STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 04375-00S
DCR DOCKET NO. EL11AG-45749E
Decided: May 27, 2003

ARTHUR G. MATTEI Complainant, v. NEW JERSEY ADMINISTRATIVE OFFICE OF THE COURTS Respondent.	)	ADMINISTRATIVE ACTION FINDINGS, DETERMINATION AND ORDER

APPEARANCES:

Klausner, Hunter and Rosenberg, Attorneys at Law (Stephen E. Klausner, Esq., attorney), for the complainant

Peter C. Harvey, Acting Attorney General of New Jersey (Robert H. Stoloff, Assistant Attorney General), for the respondent

BY THE DIRECTOR:

I. INTRODUCTION

This matter is before the Director of the New Jersey Division on Civil Rights (Division) pursuant to a verified complaint filed by the complainant, Arthur G. Mattei (Complainant), alleging that the respondent, New Jersey Administrative Office of the Courts (Respondent), subjected him to unlawful discrimination in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Specifically, Complainant alleged that Respondent unlawfully rejected his candidacy for the position of Trial Court Administrator (TCA) for the Mercer Vicinage because of his age. Complainant was 57 years old at the time of his application. Complainant also filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging that Respondent violated the Age

Discrimination in Employment Act of 1967, as amended (ADEA), 29 U.S.C. 621 et. seq.

On February 20, 2003, after hearings and extensive evidence offered by the parties, the Honorable Jeff S. Masin, Administrative Law Judge, issued an initial decision[1] dismissing the complaint. Based on the Director's independent review of the record, including the initial decision, exhibits, exceptions, and replies, the Director adopts the initial decision of the ALJ dismissing the complaint.

II. PROCEDURAL HISTORY

On July 16, 1997, Complainant filed a charge with the EEOC claiming that Respondent violated the ADEA and, pursuant to a worksharing agreement between EEOC and the Division, also filed a verified complaint with the Division alleging Respondent violated the LAD. Respondent filed an answer to the complaint denying the charges of discrimination.

On December 23, 1998, the EEOC issued a finding that there was reason to believe that discrimination had occurred in violation of the ADEA. A Notice of Right to Sue was issued and Complainant subsequently filed suit in the United States District Court for the District of New Jersey.

In a Memorandum and Order issued on March 31, 2000, the Honorable Anne E. Thompson, U.S.D.J., granted Respondent's motion to dismiss the complaint based on the Supreme Court's decision in Kimel v. Florida Bd. Of Regents, 528 U.S. 62 (2000), which held that the 11th Amendment to the United States Constitution prohibits individuals from bringing ADEA suits against non-consenting states in federal court.

On March 7, 2000**,** Complainant requested the Director to transmit his LAD complaint to the

[1]Hereinafter, "ID" shall refer to the written initial decision of the ALJ; "CE" and "RE" shall refer to Complainant's exceptions and Respondent's replies, respectively; "P" and "R" shall refer to Complainant's and Respondent's exhibits, respectively; "TR1" shall refer to the transcript of the September 24, 2001 hearing; "TR2" shall refer to the transcript of the September 25, 2001 hearing; "TR3" shall refer to the transcript of the May 20, 2002 hearing; "TR4" shall refer to the transcript of the May 21, 2002 hearing; "TR5" shall refer to the transcript of the May 22, 2002 hearing; and "TR6" shall refer to the transcript of the September 11, 2002 hearing.

Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 10:5-13. A prehearing conference was conducted on October 31, 2000 by the Honorable Robert S. Miller, Administrative Law Judge, and a prehearing order was issued on November 3, 2000. On March 29, 2001, the Honorable Solomon Metzger, Administrative Law Judge, issued an interlocutory ruling regarding contested discovery matters. Thereafter, this case was reassigned to the Honorable Jeff S. Masin, Acting Chief Administrative Law Judge (ALJ) who, on May 21, 2001, issued an interlocutory order regarding how certain witnesses in this matter, in particular judges, would be addressed during the proceedings. Hearings were held on September 24 and 25, 2001, at which time issues arose regarding attorney-client privilege. This resulted in extensive briefing and an interlocutory order issued on November 20, 2001. The hearings resumed and were completed on May 20, 21 and 22, 2002. A supplementary hearing was conducted on September 11, 2002 for certain rebuttal and sur-rebuttal testimony. Both parties submitted post hearing briefs and replies and the record was closed on January 22, 2003. The ALJ issued his initial decision on February 20, 2003, Complainant filed exceptions to the initial decision on March 24, 2003, and Respondent filed a reply to Complainant's exceptions on March 27, 2003. The Director received one extension of time to file his final determination in this matter, which is now due on May 27, 2003.

III. THE ALJ's DECISION

A. Factual Determinations

The ALJ set forth a detailed summary of the testimony at pages 3 through 16 of the initial decision, without making specific findings of fact. As part of his legal discussion and analysis, the ALJ did weigh corroborating evidence to reach conclusions regarding the selection process and Respondent's asserted legitimate business reasons for not hiring Complainant for the TCA position. The following factual findings can be gleaned from the ALJ's analysis.

Complainant was fifty-seven years old at the time that he applied for the position of Trial Court Administrator and was rejected. Complainant exceeded the minimum requirements for the position

having worked for the Administrative Office of the Courts (AOC) in various capacities, including Assistant Trial Court Administrator in Middlesex County from 1974 through 1996. Complainant had a B.S. degree, an M.B.A., and was a Fellow of the Institute of Court Management. After rejecting Complaint for the position, Respondent continued to seek to fill the position from persons similarly qualified. Respondent ultimately selected a person twelve years younger than Complainant (ID 5-6).

With respect to the hiring process, the selection committee was established by Judge Phillip Carchman, then the assignment judge for the Mercer Vicinage. The committee consisted of Linda Feinberg, then forty-seven years old and presiding judge of the Family Part in Mercer County; Thomas Demartin, then sixty-three years old and presiding judge for the Criminal Division in Mercer County; Neil Shuster, then fifty-one and presiding judge of the Civil Division in Mercer County; Norman Agin, then fifty-nine and the president of a software company; Angela Bowers, then fifty-seven, who worked at Mercer County Human Resources; Samuel Conti, then fifty-three and AOC Assistant Director for Trial Court Support Operations; Joseph Davis, then forty and the TCA for Hudson County; Joan Josephson, Esq., then forty-seven and an attorney who was a former staff person at the AOC where she served as Director of Labor Relations; Marylee Ramm, then forty-seven, and a union representative; and James Rebo, then forty-five, who worked in the AOC in Information Technology (ID 6).

The TCA position was advertised by posting the position in the Judiciary's various human resources offices, in the Superior Court Clerk's offices, in the AOC and through the New Jersey Department of Personnel. Advertisements were also published in the Criminal Justice Newsletter and throughout the National Center for the Courts (ID 6).

The minimum requirements for the position were graduation from an accredited college or university with a bachelor's degree; seven years of comprehensive managerial experience in a public, private or court-related environment, at least three years of which to be spent in a

supervisory capacity at the management level; managerial experience on a daily basis over administrative operations; and experience in development and implementation of programs requiring knowledge of information systems and equipment. It was permissible to substitute a masters degree for one year of non-supervisory experience and a law degree could be substituted for two years of non-supervisory experience. Ibid.

There were two selection processes. In the Spring of 1996, more than100 applications were received for the position, and over forty applications were received during the Fall 1996 process. Applications were screened by Loreta Sepulveda, a personnel assistant for the AOC, whose job it was to review applications to determine which applicants met the minimum job requirements. In each of the two selection processes, Complainant was deemed to have met the minimum requirements and his name and resume were referred to the selection committee (ID 6 to 7).

Judge Feinberg scheduled an initial meeting of the committee for April 10, 1996, prior to which each member received a notebook containing the resumes of the "minimally" qualified applicants. Judge Carchman appeared at the meeting and gave the committee its charge. Judge Feinberg, as chairperson of the committee, requested that the committee members recommend fifteen applicants for interviews, and each member presented his or her selections by April 12, 1996. Complainant was on the list of applicants who received at least one vote from the committee as well as the list of 19 applicants who received at least four votes from the committee. These 19 candidates were discussed at a meeting held on April 19, 1996, and it was determined that ten would be interviewed. Complainant was not one of the ten selected to be interviewed. Interviews were conducted on May 14 and 17, 1996. Following the interviews, the committee recommended that Judge Carchman interview four applicants. He made an offer to one applicant who declined, then a second applicant who also declined. Judge Carchman decided to interview a third applicant who was not one of the ten interviewed by the committee, however, he decided not to offer the position to that applicant. Instead, Judge Carchman requested that the committee conduct a new

search (ID 7).

During the second selection process, in the Fall of 1996, a similar distribution of job postings was conducted and more than forty resumes were received. Following Ms. Sepulveda's screening of resumes, she prepared charts indicating which applicants met the minimum qualifications. Complainant was again deemed qualified. The resumes were similarly distributed to the committee, which met on November 12, 1996 (ID 7). The committee again looked at the 19 candidates that were considered during the first process, and also at the additional resumes. This time, the committee decided that it would not conduct interviews itself, but instead would recommend five prospects to Judge Carchman for interviews. The five candidates all worked for the court system. They were Carol Hatcher, fifty-three; Guy Willetts, sixty-three; Jude DelPriore, forty-five; Diane Ailey, forty-five; and Michael O'Brien, forty-three. Judge Carchman offered the position to Jude DelPriore, who accepted the position (ID 7-8).

The testimony of the committee members indicated that the decisions not to interview Complainant in the Spring process, and then not to recommend that Judge Carchman interview him in the Fall process, were "the result of their impressions of Mr. Mattei's experience and of their personal perceptions of his attitude about and toward the job he held, and the system in which he functioned. Similarly, personal perceptions concerning other candidates played a significant role in the process to select the final interviewees" (ID 8). Concerning the selection of Mr. DelPriore, the ALJ stated that "his ultimate selection was the result of the overwhelmingly positive reaction of members to their prior experience with him, and to Judge Carchman's strong personal impression and response to him." Ibid. Carchman was not troubled by the fact that, to some degree or another, members of the committee personally knew of persons considered during the selection process. He trusted the members and their perceptions and expected that they would judge the candidates on their merits, taking due consideration of background information that they might have on the candidates (ID 8, TR1-161 to 163).

Judge Feinberg, who chaired the selection committee, testified that personal knowledge that committee members had about potential candidates was "important" and, to the extent that persons knew things about the reputation, performance and skills of candidates, this was appropriate information to factor into the selection process (ID 8, TR2-99). Judge Feinberg had known Complainant for six or seven years during the time she served as a Municipal Court Judge and as a Superior Court Judge, and would see him three or four times a year at meetings, seminars, and conferences. Judge Feinberg testified about her impressions of Complainant's demeanor, stating that he seemed very negative and very disgruntled, and was dissatisfied with what he was doing. Judge Feinberg felt that Complainant's complaining to her about people with whom he worked in the Mercer Vicinage was an act of disloyalty that concerned her. According to Judge Feinberg, Complainant's negative attitude overshadowed his impressive resume (ID 9, TR2-113, 114). She felt that Complainant was not the kind of leader needed for this position, and she shared her feelings with the rest of the committee at its meeting on April 19 (ID 9).

Committee member Joan Kane Josephson, Esq., is a former employee of the AOC who served as the chief of labor relations for the Judiciary. In that capacity, she negotiated labor contracts in all counties and interacted with the counties' Assignment Judges and Trial Court Administrators (TR3-143, 142). Ms. Josephson testified that she based her selections on her experience with the TCAs and her awareness of the job requirements for the position, that she was most interested in the experience of the candidates, and that the age of any of the candidates was not at all a factor. Ms. Josephson knew several of the candidates, including Complainant, and testified that Complainant was not a happy employee, and she did not see him as a team player (ID 11, TR3-151 to 158, 162 to 165).

Ms. Josephson recruited Jude DelPriore, the ultimately successful candidate, whom she knew from the time that she was employed at the AOC. She considered Mr. DelPriore to be a "superstar" that was "very highly regarded," and as a result "implored him" and "twisted his arm" to apply (ID 11; TR3 -166).

Samuel D. Conti has worked for the State of New Jersey periodically since 1971. He is a former TCA for the Hudson Vicinage and served as regional director for the National Center for State Courts from 1973 to 1987. He worked specifically for the AOC from 1992 to 1996 as the Assistant Director for Trial Court Support, and currently serves as the manager of operations review and technical assistance and is Chief of Professional Services (ID 11). He testified that over the years, he saw Complainant five to six times per year and his demeanor made it plain that Complainant was not happy with his role. Conti said he knew this by the comments that Complainant made. He did not like the level and kinds of duties he was performing. He was frustrated, disappointed and had a "hang-dog" attitude (ID 12). Mr. Conti acknowledged that his understanding of Complainant and his situation in the Vicinage did weigh in his decision not to place Mattei on his list of recommended candidates. Ibid.

Joseph Francis Davis, Esq., recommended to the committee by the Deputy Director of the AOC, has worked in the court system since 1978 and has served as the Trial Court Administrator of Hudson County. Mr. Davis took notes of Judge Carchman's comments during the first committee meeting. He noted that the characteristics and experience that Judge Carchman highlighted were "innovation and vision, an ability to manage people and deal with judges, and experience and ability to deal with fiscal, technology, labor/management and personnel issues, case flow concepts and the 'matrix issues', which the notes suggest involve the relationship of the assignment judge and the AOC" (ID 13). Complainant was on Mr. Davis' list of 15 recommended candidates. However, Mr. Davis indicated that upon receipt of Mr. DelPriore's resume during the Fall process, "the rest was just an excercise" and the committee was "shocked" that Mr. DelPriore had not initially applied for the position. Ibid. Davis said Delpriore was vocal, articulate and knowledgeable, had an outstanding reputation, was an outstanding motivational speaker, and was known for the innovative Sheriff's Labor Assistance Program he had developed (ID 13; TR4-167 to 168).

In Complainant's testimony, he gave details about his work history, including positions held

and projects completed. At the time of his testimony, he was serving with the AOC in the Middlesex Vicinage as the municipal court division manager. Complainant contradicted portions of Judge Feinberg's testimony and denied having certain conversations with her. Further, he denied having any social contact with her, although they both lived in Lawrenceville and saw each other on occasion around town. Complainant acknowledged calling Judge Feinberg at her chambers because he was very disappointed about not being selected for the position during the Spring 1996 selection process, and he inquired as to whether there was something wrong with his application. He also denied that his position as municipal court liaison "was any less challenging and difficult than other roles in the Vicinage." However, he acknowledged that "many times less accomplished persons were placed in the municipal liaison position" (ID 14).

Complainant had contact with Ms. Josephson three or four times per year. However, he denied that she ever gave him a ride home as she had testified. In fact, Complainant testified that on one occasion Ms. Josephson was in Middlesex County on business and Complainant gave her a ride home to Trenton because she had sustained a broken foot. During that ride they exchanged comments about their mutual frustration with their respective positions and Complainant testified that Ms. Josephson was "very down about the organization at AOC" (ID 14).

Complainant testified that his primary objection is that he was not afforded an interview for the position. Complainant acknowledged that he previously applied for the Trial Court Administrator position in Middlesex County and that he was unhappy about his relationship with TCA Edwards. Complainant had a "very bad relationship" with Mr. Edwards after Edwards got the job, and he was "subjected to some very shabby treatment" (ID 15). A year after Mr. Edwards took the position, Complainant was assigned to the municipal courts. He admitted that at first he did not like the idea, feeling that it was a demeaning assignment, but he later came to enjoy the assignment - one which, prior to his taking it on, had been a shared responsibility. Ibid.

Judge Feinberg offered rebuttal testimony regarding Complainant's telephone call to her

when he was not selected following the first review process. Judge Feinberg was surprised by the telephone call and was "uncomfortable" because she "felt bad for him," and didn't want to hurt him. Ibid. The Judge may have shared information about the conversation with other committee members but did not discuss it with Judge Carchman. Judge Feinberg did not believe that the call affected her decision-making process. Ibid.

Joan Josephson also offered rebuttal testimony, denying that she ever had a broken foot or was unable to drive. She noted that her assistant, Judy Stein, had suffered a torn Achilles tendon and could not drive. Josephson recalled that Ms. Stein lived in Somerset, New Jersey and was unhappy about her superior, Mr. Sterben (ID 16).

Complainant offered sur-rebuttal testimony. Complainant testified that he was professionally acquainted with Ms. Stein, however, he was never alone in a car with her, did not know where she lived and never went to her house. Complainant reaffirmed his prior testimony that Ms. Josephson did have an injured foot and he did drive her home, and that she "expressed her bitterness over the hiring of Sterben, who he believed was a 'good bit' younger than was Josephson." Ibid.

The ALJ found that the testimonies of Judge Feinberg, Joan Josephson and Samuel Conti regarding their subjective impressions about the Complainant's attitudes and perspectives were "highly credible," and that these witnesses presented information about their experiences with Complainant to other committee members (ID 21). The ALJ also found that Ms. Josephson did ride in a car with the Complainant and Complainant did express his negative feelings about his job. Ibid. Although the ALJ acknowledged that these findings did not necessarily mean that these witnesses accurately recalled what Complainant said or that they accurately interpreted his attitudes, he concluded that at the time that they served on the selection committee, these witnesses believed that Complainant had spoken negatively about his job and the court system of which he was a part. Ibid.

B. Legal Conclusions.

Citing Millbrook v. IBP, Inc., 280 F. 3d 1169,1174 (7th Cir. 2002), the ALJ determined that Complainant established a prima facie case of age discrimination, which raised an inference that he had been subjected to unlawful discrimination (ID 16). The ALJ noted that, once a prima facie case is established, the burden shifts to the respondent to demonstrate the existence of legitimate non-discriminatory business reasons for its decision (ID 5). The ALJ concluded that Respondent met that burden by presenting evidence that it had legitimate business reasons for not offering Complainant the position of Trial Court Administrator. Specifically, the ALJ relied on testimony from members of the selection committee that confirmed that Complainant had a sense of negativity, frustration, disillusionment and unhappiness with regard to his job. Further, the narrowed focus of Complainant's job responsibilities as assistant trial court administrator rendered him unsuitable for the extremely responsible position of Trial Court Administrator. The ALJ determined that Respondent's proofs eliminated any inference of discrimination, thus shifting the burden back to Complainant to show that Respondent's legitimate reasons for excluding him were "mere pretext," and that age discrimination was the primary reason why Complainant did not advance in the hiring process (ID 16 - 17). The ALJ then concluded that Complainant failed to demonstrate by a preponderance of the evidence that the reasons advanced by Respondent for its failure to appoint Complainant to the TCA position were pretexts for discrimination or that Respondent was in any way influenced by considerations of age (ID 2, 23). The ALJ concluded that there was not a "scintilla of evidence to support the Complainant's attempts to demonstrate that the proffered business reasons were pretextual" (ID 3).

The ALJ specifically addressed arguments offered by Complainant to demonstrate that Respondent's justifications for denying him the TCA position were pretexts for age discrimination (ID17-22). In particular, the ALJ rejected Complainant's argument that Respondent's justifications at hearing differed in certain respects from those asserted previously before the EEOC during its

investigation, most notably because they referenced subjective criteria as opposed to the objective criteria that were referenced in the earlier proceeding, and that this inconsistency amounts to evidence that unlawful factors were considered in making the decision. The ALJ found no significant contradiction between the initial submission to EEOC and the defense asserted at hearing (ID 22). The ALJ similarly rejected Complainant's assertion that Respondent's reliance on "highly subjective criteria" which valued characteristics such as enthusiasm and energy suggested to committee members that older candidates were to be avoided (ID 20-22). Citing Fuentes v. Perskie, 32 F. 3d 759 (3rd Cir. 1994), and **Millbrook v. IBP, Inc., supra, 280 F.3d 1169, the ALJ found that the use of subjective evaluation criteria and personal impressions about candidates during the hiring process is not forbidden under civil rights laws so long as the use of such information is not a cover for discrimination (ID 21-22).** He further found that at no time, and by no means, did Judge Carchman tell or imply to the committee that age was a factor to be considered in the hiring process (ID 23).

The ALJ also addressed the Complainant's reliance on the evidentiary inference of spoliation as a means to demonstrate that Respondent's articulated reasons for rejecting Complainant were pretextual. Complainant had argued that, based on this doctrine, an adverse inference should be applied against Respondent because one witness, Mr. Conti, made personal notes during the Fall selection process which he was unable to provide during these proceedings, and that Respondent's failure to produce these notes violated 29 CFR 1602.31, which requires political jurisdictions to retain employment records under certain circumstances. The ALJ noted that this inference may be warranted under certain circumstances where the record reflects "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation" (quoting West v. Goodyear Tire and Rubber Co., 167 F. 3d 776, 779 (2d Cir. 1999)). However, the ALJ determined that even if applicable in this case, such an evidentiary inference would not be sufficient to support a finding by a preponderance of the

credible evidence that Respondent engaged in age discrimination since the evidence produced by Respondent outweighed any adverse inference that would otherwise benefit Complainant (ID 19). Moreover, the ALJ found the inference was inapplicable in this case for several reasons. First, although the witness acknowledged that he made personal notes during some of the meetings, there was nothing in the record that suggested that any significant percentage or type of document was destroyed or otherwise made unavailable. Second, these personal notes did not remotely resemble the substantial nature of the documents destroyed in the cases cited by Complainant. Third, from the language of the federal regulation, it was not patently clear that the personal notes of a selection committee member are the type of record intended to be covered by the rule (ID 18 - 19).

The ALJ cautioned that the spoliation presumption should be carefully applied only to circumstances that clearly warrant it (ID 20). Further, an application for such a presumption should be made at the time that the witness whose notes were missing testified, before the record is closed. The ALJ asserted that even if it was appropriate to request the inference after the hearing, the record should support a finding of a culpable state of mind, which was absent here. He further concluded that there is no evidence that personal notes of the committee member were destroyed pursuant to any policy of the Respondent since there was no evidence that the notes were a requirement of the process or were a part of Respondent's files, or that Respondent was even aware that the notes existed. For the foregoing reasons, the ALJ concluded that there was no basis for imposing a spoliation presumption. Ibid.

Accordingly, the ALJ found that the reasons proffered by Respondent for rejecting Complainant were in fact the reasons which motivated the selection committee, and not discrimination based upon age. Therefore, the ALJ concluded that the business justification asserted by Respondent was not a pretext for discrimination and that Complainant failed to meet his burden of demonstrating by a preponderance of the credible evidence that his rights were

violated (ID 23).

IV. THE PARTIES' EXCEPTIONS AND REPLIES

A. Complainant's Exceptions

In his exceptions, Complainant first argues that the ALJ exceeded his authority by questioning witnesses during examination and "becoming a second, experienced lawyer arguing for the AOC's interests instead of being and appearing to be a dispassionate and unbiased fact-finder" (CE 1).

Complainant also argues that the ALJ failed to properly respond to Complainant's motion to reconsider his interlocutory ruling that certain communications between the Assistant Attorney General and judicial witnesses are privileged. The ALJ's ruling was based on his determination that the Attorney General has an attorney-client relationship with members of the Judiciary because the AOC and the New Jersey Judiciary constitute the same employer. Complainant requests that the Director reverse the ALJ's decision on this point and instruct the ALJ to permit Complainant to question the judicial witnesses regarding their conversations with the Assistant Attorney General who represented Respondent (CE 2).

Complainant next takes exception to the ALJ's conclusion that there is no significant contradiction between Respondent's initial response to Complainant's charge of age discrimination filed at the EEOC, and the defense asserted later at the hearing of his LAD complaint. Complainant asserts that Respondent initially represented to the EEOC that the decision not to hire Complainant was based upon objective criteria, but failed to disclose that Judge Carchman also provided certain subjective criteria to the selection panel. Moreover, according to Complainant, it was only at the hearing that Respondent asserted for the first time that it considered subjective criteria in evaluating candidates. Complainant argues that Respondent's positions are inconsistent, and that this inconsistency amounts to evidence that Respondent considered improper factors in rejecting Complainant (CE 2-6).

Complainant further argues that Respondent erroneously stated that the selection committee interviewed the top five candidates as a part of the Fall 1996 selection process when, in reality, the committee did not conduct interviews during this phase of the process, and simply submitted the resumes of the top five candidates to Judge Carchman for his consideration. Complainant asserts that the ALJ also ignored this misrepresentation, and that it too is evidence of unlawful discrimination (CE 2-5).

Complainant takes further exception to the ALJ's failure to accept the findings of the EEOC as substantive evidence to be weighed in his favor. The EEOC issued a determination on December 23, 1998, concluding that its investigation uncovered evidence which established that Respondent violated the federal statute against age discrimination. Complainant asserts that by not accepting the EEOC determination, the ALJ ignored the holding in Hernandez v. Region Nine Housing Corp., 146 N.J. 648 (1996), that an EEOC determination may be admitted at subsequent trials unless there is a specific finding that it is untrustworthy. Complainant asserts that there is no evidence in the record which supports a finding that the EEOC determination is particularly untrustworthy (CE 4).

Complainant also argues that the ALJ wrongfully declined to draw an adverse evidentiary inference of spoliation against Respondent based on Respondent's intentional or inadvertent destruction of notes of interviews and committee meetings, which Complainant asserts violated 29 CFR 1602.31. The record established that one witness, Sam Conti, lost or misplaced his notes of the committee meetings. Complainant contends that Respondent intentionally or inadvertently destroyed these and other notes relating to interviews, selection committee meetings, candidates' resumes, and Judge Carchman's presentation to the committee. Complainant requests the Director to conclude that these records are covered by 29 CFR 1602.31, and that Respondent's failure to produce these documents gives rise to an inference that they contained some evidence which would have supported Complainant's claim (CE 6-17).

Finally, Complainant challenges the ALJ's determination that the testimonies of Judge Feinberg, Joan Josephson, and Samuel Conti regarding their reasons for not recommending Complainant for an interview were highly credible. Complainant asserts that Judge Feinberg's testimony that Judge Carchman was seeking an energetic, enthusiastic person implies that he sought a young person for the position, and her testimony is therefore evidence of age discrimination. Citing Aka v. Washington Hospital Center, 156 F.3d 1284 (D.C. Cir. 1998), Complainant argues that the use of these words by the ultimate decision maker can be a sufficient basis to establish pretext in an age discrimination claim, particularly where there is asserted a strong reliance on subjective feelings about candidates in making the selection (CE 17-18).

B. Respondent's Replies to Complainant's Exceptions

Respondent counters that Complainant is not entitled to a spoliation inference because: the personal notes that Sam Conti misplaced are not statutorily required; there is no evidence in the record which reflects that any documents were destroyed or that notes other than Sam Conti's actually existed, and if they did, there's no evidence that they would have helped Complainant; Complainant's request is not timely under the court's decision in State v. Clawans, 38 N.J. 162 (1962); and the ALJ has discretion as to whether to apply a spoliation inference (RE 10-14).

Respondent also argues that it did not change its explanation for not interviewing Complainant since its position statement to the EEOC referred to a list of selection criteria that included several subjective qualifications, such as intelligence, communication skills, enthusiasm, and judgment, that were similar to the criteria asserted at hearing. Respondent contends that the six day hearing before OAL presented it with an opportunity to detail its nondiscriminatory reasons for its actions, and its more expansive explanation in no way suggests that the reasons given at hearing were "post hac rationalizations" or inconsistent with its previous statements to EEOC (RE 14-15).

Respondent next argues that the ALJ properly considered EEOC's determination and, after

six days of hearings, rejected its conclusion. Respondent cites several cases which stand for the proposition that, although EEOC determinations are admissible, the quality of the investigations vary and the courts have accorded them little weight. Respondent contends that the ALJ did not ignore the EEOC decision; he simply disagreed with it (RE 17 to 18). Respondent also concurs with the ALJ's decision that the conversations between the witness judges and their attorneys are privileged and not discoverable (RE 19).

Respondent also asserts that its use of subjective criteria in selecting a Trial Court Administrator is not evidence of discrimination. Respondent asserts that courts have recognized the legitimate use of subjective criteria in employment decisions, and contends that in this case there was no evidence that witnesses' use of the words "enthusiasm" and "energetic" indicated that Respondent was seeking only young candidates (RE 16 to 17).

Finally, Respondent argues that there is no basis in the record to reject the ALJ's credibility findings. Citing N.J.S.A. 52:14b-10(c), Respondent argues that the ALJ's findings should not be rejected unless they are found to be "arbitrary, capricious or unreasonable or are not supported by sufficient, competent evidence in the record." Moreover, Respondent asserts that Complainant confirmed the impressions of the selection committee in his own testimony (RE 21). Respondent argues that there is no evidence in the record sufficient to overturn the ALJ's credibility findings (RE 20).

V. THE DIRECTOR'S FINDINGS AND DETERMINATIONS

A. Findings of Fact

Generally, the Director must give substantial weight to the ALJ's credibility determinations and to all findings based on these determinations, since it was the ALJ who had an opportunity to hear the testimony of the witnesses and to assess their demeanor. See Clowes v. Terminix International, Inc., 109 N.J. 575, 587(1988); Renan Realty Corp. v. Dept. of Community Affairs, 182 N.J. Super. 415, 419 (App. Div. 1981). An agency head may reject or modify factual findings

based on credibility of lay witnesses only upon a showing that the specific findings of the ALJ were arbitrary, capricious or unreasonable, or are not supported by sufficient, competent and credible evidence in the record. N.J.A.C. 1:1-18.6(c); N.J.S.A. 52:14B-10.

In this instance, the Director finds sufficient credible evidence in the record to support the ALJ's factual findings summarized above, and adopts them as his own. In particular, after reviewing the entire record and considering Complainant's exceptions as discussed above, the Director finds no substantial basis to reject or modify the ALJ's findings, based on his determinations of the credibility of the witnesses, that Judge Feinberg, Joan Josephson, and Samuel Conti believed that Complainant had spoken negatively about his job and the system in which he worked; that these witnesses presented information to the other committee members about their personal experiences with Complainant; and that the decision of the selection committee not to interview or recommend Complainant was the result of the members' impressions of his experience and of their personal perceptions of his attitude about his job (ID 22-23).

B. Conclusions of Law

1. Procedural and Evidentiary Issues

a. Applicability of attorney-client privilege

Complainant contends that during the hearing on September 24, 2001, the ALJ improperly refused to permit Complainant's attorney to cross examine Judges Carchman and Feinberg regarding communications they may have had, regarding Complainant's charges, with Deputy Attorneys General and an Assistant Attorney General, in preparation for hearing. Respondent objected to this line of cross examination on the ground that such conversations were protected by the attorney-client privilege. The ALJ requested briefing on the issue, and subsequent to his receipt of written submissions from both parties, he issued a written opinion on November 20, 2001

concluding that such conversations were protected from disclosure by the attorney-client privilege.[2]

In his written submissions to the ALJ, Complainant argued that the sole respondent in this case is the Administrative Office of the Courts (AOC), and that Judges Carchman and Feinberg are not employees of the AOC per se. Therefore, while the attorney-client privilege does apply to conversations between a corporate or institutional employer's attorney and its employees, see Upjohn v. United States, 499 U.S. 383 (1981), Complainant contended that it did not extend to the communications at issue here, because the judges were not employees of the named respondent.

In his well-reasoned decision, the ALJ rejected Complainant's argument. The ALJ noted that the AOC exists to perform administrative and support functions for the Judiciary. N.J.S.A. 2A:12-1 et seq. The Director of the AOC is appointed by the Chief Justice of the Supreme Court, who establishes the compensation, duties and functions of the Director and Deputy Director. The Chief Justice is also authorized to approve hiring and salary decisions by the Director, and the Director is required by statute to carry out certain delineated administrative functions subject to the direction of the Chief Justice. N.J.S.A. 2A:12-3. The ALJ noted that the interrelationship between the judges performing administrative functions for the court system and the administrative support staff supplied by the AOC, demonstrated that functionally, the AOC serves not as an independent unit of government, but as the administrative arm of the New Jersey court system. Therefore, the ALJ found that "[t]o the extent that Judges Carchman and Feinberg participated in the selection process

[2]In a letter dated December 4, 2001, Complainant requested reconsideration of this ruling. The ALJ did not issue a written decision in response to this motion. During the hearing held on May 20, 2002, Complainant raised this issue again with the ALJ, who acknowledged that he had neglected to respond in writing to the motion for reconsideration. At the same time, he ruled on the record that he was denying the motion for reconsideration, and indicated that he would put that denial in writing. In his exceptions, Complainant points out that the ALJ never issued a written denial of the motion for reconsideration, and contends that this prevented him from seeking interlocutory review. The Director finds no merit to this argument. Under the rules governing the Office of Administrative Law, Complainant could have sought interlocutory review from the written November 20, 2001, or from an oral ruling of the ALJ. N.J.A.C. 1:1-14.10(b). In any event, the rules further provide that "any order or ruling reviewable interlocutorily is subject to review by the agency head after the judge renders the initial decision in the contested case....", N.J.A.C. 1:1-14.10(j), and, therefore, the Director has the authority to review the ruling at this stage of the proceedings.

for the vicinage trial court administrator they functioned as employees of the Judiciary; and the Judiciary is in fact the appropriate respondent, whether the challenge is to action by its administrative arm, the AOC, or the judicial arm itself, acting in its administrative capacity." (November 20, 2001 Interlocutory Decision, p.3). The ALJ then concluded that the attorney-client privilege protects from disclosure communications between Judges Carchman and Feinberg and the attorneys assigned to represent the New Jersey Judiciary. The Director has closely examined the arguments of the parties and the ALJ's thoughtful decision, and adopts the ALJ's conclusion for the reasons set forth in his decision.

b. Spoliation Inference

Complainant argues that he is entitled to a spoliation inference, based on his contention that Respondent intentionally or inadvertently destroyed interview notes and notes of committee meetings. Specifically, Complainant requests that the Director find that the missing evidence would be unfavorable to Respondent and would support Complainant's claim of age discrimination. (CE 7, 14).

Spoliation is the hiding or destroying of evidence pertinent to litigation, usually by an adverse party, thereby interfering with proper disposition of the litigation. Rosenblit v. Zimmerman, 166 N.J. 391, 400 (2001); Aetna Life and Casualty v. Imet Mason Contractors, 309, N.J. Super. 358, 364 (App. Div. 1998). A spoliation inference serves as a form of sanction for interference with discovery, and permits the factfinder to draw an unfavorable inference against the party who has destroyed evidence. Hirsch v. General Motors Corp., 266 N.J. Super. 222, 257-258 (Law Div. 1993); R. 4:23-2(b).

The ALJ concluded that even if a spoliation inference were warranted, granting such an inference would not change the ultimate determination that Complainant failed to prove age discrimination, as the inference would be insufficient to outweigh the persuasive, credible evidence of Respondent's non-discriminatory reasons for not hiring Complainant (ID 19). Evaluating the

factors relevant to imposing a spoliation inference, the ALJ also concluded that no such evidentiary inference was warranted here because of the nature of the missing documents, the absence of a culpable state of mind, and Complainant's failure to raise the issue until after the hearing (ID 19-20). After review of the arguments of the parties and the relevant caselaw, the Director finds no basis for rejecting the ALJ's determination on this issue.

Respondent cites State v. Clawans, 38 N.J. 162, 172 (1962) for the proposition that a request for a spoliation inference must be made before the hearing concludes. Clawans addressed a request for an adverse evidentiary inference based on failure to call a witness, rather than spoliation of evidence. The theories underlying these distinct evidentiary inferences differ, in that unlike destroyed evidence, an absent witness is generally available to be called by the opposing party if he or she so chooses. Thus, any inference drawn from the absence of a witness does not serve the deterrence or remedial functions served by a spoliation inference. Nevertheless, the Director finds the Clawans court's reasoning and conclusion to be equally applicable to a request for a spoliation inference - - it is "the better practice" to request the inference prior to conclusion of the hearing, so that the opposing party has an opportunity to be heard, either by evidence or argument, on the merits of imposing the inference. Ibid.

Where spoliation is the subject of an independent tort action for fraudulent concealment of evidence, New Jersey courts require a plaintiff to establish that the destruction of evidence was willful or intentional. Hirsch, supra, 266 N.J. Super. at 244. However, where a litigant raises spoliation in the underlying litigation to request an evidentiary inference or a discovery sanction, New Jersey courts have generally not required a showing that the destruction of evidence was intentional. Aetna Life and Casualty, supra, 309 N.J. Super. at 368, citing Hirsch, supra, 266 N.J. Super. at 256; but see Barbera v. DiMartino, 305 N.J. Super. 617, 642 (App. Div. 1997)("Spoliation of evidence occurs when, in a prospective civil action, evidence necessary to the disposition of the matter willfully is destroyed with the intent of depriving a party of its use in litigation"). While

negligent destruction of evidence may warrant a spoliation inference in some circumstances, some other jurisdictions indicate that at least gross negligence must be shown to support a spoliation inference. See, e.g., Byrnie v. Town of Cromwell, 243 F. 3d 93, 108 (2nd Cir. 2001). Even where a showing of willful or intentional destruction of evidence is not required, the spoliator's intent level is not irrelevant; it will be considered in determining the appropriate remedy for the destruction of evidence. Aetna Life and Casualty, supra, 309 N.J. Super. at 368, citing Hirsch v. General Motors Corp., 266 N.J. Super. 222, 256 (Law Div. 1993).

Starting from the premise that Respondent's negligent, rather than intentional, destruction of evidence may be sufficient to warrant a spoliation inference, the nature and materiality of the evidence lost or destroyed should be considered. The ALJ found that Conti's interview notes were not created as a requirement of the committee's hiring procedures and were never part of Respondent's file on the selection process. The ALJ also specifically concluded that it was not clear that Respondent was aware that Conti created any interview notes prior to their destruction (ID 20).

Relying on Byrnie v. Town of Cromwell, supra, 243 F. 3d 93 and Shipley v. Dugan, 874 F. Supp. 933 (S.D. Indiana, 1995), Complainant contends that regardless of Respondent's control or awareness of Conti's notes, a spoliation inference should be imposed against Respondent based on a federal regulation which required Respondent to retain all "records having to do with hiring" for two years or until final disposition of a discrimination charge relating to the hiring. 29 C.F.R. 1602.31. After reviewing the caselaw, the ALJ concluded that personal notes made by a member of a selection committee were not clearly the type of hiring records contemplated by the regulation, and that the spoliation inferences imposed in the cited cases were based on destruction of more varied and substantial documents. The Director agrees.

In Shipley v. Dugan, the employer destroyed its application files on other candidates for the position Complainant sought, thereby hindering her attempts to show that she was more qualified

than other applicants. 874 F. Supp. at 939-940. The court found that the employer's applicant files, which included "resumes, cover letters and any interview notes relevant to the hiring proceedings," were records an employer was required to preserve pursuant to 29 C.F.R. 1602.31. Ibid. The court concluded that, because the employer destroyed those files after one year, rather than retaining the files as required under federal law, it was appropriate to permit (but not require) the jury to infer that the lost records contained evidence favorable to the plaintiff. 874 F. Supp. at 943-944.

In Byrnie v. Town of Cromwell, the employer destroyed some application materials of other candidates, as well as the written ballot forms for ranking candidates, forms on which interviewers listed their top three choices, a tally sheet of interviewers' votes, and notes made by interviewers during first and second interviews. 243 F. 3d. at 107. The court found that the voting tally sheets and interview notes were hiring records the employer was required to retain pursuant to 29 C.F.R. 1602.40 (the federal records-retention regulation applicable to school districts, which is identical in pertinent part to 29 C.F.R. 1602.31).

Although the determinations in Shipley and Byrnie demonstrate that in some circumstances interview notes may constitute hiring records subject to the federal records-retention regulations, the Director concludes that these cases do not mandate a finding that 29 C.F.R. 1602.31 puts employers on notice that they must collect, preserve and retain any and all stray notes made by every individual involved in a hiring process. In both Shipley and Byrnie, the records destroyed had clearly been maintained as part of the employer's records, and had been destroyed pursuant to the employer's policies. 243 F. 3d at 109; 874 F. Supp. at 939-940. In contrast, in the present case Respondent never had control of Conti's notes, nor is it clear that Respondent knew that such notes existed. The Director agrees with the ALJ's conclusion that Conti's lost notes were not the types of documents Respondent was required to retain pursuant to 29 C.F.R. 1602.31.

The reported decisions which found sufficient basis to impose a negative spoliation inference, including those relied on by Complainant, generally characterize such an inference as permissive,

rather than obligatory. This means that the trier of fact may, rather than must, conclude that the destroyed evidence would show unlawful discrimination. See, e.g., State Commissioner of Transp. v. Council, Div. of Resource Dev., 60 N.J. 199, 202 (1972); Smith v. Borough of Wilkinsburg, 147 F. 3d 272, 280 (3rd Cir. 1998).

Both Shipley v. Dugan and Byrnie v. Town of Cromwell, cited by Complainant, imposed a permissive evidentiary inference, leaving it to the jury to decide whether to draw such an inference. 874 F. Supp. at 943-944; 243 F. 3d at 110 . Moreover, the Shipley court indicated that the evidentiary inference would most likely be made in the form of argument by counsel rather than a specific instruction to the jury. 874 F. Supp. at 943-944. The permissive nature of the inference is significant in that, in an administrative proceeding where the ALJ is the finder of fact, the ALJ's ruling on whether an evidentiary inference is permissible merges, for all practical purposes, with his ultimate determination as to whether the preponderance of the evidence shows unlawful discrimination. Thus, the significance of an evidentiary inference in an **administrative proceeding** in which the ALJ is the finder of fact is minimal.

Moreover, a litigant's request for the imposition of a negative evidentiary inference is essentially a request that the factfinder reach a specific conclusion regarding a disputed fact. Factual determinations based on credibility of witnesses are particularly within the purview of the ALJ. The Director must give substantial weight to the ALJ's credibility determinations and to all findings based on these determinations, since it was the ALJ who had an opportunity to hear the testimony of the witnesses and to assess their demeanor. See Clowes v. Terminix International, Inc., supra, 109 N.J. 575, 587(1988); Renan Realty Corp. v. Dept. of Community Affairs, supra, 182 N.J. Super. 415, 419 (App. Div. 1981). The Director may not reject factual findings based on the ALJ's determinations regarding the credibility of lay witnesses unless the specific factual finding is arbitrary, capricious, unreasonable, or is not supported by sufficient competent and credible evidence in the record. N.J.A.C. 1:1-18.6(c). Accordingly, the Director must give substantial weight

to the ALJ's credibility determinations regarding the testimony of witnesses who testified as to Respondent's reasons for rejecting Complainant, as well as his credibility determinations regarding the states of mind of the witnesses who testified about the non-existence, loss or destruction of documents. Based on the evidence in the record and the ALJ's credibility determinations, the Director specifically adopts the ALJ's conclusion that, even if an adverse evidentiary inference based on spoliation were warranted in this case, it would be insufficient to establish pretext.

c. Abuse of Discretion

The Director finds that Complainant's argument that the ALJ interjected himself into the case by questioning witnesses in the middle of examination, (CE - 1), is without merit. A review of the testimony reveals that the ALJ did interject for clarification during the proceedings (i.e., TR3 - 155,158). However, the Director finds that there was no inappropriate or biased questioning of witnesses by the ALJ as alleged by Complainant, and there is no evidence that he abused his authority. N.J.A.C. 1:1-14.6 (o)

2. Substantive Issues

An initial decision must include an explicit statement of the underlying facts which support the ALJ's findings of fact, and those facts must be sufficient to support the ALJ's legal conclusions. N.J.S.A. 52:14B-10(d); State Department of Health v. Teqnazian, 194 N.J. Super. 435, 442-43 (App. Div. 1984). In the initial decision, the ALJ provided an explicit and thorough statement of the facts underlying his decision.

The LAD prohibits an employer from refusing to hire an applicant on the basis of age. N.J.S.A.10:5-4; 10:5-12(a).[3] As a starting point for analyzing cases brought under the LAD, including failure to hire cases, New Jersey courts have adopted the methodology established by

[3]The LAD does permit an employer to refuse to hire or promote a person over 70 years of age, N.J.S.A. 10:5-12(a). That exception to the general prohibition against age discrimination in employment is inapplicable to the facts in the instant matter, as Complainant was **57** years old at the time Respondent refused to hire him.

United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). [4] This methodology involves a burden-shifting analysis, with the complainant first bearing the burden of establishing a prima facie case. Id. at 802. However, the elements of a prima facie case are flexible, and will vary in differing factual circumstances. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). To establish a prima facie case of discriminatory failure to hire, a complainant must demonstrate that 1) he is a member of a protected class; 2) he was qualified for the position sought; 3) he was rejected despite his qualifications; and 4) the employer continued to seek applicants of similar qualifications for the vacancy after rejecting him. Anderson v. Exxon, 89 N.J. 483, 492-93 (1982); **Martinez v. National Broadcasting Co., 877 F. Supp. 219 (D.N.J. 1994)**. Once a complainant has established a prima facie case of unlawful discrimination, the burden of production shifts to the respondent to articulate a legitimate, nondiscriminatory reason for the adverse action. Texas Department of Community Affairs v. Burdine, supra, 450 U.S. at 253-54. To accomplish this, the respondent must, through the introduction of admissible evidence, raise a genuine issue of fact as to whether it discriminated against the complainant. Id. at 255. If the respondent presents such a reason, the burden shifts back to the complainant to prove by a preponderance of the evidence that the respondent's articulated reason for its action was pretextual and that the employer's true motivation and intent were discriminatory. Goodman v. London Metal Exchange, Inc., 86 N.J. 19,32 (1981). Applying these standards, the Director adopts the ALJ's conclusion that Respondent did not discriminate against Complainant in violation of the LAD.

Employing the burden-shifting methodology described above, the Director agrees with the ALJ's determination that Complainant has presented sufficient evidence to establish a prima facie case of discriminatory refusal to hire based on age. It is undisputed that Complainant is a member

[4] Although the Division is not bound by federal precedent when interpreting the LAD, New Jersey courts have consistently "looked to federal law as a key source of interpretive authority" in construing the LAD. Grigoletti v. Ortho Pharmaceutical Corp., 118 N.J. 89, 97 (1990).

of a protected class, that he met the basic qualifications for the available position, and that Respondent rejected him and continued to seek other applicants of similar qualifications.[5] The Director also agrees with the ALJ that Respondent successfully rebutted Complainant's prima facie case by proffering legitimate nondiscriminatory reasons for not hiring Complainant. In particular, Respondent presented evidence (1) that Complainant had expressed a sense of negativity and frustration about his job; and (2) that the narrowed focus of Complainant's job responsibilities as assistant trial court administrator rendered him unsuitable for the TCA position. The Director adopts the ALJ's determination that Respondent's proofs eliminated any inference of discrimination, thus shifting the burden back to Complainant to show that Respondent's legitimate reasons for excluding him were pretextual, and that age discrimination was the reason why Complainant did not advance in the hiring process.

After a thorough review of the record, the Director concurs with the ALJ that Complainant failed to demonstrate by a preponderance of the evidence that the reasons advanced by Respondent were pretexts for discrimination, or that Respondent was in any way influenced by considerations of age. The ALJ explicitly found that Judge Feinberg, Ms. Josephson, and Mr. Conti firmly believed that Complainant had spoken negatively about his job and the system of which he was a part, (ID 21), and that this attitude was the reason which motivated the committee to reject Complainant, (ID 22). These findings, based on the ALJ's determination that these witnesses were "highly credible," (ID 21), demand substantial weight and may be modified or rejected only upon a showing that the specific findings are arbitrary, capricious or unreasonable, or are not supported by sufficient, competent, and credible evidence in the record. Clowes v. Terminix International, Inc., supra, 109 N.J. 575,587; N.J.A.C. 1:1-18.6(c). Complainant has failed to make the requisite showing that would warrant modifying or rejecting either the ALJ's credibility determinations or the

[5]Respondent stipulated that Complainant established a prima facie case of unlawful discrimination against him because of his age (TR - 6).

facts based thereon.

Judge Linda Feinberg credibly testified that Complainant's negative attitude overshadowed his impressive resume and that Complainant was not the kind of leader needed for the position. She shared her feelings with the rest of the committee (TR2-113, 114). Joan Kane Josephson, Esq., similarly testified that she knew Complainant and he was not a happy employee, and she did not see him as a team player. She also testified that the candidates' age was not "at all' a factor (TR3-151 to 158 , 162 to 165). Ms. Josephson recruited Jude DelPriore, the successful candidate, whom she knew from the time that she was employed at the AOC. She considered Mr. DelPriore to be a "superstar" that was "very highly regarded," and as a result "implored him" and "twisted his arm" to apply (ID 11; TR3 -166).

Further, the committee believed that the narrowed focus of Complainant's job responsibilities rendered him unsuitable for the Trial Court Administrator position (e.g., TR4-74 to 75). Complainant acknowledged that, although he personally did not feel that his reduced responsibilities were less important or less challenging, a perception existed that the municipal courts were the "little guys and the step children of the court system" (TR5 - 31 to 32). He stated "quite frankly over the years many times the less spectacular performing people were put there to work with the municipal courts..." Ibid. Based on this evidence, and giving proper deference to the ALJ's credibility determinations, the Director concludes that Complainant failed to demonstrate that Respondent's articulated reasons for rejecting Complainant were pretexts for discrimination.

The ALJ rejected Complainant's argument that Respondent's defense at hearing, which relied on subjective criteria, was inconsistent with the position it previously presented during EEOC's investigation, and that this inconsistency is evidence of pretext (ID 18-19). The Director agrees with the ALJ that there is no significant contradiction between Respondent's initial submission to EEOC and the defense asserted at hearing (ID 19). Complainant points to Respondent's position statement to the EEOC which asserts that the hiring decision was based on objective criteria, and

attempts to contrast this characterization with Respondent's stated position before the OAL (CE 2-3). It is clear from the record, however, that Respondent's description to EEOC of the criteria used to assess candidates was an imprecise characterization, particularly since the exhibit which accompanied Respondent's submission lists traits such as "enthusiasm" and "judgment," which call for a subjective evaluation. Moreover, it is unreasonable to compare Respondent's effort to summarize its defense before the EEOC to the evidence compiled during six days of hearings. In light of the ALJ's findings concerning the reasons Respondent rejected Complainant for the TCA position, Complainant's contention that Respondent offered inconsistent positions during different stages of this litigation is insufficient to establish that Respondent's reasons are false.

The Director also adopts the ALJ's finding that the use of subjective criteria in the selection process does not by itself demonstrate that Respondent rejected Complainant because of his age. Complainant argues that subjective criteria were used during the selection process and, particularly, that the selection committee was directed by Judge Carchman to look for an "enthusiastic" and "energetic" candidate (CE 17). Complainant asserts that these terms suggest that a youthful person was desired and, therefore, that Judge Carchman's instructions are evidence of age discrimination. Ibid.

The ALJ correctly observed that the use of subjective evaluation criteria and personal impressions about candidates during the hiring process is not forbidden under civil rights laws so long as the use of such information is not a cover for discrimination (ID 21 - 22, citing Fuentes v. Perskie, 32 F. 3d 759 (3rd Cir. 1994) and Millbrook v. IBP, Inc., supra, 280 F.3d 1169). It is well settled that under the LAD, "a firm's business judgment of highly subjective criteria, exercised in good faith, will not be second-guessed in the absence of some evidence of impermissible motives." Jason v. Showboat Hotel and Casino, 329 N.J. Super. 295, 308 (App. Div. 2000), quoting Davis v. Rutgers Cas. Ins. Co., 964 F. Supp. 560, 573 (D.N.J. 1997). Further, "anti-discrimination laws do not permit courts to make personnel decisions for employers. They simply require that an

employer's personnel decisions be based on criteria other than those proscribed by law." Jason, v. Showboat Hotel and Casino, supra, 329 N.J. Super. 308, citing Peper v. Princeton Univ., 77 N.J. 55, 87 (1978). The cases relied upon by Complainant are predicated on facts which are distinguishable from those in this case, and stand for the proposition that strong reliance on subjective criteria can support an inference of pretext, but only if there is other substantial evidence of discrimination. See EEOC v. Marion Motel Associates, 961 F.2d 211 (4th Cir. 1992)(defendant placed an advertisement seeking "young, energetic persons," and this statement combined with other evidence was recognized by the Court as probative of age discrimination); Aka v. Washington Hosp. Center, 156 F. 3d 1284, 1297 (D.C. Cir. 1998) (question of whether enthusiasm was properly considered in the hiring decision is one for the jury where jury could find that plaintiff was significantly better qualified); Koster v. Trans World Airlines, 181 F. 3d 24 (1st Cir. 1999) (subjective criteria were suspect where there was abundant evidence that plaintiff was more qualified). This record contains no independent evidence of discrimination that would support a finding that Respondent's reliance on subjective criteria proves pretext. Moreover, the ALJ specifically found "that at no time did Judge Carchman, by word, expression, indication, or direction, tell or imply to the committee members that age was a factor to consider in determining who were the viable candidates for selection as the TCA" (ID 23). Based on the foregoing, the Director adopts the ALJ's finding that Complainant **failed to demonstrate by a preponderance of the evidence that the subjective criteria relied upon by Respondent were pretexts for discrimination.**

The Director also concludes that the ALJ properly considered the EEOC determination. In Hernandez v. Region Nine Housing, Corp., 146 N.J. 648 (1996), the Court held that EEOC determinations are generally admissible in evidence at subsequent trials, but they are not precedential. Id. at 656. The ALJ considered the EEOC determination and, based on a full presentation of all the evidence, respectfully disagreed with it (ID 2, ftnt.). The Director finds that the ALJ acted reasonably in rejecting its conclusion.

Therefore, based on all the foregoing, the Director adopts the ALJ's conclusion that Complainant failed to prove by a preponderance of the evidence that Respondent's articulated reasons for rejecting Complainant were pretexts for discrimination, or that he was unlawfully discriminated against based on age.

VI. ORDER

Having conducted a thorough and independent review of the record, and for all of the foregoing reasons, the Director adopts the ALJ's initial decision dismissing the complaint.

Date: _____

_____
J. FRANK VESPA-PAPALEO, ESQ., DIRECTOR
NEW JERSEY DIVISION ON CIVIL RIGHTS