



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

[REDACTED]  
Geraldine G.,<sup>1</sup>  
Petitioner,

v.

Megan J. Brennan,  
Postmaster General,  
United States Postal Service  
(Headquarters),  
Agency.

Petition No. 0420170001

Appeal No. 0720140039

Agency No. 66-000-0014-12

**DECISION ON PETITION FOR ENFORCEMENT**

On August 11, 2016, the Equal Employment Opportunity Commission (EEOC or Commission) docketed a petition for enforcement to examine the enforcement of an Order set forth in EEOC Appeal No. 0720140039 (June 3, 2016). The Commission accepts this petition for enforcement pursuant to 29 C.F.R. § 1614.503. For the reasons that follow, the petition is GRANTED.

**BACKGROUND**

At the time of events giving rise to this complaint, Petitioner worked as a Postal Inspector at the Agency's Processing & Distribution Center in Des Moines, Iowa. On August 11, 2012, Petitioner filed a complaint in which she alleged that the Agency discriminated against her on the basis of age (50) in violation of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. when on April 10, 2012, she interviewed for the position of Postal Inspector Team Leader, Level 14, and during the interview she was questioned regarding her years of eligibility and retirement. Subsequently, on April 12, 2012, she learned she was not awarded the position.

At the conclusion of the investigation, the Agency provided Petitioner with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment

---

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

Opportunity Commission Administrative Judge (AJ). Petitioner timely requested a hearing. The AJ held a hearing on June 18, 2013, and thereafter issued a decision on August 6, 2014, finding that the Agency discriminated against Petitioner based on her age. The AJ ordered the Agency to promote Petitioner to the position of Postal Inspector Team Leader, Level 14, in the St. Paul, Minnesota facility or some substantially equivalent position/location within 30 days. Additionally, the AJ ordered the Agency to determine and pay Petitioner back pay and other benefits.

The Agency subsequently issued a final order rejecting the AJ's decision and the relief ordered. Additionally, the Agency filed an appeal with the Commission. In Geraldine G. v. U.S. Postal Serv., EEOC Appeal No. 0720140039 (June 3, 2016), the Commission reversed the final order, finding that there was substantial record evidence supporting the AJ's finding that the Agency discriminated against Petitioner. The Commission ordered the Agency to offer Petitioner a position as a Postal Inspector Team Leader, Level 14, in St. Paul, Minnesota, or a substantially equivalent position at a mutually agreed upon Agency location; determine and pay the appropriate amount of back pay; provide training to the management officials in the Denver Division of the Postal Inspection Service; consider taking appropriate disciplinary action against all responsible management officials still employed by the Agency; and to post a notice. The matter was assigned to a Compliance Officer and docketed as Compliance No. 0620160643 on June 3, 2016.

On August 11, 2016, Petitioner, through her attorney, submitted the petition for enforcement at issue. Petitioner contends that the Agency failed to determine and pay her back pay with benefits; offer her the Postal Inspector Team Leader, Level 14 position or a substantially equivalent position; or to post the required notice electronically. Petitioner noted that the Commission's order erroneously included a statement awarding her attorney's fees despite the unavailability of attorney's fees in a complaint alleging discrimination under the ADEA. Nonetheless, Petitioner believes that she is entitled to attorney's fees in light of the Agency's "frivolous positions in this compliance matter."

On September 13, 2016, the Agency responded that it had complied with the relief ordered in the Commission's decision. The Agency first noted that it could not begin to calculate the amount of back pay owed until it was notified by Petitioner if she intended to accept or decline its June 29, 2016 offer. Petitioner did not advise the Agency that she was declining the Agency's offer until July 26, 2016. The Agency asserts that on August 29, 2016, it sent Petitioner the required form to complete and sign so that its accounting service could determine and process the appropriate amount of back pay due. Petitioner returned the form, but signed "Under Protest" because she disagreed with the Agency's preliminary back pay calculation. The Agency claims that it then sent the form to its accounting service for processing.

Additionally, the Agency explained that it could not offer Petitioner a Team Leader Level 14 position in St. Paul because no such position was available to be offered at that location as positions were allocated and staffed in accordance with complement, budgetary, workload, and other considerations. The Agency stated that because it could not offer Petitioner a Level 14

Team Leader position in St. Paul, it offered Petitioner positions in New York, Philadelphia, Cleveland, Newark, and Miami. Additionally, the Agency offered Petitioner positions at its Headquarters in Washington, D.C.; however, Petitioner declined the Agency's offers. The Agency acknowledged that these positions were not within a reasonable commuting distance from St. Paul; however, the Agency noted that Petitioner did not now and did not at the time of her non-selection live in St. Paul, Minnesota. Instead, Petitioner resided and worked in the Des Moines, Iowa area. Thus, the Agency contended that even if it were able to offer Petitioner a Team Leader Level 14 position in St. Paul, she would have needed to move from Des Moines at the Agency's expense just like if she had accepted one of the six offered Team Leader Level 14 positions in the other cities.

Finally, the Agency argued that it has acted in good faith and Petitioner's request for attorney's fees is baseless as attorney's fees are not available under the ADEA. Accordingly, the Agency requests that the Commission deny the Petition for Enforcement.

### ANALYSIS AND FINDINGS

#### *Promotion or Placement in a "Substantially Equivalent" Position*

The Agency was required to offer Petitioner a position as a Postal Inspector Team Leader, Level 14, in St. Paul, Minnesota, or "a substantially equivalent position." The Commission has consistently held that a substantially equivalent position is one that is similar in duties, responsibilities, and location (reasonable commuting distance) to the position for which the complainant originally applied. See, e.g., Monroig v. U.S. Comm'n on Civil Rights, EEOC Petition No. 04A40029 (Sept. 29, 2005); Spicer v. Dep't of the Interior, EEOC Petition No. 04980007 (Sept. 24, 1998); Patterson v. Dep't of Agriculture, EEOC Request No. 05940079 (Oct. 21, 1994). The burden is on the Agency to establish that the position offered to complainant in fact is substantially equivalent to the position lost. See Rai v. Dep't of the Interior, EEOC Appeal No. 01901186 (May 17, 1990).

The Agency contended that it could not offer Petitioner the Team Leader Level 14 position in St. Paul because no such position was available. Instead, the Agency offered Petitioner six Team Leader Level 14 positions and two Program Manager Level 14 positions located in various areas throughout the country. The Commission finds the positions offered were not substantially equivalent to the Team Leader position denied to Petitioner. Specifically, the positions offered were not in geographic/commuting locations remotely close to the position that Petitioner was discriminatorily denied. Therefore, the Commission finds that the Agency is not in compliance with the previous Order. See Carroll v. Dep't of the Air Force, EEOC Petition No. 0420070018 (Feb. 29, 2008) (position offered in another geographic location not substantially equivalent to position denied to petitioner).

The Commission further notes that 29 C.F.R. § 1614.501 expressly provides for an unconditional offer of placement in the position the victim of discrimination would have occupied absent discrimination or in a "substantially equivalent" position. The Agency maintained that it is

unable to offer Petitioner the St. Paul position because it is no longer vacant and is currently occupied by an incumbent employee who apparently was selected over Petitioner.

Although there may be some disagreement among the Federal circuits, case law from federal courts and the Commission recognizes the bumping of an incumbent employee as a possible remedy for discrimination. Padilla, Jr. v. Dep't of Housing and Urban Dev., EEOC Petition No. 04A20031 (Sept. 30, 2003); Sheth v. Dep't of Agric., EEOC Petition No. 04A10011(Mar. 8, 2001); Myers v. U.S. Postal Serv., EEOC Appeal No. 04950028 (May 2, 1996); Banks v. Dep't of the Interior, EEOC Request No. 05920680 (Mar. 4, 1994) at n. 5; Mitchell v. U.S. Postal Serv., EEOC Petition No. 04910005 (Aug. 1, 1991); Bruno v. City of Crown Point, Indiana, 950 F.2d 355, 360 (7th Cir. 1991); cert. denied, 505 U.S. 1207 (1992); Lander v. Lujan, 888 F.2d 153, 156-58 (D.C. Cir. 1989) (“[B]umping in this case accords with the broad guidelines that the Supreme Court has provided on the proper scope of Title VII remedies.”)

In addition, the Commission has previously held that the bumping of an incumbent is a permissible remedy when, in the absence of bumping, the petitioner's relief would be unjustly inadequate. Padilla, Jr., EEOC Petition No. 04A20031 (citing Kerschner, Jr. v. Dep't of Labor, EEOC Appeal No. 01933023 (Mar. 15, 1994)); Harness v. U.S. Postal Serv., EEOC Appeal No. 01920294 (June 16, 1992) (citing Lujan, 88 F. 2d, at 156-58). If there is no position available that is substantially equivalent to the positions petitioner was discriminatorily denied, bumping of an incumbent may be the only adequate remedy. Padilla, Jr., EEOC Petition No. 04A20031.

Here, there is apparently no substantially equivalent position in terms of commuting distance with regard to the St. Paul position, a position which Petitioner was discriminatorily denied. The Agency's offering of positions in completely different geographical locations throughout the country is plainly an unjustly inadequate remedy. As there is no substantially equivalent position to the Team Leader, Level 14 position at the St. Paul, Minnesota location, the Commission finds that bumping the incumbent employee is the only remedy that would make Petitioner whole under the circumstances. See e.g., Franks v. Bowman Transpor. Co., Inc., 424 U.S. 747, 764 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975).

Accordingly, Petitioner is entitled to be placed in the St. Paul Team Leader, Level 14 position, even if it means bumping the individual who was selected over her. See Sheth, EEOC Petition No. 04A10011 (petitioner entitled to be placed in the original position for which he was not selected, even if it means removing one of the original selectees); Padilla, Jr. EEOC Petition No. 04A20031 (petitioner discriminatorily not selected to multiple geographic locations entitled to the location of his choice and to bump an incumbent employee selected over him when no substantially similar position was available).

#### *Back Pay*

Petitioner contends that the Agency has not complied with the Commission's order to determine and pay her back pay with benefits. The Agency argues that any delay in calculating the appropriate amount of back pay was due to Petitioner's failure to timely accept or decline its offer of position placement. In addition, once the Agency submitted its calculation worksheet to

Petitioner, she signed and returned it on September 8, 2016, stating it was “Under Protest.” Nonetheless, the Agency claimed that it sent the calculations form to its accounting service for processing. The Commission notes that the Agency has provided a copy of its back pay calculations worksheet; however, it has not submitted any evidence demonstrating that any amounts have been paid to Petitioner. Additionally, given the Commission’s determination that Petitioner should be placed in Team Leader, Level 14 position in St. Paul, the Commission orders the Agency to re-calculate and pay Petitioner the appropriate amount of back pay.<sup>2</sup>

#### *Training and Discipline for Management Officials*

The Commission ordered the Agency to provide training to the management officials of the Denver Division of the Postal Inspection Service regarding their responsibilities under EEO laws and regulations. Petitioner did not challenge the Agency’s compliance, and the Agency provided evidence showing that the training was completed as ordered. Likewise, the Agency submitted evidence establishing that the responsible management official retired from the Agency prior to the Commission’s decision. Accordingly, the Commission finds that the Agency has complied with the Commission’s order regarding discipline and training for the responsible management officials.

#### *Notice in Hard Copy and Electronic Format*

The Agency was ordered to post at its St. Paul, Minnesota facility copies of the “Notice to Employees” in both hard copy and electronic format. The Agency submitted evidence that the notice was posted in the facility; however, it failed to show that the notice was also posted electronically. As a result, the Commission finds that the Agency has not fully complied with that portion of the order.

#### *Attorney’s Fees*

Finally, as to Petitioner’s request for attorney’s fees, the Commission notes that the previous decision erroneously included a provision stating that if Petitioner had been represented by an attorney, she was entitled to an award of reasonable attorney’s fees incurred in the processing of the complaint. The previous decision found discrimination based solely in violation of the ADEA. Thus, the Commission takes this opportunity to clarify that attorney’s fees are not available for claims brought under the ADEA. See Tellez v. Dep’t of the Army, EEOC Request No. 05A41133 (Mar. 18, 2005). Accordingly, the Commission finds that Petitioner is not entitled to an award of attorney’s fees.

### CONCLUSION

---

<sup>2</sup> The Commission notes that it has consistently recognized that interest on an award of back pay is not available as a remedy under the ADEA. Ryan v. Dep’t of Def., EEOC Petition No. 04960005 (Nov. 7, 1996).

Accordingly, the Commission finds that the Agency has not fully complied with our previous order set forth in Geraldine G. v. U.S. Postal Serv., EEOC Appeal No. 0720140039 (June 3, 2016). Therefore, the petition for enforcement is GRANTED. The Agency must now take additional steps to achieve full compliance. The Commission REMANDS this matter to the Agency to comply with our order below.

### ORDER

Within **sixty (60) calendar days** of the date this decision is issued, the Agency is ordered to take the following remedial action to the extent that it has not already done so:

1. Within sixty (60) days of receipt of this decision, the Agency shall offer Petitioner a position as a Postal Inspector Team Leader, Level 14, in St. Paul, Minnesota, retroactive to April 12, 2012. Petitioner must be offered the St. Paul Postal Inspector Team Leader, Level 14 position, even if this involves bumping an incumbent. Petitioner shall be given a minimum of **fifteen (15) calendar days** from receipt of the offer within which to accept or decline the offer. Failure to accept the offer within the time period set by the Agency will be considered a rejection of the offer, unless Petitioner can show that circumstances beyond her control prevented a response within the time limit.
2. The Agency shall determine the appropriate amount of back pay and other benefits due Petitioner, pursuant to 29 C.F.R. § 1614.501. Petitioner shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due, and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the Petitioner for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. Petitioner may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."
3. The Agency shall provide proof that it posted the "Notice to Employees" at its St. Paul, Minnesota facility in electronic format for the 60 consecutive days as specified in the Posting Order contained in EEOC Appeal No. 0720140039.

### IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Petitioner. If the Agency does not comply with the Commission's order, the Petitioner may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Petitioner 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 Petitioner 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 Petitioner 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.

### PETITIONER'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 Petitioner's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



---

Carlton M. Hadden, Director  
Office of Federal Operations

May 4, 2017

Date