



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

[REDACTED]
Jacinto Q.,¹
Complainant,

v.

Janet Dhillon,
Chair,
Equal Employment Opportunity Commission,
Agency.

Appeal No. 0120162639

Agency No. 2014-0041

DECISION

Complainant timely 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 July 11, 2016, final decision concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission AFFIRMS the Agency's final decision.²

ISSUES PRESENTED

The issues presented are: (1) whether the Agency processed Complainant's complaint improperly and (2) whether the Agency discriminated against Complainant on the basis of disability and in reprisal for prior protected EEO activity when it did not select him for a GS-0301-12 ADR Mediator position.

¹ 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.

² As a procedural matter, we note that the Equal Employment Opportunity Commission (EEOC) is both (1) the respondent Agency and (2) the adjudicatory authority issuing this decision. For the purposes of this decision, the term "Commission" is used when referring to the adjudicatory authority and the term "Agency" is used when referring to EEOC in its role as the respondent party. In all cases, the Commission its adjudicatory capacity operates independently from those offices charged with in-house processing and resolution of discrimination complaints.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was an applicant for employment at the Agency. On October 10, 2014, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of disability and in reprisal for prior protected EEO activity. In its Notice of Acceptance, the Agency defined the accepted issues as follows:

- (1) on August 18, 2014, Complainant was not selected for the GS-0301-12 ADR Mediator position advertised under Job Announcement No. D14-OFP-1095443-085-TMD, which advertised vacant positions located in Baltimore, Maryland; New York, New York; Houston, Texas; and an “unspecified” location, which later was identified as Seattle, Washington;
- (2) Complainant was not selected for the GS-0301-12 ADR Mediator position advertised under Job Announcement No. D14-OFP-1183231-132-TMD, which advertised vacant positions located in Miami, Florida, and Philadelphia, Pennsylvania; and
- (3) unknown EEO management and Human Resource officials, including a Human Resources Specialist (HRS),
 - (a) conspired to manipulate the recruitment and staffing for ADR Mediator positions;
 - (b) conspired to cancel and move the advertised vacancy in the Houston, Texas, office to the Miami, Florida, office;
 - (c) conspired to cancel and move the advertised vacancy in the Baltimore, Maryland, office to the Philadelphia, Pennsylvania, office; and
 - (d) failed to follow established procedures for the receipt and administration of applications received from applicants with disabilities.

Further, the Agency noted that Complainant also claimed that the Agency discriminated against him on the basis of disability and in reprisal for prior protected EEO activity when unknown EEOC management officials authorized and administered EEO counseling designed to intimidate and deter him from filing a formal EEO complaint. The Agency stated that it would process the claims concerning the processing of his complaint pursuant to Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110). Specifically, Complainant alleged that:

- (1) the EEO Counselor failed to identify herself or her role when she initially contacted Complainant, causing an unnecessary delay in the start of EEO counseling;

- (2) the EEO Counselor initially refused to respond via e-mail to Complainant's specific inquiries regarding his initial contact;
- (3) the EEO Counselor restricted the amount of time available for EEO counseling by not promptly responding to Complainant's e-mails. It was only when Complainant involved the EEO Counselor's supervisor, the Deputy Director of the Office of Equal Opportunity (OEO), that the EEO Counselor understood that Complainant could submit communications in writing;
- (4) the EEO Counselor recorded Complainant's claims and bases incorrectly;
- (5) the EEO Counselor conducted an insufficient limited inquiry, closed out EEO counseling prematurely, and did not ask whether Complainant would agree to an extension of the EEO counseling to conduct a sufficient limited inquiry;
- (6) the EEO Counselor failed to identify the name and title of any involved EEOC management official or any documents reviewed during EEO counseling;
- (7) the EEO Counselor failed to provide Complainant with the specific reasons why he was not selected by the EEOC responsible management officials or the reasons why the positions were cancelled and moved to another location; and
- (8) the EEO Counselor failed to identify any resolving official or any attempts at resolution during the counseling;

Complainant subsequently also alleged that that the Agency subjected him to reprisal for the instant complaint by not framing his allegations accurately in the Notice of Acceptance.

On April 10, 2014, the Agency announced six vacancies for GS-0301-12 ADR Mediator positions (Job Announcement No. D14-OFP-1095443-085-TMD). The vacancy announcement listed the following vacancy locations: Kansas City, Kansas; Baltimore, Maryland; Buffalo, New York; New York, New York; Houston, Texas; and "More Locations (1)." The "More Locations" reference had a link that, according to HRS, showed the location to be in Seattle, Washington. The record contains a five-page printout of the announcement; page 5 of the printout lists the sixth location as Seattle. The announcement period closed on April 18, 2014.

In an April 21, 2014, e-mail to HRS, Complainant stated that he was a 30% or greater disabled veteran, that he had attempted to apply for the ADR Mediator vacancies prior to the closing date but had been unable to do so, and that he would like to be considered for the position under the Schedule A hiring authority.³ Complainant did not explain why he had been unable to apply for

³ The "Schedule A" hiring authority is a non-competitive appointment authority used for hiring applicants with disabilities. Although federal agencies are authorized to use Schedule A hiring

the vacancies within the allotted time. HRS replied that Complainant should e-mail the required documents to her and should identify the locations for which he wanted to apply. Complainant submitted the documents to HRS on April 21, 2014; identified the Baltimore, New York, and Houston locations; and reiterated his interest in applying under the Schedule A hiring authority.

On July 11, 2014, HRS sent the Schedule A certificate to the District Resource Manager (DRM) of the Houston District Office (Houston DO) and notified Complainant that his application had been referred to Houston for consideration under Schedule A. Complainant responded on July 14, 2014, that he also wanted to be considered for the Baltimore and New York vacancies, and HRS replied that she would issue notification letters as soon as she finished reviewing the applications.

On July 15, 2014, HRS sent Schedule A certificates to the DRMs of the New York District Office (NYDO) and Philadelphia District Office (Philadelphia DO)⁴ and the corresponding notification letters to Complainant. Complainant asked if the Agency was considering him under all hiring authorities, including the non-competitive Veterans Employment Opportunities Act (VEOA), Reinstatement Eligible, and 30% or More Disabled Veteran authorities. HRS notified the DRMs of the New York, Houston, and Philadelphia District Offices that Complainant wanted to be considered under the four non-competitive authorities, provided the non-competitive certificates and Complainant's application package to the DRMs, and sent notification letters to Complainant.

The Philadelphia DRM sent HRS a July 16, 2014, e-mail stating that the Agency had moved the Baltimore vacancy to the Philadelphia District Office. She stated in her affidavit that the Philadelphia District Director asked the Agency's Assistant Director of the Office of Human Resources to move the vacancy to Philadelphia. According to the Philadelphia DRM, the Philadelphia office had a greater need for a mediator because two mediators had retired. The Philadelphia District Director stated in his affidavit that the Agency's Assistant Director of the Office of Human Resources made the decision to cancel the Baltimore vacancy and that management officials in the Baltimore Field Office had no involvement in the cancellation decision.

In a July 22, 2014, memorandum to the NYDO Director, the NYDO ADR Coordinator stated that he, the NYDO Deputy Director, and the Director of the Buffalo Local Office interviewed seven candidates from the Best Qualified and Merit Promotion certificates for the New York City vacancy.⁵ They unanimously recommended a candidate (S1) who was on the Best Qualified

authority when considering applicants with disabilities, the use of this authority is not mandatory. See generally 5 C.F.R. § 213.3102(u).

⁴ The Philadelphia DRM served the Baltimore Field Office, which falls under the jurisdiction of the Philadelphia District Office.

⁵ The NYDO Director, NYDO Deputy Director, and NYDO ADR Coordinator stated in their affidavits that the Director of the Buffalo Local Office was a member of the interview panel. The Director of the Buffalo Local Office stated in his affidavit that he "was not involved in the selection of the candidate" for the NYDO and that he "was not part of the interviewing panel for the vacancy in question."

certificate. According to the memorandum, S1 “had a good interview,” received “an extremely strong reference from his former” supervisor, “is a licensed attorney and has an LLM in Dispute Resolution.” The New York DRM offered the position to S1 on July 25, 2014, and he accepted the offer.

In his affidavit, the NYDO Director stated that he selected S1 based on the recommendation of the interview panel. The NYDO Deputy Director stated in her affidavit that the panel interviewed candidates from the Best Qualified and Merit Promotion certificates because “those lists offered the largest number of best-qualified applicants.” She also stated that S1 was the best candidate because he had experience working with the New York District Office’s ADR/Mediation program, was familiar with the Office’s mediation approaches, and had “focused his professional development on mediation practice.” The NYDO ADR Coordinator stated in his affidavit that S1 had been an intern in the NYDO, had experience in the Office’s ADR Unit, and “was very focused on a mediation career.”

In a July 23, 2014, e-mail to the Director of the Office of Field Programs (OFP) and a Supervisory Program Analyst in OFP, the Houston District Director stated that he had offered the Houston position to a GS-13 Mediator from the Agency’s Miami District Office (Miami DO) who had applied for the job in Houston. The District Director asked whether he could accept the GS-13 Mediator as a “reassignment eligible” candidate and have the vacancy transferred to the Miami District Office. The Supervisory Program Analyst replied that the Mediator could be reassigned and that she would try to transfer the vacancy. The OFP Director approved of the request on July 24, 2014.

The Houston District Director stated in his affidavit that he appointed the Houston ADR Supervisor, the Houston Deputy Director, and the Director of the New Orleans Field Office to a selection panel. He and the panel reviewed the DEU and Merit Promotion certificates and realized that an EEOC employee (S2) from the Miami District Office was on the certificates. They reviewed S2’s application package and agreed to select him as the best qualified applicant. Because S2 would have had to accept a downgrade if he were chosen from one of the certificates, the Houston District Director contacted the Miami District Director to inquire about reassigning S2 to the Houston DO. According to the Houston Director, the two district offices, OFP, and the Office of Human Resources agreed to reassign S2 to the Houston DO and to give the Miami DO authorization to hire a mediator.

The Miami District Director stated in his affidavit that he had no information about the cancellation of the Houston vacancy. He also stated that he was aware that the Miami DO received a Mediator position from the Houston DO in exchange for the transfer of a Miami DO Mediator to the Houston DO.

On August 5, 2014, the Agency announced two vacancies for GS-0301-12 ADR Mediator positions in Miami and Philadelphia (Job Announcement No. D14-OFP-1183231-132-TMD). The vacancy announcement closed on August 13, 2014.

In an August 6, 2014, cancellation letter that HRS e-mailed to Complainant, HRS stated that the Agency had cancelled the Baltimore vacancy and relocated it to Philadelphia. She provided the new vacancy announcement number (Job Announcement No. D14-OFP-1183231-132-TMD) and stated, "Applicants who previously applied must RE-APPLY." In response, Complainant asked why the Agency had cancelled the vacancy. HRS replied on August 11, 2014, that the Philadelphia District Office made the decision to move the vacancy to Philadelphia. In addition, she informed Complainant that the Agency reassigned the Miami ADR Mediator to Houston and moved the Houston vacancy to Miami.

On August 12, 2014, Complainant asked HRS for the contact information of the Agency employee responsible for receiving discrimination complaints. HRS provided the names and telephone numbers of two individuals, including an "Equal Employment Specialist, Office of Equal Opportunity."

Also on August 12, 2014, Complainant asked HRS about the status of the vacancies in New York, Kansas City, Buffalo, and the "unstated location." HRS replied that that Agency had made a selection for the Seattle position but not for the other positions. Complainant then asked how the decision to move the vacancies to Philadelphia and Miami affected his application, whether he automatically would be considered for the two vacancies, whether he would have to reapply for the vacancies, and whether the Agency had selected, reassigned, or detailed candidates to fill the vacancies. HRS replied that the Baltimore cancellation letter stated that he would have to reapply but, because he had applied based on non-competitive authorities, she would automatically consider his application if he was interested in the Philadelphia location. She likewise told him that, because he had applied based on non-competitive authorities, she would automatically consider his application if he was interested in the Miami location. HRS stated that the Agency had not selected, reassigned, or detailed candidates for the vacancies.

In an August 14, 2014, e-mail to HRS, Complainant asked who made the decisions to cancel the Baltimore and Houston vacancies, why the Agency made the decisions, and how many ADR Mediators were assigned to the Baltimore, Philadelphia, Houston, and Miami offices. HRS informed Complainant that she had forwarded his questions to her supervisor. On August 15, 2014, HRS replied that "[m]anagement made the decision[s]" to cancel and transfer the vacancies and that Complainant could obtain information about the numbers of ADR Mediators by filing a Freedom of Information Act (FOIA) request.

Complainant sent HRS an August 18, 2014, e-mail asserting that he had a right to know why the Agency had not selected him for the vacancies. He noted that the Agency had cancelled two of the vacancies for which he had applied, that the cancellations occurred after he submitted his application and was found to be qualified for the position, and that the Agency had not cancelled any of the vacancies for which he had not applied. Complainant alleged, "It now appears that you may be part of a concerted effort to impede my ability to obtain employment in advertised vacant positions that I am extremely qualified for and I should not have to take legal action to obtain information that should be available upon request." Also on August 18, 2014, Complainant contacted the Equal Employment Specialist, and stated that he wanted to file an EEO complaint.

On August 27, 2014, HRS notified the Philadelphia and Miami District Directors and DRMs that Complainant wanted to be considered for the vacancies under the four non-competitive authorities. She provided the non-competitive certificates and Complainant's application package. HRS sent the notification letters to Complainant on September 3, 2014.

In a September 4, 2014, response to HRS, Complainant asked whether there were certificates of eligibility on which he was not listed and, if so, why. HRS replied that the Agency's automated system (USAStaffing) had generated Delegated Examining Unit (DEU) and Merit Promotion certificates and that Complainant's name was not on those certificates. Complainant responded that his name should have been on the DEU and Merit Promotion certificates if he was eligible under those authorities. He stated that he never told HRS that he wanted to be considered only for a non-competitive appointment. Complainant argued,

If it was necessary to extend the time for me to apply because I needed to submit my application online via USA Staffing, you should have advised me because there was plenty of time to add my name and/or reopen the vacancy so that I could apply and not disrupt the staffing and recruitment process. . . . It appears that there may be a coordinated effort to conduct recruitment for the position of ADR Mediator in a manner designed to excluded me from consideration, although I am extremely qualified to fill the position.

Complainant sent HRS a September 12, 2014, e-mail noting that HRS had not responded to his September 4 communication and asking if he should assume that his name was not added to the DEU and Merit Promotion certificates. On September 17, 2014, HRS replied,

Your name was referred to the selection official based on your prior emails. You asked if you would be automatically referred to the ADR Mediator vacancies in Philadelphia and Miami. So I referred your name to the selecting official as I referred it for the prior vacancy.

Complainant responded,

I never requested only to be considered under non-competitive appointing authorities for the ADR Mediator positions at issue. I requested to be considered under all applicable appointing authorities/methods. If you were not clear, then you should have made me aware and explained the process fully. Furthermore, I did not request consideration in a different manner for the Philadelphia vacancy (cancelled Baltimore vacancy) because I was not aware that I could request consideration under different appointing authorities or that the vacancy announcement would be reannounced and changed to generate additional certificates of eligibility, DEU and Merit Promotion. None of the other advertised vacancies for the ADR Mediator were reannounced and/or changed.

In a September 6, 2014, e-mail to HRS, the Philadelphia DRM stated that the office had chosen an internal candidate from the Merit Promotion certificate for the position. The Philadelphia District Director stated in his affidavit that the office did not conduct interviews and that he was the “Approving Official” for the Philadelphia vacancy.⁶ He also stated that the selectee (S3) was the best candidate because S3 was an “excellent worker” who was dependable, could handle a large inventory, and had a “strong EEO background.” In addition, S3 had experience in mediation, counseling, negotiations, and settlements.

In his affidavit, the Miami District Director stated that he assigned the Miami Deputy District Director, the Tampa Field Office Director, the Tampa Field Office Mediator, and the Miami District Chief Administrative Judge to the interview panel for the Miami vacancy. The panel interviewed candidates from the DEU and Merit Promotion certificates “because of the vast number of highly qualified candidates” on the certificates. According to the Miami District Director, the interview panel ranked the selected candidate (S4) the highest among the candidates. S4 “demonstrated an in-depth knowledge about the functioning, background and training of an EEOC mediator;” had worked with Agency mediators through an Agency mentorship program; and “presented strong background and training as a lawyer, certified mediator, and EEOC investigator.”

In his Initial Interview Narrative, which he signed on August 28, 2014, Complainant alleged that the Agency discriminated against him on the basis of disability when it did not select him for any of the vacancies advertised in the April 10, 2014, vacancy announcement. He asserted that management and human resources officials manipulated the selection process to exclude him. Complainant stated, “Although I did not share my specific disability, I made human resources and management aware that I had a disability when I requested to be considered for an appointment under [Vacancy Announcement No. D14-OFP-1095443-085-TMD] as a Schedule A (targeted disability) and as a Disabled Veteran.” Complainant also stated that he “applied competitively and non-competitively, as a status candidate, Schedule A, reinstatement eligible, VEOA, and Disabled Veteran.”

Complainant noted that he sent e-mails to HRS regarding the vacancies. He also noted that he asked HRS who had decided to cancel the vacancies in the Baltimore and Houston offices and to transfer the vacancies to the Philadelphia and Miami offices. According to Complainant, HRS refused to identify the decision-maker or to explain the reasons for the actions.

In signed, written responses to the EEO Counselor’s interview questions, Complainant alleged that the Agency cancelled the vacancies to prevent him from being selected for the positions. He also alleged that the Agency “concealed the location of the vacancy in the Seattle Office” to prevent him from applying for the position. Complainant declined to disclose whether he had a physical or mental disability and asked that his disability be identified as “unspecified.” He argued that, because he applied for the positions as a Schedule A and disabled-veteran applicant, human resource and management officials were aware that he had a disability.

⁶ In her affidavit, HRS identified the Philadelphia District Director as the “Selecting Official.”

Procedural Background

In an August 18, 2014, e-mail to the Agency Equal Employment Specialist whose name HRS had provided and who served as the EEO Counselor, Complainant stated that he wanted to file an EEO complaint regarding a non-selection. The EEO Counselor replied on Tuesday, August 19, and asked Complainant to let her know when he would be available for a discussion on Wednesday through Friday. Complainant responded on Friday, August 22, 2014. In his e-mail, Complainant asserted that he had “applied competitively and non-competitively” for an ADR Mediator position under Job Announcement No. D14-OFPP-1095443-085-TMD. He alleged that the Agency subjected him to disability-based discrimination when Human Resources and Management officials allegedly manipulated the selection process by cancelling the Baltimore and Houston vacancies after learning that he was eligible for a non-competitive appointment. He asked the EEO Counselor to call or e-mail him if she needed additional information.

On Monday, August 25, 2014, Complainant e-mailed the EEO Counselor, stated that she had not replied to the voice-mail message that he left her on August 22, asserted that it was taking too long to complete his initial EEO contact, and asked for the contact information of her supervisor. The EEO Counselor replied that she had been out of the office and asked if Complainant was available to discuss his complaint at 2:00 p.m. that day. In his response, Complainant asserted that his August 24 e-mail provided sufficient information and again asked for the contact information of the EEO Counselor’s supervisor. The EEO Counselor replied that she needed additional information from Complainant, that an initial interview was part of the complaint process, that she had called and left a message for him after receiving his voice-mail message, that he could provide an alternative time and date to discuss his complaint, and that she would forward his e-mail to the OEO Deputy Director. She subsequently asked Complainant to provide his home address and to indicate the law under which he was filing his complaint, whether he had a representative, and whether he wished to remain anonymous.

In an August 26, 2014, e-mail to the EEO Counselor, Complainant alleged that the EEO Counselor’s behavior was “very troubling,” that some of the information she requested was not required during an initial interview, that “the applicable law is not a factor during the informal process,” and that she was trying to impede his ability to articulate his claim. He further asserted that, because she had not identified herself as an EEO Counselor, he was not aware that she was engaging in anything beyond an initial contact. He claimed that, “[a]s an EEO professional with many years of experience and knowledge regarding the processing of” federal-sector complaints, he was not aware of any requirement that the initial contact and interview be conducted orally. He asked her to confirm whether she was acting as an EEO Counselor and to provide contact information for her first- and second-level supervisors. In addition, Complainant stated that he would submit a narrative to her and she could let him know if she had any questions about it.

The OEO Deputy Director replied on August 26, 2014, and stated that Complainant’s August 18 e-mail to the “Equal Employment Specialist, who serves as the agency’s EEO Counselor” was sufficient to begin the counseling process. The OEO Deputy Director also stated that she was the

EEO Counselor's first-level supervisor and the OEO Director was the second-level supervisor. She noted that an individual's "initial contact begins the counseling process" and that, after the initial contact, the EEO Counselor sets up a meeting to discuss the individual's claims. She explained that the Agency's process might be different from the process that Complainant had experienced at his agency and asked Complainant to comply with the EEO Counselor's request for a meeting. Complainant responded that he was not legally required to engage in an oral interview, that he preferred to communicate about his complaint in writing, and that the EEO Counselor could forward notices to him via e-mail. He asserted that "there is no miscommunication or misunderstanding on [his] part."

The EEO Counselor sent interview questions to Complainant on August 28, 2014, and Complainant submitted his answers the next day. Complainant subsequently asked whether the EEO Counselor had spoken with management and whether management wished to discuss a resolution to his complaint. The EEO Counselor replied that the Agency cancelled the Houston vacancy because a Mediator had transferred to the position from Miami, that the Agency selected a candidate for the New York vacancy, that the Baltimore vacancy was cancelled and moved to Philadelphia, that the Agency placed someone in the Seattle position through a settlement agreement, and that HRS stated that she forwarded certificates and application packages for non-competitive authorities to the locations that Complainant had listed. She subsequently informed Complainant that the Agency chose an internal candidate for the Philadelphia vacancy.

In a September 15, 2014, letter to Complainant, the EEO Counselor confirmed that she had conducted an initial interview with Complainant on August 28, 2014. She stated that Complainant alleged that the Agency subjected him to disability-based discrimination when it did not select him for any of the ADR Mediator vacancies under Job Announcement No. D14-OFD-1095443-085-TMD. On September 16, 2014, the EEO Counselor sent Complainant an e-mail stating that the counseling process had ended. She issued a Notice of Right to File a Formal Complaint (NRTF) that stated that Complainant had alleged disability-based discrimination when he was "not selected for the GS-12 ADR Mediator position advertised under Vacancy Announcement ID (D14-OFD-1095443-085-TMD) for the following offices: Miami, Baltimore, Houston, Philadelphia, and New York." In a September 18, 2014, e-mail response, Complainant asserted that the EEO Counselor's contact with HRS was the sole extent of the Counselor's inquiry and that there had been no efforts to resolve his complaint during the informal process. He asked whether HRS or other management officials had provided any documents concerning the matter. The EEO Counselor replied on September 21 that she conducted inquiries with HRS, the Philadelphia and Miami DRMs, and the NYDO Director; that she learned during the inquiries that the Agency had filled the vacancies; and that the documents she received included vacancy announcements, Complainant's application package, the certificates on which his name appeared, and internal e-mails. She reminded Complainant that "the counseling process is a limited process and not intended to duplicate an investigation." Complainant responded on October 7, 2014, and asserted that the counseling "was woefully inadequate and biased." He alleged, among other things, that the EEO Counselor did not conduct a sufficient inquiry, did not provide him with sufficient information, and did not address whether Agency officials wanted to resolve his claim.

In an October 9, 2014, letter to the OEO Director, Complainant asserted that the EEO Counselor had mischaracterized his claim. He filed a formal EEO complaint on October 10, 2014. In an October 17, 2014, letter to the OEO Director, Complainant expressed his dissatisfaction with the processing of his informal complaint. He alleged that the EEO Counselor conducted counseling in a manner designed to impede his ability to file a formal complaint. Complainant raised several specific allegations, which the Agency summarized in its January 29, 2015, acceptance letter.

In January 12, 15, and 20, 2015, e-mails to Complainant, an Equal Employment Specialist, who served as the EEO Investigator, asked Complainant to clarify his allegation that unknown management officials had intimidated and deterred him from filing a formal complaint. Complainant sent a January 20, 2015, letter to the OEO Director and identified several Agency management officials. In addition, he alleged that the EEO Counselor conducted biased counseling by “(1) not wanting to communicate in writing, (2) waiting until most of the EEO Counseling period had expired to begin EEO Counseling, and (3) interviewing responsible management officials after EEO Counseling had closed even though they were available prior to the close of EEO Counseling.” Asserting that “ADR Mediators likely work very closely with EEOC EEO employees,” Complainant argued that it posed a conflict of interest to have Agency EEO employees handle his complaint. He identified his claim as follows:

I was subjected to illegal discrimination on the basis of disability (Schedule A-targeted) and reprisal for prior EEO activity when EEOC Human Resources and Management employees conspired to manipulate the recruitment and selection process for advertised vacancies as a GS-12 ADR Mediator under vacancy announcements (D14-OFD-1095443-085-TMD and D14-OFD-1183231-132-TMD) to prevent my consideration and selection as a top qualified candidate. My contention is evidence by the following events:

He then identified specific individuals and five events: the cancellation of the Houston vacancy, the cancellation of the Baltimore vacancy, his non-selection for the New York vacancy, the alleged concealment of the location of the Seattle vacancy, and the alleged improper processing of his complaint.

The Agency accepted Complainant’s complaint for investigation on January 29, 2015. In a February 7, 2015, e-mail to the OEO Deputy Director, Complainant objected to the acceptance letter’s use of the phrase “unknown EEOC management officials” and questioned why the Agency had provided copies of the letter to several management officials. The OEO Deputy Director replied on February 9 that the phrase “unknown EEOC management officials” came from Complainant’s formal complaint, that Complainant would have an opportunity during the investigation to ensure that all officials were identified correctly, and that the Agency notifies the affected offices when a complaint is accepted to ensure that the offices retain relevant documentation. In a February 13, 2015, e-mail to the OEO Deputy Director, Complainant argued that the acceptance letter inappropriately omitted the names of responsible management officials and relevant information that he had mentioned in his January 20, 2015, letter. He stated that he wanted to receive copies of all management officials’ statements so that he could provide a rebuttal

statement. In addition, he repeated the arguments that he made in his January 20, 2015, letter to the OEO Director.

In a March 3, 2015, email to Complainant, the EEO Investigator attached an “affidavit in question form” and asked Complainant to complete the affidavit by March 12, 2015. The form reiterated the accepted issues and asked such questions as when and how Complainant applied for the positions, what his qualifications were, whether he knew who the selecting officials and selectees were, why he believed that the Agency subjected him to discrimination based on disability and reprisal, and whether he wished to provide any other information or documents. In a March 4, 2015, e-mail to the OEO Deputy Director, Complainant noted that OEO Deputy Director had not replied to his February 13 e-mail. He alleged that it was a conflict of interest for the Agency EEO Investigator to investigate his complaint. In addition, Complainant argued that the EEO Investigator had given him “an affidavit that reflects only . . . generic and incorrect claims” rather than specific claims that identified management officials.

The OEO Deputy Director replied on March 4, 2015. She stated that Agency mediators work in the field offices and are not assigned to mediate internal EEO claims, that none of the Agency’s EEO officials had any involvement in Complainant’s substantive claims, and that there was no conflict of interest. She also stated that the affidavit gave Complainant an opportunity to support his claim and to identify the responsible management officials, that the EEO Investigator might identify additional officials during the investigation, that the Agency would provide a summary of management officials’ statements to him for rebuttal purposes, and that he would receive copies of all statements after the conclusion of the investigation. Finally, the OEO Deputy Director noted that Complainant’s concerns about the processing of his complaint would be included in the complaint file.

Complainant continued to disagree with the Agency’s characterization of his claims and to express dissatisfaction with the complaint process. In a March 16, 2015, e-mail to the OEO Deputy Director, Complainant alleged that the OEO Director, OEO Deputy Director, and EEO Investigator retaliated against him by refusing to record his claims accurately. He asserted that, because he now had identified them as responsible management officials, their involvement in the processing of his complaint created a conflict of interest. The OEO Deputy Director replied that the Agency was investigating his complaint in accordance with the applicable regulations. She stated that Complainant’s definition of his claim “materially addresses the same claim that was accepted” and that he could clarify as well as support his claim in his affidavit. She reiterated that the complaint file would include Complainant’s concerns about the processing of his complaint.

On March 11, 2015, Complainant requested and received an extension of time for submitting his affidavit until March 16, 2015. He stated that he had been unable to complete the affidavit “due to illness and other obligations.” On March 18, 2015, the EEO Investigator asked Complainant about the status of his affidavit. He responded on March 20 that he had been waiting to learn if the Agency would revise the characterization of his claims, that the EEO Investigator had sufficient information to begin the investigation, and that he would submit an affidavit and rebuttal statement after the Investigator gave him an opportunity to review the affidavits provided by management witnesses. Complainant stated that, if necessary, he would grant the Investigator an extension of

time within which to complete the investigation. On March 23, the EEO Investigator requested an extension until May 22, 2015, for completion of the investigation. Complainant responded that he would grant an extension only if the Agency's Assistant Legal Counsel for Freedom of Information Act Programs would provide him "with all of the responsive documents regarding [his] FOIA request . . . without redacting unnecessary information." The EEO Investigator replied on March 26 that, because Complainant was not willing to grant an extension, she would issue the Report of Investigation (ROI) on April 8, 2015, and would give Complainant 15 days after receipt of the ROI within which to submit a rebuttal. Complainant subsequently informed the EEO Investigator that he would grant an extension until May 22, 2015. He asked the Investigator if she would provide him with a copy of her Investigative Plan, witness statements, and the selectees' application materials. The EEO Investigator replied that she would give Complainant an opportunity to review management's responses and to submit a rebuttal and that she would include additional information in the ROI.

On April 23, 2015, the EEO Investigator provided Complainant with a summary of management's and witnesses' statements and asked him to provide a rebuttal by May 6, 2015. Complainant asked the Investigator to provide additional information, including e-mails regarding the selections and vacancies, complete witness statements, application packages, certificates, and interview-panel notes and scores. The OEO Deputy Director replied that the Investigator was in training, that investigators did not provide affidavits and other evidence prior to the conclusion of an investigation, that the Agency provides a summary of management's responses for rebuttal purposes, and that Complainant would receive the entire record at the conclusion of the investigation.

On May 6, 2015, Complainant requested an extension of time for submitting his affidavit until May 13, 2015, because of "unforeseen personal circumstances." The EEO Investigator granted his request and asked to extend the time for completing the investigation until June 5, 2015. Complainant agreed to the extension. On May 14, 2015, the EEO Investigator asked Complainant for the status of his affidavit. He responded on May 15 and asked the Investigator to hold the investigation in abeyance for two weeks because he was "currently experiencing medical issues that require immediate attention." The Investigator agreed to extend the date for the affidavit until May 29 and noted that this would extend the investigation until June 19, 2015. On June 2, 2015, Complainant informed the Investigator that he had "not fully recovered from the medical issues" that had prevented him providing his affidavit. He asked for an additional two-week extension. The EEO Investigator replied that OEO needed to issue the ROI but would allow Complainant to submit an affidavit up to two weeks after June 19, 2015. Complainant never submitted an affidavit or a rebuttal statement.

By letter dated June 15, 2015, the Agency provided Complainant with a copy of the ROI and notice of his right to request a hearing before an EEOC Administrative Judge or a final agency decision. According to the Agency, Complainant requested a final agency decision.

Final Agency Decision

In its final decision, the Agency concluded that Complainant did not establish that it discriminated against him as alleged. The Agency found that Complainant did not establish prima facie cases of discrimination based on disability or reprisal. The Agency further found that it articulated legitimate, nondiscriminatory reasons for its actions and that Complainant did not show that the articulated reasons were a pretext for discrimination.

For example, the Agency noted that the Miami, Philadelphia, and New York officials selected candidates from competitive certificates because the certificates offered a larger number of candidates than the non-competitive certificates. It found no evidence that discriminatory or retaliatory animus motivated the Agency's decision to use only the competitive certificates. Similarly, the Agency found no evidence to support Complainant's assertion that the Agency failed to consider him for the positions because he notified HRS that he wanted to be considered through non-competitive authorities. Further, the Agency concluded that the evidence did not support Complainant's claims that Agency officials conspired to exclude him from the ADR Mediator positions by cancelling and moving vacancies or by excluding him from the competitive certificates.

The Agency found that there was no merit to Complainant's claim of improper complaint-processing. In that regard, the Agency stated that the EEO Counselor "took all reasonable measures to ensure that his complaint was timely filed," that her failure to identify herself as an EEO Counselor in her initial e-mail to Complainant did not delay or negatively affect the counselling, that the OEO Deputy Director's August 26, 2014, e-mail to Complainant explained the initial-contact process, and that the EEO Counselor responded promptly to Complainant's inquiries. The Agency noted that the EEO Counselor's "generic statement" of Complainant's claim in the Notice of Right to File a Formal Complaint did not include all of the information that Complainant provided in his August 2014 submissions. It also noted, however, that OEO used all of the information that Complainant provided when it drafted its Notice of Acceptance. As a result, the Agency found that OEO cured any harm that Complainant may have suffered. The Agency further found that the EEO Counselor conducted a sufficient inquiry and that she gave Complainant the names of several management witnesses. Noting that Complainant received the names of additional officials after filing a FOIA request and that the EEO Investigator interviewed all of the responsible management officials whom Complainant identified, the Agency stated that the inclusion of this information in the investigation cured any harm that Complainant may have suffered. In addition, the Agency found that there was no merit to Complainant's claim that the EEO Counselor did not provide him with the reasons for his non-selection and the cancellation of vacancies. With respect to Complainant's claim that the Counselor failed to identify resolving officials or attempts at resolution, the Agency stated that the selecting officials were the responsible management officials and "would also have been the resolving officials if they thought a resolution could be reached." Finally, the Agency found that the Notice of Acceptance adequately framed Complainant's claims.

The Agency concluded that Complainant did not identify any harm that he suffered as a result of the Agency's actions regarding the processing of his complaint and did not show that the Agency's actions affected the outcome of the complaint. The Agency "dismissed" Complainant's improper-processing complaint for failure to state a claim. In its Conclusion, the Agency also "dismissed" Complainant's claim that the Agency discriminated against him on the basis of disability and in reprisal for prior protected EEO activity.

CONTENTIONS ON APPEAL

Complainant did not file a statement on appeal.⁷ The Agency argues that its final decision correctly rejected Complainant's claims of discrimination and improper complaint-processing.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chap. 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

ANALYSIS AND FINDINGS

As a preliminary matter, we note that, in its final decision, the Agency stated that it was dismissing Complainant's claims of discrimination and improper complaint-processing. The Agency, however, addressed the merits of Complainant's allegations. Rather than stating that it was dismissing Complainant's claims, the Agency should have stated that it found that it had not discriminated against Complainant and had not processed his complaint improperly. Given that the Agency adequately discussed and addressed the merits of Complainant's claims, its use of the term "dismiss" was harmless error.

Complaint Processing

When a complainant raises allegations of dissatisfaction regarding the processing of his or her pending complaint, the Agency official responsible for the quality of complaints processing must add a record of the complainant's concerns, and any actions the Agency took to resolve the

⁷ In a September 9, 2016, e-mail to the Commission's Office of Federal Operations (OFO), Complainant noted that the brief in support of his appeal was due on September 15 and requested a 30-day extension of the time within which to file a brief. He did not give a reason for his request. OFO granted Complainant a 10-day extension until September 30, 2016. Complainant, however, did not file a brief in support of his appeal.

concerns, to the complaint file maintained on the underlying complaint. If no action was taken, the file must contain an explanation of the Agency's reason(s) for not taking any action. EEO MD-110 Chapter 5, IV.A.12 and IV.D. (Aug. 3, 2015).

In this case, Complainant has alleged that the Agency discriminated against him on the basis of disability and in reprisal for prior protected EEO activity by processing his complaint improperly. The record does not support Complainant's allegations.

Although Complainant might have had a clearer understanding of the EEO Counselor's role if she had expressly identified herself as a Counselor, her failure to do so did not delay the EEO process. As the OEO Deputy Director noted in her August 26, 2014, e-mail to Complainant, Complainant's August 18, 2014, e-mail to the EEO Counselor began the counseling process. Complainant engaged in extensive e-mail correspondence with the OEO Deputy Director and the EEO Counselor. Given the extent of the e-mails and the dates and times that Complainant sent them, we find that OEO representatives replied to his inquiries in a timely manner. Even though the OEO representatives asked Complainant to participate in an oral interview, they acceded to his request for written communications. In addition, we agree with the Agency's determination that the Notice of Acceptance cured any harm that Complainant might have suffered as a result of the NRTF's "generic statement" of Complainant's claims. Further, having reviewed the EEO Counselor's Report, all of the communications between Complainant and OEO representatives, and the entire record, we find that the EEO Counselor conducted a sufficient inquiry into Complainant's claims and that the EEO counseling met the requirements of 29 C.F.R. § 1614.105 and EEO MD-110 Chapter 2 ("Equal Employment Opportunity Pre-Complaint Processing). Finally, we find that the Agency accurately articulated Complainant's allegations in the Notice of Acceptance.

Having thoroughly and carefully reviewed the record, we find that the record does not establish that the Agency administered EEO counseling in a manner designed to intimidate or deter Complainant from filing a formal EEO complaint. We further find that the record does not establish that the Agency processed Complainant's complaint improperly.

Non-Selection for ADR Mediator Positions

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). Complainant must initially 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 Construction 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. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Community 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 Products, Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Center v. Hicks, 509 U.S. 502, 519 (1993).

Complainant can do this by showing that the proffered explanations are unworthy of credence or that a discriminatory reason more likely motivated the Agency. Burdine, 450 U.S. at 256. A showing that the employer's articulated reasons are not credible permits, but does not compel, a finding of discrimination. Hicks at 511.

We assume for purposes of analysis only, and without so finding, that Complainant has established prima facie cases of discrimination based on disability and reprisal. We find that the Agency has articulated legitimate, nondiscriminatory reasons for its actions and that Complainant has not shown that the articulated reasons are a pretext for discrimination.

The NYDO Deputy Director stated that the interview panel considered candidates from the Best Qualified and Merit Promotion certificates because those certificates had the largest number of best-qualified candidates. She and the NYDO ADR Coordinator stated that S1 had experience working in the NYDO ADR Unit and was focused on mediation. The Agency moved the Baltimore vacancy to Philadelphia because two mediators had retired from the Philadelphia District Office. The Agency chose an internal candidate who was a dependable, "excellent worker" who had mediation experience for the Philadelphia vacancy. After a mediator from the Miami District Office applied and was deemed qualified for the Houston position, the Agency transferred the mediator to Houston and moved the vacancy to Miami. The Miami District Director stated that the interview panel considered candidates from the Best Qualified and Merit Promotion certificates because of the large number of qualified candidates on those certificates. He also stated that S4 had worked with Agency mediators and had a "strong background and training as a lawyer, certified mediator, and EEOC investigator."

Complainant, who did not provide an affidavit, has not shown that the articulated reasons are unworthy of credence. He has not refuted the Agency's explanation that interview panels considered candidates from the Best Qualified and Merit Promotion certificates because of the number of qualified candidates on those certificates. Further, he has presented no evidence that he was more qualified for the positions than were the selectees. All of the selectees had strong mediation backgrounds and experience working with the Agency's mediation program. S2, who transferred to Houston from Miami, already was an Agency Mediator.

In addition, Complainant has not shown that a discriminatory reason more likely motivated the Agency's actions. He offers no evidence to support his allegation that the Agency cancelled the Baltimore and Houston vacancies to prevent him from being selected for the position. In addition, there is no merit to Complainant's claim that the Agency "concealed the location of the vacancy in the Seattle Office" to prevent him from applying for the position. The vacancy announcement contained a link that identified the Seattle location. Further, the record establishes that Complainant was not on the competitive certificates for Vacancy Announcement No. D14-OFP-1095443-085-TMD because he did not submit an application within the established time frame. Finally, there is no evidence that the Agency manipulated the recruitment and staffing process to prevent Complainant's consideration and selection. Complainant's unsupported speculation is insufficient to establish pretext.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we find that the Agency did not process Complainant's complaint improperly and that Complainant has not established that the Agency discriminated against him on the basis of disability or in reprisal for prior protected EEO activity when it did not select him for an ADR Mediator position.

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 (S0610)

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. 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:

/s/ Bernadette B. Wilson
Bernadette B. Wilson
Executive Officer
Executive Secretariat

November 27, 2019
Date