



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Office of Federal Operations**  
**P.O. Box 77960**  
**Washington, DC 20013**

[REDACTED]  
Norberto G.,<sup>1</sup>  
Complainant,

v.

James N. Mattis,  
Secretary,  
Department of Defense  
(Defense Logistics Agency),  
Agency.

Appeal No. 0120160311

Agency No. DLAR-15-0018

**DECISION**

On November 2, 2015, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's September 30, 2015, final decision concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e *et seq.*, Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 *et seq.*, and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 *et seq.* Our review is *de novo*. For the following reasons, the Commission AFFIRMS in part and REVERSES in part the Agency's final decision.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Supply Relationship Program Manager, GS-13, at the Agency's Aviation Richmond facility in Richmond, Virginia.

On December 8, 2014, Complainant filed an EEO complaint wherein he claimed that the Agency discriminated against him on the bases of his sex (male), disability (paralyzed and utilizes a wheelchair for mobility), age (52), and in reprisal for his prior protected EEO activity under Title

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<sup>1</sup> This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

VII and the Rehabilitation Act, when on October 6, 2014, he learned that he had not been selected for the position of Supervisory Strategic Sourcing Chief, GS-1101-14.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). When Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f), the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

The Agency determined that Complainant failed to prove that it subjected him to discrimination as alleged. The record reveals that an interview panel composed of three individuals interviewed ten candidates for the position of Supervisory Strategic Sourcing Chief. The Agency stated that scoring was prohibited in the first round of interviews. According to the Agency, the selection criteria were based on: program management, strategic sourcing, strategic contracting, communication skills, supervisory and managerial competencies. The Agency stated that the panel members discussed the candidates' resumes, interviews and qualifications based on the Applicant Review Summary. The panel referred two candidates, one of whom was Complainant, to the selecting official (the Deputy Director, Strategic Acquisition Programs Directorate) to make the final selection.

The selecting official and the Director (Director, Strategic Acquisition Programs), who had most recently held the position at issue, conducted a second set of interviews with the two finalists. They also interviewed three additional candidates from the original group after concerns were raised by Human Resources about the two finalists both being Caucasian males. Complainant was not selected for the position. Complainant requested a debriefing with the selecting official as to his nonselection. The Agency stated that the selecting official and the Director told him they believed the selectee was the best choice based on his background and experience. The Agency noted that these officials explained to Complainant that he was not selected due to a lack of supervisory experience and Original Equipment Manufacturers (OEM) supervisory experience in the competitive world. Complainant referenced his supervisory experience in 2012, but Complainant stated that the selecting official informed him that he needed more and that supervisory experience did not factor into the decision. The Agency further stated that Complainant remarked that the interview panel never asked him questions regarding his OEM experience, and it was not listed in the requirements of the job announcement. The Director observed that the selectee had a more strategic view and provided more tactical examples during his interview. The Director maintained that the selectee was chosen primarily because he had a clearer understanding of strategic acquisitions from beginning to end.

The Agency determined that Complainant established a prima facie case of age and disability discrimination. The Agency stated that Complainant is approximately seventeen years older than the selectee. The Agency noted that the record established that Complainant is a qualified individual with a disability and the Agency had full knowledge of Complainant's disability. The Agency determined that Complainant failed to set forth a prima facie case of sex discrimination given that the selectee is also male.

With regard to the basis of reprisal, the Agency determined that Complainant failed to establish a prima facie case because he did not establish a causal connection between his protected activity and his nonselection. According to the Agency, even if its selection officials were aware of Complainant's prior EEO activity, mere knowledge by itself is insufficient to make a causal connection. The Agency stated that the nonselection occurred seven months after the conclusion of Complainant's prior EEO activity and it indicated that a lack of temporal proximity precluded there being a causal connection.

With regard to the bases of age and disability, the Agency determined that it articulated legitimate, nondiscriminatory reasons for Complainant's nonselection. In terms of leadership experience, the Agency stated that the selectee had 7.4 years and Complainant had six years. The Agency stated that the selecting official and the Director concluded that the selectee had all the skills and knowledge required for the position and that Complainant was considered to only have most of the skills and knowledge required for the position. According to the Agency, the selectee had a more strategic perspective, provided more tactical examples during his interview and had a clearer understanding of strategic acquisitions from beginning to end. The Agency maintained that Complainant did not demonstrate clear experience in acquisition strategy from development through implementation. The Agency determined that Complainant failed to establish that his explanation is pretext as he did not demonstrate that his qualifications were plainly superior to those of the selectee.

#### CONTENTIONS ON APPEAL

On appeal, Complainant contends that the selecting official and the Director refused to cooperate during the investigation. Complainant states that neither of these officials responded to supplemental questions regarding the means by which the interview process deviated from standard Agency practice or the nature of their alteration and use of the criteria used to select the candidates. Complainant states that during his debriefing with these officials they told him he was not selected because he lacked recent supervisory experience, as well as competitive sourcing experience and market research experience. Complainant maintains that these reasons are false given that he had recent supervisory experience, as well as extensive competitive sourcing experience and market research experience, as reflected in his resume. Complainant points out that when he stated during the debriefing that he had recent supervisory experience ending in January 2013, the Director backtracked and told him she did not think that this factored into the decision necessarily so much. Complainant states he was not asked by the panel about his competitive sourcing experience or his recent supervisory experience.

Complainant argues that the selecting official and the Director deviated from standard Agency practice in the selection process. Complainant states that they created a second interview panel and added unannounced selection criteria. Complainant maintains that the second interview was unfair as he was denied the opportunity to address the additional selection criteria. Complainant asserts that the selecting official and the Director claimed to have cleared the alteration of the selection process with Human Resources, but each of them refused to answer the investigatory questions about their purported contact with Human Resources.

Complainant points out that there were four selection criteria for the position: Program Management, Strategic Sourcing/Strategic Contracting, Communications, and Supervisory and Managerial Competencies. Complainant maintains that the selection process and criteria were altered to favor the selectee over him. Complainant argues that the selectee's lack of program management experience was ignored, as was Complainant's competitive sourcing experience, multiple successful implementations of strategic sourcing methods and recent supervisory experience. Complainant also questions how the Applicant Review Summary from the first interview panel that is dated October 2, 2014, could have been considered by the second interview panel that met on September 16, 2014.

Complainant contends that the Agency's analysis of his reprisal claim is flawed. According to Complainant, his prior EEO complaint had not concluded at the time of the instant nonselection. Complainant states that the final decision on the issue of damages after a remand of his prior complaint was not issued until October 20, 2014, after the instant nonselection. Complainant argues that there is temporal proximity between his prior EEO activity and the complaint at issue, and therefore he established a prima facie case of reprisal.

Complainant maintains that his qualifications were plainly superior to those of the selectee. Complainant states that the selectee was credited in the Applicant Review Summary for his participation in a single project. However, Complainant argues that the selectee's actual position was a team lead rather than a program manager. Complainant claims that the use of quotation marks on the Applicant Review Summary indicates that the selectee did not manage any programs, but rather claimed that he employed program management techniques to solve singular process problems. Complainant states that he had 8.8 years of supplier relationship manager/program manager experience. Further, Complainant asserts that he had ten years more overall experience than the selectee.

Complainant states that he was informed by Agency officials that he lacked strategic sourcing experience but Complainant maintains that is contradicted by his 23 years of work history and the sworn statements of other Agency employees. Complainant references three coworkers who stated that he is more qualified than the selectee. Complainant notes that one of these coworkers is also a close friend of the selectee. Complainant states that one of the coworkers said that the selectee lacked any direct experience within the Strategic Acquisitions/Program Division and another coworker asserted that he is more qualified than the selectee due to greater experience in program management.

In response, the Agency asserts that Complainant's brief in support of his appeal was not submitted in a timely manner. The Agency states that the postmark on the envelope containing the brief is December 16, 2015, one day after the deadline for submitting his appeal brief. The Agency maintains that the selecting official and the Director cooperated in the investigation. The Agency argues that the EEO Investigator did not inform the selecting official that failure to provide supplemental responses by April 6, 2015, would result in her responses being excluded from the record.

According to the Agency, the selecting official completed her supplemental declaration on April 9, 2015, but did not maintain a copy of any correspondence in which she forwarded the declaration to the Investigator. The Agency states that the Investigator did not clearly state that the investigation would officially close on April 6, 2015, and/or that the Director's failure to provide her supplemental responses by April 6, 2015, would result in her responses being excluded from the record. The Agency asserts that the Director completed her supplemental declaration on April 8, 2015, and e-mailed it that day to the Investigator. The Agency notes that on May 17, 2015, the Investigator e-mailed the Director requesting that she sign her supplemental declaration. The Agency argues that this correspondence establishes that the Investigator had the Director's response, even if unsigned, as early as April 9, 2015, and thus negates Complainant's argument about noncooperation and refusal to answer the Investigator's questions concerning the reasons given for Complainant's nonselection.

The Agency maintains that the selecting official and the Director did not violate selection procedures by having two interviewers conduct the second interviews. The Agency states that these officials followed Agency selection procedures and sought advice from the Human Resources Office to confirm they were following proper procedures. The Agency asserts that even if the second interview format violated selection procedures, all five top candidates, including Complainant, had an initial three-member panel interview followed by a second two-person interview where they were asked the same questions.

As for Complainant's contention concerning when the Applicant Review Summaries were signed, the Agency states that the selecting official signed all of these Summaries on October 2, 2014, at the time of the selection. The Agency notes that both the selecting official and the Director stated in their declarations that they reviewed the three-person panel's Applicant Review Summaries prior to conducting second interviews. The Agency states that neither the selecting official nor the Director were required to sign the Applicant Review Summaries on the date they read them, and the Director was not required to sign them.

The Agency maintains that Complainant has not established that his qualifications are plainly superior to those of the selectee. The Agency disputes Complainant's claim that the selecting official told him that he lacked particular experience. The Agency maintains that Complainant was informed he could gain more experience in certain areas to become more competitive rather than he had no experience in any particular area. The Agency seeks to negate the opinions of employees referenced by Complainant, noting that they did not review the applicants' resumes, did not participate in the interviews and were not involved in the selection process. The Agency argues that neither the selecting official nor the Director stated Complainant was not qualified for the position, but rather they found the selectee to be better qualified for the position.

#### ANALYSIS AND FINDINGS

Initially, we shall address the Agency's assertion that Complainant's brief in support of his appeal was submitted to it on December 16, 2015, and therefore is untimely by one day and should be excluded from consideration.

We observe that it appears Complainant's attorney acted in good faith to submit the brief to the Agency in a timely manner as it was sent to the Agency by fax transmission on December 15, 2015. We shall exercise our discretion and consider the brief timely submitted.

To prevail in a disparate treatment claim such as this, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). He must generally establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Co. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 802 n. 13. To establish a prima facie case of reprisal, Complainant must show that: (1) he engaged in protected EEO activity; (2) the Agency was aware of the protected activity; (3) subsequently, he was subjected to adverse treatment by the Agency; and (4) a nexus exists between his protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000).

The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tx. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is pretextual. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

We find that Complainant set forth a prima facie case of discrimination under each of the alleged bases except for sex discrimination. With respect to the basis of sex, we note that both Complainant and the male selectee are members of the same protected group. As for the basis of disability, for the purposes of analysis, we shall assume Complainant is an individual with a disability. 29 C.F. R. § 1630.2(g)(1). Further, we observe that the Agency stated in its final decision that the record establishes Complainant is a qualified individual with a disability and it had full knowledge of Complainant's disability.

In terms of the basis of reprisal, we reject the Agency's reasoning that a nexus does not exist between Complainant's protected activity and his nonselection. The Agency indicated that temporal proximity is not present due to there being a seven-month gap between the conclusion of Complainant's EEO activity and the nonselection. However, the prior complaint was on remand to the Agency for a final decision on the issue of damages after the Commission issued a finding of discrimination. See Complainant v. Dept. of Defense (Defense Logistics Agency), EEOC Appeal No. 0120121062 (May 1, 2014). In that decision, the Commission found that the Agency was liable for the hostile work environment based on disability that was created by Complainant's then-supervisor. The decision awarded compensatory damages, ordered the Agency to conduct EEO training for the involved responsible management officials, and ordered that a notice of discrimination be posted at the facility. Therefore, the EEO training was ordered to occur within 180 days of May 1, 2014, during the time period of the selection process. The notice of a finding of discrimination was ordered to be posted "in conspicuous places" for 60 days, beginning in early June 2014, also within or immediately preceding the time period of the selection process.

It is therefore likely that Agency employees at the facility were aware of Complainant's prior complaint, and the outcome. We find that temporal proximity exists and that Complainant set forth a prima facie case of reprisal.

The Agency's legitimate, nondiscriminatory reasons included the explanation that Complainant was not selected for the position at issue because the selecting official and the Director concluded that the selectee had all the skills and knowledge required for the position and that Complainant was considered to only have most of the skills and knowledge required for the position. According to the Agency, the selectee had a more strategic perspective, provided more tactical examples during his interview, and had a clearer understanding of strategic acquisitions from beginning to end. The Agency maintained that Complainant did not demonstrate clear experience in acquisition strategy development from development through implementation. We find that the Agency has articulated legitimate, nondiscriminatory reasons for its selection decision.

Complainant presents several arguments to establish that the Agency's explanation is pretext intended to hide discriminatory motivation. Complainant emphasizes his reprisal claim on appeal. With respect to Complainant's argument that the officials involved in the selection refused to cooperate with the investigation and withheld information from the EEO Investigator, we observe that the selecting official and the Director both submitted their supplemental responses shortly after the date requested by the Investigator.

Upon review of the responses from the selecting official and the Director, we discern that they sufficiently responded to the supplemental questions. As for the propriety of the selecting official and the Director both interviewing Complainant during the second interview, we do not observe any evidence that contradicts the Director's assertion that she was informed by Human Resources prior to the second interview that it was acceptable for both to participate and they needed to be consistent with questions and process. We also consider the Agency's explanation reasonable that the selecting official reviewed the first panel's Applicant Review Summaries prior to the second panel interviews even though the selecting official did not sign the first panel's Applicant Review Summaries until after the second panel interviews were completed.

The vacancy announcement for the position provided that a candidate's qualifications would be evaluated on the basis of the candidate's level of competency (knowledge, skills and abilities) in the following areas:

Knowledge of end-to-end supply chain processes and capabilities, and associated [Agency] supply management policies, laws and regulations as they relate to customer material requirements.

Knowledge of procurement operations and of acquisition principles and programs.

Skill in persuading and negotiating to influence the acceptance of recommendations or to obtain the desired effect for gaining compliance with mission objectives when policies or processes are unclear or not established.

Knowledge of the following supervisory/managerial competencies: Professionalism, leadership, teamwork, oral and written communication, strategic focus, responsibility and accountability, innovation and initiative, customer service and resource stewardship.

Complainant may be able to establish pretext with a showing that his qualifications were plainly superior to those of the selectee. Wasser v. Department of Labor, EEOC Request No. 05940058 (November 2, 1995); Bauer v. Bailar, 647. F.2d 1037, 1048 (10<sup>th</sup> Cir. 1981). Other indicators of pretext include discriminatory statements or past personal treatment attributable to those responsible for the personnel action that led to the filing of the complaint, comparative or statistical data revealing differences in treatment across various protected group lines, unequal application of Agency policy, deviations from standard procedures without explanation or justification, or inadequately explained inconsistencies in the evidentiary record. Mellissa F. v. United States Postal Service, EEOC Appeal No. 0120141697 (Nov. 12, 2015).

Complainant maintains that pretext is evident by how the selecting official backed away from her explanation that recent supervisory experience was an important factor in her selection decision. According to Complainant, during his debriefing with the selecting official and the Director, they told him he was not selected because he lacked recent supervisory experience given that his most recent supervisory experience was seven years ago, and that he also lacked competitive sourcing experience and market research experience. Complainant argues that he told these officials during the debriefing that he had recent supervisory experience ending in January 2013, and that the Director backtracked from her statement and informed him she did not think that this factored into the decision necessarily so much. The selecting official stated in her supplemental declaration that she did not recall telling Complainant that his most recent supervisory experience ended seven years ago. According to the selecting official, since the position at issue was a second-level supervisory position, supervisory experience was important but it was not the main factor. We note that in her supplemental declaration the Director stated that although recent supervisory experience was not a key factor, the selectee had more recent supervisory experience. We find Complainant's argument persuasive that these responses from the selecting official and the Director cast doubt on their honesty and motivation.

Complainant claimed that his qualifications were plainly superior to those of the selectee in that he had more years of experience than the selectee. Complainant states that he had 8.8 years of Supplier Relationship Manager/Program Manager experience and ten years more overall experience than the selectee. Complainant began employment with the Agency in May 1991 and the selectee commenced his employment with the Agency in July 2001. The record reflects that in his most recent position, Complainant started working in January 2013 as a Supplier Relationship Manager and Program Manager. Prior to that position, from February 2010 to January 2013, Complainant was an Integrated Supplier Team Chief. Complainant stated on his resume that he had oversight over the work of a multi-functional team through two subordinate supervisors. Complainant stated that he directed the performance of the complete range of Integrated Supplier Team mission functions to support the overall supply logistics chain mission to provide spares and supplies to military customers.



Another position that Complainant held with the Agency was Supplier Relationship Manager from April 2002 – February 2009. According to Complainant, he managed numerous improvement teams for major OEMs and their related programs, and acted as a project leader for initiatives that impact the Agency enterprise and acquisition plus administrative initiatives. Complainant stated that he was tasked with proposing or developing ideas for an Agency acquisition strategy to maintain support and measure supplier performance. Complainant stated that he also served from February 1999 – January 2002 as a Supervisory Contract Specialist/Section Chief/Contracting Officer. Complainant asserted that he participated in managing all aspects of the acquisition cycle.

As for the selectee, at the time of the selection, he had been working for six months as Acting Division Chief for the Bearings Division. The selectee stated on his resume that he directly supervised a Deputy Division Chief and three Integrated Supplier Team Leads, who have personnel that perform a wide variety of acquisition and sourcing functions. The selectee asserted that he ensures acquisitions are completed in accordance with applicable policies, regulations and instructions. According to the selectee, he analyzes strategies for cost-effectiveness and return on investment relating to improved acquisition approaches and industry techniques. Prior to that position, the selectee worked from March 2010 – April 2014, as a Supervisory Integrated Supplier Team Lead. The selectee noted in that position he developed procurement objectives and acquisition strategies. The selectee maintained that he possesses an understanding of sources of supply, trends, cost factors, market conditions, negotiating cost elements, and evaluating price and cost proposals. Other positions held by the selectee during his tenure with the Agency include Supervisory Acquisition Specialist from June 2007 – February 2010, and Acquisition Specialist from July 2001 – May 2007.

We observe that in support of his position Complainant presents sworn statements from three coworkers. One Supplier Relationship Manager who has been with the Agency for sixteen years stated that Complainant has more overall experience than the selectee based on his years with the Agency. This coworker stated that Complainant has much more program management type experience than the selectee as Complainant has served two stints as a Supplier Relationship Manager. The coworker indicated that serving as a Supplier Relationship Manager requires top notch communication skills. Another coworker who is an Integrated Supplier Team Lead and has been with the Agency for nineteen years stated that Complainant is an extremely capable employee who possesses a thorough understanding of the Division's business processes. This coworker maintained that the selectee does not possess any direct experience within the Strategic Acquisition/Programs Division nor enough similar experience from his positions within Supplier Operations to compare to Complainant's accumulated corporate knowledge. The coworker also stated that she believes the Agency has a sharp preference toward promoting individuals under 40 years of age. An additional coworker who stated he is a personal friend of the selectee stated that Complainant has more experience than the selectee in some of the areas covered by the selection criteria. This coworker indicated he has been with the Agency for fifteen years and that he works as a Strategic Contracting Officer. The coworker stated that he works with Complainant on strategic projects as Complainant is the Supplier Relationship Manager for BAE and Northrop Grumman, and he is the contracting officer for those corporate contracts.

The coworker stated that Complainant has more strategic experience than the selectee and at least as much supervisory experience, if not more, than the selectee.

Agencies have broad discretion to choose among equally qualified candidates as long as the selection is not based on unlawful considerations. Complainant v. Department of Homeland Security, EEOC Appeal No. 0120131478 (July 31, 2015). They may select candidates with fewer years of experience if they believe that such candidates are best qualified to meet the needs of the organization. See Complainant v. Department of Justice, EEOC Appeal No. 0120131151 (February 25, 2015).

Upon review of the record, we find that Complainant has established that his qualifications for the position at issue were clearly superior to those of the selectee. According to the Agency, the selection criteria were based on: Program management, strategic sourcing, strategic contracting, communication skills, supervisory and managerial competencies. Complainant maintains that the selection process and criteria were altered to favor the selectee over him. Complainant argues that the selectee's lack of program management experience was ignored, as was Complainant's competitive sourcing experience, his multiple successful implementation of strategic sourcing methods and his recent supervisory experience. We largely agree with this argument presented by Complainant. We note that the selectee has significant acquisition experience, recent supervisory experience, and he performed very well in his interviews. However, it is evident that Complainant clearly had more program management experience, a significant amount of supervisory experience, strong communication skills, and he also had impressive interviews. Complainant also has significantly more experience overall at the Agency. A review of Complainant's resume indicates that he is not lacking in competitive sourcing experience and the selecting official stated in her supplemental response that she did not recall mentioning during the debriefing with Complainant that he lacked market research experience. Further, we take note of the statement from the coworker who is personal friends with the selectee who stated that Complainant has more strategic experience than the selectee.

We find that the record supports a finding that Complainant's nonselection was attributable to reprisal. The prior EEO complaint that had been remanded by the Commission after a discrimination finding was pending before the Agency on the issue of damages at the time of his nonselection, and the ordered EEO training and posting notice were being effectuated at the time of the selection process. Complainant noted that his successful outcome in his prior complaint was widely known at the facility as it had been announced in a town hall meeting earlier that year and there was a posting that the Agency had discriminated against him. We discern that the evident downgrading of Complainant's credentials, upgrading of the selectee's qualifications and inconsistency from the selecting official and Director about the importance of supervisory experience were unwarranted and indicative of retaliatory motivation. Although we find that reprisal occurred, we do not find that Complainant's disability was a factor in his nonselection. There is no clear evidence to attribute the nonselection to Complainant's disability.

With regard to the claim of age discrimination, we take note of the seventeen-year age difference between Complainant and the selectee, as well as the statement of one of Complainant's coworkers that the Agency has a preference toward promoting candidates under 40 years of age. However, this evidence is not sufficient to establish that age was a factor in Complainant's nonselection.

### CONCLUSION

The Agency's determination that no discrimination occurred is **AFFIRMED** in part and **REVERSED** in part. We find that Complainant was discriminated against on the basis of reprisal. We further find that Complainant was not discriminated against on the bases of his sex, disability, or age.

### ORDER

The Agency shall take the following actions:

1. The Agency shall make Complainant an offer of placement into the position of Supervisory Strategic Sourcing Chief, GS-1101-14, at the Richmond, Virginia facility, at the grade and step where he would have been absent the discrimination, or a substantially equivalent position, no later than sixty (60) days from the date on which this decision is issued. See 29 C.F.R. § 1614.501(a)(3). The Agency offer shall include a notice that, if Complainant does not respond or declines the job offer within 15 days of receipt, his right to receive further back pay and other benefits based on the job offer shall terminate as of that date. See 29 C.F.R. § 1614.501(b)(1), (c)(1). If the offer is accepted, the Agency shall place Complainant into the position no later than 30 days from the date of acceptance.
2. The Agency shall issue Complainant a check for backpay with interest for the period of time that Complainant has not been performing the position of Supervisory Strategic Sourcing Chief, GS-1101-14, from the date of the non-selection until such date as Complainant is placed in the position or declines it, as referenced above. The Agency shall determine the appropriate amount of backpay (with interest, if applicable) and other benefits due Complainant pursuant to 29 C.F.R. § 1614.501, no later than sixty (60) calendar days after the date this decision is issued. Complainant shall cooperate in the Agency's efforts to compute the amount of backpay and benefits due, and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of backpay and/or benefits, the Agency shall issue a check to Complainant for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."
3. The Agency shall also pay compensation for the adverse tax consequences of receiving back pay as a lump sum.

4. Complainant has the burden of establishing the amount of increased tax liability, if any. Once the Agency has calculated the proper amount of back pay, Complainant shall be given the opportunity to present the Agency with evidence regarding the adverse tax consequences, if any, for which Complainant shall then be compensated.
5. The Agency shall conduct a supplemental investigation on compensatory damages, including providing Complainant an opportunity to submit evidence of pecuniary and non-pecuniary damages. For guidance on what evidence is necessary to prove pecuniary and non-pecuniary damages, the parties are directed to EEOC Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991 (July 14, 1992) (available at eeoc.gov). The Agency shall complete the investigation and issue a final decision appealable to the EEOC determining the appropriate amount of damages within 90 days of the date the decision is issued. The Agency shall pay the amount determined within 30 days from the date of that determination.
6. Within 90 calendar days of the date this decision is issued, the Agency shall provide a minimum of eight (8) hours of in-person or interactive training to the responsible management officials with an emphasis on reprisal discrimination.
7. The Agency shall consider taking appropriate disciplinary action against the responsible management officials. The Commission does not consider training to be disciplinary action. Within 30 days of the date this decision is issued, the Agency shall report its decision to the Compliance Officer referenced herein. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If the responsible management officials have left the Agency's employment, then the Agency shall furnish documentation of their departure dates.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include evidence that the corrective action has been implemented.

#### POSTING ORDER (G1016)

The Agency is ordered to post at its Richmond, Virginia facility copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material.

The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

#### ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- not to the Equal Employment Opportunity Commission, Office of Federal Operations -- **within thirty (30) calendar days** of the date this decision was issued. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

#### IMPLEMENTATION OF THE COMMISSION'S DECISION (K0618)

Under 29 C.F.R. § 1614.405(c) and § 1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

STATEMENT OF RIGHTS - ON APPEAL  
RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

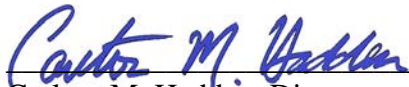
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or your appeal with the Commission, until such time as the Agency issues its final decision on your complaint.

If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. “Agency” or “department” means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant’s Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:

  
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Carlton M. Hadden, Director  
Office of Federal Operations

September 14, 2018

Date