



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]  
Pamala L.,<sup>1</sup>  
Complainant,

v.

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

Appeal No. 2021001021

Agency No. 200I-0516-2020103512

**DECISION**

On November 23, 2020, 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 November 2, 2020, final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, the Commission REVERSES the Agency's final decision.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Section Chief, Primary Care, VM 15-10 at the Bay Pines VA Healthcare System (VAHCS) in Bay Pines, Florida.

On May 15, 2020, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of sex (female) when, on April 14, 2020:

- A. She was not selected for the position of Chief of Primary Care, under Vacancy Announcement Number CBTC-10682406-AS and;

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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.

- B. She was not selected for the position of Chief of Primary Care under Vacancy Announcement Number CAZH-10611133-SS-19.<sup>2</sup>

According to Complainant, the vacancy announcement in claim B was posted on USA Jobs from September 30, 2019 through October 7, 2019, and she applied during that time. See ROI at 89. The Selecting Official (SO) explained that the facility leadership panel (hereinafter “panel”) scored applicants based on nine established categories. Applicants who received a weighted score of 175 out of 200 were recommended for an interview. See Report of Investigation (ROI) at 90. He stated that Complainant was not interviewed because she did not achieve the required minimum score. Ultimately, the panel did not conduct any interviews and the posting was cancelled. The SO did not provide any explanation for the decision not to interview any candidates.

The position was reposted as Vacancy Announcement Number CBTC-10682406-AS (claim A), from December 23, 2019 through January 3, 2020, and Complainant submitted her application. See ROI at 86. Complainant stated she was not interviewed for the position. The SO explained that while he was the selecting official, it was the panel that scored each applicant, based on the nine established categories, and recommended for an interview the applicants who scored at least 175. ROI at 87. The SO asserted that Complainant was not interviewed because she received a score of 154.83. ROI at 108, Section 7-3 (SO Affidavit), and 264. Further, he noted that among the other candidates, one male candidate, who was interviewed but not selected, received a score of 192.33. See ROI at 264. Thereafter, a Direct Hire email was sent seeking additional applicants. As a result of the Direct Hire process, the SO and the panel interviewed another male candidate, who was ultimately selected for the position. See ROI at 108, Section 7-3. The SO denied that Complainant’s sex was a factor in the decision-making process, noting that she had limited experience in performance improvement processes and activities, and in development of policy and operational procedures. See ROI at 113, 109, Section 7-3. He further stated that the selectee was chosen because he had 23 years of experience as a licensed physician, nearly 16 years of experience at the Agency, and had been a member of several committees. See ROI at 111-112.

Complainant believes she is more qualified than the selectee because of her experience as the Section Chief and as the acting Chief of Primary Care. See ROI at 86. Complainant has 27 years of experience as a licensed physician, 19 years of experience at the Agency, and 9 years of supervisory experience. See ROI at 89.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). In accordance with Complainant’s request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

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<sup>2</sup> According to the Agency, no one was selected from Vacancy Announcement CAZH-10611133-SS-19 (claim B). The vacancy was cancelled and later reposted under Vacancy Announcement CBTC-10682406-AS (claim A).

In its November 2, 2020 decision, the Agency concluded that Complainant was not subjected to discrimination as alleged. The Agency found that it met its burden to establish a legitimate, nondiscriminatory reason for its conduct, namely that Complainant did not earn the score necessary to be granted an interview and further considered for selection. Moreover, the Agency concluded that Complainant failed to prove that the Agency's explanation was pretext.

### CONTENTIONS ON APPEAL

On appeal, Complainant contends that the Agency failed to meet its burden of establishing that it would have made the same decision regardless of her sex. Specifically, Complainant argues that the record supports a finding that sex was a motivating factor in the selection process because she has more experience than the selectee and the Agency failed to produce any evidence of the selectee's qualifications.

In response, the Agency argues that it provided objective evidence to support its decision, whereas Complainant only offered subjective and self-serving assessments of her qualifications relative to the selectee's. The Agency therefore requests the Commission affirm its finding of no discrimination.

### ANALYSIS AND FINDINGS

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (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").

Here, Complainant alleges she was subjected to disparate treatment when she was not selected for the position of Chief of Primary Care on two occasions. To prevail in a disparate treatment claim, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must initially establish a prima facie case by demonstrating that she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 802 n.13. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is pretextual. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 120 S. Ct. 2097 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

In the non-selection context, a complainant may establish a prima facie case of race or sex discrimination by showing that: (1) she is a member of a protected class; (2) she was qualified for the position; (3) she was not selected for the position; and (4) she was treated differently than similarly situated persons outside her protected group. EEOC Enforcement Guidance on O'Connor v. Consolidated Coin Caterers Corp., EEOC Notice No. 915.002 (Sept. 18, 1996); Williams v. Dep't of Educ., EEOC Request No. 05970561 (Aug. 6, 1998). We note that, although a complainant bears the burden of establishing a "prima facie" case, Burdine, 450 U.S. at 252-53, the requirements are "minimal," St. Mary's Honor Ctr., 509 U.S. at 506 (1993), and complainant's burden is "not onerous." Burdine, 450 U.S. at 253.

In its decision, the Agency assumed, without finding, that Complainant established a prima facie case of discrimination. A review of the record reveals that Complainant established a prima facie case of sex discrimination because she: (1) is a female; (2) was qualified for the position; (3) was not selected for the position; and (4) was treated differently than similarly situated persons outside her protected group. The record shows that, regarding claim A, the Agency interviewed a male candidate with objectively similar, if not lesser, qualifications to Complainant. The male candidate who was granted an interview had 18 years of experience as a licensed physician and 12 years of experience at the Agency, including 9 years in supervisory positions. Meanwhile, Complainant had been a physician for 27 years, 19 years of experience at the Agency, and 9 years of supervisory experience. See ROI at 89, 154-55.

Because Complainant established a prima facie case of sex discrimination, the Agency now has the burden of producing a legitimate, nondiscriminatory explanation for not selecting Complainant. While we note that an agency's burden of production is not onerous, it must provide a specific, clear, and individualized explanation for its selection decision. This is required in order for a complainant to have the opportunity to prove that the asserted reason was a pretext for discriminatory animus. See Stewart v. Dep't of Homeland Security (TSA), EEOC Request No. 0520070121 (Nov. 14, 2011) (agency failed to meet its burden of production by simply explaining the general mechanics of the selection process but failed to provide an individualized explanation for complainant's specific score) (citing Boston v. U.S. Postal Serv., EEOC Appeal No. 0120042074 (May 26, 2004)).

Here, the SO explained that the panel scored applicants for both vacancy announcements, based on nine established categories, and applicants who received a weighted score of 175 out of 200 were recommended for an interview. See ROI at 90. He stated that Complainant was not interviewed because she did not achieve the required minimum score. See id. In support, the Agency provided a matrix of the applicants with the categories and scores given to each, including Complainant and the male candidate who was interviewed but ultimately not selected. See ROI at 259-264, Section 7-20. Complaint received a score of 154.83, while the male candidate received a score of 192.33. See ROI at 264. However, the matrix does not include any information about the selectee. In addition, the record does not contain affidavits or statements from the members of the panel nor any notes from the interviews granted to the unsuccessful male candidate or the selectee.

We find that the evidence presented by the Agency is not sufficient to provide a specific, clear, and individualized explanation as to why Complainant was not selected for the position. The Agency explained the general mechanics of the selection process but failed to provide an individualized explanation for Complainant's specific score. See Koudry v. Dep't of Educ., Request No. 0520100196 (Apr. 13, 2010) (discrimination found where agency merely explained the mechanics of selection process, provided list of candidates deemed best qualified, and summarized applications of selectee and complainant, but failed to provide statements from selecting officials explaining how complainant's qualifications were evaluated compared to selectee's qualifications). We have held that an agency fails to articulate a legitimate, non-discriminatory reason when it fails to provide specific information to explain why agency officials assigned their respective ratings or scores to a complainant. See, e.g., Myles v. Soc. Sec. Admin., EEOC Appeal No. 0120092511 (Feb. 10, 2011) (agency failed to meet burden of production when it merely said that complainant was not selected because Review Panel ranked him lower in scoring because this was not a specific, clear, and individualized explanation for Complainant's non-selection); Glomski v. U.S. Postal Serv., EEOC Appeal No. 01955157 (July 17, 1997) (agency failed to meet its burden of production because it did not provide an explanation of the review committee's assignment of scores to complainant and the selectee).

In this case, we find that the Agency has not met its burden of production. The Agency has failed to offer any evidence explaining the scores awarded. Contrary to the Agency's assertion that it provided objective evidence to support its decision, the record simply contains the bare numerical scores the panelists gave Complainant and the other applicants, not including the selectee, without any testimonial or documentary evidence explaining how they determined each score. For example, the first scoring matrix reflects that Complainant received a raw score of 3 out of 5 for the category, Educational Preparation and Professional Development, while the male candidate, who was interviewed but not selected, scored 5 out of 5 in that category. See ROI at 259. It is not, however, apparent from the record why Complainant received a lower score than the male candidate in that, or any other, category. See Jackson v. Lowndes County School District, 2010 WL 91245 (N.D. Miss. 2010) (defendant failed to meet its burden of production when it merely stated that it did not hire plaintiff because he scored lower in his interview than candidate who was hired and provided tally sheet reflecting scoring of candidates on a scale of one to five, but failed to explain reasons for scores).

Moreover, the instant record lacks any specific information whatsoever about the selectee. The selectee is not included in the scoring matrix nor is his application, resume, or any other pertinent information regarding his qualifications included in the record. The only information regarding the selectee's qualifications is the SO's generalized statement that the selectee was chosen due to his years of experience as a licensed physician and with the Agency, as well as his membership on a number of committees.

Further, the SO's explanation regarding the selectee's allegedly superior qualifications does not appear to be supported by the record. Instead, the record reflects that Complainant has more years of experience as a licensed physician and with the Agency than the selectee.

Moreover, Complainant has not only served as a member of several committees but also chaired several committees. The only individualized explanation for Complainant's non-selection is the SO's statement that Complainant had limited experience in performance improvement processes and activities, and in development of policy and operational procedures. See ROI at 109, Section 7-3. Given the absence of any information regarding the selectee, however, the Commission is unable to determine if the selectee was better qualified than Complainant in these aspects. See Clemente v. Dep't of Justice, EEOC Appeal No. 0720080012 (Sept. 24, 2008) (agency failed to meet burden of production when it provided description of selection process, generally stated that selectees were more qualified than complainant, and provided no record clarification of specific qualities that made selectees better qualified than complainant.).

Therefore, we find that the Agency failed to overcome Complainant's prima facie case of sex discrimination, and Complainant prevails without having to prove pretext. Chhe v. Dep't of Housing and Urban Dev., EEOC Request No. 0720090008 (Aug. 6, 2010) (the consequence of an agency's failure to meet its burden of production under McDonnell Douglas is that the complainant, having established a prima facie case, prevails without having to make any demonstration of pretext), request for recon. den. EEOC Request No. 0520100584 (Jan. 27, 2011). As a result of the Agency's failure to meet its burden of production, we find that Complainant has established that she was subjected to sex discrimination when she was not selected for the position of Chief of Primary Care.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we **REVERSE** the Agency's decision and **REMAND** the matter for further processing in accordance with the Order below.

### ORDER

The Agency is ordered to take the following remedial actions:

1. Within thirty (30) calendar days of the date this decision is issued, the Agency shall offer Complainant the position of Chief of Primary Care at Bay Pines VAHCS facility, or a substantially equivalent position. Complainant shall have fifteen (15) days, from the date of the offer, to accept or decline the position. If Complainant should decline the Agency's offer, the date of her rejection shall be the end date for any back pay due Complainant.
2. The Agency shall pay Complainant back pay, with interest, from the date on which it is determined Complainant would have started in the Chief of Primary Care position. The Agency shall determine the appropriate amount of back pay, with interest, and other benefits due the Complainant, pursuant to 29 C.F.R. § 1614.501, no later than sixty (60) calendar days after the date this decision was issued. The Agency shall also pay compensation for the adverse tax consequences of receiving back pay as a lump sum. Complainant has the burden of establishing the amount of increased tax liability, if any.

Once the Agency has calculated the proper amount of back pay, Complainant shall be given the opportunity to present the Agency with evidence regarding the adverse tax consequences, if any, for which Complainant shall then be compensated. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the Complainant for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. The Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."

3. The Agency shall conduct and complete a supplemental investigation on the issue of Complainant's entitlement to compensatory damages and will afford her an opportunity to establish a causal relationship between the Agency's discriminatory action and his pecuniary or non-pecuniary losses, if any. Within fifteen (15) calendar days of the date this decision is issued, the Agency shall give Complainant notice of her right to submit objective evidence (pursuant to the guidance given in Carle v. Dep't. of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)) in support of her claim for compensatory damages. Complainant shall have forty-five (45) calendar days from the date the Complainant receives the Agency's notice to submit her compensatory damages evidence. The Agency shall issue a final decision, with appeal rights to the Commission, on the issue of compensatory damages. 29 C.F.R. § 1614.110. The Agency shall submit a copy of the final decision to the Compliance Officer at the address set forth herein. Within thirty (30) calendar days of determining the amount of compensatory damages due Complainant, the Agency shall pay that amount to Complainant.
4. Within ninety (90) days from the date the decision is issued, the Agency is directed to conduct eight (8) hours of in-person or interactive training for the selecting official for the Chief of Primary Care position. The Agency shall address management's responsibilities with respect to eliminating discrimination in the workplace.
5. Within sixty (60) days from the date the decision is issued, the Agency shall consider disciplining the selecting official for the Chief of Primary Care position. The Commission does not consider training to constitute disciplinary action. The Agency shall report its decision to the Compliance Officer. If the Agency decides not to issue any disciplinary action, it shall set forth the reason(s) for its decision. If any of the named management officials is no longer employed by the Agency, the Agency shall furnish proof of the date(s) of separation.
6. The Agency shall, within thirty (30) days of the date this decision is issued, post a notice in accordance with the Order below.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

Further, the report must include supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

#### POSTING ORDER (G0617)

The Agency is ordered to post at its Bay Pines VAHCS facility copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

#### ATTORNEY'S FEES (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she/he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- not to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of receipt of this decision. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

#### 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).

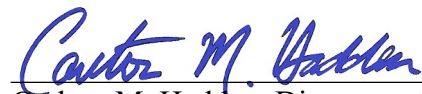
#### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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

December 13, 2021

Date