

OFFICE OF COMPLIANCE  
LA 200, John Adams Building, 110 Second Street, S.E.  
Washington, DC 20540-1999

Dorsey Frazier	)	
Appellant	)	
	)	
v.	)	
	)	
United States Capitol Police,	)	Case Number: 12-CP-63 (CV, AG, RP)
Appellee	)	
	)	
	)	

**Before the Board of Directors: Barbara L. Camens, Chair; Alan V. Friedman; Roberta L. Holzwarth; Susan S. Robfogel; Barbara Childs Wallace, Members.**

**DECISION OF THE BOARD OF DIRECTORS**

This case is before the Board of Directors (“Board”) pursuant to a petition for review filed by Dorsey Frazier (“Frazier”), against the United States Capitol Police (“USCP”). Frazier seeks review of the Hearing Officer’s April 1, 2013 Order, dismissing the race and age discrimination claims; and April 29, 2013 Order, dismissing the retaliation claims.

Upon due consideration of the Hearing Officer’s Orders, the parties’ briefs and filings, and the record in this proceeding, the Board affirms the Hearing Officer’s dismissal of the race and age discrimination claims; and the retaliation claims.

**I. Background**

Frazier, a 69 year old black male, works for the USCP as a civilian communications officer. He is the oldest employee in his division. His days off were Sundays and Mondays.<sup>1</sup> In April 2012, a younger employee, who is also black, advised Frazier that he was changing his days off to Sundays and Mondays. Frazier believed that this change in days off would result in his losing days off on Sundays and Mondays. Frazier complained to his immediate supervisor, who is white and younger, and later his second-level supervisor, who is also white, about the proposed change and stated that he would file a claim with the Office of Compliance (“OOC”) if it was

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<sup>1</sup> In 2010, Frazier transferred to his current shift and wanted to change his days off from Saturdays and Sundays to Sundays and Mondays. A member of the current shift, who is white and younger than Frazier, already had Sundays and Mondays off. However, the USCP granted Frazier’s request for Sundays and Mondays off because he had more seniority and changed the younger white employee’s days off.

implemented. The second-level supervisor advised Frazier that she intended to follow the USCP's standard operating procedure which determined days off by seniority and employee preference.

The five employees on Frazier's shift submitted their days off preferences. Frazier and two other employees all requested Sundays and Mondays as their first choice. The USCP did not give Frazier Sundays and Mondays off, but instead gave those days off to one of the other employees because he was the most senior of the three. The employee who received Sundays and Mondays off was black and younger than Frazier and the same employee who initially advised Frazier that he was changing his days off to Sundays and Mondays. Frazier received Fridays and Sundays off. The remaining employee (the same white and younger employee who lost his days off of Sundays and Mondays to Frazier in 2010 because of Frazier's higher seniority) received Mondays and Tuesdays off.

In July 2012, the immediate supervisor rated Frazier a "Meets Expectations" on each of five elements of his 2012 performance evaluation as well as an overall rating of "Meets Expectations." For his 2011 evaluation, the same immediate supervisor had given Frazier a "Meets Expectations" on five out of six elements. One element – "Interpersonal Skills" – had been rated as "Outstanding." The immediate supervisor stated that he gave Frazier an "Outstanding" on the element of "Interpersonal Skills" because he was concerned that with only three ratings to be evaluated on each element, an evaluation of "Meets Expectations" seemed like a "mediocre" assessment.

The immediate supervisor maintains that the evaluation process changed in 2012. He asserts that there were new elements to be evaluated, "Interpersonal Skills" was no longer an element to be evaluated, and more ratings were to be evaluated on each element. The immediate supervisor testified that he reviewed the new elements and ratings and decided that "Meets Expectations" was a fair assessment on each of the new elements for Frazier's evaluation.

Also, Frazier claims that when he voluntarily moved from his former shift to his current shift in 2010, he gave up his position as acting supervisor. He also claims that his current immediate supervisor, who also was an acting supervisor, was given opportunities to receive training and promotions that were not afforded to Frazier.

Frazier also alleges that the immediate supervisor stated, "Let me know when the Alzheimer's kicks in," and "You're so old, you've forgotten your own birth date." Frazier, however, does not state the dates or context in which these statements were allegedly made.

Frazier sought counseling with the OOC on August 9, 2012. After mediation did not resolve Frazier's claims, on January 15, 2013, Frazier filed his complaint alleging that he was subjected to race and age discrimination, and retaliation on the grounds that (i) the change in his days off would cause him to miss the medical appointments he had already made for himself and his

elderly mother, and that he would be unable to attend church on Sundays; (ii) the immediate supervisor unfairly lowered his 2012 evaluation from “Outstanding” to “Meets Expectations;” (iii) the immediate supervisor (also once an acting supervisor) was given opportunities to receive training and promotions that were not afforded to Frazier; and (iv) the immediate supervisor stated, “Let me know when the Alzheimer’s kicks in,” and “You’re so old, you’ve forgotten your own birth date.” On March 1, 2013, after numerous party filings, Frazier filed his revised second amended complaint which included the following counts:

- Count I race discrimination in unilateral change in days off;
- Count II age discrimination in unilateral change in days off;
- Count III retaliation in unilateral change in days off;
- Count IV race discrimination in denial of training opportunities;
- Count V age discrimination in denial of training opportunities;
- Count VI race discrimination in denial of promotional opportunities;
- Count VII age discrimination in lowered performance rating; and
- Count VIII retaliation in lowered performance rating.

For Counts I & II, Frazier specifically alleged that his supervisors changed his days off from Sundays and Mondays because Frazier is black and the oldest employee in his Division. With regard to Count III, Frazier alleged that the USCP retaliated against him by changing his days off from Sundays and Mondays because Frazier had objected to the proposed change of days off to Sundays and Mondays made by his black and younger co-worker in April 2012. In Counts IV & V, Frazier alleged that he was denied training opportunities that were made available to his white and younger immediate supervisor because of his race and age. Also, for Count VI, Frazier specifically alleged that he was denied promotional opportunities that were made available to his white immediate supervisor because of his race. For Count VII, Frazier alleged that the USCP gave him a lowered performance rating of “Meets Expectations” for his 2012 evaluation because of Frazier’s age. Finally, in Count VIII, Frazier alleged that the USCP retaliated against him by lowering his 2012 performance evaluation to “Meets Expectations” because Frazier objected to the change in his days off from Sundays and Mondays.

On March 5, 2013, the USCP filed a motion to dismiss all eight Counts of the revised second amended complaint. Frazier filed an opposition on March 22, 2013. On April 1, 2013, the Hearing Officer issued a Memorandum Opinion and Order in which she determined that the USCP’s motion to dismiss should be granted in part and denied in part. Specifically, the Hearing Officer dismissed the race and age claims (Counts I & II, IV-VII). The Hearing Officer, however, declined to dismiss the two retaliation claims (Counts III & VIII)<sup>2</sup>. On April 29, 2013, the Hearing Officer issued a second Memorandum Opinion and Order which concluded that

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<sup>2</sup> Although the OOC Procedural Rules do not explicitly allow for motions for reconsiderations by a hearing officer, the Hearing Officer denied the USCP’s motion for reconsideration regarding the non-dismissal of the retaliation claims, on the record, at an April 15, 2013 hearing.

Frazier failed to prove either claim of retaliation. The Hearing Officer's April 1, 2013 and April 29, 2013 Orders are the subjects of the petition for review before the Board.

### **Hearing Officer's April 1, 2013 Order on the Motion to Dismiss**

The Hearing Officer's April 1, 2013 Order granted the USCP's motion to dismiss in part, finding that the alleged age comments did not support an inference of age discrimination with respect to the change in the USCP's days off from Sundays and Mondays, and the alleged lowered 2012 performance rating of "Meets Expectations" (Counts II & VII). The Hearing Officer determined that the two alleged age comments were isolated and not associated with nor causally connected to the change in Frazier's days off or his performance evaluation. The Hearing Officer also stated that Frazier did not identify the dates when the statements were made or demonstrate that the claims based on these statements were timely filed with the OOC. The Hearing Officer dismissed the race and age claims related to the change in days off from Sundays and Mondays (Counts I & II), concluding that Frazier did not allege an adverse employment action to prove race or age discrimination.

The Hearing Officer found the race and age claims related to the denial of training and promotion (Counts IV through VI) untimely and also dismissed those claims. The Hearing Officer stated that Frazier asserts that his immediate supervisor, who is white and younger, was offered training opportunities in October 2010 and subsequently promoted, but that Frazier was denied similar opportunities because of his race and age. The Hearing Officer, however, found that Frazier did not provide the dates he was denied trainings or promotions. Further, the Hearing Officer agreed with the USCP that when Frazier was transferred to his current shift in 2010 and lost his acting supervisor position, Frazier should have made a request for counseling within 180 days on the alleged training or promotional denials, but did not, making these claims untimely because he sought OOC counseling on August 9, 2012. The Hearing Officer denied the motion to dismiss for the two retaliation claims: days off changed (Count III) and lowered performance evaluation (Count VIII).

### **Hearing Officer's April 29, 2013 Order on the Two Remaining Retaliation Counts**

The Hearing Officer's April 29, 2013 Order found that that Frazier had failed to prove either count of retaliation: change in days off from Sundays and Mondays (Count III) and the lowered 2012 performance evaluation (Count VIII). The Hearing Officer determined that the USCP's supervisors testified credibly that they implemented the standard operating procedure and used seniority as the only determinant to grant days off. The Hearing Officer further determined that the immediate supervisor testified credibly that Frazier's opposition to the change in his days off from Sundays and Mondays had nothing to do with his rating on any element of the 2012 evaluation or on the overall rating. The Hearing Officer accepted the immediate supervisor's testimony that, in 2011, he gave Frazier an "Outstanding" on the element of "Interpersonal

Skills” because he was concerned that with only three ratings to be evaluated on each element, an evaluation of “Meets Expectations” seemed like a “mediocre” assessment. The Hearing Officer also accepted the immediate supervisor’s testimony that the evaluation process in 2012 changed to include new elements and more ratings to give on each element. The immediate supervisor testified that he reviewed the new elements and ratings and decided that “Meets Expectations” was a fair assessment on each of the new elements for the 2012 evaluation.

The Hearing Officer specifically determined that there was no causal connection between the decisions to change Frazier’s days off of Sundays and Mondays or evaluate his performance and his opposition to those actions. The Hearing Officer also found no credible evidence of retaliatory animus.

## **II. Standard of Review**

The Board’s standard of review for appeals from a Hearing Officer’s decision requires the Board to set aside a decision if the Board determines the decision to be: (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; (2) not made consistent with required procedures; or (3) unsupported by substantial evidence. 2 U.S.C. §1406(c).

## **III. Analysis**

### **April 1, 2013 Order (Race and Age Discrimination)**

The Hearing Officer properly determined that Frazier was unable to prove race and age discrimination. With respect to the race and age claims related to any changes in Frazier’s days off from Sundays and Mondays (Counts I & II), the days off procedure in 2012 was applied to every employee on Frazier’s shift. In accordance with the standard operating procedure, the employee with the most seniority received Sundays and Mondays off. The Hearing Officer determined that it was not because of Frazier’s race or age.<sup>3</sup> Moreover, Frazier benefitted from this same procedure in 2010 when he requested and had his days changed, receiving priority over the request of his white younger and less senior co-worker. The Hearing Officer also properly found that the two alleged age comments were not in any way associated with or causally connected to the change in Frazier’s days off because Frazier failed to show a link between these alleged comments and the change in his days off. The evidence shows that determining days off by seniority and preference was an objective practice that had nothing to do with Frazier’s race or age.

With regard to the claim that Frazier’s performance evaluation was lowered from “Outstanding” to “Meets Expectations” because of age discrimination (Count VII), the record supports the Hearing Officer’s findings that the immediate supervisor testified credibly pertaining to his

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<sup>3</sup> The employee who had the most seniority on the job was black and younger than Frazier and the third employee was white and also younger than Frazier.

reasons for giving Frazier “Meets Expectation” for every element on his 2012 evaluation. There were new elements to be evaluated, more ratings to be evaluated on each element, and “Interpersonal Skills” was no longer an element to be evaluated. *See Sheehan v. Office of the Architect of the Capitol*, 08-AC-58 (CV, RP) (Jan. 21, 2011) (observing that “credibility determinations are entitled to substantial deference, because it is the Hearing Officer who ‘sees the witnesses and hears them testify, while the Board and the reviewing court look only at cold records.’” (quoting *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962))). Furthermore, Frazier fails to demonstrate how the alleged age comments are related to the alleged lowering of his 2012 performance evaluation because the immediate supervisor gave him the same overall rating of “Meets Expectations” in 2011 and 2012. Thus, Frazier cannot show that any of his supervisors involved in the 2012 evaluation decision were motivated by an age animus.

The Hearing Officer also properly found that the claims of denial of training and promotional opportunities (Counts IV-VI) are untimely and therefore should be dismissed. The record does not show that Frazier was denied a specific training or promotional opportunity within 180 days of the date that Frazier sought counseling with the OOC (August 9, 2012).

#### **April 29, 2013 Order (Retaliation)**

The Hearing Officer properly found that Frazier failed to prove either claim of retaliation with respect to the change in Frazier’s days off from Sundays and Mondays and Frazier’s lowered 2012 performance evaluation (Count III & VIII). To establish a claim for retaliation under the CAA, an employee is required to demonstrate that: (1) he engaged in activity protected by Section 207(a) of the CAA; (2) the employing office took action against him that is “reasonably likely to deter” protected activity; and (3) a causal connection existed between the two. *See Britton v. Office of the Architect of the Capitol*, 02-AC-20 (CV, RP) (May 23, 2005). If the employee so demonstrates, the employing office thereafter is required to rebut the presumption of retaliation by articulating a legitimate non-discriminatory reason for its actions. *Id.*; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

Here, there is no causal connection between Frazier’s activity and the actions taken against him because of what he claims to be protected activity. The seniority-based procedure used to change days off in 2012 was the same practice used in 2010, in which Frazier requested and had his days changed, receiving priority over his less senior and younger white co-worker. Further, although the USCP did not give Frazier an “Outstanding” on one of the elements of the 2012 evaluation, the record shows that the immediate supervisor testified credibly about how the evaluation process changed in 2012 and why he gave Frazier “Meets Expectations” on each element.

Moreover, Frazier also cannot show that any employee from the USCP involved in the challenged employment actions was motivated by retaliatory animus. The record is clear that the

second-level supervisor had decided much earlier than Frazier's objections to the change in Frazier's days off from Sundays and Mondays to use the standard operating procedure to handle the more senior employee's days off request. Frazier cannot prove retaliation.<sup>4</sup>

## **ORDER**

For the foregoing reasons, the Hearing Officer's decisions that the evidence did not support the claims of race and age discrimination (Counts I & II, IV-VII) (April 1, 2013 Order) or the claims of retaliation (Counts III & VIII) (April 29, 2013) **are affirmed**.

It is so ORDERED.

Issued, Washington, DC on February 11, 2014

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<sup>4</sup> The Hearing Officer also found that Frazier did not engage in protected activity when he opposed the change in his days off of Sundays and Mondays, and that the change in days off and 2012 performance evaluation were actions that were not reasonably likely to deter Frazier from engaging in protected activity. The Board, however, need not reach these issues because the Hearing Officer correctly found that Frazier failed to prove a causal connection between the change in his days off or lowered performance evaluation and his opposition to those actions. Also, because the Board agrees with the Hearing Officer's finding of no retaliation, we find it unnecessary to address the effect, if any, of the Supreme Court's ruling in *Burlington v. Northern and Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006) on retaliation claims under the CAA.