U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
OFFICE OF FEDERAL OPERATIONS

[redacted], Complainant, v. Kirsten Nielsen, Secretary, U.S. Department of Homeland Security, Agency.	EEOC No. [redacted]

AGENCY'S OPPOSITION TO COMPLAINANT'S APPEAL

The United States Secret Service ("Secret Service" or "Agency") respectfully submits this brief opposing Complainant's appeal of the decision that granted the Agency's motion for summary judgment ("SJ Motion") on his Equal Employment Opportunity complaint. On August 20, 2018, Administrative Judge Antoinette Eates, without holding a hearing, issued a decision finding that Complainant failed to establish that he was discriminated against based on his disability. ("Summary Judgment Decision"). The Department of Homeland Security issued a Final Order fully implementing the Administrative Judge's decision on September 19, 2018.[1]

[1] As an initial matter, the Appeal does not appear to be properly filed. EEOC regulations provide that appeals may be filed in response to an "agency's final action or dismissal of a complaint." *See* 29 C.F.R. § 1614.401(a). The Department of Homeland Security issued the Final Order on the exact same day that the Complainant's filed his appeal brief on the Agency. However, nothing in the materials served upon the Agency by Complainant indicates that a Notice of Appeal or the appellate brief was served on the Equal Employment Opportunity Office of Federal Operations ("EEOC OFO"), as required. *See* Equal Employment Opportunity Management Directive for 29 C.F. R. Part 1614 (MD)-110, at Chapter 9 § IV.A (Aug. 15, 2015). To date, the Agency has also not received any acknowledgment from EEOC OFO that the appeal has been received and/or docketed. *Id.* § IV.C. ("OFO will docket and acknowledge in writing the receipt of an appeal.").

The Commission should affirm Administrative Judge Eates' finding of no discrimination. Complainant's brief in support of his appeal ("Appeal") identifies three primary grounds for why the Decision should be reversed: (1) that the Agency should have been sanctioned for spoliation of evidence; (2) that there are genuine disputes of material fact, including whether the Agency "used a polygraph examination as a guise to discriminate" against Complainant by improperly conducting and interpreting the exam; and (3) that the Administrative Judge incorrectly determined that a Special Agent (SA) applicant was not a legally valid comparator. *See* Appeal at 7-8, 20-24. Complainant's Appeal, however, does not cite to any specific evidence, deposition testimony, discovery responses, or legal arguments that call into question the undisputed materials facts and legal conclusions in the Decision. Instead, the Appeal presents only speculation, misrepresentations, irrelevant or immaterial facts, and unsupported arguments. The complete, undisputed record demonstrates that: (1) Judge Eates' Order Denying Complainant's Motion to Show Cause Why Sanctions Should Not Be Imposed for Spoliation of Evidence ("Sanctions Order") was appropriate; (2) there is no genuine dispute as to any material fact: Complainant failed to establish a prima facie case of discrimination on the basis of his disability because he was not qualified for the position at issue, even assuming the Complainant could state a prima facie case, the Agency presented a legitimate, non-discriminatory reason for not hiring Complainant, and there is no evidence in the record establishing pretext; and (3) as a matter of law, SA Tignor is not a comparator to Complainant. For these reasons, the Summary Judgment Decision should be upheld.

ARGUMENT

It is well established law that in order to survive summary judgment, it is **Complainant's** burden to show, by a preponderance of the evidence, that discrimination motivated the Agency's

actions. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). To accomplish this, Complainant must put forward specific facts showing there is a genuine issue in dispute. *See* 29 C.F.R. § 1614.109(g); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) ("the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirements is that there be no *genuine* issue of *material* fact") (emphasis in original). In other words, Complainant cannot manufacture genuine issues of material fact with "some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Likewise, Complainant cannot create a factual issue of pretext based merely on conclusory allegations or personal speculation of discriminatory or retaliatory intent. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990); *Peacock v. U.S. Postal Serv.*, Appeal No. 0120061969, 2008 EEOPUB LEXIS 1795, at *17 (May 22, 2008). Complainant's Appeal consists of nothing more than a barrage of mischaracterizations of the record evidence, misinterpretations of the relevant legal standards and precedent, and arguments that are either not relevant or beyond the jurisdiction of the EEOC. As a result, he failed to meet his burden in his Opposition to the SJ Motion, and he fails to do so again in his Appeal.

I. THERE WAS NO SPOLIATION OF EVIDENCE.

The majority of the Appeal is dedicated to arguing that the Sanctions Order was incorrectly decided and that the Agency should have been found to have spoliated evidence. *See* Appeal 8-15. Rehashing old arguments and already decided claims, Complainant again attempts to challenge the audio recording of Complainant's polygraph examination produced by the Agency in discovery. With little to no citation to supporting evidence and absolutely no

identification of relevant case law, the Appeal fails to offer any reason to overturn either the Administrative Judge's Sanctions Order or find that spoliation occurred.

A. The Sanctions Order Was Properly Decided.

The EEOC has determined "that delegating to its Administrative Judges the authority to issue sanctions against agencies, and complainants, is necessary and is an appropriate remedy which effectuates the policies of the Commission." MD-110, Chapter 7 § III.A, *quoting Waller v. Dep't of Transp.*, EEOC Appeal No. 0720030069, 2007 WL 1661113, at *8-9 (May 25, 2007). The appropriate standard of review for an Administrative Judge's decision on sanctions is abuse of discretion. *Waller*, 2007 WL 1661113, at *10, 11.

Rather than identifying specific errors made or abuses committed by Judge Eates in the Sanctions Order, Complainant's Appeal merely repeats the majority of the same arguments about the audio recordings and presents much of the same evidence that he did in his Motion to Show Cause Why Sanctions Should Not Be Imposed For Spolitation (sic) Of Evidence on October 4, 2016. ("Sanctions Motion"). *Compare* Sanctions Motion at 4-5, Attach. 1 ([redacted] Aff.) at 2 and Attach. 2 (Seiler Aff.) at 3 *with* Appeal at 8-12, and 15. Repetition does not lend credence to arguments already properly rejected by the Administrative Judge when she issued the Sanctions Order, or prove that her order was improper. Indeed, Complainant seems to identify only two instances of alleged impropriety by Judge Eates. Complainant claims that Judge Eates should have required the Secret Service to provide maintenance records to prove equipment failure before denying his Sanctions Motion. Appeal at 16. Complainant, of course, provides no legal support for this evidentiary standard, and there is none. Administrative Judges have broad discretion in determining what evidence to admit or exclude. *See* 29 C.F.R. § 1614.109(e).

Complainant also asserts that Judge Eates issued the Sanction Decision without ever listening to the audio files at issue. *See* Appeal at 10 ("Judge Antoinette Eates . . . made no mention of ever listening to [the audio files] during the telephone conference . . . and instead cherry picked information provided to her by the USSS"). This argument is, at best, disingenuous. What Complainant tellingly neglects to point out is that Judge Eates has explicitly stated that she did, in fact, review the audio files and her review "confirmed [SA] Ripperger's description of the audio recording": "Based on my assessment of the parties' filings, the audio recordings, and the parties' arguments during a teleconference . . . I denied Complainant's motion for sanctions . . . finding no evidence that spoliation had occurred." Summary Judgment Decision at 2 n.1.

Judge Eates, exercising the broad discretion that Administrative Judges have in the conduct of discovery, *see* 29 C.F.R. § 1614.109(e); MD-110, at Chapter 7 § III.A, found that Complainant had failed to show spoliation of evidence by the Agency. Nothing in the Appeal demonstrates that Judge Eates abused her discretion in denying Complainant's Motion for Sanctions.

B. Complainant Fails To Establish That Spoliation Occurred.

In addition to repeating his Sanctions Motion, Complainant's Appeal does attempt a new theory speculating that a different version of the audio recording existed than the one that the Agency produced in discovery. The party claiming spoliation must demonstrate that the relevant evidence actually existed, not that it possibly or likely existed. *See Sova v. Peace Corps,* Appeal No. 0120110359, 2013 WL 3466315, at *6 (July 5, 2013) (Commission upheld decision dismissing request for sanctions after concluding Complainant could not establish that interview notes actually existed and were actually destroyed). Complainant's Appeal asserts that "Special

Agent Ellen Ripperger, Special Agent Ed Alston, and Special Agent Thomas Christopher all signed documents or stated under oath that they had reviewed the audio recording of Mr. [redacted] polygraph exam and found it to be audible." Appeal at 12. Complainant's assertion does not establish that evidence actually existed because it is a misrepresentation of the record. Complainant cites deposition testimony from SA Ripperger that states she reviewed the audio recording and found a *portion* of the audio recording to be audible. Appeal at 11 citing Ripperger Dep. at 31:12-14. SA Alston testified that he *never* reviewed a full audio recording of Complainant's exam. Agency Ex. A (Dep. of Edward Alston) at 27:16-22 ("Q. Okay. Was it audible to you? A. Initial recording was. Q. What do you mean, 'the initial recording was'? A. Initially, it started out, then it – Q. Okay. A. -- went dead"), 29:6-16 ("I didn't listen to the whole exam. . . . It was not required."). Complainant's assertion that he has adduced "new evidence" since the Sanctions Motion, Appeal at 23 n.11, similarly fails to explain that this "new evidence" is not new at all Complainant presented the exact same evidence, consisting essentially of Complainant's own opinion about the Agency's recording software, with his summary judgment Opposition. *See* SJ Reply at 4-5. As such, this evidence was already considered and evaluated by the Administrative Judge.

All of the evidence in the record, including the audio files themselves, contain time stamps that indicate that they are the original recordings created on September 18, 2014.[2] SJ

[2] Complainant's filings have persisted with the false statement that the audio records of his exam were shorter than his examination itself. *See* Appeal at 15. Every document in the record, including Complainant's Polygraph Report, indicates that his exam began at "0940" and ended at "1320." *See* SJ Motion, Exhibit 5. This indicates an examination of 3 hours and 40 minutes, which is consistent with the time stamps on the audio recording. Complainant claims, without citation to any supporting evidence, that his examination took 5 hours (and included a fifteen to twenty minute break). This appears to stem from Complainant's misunderstanding that "1320," the military time depicted on his Polygraph Report, means 1:20 pm, not 3:20 pm.

Motion Ex. 5; Ex. B. (Ripperger Dep.) at 31:19-32:10. Complainant's theorizing and speculation about the possibility that there could have perhaps been some alternate version of the audio recording of his exam cannot and does not support his claim of spoliation.

II. SUMMARY JUDGMENT WAS CORRECTLY GRANTED TO THE AGENCY AND COMPLAINANT HAS NOT IDENTIFIED ANY MATERIAL FACTS IN DISPUTE.

The Summary Judgment Decision sets forth twenty-three undisputed material facts on which the decision to grant summary judgment was based.[3] Summary Judgment Decision at 2-5. The Appeal fails to identify which, if any, of these material facts are allegedly in dispute, or, for that matter, to identify *any* properly supported material facts that are allegedly in dispute. Instead, the Appeal attempts to generate disputes of fact by raising irrelevant issues, making arguments about immaterial facts, and misrepresenting the evidence of record, the same tactics Complainant used in his Opposition to the SJ Motion. *See, e.g.,* Summary Judgment Decision at 8 n.6 ("the Agency's Reply accurately identifies several instances where Complainant misstates the record evidence. I will not repeat these instances herein, but hereby incorporate the Agency's Reply in my analysis.").

The Appeal argues that there are genuine issues of materials fact regarding the conduct and validity of the polygraph exam administered to him and so summary judgment should not have been granted. Appeal at 22-23. Relying on that premise, and based on nothing more than his own supposition, Complainant contends that there are several unanswered questions about the audio recording of the polygraph, ranging from the significance of its existence to why the

[3] In its SJ Motion, the Agency submitted 22 statements of material fact, each of which was supported by at least one citation to the record. In his Opposition to the SJ Motion, Complainant did not dispute any of the Agency's statements of material fact. Therefore, in her Decision, Judge Eates correctly found that the Agency's statements of material facts were undisputed. Summary Judgment Decision at 2 n. 2.

recording is inaudible.[4] Appeal at 8-15. The only issue before the EEOC and within the Commission's jurisdiction, however, is whether the Agency discriminated against him.[5] *See Lyons v. Department of the Navy*, Appeal Nos. 01891653; 01890781, 1990 WL 711573, at *7 (Mar. 22, 1990). Complainant's claims about the quality of the audio recording and its creation, are immaterial and not probative to the legal analysis of whether disability discrimination occurred.[6] During the investigation of his complaint, Complainant identified the actions taken by the Agency during his security interview and polygraph exam that he asserts were discriminatory. *See* ROI, Ex. A-1, ¶¶ 28, 34-39. In the SJ Motion, the Agency articulated how, even accepting all of his allegations as true, none of the actions evidenced discriminatory motive or disparate treatment. SJ Motion at 8-12. Complainant has not raised any disputes of fact about what occurred during the polygraph or identified any additional alleged discriminatory actions by the Agency, either in his Opposition to summary judgment or in his Appeal. As such, the actual audio recording of the polygraph exam is irrelevant.

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[4] The Appeal hypothesizes that SA Ripperger may have deliberately created an inaudible audio recording. *See* Appeal at 12-15. Complainant offers no evidence or explanation either connecting that imagined action to his disability or addressing why there were multiple deficient audio recordings that occurred around the same time. Ex. B (Ripperger Dep.) at 123:3-13; Agency's Opp'n to Sanctions Mot., Ex. 1 (Ripperger Aff.) at 2.

[5] Complainant posits whether discrimination occurred, not as the ultimate legal inquiry, but as a genuine material fact in dispute. *See* Appeal at 4. Accepting Complainant's argument would result in the abolition of summary judgment, since whether there was discrimination is always in dispute in any complaint.

[6] The Appeal speculates that a pending investigation by the Department of Homeland Security Office of Inspector General (OIG) could perhaps uncover an audible recording of Complainant's polygraph, or could find that the audio was destroyed, or could determine that there was a due process violation. Appeal at 18-19. In the Summary Judgment Decision, the Administrative Judge specifically considered the pending OIG investigation and concluded that any evidence ultimately produced from the investigation "[would] not be germane to the legal analysis of whether disability discrimination has occurred in this case." Summary Judgment Decision at 6 n.3.

Likewise, his challenge of the "validity" of the polygraph exam has no bearing on a *McDonnell-Douglas* legal analysis. Complainant does not offer any evidence that a fact-finder could use to conclude that his polygraph exam was invalid and not properly scored. The Appeal claims, without evidentiary citation, that SA Ripperger interpreted Complainant's response to the relevant question of whether he had engaged in serious criminal activity as "significant response," while SA Edward Alston (and Complainant's "expert" Mr. Seiler) interpreted the response as "inconclusive," necessitating Sgt. Magnuson to serves as a "tie breaker." Appeal at 17-18. Complainant argues, again without any evidentiary support, that this lack of consensus should have resulted in additional questioning instead of the Agency failing Complainant "as fast as they could and as expediently as they could. Appeal at 18. Complainant's entire argument is based on a clear (and repeated) misrepresentation of the record. SA Ripperger evaluated Complainant's response to question R4 in Series II as "-3" or "significant response." SJ Motion Ex. 1 at 2. SA Alston scored question R4 in Series II as "-3." *Id.* at 3. Sergeant Magnusson scored question R4 in Series II as " 3" and wrote "SR" at the bottom. *Id.* at 6. Complainant's witness, Mr. Seiler, who uses a different scoring methodology, nevertheless agreed Complainant had a significant response question R4 in Series II. SJ Motion Ex. 7 (Dep. of Danny Seiler) at 31:17-22 ("Q: 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"). In other words, every polygraph examiner who evaluated Complainant's examination, including Complainant's own witness, agreed that his response to relevant question R4 was a significant response. *See* SJ Motion at 6-7; SJ Reply at 5-7; Summary Judgment Decision at 4, ¶ 17. Complainant has failed to offer any evidence, either in his Opposition to summary judgment, or now in his Appeal, to indicate that his exam was not properly evaluated.

The Appeal disregards entirely Complainant's ultimate burden to demonstrate that the Agency discriminated against him. The Appeal contains no shortage of speculation about, for example, the *possibility* that there were unknown technical flaws in the Agency's polygraph examination equipment, but it is very short on any purported *evidence* that any Agency employee engaged in discrimination. What the undisputed evidence in the record shows is that Complainant was not a qualified individual with a disability within the meaning of the Rehabilitation Act, *see* SJ Motion at 4-5; Summary Judgment Decision at 7; that the Agency determined that Complainant had a significant response to a relevant question during his polygraph examination and, per policy, found the entire test as showing significant responses, *see* SJ Motion at 5-7; Summary Judgment Decision at 7 and 4, ¶ 18); and that as a result of not successfully completing his background investigation, he was not selected for the position of IT Program Manager. Summary Judgment Decision at 4-5, ¶¶ 20-22; SJ Motion at 7. Complainant's Appeal offers nothing to disturb or challenge these undisputed facts.

III. COMPLAINANT HAS FAILED TO PROVIDE ANY LEGALLY VALID COMPARATOR EVIDENCE TO ESTABLISH PRETEXT.

While most of the Appeal is dedicated to hypothetical and irrelevant questions regarding the audio recording of Complainant's polygraph examination, it does briefly argue that the Summary Judgment Decision contains an error of law. Specifically, the Appeal argues that the Summary Judgment Decision incorrectly determined that Complainant and SA Tignor were not similarly situated comparators. Appeal at 21-22. Judge Eates made the following determination regarding this issue:

> I find that Tignor, an applicant for a Special Agent position, was not similarly situated to Complainant because he had previously passed a polygraph examination prior to the hiring freeze, and the individuals involved in permitting Tignor to take a third polygraph examination after his significant response were not involved in Complainant's hiring for the IT position at issue.

Summary Judgment Decision at 11. The Appeal concedes that the individuals who decided to allow Tignor to retake his polygraph examination were different from the individuals who decided not to allow Complainant to retake his examination. Appeal at 22. The Appeal argues, however, resorting once again to misstatements of the record[7] and completely lacking in citation to legal authority, that SA Tignor and Complainant are similarly situated to one another despite the different decision-makers. *Id.*

Complainant's argument is contrary to established legal precedent regarding the issue of similarly situated comparators. Purported comparators must be "nearly identical" in all relevant aspects of their situation to be considered similarly situated, including being subject to the same supervisor or decision-maker. *See Johnson v. Wash. Metro. Area Transit Auth.*, 314 F. Supp. 3d 215, 221 (D.C. Cir. 2018), *quoting Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1514 (D.C. Cir. 1995); *Payne v. U.S. Postal Serv.*, Appeal Nos. 0120082497, 0120082510, 2010 EEOPUB LEXIS 4042, at *10 (Dec. 22, 2010); *Anderson v. Dep't of Treasury*, Appeal No. 01A22092, 2003 EEOPUB LEXIS 1303, at *5 (Mar. 13, 2003). SA Tignor and Complainant were not "nearly identical" in their situations. Not only were different decision-makers involved in the decisions to offer them polygraph examination retests, but SA Tignor had extensive prior employment with the Agency and a prior successful polygraph examination while Complainant did not. SJ Reply at 8-10, Exs. I-VI. Such different backgrounds render them too dissimilar to be comparators. *See Royall v. Nat'l Ass'n of Letter Carriers*, 548 F.3d 137, 145 (D.C. Cir. 2008) (complainant was not similarly situated to a purported comparator where his replacement was

[7] The Appeal's assertion that SA Tignor's "prior polygraph examinations by other examiners were for different positions and bore no relevance to the current position for which he underwent a test by Special Agent Ripperger," is incorrect. Appeal at 22. SA Tignor applied for the same position of Special Agent in 2011 and 2013 for which he took the same polygraph examinations. *See* SJ Reply Exhibits I and II.

previously employed by the employer); *Stan G. v. Dep't of Veterans Affairs,* Appeal No. 0120150663, 2017 WL 4163618, at *4 (E.E.O.C. Sept. 8, 2017) (complainant was not similarly situated to purported comparators due to significant differences in their positions and/or "different Agency official made the determination as to the course of action following the failure of the police services inspection that year"). As SA Tignor and Complainant are not similarly situated comparators.

The Appeal fails entirely to undermine the essential facts of this case. Complainant did not successfully complete his background investigation, and he was therefore not qualified for the position for which he applied. The Agency has also presented a legitimate, non-discriminatory reason for not hiring Complainant, which is that he had a significant response to a relevant question on his polygraph examination. Complainant had not identified a similarly situated comparator who was treated more favorably, thereby failing to establish pretext. Failing to demonstrate that the Agency's real motivation for its decision to not hire Complainant was discrimination, summary judgment was properly entered in favor of the Agency.

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CONCLUSION

For the reasons stated above, the Complainant's Appeal should be denied and the Summary Judgment Decision should be upheld.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the attached document entitled "Agency's Brief in Opposition to Complainant's Appeal" was sent on this day to:

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