



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

[REDACTED]
Vance C,¹
Complainant,

v.

Thomas J. Vilsack,
Secretary,
Department of Agriculture
(Animal and Plant Health Inspection Services),
Agency.

Appeal No. 2024003601

Agency No. APHIS-2024-00164

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated April 18, 2024, dismissing his complaint of unlawful employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the reason discussed below, we affirm the Agency's final decision.

ISSUES PRESENTED

Whether the Agency properly dismissed Complainant's complaint for having previously raised the same matter before the Merit Systems Protection Board (MSPB).

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.

BACKGROUND

During the period at issue, Complainant was an applicant for the Agency's Veterinary Medical Officer vacancy within its Centers for Epidemiology and Animal Health at Minneapolis, Minnesota.

On March 19, 2024, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination based on disability and age when:

On December 1, 2023, Complainant was informed he was not selected for the Veterinary Medical Officer (VMO), SDA GS-12 ASF Term VMO (Epi), as advertised under the Vacancy Announcement Number: DH-12071638-23-VS.

On April 18, 2024, the Agency dismissed the Complainant's complaint under 29 C.F.R. § 1614.107(a)(4) which requires dismissal of matters that a complainant has elected to raise in an appeal to the MSPB.

CONTENTIONS ON APPEAL

On appeal, Complainant has disputed that he raised the same matter before the MSPB. Complainant argues that his MSPB appeal only concerned misapplication of the Direct Hire Authority such that the Agency did not properly consider his veterans preference in its non-selecting him for the vacancy. Complainant averred that he did not raise his claims of age and disability discrimination with the MSPB. Complainant maintained that the Agency's dismissal was improper because he did not allege discrimination before the MSPB.

STANDARD OF REVIEW

The Agency's decision to dismiss a complaint is subject to de novo review by the Commission, which requires the Commission to examine the record without regard to the factual and legal determinations of the previous decision maker and issue its decision based on the Commission's own assessment of the record and its interpretation of the law. 29 C.F.R. § 1614.405(a). The Commission should construe the complaint in the light most favorable to the complainant and take the complaint's allegations as true. See Cobb v. Department of the Treasury, EEOC Request No. 05970077 (March 13, 1997).

Thus, all reasonable inferences that may be drawn from the complaint's allegations must be made in favor of the complainant.

ANALYSIS

The record shows that Complainant appealed his nonselection to the MSPB on February 28, 2024. He filed the EEO complaint challenging the same non-selection on March 19, 2024.

We find that the Agency properly dismissed the complaint in accordance with 29 C.F.R. § 1614.107(a)(4), which requires dismissal of a claim that states the same claim that was raised before the MSPB. Even though Complainant did not expressly raise discrimination in his MSPB appeal of his non-selection, Complainant's act of filing the MSPB appeal before his formal EEO complaint amounts to an election of the MSPB forum over the EEO process. Therefore, the Agency's dismissal decision was proper in that Complainant is precluded from contesting his non-selection in the present EEO complaint. See Aho v. Dep't of Agric., EEOC Request No. 05860085 (May 22, 1987).

CONCLUSION

The Commission **AFFIRMS** the Agency's final decision, dismissing Complainant's EEO complaint because he had raised the non-selection matter in an appeal to the MSPB.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0124.1)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that 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 for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.**

A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within 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).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at

<https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the 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(f).

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:



Carlton M. Hadden, Director
Office of Federal Operations

December 18, 2024
Date