



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

[REDACTED]  
Horace A.,<sup>1</sup>  
Complainant,

v.

Charlotte A. Burrows,<sup>2</sup>  
Chair,  
Equal Employment Opportunity Commission,  
Agency.

Appeal No. 2020003295  
Agency No. 2017-0007

**DECISION**

Following its May 1, 2020, final order, the Agency simultaneously filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. § 1614.403(a). On appeal, the Agency requests that the Commission affirm its rejection of an independent contract Administrative Judge's (AJ) finding of discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. The Agency also requests that the Commission affirm its rejection of the relief ordered by the AJ. Complainant opposed the Agency's appeal and filed his own cross-appeal. For the following reasons, the Commission AFFIRMS the Agency's final order.

**ISSUES PRESENTED**

The issues presented concern whether Complainant was subjected to discrimination based on disability and reprisal, when management assessed him as "Highly Effective," refused to reconsider that rating, scrutinized his work calls, and proposed to suspend him for three days.

---

<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> In the present matter, the Equal Employment Opportunity Commission (EEOC) is both the respondent Agency and the adjudicatory authority. The Commission's adjudicatory function is separate and independent from those offices charged with in-house processing and resolution of discrimination complaints. For the purposes of this decision, the term "Commission" is used when referring to the adjudicatory authority and the term "Agency" is used when referring to the respondent party in this action. The Chair has abstained from participation in this decision.

### BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Information Intake Representative (IIR), GS-1802-05, at the Agency's Seattle Field Office (SEAFO) in Seattle, Washington. He joined the Agency on October 6, 2014 and has been diagnosed with posttraumatic stress disorder (PTSD). At the time of Complainant's hire, his first-level supervisor was the SEAFO Intake Supervisor (S1). S1 reported to the SEAFO Enforcement Manager (S2), who, in turn, was supervised by the SEAFO Deputy Director (S3).

As an IIR, Complainant assisted members of the public over the telephone. Although Complainant reported to local SEAFO management, his performance as an IIR was tracked by the Intake Information Group (IIG), located in Kansas City, Kansas. The IIG tracked all contacts that IIRs had with the public and measured their performance under three metrics: Calls Answered, Average Talk Time, and Availability.

In September 2015, Complainant transferred to the SEAFO Legal Unit, where he worked as a Legal Technician. See Agency's Motion for Findings and Conclusions Without a Hearing at 8. As Complainant had worked as an IIR for almost all of fiscal year (FY) 2015, local SEAFO management conducted his FY2015 performance evaluation based on his performance as an IIR. On November 12, 2015, Complainant received an "Outstanding" rating for FY2015, which was the highest possible rating. ROI at 00208. S2 served as the rating official. S3 was the approving official.

The following month, in December 2015, Complainant requested a transfer back to his SEAFO IIR position as a reasonable accommodation for his PTSD. ROI at 00168. The Agency granted Complainant's request in early January 2016. Id. As before, Complainant reported to a new acting first-level supervisor (NAS1). NAS1 supervised Complainant for all of FY2016. She was not aware of Complainant's request for reasonable accommodation or his disability.

From May 2016 to September 2016, Complainant served as a union steward. ROI at 00046. As Complainant was the first IIR to serve in that role, there were "no measures in place to remove [him] from active status to conduct union approved duty time." Id. at 00020.

The fiscal year ended on September 30, 2016. Soon after the start of the new fiscal year, NAS1 went on emergency maternity leave beginning October 15, 2016. Because of NAS1's sudden departure, NAS1 had no formal input in Complainant's FY2016 performance evaluation. ROI at 00177-78. However, In her affidavit, NAS1 said that she thought that Complainant's FY2016 performance declined slightly from the highest rating of "Outstanding" to the second highest rating of "Highly Effective" because Complainant's work as a union steward had caused his availability to perform calls to decrease, "which brought his stats down." Id. at 00178

On November 30, 2016, Complainant received his performance evaluation for FY2016. S3 was the rating official for the rating period because NAS1 was on maternity leave. ROI at 00114. The

SEAFO Director (S4) was the approving official. Id. The evaluation characterized Complainant's performance as "Highly Effective" and was largely positive. Id. at 109. In this regard, the evaluation noted that Complainant was able to use the established call flow to accurately and efficiently capture the information presented by callers in a "clear, accurate, and organized manner." Id. The evaluation also noted that Complainant appropriately used the training, feedback, and coaching that he received in the past to provide "courteous and helpful information to callers." Id. While the evaluation praised Complainant for handling between 377 to 754 calls per month, which the evaluation characterized as excellent work for an IIR, the evaluation noted that Complainant's availability was impacted due to Complainant's work as a union steward. Id. Lastly, the evaluation recognized Complainant for decreasing his average talk time, "which positively contribute[d] to the goals of the district and the agency." In emailing the evaluation to Complainant, S3 praised Complainant for his "dedication to the public." Id. at 00050.

Complainant vehemently disagreed with the "Highly Effective" rating. He believed that his performance in FY2016 was "Outstanding." On November 30, 2016, Complainant met with S3 in person to voice his concerns. ROI at 00135. At the meeting, Complainant asked S3 to reconsider the evaluation. Complainant subsequently spoke with S3 and S4 over the telephone on December 7, 2016. Id. at 00028. During that call, Complainant inquired as to why he had been downgraded and was allegedly told by S3 and S4 that the rating was accurate. Id. When Complainant asked what he needed to do to return to the "Outstanding" level, S3 and S4 allegedly told him to do what he had been doing. Id. Following the call, Complainant notified S3 by email that he had signed the evaluation "under duress" on the advice of the union. Id.

On December 8, 2016, SEAFO management became aware that two members of the public had lodged complaints against Complainant. ROI at 00316. These complaints related to Complainant's handling of calls to the Agency's call center on October 24, 2016<sup>3</sup> and November 30, 2016. Id. In response to these complaints, S1 requested the call recordings from IIG and forwarded them to S4. Id. at 00203 and 00289. In late December 2016 and January 2017, S4 asked IIG to pull additional randomly selected calls that Complainant had participated in due to her concerns about Complainant's telephone manners. Id. at 00184.

On February 1, 2017, S3 issued Complainant a notice proposing to suspend Complainant for three days without pay. ROI at 00316-23. The notice charged Complainant with improper conduct and was supported by six specifications. These specifications accused Complainant of being discourteous to a total of 10 callers between October 24, 2016 to January 6, 2017. Through the union, Complainant filed a response disputing the charge,<sup>4</sup> but he subsequently resigned on March 17, 2017, before the issuance of a final decision on the proposal.

---

<sup>3</sup> According to the union, the October 24, 2016 incident actually occurred on October 12, 2016. ROI at 00071.

<sup>4</sup> See ROI at 00069-81.

Complainant filed a formal EEO complaint on February 15, 2017. In his complaint, Complainant alleged that the Agency discriminated against him on the bases of disability (PTSD) and in reprisal for prior protected EEO activity under Section 501 of the Rehabilitation Act of 1973. The Agency accepted the following claims for investigation:

1. Whether Complainant has been subjected to harassment and disparate treatment on the bases of disability and reprisal when:
  - a. On November 30, 2016, Complainant received a rating of “Highly Effective,” instead of “Outstanding” on his FY2016 performance evaluation;
  - b. On December 7, 2016, Complainant’s request for reconsideration of his FY2016 performance evaluation rating was denied; and
  - c. On January 10, 2017 and January 18, 2017, Complainant was called into a performance call review meeting, whereas other IIRs were not similarly treated.
2. Whether Complainant continued to be subjected to harassment on the bases of disability and reprisal when on February 1, 2017, he was issued a three-day proposed suspension without pay.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of his right to request a hearing before an Administrative Judge (AJ). Complainant timely requested a hearing. Both parties subsequently submitted motions for a decision without a hearing.

In his motion for summary judgment dated December 7, 2018, Complainant claimed that due to his disability he can become upset in a confrontational situation. According to Complainant, “[t]he Seattle Field Office Senior Management, including [S2, S3, and S4] have all been aware of said disability for Complainant as early as May 18, 2015 with [S2] and repeated again on August 14, 2015 with [S2 and S3] and finally in the reassignment action taken by the EEOC agency in January 2016.” See Hearing Transmittal File at 185. Complainant maintained that his performance throughout his time with the Agency had been at the “Outstanding” level. He asserted that the Agency’s actions, including the call reviews and proposed suspension, were taken due to his disability and protected EEO activity.

On December 21, 2018, the Agency filed a motion for summary judgment asserting that while S1, S2, and S3 became aware on May 18, 2015, that Complainant had a disability, they did not know the specifics about Complainant’s disability at that time. See Agency’s Motion for Findings and Conclusions Without a Hearing at 7. The Agency maintained that S2 only became aware that Complainant had PTSD in December 2015 when Complainant told him that he had PTSD. Id. at 8. With regard to Complainant’s FY2016 performance evaluation, the Agency asserted that S3, in assessing Complainant’s performance relied on the input he received from NAS1 and S2 during conversations in FY2016 and “[b]ased on those conversations[,] [S3] concluded that Complainant’s performance had declined slightly from the prior year.” Id. at 9. The Agency contended that the IIG metrics clearly showed that Complainant answered the least

calls, averaging 523 calls per month as compared to the other IIRs who answered 600 or more calls per month, and was the least available, being the only IIR to have below 60% availability. Id. The Agency argued that, while Complainant's excellent average talk time made him "Highly Effective," he was not "Outstanding" due to his poor scores in two of the three metrics. As for the remaining claims, the Agency denied that taking the alleged actions was based on discriminatory or retaliatory motive.

After considering both motions, the AJ issued a decision without a hearing on January 15, 2020, which was partially in Complainant's favor. In this regard, the AJ found that Complainant had successfully shown that he had been subjected to disability discrimination as alleged in claim 1a (disability), when the Agency lowered his FY2016 evaluation from "Outstanding" to "Highly Effective." The AJ, however, found no evidence that the Agency lowered Complainant's evaluation in reprisal for his protected EEO activity (claim 1a). The AJ also found no merit to claims 1b, 1c, and 2.

In finding discrimination on claim 1a (disability), the AJ found that NAS1's assessment of Complainant clearly demonstrated that the decline in Complainant's performance was due to Complainant's decision to take on additional duties as a union steward. See AJ's Decision at 6 (noting that, prior to Complainant's union service, "[t]here was a point where he was a top performer). The AJ determined that "[n]othing in [NAS1's] statement suggest[ed] any decline in the actual performance of [Complainant's] IIR duties, that is, handling calls efficiently."

Further, while the AJ acknowledged that S3 claimed that Complainant's performance "had declined slightly from the prior year," the AJ found that such explanation did not constitute a legitimate, nondiscriminatory reason, as the record clearly showed that S3 admitted that he used his "*sense* [emphasis in original] of Complainant's performance" to rate Complainant. The AJ also compared Complainant's evaluation with the evaluation of one of Complainant's IIR colleagues (C1) who received an "Outstanding" rating. In comparing the evaluations, the AJ found "little difference between the two," as the evaluations mostly contained the same boilerplate language. As such, the AJ inferred that the real reason for the downgraded evaluation was discrimination based on disability and concluded that summary judgment in favor of Complainant was appropriate on claim 1a (disability).

The AJ issued a decision on damages on March 13, 2020, directing the Agency to pay Complainant the amount of \$1,500.00 in compensatory damages and change his FY2016 performance evaluation from "Highly Effective" to "Outstanding."

The Agency subsequently issued a final order rejecting the AJ's finding of disability discrimination on claim 1a. The Agency only implemented the AJ's finding of no discrimination on claims 1a (reprisal), 1b, 1c, and 2. In accordance with the Agency's regulations, the Agency issued the final order simultaneously with its appeal to the Commission. Complainant opposed the Agency's appeal and filed his own appeal challenging the AJ's failure to allow the parties to engage in discovery.

### CONTENTIONS ON APPEAL

On appeal, the Agency asserts that the record fails to establish any evidentiary link between Complainant's disability and the FY2016 performance evaluation. The Agency contends that the AJ erred legally and factually when she found that the Agency failed to provide a legitimate, nondiscriminatory reason for the "Highly Effective" rating. In this regard, the Agency asserts that contrary to the AJ's finding, the record is replete with independent evidence demonstrating that Complainant's performance in FY2016 did not merit an "Outstanding" rating. Specifically, the Agency points to S3's unimpeached statement that C1 "never had complaints against her, had many congratulatory feedbacks from customers and she received high ratings on calls." The Agency contrasted C1's stellar performance with Complainant's performance, who, according to S3, "had received a number of negative feedbacks" and had "far, far less, congratulatory customer feedback than his peer IIRs."

Additionally, the Agency contends that S3's assessment of Complainant's performance is identical to Complainant's first-level supervisor, NAS1, who, in her affidavit, opined that Complainant's performance had declined to "Highly Effective" because Complainant's availability to perform calls had been affected by his union duties. The Agency asserts that the AJ, in addressing NAS1's affidavit, clearly erred legally and factually when she ruled that "nothing in [NAS1's] statement suggest[ed] any decline in the actual performance of his IIR duties, that is, handling calls efficiently." To the contrary, the Agency contends that Complainant's availability to perform calls is indeed the actual performance of his IIR duties. Furthermore, the Agency asserts that NAS1's characterization of Complainant's performance is supported by IIG metrics that clearly show that Complainant's performance statistics declined between FY2015 and FY2016, thereby directly contradicting the AJ's finding that "nothing in [NAS1's] statement suggest[ed] any decline in the actual performance of his IIR duties." The Agency maintains these metrics clearly show that Complainant's performance in FY2016 was not "Outstanding" and constitute a legitimate, nondiscriminatory reason for the "Highly Effective" rating.

Complainant opposes the Agency's appeal and asserts that the AJ "would have discovered grounds for discrimination on all of [his] claims" had the AJ not resorted to summary judgment and allowed the parties to engage in discovery. With regard to his performance rating, Complainant asserts that the Agency's continued emphasis on his availability, or lack thereof, due to his union duties, "highlights a reason for an apparent decrease in stats that cannot be considered to impact performance reviews per union guidelines and legal protection."

### STANDARD OF REVIEW

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). This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and Agency's, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See id. at Chapter 9, § VI.A. (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”).

### ANALYSIS AND FINDINGS

We first determine whether the AJ appropriately issued the decision without a hearing. 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). The Commission’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. An AJ may issue a decision without a hearing only after determining that the record has been adequately developed. See Petty v. Dep’t of Def., EEOC Appeal No. 01A24206 (July 11, 2003).

On appeal, Complainant contends that the AJ’s issuance of a decision without a hearing on claims 1a (reprisal), 1b, 1c, and 2, was procedurally improper because the AJ did not allow the parties to engage in discovery. However, we find that contention to be unpersuasive because the record clearly shows that the parties did indeed engage in discovery.<sup>5</sup> The record indicates that Complainant did not actively engage in the discovery process during the hearing stage. We further note that Complainant has not pointed to any evidence that he feels was wrongly excluded, nor has he supplemented the record with any evidence that he feels should have been

---

<sup>5</sup> In his motion for summary judgment, Complainant stated that the Agency falsely accused him of demanding “several actions” throughout the discovery process. He argued that his “demand” was actually a request to be deposed by the Agency via videoconference. See Hearing Transmittal File at 184.

included. Based on the foregoing, we conclude that the record was adequately developed on those claims and summary judgment was appropriate.

Because Complainant has not specifically raised arguments regarding the merits of claims 1a (reprisal), 1b, 1c, and 2, we need not address the merits of these claims. See Valentin G. v. Dep't of Veterans Affairs, EEOC Appeal No. 2019005341 (Oct. 26, 2020) (declining to address the merits of claims that were not specifically raised on appeal) citing EEOC MD-110 at Chap. 9, § IV.A. (“Although the Commission has the right to review all of the issues in a complaint on appeal, it also has the discretion to focus only on those issues specifically raised on appeal.”). We therefore affirm the Agency’s decision to implement the AJ’s finding of no discrimination on claims 1a (reprisal), 1b, 1c, and 2.

### *Claim 1a*

For claims of disparate treatment under the Rehabilitation Act, where the agency denies that its decisions were motivated by a complainant’s disability and there is no direct evidence of discrimination, we apply the burden-shifting method of proof set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) See Heyman v. Queens Village Comm. for Mental Health for Jamaica Cmty. Adolescent Program, 198 F.3d 68 (2d Cir. 1999). Under this analysis, in order to establish a prima facie case, Complainant must demonstrate that: (1) he was an individual with a disability; (2) he was qualified for the position held or desired; (3) he was subjected to an adverse employment action; and (4) the circumstances surrounding the adverse action give rise to an inference of discrimination. Lawson v. CSX Transp., Inc., 245 F.3d 916 (7th Cir. 2001). The burden of production then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for the adverse employment action. In order to satisfy his burden of proof, Complainant must then demonstrate by a preponderance of the evidence that the Agency’s proffered reason was a pretext for discrimination. Id.

Assuming, arguendo, that Complainant established a prima facie case of discrimination based on disability, we find that the Agency has articulated legitimate, nondiscriminatory reasons for Complainant’s rating. As reflected in Complainant’s FY2016 evaluation, S3 rated Complainant’s performance as “Highly Effective” because Complainant’s service as a Union steward decreased his availability to handle calls. Further, S3 stated that Complainant had far less congratulatory customer feedback than his peer IIRs.

In arguing pretext, Complainant maintained during EEO investigation that his disability was the reason for his lowered rating. However, he reasoned that his union service likely played a significant role in his lack of availability because there were “no measures in place to remove [him] from active status to conduct union approved duty time,” as he was the first IIR to become a union steward. Complainant asserts that the Agency’s continued focus on his availability is contrary to “union guidelines and legal protection.”

After careful consideration, we find that the record fails to demonstrate that Complainant’s FY2016 rating of “Highly Effective” was because of Complainant’s disability. The record



clearly shows that S3 lowered Complainant's rating because of Complainant's reduced availability and his receipt of far less congratulatory customer feedback than other IIRs.<sup>6</sup> Because the record clearly shows that the "Highly Effective" rating was not based on Complainant's disability, we conclude that the AJ erred in finding discrimination on claim 1a.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final order.

### 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.

---

<sup>6</sup> Whether the Agency failed to provide Complainant with the appropriate official time to conduct his Union duties is not appropriate for consideration in this appeal. The proper forum for Complainant to raise the issue would be in the grievance process.

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 (S0610)

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 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. 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:

/s/ Shelley Kahn

---

Shelley E. Kahn  
Acting Executive Officer  
Executive Secretariat

October 13, 2021

---

Date