



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

[REDACTED]
Vickie P.,¹
Complainant,

v.

James N. Mattis,
Secretary,
Department of Defense
(Defense Commissary Agency (DeCA)),
Agency.

Appeal No. 0120172280

Hearing No. 430-2015-00133X

Agency No. DeCA-00130-2014

DECISION

Complainant timely filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from a final Agency decision (FAD) dated March 14, 2017, concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq.

BACKGROUND

When the events in 2014 giving rise to Complainant's complaint occurred, she was a former reemployed annuitant with the Agency in the position of Investigation Specialist, GS-1801-12 at Headquarters, Office of Inspector General, Inspections & Investigation Division, assigned to the Fraud, Waste and Abuse Program in Fort Lee, Virginia who, in September 2011, was separated after her reemployed annuitant status or appointment expired, and was seeking reemployment with the Agency.

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

On July 15, 2014, Complainant filed an EEO complaint alleging that the Agency discriminated against her based on reprisal for prior protected EEO activity under Title VII when she learned in May 2014, that there were *currently* two GS-12 vacancies (Inspector) and one GS-13 vacancy (Lead Inspector) in her former office and she was denied the opportunity to apply for them.

Following an investigation, the Agency provided Complainant with a copy of its report and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant requested a hearing, but subsequently withdrew her request. Consequently, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). It found no discrimination.

While the investigation of the complaint touched on events that occurred in 2014, much of its focus was on events that occurred in 2013 and before.

In its FAD, the Agency characterized Complainant's complaint as concerning the following three positions in its Office of Inspector General filled in **2013**: Investigator, GS-1801-12, Announcement DeCA-12-764723-MP, filled via reassignment by a DeCA employee on or about February 10, 2013 ("Job 1"); Investigator, GS-1810-12, Announcement DeCA 13-845393-MP – announcement was "pulled" on February 28, 2013, the first day it opened to applicants and was not filled ("Job 2"); and Lead Investigator, GS-1810-13, announcement DeCA-13-763915-MP, filled via promotion by a DeCA employee on or about February 24, 2013 ("Job 3"). All three announcements restricted applicants to current DeCA employees, and contained the language, "This position DOES NOT meet the Department of Defense (DOD) criteria for hiring Reemployed Annuitants. Therefore, reemployed annuitants will not be considered for this position." In concluding that there was no discrimination in its March 14, 2017 FAD, the Agency found that Complainant failed to prove that the stated reason for denying reemployed annuitants eligibility for Jobs 1 – 3 was invalid, and did not prove disparate treatment.

We take administrative notice that following a hearing on a prior EEO complaint by Complainant, an EEOC Administrative Judge found, in a decision dated May 12, 2015, that hiring an annuitant never entered the selecting official's mind for Jobs 1 and 3, no one told him or induced him to restrict the area of consideration to exclude Complainant, the selecting official's testimony was credible and convincing, and Complainant did not prove discrimination on this. In Vickie P. v. Department of Defense (DeCA), EEOC Appeal No. 0120152441 (Nov. 30, 2017) the Commission affirmed this part of the AJ's decision.

Despite the Agency's characterization in its FAD, we now conclude that Jobs 1 – 3 are not part of the complaint currently before us. On the three positions that are the subject of the instant EEO complaint (coincidentally two GS-12 Investigators, one GS-13 Lead Investigator, but vacant in **2014**) Complainant stated, in response to the EEO investigator's questions, that she verbally

learned about them from three identified friends who are employed by the Agency, and she did not know if they were announced in any way or if anyone was selected.

Regarding these three 2014 vacancies, DeCA's Inspector General confirmed that as of December 2013, an Investigator was not hired, and as of October 2014, DeCA's Office of Inspector General had two vacant Investigator, GS-12 positions, and one vacant Investigator, GS-13 position. In response to the EEO investigator's question on why they were not announced or competed, the Inspector General stated there was a hiring freeze in Fiscal Year 2013, and the Director/Chief Executive Officer ("CEO") of DeCA, who was his first line supervisor, said "he wanted to wait and move to fill the positions until all litigation matters were resolved. Only in the past year has [Complainant] been filing complaints on the current positions." Report of Investigation (ROI), at Bates stamp (upper right corner), 301. At another point in October 2014, the Inspector General stated that the CEO "directed no hiring of IG Investigator due to ongoing litigation cases and matters ongoing...".

After the Agency found no discrimination, the instant appeal followed on May 25, 2017.

ANALYSIS AND FINDINGS

Timeliness of Complainant's Appellate Brief

Due to a clerical error, this office did not docket Complainant's appeal until June 21, 2017. By revised acknowledgment letter to Complainant dated June 23, 2017, this office advised her that any brief in support of her appeal must be filed within 30 days of receipt of the acknowledgment letter. Complainant, by and through her attorney, filed her appeal brief on July 27, 2017, writing the acknowledgment letter was received on June 28, 2017. Meanwhile, on June 22, 2017, before the revised acknowledgment letter to Complainant extending her deadline to file a brief, Complainant requested an extension to file her brief, which this office separately granted the same day, setting a new deadline of July 12, 2017.

In opposition to the appeal, the Agency argues that Complainant's appeal brief should not be considered because it was untimely filed, pointing to this office's June 22, 2017 letter to Complainant setting a deadline of July 12, 2017.

We disagree with the Agency that Complainant untimely filed her brief. The June 23, 2017, revised acknowledgment letter extending Complainant's deadline to file a brief to 30 days of receipt thereof, superseded the prior letter from this office extending her deadline to July 12, 2017. Even if we did not view the latter letter as superseding the former, we would deem the brief timely because of our conflicting instructions.

Agency's Final Decision Vacated

Complainant argues that her EEO activity while she still worked at the Agency motivated the responsible management officials to retaliatorily take a series of actions to prevent her from

applying for vacant positions as they come open, or to otherwise exclude her from consideration. She argues that the DeCA Inspector General corroborated this by stating he was told by the CEO to wait to fill the three 2014 vacancies until all litigation matters involving her were resolved. Complainant argues that no legitimate business reason existed for not filling the 2014 vacancies.

In its March 14, 2017 FAD, the Agency ruled on events that occurred in 2012 and 2013 connected to Jobs 1 - 3, none of which were the subject of Complainant's instant complaint, which was about three vacancies in 2014. Jobs 1 and 3 were the subject of a prior complaint by Complainant, and after a hearing an AJ found no discrimination regarding Jobs 1 and 3. On appeal, the Commission affirmed this part of the AJ's decision.

Therefore, the Agency's March 14, 2017 FAD is VACATED because it ruled on matters and allegations that occurred before the events that are the subject of the instant complaint, and the record contains insufficient information on the three 2014 vacancies at issue to allow a determination on whether not announcing or competing them was discriminatory or retaliatory.

The Inspector General stated that that the CEO told him not to fill the three 2014 vacancies until all litigation was resolved. Assuming this referred to Complainant's EEO litigation, this was potentially retaliatory, but we have insufficient information to rule on this. Among other things, no declaration was taken from the CEO. He could be asked, for example, to respond to questions on his knowledge of Complainant's EEO activity, whether after the freeze in fiscal year 2013, DeCA planned to fill the positions in 2014 or later (e.g., because it made business sense to do so) but Complainant's litigation factored into the decision not to fill them; if Complainant's litigation was a factor, why; what the plan(s) or expectations, if any, for the area of consideration for applicants (current DeCA employees only or broader) and permitting or not permitting retired annuitants to be considered for the or the 2014 vacancies, and why. Relevant follow up questions should also be asked of the Inspector General and the Supervisory Investigator, who previously gave declarations in this case. Human Resources professionals, who would have been responsible for helping craft the vacancy announcements for three 2014 vacancies, should be asked about what the plan(s) or expectation would have been for area of consideration for applicants (who may apply), and allowing retired annuitants to be considered, and why. Complainant should be provided an opportunity to give a declaration, and declarations should be taken from additional witnesses if they have relevant information. Relevant documentation, if any, should also be gathered.

The FAD is VACATED and the complaint is REMANDED to the Agency for compliance with the Order below.

ORDER

The Agency shall acknowledge to Complainant that it has received the remanded claims **within thirty (30) calendar days** of the date this decision was issued. The Agency shall conduct a supplemental investigation into the remanded claims, using 29 C.F.R. § 1614.108 as a guide, and provide Complainant a copy of the report of investigation **within one hundred and twenty (120) calendar days** of the date of this decision.

At the same time, the Agency shall issue Complainant a notice of her right to request a hearing before an EEOC Administrative Judge or receive an immediate final decision pursuant to 29 C.F.R. § 1614.108(f).

As provided in the statement entitled "Implementation of the Commission's Decision," the Agency must send to the Compliance Officer: 1) a copy of the Agency's letter of acknowledgment to Complainant, and 2) a copy of the Agency's notice that transmits the new investigative report to her.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0618)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

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

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

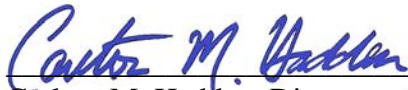
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. 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. **Filing 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:



Carlton M. Hadden, Director
Office of Federal Operations

December 11, 2018

Date