



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

[REDACTED]
Arthur J.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs
(Veterans Health Administration),
Agency.

Appeal No. 2021004758

Agency No. 200H-0539-2021100210

DECISION

On August 25, 2021, 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 July 28, 2021, final decision concerning his 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, we REVERSE the Agency's final decision and REMAND the matter for further processing.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Health Systems Specialist, GS-0671-11, at the Agency's Cincinnati Medical Center (VAMC) in Cincinnati, Ohio.

On September 8, 2020, the Agency announced a vacancy for the position of Administrative Officer (AO), GS-0341-11, at the VAMC's Eye and Vision Center and advertised the position under Vacancy Announcement No. CBSR-10906777-20-AF. See Report of Investigation (ROI) at 117-22. Complainant timely applied for the position.

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.

After reviewing the candidates' resumes, the Selecting Official did not select Complainant for an interview, as Complainant did not rank among the top five candidates. Id. at 85 and 90. Complainant ultimately learned that he had not been selected on or about October 15, 2020. Id. at 54.

Believing that he had been subjected to discrimination, Complainant filed an EEO complaint on November 23, 2020,² alleging that the Agency discriminated against him on the basis of race (Black) when on or about October 15, 2020, he was not selected for the Administrative Officer (CBSR-10906777-20-AF) position.

During the EEO investigation, the Selecting Official denied Complainant's allegation of discrimination and emphasized that he was unaware of Complainant's race during the selection process. According to the Selecting Official, he conducted an initial review of the candidates' resumes. While the Selecting Official acknowledged that he did not utilize any particular method for determining whom to interview, he recalled that he was looking for resumes that had "clear and concise description of skill and knowledge relevant to the Administrative Officer job duties." He explained that he ultimately decided not interview Complainant because Complainant's resume was not in the top five. According to the Selecting Official, the two other panel members "each reviewed [the] resumes [that he selected] and concurred with the selections." ROI at 84-85 and 90. Ultimately, the Agency selected a Caucasian candidate for the position. Id. at 65.

Both Panelist-1 and Panelist-2 confirmed the Selecting Official's recollection of the selection process. ROI at 73-77 and 95-99. While Panelist-1 acknowledged that she had interviewed Complainant in 2018 for a position, she emphasized that she was unaware of Complainant's race because the interview had occurred over the telephone. Id. at 55. Panelist-2 also denied any knowledge of Complainant's race. Id. at 96.

Complainant, however, argued that the selection process was not fair as there was not a clear method for scoring the resumes. While Complainant could not explain how and when the members of the selection panel became aware of his race, he emphasized that "[t]hey [were] aware that I am a Black male." He attributed his non-selection to race because since 2018, the Agency repeatedly failed to select him for positions even though he was plainly superior to the Caucasian individuals who were selected. ROI at 63-66.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the ROI and notice of his 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), which concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

² We note that Complainant raised numerous other non-selection claims, which the Agency dismissed pursuant to 29 C.F.R. § 1614.107(a)(2). As Complainant has not challenged the dismissal of these claims, we need not consider them herein. The Commission has the discretion to review only those issues specifically raised in an appeal. EEO MD-110 at 9-10.

In finding no discrimination, the Agency initially found that Complainant could not prevail because he failed to establish a prima facie case of discrimination, as the record persuasively showed that the members of the selection panel were not aware of his race. However, the Agency concluded that even if Complainant had made the requisite showing, he still could not prevail because he failed to demonstrate that he was plainly superior to the selectee.

STANDARD OF REVIEW

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 Chap. 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”).

ANALYSIS AND FINDINGS

For Complainant to prevail on his claim of disparate treatment, he must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). Complainant must initially establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Co. 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 804 n. 14. The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep’t of Cmty. Aff. v. Burdine, 450 U.S. 248, 253 (1981). Complainant can demonstrate pretext in non-selection cases by showing that his qualifications for the position were plainly superior to those of the selectee. Hung P. v. Dep’t. of Vet. Aff., EEOC Appeal No. 0120141721 (Dec. 3, 2015). Complainant must ultimately prove, by a preponderance of the evidence, that the agency’s explanation was pretext for discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000); St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Burdine, 450 U.S. at 256.

Having reviewed the record, we initially find that Complainant has established a prima facie case of discrimination because the record shows that Complainant applied for the position in question and was found to have been qualified for the position in question. Further, the Agency selected a Caucasian individual for the position creating an inference of discrimination. See Dixon v. Dep’t of Justice, EEOC Appeal No. 07A20008 (Aug. 15, 2002) (holding that a prima facie case can be established by presenting facts that, if unexplained, would reasonably give rise to an inference of discrimination).

As Complainant has established a prima facie case of discrimination, we must now determine whether the Agency has articulated a legitimate, nondiscriminatory reason for not selecting him. Here, Selecting Official conducted an initial review of the candidates' resumes. While the Selecting Official acknowledged that he did not utilize any particular method for determining whom to interview, he recalled that he was looking for resumes that had "clear and concise description of skill and knowledge relevant to the Administrative Officer job duties." The Selecting Official explained that he ultimately decided not to interview Complainant because Complainant's resume was not in the top five.

Upon review, we find that the Agency failed to articulate a specific, clear, and individualized reason as to why he was not selected for the position. Selecting Official provided his subjective belief without any clarification how Complainant's resume did not adequately provide a "clear and concise description of skill and knowledge relevant to the Administrative Officer job duties." As we have repeatedly found such explanations to be insufficient to meet an agency's burden of producing a legitimate, nondiscriminatory reason, we find that the Agency engaged in discrimination when it failed to select Complainant for the position at issue. See, e.g., Ayesha v. Soc. Sec. Admin., EEOC Appeal No. 2022002856 (May 16, 2023) (finding insufficient agency's explanation that selection process was "based on job knowledge, interpersonal skills and presentation experience..."; 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); and 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, as Complainant has established a prima facie case of race discrimination and the Agency failed to articulate a legitimate, nondiscriminatory reason for its decision, we find that Complainant has prevailed.

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 final decision and REMAND the matter for further action in accordance with the Order below.

ORDER

The Agency shall 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 Administrative Officer (AO), GS-0341-11, at the VAMC's Eye and Vision Center, or a substantially equivalent position.

2. Within **sixty (60) calendar days** of the date this decision is issued, the Agency shall determine the appropriate amount of benefits with interest, *if applicable*, due Complainant from October 15, 2020 (date of non-selection) to the effective date of his placement in the AO position, or the date Complainant declines the offer of the position. Complainant shall cooperate in the Agency's efforts to compute the amount of benefits due and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of benefits, the Agency shall issue a check to Complainant for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due.
3. The Agency shall conduct and complete a supplemental investigation on the issue of Complainant's entitlement to compensatory damages and will afford him an opportunity to establish a causal relationship between the Agency's discriminatory action and his pecuniary or non-pecuniary losses, if any. Effective the date that this decision is issued, the Agency shall give Complainant notice of his 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 his claim for compensatory damages. Complainant shall have thirty (30) calendar days from the date the Complainant receives the Agency's notice to submit his compensatory damages evidence. Complainant has a duty to cooperate in determining compensatory damages, including providing evidence/input/documents (including responding to agency requests for documentation or completing agency forms). Within **sixty (60) calendar days** of the receipt of this decision, the Agency shall determine the appropriate amount of compensatory damages. Within **sixty (60) calendar days** of determining the amount of compensatory damages due Complainant, the Agency shall issue a final decision, with appeal rights to the Commission, on the issue of compensatory damages, and payment of any undisputed funds. 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.
4. Within **ninety (90) calendar days** of the date this decision is issued, the Agency shall provide eight hours of in-person training to the Selecting Official.³ The training shall address the Agency's obligations under Title VII of the Civil Rights Act of 1964. The Agency may, at its discretion, contact the EEOC, Office of Federal Operations, Training and Outreach Division, for assistance in obtaining the necessary training material.
5. Within **one hundred twenty (120) calendar days** from the date this decision is issued, the Agency shall consider disciplining the Selecting Official. 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. If these individuals have left the Agency's employ, the Agency shall furnish documentation of their departure dates.

³ The Selecting Official is identified on page 83 of the ROI.

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 the Cincinnati VAMC, 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).

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

June 26, 2023
Date