

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA

Schultz v. The Harry S. Truman Scholarship Foundation

Schultz · No. 20-cv-04058-MMC · Decided March 10, 2023

OPINION

Schultz v. The Harry S. Truman Scholarship Foundation

PER CURIAM.

1 2 3

4 IN THE UNITED STATES DISTRICT COURT

5 FOR THE NORTHERN DISTRICT OF CALIFORNIA

6 7 BRENDAN SCHULTZ, Case No. 20-cv-04058-MMC 8 Plaintiff,

ORDER GRANTING IN PART AND

9 v. DENYING IN PART MOTION TO

DISMISS

10 THE HARRY S. TRUMAN

SCHOLARSHIP FOUNDATION, Re: Dkt. No. 58

11 Defendant. 12

13 Before the Court is defendant Harry S. Truman Scholarship Foundation’s 14 (“Foundation”) “Motion,” filed January 9, 2023, “to Dismiss Fourth Amended Complaint” 15 (“FAC”). On January 23, 2023, plaintiff Brendan Schultz (“Schultz”) filed his “Response 16 to Defendant’s Notice of Motion and Motion to Dismiss Fourth Amended Complaint,” to 17 which the Foundation has replied. Having read and considered the parties’ respective 18 written submissions, the Court rules as follows.¹

19 BACKGROUND²

20 The Foundation is a federal agency that administers the Harry S. Truman 21 Scholarship (“Scholarship”) program. (See FAC ¶ 5.) Schultz, as a third-year 22 undergraduate student, sought and received a nomination from his college to apply for 23 the Scholarship. (See FAC ¶ 6.) In his application, Schultz stated he is “a proud member 24 of the Jewish . . . communit[y],” and provided examples of his “leadership” and “public 25 service” wherein his Jewish identity played a role. (See FAC, Ex. 8, at 4, 6.) In that 26 1 By order filed February 10, 2023, the Court took the matter under submission. 27 1 regard, Schultz described an incident that took place on his college campus, specifically, 2 at a meeting “to discuss a proposal to suspend a study-abroad program in Israel due to 3 Israeli laws banning entry for boycott leaders.” (See FAC, Ex. 8, at 4.) In particular, 4 Schultz wrote that after a professor gave a “speech compar[ing] the Israeli State to Nazi 5 Germany,” Schultz “knew [his] community needed a voice for unity” and raised his hand 6 to

1 speak on the “moral obligation to educate students on the experiences of oppressed 7 groups and
the necessity to have a standard that be applied uniformly.” (See *id.*) 8 Based on his application,
Schultz “advanced to finalist status” and, on March 18, 9 2019, underwent a finalist interview by
the San Francisco Regional Review Panel. (See 10 FAC ¶ 6.) At the interview, Schultz alleges,
one panelist asked him “demeaning and 11 inappropriate questions,” including, “Do you think that
Jews are oppressed?” and “Are 12 Jews . . . oppressed as racial minorities in the United States?”
(see FAC ¶¶ 7c, 7f) and 13 that, upon Schultz’s expressing a desire to run for elected office,
another panelist 14 laughed at him (see FAC ¶¶ 7g-h). Additionally, Schultz alleges that the only
other 15 Jewish finalist was asked about “how the oppression of Jews in America compared to 16
Black Americans,” and that Schultz and said finalist were the only ones who were 17 questioned
about their ethnic or religious identity. (See FAC ¶ 8.) 18 When he did not receive a Scholarship
from the Foundation, and believing he 19 faced discrimination on the basis of his “ethnic
identity,” Schultz, on April 23, 2019, sent 20 an email to the Deputy Executive Secretary of the
Foundation “to request information 21 pertaining to the Foundation’s civil rights grievance
process,” to which the Deputy 22 Executive Secretary responded that she would begin an
investigation into his interview 23 experience. (See FAC ¶ 12.) Thereafter, on May 8, 2019,
Schultz sent another email “to 24 ask for the . . . Foundation’s civil rights grievance procedure that
he never received,” to 25 which the Deputy Executive Secretary responded with the results of her
“initial inquiry,” 26 specifically, that the panelists’ recollection of his interview and materials was
“generally 27 positive,” but that “[t]he threshold for being selected as a Scholar . . . is much higher
than 1 in-depth investigation. (See FAC ¶¶ 13-14.) Ultimately, on July 12, 2019, the Deputy 2
Executive Secretary “admitted that she had been ‘negligent’ in handling the investigation 3
process,” after which the “newly-appointed Executive Secretary” began a second 4 investigation
into Schultz’s interview. (See FAC ¶ 15.) 5 On August 14, 2019, the Executive Secretary emailed
Schultz her findings from 6 the second investigation. Although she described Schultz as “well
qualified” for the 7 Scholarship and “admitted that some members of the panel posed questions
with 8 ‘irreverence,’” she concluded “others presented themselves in both writing and in person 9
as better fits for our organization and its mission.” (See FAC ¶ 16.) Schultz responded 10 with
“criticisms regarding the lack of due process and impartiality of the . . . investigation,” 11 after
which the Executive Secretary replied that the investigation would be turned over to 12 the
Foundation’s “outside legal counsel.” (See FAC ¶ 18.) 13 Thereafter, Schultz, “[u]nconfident
regarding the sincerity of the [Foundation’s] 14 investigative process,” contacted a number of
federal agencies as well as his 15 Congressional representative, none of which, according to
Schultz, provided satisfactory 16 assistance. (See FAC ¶¶ 19-20.) Subsequently, on May 1, 2020,
the Foundation’s 17 outside legal counsel sent Schultz an email in which he stated his conclusion
that the 18 Foundation’s “belief in, and practice of, nondiscrimination ma[de] it highly unlikely
that 19 [Schultz’s] unsatisfactory interview experience resulted from personal animus by the 20
interviewers.” (See FAC ¶ 22.) 21 Based on the above allegations, Schultz asserts two Claims for

Relief: (1) 22 “Violation of the Due Process Clause of the Fifth Amendment,” and (2) “[V]iolation of the 23 Administrative Procedure Act, 5 U.S.C. § 701, et seq.” (See FAC at 17:19, 23:7-8.)3 24 3 By order filed November 10, 2022 (see Order Granting Def.’s Mot. to Dismiss 25 Third Am. Compl., Dkt. No. 52) (“November 10, 2022, Order”), the Court granted the Foundation’s motion to dismiss Schultz’s Fifth Amendment and Administrative Procedure 26 Act (“APA”) claims as asserted in his Third Amended Complaint, finding Schultz had failed to plead sufficient facts to establish standing, specifically, facts demonstrating the 27 Court could grant him the requested relief in light of eligibility requirements in the 1 By the instant motion, the Foundation seeks, pursuant to Rule 12(b)(6) of the 2 Federal Rules of Civil Procedure, an order dismissing both of Schultz’s claims, for failure 3 to state a claim. Additionally, the Foundation seeks, at a minimum, an order again 4 dismissing Schultz’s requests for monetary damages (see Order Dismissing in Part 5 Second Am. Compl. Pursuant to 28 U.S.C. § 1915 (“December 2, 2021, Order”), at 5-7, 6 Dec. 2, 2021, Dkt. No. 22 (dismissing Schultz’s Fifth Amendment and APA claims to the 7 extent he sought damages)), as well as an order striking his jury demand.

8 LEGAL STANDARD

9 Dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure “can be 10 based on the lack of a cognizable legal theory or the absence of sufficient facts alleged 11 under a cognizable legal theory.” See *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 12 699 (9th Cir. 1990). Rule 8(a)(2), however, “requires only ‘a short and plain statement of 13 the claim showing that the pleader is entitled to relief.’” See *Bell Atlantic Corp. v. 14 Twombly*, 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). Consequently, “a 15 complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual 16 allegations.” See *id.* Nonetheless, “a plaintiff’s obligation to provide the grounds of his 17 entitlement to relief requires more than . . . a formulaic recitation of the elements of a 18 cause of action.” See *id.* (internal quotation, citation, and alteration omitted). 19 In analyzing a motion to dismiss, a district court must accept as true all material 20 allegations in the complaint and construe them in the light most favorable to the 21 nonmoving party. See *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). “To 22 survive a motion to dismiss,” however, “a complaint must contain sufficient factual 23 material, accepted as true, to ‘state a claim to relief that is plausible on its face.’” 24 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “Factual 25 graduate school, intending and agreeing to dedicate three of the first seven years of his 26 post-graduate school professional career to public service, intending to dedicate his career to the public sector, being a US citizen, and agreeing to comply with any other 27 requirements of accepting and receiving a Truman Scholarship.” (See FAC ¶ 24.) In 1 allegations must be enough to raise a right to relief above the speculative level,” 2 *Twombly*, 550 U.S. at 555, and courts “are not bound to accept as true a legal conclusion 3 couched as a factual allegation,” see *Iqbal*, 556 U.S. at 678 (internal quotation and 4 citation omitted).

5 DISCUSSION

6 A. First Claim for Relief – Fifth Amendment 7 Schultz alleges the Foundation violated the Fifth Amendment by discriminating 8 against him in the review of his application for a Scholarship and in the review of his 9 subsequent grievance. (See FAC ¶¶ 36, 37.) 10 “[A] cause of action may be implied directly under the equal protection component 11 of the Due Process Clause of the Fifth Amendment.” See *Davis v. Passman*, 442 U.S. 12 228, 242 (1979). “To state a claim for violation of the Equal Protection Clause, a plaintiff 13 must show that the defendant acted with an intent or purpose to discriminate against him 14 based upon his membership in a protected class.” See *Serrano v. Francis*, 345 F.3d 15 1071, 1082 (9th Cir. 2003) (citation omitted); see also *Maynard v. City of San Jose*, 37 16 F.3d 1396, 1404 (9th Cir.1994) (noting “[i]ntentional discrimination means that a 17 defendant acted at least in part because of a plaintiff’s protected status”) (emphasis in 18 original) (citation omitted).⁴ Consistent therewith, “claims based on Equal Protection 19 violations must plead intentional unlawful discrimination or allege facts that are at least 20 susceptible of an inference of discriminatory intent.” See *Monteiro v. Tempe Union High 21 Sch. Dist.*, 158 F.3d 1022, 1026 (9th Cir. 1998). 22 Here, Schultz alleges facts that are “at least susceptible of an inference of 23 discriminatory intent.” See *id.*; see also *Vill. of Arlington Heights v. Metro. Hous. Dev. 24 Corp.*, 429 U.S. 252, 266 (1977) (holding “[d]etermining whether . . . discriminatory 25 26 4 Although *Serrano* and *Maynard* both concerned the Equal Protection Clause of the Fourteenth Amendment, “[e]qual protection analysis in the Fifth Amendment area is 27 the same as that under the Fourteenth Amendment.” See *Buckley v. Valeo*, 424 U.S. 1, 1 purpose was a motivating factor demands a sensitive inquiry into such circumstantial and 2 direct evidence of intent as may be available”).⁵ In particular, Schultz alleges his 3 “interview experience was a departure from the experience other Truman Scholarship 4 finalists, aside from another Jewish candidate, underwent” in that it “included members of 5 the interview panel . . . asking questions that were intended to emotionally provoke [him], 6 using [his] racial/ethnic/religious identity to attack him, and laughing at [him].” (See FAC 7 ¶ 34a.) Specifically, Schultz alleges “[n]o other finalist was asked questions related to 8 their identity in [a] protected class, asked to defend the traumatic communal experiences 9 of their ethnic group, told that they were ‘unequivocally unqualified’ for their career 10 aspirations, or laughed at.” (See FAC ¶ 8.) Further, Schultz alleges, “non-Jewish 11 finalists reported being treated with respect and decency by all members of the San 12 Francisco Regional Review Panel” (see FAC ¶ 8), including the “finalist from Hawaii” 13 who, Schultz alleges, upon “return[ing] to the waiting room from [her] interview,” told him 14 “the interview panelists were kind and [he] had nothing to worry about” (see FAC ¶ 7a). 15 Given the above allegations, the FAC contains sufficient “factual content to nudge 16 [Schultz’s] claim of purposeful discrimination across the line from conceivable to 17 plausible.” See *Iqbal*, 556 U.S. at 683 (internal quotations, citation, and alteration 18 omitted). 19 Accordingly, the Court finds Schultz, at this stage of the proceedings, has stated a 20 claim for violation of the Due Process Clause of the Fifth Amendment. 21 B. Second Claim for Relief – APA 22 Schultz alleges the Foundation, by violating Executive Order

(“EO”) 13160 and its own agency procedures, created circumstances that are “subject to judicial review according to the [APA].” (See FAC ¶¶ 44-45.) Although Arlington Heights describes an evidentiary framework rather than a pleading standard, the Ninth Circuit has applied that framework in reviewing a district court’s dismissal of an equal protection claim under Rule 12(b)(6). See *Ave. 6E Invs.*, 1 EO 13160 prohibits “discrimination on the basis of race, sex, color, national origin, disability, [and] religion . . . in Federally conducted education and training programs and activities,” see Exec. Order No. 13160, 65 Fed. Reg. 39775 (June 23, 2000), and 4 provides that “[a]ny person who believes himself or herself to be aggrieved by a violation of [said] order or its implementing regulations, rules, policies, or guidance may . . . file a written complaint with the agency,” see *id.* at 39777. EO 13160 further requires “each executive department or agency [to] conduct an investigation of any complaint by one of its employees[6] alleging [such] violation,” and, consistent therewith, requires “each executive department and agency [to] establish a procedure to receive and address complaints.” See *id.* 11 The Foundation’s “Equal Employment Opportunity Statement” covers “applicants 12 to the Truman Scholarship Program” and provides: “The Foundation does not 13 discriminate against a candidate on the basis of race, color, national origin, religion, sex, 14 age, genetic information, disability, marital status, pregnancy, economic status or sexual 15 orientation.” (See FAC, Ex. 12, at 1.) 16 Under the APA, “[a] person suffering legal wrong because of agency action, or 17 adversely affected or aggrieved by agency action within the meaning of a relevant 18 statute, is entitled to judicial review thereof.” See 5 U.S.C. § 702. Courts “may review a 19 claim under the APA asserting that an agency violated an executive order where the 20 order has the force of law.” See *Silver Dollar Graving Ass’n v. U.S. Fish & Wildlife Serv.*, 21 2009 WL 166924, at *2 (9th Cir. Jan. 13, 2009); (see also December 2, 2021, Order at 22 7:5-17 (finding EO 13160 has force of law)). Additionally, courts have jurisdiction under 23 the APA “to review allegations that an agency has abused its discretion . . . by failing to 24 25 6 The Attorney General’s “Executive Order 13160 Guidance Document” clarifies that EO 13160, including the above-cited section, “covers all individuals involved in 26 federally conducted education and training programs,” “many [of whom] are likely to be members of the general public, rather than federal employees.” See Executive Order 27 13160 Guidance Document: Ensuring Equal Opportunity in Federally Conducted 1 comply with its own regulations.” See *ASSE Int’l, Inc. v. Kerry*, 803 F.3d 1059, 1069 (9th 2 Cir. 2015).

3 Here, Schultz seeks judicial review of two asserted agency actions. First, Schultz 4 alleges the Foundation’s decision not to select him to be a Scholar violated EO 13160, as 5 well as the Foundation’s own procedures. (See FAC ¶¶ 44-46.) Second, Schultz alleges 6 the Foundation’s failure to develop “a procedure to receive and address its complaints” 7 violated EO 13160’s requirement that such a procedure be established. (See FAC ¶ 48.) 8 The Court considers below each such challenge in turn. 9 1. Non-Selection: Discrimination 10 Schultz alleges the Foundation,

“by . . . engaging in discrimination,” violated EO 11 13160 and “departed from its own agency procedures.” (See FAC ¶ 46.) To the extent 12 Schultz brings a constitutional violation under the APA, namely, “discrimination based on 13 race, ethnicity, and national origin” (see FAC ¶ 44), he has, as discussed above, pleaded 14 sufficient facts to support such claim, see *supra* Section A; see also *Webster v. Doe*, 486 15 U.S. 592, 603-04 (1988) (holding, even where agency action “committed to agency 16 discretion by law,” constitutional claim based on such action “may be reviewed [under 17 APA] by the District Court”). 18 Accordingly, to the extent Schultz’s claim under the APA is based on a 19 constitutional violation, his claim is not subject to dismissal. 20 2. Non-Selection: Candidate’s Qualifications 21 Schultz alleges the Foundation, “by not awarding a scholarship based on a 22 candidate’s merit,” violated EO 13160 and “departed from its own agency procedures.” 23 (See FAC ¶ 46.) By the instant motion, the Foundation argues Schultz’s “nonselection is 24 not reviewable under the APA because there is no meaningful standard against which to 25 judge the Truman Foundation’s decision.” (See Def.’s Mot to Dismiss Fourth Am. Compl. 26 (“Def.’s Mot.”) at 9:8-9, Dkt. No. 58.) 27 Although there is a “strong presumption” of reviewability under the APA, see 1 the APA expressly precludes judicial review of agency actions “committed to agency 2 discretion by law,” see 5 U.S.C. § 701(a)(2). “Agency action is committed to agency 3 discretion in those rare instances where statutes are drawn in such broad terms that in a 4 given case there is no law to apply, thereby leaving the court with no meaningful standard 5 against which to judge the agency’s exercise of discretion.” See *ASSE*, 803 F.3d at 1068 6 (internal quotation and citation omitted). “If no ‘judicially manageable standard’ exists by 7 which to judge the agency’s action, meaningful judicial review is impossible and the 8 courts are without jurisdiction to review that action.” See *Steenholdt v. F.A.A.*, 314 F.3d 9 633, 638 (D.C. Cir. 2003) (citation omitted). To determine whether judicial review is 10 precluded by § 701(a)(2), courts consider “the language of the statute and whether the 11 general purposes [thereof] would be endangered by judicial review.” See *Perez Perez v. 12 Wolf*, 943 F.3d 853, 856 (9th Cir. 2019) (internal quotation and citation omitted); see also 13 *Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 719 (9th Cir. 2011) (noting courts 14 “may also look to regulations, established agency policies, or judicial decisions for a 15 meaningful standard to review”) (internal quotation and citation omitted). 16 Here, the relevant statute, 20 U.S.C. §§ 2001-2013, provides: “The Foundation is 17 authorized to award scholarships to persons who demonstrate outstanding potential for 18 and who plan to pursue a career in public service.” See § 2005(a). The statute thus 19 establishes two eligibility requirements the Foundation considers in selecting a Scholar, 20 namely, the candidate must (1) “demonstrate outstanding potential for . . . a career in 21 public service,” and (2) “plan to pursue a career in public service.” See *id.* The statute 22 does not, however, obligate the Foundation to award Scholarships to every candidate 23 who meets these eligibility requirements, but, rather, provides that the Foundation “is 24 authorized” to award Scholarships to those who do. Such broad statutory language 25 indicates the Foundation’s awarding of scholarships is committed to agency discretion by 26 law. See *Helgeson*, 153 F.3d at

1004 (finding, where “statute d[id] not equate loan 27 eligibility with loan entitlement, but provide[d] that loans ‘may’ be issued to eligible 1 law); cf. *Spencer Enterprises, Inc. v. United States*, 345 F.3d 683, 688 (9th Cir. 2003) 2 (finding statute “provid[ing] that, upon determining that the petitioner is eligible, the 3 Attorney General ‘shall . . . approve the petition’” did not leave denial of visa petition to 4 agency discretion by law) (emphasis in original). Indeed, the Foundation’s regulations 5 provide that “[i]n the event that a . . . panel determines that none of the Finalists from a 6 state meets all the requirements expected of a Truman Scholar, it does not provide a 7 recommendation,” and “carr[ies] over the Scholarship for that state[,] making two 8 Scholarships available the following year.” See 45 C.F.R. § 1801.23(c). 9 Moreover, the statute, while defining other terms and phrases used therein, see 20 10 U.S.C. § 2002, does not define “outstanding potential,” further indicating Congress 11 committed the selection of Scholars to the Foundation’s discretion. See *Hyatt v. Off. of 12 Mgmt. & Budget*, 908 F.3d 1165, 1174 (9th Cir. 2018) (finding statute providing agency 13 “shall . . . take appropriate remedial action, if necessary” committed to agency’s 14 discretion agency’s decision “not to provide any remedial action in response to 15 [petitioner]’s [p]etition”; noting “[t]here [was] no express standard in the [statute] to guide 16 the [agency] in determining whether any particular remedy [was] either ‘appropriate’ or 17 ‘necessary’”). Schultz argues the Court “is perfectly well equipped to review whether a 18 college student shows outstanding potential for a career in public service.” (See Resp. to 19 Def.’s Notice of Mot. and Mot. to Dismiss Fourth Am. Compl. at 4:10-11, Dkt. No. 59.) He 20 does not, however, explain, much less identify, what law or standard the Court should 21 use in reviewing the Foundation’s determination that a candidate did or did not 22 demonstrate outstanding potential. 23 Although the Foundation’s regulations outline several evaluation criteria, in that 24 they state “[p]anel[s] evaluate Truman Finalists primarily on: (a) [l]eadership potential and 25 communication skills; (b) [l]ikelihood of ‘making a difference’ in public service; and 26 (c) [i]ntellectual strength, analytical abilities, and prospects of performing well in graduate 27 school,” see 45 C.F.R. § 1801.22 (emphasis added), such subjective factors, absent any 1 standard,” see *Steenholdt*, 314 F.3d at 638, allowing for meaningful judicial review.⁷ 2 Indeed, the use of the word “primarily” in the regulation essentially precludes application 3 of a meaningful standard of review, as there is no indication therein what other factors 4 may properly be considered. Lastly, as the Foundation points out, not only does it 5 “evaluate whether one individual shows outstanding potential, it evaluates whether that 6 individual, in competition with hundreds of other applicants, should be awarded one of a 7 highly limited number of scholarships,” thus “balancing . . . one person’s qualifications 8 and perceived potential with those of another.” (See Def.’s Reply in Supp. of Mot. to 9 Dismiss FAC at 1:20-24, Dkt. No. 61.) 10 In light of all of the above circumstances, the Court finds the Foundation is “far 11 better equipped than the courts to deal with the many variables involved,” see *Heckler v. 12 Chaney*, 470 U.S. 821, 831–32 (1985) (holding agency’s decision not to institute 13 enforcement proceedings was unreviewable under APA; finding decision required “a 14 complicated balancing of a number of

factors which [were] peculiarly within [agency's] 15 expertise"), and consequently, to the extent Schultz claims "greater merit" than the 16 selected Scholars, the Court finds there is no meaningful standard by which to judge the 17 Foundation's exercise of discretion. 18 Accordingly, to the extent Schultz's claim under the APA is based on his allegedly 19 superior qualifications as a candidate, his claim is subject to dismissal. 20 3. Grievance Procedure 21 Schultz also alleges the Foundation "failed to adhere to [EO 13160] by not 22 developing a procedure to receive and address its complaints and did not make any 23 attempt to establish these procedures before addressing [his] complaints." (See FAC 24 25 7 Schultz, for example, claims "greater merit" than a finalist from California who "studied with a language program [in which] college students commonly participate," on 26 the ground that he "received a fellowship to study Arabic at the most prestigious intensive language school in the US" (see FAC ¶ 10), a claim as to which there exists no 27 meaningful standard to determine which experience better prepares an individual to 1 ¶ 48.) An exhibit to the FAC, however, indicates the Foundation had developed such a 2 procedure. Specifically, a complainant can "[e]ither send along [to the Deputy Executive 3 Secretary] a narrative of the issues that [he/she] experienced during the [Scholar 4 selection] process that [he/she] wish[es] for [the Deputy Executive Secretary] to address" 5 or "[p]ermit [the Deputy Executive Secretary] to conduct [her] own investigations and 6 share [her] findings with [the complainant]." (See FAC, Ex. 4, at 1.) As explained by the 7 Deputy Executive Secretary, "[s]electing option #2 . . . allow[s] [the complainant] to 8 remain confidential as [she] would just ask general questions regarding the process," but 9 "may take a bit longer if [she] need[s] to re-investigate or ask questions of the other 10 parties should [the complainant] provide information that contradicts their recollection." 11 (See *id.* at 2.) Upon completion of the investigation, the Deputy Executive Secretary 12 "report[s] directly to the Executive Secretary for direction." (See *id.* at 1.) 13 In any event, even assuming, arguendo, a failure to develop a grievance 14 procedure, the Court finds such failure was harmless. Under the APA, "due account shall 15 be taken of the rule of prejudicial error," see 5 U.S.C. § 706, also called the "harmless 16 error rule," see *Shinseki v. Sanders*, 556 U.S. 396, 406 (2009). Here, as noted, Schultz's 17 complaint of discrimination was investigated at three levels within the agency. 18 Consequently, the Court finds he was not prejudiced by the alleged lack of a grievance or 19 investigation procedure. 20 Accordingly, to the extent Schultz's claim under the APA is based on the 21 Foundation's alleged failure to develop a grievance procedure, his claim is subject to 22 dismissal. See *Safari Club Int'l v. Haaland*, 31 F.4th 1157, 1179 (9th Cir. 2022) (holding 23 court "will not grant relief" where "to the extent that any such errors may exist, they were 24 harmless"). 25 C. Monetary Damages 26 In the FAC, Schultz again seeks monetary damages. (See FAC ¶ 61 (requesting 27 "compensatory damages"), ¶ 62 (requesting "punitive damages"), ¶ 63 (requesting

1 November 10, 2022, Order, the Court, by its December 2, 2021, Order, dismissed

2 Schultz's claims under both the Fifth Amendment and the APA to the extent he sought 3 damages. (See November 10, 2022, Order at 1 n.1; December 2, 2021, Order at 5-7.) 4

Accordingly, for the reasons stated in the December 2, 2021, Order, Schultz's 5 requests for damages will again be dismissed. 6 D. Jury Trial 7 In the FAC, Schultz demands a jury trial, which demand, the Foundation argues 8 "should be struck because the Government has not waived sovereign immunity to permit 9 a jury trial under the APA or an implied cause of action [as to] a Constitutional claim." 10 (See Def.'s Mot. at 15:14-20 (citing Haynie v. Veneman, 272 F. Supp. 2d 10, 20 (D.D.C. 11 2003) (noting "sovereign immunity precludes demands for jury trials on claims against the 12 federal government unless Congress has clearly waived that immunity and expressly 13 granted a right to a jury trial"))). The Court finds the Foundation's argument persuasive, 14 and Schultz makes no argument to the contrary. 15 Accordingly, the request for a jury trial will be stricken.

16 CONCLUSION

17 For the reasons stated above: 18 1. To the extent the Foundation moves to dismiss Schultz's Fifth Amendment 19 claim, the motion is hereby DENIED. 20 2. To the extent Schultz's APA claim is based on a constitutional violation, the 21 motion is hereby DENIED. 22 3. To the extent Schultz's APA claim is based on his qualifications as a 23 candidate, the motion is hereby GRANTED. 24 4. To the extent Schultz's APA claim is based on the Foundation's alleged 25 failure to establish a grievance procedure, the motion is hereby GRANTED. 26 5. To the extent the Foundation moves to dismiss Schultz's requests for 27 monetary damages, the motion is hereby GRANTED. 1 trial, the motion is hereby GRANTED. 2 3 IT IS SO ORDERED. 4 5 || Dated: March 10, 2023 .

INE M. CHESNEY

6 United States District Judge 7 8 9 10 11 12 13 16 18 19 20 21 22 23 24 25 26 27 28