

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

Appeal No. 221-01

ORDER GRANTING MOTION FOR DIRECTED VERDICT

IN THE MATTER OF THE APPEAL OF:

PAUL MURPHY, Appellant

Department: DEPARTMENT OF SAFETY, DENVER SHERIFF DEPARTMENT,
and THE CITY AND COUNTY OF DENVER, a municipal corporation

INTRODUCTION

This case comes to hearing on Appellant's appeal of the Denver Sheriff's Department's ("Department") failure to promote him. Appellant is a Caucasian male Deputy Sheriff for the Department. The matter concerns a dispute related to the results of a promotional examination for individuals presently classified as Deputy Sheriff to the position of Sergeant, and subsequent appointments to openings of that classification. Appellant alleges that numerous individuals of protected status, with lower ranking in the written and assessment testing procedures and with less seniority than Appellant, have been promoted ahead of him. Appellant argues that the Department's failure to promote him under such circumstances constitutes reverse discrimination.

The Department responds that the promotional decisions were based on the oral interviews of the candidates and not the scoring process used to determine the list of those candidates. It argues that Appellant's interview was less remarkable than those of other successful candidates, and that this was the reason for their choice of other candidates over Appellant, not his Caucasian male status.

A hearing in this matter was held before Hearing Officer Joanna L. Kaye ("hearing officer") on November 13 and 14, 2001. The Department was represented by Assistant City Attorney Mindi L. Wright, with Fred J. Oliva, Director of Corrections and Undersheriff for the City and County of Denver, present for the majority of the proceedings and serving as advisory representative for the Department. Appellant was present and was represented by Mr. David L. Worstell.

Witnesses for Appellant included Broomfield Police Officer Shawn Laughlin and the following employees of the Department: Division Chief Stephen J. Comito, Deputy Sheriff Karyn Bonamo, Sergeant Franklin Gayle, Deputy Sheriff Daniel Wilburn, Director Oliva, and Appellant.

The Department did not present its case-in-chief because the hearing officer granted the Department's Motion for Directed Verdict at the close of Appellant's case.

The parties stipulated to the admission of the following exhibits: Department Exhibits 1-10, Appellant's Exhibits A-E, I, K and M. Appellant's Exhibits F-H, O and P were admitted without objection. Exhibit 11, a letter used with the intent of impeaching Deputy Wilburn, was offered and admitted without objection during the hearing.

ISSUES

The only issue in this case is whether Appellant demonstrated a *prima facie* case of reverse discrimination against the Department for its failure to promote him. For the reasons set forth below, Appellant failed to demonstrate a *prima facie* case, and all other issues are therefore moot.

FINDINGS OF FACT

1. Appellant, a Caucasian male, has been a Deputy Sheriff for the Department for approximately 7 years. He was previously a law enforcement officer in the United Kingdom and in the State of Arkansas for a total of approximately 7 years. During his years in law enforcement, Appellant has received a Medal of Valor, a recommendation for commendation, and several other notations of commendable service (*see*, Exhibits E-H, O and P). Appellant volunteers as a den leader at a local Boy Scout chapter. He makes stranger awareness presentations at local schools. Appellant is the father of five children.
2. During the last three years Appellant has been supervised by two supervisors who never give "outstanding" performance ratings. Appellant has consistently gotten "exceeds expectations" performance ratings for the past several years. Approximately 90% of the performance evaluations of Department employees result in "exceeds expectations" performance ratings.
3. In the latter part of 1999 the Department initiated a promotional process whereby Deputy Sheriffs could compete for promotion to the position of Sergeant. The process included a written examination and a comprehensive, lengthy (approximately 5-hour) assessment process conducted by an outside assessment agency (*see*, Exhibit 5). Through a combined scoring of these two steps, Career Service Authority ("CSA") established a list of 38 individuals, who would remain eligible for promotion to Sergeant for a period of two years. (Exhibit 4) Pursuant to CSA promotional procedures, the Department was then charged with conducting oral interviews of individuals from this list, and making recommendations to the appointing authority based on those interviews.
4. The Department impaneled the following individuals to conduct oral interviews of the candidates: then Division Chief Frank Oliva, Division Chief Smith, Division Chief Stephen Comito, and Major Carlos Jackson. Then Director of Corrections J. Simonet conducted the interviewing panel as the appointing authority at that time.
5. The CSA forwarded the first 16-highest scoring candidates to the Department for interviewing (Exhibit 3). Appellant, who was ranked as 11, was among these first 16 candidates (*see*,

- Exhibit 4). The list the panel received was in alphabetical order and did not include either the scores of these individuals or their rank order, but it is apparently understood that the names forwarded to the Department begin with the highest-ranking individuals. Therefore, while the panel did not know the rank order of each of these individuals, it did know they were the top 16 highest-scoring individuals in the testing process. The panel was therefore constructively aware that Appellant had to have ranked somewhere between 1 and 16 based on his combined scores in the written test and assessment center.
6. The panel conducted interviews of the first 16 candidates. On February 1, 2000, the Department promoted 6 of these candidates, not including Appellant. By the time of these appointments, Director Simonet had retired and Butch Montoya, the Interim Director of Corrections, was the appointing authority.
 7. In late May or early June of 2000, the Department had three additional openings for the position of Sergeant and elected to undergo another round of promotions from the list compiled during the 1999 testing process. Pursuant to the governing regulations, those among the original 16 candidates forwarded to the Department, who had not yet been promoted, remained eligible for consideration in this round of promotions.
 8. In either this round of promotions or the following round, the CSA forwarded several more names (again the next-ranking individuals immediately below the first 16 but in alphabetical order) to supplement the list of eligibles sufficiently to provide a large enough pool from which the Department could then choose. The panel conducted interviews of these new individuals.
 9. The Department subsequently promoted three more candidates to the position of Sergeant on July 1, 2000. All three of these promotees were among the 16 highest-ranking individuals (the first list). Again Appellant was not among the promotees. As of July 2000, former Division Chief Oliva had been appointed as the new Director of Corrections, and became the now appointing authority at that time. The remaining panel members remained the same.
 10. At some point between the first and second round of appointments from the 1999 list, the Career Service sent the Department a list of the eligibles with scores next to their names, thus putting the panel on constructive notice of the actual ranking of the 38 candidates.
 11. The same process as described above in paragraphs 7 and 8 was repeated either once or twice more, adding a total of approximately 16 more candidates to the original interview pool. By some time late in 2000, many of the panelists' notes from the first panel interviews were destroyed and so those panelists were comparing the interviews of subsequent candidates with those of the original 16 by memory. On February 16, 2001, the Department promoted 7 individuals to the position of Sergeant, two of whom were among the top 16. On June 13, 2001, the Department promoted two more individuals, both of whom were among the original top 16. At this point, the only two individuals from the original top 16 who had not been promoted were Appellant and an individual with known criminal involvement in the financial affairs of Lodge 27 of the Fraternal Order of Police ("FOP").
 12. Panelists Comito and Oliva testified that the panel asked the same four questions during each set of interviews of the 1999 candidates. They testified that the empirical testing process only

determines who is eligible for an interview for promotional consideration, and is not considered in the panel recommendations. The panelists testified that the panel recommendations to the Director are based solely on the oral interviews, and the Director makes the final decision based on the panel's recommendations. They testified that typically the scores and rank order of the candidates are not even known to the panel, and that they did not consider the scores or ranking in this case. They further testified that the panelists did not review the candidates' personnel files or seniority status, and that they typically do not do so.

13. Panelists Oliva and Comito testified that they recalled recommending candidates who made the most impressive, proactive presentations of their credentials, abilities, special qualifications, voluntary service, and exhibited other instances of performance above and beyond the call of duty during their interviews, including "outstanding" performance ratings. Both testified that because the panelists did not review the personnel files of any of the candidates, they would not know anything about the candidates other than in their direct experience through the chain of command and through the information offered during the interviews. They testified that they recalled Appellant's interview as generally less impressive than those of the other individuals whom they recommended for promotion, and that Appellant specifically did not draw their attention to any such accolades or activities during his interview.
14. The Department witnesses testified that they did not tell any of the candidates that the panelists would not be reviewing personnel files as part of the interview and recommendation process.
15. Appellant testified that he did not know the interview panel would not be reviewing the rank, scores, or personnel files of the candidates and would therefore not be aware of any special volunteer activities, honors and awards, or other types of commendation he has received unless he specifically brought this information to their attention during the interview. On the contrary, Appellant argued that he presumed the panel would have reviewed the personnel files of the candidates as essential to their determination of the best-qualified candidates.
16. After several rounds of promotions resulted in individuals of protected status with less seniority being promoted in lieu of Appellant, he became concerned and made several requests for additional information concerning the ranking of the candidates. After the CSA refused to provide the information Appellant requested, his attorney successfully requested that CSA provide the rank order of the 1999 candidates. Upon receipt of that information on March 26, 2001 (*see*, Exhibits A and B) it became clear to Appellant that with the exception of an individual with known criminal history involving the local FOP chapter, he was the only one of the original 16 candidates not selected for promotion.¹ Eight of the original 16 candidates are members of at least one (racial or gender) protected class.
17. On April 3, 2001, Appellant filed his appeal giving rise to this case.

¹ While it is not clear why, the list provided by the CSA in March of 2001 indicates Appellant ranked fourth in the testing process. Apparently this list only represents one part of the two-part testing procedure, since the final list ranks Appellant as eleventh in the list of eligibles (*see*, Exhibit 4).

PRELIMINARY MATTERS

1. The Hearing Officer's Jurisdiction

The hearing officer has jurisdiction over issues contemplated in the CSR Rules and violations thereof, specifically CSR Rule 19-10 c), as follows in relevant part:

Discriminatory actions: Any action of any officer or employee resulting in alleged discrimination because of race...(or) sex...

* * *

Jurisdiction was not disputed by either party to this case.

2. Burden of Proof

In claims of discrimination, Appellant bears the burden of affirmatively establishing a *prima facie* showing of discrimination. In a typical discrimination case, the party is a member of a protected status. The *prima facie* requirement in such cases presumes suspicion of discrimination if the individual is qualified, is not promoted and the position remains open for consideration or is filled by a person of non-protected status. See, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

The suspicion of discrimination is not present in a reverse discrimination case. A *prima facie* showing of reverse discrimination must be shown in one of three ways. Appellant offers direct evidence, such as the expression of the Department of its intent to discriminate, or one or more forms of indirect evidence. Direct evidence is rarely available in any kind of discrimination case. Indirect evidence of reverse discrimination is that tending to show that the Department took the action complained of because of the Appellant's non-protected status, and can include evidence of the requisite *background circumstances* establishing the Department has engaged in an historic pattern of discriminating against individuals of a non-protected status. If there is no such evidence of the requisite background circumstances, the Appellant can still make a *prima facie* showing of reverse discrimination by presenting evidence which would otherwise lead a reasonable person to infer that, but for the individual's non-protected status, he would have been promoted. See, Notari v. Denver Water Department, 971 F.2d 585 (1992); citing Holmes v. Bevilacqua, 794 F.2d 142 (4th Cir. 1986).

DISCUSSION

Appellant argues that the objective testing processes are clearly better barometers of qualifications than a ten-minute oral interview, yet the panel disregarded the comprehensive testing procedure. He further argues that the panel's failure to review personnel files of the candidates led to arbitrary results because the candidates were expected to intuit that they had to affirmatively bring their performance records to the panel's attention without any forewarning that the panel would not already have this critical information. Appellant argues that because of this, the panelists were not informed of several accolades which, based on their

testimony of factors they considered important in their recommendations, might have led them to recommend him for promotion.

Appellant argues that in contrast to all of this objective, reliable information, the brief panel interview was comparatively subjective and unfair, and resulted in inconsistent choices for promotion by the Department, as evidenced by its failure to promote him despite that he was clearly better qualified than the candidates who were promoted yet ranked below him in the comprehensive testing procedures. He underscores that the subjective nature of the interviews is further aggravated by the fact that several rounds of interviews were conducted over long period of time, by a panel without all the original members, and without those panelists having the benefit of their notes from the original interviews (including Appellant's) because those notes had been destroyed. Therefore, the remaining panelists were comparing the new interviews with his from memory.

Finally, Appellant posits that he, a Caucasian male, was the only viable candidate of the first 16 who was never promoted in lieu of numerous individuals of protected status who ranked below him in the objective testing procedures.

At the close of Appellant's case-in-chief, the Department moved for a Directed Verdict pursuant to C.R.C.P. Rule 50. The Department argued that Appellant had failed to make a *prima facie* showing under Notari (above) that but for his Caucasian male status, he would have been promoted to the position of Sergeant.

The hearing officer granted the Department's Motion from the bench. She now sets forth the basis for that Order in writing.

First, the interviewing panel based its decision solely on the oral interviews, not the qualifying scores of the written test and assessment procedures. It considered all candidates on equal footing without regard to where they ranked in the testing procedures, or in seniority. The testifying panel members stated that Appellant's interview was less impressive than those of successful candidates, and that this was the reason Appellant has not yet been promoted.

Second, the Department did not review any of the personnel files and did not notify any of the candidates that it would not do so. While Appellant's performance record appears to include several commendations, many of those commendations apparently were not brought to the attention of the interviewing panel.² Appellant does not recall what of this information he proffered during his interview. He presumed that the panel would review his personnel file and so would consider his performance record. While this presumption might have been a reasonable one, and while it might not appear rational on its face for the panel not to have reviewed the personnel files of its candidates, its failure to do so is not evidence of discrimination. The Department did not apply a different standard, but instead treated all the candidates even-handedly and allowed them to proffer the information they considered important in the process of their consideration as candidates. As the panel members testified,

² Exhibits F-H and P indicate that various panel members were aware of some of Appellant's accomplishments at one time or another. Exhibits F-H were memoranda sent to Capt. Jackson at various times before Appellant's interview, but it is not known whether he recalled these or shared them with the other panelists. Exhibit O indicates that Appellant's recommendation for Commendation came after all the promotions had already occurred.

successful candidates did affirmatively bring their performance records to the attention of the panel.

Another item the panel appeared to focus on was prior "outstanding" performance evaluations. Because all "outstanding" performance evaluations have to be reviewed and approved by the upper chain of command, many of the panelists were aware of individuals who received such evaluations even if the candidates had not brought this to their attention. While Appellant had at least two supervisors who testified they never give "outstanding" performance evaluations, there is no evidence in the record that the Department was aware of this or took it into consideration when considering the "outstanding" performance ratings of many successful candidates. Again, while this consideration might not appear very fair, it is not evidence of discrimination against Appellant because of his Caucasian male status. Every employee under these two supervisors would be placed at the same disadvantage, and there is no evidence that these two supervisors only supervised Caucasian males.

In addition, Appellant adduced no evidence tending to establish that the Department has historically favored or disfavored any particular groups in its hiring and promotional practices. In fact, the demographic breakdown evidenced in Exhibit 4 indicates, on the contrary, significant representations of virtually every group present in the mix of which there are sufficient numbers to establish a representation of that group, including Caucasian males. Of the 32 individuals interviewed by the panel, the following demographic breakdown of promotions resulted. (See, Exhibit 4)

MALES

Status	Promoted	Not Promoted	Interviewed	% Promoted
White Male	7	6	13	53.8%
Hispanic Male	2	3 ³	6	33.3%
Black Male	3	0 ⁴	4	75%
Asian Male	1	0	1	100%
TOTAL MALES	13	9	24	54.1%⁵

FEMALES

Status	Promoted	Not Promoted	Interviewed	% Promoted
White Female	4	1	5	80%
Black Female	1	1	2	50%
Hispanic Female	0	1	1	0%
TOTAL FEMALES	5	3	8	62.5%

³ Four Hispanic males were interviewed, but one of them was terminated at some point during the promotional consideration process. Removal of this individual from the total number interviewed results in a calculation of 40% promotions to interviews.

⁴ Four Black males were interviewed, but one was terminated at some point during the promotional consideration process. Removal of this individual from the total number interviewed results in a calculation of 100% promotions to interviews.

⁵ Removal of the two individuals terminated during the consideration process (see footnotes 2 and 3 above) yields a total of 59% of the male candidates being promoted.

Total percent of non-protected (Caucasian male) status individuals promoted:	53.8%
Total percent of protected status male individuals promoted:	54.5%
Total number of female individuals promoted:	62.5%
Total percent of protected (race and/or gender) status individuals promoted:	57.8%

The demographic breakdown of this series of promotions indicates that a little more than half of the Caucasian males interviewed were promoted. This percentage is not sufficiently dissonant with the percentages of other represented groups, either individually or collectively, to demonstrate a tendency to discriminate against Caucasian males. While many of those individuals promoted ranked lower than Appellant in the testing process, both Caucasian males and individuals of protected status are included in that lower-ranking group. In addition, the Department based its recommendations solely on the interviews and did not consider either the seniority or the ranks of any of the candidates based on the testing process.

The hearing officer sympathizes with Appellant's initial suspicions when he realized that he was the only one of the top 16 viable candidates not promoted from the list, especially where others ranked as far down the list as 31 were promoted.⁶ However, Appellant did not at that time have the benefit of knowing that the panel based its decisions on the interviews alone, did not look at the candidates' ranking, objective test scores, seniority or personnel files, and therefore probably did not consider much of Appellant's performance history because Appellant did not bring it to their attention during the interview. It is unfortunate that the process apparently operated somewhat unfairly toward Appellant, who based on the testimony at hearing is more impressive as a candidate than the panel might have been aware of in its deliberations. However, while possibly unfair, the process has not been shown to be in any manner discriminatory, since the evidence at hand clearly does not implicate Appellant's Caucasian male status was in any way influential in the Department's decision.

The totality of this evidence therefore does not sufficiently support a reasonable inference that but for Appellant's Caucasian male status, he would he been promoted.

CONCLUSION OF LAW AND ORDER

Based on the foregoing, the hearing officer concludes that Appellant has failed to make a *prima facie* showing of reverse discrimination.

WHEREFORE, the Department's Motion for a Directed Verdict is GRANTED. This matter is hereby DISMISSED WITH PREJUDICE.

Dated this 20th day of November, 2001.


Joanna L. Kaye
Hearing Officer for the
Career Service Board

⁶ This would have been even truer when Appellant reasonably believed he was actually ranked fourth out of three-dozen people based on the list provided by the CSA (Exhibits A and B).