

BEFORE THE MISSISSIPPI EMPLOYEE APPEALS BOARD

PETER T. CLINTON

**FILED**  
**DEC 10 2015**

APPELLANT

VS.

**EMPLOYEE APPEALS BOARD**

DOCKET NO.: 14-032

MISSISSIPPI DEPARTMENT OF PUBLIC SAFETY

RESPONDENT

**FULL BOARD ORDER**

Peter T. Clinton (hereafter “Clinton”), an investigator employed by the Mississippi Department of Public Safety (“MDPS”) filed a grievance alleging he should have been promoted from the Enforcement Captain’s promotional list to Captain in the Mississippi Bureau of Investigation (“MBI”). Clinton filed his grievance on July 23, 2014. Clinton alleged racial and gender discrimination in his grievance. Several hearings have been held in this cause and several orders have been issued. This tribunal affirms the hearing officer’s order dated October 13, 2015.

Clinton asked MDPS to unilaterally promote him to MBI Captain without taking the MBI Captain’s examination. Later after the filing of his grievance, he sat for the merit promotion test for MBI Captain. He was promoted to the position of Captain of the northern MBI region prior to a hearing on the merits of this cause.

The Commissioner of the Mississippi Department of Public Safety has the authority to organize the offices comprising the Department of Public Safety, which include the Mississippi Highway Safety Patrol (“MHP”) and the Mississippi Bureau of Investigations (MBI) as

subcomponents of MDPS. *Mississippi Code Annotated Section 45-1-2*. “When not otherwise specifically provided, the Commissioner is authorized to make and promulgate reasonable rules and regulations to be coordinated and to carry out general provisions of the Highway Safety Patrol and the Driver’s License Law of 1938.” *Mississippi Code Annotated Section 45-1-3*. The Commissioner has broad discretionary authority by statute. Policies and procedures of the Mississippi Department of Public Safety have been contained in what is commonly referred to as the “Black Book.” The Black Book contains information concerning promotions, discipline, attendance, dress, pursuit policy and many other matters.

General Order 22/01 is the merit promotion policy of the Department of Public Safety. It is designed to establish a testing mechanism whereby eligible candidates may take a written assessment test designed to promote to supervisory positions those candidates that are most capable, without unfair bias. The General Order was amended in 2012. At that time, a methodology for merit promotion testing was inserted. In 2014, the position of MBI Captain was added as another position that would be tested by the Mississippi Department of Public Safety. This is the position that is the subject of Clinton’s appeal.

Clinton contended in his grievance and subsequent hearings that even though he did not take a Captain’s test for MBI in 2013 that he should have been promoted to a permanent MBI Captain position. Furthermore, Clinton claimed that Colonel Donnell Berry, an African-American male of the Mississippi Highway Patrol, who is over forty years of age, discriminated against him by not granting his request. He also levied the same accusations at MDPS Commissioner Albert Santa Cruz.

## 1. PETER CLINTON'S ALLEGED DISCRIMINATION CLAIM

Clinton's July 23, 2014 grievance filed with the Mississippi Employee Appeals Board (MEAB) alleges he should have been promoted from the Enforcement Captain's promotion list to Captain in the Mississippi Bureau of Investigation (MBI). Mr. Clinton requested that he be promoted to the rank of Captain MBI northern region and a reasonable monetary compensation for the alleged discrimination and emotional distress. He also requested the test scores and detailed calculations for the 2013 exams and an amendment to General Order 22/01 that outlines the length of time a candidate will remain on the merit promotion list.

It is not within the authority of the MEAB to grant monetary compensation for discrimination or emotional distress, or to amend General Order 22/01. Therefore, the hearing officer correctly dismissed those portions of Clinton's grievance. We affirm the dismissal of those portions of Clinton's original grievance.

Clinton makes broad allegations of sex and race discrimination based on a number of alleged facts. He focuses mainly on the fact that a white female, Lori Smith ("Smith"), was promoted from the position of Master Sergeant Enforcement to the position of MBI Lieutenant, Troop C. This occurred even though Smith had never worked at MBI before the promotion and did not test for the MBI Lieutenant position. Clinton indicated that he did not think Smith was qualified to hold the position of MBI Lieutenant.

The evidence indicated that no one was chosen over Clinton, that Smith was not chosen over Clinton for the position of MBI Lieutenant from an Enforcement Captain's list. Clinton had already been promoted to the position of MBI Lieutenant. Lori Smith was never promoted to MBI Captain. Neither Smith nor Clinton requested or were ever placed as interim Captains at

MBI. Clinton made a request to be placed in a permanent MBI Captain's position after he was made aware that a test would be administered for the same position. It appears that he requested a unilateral promotion to the position without having to sit for the test which he knew was being developed. Smith and Clinton both took the Captain Enforcement test in April, 2013. There were sixteen (16) MHP officers who tested for MHP Captain Enforcement in 2013. Smith scored 88.80 and was seventh (7<sup>th</sup>) on the list, and Clinton scored 85.23 and was eleventh (11<sup>th</sup>) on the list.

Clinton was listed on the MBI Lieutenant promotion list, along with seven other officers. However, Smith did not test for the MBI Lieutenant or for any position with the MBI. She was not listed with Clinton and the seven other officers identified on the MBI Lieutenant promotion list. In May 2013, Clinton was promoted to Lieutenant with the MBI and stationed with the MBI, Troop E.

Smith was transferred from the Captain Enforcement list to MBI Lieutenant, Troop C in June, 2013. Smith was transferred from the Captain Enforcement list to the MBI Lieutenant list because all the officers on the MBI Lieutenant list and Captain Enforcement list were exhausted. Clinton makes the argument that the MHP Captain Enforcement list was not exhausted at the time Smith was selected as the person to be assigned to the MBI Lieutenant position. We affirm the hearing officer's finding that Lori Smith was assigned to the MBI Lieutenant position only after all other officers listed on both the MBI Lieutenant list and the Captain Enforcement list either refused to be assigned to MBI, Troop C or because all officers before her on the MBI Lieutenant promotion list and Captain promotion list were exhausted and Smith was the next candidate on the list. We also affirm the hearing officer's finding of fact that Smith was not assigned to the MBI Lieutenant position because of her sex or because of her race. We find that

Smith did not apply to test for the MBI Lieutenant position, and she never tested for the MBI Lieutenant position. The MBI Lieutenant position was a merit position and Smith did not test for that position. Therefore, she was not properly appointed to the MBI Lieutenant position under section 22/01.02 of General Order 22/01, effective 02/15/13. This finding that neither General Orders 22/01 or 22/02 authorize the appointment of Smith to the MBI Lieutenant position does not provide a factual or legal basis to support Clinton's claims of discrimination. We find that MDPS did not follow its orders properly in appointing Smith, but this error does not prove Clinton's claims of discrimination.

The United States Supreme Court case of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973) states "under this framework the plaintiff must create a presumption of discrimination by making a prima facie case of discrimination." The burden then shifts to the defendant to articulate a non-discriminatory reason. If the defendant can articulate a non-discriminatory reason, the burden shifts back to the plaintiff who must show "a new level of specificity" that the explanation is merely a pretext for discrimination. *Thornberg v. Columbus and Greenville Railroad Company*, 760 F.2d 633, 639 (5th Cir. 1985). In the alternative, the appellant may show that "the employer's reason while true, is not the only reason for its conduct and another motivated factor is the plaintiff's protective characteristic." Clinton, in order to establish a prima facie case of discrimination or to prove a prima facie case of discrimination had to prove, by a preponderance of the evidence 1) that he belongs to a protected class; 2) that he applied for and was qualified for a position for which applicants were being sought; 3) that he was rejected; and 4) that a person outside his protected class was hired for the position. *Mitchell v. City of Tupelo*, No.1:13CV00049-SA-DAS, 2014 WL 4540924 (N.D. Miss, Sept. 11, 2014) and *Burrell v. Dr Pepper/Seven Up Bottling Grp., Inc.*, 482 F.3d 408, 412 (5<sup>th</sup> Cir. 2007).

Clinton is a member of a protected class, but his claim fails beyond that fact. He did ask Colonel Donnell Berry and Commissioner Santa Cruz to promote him from MBI Lieutenant to MBI Captain and indicated that he would file a grievance if his request was not granted. It is also well established that he did not receive the position of MBI Captain when he asked. The MDPS did give him the opportunity to test for the position, and he was later awarded the same position at the conclusion of the merit promotion test in 2014. Obviously, no person outside of his protected class was hired for the position. Clinton was hired for the position after participating in the merit test in the fall of 2014.

Clinton did establish that he is within a protected class because he is a black male. However, Clinton could not meet his burden of proof that he was “qualified for a position for which applicants were being sought.” The reason for this is that during 2013 or prior to September 2014, MDPS was not seeking applications for the position of Captain with the MBI. Clinton was not rejected for the MBI Captain position, nor was a person outside of Mr. Clinton’s protective class selected instead of Clinton and promoted to MBI Captain, and for those reasons Clinton could not establish all of the four (4) requirements for a prima facie case of discrimination. Furthermore, if Clinton had met his burden of proof or established a prima facie case of racial discrimination or sex discrimination, MDPS has set forth a non-pretextual, non-discriminatory reason for Mr. Clinton’s failure to be promoted in 2013 to Captain of the MBI. MDPS did not believe that a Captain’s slot was available to be filled at that time. Colonel Berry, an African American male, testified that the Captain position with the MBI had been eliminated by a previous administration and had been replaced with the position of Major. This tribunal finds the testimony of Colonel Berry to be credible and that no Captain position was available for Clinton or anyone else. There was no position for Clinton to be promoted into in 2013 and no

test was given in 2013 for the Captain's position Clinton was seeking. Clinton attempted to establish by testimony that the MBI Captain position had not been eliminated, and he was able to raise some doubt about whether the position had been eliminated or not. However, this tribunal finds after considering all the evidence in total, that MDPS was operating during the time period in question under the belief that the Captain position had been eliminated and was not available for anyone to be placed in that position. Clinton did not meet his burden of proof in establishing that the MBI Captain position was not eliminated. The evidence presented at the hearing established that MDPS had eliminated that position, and it was not available to Clinton or anyone else at that time period.

MDPS did make a mistake in assigning Lori Smith to the Lieutenant position in the MBI. However, we find that Clinton's allegations that this error was sufficient to prove age and racial discrimination are not supported by the evidence. We find that MDPS was in error assigning Lori Smith to the position with the MBI. However, this fact does not establish that Clinton was discriminated against based on age and gender. Clinton must prove discrimination by a preponderance of the evidence and the proof must show intentional discrimination. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742 (1993). Clinton failed to meet his burden of proof that MDPS, through Colonel Berry, an African American male, discriminated against Clinton or engaged in intentional discrimination against Clinton. We affirm the hearing officer's finding in favor of MDPS on Clinton's claim of sex and race discrimination.

## 2. CLINTON'S TEST SCORE

Peter Clinton did not score higher than Walter Duncan (“Duncan”) on the Captain's Enforcement test. This tribunal held on February 4, 2015, that Peter Clinton scored higher than Walter Duncan on the Captain's Enforcement test. The reason for this error in the record was confusion surrounding Exhibit 20, which was part of a string of emails provided to Clinton and to the MEAB at the conclusion of a telephonic hearing on the Respondent’s Motion to Dismiss by counsel for MDPS. Counsel for MDPS erroneously represented that Clinton's Captain's score was 87.5, as referenced by a raw test score, which included a breakdown of component scores for the test. This score would have resulted in Clinton scoring higher than Duncan, who scored 86.32 on the Captain’s test in 2013. Counsel for MDPS clarified in the email string his error concerning information he had provided by email to Clinton. Counsel properly noted that the score was indeed Clinton’s Lieutenant's raw score and not his Captain's score. This matter concerning the email string and Exhibit 20 was reopened to address this point of confusion. This tribunal had authority to reopen the record to clarify this issue. *Herring Gas Company v. Mississippi Employment Security Commission*, 944 So.2d 943 (2006).

Dr. Brian Bellenger from Centrus Personnel Solutions testified via video conference on May 15, 2015, as to the issue concerning Peter Clinton’s and Walter Duncan’s scores on the Captain’s Enforcement test. Centrus Personnel Solutions is the official testing company employed by MDPS to develop and administer merit promotion tests. Centrus developed both the 2013 and 2014 merit promotion tests.

Dr. Bellenger in his testimony indicated that Clinton scored 85.23 on the Captain’s Enforcement test and that Duncan scored 86.32. Dr. Bellenger could not identify or recognize

Exhibit 20. His testimony did indicate that the score breakdown as referenced on Exhibit 20 on the unmarked document approximated Clinton's Lieutenant score. The only difference was that the score appeared to be rounded up slightly to 87.5 as opposed to 87.46 listed on the official Lieutenant merit promotion list.

We find Dr. Bellenger's testimony to be credible as he was a completely independent witness and did not have "a dog in the fight." He testified to the best of his knowledge and, in this tribunal's opinion, truthfully concerning the fact that Clinton did not score higher than Duncan on the Captain's Enforcement test. It is unfortunate that the record had to be reopened in this matter and that so much was made of the issue surrounding Exhibit 20. However, this tribunal went the extra mile in order to clarify this issue with Dr. Bellenger's testimony and to ascertain exactly what Clinton's score on the Captain's Enforcement test was, as well as Duncan's score on the Captain's Enforcement test. This tribunal finds that based on the testimony of Dr. Bellenger, Clinton scored 85.23 on the Captain's Enforcement test and Duncan scored 86.32. When rounded, Clinton's score on the Captain's Enforcement score was 85.25. When rounded, Duncan's Captain's Enforcement score was 86.50.

It is the finding of this tribunal that the score of 87.5 on Exhibit 20 is Mr. Clinton's score for the MBI Lieutenant's position. When rounded to the next whole number, Mr. Clinton's MBI Lieutenant's score is 87.5 – as reflected on Exhibit 20.

This tribunal finds that Clinton had the burden to prove that he scored higher than Walter Duncan on the 2013 Captain's Enforcement test and that he did not meet his burden of proof. For the reasons set forth in this order, this tribunal affirms the hearing officer's decision dated October 15, 2015 that found that Peter Clinton scored 85.23 on the 2013 Captain's Enforcement test and that score was rounded to 85.25. Walter Duncan scored 86.32 on the 2013 Captain's

Enforcement test and was rounded to 86.50. The hearing officer's judgment in favor of the Mississippi Department of Public Safety on Clinton's appeal is affirmed. Clinton's appeal is dismissed with prejudice.

So ORDERED, on this the 9<sup>th</sup> day of December, 2015.

MISSISSIPPI EMPLOYEE APPEALS BOARD,  
EN BANC

A handwritten signature in blue ink, appearing to read "Grant M. Fox", written over a horizontal line.

Grant M. Fox, Hearing Officer