



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

[REDACTED]  
Earl F.,<sup>1</sup>  
Complainant,

v.

Denis R. McDonough,  
Secretary,  
Department of Veterans Affairs,  
Agency.

Appeal No. 2023004920

Agency No. 200P-663-2023-150013

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 August 31, 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 was not subjected to reprisal as alleged.

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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 Chief of Logistics (GS-14) at the Agency's Puget Sound Health Care System in Seattle, Washington.

On February 14, 2023, Complainant filed an EEO complaint alleging that the Agency discriminated against him in reprisal for prior protected EEO activity when Complainant learned in December 2022 that he was deprived of the opportunity to compete for the position of Health Systems Administrative Deputy Director (GS-15), announced under vacancy number CBSV-11486006-AMR.

The EEO investigation revealed that the Agency posted the vacancy at issue to USAJobs on May 5, 2022, as a temporary one-year appointment with an option to extend or make permanent without further competition. Report of Investigation (ROI) at 460-9. Five (5) candidates were deemed eligible. A panel reviewed their resumes, and the top three (3) candidates were interviewed prior to the selection. ROI at 406. Complainant learned in December 2022 that the position was advertised in May 2022. ROI at 49.

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. In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The Agency found that Complainant could not demonstrate that he was subjected to a materially adverse action. There was no evidence that any individual discouraged Complainant from applying; utilized an informal or secretive selection process; or took other affirmative steps to harm his candidacy. The Agency concluded that Complainant failed to prove that the Agency subjected him to reprisal as alleged.

The instant appeal followed.

### CONTENTIONS ON APPEAL

On appeal, Complainant argues that the Agency typically takes months to complete a final decision, but one was issued within just ten (10) days, without a supplemental investigation.<sup>2</sup>

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<sup>2</sup> Complainant provided a rebuttal and supporting documents, and he has not shown any insufficiencies in the record to warrant a supplemental

The final decision found that all that was required was a posting to USAJobs. However, Complainant disagrees, and he poses hypothetical questions such as asking about the Selecting Official's obligation to mentor him and inform him of opportunities, and he accuses her of breaking standard operating procedures when she failed to send an email. Complainant further asserts that the Selecting Official "arranged this situation" to deny him an opportunity to compete.

The Agency opposes Complainant's appeal. It highlights that the vacancy was posted onto USAJobs, which is a publicly available website, and is anything but secretive. Complainant did not do his due diligence in monitoring open positions. In addition, there is no evidence that Complainant was discouraged from applying or that anyone took affirmative steps to harm his candidacy. While Complainant asserts that the Agency had an affirmative duty to notify him of the vacancy, his documents did not support this proposition because none of the provided emails were sent by the Selecting Official. The Agency contends that Complainant made assumptions about how this position would be filled, but he was wrong, and the Agency followed proper procedure in advertising and filling this position. The Agency requests that the Commission uphold 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").

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investigation. To the extent that he complains of the Agency's process when it issued the final decision, the proper forum to raise such allegations is with the Agency official responsible for complaint processing and/or processed as part of the original complaint, rather than on appeal. See Samuel C. v. Dep't of Justice, EEOC Appeal No. 0120182823 (Nov. 15, 2018); Denis M. v. U.S. Postal Serv., EEOC Appeal No. 0120181126 (May 2, 2018).

## ANALYSIS

### *Non-Selection*

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 reprisal by showing that: (1) they engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, they were subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000).

A claim of discriminatory non-selection typically fails to state a claim when the complainant failed to apply for the position. See Owen v. Social Security Admin., EEOC Request No. 05950865 (Dec. 11, 1997). A complainant is only aggrieved by such claims where he proves that the agency discouraged him from applying or that the application process was secretive. See Ozinga v. Dep't of Veterans Affairs, EEOC Request No. 05910416 (May 13, 1991). It is undisputed that Complainant did not apply for the Health Systems Administrative Deputy Director position.

Complainant accused the Selecting Official of reprisal when she failed to send a message to employees about the vacancy. The Selecting Official explained that the position was posted on USAJobs, and she was unaware of any requirement that she needed to notify all staff of any open positions. The Selecting Official added that it was an individual's responsibility to look for open positions on USAJobs, and that it is a common practice to request automatic notifications. She denied depriving Complainant of an opportunity to apply for this position. ROI at 407.

The Commission previously found no claim when an agency did not email the vacancy announcement to the complainant but posted it on USAJobs for all who may be interested to see in Nakesha D. v. Department of the Air Force, EEOC Appeal Number 2023003479 (November 22, 2023), request for reconsideration denied, EEOC Request Number 2024001488 (June 3, 2024). See also Cornell S. v. U.S. Postal Serv., EEOC Appeal No. 2024002450 (Jul. 2, 2024) (finding that the complainant's argument that he failed to see the vacancy announcement because he rarely checked was insufficient to rebut the general rule that a complainant who fails to apply cannot make a claim of discriminatory non-selection); Oda H. v. Dep't of Agriculture, EEOC Appeal No. 0120142045 (Jun. 23, 2016) (no secretive process that included a posting on USAJobs). Complainant has not shown that the Selecting Official discouraged him from applying or that the application process was secretive, and he was not subjected to adverse treatment by the Agency.

Even crediting, for the sake of argument, that Complainant could establish a prima facie case of reprisal, the Selecting Official provided a legitimate, nondiscriminatory reason that she was unaware of a requirement to notify employees of vacant positions. We are not persuaded by Complainant's argument that the Selecting Official retaliated against him because she did not follow the Agency's standard procedure to notify employees because he has not shown that the proffered reason was pretext 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).

As noted by the Agency, Complainant's examples show that previous emails about vacancies were not sent by the Selecting Official. ROI at 60-2, 140-62, 203-8, 284-8, 297-311, 318-38. This is consistent with the Selecting Official's explanation that she was unaware of a requirement to notify all staff of any open positions. Even if this was the Agency's standard practice, Complainant only offers speculation, without evidence, that the Selecting Official's action was intentional to deprive him of an opportunity to compete, rather than a mistaken belief that there was no such policy. A mistake, without more, does not establish discriminatory animus. See Calvin D. v. Dep't of the Army, EEOC Appeal No. 0120171662 (Sept. 25, 2018); Velda F. v. Dep't of the Interior, EEOC Appeal No. 0120122684 (Jul. 10, 2018). Further, an Assistant Human Resources Officer informed Complainant on December 13, 2022, that announcing job opportunities was not a requirement. ROI at 84.

Accordingly, we find that Complainant did not establish reprisal for his claim that he was deprived of the opportunity to compete for the Health Systems Administrative Deputy Director 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

January 14, 2025

Date