

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CC-00381-COA**

**MISSISSIPPI DEPARTMENT OF
REHABILITATION SERVICES, OFFICE OF
DISABILITY DETERMINATION SERVICES**

APPELLANT

v.

WILLIE L. SILAS

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	2/14/96
TRIAL JUDGE:	HON. JAMES E. GRAVES JR.
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	OFFICE OF THE ATTORNEY GENERAL
	BY: SARA ELIZABETH DELOACH, and ALICE D. WISE
ATTORNEY FOR APPELLEE:	DEBORAH MCDONALD
NATURE OF THE CASE:	CIVIL
TRIAL COURT DISPOSITION:	ORDERED PROMOTION
DISPOSITION:	REVERSED - 12/02/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	12/23/97

BEFORE BRIDGES, C.J., COLEMAN, DIAZ, AND SOUTHWICK, JJ.

SOUTHWICK, J. FOR THE COURT:

Willie L. Silas is an employee of the Department of Rehabilitation Services, Office of Disability Determination Services (DDS). After not being chosen for promotion, Silas was unsuccessful with the grievance procedure at the agency and then failed in his appeal to the Employee Appeal Board. However, the Hinds County Circuit Court found that Silas, a black male, had been the victim of discrimination and ordered that he receive the next available promotion.

DDS appeals arguing the following: (1) the decision of the EAB was supported by substantial evidence; (2) the court exceeded the proper scope of review in its decision; and (3) the court erred in finding that the decision of the DDS not to promote Silas to one of the available positions was the result of discrimination. We reverse and reinstate the EAB's decision.

FACTS

Disability Determination Services, an office in the Department of Rehabilitation Services, develops and evaluates medical evidence for disability claims that are filed with the federal Social Security Administration. The DDS announced openings for three branch director II positions in March 1992 and eight supervisor III positions in April 1992. DDS solicited applicants only within the agency. After two of the branch director II positions were filled with the lower-level supervisors, two additional supervisor III positions needed to be filled. Fourteen employees applied for the branch director II positions, and twenty-nine employees applied for the supervisor III positions.

The selection committee consisted of the eleven members of the DDS administrative staff. Men, women, blacks, and whites were on the committee. Each applicant submitted a letter of intent. The letter included information concerning the applicant's background, qualifications and interest in the position. The committee solicited and received supervisor write-ups on each applicant. Additionally, the committee interviewed the applicants asking each the same set of questions and giving them the opportunity to make a statement.

The committee published the minimum requirements for each position as required by the State Personnel Board. Far more applicants met the minimum requirements than there were vacancies. The committee identified five characteristics that would distinguish successful branch directors and supervisor's. The criteria chosen were: (1) independence; (2) technical knowledge; (3) leadership skills; (4) analysis and problem solving skills; and (5) ability to respond to the changing regulatory environment. The committee rated each applicant using a scale of one to three. One signified that the applicant was below average, two was average and three was above average. The committee decided that if an applicant received a rating of below average in any area then such applicant would be disqualified from the process. The committee relied on education, experience, qualifications, and job performance in making their decisions. The committee testified that they did not consider or even mention race, gender, or political affiliation in their discussions.

Silas applied for both positions. The committee rated him below average in the area of technical knowledge. Silas was not in the group that the committee promoted. Silas filed a grievance within the Department of Rehabilitation Services, Office of Disability Determination Services alleging discrimination based on race, gender, and political affiliation. In response to his grievance, the executive director of the Department reevaluated the decisions of the administrative staff and found no discrimination in the selection process. Silas then sought relief at the Employee Appeals Board. Following a three day evidentiary hearing, the hearing officer found no discrimination. Silas requested full board review of the matter. The EAB sitting en banc upheld the decision of the hearing officer by order dated May 11, 1993.

In June of 1993, Silas filed a notice of appeal with the Circuit Court of Hinds County. The circuit court issued an order dated October 4, 1994, finding that DDS had discriminated against Silas. The circuit court determined that the five criteria were too subjective and that no regular performance

appraisal had been completed on Silas for the previous year. Based on those two decisions, the court found discrimination, but did not say whether it was racial, gender based, or political in nature. The court ordered DDS to promote Silas to the next available position for which he qualified. Silas filed a motion for reconsideration or alternatively, motion for award for retroactive pay. That motion was denied on February 14, 1996. DDS appealed and the case was deflected here.

I. SUBSTANTIAL EVIDENCE

On appeal the decisions of the EAB are not to be tried anew, but the courts are limited to a review of the agency record. **Miss. Code Ann. § 25-9-132 (Rev. 1991)**. A circuit court under our statutory appeal procedures has the initial obligation to determine whether the EAB decision was based on adequate evidence, or was arbitrary, capricious, or in violation of an employee right. *Id.*; ***Mississippi State Tax Comm'n v. Mask*, 667 So. 2d 1313, 1314 (Miss. 1995)**. Our role is the same, allowing the circuit judge's conclusions to focus us on any errors that he found existed, but ultimately still relying on the agency record to determine the validity of the EAB action.

The EAB found no evidence to support Silas's assertion that he was passed over because of racial, sexual, or political discrimination. The EAB found that such factors were not "remotely considered in the selection process." Blacks and whites of both sexes were promoted. Silas's argument that his political activities affected the decision was supported by nothing other than his speculation. The circuit court looked at the same evidence and found two circumstances to remove the substantial evidence support for the EAB's decision: 1) a supervisor's failure to complete the prior year's performance appraisal for Silas and 2) the selection committee's use of five subjective criteria in making the promotion decisions.

No explanation was given as to why Silas's performance appraisal had not been completed, but that is insignificant since no applicant's performance appraisal was used in determining who should be hired. Instead the committee solicited new evaluations from supervisors. The information contained in the promotion evaluations and in the normal appraisal forms was substantially the same. The absence of a periodic appraisal may be a defect in the internal operations of the agency, but this does not establish improper discrimination in totally separate promotion decisions. ***Risher v. Aldridge*, 889 F.2d 592, 597 (5th Cir. 1989)**. There is no proof and the evidence is to the contrary that the absence of the appraisal was due to or was used for racial, sexual, or political discrimination.

We also disagree with the circuit court's finding that the committee's use of the five criteria was improper and discriminatory. It is hard to imagine a promotion decision that did not consider some factors such as these. The committee just agreed to a specific set instead of each committee member applying his or her own. The Fifth Circuit has held that "[s]ubjective criteria necessarily and legitimately enter into personnel decisions involving supervisory positions." *Id.* at 597. The circuit court relied on a decision of the Court of Appeals for the Fifth Circuit, which was analyzing evidence that it found proved discrimination under 42 U.S.C. 2000e (Title VII). ***Rowe v. General Motors Corp.*, 457 F. 2d 348 (5th Cir. 1972)**. A recent decision of the same court referred to *Rowe* as standing for the proposition that the court "recognized the potential of subjective criteria to provide cover for unlawful discrimination." ***Lindsey v. Prive Corp.*, 987 F.2d 324, 328 (5th Cir. 1993)**. The court stated that "[e]stablishing qualifications is an employer's prerogative, but an employer may not

utilize wholly subjective standards by which to judge its employees' qualifications and then plead lack of qualification when its promotion process, for example, is challenged as discriminatory." *Id.*, (quoting *Crawford v. Western Electric Co.*, 614 F.2d 1300, 1315 (5th Cir.1980)), (citing *Rowe*, 457 F.2d at 358-359). In *Lindsey* the court ultimately found that the subjective criteria were justified, but whether those criteria were the actual reasons for an employee's discharge was a fact question that should not have been decided on summary judgment. *Lindsey*, **987 F. 2d at 328**.

There was no summary judgment here. The EAB conducted a three-day trial. No one has found, and there is absolutely no evidence, that this biracial committee with men and women had an intent to discriminate against blacks, males, or political activists. Subjective factors may provide an opportunity for discrimination, but there still must be proven discrimination. The statutorily-empowered fact-finder here found no discrimination.

The evidence adduced at the hearing failed to show discriminatory motive on the part of the selection committee. The EAB found no discriminatory effects in the promotion process. There was substantial testimony that race, gender, and political affiliation never entered into the promotion process, and there was no evidence to the contrary. Nothing in the cases cited by the circuit court creates a *per se* rule of discrimination if subjective criteria are used. If judges, federal or state, created such a rule then many, if not most, promotion decisions would become impossible.

There was substantial evidence to support the EAB's decision, and no arbitrariness, caprice, or a violation of law entered into that decision. Because of our ruling on the initial appellate issue, we do not address the remaining two. We reverse and reinstate the decision of the EAB.

THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT FINDING DISCRIMINATION BY THE DEPARTMENT OF REHABILITATION SERVICES, OFFICE OF DISABILITY DETERMINATION SERVICES AND ORDERING SILAS TO BE GIVEN THE NEXT AVAILABLE PROMOTION FOR WHICH HE QUALIFIES IS REVERSED AND THE DECISION OF THE EMPLOYEE APPEALS BOARD IS REINSTATED. ALL COSTS OF THIS APPEAL ARE ASSESSED AGAINST THE APPELLEE.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, AND PAYNE, JJ., CONCUR.