



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

[REDACTED]  
Craig M.,<sup>1</sup>  
Complainant,

v.

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

Request No. 2024004589

Appeal No. 2023003980

Agency No. 200P-612-2022-147191

**DECISION ON REQUEST FOR RECONSIDERATION**

Complainant timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in EEOC Appeal No. 2023003980 (August 7, 2024).

**ISSUE PRESENTED**

The issue is whether Complainant's request for reconsideration of EEOC Appeal No. 2023003980 meets the criteria detailed in 29 C.F.R. § 1614.405(c).

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant was on detail as the Acting Chief of Police (Acting Chief), GS-0080-12, at the Agency's

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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.

Northern California Healthcare System in Sacramento, California. His permanent duty station was in Jackson, Mississippi, where he served as the Deputy Chief of Police (Deputy Chief) at the Jackson VA Medical Center.

On September 13, 2022, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of race (Asian) when, on July 5, 2022, Complainant became aware through Human Resources that he was not selected for the position of Supervisory Security Specialist (Deputy Chief) CBSW-11474385-22-GK.

The investigation into the complaint revealed that Complainant applied for the subject position in April 2022. Complainant was found qualified and among three candidates selected for an interview. On June 15, 2022, Complainant was interviewed via Microsoft Teams videoconference by a panel. Complainant asserted that the panel members could discern his race by visual observation. See Report of Investigation (ROI) at 80.

The record reveals that the panel members developed and asked predefined performance-based interview questions and evaluated resumes. The panel members asked each interview candidate the same questions. After interviews, the panel members scored the candidates. Ultimately, the Selectee earned a score of 174, whereas Complainant ranked in third place with a score of 142. The panel members then submitted a memorandum recommending the highest scoring candidate to the Chief of Police of the Northern California VA Medical Center, who served as the Selecting Official. The Selecting Official attested that he did not know Complainant or his race and that he merely adopted and agreed with the panel's recommendation to select the highest scoring candidate. ROI at 81-6.

Complainant, however, challenged the selection decision on the grounds that the Selectee was selected because of a prior relationship with the former Chief of Police and that he believed the former Chief of Police had a part in the selection process. ROI at 102.

He also believed that his non-selection was based on discriminatory animus because there were no Asian Americans in management at the facility. ROI at 94.

While all the responsible management officials acknowledged that Complainant was well qualified for the position, they all denied that he was the best qualified. According to the Deputy Chief of Police for the Palo Alto VA Medical Center, who served as one of the panel members, Complainant had

similar qualifications as the Selectee. However, Complainant received an overall lower score because, unlike the Selectee, Complainant did not have experience doing VA compliance inspections. ROI at 120. The Chief of Police of the VA Southern Nevada Healthcare System, who also served on the panel, noted that Complainant did not completely answer the interview questions. For example, when asked to explain the approach that he used for performance improvement, Complainant provided an example involving a conduct issue and ultimately did not score as well as the Selectee during the interview phase. ROI at 163. The Selecting Official again emphasized that he adopted the panel's recommendation to select the highest scoring candidate. ROI at 131.

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 Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. Ultimately, the AJ determined sua sponte that the complaint did not warrant a hearing and over Complainant's objections, issued a decision without a hearing on June 8, 2023.

The AJ found that the facts supported the Agency's stated reasons for the non-selection at issue. Specifically, the Selectee scored higher than Complainant during the selection process, which consisted of standard performance-based interview questions and a resume review. The AJ explained that a review of the score sheet did not reveal evidence of discriminatory bias.

Additionally, the AJ found that while Complainant might have believed himself to be the plainly superior candidate, a review of Complainant's qualifications and panel results alongside the Selectee's did not render a decision as such. In support, the AJ pointed to the Selectee's experience doing compliance inspections, whereas Complainant did not have such experience.

As for pretext, the AJ determined that Complainant did not present substantiated evidence to link the non-selection to his race. Rather, the AJ found that Complainant made unsupported assertions that the Selectee was preselected because of a prior relationship. In that regard, the AJ found that the record did not support the assertion because the panel members, as well as the Selecting Official, attested that former Chief of Police had no role in the selection process or panel discussion. Further, the prior relationship had no nexus to race. The AJ concluded that even if Complainant could establish preselection, which he did not, Complainant failed to establish a causal link to discriminatory intent based on race.

Regarding Complainant's assertion that he had "so much more experience" than the Selectee, the AJ noted that a review of the resumes of both Complainant and the Selectee did not reveal Complainant to be the plainly superior candidate. The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged. Complainant appealed the AJ's decision and the Agency's final order adopting it.

In EEOC Appeal No. 2023003980 (August 7, 2024), we found that Complainant established a prima facie case of discrimination based on race. Specifically, Complainant is a member of a protected class based on his race; he applied for the position in question and was found qualified; he was not selected for the position; and someone outside his protected class was selected.

We found that the Agency had met its burden. Our review of the record revealed that the Selectee received the highest combined interview and resume score because she not only had experience with VA compliance inspections but also provided answers during the interview that were more responsive to the questions asked. Ultimately, the Selectee earned a score of 174, whereas Complainant ranked in third place with a score of 142. Notably, the Selectee received the highest score from each individual panelist in addition to the highest overall score.

We ultimately found no evidence that Complainant's protected classes were a factor. Regarding his non-selection, Complainant argued that he should have been selected because he was the most qualified based on his rank and experience. He maintained that he had more years of service than the Selectee, and emphasized that during the relevant period, he was serving a detail as the Acting Chief of Police at the Agency's Northern California Healthcare System in Sacramento, California.

While we understood Complainant's contentions, we noted that the Commission has long 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. We observed that even if we assumed as true that the Selectee was preselected and that Complainant had more years of service, we were still disinclined to infer pretext, as Complainant had adduced no evidence of discrimination aside from pointing to the absence of Asian Americans in management.

Moreover, we stated, the probative record revealed that the Selectee held the same permanent rank as Complainant (Major) and had supervisory experience like Complainant. However, unlike Complainant, she had experience conducting VA compliance inspections. We determined that Complainant had not offered any evidence demonstrating that he had this experience. While we understood that Complainant may have seen himself as plainly superior to the Selectee, we found that Complainant could not demonstrate pretext based on his subjective assessment of his own qualifications.

In finding no discrimination, we considered Complainant's contention that his qualifications and experience were not fairly considered by the AJ, and/or that the Agency selected candidates in an arbitrary manner based in part or in whole on subjective interview scores. We also considered Complainant's contention that the AJ did not understand the Agency's rank structure. However, we ultimately found no evidence that Complainant's protected class was a factor in the Agency's decision.

#### CONTENTIONS ON REQUEST

On request, Complainant contests the Commission's decision, asserting that it contained erroneous facts. He reiterates previously and considered arguments, asserting that the selectee for the position was not superior in her time with the VA nor her time as a Supervisory Police Officer. Complainant alleges improprieties, insinuating that his non-selection was the result of favoritism. To support his assertion, Complainant states that the selectee had a work history, with the VA, of moving from one location to another to promote; and that when she was promoted to Major, she was asked to "shadow" an inspector with whom she had a personal relationship. Complainant insinuates that the Agency's statement that she had experience working in VA compliance was inaccurate because she was only shadowing the inspector as he was prepping her for the upcoming Deputy Chief position.

In response, the Agency opposed Complainant's request, asking that it be denied as Complainant failed to meet the requisite criteria. The Agency also asserts that Complainant presented no evidence to show that he satisfied his burden of proof regarding his claim of discrimination on appeal.

#### STANDARD OF REVIEW

EEOC Regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision issued pursuant to 29 C.F.R. § 1614.405(a), where the requesting party demonstrates 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. See 29 C.F.R. § 1614.405(c).

### ANALYSIS

We have reviewed the submissions by Complainant in support of the instant request for reconsideration. However, we determine that there is no reason to disturb the Commission's prior decision. Complainant raises little argument to support his request for reconsideration as he presented no basis to support a finding that the previous decision erroneously affirmed the Agency dismissal on the grounds stated therein.

We note Complainant's request indication that his non-selection may have stemmed from favoritism as the selectee had shadowed an inspector with whom she had a personal relationship. In that regard, the Commission has held that while favoritism is a practice prohibited by most agencies, favoritism, without more, is not a violation of Title VII or EEOC Regulations. See Alcocer v. U.S. Dep't of the Air Force, EEOC Appeal No. 01851239 (Jan. 30, 1987).

After reviewing the previous decision and the entire record, the Commission finds that the request fails to meet the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to deny the request. The decision in EEOC Appeal No. 2023003980 remains the Commission's decision. There is no further right of administrative appeal on the decision of the Commission on this request.

### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (P0124)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. 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.

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:



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Carlton M. Hadden, Director  
Office of Federal Operations

November 26, 2024

Date