



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, DC 20507**

[REDACTED]  
Arlette W.,<sup>1</sup>  
Complainant,

v.

Sonny Perdue,  
Secretary,  
Department of Agriculture  
(Food Safety and Inspection Service),  
Agency.

Appeal No. 0720170039

Hearing No. 420-2011-00127X

Agency Nos. CR990126 & FSIS-2010-00965

**DECISION**

Following its September 20, 2017, final order, the Agency filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. § 1614.403(a). On appeal, the Agency requests that the Commission affirm its rejection of an Equal Employment Opportunity Commission Administrative Judge's (AJ) finding of discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. The Agency also requests that the Commission affirm its rejection of the relief ordered by the AJ, including back pay and benefits, compensatory damages and attorneys' fees. For the following reasons, the Commission AFFIRMS the Agency's final order.

**ISSUES PRESENTED**

Whether the AJ's finding in Agency No. CR9900126, filed November 9, 1998, that the Agency discriminated against Complainant on the bases of race (African-American) and sex (female) when it discontinued consideration of her application for the position of Supervisory Veterinary Medical Officer (SVMO) on March 27, 1998, is supported by substantial evidence of record.

Whether the AJ's finding in Agency No. FSIS-2010-00965, filed May 26, 2010, that the Agency discriminated against Complainant on the bases of race, sex, and in reprisal for prior protected

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<sup>1</sup> 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.

EEO activity when, in June 2010, she was informed by the Agency's Human Resources Field Office that her official personnel file (OPF) continued to reflect that she had been terminated on February 5, 1993, despite the fact that she had voluntarily resigned from the Agency in January 1993, is supported by substantial evidence of record.

### BACKGROUND

*Agency No. CR990126*

In 1992, Complainant applied for a SVMO position shortly after receiving her doctorate in Veterinary Medicine. She received a letter instructing her to report for orientation at the Agency's Area Office in Tallahassee, Florida on January 25, 1993, to meet with the Assistant Area Supervisor (AAS-1) to whom she would be assigned. Upon completing orientation, Complainant was directed by AAS-1 to report to Guntersville, Alabama to complete her initial training. Complainant informed AAS-1 that she would need to be advanced travel funds in order to make the trip to Guntersville because she did not have the money to cover her transportation and hotel expenses. On January 26, 1993, Complainant met with another Area Supervisor (AAS-2) and a Program Assistant to secure the travel funds she needed to complete her training. AAS-2 advised her to speak with the Area Supervisor (AS).

Complainant met with the AS as directed and explained to him that she needed advanced travel funds to cover her expenses during her training in Guntersville. The AS informed her, however, that travel funds were not available and that she would have to use her own money. The AS further informed Complainant that she needed to proceed to Guntersville or resign from her newly appointed position. She responded by telling that the AS that because of the precariousness of her financial situation, she had no choice but to resign. She immediately tendered her badge and identification card to the Program Assistant. Later that same day, January 26, 1993, Complainant received a memorandum from the AS which stated, in pertinent part, "Your failure to follow instructions to report to the training facility in Guntersville, Alabama and your returning your badge and identification card leaves me no alternative but to recommend that your employment be terminated. Consolidated Appeal Record (CAR)<sup>2</sup> at 609.

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<sup>2</sup> Agency No. CR990126 had originally been accepted on February 22, 2000 and investigated in June 2000. According to the AJ, the Agency was unable to determine whether a report of investigation and a final decision on Agency No. CR990126 had ever been issued. The AJ reported in his decision that Agency No. CR990126 was re-accepted by the Agency and was re-investigated together with Agency No. FSIS-2010-00965. The combined investigative report for these two complaints, together with the hearing transcript, motions, and all other documents pertinent to the appeal were merged into a single document with pagination and submitted by the Agency in support of its appeal. CAR at 575-87, 617, 619-20, 622-23, 625-27, 629-35. We have designated this document as the Consolidated Appeal Record. The original investigative report for Agency No. CR990126 resurfaced during the hearing phase of the proceeding and in due course was incorporated into the hearing record and later the appeal record. For citation purposes, the initial investigative report from Agency No. CR990126 will be referred to as the Original Investigative

Complainant responded by letters dated January 29, 1993 to the AS and to the Regional Director (RD) who was the AS's supervisor. She stated in those letters:

In our conference, you (the AS) advised me to report to the Guntersville Plant by January 27, 1993 or resign my newly appointed position. I immediately informed you that I was not refusing to obey your instructions. However, it was not possible for me to comply for financial reasons. Once again, you indicated that I should report or resign. Thus, I rendered my badge as an indication of my voluntary resignation.

CAR at 326-40, 613-14. The Agency subsequently issued a Standard Form 50 (SF-50) notification of personnel action indicating that Complainant had been terminated from her SVMO position, effective February 5, 1993. The reason for the termination is set forth in the document as follows: "failure to follow instructions and not reporting to your official duty station." OIR, Ex. 26; CAR at 90, 244-245, 615. Accompanying the SF-50 was a letter from the AS in which he stated that Complainant's failure to follow his instructions to report to the training at Guntersville and her returning of her badge and identification card left him no choice but to recommend that her employment be terminated. CAR at 609. A similar letter from the RD stated that Complainant would be separated from her position effective February 5, 1993. OIR, Ex. 23; CAR at 611.

Between 1993 and 1998, Complainant applied for various vacancies at the Agency, including two unsuccessful applications for the position of Microbiologist and three applications for VMO vacancies that opened between August 1995 and March 1997. CAR at 801-10, 812-21. It was not until January 1998 that she received what she characterized as an affirmative response to her inquiries. Complainant averred that in January 1998, she applied for and was offered a SVMO position in New Brockton Alabama. She made the certificate of eligible candidates for the position and received a letter from the Personnel Staffing Specialist (PSS) responsible for processing her application dated March 5, 1998, in which she was informed that she was being considered for the SVMO position in question. CAR at 754. As part of the application process, she submitted a Declaration for Federal Employment (DFE), a document that included her fingerprints, and a disclosure of her race and sex. OIR, Ex. 17, Ex. 18; CAR at 358-60, 754, 759.

Complainant submitted three DFEs dated August 26, 1997, December 15, 1997, and January 29, 1998. In question number 11, the declarant was asked, "During the last five years were you fired from any job for any reason?" In all three DFEs, Complainant responded, "No." OIR, Ex. 20.

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Report (OIR). Because the OIR does not have pagination, citations to that report will include the exhibit number (Ex.), the page number within that exhibit, and where necessary, paragraph numbers.

The PSS and the Personnel Staffing Assistant who worked with the PSS on Complainant's application averred that the Agency had discovered through a routine background check that Complainant had worked for the Agency in the past and had been terminated. OIR, Ex. 8, p. 1, ¶ 2, Ex. 9, p. 1, ¶ 2. Complainant's OPF included a pair of SF-50 notices of personnel action. The first SF-50 indicated that Complainant's effective date of appointment was January 24, 1993. The second SF-50, as referenced above, indicated that she was terminated effective February 5, 1993. OIR, Ex. 27, pp. 1-5, 12.

The PSS averred that based on the information she discovered in Complainant's OPF, and in consultation with her district office, she made the decision that the Agency should discontinue consideration of Complainant's application for the New Brockton SVMO vacancy. Ex. 8, pp. 1-2, ¶ 3. The PSS prepared a letter to Complainant to that effect dated March 27, 1998. The text of the letter stated, in pertinent part:

During our routine employment background investigation, it was discovered that your [DFE], OF-306 appears to have been falsified. Your Official Personnel Folder contains documentation stating that you were terminated from employment with our Agency on February 5, 1993, due to your failure to follow instructions and not reporting to your official duty station. On the OF 306 that you submitted to our office, Question 11 asked: "During the last five years, were you fired from any job for any reason \* \* \*?" You answered "no" to question 11. You signed the form, certifying that, to the best of your knowledge and belief all of your answers were true, correct, complete and made in good faith. It appears that you should have answered "yes" to question 11 on your OF-306. Based on the above information, we are discontinuing further consideration of your application....

OIR, Ex. 21; CAR at 591, 759. In her response to the PSS's letter dated April 6, 1998, Complainant explained the circumstances regarding her inability to obtain travel funds in 1993 and reiterated that she was not aware that her status had been listed as a termination rather than as a voluntary resignation. She included copies of her January 1993 correspondence with the AS and the RD.

The PSS averred that her position was located within the Human Resources Field Office, and that her office did not have the authority to change personnel actions without direction from management. OIR, Ex. 8, pp. 1-2, ¶ 3; CAR at 689. She also stated that she although she remembered talking to Complainant on the telephone, she did not recall receiving the April 6, 1998 letter from Complainant. OIR, Ex. 8, p. 2, ¶ 4; CAR at 239-42, 251, 271-73, 689. When asked by the original EEO investigator whether she had retained a copy of that letter, the PSS replied as follows:

We maintain files on current employees. We do not keep documentation for a long period of time on potential employees. The policy is to keep documentation for the current fiscal year and two prior fiscal years. Register documentation needs to be

kept five years or until we have been audited, which we have been. Therefore, we would not keep records from 1998 or prior.

OIR, Ex. 8, p. 2, ¶ 4. The PSS reiterated that she made the decision to discontinue consideration of Complainant's application based upon the documentation in Complainant's OPF. OIR, Ex. 8, pp. 1-2, ¶ 3; CAR at 687-89. She also reiterated that she did not discriminate against Complainant. CAR at 690-91. When asked at the hearing whether, assuming that she did receive Complainant's April 6, 1998 letter, that letter would have put her on notice that something was wrong with Complainant's OPF, the PSS testified as follows:

That would not be in my authority to question the regional director's decision to terminate her. I didn't make the decision to terminate her so it's not my decision to change. If I had a question about whether she should have resigned or not, that would be between the regional director and Complainant's supervisor, not between me. I have no authority in whether a person is terminated or how they're terminated what their action is. I go by what the action is that I received from the official, [the RD]. On the [SF-50] shows it's a termination action, and that's what I have to go by as an HR staffing specialist. I can't change - - what his decision is, if he should choose to have a resignation or a termination process. That's not my responsibility or my duty.

CAR 274-77. The Agency stated, and Complainant acknowledged, that in June 1998, a Black Female Veterinarian had been hired to fill the New Brockton SVMO vacancy. CAR at 592, 673, 678-79, 766-70. OIR, Ex. 28, p. 2. A letter dated May 27, 1998 from the PSS to the Selectee directed the Selectee to report to her assigned duty station on Monday, June 8, 1998. OIR, Ex. 28, p. 2.

*Agency No. FSIS-2010-00965*

As previously noted, the SF-50 dated February 5, 1993 indicated that Complainant had been terminated from her SVMO position. CAR at 590. In an unsworn declaration sent via email to the original EEO Investigator on December 17, 2000, after he had retired from the Agency, the AS stated the following:

Included in the paperwork for processing incoming VMOs were application for advance of funds to cover future travel expenses. The applications for advance funds were forwarded through channels to the National Finance center. No funds were kept at the area offices.

VMO Training involved several months of traveling between the training station and the training center located in College Station, Texas. VMOs were entitled to travel expenses. They usually received an advance of funds after completing the necessary forms during orientation. Funds were usually received several weeks

after orientation. VMO trainees usually submitted travel vouchers on a regular time basis.

My recollection is that Complainant wanted funds at that moment in order to travel to Guntersville, Alabama. It was explained to her that the Tallahassee Area Office did not keep funds and that the procedure would be to complete a request for advance of funds. At the time, Complainant stated that she could not travel until she was provided with funds. I instructed her to report to Guntersville by a specific time and date.

Complainant did not report as instructed. I do not recall telling Complainant to render (*sic*) her badge in resignation, nor do I recall receiving her badge. I also do not recall receiving a letter dated January 29, 1993 from her.

As a note, I believe Complainant's husband was employed by the Agency during this same time frame.

OIR, Ex. 10.

Complainant averred that between March 27, 1998 and June 2010, she did not receive any correspondence from the Agency indicating that her February 1993 SF-50 indicating her termination had been changed to reflect that she had voluntarily resigned. CAR at 590, 680. She further averred that it was not until June 2010, when she applied for another Veterinarian vacancy and received word that she was found ineligible, that she telephoned the Human Resources Field Office and was informed by an Employee Relations Specialist (ERS) that her OPF still reflected that she had been terminated in 1993. CAR at 679-80, 690, 695. A Supervisory Human Resources Specialist (SHRS) testified that on January 24, 2011, her office received a request from the Employee and Labor Relations Office (ELRO) to remove the notice of removal dated February 5, 1993 and replace it with a notice of voluntary resignation. She further testified that the request originally came from a Staffer within the Complainants Management Office (CMO). She also testified that she received the SF-52 from the ELRO that was necessary to make the change. CAR at 316-20, 699-700, 705.

The SHRS explained the process through which the termination was changed to a voluntary resignation:

In order for an SF-50 to be generated, the removal must be canceled and replaced. Because the removal occurred 18 years ago[, s]ome of the programming codes are no longer in use and the system was unable to recognize them. The codes we entered were not matching and the corrections we attempted to make were not applying in the system. We had to work with programmers in the national finance center to make the official corrections in the personnel system. Due to the difficulty with the programming codes, we prepared a manual SF-50 on February 3, 2011 and gave it to [the Staffer from the CMO] which she, in turn, sent to Complainant. The

manual SF-50 was emailed to [the CMO Staffer] and we were told she would be furnishing a copy to Complainant. The termination SF-50 was removed from her OPF and a hard copy of the newly generated manual SF-50 indicating a resignation was placed in her OPF. An electronic copy of the Manual SF 50 was also scanned into her electronic OPF, which we created. After the corrections are made an [sic] apply in the system, the manual form will be replaced by the official form generated by the National Finance center. The week of February 28, 2011, we were successful with the programming codes in the system.

CAR at 700, 778-793. An SF-50 was placed into Complainant's OPF specifying that she voluntarily resigned on January 26, 1993. CAR at 795, 798. The action was also documented by a letter to Complainant dated February 3, 2011, from the Assistant Administrator in the Office of Management advising Complainant that the termination notice had been removed and replaced with a notice of voluntary resignation. CAR at 796.

#### *Post-Investigation*

As stated in note 2, *supra*, the two complaints had been consolidated for a single investigation before the OIR reappeared. At the conclusion of that investigation, the Agency provided Complainant with a copy of the investigative report and notice of her right to request a hearing before the Commission. Complainant timely requested a hearing. The AJ held a hearing by video-teleconference on April 22, 2013 and issued a decision on August 25, 2017. CAR at 199; Appeal Brief, p. 7. The AJ found that Complainant had established a *prima facie* case of race and sex discrimination and that the Agency's proffered explanations for its actions in both complaints were pretextual.

With regard to Agency No. CR990126, the AJ concluded:

Complainant has shown, by a preponderance of the evidence, that the Agency's proffered explanations for its actions in incident A [Agency No. CR990126] above, contain such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions that a reasonable fact finder could rationally find them unworthy of credence.

AJ Decision, p. 25, ¶ 60.

With regard to Agency No. FSIS-2010-00965, the AJ concluded:

The AJ finds, by a preponderance of the evidence, that the reasons offered by the Agency for not correcting Complainant's OPF to reflect that her final status [had changed] from a "termination" to a "resignation" are unworthy of belief and are, therefore, a pretext for unlawful employment discrimination."

AJ Decision, p. 25, ¶ 59.

The AJ's findings in support of these conclusions can be briefly summarized:

- The Commission has jurisdiction over the complaint by virtue of the fact that Complainant timely contacted an EEO Counselor. AJ Decision, pp. 14-16.
- Complainant established a prima facie case of race and sex discrimination in that the Agency's March 1998 discontinuation of her employment application for the SVMO vacancy in New Brockton, Alabama, constituted an adverse employment action, and the PSS, the official who made the decision to discontinue the Agency's consideration of her application, was aware of Complainant's race and sex by virtue of having reviewed the fingerprint card containing that information. AJ Decision, pp. 16-19.
- The PSS destroyed certain unspecified documents pertaining to Agency No. CR990126, in violation of the Agency's record-retention policy. AJ Decision, pp. 19-20.
- The PSS failed to follow policy guidance to the effect that Complainant's protestations that she had resigned in 1993, as opposed to being fired, should have alerted her, the PSS, to investigate the firing/resignation issue further, and that the PSS's failure to do so constituted evidence of discriminatory animus on her part. AJ Decision, pp. 20-22.
- The PSS was not forthright in her sworn testimony on whether she was aware of Complainant's EEO activity in April 1998, whether she knew that Complainant was considered for the SVMO vacancy in March 1998, whether she saw Complainant's OPF prior to February 24, 2011, and whether she considered an Agency policy stating that failure to report as directed would be viewed as a declination of employment. AJ Decision, pp. 22-24.
- The AS was less than truthful in his sworn affidavit when he said that he could not recall Complainant tendering her badge to him or receiving Complainant's letter dated January 29, 1993 but was able to remember that Complainant's husband was employed by the Agency. AJ Decision, pp. 24-25.

The Agency subsequently issued a final order rejecting the AJ's finding that Complainant proved that the Agency subjected her to discrimination as alleged. At the same time, the Agency submitted its brief on appeal.

#### CONTENTIONS ON APPEAL

The Agency initially contends on appeal that the AJ's finding of an inference of discrimination is not supported by any evidence. The Agency stated that there is neither evidence of a similarly-situated comparator outside of Complainant's protected classes nor any other evidence that raises

an inference of discrimination. The Agency argues that the AJ found constructive knowledge of Complainant's race by assuming, without a factual basis, that the PSS reviewed the fingerprint card that Complainant submitted. It asserts that the evidence of record did not reflect that the PSS actually saw the fingerprint card and that the PSS did not become aware of Complainant's race until February 2011. Appeal Brief, p. 8

Next, the Agency contends that the AJ wrongly relied upon actions taken in 1993 by different Agency employees when establishing a purported inference of discrimination with respect to the PSS's processing of Complainant's application. The Agency maintains that whether the AS and the RD knew of her race in 1993 was irrelevant to whether the PSS had knowledge of Complainant's race at the time the decision was made to discontinue consideration of Complainant's application. The Agency reiterated that Complainant failed to prove that the PSS actually saw the fingerprint card, noting that the PSS herself could not recall whether she had seen it or whether it had gone to Agency's Security Office. Appeal Brief, pp. 8-9.

Third, the Agency contends that, even if the PSS had been aware of Complainant's race, there was no evidence on record of any discriminatory motive on her part or facts that would support the existence of a discriminatory motive on the part of the PSS when she, the PSS, made the decision to discontinue consideration of Complainant's application. The Agency maintains that the PSS made that decision based on information contained in Complainant's OPF. Appeal Brief, p. 10.

The Agency also addresses the AJ's remaining points. The Agency reiterated that a Black female was selected for the vacancy for which Complainant had applied and that Complainant failed to show that the PSS deviated in any way from its personnel policies, regulations, and practices. The Agency also pointed out that the Suitability Guide had not been promulgated until January 2005, and was therefore not in existence in 1998, CAR at 715, and that even if it were, it would not apply because the PSS was not making a suitability determination. Finally, the Agency asserted that it had eventually changed the 1993 employment action from a termination to a resignation, and that to hold the PSS responsible for its failure to do so earlier was to hold the PSS accountable for matters that were not part of her duties. Appeal Brief, pp. 11-19.

Complainant maintains in her opposition to the Agency's appeal that the evidentiary record is sufficient to support a finding that the PSS and other officials had discriminated against her on the bases alleged. In particular, she points to what she characterizes as the inconsistent statements made by the PSS concerning the actions she took once Complainant informed the PSS that she had resigned in 1993, and to the Agency's failure to give weight to the AJ's findings of mendacity on the part of the PSS. Complainant's Opposition Brief, pp. 9-32. Complainant contends that those inconsistencies are sufficient to establish the existence of an unlawful motivation on the part of the PSS. Accordingly, Complainant requests that we affirm the AJ's findings and conclusions.

### STANDARD OF REVIEW

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Universal Camera Corp. v. Nat'l Labor Relations Bd., 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ’s conclusions of law are subject to a de novo standard of review, whether or not a hearing was held. An AJ’s credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chapter 9, at § VI.B. (Aug. 5, 2015).

### ANALYSIS AND FINDINGS

Because we are addressing the merits of the two complaints, we need not address the AJ’s rejection of the Agency’s arguments regarding the Commission’s lack of jurisdiction and untimely contact with an EEO counselor. We do take issue, however, with the AJ’s framing of the prima facie case, particularly with regard to element (c), on pages 13 and 14 of the AJ’s decision. The AJ identified element (c) as follows: “Complainant has shown, by a preponderance of the evidence, that the Agency’s proffered legitimate, nondiscriminatory explanations for its actions contain such weaknesses, implausibilities, incoherencies, or contradictions that a reasonable fact finder could rationally find them unworthy of credence.” This is not an element of the prima facie case; rather, it is the third prong of the tripartite analysis for proving pretext in disparate treatment claims. The AJ’s failure to properly address whether Complainant presented evidence supporting a prima facie case of discrimination is fatal to the analysis in support of a finding of discrimination.

Our discussion of Agency No. CR990126 begins with the AJ’s finding that the PSS failed to follow the Agency’s record-retention policy. AJ Decision, pp. 19-20. The PSS averred in her first affidavit that she could not recall having received Complainant’s response letter dated April 6, 1998, and that, in accordance with the Agency’s record-keeping policy as she understood it, she did not keep records from 1998 or prior. OIR, Ex. 8, p. 2, ¶ 4. She also averred that she kept a few documents that had been requested in the past for EEO purposes from two EEO counselors, and that she provided those documents to the EEO investigator upon her request. OIR, Ex. 8, p. 2, ¶ 5. Based on these facts, the AJ appears to have inferred that the PSS selected certain documents from Complainant’s OPF to keep and certain documents to destroy and concluded that this was a violation of federal law.<sup>3</sup> AJ Decision, p. 20. The AJ’s implicit finding is that the actions of the

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<sup>3</sup> Although the AJ referenced 29 C.F.R. § 1602.12 in his decision, he was likely referring to § 1602.14, the relevant provision of which states that, where a charge of discrimination has been filed under Title VII, the employer shall preserve all records relevant to the charge until its final

PSS constitute a deviation from standard record-keeping procedures that should be considered an indicator of pretext. We disagree, emphatically. First, the record at the heart of this controversy, Complainant's April 8, 1996 letter to the PSS, was not destroyed. Rather, it was preserved and incorporated into the consolidated investigative report. CAR at 592. Second, Complainant has not provided any documents or testimony tending to show that the PSS actually destroyed any records that pertain to Agency No. CR 990126. The correspondence from 1993 and 1998 that Complainant referenced as being central to her claim regarding Agency No. CR990126 are all part of the investigative files, as are the 1993 SF-50 and other relevant personnel documents. OIR, Ex. 17, Ex. 18, Ex. 19, Ex. 20, Ex. 21, Ex. 22, Ex. 23, Ex. 24, Ex. 25, Ex. 26, Ex. 27, Ex. 28; CAR at 592. We therefore find that the evidentiary record does not support the AJ's finding that the PSS destroyed pertinent records in the midst of an EEO proceeding.

Next, we look at the AJ's finding that Complainant's "unyielding protestations" that she resigned rather than being terminated in 1993 should have put the PSS on notice that further investigation was necessary for the resolution of that issue. The AJ's implicit conclusion is that the PSS's failure to conduct a follow-up investigation on whether Complainant was terminated or not was a deviation from standard procedures and was therefore another indicator of pretext. Again, we disagree. Unlike the AJ, we find no inconsistencies in the PSS's sworn statements on the facts most crucial to the outcome of this case, namely, whether the PSS harbored a discriminatory animus toward Complainant. It bears repeating that the PSS testified, without contradiction, that she made the decision to discontinue the Agency's consideration of the application for the New Brockton SVMO vacancy, and that she did so on the basis of information that she had discovered in Complainant's OPF that she had been previously employed by the Agency and had been terminated for failure to follow instructions and not reporting to her official duty station. OIR, Ex. 8; CAR at 224, 227-28, 230-31, 590-91, 687-91. The Personnel Staffing Assistant who worked with the PSS confirmed the PSS's assessment that there was information in Complainant's OPF indicating that she had been terminated. OIR, Ex. 9. The PSS also stated in her affidavits and at the hearing that she could not recall having received the April 8, 1998 letter from Complainant. OIR, Ex. 8, p. 2; CAR at 240-42, 251, 689. At the hearing, the PSS reiterated that even if she had seen Complainant's April 6, 1998 letter, she would not have had the responsibility or the authority to determine whether or not the SF-50 documenting Complainant's termination was valid. CAR at 274-77. Again, Complainant has not presented any documents or testimony from other witnesses that contradict the PSS's explanation for why she decided to discontinue the Agency's consideration of her application for the SVMO vacancy or which undermine her veracity.

Complainant presented absolutely no evidence that the PSS had the authority or responsibility to question the validity or accuracy of the SF-50 documenting her termination in February 1993. The AJ found otherwise. He stated, in essence, that the PSS could have relied on the SPG, which provided guidelines from the Office of Personnel Management (OPM) on how to handle

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disposition. Because Complainant did not raise the violation of EEO-related record-keeping regulations as a separate issue in either complaint, we will not address that issue in this decision.

intentional falsification in the job application process. AJ Decision, pp. 20-22. The SPG identifies intentional falsification in the job application process as a disqualifying issue and stated that the seriousness and recency of the termination should be considered in determining whether the falsification is intentional. CAR at 717. See also, e.g., 5 C.F.R. §§ 731.202(b)(3), 202(c). The SPG also stated that when OPM debars an applicant from employment, it does so for three years and for positions across all agencies, and since the effect of debarment is so far reaching, OPM uses that power quite sparingly. In adopting the SPG, the Agency stated that if debarment were the outcome of a suitability evaluation, it would only last for one year and only for the Agency. CAR at 716. The AJ appears to have determined that the PSS's failure to follow the SPG is another indicator of pretext. We disagree. The Agency did not adopt the SPG until January 1, 2005. CAR at 715-16. The policy therefore did not even exist within the Agency in 1998, when the PSS decided to discontinue the Agency's consideration of Complainant's application. As a secondary consideration, we note that, while the PSS's letter to Complainant dated March 27, 1998 could reasonably be construed to constitute a suitability action pursuant to 5 C.F.R. § 731.203(a), it was not a debarment. Consequently, the rules governing debarment that are set forth in 5 C.F.R. § 731.20, on which the AJ relied, would not apply. We therefore find, contrary to the AJ, that the PSS's non-reliance on the SPG is not an indicator of pretext and therefore not a reflection of unlawful motive on the part of the PSS.

The AJ stated that the PSS was not forthright in her sworn testimony. AJ Decision, p.22, ¶ 45. We cannot discern from this sentence whether the AJ is referring to the PSS's veracity based on the consistency of her affidavit statements or her credibility as a witness during the hearing. As we mentioned above, assuming that the AJ is referring to the PSS's credibility, the Commission typically defers to credibility determinations based upon the AJ's personal observation of a witness who is giving testimony. But that deference is not absolute and will be challenged on appeal if the AJ draws factual inferences from his credibility determinations that are contradicted by other evidence in the record.

The AJ found that the PSS knew as early as April 15, 1998 that Complainant had contacted the Agency's EEO Office, as demonstrated by the EEO Counselor's report for Agency No. CR990126, which indicates that the EEO Counselor interviewed the PSS by telephone on April 15, 1998. OIR, Ex. 3, p. 3. The PSS averred in her second affidavit, given on February 28, 2011, that she first became aware of Complainant's previous participation when she was provided with the file documents on February 16, 2011. CAR at 687, 953. The AJ states that this testimony is untrue. AJ Decision, p. 23. Even if the PSS's statement in her second affidavit is contradicted by the EEO Counselor's report for Agency No. CR990126, that inconsistency only goes to whether Complainant had established a *prima facie* case of reprisal and is not material to the outcome of the dispute because the *prima facie* case in both complaints has been assumed.<sup>4</sup>

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<sup>4</sup> Complainant did not raise reprisal as a basis in Agency No. CR990126. This complaint was the prior EEO activity referenced in Agency No. FSIS-2010-00965.

The AJ also pointed to the PSS's statement in her second affidavit that if Complainant had undergone a physical examination, a tentative job offer would have been made prior to the physical examination occurring. The AJ further stated:

However, a few paragraphs later in the same sworn affidavit, the PSS changes her testimony and vacillates by stating, “[I]t appears that [Complainant] could have been considered for a position. The letter of March 27, 1998 offered seems to indicate that we were considering her for a position, but I don’t know.”

AJ Decision, p. 23, ¶¶ 48, 49 citing CAR at 688-89, 743-68. From these sworn statements by the PSS, the AJ found:

[The] PSS knew, in fact, just by the language in her March 27, 1998 letter to Complainant that the Agency was considering Complainant for employment.\*\*\* However, when asked by [the] EEO investigator to state the evidence that reflects [that Complainant] was considered for the position, [the] PSS becomes evasive and testifies, the only evidence that I have seen were the letters which were included in a packet of information that I recently received in February [2011] from the Office of Civil Rights.

AJ Decision, pp. 23-24, ¶¶ 50, 52 citing CAR at 690. The AJ stated that the PSS's sworn testimony was dubious and unbelievable given the fact that she authored the March 27, 1998 letter and was the Agency's servicing Personnel Staffing Specialist in March 1998 for the SVMO position at issue in Agency No. CR990126. AJ Decision, p. 24, ¶ 55. The AJ appears to be focusing on what he characterizes as the PSS's inconsistent statements on whether or not Complainant was being considered for the New Brockton SVMO vacancy. We note, however, that the fact Complainant was considered for the position is not in dispute. The PSS's letter dated March 5, 1998 clearly informed Complainant that she was under consideration for the position. CAR at 754. The PSS also stated:

I am aware of a March 27, 1998 letter that I signed. The letter does not indicate that the Agency failed to consider Complainant’s application. It indicates that her application was accepted.

CAR at 687. She further averred that Complainant was being considered for the position and had probably been referred to the selecting official who then selected her. CAR at 688. We can find no material inconsistency in the PSS's sworn statements regarding whether Complainant had been under consideration for the New Brockton SVMO vacancy in March 1998, regardless of whether she had taken a physical examination.

In addition, the AJ found:

[The] PSS further engages in mendacity by testifying that, "I did not see her OPF until February 24, 2011, and by testifying, "I have not been made aware of anything related to her until recently, February 2011.

AJ Decision, p. 24, ¶ 53 citing CAR at 690-91. As we previously found, in her initial affidavit, the PSS clearly stated that she made the decision to discontinue consideration of Complainant's application for the SVMO vacancy based on information she obtained from Complainant's OPF indicating that Complainant had falsified her declaration for federal employment. OIR, Ex. 8, p. 1, ¶ 2, pp. 1-2, ¶ 3. The statements that the PSS made in her two affidavits clearly contradict each other, but the AJ's assessment of the significance of this evidence is unsupported by the record.

Where a complainant has made out a prima facie case of discrimination, a fact finder's disbelief of the reasons put forward by the defendant, particularly when accompanied by a suspicion of mendacity, permits a finding of discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511, 519 (1993); Finklea v. U.S. Postal Serv., EEOC Request No. 05940134 (Nov. 18, 1994). Here, however, the ultimate selectee for the New Brockton SVMO vacancy was also a Black female whose application for the position had been processed by the PSS, and Complainant has offered no other evidence or explanation to support a prima facie case based on either race or sex alone, or both. OIR, Ex. 28, p. 2. Absent prima facie showing to create an inference of discrimination, the lack of credibility of the asserted reasons for the non-selection does not support a finding of discrimination.

Finally, we note that in his assessment of the PSS's sworn statements, the AJ does not reference Complainant's hearing testimony at all. He also makes no mention of the PSS's appearance or demeanor as a witness. Because the hearing was conducted via a video teleconference, the AJ was clearly in a position to make these observations.

To summarize our determinations with respect to Agency No. CR990126, we find that Complainant failed to show that the PSS harbored a discriminatory animus toward her based on her race and sex when she issued the March 27, 1998 letter to Complainant informing her that the Agency had discontinued consideration of her application for the SVMO vacancy in New Brockton, Alabama based upon information in Complainant's OPF reflecting that she had falsified her application. The AJ's findings and conclusions to the contrary are not supported by substantial evidence.

We turn now to Agency No. FSIS-2010-00965. In order to prevail in her claim of disparate treatment with respect to the Agency's failure to correct her SF-50 during the eighteen years that had elapsed between March 1998 and February 2011, Complainant would have to show that the AS, the RD, the Program Assistant, the PSS, the ERS, and the SHRS, and any other official who was involved harbored a discriminatory animus toward her based on her race, sex, and/or the fact that she filed Agency No. CR990126. As we previously found, despite inconsistencies on some minor points, the PSS's sworn testimony that she discontinued consideration of Complainant's

application due to what she believed was Complainant's falsification of her declaration for employment was supported by the evidentiary record. The RD did not provide an affidavit. The AJ found that the AS was untruthful in his affidavit testimony and had engaged in selective amnesia when he stated that he could not recall receiving Complainant's badge or a letter from Complainant in January 1993 insisting that she was resigning. AJ Decision, pp. 24-25, ¶ 57.

As we emphasized above, the falseness of the Agency's explanation for its actions does not automatically result in a finding of discrimination. With respect to the claims of race and sex discrimination, Complainant has not pointed to any evidence of anyone outside of Complainant's protected group being treated differently by the AS, nor provided any other evidence to establish a *prima facie* case on any of the alleged bases. Moreover, there are no indications of any communication between the AS and the RD, who were involved with Complainant in 1993, the PSS, who was involved with her in 1998, and the ERS and the SHRS, who were involved with her in 2010-2011. Without evidence that these officials even communicated with each other, there is no support for the inference of an ongoing discriminatory or retaliatory motive that could be imputed from the earlier group to the PSS or to the latter group. Moreover, the ERS and the SHRS took steps to correct Complainant's status in the Summer 2010, as soon as they were notified by the appropriate management branch that the correction needed to be made, which further undermines any inference of a discriminatory or retaliatory animus on the part of these officials. The delay between June 2010 and February 2011 was caused by technical problems in the programming codes and the need to create an electronic OPF for Complainant. As with Agency No. CR990126, we find that the AJ's finding of discrimination with respect to Agency No. FSIS-2010-00965 is not supported by substantial evidence of record.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we find that the AJ's decision is not supported by the substantial evidence of record. Accordingly, we AFFIRM the Agency's final order rejecting the AJ's findings and conclusions in EEOC Hearing No. 420-2011-00127X.

### STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0620)

The Commission may, in its discretion, reconsider this appellate decision if the 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, 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 (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, **filings 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:

/s/ Rachel V. See

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Rachel V. See  
Acting Executive Officer  
Executive Secretariat

May 6, 2021

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Date