STATE OF RHODE ISLAND
COMMISSION FOR HUMAN RIGHTS

RICHR NO. 10 ERA 236 EEOC NO. 16J-2010-00188

In the matter of

Matthieu Yangambi, Ed.D.
Complainant

v. DECISION AND ORDER

Providence School Board, Jointly and
Severally, and Stephen T. Napolitano, Treasurer
Respondent

INTRODUCTION

On April 2, 2010, Matthieu Yangambi (hereafter referred to as the Complainant) filed a charge against the Providence School Board, Jointly and Severally, and Stephen T. Napolitano, Treasurer (hereafter referred to as the Respondent) with the Rhode Island Commission for Human Rights (hereafter referred to as the Commission). The charge alleged that the Respondent discriminated against the Complainant with respect to denial of promotions because of his race, color and ancestral origin and in retaliation for protected conduct, in violation of the Fair Employment Practices Act, Title 28, Chapter 5 of the General Laws of Rhode Island (hereafter referred to as the FEPA). The charge was investigated. On June 17, 2011, Preliminary Investigating Commissioner Camille Vella-Wilkinson assessed the information gathered by a staff investigator and ruled that there was probable cause to believe that the Respondent violated the provisions of Section 28-5-7 of the General Laws of Rhode Island. On February 23, 2012, a Complaint and Notice of Hearing issued. The Complaint alleged that the Respondent discriminated against the Complainant with respect to denial of promotions because of his race, color and ancestral origin and in retaliation for protected activity. On October 18, 2012, the Complainant moved to amend the Complaint to clarify the allegations. The Respondent objected. On November 14, 2012, the Commission issued a Decision on Motion to Amend, granting the Motion to Amend with respect to some of the allegations and denying the Motion to Amend with respect to other allegations. The allegations in the instant case relate to denial of positions from April 2009 to through 2010[1].

Hearings on the Amended Complaint were held before Commissioner John B. Susa on January 9 and 10, 2013.[2] The Complainant represented himself. The Respondent was represented by counsel. The Complainant filed a Post-Hearing Memorandum on February 22, 2013. The

[1] The Complainant's charge in the instant case was filed in April 2010 and covered denials of positions within the year before his filing. The finding of probable cause was made in June 2011.
[2] When the transcripts of the hearings are referred to in this Decision and Order, the Volumes will be referred to as follows: the January 9, 2013 transcript will be referred to as Vol. 1, and the January 10, 2013 transcript as Vol. 2.

Respondent filed a Post-Hearing Memorandum and Closing Argument on March 7, 2013. The Complainant filed a Rebuttal Memorandum on March 10, 2013. The Respondent filed a Rebuttal Memorandum and Objection to and Motion to Strike New Evidence Contained within Complainant's Written Submissions on March 27, 2013. The parties were notified on March 28, 2013 that the Commission would take into account the arguments of both parties that the adverse party's memoranda contained references to facts that were not presented at the hearing and would disregard statements relating to allegations that were not based on evidence contained in the record.

JURISDICTION

The Respondent is a political subdivision of Rhode Island and thus it is an employer within the definition of R.I.G.L. Section 28-5-6(7)(i) and is subject to the jurisdiction of the Commission.

FINDINGS OF FACT

1. The Complainant is a black man of Congolese ancestral origin. The primary language of the Democratic Republic of the Congo is French. The Complainant, who, at the time of the hearing, was the President of the Congolese Community of Rhode Island, knew no other people employed by the Respondent who were of Congolese origin, as of the date of the hearing. He had been asked about his ancestral origin by teachers and administrators of the Respondent and had told them of his Congolese origin. Nkoli Onye, who served as the Executive Director of High Schools for the Respondent from 2008 to 2012, knew the Complainant's ancestral origin.

2. The Complainant received a B.S. Degree in Biomedical Sciences from the University of Kinshasa, in the Democratic Republic of the Congo. He worked as the Head Supervisor at a hospital in Gabon for ten years, where his duties included supervising and evaluating nurses and nursing students. He received a Master's Degree in Education, Secondary Administration from Providence College in Rhode Island in 1998. In June 2005, he earned a Doctorate Degree in Education concentrating in Educational Leadership, Curriculum and Instruction, Teacher Training, Secondary School Science, and Education for English Language Learners from Johnson and Wales University.

3. The Complainant began working for the Respondent as a teacher in 1992. He has taught biological science at Mount Pleasant High School since 1993. His evaluations have been excellent.

4. At the time of the events in question, the Complainant was certified by the Rhode Island Department of Education as a "Contingent Content ESL Teacher", a "Professional Middle/Secondary School Principal" and a "Professional Curriculum/Instruction Administrator".

5. The Complainant participated in activities at Mount Pleasant High School to improve the school. He served on a number of committees, including, for example, the NEASC School Visitation Committee and the School Restructuring for Student Achievement Committee.

6. During his employment with the Respondent, the Complainant applied to the Respondent for a number of positions and did not receive them. At one point, he received a summer position relating to developing a new student code. The parties submitted specific evidence on nine positions, the Director of English Language Learners, three positions of Acting Principal and five positions of Acting Assistant Principal, that were available in the time period in question, 2009 and 2010.

7. The Complainant filed previous charges of discrimination with the Commission against the Respondent concerning the Complainant's allegations of discrimination relating to a time period before April 2009. The Complainant filed suit against the Respondent in Superior Court with respect to his prior allegations of discrimination. At the time of the events in question, that case was pending in Rhode Island Superior Court.

8. The Respondent sent the Complainant a letter dated September 29, 2009, relating to the Director of English Language Learners position for which the Complainant had applied. The Complainant did not receive the letter. The letter stated that he would be unable to continue in the interview process because he did not have a "Bilingual and ESL Endorsement Certificate". Respondent's Exhibit A. The Complainant had earned the certificate of "Endorsement: Content ESL Teacher". The Respondent presented evidence that the "Content Endorsement" certificate did not require as many courses as the "Bilingual and ESL Endorsement" certificate. Respondent's Exhibit I.

9. The person selected by the Respondent to fill the Director of English Language Learners position, Soledad Catanzaro, was of Hispanic ancestral origin. Gail Hareld, the Human Resources Administrator for the Respondent, testified that Ms. Catanzaro had the certificate necessary for the position. Trans. Vol. 1, pp. 189-190.

10. The impetus to fill Acting Principal and Acting Assistant Principal positions arises when there is an immediate need to have a person fulfill the responsibilities of the position. For example, the person who had been holding the permanent position may be on sick leave, temporarily filling another position, on a leave of absence or leaving the Respondent's employment. When the Respondent fills Acting Principal positions and Acting Assistant Principal positions, it does not post the positions and does not allow formal applications for the positions. The Respondent knew, at the time period in question, that the Complainant was seeking to be placed in an Acting Principal or Acting Assistant Principal position.

11. During the time of the events in question, Edmund Miley was employed by the Respondent to provide leadership support and development services. He testified that Acting Assistant Principal positions are usually filled very quickly because of the need to manage discipline in the schools. Trans. Vol. 1, p. 148. He testified that, according to his observations, when an Assistant Principal position is open, the Principal calls his/her supervisor, the Executive

Director, and asks that an Acting Assistant Principal be appointed as soon as possible, usually giving the name of someone whom the Principal knows has the required certification, is interested in being an administrator, and "has some credibility" with the Principal. Trans. Vol. 1, pp. 148-149. Dr. Miley testified that, when deciding on a recommendation, the Principal's supervisor might consult with the Chief Academic Officer, Assistant Superintendent or people in Human Resources, but generally, with an Acting Assistant Principal position, the Executive Director would just check with his/her supervisor. Trans. Vol. 1, p. 149. Dr. Miley, at the time of the hearing, had never seen a formal policy to follow when there was an Assistant Principal vacancy. Dr. Miley testified that filling an Acting Principal position would generally involve consultation between the Executive Director, the Chief Academic Officer and the head of Human Resources. Trans. Vol. 1, p. 150. Dr. Miley knew, at the time in question, that the Complainant was interested in an administrator's position. He was aware that the Complainant had filed a previous charge of discrimination.

12. Ms. Onye, who served as the Executive Director of High Schools for the Respondent from 2008 to 2012, testified that, with respect to the appointment of Paul Rao to the Acting Assistant Principal position at Mount Pleasant High School, Dr. Miley's office looked into who was available and a suggestion was made to the Superintendent, who took it from there. Trans. Vol. 2, p. 26. With respect to the appointment of Oscar Paz for Acting Principal for Mount Pleasant High School, Ms. Onye testified that she was "sure that [she] was part of that conversation". Trans. Vol. 2, p. 28.

13. When asked whether, when she was serving as Executive Director for High Schools from 2008 to 2012, she knew whether the Complainant had made any complaint of discrimination with the Commission, Ms. Onye testified: "I don't recall, but you know, there's several – there have been several while I was executive director. I don't recall Dr. Yangambi's." She agreed that she was aware of other complaints that other individuals had made and when asked: "However, you had no recollection at that time of anything that Dr. Yangambi had filed?", she replied: "No". Trans. Vol. 2, p. 32.

14. On April 20, 2009, John Hunt was named as Acting Principal for Central High School. He is white. Previous to this appointment, he was an Assistant Principal at Central High School from 2001 to 2004 and a Dean of Teaching and Learning starting in August 2004. He had been doing the work of Acting Principal unofficially until he was appointed as Acting Principal. Mr. Hunt had a Master's Degree in Education. The Complainant had never worked at Central High School. With respect to the selection of Mr. Hunt, Ms. Onye testified that he had been doing the job unofficially and the Respondent needed to find someone quickly to lead the school. Trans. Vol. 2, p. 35.

15. On November 24, 2009, Oscar Paz was named as Acting Principal for Mount Pleasant High School. He is Hispanic. Previous to this appointment, he had worked as an Assistant Principal at Mount Pleasant High School since April 2006. He assumed the role of Acting Principal unofficially until he was appointed. He participated in the Providence Schools Aspiring Principals Program and had a Master's Degree in Education. With respect to the

selection of Mr. Paz, Ms. Onye testified that he had been at Mount Pleasant High School for many years, knew the students very well and had assumed the role unofficially before he was appointed. Trans. Vol. 2, p. 27.

16. The Providence Schools Aspiring Principals program was started in 2000. It was a partnership between the Respondent and the University of Rhode Island. It was a two-year program that included a paid internship. Successful completion resulted in receipt of a Master's Degree and licensure from the state. It was a very competitive program.

17. On January 4, 2010, Christopher Lopardo was named Acting Principal for Oliver Hazard Perry Middle School (Perry Middle School). He is white. Previous to his appointment, he had worked as an Assistant Principal at Esek Hopkins Middle School since July 2008. He participated in the Providence Schools Aspiring Principals Program and had a Master's Degree in Education. Perry Middle School was scheduled to close and the Respondent wanted an Acting Principal with strong managerial skills and strong skills in procedures and structures to oversee the closure. Marc Catone, who served as the Executive Director of Middle Schools at the time in question, testified that Mr. Lopardo had demonstrated the skills needed to fill the position without training. Trans. Vol. 2, pp. 68-69. Mr. Catone, in consultation with the previous Executive Director for Middle Schools, made the decision to recommend Mr. Lopardo. Mr. Catone testified that, at the time in question, he was not familiar with the Complainant, he had never worked with the Complainant, and he did not know that the Complainant had previously filed a discrimination charge. Trans. Vol. 2, pp. 71-72.

18. The Respondent typically looked at Assistant Principals who were working in the same building when deciding appointments for Acting Principal. The Respondent was looking for individuals who could assume the role quickly and who understood what needed to happen to run the school.

19. When selecting Acting Assistant Principals, Respondent generally looked for those from within the particular school building who had demonstrated an ability to work with others in support of the school.

20. On April 20, 2009, Cynthia Robles was hired as Acting Assistant Principal for Perry Middle School. She is Hispanic. She was a graduate of the Providence Schools Aspiring Principals program. She had Master's Degrees in School Administration and Special Education. Prior to her appointment, she had been a Diagnostic Prescriptive Teacher with the Respondent since 2008 and a Special Education Teacher for the Respondent from 2000 to 2008.

21. On January 4, 2010, Leonard Kiernan was hired as Acting Assistant Principal for Esek Hopkins Middle School. He was filling the position temporarily vacated by Christopher Lopardo, who had been named as Acting Principal for Perry Middle School. Mr. Kiernan is white. Previous to his appointment as Acting Assistant Principal for Esek Hopkins Middle School, Mr. Kiernan had been a teacher at Perry Middle School and had also acted as a Substitute Assistant Principal, an Interim Assistant Principal and an Acting Assistant

Principal at Perry Middle School. He had a Master's Degree in Secondary Administration. Mr. Catone, who was at that time the Executive Director of Middle Schools, testified that the Respondent was looking for someone with middle school experience who would be able to walk into a mid-year replacement position and have a smooth transition. Trans. Vol. 2, p. 69. Mr. Catone testified that Mr. Kiernan was viewed as a good placement for that position because he was strong with discipline, had spent his career at the middle school level, and knew the middle school protocols. Trans. Vol. 2, pp. 69-70.

22. On March 1, 2010, Paul Rao was hired as Acting Assistant Principal for Mount Pleasant High School. Mr. Rao is white. Before his appointment, he was a Physical Education teacher and coach at Mount Pleasant High School. He had a Master's of Science Degree in Athletic and Physical Education Administration. Ms. Onye testified that Mr. Rao was selected because he was "in the building", he knew the students very well, he had a commanding presence and the students respected him. Trans. Vol. 2, p. 25. She further testified that because he was the head football coach, he had established rapport in the community and school. Trans. Vol. 2, p. 63. Ms. Onye knew, at the time in question, that the Complainant was interested in an administrator's position.

23. On March 8, 2010, the Respondent hired Dina Cerra as Acting Assistant Principal for Mount Pleasant High School. Ms. Cerra is white. She was a graduate of the Providence Schools Aspiring Principals program with a Master's Degree in Education Administration. Before her appointment, she served as the Secondary Implementation Specialist for "ELA" for Respondent since August 2008. She worked out of the district office. Her résumé did not reveal any experience at Mount Pleasant High School. She was the Acting Assistant Principal for two weeks.

24. On March 8, 2010, the Respondent hired Charles Moreau as the Acting Assistant Principal for the Providence Academy of International Studies (PAIS). Mr. Moreau is white. He had a Master's Degree in Secondary Administration. Before his appointment, he was a physical education teacher at PAIS. Ms. Onye testified that she was not very involved in Mr. Moreau's selection but "it would have made sense" for him to be the Acting Assistant Principal because he had a lead role in the school as a teacher and coach. Trans. Vol. 2, pp. 37-38.

25. As of December 24, 2012, the Respondent had 35 Principal positions – 56.8% of these positions were filled by white individuals, 29.7% by black individuals, 10.8% by Hispanic individuals and 2.7% by Asian individuals. As of December 24, 2012, the Respondent had 41 Assistant Principal positions – 70.7% of these positions were filled by white individuals, 12.2% by black individuals, 9.8% by Hispanic individuals and 4.9% by Asian individuals.

26. Of the 59 administrator appointments by the Respondent from March 10, 2008 to August 10, 2010, 62.7% were of white individuals and 24% were of black individuals.

27. The percentage of black individuals in the population of Rhode Island in 2010 was 5.7%. The percentage of individuals identifying as being of two or more races in 2010 was 3.3%.

Respondent's Exhibit K, 2010 United States Census: Rhode Island Profile.

28. Nathan Biah, an individual of African/Liberian ancestral origin, was selected as an Acting Assistant Principal at Mount Pleasant High School and then was named Assistant Principal at Cooley High School. Dinah Larbi, an individual of African/Ghanian ancestral origin, was selected as Principal of DelSesto Middle School. Ms. Onye, an individual of African/Nigerian ancestral origin, was Principal at Hope Technology and PAIS from 2003 to 2008, was Executive Director of High Schools in the period between 2008 and 2012 and was given a special assignment as the Principal of Mount Pleasant High School during the 2011-2012 school year. On the date of the hearing, her position was Executive Director of Performance Management. Dr. Mator Kpangbai, an individual of African/Liberian ancestral origin, served as Principal of Cooley High School for a short period of time. .

CONCLUSIONS OF LAW

The Complainant did not prove by a preponderance of the evidence that the Respondent discriminated against him with respect to denial of promotion because of his race, color or ancestral origin during the time period in question.

The Complainant did not prove that the Respondent retaliated against him for protected activity with respect to denial of appointment to the positions of Director of English Language Learners, the positions of Acting Principal filled by the appointments of Mr. Hunt, Mr. Paz and Mr. Lopardo, and the position of Acting Assistant Principal filled by the appointment of Mr. Kiernan.

The Complainant proved that the Respondent retaliated against him for protected activity with respect to denial of appointment to the positions of Acting Assistant Principal filled by the appointments of Ms. Robles, Mr. Rao, Ms. Cerra and Mr. Moreau.

DISCUSSION

THE STANDARDS FOR EVALUATING EVIDENCE OF DISCRIMINATION AND RETALIATION

The Commission utilizes the decisions of the Rhode Island Supreme Court, the Commission's prior decisions and decisions of the federal courts interpreting federal civil rights laws in establishing its standards for evaluating evidence of discrimination. The Rhode Island Supreme Court has utilized federal cases interpreting federal civil rights law as a guideline for interpreting the FEPA. "In construing these provisions, we have previously stated that this Court will look for guidance to decisions of the federal courts construing Title VII of the Civil Rights Act of 1964. *See* Newport Shipyard, Inc., 484 A.2d at 897-98." Center for Behavioral Health, Rhode Island, Inc. v. Barros, 710 A.2d 680, 685 (R.I. 1998) (hereafter referred to as Barros).

The FEPA prohibits discrimination in promotions based on race, color and/or ancestral origin. R.I.G.L. Section 28-5-7(1)(i and ii) provides in relevant part that:

> It shall be an unlawful employment practice:
> (1) For any employer:
> (i) To refuse to hire any applicant for employment because of his or her race or color, … or country of ancestral origin;
> (ii) Because of those reasons, to discharge an employee or discriminate against him or her with respect to hire, tenure, compensation, terms, conditions or privileges of employment, or any other matter directly or indirectly related to employment.…

R.I.G.L. Section 28-5-7(5) provides in relevant part that it is an unlawful employment practice: "For any employer … to discriminate in any manner against any individual because he or she has opposed any practice forbidden by this chapter, or because he or she has made a charge, testified, or assisted in any manner in any investigation, proceeding, or hearing under this chapter". This type of discrimination is called retaliation.

I. Disparate Treatment Discrimination

There are two common methods for analyzing evidence of disparate treatment discrimination, one is denominated the "pretext method" and the other the "mixed motives method".

A. Pretext Method

With respect to the pretext method, the Courts in Barros, Newport Shipyard v. Rhode Island Commission for Human Rights, 484 A.2d 893 (R.I. 1984), McDonnell Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973) (hereafter referred to as McDonnell Douglas), Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L.Ed.2d 207 (1981), St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S. Ct. 2742, 125 L.Ed.2d 407 (1993) (hereafter referred to as Hicks) and Bell v. E.P.A., 232 F.3d 546 (7th Cir. 2000) set forth a method for analyzing evidence of discrimination. According to this method, the complainant must first establish a prima facie case of discrimination. A complainant may establish a prima facie case of race, color and/or ancestral origin discrimination with respect to denial of hire/promotion by proving that:

1. He belonged to a protected class in that he was of a particular ancestral origin, race and color;
2. He applied and was qualified for an available position;
3. He was not selected;
4. The employer hired/promoted someone of a different race, color and/or ancestral origin.

Once a complainant has made a prima facie case of discrimination, the respondent must present a legitimate, non-discriminatory reason for its actions in order to negate the prima facie case of discrimination.

> Thus, the McDonnell Douglas presumption places upon the defendant the burden of producing an explanation to rebut the *prima facie* case - *i.e.*, the burden of "producing evidence" that the adverse employment actions were taken "for a legitimate, non-discriminatory reason". Burdine, 450 U.S. at 254. "[T]he defendant must clearly set forth, through the introduction of admissible evidence," reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action. *Id*. at 254-255, and n.8.

Hicks, *supra*, 509 U.S. at 506–507, 113 S. Ct. at 2747, 125 L.Ed.2d at 416. [Emphasis in original.]

Once a respondent has presented a legitimate, non-discriminatory reason for its actions, a complainant may prove discrimination by proving that the reason given is a pretext for discrimination. The complainant may present direct or indirect evidence that the respondent was motivated by discrimination (such as evidence that the reasons presented by the respondent are not credible). Under Hicks, the finder of fact, in this case the Commission, must find that the respondent's actions were motivated by discrimination. "It is not enough to disbelieve the employer; the factfinder must believe plaintiff's explanation of intentional discrimination." Hicks, *supra*, 509 U.S. at 519, 113 S. Ct. at 2754, 125 L.Ed.2d at 424. [Emphases in original.] The "rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination" but it does not compel such a finding. Hicks, *supra*, 509 U.S. at 511, 113 S. Ct. at 2749, 125 L.Ed.2d at 417. *See also* Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S. Ct. 2097, 147 L.Ed.2d 105 (2000).

B. Mixed Motives Method

The other method for analyzing evidence of discrimination is the mixed motives method. The FEPA specifically provides that a complainant may prove discrimination by proving that discrimination was a motivating factor for the respondent's actions, even though the actions were also motivated by other lawful factors. R.I.G.L. Section 28-5-7.3 provides that:

> An unlawful employment practice may be established in an action or proceeding under this chapter when the complainant demonstrates that race, color, religion, sex, sexual orientation, gender identity or expression, disability, age, or country of ancestral origin was a motivating factor for any employment practice, even though the practice was also motivated by other factors. Nothing contained in this section shall be construed as requiring direct evidence of unlawful intent or as limiting the methods of proof of unlawful employment practices under § 28-5-7.

Title VII of the Civil Rights Act of 1964 contains similar language (42 U.S.C. Section 2000e-2(m)) which was interpreted in Desert Palace, Inc. v. Costa, 539 U.S. 90, 123 S. Ct. 2148 (2003) (hereafter referred to as Desert Palace). Both R.I.G.L. Section 28-5-7.3 and Desert Palace provide that a plaintiff does not need direct evidence to prove that discrimination was a

motivating factor. A complainant may use circumstantial evidence to prove that discrimination was a motivating factor. Desert Palace, 539 U.S. at 99-101, 123 S. Ct. at 2153-2155.

To evaluate whether a complainant has proved discrimination under R.I.G.L. Section 28-5-7.3, the Commission has utilized a "modified" McDonnell Douglas approach.[3] *See* Bagnall v. UPN 28 TV, WLWC, Paramount Pictures, Commission File No. 01 EAG 069 (2005) Selvidio v. TGI Fridays (Carlson Restaurants Worldwide), Commission File No. 07 EMD 142 (2011). A modified McDonnell Douglas approach, continues to use the first two "prongs" of the analysis – i.e., that the plaintiff must make a prima facie case of discrimination and the defendant must then proffer a legitimate, non-discriminatory reason for its actions, and then modifies the third "prong".

> This Circuit has adopted use of a "modified McDonnell Douglas approach" in cases where the mixed-motive analysis may apply. *See* Rachid, 376 F.3d at 312. After the plaintiff has met his four-element *prima facie* case and the defendant has responded with a legitimate nondiscriminatory reason for the adverse employment action:
>
> > [T]he plaintiff must then offer sufficient evidence to create a genuine issue of material fact either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another motivating factor is the plaintiff's protected characteristic. (mixed-motive[s] alternative). *Id.* (internal quotation marks and citations omitted).

Keelan v. Majesco Software, Inc., 407 F.3d 332, 341 (5th Cir. 2005).[4]

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[3] The Commission does not intend to foreclose other methods of analysis that might be appropriate in a particular case to prove discrimination. For example, there may be cases in which a complainant who could not present sufficient evidence to establish a prima facie case of discrimination could still establish that discrimination was a motivating factor in the employer's decision. In most cases, however, the modified McDonnell Douglas approach provides a useful method of analysis.

[4] In Chadwick v. WellPoint, Inc., 561 F.3d 38, 45 (1st Cir. 2009), the Court held that the essential question under any method of analysis is whether the plaintiffs:

> "present enough evidence to permit a finding that there was differential treatment in an employment action and that the adverse employment decision was caused at least in part by a forbidden type of bias." Hillstrom, 354 F.3d at 31 (discussing the "interaction between Desert Palace and McDonnell Douglas").

II. Retaliation

Federal cases interpreting evidence in retaliation cases generally use the method of proof used to evaluate evidence of protected class discrimination. *See* Quinn v. Green Tree Credit Corp., 159 F.3d 759 (2nd Cir. 1998) *abrogated in part on other grounds by* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002) (hereafter referred to as Quinn). Quinn sets forth the standards used to evaluate evidence in retaliation cases. The prima facie case for proving unlawful retaliation can be made by demonstrating that:

1) The complainant engaged in protected activity (such as filing a charge of discrimination) known to the respondent;
2) The respondent took adverse action against the complainant;
3) There is a causal link between the protected activity and the adverse action.

Accord, Velez v. Janssen Ortho, LLC, 467 F.3d 802 (1st Cir. 2006). The complainant's "prima facie burden [in a retaliation case] is not onerous." Fennell v. First Step Designs, Ltd., 83 F.3d 526, 535 (1st Cir. 1996) (hereafter referred to as Fennell). Once a complainant has made a prima facie case of retaliation, the respondent has the burden of presenting a legitimate, non-discriminatory reason for its actions. Once a respondent has presented a legitimate, non-discriminatory reason for its actions, the Commission must determine whether the complainant proved that the reason given by the respondent was a pretext for retaliation. Fennell.

THE COMPLAINANT DID NOT MAKE A PRIMA FACIE CASE OF DISCRIMINATION OR RETALIATION WITH RESPECT TO THE POSITION OF DIRECTOR OF ENGLISH LANGUAGE LEARNERS

The Complainant did not establish a prima facie case of race, color or ancestral origin discrimination or retaliation with respect to denial of the position of Director of English Language Learners. An essential element of the prima facie case is that he was qualified for the position. The position required a "Bilingual and ESL Endorsement Certificate" which the Complainant did not have. Further, the Respondent introduced evidence that the selected candidate had this certificate. The Complainant did not produce evidence that this requirement was placed on the position to screen him out. Therefore, the Commission finds that the Complainant did not prove that the Respondent discriminated against him or retaliated against him with respect to the denial of the position of Director of English Language Learners.

THE COMPLAINANT MADE A PRIMA FACIE CASE OF DISCRIMINATION AND RETALIATION WITH RESPECT TO THE ACTING POSITIONS

Applying the standards listed above, the Complainant met the requirements for making a prima facie case of discrimination with respect to denial of the positions of Acting Assistant Principal and Acting Principal. The Complainant was within a protected class/protected classes, being a black individual of Congolese ancestral origin. He filed prior charges of discrimination, filed a complaint in Court and pursued that complaint. The Complainant met the basic qualifications for the positions of Acting Principal and Acting Assistant Principal. He had the certifications

required for the positions, he had a Doctorate degree, he had been a teacher for the Respondent for many years and his evaluations were excellent. The Complainant was not selected for any of the positions in question and none of the persons selected were black or of Congolese ancestral origin.

A question remains with respect to the requirement that the Complainant prove that he "applied" for the positions in question. The Respondent does not post the positions and does not have an application process. In these circumstances, a complainant may make a prima facie case of discrimination if the complainant demonstrates that he or she did not know about the position until it was filled or by showing that the employer knew that the complainant was interested in the job. Chambers v. Wynne Sch. Dist., 909 F.2d 1214 (8th Cir. 1990). The Respondent, as an organization, knew that the Complainant was seeking a promotion to an administrative position, as he had applied for many administrative positions in the past. Individuals involved in the process, Ms. Onye and Dr. Miley, knew that he was interested in an administrative position.

With respect to the Complainant's allegations of retaliation, the Respondent as an organization, knew of his protected activity. Dr. Miley knew of his previous charge. Ms. Onye's testimony on her recollection of what she knew at the time in question of the Complainant's protected activity, appears to be that while she remembers charges being filed by some individuals, she cannot remember whether she knew of the Complainant's charge. (See Finding of Fact Para. No. 13). Given her position as Executive Director of High Schools, her knowledge of other charges and the status of Complainant's then-pending court case, the Commission concludes that at the time in question, she knew of the Complainant's protected activity. Jones v. Bernanke, 557 F.3d 670, 679 (D.C. Cir. 2009) (knowledge of protected activity can be established by circumstantial evidence).

To prove a prima facie case of retaliation, a complainant must also prove a causal connection between the adverse action, the denial of positions, and his protected activity. When, as here, the Complainant has initiated and continued a series of protected activities, adverse actions during that time period can establish the causal connection. This is not a case where a complainant filed a charge and one adverse action occurred. In this case, the Complainant filed charges of discrimination, filed a discrimination action in court and continued to press the court case. The Complainant does not claim one adverse action, he claims a series of job denials in response to his protected activity. While the instant case concerns a particular time period in 2009 and 2010, the Complainant alleges a series of job denials before that time. *See* Raposa v. Winter, C.A. 07-417, 2009 WL 2391675, p. 5 (D.R.I. Aug. 4, 2009) in which the Court held that:

> this Court will consider the entirety of the EEO activity in regard to the 1996 complaint, rather than the sole act of filing the complaint in 1996. Raposa suffered an adverse employment action at the time she was engaged in protected EEO activity. The temporal proximity between Raposa's EEO activity and the adverse employment action suffered is sufficient to establish causation for purposes of summary judgment.

See also Jones, 557 F.3d at 680 (for purposes of finding causal temporal proximity, the Court should not look solely at the date of the original charge but also at later protected activity such as a request for a hearing before an administrative law judge); Holcomb v. Powell, 433 F.3d 889, 903 (D.C. Cir. 2006) ("[b]ecause Holcomb repeatedly engaged in protected activity during the period when she also experienced reduced work assignments, we believe she has met this minimal burden and made out a prima facie case of retaliation", causal temporal proximity found when the plaintiff took several protected actions, including filing a court action, during the time period when she was suffering adverse actions from her employer); Psy-Ed Corp. v. Klein, 459 Mass. 697, 712, 947 N.E.2d 520, 534 (2011) (" More generally, we think it reasonable to believe that an employer might perceive the issuance of a probable cause finding … as an indicator that a discrimination claim was not going to go away, and that an employer at that point may be tempted to retaliate against the employee's continued pursuit of a protected activity. In our view, § 4(4) and (4A) [of the Massachusetts General Laws forbidding retaliation for anti-discrimination activities] forbid such a response".)

Based on the above, with respect to the positions of Acting Principal and Acting Assistant Principal, the Complainant made a prima face case of race, color and ancestral origin discrimination and retaliation.

THE COMPLAINANT DID NOT PROVE THAT THE RESPONDENT'S SELECTION OF OTHER INDIVIDUALS FOR THE POSITIONS OF ACTING PRINCIPAL WAS DISCRIMINATORY OR RETALIATORY

The three individuals selected for the positions of Acting Principal had previously been Assistant Principals. Two of them were named Acting Principal for the same school in which they had served as Assistant Principal. The other individual, who was named as the Acting Principal of Perry Middle School, had served as an Assistant Principal in another middle school. Dr. Miley testified that he had never heard of anyone but an Assistant Principal becoming the Acting Principal of a high school or middle school. Trans. Vol. 1, p. 150. Ms. Onye agreed that the Respondent typically looked first at Assistant Principals when deciding whom to select for Acting Principal positions. Trans. Vol. 2, pp. 28-29.

With respect to the selection of Mr. Lopardo as Acting Principal for Perry Middle School, Mr. Catone testified that Mr. Loparado had shown the skills needed to fill the position without training. Trans. Vol. 2, pp. 68-69. Mr. Catone was not familiar with the Complainant.

With respect to the selection of Mr. Hunt as Acting Principal for Central High School, Ms. Onye testified that he had been doing the job unofficially and the Respondent needed to find someone quickly to lead the school. Trans. Vol. 2, p. 35. With respect to the selection of Mr. Paz as Acting Principal for Mount Pleasant High School, Ms. Onye testified that he had been at Mount Pleasant High School for many years, knew the students very well and had assumed the role unofficially before he was appointed. Trans. Vol. 2, p. 27.

The Complainant had never been an Assistant Principal. He did not show that the Respondent had ever selected as an Acting Principal anyone but those who had served as an Assistant

Principal. The Respondent's given reason for the selections – that it wanted to select someone who had been an Assistant Principal who could step in quickly to fulfill the duties of Principal[5] – is logical in itself and the Complainant did not demonstrate that it was a pretext for discrimination or retaliation. With respect to the selection by Mr. Catone, the Complainant did not demonstrate that Mr. Catone was aware of the Complainant's charge or ambition to become an administrator. With respect to the other selections, the Complainant did not demonstrate that he, or other individuals who were not Assistant Principals, had been considered for the positions. The Complainant did not prove that the reasons given by the Respondent constituted a pretext for discrimination or retaliation. *See* Ash v. Tyson Foods, Inc., 546 U.S. 454, 456-457, 126 S. Ct. 1195, 1197, 163 L. Ed. 2d 1053 (2006) (while not articulating a specific standard in a failure to promote case, held that a plaintiff trying to show pretext need not show that his superior qualifications "jump off the page and slap you in the face"; the Court gave implied acceptance to standards that require a plaintiff to show clearly superior qualifications, or superior qualifications along with other evidence of discrimination, to prove an employer's given reasons for denial of promotion were a pretext for discrimination) and Carter v. George Washington Univ., 387 F.3d 872 (D.C. Cir. 2004) (summary judgment for the employer affirmed; while the plaintiff had a Master's Degree and the selected candidate had only a Bachelor's Degree, that was insufficient to find pretext; the selected candidate had more experience in areas relating to the position).

The Complainant also did not prove that discrimination was a factor in the decision to select others for the Acting Principal positions. A complainant can demonstrate discrimination by producing statistical evidence, evidence of different treatment, evidence of discriminatory comments and/or comparative evidence. Webber v. Int'l Paper Co., 417 F.3d 229 (1st Cir. 2005) (applying federal anti-discrimination law precedents to a claim brought under the Maine Human Rights Act; affirming lower court judgment as a matter of law for the employer). The evidence presented to prove the Complainant's prima facie case of discrimination is also a factor in determining whether discrimination occurred. Webber. The Complainant did not produce evidence of slurs or any adverse comments based on his race, color or ancestral origin[6]. He did not show that he was similarly situated to those selected. While he has a Doctorate Degree and the persons selected had Master's Degrees, that was insufficient to demonstrate that his qualifications were superior. Respondent's preference for experience over additional education is not discriminatory in itself. The Complainant did not show deviations in Respondent's usual procedures. The statistical evidence supports the Respondent. Of those who held positions of Principal in December 2012, 29.7% were black. Of those who held positions of Assistant Principal in 2012, 12.2% were black. Of the administrative appointments in the relevant time

[5] Trans. Vol. 2, pp. 28-29.

[6] Adverse treatment because of accent can be unlawful ancestral origin discrimination. Raad v. Fairbanks N. Star Borough Sch. Dist., 323 F.3d 1185, 1195 (9th Cir. 2003) opinion amended on denial of reh'g, 2003 WL 21027351 (9th Cir. May 8, 2003) (unless the accent interferes with job performance, discrimination based on accent is evidence of discrimination on the basis of national origin); Ang v. Procter & Gamble Co., 932 F.2d 540 (6th Cir. 1991). The Complainant did not introduce evidence of any adverse remarks or treatment relating to his accent connected to the decision makers for the positions in question or during the time period in question in the instant Complaint.

period, 24% were of black individuals. Respondent presented evidence relating to the percentage of black individuals in the state as a whole – in 2010 blacks were 5.7% of the population and those identifying as being of two or more races were 3.3%. The Respondent presented evidence that other individuals whose ancestral origin was from an African country had been appointed as administrators[7]. In this case, the Complainant did not demonstrate that discrimination against him was one of the factors in the decisions to name others as the Acting Principals in question.

THE COMPLAINANT DID NOT PROVE THAT THE RESPONDENT'S SELECTION OF OTHER INDIVIDUALS FOR THE POSITIONS OF ACTING ASSISTANT PRINCIPAL WAS CAUSED BY RACE, COLOR OR ANCESTRAL ORIGIN DISCRIMINATION

The Complainant's evidence did not persuade the Commission that race, color or ancestral origin were factors in the selection of Acting Assistant Principal positions in question. As discussed above, the percentage of black administrators in the Respondent's workforce, the percentage of black individuals promoted in the relevant time period and the Respondent's past history of promoting individuals from African countries indicate that it was open to promotion of black individuals of African origin. While statistics related to past practices do not always foreclose the possibility that discrimination occurred in a particular instance, there is no evidence of racial or ancestral origin animus with respect to the selections in the instant case. The evidence as a whole did not convince the Commission that race, color or ancestral origin discrimination was a factor in the selection of the Acting Assistant Principal positions in question.

THE COMPLAINANT DID NOT PROVE THAT THE RESPONDENT'S SELECTION OF MR. KIERNAN AS ACTING ASSISTANT PRINCIPAL WAS MOTIVATED BY RETALIATION

The Respondent chose Mr. Kiernan as Acting Assistant Principal for Esek Hopkins Middle School. Mr. Kiernan had acted as a Substitute, Acting and Interim Assistant Principal in the past. Mr. Catone testified that Mr. Kiernan was a good placement because he was strong with discipline, had spent his career at the middle school level and knew the middle school protocols. Trans. Vol. 2, p. 70. The Complainant had never served as an Acting or Interim Assistant Principal, nor had he taught in a middle school. He did not demonstrate that the Respondent's given reasons for its selection of Mr. Kiernan were a pretext for retaliation. Mr. Catone was not familiar with the Complainant; there is no evidence that the Complainant was considered for the position. The Complainant did not prove that the selection of Mr. Kiernan was motivated by retaliation.

[7] While it is certainly possible for individuals to have prejudice against people from one specific African country and not against people from other African countries, the Complainant did not present evidence that anyone involved in the selection process had an animus against people of Congolese origin. *See* Naficy v. Illinois Dep't of Human Servs., 697 F.3d 504 (7th Cir. 2012) (Plaintiff did not prove national origin discrimination where she did not prove disparate treatment of similarly-situated employees and did not present direct evidence that the decision makers had a discriminatory animus).

THE COMPLAINANT PROVED THAT THE RESPONDENT WAS MOTIVATED BY RETALIATION WHEN IT DENIED THE OTHER POSITIONS OF ACTING ASSISTANT PRINCIPAL TO THE COMPLAINANT

As discussed above, the Complainant made a prima facie case of retaliation. With respect to three of the positions of Acting Assistant Principal, the Respondent did not meet its burden of presenting a legitimate, non-discriminatory reason for its actions.

With respect to the selection of Ms. Robles as Acting Assistant Principal for Perry Middle School, there was no explanation for the Respondent's action. The résumé of Ms. Robles (submitted by the Complainant) does not indicate any experience with Perry Middle School, although it does list a previous position as Credit Recovery Coordinator at Gilbert Stuart Middle School. Since the Respondent did not provide a reason for the selection of Ms. Robles, the Complainant has proved that the Respondent was motivated by retaliation. *See* Patrick v. Ridge, 394 F.3d 311 (5th Cir. 2004), in which the Court overturned the lower court's grant of summary judgment to the employer, holding that once the Plaintiff has submitted a prima facie case of retaliation, an employer must articulate in some detail a specific reason for its action.

The Respondent selected Mr. Moreau as Acting Assistant Principal at PAIS. Ms. Onye testified that she was not very involved in Mr. Moreau's selection but "it would have made sense" for him to be the Acting Assistant Principal because he had a lead role in the school as a teacher and coach. Trans. Vol. 2, pp. 37-38. The Respondent's burden is to present its reason for its action, not to present a hypothetical reason which would have made sense.

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. … It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff [Footnote omitted]. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.[9] [Footnote 9. An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel.]
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> … [T]he defendant's explanation of its legitimate reasons must be clear and reasonably specific.

Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254-56, 258, 101 S. Ct. 1089, 1094-95, 1096, 67 L. Ed. 2d 207 (1981). Ms. Onye testified to limited involvement with the selection, so it is logical that she could not testify to the actual motivation of the decision maker(s). Without direct evidence from the Respondent as to why Mr. Moreau was selected, the evidence from the

Complainant's prima facie case of retaliation leads the Commission to the conclusion that the Respondent was motivated by retaliation.

With respect to Ms. Cerra, Ms. Onye commented as follows:

> Q. … How about Miss Dina Cerra? Do you recall appointing Miss Cerra to the acting assistant principal position at Mount Pleasant High School?
> A. She was there very briefly and she had a role in the district office managing one of our interventions, our ELA intervention, our arts intervention and we sent her there as acting for a short period of time. The chief academic officer at the time was back at the district and so because there was no one to manage that intervention so her time there was very brief.

Trans. Vol. 2, pp. 36-37.

This testimony does not present a reason for the selection of Ms. Cerra. Not only is the Complainant's prima facie evidence of retaliation unrebutted, there is additional evidence of disparate treatment. Ms. Cerra worked at the district office and her résumé does not reveal any experience with Mount Pleasant High School. The Complainant had worked at Mount Pleasant High School for approximately eighteen years at that point. The Respondent generally looked for those from the particular school building when selecting Acting Assistant Principals.[8] The Respondent did not give a reason for its selection of Ms. Cerra as Acting Assistant Principal and departed from its usual practice of selecting someone from within the school when selecting her instead of the Complainant. The Complainant proved that the Respondent was motivated by retaliation when it failed to select him for the position of Acting Assistant Principal.

The Complainant also proved that the Respondent retaliated against him for protected activity in the selection of Mr. Rao as Acting Assistant Principal at Mount Pleasant High School. While this situation is not as clear-cut as the Acting Assistant Principal positions discussed above, the preponderance of the evidence supports a finding of retaliation. The Complainant made a prima facie case of retaliation, as discussed above. The Respondent, in this instance, provided a reason for its selection of Mr. Rao. Ms. Onye's testimony in essence was that Mr. Rao was selected

[8] Dr. Miley testified about the filling of Acting Assistant Principal positions that, as he observed it:

> the principal calls whoever their supervisor is at that time and says something to the effect, "I need someone in the building right away. I'd like to, if possible, use Joe Smith" because the principal knows Joe has a certificate, is interested in being an administrator at some point and has some credibility with the principal. So they ask generally for a person. If **they don't have a person in the building that has a certificate**, they will probably ask their supervisor to make a recommendation for someone."

Trans. Vol. 1, pp. 148-149. [Emphasis added.] Ms. Onye also testified that the Respondent generally looks within the school to fill an acting administrative vacancy. Trans. Vol. 2, p. 38.

because he had experience in the building, knew the school community, and was known and respected by the school community based in part on his leadership as a football coach. Trans. Vol. 2, pp. 25, 63.

The Commission finds that the Respondent's given reasons are a pretext for retaliation based on the objective qualifications of the Complainant compared to those of Mr. Rao, the subjective nature of the selection process and the inconsistencies in the testimony of Respondent's witnesses. While a subjective process and subjective reasons given are not in and of themselves enough to find pretext, they do trigger a stricter scrutiny of the evidence because unlawful motivations can be easily hidden in subjective reasons and a subjective process. Garrett v. Hewlett-Packard Co., 305 F.3d 1210, 1218, 1221 (10th Cir. 2002) (use of subjective criteria can be a factor in determining that the reason given by the employer is a pretext for retaliation and discrimination). The Respondent's process for filling Acting Assistant Principal positions, as set forth by the Respondent's witnesses, has no objective guidelines and no clear line of authority. The Superintendent and School Board have ultimate approval; but it is unclear who initiates the recommendations and who is under consideration for the positions. Mr. Catone and his predecessor made the final recommendations for middle school acting positions, for the time period shortly after Mr. Catone was appointed as Executive Director of the Middle Schools. The decision makers for the acting Middle School Principal before Mr. Catone's appointment and the decision makers for the acting Assistant High School positions are not clear. Dr. Miley testified that he never saw a formal policy on the selection process. (Trans. Vol. 1, p. 149.) It appears that whoever makes the initial recommendation does it based on their personal knowledge and preference. There are no established standards for selection. Such a process facilitates those who have prejudices to further their prejudices by their recommendations. The Respondent's witnesses were also inconsistent in their description of the process. Dr. Miley testified that generally the Principal in question would call his/her supervisor, the Director of High Schools, and recommend a candidate for the position. Trans. Vol. 1, pp. 148-149. Ms. Onye, the Director of High Schools at the time in question, testified that she was not very involved with one position (Trans. Vol. 2, p. 37) and that it was Dr. Miley's office which looked at who was available with respect to another position (Trans. Vol. 2, p. 26). Given the contradictions in the descriptions of the process, the testimony as to why Mr. Rao was selected instead of the Complainant is entitled to less weight. Ms. Onye gave the testimony on the Respondent's rationale, but testified that Dr. Miley's office suggested candidates (Trans. Vol. 2, p. 26), while it was Dr. Miley's testimony that generally the initial suggestion for a candidate came from the principal of the high school. Trans. Vol. 1, pp. 148-149.

Against this background of a byzantine selection process, the Complainant's superior objective qualifications stand out. Both the Complainant and Mr. Rao had experience at Mount Pleasant High School. Mr. Rao had a Master's Degree in Athletic and Physical Education Administration. The Complainant had a Doctorate Degree in Education concentrating in Educational Leadership, Curriculum and Instruction, Teacher Training, Secondary School Science, and Education for English Language Learners. The Complainant had ten years of experience supervising nursing students at a hospital in Gabon. While Mr. Rao had experience as an Activity Director for a National Youth Sports Program, his résumé does not indicate administrative supervisory experience at a school.

The strength of the Complainant's prima facie case of retaliation, the Complainant's clearly superior objective qualifications, the subjectivity of the Respondent's process and the inconsistent and unclear testimony of Respondent's witnesses as to who proposed Mr. Rao as the candidate to the Superintendent and School Board, combine to establish that the Respondent was motivated by retaliation in its failure to select the Complainant for the Acting Assistant Principal position. *See* Ash v. Tyson Foods, Inc., 546 U.S. 454, 456-457, 126 S. Ct. 1195, 1197, 163 L. Ed. 2d 1053 (2006) (while not articulating a specific standard in a failure to promote case, held that a plaintiff trying to show pretext need not show that his superior qualifications "jump off the page and slap you in the face"; the Court gave implied acceptance to standards that require a plaintiff to show clearly superior qualifications, or superior qualifications along with other evidence of discrimination, to prove an employer's given reasons for denial of promotion were a pretext for discrimination).

In summary, taking all of the evidence into account, the Commission finds that the Complainant did not prove that the Respondent discriminated against him because of race, color or ancestral origin or retaliated against him for filing charges and opposing unlawful employment practices with respect to the positions of Director of English Language Learners, Acting Principals or the Acting Assistant Principal position filled by Mr. Kiernan. The Commission finds that the Complainant did not prove that the Respondent discriminated against him because of race, color or ancestral origin with respect to the other positions of Acting Assistant Principal. The Commission finds that the Complainant proved that the Respondent retaliated against him for opposing unlawful employment practices, filing charges of discrimination and filing and pursuing a court complaint alleging violation of the FEPA, with respect to the Acting Assistant Principal positions filled by Mr. Moreau, Mr. Rao, Ms. Robles and Ms. Cerra.

LACK OF UNANIMITY OF THE COMMISSIONERS WITH RESPECT TO THE ALLEGATIONS OF RETALIATION IN THE SELECTION OF ACTING ASSISTANT PRINCIPALS

The Commission notes that the Hearing Officer, John Susa, has dissented from the Commission's finding that the Complainant proved that retaliation activated the Respondent's decisions with respect to the selection of some of the Acting Assistant Principals. *See* p. 21, *infra*. In general, an administrative agency must respect the credibility determinations and findings of fact of the Hearing Officer. *See* Environmental Scientific Corp. v. Durfee, 621 A.2d 200, 209 (R.I. 1993). The Commission acknowledges that the findings of the Hearing Officer are entitled to deference because he observed the witnesses. With respect to the position filled by Mr. Rao, the Commission's finding of retaliation is based primarily on the respective qualifications of the Complainant and Mr. Rao, which are not in dispute, and the inconsistencies in the testimony of Respondent's witnesses. With respect to the other three Acting Assistant Principal positions, the decision is primarily based on the Respondent's failure to meet its burden to articulate a reason for its selections. The Decision is not based on an evaluation of the credibility of Respondent's witnesses, it is based on the lack of a proffer of a reason for its actions. *See* Birchwood Realty, Inc. v. Grant, 627 A.2d 827 (R.I. 1993) (the decision maker's final decision need not precisely track the decision of the Hearing Officer if the decision maker accepts the Hearing Officer's determinations

on credibility and most of his findings of fact).

RELIEF

R.I.G.L. Section 28-5-24 sets forth the remedies that the Commission can award after finding that a respondent has committed an unlawful employment practice. It provides in relevant part as follows:

> (a) If upon all the testimony taken the commission determines that the respondent has engaged in or is engaging in unlawful employment practices, the commission shall state its findings of fact and shall issue and cause to be served on the respondent an order requiring the respondent to cease and desist from the unlawful employment practices, and to take any further affirmative or other action that will effectuate the purposes of this chapter, including, but not limited to, hiring, reinstatement, or upgrading of employees with or without back pay, or admission or restoration to union membership, including a requirement for reports of the manner of compliance. Back pay shall include the economic value of all benefits and raises to which an employee would have been entitled had an unfair employment practice not been committed, plus interest on those amounts.
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> (b) If the commission finds that the respondent has engaged in intentional discrimination in violation of this chapter, the commission in addition may award compensatory damages. The complainant shall not be required to prove that he or she has suffered physical harm or physical manifestation of injury in order to be awarded compensatory damages. As used in this section, the term "compensatory damages" does not include back pay or interest on back pay, and the term "intentional discrimination in violation of this chapter" means any unlawful employment practice except one that is solely based on a demonstration of disparate impact.

The Commission will order affirmative relief to effectuate the purposes of the FEPA.

ORDER

I. Violations of R.I.G.L. Sections 28-5-7 having been found, the Commission hereby orders that:

A. The Respondent cease and desist from all unlawful employment practices;

B. That the Respondent train all personnel, who have any role in the process of recommendations for filling Acting Assistant Principal

positions, on the anti-retaliation provisions in state and federal law and provide a certification to the Commission within six (6) months of the date of this Order that the training has been completed, the names and titles of the participants, the name of the trainer and a copy of the syllabus;

C. That the Respondent post the Commission anti-discrimination poster prominently in its facilities.

II. The Commission will schedule a hearing on relief at which the parties can present evidence and argument on the appropriate award of damages, on how to frame the Order relating to offering the Complainant an available position of Acting Assistant Principal and on whether the Commission should order the Respondent to establish written standards for its selection process and selection criteria for filling positions of Acting Assistant Principals.

Entered this [16th] day of [October], 2013.

I have read the record and agree to the judgment.

_____/S/_____

Alberto Aponte Cardona, Esq.
Commissioner

_____/S/_____

Nancy Kolman Ventrone
Commissioner

OPINION OF COMMISSIONER JOHN B. SUSA JOINING IN PART AND DISSENTING IN PART

I join the Commission's opinion with respect to its findings relating to the position of Director of English Language Learners, the positions of Acting Principals and the position of Acting Assistant Principal filled by Mr. Kiernan. I join the Commission's opinion that the Complainant did not prove race, color or ancestral origin discrimination with respect to the positions of Acting Assistant Principals filled by Mr. Rao, Mr. Moreau, Ms. Cerra and Ms. Robles.

I dissent with respect to the Commission's findings that the Complainant proved that retaliation motivated the Respondent with respect to filling the Acting Assistant Principal positions ultimately filled by Mr. Rao, Mr. Moreau, Ms. Cerra and Ms. Robles.

With respect to the position filled by Mr. Rao, the Respondent gave a reason for its selection and I, as the hearing officer, found it credible. Ms. Onye's testimony in essence was that Mr. Rao was selected because he knew the school community, and was known and respected by the school community based in part on his tenure as a football coach. Trans. Vol. 2, pp. 25, 63. While the Complainant had supported the school beyond his teaching by working on various committees, the committees on which he worked did not involve substantial interaction with the students or parents. As the hearing officer, my credibility determinations should be entitled to deference. Environmental Scientific Corp. v. Durfee, 621 A.2d 200, 209 (R.I. 1993). I dissent from the Commission's finding that the Complainant proved that the Respondent was motivated by retaliation in the selection of Mr. Rao.

With respect to the positions filled by Mr. Moreau, Ms. Cerra and Ms. Robles, I share the concern of the Commission that the Respondent's process for selecting individuals for acting positions is so diffuse and unregulated that it could easily allow prejudices of the decision makers to influence the decisions. I also understand that the Respondent did not give specific reasons for its selection of these individuals. When the Respondent gave a fuller explanation of its rationale for appointing the other Acting Assistant Principals, Mr. Rao and Mr. Kiernan, I was convinced that the Respondent weighed interpersonal experience and practical knowledge more than intellectual knowledge for these positions. Mr. Moreau was named Acting Assistant Principal at the school where he had taught as a coach, giving him more practical experience at that school. While the resumes of Ms. Cerra and Ms. Robles do not illuminate why the Respondent considered them more qualified than the Complainant, and the Respondent did not present evidence on this issue, I infer that the Respondent preferred their practical and leadership skills. *See* Carter v. George Washington Univ. and Amirmokri v. Baltimore Gas & Elec. Co., 60 F.3d 1126 (4th Cir. 1995) (judgment for the employer on a claim of ancestral origin discrimination in promotion affirmed; the employer could consider subjective factors like interpersonal skills and ability to lead a team in deciding to promote someone other than the Plaintiff, even though the Plaintiff's education and outside experience were superior to those of the selected candidate). I dissent from the Commission's finding of retaliation with respect to these positions.

_____/S/_____ _[October 16, 2013]_____

John B. Susa Date
Hearing Officer