



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

[REDACTED]  
Foster B.,<sup>1</sup>  
Complainant,

v.

Alejandro N. Mayorkas,  
Secretary,  
Department of Homeland Security  
(Federal Emergency Management Agency),  
Agency.

Appeal No. 2023004727

Agency No. HS-FEMA-00260-2023

DECISION

On August 21, 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 July 24, 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 issued a final decision (FAD) concluding that Complainant was not discriminated against regarding a non-selection for promotion based on his race (African American), color (black), and sex (male).

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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 Logistics Management Specialist (LMS) Cadre of On-Call Response/Recovery Employee (CORE), GS-0346-12 at the Agency's Response Division, Region IV facility in Atlanta, Georgia. Report of Investigation (ROI) at 69. Complainant is a black African-American male.

Complainant's first-line supervisor from August 2019 to February 11, 2023, (Supervisor 1A [African American, black, male]) was the Regional Logistics Chief. Complainant's first-line supervisor since February 2023, (Supervisor 1B [African American, black, male]) was the Acting Logistics Branch Chief. Complainant's second-line supervisor (Supervisor 2 [Caucasian, white, male]) was the Deputy Division Director. ROI at 70, 113, and 122.

Complainant initiated EEO contact on November 7, 2022. On December 2, 2022, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (African-American), sex (male), and color (Black) when, on or around November 10, 2022, management did not select Complainant for the Logistics Management Specialist position, Vacancy Announcement Number: FEMA-22-KG-573987-MP.

The Agency conducted an investigation into the complaint. The investigation revealed that Complainant recalled a May 2020, email in which a named Response Division Director (Response Director [Latino, male]) had allegedly stated that "we can talk about it [promotion to Complainant's position] later;" and that Complainant did not mind doing "both jobs." ROI at 70 and 73-4. On June 1, 2021, Complainant sent Supervisor 1A an email requesting the CORE equivalent of a desk audit for his position as a LMS, GS-12. Complainant pointed out in his request that the equivalent classification for a Logistics Section Chief Type 3 is a Core Type 13. Complainant also stated that public acknowledgement was made by Supervisor 2 and Response Director who was present that the role Complainant was fulfilling should be a CORE 13, not 12. According to Complainant, at that time, "we" walked away from the meeting expecting the 13 to get approved, but it was not. ROI at 92.

Complainant believed that he was entitled to a promotion based on the amount of work he produced, having deployed twice as many times as others. ROI at 32. In Complainant's email, Complainant insinuated that his chain of command, including Supervisor 2, supported his belief.

Supervisor 1A forwarded the email to a named Human Resources contact (Human Resources contact). In an email on June 2, 2021, Supervisor 2 expressed his concerns to Supervisor 1A about Complainant's lack of candor. According to Supervisor 2, Complainant's characterization of the May 2020 meeting regarding Complainant's desired promotion was inaccurate because management had not expressed support for Complainant's promotion, which demonstrated Complainant's failure to adhere to FEMA's core values. ROI at 97-9.

From July 11, 2022, to July 15, 2022, FEMA advertised a LMS, GS-0346-13 position, under VAN: FEMA-22-KG-573987-MP, for one vacancy in Atlanta, Georgia. ROI at 182-86. In July 2022, Complainant applied for the LMS position through USA Jobs. ROI at 71-2. On August 9, 2022, the Agency issued a Subject Matter Expert (SME) Review List which had 82 candidates, including Complainant. ROI at 197-207. Effective September 19, 2022, the Competitive Merit Promotion Certificate of Eligibles ("CERT") list for the LMS, GS-0346-13 position, under VAN FEMA-22-KG-573987- MP showed 24 candidates, including Complainant. ROI at 188-91.

Supervisor 2, a Supervisory Grants Management Specialist (Supervisory Grants Management Specialist [African American, black, female]), and the Supervisory Facility Operations Specialist (Supervisory Facility Operations Specialist [Caucasian, white, male]) served on the interview panel. ROI at 132, 161, and 439. Response Director served as the hiring official. ROI at 209. The Deputy Regional Administrator (Deputy Regional Administrator [Caucasian, white, male]) was the selecting official. ROI at 72, 107-08, 132, 161, and 209.

The interview panel selected five candidates, including Complainant, for interviews. The fifth candidate declined an interview. On October 13, 2023, the panel interviewed Complainant for the LMS position along with three other candidates. Complainant's overall score was 94 out of a maximum of 135; another candidate (Selectee [white, white, male]) had an overall score of 117. Each of the three interview panelists scored Selectee the highest based on their interview scores. ROI at 372. On October 14, 2022, Response Director sent a memorandum (memo) to Deputy Regional Administrator, recommending Selectee for the position. Response Director recommended Complainant as the alternate Selectee. ROI at 73, 209-10, and 372.

On December 28, 2022, the Agency notified Complainant that he was not selected for the LMS, GS-0346-13 position. ROI at 211. Complainant alleged that his non-selection for the position was based on discrimination due to Supervisor 2 and Response Director's decision to remove Supervisor 1A, an African American like Complainant, from the interview panel. ROI at 101-03.

Both Supervisor 2 and Response Director attributed their decision to remove Supervisor 1A from the interview panel to an alleged complaint from an employee regarding a perception that the Logistics Branch hiring practices were not impartial based on inappropriate influence of social relationships. Consequently, management changed the interview panel to include Supervisory Grants Management Specialist and Supervisory Facility Operations Specialist, supervisory employees outside of the Logistics Branch as panelists. ROI at 102 and 108. Complainant also asserted that Supervisors 1A and 1B were removed from the panel in response to a verbal anonymous tip about favoritism during the hiring process. Complainant stated that they shared the anonymous tip, which management allegedly failed to investigate, with him. ROI at 72.

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). In accordance with Complainant's request, on July 24, 2023, the Agency issued a final decision (FAD) pursuant to 29 C.F.R. § 1614.110(b). The Agency concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

#### CONTENTIONS ON APPEAL

In his appeal statement, among other things, Complainant contests the Agency's final decision. He alleges that management, including Supervisor 2 and Response Director, provided contradictory statements; and that Supervisor 1A's removal from the interview panel was significant because Supervisor 1A and Complainant are both African American. Complainant also alleges that Supervisor 2's June 2021, email concerning his integrity "explicitly stated that he would not consider hiring [Complainant] for" a promotion. Complainant's Appeal Statement at 2. Complainant highlights his logistics supervisory experience and relevant education, asserting that his qualifications for the LMS position were superior to those of Selectee. Complainant's Appeal Statement at 3.

In response, the Agency reiterates its stated explanations for Complainant's non-selection, requesting that the Commission affirm its FAD.

### 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 based on race, color, and sex*

The Commission has adopted the burden-shifting framework for analyzing claims of discrimination outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). To establish a prima facie case of disparate treatment, a complainant must show that: (1) they are a member of a protected class; (2) they were subjected to an adverse employment action concerning a term, condition, or privilege of employment; and (3) they were treated differently than similarly situated employees outside their protected class, or there was some other evidentiary link between membership in the protected class and the adverse employment action. See Nanette T. v. U.S. Postal Serv., EEOC Appeal No. 0120180164 (March 20, 2019); McCreary v. Dep't of Def., EEOC Appeal No. 0120070257 (Apr. 14, 2008); Saenz v. Dep't of the Navy, EEOC Request No. 05950927 (Jan. 9, 1998).

Once Complainant has established a prima facie case, the burden of production 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 her obligation to show by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Center v. Hicks. 509 U.S. 502 (1993).

For the following reasons, we find that Complainant failed to establish a prima facie case of discrimination based on race, color, and sex.

Complainant established a prima facie case of race, color, and sex discrimination to the extent that he is a Black African-American male. However, Complainant did not identify any other similarly situated employees outside of his protected classes who were treated more favorably. Therefore, Complainant has not established a prima facie case of disparate treatment based on his protected bases. The Agency has also provided legitimate nondiscriminatory reasons for Complainant's non-selection; and we find no persuasive proof of pretext.

Members of the interview panel for the LMS position stated that Selectee was chosen over Complainant because Selectee had more logistics experience and was more qualified for the position. According to Response Director, he received the panel's recommended list of candidates interviewed, the candidates' scores in ranking order, the resumes and reference checks. ROI at 5. Response Director explained that members of the interview panel, who were selected based on technical experience and experience in the Agency, unanimously selected Selectee based on his logistics experience. and Selectee had an overall score of 117, 23 points higher than Complainant. The interview score summary sheet supports these explanations; and reflects the interview panel's statement that Selectee demonstrated the knowledge and relevant experience required for the position. ROI at 209 and 372. See ROI at 14 and 169-70 for statements provided by two witnesses, one of whom was a Supervisory Human Resources Program Specialist, reflecting that FEMA followed the established process for hiring and selection; and that they did not believe race, color, or sex were factors in Complainant's non-selection.

We next turn 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 (date/year) (citing January B. v. Dep't of the Navy, EEOC Appeal No. 0120142872 (Dec.

18, 2015) (Citing Mellissa F. v. U.S. Postal Serv., EEOC Appeal No. 0120141697 (Nov. 12, 2015)).

Here, Complainant failed to show pretext because he failed to establish a link between the challenged non-selection and any of his protected bases. Complainant contests the hiring officials' statements, alleging on appeal that management provided contradictory explanations for removing Supervisor 1A (and Supervisor 1B) from the interview panel. Complainant believed that he would have been selected for the position at issue had Supervisor 1A, who shared his protected characteristics, been on the interview panel.

However, Complainant did not dispute management's assertions that Supervisor 1A's removal from the interview panel was due to an alleged complaint regarding a perception that the Logistics Branch hiring practices were not impartial based on inappropriate influence. Rather, Complainant himself asserted that Supervisors 1A and 1B were removed from the panel in response to a verbal anonymous tip, which they shared with Complainant, about favoritism during the hiring process. ROI at 72. Moreover, along with Supervisor 2, White male, and Response Director, Latino male, a member of the interview panel was a Black African-American female. This supports a conclusion that management's motive was to create a diverse hiring team and to ensure integrity of the selection process.

Complainant in his appeal statement alleged that his qualifications were superior to those of Selectee, highlighting his logistics supervisory experience and relevant education. We have held that in a non-selection case, the complainant may establish pretext by showing that his or her qualifications were plainly superior to those of the selectee. Becki P. v. Kerry, Appeal No. 0120152856 (Mar. 24, 2016). Having more years of experience than the selectee does not necessarily make an individual more qualified to meet an agency's needs. Kandi M. v. Esper, Appeal No. 2020001785 (Aug. 10, 2020) (citing Collins v. Snow, Request No. 05A41248 (Oct. 5, 2004)).

Here, Complainant presented no evidence to dispute record evidence, and managements' assertions, reflecting that overall, Selectee was more qualified because Selectee had more experience in logistics and has had a similar position in other federal agencies. Selectee had also completed two thirds of a master's degree in Logistics Management, while Complainant had a Bachelor of Science degree in the liberal arts. Moreover, Selectee has substantial logistics experience in the federal government cited in his resume, including responsibility for \$23 million dollars of inventory including 8.8 million in stock items. ROI at 109.

Compare ROI at 380-83 - Complainant's Resume with ROI at 385-400 - Selectee's resume. Compare also ROI at 366-71 - Complainant's interview notes with ROI at 358-62 - Selectee's interview notes.

Also, regarding Complainant's arguments about his number of years of experience, the Commission has held that agencies may select candidates with fewer years of experience if they believe that such candidates are best qualified to meet the needs of the organization. Complainant v. Dept. of Justice, EEOC Appeal No. 0120131151 (Feb. 25, 2015). They may even preselect a candidate as long as the preselection is not premised upon a prohibited basis. Complainant v. Dept. of Homeland Sec., EEOC Appeal No. 0120132858 (Mar. 9, 2015).

Moreover, the record does not support Complainant's appeal contention that Supervisor 2's email meant that he did not want to promote Complainant. Instead, Supervisor 2's email, which is included in the record, demonstrates that Supervisor 2 had concerns about Complainant's conduct because Complainant had mischaracterized what was said at a May 2020 meeting. ROI at 97-9.

Importantly, the hiring panel recommended Complainant as the alternate candidate so that he could have been selected if Selectee had declined the position. This demonstrates that management was not opposed to promoting Complainant; nor were they motivated by discriminatory animus against him.

Complainant also failed to identify any similarly situated candidates who received more favorable treatment under similar circumstances. See ROI at 157 reflecting that Complainant's coworker (White, White, male) was also not selected for the position.

### 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

December 9, 2024

Date