



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Jasper C.,¹
Complainant,

v.

Douglas J. Burgum,
Secretary,
Department of the Interior
(Geological Survey),
Agency.

Appeal Nos. 2023004921
2024002375

Hearing Nos. 570-2023-00341X
570-2023-01319X

Agency Nos. DOI-APC-USGS-22-0290
DOI-APC-USGS-23-0143

DECISION

Complainant filed two appeals,² pursuant to 29 C.F.R. § 1614.403(a), from the Agency's August 3, 2023, and February 14, 2024, final orders concerning his equal employment opportunity (EEO) complaints alleging employment discrimination in violation of Title VII of the Civil Rights Act of

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 Complainant requests that the Commission join his two appeals. The Commission may, in its discretion, consolidate two or more complaints of discrimination filed by the same complainant. See 29 C.F.R. § 1614.606. Accordingly, the Commission exercises its discretion to grant Complainant's request and consolidate the captioned cases.

1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., and 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 orders.

At the time of events giving rise to this complaint, Complainant worked as a Manager, EEO Complaints and Compliance (GS-14) at the National Park Service's Office of Equal Opportunities Programs in Washington, D.C.

DOI-APC-USGS-22-0290 (Complaint 1)

On August 8, 2022, Complainant filed an EEO complaint alleging discrimination and harassment on the bases of race (Asian), national origin (India), religion (Sikh), and age (YOB: 1953), and in reprisal for prior protected EEO activity when on March 29, 2022, he was informed that he was not selected for the position of Supervisory EEO Specialist (GS-14), under Vacancy Announcement USGSRES-21-11215781-ST-1B.

The selectee ("Selectee 1") later declined the position, and the Agency reannounced the position. Report of Investigation (ROI) 1 at 233, 93.

DOI-APC-USGS-23-0143 (Complaint 2)

On May 9, 2023, Complainant filed another EEO complaint alleging discrimination on the bases of sex (male), race, national origin, religion, and age, and in reprisal for prior protected EEO activity when on January 18, 2023, he was not selected for the position of Supervisory EEO Specialist (GS-14), under Vacancy Announcement USGS-RES-22-11556349-ST-DG. The Agency dismissed the harassment allegation when the Agency did not respond to Complainant's emails regarding the status of his selection, sent on January 5, 12, and 17, 2023, until February 1, 2023, for failure to state a claim.³ ROI 2 at 58.

³ The Commission has the discretion to review only those issues specifically raised in an appeal. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chap. 9, § IV.A.3 (Aug. 5, 2015). On appeal, Complainant did not contest the Agency's dismissal; as such, we will not address it in the instant decision.

At the conclusion of the investigations, the Agency provided Complainant with copies of the ROIs and notices of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested hearings.

Over Complainant's objections, the AJ assigned to Complaint 1 granted the Agency's motion and issued a decision without a hearing on July 20, 2023. The AJ found that the Selecting Official chose Selectee 1 based on the recommendation from two interviewers. They explained that Selectee 1's answers during the interview were targeted towards the questions, and that she expressed a desire to work toward process improvement and employee engagement that the office needed at the time. The AJ found that Complainant did not set forth evidence to show that he was demonstrably qualified or to raise a material issue casting doubt on the Agency's reasons for his non-selection. The AJ concluded by granting the Agency's motion for summary judgment.

The AJ for Complaint 2 issued a Notice of Proposed Summary Judgment, and Complainant failed to file a response. The AJ subsequently issued a Decision Without a Hearing and Order Entering Judgment on January 24, 2024, in the Agency's favor. In this case, the Agency made two selections. The initial selectee ("Selectee 2") withdrew from consideration while the other selectee ("Selectee 3") accepted another position. The AJ highlighted that none of the interviewers were aware of any of Complainant's protected categories, and he did not establish a prima facie case of discrimination. The panelists recommended the two selectees based on their superior qualifications. Complainant did not claim that he was better qualified than either Selectee 2 or Selectee 3, but he contended that the Agency's decisions were uninformed. However, the AJ determined that Complainant only offered bare assertions and his unsupported, subjective beliefs.

The Agency subsequently issued final orders fully implementing the AJ's findings that Complainant failed to prove that the Agency subjected him to discrimination as alleged. The instant appeals followed.

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. (as revised, August 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*).

Upon review, we find the records in the present cases were fully developed. To the extent that Complainant argues that the records are missing documents, the AJ for Complaint 1 noted that the documents he requested regarding Selectee 1, such as her SF-50, were not material. For Complaint 2, Complainant did not respond to the AJ's Notice of Proposed Summary Judgment and failed to raise any issues regarding purported missing documents. Complainant asserts on appeal that the record is devoid of documents such as the candidates' rating scores. However, this is not material because Complainant did not establish a *prima facie* case of discrimination on any basis for Complaint 2. He blames the Selecting Official, but the evidence shows that the interviewers unanimously did not recommend Complainant for selection. ROI 2 at 309, 318, 330. They were generally unaware of his protected categories, aside from assuming that he is male, but all confirmed that there was no discussion of any protected bases when making their recommendations. ROI 2 at 306-7, 309-10, 316-17, 319-20, 327-31. Complainant does not challenge the interviewers' lack of awareness of his protected bases, and he did not submit any other evidence to raise an inference of discrimination to establish a *prima facie* case of discrimination.

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 he 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.

On appeal, Complainant notes that the Agency posted the same vacancy twice but failed to select him. He asserts that the Selecting Official disregarded policy to not name Complainant as a secondary selectee. However, the policy provided by Complainant only stated that selecting officials are "encouraged to indicate secondary selectees."

Complainant Appeal Brief 1 at 13, Complainant Appeal Brief 2 at 10. There is no indication that this encouragement was a mandated policy that the Selecting Official failed to follow. Further, the Agency identified a secondary selectee for Complaint 2, and Complainant's argument is unavailing for this claim.

While Complainant contends that he was better qualified than Selectee 1, he did not demonstrate that his qualifications were plainly superior to hers such that the disparities in their qualifications were of such weight and significance that no reasonable person could have chosen her over Complainant. See Ash v. Tyson Foods, Inc., 126 S. Ct. 1195, 1197-1198 (2006). For example, Complainant asserts that he has more than 20 years of supervisory experience, while Selectee 1's record was devoid of such experience. However, the Commission has found that number of years of experience does not establish an applicant's qualifications as 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). Selectee 1's resume showed that she had experience as the director of an EEO office (GS-15 equivalent), and she explained her relevant leadership and supervisory experience in this higher-level position. ROI 1 at 459-63.

The Commission has previously found that an Agency has the discretion to choose among candidates whose qualifications are relatively equal as long as the decision is not premised on an unlawful factor. Devance-Silas v. U.S. Postal Service, EEOC Appeal No. 0120110338 (March 23, 2011), citing Texas Dep't of Community Affairs, 450 U.S. at 248, 252-259; Mitchell v. Baldrige, 759 F.2d 80 (D.C. Cir. 1985); Canham v. Oberlin College, 555 F.2d 1057, 1061 (6th Cir. 1981). Further, 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 presented no evidence of an unlawful factor for the selections, aside from his bare assertions, which are insufficient to prove pretext or that the actions were discriminatory.⁴

⁴ To the extent that Complainant also alleged harassment in Complaint 1, a case of harassment is precluded based on our finding that he did not establish that this non-selection was motivated by his protected bases. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000).

Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable factfinder could not find in his favor. Upon careful review of the AJ's decisions and the evidence of record, as well as the parties' arguments on appeal, we conclude that the AJs correctly determined that the preponderance of the evidence did not establish that Complainant was discriminated against by the Agency as alleged.

Accordingly, we AFFIRM the Agency's final orders fully implementing the AJ's decisions finding no discrimination.

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)

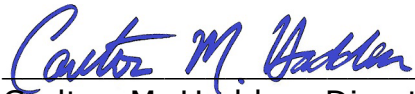
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department 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 6, 2025

Date