



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

[REDACTED]
Tommie O.,¹
Complainant,

v.

Martin J. Gruenberg,
Chairman,
Federal Deposit Insurance Corporation,
Agency.

Appeal No. 2022004717

Hearing No. 430-2021-00347X

Agency No. FDICEO-20-043

DECISION

On September 2, 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 August 1, 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. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission AFFIRMS the Agency's final order.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was an external Applicant, seeking a GS-15 position at the Agency's Complex Institution Supervision and Resolution (CISR) facility in Charlotte, North Carolina.

On October 25, 2020, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (Asian) and age (54) when:

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.

1. On January 30, 2020, Complainant was notified via USAJOBS that he was rated not qualified due to a lack of specialized experience for the position of Senior Complex Financial Institution Specialist, advertised as Vacancy Announcement No. 2019-HQ-B0307 and No. 2019 HQD-B308; and
2. On July 13, 2020, after receiving information through an Agency Freedom of Information (FOIA) request (Log Number 20-0032-PA), Complainant stated that the Agency discriminated against him by finding him not qualified.

At the time of his application, Complainant was an external applicant. He had never worked for the Agency. Complainant identified his race as Asian. He stated officials could infer his race from his resume, which stated his name and the location of the college from which he graduated. Similarly, he stated they could also approximate his age from his resume and the chronological years of his work experience.

Complainant applied online for the Senior Complex Financial Institution Specialist position, CG-1160-14/15, advertised under the Vacancy Announcement No. 2019-HQD-B0308. He applied only for Grade 15 consideration for the Senior Complex Financial Institution Specialist position in a single location, Charlotte, North Carolina. He was already a GS-15 level employee at another agency. There was a separate job announcement for a CG-1160-14/15 Senior Complex Financial Institution Specialist position advertised under Vacancy Announcement No. 2019-HQD-B0307, that was only open to “promotion eligible employees.” Complainant did not apply under this announcement.

On January 28, 2020, Complainant stated that he saw on the USAJOBS website that his application “was not referred to the selecting official with the reason – “Not Qualified – Lacks specialized experience.” ROI at 40. On January 30, 2020, Complainant first emailed the Agency contact listed in the vacancy announcement and sought an explanation for his rejection. He followed up by email on February 17, 2020 and did not receive a response for his rejection. Complainant submitted several Freedom of Information Act requests to the Agency for identification of the applications and resumes for the selectees. He named the Human Resources Specialist (African American, age 40) (HRS), as one of the Agency officials responsible for the alleged discrimination. Complainant alleged that HRS was the Agency’s key official who refused to address his inquiries on why he was rejected and offered conflicting testimony.

Complainant’s resume was reviewed by a committee consisting of two Subject Matter Experts (SME) and two Human Resources Specialists. These were the only employees who reviewed Complainant’s resume. HRS averred he was solely responsible for the determination that Complainant was not qualified for the Senior Complex Financial Institution Specialist position. HRS stated that he relied on input from the subject matter experts. HRS, the other named HR Specialist, and both SMEs stated that they were unaware of Complainant’s race or age at the time they advised that Complainant did not meet the qualifications for the position.

The panel used set criteria for all reviews. The selection criteria were contained in a “standard guide” drafted before the posting and the requisite qualifications were stated in the vacancy announcement. The committee reviewed applicants under both announcements and reviewed approximately 150 resumes in each of the four groups, which delineated status from non-status and grade 14 and grade 15. ROI at 118. Approximately half of the applicants were found to meet the qualification requirements and were referred to the next step. After this culling process, Complainant was informed he was disqualified.

Regarding Complainant’s application, HRS stated that “Per SME’s and HRS concurrence: applicant does not meet one year of specialized experience performing analytical processes risk assessment related to the financial services industry with an emphasis on the identifying, measuring, monitoring, and controlling risk levels in at least FOUR or more of the following areas: (i.e. credit, market, or liquidity, operational risk, trading operations, capital planning) present within large complex financial institutions with total assets of 450b.” ROI at 90.

On July 13, 2020, the Agency provided redacted documents in response to Complainant’s FOIA request. Complainant noticed that one candidate was selected for the Grade 15 Senior Complex Financial Institution Specialist position in Charlotte for which Complainant had applied. He found, from the Agency’s disclosure to his FOIA request, the name of the person selected for the position for which he applied. Complainant checked the selectee’s public LinkedIn profile, which showed that the selectee’s race is White. ROI at 40. Based on the selectee’s time at college, Complainant surmised that the selectee was not older than 40 years old. Complainant averred he believed his age and race were considered when Complainant was marked as not qualified.

Complainant believed the Human Resources Branch unfairly limited the selection criteria and misapplied the eligibility criteria when it “wrongly found him ineligible for the position.” Complainant stated that the Agency disregarded his two strongest qualification areas “credit” and “market” in which his resume demonstrated that he fully met one year of specialized experience requirement in those areas. In addition, Complainant claimed that the Agency framed the requirements for the position in a way that had the purpose of injuring his prospects of employment.

Complainant acknowledged that the Certificate of Qualified Candidates shows the panel did not recommend any candidate as qualified for the position for which Complainant applied. ROI, at 831. The record showed that no one was selected off of the vacancy announcement for which Complainant applied. The selectee was selected off of the vacancy announcement for status candidates, grades 14/15, for which Complainant had not submitted an application and for which he was not eligible to apply.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing.

The AJ issued a summary judgment decision in favor of the Agency finding that Complainant was not subjected to discrimination as alleged. The Agency subsequently issued a final order fully adopting the AJ's decision. This appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that the Agency violated the Commission's regulations requiring a timely, fair, and adequate investigation. Complainant argues that Agency officials provided conflicting testimony. Complainant contends that he was qualified for the GS-15 position, but the Agency rejected the Complainant by harmfully altering the selection criterion for him. Complainant argues that he was better qualified than the selectee. Complainant contends that the AJ erred by accepting the Agency's untruths. Accordingly, Complainant requests that the Commission find in his favor.

ANALYSIS AND FINDINGS

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

Initially, we note that "Complainant argues that the investigation was inadequate and biased. Investigations of discrimination complaints are governed by 29 C.F.R. § 1614.108 and the instructions contained in the Commission's EEO MD-110. See EEO MD-110, Chap. 6 ("Development of Impartial and Appropriate Factual Records"). An adequate agency investigation is one that is developed impartially and contains an appropriate factual record. 29 C.F.R. § 1614.108(b). "An appropriate factual record is one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred." 29 C.F.R. § 1614.108(b); EEO MD-110, Chap. 6, § I, IV.B., IV.C. An investigator must be unbiased, objective, and thorough. *Id.* at § V.C. The investigator must obtain all relevant evidence from all sources regardless of how it may affect the outcome. *Id.* at § V.D. Here, the Commission finds that there is no evidence of bias by the investigator and the Commission finds that the record was adequately developed such that we can draw conclusions as to whether discrimination occurred. See Spencer T. v. Dep't of Transp., EEOC Appeal No. 0120180241 (Aug. 2, 2019)."

To the extent that Complainant challenges the manner in which the AJ handled his case, the Commission notes that EEOC regulations and Commission precedent provide AJs with broad discretion in the conduct of a hearing and related proceedings. See 29 C.F.R. § 1614.109; see also Equal Employment Opportunity Management Directive 110 for 29 C.F.R. Part 1614 (EEO MD-110), at Ch. 7 (Aug. 5, 2015).

The Commission has reviewed all documentary evidence in the record and is unable to find evidence of bias, or other reversible error, resulting from the manner in which the AJ managed and adjudicated this case.

The Commission's regulations allow an AJ to grant summary judgment when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). An issue of fact is “genuine” if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A fact is “material” if it has the potential to affect the outcome of the case. In rendering this appellate decision, we must scrutinize the AJ’s legal and factual conclusions, and the Agency’s final order adopting them, *de novo*. See 29 C.F.R. § 1614.405(a)(stating that a “decision on an appeal from an Agency’s final action shall be based on a *de novo* review...”); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO-MD-110), at Chap. 9, § VI.B. (as revised, August 5, 2015)(providing that an administrative judge’s determination to issue a decision without a hearing, and the decision itself, will both be reviewed *de novo*).

In order to successfully oppose a decision by summary judgment, a complainant must identify, with specificity, facts in dispute either within the record or by producing further supporting evidence and must further establish that such facts are material under applicable law. Such a dispute would indicate that a hearing is necessary to produce evidence to support a finding that the agency was motivated by discriminatory animus. Here, however, Complainant has failed to establish such a dispute. Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable factfinder could not find in Complainant’s favor. The decision makers were unaware of Complainant’s race or age. Additionally, no selection was made from the vacancy announcement under which Complainant applied. To the extent there were anomalies in the screening process, the Commission has repeatedly stated that a mistake is not evidence of pretext absent some evidence that the mistake was due to Complainant's protected classes, which is not evident here.

Upon careful review of the AJ’s decision and the evidence of record, as well as the parties’ arguments on appeal, we conclude that the AJ correctly determined that the entry of summary judgment was appropriate because there was no genuine dispute of material fact warranting a hearing. The undisputed evidence established that Complainant was not discriminated against by the Agency as alleged.

Accordingly, we AFFIRM the Agency’s final order adopting the AJ’s decision.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0124)

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

January 25, 2024

Date