



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

[REDACTED]
Irwin R.,¹
Complainant,

v.

Martin J. O'Malley,
Commissioner,
Social Security Administration,
Agency.

Appeal No. 2022000757

Hearing Nos. 531-2019-00229X, 531-2010-00081X, 531-2008-00035X

Agency Nos. HQ-17-0194-SSA, HQ-07-0333-SSA, HQ-09-0514-SSA, HQ-13-0710-SSA

DECISION

On November 22, 2021, 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 four October 25, 2021, final decisions concerning his equal employment opportunity (EEO) complaints 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.

ISSUES PRESENTED

The issues presented concern: (1) whether Complainant has shown by a preponderance of the evidence that the Agency subjected him to discrimination on the bases of race (African-American) and sex (male) when he was not selected for various positions; and (2) whether Complainant has shown by a preponderance of the evidence that the Agency subjected him to discrimination on the bases of race (African-American), sex (male), and reprisal for prior EEO activity when his request for a detail was denied.

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.

BACKGROUND

Complainant is now retired, but he worked for the Agency for many years. For much of the period at issue, Complainant held positions classified as GS-0343-14 at the Agency's Office of Operations in Woodlawn, Maryland. During his employment, Complainant filed several EEO complaints against the Agency, including multiple claims of non-selection.

Agency No. HQ-07-0333-SSA ("2007 Complaint")

On May 21, 2007, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (African-American) and sex (male) when he was not selected for promotion to the following positions that were announced under the cited vacancy announcement numbers:

- A. Supervisory Management and Program Analyst, GS-343-15: B-3354
- B. Supervisory Management Analyst, GS-343-15: F-934-USAS
- C. Management & Program Analyst (Senior Budget Advisor), GS-343-15, F-980-USAS
- D. Supervisory Program Analyst (Division Director), GS-343-15, F-983-USAS
- E. Supervisory Social Insurance Specialist (Division Director), GS-105-15, B-343 7
- F. Division Manager, GS-301-15, B-3411
- G. Human Resources Specialist, GS-201-15, A-1137-USAS
- H. Supervisory Management Analyst, GS-0343-15, SH-160933
- I. Supervisory Program Analyst, GS-0343-15, SH-163240

The Agency conducted an investigation into these claims. The investigation showed that at the time of this complaint, Complainant was employed as a Project Manager (Team Leader), GS-0301-14, in the Division of Operations, Analysis and Customer Service, in the Office of Public Service and Operations Supper in the Office of the Deputy Commissioner for Operations.

Complainant identified his race as Black and his sex as male. He identified his prior EEO activity as membership in the Black Males for Justice at SSA, an organization supporting a class action complaint filed against the Agency on behalf of Black Males at SSA Headquarters from at least 2001 through 2003.² He also stated that he served as a member and National Chairperson for the Agency's Black Affairs Advisory Council, an employee organization focused on equal employment opportunity issues for Black employees nationwide from 1991 through 2000.

² Complainant is a lead class agent in the class action claim in *Wilkerson v. Social Security Administration*, EEOC Hearing No. 531-2008-00034X/531-2022-00225X.

Claim A (B-3354)³

Complainant testified he applied for the Supervisory Management and Program Analyst, GS-343-15 position, Vacancy Announcement Number B-3354, on or around December 11, 2006, and his name was placed on the Best Qualified List for the position, but he was not interviewed. Complainant testified he was not aware whether other candidates were interviewed. Complainant became aware on or about January 18, 2007 that Selectee A (White male), a GS-14 Management/Program Analyst in the Office of Central Operations, was selected for the position. Complainant identified the selecting official as Deputy Commissioner for Operations (Caucasian female⁴).

Complainant testified he should have been selected over Selectee A due to his superior knowledge, skills, and abilities related to the position. Complainant stated he was one of the top candidates interviewed for the position when it was vacant in 2002 or 2003, he had external component experience, he had almost four years of GS-14 experience in the major operating components with the Office of Central Operations, and he had demonstrated the ability to lead and excel at the highest organizational levels of the Agency and the selecting component. He stated he was also more qualified than Selectee A.

Complainant testified that Selectee A had recently been demoted from a GS-15 position to a GS-14 position and Complainant believed this was due to sexual harassment because it was widely rumored that Selectee A was involved in a sexual relationship with a subordinate employee. He noted that the position at issue required a high degree of confidence and trust as a public servant, but the sensitivity level and suitability were apparently ignored for the White male selectee. Complainant further stated that he had demonstrated leadership in many operational and support functions. Complainant stated he has served as a Technical Lead for the Agency's senior-most human resources executive, participated in executive level deliberations, and served as an operational supervisor with responsibility for more than 500 employees in each of two distinct operational units within the selecting component.

³ Complainant raised only certain claims in his appeal submissions. We exercise our discretion to limit our review to those issues. See Mario G. v. U.S. Postal Serv., EEOC Appeal 0120170779 (Aug. 30, 2017) (finding that “The Commission exercises its discretion to review only the issues specifically raised in Complainant’s appeal and declines to review uncontested aspects of the Agency’s final order.”), citing EEOC Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 9, at § IV.A.3 (Aug. 5, 2015) (“Although the Commission has the right to review all of the issues in a complaint on appeal, it also has the discretion not to do so and may focus only on the issues specifically raised on appeal”).

⁴ The focus of Complainant’s discrimination claims are his race and sex which he identified as “Black male”. For this reason, we will typically refer to the persons in this complaint in a similar manner. However, where they have identified themselves differently (e.g., “Caucasian female”), we will use that instead.

Complainant asserted that, in comparison, Selectee A had little more than one year of GS-14 level experience in the selecting component and had never held a position above the GS-13 level with overall responsibility for more than 15 individuals whereas the position in question involved overall responsibility for more than 700 employees. Complainant asserted that while the recommending official (Black female) stated that Selectee A had an extensive background in the Office of Central Operations, Selectee A had been demoted to a lower-level organization and had never supervised anyone in the organization.

Complainant testified his race and sex were factors in his non-selection because Selectee A is a White male and no Black male had been selected to the position in question since its inception. Complainant asserted that while the position was posted as a temporary position, exceptions were made to convert the individual to a permanent position upon selection. He stated this had only been done at the GS-15 level for White male employees. Complainant indicated he was not alleging retaliation in this instance, but he believed his status as part of a class complaint for Black males at SSA was well known to the recommending/selecting officials. He further noted no Black males had been promoted to a GS-15 position since the 2003 class complaint was settled. Complainant stated that this would have been the third time in one year that his name was on a best qualified list for a GS-15 position and he did not get the position.

Deputy Commissioner for Operations (the selecting official) testified that she customarily relies on the recommendations of executives who report to her because due to the size of her organization, her direct reports are more familiar with the positions to be filled and with the strengths and weaknesses of the applicants. She testified that for this position, she relied on the written recommendation of Associate Commissioner for the Office of Central Operations (Associate Commissioner OCO) (African-American female) and she did not review the applications or the actual best qualified list. Deputy Commissioner for Operations testified that Associate Commissioner OCO recommended two individuals, Selectee A and a GS-15 Project Manager. Deputy Commissioner for Operations testified that she was aware Selectee A had been demoted because she was the deciding official on that personnel action, but Selectee A had been in the Office of Central Operations since 2005 with no inquiries or allegations of sexual harassment. She testified that Selectee A had worked hard to overcome his prior issues, he had been rehabilitated, and his record had been impeccable. She noted Selectee A had established himself as a very articulate presenter during high level briefings and a senior leader whom others sought out for advice. She stated that he was known throughout OCO as a strong leader and staffer because of his programmatic and policy knowledge and his expertise in administrative areas.

Deputy Commission for Operations denied that race or sex play a role in the selection. She testified that the allegations that Black males are not selected for GS-15 positions are untrue. She stated that she selects the best qualified person for the position and any candidate's race and gender are never a consideration.

Associate Commissioner OCO (African-American female) testified that she was responsible for making the recommendation to the selecting official for this position. She testified that the vacancy was in the MOS component and therefore the Assistant Associate Commissioner for the Office of Management and Support (Assistant Associate Commissioner MOS) established the criteria and process that was used to identify the most qualified candidate. Based on this process, no interviews were conducted. Associate Commissioner OCO testified that some of the major factors she considered were dependability/reliability, strong communication/interpersonal skills, strong collaborator/negotiator, recent operational experience, strong organizational skills, strong analytical skills, and strong writing skills. She stated that she received verbal input regarding the selection that was centered around the experience, knowledge, and leadership skills that recommended candidate possessed and the vast cross-component experience both at the field and headquarters level, and the OCO experience with organizational reviews Selectee A had conducted. Associate Commissioner OCO testified she provided a written recommendation of the top two candidates, Selectee A and a GS-14 Project Manager (Black female). She testified that Selectee A possessed extraordinary knowledge of OCO operations and his working style was very collaborative and conducive to effective outcomes with working with OCO and headquarters components. She stated that because of this, his team's results, projects and staff work were very well done.

Associate Commissioner OCO testified that Complainant's name was on the best qualified list but based on Selectee A's positions in the field and at headquarters and his experience leading organizational review teams in OCO, Selectee A was the recommended as the best qualified person for the position. She denied that race or sex were factors in her selection.

Assistant Associate Commissioner MOS (African-American female) testified that she had access to the applications and the Best Qualified list for the position, and she provided information and advice to Associate Commissioner OCO. Assistant Associate Commissioner MOS testified she used the specific criteria of demonstrated skills in leadership, communications, writing, research and analysis, as well as demonstrated experience in effective collaboration with the executive team both in OCO and headquarters, and other organizational experience. Based on this, she provided information and advice supporting the recommendation of Selectee A and a GS-14 Project Manager. She testified that Selectee A had significant breadth of operations experience as Program Manager in the Office of Earnings Operations, as Director of Security and Integrity in the Office of Public Service and Operations Support, and as Communications Director in DCO. She stated Selectee A had an outstanding record of performance in each job, including major sensitive project leadership in OCO. Assistant Associate Commissioner MOS testified the GS-14 Project Manager had significant experience and demonstrated successful performance in human resources areas, operations, and customer service. For example, she had been the head of the National Training Vision Workgroup and she had been field office manager for several offices. Assistant Associate Commissioner MOS testified that Complainant was not recommended for the position because these candidates were considered superior based on their organizational knowledge, demonstrated leadership qualities shown in major projects, human resources and communication skills and abilities, and high degree of qualifying cross-component experience including both staff and operations components.

She testified she was aware that Selectee A had a personnel action, but she had no detailed knowledge of the stated offenses or disciplinary action. She denied that race and sex were a consideration.

Deputy Commission for Operations, Associate Commissioner DCO, and Assistant Associate Commissioner MOS all testified that the position was temporary and it had not become permanent.

The record reflects 17 applicants, including Complainant, made the Best Qualified list for the position. In addition to those 17 applicants, another two applicants (including Selectee A and the other top recommended applicant) were referred for noncompetitive consideration because they had held a position at the grade level of the vacancy or higher on a permanent basis under a career or career-conditional appointment and were eligible to be promoted without having to be ranked by a promotion committee/assessment panel and placed on a best-qualified list. An additional two applicants applied for reassignment or change to a lower grade for the position and were also not ranked by a promotion committee or an assessment panel. (ROI, pp. 394-397). Thus, Complainant was one of 22 applicants under consideration for this position. In addition to Complainant, two other Black males applied and were not selected.

Associate Commissioner OCO's Recommendation for Selection lists two candidates (Selectee A and a Black female) as "Highly Recommended" for the position, while 18 candidates (including Complainant) are listed as "Recommended". The memorandum discusses only the highly recommended candidates and states that Selectee A is recommended because Associate Commissioner OCO believed he was "the most qualified" and had "acquired extraordinary knowledge of the OCO operations that were very pertinent to the job...His performance has demonstrated the potential for benefiting the OCO organization tremendously." (ROI, pp. 272-274).

Claim C (F-980-USAS)

Complainant testified he applied for the position of Management and Program Analyst (Senior Budget Advisor), GS-343-15, which was advertised under VAN F-980-USAS, on or around August 3, 2007, and his name was placed on the Best Qualified List for the position, but he was not interviewed. Complainant testified he was told that other candidates were interviewed. Complainant became aware on or about August 31, 2007 that Selectee C (White female), a GS-14 Team Leader in the Office of Budget, was selected for the position. Complainant identified the recommending official as Associate Commissioner OPSOS and the selecting official as Deputy Commissioner for Operations.

Complainant testified he should have been selected over Selectee C because of his superior knowledge, skills, and abilities related to the position. He testified that in addition to external component experience, he has more than 7 years of GS-14 experience in the major operating components within the Office of Operations, he had demonstrated the ability to lead and excel at the highest organizational levels of the Agency and the selecting component, and he was also more qualified than Selectee C.

Complainant testified he is more qualified than Selectee C because the position includes a description for strategic and business planning, a function for which Complainant had previously worked at the Deputy Commissioner level. He also stated he has worked at the highest level of the Agency supporting the strategic and business planning process, he has been involved with the business processes of most of the major organizations within the Agency, and he has a master's degree in Economics which allows him to transfer skills to the budgeting and planning arena. Complainant indicated that he has demonstrated leadership in many of the operational and support functions beyond Selectee C's level of responsibility in her previous positions, Selectee C only has GS-14 level experience in one component, and he does not believe Selectee C has ever provided advice and guidance above the Associate Commissioner level.

Complainant testified his race and sex were factors in his non-selection because Selectee C is a White female and there has not been a Black male selected to the position since its existence. Complainant further testified that the position was posted, canceled, and then reposted within a few weeks. He believes Selectee C did not originally make the Best Qualified list and therefore the position was reposted to accommodate her. Complainant noted that he scored the maximum number of points for both announcements. Complainant indicated he was not alleging retaliation in this instance, but he believed his status as part of a class complaint for Black males at SSA was well known to the selecting official. He stated he had been on the Best Qualified list for all but one GS-15 posting in the last year and there had not been any Black males selected for the GS-15 positions in the organization.

Deputy Commissioner for Operations (the selecting official) testified that she customarily relies on the recommendations of executives who report to her because, due to the size of her organization, her direct reports are more familiar with the positions to be filled and with the strengths and weaknesses of the applicants. She testified that for this position, she relied on the written recommendation of Associate Commissioner OPSOS and she did not review the applications or the actual best qualified list. She noted that the recommendation from Associate Commissioner OPSOS stated that all candidates were interviewed by two-person panels except for two applicants who declined to be interviewed. She did not know the names of the people who served on the interview panel.

In response to Complainant's contention that he is more highly qualified than Selectee C, Deputy Commissioner for Operations testified that based on Associate Commissioner OPSOS's personal knowledge of the functions performed by Selectee C (which mirror the functions of the Team Leaders in the OPSOS budget component), she believed he made a sound recommendation.

She testified that Selectee C worked closely with Associate Commissioner OPSOS's budget staff for many years and they had an excellent working relationship. She noted Selectee C was also highly recommended by her management team in terms of her analytical abilities and knowledge of Operations' workloads and organizational structure. She also had previous hands-on operational experience as a Claims Representative in two regions.

Deputy Commissioner for Operations denied that race or sex were factors in Complainant's non-selection. She did not recall if the original vacancy announcement for the position was cancelled or posted under a different vacancy number.

Associate Commissioner OPSOS (White male) testified that testified that two selections were made from this announcement. Selectee C was initially selected. Later, a GS-14 Branch Chief (White male) was also selected. However, the GS-14 Branch Chief was subsequently reassigned to another GS-15 position in OPSOS. He noted that this position was initially advertised under Vacancy Announcement F-975-USAS from June 25, 2007, but that posting was canceled and the instant one was reissued. He testified that Complainant and the GS-14 Branch Chief were on the Best Qualified list when the position was originally posted, but Selectee C was not. He stated that the initial announcement included a question that was inappropriately worded. The question asked about supervising a diverse staff "at all levels" which led to applicants responding yes when they probably should have answered no because it was unlikely they would have supervised staff at the GS-15 level. Associate Commissioner OPSOS testified that on the advice of the Personnel Specialist in the Office of Personnel, the first announcement was canceled and the instant announcement was issued with the question revised to ask about supervision without reference to levels.

Associate Commissioner OPSOS testified that candidates who possessed direct experience on the formulation and execution of the Agency's budget and cost accounting system were interviewed for the position. A panel of three interviewers interviewed 10 candidates. He testified that Complainant was not interviewed because his application did not demonstrate that he possessed experience with the formulation and execution of the Agency's budget and cost accounting system. In addition, the Deputy Associate Commissioner for OPSOS telephoned the supervisors of the interviewees for recommendations. Associate Commissioner OPSOS testified he considered knowledge, skills, and abilities including: knowledge of DCO organization, policies, and procedures; abilities to research, analyze, evaluate, and interpret financial management regulations, policies, procedures; ability to communicate orally and in writing; and ability to provide direction to others.

Associate Commissioner OPSOS testified that Selectee C was recommended because she was a Team Leader in the Office of Budget and her team was primarily responsible for formulation of Operations' federal budgets for workyears (staffing and overtime), but she had also been directly involved in the execution and presentation of the Agency's budget. She performed a "mirror" function to the Team Leaders in the Operations budget shop. She had worked closely with the staff in the Division of Resource and Management Information (DRMI) for many years and had an excellent working relationship with them.

She had formulated several DCO component budgets as an analyst and represented OB (and indirectly Operations) on numerous workgroups. Selectee C had strong analytical skills and she had been highly recommended by her management in terms of her analytical abilities and knowledge of Operations' workloads and organizational structure.

Associate Commissioner OPSOS testified that the second selectee, the GS-14 Branch Chief, was selected because he had been with OPSOS for nearly four years as a Management Analyst. During his first two years in OPSOS he had been responsible for formulation of the Office of Disability and International Operations productivity budget. Since October 2003, he had been the Branch Chief of the Productivity Budget Branch and was responsible for the formulation and presentation of Operations' federal budgets. In doing so, he had worked directly with all components in coordination of Operations' resource requests and conducted numerous studies to justify requested resources. He had assisted in leading numerous workgroups. He had been effective in managing the complexities of Operations' budgets and the Divisions workloads.

Associate Commissioner OPSOS denied that race and sex were factors in his selection.

The record reflects that the original vacancy announcement F-975-USAS did include a question asking applicants if they "have experience in planning, directing, organizing and coordinating the activities of a diverse staff of technical and professional employees at all grade levels?" (ROI, p. 481). The vacancy announcement for F-980-USAS asked applicants if they "have experience in planning, directing, organizing and coordinating the activities of a diverse staff of technical and professional employees?" (ROI, p. 490).

The record also reflects 19 applicants made the Best Qualified list for F-975-USAS, including Complainant and the GS-14 Branch Chief. (ROI, p. 485). Selectee C does not appear on either the list of applicants or the Best Qualified list for F-975-USAS. (ROI, pp. 484-485). The record contains a letter to Complainant dated July 23, 2007 stating that the vacancy had been canceled but the "position will be reannounced the week of 07/30/07 through 08/03/07." (ROI, p. 486).

The record reflects that the position was reannounced and Complainant applied. 18 applicants made the Best Qualified list for this position, including Complainant, Selectee C, and the GS-14 Branch Chief. (ROI, p. 502). Complainant's application details his extensive experience in a variety of positions/components, but it does not describe experience formulating budgets. (ROI, pp. 504-520). Selectee C's resumes states that her current position duties include "Plan, coordinate, and oversee the review and development of the overall DCO budget" including training and directing and reviewing the work of up to ten senior and junior analysts at Grades 7-13, "Conduct and coordinate in depth analysis both for projection of the budget and for base-year analysis", and "Coordinate and review technical materials and briefing for OMB and Congress related to the DCO portion of the administrative budget." She also noted that she had personally briefed new OMB examiners on how SSA develops the workloads budgets, and she had coordinated and reviewed the writing of budget related issue papers for executives and the Commissioner to use and she had personally briefed management on a variety of issues. (ROI, pp. 521-530).

The record does not contain the recommendation memorandum from Associate Commissioner OPSOS, nor does it contain the application for the GS-14 Branch Chief.

Claim D (F-983-USAS)

Complainant testified he applied for the position of Supervisory Program Analyst (Division Director), GS-343-15, advertised under VAN F-983-USAS, on or about August 31, 2007. Complainant stated he was placed on the Best Qualified list for the position and then interviewed. Complainant characterized the interview as successful and he testified that he addressed the desired leadership competencies as defined in SSA's leadership competency matrix for mid-level and senior-level managers. However, on or about September 27, 2007, he became aware he was not selected for the position. Selectee D (White male), a GS-14 Systems Security Specialist in the Office of Public Service and Operations Support was selected for the position. Complainant identified the recommending official as the Associate Commissioner 2 and the selecting official as Deputy Commissioner for Operations.

Complainant testified he should have been selected over Selectee D because of his superior knowledge, skills, and abilities related to the position. He testified that had previously applied for this position in 2003/2004 and made the Best Qualified list (although he was not selected). He testified that in addition to external component experience, he has more than 7 years of GS-14 experience in the major operating components within the Office of Operations, he had demonstrated the ability to lead and excel at the highest organizational levels of the Agency and the selecting component, and he was also more qualified than Selectee D.

Complainant testified he is more qualified than Selectee D because Selected D has only served at the GS-14 level for a little more than a year. Complainant also testified that he was part of the team that interviewed Selectee D for his current position and Complainant did not believe Selectee D was the top ranked candidate for that position. Complainant stated that although Selectee D has held a Team Leader position, he did not believe Selectee D had ever held a designated supervisory position. He did not believe Selectee D had ever provided advice and guidance above the Associate Commissioner level.

Complainant testified his race and sex were factors in his non-selection because Selectee D is a White male and there has not been a Black male selected to the position since its existence. He further stated that he believed Selectee D was encouraged to apply for the position due to ethnic affiliation (Irish) with one of the senior-most executives. Complainant indicated he was not alleging retaliation in this instance, but he believed his status as part of a class complaint for Black males at SSA was well known to the selecting official.

Deputy Commissioner for Operations (the selecting official) testified that she customarily relies on the recommendations of executives who report to her because, due to the size of her organization, her direct reports are more familiar with the positions to be filled and with the strengths and weaknesses of the applicants.

She testified that for this position, she relied on the written recommendation of Associate Commissioner OPSOS and she did not review the applications or the actual best qualified list. She noted that the recommendation from Associate Commissioner OPSOS stated that 14 out of the 21 candidates on the Best Qualified list were interviewed by two-person panels. She testified she selected Selectee D for the Division Director position based on Associate Commissioner OPSOS's recommendation that Selectee D demonstrated outstanding performance in his previous positions, positive working relationships with his employees and peers, outstanding leadership, and the skills necessary for the position. Deputy Commissioner for Operations testified that she believed Associate Commissioner OPSOS made a sound recommendation based on his personal knowledge of Selectee D's performance. She denied that race and sex were factors in the selection.

Associate Commissioner OPSOS testified that he was the recommending official for the position, and Deputy Associate Commissioner OPSOS telephoned the supervisors of the interviewees for recommendations. He testified that 11 applicants were interviewed for the position, including Complainant. Selectee D received a perfect score on his interview. Associate Commission OPSOS testified that he recommended Selectee D because Selectee D demonstrated outstanding performance in his previous positions and he had the skills required to successfully perform the GS-15 position in DOACS. He testified that Selectee D joined OPSOS over three years earlier as a Program Analyst in the Division of Systems Security and Program Integrity, becoming a Team Leader of the Systems Security Team in February 2006. As part of this, Selectee D worked directly with SSA components and regions to coordinate projects such as security plans and reviews, HSPD-12 cards, many IVTs and PII policies and procedures. Selectee D also had relevant experience in the Regional Office and field office, and he had a Master of Science degree in Computer Information Systems. Selectee D had built positive working relationships with his employees and peers across the organization and he had demonstrated outstanding leadership. He received a perfect rating on his interview and from his supervisor.

Associate Commissioner OPSOS testified that Complainant was interviewed for the position, but he was not among the higher rated interviewees because those individuals were recommended to the Deputy Commissioner and Complainant was not among those individuals. He testified he did not have possession of the interviewers' notes. He testified that Selectee D was better qualified than Complainant because, while both candidates possessed the knowledge, skills, and abilities to perform the job, Selectee D was a stronger interview candidate and had the experience described above. He testified that among the factors he considered in making his recommendation were knowledge of SSA programs, ability to research, develop, and implement operational policies and procedures, ability to communicate orally and in writing, and ability to provide direction to others. He denied that race and sex were factors in his selection.

Director-Planning Staff (Caucasian female) testified that she was one of the interviewers for this position. She testified she was assigned to interview some, but not all, of the candidates who were interviewed. She received SF-45s for the candidates she was assigned to interview but she did not receive the Best Qualified list.

She testified she did not retain her interview notes, but she did not interview Selectee D. She testified she did interview Complainant and her recollection was that Complainant did not come off as a strong candidate. Director-Planning Staff stated they were looking for examples of leadership and examples of where candidates themselves made a difference in a project or work area and her recollection was that Complainant did not score well because he did not provide good examples of leadership and project management from him. She testified there was no mention of race when the interviewers met with Associate Commissioner OPSOS and Deputy Associate Commissioner OPSOS to discuss the interviews. (ROI, pp. 336-337).

Supervisory Program Analyst (African-American male) testified that he was one of the interviewers for the position. He stated he had access to the applications of those individuals he interviewed, but not the Best Qualified list. Supervisory Program Analyst testified that he interviewed Selectee D and Selectee D's interview was very good. He indicated that Selectee D showed he had researched some of the issues facing the Division and had recommended solutions, he answered the interview questions fully, and his answers indicated he was capable of performing the position. He stated the Complainant's interview was "OK", noting that some of Complainant's answers did not give specific detail about the specific role Complainant performed or what he did to lead in the examples he gave. However, Supervisory Program Analyst stated that Complainant's answers did indicate he was capable of performing the position. Supervisor Program Analyst testified that Complainant asked him for feedback and he provided him with the foregoing. When asked to respond to Complainant's contention that he is better qualified than Selectee D because he has more GS-14 experience in the major operations and support components in the Office of Operations, Supervisory Program Analyst responded that he "would say that if experience was the only criteria, [Complainant] could be right. But again, what other criteria was used for the selection, I really don't know." (ROI, p. 344). He stated he was not aware that race or sex played a role in the selection. He also testified he was not aware of any efforts to exclude Black males from promotion to GS-15.

Associate Commissioner OPSOS testified that the Deputy Associate Commissioner briefly spoke to Complainant about his non-selection. He stated that he also gave Complainant feedback about how to become a more competitive candidate for promotions in the future, but he did not identify the specific feedback given to Complainant.

The record reflects 20 applicants made the Best Qualified list for the position. (ROI, p. 544). The record contains the applications for both Complainant and Selectee D but does not contain any information about their respective interview scores or answers, nor does it contain information regarding supervisor recommendations. Compared to Complainant's application (ROI, pp. 546-562, Selectee D's application (ROI, pp. 563-589) contains much more detailed information regarding his experience.

Claim F (B-3411)

Complainant testified he applied for the position of Division Director, GS-105-15, advertised under VAN B-3411 on or about June 1, 2007, and he was placed on the Best Qualified list, but not interviewed for the position. He was not aware of whether other candidates were interviewed. Complainant became aware on or about October 3, 2007 that he was not selected. Selectee F (White female), a GS-14 Deputy Division Director in the Office of Central Operations was selected for the position. Complainant identified the recommending official as the Associate Commissioner and the selecting official as Deputy Commissioner for Operations.

Complainant testified he should have been selected over Selectee F because of his superior knowledge, skills, and abilities related to the position. He testified that in addition to external component experience, he had almost four years of GS-14 experience in the major operating components within the Office of Central Operations, he had demonstrated the ability to lead and excel at the highest organizational levels of the Agency and the selecting component, and he was also more qualified than Selectee F.

Complainant testified he was more qualified than Selectee F because he had demonstrated leadership in many of the operations and management functions beyond Selectee F's level of responsibility at the GS-14 level, including serving as a Technical Lead for the Agency's senior-most Human Resources executive (Deputy Commissioner for Human Resources). He noted he had also served as an operational supervisor with responsibility for more than 500 employees in each of two distinct operational units within the selecting component.

Complainant testified his race and sex were factors in his non-selection because Selectee F is a White female and there has not been a Black male selected to a GS-15 position in the organization in more than 8 years. He noted that he had been on the best qualified list for more than five positions in the Office of Central Operations in the past two years and no Black males had been selected for the positions to which he applied.

Deputy Commissioner for Operations (the selecting official) testified that she customarily relies on the recommendations of executive who report to her because due to the size of her organization, her direct reports are more familiar with the positions to be filled and with the strengths and weaknesses of the applicants. She testified that for this position, she relied on the written recommendation of Associate Commissioner OCO and she did not review the applications or the actual best qualified list. Deputy Commissioner for Operations testified that Associate Commissioner OCO recommended Selectee F, a former GS-14 Deputy Division Director in the Office of Disability Operations, based on her extensive experience, strong management skills, effective communication, and proven leadership. She denied that race or sex played a role in her selection.

Associate Commissioner OCO testified that the vacancy in question was located in the Office of Disability Operations and therefore Assistant Associate Commissioner for Disability Operations established the criteria and process that was used to identify the most qualified candidate for the vacancy. She testified that interviews were conducted and therefore Assistant Associate Commissioner for Disability Operations provided input on the top 3 candidates. She testified the top 3 candidates were Selectee F, Division Director ODO, and Deputy Director DIO. She testified that Selectee F had exceptional people skills and was seen as accessible by her subordinates, she was a strong motivator and managers responded positively to her leadership, she had experience as a management and program analyst in ODO and in her current position, and she had extensive knowledge and experience as a result of her many years in the Center for Human Resources. Division Director ODO was an Advanced Leadership Program participant, she managed a team for the Independence Day Assessment Project, she was innovative and understood well how to manage the people and processes relevant to ODO's operations. Deputy Director DIO was strong on accountability and organizational leadership, he strived to drive positive change, was confident, extremely creative, and quick to recognize and resolve problems. Associate Commissioner OCO testified that the basis for her recommendation of Selectee F was that Selectee F has previous served as a Deputy Vision Director with the Office of Disability Operations, and in addition to overseeing the daily activities of the Division, she participated in numerous workgroups for the purpose of planning and designing major changes or initiatives, programmatic improvements or policy changes. She was notable for her ability to motivate employees to provide good customer service and she was a strong communicator who could encourage employees to meet the organization's service delivery goals, and she was a very strong workflow and workload manager. Associate Commissioner OCO testified that in addition to the foregoing, Selectee F possessed exceptional people skills, was a strong motivator, had a strong coaching style resulting in a positive response to her leadership style, and she sincerely cared about the wellbeing of those under her leadership. Associate Commissioner OCO "did not believe that [Complainant's] work abilities in those areas surpassed that of [Selectee F], nor was he among the top three candidates recommended" to her. (ROI, p. 284). She denied that the Office of Central Operations excludes Black males from promotion to GS-15 level.

Assistant Associate Commissioner for Disability Operations (African-American male) testified that he established the criteria and the process used to identify the most qualified candidate for the vacancy. He testified that he had access to the Best Qualified list and the applications of those candidates who were referred for consideration. He further stated that he provided recommendation information on the candidates under his direct leadership. He stated he contacted other components to obtain recommendation information on candidates assigned to components outside the Office of Disability Operations. Assistant Associate Commissioner for Disability Operations testified recommendations were obtained to assess applicants' ability to develop people, their communication skills, their demonstrated ability to deal with administrative and operational issues and their demonstrated leadership ability. The applicants were also interviewed to assess their leadership ability, people skills, process management ability, knowledge of policy, and executive interaction ability. All interviewees were asked the same questions. He testified he obtained verbal assessment information from the interview panel as a result of their interview activity.

Assistant Associate Commissioner for Disability Operations testified that five candidates were “highly recommended” for selection and the top three “highly recommended” candidates based on the recommendations and interviews were Selectee F, Division Director ODO, and Deputy Director DIO. He testified that Selectee F was better qualified than Complainant because she had exceptional people skills, was a strong motivator, knew how to quickly get to the heart of an issue, had the ability to rally her subordinates around organizational objectives, and was very supportive of change management. She had demonstrated strong coaching ability that resulted in her subordinates responding positively to her leadership style. He denied that race and sex were factors in the recommendation/selection process. He also testified that “[t]he Office of Central Operations does not exclude Black makes from the GS-15 level position. I am a Black male, who was promoted to the GS-15 grade level in the Office of Central Operations.” (ROI, p. 354)

The record contains a September 24, 2007 memorandum from Associate Commissioner OCO to Deputy Commissioner for Operations in which she lists Selectee F, Division Director ODO, and Deputy Director DIO as highly recommended for the position, and an additional 10 applicants (including Complainant) as recommended. The memorandum states that Associate Commissioner OCO believes Selectee F “is the most qualified.” (ROI, pp. 288-290). The record reflects 12 applicants (including Complainant) made the Best Qualified list and one additional candidate made the list of those eligible for reassignment. (ROI, pp. 653-660). The record reflects Selectee F indicated on her application that she has a high school diploma or GED, but she did not list any college or university degrees.

Claim I (SH-163240)

Complainant testified he applied for the position of Supervisory Program Analyst (Staff Director), GS-343-15, advertised under VAN SH-163240 on or about December 14, 2007. He was placed on the Best Qualified list and interviewed for the position. Complainant testified he believed the interview was one of the best of his career. However, when he returned to the office on April 29, 2008 after being out on extended sick leave, he learned he was not selected for the position. Selectee I (White male), a GS-14 Branch Chief in the Office of Systems Electronic Services, Office of Systems was selected.

Complainant testified he should have been selected over Selectee I because of his superior knowledge, skills, and abilities related to the position. He testified that in addition to external component experience, he has more than 7 years of GS-14 experience in the major operating components within the Office of Operations, he has demonstrated the ability to lead and excel at the highest organizational levels of the Agency and the selecting component, and he was also more qualified than Selectee I. Complainant testified that over the past three years, he had been providing direct support for front-line employees in the Operations component within SSA who in turn provide support for electronic service delivery options (which also included interaction with claimant representatives and Department of Treasury senior managers).

Complainant testified he is better qualified than Selectee I because he has worked at the highest level of the Agency supporting strategic and business planning processes which involve integration of electronic services, he has been involved with business process development across most major organizations within the Agency, he has a master's degree in Economics which allows him to transfer skills to provide research and analysis in the electronic service delivery area, and he had represented the Agency at two national conferences for attorney representatives where he jointly conducted workshops focused on current and future electronic service delivery options with over 500 attorneys. Complainant further testified that over the past nine years, he had served at the GS-14 level for three distinct operational components, in addition to serving at the Commissioner and Deputy Commissioner level for projects involving Agency-level guidance, whereas Complainant believed Selectee I had served at the GS-14 level for less than two years and had less than two years experience at the GS-13 level.

Complainant testified his race and sex were factors in his non-selection because Selectee I is a White male and there has not been a Black male selected to the position since its existence. Complainant indicated he was not alleging retaliation in this instance, but he believed his status as part of a class complaint for Black males at SSA was well known to the selecting official. He also noted that he did not believe the OES/DCO organization had ever promoted a Black male to the GS-15 position. He stated he had been on the best qualified list for more than eight GS-15 positions in DCO in the last two years and no Black males had been selected for any of these positions.

Deputy Commissioner for Operations (the selecting official) testified that she customarily relies on the recommendations of executive who report to her because due to the size of her organization, her direct reports are more familiar with the positions to be filled and with the strengths and weaknesses of the applicants. She testified that for this position, she relied on the written recommendation of Associate Commissioner for the Office of Electronic Services (Associate Commissioner OES) who established the criteria and procedures for making a recommendation. Deputy Commissioner for Operations indicated she did not review the applications or the actual best qualified list. Deputy Commissioner for Operations testified that Associate Commissioner OES recommended Selectee I, a former GS-14 Branch Chief in OES, based on the recommendation that he was a proven and highly successful manager with significant accomplishments for eServices and SSA, he had proven to be an effective supervisor with many years of experience, he had a personal working relationship with Associate Commissioner OES and she had been consistently impressed with his ability to get along with everyone, his poise under stress/pressure, his organization and negotiating skills, his good common sense, and his extensive knowledge of eServices. Deputy Commissioner for Operations denied that race or sex played a role in her selection.

Associate Commissioner OES (Caucasian female) testified that the process for selection for this position began with every person on the Best Qualified list being given a competency-based interview regarding leadership, project/resource management, customer focus, interpersonal/team skills, decision making, and communications.

For each of the foregoing competencies, applicants were rated does not meet, somewhat meets, meet, somewhat exceeds, or exceeds. Any candidate having a “Does Not Meet” in any competency was rated as “Does Not Qualify.” Candidates having a “Somewhat Meets” or a combination of “Somewhat Meets” and “Meets” were rated as “Minimally Qualified.” Candidates with ratings of “Meets” or a combination of “Meets” and “Somewhat Exceeds” were rated “Qualified.” Candidates with ratings of “Somewhat Exceeds” or a combination of “Somewhat Exceeds” and “Exceeds” were rated as “Highly Qualified.” Only candidates rated “Highly Qualified” advanced to the second round of interviews. Six candidates, including Selectee I but not including Complainant, advanced to the second round of interviews. Associate Commissioner OES testified that after the second round of interviews, she contacted the supervisors of each candidate she had interviewed. Based on a combination of findings from the two rounds of interviews, and the supervisory recommendations, she recommended Selectee I for the position. She testified that Selectee I had extensive experience managing people over many years, he was involved in managing and directing employees in building many of SSA’s successful internet applications, he was highly respected and regarded as a capable manager and project leader, he was well acquainted with the Agency’s Internet priorities and goals and the issues surrounding eServices, and he had a keen understanding of the strengths and weaknesses of Internet services at SSA and the eServices vision for the future. He also received the highest supervisory recommendation among the finalists.

Associate Commissioner OES testified that Selectee I was determined to be better qualified than Complainant because Selectee I was rated higher on the specific required competencies by the interview panel and Selectee I had more extensive background relating to the Organizational mission of SSA’s Internet services. She denied that race or sex were factors in this selection. She also testified she was not aware of any efforts to exclude Black males from promotions in OES.

The record reflects 27 applicants made the Best Qualified list for this position, including Complainant and Selectee I. Of the applicants who were interviewed, two were rated “Does Not Qualify”, eight were rated “Minimally qualified”, six (including Complainant) were rated “Qualified” and eight (including Selectee I and a Black Male candidate) were rated “Highly Qualified”. (ROI, pp. 817-822).

Agency No. HQ-09-0514-SSA (“2009 Complaint”)

On July 13, 2009, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (African-American) and sex (male) when:

1. He learned on April 22, 2009 that he had not been selected for the position of Supervisory Social Insurance Specialist, GS-105-14, advertised under Vacancy Announcement Number (VAN) SH-217977; and
2. He learned on June 20, 2009 that he had not been selected for the position of Supervisory Management Analyst, GS-0343015, advertised under VAN SH-218150.

The Agency conducted an investigation into these claims. The investigation showed that at the time of this complaint, Complainant was employed as a Project Manager, GS-14, in the Office of Public Service and Operations Support (OPSOS).

Claim 1 (SH-217977)

Complainant testified that he applied for the position of Supervisory Social Insurance Specialist, GS-105-15, Office of Quality Performance, Office of Quality Improvement, advertised under VAN SH-217977. Complainant stated he was notified by an automatic email from the Agency's internal vacancy announcement system that he was qualified for the position and had been referred to the selecting official. However, on February 19, 2009, he received another automated email telling him he had not been selected. On April 22, 2009, he learned two selections had been made for the position, Selectee 1 (Caucasian female) and Selectee 2 (Caucasian female). Complainant testified he did not receive an interview for the position. He testified he thinks there were irregularities in the selection process that contributed to the discrimination he experienced. Complainant testified there was a two-week gap between selections, and the second selection happened after he was first notified he was not selected. Complainant testified the job announcement stated only one vacancy was available, but two White females were selected even though he is more qualified than they are.

A memorandum to file from the EEO investigator states that at the time of his application, Complainant was working as a GS-14 Project Manager in OPSOS. The selecting official was the Deputy Commissioner for the Office of Performance (White male). The recommending official was the Deputy Associate Commissioner in the Office of Quality Improvement (within the Office of Quality Improvement) (race and sex unknown). The Associate Commissioner for Quality Review (race and sex unknown) provided an informal recommendation to the selecting official. Human Resources Specialist (race and sex unknown) processed the personnel actions at issue.

Complainant testified that he was the most qualified person for the position because he has worked at the highest level of the Agency supporting business and strategic planning processes and he holds both Bachelor's and Master's degrees in Economics which allows him to transfer his skills across multiple organizational components. Complainant testified he has superior knowledge, skills, and abilities for this position and he has experience through the Agency in the areas the Agency was looking for in the job announcement for this position, including knowledge of management concepts and principles, managing components, and supervising multiple subordinates; knowledge of SSA's programs, policies, procedures, and business programs, which involves conducting reviews and other projects at both a regional and national and interagency level; the ability to communicate effectively, including giving oral presentations and briefings, making recommendations to executive level officials, working on reports and recommendations of a sensitive nature, and working with SSA central and field office managers. Complainant testified that he has over 10 years of work experience at the GS-14 level in major components within the Agency which support this job.

He stated he has prior experience at the Commissioner and Deputy Commissioner levels throughout the Agency, including serving as a Technical Analyst for Key Initiatives in the Agency's 1998 Strategic Plan, managing a call center (National 800# agents), assessing operational aspects of earnings operations, and serving as co-lead for workshops at national conferences. He noted he has worked with the component where the position is located as an Operations supports person and he served as the first point of contact for management issues involving debt management, attorney fee issues, and other specialized workloads. He reported experience in performance management, budget, and system issues at the Agency level. Complainant testified that during the last three to four years, he had been involved in a number of large and complex projects, including the Special Disability Workload (SDW). He noted that Selectee 2's SDW work was mentioned in the EEO Counselor's report as a reason for her selection, but Complainant's SDW work was not acknowledged.

Complainant testified he is more qualified than Selectee 1 because he worked with Selectee 1 in OPSOS from November 2004 until June 2005 and although he worked as her peer for a brief time, he was a GS-14 and she was a GS-13. He testified he also interviewed her for a promotion in 2005 when she was a GS-13 and she was not selected for the GS-14 promotion. Complainant testified he had the opportunity at that time to observe Selectee 1's work experience and skills and he believes his knowledge and skills are superior to hers, both in the SSA operations environment and for the current vacancy. He stated that one of the skill areas in the job announcement involves conducting reviews, studies, and projects at a national or regional level, and he believes his skills in this exceed those of Selectee 1 because of the scope and complexity of the projects for which he was responsible at the national level while working as a GS-14. He stated the selecting officials listed Selectee 1's Headquarters experience as a reason for her selection, but he had broad and high level experience at Headquarters since 1985 in a variety of components. He also noted that another skill area in the vacancy announcement involved conducting studies or performing analyses of management or operations issues and his experience in that area far exceeded Selectee 1's based not only on his work over the past 3-5 years but over his entire career with SSA. Complainant testified that during the last 3-5 years, he had been involved in a large number of complex projects requiring executive attention, including working with external partners such as the Department of the Treasury and the U.S. Postal Service to study, analyze, and address national benefit payment issues. He had also been sought out to address national attorney fee payment issues for both internal and external Agency customers. He served as a management/expert witness for the Agency in a sensitive arbitration related to the national review and approval process for employee suggestion awards.

Complainant testified that in contrast Selectee 1 was only a GS-14 level employee from 2005 until the current selection whereas he had ten years at the GS-14 level and had acquired more skills over that time period at that grade level. He stated this experience included oversight for the following areas: Special Disability Workload, Attorney Fee issues, Debt Management, Earnings Record maintenance and National 800 Call Center (where he supervised a combination of more than 500 clerical, technical, and supervisory employees). He stated he also had nine years of supervisory experience at the GS-14 level, which was more than Selectee 1's supervisory experience at the GS-14 level.

Complainant testified that he is more qualified than Selectee 2 because the vacancy announcement stated they were looking for someone able to perform work at the regional or national level and he had been involved in work at that level for a number of years. He testified he had prior experience at the Commissioner and Deputy Commissioner levels throughout the Agency, including serving as a lead Technical Analyst for Key Initiatives in the Agency's 1998 Strategic Plan, managing a call center (National 800# agents), assessing operational aspects of earnings operations, and serving as co-lead for workshops at national conferences for attorney representatives. He also stated he served as the first point of contact for management issues involving debt management, attorney fee issues, and other specialized workloads within the Operations organization. He stated he has experience performance management, budget, and systems issues at the Agency level and for the last three to four years, he had been involved in a number of large and complex projects including the Special Disability Workload. He testified that he has leadership development training and had completed Agency-level projects, such as supporting the initial automation of procurement activities including document sharing and data management, providing data for the study of labor force transitions of the elderly, managing SSI outreach grants, piloting video-conferencing with claimants in a field office, co-leading a policy redesign (reengineering), and performing environmental scanning in support of the Agency's 1998 strategic plan. He testified that to his knowledge, Selectee 2 had only been involved in the SDW and maybe a few special studies involving regional or national issues.

Complainant testified he also has greater management experience than either selectee, having served in a number of management roles.

Complainant testified he believes he was discriminated against based on race and sex because the Office of Quality Performance had never promoted a Black male in this position and the Office of Continuous Performance (part of the Office of Quality Performance) had never promoted a Black male to the GS-15 level. He testified that his experience is well-documented compared to the selectees. He had also previously applied for and made the Best Qualified list for this same position. He testified he could find no other reason for his non-selection than his race and sex. He testified the selecting official had knowledge of his abilities from both Complainant's application and from working with him previously.

Deputy Commissioner for the Office of Performance testified that he was the selecting official and he made his selections based on the recommendation of the recommending official, Deputy Associate Commissioner in the Office of Quality Improvement. He testified he did not choose Complainant because Complainant was not recommended by the recommending official. He testified he and Complainant have been colleagues for approximately 15 years and he was Complainant's supervisor during part of 2001 when they worked on a special project together. He testified he is familiar with Complainant's positions since then, but not his work performance. Deputy Commissioner for the Office of Performance testified that the Personnel Policy Manual, Chapter 17.3.1 provides for subsequent selections to be made from a best qualified list for a period of six month from the time the list is issued to the selecting official. He testified the second selection was made as the need for an additional vacancy was identified.

Deputy Commissioner for the Office of Performance denied that race or sex were factors in his decision making.

Deputy Associate Commissioner in the Office of Quality Improvement testified that she was the recommending official for the position, and she recommended Selectee 1 because she was the best candidate for the position. Deputy Associate Commissioner in the Office of Quality Improvement testified that Selectee 1 had more experience of the type and breadth that would enable her to perform well in the Division Director position. She testified that Selectee 1 had 18 years of supervisory experience, including 12 years as a Field Office District Manager, whereas Complainant had 7 or 8 years of SSA supervisory experience. Deputy Associate Commissioner in the Office of Quality Improvement testified that Selectee 1 had over 30 years experience in SSA with 25 years experience in SSA field offices as a claims representative, operations supervisor, district manager, and areas systems coordinator. She testified that Complainant had 23 years of SSA experience but no field office experience and his work in the Office of Central Operations was over a period of about 5 years. She stated that while both Selectee 1 and Complainant had experience preparing high level presentations and conducting briefings, Selectee 1's experience clearly exceeded that of Complainant. She denied that race or sex played a role in her decision making.

Associate Commissioner for Quality Review testified that he was not the selecting or recommending official for this position but he provided feedback to his supervisor (Deputy Commissioner for Quality Review, the selecting official) on Selectee 2 and informally recommended her. He did not review the package, nor did he recall having knowledge of the list of other candidates for the position at the time he spoke to the selecting official. He denied that race or sex were factors in his decision making.

The record reflects 18 applicants made the Best Qualified list for the position and one additional candidate was on the Non-Competitive Candidate Referral List (Reassignment). Two Black males other than Complainant were also on the Best Qualified list but were not selected. (ROI, pp. 213-219). Complainant's application reflects a six-month detail in the Wilmington, Delaware District Office from April to October 1994, but no other field office experience. His application reflects that he served in a supervisory role from September 2000 to the time of his application for the current position. (ROI, pp. 220-235). Selectee 1's application reflects she worked at the district office level from approximately 1977 to October 2002, with several stints as a District Manager during that time frame. Her application reflects that she served in a supervisory role for the majority of the time from December 1988 to October 2002. (ROI, pp. 236-244).

Complainant's application states that in his current position, he "also provided technical and administrative support for the Special Disability Workload...I provided administrative guidance that allows for effective communication between Regional Offices and State-level agencies who are involved with processing SDW cases. I developed standard procedures for responding to state-level data requests related to the Special Disability Workload.

I coordinated the work activities of a project group which produced a final report to address A1010/Web101 (benefit award) process issues, multiple periods of disability, amended awards, and training for SDW Cadres and Program Service Centers.” (ROI, pp. 220-221). Selectee 2’s application states that in her current position she received a Group Commissioner’s Citation for her work with Special Disability Workload in 2003 and an individual Commissioner’s Citation in 2006. She also received a Group Deputy Commissioner’s Citations in 2004 from Operations for her work on SDW. Her application states that she has planned, conducted, and written national studies and reviews, including a study on Special Disability Workload. Her application states she has experience with executive level briefing, including briefings on Special Disability Workload. She also reported “experience with controversial or sensitive reports and briefings. This is shown by the work I completed with the...legal proceeding involving SDW.” Her application indicated that Selectee 2 was able to find a solution when the Agency could not provide a comparative computation for primary insurance amounts for the SDW Terminated and she was able to broker a solution between Operations and the Office of the Actuary. She reported participating in high level workgroups, include one for SDW Process Improvements. She also reported traveling to Regional Offices to present briefings on SDW and Workers Compensation to regional officials. Selectee 2 also reported SDW work in her prior position, including developing and monitoring studies for SDW which encompassed a comprehensive quality review of SDW claims and developing method for improvement. (ROI, pp. 247-249).

Agency No. HQ-13-0710 (“2013 Complaint”)

On September 3, 2013, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (African-American) and sex (male) when:

1. On June 6, 2013, Complainant learned he was not selected for the GS-15, Supervisory Management Analyst, Director of Division of Resources and Management Information position, advertised under Vacancy Announcement Number (VAN) SH-849070; and
2. On June 11, 2013, Complainant learned he was not selected for the GS-15, Supervisory Program Analyst position, advertised under VAN SH-868791.

The Agency conducted an investigation into these claims. The investigation showed that at the time of this complaint, Complainant was employed as a GS-14 Project/Team Leader in the Agreements and Disclosure Branch in DPPO in OPSOS/DCO.

Claim 1

Complainant testified he applied for the position of Supervisory Management Analyst, Director, Division of Resources and Management Information (DRMI), GS-15, VAN SH-849070 on or about April 22, 2013 through a job posting on USAJobs. Complainant testified that he received notification that he had been qualified for the position and his name was referred for consideration, but he was not interviewed and he did not know whether interviews were conducted. On June 6, 2013 OPSOS Executive Officer (Black female) informed Complainant that he was not selected. On June 11, 2013, Complainant learned through an office-wide email from the selecting official that Selectee 1 (White male) was selected instead.

Complainant testified he was under the impression that the recommending official was Associate Commissioner OPSOS and the selecting official was Deputy Commissioner for Operations. He noted that Associate Commissioner OPSOS is his second level supervisor. However, Complainant states that the EEO Counselor's report confusingly states that OPSOS Executive Officer was the recommending official. Complainant testified he does not believe OPSOS Executive Officer was the recommending official because the recommending official for a GS-15 position cannot be a GS-14. However, Complainant testified he believed OPSOS Executive Officer was a reviewing official and he was aware that another employee (White male) was involved as a Senior Advisor.

According to the EEO Counselor's report, the recommending official failed to refer Complainant to the selecting/concurring officials because he did not possess relevant budget experience. Based on his conversation with OPSOS Executive Officer on June 6, 2013, Complainant believed the selection was made based on a review of applications for those who had experience "managing oversight of building and facilities management, along with other object budget experience." Complainant testified that he told OPSOS Executive Officer that he had shown this experience on his application. He stated the specific experience he referenced in his conversation with OPSOS Executive Officer and on his application included coordinating a Division-level team effort to prepare staff guidance on issues needing external involvement, such as system requirements, security, and facilities issues; provided recommendations and decisions on work priorities within the office that included staffing and budget allocations; and reviewing new and existing Key Initiatives (KIs) to ensure that all intra-component operational planning, resources requirements and budget specifications related to the KIs were included in the planning documentation. (ROI, p. 147). Complainant testified he was not provided any information regarding why Selectee 1's experience warranted an interview for the position or what his budget experience was. Complainant testified he was surprised that another candidate was interviewed because that candidate had only 52 weeks and 3 days in his GS-14 position and Complainant did not believe he had any "other objects" budget experience.

Complainant testified he should have been referred to the interviewing/selecting officials based on his extensive experience at the GS-14 level. He stated he is more qualified for the position than Selectee 1 based on his experience which includes performance management, budget, personnel management, training, efficiency of program operations, organization policies and procedures, and administrative management. He stated his experience is plainly superior to that of Selectee 1. Complainant testified Selectee 1 was only promoted to a GS-14 supervisory/team lead position in DRMI in April 2011, while Complainant had been working at the GS-14 level since April 1999. Complainant stated he previously applied for the supervisory/team lead position as a reassignment, but he was not selected. Selectee 1 was then selected for that position shortly after the Associate Commissioner level management team informed Complainant in March 2011 there were no team leader or supervisory positions available. Complainant further noted he possessed a master's degree while Selectee 1 has only a Bachelor's degree.

OPSOS Executive Director (Black female) testified that one of her chief responsibilities is to recruit and retain the best employees with qualifications fitting for the position for which they apply. She testified that for GS-14 or lower positions, she coordinates panel interviews and sometimes participates as a panel member, and the Directors in each OPSOS division serve as the selecting official. She stated that for GS-15 positions, her role is to review and screen application materials of all persons on the certificate of eligibles to identify candidates with relevant technical experience and qualifications. She then refers applicants with appropriate experience to an interview panel to be evaluated on their leadership competencies based on their responses to behavior-based questions. She testified that for this position, the recommending official was Associate Commissioner OPSOS and the selecting official was Deputy Commissioner of Operations. She stated Deputy Associate Commissioner for OPSOS assisted the recommending official with proposing the final selection.

OPSOS Executive Director testified she first reviewed the certificate of eligibles to identify candidates with technical competency and experience directly related to the responsibilities and duties of the position. She referred candidates for panel interviews if they had significant experience in technical knowledge of the Operations budget processes (including methodologies for allocating staffing, overtime, and other object resources); experience overseeing or personally utilizing Management Information (MI) systems and other automation tools to produce, interpret, and analyze reports regarding the Agency's services to the public and other mission critical activities; and recent supervisory experience. Applicants with minimal budget experience and more administrative responsibilities were eliminated. The others were interviewed by a panel regarding seven leadership competencies. Based on the interview responses, the panel collectively agreed to one rating on all of the competencies for all of the applicants interviewed. OPSOS Executive Director recorded the ratings in a summary document and then referred the top candidate to her first line supervisor, Deputy Associate Commissioner for OPSOS. Deputy Commissioner OPSOS then conducted informal discussions with the top two candidates (Selectee 1 and Selectee 3) and completed a supervisory reference check. After receiving a good supervisor recommendation, Deputy Commissioner OPSOS sent an email to the selecting official requesting approval to select Selectee 1.

OPSOS Executive Director testified Selectee 1 was selected for an interview because his application referenced extensive knowledge and experience providing oversight in a wide variety of budget areas, including staffing, other objects, budgeting for contracts, and facilities/delegations budgets. His application material also indicated he was currently serving as the Deputy Director in the Division and had intimate knowledge of the responsibilities of the position by way of serving under the previous Director as his alter ego. She testified that Selectee 3 was selected for an interview because his application reference extensive experience as the SUMS Management Information lead. He also had experience with SITAR, which is another core budget responsibility for DRMI. A third candidate was selected for an interview because his application referenced extensive experience as a District Manager preparing, reviewing, and analyzing Management Information, and monitoring redetermination and limited issues goals (which are budget driven activities). She testified Complainant was not selected for an interview because his application did not reflect adequate technical budget experience.

She stated that based on Complainant's application, Complainant had limited budget and MI experience compared to these candidates. She also noted Complainant's resume demonstrated several years of supervisory experience in the past, but none in the last 1-3 years. Selectee 1 and the third candidate had the most recent and relevant supervisory experience. OPSOS Executive Director testified that the number of years Complainant spent at the GS-14 level was irrelevant because years in grade (beyond the one year required for promotion) is not a bona fide occupation qualification. She testified that Selectee 1 had "extensive, documented experience (much more than the complainant) in budget and Management Information, which directly correlates with the duties and responsibilities of the Director of DRMI. OPSOS Executive Director also testified that Selectee 1's temporary position as a GS-15 was not the basis for his selection to this position. She stated his application reflected extensive budget experience and familiarity with the position. She noted Selectee 1 held the permanent position of Deputy.

She denied that Complainant's race and sex were factors in her decision. She also denied that the EEO profile of the interview panel was discriminatory. She noted that with only three panel members, it is impossible to represent all races and ethnicities but the panel consisted of men and women and Caucasian and African-American panelists.

The record reflects 11 applicants made the Best Qualified list for this position, including Complainant and two other Black males. (ROI, p. 212-213). Three of these candidates were referred for interviews. (ROI, p. 215). Two candidates, Selectee 1 and Selectee 3, were then highly recommended after interviews and Selectee 1 was recommended for selection. (ROI, pp. 239-241).

Claim 2

Complainant testified he applied for the position of Supervisory Program Analyst, GS-15, advertised under VAN SH-868791 on or about April 26, 2013. Complainant testified that he was interviewed for the position but he was not referred by OPSOS Executive Officer On June 11, 2013, he learned from Associate Commissioner OPSOS that he was not selected for the position of Director of the Division of Program Policy Operations (DPPO) and that two GS-15 positions were selected from the same vacancy announcement. Selectee 2 (White female) was selected as the Director of DPPO, and Selectee 3 was selected for another GS-15 Director's position in the Division of Operations Analysis and Customer Support (DOACS) even though that position was never advertised under that or any other vacancy announcement. Complainant testified he should have been selected for the DPPO position and the DOACS position because of his superior knowledge, skills, and abilities. He testified he first applied for the DOACS position around 2003 and he was deemed qualified but not selected. He stated he had worked at the highest levels of the Agency and he had both a Master's and Bachelor's degree in Economics which allowed him to transfer higher level skills into the workforce.

Complainant disputed the EEO Counselor's report statement that he did not meet three of seven of the leadership and competencies on which the interview panel rated applicants: customer focus, interpersonal and teams skills, and critical thinking.

Complainant testified that he is aware of the leadership competencies and he has conducted training on many of them during numerous SSA Diversity and Advisory Committee conferences as far back as 1998. He testified that he demonstrated high-level traits for the leadership and competencies. In terms of customer service, Complainant testified he helped the Agency accelerate more than 52 million one-time payments, totaling more than \$13,000,000,000 as part of the American Recovery and Reinvestment Act of 2009). His role included approval of published procedures, review of press releases, and answering questions for both internal and external customers, including the Department of Veteran's Affairs, Railed Retirement Board, and the Department of the Treasury. As for his interpersonal skills, Complainant testified that as a Deputy Division Director in the Office of Disability Operations, he was responsible for the administrative needs and employee development for more than 600 employees in grades GS-4-GS-13. In addition, his work at the GS-14 level often included communication and coordination with the Postal Service and Treasury officials to ensure timely and sometimes early payment to affected beneficiaries. In terms of strategic thinking, Complainant testified he served as an advisor to the Agency's senior executive for Human Resources on vision and strategic planning activities. He coordinated and developed executive-level briefings to support HR-sponsored activities. He was responsible for ensuring integration of major elements of SSA's Workforce Transition Plan. He compiled and analyzed executive branch and congressional materials.

Complainant testified he is more qualified for the position than Selectee 2 because of his extensive experience at the GS-14 level, which was shown on his application. Complainant noted Selectee 2, like Selectee 1, was given the opportunity to serve a temporary promotion as a GS-15 Acting Director for DPPO for more than 120 days prior to the selected as the Division Director and her prior selection into the temporary position also was not advertised.

Complainant testified he believes his race and sex were factors in his nonselection because he is not aware of any Black males at the GS-14 or GS-15 level that were recommended or selected by the officials in their current or previous positions. Similarly, he was not aware of a Black male being permanently promoted to the GS-15 level in OPSOS since its existence. Complainant also believed the interview panel was discriminatory based on the EEO profile of the panel. Complainant also noted that as a class agent (see below), he is aware that other Black males at the Agency's headquarters have asserted that the promotions process is discriminatory and disfavors Black males.

OPSOS Executive Director testified that the two vacancies filled under SH-868791 were Director positions for separate divisions. She stated that when the vacancy announcement was first advertised, there was only one vacancy in the Division of Program Policy and Operations (DPPO). However, between the time the job posting was requested and June 1, 2013, they learned of another loss in OPSOS which created a vacant Director position in the Division of Operations Analysis and Customer Service (DOACS). She testified that DPPO focuses more on developing policy and instructions for Title II of the Social Security Act, state and local agreements, data exchange agreements, and various other post-entitlement workloads.

DOACS focuses more on service delivery methods and issues related to Title XVI of the Social Security Act. They also had some non-programmatic work. She stated her role in the selection in Claim 2 was the same as her role in Claim 1.

OPSOS Executive Director testified she referred applicants for interviews if they possessed at least two of the following criteria: 1) experience working with Headquarters or regional policy and automation components to develop and implement a variety of business processes, 2) technical background or knowledge of field office and/or PC operations, including but not limited to T2, T16, or disability workloads, and 3) recent supervisory experience. OPSOS Executive Director testified the interview panel rated each applicant they interviewed on leadership competencies using a scale of exceeds criteria, meets criteria, or does not meet criteria. She testified that according to interview notes, Complainant received a score of does not meet criteria on three of the seven leadership competencies: customer focus, interpersonal and team skills, and critical thinking. Therefore he (along with a white male candidate) were eliminated from further consideration. She testified that Selectee 3 had also applied for the position in Claim 1 and his application indicated he was uniquely qualified for both positions. Since he had just interviewed for the position in Claim 1 and the leadership competencies were the same for both positions, OPSOS Executive Director made the decision not to interview him again and used his scores from the interview for position 1.

For interviews, the panel rated Selectee 2 exceeds criteria in four competencies and meets criteria in three competencies. The panel rated Selectee 3 exceeds criteria in 5 competencies and meets criteria in 2 competencies. The panel rated Complainant exceeds criteria in one competency, meets criteria in three competencies, and does not meet criteria in three competencies. Based on this, OPSOS Executive Director referred Selectee 2 and Selectee 3 to her supervisors who conducted supervisory reference checks and held informal follow up discussions.

OPSOS Executive Officer disagreed that Complainant was better qualified than Selectee 2 or Selectee 3. She testified that the number of years Complainant spent in grade at the GS-14 level is irrelevant because years in grade (beyond the one year needed for promotion) is not a bona fide occupational qualification. She testified that Selectee 2 and Selectee 3 have extensive, documented work experience in Operations field office or PC components and headquarters components. They have significant experience with systems and policy components to develop and implement policy and change or enhance service delivery through automation and their applications support this. OPSOS Executive Director noted that Complainant was mistaken about Selectee 3's experience and stated that Selectee 3 had extensive experience as the SUM Management Information Lead under the Office of Automation Support. She further noted that despite Complainant's master's degree, he lacked sufficient federal budgeting experience. She stated Complainant's master's degree was merely an indication that he had exposure to general budgeting concepts, as did many of the other applicants who were not selected for interviews. OPSOS Executive Director also testified that Selectee 2's temporary position as a GS-15 was not the basis for her selection to this position.

She stated Selectee 2 had served as Deputy and Acting Director in DPPO but it was her experience corresponding with headquarters policy components and other technical factors that led to her referral for an interview and then her interview answers led to the referral for the final selection phase.

She denied that Complainant's race and sex were factors in her decision. She also denied that the EEO profile of the interview panel was discriminatory. She noted that with only three panel members, it is impossible to represent all races and ethnicities, but the panel consisted of men and women and Caucasian and African-American panelists.

Senior Advisor (White male) testified that he was on the interview panel for this position and he interviewed Selectee 2 and Complainant. He stated he was chosen because he is an expert in the area of the subject position. He stated that the interview panel asked the same questions of each candidate they interviewed and then discussed each candidate and rated their verbal responses. They gave these ratings to OPSOS Executive Officer. Senior Advisor testified that he did not recall much of Complainant's interview but he did recall that Complainant missed a question that asked "Give a value that a supervisor has that you disagree with and tell how you dealt with it." Complainant's response involved an example of a value or trait in someone he supervised whom he did not appreciate. Senior Advisor implied that Complainant missed the point of the question, which was how he dealt with such situations. He denied that Complainant's race or sex were factors in how he was scored or that Complainant was treated any differently than others.

Senior Advisor 2 (White female) testified she was on the interview panel and she interviewed Selectee 2 and Complainant. She testified that when compared with the other applicants, Complainant fell in the middle or slightly below the middle. She noted he did not always answer the questions fully and his responses were not thorough. Selectee 2 and one of the other candidates provided better responses than Complainant in that they were detailed and thorough in their responses. She noted time in grade is not a consideration for selection. She denied that Complainant's race or sex were factors in the ratings.

Director Division of Technology Support (African-American female) testified she was on the interview panel and she interviewed Selectee 2 and Complainant. She recalled that Complainant's interview was average, not poor, but not outstanding. In contrast, Selectee 2 stood out for her thorough and detailed responses to the multi-part questions asked. She denied that race and sex were factors in the ratings.

The record reflects 11 applicants made the Best Qualified list for this position and one additional applicant was eligible for reassignment to the position. Six applicants, including Complainant were referred for interviews, but one declined the interview. (ROI, pp. 405-408). Complainant emailed Associate Commissioner OPSOS about his experience on June 4, 2013 after they had a meeting in which Associate Commissioner OPSOS suggested Complainant would benefit from demonstrating his capacity to lead in a supervisory role. Complainant stated in the email that he had "already I have already led a number of organizations or units in a supervisory role.

My most recent experience was serving as the Acting Deputy Director for the Office of PolicyNet and Program Support. I supervised managers and other subordinate employees in this position. I also have supervisory experience in the Office of Central Operations, serving as a Deputy Division Director in both ODO and OEO for more than 3 years. These divisions had approximately 400-500 employees, which included 20-25 subordinate managers. I have even held a position as an Assistant District Manager in the Wilmington, DE FO. I'm not convinced that experience has been my barrier.” (ROI, p. 504).

Class Action Claim Severance

As mentioned, Complainant is a lead class agent in the class action claim in *Wilkerson v. Social Security Administration*, EEOC Hearing No. 531-2008-00034X/531-2022-00225X⁵, a class action complaint regarding performance awards for African-American males at the Agency’s headquarters. Therefore, the 2007 Complaint, 2009 Complaint, and 2013 Complaint were held in abeyance pending the outcome of the class complaint. However, on February 12, 2015, a Supervisory Administrative Judge severed Complainant’s individual claims of discrimination for non-promotion from the *Wilkerson* class action. Complainant then re-filed requests for hearings in the 2007 Complaint, 2009 Complaint, and 2013 Complaint.

Agency No. HQ-17-0914-SSA (“2017 Complaint”)

While the severed claims were pending a hearing, on October 19, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (African-American), sex (male), and reprisal for prior protected EEO activity when on July 24, 2017, Complainant was denied a detail for special assignment with the Small Business Administration (SBA).

The Agency accepted this claim and conducted an investigation into the matter. Complainant testified that at the time of this detail denial, he was a GS-14 Technical Expert in OPSOS. He identified that management officials responsible for discriminating against him as Deputy Commissioner for Operations, Chief of Staff, and Acting Commissioner. Complainant testified that the Small Business Administration (SBA) sought out his services to support a special project based on Complainant’s previous work with them. The initial contact to Complainant from his SBA supervisor who asked if Complainant was interested. Complainant replied that he was but he would need management approval. Then SBA Senior Executive initiated contact with Associate Commissioner OPSOS. Complainant testified he prepared a draft justification to perform work at the SBA for Associate Commissioner OPSOS’ review and submittal to executive management.

⁵ A Settlement Agreement was signed in this matter on December 1, 2023 and is awaiting approval by the EEOC Administrative Judge. Under the Agreement, the Agency will pay a total of \$22,700,000 to pay all claims and attorney’s fees, and the Agency will implement monitoring of the HQ employee awards process over the next two fiscal years to search for any discrepancies.

He stated the justification discussed the work that would be done on the assignment at the SBA along with other details including a no-cost arrangement for SSA and the terms of the assignment. He believed Associate Commissioner OPSOS sent the justification to Chief of Staff based on the conversation he had with Associate Commissioner OPSOS when she informed him of the denial. Complainant testified Associate Commissioner OPSOS informed him that Chief of Staff denied the detail request based on her desire not to release any employees outside the Agency on details assignments. A few weeks later she told Complainant Assistant Deputy Commissioner for Operations had denied it. Complainant testified he verbally expressed to Associate Commissioner OPSOS that he was hopeful he could do the assignment and she indicated that she would keep Complainant in mind for future opportunities.

Complainant testified he was treated differently than other employees when he was denied the detail because other groups and other activities have been allowed to perform on detail opportunities outside or external to the Agency. He testified that there are currently employees detailed to the Social Security Advisory Board and other employees were detailed to the Department of Homeland Security (FEMA) as volunteers to help with disaster recovery with SSA bearing the costs of this assignment, whereas his SBA detail was at no cost to the Agency.

Complainant testified that as a result of the denial of his detail request, his growth, development, and workload contributions were affected. He also stated he had to keep working in an environment which he felt was hostile. Complainant testified this was demoralizing and it created a more stressful and disheartening environment. He testified it has affected his ability to do his job because it is hard to focus on his work when he has continually been denied opportunities to advance over the course of many years. Complainant testified the Agency has a pattern and practice of not promoting African-American men. He stated he was aware of one Black female that was selected for a detail assignment outside the Agency, but the others who were detailed who were not Black men. He did not have information on who authorized these details. Complainant testified he believed his detail denial was in reprisal for his prior EEO activity because of the absence of any other reason for the denial.

Chief of Staff denied any involvement in Complainant's detail request or denial.

Assistant Deputy Commissioner for Operations testified that he discussed Complainant's detail request with Associate Commissioner OPSOS the week of July 10, 2017 and then they had a follow up discussion the week of July 17, 2017. He testified they had conversations around the timing, resource issues, and loss of Complainant's skill set, and what that would mean if Complainant was gone for a year. They discussed equity and whether this was in line with what other employees were being able to do for career development. They discussed the process and how they look at details and how details come about. Assistant Deputy Commissioner for Operations testified that this was out of line with how they typically look for and approve details for employees. He testified that there are several ways in which details come about, but each of these have their own requirements that are posted publicly. All employees who have the necessary skill set or grade level can apply and then there is an open and fair selection process. He noted the detail request brought to the Agency's attention did not meet this process.

Assistant Deputy Commissioner for Operations testified that the Agency had approved Complainant's participation in the 2016 Presidential Management Council inter-agency rotational program, as part of which Complainant completed a six-month detail assignment with SBA. Complainant was then allowed to return to SBA for a week after the end of his detail to enable him to complete the project on which he had been working and to conduct a final presentation. Complainant had also been given the opportunity to participate in a week-long OPM-sponsored development training program in Virginia within the past year. Assistant Deputy Commissioner for Operations testified that Complainant was now proposing to be gone for a year after he has just been gone for six months. He testified that there were concerns with back-filling Complainant's workloads and his skill set which was on a very high priority workload and he recommended the detail was not something to be done at this time based on many factors including the workload and a hiring freeze. He stated that since the Agency was not filling critical positions, he could not afford to lose someone for a year who was working on the processing center backlog. He also had concerns that the detail was not open to all employees. He stated that after their discussion, Associate Commissioner OPSOS concurred with that reasoning and the timing, and she was not eager to lose an employee for a year. He stated the decision to deny the detail was made collaboratively between he and Associate Commissioner OPSOS. They felt it was not the right opportunity at the right time and in the best interest in the Agency or the organization.

Assistant Deputy Commissioner for Operations denied that Complainant's race, sex, or prior EEO activity were factors in the denial of the detail. He also denied that Complainant was treated differently than other employees, noting that Complainant had recently completed a six-month detail, and as for the FEMA details noted by Complainant, "as there is for most details", it had a "very defined process where a skill set and need is defined and the length of time is defined, and opportunities are provided for all employees to compete for those opportunities. That wasn't the case with the SBA request." (ROI, p. 528). He also noted that he had denied or cut short other details to the Office of Communication because the timing was not right and they thought the priority of their work was higher than that of the detail.

Associate Commissioner OPSOS testified that in July 2017, she did not approve Complainant's request for a second detail to SBA. She testified Complainant submitted a request to her for consideration to complete another detail assignment. She also personally spoke with the SBA Director about the detail. She testified Complainant had returned to the Agency in September 2016 from a detail to SBA and he was now requesting another detail to begin in July 2017 to last six months to one year. She testified Complainant submitted his request to her via email and she then submitted an email request to her first line supervisor, Assistant Deputy Commissioner for Operations, for consideration. She testified that Assistant Deputy Commissioner for Operations did not respond, but they discussed it during a regularly scheduled biweekly meeting. She testified they "considered the current staffing in OPSOS, the budget situation, the detail opportunities for other DCOSS employees, etc. and decided we could not approve the request at this time. [Complainant] had returned to the Agency less than one year, and based on what he and the Director of SBA reported, the SBA project was completed.

We weigh Agency priorities before approving such requests and we do not traditionally allow the same employee to complete back to back assignments. I have over 130 plus employees and must treat them all fairly and provide developmental opportunities. I had several employees out-stationed in other headquarters components, and I required them all return to OPSOS due to limited staffing/hiring and growing workloads." (ROI, p. 541). She testified that while she discussed the matter with Assistant Deputy Commissioner for Operations, the final decision was hers. She testified that even though she initially submitted the recommendation, she decided she could not approve it at that time. She indicated she told Complainant it might be something they could consider in the future and she delivered the message to Complainant that they were not able to support the detail at that time. She testified there was not a direct correlation that the Agency would be able to build on by approving the detail, they have limited resources and while there was not a hiring freeze, they were not able to backfill the staffing loss. She noted that SBA was not an organization with which the Agency usually partners, although Complainant had provided information in his request about marketing for research for disability beneficiaries. She testified that when she spoke with the Director at SBA, she asked if there was a possibility of a swap and whether he could lend the Agency an employee to backfill the vacancy that would be created but he stated he did not have staff available to send since SBA is a small organization. She stated she informed the SBA Director that she would not be able to approve the detail at that time, but agreed it might be a possibility in the future.

Associate Commissioner OPSOS denied that Complainant's race, sex, or prior EEO activity were factors in her decision. She testified that the employee who was submitted for the FEMA detail from OPSOS was not selected for that detail. She stated the Agency did allow a few employees to assist with the natural disasters and provide hurricane relief. She stated that was a different situation than Complainant's SBA detail request. She testified that she does not have any employees who are working for FEMA or the Social Security Advisory Board. She further testified that she denied detail extensions to two employees she required to return from Systems and the Office of Communications.

The record reflects that on July 5, 2017, Associate Commissioner OPSOS emailed Assistant Deputy Commissioner for Operations requesting approval of a temporary detail of Complainant to SBA related to their efforts to improve business development for people with disabilities. The detail request was for up to one year beginning August 1, 2017. (ROI, pp. 501-502). The record reflects Associate Commissioner OPSOS emailed Assistant Deputy Commissioner for Operations again on July 12, 2017 to followed up on their conversation about the detail. She wrote: "While I believe the timing is not the best, I can support this temporary assignment and I have provided background and justification below for you to discuss with Mary. While in the front office, [Complainant] has contributed to the workloads assigned. I also understand the limited opportunities other staff has had given the limited developmental opportunities and [Complainant] recently had an assignment. Please note, there is not a cost to the Agency and this assignment can be from six months to one year." (ROI, p. 531).

The record also contains an email from Associate Commissioner OPSOS to an employee in systems stating that she needed to transition the employee she had working in Systems back to OPSOS, stating that “[s]ince we have a DCOSS freeze, we are really looking to maximize all Operations employees where we can.” (ROI, p. 554).

The record also shows no OPSOS employees were selected for the FEMA detail. (ROI, p. 577).

Post-Investigation

At the conclusion of the investigation into the 2017 Complaint, 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 timely requested a hearing and the matter was assigned Hearing No. 531-2019-00229X. During the hearing process, Complainant sought to have the 2017 Complaint consolidated with the 2007 Complaint, the 2009 Complaint, and the 2013 Complaint. The Administrative Judge (AJ) assigned to the case denied Complainant’s request for consolidation, noting that the responsible management officials were different among the cases, the adverse action in the 2017 Complaint was different than the other complaints, the non-selections Complainant sought to consolidate occurred many years prior, and the complaints were all at different stages of the hearing process. The AJ also noted that the 2007 Complaint and the 2009 Complaint were already processed and ultimately dismissed by AJs, thus raising an issue of res judicata. According to the AJ, the 2009 Complaint was dismissed in 2010 when it was subsumed into a class action lawsuit, and the 2007 Complaint was dismissed due to a lack of jurisdiction in 2013. (ROI, pp. 311-312).

Complainant then requested to withdraw his hearing request for the 2007 Complaint, the 2009 Complaint, the 2013 Complaint, and the 2017 Complaint. The AJ assigned to the 2017 Complaint granted Complainant’s request to withdraw the hearing requests. (ROI, pp. 108-110). Consequently, the Agency issued a final decision in each of the complaints pursuant to 29 C.F.R. § 1614.110(b).

Final Agency Decisions (FADs)

The decision on the 2007 Complaint (2007 Decision) concluded that Complainant had not proved that the Agency subjected him to discrimination as alleged. The 2007 Decision found that the Agency had articulated legitimate, nondiscriminatory reasons for its selections of candidates other than Complainant. While Complainant had generally alleged that he was better qualified for the positions at issue than the selectees, he relied primarily on his years of experience, which were not necessarily in the specific area of the position. Additionally, Complainant did not dispute management’s claims that the selectees each possessed the specific knowledge, skills, and experience in the targeted areas that made them better qualified for the positions at issue, nor did he dispute any of management’s statements regarding Complainant’s interview performance or the selection process where that rationale was offered. The 2007 Decision found Complainant was unable to demonstrate that his qualifications were plainly superior to those of the selectees or that the selecting officials had any discriminatory animus when making their selections.

The decision on the 2009 Complaint (2009 Decision) concluded that Complainant had not proved that the Agency subjected him to discrimination as alleged. The 2009 Decision found that the Agency had articulated legitimate, nondiscriminatory reasons for its selections of candidates other than Complainant. Although Complainant testified that he had more years of experience than the selectees, management testified that the selectees had more supervisory experience and more experience in the areas identified in the vacancy. The Agency noted that Complainant did not specifically dispute management's claims that the selectees had more supervisory experience and had worked in positions better suited to the advertised positions. The 2009 Decision found Complainant was unable to demonstrate that his qualifications were plainly superior to those of the selectees or that the selecting officials had any discriminatory animus when making their selections.

The decision on the 2013 Complaint (2013 Decision) concluded that Complainant had not proved that the Agency subjected him to discrimination as alleged. The 2013 Decision found that the Agency had articulated legitimate, nondiscriminatory reasons for its selections of candidates other than Complainant. In Claim 1, Complainant's resume did not indicate that he had as much budget and MI experience as the selectee and his supervisory experience was not recent. In Claim 2, Complainant did not perform well during the interview and therefore was not referred to the selecting panel. They noted Complainant did not rebut the explanations that he did not possess the requisite budgeting experience (Claim 1) or that his interview performance was inferior to the selectee (Claim 2). The Agency found Complainant was unable to demonstrate that his qualifications were plainly superior to those of the selectees or that the selecting officials had any discriminatory animus when making their selections.

The decision on the 2017 Complainant (2017 Decision) concluded that Complainant had not proved that the Agency subjected him to discrimination as alleged. The 2017 Decision found that Complainant had not established a prima facie case for sex discrimination because he did not identify a male comparator. The 2017 Decision further found the Agency had articulated legitimate, nondiscriminatory reasons for its denial of Complainant's detail request. The Agency noted the negative impacts of the timing, resources, and losing Complainant's skill set, and indicated that Complainant's request did not comport with the usual method of reviewing and approving detail requests. The Agency noted there was no direct correlation between the detail and a benefit for the Agency and stated the Agency does not typically allow back to back details. Although Complainant disagreed with management's assessments, he did not provide evidence to show that their explanations were untrue. The Agency found Complainant was unable to demonstrate that the responsible management office had any discriminatory or retaliatory animus when denying his detail request.

Complainant then filed a single appeal with the Commission in which he sought an appeal of the FAD in each of four complaints (the 2007 Complaint, the 2009 Complaint, the 2013 Complaint, and the 2017 Complaint).

CONTENTIONS ON APPEAL

Complainant's Appeal Brief

On appeal, Complainant contends the Agency has repeatedly and deliberately refused to promote him from GS-14 to GS-15 from 2007 until his retirement in 2019. Complainant argues that the Commission should not believe the Agency's assurances that for every one of the more than 40 jobs for which Complainant applied, he was never the best qualified candidate.

In regard to the 2007 Decision, Complainant states the Commission should not believe the Agency's assertion that it promoted a white man who had been demoted for sexual harassment over Complainant because he had "learned his lesson" and had "outstanding interpersonal skills" (Claim A); that it did not readvertise a Senior Budget Advisor position because the eventual selectee, a white woman, failed to apply the first time but because there was a poorly worded question on the original vacancy announcement (Claim C); that it found a white man with barely more than one year of GS-14 experience more qualified than Complainant and did not retain critical documentation (Claim D); that the white female selectee, whose highest level of education was a G.E.D. was more qualified than Complainant, who has an M.A. in Economics (Claim F); and that Complainant's longer experience and work with high-level officials did not make him more qualified than a white man with less experience (Claim I).

In regard to the 2009 Decision, Complainant states the Commission should not believe the Agency's assertion that it found a less-experienced white woman whom Complainant formerly supervised to be more qualified for a GS-15 Supervisory Social Insurance Specialist position (Announcement SH-217977).

In regard to the 2013 Decision, Complainant states the Commission should not credit the Agency's assertion that Complainant's long experience as a GS-14 manager was not relevant to a decision about whether to select him for a GS-15 position (Announcements SH-849070 and SH-868791).

In regard to the 2017 Decision, Complainant states the Commission should not believe the Agency's assertion that it denied Complainant a detail with the Small Business Administration because it needed his skill set when the Agency refused to give Complainant any meaningful work.

Complainant's appeal brief also contains an argument regarding Agency No. HQ-12-0149-SSA. However, Complainant did not list this case number on his Notice of Appeal or in the heading of his appeal brief, nor include the final agency decision from this case.

Agency's Appeal Brief⁶

The Agency contends on appeal that the Commission should affirm the 2017 Decision and dismiss the other matters as not properly before the Commission. The Agency further notes that HQ-12-0149 is not ripe for review, as no final action, decision, or dismissal has been issued in the matter. The Agency argues that Complainant should not be able to circumvent the process and argue other claims under EEOC Hearing No. 531-2019-00229X that were denied consolidation by the AJ. The Agency further states that HQ-12-0179-SSA is not ripe for review, requiring dismissal as Complainant did not withdraw his hearing request for that matter and no decision, final action, or dismissal has been issued to trigger Complainant's appeal rights.

The remainder of the Agency's appeal brief largely restates the arguments made in each of the FADs at issue here. However, in regard to the 2009 Decision, the Agency argues contends this complaint should be dismissed as untimely because Complainant knew or should have known someone other than him was selected on February 19, 2009, but Complainant waited to contact an EEO counselor until April 28, 2009, more than 45 days later.

Complainant's Motion to Show Cause

Complainant also filed a Motion to Show Cause and sought an extension to review the documents uploaded by the Agency. Complainant argued that the Agency was abusing the EEO process and had uploaded more than 20 documents, leaving Complainant no time to review the record upon which the Commission would be relying making a decision on Complainant's appeal. Complainant contends a cursory examination of the record called into question whether the Agency had submitted the full record, including prior Orders of the Commission.

Agency's Opposition to Motion to Show Cause

In response, the Agency opposed the Motion to Show Cause, stating that Complainant filed an appeal of multiple Agency FADs and the Commission notified the Agency that it was required to submit a digital copy of the entire record developed for those complaints. The uploads were the required digital copies (although the records were split into multiple files due to file limitations in FedSep). The Agency notes it uploaded these documents several days ahead of the deadline, that Complainant (and his representative) had previously received these documents, and Complainant's representative never reached out to Agency counsel to inquire about the files and resolve any issues.

⁶ The Agency sought an extension of time to file its opposition and was granted an extension until February 7, 2022. Therefore the Agency's Opposition was timely filed.

ANALYSIS AND FINDINGS

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 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”).

Motion to Show Cause and Consolidation of Appeals

We do not find any abuse of the EEO process by the Agency as alleged by Complainant. The record reflects the documents uploaded by the Agency were the Reports of Investigation for the four cases appealed by Complainant. Complainant has not indicated that he did not previously receive these. The Agency is required to upload these. Additionally, Complainant is the party who chose to file four cases as a single appeal instead of filing separate appeals and then seeking consolidation, as is the usual procedure. We note that if Complainant believed additional records were germane to our decision, he could have submitted those in connection with his appeal.

While ordinarily a separate appeal should be filed for each decision being appealed and we acknowledge the AJ previously declined to consolidate these cases as requested by Complainant, in the interest of judicial economy and given the age of these cases, we will consider Agency Nos. HQ-07-0333-SSA, HQ-09-0514-SSA, HQ-13-0710-SSA, and HQ-17-0194-SSA here. We decline to consider HQ-12-0149-SSA because it was not included in Complainant's appeal form or in any of the case captions in his submissions, it was not included in his prior Motion to Consolidate (ROI, p. 349) and he did not submit a copy of the FAD for that matter. Therefore, we assume the reference to HQ-12-0149-SSA was inadvertent.

Disparate Treatment

A claim of disparate treatment is examined under the three-part analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For a complainant to prevail, he must first establish a *prima facie* case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. See McDonnell Douglas, 411 U.S. at 802; Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978). The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. See Tex. Dep't of Cnty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

Once the agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (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 its actions, 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).

Here, even assuming arguendo that Complainant proved his prima facie case for sex, race, or reprisal discrimination, the Agency articulated legitimate, nondiscriminatory reasons for its actions and Complainant has not met his burden to show these articulated reasons were pretext for discriminatory or retaliatory animus.

In the 2007 Complaint, the Agency stated that Complainant was not selected for the position in Claim A because other candidates were considered superior based on their organizational knowledge, demonstrated leadership qualities shown in major projects, human resources and communication skills and abilities, and high degree of qualifying cross-component experience including both staff and operations components. Complainant was not selected for the position in Claim C because Selectee C had experience formulating Operations federal budgets, knowledge of operations workload and organizational structures, the requisite analytical skills, and outstanding performance in previous positions. Complainant was not interviewed because his application did not demonstrate that he possessed experience with the formulation and execution of the Agency's budget and cost accounting system. Complainant was not selected for the position in Claim D because his interview was not as strong as Selectee D. Complainant failed to provide specific examples of leadership and where he made a difference whereas Selectee D has prepared for the interview by research the office and some of its challenges and proposed solutions. Complainant was not selected for the position in Claim F because Selectee F was chosen based on her in-depth experience, proven leadership and management skills, and strong interpersonal skills. Management indicated that Complainant was not among the top three candidates for the position and his skills and abilities in the desired areas did not exceed those of Selectee F. Complainant was not selected for the position in Claim I because Selectee I was determined to be better qualified than Complainant because Selectee I was rated higher on the specific required competencies by the interview panel and Selectee I had more extensive background relating to the Organizational mission of SSA's Internet services.

In the 2009 Decision, the Agency stated that Complainant was not selected for the position in Claim 1 because Selectee 1 had over 30 years experience in SSA with 25 years experience in SSA field offices as a claims representative, operations supervisor, district manager, and areas systems coordinator. Complainant had 23 years of SSA experience but no field office experience and his work in the Office of Central Operations was over a period of about 5 years.

While both Selectee 1 and Complainant had experience preparing high level presentations and conducting briefings, Selectee 1's experience clearly exceeded that of Complainant. When the Agency became aware a second selection was needed, Selectee 2 was selected because she had significant management experience, experiencing leading key initiatives, and experience at both the headquarters and regional levels.

In the 2013 Decision, the Agency stated that Complainant was not selected for the position in Claim 1 because his application reflected limited budget and management information experience and his supervisory experience was not recent. In contrast, Selectee 1 has extensive experience as the SUMS Management Information Lead as well as experience with SITAR, a core budget responsibility for DRMI. Selectee 2 had extensive knowledge and experience providing oversight in a wide variety of budget areas.

In the 2017 Decision, the Agency stated that Complainant's detail request was denied because of concerns about staffing and workload, the non-competitive nature of the details, and the fact that Complainant had completed a detail already within the past year.

With the Agency having met their burden to produce legitimate, nondiscriminatory reasons for its actions, the burden then shifts to Complainant who must prove, by a preponderance of the evidence, that the Agency's explanation is a pretext for discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981); Holley, *supra*; Pavelka v. Dep't of the Navy, EEOC Request No. 05950351 (Dec. 14, 1995). A complainant can show pretext in two ways, "either [1] directly by persuading the court that a discriminatory reason more likely motivated the employer or [2] indirectly by showing that the employer's proffered explanation is unworthy of credence." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

When the issue is non-selection, evidence of pretext can take the form of a showing that Complainant's qualifications were plainly superior to those of the selectee. Hung P. v. Dep't of Veteran Affairs, EEOC Appeal No. 0120141721 (Dec. 3, 2015). The Supreme Court has addressed the question of comparative qualifications as evidence of pretext in a non-selection case and held that the differences in qualifications must be "significant." See Ash v. Tyson Foods, Inc., 546 U.S. 454 (2006).

Complainant failed to establish that the Agency's articulated reason for Complainant's non-selection was pretext for discrimination.

In regard to the 2007 Decision, the 2009 Decision, and the 2013 Decision, one of Complainant's primary arguments as to why he was more qualified than the selectees is that he had more experience at the GS-14 level and even supervised some of the selectees or other candidates on the best qualified list. He also points to his Master's degree in Economics to show that he is more qualified than many of the selectees.

However, both of these arguments ignore that for each position, the Agency was seeking specific knowledge, skills, and abilities that varied from position to position and a GS-14 may or may not have acquired the specific knowledge, skills, and abilities regardless of the length of their tenure at the GS-14 level. Similarly, there was no requirement for a Master's degree for any of these jobs and the jobs were not always economics-focused, meaning Complainant's Master's degree was not necessarily relevant to the specific knowledge, skills, and abilities required for a position.

Complainant also argued that management "cherry picked" information to support their selections. In support of this he noted that in one selection, the selectee's experience conferences, including the BAAC Conference was cited while Complainant's BAAC experience and experience organizing many national conferences was ignored. Similarly, he cited that one selectee's SDW experience was credited, while his SDW experience was ignored. He also stated that in one instance his field experience was ignored. Review of the relevant applications shows that Complainant did not necessarily demonstrate his experience on his application as well as the selectees. For example, while Complainant's application does state that he chaired the National BAAC, it does not reflect that he organized many national conferences. When compared to Selectee 2, Complainant's discussion of SDW on his application was not as thorough or in-depth. Complainant says his field office experience was not considered but his application shows only a six-month detail as an Assistant District Manager in the Wilmington, Delaware district office in 1994. Review of the record shows that Complainant frequently submitted identical applications for multiple positions without tailoring the application to reflect the specific knowledge, skills, and abilities sought for that position. Thus he may have possessed relevant experience that was not considered because he failed to demonstrate it on his application.

Complainant also points to alleged irregularities in the various selections such as a readvertisement or multiple selections for a position. However, Complainant did not show that the Agency's explanations for these were untrue. Even if Complainant had substantiated that the Agency readvertised a position to give the job to a specific person, that does not demonstrate pretext for discriminatory animus.

Complainant frequently relies on the argument that no Black males have been promoted to the position in question or to the GS-15 level. However, the record does reflect that there are Black males at the GS-15 level and Complainant has not provided evidence to demonstrate that Black males applied for any of the positions in question in the past.

The record also reflects that all of the positions in question had a significant number of applicants make the Best Qualified list. In some cases, Complainant was one of as many as 18 applicants on the Best Qualified list. Thus, the Agency was choosing among numerous candidates who met the initial qualifications.

While we are sympathetic to Complainant's frustration after years of attempting to be promoted, Complainant has not offered any evidence to demonstrate that his qualifications were plainly superior to those of the selectees or that the Agency was motivated by discriminatory animus.

Absent discriminatory animus, the Commission will not second guess an Agency's business decisions. Texas v. Dep't of Community Affairs v. Burdine, 450 U.S. 248, 249 (1981).

In regard to the 2017 Decision, Complainant argues that the Agency did not need his skill set because they refused to give him meaningful work, but he offers no evidence to support this contention. Complainant also alleged retaliation in connection with the denial of his detail request. However, even assuming all the relevant management officials were aware of Complainant's prior EEO activity, his most recent EEO activity prior to the 2017 Complaint appears to be in 2015 and his other complaints are even more remote. He has not offered additional evidence to show that Agency was motivated by retaliatory animus.

As Complainant chose to withdraw his hearing requests, 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 Commission finds no persuasive evidence that Complainant's protected classes were a factor in any of the Agency's actions. Aside from Complainant's conclusory allegations and speculations, Complainant has failed to establish that the Agency's reasons were pretext for discriminatory or retaliatory animus. 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 based on discriminatory or retaliatory animus. Complainant failed to carry this burden.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the final decisions of the Agency.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0124.1)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that 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 for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration**.

A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within 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).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the 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(f).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

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 their 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, **filings 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:



Carlton M. Hadde, Director
Office of Federal Operations

January 22, 2024

Date