



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

[REDACTED]  
Tyson A.,<sup>1</sup>  
Complainant,

v.

James R. McHenry III,  
Acting Attorney General,  
Department of Justice  
(Federal Bureau of Prisons),  
Agency.

Appeal No. 2022003179

Agency No. BOP-2019-01317

DECISION

On May 19, 2022, 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 April 26, 2022 final order concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, the Commission AFFIRMS the Agency's final order.

ISSUE PRESENTED

The issue is whether Complainant has shown by a preponderance of the evidence that the Agency discriminated against him based on race or color regarding his non-selection for Maintenance Worker Supervisor, Vacancy Announcement # OAK-2019-0018.

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

## BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Sports Specialist, GS-9, in the Recreation Department at the Agency's Federal Correctional Complex (FCC) in Oakdale, Louisiana. Complainant held this position since January 2014.

On October 30, 2019, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (African American), color (Brown), and reprisal for prior protected EEO activity (internal affairs complaint and a grievance against management) when, on July 9, 2019, the Complex Warden ("Warden") failed to select Complainant for a Maintenance Worker Supervisor ("MW Supervisor") position, Vacancy Announcement # OAK-2019-0018. Complainant stated that he applied for the same position at the Agency's Houston, Texas facility<sup>2</sup> and was selected with the same credentials that were deemed inadequate by Oakdale FCC. He also stated that the three candidates selected do not have the credentials the Warden cited, and their information was inaccurate.

The Agency accepted Complainant's complaint for EEO investigation. During the investigation, Complainant stated that he made the Best Qualified List but was not interviewed for the position. Complainant stated, since 2012, there have been nine vacancies in the Facilities department and eight of them have been filled with Caucasian males. Complainant stated that his evaluations have been Exceptional, and he has an extensive work history in maintenance from a prior workplace.

Warden (Caucasian, Olive-Brown) is Complainant's third level supervisor and the selecting official for the position at issue. Warden stated that sixteen candidates, including Complainant, were listed on the MW Supervisor Merit Promotion Certificate. Warden stated that the Facility Manager ("Manager"), as the relevant department head, reviewed candidates' resumes and made recommendations to the Associate Warden ("Associate Warden"), who then made recommendations to Warden. Warden stated that FCC Oakdale is a large facility and more than thirty years old, so it requires complex maintenance projects. He stated that "broad construction experience and [a] degree of independence" was necessary for the MW Supervisor position. Warden stated that there were three selectees, and they had broad experience and primarily "above average" reference checks.

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<sup>2</sup> The record reveals, in February 2020, Complainant was selected for a Maintenance Worker position at FCC Houston.

Warden noted that Complainant's credentials reflected eight years specialized experience as a welder and two years as a mechanic, but did not document experience bidding, monitoring or completing construction projects. Warden stated that interviews were not conducted for the MW Supervisor position.

Associate Warden (Caucasian, White) stated, as subject matter expert, Manager conducted all resume reviews and confidential reference checks based on the Best Qualified List. When asked if he recommended Complainant for the subject position, Associate Warden responded, "I do not do recommendations."

Manager (Other, Tan) stated that he reviewed the candidates on the Best Qualified List and picked the top three candidates based on their resume, work experience, and needs of the Agency. He stated that he is the subject matter expert, and he forwards his recommendations to Associate Warden. Manager stated that he had not been at FCC Oakdale very long, so he only knew candidates if they were in his department. Manager stated that no skill certificates were required for the MW Supervisor position, but it required a "wide range of experience." Manager stated that he made three recommendations, all of whom were selected ("Selectee 1," "Selectee 2," and "Selectee 3").<sup>3</sup>

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<sup>3</sup> The record contains Applicant Data Reports and Confidential Reference Checks for Complainant and the three selectees. The Reference Checks were completed by Associate Warden based on information from each candidate's supervisor.

Complainant listed experience as a Sports Specialist, Senior Officer, Volunteer Recreation Specialist, and Cook Supervisor dating back to 2003. Complainant listed experience as a Maintenance Worker (Welder) from 2001 to 2009 and an Auto Mechanic Specialist from 1999 to 2001. Complainant's Confidential Reference Check contained three "Average" ratings and three "Above Average" ratings.

Selectee 1 (Caucasian, White) listed experience as a Senior Officer Specialist dating back to 2016, Construction Worker dating back to 2015, Maintenance Worker going back to 2013, Carpenter from 2004 to 2015, and Mechanic from 1995 to 1998. Selectee 1's Confidential Reference Check contained one "Average" rating and five "Above Average" ratings.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of the right to request a hearing before an EEOC Administrative Judge (AJ) or an immediate final agency decision (FAD). Also, the Agency informed Complainant "because your formal complaint includes an allegation of the denial of a promotion based on reprisal, this claim is being subsumed within a class action pursuant to an Order from [an] AJ." The Agency informed Complainant that EEOC certified the following class: "All Agency employees (nationwide), from January 1, 1994, to the present, who have been denied promotions based upon the Agency's policy or practice of retaliating against employees because they engaged in protected EEO activity."<sup>4</sup> The Agency stated the non-class action claims/bases were processed and would move forward.

On April 26, 2022, the agency issued a FAD finding the record does not support Complainant's claim that he was subjected to discrimination on the bases of race and/or color. The FAD found that Complainant established a prima facie case of discrimination based on race and color, the Agency articulated legitimate, nondiscriminatory reasons for its non-selection, and Complainant failed to show that the Agency's motives were discriminatory. The instant appeal from Complainant followed.

#### CONTENTIONS ON APPEAL

On appeal, Complainant stated that he had the requisite certifications and experience for the position at issue and that the three selectees did not have the experience the Warden, who was the selecting official, cited as the reason for selecting them.

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Selectee 2 (Caucasian, White) listed experience as a Correctional Officer dating back to 2012, Alternate Locksmith going back to 2013, Construction Worker going back to 2003, and Maintenance/Crane Operator from 2006 to 2009. Selectee 2's Confidential Reference Check contained six "Above Average" ratings.

Selectee 3 (Native American, unspecified) listed experience as a part-time General Contractor dating back to 2000, Materials Handler Supervisor going back to 2012, Senior Officer from 2002 to 2012, Field Line Foreman from 2001 to 2002, and Apprentice Carpenter from 1998 to 2000. Selectee 3's Confidential Reference Check reflected six "Above Average" ratings.

<sup>4</sup> The class complaint was identified as Turner, et. al. v. Dep't of Justice (Federal Bureau of Prisons), Agency Nos. P-2004-0296 and P-2000-0138.

Complainant alleged that the Warden stated Complainant lacked the requisite bidding and purchasing experience, and that the selectees had general contracting experience. Complainant alleged that the Warden lacked credibility because he stated that he received recommendations from the Associate Warden, who stated that he did not have input in the selections. Complainant stated further that the Facilities Department lacked racial diversity. Complainant asked this Commission to reverse the final agency decision.

### 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”).

### ANALYSIS

#### *Disparate Treatment*

In the absence of direct evidence of discrimination, the allocation of burdens and order of presentation of proof in a Title VII case alleging discrimination is a three-step process.

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, they must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, that is, that a prohibited consideration was a factor in the adverse employment action. McDonnell Douglas, 411 U.S. at 802; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

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 based on a prohibited reason. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

To establish a prima facie case of discrimination based on race and/or color, complainant may show: (1) that he is a member of a protected group; (2) that he was subjected to an adverse employment action; and (3) that he was treated less favorably than other similarly situated employees outside of his protected group(s). Williams v. Dep't of Education, EEOC Request No. 05970561 (August 6, 1998). We note that it is not necessary for Complainant to rely strictly on comparative evidence to establish an inference of discriminatory motivation necessary to support a prima facie case. See Soriano v. U.S. Postal Service, EEOC Appeal No. 01A14814 (February 21, 2003); see also O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312 (1996); EEOC Enforcement Guidance on O'Connor v. Consolidated Coin Caterers Corp., EEOC Notice No. 915.002, n. 4 (September 18, 1996).

Here, we find that Complainant established a prima facie case of discrimination based on race and color. The record reveals that Complainant identifies his race as African American and his color as Brown. He applied for a Maintenance Worker Supervisor position at FCC Oakdale and was not selected. Three other candidates were selected, two of whom were identified as Caucasian and White, and one selectee who was identified as Native American and color not specified.

The burden now shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its action. While the burden upon the Agency to articulate a reason is not an onerous one, Commission precedent holds that the Agency must set forth with sufficient clarity, reasons for Complainant's non-selection, such that he has a full and fair opportunity to demonstrate that those reasons are pretext. See Parker v. U.S. Postal Service, EEOC Request No. 05900110 (April 30, 1990); Lorenzo v. Dep't of Defense, EEOC Request No. 05950931 (November 6, 1997).

Here, the selecting official, Warden, stated that the facility is large and several decades old, so it requires complex maintenance projects. He stated that "broad construction experience and [a] degree of independence" was necessary for the MW Supervisor position. Warden stated that he made three selections, and the selectees had broad experience and primarily "above average" reference checks.

Warden noted that Complainant's credentials reflected eight years specialized experience as a welder and two years as a mechanic, but did not document experience bidding, monitoring or completing construction projects.

The Facilities' department head, Manager, stated that he reviewed the candidates on the Best Qualified List, including Complainant. Manager stated that he picked the top three candidates based on their resume, work experience, and needs of the Agency. Manager stated that he forwarded his recommendations to Associate Warden. Manager acknowledged that the MW Supervisor position required a "wide range of experience." Manager stated that all three of his recommended candidates were selected. Based on the above, we find the Agency has met its burden.

We turn next to Complainant to show pretext. The Commission has stated that proof of pretext includes discriminatory statements or past personal treatment attributable to the named managers, unequal application of agency policy, deviations from standard procedures without explanation or justification, or inadequately explained inconsistencies in the evidentiary record. See Ricardo K. v. Dep't of Veterans Affairs, EEOC Appeal No. 2019004809 (December 10, 2020)(citing January B. v. Dep't of the Navy, EEOC Appeal No. 0120142872 (December 18, 2015)(citing Mellissa F. v. U.S. Postal Service, EEOC Appeal No. 0120141697 (November 12, 2015)).

To show pretext, Complainant asserted that the Agency was motivated by discrimination with respect to the challenged non-selection. Complainant stated that the three selectees do not have the credentials the Warden cited, and their information was inaccurate. Complainant also alleged that Associate Warden denied making candidate recommendations although Warden stated he did. Also, Complainant stated that he was selected for a similar position at FCC Houston, which shows he was qualified.

We find Complainant failed to show that the Agency's articulated reasons for choosing Selectee 1, Selectee 2, and Selectee 3 instead of Complainant were a mere pretext for discrimination. The Commission has repeatedly held that pretext requires more than a belief, assertion, or suspicion that the Agency was motivated by discrimination. Kathy D. v. Environmental Protection Agency, EEOC Appeal No. 0120171318 (August 14, 2018); Vickey S. v. U.S. Postal Service, EEOC Appeal No. 0120171004 (July 12, 2018); Letty K. v. Dep't of Veterans Affairs, EEOC Appeal No. 2019003570 (February 21, 2020).

The record shows that Complainant and the three selectees were all on the best qualified list for the MW Supervisor position. Complainant had three "Average" ratings and three "Above Average" ratings on his Confidential Reference Check. Whereas two selectees had all "Above Average" ratings, and one selectee had five "Above Average" ratings and one "Average" rating on their reference checks. The record reveals that the subject matter expert, Manager, made the three recommendations and conveyed them through Associate Warden to Warden. The record shows, in February 2020, Complainant was selected for a Maintenance Worker position at FCC Houston, which appears different from the Maintenance Worker Supervisor position at FCC Oakdale. We find the record does not contain evidence demonstrating that Complainant's qualifications were plainly superior to the selectees' qualifications. Patterson v. Dep't of the Treasury, EEOC Request No. 05950156 (May 9, 1996).

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the final agency decision finding no discrimination.

### 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).

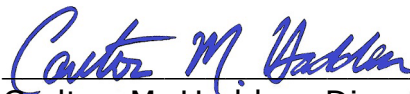
#### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

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, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

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

FOR THE COMMISSION:



Carlton M. Hadden, Director  
Office of Federal Operations

February 4, 2025

Date