*, 155 F.3d 435, 444 (4th Cir. Va. 1998). See also *Schultz v. General Electric Capital Corp.*, 37 F.3d 329, 334 (7th Cir. Ill. 1994). The employer's perception that the test was a good tool to evaluate employees should be given great weight. *Furr v. Seagate Tech.*, 82 F.3d 980, 988 (10th Cir. Okla. 1996).

10. Petitioner cannot establish his own criteria for judging his qualifications for the promotion. He must compete for the promotion based on the qualifications established by his employer. *Anderson v. Westinghouse*, 406 F.3d 248, 269 (4th Cir. S.C. 2005); see *Beall v. Abbott Labs.*, 130 F.3d 614, 620 (4th Cir. Md 1997). The crucial issue in a Title VII action is an unlawfully discriminatory motive for a defendant's conduct, not the wisdom or folly of its business judgment. *Anderson v. Westinghouse*, 406 F.3d at 271.

11. Petitioner has made no showing that his failure to be promoted was based upon his race, and no showing of motivation of racism or disparate impact.

12. It is legally significant that multiple senior persons with the ultimate authority at both License and Theft and DMV generally have been shown under the evidence to have expressed animus for whatever reason against Petitioner and specific opposition to his promotion.

13. This Court is satisfied and convinced, and therefore concludes, that this personal animus toward Petitioner was such that they did not want to promote Petitioner, but this court is equally satisfied and convinced that the failure to promote was not based upon any racial motivation.

14. This Court is not called upon to rule as to whether or not there was a breach of contract with the terms of the settlement agreement.

On the basis of the above Findings of Fact and Conclusions of Law, the undersigned makes the following:

DECISION

Petitioner has not shown by a preponderance of the evidence that Respondent's legitimate nondiscriminatory reasons for its failure to promote Petitioner amounted to a pretext to conceal intentional discrimination against him on the basis of his race. Respondent's decision to not promote Petitioner is **UPHELD**.

NOTICE

The Agency that will make the final decision in this contested case is the North Carolina State Personnel Commission.

The Agency is required to give each party an opportunity to file exceptions to the recommended decision and to present written arguments to those in the Agency who will make the final decision. N.C.G.S. § 150-36(a). The Agency is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

In accordance with N.C.G.S. § 150B-36, the Agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency in not adopting the finding of fact. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency in making the finding of fact.

This the 31st day of January, 2014.

Donald W. Overby
Administrative Law Judge