



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

[REDACTED]  
Jordan S.,<sup>1</sup>  
Complainant,

v.

Matthew G. Whitaker,  
Acting Attorney General,  
Department of Justice  
(Federal Bureau of Investigation),  
Agency.

Appeal No. 0120171870

Agency No. BOP201501649

DECISION

On May 2, 2017, Complainant filed an appeal<sup>2</sup> with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's July 31, 2017, 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. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission MODIFIES the Agency's final decision.

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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.

<sup>2</sup> When Complainant filed his appeal, it was premature as the Agency had not yet issued its final decision. However, as discussed further herein, the Agency subsequently issued its final decision. Where a premature appeal has been filed and the Agency subsequently issues a final action while the appeal remains pending, we have held that the issuance of the decision cured the defect and made the appeal ripe for adjudication. See Franchesca V. v. Dep't of the Treasury, EEOC Appeal No. 0120150620 (Mar. 24, 2017); Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120120712 (June 18, 2014).

## BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Case Manager at the Agency's Federal Correctional Institute Sandstone facility in Minnesota. On July 9, 2015, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of disability (torn rotator cuff, bilateral knee pain, type 2 diabetes), age (49), and in reprisal for prior protected EEO activity when the Agency did not select him for the position of Senior Officer Specialist, Vacancy Announcement No. SST-2015-0009.<sup>3</sup>

The Agency sought to hire five people through the vacancy announcement. Complainant and 23 other candidates were certified as eligible. Complainant argued that he was more than qualified for the position because he was the ninth most senior officer with the Agency and "had been performing the same duties as the GS-08 Senior Officer position despite the fact that [he] was working as a GS-07." By comparison, Complainant stated the selectees have only worked with the Agency between three and six years.

Moreover, Complainant averred that he has supervised others and worked in a position higher than his position. According to Complainant, after he was not selected for the position, he met with the Warden, who told him that she could not see Complainant as a Senior Officer Specialist and that "the process to promote officers is we decide which ones would make good lieutenants in the future or are able to move up to other positions." Complainant interpreted these sentiments to mean that the Agency was seeking younger officers who will have a longer career, and therefore time to move up to higher positions.

The Warden was the selecting official for the position. The Warden denied that any of Complainant's protected bases played a role in his non-selection. Rather, she explained that the five selectees scored higher on their integrity/reference check and all had critical correctional services training and listed the selectees' attributes. Selectee 1 had average writing, three areas of institutional leadership, and an advanced degree. Selectee 2 had good writing skills, military leadership, and speaks a second language. Selectee 3 had average writing skill, military and institutional leadership, and an advanced degree. Selectee 4 had average writing skill, and military leadership and supervisory experience. Finally, Selectee 5 had good writing skill, military leadership, some college experience, and spoke two other languages. By comparison, the Warden noted that Complainant had a slightly less than average integrity/reference rating and did not have current critical correctional service training.

The integrity/reference check form lists six separate categories: (1) administrative skills; (2) oral communication skills; (3) written communication skills; (4) technical expertise; (5) responsiveness; and (6) analytical ability. Each candidate was assigned one of four scores: (a) not observed; (b) below average; (c) average; or (d) above average.

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<sup>3</sup> The Agency informed Complainant that the reprisal-based portion of his complaint would be held in abeyance because it was subsumed within a pending class action, Turner, et al. v. Dep't of Justice, EEOC No. 541-2008-0255X.

On Complainant's reference check form, the Agency scored him as "average" on all categories except written communication skills. In that category, Complainant scored "above average." By comparison, the selectees all scored predominantly "above average." Two selectees scored "average" in just one category, and a third scored "average" in two categories.

At the conclusion of the investigation, on March 9, 2016, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f). Notwithstanding, the Agency failed to issue a final decision within the time frame prescribed by 29 C.F.R. § 1614.110(b). As of May 2, 2017, Complainant had not received a final decision from the Agency. Thus, Complainant appealed the matter to the Commission in the form of a motion for sanctions and default judgment. Nearly four months later, on July 31, 2017, the Agency issued a final decision. The decision concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged. The Agency found that the Warden's explanations were legitimate and nondiscriminatory. Further, Complainant failed to demonstrate that these reasons were pretext for discriminatory animus or that his qualifications were observably superior to those of the selectees.

#### CONTENTIONS ON APPEAL

On appeal, Complainant argues that he is entitled to default judgment as a sanction for the Agency's delay in issuing a final decision. Turning to the merits of the Agency's final decision, Complainant contends that the Agency has not articulated a legitimate, nondiscriminatory reason for not selecting him. According to Complainant, the Agency's explanation amounts to nothing more than simply that the selectees were better qualified but lacks specifically how they were better. Complainant continues to insist that his seniority and years of experience show that he is demonstrably superior to the selectees.

#### ANALYSIS AND FINDINGS

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 Chapter 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").

#### *The Agency's Issuance of its Final Decision*

As an initial matter, the Commission will address the Agency's untimely issuance of its final decision and Complainant's request for default judgment in her favor as a sanction. EEOC Regulations provide that an agency shall issue the final decision within 60 days of receiving notification that a complainant has requested an immediate decision from the agency, or within 60 days of the end of the 30-day period for the complainant to request a hearing or an immediate final decision where the complainant has not requested either a hearing or a decision. 29 C.F.R. §1614.110(b).

Here, the record indicates that the Agency issued the report of investigation and notified Complainant of his right to request on March 9, 2016. Complainant did not request a hearing within the regulatory timeframe; however, the final decision was not issued until July 31, 2017, more than a year after the request and more than three months after Complainant appealed to the Commission. The Agency has not provided a valid reason for the late issuance of the final decision. Indeed, the Agency submitted no response to Complainant's contentions on appeal. Therefore, the Commission finds that the Agency did not comply with its obligation to issue a final decision in accordance with the time frames set forth at 29 C.F.R. § 1614.110(b). As noted by the Commission in Mach v. Dep't of Def., EEOC Appeal No. 0120080658 (Nov. 30, 2010), "the procedures contained in the Commission's regulations are no more or no less than the necessary means to eliminate unlawful employment discrimination in Federal employment." Accordingly, we find that a sanction in this case is appropriate.

### *Sanctions*

Sanctions serve a dual purpose. On the one hand, they aim to deter the underlying conduct of the non-complying party and prevent similar misconduct in the future. Barbour v. U.S. Postal Serv., EEOC 07A30133 (June 16, 2005). On the other hand, they are corrective and provide equitable remedies to the opposing party. Given these dual purposes, sanctions must be tailored to each situation by applying the least severe sanction necessary to respond to a party's failure to show good cause for its actions and to equitably remedy the opposing party. Royal v. Dep't of Veterans Affairs, EEOC Request No. 0520080052 (Sept. 25, 2009). Several factors are considered in "tailoring" a sanction and determining if a particular sanction is warranted: 1) the extent and nature of the non-compliance, and the justification presented by the non-complying party; 2) the prejudicial effect of the non-compliance on the opposing party; 3) the consequences resulting from the delay in justice; and 4) the effect on the integrity of the EEO process. Gray v. Dep't of Defense, EEOC Appeal No. 07A50030 (Mar. 1, 2007).

In the case at hand, we find that the Agency failed to comply with the EEOC's regulations. We note that the Agency did not provide any explanation for its extraordinary delay in issuing the FAD. However, we note that Complainant did not make a showing that he was prejudiced by the Agency's delay. Thus, although the Agency failed to issue a timely decision as required by regulation, the Commission finds that the Agency did not act in a manner to warrant a default judgment sanction. See, e.g. Josefina L. v. Soc. Sec. Admin., 0120142023 (July 19, 2016), req. for recon. den'd, EEOC Request No. 0520170108 (Feb. 9, 2017) (finding that the Agency's 571-day delay in issuing the FAD did not warrant sanctions, as complainant did not show she was

prejudiced by the delay); Abe K. v. Dep't of Agric., EEOC Appeal No. 0120141252 (Nov. 4, 2016)(declining to sanction an agency that issued a FAD after approximately 326 days when complainant failed to show that he was prejudiced by the delay); Jocelyn R. v. Dep't of Def., EEOC Appeal No. 0120152852 (Mar. 11, 2016) (citing Vunder v. U.S. Postal Serv., EEOC Appeal No. 01A55147 (May 12, 2006) (declining to sanction an agency that issued a FAD after approximately 371 days)).

Based on the specific circumstances of this case, we find the most appropriate sanction to address the Agency's conduct is to order the Agency to: (1) post a notice at its Complaint Adjudication Office in Washington, D.C. regarding its failure to comply with the Commission's regulatory timeframes and orders; and (2) provide training to its EEO personnel who failed to comply with our regulatory timeframes. Our decision to sanction the Agency in this matter will effectively emphasize to the Agency the need to comply with Commission regulations and orders in a timely manner.

#### *Disparate Treatment*

To prevail in a disparate treatment claim, 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 Constr. Corp. 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 804 n.14. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. 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, 120 S. Ct. 2097 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a prima facie case, need not be followed in all cases. Where the Agency has articulated a legitimate, nondiscriminatory reason for the personnel action at issue, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether Complainant has shown by a preponderance of the evidence that the Agency's actions were motivated by discrimination. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Dep't. of Transp., EEOC Request No. 05900159 (June 28, 1990); Peterson v. Dep't. of Health and Human Servs., EEOC Request No. 05900467 (June 8, 1990); Washington v. Dep't. of the Navy, EEOC Petition No. 03900056 (May 31, 1990). Here, we find the Agency has articulated legitimate, nondiscriminatory reasons for its actions. In addition to the integrity and reference checks, the Warden explained that she saw attributes in the selectees' background that made them best qualified for the position.

Complainant now bears the burden of establishing that the Agency's stated reasons are merely a pretext for discrimination. Shapiro v. Soc. Sec. Admin., EEOC Request No. 05960403 (Dec. 6, 1996). Complainant can do this directly by showing that the Agency's proffered explanation is unworthy of credence. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981).

At all times, the ultimate burden remains with Complainant to demonstrate by a preponderance of the evidence that the Agency's reasons were not the real reasons and that the Agency acted on the basis of discriminatory or retaliatory animus.

Where, as here, the alleged discriminatory action is non-selection, pretext may be found where the complainant's qualifications are demonstrably superior to those of the selectee. Bauer v. Bailer, 647 F.2d 1037, 1048 (10th Cir. 1981). Otherwise, the Agency may choose among qualified candidates based on its discretion, provided that the decision is not based upon unlawful criteria. See Burdine, 450 U.S. at 259; Vanek v. Dep't of the Treasury, EEOC Request No. 05940906 (Jan. 16, 1997). It is not the function of this Commission to substitute its judgment for that of management officials who are familiar with the needs of their facility, and who are in a better position to make decisions, unless other facts suggest that proscribed considerations of bias entered the decision-making process. See Shapiro v. Soc. Sec. Admin., EEOC Request No. 05960403 (Dec. 6, 1996), citing Bauer, 647 F.2d at 1048; see also Allen v. Dep't of the Navy, EEOC Appeal No. 01A52639 (Aug. 10, 2005) (personnel decisions and should not be second-guessed by the reviewing authority absent evidence of unlawful motivation).

In this case, Complainant does not carry his burden. Although Complainant argues that he did not score "below average" in any category, Complainant does not show that the Warden's arguments are false or unworthy of belief. As Complainant chose not to request a hearing before an EEOC AJ, the Commission does not have the benefit of an Administrative Judge's credibility determinations after a hearing. Therefore, the Commission can only evaluate the facts based on the weight of the evidence presented. The record evidence demonstrates that Complainant scored lower than any of the five selectees. To that end, Complainant's arguments do not show that he is demonstrably superior to those of the selectees. Most of Complainant's reference checks were scored as "average" whereas the selectees all scored mostly "above average." Further, Complainant's interpretation of the Warden's comments regarding what she seeks in a correctional officer is neither corroborated nor supported by the record. Furthermore, Complainant's argument regarding the selectees' limited tenure compared to his is similarly not well taken; the Commission notes that number of years of experience, alone, is insufficient to establish that a candidate's qualifications are observably superior. Kopkas v. U.S. Postal Serv., EEOC Appeal No. 0120112758 (Oct. 13, 2011).

The Commission finds no persuasive evidence that Complainant's protected classes were a factor in any of the Agency's actions. At all times, the ultimate burden remains with Complainant to demonstrate by a preponderance of the evidence that the Agency's reasons were not the real reasons and that the Agency acted on the basis of discriminatory animus. Complainant failed to carry this burden. As a result, the Commission finds that Complainant has not established that he was subjected to discrimination as alleged.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's finding of no discrimination based on age and disability. The Agency's final decision, however, is MODIFIED in accordance with this decision and the ORDER below.

### ORDER

Unless otherwise indicated, the Agency is ordered to complete the following remedial actions within 60 days of the date this decision is issued:

1. The Agency shall post a notice in accordance with the paragraph below.
2. The Agency shall provide in-person or interactive training to its EEO management officials in the Office of Adjudication regarding their responsibilities concerning case processing under 29 C.F.R. Part 1614.

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation verifying that the corrective action has been implemented.

### POSTING ORDER (G0617)

The Agency is ordered to post at its Office of Adjudication facility located in Washington, D.C. 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).

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)

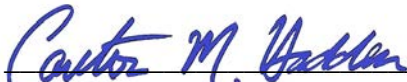
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from 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

March 20, 2019

Date