



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Fredrick A.,¹
Complainant,

v.

Douglas A. Collins,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2023003560

Agency No. 20DR-0010-2022-14793

DECISION

Complainant filed an appeal, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's June 5, 2023 final decision concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the reasons set forth herein, we AFFIRM the Agency's final decision.

ISSUE PRESENTED

The issue presented is whether the Agency discriminated against Complainant based on age (67) when on August 26, 2022, Complainant received an email from USA Staffing that his application was reviewed, but another applicant was selected for the SES Network Director for VISN 12 position (Job Announcement VA-SES-11452422-VNAT).

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

At the time of events giving rise to this complaint, Complainant was a non-employee applicant for VA position VA-SES-11452422-VNAT, Network Director of the Veterans Integrated Service Network (VISN) 12. Complainant previously served as Network Director of VISN 10 from November 2006 through February 2016. Complainant retired in February 2016. Report of Investigation (ROI) at 59-61.

On November 1, 2022, Complainant filed a formal complaint alleging the Agency discriminated against him on the bases of age (67) when on August 26, 2022, Complainant received an email from USA Staffing that his application was reviewed, but another applicant was selected for the SES Network Director for VISN 12 position, Job Announcement Number VA-SES-11452422-VNAT. ROI at 31-32.

The investigation into the complaint revealed that candidates were not required to identify their age in the application. Neither Complainant nor any other candidate provided their age in their application packages. ROI at 76-85, 217-221, 231-254. Complainant met the minimum qualifications to be considered for the positions. Candidates for the position were referred from the Corporate Senior Executive Management Office to the Assistant Under Secretary for Health for Operations (Selecting Official) and then the certificates were sent to the Selection Panel. ROI at 64, 112, 166.

The Selecting Official established a Selection Panel comprised of three members, who were current Network Directors of other VISNs. The Selecting Official tasked the Selection Panel to review resumes, conduct interviews, and make recommendations for the top two – three candidates. ROI at 99-100, 113. The Selection Panel only focused on candidates currently encumbered in SES and SES equivalent positions at the VA Network or Medical Centers. Selection Panel Member 2 explained that he agreed with this decision and reasoned that experience in the current medical environment, particularly given the COVID-19 pandemic and PACT Act, would be critical success factors for an SES Network Director. Ultimately, the Selection Panel reviewed 14 resumes for current VHA leadership experience, interviewed four candidates, and referred three candidates to the Selecting Official for a final selection. Complainant was excluded from consideration and not interviewed because he had no VHA leadership experience within the last six years. ROI at 99-100, 113, 129-135, 146.

Complainant disagreed with the Selection Panel's focus on candidates who were current SES or SES equivalent in the VHA with COVID-19 pandemic and PACT Act experience. Complainant maintained that the Selection Panel could have come up with this requirement after the certification list was reviewed, as a means to exclude him and another candidate on the list who was not a current VA SES employee, especially since the PACT Act became law in October 2022. Supplemental Document 2-4.

Selection Panel Member 2 stated that knowledge of the PACT Act² is a critical factor for the successful management of the current VHA. Candidates who are not in current SES leadership positions at the VHA are less likely to have experience with the PACT Act. In contrast, Selection Panel Member 3 did not mention the PACT Act, but instead mentioned that leadership experience during the pandemic was a significant consideration in seeking a current SES employee. ROI at 129, 132, 147-149.

Complainant believed that he was more qualified for the position than the Selectee based on his experience, performance, and awards. Complainant's resume highlighted his experience as Network Director of VISN 10 for nearly 9 years before his retirement. Prior to holding that position, Complainant served as Hospital Director, Associate VAMC Director and Deputy Network Director. Complainant also received the 2011 Federal Excellence in Healthcare Leadership award, and several "Cornerstone" awards. He indicated that he was frequently asked to chair task forces and work groups, provide consultation to top VHA leaders and other special assignments. Complainant has a Bachelor of Science in Education and a Master of Education. Notably, Complainant's resume does not list current pandemic or PACT Act experience following his retirement from the VHA. ROI at 63, 80-89.

The Selectee's resume demonstrated that he served as the Acting Network Director of VISN 12 for five months before his selection. Prior to his detail he served as an SES Medical Center Director at a complex 1a facility, Associate Director, Health System Specialist, and Acting Associate Director. The Selectee has a Bachelor of Science and a Ph.D. in Clinical Psychology. Above all, the Selection Panel determined he was the best fit for the position due to his pandemic leadership experience. ROI at 67-70, 94, 288.

² The PACT Act is a law which expands VA health care benefits to Veterans exposed to burn pits, Agent Orange, and other toxic substances. The PACT Act became law on August 10, 2022 and not in October 2022 as referenced by Complainant.

https://www.publichealth.va.gov/exposures/benefits/PACT_Act.asp

Complainant accused the Selection Panel of pre-selecting the Selectee for the position because he served as the Acting Network Director at the time of his selection. Complainant asserted that the pre-selection resulted in a younger and less qualified selectee. ROI at 66-68. Moreover, Complainant alleged that the Selection Panel was aware of his potential age range due to his status of being a retired former VHA employee. ROI at 61-62, 66-68.

The Selection Panel denied Complainant's allegation of pre-selection. While Selection Panel Member 2 agreed with Complainant that management was able to make a general assessment of his age based his retirement status, he did not believe that the non-selection was due to the Complainant's age. ROI at 115, 131-132, 148.

Complainant asserted the Selection Panel Chair was likely aware and influenced by the circumstances surrounding his departure. ROI at 61, 109-110. Selection Panel Chair stated she lacked knowledge of why Complainant ended his employment with the VHA, but his departure "influenced the [Selection Panel] only in that he had been gone for over six years." ROI at 109-110.

The Selecting Official did not offer testimony because she was not involved in the selection process prior to the referral of the top three candidates for further review. Further, through her Executive Assistant, she denied knowing Complainant applied for the position. ROI at 99-106, 108-111, 129-131.

CONTENTIONS ON APPEAL

On appeal, Complainant argues, in relevant part, that the Agency erred in finding no discrimination because the record reflects that his age was a factor in his non-selection since his qualifications were superior to the Selectee's. Furthermore, Complainant alleges that evidence of discriminatory animus can be seen in the Selection Panel's pre-selection of the Selectee because he was Acting Network Director at the time of the selection.

The Agency opposes the appeal, arguing there is no basis for finding discrimination. In particular, the Agency contends that Complainant was not asked to interview for the position because he was not currently in an SES or SES equivalent position at the VHA when he applied for the position per requirement of the Selection Panel. The Selectee met the requirements and was determined to be the best qualified candidate for the position.

The Agency avers that Complainant did not demonstrate that his qualifications were so superior as to create an inference of discrimination or establish pretext based on age.

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. See 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 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 (Non-Selection)

To prevail in a disparate treatment claim, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must initially establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Construction Co. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 802 n. 13. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Should the Agency carry its burden, Complainant must then 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, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

Here, we find that Complainant has established a prima facie case of age discrimination. Complainant has demonstrated that: (1) he is a member of a protected class (over 40 years of age); (2) he applied and was at least minimally qualified for the position at issue; (3) he was not selected for the position; and (4) he was accorded treatment different from that given to

persons otherwise similarly situated who are not members of his protected group, or who are considerably younger than him. Obas v. Dep't of Jus., EEOC Appeal No. 01A)4389 (May 16, 2002); Williams v. Dep't of Educ., EEOC Request No. 05970561 (Aug. 6, 1998). As Complainant has established a prima facie case of age discrimination, the burden shifts to the Agency to show legitimate, nondiscriminatory reasons for its actions. Violet F. v. Dep't of the Navy, EEOC Appeal No. 0120162046 (Dec. 22, 2017); request for recon. den., EEOC Request No. 0520180202 1570 (May 8, 2018).

The Agency concedes that it did not interview Complainant because he was not in an SES or SES equivalent position at the time of his application. The probative record shows that the Selection Panel only considered candidates currently encumbered in SES or SES equivalent positions at the VHA at the time of their application. The Selection Panel maintained their decision was necessary due to the current medical environment, including experience with the COVID-19 pandemic developments and the PACT Act, as they were critical success factors for the position in question. The Selection Panel interviewed four candidates who currently held SES or SES equivalent positions in the VHA and referred three to the Selecting Official. The Selectee was selected based on his pandemic leadership experience. Therefore, we find that the Agency offered a nondiscriminatory legitimate reason for its selection decision.

Given that the Agency articulated legitimate, nondiscriminatory reasons for its actions, the Complainant now bears the burden to persuade the fact finder by a preponderance of the evidence that the agency's articulated reasons are pretextual and that the agency instead acted on the basis of a prohibited reason. Shapiro v. Soc. Sec. Admin., EEOC Request No. 05960403 (Dec. 6, 1996). Complainant argues that the Agency's reason for his non-selection was a result of pre-selection because the Selectee was Acting Network Director at the time of his selection. As part of his argument, he insists that the pre-selection resulted in a younger and less qualified candidate. Nevertheless, Complainant presents no evidence to show how the Agency's selection criteria was imbued with bias such that Complainant was not selected because of his age. Employment decisions based on friendship, favoritism or preselection are not prohibited so long as they are not premised on a prohibited basis. See Simonne J. v. Dep't of the Air Force, EEOC Appeal No. 2019004364 (Dec. 31, 2020).

We find no evidence that Complainant's protected class was a factor. At all times, the ultimate burden remains with Complainant to demonstrate by a preponderance of the evidence that the Agency's reasons were not the real reasons and that the Agency acted on the basis of discriminatory animus.

Complainant failed to carry this burden. While we have long held that a complainant can demonstrate pretext in a non-selection case by showing that his or her qualifications were plainly superior to Selectee, we find that Complainant failed to do so, as Complainant proffered no persuasive evidence of pretext aside from his self-assessment of his qualifications. Palmer N. v. Dep't of Def., EEOC Appeal No. 0120140070 (Mar. 18, 2016) (finding that a complainant cannot demonstrate pretext by simply referencing his or her qualifications). Nor did Complainant show that the Selectee did not demonstrate the leadership experience during the pandemic that the agency relied upon in making its selection.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final 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 4, 2025

Date