



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

[REDACTED]  
Kenneth W.,<sup>1</sup>  
Petitioner,

v.

Frank Kendall III,  
Secretary,  
Department of the Air Force  
(National Guard Bureau),  
Agency.

Petition No. 2020000416  
Request No. 0520160375  
Appeal No. 0720120031  
Hearing No. 420-2009-00091X  
Agency No. T0585MSF107RO

**DECISION ON A PETITION FOR ENFORCEMENT**

On October 21, 2019, the Equal Employment Opportunity Commission (EEOC or Commission) docketed a petition for enforcement to examine the enforcement of an Order set forth in Kenneth W. v. Department of the Air Force (National Guard Bureau), EEOC Request No. 0520160375 (March 2, 2017). The Commission accepts this petition for enforcement pursuant to 29 C.F.R. § 1614.503. Petitioner has alleged that the Agency failed to comply with the Commission's order.

**BACKGROUND**

Petitioner worked as an Air National Guard Ground Power Technician (dual-status technician) at the Agency's Key Field Air National Guard Base in Meridian, Mississippi. On June 6, 2006, the Agency announced that it was recruiting to fill a Powered Support Systems Mechanic position. Petitioner

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<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.

applied and was placed on the "Certificate of Eligibles" along with five other candidates. An interview panel was convened to screen the candidates. Ultimately a candidate (Caucasian) other than Petitioner was selected.

On April 23, 2007, Petitioner filed an EEO complaint alleging that his non-selection was discriminatory based on his race. The Agency processed the complaint through the 29 C.F.R. Part 1614 process. Following the investigation, Petitioner requested a hearing before an EEOC Administrative Judge (AJ). The AJ held a hearing, and on February 15, 2011, issued a decision finding race discrimination.

The Agency subsequently issued a final action rejecting both the AJ's finding of discrimination and relief ordered, and filed an appeal. In its appeal, the Agency contended, in pertinent part, that the Commission does not have jurisdiction over the complaints of dual-status technicians because their jobs are inherently military in nature.

*EEOC Appeal No. 0720120031*

In our prior appellate decision, EEOC Appeal No. 0720120031 (October 20, 2015), we noted that the Commission had long taken the position that dual-status technicians were considered both uniformed military personnel as well as federal civilian employees and that, when alleged discriminatory action arises from an individual's capacity as a federal civilian employee, the individual is covered by Section 717 of Title VII and as a result the Commission has jurisdiction over those cases. We determined that the claim arose under Petitioner's federal civilian capacity and was within the jurisdiction of the Commission.

*EEOC Request No. 0520160375*

Thereafter, on November 19, 2015, Petitioner requested reconsideration of Appeal No. 0720120031 regarding the relief awarded. We denied Complainant's request, finding that Petitioner's request failed to meet the criteria of 29 C.F.R. § 1614.405(c), and that Appeal No. 0720120031 therefore remained the Commission's decision. EEOC Request No. 0520160375 (March 2, 2017). Nonetheless, we directed the Agency to submit a report of compliance regarding the relief awarded, including supporting documentation verifying that all corrective action has been taken. Id.

### *EEOC's Compliance Efforts*

The case was assigned to an EEOC Compliance Officer, who attempted to work with both parties to ensure that the Agency complied with our Order. In letters to the Agency dated April 12, 2017, March 16, 2018, and October 4, 2018, respectively, the EEOC Compliance Officer notified the Agency that the Office of Federal Operations had no record that it implemented the Commission's decision in EEOC Request No. 0520160375. To date, the Agency has not responded to any of our correspondence concerning its compliance with this case.

### *Petition for Enforcement*

On or about May 31, 2017, Petitioner submitted the instant Petition for Enforcement, maintaining that the Agency has not complied with any of the relief as ordered in EEOC Request No. 0520160375. Specifically, Petitioner states that the Agency has not paid him the ordered non-pecuniary compensatory damages, the ordered amount of attorney's fees, has not trained the responsible management officials, complied with the posting notice requirement, and has made no attempt to comply with the Commission's orders for relief herein in any fashion whatsoever. Petitioner states that although compliance with the Commission's corrective action was mandatory, the Agency has not submitted a compliance report as the Commission ordered it to do so.

The Agency has not responded to the Petition for Enforcement.

### ANALYSIS AND FINDINGS

As noted, supra, the Commission's position is that when alleged discriminatory action arises from a dual-status technician's capacity as a federal civilian employee, the individual is covered by Section 717 of Title VII and as a result the Commission has jurisdiction over those cases. See EEOC Appeal No. 0720120031 (October 20, 2015). Having concluded that the position for which Petitioner applied, the Powered Support Systems Mechanic position, was a civilian position, and therefore his claim was within the jurisdiction of the Commission, we then found in favor of Petitioner and ordered the Agency to take remedial action in EEOC Order No. 0720120031. We also ordered the Agency to file a compliance report within thirty (30) days of completion of all ordered corrective actions. Id.

Subsequent to our decision in EEOC No. 0720120031, and while compliance by the Agency with our Order was still pending, President Barack Obama

signed into law the National Defense Authorization Act for Fiscal Year 2017 (NDAA 2017) on December 23, 2016. Pub. L. 114-328, 130 Stat. 2000, sec. 512 (2016). The Commission views the NDAA 2017 as codifying its long-held position – that dual-status technicians have full rights in the 29 C.F.R. Part 1614 process, including the right of appeal. The Agency, however, maintains that the NDAA 2017 conferred a new right on dual-status technicians and the claims of dual-status technicians, such as Petitioner, which arose prior to the effective date of the NDAA 2017, are not within the Commission’s jurisdiction, and therefore it is not bound by the orders issued in this case. See Malinda F. v. Dep’t of the Air Force (Nat’l Guard Bureau), EEOC Appeal No. 2020002487 (Dec. 29, 2020).

Given the Agency’s asserted position, and in light of the unsuccessful efforts already undertaken, we determine that any further efforts in the administrative process are futile.

Accordingly, we deny the petition for enforcement and Complainant is notified of the right to seek judicial review pursuant to 29 C.F.R. § 1614.503(g):

Where the Commission has determined that an agency is not complying with a prior decision, or where an agency has failed or refused to submit any required report of compliance, the Commission shall notify the complainant of the right to file a civil action for enforcement of the decision pursuant to Title VII, the ADEA, the Equal Pay Act, the Rehabilitation Act, the Genetic Information Nondiscrimination Act, or the Pregnant Workers Fairness Act and to seek judicial review of the agency's refusal to implement the ordered relief pursuant to the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, and the mandamus statute, 28 U.S.C. 1361, or to commence *de novo* proceedings pursuant to the appropriate statutes.

#### CONCLUSION

Accordingly, the Petition for Enforcement is DENIED. Petitioner’s rights following this decision are appended below.

STATEMENT OF RIGHTS – On PETITION FOR ENFORCEMENT  
COMPLAINANT’S RIGHT TO FILE A CIVIL ACTION (S0124)

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 their 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:



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Carlton M. Hadden, Director  
Office of Federal Operations

January 17, 2025  
Date