

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

**JAMES PENN &
RONALD GOOCH**

Complainant

and

**STATE OF OHIO,
DEPARTMENT OF ADJUTANT GENERAL**

Respondent

Complaint #8521
(COL) 71032798 (25617) 042498
22A-98-3688

Complaint #8522
(COL) 71032798 (25618) 042498
22A-98-3690

**HEARING EXAMINER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND RECOMMENDATION**

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INTRODUCTION AND PROCEDURAL HISTORY

James Penn and Ronald Gooch (Complainants) filed sworn charge affidavits with the Ohio Civil Rights Commission (Commission) on April 24, 1998.

The Commission investigated the charge and found probable cause that the State of Ohio, Department of Adjutant General (Respondent) (Department) engaged in unlawful employment practices in violation of Revised Code Section (R.C. §) 4112.02(A).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued two Complaints on April 8, 1999.

The Complaints alleged that Complainants were denied a promotion because of their race.

Respondent filed timely Answers to the Complaints. Respondent admitted certain procedural allegations, but denied that it engaged in any

unlawful discriminatory practices. Respondent also pled affirmative defenses.

A public hearing was held on October 25-26, 1999 at the Commission's Central Office in Columbus, Ohio.

The record consists of the previously described pleadings, a transcript of the hearing consisting of 390 pages, exhibits admitted into evidence during the hearing, and post-hearing briefs filed by the Commission on December 21, 1999 and by Respondent on February 1, 2000.

FINDINGS OF FACT

The following findings of fact are based, in part, upon the Hearing Examiner's assessment of the credibility of the witnesses who testified before him in this matter. The Hearing Examiner has applied the tests of worthiness of belief used in current Ohio practice. For example, he considered each witness's appearance and demeanor while testifying. He considered whether a witness was evasive and whether his or her

testimony appeared to consist of subjective opinion rather than factual recitation. He further considered the opportunity each witness had to observe and know the things discussed, each witness's strength of memory, frankness or lack of frankness, and the bias, prejudice, and interest of each witness. Finally, the Hearing Examiner considered the extent to which each witness's testimony was supported or contradicted by reliable documentary evidence.

1. Complainants filed sworn charge affidavits with the Commission on April 24, 1998.

2. The Commission determined on March 11, 1999 that it was probable that Respondent engaged in unlawful discrimination in violation of R.C. § 4112.02(A).

3. The Commission attempted to resolve this matter by informal methods of conciliation. The Commission issued Complaints #8521 and #8522 after conciliation failed.

4. Respondent is an agency of the State of Ohio and an employer. The Adjutant General has a federal and a state mission. Approximately 15,000 Army and Air National Guardsmen are under his jurisdiction on what is called the "federal side". The federal side has a budget of approximately \$260,000,000 for equipment. The other mission is a state mission. In this capacity, the Adjutant General reports to the Governor of the State of Ohio. The Ohio National Guard functions on the state side when the governor declares a state of emergency. The Adjutant General employs 2,370 full-time military technicians and active duty soldiers, as well as 314 state employees who support the entire Department.

5. Complainants are African-American.

6. Complainant Penn has been employed by Respondent since 1989. He began his career as a Maintenance Repair Worker 2, performing semi-skilled maintenance duties. Six months later he was promoted to a Maintenance Repair Worker 3, performing similar duties and acting as a lead worker. In 1994, he was promoted to Building Maintenance Superintendent 2 (BMS 2), which was the position he held in 1998. His

primary duties as BMS 2 consists of overseeing the maintenance of approximately 35 state armories in the northern half of Ohio.

7. Complainant Gooch was employed by Respondent as a Maintenance Repair Worker 2 in 1984. He was promoted to Maintenance Repair Worker 3 in 1989. Shortly thereafter, he was promoted to Building Maintenance Superintendent 1 (BMS 1). In 1994, he was promoted to BMS 2, the position he held in 1998. Complainant Gooch performs duties similar to the duties performed by Complainant Penn.

8. Both Complainants reported to Mike Snow, Administrative Officer 2. Sometime in 1997, Snow decided to create a new position to deal with a large maintenance backlog in the armories. Snow was unable to deal with this problem because he had too many other duties. The new position was classified as Administrative Officer 1 (AO 1). The duties of AO 1 included establishing a budget which would meet the need for increased maintenance and getting that budget approved by the legislature, establishing a preventative maintenance program, and developing a comprehensive plan to accomplish repairs that were needed.

9. The position was posted from January 7, 1998 until January 22, 1998. There were eighty (80) applicants. Both Complainants applied for the position. Robert Labadie, Caucasian, was also one of the applicants.

10. Labadie worked full-time for the Ohio Army National Guard (OANG) from 1975 until 1998. His last position was Director of Logistics. He held the rank of full Colonel, and his annual salary was \$75,000. He was responsible for planning, resourcing, and management of logistical operations. Prior to that, he was the Chief Logistics Officer responsible for the assessment, procurement, distribution, and management of supplies, equipment, funds, and property.

11. When Labadie was the Director of Logistics, he reported directly to the Adjutant General of Ohio, among others. He was the resource manager for all the functions and operations of the day-to-day business of the OANG. He assessed the operational needs, including training, environments, deployments, mobilization, and readiness issues. He maintained oversight or provided the parameters for the distribution of supplies, materials, equipment, services, and contracting.

12. He oversaw the federal budget that was assigned to the OANG from the National Guard Bureau. He also was responsible for comparing the funds that were made available during a budget cycle to the operational needs and prioritizing projects based on available funds. He supervised twelve to fifteen staff members who reported directly to him. He also had an extensive history of public speaking and was an experienced trainer.

13. While he was Director of Logistics, Labadie was a member of the Army Executive Council (Council), which was headed by the Adjutant General. The purpose of the Council was to establish the goals and vision for the OANG. Labadie managed the infrastructure of the OANG. This meant he was managing training, readiness, and personnel, including buildings and sites.

14. Labadie wanted to continue working after he retired from the OANG. He investigated opportunities in the private sector and the public sector.

15. During his search for employment, Labadie heard about the AO 1 position. One of the persons who worked him told him about the

posting. He followed up and had a general discussion about the position with Richard Dreiman, the Deputy Director responsible for the acquisition, inventory, repair, and maintenance of all property that is owned and operated by the Adjutant General's Department. He also had discussions with Snow about the AO 1 position and about the process for applying for a position in state government. He had similar discussions with others he knew who were employed on the state side of the Department regarding other opportunities such as working at The Ohio State University and working for the Emergency Management Agency.

16. After the posting period for the AO 1 position expired, the applications were screened for minimum qualifications by Karen Holcomb, Personnel Officer. After she screened the applications for minimum qualifications, Holcomb was required to screen the remaining applications to determine the eight most qualified applicants. Complainants' applications were included on Holcomb's list. Labadie's was not.

17. After Holcomb screened down the applications to eight, the packet was reviewed by her immediate supervisor and Mary Bangs,

Human Resources Administrator. The packet was also reviewed by Deputy Director Dreiman.

18. Dreiman knew that Labadie had applied for the position and was surprised when he saw that he was not among the top eight candidates. He went to Bangs and asked her why Labadie did not meet the minimum qualifications. He wanted to know what screening criteria were used to screen the applicants.

19. After discussing the matter with others in the Department, including the Adjutant General, Bangs instructed Holcomb to re-screen the applicants and to add two additional applicants to the interview list, one female and one veteran over forty years of age. Holcomb, who had heard rumors that Labadie was pre-selected for the position, believed that the packet would not be approved unless she added Labadie's name.¹ She did so and prepared a second transmittal memorandum containing ten interviewees, including Labadie.

¹ There were also rumors that Complainant Penn, someone named Joe Brimmler and several retired federal military officers were to be awarded the position.

20. The next step in the process is an interview by a three-person interview panel. The interview panel for the AO 1 position consisted of Snow, Tamara Little, and Albert Hale. Snow was a member of the interview panel because he would be the AO1's immediate supervisor. Little, who was an Assistant Attorney General assigned to Respondent, served on the panel because the position would work closely with her when legal matters arose. Hale, who was retired, served on the panel because of his prior experience as an administrative officer at an armory in the Columbus area.

21. The interviews were structured interviews. Each interviewee was asked the same set of questions. Little kept notes of the interviews. When Labadie was interviewed, he brought with him a forty-page notebook which contained information about Respondent's operation that he had researched through the Internet and from other sources. He used the notebook to assist him when responding to the panel's questions. The panel was impressed with his preparation for the interview and the detailed answers he gave to each question. They were also impressed with his extensive experience in the federal military.

22. The panel also interviewed Complainants Penn and Gooch.

23. At the end of the interview process, Hale selected Complainant Penn as the most qualified person for the position. Little and Snow both selected Labadie. During their discussion, Hale stated that if Respondent wanted someone to promote from within the system, he felt Complainant Penn was the best choice. However, if Respondent wanted someone who could start the job immediately, Labadie was the best choice.

24. The final recommendations, which represented a consensus of the panel, ranked Labadie first, Complainant Penn second, Complainant Gooch third, and another applicant fourth. Ultimately, the panel's recommendation was adopted by everyone in the chain of command, including Dreiman and the Adjutant General, Richard C. Alexander, who was the appointing authority.

CONCLUSIONS OF LAW AND DISCUSSION ²

All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties and the arguments made by them are in accordance with the findings, conclusions, and views stated herein, they have been accepted; to the extent they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues presented. To the extent that the testimony of various witnesses is not in accord with the findings therein, it is not credited.

1. The Commission alleged in the Complaints that Complainants were denied a promotion because of their race.

2. This allegation, if proven, would constitute a violation of R.C. 4112.02 provides, in pertinent part, that:

² Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

It shall be an unlawful discriminatory practice:

- (A) For any employer, because of the race, . . . of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

3. The Commission has the burden of proof in cases brought under R.C. Chapter 4112. The Commission must prove a violation of R.C. 4112.02(A) by a preponderance of reliable, probative, and substantial evidence. R.C. § 4112.05(G) and 4112.06(E).

4. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Columbus Civ. Serv. Comm. v. McGlone* (1998), 82 Ohio St.3d 569. Therefore, reliable, probative, and substantial evidence means evidence sufficient to support a finding of unlawful discrimination under Title VII of the Civil Rights Act of 1964 (Title VII).

5. Under Title VII case law, the Commission is normally required to establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. *McDonnell Douglas Co. v. Greene*, 411 U.S. 792, 5 FEP Cases 965 (1973). The proof required to establish a *prima facie* case may

vary on a case-by-case basis. *Id.*, at 802, 5 FEP Cases at 969, n.13. The establishment of a *prima facie* case creates a rebuttable presumption of unlawful discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 25 FEP Cases 113 (1981).

6. Once the Commission establishes a *prima facie* case, the burden of production shifts to Respondent to “articulate some legitimate, nondiscriminatory reason” for the employment action. *McDonnell Douglas*, *supra* at 802, 5 FEP Cases at 969. To meet this burden of production, Respondent must:

. . . “clearly set forth, through the introduction of admissible evidence,” reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action.

St. Mary’s Honor Center v. Hicks, 509 U.S. 502, 507, 62 FEP Cases 96, 103 (1993), *quoting Burdine, supra* at 254-55, 25 FEP Cases at 116, n.8.

The presumption created by the establishment of a *prima facie* case “drops out of the picture” when the employer articulates a legitimate, nondiscriminatory reason for the employment action. *Hicks, supra* at 511, 62 FEP Cases at 100.

7. In this case, it is not necessary to determine whether the Commission proved a *prima facie* case. Respondent's articulation of a legitimate, nondiscriminatory reason for its decision removes any need to determine whether the Commission proved a *prima facie* case, and the "factual inquiry proceeds to a new level of specificity." *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 713, 31 FEP Cases 609, 611 (1983), quoting *Burdine*, *supra* at 255, 25 FEP Cases at 116.

Where the defendant has done everything that would be required of him if the plaintiff has properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant.

Aikens, *supra* at 713, 31 FEP Cases at 611.

8. Respondent met its burden of production.³ Respondent's legitimate, nondiscriminatory reason for its decision to hire Labadie instead of promoting either Complainant was offered through the testimony of two of the three persons on the interview panel, Tamara Little and Michael Snow. They testified that he was the best qualified candidate.

³ In its brief, the Commission conceded that Respondent satisfied its burden of production. (Comm.Br. 19)

9. Respondent having met its burden of production, the Commission must prove that Respondent unlawfully discriminated against Complainants because of their race. *Hicks, supra* at 511, 62 FEP Cases at 100. The Commission must show by a preponderance of the evidence that Respondent's articulated reason for its decision was not the true reason, but was "a pretext for discrimination." *Id.*, at 515, 62 FEP Cases at 102, quoting *Burdine, supra* at 253, 25 FEP Cases at 115.

[A] reason cannot be proved to be a "pretext for discrimination" unless it is shown *both* that the reason is false, *and* that discrimination is the real reason.

Hicks, supra at 515, 62 FEP Cases at 102.

10. Thus, even if the Commission proves that Respondent's articulated reason is false or incomplete, the Commission does not automatically succeed in meeting its burden of persuasion:

That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the . . . [Commission's] proffered reason of race is correct. That remains a question for the factfinder to answer

Id., at 524, 62 FEP Cases at 106.

Ultimately, the Commission must provide sufficient evidence for the factfinder to infer that Complainants were, more likely than not, the victims of race discrimination.

11. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reason for choosing to hire Labadie and not promote either of the Complainants. The Commission may directly challenge the credibility of Respondent's articulated reason by showing that the reason had no basis *in fact* or it was *insufficient* to motivate the employment decision. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994). Such direct attacks, if successful, permit the factfinder to infer intentional discrimination from the rejection of the reason without additional evidence of unlawful discrimination.

The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may together with the elements of the *prima facie* case, suffice to show intentional discrimination . . . [n]o additional proof is required.⁴

Hicks, supra at 511, 62 FEP Cases at 100 (emphasis added).

12. In this case, the Commission argues that Labadie was not as qualified as either of the Complainants. Part of this argument is based on the initial screening process where Holcomb did not select Labadie as one

⁴ Even though rejection of a respondent's articulated reason is "enough at law to sustain finding of discrimination, *there must be a finding of discrimination.*" *Hicks, supra* at 511, 62 FEP Cases at 100, n.4.

of the top eight candidates. Part of the Commission's argument is also based on a comparison of Labadie's experience and Complainants' experience as it related to maintenance, budgetary experience, supervisory experience, and experience meeting with public officials. The Commission also argues that Labadie was preselected for the position and that his preselection is also evidence of discrimination.

13. After considering all of the Commission's arguments and reviewing the record, including numerous exhibits, there is insufficient evidence to support the inference that the interview panel made its decision to recommend Labadie for the position because of his race and/or decided to not recommend either Complainant because of their race.

14. Although the ultimate decision-maker was the Adjutant General, it was undisputed that he always accepted the recommendations of the interview panel. Likewise, there was no evidence that Deputy Director Dreiman influenced the interview panel's recommendation. Therefore, the focus in this case must be on the interview panel.

15. Instead of focusing on the interview panel, the Commission attempts to focus on the selection process at its inception. This would be appropriate if the Complainants' applications were screened out of the process. However, that was not the case.

Title VII protects against discrimination only in final employment decisions, not intermediate steps

Smith v. Board of Trustees, St. Mary's College of Maryland, 155 F.3d 561, 1998 WL 417290 (4th Cir. Md. 1998).

16. The problem with the selection process was the screening process. Upper management, for some reason, delegated the responsibility to a personnel officer to do much more than screen applicants to see if they met the minimum qualifications for the position. Instead, she was required to screen out 72 of 80 applicants for a high-level management position where the qualifications were subjective. In effect, the personnel officer ended up having much more control over the outcome of the selection process than the interview panel. As Respondent conceded in its brief, this was a very poor management decision. However, as the courts and the Commission have stated on numerous occasions, poor management is not the equivalent of unlawful discrimination:

[A] plaintiff may not establish that an employer's proffered reason is pretextual merely by questioning the wisdom of the employer's reason, at least not where, as here, the reason is one that might motivate a reasonable employer.

Combs v. Meadowcraft, Inc., 73 FEP Cases 232, 249 (11th Cir. 1997).

The law does not require employers to make perfect decisions, nor forbid them from making decisions that others may disagree with. Rather, employers may not hire, fire, or promote for impermissible, discriminatory reasons.

Hartsel v. Keys, 72 FEP Cases 951, 955 (6th Cir. 1996).

17. Likewise, a factfinder cannot rely on rumors to make a finding of preselection. Rumors are not reliable, probative evidence. *Rand v. CF Industries, Inc.*, 42 F.3d 1139, 1146 (7th Cir. 1994) ("Inferences and opinions must be grounded on more than . . . rumors . . ."). In this case, the rumors were also not supported by the evidence. Labadie did what any astute applicant seeking a high-level management position would do. He contacted persons within state government that he knew and asking them if they knew about any positions that were available that he might be qualified to apply for. He also contacted persons in the private sector and asked them about available positions.

18. When he heard about the AO 1 position, he contacted Colonel Dreiman, who he knew because they were both on the Army Executive Council. He followed up his discussion with Dreiman by having a discussion with Snow, the person who would be supervising the position, to find out more about it and to find out the procedure he had to follow to apply. There was nothing sinister about Labadie's actions.

19. There was no evidence that anyone on the interview panel sought him out and invited him to apply. Even if that occurred, it would not be evidence of discrimination unless it was motivated by racial bias. It is not unlawful to seek out qualified candidates and invite them to apply for a position based on their qualifications.

Preselection, of course, does not violate Title VII when such preselection is based on the qualifications of the preselected party and not on some basis prohibited by Title VII.

Goostree v. State of Tenn., 796 F.2d 337, 341 (6th Cir. 1986).

20. The comparative qualifications of the applicants presents the Commission with its strongest argument in this case. Both Complainants were highly regarded by their immediate supervisor who was on the selection panel. They certainly possessed the qualifications and

experience that would have been helpful to them if they were promoted into the position. They were both performing well in the positions that they held. Apparently they got along well with the persons they associated with in that position, as well as their immediate supervisor.

21. However, they were still required to participate in the selection process and the outcome of the selection process was determined by the interview panel. The Complainants were not members of a bargaining unit and the position in question, being a high-level management position, was not automatically awarded to an incumbent employee because the employee had more seniority than the other applicants or because the employee was “next in line” for the position on the table of organization. The criteria for the position, as in most high-level management positions, were subjective. Thus, the qualifications of all applicants, including Complainants, were subjectively interpreted by the interview panel.

22. The interview panel was well balanced and capable. The persons one would expect to be on such a panel were on the panel. The immediate supervisor of the position was chosen obviously because he would have to supervise the person who received the position and,

therefore, should have some input into that decision. There was a representative of the “customer base”, Albert Hale, an African-American, who represented the armories. The third member of the panel, Tamara Little, was placed on the panel because she would be working with the person who received the position in legal matters and the budget process which required interfacing with the Office of Management and Budget. Little had also worked with both Complainants.

23. Given the Complainants’ qualifications, someone in Labadie’s position, an outside applicant, would be at a disadvantage. Labadie was able to overcome that disadvantage because he did his homework prior to the interview. He was also able to articulate his qualifications and experience to the interview panel much better than they were stated on his résumé and civil service application. While his previous job experience in logistics was broader than the position he was interviewing for, it included overseeing maintenance.

24. The interview panel was impressed with the research he had done and the notebook that he brought with him to the interview which evidenced his preparation. They were also impressed with the answers he

gave to the prepared questions and his prior experience, which was at a much higher level than the AO 1 position. They were also impressed with the amount of responsibility he had in his previous position as Director of Logistics and his supervisory experience. His experience dealing with budgets also impressed the interview panel. Therefore, they concluded that he was the most qualified candidate.

25. The panel also concluded that Complainant Penn, and perhaps Complainant Gooch, could do the job. Both Complainants possessed good technical knowledge and had supervisory experience, but they lacked sufficient administrative and budgetary experience as the panel saw it. There was also a concern expressed by one panel member that if one of the Complainants was promoted to the position, their position would have to be filled before they could devote full-time to the AO 1 position. This apparently motivated him to go along with the recommendation of the two other members.

26. In conclusion, the testimony of Michael Snow and Tamara Little regarding the reasons they recommended Labadie for the AO 1 position was credible. The Commission was unable to prove that Respondent's

legitimate, nondiscriminatory reason was a pretext for race discrimination. Although the screening process was flawed, the ultimate decision was not tainted by racism. Therefore, the Complaints must be dismissed.

RECOMMENDATION

For all the foregoing reasons, it is recommended that the Commission issue Dismissal Orders in Complaints #8521 and #8522.

FRANKLIN A. MARTENS
CHIEF HEARING EXAMINER

April 25, 2000