



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

[REDACTED]  
Lynette B.,<sup>1</sup>  
Complainant,

v.

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

Appeal No. 2020002984

Hearing No. 460-2019-00052X

Agency No. 2003-0580-2018101948

**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 March 6, 2020 final order concerning an equal employment opportunity (EEO) complaint claiming employment discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

**BACKGROUND**

During the period at issue, Complainant worked as a Quality Manager, VN-3, at the Agency's VA Medical Center in Houston, Texas.

On May 11, 2018, Complainant filed a formal EEO complaint claiming that the Agency discriminated against her because of age (age 63)<sup>2</sup> and in reprisal for prior protected EEO

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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.

<sup>2</sup> Complainant amended her formal complaint during the Initial Status Conference at the hearing stage to add age as a basis to her formal complaint after she learned, following the completion of the investigation, that the Selectee was in her thirties at the time of her selection for the position. The EEOC Administrative Judge granted Complainant's request.

activity when, on December 19, 2017, Complainant received written notification that she was not selected for the position of Nurse Executive, Neurology/Rehabilitation and Extended/Spinal Cord Injury, VN-0610-00, under vacancy announcement No. JP-17-AA-1968410.

After an investigation of the claim, the Agency provided Complainant with a copy of the report of investigation and notice of the right to request a hearing before an EEOC Administrative Judge (AJ) or a final decision from the Agency. On October 19, 2018, Complainant timely requested a hearing. The Agency filed a motion for summary judgment and Complainant filed a motion for partial summary judgment on the claim of discrimination based on age. After the Agency filed an opposition and Complainant filed a response, the AJ issued a decision by summary judgment in favor of the Agency.<sup>3</sup>

The AJ determined that the applications and resumes of all the candidates for the position were initially screened. Based on the scores received during the screening, the top applicants were referred for an interview. The initial interviews occurred on July 31, 2017, and Complainant was one of four candidates interviewed on that day. However, according to the Agency in its motion for summary judgment, another candidate ("Candidate A") was selected as the top candidate and was referred for selection. Candidate A, however, was not ultimately selected for the position. In August 2017, a second round of interviews was held with six candidates, again including Complainant. The eventual Selectee was also among those candidates interviewed during the second round. However, she had not been selected for an interview during the first round.

Interviews were held by two panels, one made up of nurse executives and the other of physicians. The AJ found that after the second-round interviews, Complainant scored 37 points by the Nurse panel and 46 points by the Physician panel for a total of 83 points. The eventual Selectee (age 34) scored 97 points by the Nurse panel and 71 points by the Physician panel for a total of 168 points. Of all the candidates interviewed during the second round, the Selectee had the highest collective score.

The AJ determined that the record supported a finding that the Selectee's higher scores and her superior experience related to the position in question justified her selection over Complainant. The AJ found that the Selectee had been an interim Nurse Executive for SCI/Neurology/Rehabilitation and worked as a Nurse Manager in Neurology/Rehab/Med-Surgical since August 2012. Complainant, who the AJ concedes was also judged qualified for the position, had been the Nurse Manager in the Operative Care Line for 7 years, and prior to that worked as a Nurse Executive in the Mental Health Care Line. The AJ determined that the evidence supported the Agency's assertions that the Selectee had performed better during the interviews and had more relevant experience. In sum, the AJ concluded Complainant had not proven that she was discriminated against because of her age when she was not selected for the position at issue.

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<sup>3</sup> The AJ initially issued a final decision on March 3, 2020, but subsequently issued a corrected decision on April 1, 2020. The corrected decision addressed a clerical error and did not alter the AJ's finding of no discrimination.

The AJ also concluded there was little evidence that those involved in the selection process were aware of Complainant's prior EEO activity or that there was a nexus between that activity and her non-selection.

On March 6, 2020, the Agency issued a final order implementing the AJ's finding of no discrimination or unlawful retaliation.

The instant appeal from Complainant followed.

### ANALYSIS AND FINDINGS

The Commission's regulations allow an AJ to issue a decision without a hearing upon finding that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). EEOC's decision without a hearing regulation follows the summary judgment procedure from federal court. Fed. R. Civ. P. 56. The U.S. Supreme Court held summary judgment is appropriate where a judge determines no genuine issue of material fact exists under the legal and evidentiary standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a summary judgment motion, the judge is to determine whether there are genuine issues for trial, as opposed to weighing the evidence. Id. at 249. At the summary judgment stage, the judge must believe the non-moving party's evidence and must draw justifiable inferences in the non-moving party's favor. Id. at 255. A "genuine issue of fact" is one that a reasonable judge could find in favor for 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 "material" fact has the potential to affect the outcome of a case.

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. Here, we conclude that on appeal Complainant has pointed with specificity to particular evidence in the investigative file that indicates that there are material facts in dispute which require resolution through a hearing before an adjudication of Complainant's discrimination claims.

On appeal, Complainant, through counsel, focuses on her age claim, noting the Selectee was nearly thirty years younger, and argues that the record fails to support the AJ's determination that the Agency articulated legitimate, non-discriminatory reason for Complainant's non-selection. Complainant asserts that during the initial screening of the application materials the Selectee's score did not qualify her for advancement to an interview during the first round and she did not receive an interview. During the initial screening, Complainant points to the fact that her application package initially had a score of 65 points which was the highest initial screening score. In contrast, Complainant indicates that the Selectee had an initial application package score of 24 points which was deemed too low to qualify the Selectee for an interview. Consequently, Complainant and three other candidates were chosen for the first-round initial interviews on July 31, 2017, while the Selectee was not.

The record contains two Candidate Scoring Tools logging the scores from the initial application process. However, there is no explanation for the fact that it is clear that Complainant's initial application package score was altered from 65 points to 35 points on one of the Candidate Scoring Tools, which reduced her combined score (application package score and initial interview score) from 95 points to 68 points. In addition, the notation "ranked too low for interview by initial interview panel" was removed from the Selectee's name on one score sheet but was included on the other. Again, no explanation for the alteration is provided in the record.

Complainant points to evidence of record that on July 27, 2017, the Deputy Associate Director of Patient Care Service ("Deputy Associate Director"), who was the ultimate selecting official, asked to see the scores for the initial applications on July 27, 2017, several days before the first round of interviews despite the fact that she was not part of the interview panel. Complainant suggests that testimony is needed from this official, as well as others, to explain why the scoring sheets for Complainant and the Selectee appear to be altered.

Complainant also argues that the evidence of record suggests that, in an effort to reach the Selectee, despite her failure to qualify for an interview the first time, the selection process was manipulated to include the Selectee by creating a second interview process. Complainant points out that, in its motion for summary judgment, the Agency attempts to explain the reason the second round of interviews was held was because Candidate A was initially referred for selection, but then not chosen, which necessitated further interviews. However, Complainant correctly argues this claim is unsupported by the evidence developed during the investigation of her complaint. There is no explanation for why not a single management official who provided an affidavit to the EEO investigator during the course of the investigation ever mentioned Candidate A's name or that she was referred, and then not selected, resulting in the selection process being "reopened". What is clear from the record is that the Selectee, whose initial screening scores were apparently assessed as too low for a first-round interview, was later included in the second round of interviews.<sup>4</sup>

Given these critical discrepancies in the evidentiary record, and drawing all justifiable inferences from the evidence identified by Complainant, we determine that summary judgment was not appropriate for this matter and a hearing is needed to properly adjudicate this case.

### CONCLUSION

Accordingly, we VACATE the Agency's final decision adopting the AJ's decision by summary judgment and REMAND the matter to the Agency for further processing in accordance with the ORDER below.

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<sup>4</sup> Complainant further argues that the decision to interview six candidates in the second-round, while only interviewing the top four in the first round, occurred because the Selectee's initial score put her in sixth place.

### ORDER

Within 15 calendar days of the date this decision is issued, the Agency shall submit to the Hearings Unit of the EEOC's Houston District Office a renewed request for a hearing on this complaint, the complete complaint file, and a copy of this appellate decision. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit. Thereafter, the Administrative Judge shall issue a decision in accordance with 29 C.F.R. § 1614.109 and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

### IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

## STATEMENT OF RIGHTS - ON APPEAL

### RECONSIDERATION (M0920)

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 his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit his or her 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 his or her 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(c).


COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. 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. **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:

  
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Carlton M. Hadden, Director  
Office of Federal Operations

March 16, 2021

Date