



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

[REDACTED]
Olin M,¹
Complainant,

v.

Dorothy Fink,
Acting Secretary,
Department of Health and Human Services
(Centers for Medicare and Medicaid Services),
Agency.

Appeal No. 2024004393

Agency No. HHS-CMS-0026-2024

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated June 3, 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. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

ISSUES PRESENTED

Whether the Agency properly dismissed Complainant's complaint in its entirety pursuant to 29 C.F.R. § 1614.107(a)(4) as a matter which has been pursued by Complainant in a negotiated grievance procedure.

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

At the time of events giving rise to this complaint, Complainant worked as a Health Insurance Specialist, GS-13-10, as a remote employee for the Agency's Centers for Medicare and Medicaid Services (CMS) Atlanta Regional Office in Atlanta, Georgia.

As a CMS employee, Complainant is covered by the Collective Bargaining Agreement (CBA) between CMS and the American Federation of Government Employees (AFGE), Local 1923, effective July 10, 2023. Per Articles 18 and 24 of the CBA, "[a]n employee affected by a prohibited personnel practice or discrimination may raise the matter under a statutory procedure or the negotiated grievance procedure, but not both."

On October 18, 2023, Complainant contacted the Agency's EEO office to initiate the informal, pre-complaint stage of the EEO process, regarding his non-selection for the Supervisory Health Insurance Specialist position.

On November 20, 2023, Complainant, through his union representative, filed a Step 1 grievance pursuant to CMS's negotiated grievance procedures under the CBA. On the form, Complainant alleged that Agency officials improperly selected another applicant who Complainant believed was less qualified for the Supervisory Health Insurance Specialist position he applied for. Complainant alleged that the selection for this position violated Article 26, Section 6.A and 6.H of the CBA.

After considering Complainant's grievance, Complainant was issued a Step 1 grievance decision on December 1, 2023, finding that, with regard to his "grievance . . . concerning [his] non-selection," the Agency complied with the CBA regarding the selection for the Supervisory Health Insurance Specialist position, and denied his requested relief.

Thereafter, on December 7, 2023, Complainant, through his union representative, filed a Step 2 grievance regarding the same issue pursuant to the Agency's negotiated grievance procedures under the CBA. On December 15, 2023, Complainant made an oral presentation in connection with his Step 2 grievance, in which Complainant again challenged his non-selection, alleging, among other things, that the selectee was unqualified for the position and that the FIG Director abused her authority by allegedly supplanting another Agency official as the selecting official and selecting another candidate.

On January 2, 2024, the Agency issued its Step 2 grievance decision affirming that the selection for the Supervisory Health Insurance Specialist position did not violate the CBA.

On January 26, 2024, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the bases of race (African-American), sex (male), and age (47) when on October 11, 2023, the Director, Fraud Investigation Group (FIG), Center for Program Integrity (CPI); failed to select Complainant for vacancy announcement No. CMS-CPI-23-12088241-ST (Supervisory Health Insurance Specialist, GS-0107-14).

On June 3, 2024, the Agency issued a final decision, dismissing Complainant's formal complaint. Therein, the Agency dismissed the formal complaint, in accordance with 29 C.F.R. § 1614.107(a)(4), because Complainant had raised the same matters in a negotiated grievance procedure that permitted allegations of discrimination.

The instant appeal followed.

CONTENTIONS ON APPEAL

Complainant appealed the Agency's dismissal and requested the Commission reverse the dismissal. Complainant claims the grievance claims and EEO claims are separate issues. Complainant contends his EEO complaint alleged discrimination when he was not selected for the position at issue and a white male was selected. Complainant states the selection itself of a white male was in violation of the CBA.

In opposition to the appeal, the Agency points to the record which shows Complainant elected to challenge his non-selection through the Agency's negotiated grievance procedures under the CBA, which also permitted him to raise allegations of discrimination. The Agency argues under the election of remedies, Complainant's claims were pursued in the grievance process and dismissal was proper. The Agency requests the Commission affirm the dismissal.²

² On appeal, the Agency also argues Complainant's appeal should be dismissed as untimely. The dismissal was issued on June 3, 2024, while Complainant's appeal was not filed until July 25, 2024, which is more than time limitation of 30 days to file an appeal to this Commission. As we affirm the Agency's dismissal pursuant to 1614.107(a)(4), and based on the

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

EEOC Regulation 29 C.F.R. § 1614.301 requires that where a person is employed by an agency subject to 5 U.S.C. § 7121(d), and is covered by a collective bargaining agreement that permits allegations of discrimination to be raised in the negotiated grievance procedure, an election must be made to proceed under either the negotiated grievance procedure or the EEO complaint procedure but not both. An aggrieved employee who files a grievance in writing with an agency, whose negotiated agreement permits the inclusion of allegations of discrimination, may not thereafter file an EEO complaint on the same matter, irrespective of whether the agency has informed the individual of the need to elect, or whether the grievance actually raised allegations of discrimination. Pursuant to 29 C.F.R. § 1614.107(a)(4) provides that the agency shall dismiss a complaint where the complainant has elected to pursue the allegations under a negotiated grievance procedure.

Prior to filing his formal complaint, Complainant filed a grievance challenging his non-selection as also detailed in his formal complaint, pursuant to a CBA that permits claims of discrimination to be raised in the grievance process or the EEO complaint process, but not both (Articles 18 and 24 of the CBA). The record contains the pertinent portion of the Collective Bargaining Agreement, providing that an employee may pursue a matter through either the grievance process or the EEO complaint process, but not both.

circumstances of this case, we find it unnecessary to address the timeliness issue.

When complainants attempt to pursue discrimination claims through both the EEO and grievance process, Agency's shall dismiss the complaint pursuant to 29 C.F.R. §1614.107(a)(4). See Michelina C. v. Social Sec. Admin., EEOC Appeal No. 2024004619 (Dec. 2, 2024).

Complainant filed two separate step challenges, made oral presentations, and received two step decisions on his grievances on the issues raised in his EEO complaint. The Commission has held that where, as here, the adjudication of the case in another forum is tantamount to an election of remedies. See Spriesterbach v. U.S. Postal Serv., EEOC Appeal No. 01A00346 (April 6, 2000) (citing Aho v. Dep't of Agric., EEOC Request No. 05860085 (May 22, 1985)). This reflects "the unequivocal legislative interest" in providing only one forum in which to challenge the propriety of an agency action alleged to have been based, in whole or in part, on discriminatory factors. The purpose of this regulatory scheme is to eliminate duplicative proceedings and the possibility of conflicting outcomes on the same matter. Id. We find Complainant elected to pursue his claims in the grievance process first and therefore, the Agency properly dismissed the formal complaint.

Importantly, addressing these claims by the Commission could constitute an improper collateral attack on a forum outside of the Commission's EEO complaint process. See Walsh v. U.S.P.S., EEOC Request No. 05980369 (Mar. 29, 2001). Upon review, the Commission finds that Complainant's complaint was properly dismissed pursuant to 29 C.F.R. § 1614.107(a)(4).

CONCLUSION

Accordingly, the Agency's final decision dismissing Complainant's complaint is affirmed.

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).

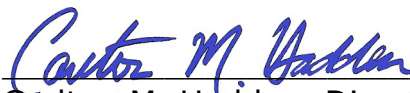
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

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

January 28, 2025
Date