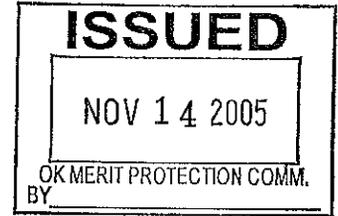


OKLAHOMA MERIT PROTECTION COMMISSION  
STATE OF OKLAHOMA



TERRY L. CODY, )  
Appellant )  
vs. ) CASE NO. MPC 05-168  
DEPARTMENT OF CORRECTIONS, )  
and STEVE YOUNG, )  
Appellees. )

**FINAL ORDER**

Hearing on this matter was held before the undersigned duly appointed Administrative Law Judge on November 2, 2005 at the Merit Protection Commission offices in Oklahoma City, Oklahoma. Appellant, Terry L. Cody, appeared in person and was represented by Linda Samuel-Jaha, Esq. Appellee, Department of Corrections (hereinafter referred to as "DOC"), appeared by and through its Counsel Michelle Miniotta, Assistant General Counsel, and agency representative Warden Lenora Jordan, Warden of the Oklahoma State Reformatory (hereinafter referred to as "OSR") in Granite. Appellee, Steve Young was present and represented by Amanda Salisbury, Esq.

Appellant, a correctional officer at Oklahoma State Reformatory in Granite, Oklahoma, filed this grievance after he applied for the posted position of Correctional Security Manager II (Captain) and another candidate, younger than Appellant, was selected. Appellant alleges that the agency violated 74 O.S. §954, prohibiting

discrimination on the basis of age, when it selected an applicant under 40 years of age for promotion over Appellant, who is over forty.

Whereupon, the sworn testimony of witnesses for both Appellee and Appellant was presented, along with Exhibits, which were admitted and are incorporated herein and made a part hereof. Accordingly, after careful consideration of all evidence, testimony, and exhibits, the undersigned Administrative Law Judge issues the following findings of fact, conclusions of law, and order.

#### **FINDINGS OF FACT**

Appellant, Terry L. Cody is a Lieutenant at Oklahoma State Reformatory (hereinafter "OSR"), and has been employed with DOC for twenty (20) years. Appellant was 45 years old at the time he applied for the posted vacancy announcement for a Correctional Security Manager, Level II (Captain) position on October 7, 2004. Chief William Monday appointed an initial interview panel comprised of three members, all from facilities other than OSR. Qualified applicants were interviewed by the panel and ranked based on their answers to six predetermined interview questions. The questions had assigned scores from 0 to 5 points each and an applicant could score a maximum of 30 points per interviewer or a combined maximum of 90 points from all three interviewers. After adding the interviewers' scores, the three highest scoring candidates were selected for a second round of interviews. Appellant received the highest score (70); Appellee Stephen Young received the second highest score (69); applicant Bobby Goodson received the third highest score (68).

A second round of interviews, with a new set of six interview questions, was held before Chief of Security William Monday and Deputy Warden Phillip Brandon. The three candidates were again scored and ranked based on their answers. Appellant scored a total of 40 points – 20 from Deputy Warden Brandon and 20 from Chief Monday (including one non-discretionary point by each scorer for a "meets standards" PMP rating in 2004). Appellant was the third highest scorer of the three. The high scorer, Appellee Stephen Young, scored a total of 47 points – 22 from Deputy Warden Brandon and 25 from Security Chief Monday (including two non-discretionary points by each scorer for a "exceeds standards" PMP rating in 2004). As the high scorer, Stephen Young was selected for promotion and was appointed the rank of Captain (Correctional Security Manager II) effective November 1, 2004.

Appellant's date of birth is April 7, 1959, and at the time the position was announced Appellant was 45 years old. Appellee Young's birthdate is June 7, 1971, and at the time the position was announced he was 33 years old. The sole issue before this Administrative Law Judge is whether Appellee Young's selection and Appellant's non-selection for the promotion to Correctional Security Manager II was because of age, in violation of 74 O.S. §954.

The uncontroverted facts indicate that Appellant received the highest number of points of all applicants during the first round of interviews conducted by three interviewers from outside OSR. During the second round of interviews, conducted by OSR Chief of Security William Monday and OSR Deputy Warden Phillip Brandon, Appellant scored lowest of the three top interviewees from the first round. Appellant

was 45, the selected individual, Appellee Young, was 33. These facts state a *prima facie* case for age discrimination. However, the analysis cannot stop here.

Appellee DOC points out that both interviewers in round two scored Appellee Young higher than Appellant based on their answers to the six interview questions asked all three applicants. Deputy Warden Brandon scored both applicants the same number of points on all questions except question number 4, where he scored Appellant "3 – satisfactory knowledge" and scored Appellee Young "4 – satisfactory knowledge +". (Joint Exhibits 15 and 16) During his testimony Deputy Warden Brandon could not specifically recall what Appellee Young said that caused him to be scored higher, but believed his answer to be more expansive than the one given by Appellant.

Chief of Security (Major) Monday scored Appellee Young one point higher ("4 – satisfactory knowledge +") than Appellant ("3 – satisfactory knowledge") on four of the six questions. (Joint Exhibits 15 and 16) Major Monday indicated that on question number 1 Appellee Young gave a more detailed response than Appellant; on question number 4 Appellee Young was able to quote policy, who to contact, and provided more details; on question number 5 Appellee Young exhibited more in-depth knowledge of the requirements of a leadership role; and on question number 6 Appellee Young was able to discuss the "big picture", giving his answer relative to DOC as an agency, not just OSR, the facility. Based on Appellee Young's responses to the questions, Major Monday believed him to be the stronger candidate for the Captain position.

When discussing the second round of interviews, Appellant testified that he was called to his interview after he had worked an extended shift; he had no warning and no opportunity to prepare for the interview. Additionally, he had never worked directly for

either Major Monday or Deputy Warden Brandon and did not have the relationship with them that Appellee Young had.

In contrast to Appellant, Appellee Young worked under the direct chain of command of Major Monday. In fact, Major Monday was the supervisor who completed Young's 2004 PMP, and Deputy Warden Brandon was the reviewer who approved it. (Joint Exhibit 2d) Appellant questioned the fact that this 2004 PMP was completed in August 2004 rather than in December, as is customary, suggesting that perhaps it was completed to give Appellee Young an unfair advantage over Appellant. In explanation Major Monday testified that he had applied for a position outside OSR and thought that he might not be at OSR in December at the time the PMP's are usually completed. A new supervisor might have insufficient knowledge to rate his people, so Major Monday completed a PMP on both Appellee Young and on his other Lieutenant.<sup>1</sup> The "exceeds standards" rating on Appellee Young's 2004 PMP gave him a non-discretionary two points over Appellant's "meets standards" rating. However, even ignoring the 2004 PMP completed in August 2004 by Major Monday, and considering instead Appellee Young's 2003 PMP, rated by a different supervisor and reviewed by Major Monday, Appellee Young's 2003 rating of "exceeds standards" would still give him a two-point advantage over Appellant.

It is true that a known entity might have an advantage over an unknown entity. In this instance, Major Monday might have unconsciously given an advantage to Appellee Young because he is personally familiar with his performance, his work ethic, and has a basis for believing he would perform well in the job. Additionally, his familiarity with

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<sup>1</sup> DOC operating procedures provides for a midyear rating under just such circumstances. See: Joint Exhibit 20, Section II.A.2.c.

Appellee Young's communication style through their daily interactions might allow him to more easily comprehend and interpret Appellee Young's responses to the interview questions than Appellant's responses. Of course, personal familiarity also can be a disadvantage. The supervising person is more aware of that individual's shortcomings, characteristics, traits, and work performance that might impact his or her performance in a new position. In fact, Deputy Warden Brandon admitted that if he had to choose between the two applicants based on his knowledge of them, rather than on their responses to the interview questions, he would lean toward Appellant because he knows him better than he knows Appellee Young.

Although Appellant alleged a pattern and practice of promoting employees below 40, he presented no statistical data to support this allegation. Peggy Carter, Affirmative Action Officer who investigated Appellant's complaint of age discrimination found insufficient evidence to support the allegations of age discrimination. Appellant points out, however, that Ms. Carter's report alluded to the possibility that, based on Major Monday's "guesstimate" of their ages, perhaps three or four out of five persons promoted under him may have been under 40 years of age. (Joint Exhibit 4) Warden Lenora Jordan testified that in the two and a half years she has been warden at OSR there have been two captain promotions – one over 40 years old and one under 40 years old (Appellee Young).

In identifying reasons why Appellant scored lower on the second round of interviews than did Appellee Young, Appellant has raised the following facts:

- (1) that Appellant was tired from working an extended shift and had no time to prepare for the interview<sup>2</sup>;
- (2) that Appellee Young worked directly for Major Monday and was better known to him than was Appellant, thereby giving him an advantage;
- (3) that Major Monday prepared a 2004 PMP for Appellee Young prior to the usual time in December, so that Appellee Young would have it "on file" for consideration in this promotion selection.

These facts do not, however, support a finding of age discrimination. On the contrary, these facts tend to show considerations other than age (whether proper considerations or not) that may have played a part in Appellant scoring lower on his second round of interview questions than did Appellee Young and, therefore, why Appellee Young was selected for the promotion rather than Appellant.

This administrative law judge finds that Appellant has failed to present sufficient evidence to support, by a preponderance of the evidence, his allegations that Appellant was discriminated against because of his age when Appellee Steve Young was selected for promotion to the Correctional Security Manager II (Captain) position over Appellant.

### **CONCLUSIONS OF LAW**

1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and subject matter in the above-entitled matter.

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<sup>2</sup> However, Appellant has introduced no evidence that he requested a change of his interview time and that this request was denied.

2. Any findings of fact that are properly conclusions of law are so incorporated herein as conclusions of law.

3. The burden of proof in this case was placed on Appellant pursuant to Merit Rule 455:10-9-2(f)(2) to show by a preponderance of the evidence that Appellee violated state law or Merit Rules. Appellant has failed to meet his burden of proof in this case.

4. 74 O.S. §954 prohibits discrimination in employment on the basis of age, and prohibits any agency or official from denying an individual a promotion or increase in compensation solely on the basis of age.

5. Appellant, Terry L. Cody, has failed to show by a preponderance of the evidence presented at the hearing that Appellee DOC violated 74 O.S. §954 by denying him promotion to the Correctional Security Manager II (Captain) position because of his age.

#### ORDER

*IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED* by the undersigned Administrative Law Judge that the petition of Appellant is hereby **DENIED**.

DATED: this 11<sup>th</sup> day of November, 2005.

A handwritten signature in black ink, appearing to read "Annita M. Bridges", is written over a horizontal line.

Annita M. Bridges, OBA # 1119  
Administrative Law Judge

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