



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Glynda S.,¹
Complainant,

v.

Kelu Chao,
Acting Chief Executive Officer,
U.S. Agency for Global Media,
Agency.

Appeal No. 2020004387

Agency No. OCR-20-02

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 June 30, 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. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission REVERSES the Agency's final decision.

BACKGROUND

Complainant worked as a Contract Support Specialist, GS-1102-13, within the Budget Division of the Agency's Office of the Chief Financial Officer (OCFO) in Washington, D.C. On October 18, 2019, Complainant filed an EEO complaint in which she alleged:

1. The Agency discriminated against her on the bases of race (African-American), color (Black), age (42), and reprisal (prior EEO activity) when on August 13, 2019, she learned that she was not considered for a GS-13/14 Budget Analyst position for which she applied in June 2018;

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. The Agency discriminated against her on the bases of race (African-American), color (Black), age (42) and reprisal (prior EEO activity) when on August 13, 2019, she was informed she was not considered for the Budget Analyst GS- 0560-13/14, position, advertised under Vacancy Announcement No. IMP-10202171-18-WF, when her supervisor told her only one person was on the certificate of eligible candidates for that position; and
3. The Agency discriminated against her in reprisal for prior protected EEO activity when on March 3, 2020, essential duties were taken from Complainant, which in turn demoted her job.

At the conclusion of the ensuing investigation, the Agency provided Complainant with a copy of the investigative report (IR) 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). The decision concluded that Complainant failed to prove that the Agency subjected her to discrimination or reprisal as alleged.

When Complainant was originally hired in August 2016, she was assigned to the Contract Officer Representative (COR) team within the Budget Division. The COR team consisted of herself and several other Contract Support Specialists, including a coworker (CW1 – Caucasian) and the eventual selectee for the Budget Analyst vacancy at issue (White, younger than 40). In an email to Complainant and the other COR team members dated October 19, 2016, the previous Budget Director, who was Complainant's first-line supervisor at the time (S1a) informed them that he had decided to dissolve the COR team as an entity due to lack of stakeholder support.² Following the dissolution of the COR Team, Complainant served two details in other offices and returned to the OCFO in April 2017. She averred that since her return to OCFO, she had been performing budget-related duties pertaining to Interagency Agreements (IAAs). IR 30, 42, 104.

Incident 1 - Nonselection for Budget Analyst Vacancy

A vacancy for a GS-13/14 Budget Analyst had been posted on USAJobs between May 25 and June 1, 2018. According to the vacancy announcement, the incumbent would be responsible for formulating and executing the Agency's budget and providing technical assistance to the Budget Director, S1a at the time. The duties of the position included coordinating with Budget Office and Program Offices to complete budget formulation and execution, developing budget projections, preparing budget requests and monitoring execution of the current year budget. Specialized experience for the position included: formulating and executing a budget; developing budget justifications and estimates; analyzing and presenting budget data using financial databases; and interpreting and applying financial policies, regulations, and guidance. IR 74.

² S1a retired in September 2019. S1b took over as Budget Director the following month.

The selectee's resume indicated that she had served as a Budget Analyst since July 2011. Her experience included budget formulation, managing IAAs, managing daily execution operations, and coordinating with budget and program office colleagues to complete budget formulation and execution exercises. She led the budget formulation for the Agency's program for FY 2018, managed daily budget execution operations, formulated yearly budgets for various offices within the Agency; and performed numerous other budget-relevant activities. Complainant's resume indicated that she had been a Contract Support Specialist within the Budget Division of the OCFO since August 2016. Her experience included serving as the main point of contact on all unliquidated obligations, providing financial data to staff and management, providing expert advice for the Budget Director, and developing budget policy and procedures. She had also completed training courses in budget formulation, and execution. IR 82, 84-86.

On June 1, 2018, Complainant received a notification that her application had been received. Complainant averred that she heard nothing about her application until August 13, 2019, when S1a informed her that the selectee had been chosen. The selectee was the only applicant whose name appeared on the certificate of eligibles for the Budget Analyst vacancy. When asked what final determination the Human Resources Office made about Complainant's application, a Human Resources Specialist (HRS)³ replied that Complainant did not meet the specialized experience requirements as stated in the vacancy announcement. The Deputy Chief Financial Officer who served as Complainant's second-level supervisor (S2), in his capacity as the selecting official, signed the certificate on June 26, 2018, although it is not clear exactly when the selectee was actually offered the position. IR 30, 38-39, 72, 80, 88.

Incident 2 – Unsuccessful Reassignment from Contract Specialist to Budget Analyst

The record contains a request for an approval of staffing action form prepared by S1a and signed on June 7, 2018. S1a identified the action as a promotion to the position of Budget Analyst, GS-0560-13/14. S1a indicated on the form that the vacancy left behind by the person being promoted would not be filled and that a position description for the Budget Analyst position already existed. He noted that his request to fill the position would be open to recruitment for all qualified candidates. In justifying his request, S1a stated:

This recruitment is to get one staff member of OCFO aligned with her present duties. Staff member was hired as a Contract Specialist. Section has been dissolved and she has been performing as a Budget Analyst for two years. She has completely remodeled the IAAs and has been self-taught on various processes enhancing the section for the [Agency]. This will be a persistent future requirement and this requirement is the most cost effective way to fulfill this ongoing skills requirement. She is currently building a required Government system change for the [Agency] which will keep the IAAs in alignment with contracts currently being required by

³ It is unclear whether the HRS handled Complainant's application herself or whether she was merely reporting on the work done by another human resources specialist.

the Government. This is a new initiative and she is creating the program along with the plan for enactments.

IR 93. When asked what the impact on the mission would be if the action was not approved, S1a wrote:

With financial Aspects being more highly scrutinized at the OIG, OMB, and Congressional levels, there needs to be an influx of new, innovative ideas to reduce the burden on the [Agency] programs but still maintain complete control and accountability for all funding issues. Aligning her duties with her performance appraisal is a requirement. Promoting her to a higher level, keeping her aligned with the other Budget Analysts that are currently working on similar tasks and requirements ensures the [Agency] keeps the most qualified personnel within the Agency.

IR 93. The record also contains a partially completed Standard Form (SF) 52. The action requested in section (1) of the document was listed as a vacancy. Section (5) indicates that S1a, in his capacity as Budget Director had requested the action, and section (6) indicates that the Chief Financial Officer had authorized the action. Sections (7), (10), (15) and (18) identified the proposed action as a conversion from Contract Support Specialist to Budget Analyst with no change in grade. Absent from the document is an approval signature, a proposed effective date, an effective date, and a date of approval. IR 143.

In various emails he sent to S2 in 2018 and 2019, S1a reiterated that Complainant's unique experience was vital to the mission of the Budget Division and that he needed to get Complainant's position aligned with the other positions in the OCFO Budget Division. However, there are no indications in the record that the action was ever completed. S2 and the HRS averred that the SF-52 drafted by S1a was not accepted because it had not gone through the appropriate channels for approval prior to being submitted to the Human Resources Office. When asked if there was any effort in progress to realign Complainant's position description with her current duties, S2 averred that he had tasked S1b to work with Complainant to identify any of her job duties that were inconsistent with her position as a Contract Support Specialist. S1b averred that based upon his three months as Budget Director, he would not categorize her duties as those of a Budget Analyst. IR 39, 47-48, 55-56, 92-93, 100-02, 108-10, 114-15.

One of S1a's last actions as Budget Director was to sign off on Complainant's annual performance appraisal on September 19, 2019. IR 133. The appraisal covered the period from May 1, 2018 through April 30, 2019. IR 122. Complainant received ratings of highly successful in all four performance elements and consequently, she was given an overall rating of "Highly Successful." Under element (1), "budget formulation," S1a reported that Complainant led efforts to determine budgets for the Agency's components and program offices, crafted budget documents, and certified funding. Under performance element (2), "resources / funds execution," Complainant served as the lead budget analyst responsible for conversion of the Agency's legacy system into the Project Cost Allocation System.

S1a noted that Complainant handled these critical responsibilities flawlessly and without error. IR 126, 128, 130-32. S1a added the following narrative to accompany the summary rating he gave Complainant:

[Complainant] is an **outstanding Budget Analyst** [Emphasis added.] and has done a fantastic job during this performance period. *** [Complainant] assumed duties as a Lead Budget Analyst for [IAAs], because of her expertise and experience working on budgets and contractual issues. [Complainant] is also the Lead Budget Analyst for handling all [Agency] funding issues with State Dept. on the International Cooperative Administrative Support Services (CASS) program. This involved many meetings and ensured that [Agency] overseas offices continue receiving support from the State Dept. *** [Complainant] is an **outstanding Budget analyst**. [Emphasis added.] that pays attention to detail and handles all matters in a professional and competent manner.

IR 132-33. S2, as the reviewing official, concurred in S1a's overall summary rating. He signed off on the appraisal on August 13, 2019, the day Complainant became aware of both the nonselection and her failure to be reassigned into a Budget Analyst position. IR 134. No explanation was given as to why the reviewing official, S2, signed the appraisal over a month before the rating official, S1a, had signed it.

According to CW1, S1a had been trying to have Complainant and the other members of the former COR team converted to GS-0560 Budget Analysts up until he retired in September 2019. During the investigation, CW1 was asked whether she could confirm Complainant's qualifications and credentials for the Budget Analyst position, to which she responded:

Yes, that's true. I have worked with [Complainant] for 15 plus years, and we both came up through the ranks the hard way, even though I have a BS degree from a highly accredited university. Because we were both diligent and hardworking, making sure to participate in on the job trainings, classes outside of the Agency, and earning every GS grade as we went along, we both gained and learned the knowledge needed to be where we are today. [Complainant] is knowledgeable in both Budget and Contracting; holding one of the highest bonds in the Office of Contracts. Her background and training as a contracting officer enables her to decipher and more fully understand the mechanics of the agreements from a contracting perspective. And given that these agreements are contracts between Agencies, it is very helpful that she has this knowledge. She has been working with (monitoring, developing, writing, working the budgets and more) the Interagency Agreements (IAAs) for about two years. This function has always been held within the OFCO Budget Office, by Budget Analysts, GS-0560-13/14s.

IR 43-44. When asked whether she was reassigned to a different position when the COR Team was dissolved, CW1 replied:

I was not reassigned to any of the positions I have held within the OFCO Budget Office. I applied for and was selected for the two positions held within the Budget Office. The first was the COR Team, Contracting Specialist, GS-12/13, and after that was dissolved, I applied for a GS-12 Budget Analyst position that was advertised and was selected. The position did not have promotion potential to GS-13/14, although my position on the COR Team had promotion potential to GS-13. I was told that the HR Director insisted that it remain a grade 12, and cut the 13, although all positions within the Budget Office are GS-13/14s. [S1a] was quite upset (furious) and told me that he felt that it was for personal reason(s) that this was being done – toward me. The same comment was made by [S1a] about [Complainant] when she was denied the GS-560-13, which did not make any sense. All [full-time equivalents] FTEs on the Budget Team are GS-560 Budget Analysts – even the grantee team. I was assured by [S1a] after [Complainant] and I both were working on a GS-560 Budget Analyst position description that [the selectee], [Complainant] and I would all be switched over to a GS-560-13/14 Budget Analyst Positions. We would all apply, nothing would be automatic, and nothing would be given to us. This happened for the one employee: [the selectee].

IR 43. When asked whether she would state that Complainant had been discriminated against, CW1 stated:

In my personal opinion, yes, I do think she has been discriminated against. I think the Agency does discriminate (and it is not always black or white, but age is definitely a factor within the OCFO as well) I believe it starts within the Human Resources Office. I have personal reasons to think that she has been discriminated against and will be happy to share with you.

IR 43. Finally, when asked if she had anything else to add that was relevant, CW1 averred:

I have long thought the Agency has granted promotions and reassignments (not all but many) based upon favoritism (which includes race and age, and there are quite a few instances that can be named). If our former supervisor [S1a] had not retired, this would have been taken care of; both [Complainant] and I would have received our promotions. Complainant has the working knowledge as well as the workload and the drive. Knowing her background and based upon the duties she is currently performing, there is no reason for Complainant to have not only been reassigned to a GS-0560-13 Budget Analyst, but to have received her promotion to GS-14. I believe she has not received the promotion because management tends to lean toward being racist, **which is not only pertaining to race but age.** [Emphasis added.] I also know that the former supervisor said that both of us should have been promoted at least one year prior to when he submitted the paperwork. He was “sick of their games.”

IR 44.

Incident (3) - Removal of Apportionment Duties from Complainant's Position Description

In an email sent to Complainant and S1b on February 21, 2020, S2 asked them to work together to identify any duties that Complainant might have been performing that were outside the scope of her position description as a Contract Support Specialist. S1b responded by email on February 28, 2020 that the only duty that did not fall within the realm of contract administration was the task of apportionment. S1b indicated that Complainant handled approximately \$11 million in apportionments, and that he would reassign those duties to the GS-14 Budget Analyst who was already handling approximately \$800 million worth of apportionments. Complainant emailed S1b and S2 on March 3, 2020. In her response email to S1b and S2, dated March 3, 2020, Complainant stated:

I concur my duties are inconsisten[t] with my title and PD.

[S2],

I'm not sure how the duties [S1b] described falls under what I am performing but the duties I have provided to him is an accurate description of my job as a 13.

IR 35-36, 51-53, 59-60, 145-47.

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”).

Disparate Treatment

To prevail in a disparate treatment claim such as this, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Her first step is to establish a prima facie case by demonstrating that she was subjected to adverse employment actions under circumstances that suggest the existence of a discriminatory or retaliatory motivation. Furnco Const. Corp. v. Waters, 438 U.S. 567, 576 (1978). Complainant sought conversion from Contract Support Specialist to Budget Analyst via two avenues: the competitive selection process and by changing her position description.

By all accounts, both attempts failed, and a younger white female, the selectee, was placed into the position of Budget Analyst sometime during 2018. This is sufficient to establish a prima facie case of race and age discrimination. As to the removal of apportionment duties from Complainant's position description in March 2020, that fact that this incident occurred during the processing of the instant complaint is likewise sufficient to establish a prima facie case of reprisal.⁴

The Agency must articulate legitimate and nondiscriminatory reasons for not converting Complainant from Contract Support Specialist to Budget Analyst in August 2019 and for removing apportionment duties from her job description in March 2020. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981). Regarding the competitive selection process, the HRS averred that, based on Complainant's written application, she did not meet the specialized experience requirements for the Budget Analyst position. IR 39. As to S1a's attempt to convert Complainant's existing position from Contract Support Specialist to Budget Analyst prior to his retirement, HRS averred that the Standard form 52 that S1a attempted to submit had not gone through the requisite approval process prior to being submitted to the Human Resources Office. IR 39. With respect to the removal of apportionment duties from Complainant's position description, S1b and S2 both averred that of the 20 job functions Complainant identified, the only job function outside of her position description was apportionment. They further stated that it was far easier under those circumstances to transfer the apportionment function to an employee who already was a Budget Analyst than to convert Complainant to that position. IR 51-54, 59-60.

When asked by the EEO investigator why she believed that she was not selected as a Budget Analyst or reassigned to a Budget Analyst position due to her race, color, and age, Complainant replied that she realized that she was being discriminated against just as S1a was about to retire, and that since S1b, S2, and the CFO were all White and she was an older African-American female, they viewed the selectee more favorably than her. IR 31-32. To ultimately prevail on this claim, Complainant must prove, by a preponderance of the evidence, that the explanations provided by S1b and S2 for not making her a Budget Analyst and taking away her apportionment duties are a pretext for discrimination. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000); St. Mary's Hon. Ctr. v. Hicks, 509 U.S. 502, 519 (1993). Pretext can be demonstrated by showing such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the Agency's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence. Opare-Addo v. U.S. Postal Serv., EEOC Appeal No. 0120060802 (Nov. 20, 2007), req. for reconsid. den'd EEOC Request No. 0520080211 (May 30, 2008).

With regard to the nonselection at issue in incident (1), Complainant could demonstrate pretext by showing that her qualifications for the Budget Analyst position were plainly superior to those of the selectee. Hung P. v. Dept. of Veterans Affairs, EEOC Appeal No. 0120141721 (Dec. 3, 2015).

⁴ The fact that the GS-14 Budget Analyst to whom Complainant's apportionment duties were assigned is an African American older than Complainant is irrelevant and immaterial since reprisal was the only basis raised by Complainant in incident (3).

Complainant averred that she should have been on the cert list, given that she had been a COR member in the Budget Division and as such, had been performing budget-related functions since her return to the Budget Division in April 2017. IR 31. Agencies have broad discretion to choose from among equally qualified candidates as long as the selection is not based on unlawful considerations. Lashawna L. v. Evtl. Prot. Agency, EEOC Appeal No. 2019000124 (March 8, 2019). They may select candidates with fewer years of experience if they believe that such candidates are best qualified to meet the needs of the organization. Barney G. v. Dep't of Agric., EEOC Appeal No. 0120172111 (Nov. 29, 2018). They may even preselect a candidate as long as the preselection is not premised upon a prohibited basis. Michael R. v. Dep't of Agric., EEOC Appeal No. 0120172112 (Nov. 29, 2018). The Commission cannot second-guess such personnel decisions unless there is evidence of a discriminatory motivation on the part of the officials responsible for making those decisions. Burdine, *supra*, 450 U.S. at 259.

In this case, there are no notes from a review panel or any other documentation explaining how the Human Resources Office reached its conclusion that Complainant did not meet the specialized experience requirements for the Budget Analyst position despite having performed those duties for at least a year before she submitted her application. Without such documentation, we can only speculate that the Human Resources Specialist who excluded Complainant from the cert list had done so based upon his or her assessment of Complainant's description of her experience in her resume as matched against the experience requirements specified in the vacancy announcement. Complainant clearly identified herself as a Contract Support Specialist working in the Budget Division, as opposed to the Selectee, who identified herself as an actual Budget Analyst, the position that needed to be filled. IR 82, 84. Moreover, Complainant's 2018-2019 performance appraisal, which included extensive detail regarding her budget-related duties as well as ratings on budgetary functions, had yet to be written at the time Complainant submitted her application. IR 133-34. Given that Complainant did not identify herself as a Budget Analyst on the first page of her resume, the HRS's statement that Complainant did not meet the specialized experience requirements as stated in the vacancy announcement was not unreasonable. Moreover, even if Complainant had made the cert list, a head-to-head comparison of her qualifications as listed in her resume at the time she applied to those of the selectee at the same time does not suggest that Complainant was the plainly superior candidate in June 2018. At best, their qualifications would have been comparable.

Other indicators of pretext include discriminatory statements or past personal treatment attributable to those responsible for the personnel action that led to the filing of the complaint, comparative or statistical data revealing differences in treatment across various protected-group lines, unequal application of Agency policy, deviations from standard procedures without explanation or justification, or inadequately explained inconsistencies in the evidentiary record. Mellissa F. v. U.S. Postal Serv., EEOC Appeal No. 0120141697 (Nov. 12, 2015). The only indicator of pretext we have that ties the nonselection to the Human Resources Office is CW1's expressed belief that the discrimination started within that office. IR 43. We also find it extremely suspicious that no one had ever informed Complainant that she had been not selected until she asked S1a about it more than a year after she had submitted her application. IR 30.

But other than this, Complainant has presented neither affidavits, declarations, or unsworn statements from witnesses other than herself nor documents that identify the Human Resources staff who actually made that decision. Without actually knowing who decided not to include Complainant on the cert list, the Commission simply cannot conclude that that decision, and hence the nonselection that followed from it, was tainted by unlawful considerations of Complainant's race and age.

Our inquiry does not end here, however. We must also consider S1a's unsuccessful attempts to reassign Complainant to the Budget Analyst position before and after the nonselection. And in this regard, we find numerous indicators of pretext.

S1b stated that a Budget Analyst would typically formulate the budget and review any budget justifications to ensure the proposed budget tables are in sync with the narrative. IR 56. Those functions are clearly laid out in the first element of Complainant's performance appraisal. IR 126. S1b also averred that, based upon his limited observation time, Complainant was performing contracting duties in the sense that she manages all of the Agency's IAAs. IR 56. The first element of Complainant's performance appraisal makes clear that Complainant's budgetary duties and responsibilities revolve around IAA management. IR 126-27. Therefore, S1b's assertion that Complainant's duties were not the same as those of a Budget Analyst is completely at odds with her performance as documented in the request-for-approval issued in June 2018 and Complainant's 2018-2019 performance appraisal. While S1b did not become the Budget Director, and hence Complainant's supervisor until October 2019, his input had apparently influenced S2's ongoing failure to approve the request originally made by S1a that Complainant be reassigned to the Budget Analyst position.

The emails and documents generated by S1a between 2017 and his retirement in September 2019 show that he repeatedly emphasized the importance of aligning Complainant's position description with the duties she was actually performing. IR 92-93, 100-02, 107-115, 126-37. Yet when asked whether he had any conversations with S1a on that subject prior to S1a's retirement, S2 replied that S1a told him that he was going to raise the matter with the CFO. S2 denied seeing the June 2018 request-for-approval-of-staffing-action form until the pre-complaint stage of the instant EEO proceeding. IR 47-48. When asked if he had promised Complainant that he would consider changing Complainant's job title after reviewing her resume to ensure that she had the required skills for the budget analyst position, S2 averred that he only promised to review her resume and provide feedback for professional development as it relates to the Budget Analyst job series. IR 5, 48. Yet he, S2, had already signed off on a performance appraisal which demonstrated that Complainant did possess the qualifications needed for the Budget Analyst series by virtue of having performed budget-related functions since April 2017. IR 134.

The HRS averred that although S1a did draft an SF-52 and emailed it to her, Human Resources did not accept SF-52s unless they were approved by management. By that, she meant that the SF-52 submitted by S1a did not go through the appropriate channels for approval before being submitted to Human Resources. She averred that she made that clear to S1a in an email. IR 39.

On June 7, 2019, S1a had sent an email to the HRS, the subject of which was the Budget position into which he was attempting to place Complainant. S1a stated that he had attached the necessary position descriptions, staffing requests, and the SF-52. He asked the HRS to let him know if any changes were needed and that once he obtained clearance from the Human Resources Office, he would obtain the necessary approval signatures. He reminded the HRS that Complainant had been working in a GS-13/14 Contract Support Specialist position that was slated for elimination, and that he needed to get her aligned with the Budget Analyst position she had been filling. Further, S1a noted that CW1 had been converted from a GS-12/13 contract position to a GS-12 Budget position in 2018, and that since CW1's promotion potential had been taken away, he needed to get CW1 equivalent to the other budget positions on his team as she was providing the same work as the other analysts. IR 101-02. In an email sent to S1a on June 19, 2019, the HRS asked S1a if he had moved forward with the approval signatures for the SF-52 and urged him to do so if he had not, to which S1a replied that he was waiting for the HRS's review of the documents to see if they looked okay to go forward. IR 101. After receiving no response from the HRS, S1a sent her an email on June 26, 2019, in which he asked whether he could proceed and get the SF-52's signed. The following day, the HRS emailed her reply to S1a in which she told him, "yes, please proceed for approval signatures." IR 100-01. Although the HRS asserted that her office had disapproved of the SF-52, there is no documentation of that disapproval anywhere in the record. The email correspondence between S1a and the HRS indicates the opposite – that the SF-52 had been given clearance by the Human Resources Office and all that S1a had to do was to obtain the necessary signatures for final approval. The HRS's statements regarding the need for approval appear to be an after-the-fact justification for the Human Resources Office's failure to act on the SF-52.

According to CW1, S1a was extremely upset with what he perceived to be a lack of action on Complainant's conversion, which he had been working on for more than a year. CW1 averred that S1a was furious and had told her that he felt that it was for personal reasons that she and Complainant had not been converted to Budget Analysts with promotion potential to GS-14. CW1 also averred that S1a had assured her after she and Complainant were both working on a GS-560 Budget Analyst position description that the selectee, Complainant, and she would all be switched over to GS-560-13/14-Budget Analyst position after a competitive process, but that this was done only for the selectee. IR 43. As noted above, no other names besides the selectee's had appeared on the certificate of eligibles. IR 80. In addition, CW1 averred that S1a had said that both she and Complainant should have been promoted at least one year before he submitted the paperwork and that S1a was "sick of their [management's] games." IR 44. CW1's account of what S1a had told her clearly constitutes hearsay. While generally admissible in an EEO administrative proceeding, hearsay evidence is of limited probative value. Renee L. v. Dep't of Commerce, EEOC Appeal No. 0120141032 (Mar. 29, 2017), req. for reconsid. den'd EEOC Request No. 0520170339 (Aug. 8, 2017). But when considered in context with the numerous inconsistencies in the evidentiary record described above, CW1's assertions regarding what S1a had told her take on real significance.

We also note that CW1 had told the EEO investigator that she would state on the record that Complainant had been discriminated against. She opined that the OCFO did discriminate, sometimes on the basis of race but definitely on the basis of age, and that there were individuals within Human Resources who had committed acts of discrimination. IR 43. She did not specifically implicate S1b, S2, or the HRS. However, she did point out in regard to her own situation that both she and S1a were “furious” with the decision made by the Human Resources Director to cap CW1’s Budget Analyst position at GS-12. That decision appears somewhat arbitrary in light of the fact that all of the other Budget Analyst positions in the OCFO topped out at GS-14. IR 43.

Finally, CW1 also expressed her belief that the Agency granted many promotions and reassignments based upon “favoritism” which included considerations of race and age. She further opined that her reassignment and Complainant’s reassignment to GS-13/14 Budget Analyst would have gone through if their previous supervisor, S1a, had not retired. As to Complainant, CW1 averred that, knowing Complainant as she did and based upon the duties Complainant was performing at the time, there was no reason for Complaint to not only have been reassigned to a GS-560-13 Budget Analyst, but to receive her promotion to GS-14. CW1 specifically stated: “I believe that she [Complainant] has not received the promotion because management tends to lean toward being racist, which is not only pertaining to race, but age.” IR 44.

Considering the above-described evidentiary record as a whole, and the inconsistencies throughout that record in particular, we find the preponderance of the evidence sufficient to establish that S2 had made the decision not to reassign Complainant from Contract Support Specialist to Budget Analyst since her return to the OCFO in April 2017. We also find that S1b participated in this decision since he took over as Budget Director from S1a in October 2019. Ultimately, we find that in refusing to reassign Complainant, S1b and S2 were motivated by unlawful considerations of Complainant’s race and age.

As to incident (3), we find the assertion of S1b and S2 that Complainant was only performing one budget function out of 20 job duties to be inconsistent with CW1’s affidavit and Complainant’s 2018-2019 performance appraisal. S1b and S2 both averred that out of 20 duties Complainant identified during her discussions with S1b, the only duty Complainant was performing beyond her contract specialist position description was apportionment. IR 52, 59, 146. In an email to Complainant, and copied to S2, sent on February 28, 2020, S1b informed Complainant that he would reassign apportionments to the GS-14 Budget Analyst. IR 146. Complainant responded to S1b and S2 by email dated March 3, 2020 that she was not sure how the duties described by S1b fell under her current position description and that the duties she provided to S1b were an accurate description of what she was actually doing. Those duties and her performance of those duties are described in detail in Complainant’s 2018-2019 performance appraisal which, again, was signed off on by both S1b and S2. IR 122-37, 146. According to CW1, Complainant was handling budget-related functions pertaining to IAAs, which appear to involve a lot more than apportionment. Her assessment was that Complainant had been performing the work of a GS-0560 Budget Analyst at grades 13 or 14 and that Complainant should have been promoted to GS-14 in 2017. IR 43-44.

The first and second elements of Complainant's performance appraisal, both of which were deemed critical, revolved extensively around budget formulation and execution. IR 126, 128. S1a referred to Complainant as an "outstanding Budget Analyst" twice in his overall narrative and S2 concurred with that assessment. IR 132-33. This leads us to believe that Complainant was doing much more budget-related work than the mere five percent that S1b and S2 found her to be doing. Although we disagree with Complainant that S1b and S2 made the decision to remove apportionment duties from her position description and transfer those duties to a GS-14 Budget Analyst in retaliation for Complainant having filed the instant EEO complaint, we do find that the reassignment of Complainant's apportionment duties was an attempt to ensure that she remained a Contract Support Specialist and therefore constitutes additional evidence of S1b's and S2's discriminatory refusal to convert her to a Budget Analyst in the OCFO.

Entitlement to Relief

Complainant is therefore entitled to relief unless the Agency shows, by clear and convincing evidence, that the claimant would not have been entitled to that remedy even absent discrimination. Velva B. v. U.S. Postal Serv., EEOC Appeal Nos. 0720160006 & 0720160007 (Sept. 25, 2017), req. for recon. den'd EEOC Request Nos. 0520180094 & 0520180095 (March 9, 2018). We find that the Agency has not made such a showing. We will therefore enter an order directing the Agency to award equitable relief, compensatory damages, and attorney's fees, provide training for S1b and S2, and consider disciplinary action against S1b and S2. The parties will need to determine as accurately as possible the date upon which Complainant would have been placed into the position of Budget Analyst and whether or when she would have been promoted to GS-0560-14. The Agency will also need to determine whether and to what extent she may be entitled to back pay.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we REVERSE the Agency's final decision because the preponderance of the evidence establishes that discrimination had occurred. We REMAND this matter for the Agency to take the remedial action ordered below.

ORDER (D0617)

1. 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 60 calendar days after the date this decision was issued. The Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due, and shall provide all relevant information requested by the Agency. In particular, Complainant shall work with the Agency to determine as accurately as possible the date on which her conversion from GS-1102-13 Contract Support Specialist to GS-0560-13 Budget Analyst would have occurred as well as the date, if any, on which Complainant would have been promoted to GS-14. 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 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."

2. Within 90 calendar days of the date this decision is issued, the Agency shall conduct a supplemental investigation to determine Complainant's entitlement to compensatory damages under the Rehabilitation Act. The Agency shall give Complainant notice of the 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)) and request objective evidence from Complainant in support of her request for compensatory damages within 45 calendar days of the date Complainant receives the Agency's notice. No later than 60 calendar days after the supplemental investigation is complete, the Agency shall issue a final Agency decision addressing the issue of compensatory damages and remit payment of said amount. The final decision shall contain appeal rights to the Commission.
3. Within 90 calendar days of the date this decision is issued, the Agency is ordered to provide eight hours of in-person or interactive training to the officials identified in the decision as S1b and S2. The required training shall cover those officials' responsibilities under Title VII of the Civil Rights Act, particularly their responsibility to maintain a workplace free of discrimination and harassment of any employee. If these officials are no longer employed, the Agency shall provide documentation of their departure dates.
4. The Agency shall consider taking disciplinary action against the officials identified as S1b and S2 to the extent that these individuals are still employed by the Agency. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the Compliance Officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline.

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 in the Office of the Chief Financial Officer 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).

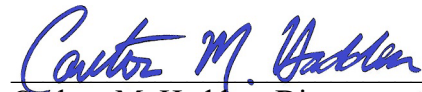
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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:



Carlton M. Hadden, Director
Office of Federal Operations

March 28, 2022

Date