

INTRODUCTION AND PROCEDURAL HISTORY

Vera B. Penn and Erma L. Gregory (Complainants) filed sworn charge affidavits with the Ohio Civil Rights Commission (Commission) on February 4, 1998 and February 5, 1998, respectively.

The Commission investigated these charges and found probable cause that the City of Cleveland (Respondent) engaged in unlawful employment practices in violation of Revised Code Section (R.C.) 4112.02(A).

The Commission attempted, but failed to resolve these cases by informal methods of conciliation. The Commission subsequently issued Complaints on January 7, 1999.

The Complaints alleged that Respondent denied Complainants a merit pay increase because of their race.

Respondent filed Answers to the Complaints on February 4, 1999. Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful discriminatory practices.

A public hearing was held on July 11-12, 2000 and August 3, 2000 at the Lausche State Office Building in Cleveland, Ohio.

The record consists of the previously described pleadings, a 354-page transcript, exhibits admitted into evidence during the hearing, and post-hearing briefs filed by the Commission on October 19, 2000 and by Respondent on November 13, 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 February 4, 1998 and February 5, 1998, respectively.

2. The Commission determined on October 29, 1998 that it was probable that Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(A).

3. The Commission attempted to resolve these cases by informal methods of conciliation. The Commission issued the Complaints after conciliation failed.

4. Respondent is an employer and a political subdivision of the State of Ohio. Respondent has several departments that are divided into divisions. The divisions are further divided into sections. A director oversees each department while a commissioner manages each division. Each section has a manager who reports to the division's commissioner. The commissioners report to the department directors who, in turn, report to the mayor.

5. Complainants are black persons.

6. Respondent hired Complainant Gregory and Complainant Penn in 1984 and 1985, respectively. In 1996 and 1997, Complainants worked in the Division of Park Maintenance and Properties (Parks Division).¹ Richard Silva, a white person, was the Commissioner of the Parks Division. Commissioner Silva reported to Oliver Spellman, the Director of the Department of Parks, Recreation and Properties. Director Spellman, a black person, reported to Mayor Michael White who is also black.

¹ The Parks Division employed approximately 225 full-time and 325 seasonal employees in those years. Approximately 75 to 80% of these employees were black persons. (Tr. 341)

7. The Parks Division had four section managers in 1996 and 1997. They reported directly to Commissioner Silva. Michael Copeland managed Park Maintenance; Heather White managed Urban Forestry; Donald Slogar managed the Greenhouse and Horticulture; and Richard Wozniak managed the Vacant Lot Program and Off-Road Equipment Shop. All of these managers are white persons except for Copeland.

8. The Parks Department employed other non-union employees besides these managers. For example, Kimberly Fisher-Burns worked as Copeland's administrative assistant. Heather White supervised William Breitenbach and Thomas Sowell, both field operations foresters, and Steven Balyint, district forester. Janice Ciaccia, an office assistant, acted as Commissioner Silva's personal secretary and performed receptionist duties for his office. Johnnie Walker worked as a project director under Commissioner Silva's supervision. Fisher-Burns, Sowell, and Walker are black persons; Breitenbach, Balyint, and Ciaccia are white persons.

9. Stephanie Radcliff, a black person, was the Deputy Commissioner for 1996 and most of 1997. She supervised the Cemetary Section and Complainant Gregory, an assistant administrator. Complainant Gregory

primarily handled the Division's budget and overtime reports, and performed special projects for Radcliff.

10. Complainant Penn was a budget analyst. Her primary duties were billing as well as tracking both the Division's invoices and requisitions. Her immediate supervisor was Complainant Gregory.

11. On May 7, 1997, Joseph Nolan, the Director of the Department of Personnel and Human Resources, submitted a memorandum to all department directors regarding "a limited amount of funds" available for merit pay increases to non-union employees. (Comm.Ex. 14, R.Ex. I) The Memorandum indicated that the work performance of eligible employees would be evaluated in accordance with Respondent's "Performance Evaluation System and Guidelines for Non-Bargaining Unit Personnel" (Performance Evaluation System). (Comm.Ex. 13, R.Ex. D) The Memorandum listed the following guidelines and limitations for distribution of the merit pay increases²:

² Under guidelines and limitations, the Memorandum also established a procedure for employees to protest their evaluations and advised evaluators to carefully review the "Normal Percent of Group chart" that was enclosed. This chart gave the normal percentages for "Outstanding" ratings (10%), "Exceptional" ratings (25%), "Exceeds Requirements" ratings (25%), "Meets Requirements" ratings (30%) and "Marginal" and "Unsatisfactory" ratings (10% combined).

- Merit increases should be granted sparingly and only to those whose performance has been evaluated as truly “meritorious.” **THUS, ONLY EMPLOYEES EVALUATED AS OUTSTANDING, EXCEPTIONAL, OR EXCEEDS REQUIREMENTS CAN BE RECOMMENDED FOR A MERIT PAY INCREASE.** Any recommended increase must be consistent with the employee’s performance rating;
- No employee can be recommended for a merit increase of more than seven percent [7%], regardless of the employee’s rating, and no Department can exceed the amount it has been allocated for merit increases;
- EVERY evaluation form must be sent to the Director of Personnel and Human Resources after the Director submitting it has approved it. The submitting Director must also send a copy to his/her Executive Assistant. The Director of Personnel and Human Resources is responsible for reviewing all merit increases for (a) consistency with the employee’s evaluation rating and (b) consistency with merit increases recommended by other Directors so that there is a meaningful level of City-wide consistency;
- Employees with less than one year of service to the City are not eligible for merit increases in 1997; and
- ALL EVALUATION FORMS, INCLUDING ACTION PLANS, MUST BE SENT TO THE DIRECTOR OF PERSONNEL AND HUMAN RESOURCES, WITH A COPY TO THE APPROPRIATE EXECUTIVE ASSISTANT, BY NO LATER THAN JUNE 20, 1997.

12. The work performance of Respondent’s non-union employees was evaluated from July 1, 1996 to June 30, 1997. The employees’

performance of their major work objectives and assignments or “Performance Against Objectives” were rated on the following scale:

0= Unsatisfactory	3= Exceeds Requirements
1= Marginal	4= Exceptional
2= Meets Requirements	5= Outstanding

13. The employees were also rated on the same scale in the following “Performance Factors”: judgment, initiative, interpersonal skills, communications, cooperation, leadership, analytical ability, and quality of work. The average rating for “Performance Against Objectives” and the “Performance Factors” were added together and divided by two to calculate an overall performance rating. Employees needed at least an overall performance rating of “Exceeds Requirements” to receive a merit pay increase.³

14. Throughout May 1997, Respondent trained commissioners and supervisors from each division on its Performance Evaluation System. This system required evaluators to discuss all evaluations with the commissioner of their division prior to reviewing them with the individual

³ The overall performance ratings were rounded up. Therefore, an employee needed at least a 2.5 overall rating to receive a merit pay increase.

employees. Evaluators were also informed at the training that the commissioners and directors had the authority to override the evaluations conducted by front line supervisors. Commissioner Silva had approximately one month after his division received training to submit his recommendations regarding who would receive merit increases in his division. Director Spellman made the final recommendations to Mayor White based on Commissioner Silva's input.

15. In mid-May 1997, Commissioner Silva was also dealing with "administrative and clerical problems" at the Highland Park Cemetery. (Tr. 18) On May 14, 1997, Commissioner Silva notified Radcliff that she was being suspended for 10 days in June. (R.Ex. G) Commissioner Silva assigned Complainant Gregory to the Cemetery to assist Radcliff in resolving these problems.

16. Commissioner Silva began evaluating the section managers and Radcliff during the week of June 9, 1997. All the section managers received "Exceeds Requirements" ratings; their overall performance ratings ranged from 2.59 to 3.24. (Comm.Exs. 16-18, 20) Radcliff received a 1.79 rating.

17. Early that week, Commissioner Silva received Fisher-Burns's evaluation via interoffice mail. Copeland had already discussed the evaluation with Fisher-Burns, and she signed it prior to Commissioner Silva's receipt. Copeland gave Fisher-Burns a higher evaluation than any other employee in the Division eventually received.⁴

18. Commissioner Silva returned Fisher-Burns's evaluation to Copeland and later discussed the matter with him. Commissioner Silva informed Copeland that he had not followed instructions. Specifically, Commissioner Silva told Copeland that he failed to discuss Fisher-Burns's evaluation with him prior talking to her about it.

19. Commissioner Silva also advised Copeland that he disagreed with Fisher-Burns's overall performance rating. Commissioner Silva reminded Copeland that he previously blamed her for late reports and those that had to be redone. Commissioner Silva further reminded Copeland of his monthly complaints about her work performance. Commissioner Silva told Copeland that Fisher-Burns's work performance

⁴ The record does not contain the numerical rating that Copeland initially gave Fisher-Burns. Commissioner Silva testified that it was at least "Exceptional" or 3.5. (Tr. 191-92) Wozniak eventually received the highest rating, which was 3.24.

was “not worthy of a meritorious increase” and did not “exceed expectations.” (Tr. 195, 228) Commissioner Silva instructed Copeland to redo Fisher-Burns’s evaluation in light of his opinion about her work performance.

20. Copeland protested the instruction, but he resubmitted Fisher-Burns’s evaluation to Commissioner Silva within days of their conversation. Fisher-Burns received an overall rating performance rating of 2.0 on this evaluation. (Comm.Ex. 22)

21. Following his discussion with Copeland, Commissioner Silva called Complainant Gregory at the Cemetery and told her that she needed to complete Complainant Penn’s evaluation. Commissioner Silva also told Complainant Gregory that “the division had high goals” and “only a couple [of] people” might exceed his expectations. (Tr. 22) Commissioner Silva informed Complainant Gregory that he already had to return an evaluation because a section manager rated his subordinate above “Meets Requirements.” Commissioner Silva advised Complainant Gregory not to make the same mistake.

22. Commissioner Silva also informed Complainant Gregory that he would be evaluating her. Commissioner Silva asked Complainant Gregory to type her “major work objectives and assignments” on an evaluation form for his later use.

23. Complainant Gregory met with Commissioner Silva a few days after their conversation. They first reviewed Complainant Penn’s evaluation. Complainant Gregory gave Complainant Penn an overall performance rating of 1.57. (Comm.Ex. 4)

24. Commissioner Silva then reviewed Complainant Gregory’s evaluation with her. While discussing the evaluation, Commissioner Silva changed Complainant Gregory’s rating for “cooperation” from 2 to 3. Complainant Gregory received an overall performance evaluation of 2.07.

25. Besides the section managers, Radcliff, and Complainant Gregory, Commissioner Silva also evaluated Ciaccia and Walker before the

June 20 deadline.⁵ Ciaccia and Walker received overall performance ratings of 2.65 and 2.19, respectively.

26. In late June 1997, Complainant Gregory sent a memorandum to Director Spellman about her evaluation. (Comm.Ex. 2) Complainant Gregory expressed concern about Commissioner Silva evaluating her instead of Radcliff, her immediate supervisor. Complainant Gregory indicated that Commissioner Silva could not give her a “fair evaluation” because he did not review her work directly, except for a few assignments. *Id.*

27. Director Spellman asked Commissioner Silva to respond to this memorandum in writing. Commissioner Silva met with Complainant Gregory in early July 1997 and followed up with a letter to her. Commissioner Silva told Complainant Gregory during their meeting that the Division was on a “very tight time table” to finish the evaluations, and he evaluated her because “he could not depend on . . . [Radcliff] to get the evaluation back in a timely manner.” (Comm.Ex. 3, Tr. 26)

⁵ White submitted evaluations for her three non-union employees prior to the deadline. White rated these employees as “Meets Requirements”; their overall performance ratings ranged from 2.00 to 2.29.

Commissioner Silva indicated in the letter that although he did not assign Complainant Gregory the majority of her work, he understood many of her duties and worked with her on a number of projects.

28. In January 1998, White, Slogar, Wozniak, and Ciaccia received a merit pay increase based on their overall performance ratings of “Exceeds Requirements.” Copeland did not receive a merit pay increase, despite his “Exceeds Requirements” performance rating, because even a one percent (1%) pay increase would have placed his earnings over the City’s pay ban for his position. (Tr. 221)

CONCLUSIONS OF LAW AND DISCUSSION

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 Respondent denied Complainants a merit pay increase because of their race.

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

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 usually required to first 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.⁶

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 legitimate, nondiscriminatory reasons for denying Complainants a merit pay increase removes any need to determine whether the Commission proved

⁶ Although the burden of production shifts to Respondent at this point, the Commission retains the burden of persuasion throughout the proceeding. *Burdine, supra* at 254, 25 FEP Cases at 116.

The defendant’s burden is merely to articulate through some proof a facially nondiscriminatory reason for . . . [the denial of merit increases]; the defendant does not at this stage of the proceedings need to litigate the merits of the reasoning, nor does it need to prove that the reason relied upon was bona fide, nor does it need to prove that the reasoning was applied in a nondiscriminatory fashion.

EEOC v. Flasher Co., 60 FEP Cases 814, 817 (10th Cir. 1992) (citations and footnote omitted).

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 with Commissioner Silva’s testimony and documentary evidence. The latter shows that Commissioner Silva did not recommend Complainants for a merit pay increase because their overall performance ratings were “Meets Requirements”; only employees who were evaluated as “Exceeds Requirements”, “Exceptional”, or “Outstanding” could be recommended for such increases. (Comm.Exs. 1, 4, 14, R.Ex. I) Commissioner Silva testified that Complainant Gregory was a good employee, but her work performance did not warrant a merit pay increase. Commissioner Silva testified that he agreed with Complainant Gregory’s evaluation of Complainant Penn even though he felt it was “a little harsh.” (Tr. 233)

9. Respondent having met its burden of production, the Commission must provide sufficient evidence to prove that Respondent unlawfully discriminated against Complainants. *Hicks, supra* at 511, 62 FEP Cases at 100. The Commission must show by a preponderance of the evidence that Respondent's articulated reasons for denying Complainants a merit pay increase were not its true reasons, but were "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 reasons are 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 reasons for denying Complainants a merit pay increase. The Commission may directly challenge the credibility of Respondent's articulated reasons by showing that the reasons had no basis *in fact* or were *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 reasons 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.⁷

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

⁷ Even though rejection of a respondent's articulated reasons is "enough at law to *sustain* finding of discrimination, *there must be a finding of discrimination.*" *Hicks, supra* 511, 62 FEP Cases at 100, n.4.

12. The Commission may indirectly challenge the credibility of Respondent's reasons by showing that the sheer weight of the circumstantial evidence makes it "more likely than not" that the reasons are a pretext for unlawful discrimination. *Manzer, supra* at 1084. This type of showing, which tends to prove that the reasons did not *actually* motivate the employment decisions, requires the Commission produce additional evidence of unlawful discrimination besides evidence that is part of the *prima facie* case. *Id.*

13. In these cases, the Commission does not dispute that Complainants' overall performance ratings were not high enough to receive a merit pay increase. The Commission blames Commissioner Silva's "discriminatory actions" for Complainants' "Meets Requirements" ratings and ultimately their denial of a merit pay increase. (Comm.Br. 6) The Commission labels Commissioner Silva's actions as discriminatory despite the lack of evidence that Commissioner Silva harbored discriminatory animus toward Complainants or black persons in general. The conclusory opinions of Complainant Gregory and Copeland that Commissioner Silva is a racist are insufficient to infer that he was motivated by discriminatory animus in these cases. *Gill v. Westinghouse Elec. Corp.*, 594 F.Supp. 48

(D.C.III 1984) (employee's unsupported claim that certain supervisors were racists was not evidence of race discrimination).

14. The Commission also asks the Hearing Examiner to infer race discrimination from the fact that no black employees in the Parks Division received a merit pay increase.⁸ This evidence, though relevant, has minimal probative value in deciding whether Complainants were victims of race discrimination. It is neither substantial evidence nor a reliable indicator that such discrimination occurred. The latter is particularly true in cases lacking evidence of discriminatory animus on the part of the decision-maker.

15. The Commission further points out that seven (7) of the thirteen (13) non-union employees in Parks Division were black persons. This evidence is also relevant; however, statistical evidence "must be viewed in terms of actual numbers involved." *Wade v. New York Tel. Co.*, 500 F.Supp. 1170, 1180 (D.C.N.Y. 1980). The numbers represented by this

⁸ While this is true, Commissioner Silva did rate Copeland's overall work performance as "Exceeds Requirements." Commissioner Silva testified that Copeland did not receive a merit pay increase because even a one percent (1%) pay increase would have placed his earnings over the City's pay ban for his position. Neither Copeland nor any of the Commission witness rebutted this testimony.

statistical evidence are simply too small to raise a reliable inference of race discrimination. *Simpson v. Midland-Ross Corp.*, 823 F.2d 937 (6th Cir. 1987) (reliance on statistical evidence based on a sample of only 17 employees is suspect).

16. In Complainant Penn's case, it cannot be overstated that Complainant Gregory completed her evaluation. The Commission argues that Commissioner Silva influenced Complainant Gregory to rate Complainant Penn on a scale of 0-2 rather than 0-5. Assuming this is true, Complainant Gregory testified that she still would have rated Complainant Penn's overall work performance as "Meets Requirements."⁹ (Tr. 78, 107) Complainant Gregory further testified that she did not believe

⁹ There is no evidence that Commissioner Silva intentionally misled Complainant Gregory into rating Complainant Penn on a scale of 0-2. Commissioner Silva talked to Complainant Gregory shortly *after* he asked Copeland to redo Fisher-Burns's evaluation. Copeland's rating of Fisher-Burns, which was too high in Commissioner Silva's opinion, undoubtedly influenced the instructions that he gave Complainant Gregory about Complainant Penn's evaluation. (See *Findings of Fact*, ¶ 21) These instructions were consistent with Nolan's memorandum. His memorandum indicated that only "a limited amount of funds" were available and stressed that the merit increases should be granted "sparingly":

. . . if a [m]anager were to recommend merit increases for all or even most eligible employees in her/his department, the amount will not be significant enough to be meaningful as either a reward or a motivator. Therefore, such a recommendation would be unacceptable as inconsistent with the merit concept.

(Comm.Ex. 14, R.Ex. I)

that Complainant Penn deserved a merit pay increase based on her work performance. Complainant Gregory's testimony is conclusive evidence that Complainant Penn would not have received a merit pay increase regardless of any influence that Commissioner Silva might have had on her evaluation. The Commission cannot lawfully substitute its judgment for Complainant Gregory's assessment of Complainant Penn's work performance.

17. In the same vein, the Commission cannot lawfully substitute its judgment for Commissioner Silva's assessment of Complainant Gregory's work performance. This does not mean that subjective assessments of decision-makers are above scrutiny.¹⁰ It only means that the focus of the inquiry is necessary limited to whether the assessment was motivated or otherwise tainted by an illegal criterion such as race.

¹⁰ Subjective evaluations are not unlawful *per se*. *Rogers v. International Paper Co.*, 510 F.2d 1340 (8th Cir. 1975), *vacated on other grounds*, 423 U.S. 809 (1975).

[Subjective criteria] . . . are not to be condemned as unlawful *per se*, for in all fairness to applicants and employers alike, decisions about hiring and promotion . . . [and merit pay increases] cannot realistically be made using objective standards alone.

Id., at 1345.

18. In Complainant Gregory's case, the Commission questioned Commissioner Silva's decision to conduct her evaluation instead of Radcliff, her immediate supervisor. The Commission argues that "Commissioner Silva was not as familiar with Ms. Gregory's duties as Ms. Radcliff had been." (Comm.Br. 7) The Commission notes that Complainant Gregory typed her "major work objectives and assignments" on her evaluation at Commissioner Silva's instruction.

19. Commissioner Silva testified about why he evaluated Complainant Gregory. Commissioner Silva testified that he did not trust Radcliff to complete the evaluation "in a timely manner" because she was "on multiple suspensions" for work performance problems. (Tr. 262) These problems included neglect of duty. (R.Ex. G)

20. Commissioner Silva's testimony on this issue was consistent with his statement to Complainant Gregory after she complained to Director Spellman about Commissioner Silva evaluating her. Commissioner Silva told Complainant Gregory then that "he could not depend on . . . [Radcliff] to get the evaluation back in a timely manner." (Tr. 26) Commissioner Silva also informed Complainant Gregory in writing that the

Division was on a “very tight time table” to finish the evaluations.
(Comm.Ex. 3) In other words, time was of the essence.

21. Commissioner Silva also testified about why he believed that he was in a position to evaluate Complainant Gregory’s work performance:

Q: Do you feel that you had a good working knowledge of exactly what Ms. Gregory . . . her job responsibilities?

A: As I discussed with Erma, I was not intimately involved with all of her responsibilities, but I certainly . . . I’m the one that’s ultimately responsible to sign off on the budget and to present it to the Director. There were a number of projects that we worked on together that I would assign to her directly. So I was familiar with many of her projects, and she did work right on the same floor, so we interacted daily.

(Tr. 232)

22. Commissioner Silva even testified about why he asked Complainant Gregory to complete the “major work objectives and assignments” portion of her evaluation:

Q: And by [the] mere fact that you had Ms. Gregory sort of draft out her objectives and her work assignments for the evaluation, did that lessen your ability to fairly evaluate her work in those areas?

A: As I said, I would have . . . I wish circumstances had been different. But I wanted to make sure I captured all of her major work objectives, which is why I wanted to see what she felt they were so I could review them, rather than me just saying this is what I think you do.

(Tr. 282)

23. While Radcliff may have been more familiar with Complainant Gregory's duties and work performance than Commissioner Silva, neither the Commission nor the Hearing Examiner are in the position to second-guess his decision to evaluate her. *Alexander v. Fulton County, Ga.*, 207 F.3d 1303, 1341 (11th Cir. 2000) (“[I]t is not the court’s role to second-guess the wisdom of an employer’s decision as long as the decisions are not racially motivated”). This decision was not “so lacking in merit as to call into question its genuineness.” *Hartsel v. Keys*, 87 F.3d 795, 800 (6th Cir. 1996) (citation and quotation marks omitted).¹¹ To the

¹¹ In *Hartsel*, the Sixth Circuit recognized that:

The distinction lies between a poor business judgment and a reason manufactured to avoid liability. Thus, facts may exist from which a reasonable jury could conclude that the employer’s business judgment was so lacking in merit as to call into question its genuineness.

Hartsel, *supra* at 800.

contrary, Commissioner Silva's explanations for why he evaluated Complainant Gregory might have motivated the reasonable employer to make the same decision.

[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.

Chapman v. AI Transport, 229 F.3d 1012, 1030 (11th Cir. 2000), quoting *Combs v. Meadowcraft, Inc.*, 106 F.3d 1519, 1543 (11th Cir. 1997), cert. denied, 522 U.S. 1045, (1998).

24. The Commission also questioned Commissioner Silva's influence on the overall performance rating of another black employee, Kimberly Fisher-Burns. The evidence shows that Commissioner Silva returned Fisher-Burns's evaluation for two reasons: (1) Copeland, her immediate supervisor, failed to discuss the evaluation with him prior to talking to her about it, and (2) he disagreed with Fisher-Burns's initial performance rating, which was higher than the ratings that the other employees in the Division eventually received.

25. Commissioner Silva testified about why he believed that Fisher-Burns's work performance was not worthy of a merit pay increase. Commissioner Silva testified that Copeland previously blamed Fisher-Burns

when Park Maintenance submitted late, inaccurate, or incomplete reports to him and complained about her work performance on a regular basis.

Commissioner Silva gave the following testimony on this issue:

For one thing that comes to mind, is that one of the issues me and Mike had discussed a number of times was the quality of reports, the comprehensiveness of reports, the follow-through or timeliness of reports and disciplinaries. And he would usually blame that . . . on Ms. Burns . . . Yet he rated her extremely high as my recollection on that evaluation. So I said if she's the problem, then how can she be so good . . . to make a long story short.

(Tr. 225)

26. Copeland testified at the hearing. Copeland acknowledged that he blamed Fisher-Burns for late or inadequate reports when discussing such reports with Commissioner Silva. Copeland also acknowledged that either he or Commissioner Silva complained to each other about Fisher-Burns's work performance on a monthly basis. Copeland's testimony corroborated the factual accuracy of Commissioner Silva's reasons for concluding that Fisher-Burns's work performance was not meritorious. Commissioner Silva acted within this authority and in accordance with Respondent's Performance Evaluation System in overriding Copeland's initial evaluation of Fisher-Burns.

27. After a careful review of the entire record, there is insufficient evidence to conclude that Respondents denied Complainants a merit pay increase because of their race. The substantial weight of the evidence suggests that Complainants' race did not affect their overall performance ratings in any manner. Therefore, the Complaints must be dismissed.

RECOMMENDATION

For all of the foregoing reasons, it is recommended that the Commission issue Dismissal Orders in Complaints #8463 and #8464.

TODD W. EVANS
HEARING EXAMINER

February 27, 2001