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

[redacted], Complainant,	
v.	EEOC No. [redacted]
Chad Wolf, Acting Secretary, U.S. Department of Homeland Security, Agency.	EEOC Original Appeal No. [redacted]

AGENCY'S BRIEF IN OPPOSITION TO COMPLAINANT'S REQUEST FOR RECONSIDERATION

The United States Secret Service ("Secret Service" or "Agency") respectfully submits this Brief in Opposition to Complainant's Request for Reconsideration of the Decision on Appeal (the "Request") in Appeal Number [redacted] Complainant [redacted] (Complainant) provides the following grounds for his Request:

1) that the Decision on Appeal included materially false statements (Request at 3-14);
2) that inferences were not drawn in his favor (Request at 14-15); and
3) that the Decision on Appeal included "Erroneous Interpretations of Material Facts" (Request at 16-18).

As explained below, Complainant's Request should be denied and the Decision on Appeal should be upheld.

STANDARD OF REVIEW

The Commission may grant a request for reconsideration if the requesting party demonstrates that:

> (1) The appellate decision involved a clearly erroneous interpretation of material fact or law; or
> (2) The decision will have a substantial impact on the policies, practices or operations of the agency. 29 C.F.R. §§ 1614.405(c)(1) & (2).

The decision on an appeal from an agency's final action shall be based on a *de novo* review, except that the review of the factual findings in a decision by an administrative judge issued pursuant to § 1614.109(i) shall be based on a substantial evidence standard of review. 29 C.F.R. § 1614.405. The appropriate standard of review for an administrative judge's decision on sanctions is abuse of discretion. *Waller v. Dep't. of Transportation*, EEOC Appeal No. 0720030069 (May 25, 2007).

ARGUMENT

As described in further detail below, the Decision on Appeal did not involve any clearly erroneous interpretation of material fact or law, nor will the Decision on Appeal have any impact on the policies, practices, or operations of the Agency. As such, Complainant's Request fails to meet the standard for granting reconsideration.

I. The Decision on Appeal Did Not Err in Finding That There Were No Genuine Disputes of Material Fact or Law with Regards to the Decision on Summary Judgment.

In its Motion for a Judgment without a Hearing, the Agency submitted twenty-two (22) statements of material fact, each of which was supported by at least one citation to the record. Agency's Motion for a Judgment without a Hearing at 2-3. In his Opposition to the Agency's Motion, Complainant did not dispute any of the Agency's statements of material fact. *See* Opposition at 4-10 (rather than dispute any of the Agency's statement of facts, Complainant

provided 32 additional statements of fact). Accordingly, the Administrative Judge correctly found that the Agency's statements of material fact were undisputed. *See* Administrative Judge's Decision (August 20, 2018) at page 2, FN 2.

In his Request, Complainant identifies seven alleged "materially false statements" (subsequently identified as "erroneous statements") in the Decision on Appeal. Request at 3-14. As an initial matter, the Request almost entirely lacks citations to the record, which makes the accuracy of Complainant's assertions difficult, if not impossible, to verify. Furthermore, the Request seems to intermingle statements of law and fact, and the Administrative Judge's decision on sanctions and her decision on the merits, decisions which, as noted above, are subject to different standards of review on appeal. When there are no genuine disputes of material fact, EEOC regulations provide that an administrative judge may issue a decision without a hearing. *See* 29 C.F.R. § 1614.109(g).

Several of the "erroneous statements" identified in the Request are disputes of legal interpretations, rather than genuine disputes of material fact that would necessitate a hearing. Specifically, "erroneous statement" #4 on page 8 of the Request ("Complainant . . . did not provide any evidence to show that SA' s [Special Agent Ellen Ripperger's] testimony was not credible"), and #5 on page 10 of the Request ("Complainant . . . did not provide any evidence showing that SA, or any other Agency official, based their decisions on Complainant's disability") are legal conclusions regarding witness credibility and the ultimate question of evidence that the Agency was motivated by unlawful discrimination. The remaining "erroneous statements" are disputes about the Administrative Judge's decision on sanctions (statements 1 and 2) or rely on misrepresentations of the record (statements 3, 6, and 7) to attempt to generate

unsubstantiated disputes of fact. None of the Request's purported "erroneous statements" constitute an erroneous interpretation of material fact or law

II. The Decision on Appeal Appropriately Reviewed and Affirmed the Administrative Judge's Decision to Deny Complainant's Motion for Sanctions.

The Request begins by re-litigating the Administrative Judge's decision to deny Complainant's motion for sanctions. Request at 3-6. The Decision on Appeal addressed Complainant's arguments supporting his claim that the Agency destroyed an audio file of his polygraph examination – that Special Agent Alston checked a box on the Quality Control worksheet indicating he listened to the audio recording, and that Complainant submitted an affidavit explaining how the polygraph recording software used by the Agency works. Decision on Appeal at 6-7. The Decision on Appeal properly determined that these facts, even if accepted as true, do not amount to evidence that the Agency actually destroyed or altered an audio file and that the Administrative Judge therefore did not abuse her discretion in denying Complainant's Motion for Sanctions. *Id*. at 7. The Commission's legal determination is sound, particularly considering that the party claiming spoliation must demonstrate that the relevant evidence actually existed, not that it possibly or likely existed. *See Rude v. The Dancing Crab at Washington Harbor, L.P.*, 245 F.R.D. 18, 22-23 (D.D.C. 2007). As Complainant failed to meet this burden on appeal and again in his Request, the Commission's finding should be affirmed.

One of the Request's arguments regarding the audio file relies on a misinterpretation of the record. The Request argues that SA Ripperger's testimony that she reviewed the audio recording and found a portion of the audio recording to be audible "contradicts" her "statement" (presumably her affidavit in the Agency's opposition to sanctions) that she never destroyed or altered the recording. Request at 5. There is, however, no contradiction. The audio file produced by the Agency to Complainant and the administrative judge included audible portions, which SA

Ripperger described in her deposition. Complainant's Opposition to Agency's Motion for Summary Judgment, Exhibit A at 30:1-14. The administrative judge listened to the audio recording and determined that SA Ripperger's description of it was accurate. *See* Administrative Judge's Decision (August 20, 2018) at page 2, FN 1. Furthermore, the audio files provided to Complainant contain time stamps that indicate that they are the original recordings created on September 18, 2014, at 0931, 1149, and 1320. *See* Agency's Opposition to Complainant's Motion to Show Cause, Exhibits 2, 3, & 4. This partially audible audio file was produced to the Complainant in discovery and was never destroyed or altered and Complainant has failed to prove otherwise.

III. The Decision on Appeal Did Not Err in Finding That There Was No Genuine Dispute Regarding the Validity or Scoring of the Complainant's Polygraph Examination.

The Request asserts that there were and remain genuine issues of material fact as to the validity and scoring of Complainant's polygraph examination. However, disagreement with the Commission's conclusions, without more, does not establish that clearly erroneous interpretations of law or fact were made by the Commission. Rather than provide any specific evidence, the Request repeats the unfounded argument from Complainant's Appeal and his Opposition to Summary Judgment that SA Alston and Complainant's expert, Mr. Seiler, interpreted Complainant's response to the relevant question of whether he had engaged in serious criminal activity as "inconclusive," rather than "significant response." *See* Request at 7-8. This statement is not supported with any citation to the record and is, quite simply, wrong. Every polygraph examiner who evaluated Complainant's examination agreed that his response to relevant question R4 was a significant response, including Mr. Seiler. *See* Agency's Reply in Support of Its Motion for a Decision without a Hearing at 5-7. Specifically, Mr. Seiler testified

during his deposition that he agreed with SA Ripperger's scoring of Complainant's response to question R4. Agency's Motion for a Decision without a Hearing, Exhibit 7 at 31:17-22 ("So, looking at the graph here of the response to question R4… Do you agree with Ms. Ripperger's scoring of the response to that question? A. Yes."). Complainant cannot generate a genuine dispute of material fact by misrepresenting the record, particularly when he cannot cite to anything in the record to support his argument.

The Request further alleges that Complainant's polygraph examination was invalid and therefore cannot be the basis for the Agency's legitimate, non-discriminatory reason for his non-selection. Complainant has made this argument throughout his case, despite the Administrative Judge's decision that she would not evaluate the validity or the science of that polygraph examination and that such evaluation would be irrelevant to the question of discrimination. Order at FN3 & FN5. The record does not support Complainant's argument that his polygraph exam was invalid, as even Mr. Seiler limited his criticism of the examination to a difference of opinion regarding the optimal polygraph scoring method. Agency's Motion for a Decision without a Hearing, Exhibit 7 at 33:11-25. The Request raises a new argument that Complainant's examination did not meet the standards of the American Polygraph Association (APA) or the National Center for Credibility Assessment (NCCA). In support of this argument, the Request cites generally to "APA STANDARDS OF PRACTICE," (which are not in the record for this case) without explanation as to why the Agency would be subject to these non-governmental standards. Request at 12. The Request does not provide any citation at all in support of its assertion that Complainant's polygraph examination violated NCCA standards. Further, whether the polygraph examination provided to the Complainant meets some external validity standards

has no relevance to the question of whether the Agency discriminated against him on the basis of his disability.

IV. Allegations of Misconduct Are Not Evidence of Discrimination.

The Request includes of a series of allegations in its "erroneous statements" that Agency employees, particularly SAs Stakias and Ripperger, engaged in misconduct. Request at 9-11 & 18. The Request argues that this alleged misconduct is evidence of illegal discrimination. *Id*. The Request returns to the issue of SA Stakias's request for the Complainant to provide a short description of his mental health, which the Agency addressed in its Motion for a Decision without a Hearing. Agency's Motion at 9-10. SA Stakias made a perfectly appropriate and minimal inquiry into Complainant's mental health conditions to determine whether such conditions could affect his eligibility to access classified information pursuant to the Adjudicative Guidelines for Determining Access to Classified Information and Executive Order 12968.

The Request also appears to argue that since Complainant has submitted a separate complaint regarding SA Ripperger to the Department of Homeland Security Office of Inspector General (DHS-OIG), that her testimony in this matter is not credible. Request at 8-10. Complainant's argument is without merit, as SA Ripperger was not the subject of an investigation at the time of any of her testimony in this matter. Complainant's initial complaint to DHS-OIG is dated March 17, 2017.[1] SA Ripperger's deposition was taken on October 18, 2016, and her affidavit in support of the Agency's Opposition to Complainant's Motion to Show Cause was provided on October 13, 2016. Agency's Opposition to Complainant's Motion to Show Cause, Exhibit 1. Accordingly, at the time SA Ripperger provided testimony in this matter she

[1] Complainant purportedly submitted this document as an attachment to his Request, although Complainant's service of the Request on the Agency Representative did not include any attachments.

was not the subject of an investigation, and her testimony could not possibly have been influenced by an investigation that did not yet exist. Moreover, the Commission should not countenance Complainant's attempt to create an adverse credibility factor through his own action of simply reporting a matter to the OIG for investigation, especially where, as is the case here, there has been no finding of misconduct or impropriety.

V. The Decision on Appeal Did Not Err in Finding That Complainant Did Not Identify Similarly Situated Employees Who Received More Favorable Treatment.

In his Opposition to the Agency's Motion for a Decision without a Hearing, Complainant identified SA Stephen Tignor as a purportedly similarly situated Agency employee who received more favorable treatment than did Complainant. *See* Opposition at 6-7. In its Reply, the Agency addressed this argument and explained that SA Tignor was not similarly situated to Complainant due to significantly different factual contexts. Reply at 7-10. The Administrative Judge's Order correctly determined that SA Tignor was not a similarly situated comparator to the Complainant and the Decision on Appeal upheld this determination. Order at 10-11.

In his Response to the Agency's Brief in Opposition to Complainant's Appeal, Complainant identified another purported similarly situated comparator, Alvario Richards, for the first time. Response to USSS Opposition to Appeal at 13. The Decision on Appeal did not address Complainant's arguments regarding Mr. Richards, presumably because Mr. Richards was never raised as a comparator before the Administrative Judge and does not appear in the record in this case. In his Response, Complainant explains that he heard about Mr. Richards "through an anonymous message left at his attorney's office by someone who identified themselves as employed at the USSS." *Id*. This purported anonymous message is particularly unreliable and inadmissible hearsay. *See* Federal Rules of Evidence 801 & 802. The Response did not explain when this message was received or who heard it, nor has a copy of this message

or an affidavit testifying as to its contents been produced to the Agency or the Commission. Furthermore, this argument is untimely, as it was never raised before the Administrative Judge, was never subject to discovery, and was only raised in a reply brief on appeal. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *see also Anderson v. United States Dept. of Labor*, 422 F.3d 1155 (10th Cir. 2005) ("[A]ppellate courts will not entertain issues raised for the first time on appeal in an appellant's reply brief." (quoting *Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1277-78 (10th Cir. 1994))). Accordingly, this is neither an admissible nor cognizable argument before the Commission and the Agency will not reopen discovery at this point to respond to this allegation.[2]

VI. The Decision on Appeal Is Supported By the Record.

The record demonstrates that Complainant was not a qualified individual with a disability within the meaning of the Rehabilitation Act and that the Agency presented a legitimate, non-discriminatory reason for not hiring Complainant. The Agency determined that Complainant had a significant response to a relevant question during his polygraph examination. *See* Agency's Motion for a Decision without a Hearing, Exhibit 1. The Agency then followed its written policy requiring that a significant response to a relevant question will indicate the entire test as showing significant responses. *Id.*, Exhibit 4. Chief of the Security Clearance Division Robin DeProspero-Philpot then determined that Complainant would be removed from the background investigation process. *Id.*, Exhibit 8. Without successfully completing his background investigation, Complainant was not qualified for the position of IT Program Manager and was discontinued from the hiring process. *Id*. The Agency has also presented a legitimate, non-discriminatory

[2] If the Commission nonetheless decides to entertain Complainant's new argument that a previously unidentified similarly situated comparator demonstrates that the Agency's legitimate non-discriminatory explanation for the non-selection is pretext for discrimination, the Agency respectfully requests the opportunity to provide supplemental briefing.

reason for not hiring Complainant, which is that he had a significant response to a relevant question on his polygraph examination.

Complainant's own record testimony demonstrates that in the middle of his polygraph examination, he decided to point out to SA Ripperger what he believed were "inconsistencies" with her questions, including "one thing that I caught her on that was a zinger," and that he believed he aggravated her by pointing out these inconsistencies. Agency's Motion for a Decision without a Hearing, Exhibit 3 at 25:8-25 & 26:1-17. Complainant's testimony is therefore just one more example that supports the Commission's finding on appeal that even if SA Ripperger was aggravated by Complainant during his polygraph examination, she was motivated by his conduct and not by his disability. Decision on Appeal at 9. Ultimately, Complainant's frustration with the rigorous background examination process for an applicant for a sensitive national security position is not a basis to overturn the Decision on Appeal.

CONCLUSION

Neither of the grounds contained in 29 C.F.R. §§ 1614.405(c)(1) & (2) for granting a request to reconsider an appellate decision have been met. The Decision on Appeal did not involve any clearly erroneous interpretation of material fact or law, nor will the Decision on Appeal have any impact on the policies, practices, or operations of the Agency. As such, the Complainant's Request should be denied and the Order Entering Judgment should be upheld.

Respectfully submitted,

/s/ Steven Giballa_____
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CERTIFICATE OF SERVICE

I certify that the attached document entitled "Agency's Brief in Opposition to Complainant's Request for Reconsideration" was sent on this day by e-file to:

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And by e-mail to:

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Complainant
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11/09/20
Date

/s/ Steven Giballa
Steven Giballa
Agency Representative
United States Secret Service