



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

[REDACTED]
Jacinto Q.,¹
Complainant,

v.

Janet Dhillon,²
Chair,
Equal Employment Opportunity Commission,
Agency.

Request No. 2020001273

Appeal No. 0120162639

Agency No. 2014-0041

DECISION ON REQUEST FOR RECONSIDERATION

Complainant timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in EEOC Appeal No. 0120162639 (November 27, 2019). 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). For the reasons that follow, the Commission **DENIES** Complainant's request for reconsideration for failure to meet the regulatory criteria.

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 As a procedural matter, we note that the Equal Employment Opportunity Commission (EEOC) is both the respondent agency and the adjudicatory authority issuing this decision. For the purposes of this decision, the term "Commission" or "EEOC" is used when referring to the adjudicatory authority and the term "Agency" is used when referring to EEOC in its role as the respondent party. In all cases, the Commission in its adjudicatory capacity operates independently from those offices charged with in-house processing and resolution of discrimination complaints. The Chair has abstained from participation in this decision.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was an applicant for employment at the Agency. On April 10, 2014, the Agency posted a vacancy for an Alternative Dispute Resolution (ADR) Mediator in multiple locations, under vacancy number D14-OFP-1095443-085-TMD. Complainant contacted a Human Resources Specialist (HRS) and provided his documents to apply for the positions in Baltimore, New York City, and Houston. HRS referred Complainant's application to the respective selecting officials, noting that Complainant wished to be considered under the following non-competitive authorities: Schedule A,³ Veterans Employment Opportunities Act of 1998 (VEOA), Reinstatement Eligibles, and 30% or more Disabled Veterans.

Complainant was not selected for the position in New York City. The Agency moved the Baltimore vacancy to Philadelphia because two ADR Mediators in Philadelphia retired, which created a greater need to hire mediators in that office. The Agency also moved the Houston vacancy to Miami because it reassigned an internal ADR Mediator from Miami to Houston. On August 5, 2014, the Agency posted a vacancy for ADR Mediators in Philadelphia and Miami, under vacancy number D14-OFP-1183231-132-TMD. Complainant requested that he be considered for these two vacancies, and he was not selected.

On October 10, 2014, Complainant filed an equal employment opportunity (EEO) complaint alleging that the Agency discriminated against him on the basis of disability and in reprisal for prior protected EEO activity when:

- (1) on August 18, 2014, Complainant was not selected for the GS-0301-12 ADR Mediator position advertised under Job Announcement No. D14-OFP-1095443-085-TMD, which advertised vacant positions located in Baltimore, Maryland; New York, New York; Houston, Texas; and an "unspecified" location, which later was identified as Seattle, Washington;
- (2) Complainant was not selected for the GS-0301-12 ADR Mediator position advertised under Job Announcement No. D14-OFP-1183231-132-TMD, which advertised vacant positions located in Miami, Florida, and Philadelphia, Pennsylvania; and
- (3) unknown EEO management and Human Resource officials, including HRS,
 - (a) conspired to manipulate the recruitment and staffing for ADR Mediator positions;
 - (b) conspired to cancel and move the advertised vacancy in the Houston, Texas, office to the Miami, Florida, office;

³ The "Schedule A" hiring authority is a non-competitive appointment authority used for hiring applicants with disabilities. See generally 5 C.F.R. § 213.3102(u).

(c) conspired to cancel and move the advertised vacancy in the Baltimore, Maryland, office to the Philadelphia, Pennsylvania, office; and

(d) failed to follow established procedures for the receipt and administration of applications received from applicants with disabilities.

Complainant also alleged that management officials authorized and administered EEO counseling designed to intimidate and deter him from filing a formal EEO complaint. Specifically, Complainant alleged that:

- (1) the EEO Counselor failed to identify herself or her role when she initially contacted Complainant, causing an unnecessary delay in the start of EEO counseling;
- (2) the EEO Counselor initially refused to respond via email to Complainant's specific inquiries regarding his initial contact;
- (3) the EEO Counselor restricted the amount of time available for EEO counseling by not promptly responding to Complainant's e-mails. It was only when Complainant involved the EEO Counselor's supervisor, the Deputy Director of the Office of Equal Opportunity (OEO), that the EEO Counselor understood that Complainant could submit communications in writing;
- (4) the EEO Counselor recorded Complainant's claims and bases incorrectly;
- (5) the EEO Counselor conducted an insufficient limited inquiry, closed out EEO counseling prematurely, and did not ask whether Complainant would agree to an extension of the EEO counseling to conduct a sufficient limited inquiry;
- (6) the EEO Counselor failed to identify the name and title of any involved management official, or any documents reviewed during EEO counseling;
- (7) the EEO Counselor failed to provide Complainant with the specific reasons why he was not selected by the responsible management officials, or the reasons why the positions were cancelled and moved to another location;
- (8) the EEO Counselor failed to identify any resolving official, or any attempts at resolution during the counseling; and
- (9) the Agency failed to frame his allegations accurately in the Notice of Acceptance.

The Agency informed Complainant that it would process the claims concerning the processing of his complaint pursuant to Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110) (August 3, 2015).

Complainant requested a final decision from the Agency, which found that Complainant did not establish that it discriminated against him as alleged. The Agency found that Complainant did not establish prima facie cases of discrimination based on disability or reprisal. The Agency found that management officials nonetheless had articulated legitimate, nondiscriminatory reasons for its actions, and that Complainant did not show that the articulated reasons were a pretext for discrimination.

The Agency also found that there was no merit to Complainant's claim of improper complaint-processing. For example, the Agency stated that the EEO Counselor "took all reasonable measures to ensure that his complaint was timely filed," and that her failure to identify herself as an EEO Counselor in her initial email to Complainant did not delay or negatively affect the counselling. The Agency also found that OEO cured any harm that Complainant may have suffered. The Agency concluded that Complainant did not identify any harm that he suffered as a result of the Agency's actions regarding the processing of his complaint, and he did not show that the Agency's actions affected the outcome of the complaint.

Complainant appealed the Agency's final decision, but he did not submit any arguments in support of his appeal. The Commission issued its decision in Jacinto Q. v. Equal Employment Opportunity Commission, EEOC Appeal No. 0120162639 (Nov. 27, 2019). As an initial matter, the Commission found that the record did not establish that the Agency administered EEO counseling in a manner designed to intimidate or deter Complainant from filing a formal EEO complaint, or that the Agency processed Complainant's complaint improperly.

Regarding the non-selections, the Commission assumed, for purposes of analysis only and without so finding, that Complainant established prima facie cases of discrimination based on disability and reprisal. The Commission then found that the Agency articulated legitimate, nondiscriminatory reasons for its actions. For example, two selecting officials stated that they only considered candidates from the Best Qualified and Merit Promotion certificates because those certificates had the largest number of best-qualified candidates.

The Commission determined that Complainant had not shown that the articulated reasons were a pretext for discrimination. Specifically, the Commission found that Complainant did not refute the Agency's explanation that they considered candidates from the Best Qualified and Merit Promotion certificates because of the number of qualified candidates on those certificates. Further, the Commission found that Complainant did not present evidence that he was more qualified for the positions than those selected, all of whom had strong mediation backgrounds and experience working with the Agency's mediation program.

In addition, the Commission found that Complainant had not shown that a discriminatory reason more likely than not motivated the Agency's actions. The Commission noted that Complainant did not offer any evidence to support his allegation that the Agency cancelled the Baltimore and Houston vacancies to prevent him from being selected for the positions, nor was there evidence that the Agency manipulated the recruitment and staffing process to prevent Complainant's consideration and selection.

The Commission determined that Complainant's unsupported speculation was insufficient to establish pretext and concluded that Complainant did not establish that the Agency discriminated against him based on disability or in reprisal for protected EEO activity, when it did not select him for any of the ADR Mediator positions.

Complainant filed the instant request for reconsideration and submitted a brief in support of his request. The Agency did not submit a response to Complainant's request for reconsideration.

CONTENTIONS ON REQUEST FOR RECONSIDERATION

Complainant argues that the appellate decision "misconstrued" material facts. Complainant notes, for example, that the Commission determined that selecting officials used only competitive certificates because they provided a larger number of qualified candidates. Complainant argues that there is "no testimonial or documentary" evidence that supports this finding. Complainant also argues that the Commission "did not rely on the appropriate law." Specifically, Complainant states that there were "many weaknesses, implausibility, inconsistencies, incoherencies, or contradictions" in the Agency's proffered legitimate, nondiscriminatory reasons that a reasonable fact-finder would rationally find them unworthy of credence. Complainant states that the Agency did not present any evidence to support its "subjective and unsupported" claim that the workload increased to justify moving the Baltimore vacancy to Philadelphia. Complainant also argues that management officials made contradictory statements regarding who cancelled the Baltimore vacancy.

Complainant argues that a "new decision" may have a substantial impact on Agency policies, procedures, and operations because it will likely result in a requirement to publish the Agency's written internal procedures for processing EEO complaints. For example, Complainant states that the Commission does not provide written guidance for complainants to request a copy of the same complaint file that is in the Commission's internal database. In addition, Complainant states that the Commission should publish a public notice advising complainants of a "virus," which automatically deletes the complaint file in the portal when an appellate decision is issued.⁴

Complainant asserts that the appellate decision erred in finding no merit to his allegation of improper processing of his complaint, and that the Agency's intentional hostility, and refusal to adequately process his complaint, was to intimidate him into dropping his complaint. Complainant states that he was not advised of his right to an "inter-agency adjudicator" and that when he requested one, his request was denied. Complainant notes that the Commission has remanded complaints when complainants were not provided with appropriate rights.

⁴ There is no evidence of a computer "virus." The Commission informed Complainant that a "design flaw" prevented access to his closed appeal in the portal, but once Complainant's request for reconsideration was opened, the underlying documents were copied to the new request file.

Complainant also alleges a conflict of interest, demonstrated by “corrupt behavior.” Complainant states that the Commission designed its internal complaint process to “secretly manipulate the record to cover up discrimination and retaliation.” Complainant asserts that the Agency provided the Commission with a document that was “bookmarked and word searchable,” while he was given a “collection of unnumbered and unorganized documents,” and when he requested access to the same complaint file used by the Commission, he did not get a response. Complainant states that his correspondences with an anonymous email mailbox from an “Attorney of the Day” was done to prevent him from being able to refer to a specific Commission employee who may have provided misinformation.

Complainant requests that the Commission vacate the prior appellate decision and remand his complaint for a supplemental investigation and further adjudication. In addition, Complainant asks that he be provided with new notices of his right to elect: (1) another final decision; (2) a hearing before a contract EEOC administrative judge or inter-agency adjudicator; or (3) file a civil complaint.⁵

ANALYSIS AND FINDINGS

As an initial matter, we note that a request for reconsideration is not a second appeal to the Commission. See, e.g., Jules H. v. Dep’t of Homeland Sec., EEOC Appeal No. 0520160173 (Apr. 22, 2016). Here, we find that Complainant could have raised all the arguments he raises in this request when he filed the initial appeal. Complainant raised no arguments during the initial appeal. A request for reconsideration is not appropriate as a replacement for arguments neglected to be made in the initial appeal. Nevertheless, although not required, we will consider Complainant’s arguments which could have been raised during the initial appeal.

Conflict of Interest

Conflicts of interest can arise when the responsible management officials, alleged to have engaged in discriminatory conduct, are the Agency head; a member of the immediate staff of the Agency head; within the Agency’s EEO office; or occupy a high-level position of influence in the Agency. See EEO MD-110 at Chap. 1, § IV.B. Complainant argues that there is a conflict of interest due to a “secret internal process” that manipulates the process to “cover up discrimination.” However, we find that Complainant’s allegations do not raise a conflict of interest. In this case, the responsible management officials are those who decided not to hire Complainant for the various ADR Mediator positions, and there is no evidence that they were staff members who work for the Agency head, or that they had influence over those who work in OEO. As such, we find that there is no conflict of interest in Complainant’s case.

⁵ We note that Complainant’s right to file a civil action is included at the end of this decision.

Complaint Processing

When a complainant raises allegations of dissatisfaction regarding the processing of his or her pending complaint, the Agency official responsible for the quality of complaints processing must add a record of the complainant's concerns, and any actions the Agency took to resolve the concerns, to the complaint file maintained on the underlying complaint. See EEO MD-110 at Chap. 5, § IV.A.12 and § IV.D. Complainant notes his dissatisfaction with the processing of his EEO complaint. Specifically, Complainant states that he received anonymous emails from an "Attorney of the Day," which prevented him from naming a Commission employee who provided misinformation; was provided with a collection of unnumbered and unorganized documents that differed from what OEO provided to OFO; and had to use a system which contained a "computer bug." However, we find that Complainant has not shown that he was provided any misinformation by an "Attorney of the Day"; that his documents differed from those considered by OFO; or that any "computer bug" affected the processing of his EEO complaint.

Complainant also argues that he was not advised of his right to an "inter-agency adjudicator," and that when he requested this option, it was denied. However, Complainant has not provided any evidence showing that he was offered, or denied, an option for an "inter-agency adjudicator." Also, we find no such "right" or need for another agency to be involved in processing the instant complaint. Further, Complainant only makes unsupported assertions of improper behavior during the processing of his EEO complaint. Accordingly, we find that Complainant has not shown that his complaint was improperly processed.

Substantial Impact

Complainant argues a possible substantial impact on the policies, practices, or operations of the Agency because a "new decision" will likely result in a requirement to publish the Agency's written internal procedures. However, we find that Complainant has not shown any improprieties in the processing of his complaint, and he has not shown a need to change the Agency's policies, practices, or operations.

Disparate Treatment

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, 577 (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 Dept. 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, 507-08 (1993); U.S. Postal Service v. Aikens, 460 U.S. 711, 715-716 (1983).

Assuming, arguendo, that Complainant established a prima facie case of discrimination based on disability and in reprisal for protected EEO activity, the previous decision correctly found that the Agency articulated legitimate, nondiscriminatory reasons for not selecting Complainant. Management officials for the New York City and Miami vacancies stated that they only considered candidates from the competitive certificates due to the large number of qualified candidates on those certificates. The Philadelphia selecting official (PSO) stated that he chose the selectee (S1) because he was an internal candidate with a reputation as an "excellent worker," with experience in negotiation and mediation and a strong EEO background.

Further, the previous decision correctly found that Complainant did not show that the proffered reasons were pretext for discrimination. In a non-selection case, pretext may be found where the complainant's qualifications are plainly superior to the qualifications of the selectee. See Wasser v. Dep't of Labor, EEOC Request No. 05940058 (Nov. 2, 1995); Bauer v. Bailar, 647 F.2d 1037, 1048 (10th Cir. 1981). In his request for reconsideration, Complainant argues that he was more qualified than S1 because he had more than 14 years of relevant EEO-related experience, while S1 only had five years of "EEO training." However, S1's resume shows that he had five years of experience as an EEO Investigator, and not "training," and as noted above, S1 had experience in negotiation and mediation. In addition, we note that the Commission has found that number of years of experience, alone, is insufficient to establish that a candidate's qualifications are plainly superior. See Kopkas v. U.S. Postal Serv., EEOC Appeal No. 0120112758 (Oct. 13, 2011). As such, Complainant has not demonstrated that he was a plainly superior candidate, as compared to S1.

A complainant can also establish pretext in two ways: "(1) indirectly, by showing that the employer's proffered explanation is unworthy of credence because it is internally inconsistent or otherwise not believable, or (2) directly, by showing that unlawful discrimination more likely motivated the employer." Chuang v. Univ. of Cal. Davis Bd. of Trs., 225 F.3d 1115, 1127 (9th Cir. 2000) (internal quotation marks omitted); see also McDonnell Douglas, 411 U.S. at 804-05. Here, Complainant argues that there are "many weaknesses, implausibility, inconsistencies, incoherencies, or contradictions" in the management officials' responses.

For example, Complainant argues that it is "very suspicious" that the selecting official for the Miami vacancy did not consider the applicants on the non-competitive certificates. However, the Commission has found that, although federal agencies are authorized to use the Schedule A hiring authority when considering people with disabilities, the use of this authority is not mandatory.

In addition, while Executive Order 13548 provides that agencies shall generally increase utilization of Schedule A hiring authority, the Executive Order does not mandate the use of Schedule A authority in any particular hiring decision. See Maricruz Y. v. Dep't of Homeland Security, EEOC Appeal No. 2019000976 (Dec. 10, 2019); Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120131609 (Dec. 16, 2014); Hein v. National Archives and Records Administration, EEOC Request No. 0520130314 (Aug. 5, 2013). As such, we do not agree with Complainant that the Agency's decision to only consider the competitive certificates was "very suspicious."

Complainant also argues that pretext is shown because the Agency's articulated reason for moving the Baltimore vacancy to Philadelphia is not supported by any evidence in the record. However, the record contains an affidavit from the Philadelphia District Resource Manager (PDRM), who stated that the Philadelphia office was short two mediators due to retirements, and it had a greater need for mediators due to the volume of work. In addition, Complainant argues that there are inconsistencies in the record because PDRM stated that she returned the certificates "unused,"⁶ while PSO stated that he made a selection from the merit certificate; and there are conflicting statements regarding who made the decision to move the Baltimore vacancy. Complainant also argues that while PSO stated that he did not have enough information to determine if Complainant was qualified or disabled, Complainant was referred under Schedule A, and PSO was aware that Complainant was disabled and qualified. However, these purported inconsistencies do not prove that PSO's reasons for selecting S1 are not worthy of belief, and they are insufficient to establish pretext for discrimination.

We find that the Commission's prior appellate decision did not contain a clearly erroneous interpretation of material fact or law, and that it correctly found that Complainant did not establish that the Agency discriminated against him based on his disability or in reprisal for protected EEO activity, when it did not select him for a position as an ADR Mediator.

CONCLUSION

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. 0120162639 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 (P0610)

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.

⁶ We note that PDRM stated that she returned the certificates in USAJOBS, and that she returned the "manual" certificates unused.

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 his or her 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:

/S/ Bernadette B. Wilson
Bernadette B. Wilson
Executive Officer
Executive Secretariat

October 5, 2020
Date