OFFICE OF COMPLIANCE
LA 200, John Adams Building, 110 Second Street, S.E.
Washington, DC 20540-1999

LAWRENCE HATCHER, **Appellant,**	)	
v.	)	**Case No. 96-AC-15 (CV, RP)**
OFFICE OF THE ARCHITECT OF THE CAPITOL, **Appellee.**	)	

Before the Board of Directors: Glen D. Nager, Chair; James N. Adler; Jerry M. Hunter; Lawrence Z. Lorber; Virginia A. Seitz, Members

DECISION OF THE BOARD OF DIRECTORS

Appellant, Lawrence C. Hatcher, ("appellant") appeals only from that portion of the Hearing Officer's decision dismissing his claim that he was transferred in reprisal for filing complaints of discrimination, in violation of section 207(a) of the Congressional Accountability Act (the "CAA"), 2 U.S.C. § 1317(a); he has not appealed from that portion of the Hearing Officer's decision finding that he had not been sexually harassed. For the reasons set forth below, the Board affirms the Hearing Officer's decision.

I.

As found by the Hearing Officer, appellant is a computer specialist currently assigned to the Office of the Director of Engineering, Air Conditioning Engineering Division in the Office of the Architect of the Capitol ("AOC"). *See* Decision at 2 (Finding of Fact No. 1). He has been employed by the AOC since November of 1989 in a series of long-term temporary positions, beginning as a computer operator, grade 5, in the Computer Operations Branch of Information Resources Management ("IRM") in the AOC. *See id*. at 2-3 (Findings of Fact Nos. 2, 3); *see also* Complainant's Exhibit Nos. 6, 8.

In November of 1990, appellant started working as a computer programmer in the Applications Branch of IRM in a small office under the direct supervision of the Chief of the Applications Branch, Betty Ann Rouse. *See* Decision at 2-3 (Findings of Fact Nos. 2, 3). Although appellant received two grade promotions and two in-grade step increases while under Mrs. Rouse's supervision, rising from grade 5 to grade 9 step 3, *see id*. (Finding of Fact No. 4), appellant's job performance came under criticism, *see id*. (Finding of Fact No. 5). For example, in 1994, he was required to make certain improvements in order to receive an in-grade promotion

and in 1995 he was placed on a formal "Performance Improvement Plan." *Id.*; *see also* Tr. at 531-32; Complainant's Exhibit No. 1.

Appellant's job performance problems were marked by increasing conflicts with Mrs. Rouse. *See id.* at 3-4 (Finding of Fact No. 6). Appellant repeatedly interrupted Mrs. Rouse to ask her questions and to argue with her evaluations of his work, leading her to have a partition constructed around her desk. *See id*.; *see also* Tr. at 350-52; Respondent's Exhibit No. 33. In addition to face-to-face confrontations, appellant also sent Mrs. Rouse "unseemly" e-mails. Decision at 4 (Finding of Fact No. 6); *see also* Respondent's Exhibit Nos. 14-17. Several times in 1994, "work related conflict spilled over into confrontation on the public streets." Decision at 4 (Finding of Fact No.6); *see also* Tr. at 367-72; 398-401. The Fair Employment Practice Office ("FEP") of the AOC recommended that appellant complete gender communication training. *See* Decision at 4 (Finding of Fact No. 6); *see also* Respondent's Exhibit No. 18. Finally, on November 3, 1995, Mrs. Rouse wrote a memorandum to the Director of IRM, her supervisor, Richard A. Kashurba, asking him to transfer appellant permanently from her unit. *See* Decision at 4 (Finding of Fact No. 7). "This request was consistent with a 1994 memo to Mr. Hatcher in which [Mrs. Rouse] suggested a transfer to alleviate his problems." *Id*.; *see also* Respondent's Exhibit No. 27.

Steps were then taken to effectuate appellant's transfer in order "to give [him] a fresh start . . . . instead of firing him." Decision at 7 (Finding of Fact No. 11.b.(1)); *see also* Tr. at 426-32, 510-11, 514. The Air Conditioning Engineering Division had long perceived the need for a computer specialist, *see* Decision at 7 (Finding of Fact No. 11.b.(2)), and Mr. Kashurba agreed to transfer appellant's position, along with appellant, from the Applications Branch to the Office of the Director of Engineering, *see* Decision at 8 (Finding of Fact No. 11.c.(1)); *see also* Tr. at 258.

Between November 1995 and March 1996, steps were taken to effectuate the change, *see* Decision at 7 (Finding of Fact No. 11.b.(1)); on January 16, 1996, the Director of Engineering and the Assistant Director of Engineering formally requested the transfer, *see* Respondent's Exhibit No. 5, and on February 21, 1996, William Ensign, Acting Architect of the Capitol, approved the new position, *see* Respondent's Exhibit No. 3. On March 4, 1996, appellant, aware of his imminent transfer, *see* Decision at 4, 7 (Findings of Fact Nos. 9 & 11(a)), initiated written proceedings with the FEP, alleging that Mrs. Rouse had made unwelcome sexual advances to him in 1991 and 1992 and that, since his rejection of them, he had been discriminated against in his work, *see id.* at 4 (Finding of Fact No. 9); *see also* Complainant's Exhibit No. 5 at 1-2. On March 6, 1996, appellant received a letter dated March 4, 1996, notifying him formally of his transfer to the Office of the Director of Engineering, Air Conditioning Engineering Division of the AOC, effective March 10, 1996. *See* Respondent's Exhibit No. 4. The letter stated that the "reassignment is not considered an adverse action and provides the same career path as the position you currently occupy in Information Resources Management." *Id*. Appellant remains at the same grade and step as in his previous position. *See* Decision at 8 (Finding of Fact No. 11.c.(1)).

II.

Appellant filed a complaint with the Office of Compliance alleging that "Mr. Kashurba's and Ms. Rouse's continuing discrimination, creating a hostile environment, reprisal, and subsequent reassigning me to the Air Conditioning Division is a direct result of my refusal to reciprocate Ms. Rouse's sexual advances and for initiating discriminatory complaints against them with the FEP Office on March 4, 1996, October 1995, June 1995, and/or September 1994." Complaint at 1. As provided under section 405 of the CAA, 2 U.S.C. § 1405, a full hearing was held before a Hearing Officer. Appellant, represented by counsel, testified on his own behalf and introduced 16 exhibits. The AOC called four witnesses, including Mrs. Rouse, Mr. Kashurba, and Ms. DiCanio, and offered 30 exhibits.

In a written decision incorporating separate Findings of Fact and Conclusions of Law, the Hearing Officer rejected both appellant's claim of sexual harassment and his claim of retaliatory transfer. The Hearing Officer concluded that appellant had "failed to prove by a preponderance of the evidence that the Office of the Architect of the Capitol discriminated against Lawrence C. Hatcher in employment matters." Decision at 9 (Conclusion of Law No. 2).

The Hearing Officer's conclusion that appellant had failed to prove any sexual harassment was based on the documentary evidence and her assessment of the testimony, particularly the credibility of appellant and Mrs. Rouse. She found that appellant's testimony regarding his allegations of sexual harassment was "not credible": "It comes 4-5 years after the alleged events and smacks of recent fabrication designed to challenge his transfer. H[is] assertion of reluctance to come forward earlier is fatuous particularly in light of his frequent use of the FEP Office for other complaints about Mrs. Rouse. His testimony does not match his prior affidavits." *Id*. at 5 (Finding of Fact No.10.a.(1)). In contrast, the Hearing Officer specifically credited Mrs. Rouse's testimony, which she found "had a ring of authenticity and accuracy." *Id*. at 6 (Finding of Fact No. 10.a.(3)).

As to appellant's claim of retaliatory transfer, the Hearing Officer reached the following Conclusion of Law:

> Complainant did not establish that any employment decisions concerning him were reprisal or retaliation for initiating complaints of discrimination against Mrs. Rouse. He did not prove that his transfer was an adverse action or that it was causally connected to his initiation of a discrimination complaint thus he failed to establish at least two of the legal requisites for this claim. *Marzec v. Marsh*, 990 F.2d 393, 396 (8th Cir. 1993).

Id. at 9-10 (Conclusion of Law No. 2). In support of this conclusion, the Hearing Officer found that there was no improper conduct underlying any employment action respecting appellant in the entire period in which Mrs. Rouse was his supervisor: "Mr. Hatcher's work experiences and the employment decisions made concerning him from 1990-1996 were not the result of unlawful conduct by Respondent." *Id*. at 6 (Finding of Fact No. 10.b). Rather, the Hearing Officer

concluded: "The credible testimony and the documentary exhibits establish that Mr. Hatcher's work environment and the employment decisions were the result of such factors as his apparent inability to do some of the work, his refusal to follow directions and what appears to be poor interpersonal skill." *Id*. (Finding of Fact No. 10.b.(1)) In addition, the Hearing Officer made specific findings in support of her conclusion that the "transfer was not motivated by discriminatory animus or in response to the allegations of sexual harassment." *Id*. at 7-8 (Finding of Fact No. 11.b). The Hearing Officer, crediting the testimony of the AOC's witnesses, found that the "transfer was designed to give Mr. Hatcher a fresh start. His supervisors and the Fair Employment Practice Office of the Architect of the Capitol helped him instead of firing him." *Id*. at 7 (Finding of Fact No. 11.b.(1)). Moreover, the Hearing Officer stated that she was persuaded by testimony in the record that there was a "long-perceived need for computer assistance in the Office of the Director of Engineering." *Id*. (Finding of Fact No. 11.b.(2)).

The Hearing Officer also made specific findings to support her conclusion that the transfer was not an adverse action. She found that appellant's actual position was transferred from his old unit to the new, and her analysis of the position descriptions of appellant's old and new jobs led her to conclude that the differences between them were "de minimis." *Id*. at 8 (Finding of Fact No.11.c.(1)). Moreover, the "'professional status'" appellant enjoyed in his old job was not, in the Hearing Officer's view, "diminished by the transfer." *Id*. (Finding of Fact No.11.c.(2)). The Hearing Officer further found that data entry tasks were necessitated by the start-up requirements of the job and did not detract from the "professional stature and growth in being the first computer specialist to serve the Engineering Division." *Id*.

III.

Under section 406(c) of the CAA, "[t]he Board shall set aside a decision of a hearing officer if the Board determines that the decision was—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;
(2) not made consistent with required procedures; or
(3) unsupported by substantial evidence."

2 U.S.C. § 1406(c). "In making determinations under subsection (c), the Board shall review the whole record, or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." 2 U.S.C. § 1406(d). Applying these standards, and after review of the record as a whole, the Board concludes that the Hearing Officer's decision should be affirmed.

Appellant does not challenge the Hearing Officer's Conclusion of Law that, in order to prove a claim of unlawful retaliation under section 207, he had to show, among other things, that his transfer "was causally connected to his initiation of a discrimination complaint." *Id*. at 10 (Conclusion of Law No. 2). Rather, appellant appears to challenge the factual finding on which that legal conclusion is based, that the "transfer was not motivated by discriminatory animus or in response to the allegations of sexual harassment." Decision at 7 (Finding of Fact No. 11.b). In the Board's judgment, however, the Hearing Officer's finding regarding causation is supported by

substantial evidence in the record.

"Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 477, 71 S. Ct. 456, 459 (1951) (citation omitted). The record in this case clearly would allow a reasonable mind to conclude that appellant's transfer was not in retaliation for his filing of any discrimination complaint.

The record amply documents the Hearing Officer's finding respecting Mr. Hatcher's job performance problems. *See, e.g.*, Tr. at 322-24 (supervisor found appellant unable completely to master certain programming tasks and to work independently of close supervision, as required at grade 9); *see also* Tr. at 402-06; Tr. at 531 (supervisor considered withholding within-grade step increase because of performance problems); Respondent's Exhibit No. 20 (within-grade step increase conditioned on making improvements in specified areas); Respondent's Exhibit No. 11 (appellant was refused a requested promotion to grade 11 because of work performance problems); Complainant's Exhibit No. 1 (appellant placed on a Performance Improvement Plan, which required that he rectify certain enumerated performance problems or face disciplinary action).

The record also fully supports the Hearing Officer's finding that appellant's job performance problems were accompanied by escalating conflicts with Mrs. Rouse. *See, e.g.* Tr. at 350-52 (appellant's repeated interruptions of Mrs. Rouse to ask her questions and to argue with her evaluations of his work led her to have a partition constructed around her desk); Tr. at 367-72; 379-82 (testimony of Mrs. Rouse describing various incidents in which appellant accosted her in public, used offensive language, made personal remarks, "hit at" her with a document, ignored her requests that he cease bothering her); Respondent's Exhibit No. 27 (Mrs. Rouse's letter of May 3, 1994 to appellant advising him to cease "unprofessional" "personal" conversations and to stop following her and waiting for her outside the office); Respondent's Exhibit No. 18 (FEP attorney letter of Sept. 6, 1994, advising Mr. Hatcher that unless he satisfactorily completes gender communication training and modifies his behavior, his supervisors believe that he "should seek alternative employment"); Tr. at 256-57; *see also* Respondent's Exhibit No. 7.

The above record evidence provides ample support for the Hearing Officer's finding that appellant's supervisors transferred appellant as an alternative to termination in order to give appellant the opportunity to make a fresh start in a different division. *See, e.g.*, Tr. at 426-32 (testimony of Mrs. Rouse that she recommended transfer, rather than suspension or termination, to give appellant another chance); Tr. at 510-14 (testimony of Ms. DiCanio describing discussions respecting appellant's transfer, corroborating testimony of Mrs. Rouse that transfer was motivated by desire to give appellant a fresh start, "the opportunity to possibly succeed," because he had done reasonable work while on temporary transfer, rather than taking alternative options of abolishing his temporary position or firing him); *see also* Tr. at 259 (testimony of Richard Kashurba that his sole reasons for arranging transfer of position and appellant from IRM to the Engineering Division were to fill the need for a computer specialist in the Engineering Division and because Mr. Hatcher was not performing satisfactorily in his current position).

In arguing to the contrary, appellant points to a few phrases in Mrs. Rouse's memorandum of November 3, 1995, respecting appellant's frequent filing of EEO complaints in response to her criticism. But appellant has done no more than identify evidence that, if construed in favor of appellant, points in the opposite direction from the Hearing Officer's conclusions. That evidence need not be construed in such a way, however. Other evidence in the record directly supports the contrary construction, *see, e.g.* Tr. at 426-27, and, as noted above, the overwhelming mass of the record evidence points strongly against appellant. Accordingly, the evidence to which appellant points is not legally sufficient to allow rejection of the Hearing Officer's finding. *See Arkansas v. Oklahoma*, 503 U.S. 91, 113, 112 S. Ct.1046, 1060 (1992) ("A court reviewing an agency's adjudicative action should accept the *agency's* factual findings if those findings are supported by substantial evidence on the record as a whole. The court should not supplant the agency's findings merely by identifying alternative findings that could be supported by substantial evidence.") (citation omitted).

IV.

The Board need not and does not address alternative grounds of the Hearing Officer's decision or appellee's other arguments for affirmance. Rather, for the reasons set forth above, the Board affirms the Hearing Officer's decision.

It is so ordered.

Issued, Washington, D.C., February 18, 1998.