



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Newton P.,¹
Complainant,

v.

Terence Emmert,
Acting Secretary,
Department of the Navy,
Agency.

Appeal No. 2023001540

Hearing No. 480-2022-00423X

Agency No. 21-62473-00952

DECISION

On January 12, 2023, 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 December 16, 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.

At the time of events giving rise to this complaint, Complainant worked as a GS-0020-12 Community Planner, in the Agency's Asset Management Branch, Facilities Management Division, Public Works Department (PWD), at Naval Base San Diego in San Diego, California.

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.

On October 29, 2021, Complainant filed a formal complaint alleging that the Agency discriminated against him on the bases of sex (male) and age (born in 1969) when, on or about April 28, 2021, Complainant was notified that he was not selected for the position of Senior Planner, GS-0020-13.

On March 24, 2021, the Asset Management Branch Head (Supervisor-1; female, over 40) emailed six employees, notifying them that resumes were being accepted for a GS-0020-13 Senior Planner position in the Branch. The recruitment action was done as a Management Identification of Candidates (MIOC) hiring action. Four candidates were referred to the selecting official, the Public Works Director ("the Director"; male, born in 1979).

Supervisor-1 created criteria for evaluating the candidates' resumes, with a possible score of 100 total points. Up to 60 points could be awarded for Technical Expertise in Planning Processes, 15 points could be awarded for Leadership, 20 points could be awarded for PWD Coordination and Alignment, and 5 points could be awarded for Education/Training. The Director and the Deputy Public Works Director ("the Deputy"; male, born in 1963) evaluated the resumes and, according to the Director, they agreed that the selectee was the top candidate.

Complainant received 35 points for Technical Expertise in Planning Processes, 6 points for Leadership, 8 points for PWD Coordination and Alignment, and 4 points for Education/Training, for a total of 53 points. The selectee received 55 points for Technical Expertise in Planning Processes, 12 points for Leadership, 18 points for PWD Coordination and Alignment, and 2 points for Education/Training, for a total of 87 points. The selectee received the highest score, and Complainant received the lowest score. The other candidates received a total of 56 points and 74 points. At the time of the selection, Complainant was a 52-year-old man, and the selectee was a 33-year-old woman. The other candidates were a 50-year-old man (Coworker-1) and a 35-year-old man.

Complainant stated that he was the best candidate based on his qualifications, training, education, and 15 years of experience, in comparison to the selectee's four years of experience. According to Complainant, he had master's degrees in Urban Planning and Public Administration and in Business and bachelor's degrees in Urban Planning and Public Administration and in Business as well as professional certifications in Facilities Engineering Acquisition Certification Levels 1-3, whereas the selectee only had one bachelor's degree. Complainant noted that he had much more experience working at Naval Base San Diego than the selectee.

Complainant alleged that he had been working towards a promotion for more than a decade and that there was a pattern of younger women with less qualifications and experience receiving promotions over their more experienced male counterparts.

The Director stated that Complainant provided a short, one-page resume that highlighted Complainant's education but made it hard to tell what he did. The Director averred that the selectee's resume reflected frequent, professional interactions with leadership, adding that he observed the selectee perform the tasks described in her resume. According to the Deputy, Complainant's resume was lacking in several areas compared to the selectee's resume.

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 Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. Over Complainant's objections, the AJ assigned to the case granted the Agency's motion for summary judgment and issued a decision without a hearing in favor of the Agency.

The AJ found that Complainant established a prima facie case of discrimination with respect to his nonselection. The Agency's legitimate, nondiscriminatory explanation was that the selectee outscored Complainant on technical expertise, leadership, and PWD coordination and alignment, and the AJ stated that the Director and the Deputy also identified specific reasons to justify the numerical scores. The AJ determined that, while Complainant's one-page resume described his experience at a high level of generality without describing specific tasks, skills, and outcomes, the selectee's resume was far more detailed and described specific tasks and outcomes, demonstrating technical skill and experience as well as concrete leadership experience. The AJ found that Complainant's subjective belief that he was the superior candidate and that management treated the younger women in the office better than the men was insufficient to create a genuine factual dispute. The AJ concluded that, even viewing the evidence in the light most favorable to Complainant and drawing all justifiable inferences in favor of Complainant, a reasonable finder of fact could not conclude that discrimination based on sex/and or age occurred.

The Agency subsequently issued a final order fully implementing the AJ's finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged. The instant appeal followed.

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. (Aug. 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*).²

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.

On appeal, Complainant argues that there are genuine issues of material fact as to whether the Director and the Deputy willfully used the MIOc process to select a less qualified younger female candidate. Complainant contends that the Director failed to adhere to the Agency's MIOc procedures because he did not meet with the Command HR Advisor. Noting that the MIOc Standard Operating Procedure states that MIOc may not be appropriate if the selecting official needs to review a resume, Complainant suggests that the Deputy, as his third-level supervisor, and the Director, as his fourth-level supervisor, were too far up the chain to be selecting officials using MIOc procedures. However, Complainant does not articulate how these deviations from the MIOc procedures constitute evidence of pretext for discrimination based on sex and/or age.

² Although the Agency's Response to Complainant's Appeal stated that the AJ's factual findings were subject to a substantial evidence standard of review, the cited substantial evidence standard applies to an AJ's post-hearing factual findings. 29 C.F.R. § 1614.405(a). Where, as here, an AJ issues a decision without a hearing, the AJ's factual findings are subject to *de novo* review. Id.

Moreover, Complainant questions why Supervisor-1 and his second-level supervisor did not serve as the selecting official, but this does not create a genuine issue of material fact. Supervisor-1 stated that, although she did not participate in the resume review, she did not believe Complainant was more qualified than the selectee. According to Supervisor-1, she supervised both Complainant and the selectee, and the selectee's performance was consistently higher than Complainant's.

Complainant disputes that the resumes were the basis for the selection decision and contends that he was the most qualified candidate. Complainant asserts that, when he and Coworker-1 spoke to the Director about their nonselections, the Director said that the selection was based on who the Director saw in the office. In nonselection cases, a complainant can demonstrate pretext by showing that his qualifications for the position were plainly superior to those of the selectee. Hung P. v. Dep't of Veterans Affs., EEOC Appeal No. 0120141721 (Dec. 3, 2015). Complainant asserts that he had "far more years of knowledge, skills, education and experience" than the selectee. Complainant had more education than the selectee, which was reflected in his score of 4 points for Education/Training compared to the selectee's score of 2 points. Complainant was not eligible for the highest possible score of 5 points for Education/Training because his resume did not show that he had an American Institute of Certified Planners certificate or Professional Engineering license. Regarding Complainant's tenure with the Agency, the Commission has consistently held that years of service, in and of itself, does not make one the most qualified candidate for a promotion and does not render one more qualified than those with less Agency experience. See Kenyatta S. v. Dep't of Homeland Sec., EEOC Appeal No. 0120161689 (Sept. 21, 2017). Complainant has not shown that his qualifications were plainly superior to those of the selectee.

Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable fact-finder could not find in Complainant's favor.

Upon careful review of the AJ's decision and the evidence of record, as well as the parties' arguments on appeal, including those not specifically addressed herein, we conclude that the AJ correctly determined that the preponderance of the evidence did not establish that Complainant was discriminated against by the Agency as alleged.

Accordingly, we AFFIRM the Agency's final order implementing the AJ's decision.

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

March 6, 2025
Date