



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

[REDACTED]
Rosena J.,¹
Complainant,

v.

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

Appeal No. 2022001174

Hearing No. 420-2021-00082X

Agency No. 200I-V107-2020103661

DECISION

JURISDICTION

On December 22, 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 December 7, 2021, final order 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Registered Nurse at the Agency's Tuscaloosa Veterans Administration Medical Center (Tuscaloosa VAMC).

On July 27, 2020, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of race (African American) and in reprisal for prior protected EEO activity when:

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.

1. On March 24, 2020, the Agency rescinded its a job offer of employment for a Certified Registered Nurse Practitioner position advertised under Vacancy Announcement No. CBAG-10543168-19-TA.
2. On or about April 27, 2020, Complainant was not considered or interviewed for positions as Nurse Practitioner in primary care.

The Agency accepted the complaint and conducted an investigation which produced the following pertinent facts.

Complainant applied for the Nurse Practitioner position advertised under Vacancy Announcement No. CBAG-10543168-19-TA. Human resources determined that Complainant and one other candidate were qualified. The candidates interviewed for the position. The other candidate was offered the position because she had a higher overall score based on the interview. However, she declined the job offer, so the Agency offered Complainant the job. Complainant accepted the job offer.

On March 24, 2020, Complainant received an email from human resources, notifying her that the job offer was rescinded. The email did not specify who made the decision to rescind the job offer or the reason. And the record contains conflicting testimony on who made the decision. Director (Caucasian) said, “the decision was made by [Associate Director],” and “I supported his decision.” Which is a stark contrast to Associate Director (Caucasian), who said “the decision to rescind was not mine.”

The record contains an email correspondence between Director and Chief of Human Resources discussing the incident that led to the rescission. In an email dated March 23, 2020, Chief of Human Resources revealed that one of the panelists who sat on the interview panel for the Certified Registered Nurse Practitioner position submitted a Report of Contact (ROC). In the ROC, the panelist said that she was concerned because two selecting officials were in the room during interviews with a union representative. Chief of Human Resources indicated that it was not clear if the union representative was there in her capacity as a union representative or as an employee, but the selecting officials should not have been present. Nonetheless, Chief of Human Resources stated that their presence did “not change the outcome of the selection” because 3 components were used to score the candidates: (1) resume review, (2) references, and (3) interview, and Complainant had the highest scores for resume review and references.

Director replied to Chief of Human Resources’ email and stated:

I disagree, this hiring action is on hold. My understanding from you is that the [union representative] is not allowed in the interview. I also have concerns that the other two were in the room as well. I will wait to make a final decision when we’ve receive all three ROCs. Do not move the selectee at this time. Bottom line: if the [union representative] was in the room the selection is void.

Chief of Human Resources sent a reply email stating:

[Director], I never said this was on hold. I stated human resources advises that this not be placed on hold . . . my only concern is that we need to find out in what capacity [the union representative] was in during the interview. Was she there as an employee or as [a union representative] . . . The interview is one part of the overall score. My position is that all of the components need to be reviewed. I suggest again that clarification should be sought before making a decision that the facility will regret later. It seems like a form of retaliation against the [union representative] and [Complainant]. But this is your call and human resources will follow accordingly. We are holding for further instruction.

In response, Director wrote, “based on [the] attached ROCs I feel this selection is not valid,” for that reason, Director instructed Chief of Human Resources to “pull back” Complainant’s job offer. Chief of Human Resources followed Director’s instructions and asked a staff member to inform Complainant that the job offer was rescinded. Chief of Human Resources said that the next step would be for the Labor Relations Specialist and Associate Director to conduct a fact-finding investigation.

Complainant wanted to know why her job offer was rescinded, so she contacted Associate Director to discuss the matter. On March 25, 2020, Associate Director held a meeting with Complainant and Labor Relations Specialist. According to Complainant, Labor Relations Specialist (African American) stated that the interview panel felt intimidated by the presence of the selecting officials and union representative, and their attendance at her job interview was in violation of Agency policy. She said that Labor Relations Specialist informed her that a fact-finding investigation was pending, and that whenever there was a fact-finding investigation, a job offer must be rescinded according to Agency policy.

Consistent with Complainant’s testimony, Associate Director and Labor Relations Specialist testified that they informed Complainant that the interview process had been compromised because the union representative was present at job interviews. When the investigator asked Labor Relations Specialist for a copy of the policy that the Agency used in its rescission process, Labor Relations Specialist replied, “I cannot intelligently answer this question.” Labor Relations Specialist referred the investigator to Associate Director, Chief of Human Resources, or Chief Nurse, he said that these staff members would be able to provide a detailed explanation of the Agency’s rescission process. There is no indication from the record that Chief of Human Resources, or Chief Nurse were asked about the Agency’s rescission process. However, Associate Director informed the investigator that Article 45² of the National Nurses Union (NNU) contract and 5 U.S.C. 7114 did not give the union representative the right to attend the job interviews.

² Associate Director cited to Article 5 of the NNU. This appears to be a typographical error. The correct section appears to be Article 45 of the NNU.

The record contains a copy of Article 45 of the NNU. Article 45 of the NNU and 5 U.S.C. 7114 do not discuss a union representative's role in the job interview process.

The fact-finding investigation was completed after the rescission. The Fact-finding Investigation Report revealed that the interview panel expressed concerns with the union representative's actions during the interview. Specifically, the interview panel indicated that the union representative made negative comments toward them, and abruptly walked out of the room when the panel questioned Complainant's ability to manage a heavy case load. The interview panel was under the impression that the union representative favored Complainant over the other candidate. But the panel did not let the union representative influence their scores.

Complainant stated that she applied for another nurse practitioner position after the Agency rescinded its a job offer. On or around April 27, 2020, Complainant was not interviewed for the position. She said two Caucasian nurse practitioners were selected for the position. Complainant believes that she should have been hired over the selectees because she had already been selected for the position under Vacancy Announcement No. CBAG-10543168-19-TA. In addition, she stated that unlike the selectees she was a veteran and qualified for veteran's preference.

Associate Director said that he was the selecting official. He said that the selectees were selected because they had experience as certified registered nurse practitioners, and Complainant did not. He indicated that the selectees were hired under a direct hire authority that eliminates veteran's preference, competitive ranking, and competitive rating. Associate Director said cited to 5 C.F.R. § 337, which states that OPM permits agencies to use direct-hire authority if OPM determines that there is a severe shortage of candidates or a critical hiring need. However, he did not submit documentation indicating that he had OPM authority to hire the selectees under 5 C.F.R. § 337.

At the conclusion of the investigation, Complainant was provided a copy of the investigative file and requested a hearing before an EEOC Administrative Judge (AJ). However, the AJ issued a decision by summary judgment in favor of the Agency concluding no discrimination or unlawful retaliation was established. The Agency's final action implemented the AJ's decision.

Complainant filed the instant appeal. Complainant, through her attorney, argues that the AJ's summary judgment did not address genuine issues of material fact. Complainant asserts that there is an issue with the policies that the Agency cited because none of them justified the rescission. And she argues that the Agency's own investigation determined that there was no undue influence in the selection of Complainant by the presence of the union representative or her comments.

ANALYSIS AND FINDINGS

The Commission's regulations allow an AJ to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. Id. at 249. The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. Id. at 255. An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case. If a case can only be resolved by weighing conflicting evidence, issuing a decision without holding a hearing is not appropriate.

In the context of an administrative proceeding, an AJ may properly consider issuing a decision without holding a hearing only upon a determination that the record has been adequately developed for summary disposition. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003). Finally, an AJ should not rule in favor of one party without holding a hearing unless he or she ensures that the party opposing the ruling is given (1) ample notice of the proposal to issue a decision without a hearing, (2) a comprehensive statement of the allegedly undisputed material facts, (3) the opportunity to respond to such a statement, and (4) the chance to engage in discovery before responding, if necessary. According to the Supreme Court, Rule 56 itself precludes summary judgment "where the [party opposing summary judgment] has not had the opportunity to discover information that is essential to his opposition." Anderson, 477 U.S. at 250. In the hearing context, this means that the administrative judge must enable the parties to engage in the amount of discovery necessary to properly respond to any motion for a decision without a hearing. Cf. 29 C.F.R. § 1614.109(g)(2) (suggesting that an AJ could order discovery, if necessary, after receiving an opposition to a motion for a decision without a hearing).

The courts have been clear that summary judgment is not to be used as a "trial by affidavit." Redmand v. Warrenner, 516 F.2d 766, 768 (1st Cir. 1975). The Commission has noted that when a party submits an affidavit and credibility is at issue, "there is a need for strident cross-examination and summary judgment on such evidence is improper." Pedersen v. Dep't of Justice, EEOC Request No. 05940339 (February 24, 1995).

After a careful review of the record, we find that the AJ erred when she concluded that there was no genuine issue of material fact in this case. There were inconsistencies with Director and Associate Director's testimony.

Director said that Associate Director made the decision to rescind Complainant's job offer and Associate Director said, "the decision to rescind was not mine." Testimony is needed to clarify who made the decision and their rationale for the rescission.

Furthermore, Agency witnesses did not discuss the Agency rescission process or point to a policy that justified the rescission. A discussion on the Agency's rescission process is needed. We note that Complainant identified a comparator who she says was treated differently. We cannot make that determination on this without testimony on the Agency's rescission process. In addition, testimony from the Chief of Human Resources is missing from the record. Her testimony is needed because she wrote an email stating that the rescission seemed "like a form of retaliation against the [union representative] and [Complainant]." There are simply too many unresolved issues with the rescission that cannot be resolved without the benefit of a hearing on claim 1.

Similarly, we find that claim 2 should be remanded. The record is missing documentation that shows the Agency had authority to hire the selectees under 5 C.F.R. § 337. It is imperative that the Agency provide documentation on this matter because Associate Director indicated that he did not have to consider veteran's preference, competitive ranking, or competitive rating when he made his selection and, therefore, did not have to consider Complainant's application. Moreover, the fuller resolution of claim 1 may shed additional light on the motivation (lawful or retaliatory) for exercising authority under 5 C.F.R. § 337 (if the Agency had it) to eliminate consideration of Complainant, as a competitive candidate.

We note that the hearing process is intended to be an extension of the investigative process, designed to ensure that the parties have "a fair and reasonable opportunity to explain and supplement the record and, in appropriate instances, to examine and cross-examine witnesses." See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 7-1 (Aug. 5, 2015); see also 29 C.F.R. § 1614.109(e). "Truncation of this process, while material facts are still in dispute and the credibility of witnesses is still ripe for challenge, improperly deprives Complainant of a full and fair investigation of her claims." Bang v. U.S. Postal Serv., EEOC Appeal No. 01961575 (March 26, 1998). See also Peavley v. U.S. Postal Serv., EEOC Request No. 05950628 (October 31, 1996); Chronister v. U.S. Postal Serv., EEOC Request No. 05940578 (April 25, 1995). In summary, there are simply too many unresolved issues, a discussion on the Agency's rescission process is needed and documentation is needed to fill in the gaps on the direct hiring issue. Therefore, judgment as a matter of law for the Agency should not have been granted.

CONCLUSION

Therefore, after a careful review of the record, including Complainant's arguments on appeal, the Agency's response, and arguments and evidence not specifically discussed in this decision, the Commission VACATES the Agency's final action and REMANDS the matter to the Agency in accordance with this decision and the Order below.

ORDER

Within fifteen (15) calendar days of the date this decision is issued, the Agency is directed to resubmit a request for a hearing on Complainant's behalf to the appropriate EEOC Hearings Unit, as well a copy of this appellate decision and uploading the complaint file. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit. Thereafter, the Administrative Judge shall hold a hearing and issue a decision on the complaint in accordance with 29 C.F.R. § 1614.109 and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

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

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

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

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0920)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration**. A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

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

Alternatively, Complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files his or her request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).


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

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

August 7, 2023
Date