



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

[REDACTED]
Elvis G.,¹
Complainant,

v.

Dr. Heather A. Wilson,
Secretary,
Department of the Air Force,
Agency.

Request No. 2019000221

Appeal No. 0120181699

Agency No. 5Z1S18003

DECISION ON REQUEST FOR RECONSIDERATION

The Agency timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in Elvis G. v. Dep't of the Air Force, EEOC Appeal No. 0120181699 (July 19, 2018). EEOC Regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision issued pursuant to 29 C.F.R. § 1614.405(a), where the requesting party demonstrates 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. See 29 C.F.R. § 1614.405(c).

In his underlying complaint, Complainant claimed that he was discriminated against in reprisal for his prior EEO activity when:

1. In June 2017, Complainant was not given an annual performance bonus or time-off award;
2. In June 2017, Complainant's credentials were questioned during a leadership staff meeting; and

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.

3. As a result of the incidents referenced in claims (1) and (2), Complainant's technical expertise has been downgraded and false rumors have left his work environment hostile.

In its final decision, the Agency dismissed the complaint pursuant to 29 C.F.R. § 1614.107(a)(2) on the grounds that Complainant failed to initiate contact with an EEO Counselor in a timely manner. The Agency stated that Complainant initiated the EEO process on October 18, 2017, which was more than 45 days after the most recent alleged act of discrimination.

On appeal, the Commission reversed the Agency's final decision. The Commission pointed out that although Complainant's EEO contact was beyond the 45-day limitation period, the Agency failed to support its decision in that it did not show that Complainant was aware of or should have been aware of the time limit for contacting an EEO Counselor. We observed that the Agency did not provide any evidence that Complainant had taken any EEO training or provided any proof that EEO posters were in the facility where Complainant was employed. We noted that although Complainant was a witness in another employee's EEO complaint in 2012, he lacked prior experience in initiating his own EEO complaint.

In its request for reconsideration, the Agency contends that the Commission's previous decision will have a substantial negative impact on its EEO policies, practices and operations. The Agency maintains that Complainant had over 15 years of federal service at the time that he initiated contact with an EEO Counselor and that he completed training on the No FEAR Act, which included the 45-day deadline for EEO contact, seven times between 2006 and 2017.

The Commission notes that the Agency did not submit evidence pertaining to Complainant's knowledge of the EEO process until it requested reconsideration. The Agency has produced documentation concerning Complainant's No Fear Act training, but it has not explained why it failed to previously produce this evidence. The Commission has consistently declined to consider evidence that was previously available when such evidence is being presented for the first time in a request for reconsideration. Furthermore, our previous decision is consistent with our long-standing policy of placing the burden of supporting procedural dismissals upon the agencies. See e.g. Adams v. Dep't of Homeland Sec., EEOC Appeal No. 0120054463 (Aug. 31, 2007) (the agency has the burden of providing evidence and/or proof to support its final decisions); Ericson v. Dep't of the Army, EEOC Request No. 05920623 (Jan. 14, 1993); Gens v. Dep't of Def., EEOC Request No. 05910837 (Jan. 31, 1992).

The Commission emphasizes that a request for reconsideration is not a second appeal to the Commission. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (Aug. 5, 2015); see, e.g., Lopez v. Dep't of Agric., EEOC Request No. 0520070736 (Aug. 20, 2007). Rather, a reconsideration request is an opportunity to demonstrate that the appellate decision involved a clearly erroneous interpretation of material fact or law, or will have a substantial impact on the policies, practices, or operations of the Agency. The Agency has not done so here. We discern no persuasive argument or evidence in the Agency's request for reconsideration that satisfies the criteria for granting its request to reconsider.

After reviewing the previous decision and the entire record, the Commission finds that the request fails to meet the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to DENY the request. The decision in EEOC Appeal No. 0120181699 remains the Commission's decision. There is no further right of administrative appeal on the decision of the Commission on this request. The Agency shall comply with the Order as set forth below.

ORDER (E0618)

The Agency is ordered to process the remanded claims in accordance with 29 C.F.R. § 1614.108. The Agency shall acknowledge to the Complainant that it has received the remanded claims **within thirty (30) calendar days** of the date this decision was issued. The Agency shall issue to Complainant a copy of the investigative file and also shall notify Complainant of the appropriate rights **within one hundred fifty (150) calendar days** of the date this decision was issued, unless the matter is otherwise resolved prior to that time. If the Complainant requests a final decision without a hearing, the Agency shall issue a final decision **within sixty (60) days** of receipt of Complainant's request.

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, 2) a copy of the Agency's notice that transmits the investigative file and notice of rights, and 3) either a copy of the complainant's request for a hearing, a copy of complainant's request for a FAD, or a statement from the agency that it did not receive a response from complainant by the end of the election period.

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.

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

February 15, 2019

Date