

BEFORE THE MISSISSIPPI EMPLOYEE APPEALS BOARD

DONNA M. POWELL

**FILED**

APPELLANT

VS.

**MAR 07 2016**

DOCKET NO. 15-016

MISSISSIPPI DEPARTMENT OF TRANSPORTATION

**EMPLOYEE APPEALS BOARD**

RESPONDENT

**ORDER**

**INTRODUCTION**

The genesis of this long, and at times contentious, appeal to the Mississippi Employee Appeals Board began in 2014. In 2014, the Mississippi legislature authorized the Mississippi Department of Transportation (“MDOT”) to spend \$1.3 million from MDOT’s budget to establish a new career ladder and provide pay increases for MDOT enforcement officers. Once the MDOT received the Mississippi legislature’s authorization, steps were undertaken by the MDOT to modify the career ladder and minimum requirements. Ultimately, the MDOT Human Resource Division forwarded to the Mississippi State Personnel Board (“MSPB”) a new proposed career ladder and new job description for the enforcement positions.

MDOT’s proposed new job description included within it minimum qualifications in the career ladder for the enforcement divisions. The new job description’s minimum qualification career ladder was created with the assistance of the MDOT’s Human Resources Division. Also, in formulating the new career ladder and new job descriptions, MDOT through Chief Willie Huff, consulted with a number of MDOT supervisory officers, including Donna Powell.

The job description for the MDOT - Enforcement Regional Commander position as proposed by the MDOT, as attached to Ms. Divine’s October 29, 2014, email to the MSPB required that applicants have the following minimum requirements:

**(1) Graduation from a standard four-year high school or equivalent (GED) or high school equivalency diploma**

**(2) Thirteen (13) years of experience as a DOT - enforcement officer**

**(3) certification and completion of an accredited Mississippi Law Enforcement Training Academy (verified by the hiring agency) and**

**(4) a valid Federal Motor Carrier Safety Administration certification for North American Standards Courses A & B, Hazardous Material, Cargo Tank and Bulk Packaging.**

The MSPB approved the proposed job description/minimum requirements for the Enforcement Regional Commander position by letter dated December 19, 2014.

Captain Powell submitted an application for the Enforcement Regional Commander position. At the time Captain Powell applied for the Enforcement Regional Commander position, she held the position of Captain in the MDOT Enforcement Division. At that time, Captain Powell had a high school education or the equivalent GED certificate, she had successfully completed the Mississippi Law Enforcement Training Academy, and she had over thirteen years of experience as a DOT Enforcement Officer. In addition, Captain Powell had obtained the Federal Motor Carrier Safety Administration ("FMCSA") certification for North American Standards Courses A & B, and Hazardous Material, but had not been certified in Cargo Tank and Bulk Packaging, a requirement for the Enforcement Regional Commander position. Captain Powell was advised by her supervisors, Hilliard White, and Chief Willie Huff, that she did not meet the minimum requirements for the position because she had not completed the required classes of Cargo Tank or Bulk Packaging.

Following Captain Powell being informed she did not meet the minimum qualifications, a number of emails were exchanged between Chief Huff and Captain Powell. The emails between Chief Huff and Captain Powell bordered on uncivil to each other and the tone of the emails reflects frustration from both Captain Powell and Chief Huff. Ultimately, Captain Powell, in a March 13, 2015, email to Chief Huff stated, "At this point I do not want the promotion, and I know that I would not get it even if I did take the appropriate steps to stop you from proceeding with interviews until the situation could be rectified." On March 19, 2015, Chief Huff at 5:38 p.m. announced, via email, that Captain Ted Dollar had been selected for the Enforcement Regional Commander position. At 7:15 p.m., approximately 1 hour and 37 minutes after Chief Huff announced that Captain Dollar had been provided the promotion, Captain Powell emailed a thirty-one page grievance to her supervisor. In her thirty-one page grievance, Captain Powell stated, "Since the position I applied for had been filled, the only relief possible is a pay raise and salary commensurate with that pay for the promotion." Captain Powell, believing she did not receive a suitable response to her grievance, filed a grievance with the Mississippi Employee Appeals Board. This grievance was filed with the Mississippi Employee Appeals Board on April 17, 2015. In her Mississippi Employee Appeals Board grievance, Captain Powell requested the following:

1. I am requesting that the promotion process be reviewed;
2. I am requesting that I be promoted to the rank of Enforcement Commander, with the commensurate raise, or at least be given the raise I would have been entitled to.

Captain Powell's appeal to the Mississippi Employee Appeals Board did not allege that she was the recipient of discrimination and/or that she was denied the position of Enforcement

Regional Commander because of her race, sex, or any other recognized discriminatory ground.

### **FINDINGS OF FACT**

1. On March 9, 2015, Captain Donna Powell (“Captain Powell”) applied for the position of DOT Enforcement Regional Commander with the MDOT.
2. Along with the application for promotion, Captain Powell attached a letter to the MSPB requesting a substitution or waiver of the job requirements, due to the fact that the job requirements had been changed and she no longer met the minimum qualifications for promotion.
3. Captain Powell’s immediate supervisor, Danada McMurtry, turned the paperwork in to Pam Neely as instructed in the job listing.
4. On March 11, 2015, Powell received an email from Hilliard White (“White”), the Deputy Director of MDOT Enforcement, that stated that she did not meet the qualifications for the position.
5. From March 11, 2015, through March 13, 2015, Captain Powell engaged in an email exchange with both White and Willie Huff (“Huff”) regarding the decision to not advance her application for consideration of promotion to MDOT Enforcement Regional Commander.
6. On March 19, 2015, MDOT conducted interviews for the position in question. Five (5) individuals interviewed. The position was announced as filled by MDOT late in the afternoon/early evening of March 19, 2015, at approximately 5:38 p.m.
7. Captain Powell has been employed with the MDOT since March 4, 1990. Currently, and at all relevant times, Powell held the rank of Captain, or DOT Enforcement Captain Supervisor, as it is officially titled with the MSPB.

8. At the time Captain Powell applied for the promotion of DOT Enforcement Regional Commander, Captain Powell had been with the MDOT for approximately twenty-five (25) years.

9. Captain Powell currently serves MDOT as a Professional Development officer, helping to facilitate and coordinate training.

10. Captain Powell has a Bachelor's Degree in physical education. Captain Powell taught middle school for four (4) years prior to her employment with the MDOT.

11. Until 2007, Captain Powell was a firearms instructor for the MDOT.

12. All of the current Field Training Officers ("FTOs") are certified in all five (5) of the FMCSA classes required as minimum qualification for promotion to any position that requires a posting and interview process.

13. At the time the Enforcement Regional Commander MDOT position was open for the submission of application, Captain Powell had not been certified in the Cargo Tank class and the Other Bulk Packaging class.

14. When Captain Powell applied for the Enforcement Regional Commander position, the Cargo Tank class had only been offered four (4) times since 2011. The Other Bulk Packaging class had only been offered three (3) times since 2012.

15. There were approximately 180 officers employed by the MDOT, as of the date of Captain Powell's grievance. Of those employees, only forty-one (41) had been certified in the Cargo Tank and the Other Bulk Packaging classes. Of those forty-one (41), only eighteen (18) met all of the other requirements for promotion to the position of MDOT Enforcement Regional Commander.

16. Captain Powell did not take the Cargo Tank class in March, 2014.
17. Captain Powell did not attend the March, 2014, Cargo Tank class because she was requested to take a different training and development class.
18. The Other Bulk Packaging class was offered in February, 2015. Captain Powell did not attend the Other Bulk Packaging class because she had not taken and completed the Cargo Tank class.
19. Willie Huff advised MDOT employees, by a January 6, 2015, email, that the job descriptions for the non-supervisory positions, specifically DOT Enforcement Officer IV and DOT Enforcement Officer V, were being modified to require certification in all five (5) federal classes.
20. Prior to Huff advising MDOT employees of the changed requirement for DOT Enforcement Officer V, he sought input from a number of MDOT employees, including Captain Powell.
21. There was no notification that the job description for the DOT Enforcement Regional Commander had changed to require certification in the five (5) federal classes, until March 4, 2015, when Willie Huff sent out an email that that position was open.
22. There are twenty-six (26) employees with the years of employment with the MDOT and the education required for supervisory positions, but without the required classes. Of those employees, all twenty-six (26) are over the age of forty (40).
23. Ryan Beard, Director of Human Capital Core Process of MSPB, testified that a committee for the MSPB reviews proposed job description changes to make sure they do not discriminate against protected classes.

24. The MSPB committee does not review the particulars of individual employees, but rather, depends upon the information submitted by the agency representative.

25. The modifications to the job descriptions for Commander Enforcement Division excluded a number of MDOT's senior officers from being eligible for the promotion.

26. In its formation of the modified minimum requirements for the Enforcement Regional Commander position, MDOT had to start "somewhere" in formulating the requirements.

27. There are limited qualified officers within Mississippi to teach the FMCSA classes, and MDPS is required to request classes from the National Training Center of the Federal Motor Carrier Safety Administration. Scheduling for the FMCSA depends upon the availability of instructors from out of state.

28. For the position that is the subject of Captain Powell's grievance, eight (8) people attempted to apply. Two of those individuals, James Burns and Donna Powell, were denied, due to the fact that they had not completed all five (5) FMCSA classes. One individual, Ricky Higginbottom, was denied because he did not have the minimum years of experience with MDOT.

29. Five (5) individuals were interviewed for this position. Mark Hendrix did not submit his application until the deadline for applying had passed. Hendrix was allowed to interview for the position.

30. Policy number 4.3.4 of *The Mississippi State Personnel Board Policy and Procedures Manual* does not allow for the substitution of education or experience for certification or licensure.

31. In 2014, the Mississippi legislature authorized MDOT to spend \$1.3 million from MDOT's budget to establish a new career ladder and provide pay increases for MDOT.

32. MDOT's proposed new job description included within it minimum qualifications in the career ladder for the enforcement divisions.

33. On October 29, 2014, Anne Divine, the Assistant Human Resource Director for the MDOT, forwarded the proposed modification to the job description of MDOT Enforcement Regional Commander position to the MSPB for consideration.

34. The minimum requirements/job description for the MDOT - Enforcement Regional Commander position as proposed by the MDOT set forth the following:

(1) Education: graduation from a standard four year high school or equivalent (GED) or high school equivalency diploma,

(2) Experience: 13 years of experience as a DOT - enforcement officer,

(3) Certification: completion of an accredited Mississippi law enforcement training academy (verified by the hiring agency),

(4) must have and maintain a valid federal motor carrier safety administration certification from North American Standards Course A and B, hazardous materials, cargo tank and bulk packaging.

35. At the time Captain Powell applied for the Enforcement Regional Commander position, she met the minimum requirements of having a high school education or the equivalent GED certificate.

36. Captain Powell had successfully completed the Mississippi Law Enforcement Training Academy at the same time she applied for the promotion.

37. Captain Powell had over thirteen years of experience as a DOT Enforcement Officer. In addition, Captain Powell had completed the Federal Motor Carrier Safety Administration certification for North American standard for courses A and B, and hazardous material, but had not completed certification in Cargo Tank and Bulk Packaging.

38. Captain Powell was advised by her supervisor, including Chief Willie Huff, that she did not meet the minimum requirements for the position because she had not completed the Cargo Tank class or the Bulk Packaging class.

39. By email dated March 13, 2015, Captain Powell advised Chief Huff "I do not want the promotion, and I know that I would not get it even if I did take the appropriate steps to stop you from proceeding with interviews until the situation could be rectified."

40. Captain Powell's statement to Chief Huff that "I do not want the promotion, and I know that I would not get it even if I did take the appropriate steps to stop you from proceeding with interviews until the situation could be rectified" is an admission by Captain Powell that she, in fact, did not want the position of the Enforcement Regional Commander.

41. Captain Powell's admission to Chief Huff that she did not want the Enforcement Regional Commander position is an estoppel to the relief requested in her appeal to the Mississippi Employee Appeals Board.

42. Chief Willie Huff is a white male over forty years of age.

43. Captain Powell's appeal to the Mississippi Employee Appeals Board did not allege that she was the recipient of discrimination and/or that she was denied the position of Enforcement Regional Commander because of her race, sex, or any other recognized discriminatory reason.

44. The MDOT/Chief White would have stopped the March, 2015, interview process for the Enforcement Regional Commander promotion if Captain Powell had filed a grievance during the time of the interview process and before Captain Dollar was promoted.

45. On March 19, 2015, at approximately 7:15 p.m. Captain Powell submitted a thirty-one (31) page grievance to her supervisor grieving the modified minimum requirements for Enforcement Regional Commander and that she was unable to obtain certification in the two FMCSA classes. Captain Powell's thirty-one page grievance did not allege she was the recipient of age, sex or other discrimination.

### CONCLUSIONS OF LAW

Captain Powell has the burden of proof in this matter. *See, Mississippi State Personnel Board Policy and Procedures Manual*, effective date 7/1/2015, Chapter 10, Section 20.B. Also, *see Richmond v. Mississippi Department of Human Services*, 745 So. 2d 254 (Miss. 1999). In *Richmond* the court stated:

The statute and administrative regulations clearly place the burden of persuasion on the aggrieved employee to demonstrate that the reasons given are not true. Rule 17, Administrative Rules of the Mississippi Employee Appeals Board; Miss. Code Ann. § 25-9-127 (1972). ... This is not mere semantics. Under our scheme, in a nutshell, ties go to the appointing authority. That is, unless the employee carries the burden of persuasion that the alleged conduct did not occur, the employee has no right to have the employment decision overturned. *Mississippi Employment Security Commission v. Collins*, 629 So. 2d 576, 580 (Miss. 1993); Miss. Code Ann. § 25-9-127.

Having considered all of the testimony of the witnesses in this case, having considered all the exhibits introduced into evidence, having evaluated the credibility of all witnesses, and after having drawn certain inferences from the testimony of witnesses and the exhibits introduced into

evidence, this tribunal finds as a fact that Captain Powell did not meet her burden of proof that the MDOT improperly denied her the position of MDOT Enforcement Regional Commander in March, 2015. This tribunal further finds that the MDOT, in modifying the minimum requirements and job description for the Enforcement Regional Commander position, did not engage in discriminatory conduct toward Captain Powell. The reasons for this tribunal's decision follow.

While Captain Powell met a substantial portion of the modified experience/educational requirements for the Enforcement Regional Commander position, she did not meet two of the requirements as required by the MSPB. Specifically, Captain Powell did not have the certification for the Federal Motor Carrier Safety Administration and Cargo Tank and Bulk Packaging. While the MSPB can, under certain circumstances, waive certain job or education requirements, it may not waive certification requirements. Specifically, *The Mississippi State Personnel Board Policy and Procedures Manual* Section 4.3.4(a) states:

There shall be no consideration given to the submission of equivalent education/training or experience where relevant licensing, certification or similar requirements, or where state or federal statutes or regulatory guidelines preclude evaluations on this alternative basis. (Emphasis added)

*See, Mississippi State Personnel Board Policy and Procedures Manual* Section 4.3.4(a).

In her Brief, Captain Powell attempts to evade the effect of *The Mississippi State Personnel Board Policy and Procedures Manual* Section 4.3.4(a) by contending that the effect of the new requirements for the MDOT Enforcement Regional Commander position, as approved by the MSPB in December, 2014, had a discriminatory effect on her or was unfair because she had been unable in the past to take the two classes she had not completed. While it is true that a

number of officers over the age of forty were affected by the modifications, as discussed, *infra*, that fact falls short of proving age discrimination.

A review of Captain Powell's appeal to the Mississippi Employee Appeals Board reflects that Captain Powell did not allege in her appeal that she was the recipient of discriminatory actions by the MDOT or the MSPB. Further, in Captain Powell's thirty-one page grievance to her supervisor, she did not allege that the modification to the Regional Enforcement Commander minimum requirements was discriminatory or that discrimination was, in any way, the cause in fact of her not being allowed to interview. This fact undercuts any claim by Captain Powell that she was discriminated against.

In addition, throughout this matter, the record will reflect that the undersigned hearing officer specifically asked if Captain Powell was alleging that she was the recipient of discrimination. No affirmative answer was provided to that question. Captain Powell never requested she be allowed to amend her appeal to the Mississippi Employee Appeals Board to allege that discrimination was a ground for why the MDOT modified the Enforcement Regional Commander minimum requirements and why she was not allowed to interview for the position.

Captain Powell's failure to specifically allege discrimination in her appeal, or her failure to move to amend her appeal to bring to MDOT's and this tribunal's attention that she contended she was the recipient of age or sex discrimination was a waiver by Captain Powell of any discrimination claim. While it is true that during closing arguments Captain Powell's attorney, in response to a question by this tribunal, stated that even though MDOT may not have intended to discriminate that was the ultimate effect. As counsel for MDOT pointed out in his objection to Captain Powell's discrimination argument, MDOT's proof and defenses would have been

different had Captain Powell alleged discrimination in a timely fashion. Based on these facts, this tribunal finds that Captain Powell did not properly allege that she was the recipient of discrimination and, therefore, that issue is not properly before this tribunal. *See*, 10.6(A)(3) of the *Mississippi State Personnel Board Policy and Procedures Manual*.

Even if Captain Powell had properly alleged discrimination in her Mississippi Employee Appeals Board appeal, based on the record, this tribunal finds as a fact that she did not meet her burden of proof that the reason she was denied the opportunity to attend the Cargo Tank class, the Bulk Packaging class, or that the MDOT modified the job description for the Enforcement Regional Commander position was based in whole, or in part, on age, sex, or some other discriminatory reason.

While Captain Powell is a member of a protected class, over forty years of age, did not receive the promotion, and a white male received the promotion, the MDOT overcame any presumption of discrimination that may have occurred by providing a number of non-pretextual reasons for its development of the new modified job description which was approved by the MSPB December 19, 2014. These non-pretextual reasons include, but are not necessarily limited to, the following:

- (1) The FMCSA certification classes (bulk and cargo) had to be conducted by the Mississippi Highway Patrol Officers or agents from other state highway patrol had to be brought from out of state to provide the training. This limited the number of classes that could be provided to all MDOT employees, not just female MDOT officers or those officers over the age of forty.

(2) Male candidates, as well as the female candidates, were denied the opportunity to be considered for the 2015 Enforcement Regional Commander promotion because they had not completed the five certifications. Specifically, Captain James Burns, as Captain Powell, had the required number of years and submitted an application for the promotion, but he did not have the required five certifications. Captain Burns was over forty years of age and had been offered the opportunity to take the FMCSA classes, but had rejected those opportunities because certification did not increase his salary.

(3) Enforcement Field Training Officers were given priority over other MDOT officers to receive training for the five required FMCSA classes because the field training officers were needed to instruct other enforcement officers. Captain Powell agreed with MDOT's position that field training officers should be given priority to attend the classes over herself and similar situated officers.

(4) There were approximately 169 enforcement officers with the MDOT during relevant times. Such a large number of officers would make it impractical, if not impossible, for the MDOT to be sure all male and female officers, including those over forty years of age, had completed the five FMCSA classes prior to the modification of the minimum qualification requirements as set forth in the MSPB's December 19, 2014, email to the MDOT.

Captain Powell failed to meet her burden of proof that the MDOT, in its modification of the minimum requirements and experience for the Enforcement Regional Commander position, made the changes to intentionally discriminate against her because of her race, sex, or some other discriminatory reason. The law does not impose liability against an employer for employment decisions absent an intention to discriminate. As noted by the United States Supreme Court, the

party alleging discrimination is required to prove that an agency or employer took an intentional act to intentionally discriminate against them before a discriminatory claim is viable. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742 (1993). *See also, Reeves v. Sanderson Plumbing Products, Inc.*, 530. U.S. 133 (2000) holding “The **ultimate question** is whether the employer intentionally discriminated . . . . In other words, ‘[i]t is not enough . . . to dis believe the employer; the factfinder must believe the plaintiff’s explanation of intentional discrimination.’” (Emphasis added); *Guerra v. United Parcel Service, Inc.*, 250 F.3d 739 (2001).

This tribunal, having considered all the evidence, finds that neither the reasons for the modification of the job description or the job description in its final modified form was done intentionally to discriminate against Captain Powell and MDOT officers over forty years of age or over, or for any other discriminatory reason. While this tribunal might well have taken a different course in modifying the job description for Enforcement Regional Commander, this tribunal cannot say after evaluating the testimony of all witnesses, specifically that of Chief Willie Huff – who himself is over the age of forty – modified the job description to intentionally exclude Captain Powell or other MDOT officers over forty years of age, some of which he had worked with for many years without any apparent significant conflicts.

Finally, this tribunal also finds as a fact that Captain Powell waived her right to seek the remedy she now requests from the Mississippi Employee Appeals Board. Captain Powell, in her email to Chief Huff on March 13, stated “At this point I do not want the promotion and I know that I will not get it even if I did take the appropriate steps to stop you from proceeding with interviews until this situation could be rectified.” (Emphasis added)

This tribunal considers Captain Powell's statement as an admission that she did not want the job and she is now estopped to claim she should receive the relief sought in her appeal. This tribunal also notes that Captain Powell, in her March 13, 2015, email to Chief Huff, stated she believed she had available to her "appropriate steps to stop [MDOT] from proceeding with interviews until the situation could be rectified." Notwithstanding her belief she could stop the interview process, Captain Powell did not undertake steps to do so. Chief Huff testified that he would have stopped the interview process had Captain Powell filed a grievance.

The inference this tribunal draws from Captain Powell's failure to undertake whatever steps she believed would prevent the interviews from proceeding undercuts her claim that she believed she was the recipient of intentional sex or intentional age discrimination. That fact, coupled with the fact Captain Powell did not, in her thirty-one page grievance to her supervisor, mention or suggest that she had not been provided the opportunity to take the Cargo Tank and Bulk Packaging classes because of her sex or age or that she was not allowed to interview for the 2015 Enforcement Regional Commander position because of a discriminatory reason, in this tribunal's view, further indicates Captain Powell did not believe she was the recipient of discrimination.

For the foregoing reasons, judgment is entered for the MDOT. Captain Powell's appeal is dismissed, with prejudice.

SO ORDERED, THIS THE 7 DAY OF March, 2016.

MISSISSIPPI EMPLOYEE APPEALS BOARD

By:

  
MICHAEL N. WATTS  
Chief Hearing Officer