



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Randee D.,¹
Complainant,

v.

Marcia L. Fudge,
Secretary,
Department of Housing and Urban Development,
Agency.

Appeal No. 2023005279

Hearing No. 570-2022-00845X

Agency No. HUD-00080-2021

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 September 25, 2023, final order concerning her 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 following reasons, the Commission AFFIRMS the Agency's final order.

ISSUES PRESENTED

- (1) Whether the EEOC Administrative Judge's grant of summary judgment in favor of the Agency was appropriate, or whether genuine disputes of material fact exist that require a hearing.

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.

- (2) Whether the Agency's final order properly found that Complainant was not subjected to discrimination on the basis of age (56) when she was not selected for a Field Office Director position.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Senior Environmental Officer, GS-14, at the Agency's Los Angeles Field Office, Office of Community Planning and Development, in Los Angeles, California.

On October 23, 2021, Complainant filed an EEO complaint alleging that the Agency discriminated against her based on national origin (Hispanic), sex (sexual orientation), and age (56) when, on August 12, 2021, she became aware that she was not selected for the position of Field Office Director, Las Vegas Field Office, advertised under Vacancy Announcement #21-HUD-1054.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). Complainant requested a hearing. Before the AJ, Complainant indicated that she no longer wished to allege national origin or sex as bases of discrimination, leaving age as the only alleged basis of discrimination. After both parties submitted motions for a decision without a hearing, the AJ issued a decision by summary judgment in favor of the Agency. The Agency subsequently issued a final order fully implementing the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged. The instant appeal followed.

Complainant applied for the position of Las Vegas Field Office Director in May 2021. This position was within the Office of Field Policy and Management (FPM), a different division of the Agency than Complainant's current position. The AJ found that Field Office Directors serve as the highest-level career positions in FPM for each Agency Field Office. Field Office Directors also serve as the Agency Secretary's representative in the particular jurisdiction in which they are located and provide strategic leadership in implementing the Secretary's objectives in the local community, partnering with local stakeholders, and managing/implementing Agency programs. The Las Vegas Field Office's main priorities included addressing homelessness and expanding affordable housing opportunities.

In filling the vacancy at issue, the Agency relied on the Bureau of Fiscal Services (BFS)² to perform certain Human Resources functions. BFS reviewed the applications for the position and determined which applicants were qualified. BFS created several certificates of eligible applicants, grouped by type. The three lists were: external candidates with veterans' preference; qualified federal employees who had not yet achieved the GS-15 level (referred to in the record as the Competitive Merit Promotion list); and qualified federal employees who had achieved the GS-15 level (referred to as the Non-Competitive Merit Promotion list). For the first two lists, BFS provided numerical "Final Ratings" for the candidates, but the third list did not contain such rating scores. The list of external candidates (with veterans' preference) all received a "Category Rating" of "Best Qualified" from BFS, though the other lists did not contain any Category Ratings. On Complainant's list (Competitive Merit Promotion), she received a Final Rating score of 100. ROI at 279. The person ultimately chosen for the position (Selectee) was on the external candidate list and so was categorized as "Best Qualified" and received a Final Rating of 88. ROI at 170. The person first selected for the position, who declined the offer, was on the Non-Competitive Merit Promotion list and did not receive a Final Rating score or a Category Rating from BFS. ROI at 403.

These certificate lists were sent to the selecting official (SO), who was then the Las Vegas Field Office Director during hiring and later became the Phoenix Field Office Director. SO created a panel with two other Field Office Directors (from De Moines and Los Angeles) to evaluate the candidates. Because the panelists felt that resumes alone may not provide the full picture of each candidate, the panel elected to interview all candidates referred to them by BFS (eight in total). The panelists asked all candidates the same 12 questions in the same order by the same panelist. Each candidate was then scored from one to ten by each panelist for each question. The panelists' scores were then averaged and ranked.

Complainant's interview score was the fifth highest out of the eight candidates. The panel originally selected the candidate who had received the highest interview score, and the record indicated that he was at least five years older than Complainant, but he declined the position. The panel then considered the two next highest-scoring applicants. The panel chose Selectee due to her experience in leading homelessness programs, her past collaborations with external stakeholders in Nevada's local housing community, and her experience managing internal organizational operations and staff development.

² BFS is part of the Department of the Treasury.

Specifically, Selectee had about 11 years of experience leading homeless programs, which was a priority for the Las Vegas Field Office. After leaving the military, Selectee worked as a Shelter Plus Care Case Manager and a Supportive Living Program Coordinator in New York, where she acted as a case manager for homeless families. In that role she engaged with other organizations that received Agency services. She then spent seven years as a Transitional Housing Coordinator in Las Vegas managing a veteran homeless campus and supervising staff there. In that role she coordinated and managed complex social support services and coordinated with other organizations to address the needs of the homeless, in particular housing and mental health. She also oversaw her organization's outreach, budget, and operations. In that job, Selectee became well-established in the Nevada community, where she developed relationships with many community organizations and Agency stakeholders.

In comparison, Complainant's experience within the Agency involved environmental regulation and engineering, which was not an Agency priority for the Las Vegas Field Office. She did not have the same level of experience as Selectee in managing the internal operations of an organization or collaborating with external partners, and she did not have similar connections to the Nevada community. Complainant had some experience as a community builder in Los Angeles from 1999 until 2002, but since then she was responsible for environmental oversight and providing guidance to HUD offices and grant recipients about environmental issues.

The AJ found that Complainant failed to show by preponderant evidence that the Agency's decision to select Selectee for the position at issue was pretext for age discrimination. The AJ concluded that the Agency's legitimate, nondiscriminatory reason for not selecting Complainant was supported by the record. The AJ found that Complainant was not the plainly superior candidate, as she did not have the same experience managing the internal operations of an organization or collaborating with external stakeholders, especially in the Nevada community, as Selectee did. While Complainant argued before the AJ that BFS scored her resume higher than Selectee's, the AJ determined that the Agency was under no obligation to take BFS's scoring of candidates into account.

In addressing Complainant's argument that SO evidenced age bias in her affidavit by saying that Complainant's experience as a community builder from 1999 to 2002 was "not current," ROI at 121, the AJ found that SO's observation did not express a sentiment that Complainant was too old to be a viable candidate. In so finding, the AJ found significant that the candidate originally selected for the position was older than Complainant.

CONTENTIONS ON APPEAL

On appeal, Complainant argues that the Agency did not follow its own Merit Staffing Policy Handbook and that this is evidence of pretext. Complainant also argues that the interview panel misapplied points and made errors when adding up scores. Complainant also cites to a prior Commission decision involving a different complainant, Aracely J. v. Department of Housing & Urban Development, EEOC Appeal No. 2020000803 (Mar. 12, 2020), in which the Commission affirmed an AJ's finding of race discrimination and reprisal at the Las Vegas Field Office. Complainant references a memorandum from the Agency's FPM Director to the Agency's EEO Division Director in which he stated that the facts found in Aracely J. were "an organizational failure." Complainant believes that the responsible management officials in that case "inject[ed] themselves in the selection process" in her case. Complainant also argues that the AJ should have let her obtain discovery or depose staff from BFS.

The Agency on appeal argues that its selection in this case was not based on age discrimination because the original candidate selected was older than Complainant and Selectee was more highly qualified due to her leadership in homelessness issues, experience managing internal operations, and her Nevada-based partnerships. The Agency also argues that Complainant was less qualified than Selectee because she lacked leadership experience in housing issues and had limited experience partnering with local entities in Nevada. The Agency admits that the panel made some errors in tabulating the candidates' interview scores, but that these errors had no impact on the relative ranking of the candidates' scores.

In responding to Complainant's arguments on appeal, the Agency argues that it has updated its hiring process since the issuance of the Merit Staffing Policy Handbook in the form of Executive Orders, regulatory updates, and the Agency's transition to outsourcing parts of the hiring process to BFS. The Agency argues that Complainant has not shown the Agency did not follow its legitimate hiring procedures but that, even if she had, that mere fact alone does not necessarily suggest discriminatory intent.

The Agency also contends that the AJ properly denied Complainant's motion to compel regarding discovery of BFS staff, arguing that such discovery was immaterial to her claim. As to Complainant's citation to Aracely J., the Agency argues that the case is irrelevant to the instant matter. The Agency also contends that the Agency took Aracely J. seriously and implemented changes in the hiring process that were responsive to the findings in that case. The Agency also claims that no management officials involved in Aracely J. were involved in the selection process for this case.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, 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 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").

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*).

ANALYSIS

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

To prevail in a disparate treatment claim such as this, 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 Complainant was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. 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.

Complainant may establish a prima facie case in a nonselection claim by showing that: (1) Complainant is a member of a protected class; (2) Complainant applied for and was qualified for the position; (3) Complainant was not selected despite Complainant's qualifications; and (4) someone outside Complainant's protected class was placed in the position. Williams v. Dep't of Educ., EEOC Request No. 05970561 (Aug. 6, 1998).

The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981). Once the Agency has met its burden, Complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the Agency's explanation was pretextual. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993). Complainant can do this by showing that the proffered explanations were unworthy of credence or that a discriminatory reason more likely motivated the Agency. Burdine, 450 U.S. at 256. A showing that the employer's articulated reasons were not credible permits, but does not compel, a finding of discrimination. Hicks, 509 U.S. at 511.

Here, neither party disputes that Complainant can establish a prima facie case. We find that the Agency articulated legitimate, nondiscriminatory reasons for Complainant's nonselection.

Complainant's interview score (as an average of the scores of each panelist) was below the scores of the first person selected and the ultimate Selectee. See ROI at 477-78. Though Complainant is correct that the Agency's tabulation of the panelists' scores contained addition errors, review of the raw scores show that Complainant ranked well below the two people chosen for the position. Upon review of the resumes of Complainant and Selectee, it is clear that Selectee had more experience working in the Las Vegas area in the field of housing and homelessness compared to Complainant's experience in environmental issues within California. Given the priorities of the Las Vegas Field Office, including a focus on homelessness and engaging with external stakeholders in the Nevada community, the Agency chose Selectee over Complainant.

We find that Complainant failed to establish that the Agency's legitimate, nondiscriminatory reasons for her nonselection are pretext for age discrimination. We also note, as did the AJ, that the Agency originally selected someone who was slightly older than Complainant for the position, as evidenced by his high school graduation year in his resume, though he declined the offer. Complainant has not disputed this fact.

As for Complainant's arguments on appeal, they are insufficient to show that genuine disputes of fact exist that require a hearing. Complainant has not shown that the Agency ignored its own hiring policy in the selection process, regardless of whether it followed the letter of the Merit Staffing Policy Handbook that was issued in April 2004. In any event, even if the Agency did not follow its own internal policies, Complainant has not specified any record evidence to show that the selection process as it was carried out was unequally applied or otherwise tainted by irregularities that could indicate bias. See Michale S. v. Soc. Sec. Admin., EEOC Appeal No. 2023003911 (June 12, 2024) ("The focus of a pretext inquiry is whether the Agency's actions were motivated by discriminatory animus, and the pretext inquiry is not concerned with bad judgment, impeccability, . . . or mistake.").

We also find that the AJ's denial of Complainant's motion to compel discovery related to BFS was not an abuse of discretion. We find the record was adequately developed for the AJ to issue a decision without a hearing. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003). On appeal, Complainant has not specified how or why obtaining discovery or deposing staff from BFS would affect her claim, especially given that the way the candidates were scored/categorized by BFS appeared to depend on which certificate of eligibles the person was on, and that the selection panel did not rely on BFS's scores or categorization in making its selection.

Complainant's reliance on Aracely J. v. Department of Housing & Urban Development, EEOC Appeal No. 2020000803 (Mar. 12, 2020) is also misplaced. That case involved a different complainant, different management officials, and the events at issue occurred almost ten years prior to Complainant's nonselection. While Complainant believes the officials at issue in Aracely J. tried to "inject themselves" into the selection process, there is no evidence that that is the case, and in fact the record indicates that an involved official recused himself from the hiring process in the instant matter. That the finding of discrimination in Aracely J. occurred at the Las Vegas Field Office does not create a genuine dispute of material fact, and Complainant's evidence of the FPM Director's memorandum in fact suggests that the Agency attempted to resolve the issues that had led to the finding of discrimination in that case.

The Commission has held that agencies generally have broad discretion to set policies and carry out personnel decisions and should not be second-guessed by the reviewing authority absent evidence of unlawful motivation. Vanek v. Dep't of the Treasury, EEOC Request No. 05940906 (Jan. 16, 1997); Shapiro v. Soc. Sec. Admin., EEOC Request No. 05960403 (Dec. 6, 1996). Upon review, we find Complainant failed to establish that the Agency's articulated reasons were pretextual. Complainant failed to rebut these reasons or offer any evidence that could establish discriminatory or retaliatory animus.

CONCLUSION

Accordingly, the Agency's final order finding no discrimination is AFFIRMED.

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 17, 2024

Date