Public Service
Electric and Gas
Company

Steven E. Miltenberger

Vice President and Chief Nuclear Officer

Public Service Electric and Gas Company P.O. Box 236, Hancocks Bridge, NJ 08038 609-339-1100

January 4, 1994
OUR REF: N94002

Mr. Thomas T. Martin
Regional Administrator
United States Nuclear Regulatory
Commission, Region I
475 Allendale Road
King of Prussia, PA 19406-1413

Dear Mr. Martin:

This responds to your letter of December 6, 1993, requesting that Public Service Electric & Gas Company ("PSE&G") provide your office, within thirty days, "a response in writing and under oath or affirmation that describes the actions, if any, taken or planned to assure" that the employment action described in the referenced Department of Labor complaint "does not have a chilling effect in discouraging other licensee or contract employees from raising perceived safety concerns." The referenced complaint was filed by an employee of PSE&G who alleged that he was the subject of a discriminatory job action as a result of his actions in identifying a safety problem to certain Salem managers on December 3-4, 1992.

As stated in your letter, the District Director of the Wage and Hour Division has made a preliminary finding of discrimination because "on 1/26/93, the Grade 5 position which the complainant had been temporarily filling was approved for permanent status," and the failure to promote the complainant to this position was deemed discriminatory. Contrary to the finding of the Wage and Hour Division, however, PSE&G management had not approved filling the Grade 5 position at that juncture. Rather, it was on or about that date that the General Manager - Quality Assurance/Nuclear Safety Review ("QA - NSR"), received a requisition to fill the position. Because of a Company-wide job freeze as well as an ongoing evaluation of the effectiveness of the Nuclear Safety Review organization by an independent management consultant, that requisition was not approved and, therefore, the position was not available to be filled. It should be noted that other positions within the NSR organization were held open during this timeframe.

It is our understanding that the Wage and Hour Division's ultimate finding of discrimination is based upon the erroneous belief that the mere receipt of the requisition was tantamount to a decision by PSE&G management to fill the position. Moreover, the complainant's Department of Labor

complaint alleges entitlement to a Grade 6, not a Grade 5, position. The complaint does not refer to the Grade 5 position to which the Wage and Hour Division found the complainant entitled. PSE&G was unaware that the Wage and Hour Division was considering whether there had been discrimination involving the Grade 5 position until it received the decision. At no time did the Wage and Hour Division advise PSE&G of its investigation of new charges it had developed outside the scope of the complaint or give PSE&G an opportunity to respond to those new charges. Significantly, the Wage and Hour Division found no discrimination in the denial to the complainant of a Grade 6 position, as he alleged.

For these reasons, PSE&G strongly disagrees with the preliminary finding of discrimination and has appealed the decision of the Wage and Hour Division by requesting a hearing before an Administrative Law Judge. A hearing is now scheduled for January 12, 1994.

Further, PSE&G has submitted a Motion for Summary Decision to the Administrative Law Judge, which is now pending review.[1/] This motion sets forth the position of PSE&G that (1) the promotion sought by the complainant could not have been granted because of the aforementioned Company-wide job freeze and the ongoing evaluation of the NSR organization to determine whether certain positions would be eliminated;[2/] (2) PSE&G's competitive bidding requirements for open positions would have enabled any number of interested and qualified candidates to seek any position the complainant might have sought by way of

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1/ Your letter of December 6, 1993 states that our response "should not, to the extent possible, include any personal privacy, proprietary, or safeguards information so that it can be released to the public and placed in the NRC Public Document Room." In contemplation of this action, we have deleted from the Motion for Summary Decision all quotations from the complainant's personnel file, including the affidavits filed in support of the motion which discuss those files. This Motion was filed with a Motion for Restricted Access Treatment. A copy of the redacted Motion is attached for your review. An NRC representative has already reviewed the unredacted material.

2/ As you are aware, the complainant sought a Grade 14 position, as stated in his request for salary and grade increase dated May 27, 1983. The grade to which the Wage and Hour Division found the complainant entitled, however, was a Grade 13 (Grade 5 under the old system). Hence, as noted, the position to which the Wage and Hour Division found the complainant entitled did not even correspond to the position the complainant had sought.

promotion; (3) the complainant's periodic appraisals reflect a continued pattern of disrespect for authority, a failure to demonstrate an adequate level of interpersonal skills, as well as a failure to acknowledge or accept those criticisms of his performance.

With regard to the complainant's having engaged in protected activities, we previously provided to your office on June 2, 1993 the documents referenced therein which explain the results of our investigation. We have also provided you PSE&G's views regarding the real or perceived impact of those events on the involved employees, and the potential for a chilling effect upon discouraging other licensee or contract employees from raising safety concerns to PSE&G management or the NRC. As stated in the Attachment to the letter from Robert J. Dougherty, Jr., Senior Vice President - Electric, dated June 8, 1993:

- By letter dated April 26, 1993, I (Steven E. Miltenberger) personally reaffirmed to all Nuclear Department employees the commitment of PSE&G senior management that safety is, and will always be, our number one priority.

- On April 23, 1993, I convened a meeting of all managers present onsite (approximately 50) to underscore the Company's firm commitment to maintaining a work environment conducive to the filing of quality and safety concerns. This meeting included a detailed review by the PSE&G Manager of Licensing and Regulation of employee rights and employer responsibilities under Section 211 of the Energy Reorganization Act and 10 C.F.R. 50.7.

- The information conveyed at this meeting was then "rolled down" in presentations by Nuclear Department managers to their employees, including managers not available for the original presentation as well as onsite contractors.

- To assure ongoing employee and supervisory knowledge of requirements under Section 211 and 10 C.F.R. 50.7, PSE&G has enhanced new-employee initial training and annual retraining in this area.

- I also held individual conferences with those involved in the events of December 3-4 1992, to assure those who had reported safety concerns that the Company appreciated the manner in which they had conducted themselves, and to advise other individuals with an explanation of how, and to what degree, their actions were inappropriate and/or unprofessional.

- Finally, I directed the performance of an audit to review compliance by the Safety Review Group with its assigned tasks under plant Technical Specifications, and to evaluate organization effectiveness. This evaluation has been completed and the draft report is under review.

This summarizes the corrective actions described in the Attachment to Mr. Dougherty's letter of June 8, 1993. For a more complete statement of those actions, please refer to Mr. Dougherty's letter.

The complainant's having engaged in protected activities on or about December 3-4, 1992 did not at all influence or affect the denial of his promotion as requested on May 27, 1993. Rather, the denial of a promotion as requested by the complainant was based solely upon the three job-related factors discussed above, i.e., the job freeze and potential reorganization, competitive bidding process, and the complainant's performance.

Our investigation into the complainant's allegations of job discrimination has therefore concluded that no such discrimination occurred. Moreover, we have no reason to believe that other PSE&G or contractor employees are even aware that the complainant was denied a promotion inasmuch as he sought the promotion in a memorandum to his manager, rather than as part of a visible process of competitive bidding. Hence, PSE&G believes that the denial of a promotion to the complainant on May 27, 1993 has not had a chilling effect in discouraging other licensee or contract employees from raising perceived safety concerns, and that no further actions are necessary.

Sincerely,

Attachments

All without attachments

C: United States Nuclear Regulatory Commission
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Washington, DC 20555

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Bureau of Nuclear Engineering
CN-415
Trenton, NJ 08625

REF: NLR-N94002

STATE OF NEW JERSEY)
) SS.
COUNTY OF SALEM)

S. E. Miltenberger, being duly sworn according to law deposes and says:

I am Vice President and Chief Nuclear Officer of Public Service Electric and Gas Company, and as such, I find the matters set forth in the above referenced letter, concerning the Salem Unit Nos. 1 and 2 and Hope Creek Generating Stations, are true to the best of my knowledge, information and belief.

Steven E Miltenberger

Subscribed and Sworn to before me
this 5th day of January, 1994

Sherry L Cagle
Notary Public of New Jersey

My Commission expires on SHERRY L. CAGLE
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires March 5, 1997

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of Complainant, v. PUBLIC SERVICE ELECTRIC & GAS COMPANY, Respondent.	No. 94-ERA-2 The Honorable Julius A. Johnson, presiding

MOTION OF RESPONDENT PUBLIC SERVICE ELECTRIC & GAS COMPANY FOR SUMMARY DECISION

Respondent Public Service Electric & Gas Company (PSE&G) moves for summary decision on the complaint of in this case. No genuine issue of material fact exists with respect to essential elements of claim upon which he bears the burden of proof. Summary decision should therefore be granted pursuant to 29 C.F.R. §§ 18.40 and 18.41.

I. Summary of Relevant Facts

Complainant is employed by respondent PSE&G as a Senior Staff Engineer. In this proceeding, challenges his failure to receive a promotion he had demanded to a grade two levels above his current grade of compensation.

PSE&G operates the Salem Generating Station, a commercial nuclear power plant located on Artificial Island near Salem, New Jersey. has been employed in PSE&G's Nuclear

Department since 1985. In October 1988 he was assigned to the Nuclear Safety Review (NSR) organization, an organization within the Nuclear Department. He initially worked in the Offsite Safety Review group, a division within NSR. In April 1992, was reassigned to fill, on a temporary basis, a position in another NSR division, the Onsite Safety Review group (Decl. ¶¶ 4, 8). (The sworn declaration of is attached hereto as Attachment A.) The Onsite Safety Review group advises Salem Station management, as well as PSE&G Nuclear Department management, on the overall quality and safety of plant operations. Specifically, the group is charged with making recommendations for revised procedures, equipment modifications, or other means of improving the safety of the Salem plant to appropriate management. In short, as its name implies, the Onsite Safety Review group identifies potential nuclear safety issues and recommends improvements that will enhance plant safety (Decl. ¶ 4). (The declaration of is attached hereto as Attachment B.)

PSE&G positions within the Nuclear Department are structured by grade levels. Grades 1 through 4 involve periodic assessment of the employee's job performance and development. If an employee's performance so merits, he or she is promoted to the next grade level, up to Grade 4. Grades above level 4, however, involve specific positions, or slots, in the organizational structure of the workforce. Accordingly, for example, an employee can compete to move from Grade 4 to Grade 5 only if a Grade 5 position becomes available (Decl. ¶¶ 4, 5). Moreover, an employee is not simply promoted into an available Grade 5 (or higher position) if he or she is an adequate performer. Rather, once a requisition for such a position has been approved and notice of the vacancy has been posted, employees must competitively bid for the position (Decl. ¶ 14).

At the time he was reassigned to the Onsite Safety Review group, was classified at Grade 4. transfer to the Onsite Safety Review group occurred after a Grade 5 employee in the Onsite Safety Review group was reassigned to the Company's corporate headquarters (Decl. ¶ 8). It is the policy and practice within PSE&G's Nuclear Department that an employee temporarily filling a position, even on an extended basis and even though the position is slotted at a higher grade, shall do so at the employee's existing pay and grade level. Accordingly, has, since April 1992, filled the Onsite Safety Review group Grade 5 position on a temporary basis, and has been compensated during this period at his Grade 4 level of pay (Decl. ¶ 9). This is consistent with other temporary, though extended, reassignments by PSE&G in its Nuclear Department (see examples provided in Decl. ¶ 10).

On September 3, 1992, PSE&G announced a Company-wide job "freeze." Effective that date, PSE&G corporate management stated that "[n]o new employees (temporary or permanent), including replacements, will be placed on the payroll without the authorization of the appropriate [Executive Officer Group] member" (Decl. ¶ 11 and Exhibit 1; emphasis added). A follow-up announcement on September 25, 1992 provided that "[a]uthorization of the appropriate Executive Officer Group (EOG) member is required to replace or add to existing staffing levels" (Decl. ¶ 11 and Exhibit 2). The freeze thereby reduced personnel levels by eliminating selected jobs throughout the Company, including the Nuclear Department (Decl. ¶ 11).

In addition, the NSR's organizational structure has been undergoing review for over a year. The purpose of the review has been to determine what steps, including reorganization, should be taken to enhance the effectiveness of the NSR organization (Decl. ¶ 5). Accordingly, and apart from the personnel freeze, a number of the positions within NSR that

have become vacant since mid-1992 have not been filled. In fact, no vacant Grade 6 position within NSR has been filled on a permanent basis since 1991 (Decl. ¶ 15).

As of May 27, 1993 -- the date on which demanded the promotion at issue in this case -- there were four open positions in NSR: a Grade 1-4 in the Human Performance Enhancement Systems (HPES) Program; a Grade 5 in the Onsite Safety Review group (the position to which has temporarily been assigned); and a Grade 6 and a Grade 7 position in the Offsite Safety Review group. None of these positions, however, had approved requisitions on file at that time and none had been posted for competitive bidding. Indeed, no corporate management authorization had been obtained for filling these four positions, as required by the job freeze instituted in September 1992 (Decl. ¶ 12). None of these positions has been filled, and indeed the Grade 6 and 7 positions have been eliminated altogether as a result of the NSR restructuring noted above (Decl. ¶ 13).

By memorandum dated May 27, 1993, in the midst of the ongoing review of the NSR organization and the personnel freeze, requested that his grade and salary levels be increased two levels, from Grade 12 to 14[1/] (Decl. ¶ 9 and Exhibit 1). He demanded, moreover, not only that his classification and salary be increased, but that the increase be made retroactive for the preceding five years. In a memorandum dated June 30, 1993, , Manager-NSR, denied demand, noting that even at a Grade 12 level (i.e., former Grade 4) performance had consistently proven sub-par. encouraged to focus his energies on "achieving and maintaining an acceptable level of performance" in his

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1/ The grade scale for Nuclear Department employees was revised effective January 1, 1993. Current Grades 12 and 14 correspond, respectively, to former Grades 4 and 6 (Decl. ¶ 4). For simplicity, references in this Motion are to the former grade scale, which was in effect during the majority of time that Williams has been employed in the NSR organization.

present position (Decl. Exhibit 2). has petitioned the Department of Labor to compel PSE&G to grant him a Grade 6 promotion and salary increase that would be retroactive to 1988.

II. Argument

claim in this proceeding is that PSE&G "denied [him] compensation and promotion to the level of others performing the same function" because he had engaged in protected activity (Complaint, attached as Attachment C). refers in his complaint to his May 1993 request for, and the Company's June 1993 denial of, a promotion of two levels in grade and salary.

PSE&G is entitled to summary decision in this case because there are no genuine issues of material fact that warrant a hearing. Rather, compelling and undisputed evidence demonstrates that no position was available at the Grade 6 level demanded. First, the job freeze precluded filling vacant slots as well as creating new positions in the Nuclear Department or elsewhere in the Company. Second, no vacancies were being filled in the NSR organization at the time of demand because of the NSR restructuring, which actually led to the elimination of two NSR positions (Grade 6 and 7) that had been vacant in May 1993. Third, competitive bidding would have been required for such a position even if one had been available. Moreover, was in any event not qualified for the elevated classification and salary he demanded. As these were indisputably the reasons for the nonpromotion, summary decision in PSE&G's favor should be granted.

A. Applicable Law

claim arises under Section 211 of the Energy Reorganization Act, 42 U.S.C. § 5851. Section 211 prohibits discrimination against an employee because the employee has engaged in any of the "protected activities" enumerated in the statute. Id. § 5851(a)(1).

may prevail on his claim of discrimination only if he demonstrates that his protected activity "was a contributing factor" in the unfavorable employment action challenged in his complaint. Id. § 5851(b)(3)(C).

In Section 211 cases, the complainant bears the burden to prove that the respondent intentionally discriminated against him because he had engaged in protected activity. Pillow v. Bechtel Constr. Co., Case No. 87-ERA-35 (Sec'y, July 19, 1993), slip op. at 14 and n.10, citing St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993). Under the framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), must first prove a prima facie case of discriminatory nonpromotion by showing that 1) a position existed for which he was qualified; 2) he suffered "adverse action" -- i.e., was denied the position; 3) he had engaged in "protected activity" within the meaning of Section 211, of which PSE&G was aware; and 4) there is evidence sufficient to support an inference that he was denied a promotion because he engaged in the protected activity. See, e.g., Burdine, 450 U.S. at 253; Spangle v. Valley Forge Sewer Auth., 839 F.2d 171, 173 (3d Cir. 1988); Darney v. Zack Co., Case No. 82-ERA-2 (Sec'y, Apr. 25, 1983), slip op. at 6-8 (adopting the McDonnell Douglas/Burdine burden of proof framework for Section 211 cases). As demonstrated below, the evidence does not support a prima facie case of discrimination.

Once a complainant establishes a prima facie case -- or presumption -- of discriminatio , the employer may rebut and dissolve the presumption by articulating a legitimate basis for the action challenged in the complaint. Dartey, slip op. at 8. PSE&G does so below. The burden of proof thus returns to who must show to avoid summary dec'sion that the articulated reason is a fabrication, or pretext, "and that the real reason for the adverse action was discriminatory." Pillow, slip op. at 14. At all times, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains . . . with the plaintiff." Burdine, 450 U.S. at 253, citing Board of Trustees v. Sweeney, 439 U.S. 24 (1978).

Summary decision is warranted where, as here, no genuine issue of material fact exists. 29 C.F.R. §§ 18.40(d), 18.41(a). may not merely rest on his allegations of wrongdoing to avoid summary decision: he must set forth specific facts and affirmative evidence showing that there is a genuine issue of fact as to each of the essential elements of his claim on which he bears the burden of proof. "If the non-moving 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,' there is no genuine issue of material fact and the movant is entitled to summary judgment." Trieber v. Tennessee Valley Auth., Case No. 87-ERA-25 (Sec'y, Sept. 9, 1993), slip op. at 8 (upholding summary dismissal of Section 210 claim), quoting Celotex Corp. v. Catrett, 477 U.S. 317 (1986). If fails to establish a genuine issue of fact as to any of the elements of his claim, "there can be no 'genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the

nonmoving party's case necessarily renders all other facts immaterial." Celotex, 477 U.S. at 323.[2]

B. No Genuine Issue of Material Fact Exists

Summary decision is warranted in this case. It is undisputable that could not have obtained the promotion he demanded because no Grade 6 position was available at the time he demanded advancement to that level. Even if a requisition to fill a Grade 6 position had at the time been approved and the job vacancy posted, could not simply have been granted a promotion to the position upon his demand. Rather, would have been required to bid against other applicants for the position. The evidence also establishes beyond dispute that was not qualified for the position he sought. Thus, the evidence does not support a prima facie case of discrimination.[3]

1. was not subject to adverse action because no position at the Grade 6 level he requested was available.

complaint asserts that he failed to obtain a promotion to a Grade 14 (i.e., 6) position. Because there was no available position for to fill, however, there was no opportunity for a promotion at the time demanded it -- and thus was not

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[2] "Indeed, 'one purpose of the allocation of burdens of proof and production . . . [is] to identify meritless suits and stop them short of full trial.'" Douglas v. PHH FleetAmerica Corp., 62 FEP Cas. (BNA) 1615, 1619 (D. Md. 1993), quoting Conkwright v. Westinghouse Elec. Corp., 739 F. Supp. 1006 (D. Md. 1990), aff'd, 933 F.2d 231 (4th Cir. 1991).

[3] For purposes of this Motion, PSE&G does not dispute that it is an "employer" to which Section 211 applies, nor that is an "employee." PSE&G need not address in this Motion whether engaged in activity protected by Section 211, because inability to establish a genuine issue of fact with respect to the other elements of his prima facie case entitles PSE&G to summary decision.

denied any employment opportunity. Simply put, he has suffered no adverse action, and his claim accordingly must be dismissed. E.g., Doyle v. Bartlett Nuclear Serv., Case No. 89-ERA-19 (Sec'y, May 22, 1990) (dismissing complaint for failure to state a claim where no adverse action was challenged), aff'd sub nom. Doyle v. Secretary, United States Dep't of Labor, 949 F.2d 1162 (11th Cir. 1991) (table), cert. denied, 113 S. Ct. 225 (1992).

In May 1993, when requested a promotion, there were no vacant Grade 6 positions in the Onsite Safety Review group, the group to which he was temporarily assigned (Decl. ¶ 12). There was one Grade 6 position vacant in the Offsite Safety Review group, but could not have been promoted to that position because, like all other jobs within the Company, it was subject to the personnel freeze instituted in September 1992 (Decl. ¶ 6; Decl. ¶¶ 11, 12). Moreover, , the Manager-NSR, would not have filled that Grade 6 position in May 1993 even if the freeze were not in place, because the structure and effectiveness of the NSR organization were at the time under review. The review, in turn, could have led to a restructuring of the NSR and the elimination of certain positions within the organization (Decl. ¶ 6). In fact, the Grade 6 position has since been eliminated (Decl. ¶ 13; Decl. ¶ 6).[4]

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[4] does not allege in his complaint that he requested to fill permanently the Grade 5 (now Grade 13) position he currently fills on a temporary basis. In any event, while a requisition for this position had been prepared, neither that nor any other requisition for an NSR position had been approved in May 1993 in light of the personnel freeze (Decl. ¶ 12; Decl. ¶ 8). For example, another NSR position, in the Human Performance Enhancement Systems (HPES) Program, has remained open for the same period (Decl. ¶ 8). Moreover, as with the Grade 6 position in the Offsite Safety Review group, would not have assigned any personnel to fill the Grade 5 position in the Onsite Safety Review group on a permanent basis in May 1993 in light of the ongoing NSR review (id.).

Because no position of the kind demanded was available, has not established that he was denied an opportunity for a promotion. E.g., Burdine, 450 U.S. at 253 (to establish a prima facie case, plaintiff must show that he or she applied for "an available position"). For example, in Smith v. Continental Ins. Corp., 747 F. Supp. 275, 283 (D.N.J. 1990), aff'd, 941 F.2d 1203 (3d Cir. 1991), the court ruled that the plaintiff had failed to establish a prima facie case of discrimination where she could not show that vacancies existed at the time she applied. Simply put, the "terms, conditions, and privileges" of employment have not been affected because he has not been denied any opportunity that, but for discrimination, might have been afforded him. 42 U.S.C. § 5851. Because has not been subject to any adverse action, the evidence does not support a prima facie case of discrimination in violation of Section 211, and his complaint must be dismissed.[1]

2. **was not entitled to the position he sought because competitive bidding was required.**

As noted above, a PSE&G employee is not simply promoted to an available Grade 5 (or higher position) if he or she is an adequate performer. Rather, employees must competitively bid for such positions (Decl. ¶ 14). Under PSE&G's policy, once a requisition for a position is approved, notice of the availability of the position is posted, and employees may

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[1] Put differently, has not established a prima facie case because he has not shown that he was treated differently than any similarly situated employee. See, e.g., Bryant v. International Schools Serv., Inc., 675 F.2d 562, 575 (3d Cir. 1982) ("To prove their prima facie case appellants must produce evidence that similarly situated males were treated differently and that there was no adequate nonsexual explanation for the different treatment."); Postema v. National League, 799 F. Supp. 1475, 1482 (S.D.N.Y. 1992) (where employer did not promote any employees during the relevant time period, plaintiff could not show she was treated differently than other applicants, and thus could not establish a prima facie case), rev'd on other grounds, 998 F.2d 60 (2d Cir. 1993).

submit applications for it. The appropriate supervisor then reviews the applications, interviews applicants, and selects the successful job bidder (Decl. ¶ 7; Decl. ¶ 14). Thus, under no circumstances would have been entitled to a Grade 6 position merely because he had demanded it. To the contrary, fairness to other PSE&G employees (and the avoidance of discrimination claims by other employees) would have required that any such position be open for competitive applications (Decl. ¶ 14).

Accordingly, even if a Grade 6 position had been available, PSE&G could not simply have yielded to demand for such a position, regardless of whether other candidates were more qualified. has not alleged that he was discriminatorily denied the opportunity to compete for an open position, or that the bidding process for a position that had been posted was discriminatorily skewed to assure that another candidate obtained an open position. Summary decision should therefore be granted.

3. ___ was not qualified for the promotion sought.

must also establish as part of his prima facie case that he was qualified for the position he sought. E.g., Burdine, 450 U.S. at 253 (to establish a prima facie case, the plaintiff must show that "she applied for an available position for which she was qualified") (emphasis added). If the employee cannot establish his or her qualification, the employer is entitled to summary judgment. For example, in Spangle v. Valley Forge Sewer Auth., 839 F.2d 171 (3d Cir. 1988), the court granted summary judgment where the employee's performance evaluations showed him to be performing well in some areas but unsatisfactorily in another. This inadequate performance precluded the employee from establishing that he was qualified for the promotion he sought, and thus from establishing a prima facie case of discrimination. Id. at 173-74.

Similarly, in Weiss v. Coca-Cola Bottling Co., 990 F.2d 333 (7th Cir. 1993), the court affirmed summary judgment for the employer where the plaintiff failed to establish a prima facie case because she could not show she was meeting the employer's legitimate expectations for her performance. Because the employee's essential burden in establishing a prima facie case is to "eliminat[e] the most common nondiscriminatory reason for [his] rejection," Wileman v. Frank, 979 F.2d 30, 33 (4th Cir. 1992), citing Burdine, 450 U.S. at 253-54, can establish a prima facie case only if he eliminates the most common reason for non-promotion -- i.e., inadequate performance -- as a factor in this case. This he has not done.

who became the Manager-NSR in May 1993, was responsible for responding to demand that he be given a Grade 6 position and a salary increase retroactive to 1988 (the year he joined the Offsite Safety Review group). Although no position existed and any opening would have been competitively bid, nonetheless reviewed personnel file, including his performance evaluations, so that he could respond to demand. He concluded that was not qualified for the promotion he sought (Decl. ¶ 9).

based his determination on documented work performance record, which showed that lacked the interpersonal skills and communication abilities requisite to a Grade 6 position (Decl. ¶ 10). As wrote in responding to demand for a promotion:

> Based upon [your performance appraisals and other documentation], you have demonstrated a continued pattern of disrespect for authority as well as failure to demonstrate an adequate level of interpersonal skills. In my opinion, the review of your personnel file shows you to have technical competence for a grade level 12 [4], Senior Staff Engineer. But, your appraisals since 1985 and all the pertinent correspondence show a clear

> pattern of below adequate performance over the entire period. This is highlighted by your unreasonable denial that your performance is below adequate.

(Decl. Exhibit 2).

written performance appraisals leave no question that his overall performance as a Senior Staff Engineer has been well below standard from even before his assignment to the NSR organization in 1988, and in need of substantial improvement throughout his tenure with NSR. In particular, his inadequate interpersonal skills have proven a chronic problem since . began with PSE&G in 1985. Every supervisor has cited problems with interface, during the course of his work, with fellow engineers and other employees, including personnel outside the NSR organization. For example, Management Personnel Inventory for his first nine months with PSE&G (prior to his taking a position in the NSR organization) states:

(Decl. Exhibit 3). The "Career Goals" section of the same review indicates that a "

" (id.).

The same comments are reflected in Performance Appraisal for this period. His then-supervisor, , rated him as meeting or exceeding the technical

expectations of his job, but emphasized that "

" With respect to one of assignments during the review period, the appraisal notes that "

" likewise observed that

(Decl. Exhibit 4). For this review period, his performance in terms of adaptability, working with others, stability, and leadership were rated as " " and in several other categories were rated as " " (id.). In the next review, for the period from April 1986 to April 1987, Performance Appraisal again noted that his interpersonal skills required improvement (Decl. Exhibit 5).

The same problems are reflected in performance evaluation for the period concluding in August 1988. In a summary of his performance, stated that "

," and concluded that

" (Decl. Exhibit 6). In " Performance Appraisal that year, added that

" "

(Decl. Exhibit 7).

In the Performance Appraisal covering employment from September 1988* through March 1990, when worked in the Offsite Safety Review group, his supervisor -- the principal Offsite Safety Review Engineer -- pointed out the same deficiencies originally noted by :

. . . .

(Decl. Exhibit 8). For that review period, performance was rated as needing improvement in the categories of adaptability, working with others, communicating, presenting ideas, stability, dependability, and leadership (id.).

continued to receive evaluations emphasizing a need to improve performance in communicating and working with others. Comments about these deficiencies appear throughout his Performance Appraisal for the last nine months of 1990 (Decl. Exhibit 9). Commenting on his adaptability, observed that "

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* not only claims that he is now qualified for a Grade 6 classification, but demanded that PSE&G grant him a salary increase commensurate with that grade retroactive to 1988 (Decl. Exhibit 1). The evidence unambiguously establishes that in 1988, as now, was not qualified for the promotion he demands.

In terms of initiative, noted that "

" As for communications skills, observed that

" In each of these areas, and in other areas as well, was rated as "

" or " " in performance (id.). In the Summary Evaluation, wrote:

(Id.).

Owing to these deficiencies, performance was evaluated six months later. In the Performance Appraisal covering the first half of 1991 (Decl. Exhibit 10), the same performance deficiencies were noted. The areas of adaptability, initiative/accountability, customer/client satisfaction, judgment/decision-making, and interpersonal communications were all rated as needing improvement or below standard. stated that

" (id.). His interpersonal communications skills, in particular, were rated as " ." because of his inability to

be tactful in situations requiring discussion with peers to reach a common ground in working toward a solution. noted:

(Id.).

In the Summary Evaluation, concluded that

" More significantly, found that

" (id.). Indeed, as a result of ' failure to demonstrate improvement, his supervisors had to develop a six-month Performance Improvement Plan for him in consultation with the Employee Relations Department (id.; Decl. ¶ 7).

As noted, was temporarily reassigned to the Onsite Safety Review group in April 1992. In his Performance Appraisal for August 1991 through June 1992, which included feedback on performance from his temporary supervisor in the Onsite Safety Review group, noted that had made progress over the rating period in improving areas identified as " " in his last appraisal. "

" (

Decl. Exhibit 11).[7/] His overall performance on this evaluation -- the most recent one in his file

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7/ As explains in his declaration, the Nuclear Department employees with whom the NSR deals are sometimes referred to as "clients" or "customers." This expresses the (continued...)

at the time reviewed it (Decl. ¶ 11) -- was rated as " " In sum, each PSE&G supervisor to evaluate performance since 1985 has consistently found to be seriously lacking in interpersonal skills -- precisely the skills necessary for success at a Grade 6 position -- and in numerous other performance requisites as well.

A Grade 6 employee -- the grade level to which demanded a promotion -- is expected not only to be able to perform adequately the requisite technical tasks, but is expected as well to have excellent interpersonal skills (Decl. ¶ 12). Employees who currently hold Grade 6 positions within NSR are expected to be able to act as leaders on safety review teams or in a supervisory capacity in the supervisor's absence. They accordingly must be able adequately to direct the work of others, provide effective leadership, and communicate and interact constructively with other employees (id.).

The unrefutable evidence of inadequate performance demonstrates that he does not possess these characteristics and that he therefore is not qualified for the promotion he sought. For example, the court in Plaisner v. New York City Human Resources Admin., 61 FEP Cas. (BNA) 903 (S.D.N.Y.), aff'd, 888 F.2d 1376 (2d Cir. 1989), after noting that the evaluations of the plaintiff by her supervisor were "relevant to determine whether [plaintiff's] job performance" met the employer's legitimate expectations, granted summary judgment because the evaluations documented that the plaintiff was "rigid, resisted supervision, . . . would not cooperate with co-workers, and was unable to supervise effectively." Id. at 906.

2/(...continued)
sense that NSR employees are expected to build cooperative, supportive relationships, rather than engage in antagonistic "turf" fights with other groups (Decl. ¶ 3).

Summary decision for PSE&G is warranted because cannot establish that he was qualified for the position he sought.[1]

4. No genuine issue of material fact exists as to whether PSE&G's articulated reasons for nonpromotion are a pretext to mask discriminatory animus.

Summary decision is also warranted in an employment discrimination case where the employee fails to meet his evidentiary burden to demonstrate a genuine issue of fact as to whether the employer's articulated rationale for the challenged employment action is merely a pretext for discrimination. Assuming that an employee can establish a prima facie case, "[t]o avoid summary judgment, [the employee] must [also] demonstrate a genuine issue of material fact as to pretext." Merrick v. Farmers Ins. Group, 892 F.2d 1434, 1437 (3d Cir. 1990).

For example, in Healy v. New York Life Ins. Co., 860 F.2d 1209, 1216 (3d Cir. 1988), cert. denied, 490 U.S. 1098 (1989), the court affirmed summary judgment in favor of the employer where the employee's evaluations showed performance shortcomings and the employee had failed to provide evidence giving rise to an inference of pretext. See also Hankins v. Temple Univ., 829 F.2d 437 (3d Cir. 1987) (affirming summary judgment where plaintiff

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[1] In his May 27, 1993 memorandum demanding a retroactive promotion, claims that his "qualifications, ability and performance . . . surpass those of other persons in the group" (Decl. Exhibit 1). self-serving protestations as to his alleged qualifications, however, do not create a material issue of fact, for "[t]he self-perception of a plaintiff in an [employment discrimination] suit as to his or her . . . qualifications is irrelevant; what matters is 'the perception of the decision-maker.'" Douglas v. PHH FleetAmerica Corp., 62 FEP Cas. (BNA) 1615, 1620 (D. Md. 1993) (granting summary judgment for failure to establish a prima facie case), quoting Smith v. Flax, 618 F.2d 1062 (4th Cir. 1980). A plaintiff may assert that he or she is qualified for a position, but such assertions are not relevant to the issue of discriminatory intent, unless the employee can show that the employer's position as to his or her qualifications is unworthy of belief, and that the real reason for the adverse action was discrimination. Douglas, 62 FEP Cas. at 1620.

presented no evidence that the proffered reasons for her termination were pretextual). Not only is . unable in this case to create a genuine issue of fact with regard to essential elements of his prima facie case, he is unable as well to establish that PSE&G's articulated reasons for his nonpromotion are false.

The pre-complaint evidence of performance evaluations takes beyond dispute any question as to whether PSE&G's concerns about performance are genuine. . cannot resist summary decision inasmuch the evidence does not support a conclusion that his documented history of performance deficiencies is not a legitimate reason for the denial of his request for a promotion. Fowle v. C&C Cola Div. of ITT-Continental Baking Co., 868 F.2d 59, 67 (3d Cir. 1989) (affirming summary judgment where the plaintiff failed to adduce evidence of his qualifications sufficient to raise a genuine issue of material fact as to whether defendants' articulated reason for failing to hire him was a pretext for discrimination).[2/]

The question, of course, is whether PSE&G's articulated reasons for . non-promotion are a pretext for discrimination -- not whether PSE&G's job freeze or its promotion policies, or even the denial of demand for a promotion in particular, were good business judgments. See, e.g., Billet v. CIGNA Corp., 940 F.2d 812 (3d Cir. 1991) (barring discrimination, a company has the right to make business judgments on employee status, particularly when the decision involves subjective factors).

Nor is the issue whether possessed some redeeming qualities. For example, in Ezold v. Wolf, Block, Schorr, and Solis-Cohen, 983 F.2d 509, 526 (3d Cir. 1992), cert.

2/ Fowle addressed the employee's qualifications in conjunction with the second (rebuttal) and third (pretext) stages of the McDonnell Douglas/Burdine analysis. Even if qualifications for a Grade 6 position are addressed at these stages, PSE&G is entitled to summary decision because there is no genuine issue of fact disputing that was not qualified.

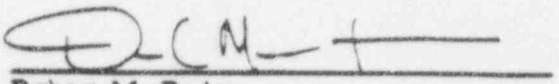
denied, 114 S. Ct. 88 (1993), the Third Circuit made clear that the relative strengths of a plaintiff who seeks a promotion vis-a-vis other candidates are immaterial, if there is no evidence that the basis on which candidate was denied a promotion -- such as lack of requisite analytical skills -- was not a legitimate basis upon which to deny the promotion. Rather, can resist summary decision only by presenting affirmative evidence raising a genuine issue of material fact as to whether the articulated reasons for his nonpromotion are untrue, and that discrimination motivated his nonpromotion. The evidence does not support such a showing, and summary decision therefore should be entered in PSE&G's favor.

III. Conclusion

The complainant in this case attempts to use Section 211 not as a shield to protect against retaliatory practices, but as a sword to cut a path to promotion he has not earned. "The real protections provided by the 'whistleblower' provision are made trivial when an employee whose performance is declining threatens to raise alleged nuclear safety concerns as a device to have management give him higher performance ratings." Diaz-Robainas v. Florida Power & Light Co., Case No. 92-ERA-10 (Mahoney, J.) (Oct. 29, 1993), slip op. at 50. is not entitled to a trial in this case because the evidence shows that he requested a promotion to a job that had not been posted, that was not available, that he would have had to bid for against other

employees, and for which he was not even qualified. For the foregoing reasons, this Tribunal should grant respondent summary decision in this case and dismiss the complaint.

Respectfully submitted,



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(202) 371-5700

Counsel for Respondent Public Service Electric & Gas Company

December 7, 1993

CERTIFICATE OF SERVICE

I hereby certify that copies of the MOTION OF RESPONDENT PUBLIC SERVICE ELECTRIC & GAS COMPANY FOR SUMMARY DECISION and MOTION FOR RESTRICTED ACCESS TREATMENT have been served on the following by mailing the same, via first class mail, postage prepaid, this 7th day of December, 1993:

David R. Culp, Esquire
Berry and Culp, P.C.
7000 Crittenden Street
Philadelphia, PA 19119

Donn C. Meindertsma

7H5

U.S. NUCLEAR REGULATORY COMMISSION - SCHEDULE OF COLLECTIONS

DEPOSIT NO.: 764006
DATE DEPOSIT CREDITED: 04/08/94

Schedule No.: PW764006-A
Page No.: 1 of 1

Account of: NRC 31-00-0001 Type: CIVIL PENALTY

Date Prepared: 04/14/94

Date Received	Name of Remitter	Purpose For Which Collections Were Rec'd	Amount	FIN/JOB CODE	Fund Symbol To Be Credited
04/11/94	PUBLIC SERVICE ELEC & GAS	EA94-003	50,000.00		31R1099

(Please attach supporting documents)

SCHEDULE GRAND TOTAL: $50,000.00

AMOUNT OF DEPOSIT: $50,000.00

Signed: Lisha A. Bush
Typed Name: Lisha A. Bush, Accountant

D13

EA NUMBER REQUEST FORM

TO: OEMAIL OR FAX TO OE			
FROM:	D Foldy	REGIONAL CONTACT	
DATE OF REQUEST	/ /	REGION	1
LICENSEE	Public Service Electric + Gas		
FACILITY/LOCATION	Salem 1	UNITS	
LICENSE/DOCKET NO(S).	50-272		
LAST DAY OF INSPECTION	4/27/94		
OI REPORT NO.		DATE OF OI REPORT	

SUMMARY OF FACTS OF CASE (ANNUAL REPORT FORMAT FOR EATS ENTRY) (MAXIMUM OF 300 CHARACTERS)

Failure to follow procedure. Did not identify nor conduct spurious high steam flow signal that occurred following three trips prior to April 7, 1994.

BRIEF SUMMARY OF INSPECTION FINDINGS (IF NOT SUFFICIENTLY DESCRIBED ABOVE)

REASON FOR POTENTIAL ESCALATED ACTION

DELEGATED CASE			YES	X	NO						
	MED INST		PHYSICIAN		NUC PHARM		RADIOG		IRRA D		
	WELL LOGGERS		ACADEMIC		GAUGE		MOISTURE DENSITY				
	OTHER TYPE:										
CITE SIMILAR CASE: EA NO.											
SHOULD OE ATTEND ENF CONF					YES		NO				
NONDELEGATED CASE			YES		NO						
	NONDELEGABLE TYPE		OI REPORT/WILLFULL		COMPLEX/NOVEL						
	DISCRETION		COMM APPROVAL		OI INTEREST		SL 1 OR 2				
	OTHER REASON:										

IS THERE A BASIS TO CLOSE ENFORCEMENT CONFERENCE? Y/N IF YES, EXPLAIN:

EA # ASSIGNED BY OE	94-112	DATE: 6/21/94	ES ASSIGNED	JEB	

1/1/4