

**STATE OF ILLINOIS  
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF: )

TREVOR M. LAWRENCE, )

Complainant, )

and )

STATE OF ILLINOIS )  
DEPARTMENT OF NATURAL RESOURCES, )

Respondent. )

CHARGE NO(S): 2004SF2254  
EEOC NO(S): 21BA41157  
ALS NO(S): S05-431

**NOTICE**

You are hereby notified that the Illinois Human Rights Commission has not received timely exceptions to the Recommended Order and Decision in the above named case. Accordingly, pursuant to Section 8A-103(A) and/or 8B-103(A) of the Illinois Human Rights Act and Section 5300.910 of the Commission's Procedural Rules, that Recommended Order and Decision has now become the Order and Decision of the Commission.

STATE OF ILLINOIS )  
HUMAN RIGHTS COMMISSION )

Entered this 16<sup>th</sup> day of June 2011

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N. KEITH CHAMBERS  
EXECUTIVE DIRECTOR

STATE OF ILLINOIS  
HUMAN RIGHTS COMMISSION

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Complainant,	)	
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	)	EEOC NO: 21BA41157
<b>STATE OF ILLINOIS DEPARTMENT OF</b>	)	ALS NO: S05-431
<b>NATURAL RESOURCES,</b>	)	
	)	
Respondent.	)	

**RECOMMENDED ORDER AND DECISION**

This matter is ready for a Recommended Order and Decision pursuant to the Illinois Human Rights Act (775 ILCS 5/1-101 et seq.) A public hearing was held before me in Springfield, Illinois on April 30, 2008 and May 1, 2008. The parties have filed their post-opening briefs. Accordingly, this matter is ready for a decision.

**Contentions of the Parties**

In the instant Complaint, Complainant asserts that he was the victim of race discrimination when Respondent failed to promote him to a Public Information Officer III position upon the completion of a two-year internship and then terminated him when he failed to attain the promotion at the end of his internship. Respondent maintains that Complainant cannot establish a *prima facie* case of race discrimination, and that Complainant was terminated for reasons unrelated to his race.

**Findings of Fact**

Based on the record in this matter, I make the following findings of fact:

1. On September 1, 2001, Complainant, an African-American, was hired by Respondent as a Public Administration Intern, with a targeted promotion to the position of Public Information Officer III in Respondent's Office of Resource Conservation.

2. At all times pertinent to the instant Complaint, Respondent had a policy which granted interns a period of 24 months to demonstrate the skills and knowledge necessary to obtain a promotion to the targeted promotion. If the intern failed to demonstrate the requisite skills for the targeted promotion by the end of the 24-month period, the intern was terminated from the intern position.

3. At all times pertinent to the instant Complaint, Complainant's job duties as a Public Administration Intern generally required that Complainant answer public inquiries about issues concerning wildlife through e-mails, the telephone and letters and participate in some presentations. Complainant was also required to compile a hunter's digest containing information that had been prepared by other co-workers, as well as certain fact sheets. The job duties of a Public Information Officer III similarly required that Complainant deal with the public on behalf of Respondent, create informational programs involving the public and serve as the ombudsman for Respondent's Division of Wildlife Resources.

4. At all times pertinent to the instant Complaint, Complainant was supervised by John Buhnerkempe, who, in turn, was supervised by Brian Anderson.

5. By June 17, 2002, Buhnerkempe had verbally counseled Complainant twice about his job performance. In April of 2002, Buhnerkempe counseled Complainant about his use of sick time after Buhnerkempe had noticed a pattern of Complainant taking sick time around weekends and holidays. In June of 2002, Buhnerkempe counseled Complainant about his failure to give a scheduled presentation to an ENTICE class located in Peoria, Illinois. During that counseling session, Complainant explained that he chose not to attend the class because he believed that the weather was too severe to make a safe trip to Peoria.

6. On June 21, 2002, Buhnerkempe drafted a memorandum to Tim Hickman, Respondent's Director for the Office of Resource Conservation, in which Buhnerkempe requested that Complainant's internship be extended for six months. In the memorandum, Buhnerkempe indicated that Complainant had not met the requirements for a promotion to the

Public Information Officer III position because Complainant: (1) had not demonstrated sufficient initiative and planning skills and was too dependent on others to direct the Wildlife Outreach Program; (2) Complainant had developed only limited outreach materials for the Division; and (3) Complainant had been counseled twice on use of time and failure to perform an assignment.

7. On July 16, 2002, Complainant submitted a two-page outline regarding his goals for the Wildlife Outreach Program. In the outline, Complainant covered areas including distribution of the fact sheets and informational bulletins, use of power point presentations during ENTICE presentations, expansion of ENTICE presentations to other agencies and school classrooms, and improvements to the editing of the hunting digest. Complainant also made suggestions with regard to preparations for the State Fair tent, his involvement in field trips, improvements to the web site/yearly reports, and authorship of articles for Outdoor Illinois.

8. At or about September of 2002, Respondent's agency became short-staffed, such that Complainant was periodically assigned to do support work such as answer telephones and cover for missing secretaries and receptionists. While these assignments generally lasted for one week out of each month, Complainant was still able to perform his regularly assigned duties.

9. On December 2, 2002, Complainant signed off on his annual evaluation covering the period from September 1, 2001 to September 1, 2002. In the evaluation, Buhnerkempe gave Complainant an over-all "acceptable" rating. In the objectives section, Buhnerkempe gave two "acceptable" ratings, but noted that Complainant needed improvement in the areas of the Wildlife Constitutency Directory, as well as in the Digest of Hunting and Trapping Regulations. Buhnerkempe gave an "unacceptable" rating for Complainant's effort on Wildlife Information Sheets that were produced weekly. Buhnerkempe additionally gave Complainant "acceptable" ratings in the categories of Quality, Productivity, Knowledge, Judgment and Teamwork (with notations that Complainant needed improvement in the areas of Quality, Productivity and Knowledge), and an "accomplished" rating in the area of Human Relations. Buhnerkempe also

gave Complainant an “unacceptable” rating in the area of Planning. As to the three objectives for the following year, Buhnerkempe listed, among other things, the need for Complainant to develop a comprehensive plan for the Wildlife Outreach Program, along with deadlines for submitting an outline and a draft copy of the plan. Buhnerkempe also suggested that Complainant attend a hunter education class, as well as a wing shooting clinic.

10. On August 13, 2003, Complainant filled out a CMS promotion employment application form for the Public Information Officer III position. Complainant eventually received a grade of “A,” which stands for well-qualified for the position. There was no place on the application that noted Complainant’s actual performance of any duty associated with the Public Information Officer III position.

11. On August 21, 2003, Complainant signed off on a performance evaluation drafted by Buhnerkempe. In this evaluation, Complainant received an overall “acceptable” rating, which included “acceptable” ratings in all categories, except Human Relations in which Complainant received an “accomplished”. Of the three goals mentioned in the prior evaluation, Buhnerkempe found that Complainant had failed to meet the goal of developing a comprehensive plan for the Wildlife Outreach Program, after observing that Complainant had failed to provide a rough draft of the plan. The other two goals from the prior evaluation had been placed on hold. In the Planning category, Buhnerkempe mentioned that Complainant needed to continue to work on developing an overall work plan. In the Quality category, Buhnerkempe stated that Complainant was improving the quality of his work with the hunting and trapping digest, and Buhnerkempe indicated in the Knowledge category that Complainant continued to strive to improve his technical knowledge, but needed to improve his background with Division programs. Complainant was also given three new objectives for the next year.

12. Complainant did not register any disagreement in the August 21, 2003 evaluation with any of the comments made by Buhnerkempe.

13. At the time of the August 21, 2003 meeting to discuss Complainant's evaluation, Buhnerkempe was not aware of how much time remained on Complainant's two-year internship.

14. At some point in early September, 2003, Michele Cusumano, Respondent's Human Resources Director, was notified that Complainant was on "overpayment" status, which meant that he was working beyond his applicable 24-month period as an intern. Cusumano informed Anderson that Complainant either had to be terminated or promoted into his targeted position.

15. After Cusumano spoke to Anderson, Anderson spoke to Buhnerkempe about Complainant's status and about whether Buhnerkempe could recommend that Complainant be promoted to the Public Information Officer III position. During the conversation, Buhnerkempe discussed Complainant's performance evaluations and indicated that although Complainant had not yet demonstrated sufficient skills to warrant his promotion, he might be able to achieve the promotion with additional mentoring. Anderson also expressed a concern that if Complainant were not promoted, the Public Information Officer III position might not ever be filled, and that the position would therefore be lost. Accordingly, both men agreed to recommend that Complainant be promoted subject to additional support and closer supervision supplied by Buhnerkempe.

16. After Anderson spoke with Buhnerkempe about Complainant's status, he relayed to Cusumano their recommendation that Complainant be promoted with the proviso that Complainant be given more time to develop his skills, with Buhnerkempe serving as his mentor. Anderson additionally informed Cusumano that Complainant was actually performing at a level of a support person (as opposed to his targeted position of Public Information Officer III), and that he was fearful that if Complainant were terminated, the agency would be unable to hire anyone else to do those duties because of the hiring freeze.

17. At some point during her conversation with Anderson, Cusumano told him that she could not recommend that Complainant be promoted to the Public Information Office III

position because he was not presently performing at that level at the end of his internship. Cusumano also believed at that time that she could not place Complainant in a different support position job since the State of Illinois was under a hiring freeze at that time that allowed only for the hiring of people performing essential positions. At no time during this conversation with Anderson was Cusumano aware of Complainant's race.

18. After Cusumano spoke with Anderson, she then spoke to Sam Flood in the Governor's office about Complainant's situation. During this conversation, Flood asked why Complainant had not been promoted months ago, and Cusumano explained that Complainant had not yet acquired the job skills for a Public Information Officer III position. Flood then advised Cusumano to terminate Complainant if he was not adequately performing the Public Information Officer III position.

19. After speaking with Flood, Cusumano told Anderson that the agency was going to terminate Complainant's internship because Complainant was not performing at a Public Information Officer III level. When Anderson learned of the decision, he told Cusumano: "Are you nuts? We're going to terminate an African-American." At that juncture, Cusumano responded with words similar to the phrase: "Crap! You've got to be kidding me." This was the first time that Cusumano had become aware of Complainant's race.

20. After speaking with Anderson a second time about Complainant's employment status, Cusumano decided to contact Flood a second time to inform him of Complainant's racial status and to determine if Complainant should be terminated in view of the fact that there was an underutilization of African-American employees in Respondent's agency. After Cusumano informed Flood of Complainant's racial status, Flood repeated that if Complainant was not performing at a Public Information Officer III level, then the internship position should be terminated. Cusumano then informed Anderson that Complainant had to be terminated.

21. Cusumano thereafter denied Complainant's requested promotion to a Public Information Officer III position and terminated Complainant because she believed that he was not performing at a Public Information Officer III level at the end of his internship period.

22. At the time that she made her decision not to promote Complainant and to subsequently terminate him, Cusumano was relying only on Anderson's assessments of Complainant's inability to perform the Public Information Officer III position.

23. Dennis Ralph, a Caucasian, was promoted on February 1, 2004 to an Executive I position in Respondent's Office of the Director, after having been hired as an intern on June 12, 2003. In his one evaluation as an intern, Ralph received an overall rating of "acceptable," with four out of nine individual job categories having a rating of "accomplished" and no job categories containing an "unacceptable" rating or comments indicating a need for improvement. While the record is unclear as to the precise identity of Ralph's supervisor, neither Buhnerkempe nor Anderson was Ralph's supervisor.

24. Michele Silver, a Caucasian, was promoted on April 1, 2004 to an Executive II position in Respondent's Office of Public Services, after having been initially hired as an intern on May 19, 2003. In her last evaluation as an intern, Silver received an overall rating of "accomplished," which is one step higher than an overall rating of "acceptable" and did not receive any "unacceptable" rating in any job category. While the record is unclear regarding the precise identity of Silver's supervisor, neither Buhnerkempe nor Anderson was one of her supervisors.

25. Jason Organ, a Caucasian, was promoted on February 16, 2004 to an Administrative Assistant I position in Respondent's Office of Land Management and Education, after having been initially hired as an intern on July 16, 2003. In his one evaluation as an intern, Organ received an overall rating of "accomplished" and did not receive any "unacceptable" rating in any job category. While the record is unclear regarding the precise identity of Organ's supervisor, neither Buhnerkempe nor Anderson was one of his supervisors.

26. Christopher Hill, a Caucasian, was promoted on April 6, 2004 to an Administrative Assistant I position in Respondent's Division of Systems and Licensing, after having been hired as an intern on September 2, 2003. In his last evaluation as an intern, Hill received an overall rating of "accomplished" and did not receive any "unacceptable" rating in any job category. While the record is unclear regarding the precise identity of Hill's supervisor, neither Buhnerkempe nor Anderson was one of his supervisors.

27. Jeffery Vose, a Caucasian, was promoted on March 23, 2004 to an unspecified Public Service Administrator position in Respondent's Office of Land Management and Education, after having been hired as an intern on September 22, 2003. In his one evaluation as an intern, Vose received an overall rating of "accomplished" and did not receive any "unacceptable" rating in any job category. While the record is unclear as to the precise identity of Vose's supervisor, neither Buhnerkempe nor Anderson was one of his supervisors.

28. Cusumano made the decisions to promote Ralph, Silver, Organ, Hill and Vose after their respective supervisors had come to her with oral recommendations for their promotions and had not examined any of their written job evaluations.

#### **Conclusions of Law**

1. Complainant is an "employee" as that term is defined under the Human Rights Act.

2. Respondent is an "employer" as that term is defined under the Human Rights Act and was subject to the provisions of the Human Rights Act.

3. Complainant failed to establish a *prima facie* case of race discrimination with respect to either Respondent's failure to promote him to the Public Information Officer III position or its decision to terminate him.

4. Respondent has articulated a legitimate, non-discriminatory reason for its failure to promote Complainant to the position of Public Information Officer III and for its decision to terminate him.

5. Complainant has failed to prove by a preponderance of the evidence that the reasons given by Respondent for its failure to promote him or for its decision to terminate him were pretexts for race discrimination.

#### **Determination**

Complainant has failed to prove by a preponderance of the evidence that Respondent violated section 2-102 of the Human Rights Act (775 ILCS 5/2-102) when it failed to promote Complainant to the Public Information Officer III position and then terminated him after his internship had expired.

#### **Discussion**

This case seeks to answer a riddle as when an overall “acceptable” rating on an employee evaluation is apparently not sufficient for an employee to be promoted into the job for which he had received the acceptable rating. In our case, Complainant, in relying on his overall “acceptable” rating, contends that he should have been promoted to the targeted position of Public Information Officer III, and that the decision to deny him that promotion (as well as his subsequent termination) was the result of race discrimination. However, I find that, in spite of said rating, Complainant’s supervisor actually and honestly believed that Complainant had not acquired the necessary jobs skills to warrant a promotion to the Public Information Officer III position, that the overall “acceptable” ratings that had been placed in Complainant’s written evaluations were inflated for reasons unrelated to his race, and that the decisions not to promote Complainant to the Public Information Officer III position and to ultimately terminate him were the result of reasons unrelated to his race.

To understand why Complainant loses on his race discrimination claim, it is necessary to review applicable case law concerning what the Human Rights Act requires in order to establish a claim of race discrimination. Specifically, the Commission and the courts have applied a three-step analysis to determine whether there has been a violation of the Human Rights Act. (See, for example, *Thompson and Hoke Construction Co.*, IHRC, ALS No. S9135, June 2,

1998), and *Loyola University of Chicago v. Illinois Human Rights Commission*, 149 Ill.App.3d 8, 500 N.E.2d 639, 102 Ill.Dec. 746 (1<sup>st</sup> Dist., 3<sup>rd</sup> Div. 1986).) Under this approach, Complainant must first establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. Then, the burden shifts to Respondent to articulate a legitimate, non-discriminatory reason for the adverse actions taken against Complainant. If Respondent is successful in its articulation, the presumption of unlawful discrimination is no longer present in the case (see, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)), and Complainant is required to prove by a preponderance of the evidence that the Respondent's articulated, non-discriminatory reason is a pretext for unlawful discrimination.

Typically, a *prima facie* case of race discrimination requires that Complainant show that: (1) he is a member of a protected class; (2) he experienced an adverse employment action; and (3) similarly situated individuals outside his protected class were treated more favorably. (See, for example, *Loyola University of Chicago v. Illinois Human Rights Commission*, 149 Ill.App.3d 8, 500 N.E.2d 639, 102 Ill.Dec. 746 (1<sup>st</sup> Dist., 3<sup>rd</sup> Div. 1986).) While no one disputes that Complainant is an African-American, Respondent nevertheless contends that Complainant cannot establish a *prima facie* case on either of his race discrimination claims since the record suggests that the relevant decision-maker, i.e., Michele Cusumano, was unaware of his race at the time she made the adverse employment decisions at issue in the instant case. In his post-hearing brief, Complainant's counsel discounts this contention by asserting that there were "many" employment records that identified Complainant's race, and that Complainant's race "could have been" communicated to Cusumano by some unknown person prior to Cusumano's making of the adverse decisions at issue in the instant Complaint. Maybe so, but counsel has not identified any specific document that Cusumano could have reviewed that would have disclosed his race to her and has failed to identify any individual that timely informed Cusumano of Complainant's race.

As such, counsel's assertions in this regard not only amount to nothing more than mere speculation that Cusumano was actually aware of Complainant's race, but seem to conflict with Complainant's own acknowledgement at the public hearing that he had never even met Cusumano prior to the date of his termination. (Tr. Vol. 1, pg. 224.) More important, there is other evidence in this record that supports Cusumano's contention that she was unaware of Complainant's race prior to the time that she made the relevant adverse decisions in this case. Specifically, Anderson credibly testified that after Cusumano had informed him of her decision to not promote and to ultimately terminate Complainant, she expressed surprise to find out that Complainant was an African-American, and Cusumano testified that she re-visited Complainant's employment status with the Governor's office a second time only after she had discovered the identity of Complainant's race. Additionally, while it could be argued that Complainant's race was potentially at issue during Cusumano's second conference with Flood, such a fact does not detract from a finding that: (1) Cusumano's original decision was made free from any consideration of Complainant's race; and (2) Cusumano's refusal to reverse her original decision was based on the identical rationale she used to support her original decision to deny Complainant's requested promotion, i.e., that Complainant had failed to demonstrate adequate job skills for the Public Information Officer III position. Accordingly, just as in other cases where the Commission rejected discrimination claims where the relevant decision-maker was unaware of the protected status/protected act at the time the adverse decision had been made (see, for example, *Green and Franklin County Hospital District*, IHRC, ALS No. S7837, November 6, 1998, and *Pace and State of Illinois, Dept. of Transportation*, IHRC, ALS No. 5827(S), February 27, 1995)), Complainant's race discrimination claims can be rejected on this basis alone since Cusumano's lack of knowledge regarding Complainant's race effectively took the issue of his race out of her decision-making process. See also, *Vahle and Principia College*, IHRC, ALS No. S12055, July 25, 2007.

However, Cusumano's lack of knowledge concerning Complainant's race is not necessarily fatal to his claims if the record establishes that Cusumano's knowledge about Complainant's employment history came from individuals, i.e., Anderson and Buhnerkempe, who: (1) were aware of Complainant's race; (2) held an animosity based on Complainant's race; and (3) had the means to withhold relevant facts in an effort to give Cusumano a false impression of Complainant's job skills. (See, for example, *Rivera and Group W Cable, Inc.*, IHRC, ALS No. 2559, October 25, 1993.) Complainant similarly notes that Cusumano did not have all of the relevant facts before her when making the decisions not to promote and to eventually terminate him since, although Anderson had told her that Complainant currently lacked the skills to warrant his promotion to the Public Information Officer III position, he failed to tell her that Buhnerkempe had actually given Complainant overall "acceptable" ratings in his two written job performance evaluations. However, in order for this argument to apply, Complainant must show that either Buhnerkempe or Anderson held a racial animosity towards him, and that said animosity played a role in either individual providing Cusumano with an inaccurate picture of his job skills. Admittedly, this required showing is difficult for our Complainant since: (1) he conceded at the public hearing that Buhnerkempe did not shape or alter downwards his evaluations of him because of his race and had otherwise treated him fairly (Tr. Vol. 1, at pg. 213); (2) Buhnerkempe testified that, in spite of the overall "acceptable" rating in Complainant's job evaluations, he actually did not believe that Complainant was ready for his promotion to the Public Information Officer III position in August of 2003, and that he provided truthful information to the same effect when Anderson brought the issue of Complainant's promotion to his attention; and (3) Complainant conceded that Anderson did not discriminate against him on account of his race. Tr. Vol. I, pgs 223-24.

A review of the record also supports Respondent's contention that Complainant was not actually ready for the Public Information Officer III position at the end of his internship period. Specifically, while Buhnerkempe gave Complainant an overall rating of "acceptable" in his first

performance evaluation on December 3, 2002, Buhnerkempe also gave Complainant an “unacceptable” rating in the area of “Planning,” with the notation that Complainant had not yet developed an overall plan to direct the Wildlife Outreach program. Indeed, while Buhnerkempe gave Complainant “acceptable” ratings in the categories of Quality, Productivity and Knowledge, Buhnerkempe also mentioned topics that needed improvement in all of these categories, and Complainant did not offer any rebuttal to these criticisms either on the job evaluation form or at the public hearing. Similarly, with respect to the August 21, 2003 job evaluation, while Buhnerkempe gave Complainant an overall rating of “acceptable,” he further noted that Complainant needed improvement in the “Planning” and “Knowledge” categories and also observed that Complainant wholly failed to complete the only relevant goal set forth in the prior evaluation that required him to complete a comprehensive plan for the Wildlife Outreach program. Thus, in contrast to *Rivera*, Complainant has not shown that Cusumano was necessarily operating under inaccurate information with respect to his job skills when denying his requested promotion. More telling, and unlike the supervisor in *Rivera*, both Buhnerkempe and Anderson, who were actually aware of Complainant’s race, took steps to help Complainant retain his employment in spite of their honest assessments that he was unable to independently perform the duties of the Public Information Officer III position. As such and in light of the above, I find that Complainant has not established any exception to the general rule that the lack of knowledge by the decision-maker of the protected status/protected act precludes the establishment of a *prima facie* case of discrimination under the Human Rights Act.

Additionally, I find that Complainant has failed to establish the third prong of his *prima facie* case of race discrimination, which requires a showing that other similarly-situated co-workers received more favorable treatment. In this regard, Complainant proffered Dennis Ralph, Michelle Silver, Jason Organ, Christopher Hill and Jeffrey Vose as his suitable comparables. None of these individuals, though, can properly be viewed as a suitable comparative since Complainant failed to show that any of these individuals performed the same

or similar duties as Complainant or had the same supervisors (i.e., either Buhnerkempe or Anderson) making recommendations for their promotions. (See, for example, *Welch and Supreme Court of Illinois et al.*, ALS No. S-10644, May 19, 2006.) True enough, Cusumano served as a common decision-maker with respect to promotion requests made by Complainant and his proposed comparables. However, Cusumano testified that the promotions given to the proposed comparables depended upon the oral assessments and/or recommendations made by the different supervisors of the proposed comparables. Accordingly, any disparity in treatment can be based solely on the different jobs being performed by the proposed comparables, as well as the different oral assessments made to Cusumano by the different supervisors.

Complainant, though, insists that a valid comparison can be made by examining the performance evaluations of his comparable co-workers. However, it is questionable as to whether any comparison of written job evaluations can establish a *prima facie* case of race discrimination in this case, where: (1) all of Complainant's proposed comparables demonstrated their proficiency for their targeted positions well within the two-year internship period for obtaining a promotion to the targeted position; (2) different supervisors were making the assessments contained in the written evaluations; and (3) all but Ralph had received a higher overall "accomplished" rating on their performance evaluations than what Complainant had received. Moreover, Ralph too proves not to be truly comparable since, unlike Complainant, he never received an "unacceptable" rating in any job category in his evaluation or had any comments indicating that he needed improvement in any job category.<sup>1</sup> In any event, a comparison of written job evaluations is really neither here nor there in this *prima facie* analysis

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<sup>1</sup> Indeed, a close examination of Ralph's evaluation indicates that Ralph received an "accomplished" rating in four categories, as opposed to Complainant's one "accomplished" rating in human relations. Indeed, Complainant's higher rating in "human relations" is consistent with Buhnerkempe's testimony that he and Anderson were trying to retain Complainant, in spite of his job performance shortcomings, because they actually liked him.

where Cusumano testified that she did not examine anyone's written evaluations when making her promotion decisions, but rather relied upon the oral representations of job performance made by the employee's supervisor.<sup>2</sup> Thus, for all of the above reasons, I find that Complainant has not established a *prima facie* case of race discrimination with respect to Cusumano's decision either to deny him a promotion to the Public Information Officer III position or to terminate him once his internship position had expired.

Alternatively, even if the record could support a finding that Complainant established a *prima facie* case of race discrimination, Complainant still would not prevail in the instant matter. Specifically, the record shows that Respondent has articulated a legitimate, non-discriminatory reason for rendering its adverse decisions, in that Cusumano explained that the decision not to promote Complainant to his targeted position was due to oral reports from Anderson that Complainant was not adequately performing the job duties of the Public Information Officer III position on an independent basis. She similarly testified that Complainant was terminated from his internship position because: (1) he had failed to demonstrate the necessary job skills for the Public Information Officer III position within the two-year period set forth in his internship; and (2) in the context of an existing hiring freeze, Complainant's performance of support role duties was not critical to the agency so as to warrant placement of Complainant in any other position. These explanations provide a race-neutral basis for Cusumano's decision not to promote Complainant and to terminate him, and Complainant has not argued that these explanations, if believable, would not be sufficient to qualify under *Texas Department of Community Affairs v.*

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<sup>2</sup> For similar reasons, I find that Complainant's CMS grade of well-qualified for the Public Information Officer III position does nothing to establish a *prima facie* case of race discrimination where Cusumano testified that she did not consider such information when making the decision to deny Complainant his requested promotion. Moreover, Complainant has not explained how the CMS grade that was given by some unnamed CMS functionary is a better indicator of his qualifications to perform the Public Information Officer III position than the observations made by Complainant's supervisors over a two-year period, during which Complainant was actually attempting to perform the Public Information Officer III position.

*Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) as legitimate, non-discriminatory reasons for making an adverse employment decision.

Complainant, though, asserts that Buhnerkempe's explanations regarding Complainant's lack of appropriate job skills are pretextual since they conflict with the overall "acceptable" rating that Buhnerkempe gave Complainant in his written job evaluations. Admittedly, Complainant has a point since both parties agreed that information contained in a job evaluation form ordinarily provides useful information to determine whether an individual is satisfactorily performing the assigned job duties. However, Complainant loses on his pretext claim since: (1) a close reading of Complainant's written job evaluations supports Buhnerkempe's testimony that Complainant actually had some job performance problems in key areas of the Public Information Officer III position; (2) Complainant has not essentially challenged Buhnerkempe's assessments of his job skills in said areas; and (3) Complainant conceded that Buhnerkempe treated him fairly throughout Complainant's internship and did not intentionally skew his assessments of his job skills on account of his race. Moreover, Buhnerkempe testified that he decided to give Complainant a number of inflated "acceptable" ratings because he believed that issuance of multiple "unacceptable" ratings could have stifled future attempts by Complainant to improve his job performance. As such, while I find that Buhnerkempe's "acceptable" rating is problematic to the extent that it misled Complainant to the extent that it did not give him a particularly accurate picture of his job performance, I further find that said misinformation did not have a consequence under the Human Rights Act where Buhnerkempe honestly believed that Complainant did not have all of the requisite job skills to independently perform the Public Information Officer III position.

Finally, as to the issue of his termination, it should be noted that Complainant has not submitted any evidence to question the truthfulness of Respondent's articulation that his failure to obtain a promotion within the applicable two-year period required that his internship be terminated pursuant to Respondent's policy. Specifically, Complainant makes no argument in

his brief that Respondent granted to others an extended internship to allow more time to acquire needed job skills. Indeed, the record shows just the opposite, i.e., Cusumano followed Respondent's policy of limiting internship periods to two years and terminating the internship if the intern had not acquired the requisite skills by that time. Moreover, Complainant has presented no evidence that Cusumano created a new position for other interns once the determination had been made that the intern had failed to acquire the necessary skills to justify a promotion to the targeted position within the internship period. True enough, Complainant argues that Cusumano's assertion of a hiring freeze was false because she actually promoted his proposed comparable co-workers during the same time frame. Complainant's argument, though, misses the mark since the record is silent as to whether the hiring freeze even applied to currently employed interns who had obtained their promotions through the internship program. In this respect, Complainant's circumstances are not similar since, unlike the circumstances surrounding the promotions given to the proposed comparables, Complainant was technically "out of a job" pursuant to Respondent's policy once Complainant had completed his two-year internship period without having obtained his targeted promotion. As such, I find that Complainant has not established that Respondent's articulation as to why he was terminated was a pretext for race discrimination.

#### **Recommendation**

For all of the above reasons, it is recommended that the instant Complaint and Charge of Discrimination of Trevor M. Lawrence be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

BY: \_\_\_\_\_  
MICHAEL R. ROBINSON  
Administrative Law Judge  
Administrative Law Section

ENTERED THE 6TH DAY OF JULY, 2010