

Reference #: [REDACTED]

[REDACTED]



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

[REDACTED] a/k/a
[REDACTED],¹
Complainant,

v.

Chad F. Wolf,
Acting Secretary,
Department of Homeland Security
(U.S. Secret Service),
Agency.

Appeal No. [REDACTED]

Hearing No. [REDACTED]

Agency No. [REDACTED]

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission),² pursuant to 29 C.F.R. § 1614.403(a), from the Agency's September 19, 2018, final order concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission AFFIRMS the Agency's final order.

ISSUES PRESENTED

The issues are whether the Administrative Judge: (1) abused her discretion when she denied Complainant's request for sanctions against the Agency; and (2) properly issued a decision without a hearing finding that Complainant did not establish that the Agency discriminated against him based on his disability when it did not select him for a 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.

² The Agency argues that Complainant's appeal was not properly filed because he did not serve his appeal or supporting brief to the Commission. However, we note that Complainant properly filed his appeal documents with the Commission.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was an applicant for a position at the Agency's Office of Technical Development and Mission Support in Washington, D.C. On September 23, 2013, the Agency opened a vacancy for an Information Technology (IT) Program Manager (GS-2210-15) under vacancy number TEC-AS166-13-MP. Report of Investigation (ROI) at 77-81. Complainant stated that he applied for the position on or around September 16, 2013, and he was interviewed on December 13, 2013. ROI at 106-7. On July 17, 2014, Complainant was extended a conditional offer for the position and instructed to initiate a background investigation. ROI at 120-1.

On September 18, 2014, Complainant submitted to a polygraph exam, which was administered by a Special Agent (SA) (unidentified disability status). Complainant stated that at the start of the polygraph exam, he disclosed that he was taking medication for obsessive compulsive disorder (OCD), depression, and anxiety. Complainant stated that when SA informed him that he failed the exam due to his responses regarding illegal drug use and past serious crimes, he offered to retake the polygraph exam. ROI at 108-9. A quality review was conducted, and the reviewer concurred that Complainant recorded one inconclusive response and one significant response during the polygraph exam. ROI at 325-6.

On October 28, 2014, the Agency informed Complainant that he was not selected for the position. Complainant requested additional information on his non-selection. On November 5, 2014, the Agency informed Complainant that his conditional offer of employment required that he successfully complete all phases of the application process, and that he did not successfully complete the polygraph exam. ROI at 63-6.

On December 19, 2014, Complainant filed an EEO complaint alleging that the Agency discriminated against him based on his disability (OCD) when on November 28, 2014, he was informed that he was not selected for the position of IT Program Manager (GS-2210-15), under vacancy announcement number TEC-AS166-13-MP. ROI at 77-81. 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 EEOC Administrative Judge (AJ). Complainant timely requested a hearing.

On August 10, 2016, the AJ issued an order denying the Agency's motion to dismiss and granting Complainant's motion to compel. Complainant sought production of: (1) the audio and/or video recording of his polygraph exam; (2) all documents related to Complainant's polygraph exam, including polygraph charts, polygraph scoring charts, and quality control documents and notes; and (3) the questions from Complainant's polygraph exam. The AJ found that the information sought in the motion to compel was relevant to Complainant's claims. The AJ was not persuaded by the Agency's assertions of national security privilege and law enforcement privilege, and she ordered the Agency to produce the requested information.

On October 4, 2016, Complainant filed a Motion to Show Cause Why Sanctions Should Not be Imposed for Spoliation of Evidence, which the Agency opposed. On October 21, 2016, the AJ issued an order denying the motion, finding that Complainant failed to show that spoliation had occurred.

On December 1, 2016, the Agency filed a Motion for Decision without a Hearing, and Complainant filed an opposition brief. On August 20, 2018, the AJ issued a decision without a hearing finding that there were no genuine disputes of material facts. The AJ found that even if Complainant were an individual with a disability, he was not qualified for the IT Manager position because he failed to pass a required polygraph exam, which rendered him unqualified.

In addition, the AJ found that Complainant's named comparator (C1) was not similarly situated because he also had a significant response during a polygraph exam and the Chief of the Security Clearance Division (Chief) (no disability) determined that C1 was no longer the best-qualified candidate. However, different officials then allowed C1 to take another polygraph exam, which he passed. The AJ noted that SA and the Chief treated Complainant and C1 the same, and that the individuals involved in C1's subsequent polygraph exam were not involved in Complainant's hiring decision.

The AJ found that even if Complainant established a prima facie case of disability discrimination, the Agency provided a legitimate, nondiscriminatory reason for his non-selection; namely, Complainant's failure to successfully complete his background check due to the results of the polygraph exam. The AJ then determined that Complainant did not show that the reasons were pretexts for discrimination. The AJ noted that Complainant primarily challenged the validity and science of the Agency's polygraph exam; further noting that Complainant relied upon the statements of a non-Agency polygraph examiner, who used a different scoring method, but also assessed that Complainant had a significant response to a relevant question on his polygraph exam.

The AJ also noted that Complainant attempted to re-litigate the spoliation arguments raised in his motion for sanctions, which the AJ had previously addressed and rejected. The AJ concluded that there were no disputed issues of material fact that could affect the outcome of this case, and that no reasonable fact finder could resolve the claims in Complainant's favor.

The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged. Complainant filed the instant appeal and submitted a brief in support of his appeal. The Agency opposed Complainant's appeal and Complainant submitted a response to the Agency's opposition brief.³

³ The Commission's regulations provide that "[a]ny statement or brief on behalf of a complainant in support of the appeal must be submitted to the Office of Federal Operations within 30 days of filing the notice of appeal." 29 C.F.R. §1614.403(d). Complainant filed his second brief on April 22, 2019, which was not within 30 days of the filing of his appeal on October 5, 2018. Accordingly, we will not consider the arguments in Complainant's second appeal brief.

CONTENTIONS ON APPEAL*Complainant's contentions*

Through his attorney, Complainant argues that: (1) the Agency's assertion that spoliation of the evidence had not occurred is inaccurate; (2) SA's testimony is not credible; (3) there are genuine disputes of material fact if Complainant's polygraph exam was conducted or interpreted properly, and if SA "steered" Complainant to fail the polygraph exam; and (4) Complainant was denied an opportunity to retake another polygraph exam, while C1 was afforded a retest.

Complainant asserts that the AJ erred when she accepted the Agency's explanation of a microphone failure and that she made no mention of listening to the recording. Complainant asserts that there is evidence that the recording was made, checked, and heard by Agency officials. Complainant also argues that the AJ prematurely issued a decision prior to the completion of an Inspector General (IG) investigation into the audio file.⁴ Complainant also states that the AJ did not make justifiable inferences in his favor; specifically, she did not find that there was a possibility that the Agency destroyed, withheld, altered, or willfully failed to produce the audio recording.

Complainant argues that spoliation had occurred and that the recording of his polygraph exam was either destroyed by the Agency or never recorded by SA. Complainant states that only the first 22 seconds and last minute of the recording is audible, and that the remainder is static noise. Complainant asserts that he provided documentation showing that the recording of his polygraph exam was made properly and was audible, such as the Quality Control Worksheet noting that the recording was audible and was randomly checked by two quality control examiners. Complainant also states that the recording was 30% shorter in length than the duration of his polygraph exam.

Complainant asserts that if SA was truthful that a microphone failure was the cause of the issue with the audio recording of his polygraph exam, then someone else destroyed the recording; the Agency has an audible copy but refuses to produce it; or SA manually overrode the safeguards to produce an inaudible recording.

Complainant also argues that the AJ erred when finding that C1 was not similarly situated to Complainant, and she used "faulty reasoning" in concluding that since those who offered C1 a second polygraph exam were not involved in Complainant's hiring decision, no discrimination occurred. Complainant states that he was treated disparately because he was not offered a retest.

Complainant argues that there is a genuine dispute of the following material facts: (1) whether his polygraph exam was conducted properly and if SA "steered" Complainant to fail due to his

⁴ The AJ noted that the IG was unable to provide an estimated timeframe for the completion of the investigation, and that it was unnecessary to wait because Complainant's claims regarding the audibility of the polygraph exam were not germane to the legal analysis of whether disability discrimination had occurred.

disability; (2) whether the results of his polygraph exam were interpreted properly; and (3) whether non-disabled applicants received more favorable treatment.

Agency's contentions

The Agency argues that Complainant did not point to any evidence and only provides speculation, misrepresentation, irrelevant or immaterial facts, and unsupported arguments. Regarding Complainant's assertion of spoliation of evidence, the Agency asserts that Complainant alleged impropriety by the AJ when she did not require the Agency to provide maintenance records to prove equipment failure and that the AJ did not listen to the audio recording. However, the Agency counters that the AJ specifically stated that she heard the recording and confirmed SA's description of the recording. The Agency asserts that Complainant did not show that the AJ abused her discretion when she denied Complainant's motion for sanctions.

The Agency also argues that Complainant did not establish that spoliation occurred. The Agency states that while Complainant asserts that SA, the Chief, and other Agency officials stated that they reviewed the audio recording and found it to be audible, he misrepresents their statements. The Agency notes that SA stated that she reviewed the audio recording and only found a portion to be audible, and that a witness (W1), who conducted a quality control review, stated that he never reviewed a full audio recording of Complainant's polygraph exam. The Agency also argues that Complainant is incorrect when he stated that the recording is shorter than his polygraph exam due to his misunderstanding that "1320" means 3:20 p.m., and that it is actually 1:20 p.m.

The Agency states that Complainant argues that there is a genuine dispute regarding the conduct and validity of his polygraph exam. However, the Agency asserts that his claims are immaterial because it is not probative to the legal analysis of his claim of disability discrimination. The Agency notes that even accepting all of Complainant's version of events as true, none of the Agency's actions evidenced discriminatory motive or disparate treatment.

The Agency argues that the undisputed evidence shows that Complainant had a significant response to a question during his polygraph exam; he did not successfully complete his background investigation; and was not selected for the position, and that Complainant did not offer any evidence to challenge these undisputed facts.

Regarding Complainant's allegation that the AJ erred when she determined that C1 was not a similarly situated comparator, the Agency notes that Complainant conceded that different individuals allowed C1 to retake a polygraph exam, and that they were not "nearly identical" in their situations. The Agency requests that the Commission affirm its final order adopting the AJ's decision without a hearing finding no discrimination.

ANALYSIS AND FINDINGS

Standard of Review

In rendering this appellate decision, we must scrutinize the AJ's legal *and* factual conclusions, and the Agency's final order adopting them, de novo. See 29 C.F.R. § 1614.405(a) (stating that a "decision on an appeal from an Agency's final action shall be based on a de novo review . . ."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (Aug. 5, 2015) (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed de novo). This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and the Agency's, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See id. at Chap. 9, § VI.A. (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

Sanctions

Under 29 C.F.R. § 1614.109, AJs are granted broad discretion in the conduct of administrative hearings, including the authority to sanction a party for failure, without good cause shown, to fully comply with an order. See Malley v. Dept. of the Navy, EEOC Appeal No. 01951503 (May 22, 1997). In this case, the AJ ordered the Agency to provide a copy of the audio recording of Complainant's polygraph exam, and Complainant requested that the AJ sanction the Agency for providing a defective copy, alleging spoliation of the evidence.

The record shows that the defective audio recording was the result of a malfunctioning microphone. SA stated that she verified that the audio function was working at the start of the polygraph exam, and that since the recording software showed that it was functioning properly, she did not stop to listen to the recording. SA stated that she never destroyed or altered the audio recording of Complainant's polygraph exam, and that the copy provided to Complainant was an accurate and complete copy. SA added that two other recordings taken around the same time as Complainant's polygraph exam had similar deficiencies that appear to be from a microphone malfunction.

We find that Complainant did not provide any evidence that the Agency ever had an audible recording of his polygraph exam, or that it had damaged it. Complainant alleges that Agency officials stated that they heard the audio recording, which established that there was an undamaged copy of the audio file and that the Agency intentionally sent him a damaged the copy. However, we find that the evidence does not support this. For example, W1 stated that he checked the box

noting that he conducted a random check, and during his initial check, he found that the audio was fine, but he did not listen to the entire recording. W1 added that the audio recording “went dead,” which indicated a “technical problem.”

Complainant also asserts that SA’s statement that a microphone malfunction was the cause of the issue with the audio recording lacks credibility, and he provided testimony from an expert on the recording software. However, we note that the cited testimony only described general information on the mechanism of the software but did not dispute SA’s statements. Complainant asserts that SA should have known that something was amiss, but he did not provide any evidence to show that SA’s testimony was not credible.

The AJ noted in her decision that she reviewed the audio recording and agreed with SA’s description. As such, we find that the AJ did not abuse her discretion in declining to sanction the Agency, after finding that Complainant failed to show spoliation of the evidence.

Decision without a hearing

We now determine whether the AJ appropriately issued the decision without a hearing. The Commission’s regulations allow an AJ to issue a decision without a hearing upon finding that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). EEOC’s decision without a hearing regulation follows the summary judgment procedure from federal court. Fed. R. Civ. P. 56. The U.S. Supreme Court held summary judgment is appropriate where a judge determines no genuine issue of material fact exists under the legal and evidentiary standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a summary judgment motion, the judge is to determine whether there are genuine issues for trial, as opposed to weighing the evidence. Id. at 249. At the summary judgment stage, the judge must believe the non-moving party’s evidence and must draw justifiable inferences in the non-moving party’s favor. Id. at 255. A “genuine issue of fact” is one that a reasonable judge could find in favor for the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A “material” fact has the potential to affect the outcome of a case.

An AJ may issue a decision without a hearing only after determining that the record has been adequately developed. See Petty v. Dep’t of Def., EEOC Appeal No. 01A24206 (July 11, 2003). We carefully reviewed the record and find that it is adequately developed. To successfully oppose a decision without a hearing, Complainant must identify material facts of record that are in dispute or present further material evidence establishing facts in dispute.

Here, Complainant argues that there are genuine disputes regarding the validity of the results of his polygraph exam due to SA’s alleged “hostility” during his polygraph exam, and he asserts that the evidence was in the audio recording. We note that the Agency did not dispute Complainant’s assertion that SA treated him with hostility during his polygraph exam. Accordingly, for the purposes of this decision, we will take Complainant’s contention as true and consider as an undisputed fact that SA treated Complainant with hostility during the polygraph exam.

In addition, Complainant alleges that there is a genuine dispute regarding C1's status as a similarly-situated comparator who was treated more favorably because C1 was offered the opportunity to take another polygraph exam. However, we find that Complainant did not dispute the fact that other (unnamed) Agency officials authorized C1's retest.⁵ Among other things, to be considered "similarly situated," the comparator must be similar in substantially all aspects, so that it would be expected that they would be treated in the same manner. See Grappone v. Dep't of the Navy, EEOC No. 01A10667 (Sept. 7, 2001) reconsideration denied, EEOC Request No. 05A20020 (Jan. 28, 2002). In this case, Complainant and C1 were treated in the same manner by SA and the Chief, and the difference in their treatment is attributed to those not involved in Complainant's situation. As such, we find that Complainant did not establish a genuine dispute regarding the fact that C1 was not a similarly-situated comparator. Accordingly, we find that the AJ properly issued a decision without a hearing.

Disparate Treatment

Generally, claims of disparate treatment are examined under the analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Hochstadt v. Worcester Found. for Experimental Biology, Inc., 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976). For Complainant to prevail, he must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); McDonnell Douglas, 411 U.S. at 802 n.13. Once Complainant has established a prima facie case, the burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the Agency is successful, the burden reverts back to Complainant to demonstrate by a preponderance of the evidence that the Agency's reason(s) for its action was a pretext for discrimination. At all times, Complainant retains the burden of persuasion, and it is his obligation to show by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); U.S. Postal Service v. Aikens, 460 U.S. 711, 715-716 (1983).

Assuming, arguendo, that Complainant established a prima facie case of discrimination based on his disability, we find that the Agency proffered legitimate, nondiscriminatory reasons for their actions. SA stated that Complainant's physiological responses to questions related to serious crimes and illegal drug use indicated that he was being deceptive, and that he failed the polygraph exam. SA noted that during the follow-up questioning, Complainant did not mention his anxiety or OCD, and that he appeared "calm and focused." SA added that it was highly unlikely that anxiety would account for the physiological effects that were registered by the polygraph because it is not a test of one's responses to stress or anxiety. ROI at 206-8.

⁵ The record only indicates that C1's retest was authorized by "AD-INV," which is the Office of the Assistant Director for Investigations.

The Chief stated that after she reviewed the report of Complainant's polygraph exam, she determined that his employment application should be discontinued. The Chief noted that if an applicant shows a significant response to any relevant question and does not make any admissions, the Agency's policy does not allow for a re-test. ROI at 241.

We find that Complainant has not shown that the proffered reasons were pretexts for discrimination. Complainant can establish pretext in two ways: "(1) indirectly, by showing that the employer's proffered explanation is unworthy of credence because it is internally inconsistent or otherwise not believable, or (2) directly, by showing that unlawful discrimination more likely motivated the employer." Chuang v. Univ. of Cal. Davis Bd. of Trs., 225 F.3d 1115, 1127 (9th Cir. 2000) (internal quotation marks omitted); see also McDonnell Douglas, 411 U.S. at 804-05.

On appeal, Complainant argues that SA "steered" him to fail the polygraph exam when the questions were asked in a hostile manner in terms of the inflection and tone of voice, and when he was called a liar and accused of numerous crimes. During Complainant's deposition, he stated that there was a point during his polygraph when SA became "hostile" and stated that Complainant "failed" based on his responses regarding drug use and past serious crimes.⁶ Complainant testified that SA stated that it was "insulting" that he would "lie to her face." We find that Complainant's statements show that any hostility was due to SA's perception that Complainant was not being honest during the polygraph exam, and not due to his disability. We further find that Complainant only made bare assertions and did not provide any evidence showing that SA, or any other Agency official, based their decisions on Complainant's disability. Accordingly, we find that Complainant did not establish that the Agency discriminated against him based on his disability when it did not select him for a position as an IT Manager.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we find that AJ did not abuse her discretion when she declined to sanction the Agency; and we AFFIRM the Agency's final order adopting the AJ's decision without a hearing finding that Complainant did not establish that the Agency discriminated against him based on his disability.

⁶ We note that Complainant did not include any statements of SA's alleged hostility during his polygraph in his original affidavit or rebuttal statement.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in 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). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

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

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

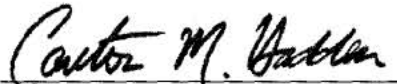
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

[REDACTED]

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

September 22, 2020

Date



CERTIFICATE OF MAILING

For timeliness purposes, the Commission will presume that this decision was received within five (5) calendar days after it was made available to the parties. I certify that on the date below this decision was provided to the following recipients via the means identified for each recipient:


Via US Mail



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Via US Mail
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Baltimore, MD 21235

U.S. Department of Homeland Security
Office for Civil Rights and Civil Liberties
Via FedSEP

Director, Office of Equal Employment Opportunity
United States Secret Service
Via FedSEP

September 22, 2020
Date



Compliance and Control Division