



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

[REDACTED]
Kenneth M.,¹
Complainant,

v.

William J. Burns,
Director,
Central Intelligence Agency,
Agency.

Request No. 2022002957

Appeal No. 2022000960

Agency No. 21-19

DECISION ON REQUEST FOR RECONSIDERATION

Complainant timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in Kenneth M. v. Central Intelligence Agency, EEOC Appeal No. 2022000960 (April 4, 2022). Upon review, the Commission GRANTS Complainant's request for the reasons set forth below.

ISSUE PRESENTED

The Agency offers employees stationed overseas a benefit known as a "remote spousal work accommodation," which enables an employee's spouse to work remotely from an Agency-assigned workspace on behalf of another federal agency.

For each request, the Agency generally investigates and makes a security clearance determination on whether the spouse can access and work at its

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.

facility. But in this case, the Agency allegedly halted and canceled the processing of Complainant's request for his same-sex spouse to have a remote spousal work accommodation.

The issue presented is whether the Commission's previous decision in Kenneth M. v. Central Intelligence Agency, EEOC Appeal No. 2022000960 (April 4, 2022), clearly erred in equating the cancelling of a request for a remote spousal work accommodation with a security clearance determination, the substance of which is precluded from review by the Commission.

BACKGROUND

At the time of events giving rise to the underlying complaint, Complainant was employed by the Agency overseas. His husband, C2, worked at the National Geospatial-Intelligence Agency (NGA). The Agency had a policy of allowing the spouse of an Agency employee stationed overseas to work remotely from an Agency-assigned workspace on behalf of another agency, such as NGA. This was known as a remote spousal work accommodation. Complainant and C2 requested this accommodation.

On or about September 28, 2020, NGA advised C2 that it was endorsing his application to secure a spousal remote work accommodation with the Agency. As part of the processing, C2 completed requested paperwork for NGA and was scheduled for a medical evaluation, drug test, and psychological test and evaluation, all of which he completed on or about October 13, 2020. In or around late-November or early-December 2020, NGA advised C2 that his completed packet was submitted to the Agency.

On December 7, 2020, Complainant and C2 arrived at the overseas Agency worksite where the spousal remote work accommodation was to occur, and Complainant was to work. But two weeks later, on or about December 21, 2020, NGA notified C2 that the Agency had "cancelled" processing the request for a remote spousal work accommodation, thereby preventing C2 from working at the Agency facility where Complainant was stationed. NGA indicated that the Agency did not provide details for its cancellation, only indicating that, "[b]ased on information provided, or that was otherwise obtained during the assignee processing, it was determined that we can no longer continue processing this assignee..."

A. Procedural background

Complainant initiated the Equal Employment Opportunity (EEO) complaint process on January 15, 2021, alleging that he was denied a benefit and privilege of his employment based on his sex (male) and sexual orientation. On March 18, 2021, the Agency EEO counselor notified Complainant's counsel that she closed the counseling period because "the Agency [denied] discrimination in the matter raised by [Complainant]" and "[t]he Office of Security state[d] that due to [policy] they [were] not able to process security clearances for non-mission critical work requirements."

On April 1, 2021, Complainant filed a formal EEO complaint, alleging that he was discriminated against based on sex (male) and sexual orientation when, on or about December 21, 2020, the Agency denied his spouse's remote spousal work accommodation and an NGA assignee status because the Agency's Office of Security cancelled C2's security vetting process.

On November 3, 2021, the Agency dismissed the complaint for failure to state a claim on the grounds that the Commission did not have jurisdiction to review an agency's security clearance determination under Dep't of the Navy v. Egan, 484 U.S. 518 (1988), which held that the U.S. Merit Systems Protection Board did not have the authority "to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action." Id. at 520. Here, the Agency argued that Complainant's claim was analogous to the fact pattern in Mowery v. Nat'l Geospatial Intel. Agency, 550 F.Supp.3d 303 (E.D.V.A. 2021), which held that claims based upon a security clearance determination are non-justiciable in the EEO process.

Following Egan, the Commission issued policy guidance on the national security exception, reiterating that the Commission is "precluded from reviewing the substance of security clearance decisions [and] from reviewing the validity of the security requirement itself." Policy Guidance on the Use of National Security Exception Contained in § 703(g) of Title VII of the Civil Rights Act of 1964, as amended (EEOC National Security Guidance), EEOC Notice No. N-915-041 (May 1, 1989).

As a result, the Commission has consistently affirmed the dismissal of complainants' claims alleging that they were subjected to discrimination due to their security clearance being revoked or denied, finding that such claims fail to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1), and are outside the purview of the Commission's jurisdiction. See, e.g., Rezaee v. Department of the Air Force, EEOC Appeal No. 01A60451 (April 25, 2006) (citing EEOC

National Security Guidance); Carr v. Department of the Army, EEOC Appeal No. 01A44011 (November 4, 2004) (same).

In its decision, the Agency noted that an initial review of C2's Standard Form-86 form led to a determination that additional security vetting would be required, and that, as a matter of policy, it does not extend additional vetting or processing for "Assignee-Detailee" candidates. The Agency reasoned that it was not possible to review the denial of C2's spousal work accommodation and assignee status without also reviewing the cancellation of his security vetting process.

In Appeal No. 2022000960, the Commission affirmed the Agency's final decision dismissing the complaint. Specifically, the Commission found that the decision to halt the security vetting process was a security clearance determination over which the Commission does not have jurisdiction.

The instant request for reconsideration followed.²

CONTENTIONS ON REQUEST

In his request, Complainant contends that the previous appellate decision relied on a substantive analysis of the merits of the claims, thereby applying a legal standard more onerous than the burden to state a claim. Complainant asserts that the Agency's decision to stop Complainant's processing was not a substantive security decision and that he alleged facts sufficient to state a claim. According to Complainant, the issue is the manner in which C2's spousal remote work accommodation request was processed and not his suitability to serve.

In support, Complainant asserts that a female, opposite-sex spouse who worked for NGA was granted assignee-detailee status with the Agency because her husband worked for the Agency at the same overseas location as Complainant.

² In Winford M. v. Central Intelligence Agency, EEOC Appeal No. 2022001048 (Apr. 4, 2022), the Commission affirmed the Agency's final decision dismissing C2's complaint for failure to state a claim. The Commission subsequently denied C2's request for reconsideration, noting that C2 (an NGA employee) lacked standing to assert a claim against the Agency. Winford M. v. Central Intelligence Agency, EEOC Request No. 2022002955 (Feb. 8, 2024).

Complainant also asserts that the prior appellate decision will have a substantial impact on the Agency's accreditation practices and policies applied to same-sex couples, as the Agency prematurely curtailed C2's vetting process by declining to devote resources towards approval of the spousal remote work accommodation because they were in a same-sex marriage.

STANDARD OF REVIEW

The Commission may 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).

ANALYSIS

Title VII of the Civil Rights Act of 1964, as amended, requires that all employee benefits be provided in a non-discriminatory manner, unless a statutory exception provides otherwise.³ Section 703(g) contains a national security exception. Its legislative history indicates that Congress only intended to except from Title VII liability situations where employers refuse to hire or discharge persons who are unable to obtain a required security clearance.⁴ Consequently, this exception precludes nonexpert bodies like the Commission from reviewing the substance of security clearance decisions. EEOC National Security Guidance.

Notwithstanding this exception, Title VII still requires all agencies to apply "the national security requirements . . . equally without regard to race, sex, color, religion, or national origin. [Agencies] cannot, merely by invoking national security, exempt themselves from coverage of the nondiscrimination provisions of the act." Id. Hence, the Commission retains authority to review whether the grant, denial, or revocation of a security clearance was carried out in a discriminatory manner. See, e.g., Fonda-Wall v. Dep't of Justice, EEOC Appeal No. 0720060035 (July 28, 2009) (citing Schroeder v. Dep't of Defense

³ U.S. Equal Employment Opportunity Commission, Compliance Manual, Section 3 Employee Benefits, EEOC-CVG-2001-1 (Oct. 3, 2000), <https://www.eeoc.gov/laws/guidance/section-3-employee-benefits>.

⁴ EEOC National Security Guidance (citing 110 Cong. Rec. 12723 (1964) (statement of Sen. Humphrey)).

(Defense Mapping Agency), EEOC Request No. 05930248 (Apr. 14, 1994)); EEOC National Security Guidance.

For example, in Dodson v. Dep't of Defense, the Commission found discrimination where a manager sought to have an employee's security clearance revoked in retaliation for filing EEO complaints. EEOC Appeal No. 01954101 (June 13, 1997). The Commission did not address whether the agency actually decided to revoke the clearance, nor did it analyze the substance of any information that was part of the decision to grant or revoke the clearance. The decision addressed the manager's motivation for seeking to have the employee's clearance removed.

Here, Complainant alleged that he was subjected to disparate treatment on the basis of sex when the Agency halted and canceled processing of his request for a workplace benefit for his same-sex spouse, while the Agency fully processed and granted a request for this same workplace benefit for another employee's opposite-sex spouse at the same overseas facility. In other words, the crux of Complainant's claim is that the processing and administration of this workplace benefit was carried out in a discriminatory manner, in which the Agency elected to fully process employee requests for opposite-sex spouses while refusing to fully process requests for same-sex spouses.

Upon review, we find that the previous decision clearly erred in equating the Agency's alleged decision to halt processing of a benefits request with a security clearance determination.⁵ Complainant alleges that the Agency stopped processing his request for a spousal accommodation before it could be finished. The premature cancellation of processing Complainant's request meant that no Agency adjudicator made an affirmative determination that Complainant's spouse posed an unacceptable security risk and should be denied a security clearance. To put it simply, Complainant's allegations do not

⁵ To the extent the Agency found Mowery, supra., controlling in that the case involved halting a security clearance assessment, we find that the factual allegations before us are distinguishable. In Mowery, the CIA notified the plaintiff that his CIA assignee security clearance assessment had been "halted" due to a "failed mental health evaluation," whereas in the matter before us, Complainant alleges that the Agency discontinued processing the remote work accommodation for his same-sex spouse without making any determination regarding whether Complainant's spouse met the security requirements. Therefore, we do not find Mowery controlling based on the factual allegations before us.

involve a security clearance determination because the Agency never bothered to conduct a full background investigation on Complainant's spouse, and it never determined whether Complainant's spouse could meet the necessary national security requirements. Because this complaint does not require the Commission to review the substance of a security clearance determination, we find that this complaint does not fall under the national security exception and it was clear error for the previous decision to hold otherwise.

Based upon the Agency's alleged decision to halt processing of a work benefit application, we find that Complainant set forth a plausible claim that the Agency administered and processed a spousal work benefit in a discriminatory manner because the Agency was willing to fully process the spousal benefit so long as the spouse was of the opposite sex of the requesting employee, and unwilling to fully process the same benefit for a spouse who was of the same sex as the requesting employee.⁶ If in fact the Agency has acted in a discriminatory manner because of a prohibited basis, in this case sex and sexual orientation, resulting in a denial of benefits, then Complainant has been adversely affected as to the terms and conditions of his employment. When viewing the facts in the light most favorable to Complainant,⁷ we find that Complainant articulated a set of facts that stated a plausible claim for which a remedy could be provided.⁸

To the extent the Agency asserted that C2's spousal work accommodation was denied because the Agency did not want to devote sufficient resources to

⁶ 42 U.S.C. 2000e-16(a) provides: "All personnel actions affecting employees or applicants for employment . . . in military departments..., in executive agencies...shall be made free from any discrimination based on...sex..."

⁷ In assessing whether to dismiss a complaint for failure to state a claim, the Commission should construe a complaint in the light most favorable to the complainant and take the complaint's allegations as true. Cobb v. Dep't of Treasury, EEOC Request No. 05970077 (1997). All reasonable inferences that may be drawn from the complaint's allegations must be made in favor of Complainant. Id. Thus, a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the complainant cannot prove a set of facts in support of the claim.

⁸ To state a valid claim of employment discrimination, a complaint must allege (1) a present harm or loss with respect to a term, condition, or privilege of employment (2) for which there is a remedy under the federal equal employment statutes. Diaz v. Department of the Air Force, EEOC Request No. 05931049 (April 21, 1994); see also Gilyard v. Dep't of Energy, Appeal No. 01A01550 (June 9, 2003).

conduct "additional vetting" of Complainant's spouse, we find that this asserted non-discriminatory reason goes to the merits of Complainant's claim and is irrelevant to the procedural issue of whether he has stated a justiciable claim. See Tommy R v. Dep't of Homeland Sec., EEOC Appeal No. 2020001501 (March 13, 2020) (EEOC reversed Agency's dismissal for failure to state a claim concerning complainant's allegation that his tentative job offer was withdrawn due to not completing a favorable polygraph examination). We note that we are not questioning the Agency's judgment as to whether Complainant's spouse should have access to sensitive information; the Agency never made a determination on the merits of whether the spouse's security clearance should be granted because the investigation was allegedly abandoned by the Agency. See Fonda-Wall v. Dep't of Justice, EEOC Appeal No. 0720060035 (July 28, 2009).

CONCLUSION

After reconsidering the previous decision and the entire record, the Commission finds that Complainant's request meets the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to GRANT the request. The decision of the Commission in Appeal No. 2022000960 and the agency's final decision are REVERSED. There is no further right of administrative appeal on the decision of the Commission on this request.

ORDER (E0224)

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, or a copy of the final agency decision ("FAD") if Complainant does not request a hearing.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

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.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0124)

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:

/s/ Raymond Windmiller
Raymond Windmiller
Executive Officer
Executive Secretariat

December 20, 2024
Date