



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

██████████, a/k/a  
Zetta B.,<sup>1</sup>  
Petitioner,

v.

Thomas J. Vilsack,  
Secretary,  
Department of Agriculture  
(Forest Service),  
Agency.

Petition No. 2023002940

Request No. 2022000030

Agency No. FS-2015-00277

**DECISION ON A PETITION FOR ENFORCEMENT**

On April 20, 2023, the Equal Employment Opportunity Commission (EEOC or Commission) docketed a petition for enforcement to examine the enforcement of an Order set forth in EEOC Request No. 2022000030 (March 24, 2022). The Commission accepts this petition for enforcement pursuant to 29 C.F.R. § 1614.503. For the following reasons, we GRANT the petition, in part, and REMAND the matter for further processing.

**BACKGROUND**

At the time of events giving rise to this complaint, Petitioner worked as a GS-0810-12 Supervisory Civil Engineer (Assistant Forest Engineer - Facilities) at the Agency's Sierra National Forest facility in Clovis, California. Petitioner filed a complaint in which she alleged that the Agency discriminated against her on the bases of race (Asian) and sex (female) in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq.

In Appeal No. 2020003201, the Commission reversed the Agency's final order rejecting the decision of an EEOC Administrative Judge (AJ) finding that Petitioner was subjected to

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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.

discrimination based on race and sex and ordered relief. The Agency requested reconsideration of the Commission's decision, and, in Request No. 2022000030, the Commission denied the Agency's request for failure to meet the regulatory criteria.

However, the Commission also exercised its discretion to reopen the matter on its own motion and modified the ordered relief. Upon review, we determined that the AJ did not award Petitioner compensatory damages because Petitioner did not request any, so we removed the order to conduct a supplemental investigation into Petitioner's entitlement to compensatory damages. Our The March 24, 2022, Order in Request No. 2022000030 specified, in pertinent part:

2. Within sixty (60) calendar days of the date this decision is issued, the Agency shall determine the appropriate amount of benefits (with interest) if applicable, due Complainant from January 1, 2015, to the effective date of her promotion to the Supervisory Civil Engineer (Forest Engineer) position. Complainant shall cooperate in the Agency's efforts to compute the amount of benefits due and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of benefits, the Agency shall issue a check to Complainant for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. Complainant may petition for enforcement or clarification of the amount in dispute, as outlined in the section titled, IMPLEMENTATION OF THE COMMISSION'S DECISION.
3. Within ninety (90) calendar days of the date this decision is issued, the Agency shall provide eight (8) hours of training to the members of the interview panel and the selecting official. The training shall address the Agency's obligations under Title VII of the Civil Rights Act of 1964.
4. Within ninety (90) calendar days from the date this decision is issued, the Agency shall consider disciplining the members of the interview panel and selecting official. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the Compliance Officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If these individuals have left the Agency's employ, the Agency shall furnish documentation of their departure dates.

The matter was assigned to a Compliance Officer and docketed as Compliance No. 2022002370 on March 29, 2022.

On March 24, 2023, Petitioner submitted the petition for enforcement at issue. Petitioner contends that the Agency has not sufficiently explained how it calculated her backpay award and still owes her approximately \$25,000 in backpay.

In its May 10, 2023, response to the petition for enforcement, the Agency asserts that it has substantially complied with the Commission's Order, including the provisions concerning backpay and providing training to and considering disciplinary action against the responsible management officials.<sup>2</sup>

### ANALYSIS AND FINDINGS

EEOC Regulation 29 C.F.R. § 1614.503(a) provides that an aggrieved person may petition for enforcement of an order issued by the Commission under its appellate jurisdiction. In this case, Petitioner alleges that the Agency is not in compliance with the Commission's Order in EEOC Request No. 2022000030.

#### *Training and Consideration of Discipline*

In provisions (3) and (4) of our Order, we ordered the Agency to provide eight hours of EEO training to and consider disciplining the members of the interview panel and the selecting official. The appellate record reflects that the selecting official retired in February 2016. Agency Appeal Package at 435-36, 1112. The Agency provided documentation that it provided four hours of training on June 15 and four hours of training on June 16, 2022, to two members of the interview panel (Panelist-1 and Panelist-2). Agency Response to Petition for Enforcement ("Agency Response") at 71-148. The Agency also provided documentation showing that it conducted an accountability assessment and decided not to propose discipline. Agency Response at 149-52. According to the Agency, effective September 4, 2016, a third interview panelist (Panelist-3) transferred from the Forest Service to the Department of Agriculture's Agricultural Research Service. Agency Response at 5, 218-25. The Agency states that it has therefore substantially complied with the order to provide training to and consider discipline for the responsible management officials.

Upon review, the record contains documentation showing that selecting official retired from the Agency in February 2016, and the Agency therefore need not provide training to or consider disciplinary action against the selecting official. The Agency provided evidence that it provided training to Panelist-1 and Panelist-2 in accordance with provision (3) of our Order. The Agency also provided documentation that it conducted an accountability assessment and decided not to propose discipline against the responsible management officials after concluding that they did not "deliberately" discriminate against Petitioner. Agency Response at 149. We find that the Agency has substantially complied with provision (4) of our Order as it relates to Panelist-1 and Panelist-2.

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<sup>2</sup> On July 11, 2023, the Agency supplemented its response to the Petition for Enforcement. On July 25, 2023, Petitioner responded to the Agency's supplemental response. On August 8, 2023, the Agency filed a motion to strike Petitioner's untimely July 25, 2023, response. On April 20, 2023, the Commission had issued acknowledgment letters informing the parties that they could submit a statement or brief concerning the petition *within 20 calendar days of receipt of the acknowledgment letter*. Therefore, we decline to consider these untimely filings.

Regarding the third interview panelist, Panelist-3, the Agency asserts that Panelist-3 left Agency employment in August 2016. The Agency therefore did not provide EEO training to or consider disciplinary action against Panelist-3. However, while Panelist-3 left his employment with the Forest Service effective September 4, 2016, the record reflects that Panelist-3's new employer, the Agricultural Research Service, was a sub-component of the same parent agency, the Department of Agriculture. Agency Response at 218-25.

The Commission construes the term "agency" broadly to include all subcomponents of a parent agency. See Rivers v. Dep't of the Treas., EEOC Appeal No. 01992843 n.3 (Jan. 16, 2002) ("[T]he Commission does not distinguish between a sub-agency and its parent agency."); Gilkerson v. Dep't of Def., EEOC Appeal No. 01986218 (Feb. 1, 2000) (reversing dismissal of complaint filed against the Defense Finance & Accounting Service (DFAS) for failure to state a claim because complainant was not an employee or applicant for employment with DFAS because DFAS and complainant's employer, the Army Corps of Engineers, were sub-agencies of the Department of Defense).

Applying this broad definition of "agency" in the context of remedies following a finding of a discriminatory nonselection, the Commission has ordered agencies to offer the complainant a position outside of the sub-agency where the discriminatory non-selection occurred. See Lombardino v. Dep't of Agric., EEOC Appeal No. 0720070007 (Nov. 27, 2009) (pursuant to finding of discriminatory nonselection involving the Farm Service Agency, declining to modify AJ's order to place complainant in the next vacant GS-15 Civil Rights Director position in any sub-agency within the Agency, the Department of Agriculture); Woodard v. Dep't of Labor, EEOC Petition No. 01970288 (Oct. 16, 2002) (agency had not complied with order to offer petitioner a position where the agency sub-component had abolished that position but our order specified "in the agency's headquarters" and petitioner was willing to accept position outside that subcomponent).

Although the record reflects that Panelist-3 left the Forest Service prior to the disposition of this case on March 24, 2022, Panelist-3 would still be considered an employee of "the Agency" if he is employed by the Department of Agriculture or any of its subcomponents. Accordingly, the Agency must provide eight hours of training to and consider disciplinary action against Panelist-3, provided that he is still an employee of the Department of Agriculture or one of its subcomponents.

### *Backpay*

Petitioner contends on petition for enforcement that the Agency has not explained its backpay calculations and has failed to pay her the full amount of backpay to which she is entitled. In response to the petition for enforcement, the Agency states that it has fully complied with the order to pay Petitioner backpay and other benefits, with interest, and provides additional documentation of its calculations and disbursements to Petitioner.

The purpose of a backpay award is to restore a prevailing complainant to the position the individual would have occupied but for the discrimination. Albemarle Paper Co. v. Moody, 442 U.S. 405, 418-19 (1975); Davis v. U.S. Postal Serv., EEOC Petition No. 04900010 (Nov. 29, 1990). The person who has been discriminated against must receive a sum of money equal to what would have been earned by that person in the employment lost through discrimination (gross backpay) less what was actually earned from other employment during the period, after normal expenses incurred in seeking and holding the interim employment have been deducted (net interim earnings). The difference between gross backpay and net interim earnings is net backpay due. Net backpay accrues from the date of discrimination, except where the statute limits recovery, until the discrimination against the individual has been remedied. Gross backpay should include all forms of compensation and must reflect fluctuations in working time, overtime rates, penalty overtime, Sunday premium and night work, changing rate of pay, transfers, promotions, and privileges of employment to which the petitioner would have been entitled but for the discrimination. See Ulloa v. U.S. Postal Serv., EEOC Petition No. 04A30025 (Aug. 3, 2004) (citing Allen v. Dep't of the Air Force, EEOC Petition No. 04940006 (May 31, 1996)); Perez v. U.S. Postal Serv., EEOC Petition No. 04A40041 (March 3, 2005).

The Commission recognizes that precise measurement cannot always be used to remedy the wrong inflicted, and therefore, the computation of backpay awards inherently involves some speculation. Hanns v. U.S. Postal Serv., EEOC Petition No. 04960030 (Sept. 18, 1997). However, uncertainties involved in a backpay determination should be resolved against the agency which has already been found to have committed the acts of discrimination. Id. The Commission finds that it is reasonable to require the agency to provide a clear and concise “plain language” statement of the formulas and methods it used to calculate petitioner's backpay. See Vashi v. U.S. Postal Serv., EEOC Petition No. 0420060009 (Dec. 5, 2007) (noting that it is the agency's obligation to ensure that its backpay calculations are clear, supported in the record and in accordance with 29 C.F.R. § 1614.501).

In this case, the record reflects that Agency disbursed net backpay and interest in the amount of \$53,796.17 to Petitioner in 17 payments between July 8, 2022, and February 9, 2023. Agency Response at 4-5, 176-211, 213-16. The Agency provided declarations from two Agency employees explaining the calculations and disbursements. Agency Response at 176-79, 213-15. We find that the Agency has provided documentation of the backpay paid to Petitioner as well as a clear and concise “plain language” statement of the Agency's formulas and methods used to calculate Petitioner's backpay.

We ordered the Agency to determine the total amount of backpay and benefits, with interest, within 60 calendar days of March 24, 2022, and, within 60 calendar days of the date the Agency determined that amount, to pay that amount to Petitioner. The Agency did not complete paying Petitioner backpay until February 9, 2023, nearly the year after the issuance of the Commission's order. However, we find that the Agency has now substantially complied with this portion of our Order.

To the extent she has not done so already, Petitioner may submit evidence of the adverse tax consequences, if any, of receiving backpay as lump sums in 2022 and 2023 to the Agency.<sup>3</sup> An award to cover additional tax liability from a lump sum payment of backpay is available to complainants. See Felicidad S. v. U.S. Postal Serv., EEOC Appeal No. 0120180637 (June 4, 2019); Goetze v. Dep't of the Navy, EEOC Appeal No. 01991530 (Aug. 22, 2001); Holler v. Dep't of the Navy, EEOC Appeal Nos. 01982627 and 01990407 (Aug. 22, 2001); Van Hoose v. Dep't of the Navy, EEOC Appeal Nos. 01982628 and 01990455 (Aug. 22, 2001). The award is available even if a decision does not explicitly order it. See Emerson S. v. U.S. Postal Serv., EEOC Petition No. 0420130026 (Nov. 20, 2015) (noting that decisions on petitions for enforcement have permitted claims for additional tax liability in cases where the Commission has not mentioned it in the original order); Cecile S. v. U.S. Postal Serv., EEOC Petition No. 0420120013 (Nov. 4, 2015) (agency erroneously found that petitioner was not entitled to an award for tax liability merely because AJ did not specifically order it as a remedy).

When backpay is awarded in a lump sum, individuals are compensated for the extra tax that they are required to pay as a result of receiving a lump sum pay award, as opposed to the actual amount of taxes that they would have paid if they had received the funds over a period of time, usually several years. Felicidad S., *supra*. It is the receipt of the funds in a lump sum that causes the extra tax liability, not the backpay award itself. Petitioner, who bears the burden of proof, must submit evidence showing the difference between the taxes that she paid on the lump-sum payments and the taxes that she would have paid had the salary been earned over time. See Dellinger v. U.S. Postal Serv., EEOC Appeal No. 07A40040 (Sept. 29, 2005) (burden of proof to establish amount of additional tax liability is on complainant); Darlene F. v. Soc. Sec. Admin., EEOC Petition No. 0420140010 (Apr. 8, 2016). Petitioner must show more than the total tax liability arising from receipt of the lump-sum award; she must show the differential between this tax burden and the taxes that she would have paid if she had received the backpay as part of her salary. Johnson v. Env'tl. Prot. Agency, EEOC Petition No. 0420060035 (Nov. 5, 2007). Petitioner must "provide exact and detailed calculations showing the amount he is claiming." Emerson S. v. U.S. Postal Serv., *supra*. We have added a provision to our Order concerning adverse tax consequences.

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<sup>3</sup> Because Petitioner received backpay as lump sums in 2022 and 2023, she may demonstrate that she incurred additional tax liability in one or both years.

### CONCLUSION

Accordingly, based on a thorough review of the record and the contentions on petitions for enforcement, including those not specifically addressed, we GRANT in part Petitioner's petition for enforcement and REMAND the matter to the Agency for further processing in accordance with this decision and the ORDER below.

### ORDER

1. Within 90 calendar days of the date this decision is issued, the Agency shall provide eight hours of in-person or interactive training to Panelist-3. The training shall address the Agency's obligations under Title VII of the Civil Rights Act of 1964.
2. Within 90 calendar days from the date this decision is issued, the Agency shall consider disciplining Panelist-3. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the Compliance Officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If Panelist-3 has left the Agency's employ, the Agency shall furnish documentation of their departure date.
3. The Agency shall also pay compensation for the demonstrated adverse tax consequences of receiving backpay as lump sums. Within 180 calendar days of the date this decision is issued, Petitioner shall have the opportunity to provide the Agency with her calculation of the additional taxes she incurred as a result of receiving the lump sum backpay awards in 2022 and 2023. Petitioner has the burden of establishing the amount of increased tax liability, if any. Within 90 calendar days of receiving such information from Petitioner, the Agency shall compensate her for the established adverse tax consequences of her lump sum backpay awards. If there is a dispute about the exact amount of tax consequences, the Agency shall issue a check to Petitioner for the undisputed amount within 60 calendar days of the amount the Agency determines the amount it believes to be due.

The Commission is further directed to submit its report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

### IMPLEMENTATION OF THE COMMISSION'S DECISION (K0124)

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 their 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 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. **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 29, 2024

Date