



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

[REDACTED]  
Archie D.<sup>1</sup>  
Complainant,

v.

Kevin McAleenan,  
Acting Secretary,  
Department of Homeland Security  
(Citizenship and Immigration Services),  
Agency.

Appeal No. 2019000588

Agency No. HS-CIS-01053-2018

**DECISION**

On October 22, 2018, Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from a final Agency decision (FAD) dated September 13, 2018, dismissing his complaint of unlawful employment discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq., and Title II of the Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff et seq.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant was employed by the Agency as a Language Specialist, GS-1040-12, at the U.S. Citizenship and Immigration Services, Language Services Section in New York, New York.

On May 21, 2018, Complainant filed an equal employment opportunity (EEO) complaint alleging that he was discriminated against by the Agency based on his age (65) and genetic information when, on October 23, 2017, he was not selected for the position of Supervisory Language Specialist, GS-13, under job announcement CIS-10021145-LSS (two vacancies).

The Agency dismissed the complaint because Complainant failed to timely initiate EEO counseling. The instant appeal followed.

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<sup>1</sup> 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.

### ANALYSIS AND FINDINGS

An aggrieved person must seek EEO counseling within 45 days of the date of the alleged discriminatory action, or in the case of a personnel action, within 45 days of the effective date of the action. 29 C.F.R. § 1614.105(a)(1) & .107(a)(2). The time limit to seek EEO counseling shall be extended when an individual shows he did not know and reasonably should not have known that the discriminatory action or personnel action occurred. 29 C.F.R. § 1614.105(a)(2).

The Commission has adopted a reasonable suspicion standard to determine when the forty-five (45) day limitation period is triggered. See Howard v. Dep't of the Navy, EEOC Appeal No. 01965648 (Feb. 11, 1999). Thus, the time limitation is not triggered until a complainant reasonably suspects discrimination, but before all the facts that support a charge of discrimination have become apparent.

The EEO counselor wrote that Complainant communicated he delayed initiating EEO counseling because he waited for management to explain why he was not selected, and stated he believed he interviewed for the job well, was notified he was not chosen on October 23, 2015, and on October 25, 2015, he sent an email to one of his interviewers to request a meeting about the selection process. In its brief in opposition to Complainant's appeal, the Agency writes that on October 24, 2017, the Supervisory Immigration Services Analyst in the Language Services Section in New York, New York notified by email all Language Services Section staff who was selected. In support thereof, the Agency submits the referenced email, which is addressed to the Language Services Section. In its brief, the Agency writes that Complainant worked with the selectees in the Language Services Section in the same local office. The EEO counselor wrote that Complainant stated that the selectees were internal candidates, one had no supervisory experience, the other has minimal supervisory experience, and neither had the necessary education for the job.

Complainant's meeting with Agency officials to discuss the selections did not occur until around mid-January 2018. The EEO counselor wrote that Complainant stated that at the meeting he was told he did great during the selection process, there was nothing wrong with his performance, and selection process was very competitive. The EEO counselor relayed that Complainant said that he believed that if the selection process was very competitive, based on his 30 years of experience as a supervisor in the Air Force he should have been selected.

In dismissing Complainant's complaint, the Agency found that he did not initiate EEO counseling until February 7, 2018, beyond the 45-calendar day time limit. The Agency found that waiting for his meeting with Agency officials to discuss his non-selection did not toll the time limit to initiate EEO counseling.

On appeal, Complainant argues that it was not until his mid-January 2018 teleconference with his two interviewers that he formed a reasonable suspicion of discrimination based on their feedback. He states that it was not until shortly before this teleconference that he learned the selectees were not at all qualified for the supervisory position.

Applying Howard, we find that Complainant formed a reasonable suspicion of discrimination on October 24, 2017, when he learned the identity of the two selectees, who were his coworkers. This is evidenced by Complainant asking to meet with management on October 24, 2017, to get an explanation on why he was not selected. The only additional information that Complainant relays he learned at the mid-January 2018 meeting with his interviewers was that the selection process was very competitive. We find that this would not trigger a belief that discrimination occurred unless Complainant already had a reasonable suspicion thereof prior to the meeting. Also, while Complainant writes on appeal that shortly before the above meeting he learned the selectees were not at all qualified for the supervisory position, he does not state when he learned this, nor what he learned for the first time that made him believe this.

Accordingly, the FAD is AFFIRMED.

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 (S0610)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. 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. If you file a request to reconsider and also file a civil action, **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

April 10, 2019

Date