



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

[REDACTED]
Humberto P.,¹
Complainant,

v.

Gary Ashworth,
Acting Secretary,
Department of the Air Force,
Agency.

Appeal No. 2023004266

Agency No. 9S1L2200841F23

DECISION

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 July 4, 2023, final decision 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 decision.

ISSUE PRESENTED

The issue presented is whether the Agency properly determined that Complainant did not establish discrimination as alleged.

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 worked as a Transportation Specialist (GS-13) at the Agency's Customs and Agriculture Branch in Scott Air Force Base, Illinois.

On November 1, 2022, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (Asian), national origin (Filipino American), and color (Brown) when on August 8, 2022, the Deputy Director failed to select him for the position of Supervisory Transportation Specialist Branch Chief (GS-14).

The EEO investigation revealed that the Agency posted the vacancy announcement for a Supervisory Transportation Specialist on June 30, 2022. Report of Investigation (ROI) at 95-102. The Deputy Director explained that the resumes of the candidates were redacted and reviewed by a panel, and the scores were submitted to him as the selecting official to select candidates to interview. A separate panel conducted telephonic interviews, utilizing the same set of questions that were sent to the candidates 30 minutes prior to their interviews. The resume scores did not carry over to the interview portion. Three panelists independently evaluated the interviewees, and the Deputy Director chose the highest scorer based on the tabulated scores. The Selectee (White, Caucasian, United States) was consistently rated the highest by the three interview panelists, and he received a total of 101.5 points. Complainant ranked sixth, with an interview score of 67.5 points. When combining the resume and interview scores, the Selectee scored 18.5 points higher than Complainant. ROI at 541-4.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the ROI and notice of his right to request a hearing before an EEOC Administrative Judge. When Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f), the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

The Agency found that the Deputy Director chose the Selectee over Complainant based on his combined higher score for his resume and interview. The Deputy Director asserted that the Selectee's interview responses were complete, germane, and well-organized, while Complainant failed to answer questions or to fully answer them. He referenced his years of experience but failed to convey specific achievements or how they related to the position at issue.

The Agency determined that Complainant did not show pretext for discrimination. The Agency concluded that Complainant failed to prove that he was subjected to discrimination as alleged.

The instant appeal followed.

CONTENTIONS ON APPEAL

Complainant argues that he was discriminated against, as shown by his number one rating based on his resume; his many years of experience, with over 28 years of active duty and twelve (12) years as a Traffic Management Specialist; and his performance during his interview, which went "reasonably well." He accuses the management officials of "interview manipulation," and giving the Selectee favorable treatment, with the Selectee's unmatched high interview scores proving favoritism and bias. The interviewers were subjective, and Complainant was unable to compete fairly for the position.

The Agency opposes Complainant's appeal, stating that he offered no evidence of pretext or a discriminatory motive. He cannot establish that his qualifications are superior to the Selectee's. Further, an employer has more discretion in selecting management-level employees because the qualities needed to successfully perform the duties are not easily quantifiable. The Agency requests that the Commission affirm its final 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

Generally, claims of disparate treatment are examined under the analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Hochstadt v. Worcester Found. for Experimental Biology, Inc., 425 F. Supp. 318, 324 (D. Mass.), *aff'd*, 545 F.2d 222 (1st Cir. 1976). For 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. Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); McDonnell Douglas, 411 U.S. at 802 n.13. Once Complainant has established a prima facie case, 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). If the Agency is successful, the burden reverts back to Complainant to demonstrate by a preponderance of the evidence that the Agency's reason(s) for its action was a pretext for discrimination. At all times, Complainant retains the burden of persuasion, and it is his obligation to show by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); U.S. Postal Serv. v. Aikens, 460 U.S. 711, 715-716 (1983).

Complainants may establish a prima facie case of discrimination by providing evidence that: (1) they are a member of a protected class; (2) they suffered an adverse employment action; and (3) either that similarly situated individuals outside their protected class were treated differently, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination. McDonnell Douglas, 411 U.S. at 802 n.13; Reeves v. Sanderson Plumbing, 530 U.S. 133, 142 (2000); Bodett v. CoxCom, Inc., 366 F.3d 736, 743-44 (9th Cir.2004) (internal quotation marks omitted). It is undisputed that Complainant belongs to protected categories based on his race; color; and national origin, and the Selectee was outside of these protected classes. Complainant suffered an adverse employment action and was treated differently when he was not selected for the Supervisory Transportation Specialist position. As such, Complainant established a prima facie case of discrimination based on race, color, and national origin.

The Agency proffered legitimate, nondiscriminatory reasons for Complainant's non-selection. The Deputy Director explained the selection process that started with a review of the applicants' redacted resumes. The resume panelists scored the resumes and submitted their information to the Deputy Director to select candidates for interviews. A separate panel conducted telephonic interviews and scored them independently. The Deputy Director ultimately selected the highest-scoring candidate. ROI at 541-2.

The Deputy Director served as a panelist for the interview, in addition to a Supervisory Transportation Specialist and the Chief of the Commander's Action Group. All three panelists gave the Selectee the highest score for his interview. The Deputy Director recalled that the Selectee's responses provided sufficient context; an understanding of the challenges he faced; the actions he took to address those challenges; and the results of his actions. To compare, Complainant's answers were generally less complete or germane to the questions asked. For example, Complainant continually referenced his years of experience without offering specific skills; abilities; or lessons learned that applied to the position, and he could not link his answers to the day-to-day duties of the Transportation Branch lead. The Deputy Director disagreed that Complainant's years of experience made him the best-qualified candidate. Instead, the Selectee demonstrated that he was the best candidate based on his articulated understanding of the branch chief position and the supervisory requirements, with a clear vision of his leadership style and methods. ROI at 543-5.

The Supervisory Transportation Specialist stated that the Selectee's responses showed that he possessed both subject matter knowledge and leadership skills. At the start of their interviews, the candidates were asked about a common career theme and what they were known for, and the Selectee emphasized collaboration and the importance to lead even when one is not in an actual leadership role, while Complainant's response focused on his long career without addressing the questions of a theme or what he was known for. The Supervisory Transportation Specialist asserted that the Selectee outshone Complainant when asked why he was the best candidate when the Selectee replied with his experience in a variety of logistics discipline; leadership experience; knowledge of the overarching mission; and his problem-solving ability, and Complainant highlighted his current grade and step; his long time as a military and civilian transporter; and PhD work. The Supervisory Transportation Specialist felt that Complainant's response came across as "it's my turn" for this position, and he conveyed nothing about leading the branch; accomplishing the mission; or improving processes and procedures. ROI at 553-4, 560.

The Chief responded that Complainant's interview demonstrated a lack of strategic understanding of the logistics enterprise, and he was unable to provide recent examples. Complainant also did not relate his previous experience to the branch chief job. The Chief recommended the Selectee based on the quality of his answers that showed that he had a working knowledge of strategic-level transportation; managed change; and successfully led teams. The Selectee gave the most complete answer regarding a leadership philosophy with appropriate examples. The Chief confirmed that each panelist scored the candidates individually without influence from the other panel members. ROI at 564-6.

We find that Complainant has not shown that the proffered reasons were pretexts for discrimination. Pretext can be demonstrated by showing such weaknesses, inconsistencies, or contradictions in the Agency's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence. See Opare-Addo v. U.S. Postal Serv., EEOC Appeal No. 0120060802 (Nov. 20, 2007) (finding that the agency's explanations were confusing, contradictory, and lacking credibility, which were then successfully rebutted by the complainant), request for recon. denied, EEOC Request No. 0520080211 (May 30, 2008).

On appeal, Complainant only speculates of "interview manipulation" and the Selectee's favorable treatment, without any supporting evidence. While Complainant contends that the interview panelists' consistent high scores for the Selectee prove favoritism and bias, he has no evidence to disprove that their scores simply reflected the Selectee's better performance. The Supervisory Transportation Specialist corroborated that they each individually scored the interviewees and discussed them after the interview was complete, and that the Selectee was the unanimous choice due to his "clearly superior" interview performance. ROI at 555. The interview panelists' notes substantiate their respective explanations about the candidates' responses. ROI at 386-9, 400-1, 408-9, 414-15, 429-30, 437-8.

Complainant also argues that the interview panelists were too subjective. However, as noted by the Agency, an employer has greater discretion when filling management level or specialized positions. See Wrenn v. Gould, 808 F.2d 493, 502 (6th Cir. 1987). Complainant avers that the panel ignored his experience and technical knowledge, but he provided no proof that this was ignored. Rather, the interview criteria had eight (8) categories, and only two (2) were related to knowledge of policy and procedures. It is undisputed that the position at issue was supervisory, and three (3) interview categories were related to leadership. ROI at 298.

The Supervisory Transportation Specialist believed that Complainant was “weak” on leadership. ROI at 556. Further, the Deputy Director noted that the Selectee validated, through his resume and interview, his relevant logistics and transportation experience and expertise, in addition to his supervisory skills. ROI at 545-6.

In the absence of evidence of unlawful discrimination, the Commission will not second guess the Agency’s assessment of the candidates’ qualifications. Texas Dep’t of Community Affairs, 450 U.S. at 259. Complainant did not prove that the proffered reasons are not worthy of belief or that there was unlawful discrimination. His bare assertions that management officials discriminated against him are insufficient to prove pretext or that their actions were discriminatory.

In a non-selection case, pretext may also be found where the complainant’s qualifications are plainly superior to the qualifications of the selectee. See Wasser v. Dep’t of Labor, EEOC Request No. 05940058 (Nov. 2, 1995); Bauer v. Bailar, 647 F.2d 1037, 1048 (10th Cir. 1981). Complainant asserts that his superior qualifications are shown by his number one rating based on his resume; his many years of experience, with over 28 years of active duty and twelve (12) years as a Traffic Management Specialist; and his performance during his interview, which went “reasonably well.”

However, Complainant’s resume rating was factored into the final decision, and the Deputy Director explained that the resume and interview scores were totaled to determine the top-scoring candidate. Complainant’s combined scores placed him as the fourth ranking candidate. ROI at 543, 298. Regarding Complainant’s years of experience, the Commission has found that number of years of experience does not establish that an applicant’s qualifications are observably superior. See Kopkas v. U.S. Postal Serv., EEOC Appeal No. 0120112758 (Oct. 13, 2011); Macready v. Dep’t of Justice, EEOC Appeal No. 01991433 (Apr. 4, 2002). Further, Complainant’s subjective assessment of his own interview performance does not demonstrate pretext for discrimination. See Mitchell H. v. Dep’t of the Air Force, EEOC Appeal No. 2023002887 (Aug. 19, 2024); Palmer N. v. Dep’t of Defense, EEOC Appeal No. 01201400070 (Mar. 18, 2016).

We find that Complainant did not show that his qualifications were plainly superior to the Selectee’s such that the disparities in their qualifications were of such weight and significance that no reasonable person could have chosen the Selectee over Complainant. See Ash v. Tyson Foods, Inc., 126 S. Ct. 1195, 1197-1198 (2006).

Accordingly, we find that Complainant did not establish discrimination based on his race, color, or national origin when he was not selected for the position of Supervisory Transportation Specialist.

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

February 3, 2025

Date