



**GOVERNMENT OF THE DISTRICT OF COLUMBIA
COMMISSION ON HUMAN RIGHTS**

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August 10, 2007

To: All Parties

From: Mario Acosta-Velez, Vice-Chairperson *MAV/CA*

Subject: Notice of Final Decision and Order on Respondent's Motion for Summary Judgment in the matter of Vincent Long-against-Potomac Electric Power Co. Docket Number 99-147-P (CN)

Attached hereto is the Final Decision and Order on Respondent's Motion for Summary Judgment in the above-referenced matter. In accordance with 4 DCMR § 431 of the Commission's Rules of Procedure for Contested Cases, any party adversely affected thereby may apply to the Hearing Tribunal for reconsideration of the ruling within fifteen (15) calendar days of receipt of the ruling. Parties wishing to file application for reconsideration shall submit them to the Commission in triplicate and serve copies of each remaining party to the proceeding.

Failure to apply for reconsideration shall not be deemed a failure to exhaust the administrative remedies under the Human Rights Act of 1977, D.C. Official Code § 2-1401.01 *et seq.* Any party adversely affected by this decision may file a petition for review in the District of Columbia Court of Appeals in accordance with the Administrative Procedure Act, D.C. Official Code § 2-1403.14.

If, in accordance with D.C. Official Code § 2-1403, the attached order requires the respondent to correct unlawful discriminatory practices and provide remedial relief as required by the order, and thirty (30) calendar days following service of the order have lapsed without the Commission's receipts from the respondent of either (1) documentation of compliance with the order, (2) confirmation of filing a petition for judicial review in the D.C. Court of Appeals in accordance with D.C. Official Code § 2-1403.14 of the Act, or (3) a timely filed application for reconsideration; the Commission shall certify the matter to the Attorney General of the District of Columbia for compliance with the order, D.C. Official Code § 2-1403.15.

DISTRICT OF COLUMBIA
COMMISSION ON HUMAN RIGHTS

In the Matter of:

VINCENT LONG
Complainant

v.

Docket Number 99-147-P (CN)

POTOMAC ELECTRIC POWER CO.
Respondent

FINAL RULING ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

On October 27, 2005, Chief Hearing Examiner Cornelius R. Alexander, Jr. issued his ruling on Respondent's Motion for Summary Judgment, recommending that all issues should be dismissed because the Complainant cannot establish a *prima facie* case of discrimination. In accordance with procedures for filing exceptions to the recommended ruling, Complainant on November 14, 2005 filed his exceptions asking the Commission to reverse the proposed order. In response to the exceptions, the Respondent filed an opposition stating that the proposed ruling by the hearing examiner was correct.

For the reasons stated below, the Commission affirms the hearing examiner's proposed ruling, dismissing this case.

Statement of the Case

Respondent, Potomac Electric Power Company ("PEPCO"), provides electrical services on a massive scale to commercial and residential customers in the District of Columbia and surrounding Maryland suburbs.

The Complainant, Mr. Vincent Long, an African-American male has continuously worked at PEPCO since December 7, 1987. He was first hired as an accountant in PEPCO's Payroll and Benefits Accounting Department at an annual salary of \$28,000. On or about March 1, 1991, PEPCO promoted the Complainant to the position of Senior Accountant.

In approximately 1995, the Respondent created a new department called the Treasury Management & Analysis Department (TM&A) by merging together several sections including the Paymaster/Bank Reconciliation Section. Also in or around 1995,

PEPCO assigned the Complainant to the Paymaster/Bank Reconciliation Section as a Senior Accountant. Mr. Long reported to the manager of the Treasury Management & Analysis Department, Ms. Karen Almquist.

In April 1998, the Respondent dismantled the Paymaster/Bank Reconciliation Section; however, it retained the Complainant as a Senior Accountant. In connection with the aforementioned reorganization, it was determined that the position of Supervisor Treasury Reporting should be created and posted. The Complainant applied and was interviewed for the position. The Complainant was not hired as the Supervisor Treasury Reporting. Instead, a Caucasian male was hired to fill the newly created position. In 2000, PEPCO changed the Complainant's job title from Senior Accountant to Senior Treasury Accountant. The Complainant has been out on long-term disability since April 28, 2000 but the Respondent continues to subsidize the Complainant's health benefits.

The Complainant has filed discrimination complaints with the Respondent's internal Equal Opportunity Office in March and May 1999 and the District of Columbia Office of Human Rights in April 1999. All of the complaints were based on Ms. Almquist's treatment of the Complainant. He alleges that PEPCO discriminated against him on the basis of race when he was not selected as the Supervisor Treasury Reporting either through a promotion or the competitive selection process. The Complainant also alleges that the Respondent retaliated against him for his discrimination complaints by not promoting him and ultimately selecting a different candidate for the Supervisor Treasury Reporting position.

Standard of Review

Summary Judgment is granted when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrell*, 477 U.S. 317 (1986). In deciding summary judgment motions, courts view the evidence in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). To prevail upon a motion for summary judgment, the moving party must clearly demonstrate that there is no genuine issue as to any material fact and that he or she is entitled to judgment as a matter of law. *Beard v. Goodyear Tire and Rubber Co.*, 587 A.2d 195 (D.C. 1991), citing *Holland v. Harmon*, 456 A.2d 807 (D.C. 1983). Thus, in ruling on a motion for summary judgment, the Commission will grant summary judgment only if the moving party is entitled to judgment as a matter of law upon facts that are not in dispute. *Ferguson v. Small*, 225 F.Supp. 2d 31 (D.D.C. 2002).

If a moving defendant has made an initial showing that the record presents no genuine issue of material fact, then the burden shifts to the nonmoving party to show that such an issue exists. *Beard, supra* citing *Landow v. Georgetown-Inland West Corp.*, 454 A.2d 310 (D.C. 1987). The moving party's initial showing can be made by pointing out that there is lack of evidence to support the nonmoving party's case. *Beard, supra.*, citing *Celotex Corp v. Catrell*, 477 U.S. 317 (1986).

In opposing a summary judgment motion, a party may not rely on vague allegations but instead must present specific facts showing that there is a genuine issue for trial. *Graff v. Malawar*, 592 A.2d 1038 (D.C. 1991). The non-moving party must do more than simply "show that there is some metaphysical doubt as to the material facts." *Jones v. Blake Construction Co., Inc.*, 2002 U.S. Dist. LEXIS 17032 (September 10, 2002). Moreover, any assertions in the movant's affidavits, depositions, etc. will be accepted as true unless the opposing party submits his own affidavits or other documentary evidence contradicting the assertion. *Id.* Conclusory allegations by the non-moving party are insufficient to establish a genuine issue of material fact or to defeat the entry of summary judgment. *Beard, supra.*, 587 A.2d 195 (D.C. 1991) citing *Moseley v. Second new St. Paul Baptist Church*, 534 A.2d 346 (D.C. 1987). Furthermore, the "existence of a factual dispute [will not] defeat a summary judgment motion when the dispute does not concern a genuine issue of material fact." *Anderson, supra* at 247. To be material, the fact must be supported by admissible evidence sufficient for a reasonable trier of fact to find in favor of the nonmoving party. *Id.* Thus, an adverse party must set forth facts showing that there is a genuine issue of trial. *Beard, supra* at 199.

Failure to Promote

In order to show that the Respondent discriminated against the Complainant when he was not promoted to the position of Supervisor Treasury Reporting, the Complainant must show that (1) he is a member of a protected class; (2) he was qualified for the position and entitled to receive it; (3) he suffered an adverse employment action; (4) a similarly situated employee outside the Complainant's class was treated differently. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). While the elements for a *prima facie* case are slightly altered in this matter, the Court in *McDonnell Douglas* stated that the *prima facie* elements may vary slightly based on differing factual scenarios. *Id.* at 802, n.13. Generally *prima facie* cases for discriminatory failure to promote require that the complainant apply for the position, however in this matter the Complainant argues that he was not required to apply for the position because he fitted into various exceptions within the Respondent's job posting and Selection Policy.

The Respondent argues that the Complainant cannot meet all of the elements of his *prima facie* case. Namely, the Respondent asserts that the Complainant cannot show that he was entitled to the promotion nor can he show that the Respondent promoted similarly situated employees outside of his protected class without subjecting them to the company's competitive application process.

The Complainant counters by alleging that he clearly fit into two different exceptions to the Respondent's general policy of advertising vacancies. First, there is an exception that allows the Respondent to progressively promote an employee to the vacancy from the employee's current position. The Respondent asserts that this option is not available for supervisory-level positions or positions outside of pre-determined career paths. (Sullivan, Manager of employment Services, Declaration ¶ 8); (Kamerick, VP and Treasurer for PEPCO Holdings, Inc., Deposition at 17-18). The two pre-determined career paths within PEPCO are the Accountant and the Analyst career paths. (Almquist

Declaration ¶ 9). The Senior Accountant position was the top position of the Accountant career path. (Almquist Declaration ¶ 14). Thus, the Complainant was at the top of the Accountant career path as a Senior Accountant. (Long Deposition at 26 ¶¶ 16-17). In addressing this issue, the Chief Hearing Examiner found that there was nothing in the record to dispute the Respondent's assertion that supervisory positions are not within pre-determined career paths. He also stated that both parties acknowledged that the progressive promotion exception is for jobs within pre-determined career paths as is stipulated in the Respondent's Job Posting and Selection Policy. We affirm the Chief Hearing Examiner's findings that there is no fact in dispute to show that the Complainant was not entitled to a progressive promotion.

The second exception is for positions resulting from reorganization, which was the case here. The Respondent argues that this exception applies only to situations where there will be an unintended reduction of its workforce due to the reorganization. (Sullivan Declaration ¶ 2). The respondent also asserts that the Complainant was not in any danger of losing his position due to the reorganization (Sullivan ¶ 4). However, the text of the Respondent's Job Posting and Selection Policy provides that a vacancy may be filled without posting for "positions resulting from reorganization" OR "to avoid an unintended reduction in the force." Thus, PEPCO's policy is not in accordance with the Respondent's assertion that it is *only* to avoid an unintended reduction in the work force. Accordingly, there is a question as to whether an employee may receive a promotion through reorganization *alone* irrespective of whether the individual is in danger of being terminated. However, the fact that the Respondent may have been able to promote the Complainant due to the reorganization does not show that he was entitled to this exception. PEPCO's Job Posting and Selection Policy provides that "vacancies in certain positions or under specific defined circumstances may be filled without posting". In other words it is within the Respondent's discretion when it wants to exercise an applicable exception.¹

While the reorganization exception arguably could have been exercised for the Complainant, he still cannot make out a *prima facie* case because he has not shown that he was treated differently than similarly situated employees outside of his protected class. The Complainant points to two employees outside of his protected class whom he claims were similarly situated to him and were promoted through the progressive promotion and reorganization exceptions respectively. The first individual, Carolyn (Gale) Stanford, received two progressive promotions one from Associate Financial Analyst to Financial Analyst and finally from Financial Analyst to Senior Financial Analyst. (Kamerick, VP and Treasurer of PEPCO Holdings, Inc., Declaration ¶ 10). Both of Ms. Stanford's promotions were within the Analyst career path, and neither promotion was to a supervisory position. The Complainant was not similarly situated to Ms. Stanford in that he was already at the top of the Accountant career path. Despite the fact that the Complainant asserts that he was entitled to receive a progressive promotion to a

¹ Even so, the position Complainant wanted to be promoted into was not subject to fill without posting because it was a separate supervisory position that was not part of any pre-determined path. Accordingly, it was a supervisory-level position above and separate from the Senior Accountant position. Hence, Respondent may not have had discretion to promote without posting.

supervisory position outside of the Accountant career path, there is nothing in the record to contradict the declarations of Mr. Sullivan and Ms. Almquist that supervisory positions are not included within pre-determined career paths.

The other individual, Ms. Debra Walker, was promoted from an obsolete position, Documents Control Assistant, to Treasury Assistant. Ms. Walker was promoted to avoid an unintended reduction in the work force (Respondent's Exhibit Q). Ms. Walker's situation is not the same as the Complainant who was not in any danger of being terminated as a result of the reorganization. The Commission finds that there is nothing in the record to dispute that Ms. Stanford and Ms. Walker were not similarly situated to the Complainant.

In his exceptions, the Complainant argues against the hearing examiner's finding that there is nothing in the record to dispute Respondent's assertion that supervisory positions are not within pre-determined career paths. Furthermore, the Complainant disputes the finding that states PEPCO's progressive promotion exception is for jobs within predetermined career paths. As proof, Complainant asserts that he was progressively promoted to a Senior Accountant, a supervisory position in 1991. He was not required to apply and compete before being awarded that position. Therefore, despite their assertions to the contrary, PEPCO does progressively promote employees to supervisory positions. The Commission disagrees with this assessment for two reasons. First, the Respondent's Job Posting and Selection Policy contain only one exception to the posting requirement: progressive promotions within a predetermined path. No other exceptions exist regarding progressive promotions. Complainant's 1991 promotion is consistent with that policy because he was promoted within a pre-determined career path. Hence, there has been no evidence that PEPCO has promoted anyone *outside* of a pre-determined career path. Second, by making the above argument, Complainant has retreated from his earlier statements that promotions are either (1) competitive or (2) within a pre-determined path. Therefore, the Commission affirms the hearing examiner's ruling on this issue. This finding is based on evidence in the record that the Supervisory Treasurer Position that Complainant alleges he should have been progressively promoted to was not included in any pre-determined career path in the Treasury Management and Analysis Department (Declaration of Michael Sullivan, Declaration of Karen Almquist, Kamerick Deposition). Furthermore, the record supports the finding that no supervisory-level positions, like the Supervisory Treasury Reporting position are within pre-determined career paths. *Id.*

Complainant further excepts to the hearing examiner's finding that he was not similar situated to Carolyn Stanford and Debra Walker who he alleges were promoted outside to supervisory positions through either progressive promotion or from the reorganization exception. The Commission disagrees. In his opposition to the proposed ruling, Complainant fails to identify *any* similarly situated employees that were treated differently by race. In order to be "similarly situated", the Complainant must show that all "relevant aspects of his employment situation were nearly identical to those of the comparators." *Jones v. Tanque*, 131 F. Supp. 2d 220, 224-25 (D.D.C. 2001) *citing* *Holbrook v. Reno*, 196 F.3d 255, 262 (D.C. Cir. 1999). In this case, Ms. Stanford was

progressively promoted within the Analyst career path. Complainant, however, was already at the top of the Accountant career path at the time he sought to be promoted to the Supervisor Treasury Reporting Position, which was not part of any pre-determined career path. Unlike, Ms. Stanford, Complainant was not seeking a progressive promotion within a career path. Therefore, the Complainant cannot be similarly situated to Ms. Stanford.

With regard to Ms. Walker, the Commission agrees with the hearing examiner in that Ms. Walker was promoted to a position to avoid an unintended work reduction. This was not the case with the Complainant because he was not in danger of losing his job.

Failure to Hire

In relation to the dismantling of the Paymaster/Bank Reconciliation Section in 1998, the Respondent determined that the Supervisor Treasury Reporting position should be created because too many employees reported directly to Ms. Almquist. (Kamerick Declaration ¶ 11-12). This position would supervise the Accountants but was not within the accountant career path. (Kamerick Declaration ¶ 12). Around October 1999, Ms. Almquist created a job description for the position and submitted it along with a completed Personnel Requisition Form to PEPCO's Employment Services Department. (Almquist ¶ 18); (Respondent's Exhibits R and S). Subsequently, the Respondent's Employment Services Department contracted with PEPCO's outside consulting firm, the Pittman McLenagan Group, L.C., to establish the minimum requirements and structured interview guide for the Supervisor Treasury Reporting position. (Respondent's Exhibit T). The Respondent posted the position internally on approximately November 11, 1999, and the Washington Post published an advertisement for the position on or about November 21, 1999. (Respondent's Exhibits U and V). PEPCO's Employment Services Department collaborated with Davis Advertising, Inc. to draft and publish the Washington Post advertisement for the Supervisor Treasury Reporting position on or before November 16, 1999. (Sullivan Declaration ¶ 9). The Employment Services Department requested that the advertisement be submitted to the Washington Post on or before November 18, 1999 deadline to insure that the advertisement would be published in the Sunday November 21, 1999 edition of the newspaper. (Sullivan Declaration ¶ 9). The position was posted internally from November 11, 1999 through November 17, 1999. (Respondent's Exhibit Y).

The Complainant applied for the position on November 17, 1999. (Respondent's Exhibit W). He was the only PEPCO employee who applied for the position. (Respondent's Exhibit Y). All other applicants were from outside PEPCO. The Employment Services Department determined that the Complainant met the minimum qualifications for the Supervisor Treasury Reporting position and referred him to attend the Supervisory Assessment Center.² (Respondent's Exhibit X). He attended the Center

² The Complainant asserts that the Respondent violated its Job Posting and Selection Policy by requiring him to attend the Supervisor Assessment Center even though he had supervised other PEPCO employees during his tenure. Even if the Commission agrees with the Complainant on this point, it did not prohibit the

from January 24, 2000 through February 1, 2000 and received the score of "Acceptable". (Respondent's Exhibit X). The interview panel for the position consisted of Ms. Almquist, Director of the Treasury Management & Analysis Department and a Caucasian female, and Ms. Renee Hamilton, a Senior Recruiter with the Employment Services Department and an African-American female. (Hamilton Declaration ¶ 1 and 4); (Almquist ¶ 1). Each interviewer assigned an overall score of "Acceptable" to the Complainant based on his responses to the structured interview questions created by PEPCO's outside consultant. (Hamilton Declaration ¶ 4); (Respondent's Exhibit P). A total of seven candidates were interviewed for the position of Supervisor Treasury Reporting only two of which, Ms. Angelica Moore and Mr. Michael Seibert, received overall scores of "Outstanding" from the interview panel based on the candidates responses to the questions from the structured interview. (Respondent's Exhibit Y). Ms. Almquist decided to offer the position to Ms. Angelica Moore an African-American female. (Respondent's Exhibit Y); (Hamilton Declaration ¶ 3). After Ms. Moore's educational qualifications could not be substantiated the position was offered to Mr. Michael Seibert, a Caucasian male. (Respondent's Exhibits Y and BB). After Mr. Seibert's references were verified, Mr. Sullivan, Manager of Employment Services, offered the Supervisor Treasury Reporting position to Mr. Seibert on June 14, 2000. (Sullivan Declaration ¶ 11-12); (Respondent's Exhibit CC). On June 29, 2000 the Complainant was notified via letter that he was not selected for the Supervisor Treasury Reporting position. (Respondent's Exhibit DD).

In order to establish a *prima facie* of discriminatory failure to hire, the Complainant must show that (1) he is a member of a protected class, (2) he applied for and was qualified for an available position, (3) despite his qualifications he was rejected, and (4) the position remained vacant and the employer continued to seek applicants. *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 802. Once the Complainant makes out a *prima facie* case, the burden shifts to the employer to produce a legitimate non-discriminatory reason for not selecting the Complainant. After the employer provides evidence of a legitimate non-discriminatory reason, the burden shifts back to the Complainant who must prove that the employer's proffered reason is pretext for discrimination. *Id.* at 802; *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-507 (1993).

In his proposed decision, the Chief Hearing Examiner ruled that the Complainant's *prima facie* of discrimination was weakened because the Respondent selected someone within the Complainant's protected class for the position.³ Although the Chief Hearing Examiner found that the Complainant established his *prima facie* case of discrimination, the hearing examiner also found that the Complainant could not show

Complainant from fully participating in the selection process as an eligible and qualified candidate and thus is not material

³ The Chief Hearing Examiner stated, "... this fact does not prohibit the Complainant from establishing a *prima facie* case under the *McDonnell Douglas* frame work. It instead may be relevant in 'assessing the merits of a plaintiff's claim beyond the *prima facie* case, but it is not a factor in the plaintiff's establishment of a *prima facie* case'. *Teneyck v. Omni Shoreham Hotel*, 365 F.3d 1139, 1150 D.C. Cir. 2004); *Stella v. Mineta*, 284 F.3d 135, 145-146 (d.C. Cir. 2002). While this fact does not prohibit the Complainant's claim it strongly weakens it. 'A replacement within the same protected class cuts strongly against any inference of discrimination.' *Murray v. Gilmore*, 406 F.3d 708, 715 (D.C. Cir. 2005).

that the Respondent's proffered legitimate non-discriminatory reason is pre-textual. The Chief Hearing Examiner found that the Complainant could not produce evidence to overcome the fact that numerous decision makers found that he was not the most qualified individual for the position and that someone within the Complainant's protected category was initially selected for the position. See Hamilton Declaration ¶ 3 and 4, Sullivan Declaration ¶ 11 and Respondent's Exhibit Y.

In his exceptions, the Complainant argues that the hearing examiner's findings regarding the interview and selection process were faulty. Specifically, the Complainant argues that the evidence Respondent used in its motion, which the hearing examiner incorporated in his findings, only provided the overall scores of the candidates and did not provide evidence of the individual scores issued by the interview panel. The Complainant further argues that Ms. Almquist, who was half of the interviewing panel, was aware that Complainant filed a discrimination complaint against her. Thus, the Complainant states that Ms. Almquist "may well have issued higher marks to the black female to attempt to show that she had no discriminatory animus."

The Commission rejects this argument and affirms the hearing examiner's findings on this issue. In reviewing the Respondent's Motion for Summary Judgment and accompany attachments, the Commission finds that the Respondent provided to the hearing examiner both the individual and overall scores of Complainant and Mr. Seibert, who was the individual ultimately selected for the Supervisor Treasury Reporting position. In addition, as Respondent points out, the individual scores of Ms. Moore were produced in discovery. At no time did Complainant raise any issues regarding those scores in his opposition to the summary judgment motion. Nevertheless, Ms. Almquist and Ms. Hamilton independently provided identical scores to Ms. Moore. Hence, there is no evidence to demonstrate that Ms. Almquist inflated her scores. See Respondent's Exhibit 10 attached to Opposition to Complainant's Exceptions. Both interviewers assigned an overall rating of "acceptable" to the Complainant. The final candidates received overall ratings of outstanding from the interview panel. Thus, there is no evidence to support any allegations of racism as suggested by the Complainant.⁴

Furthermore, the Commission finds as Respondent suggested that the fact Ms. Almquist served on the interview committee does not *per se* mean that PEPCO's non-discriminatory reason for its selection decision was a pretext for discrimination. As outline in its opposition, Respondent hired Mr. Seibert through a multi-level structured selection process involving numerous decision makers and third parties. At every stage of the selection process, Mr. Seibert was found to be the most qualified candidate for the position.

⁴ In addition, Ms. Almquist testified in her deposition that she promoted an African-American female from position of Treasury Analyst to the position of Senior Treasury Analyst (Almquist Tr. At 12-13) and she denied attending functions presented by black employees, but rather she stated that she did not recall any parties hosted by any of her employees. She recalled attending functions hosted by PEPCO for African-American employees. Thus, Respondent provides additional proof that Ms. Almquist had no discriminatory animus towards Complainant.

Retaliation

In this matter, the Complainant alleges that the Respondent failed to promote him because of his pending complaints of racial discrimination. In order to establish such a claim, the Complainant must establish that (1) he was engaged in a protected activity; (2) the employer took an adverse action against him and (3) a causal relationship exist between the protected activity and the adverse action. *See Arthur Young & Co. v. Sutherland*, 631 A.2d 354, 368 (D.C. 1993).

In its initial summary judgment motion, the Respondent argues that the Complainant cannot show a causal relationship between his protected activity [the pending discrimination complaints filed against Ms. Almquist by the Complainant in March, May and April 1999] and PEPCO's failure to promote the Complainant either through an exception to PEPCO's job posting policy or through the competitive selection process. The Complainant argued that he can show a causal connection because Ms. Almquist knew of Complainant's pending complaints regarding the posting of the job vacancy for Supervisor Treasury Reporting instead of exercising an exception to promote the Complainant to the position. Further, the Complainant argues that he should have been either promoted or selected for the Supervisor Treasury Reporting position because he performed many of the duties that were part of the new position and his prior work experience qualified him for the position.

In his initial decision, the hearing examiner noted that the Complainant admitted that PEPCO's decision to create and post the position of Supervisor Treasury Reporting was made in 1998 prior to any of Complainant's complaints regarding discriminatory treatment by Ms. Almquist. Thus, the decision not to promote someone, including the Complainant, from within PEPCO to the position without having them participate in a competitive selection process was made prior to any of Complainant's complaints. The fact that the position was not actually posted until November of 1999 does not change the fact that the Respondent intended to post the position and thus not exercise any of the exceptions to posting job vacancies in 1998. (Kamerick Declaration ¶ 11); (Respondent's Exhibits U and V).

In his exceptions, the Complainant argues that the Commission misinterpreted the facts and relied on facts that are not supported by substantial evidence. Complainant argued that he does not agree with Respondent that the Position of Supervisory Treasury Reporting was created in 1998. He only agrees that the reorganization of the TM&A Department was occurring in 1998. The position was not created until 1999 after he filed a complaint against Ms. Almquist. Complainant also states that Respondent offers no documentation or reliable evidence to support its contention that a decision was made in 1998 to create and post the position. During 1998, Ms. Almquist consistently promised Mr. Long that his job title would be changed and would be promoted; she never mentioned that a new position was being created. He further states that Ms. Almquist did not create a job description and inform the staff about the position until October 1999. At that point in time, Complainant had already filed his complaints. If the "new" position

was created before then, it had to be created for Complainant who was the logical choice for the position before the complaints were filed.

In response to the exceptions, Respondent argues that Complainant contradicted his statements that he earlier made in his opposition to the summary judgment. Complainant stated "as part of the reorganization that occurred in the TM&A Department in or around 1998, PEPCO, specifically Ms. Almquist, determined that the position of Supervisor Treasury Reporting should be created and posted." (Opposition at 4) (emphasis added). Further, Complainant conceded in his deposition that he did know when the Supervisor Treasury Reporting position was created or who created the position. (Long Tr. Vol. II at 35-36). Respondent further points to the deposition and affidavits of Ms. Almquist and Mr. Kamerick who stated that Ms. Almquist created with the approval of Mr. Kamerick the Supervisor position in 1998, before Complainant's discrimination complaints. Respondent also states that since Complainant was a subordinate to Ms. Almquist, she did not need his input or approval to create the new position. In his own deposition, Complainant does not present any evidence about when the position was created or by whom. (Long Tr. Vol. II at 35-36).

In reviewing the arguments on this issue, the Commission concurs with the hearing examiner's assessment of this issue. The evidence supports the conclusion that the Supervisor Treasury Reporting position was created in 1998 before Mr. Long lodged his discriminatory complaints against Ms. Almquist. Moreover, Complainant cannot present any evidence to the contrary. He himself concedes to the time when the position was created. Thus, based on the foregoing, the Commission finds that the Complainant cannot establish a *prima facie* case of retaliation because the Complainant cannot produce evidence to show a causal connection between the protected activity (discrimination complaints against Ms. Almquist) and the posting of the supervisor Treasury Reporting position.

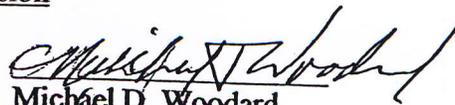
Thus based on the foregoing, the Commission affirms the hearing examiner's proposed decision and order in dismissing the case on the basis that Complainant cannot establish a *prima facie* case of discrimination.

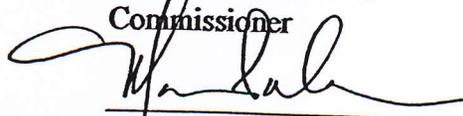
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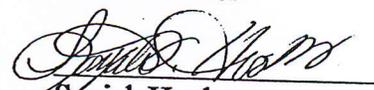
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Michael D. Woodard
Commissioner


Monica Palacio
Commissioner


Sonjah Hooks
Commissioner