



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
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[REDACTED] Jeffery J.,
[REDACTED] Shane L.,
[REDACTED] Jay C., &
[REDACTED] Gilbert B.,
Petitioners,

v.

Lloyd J. Austin III,
Secretary,
Department of Defense
(Office of the Secretary of Defense),
Agency.

Petition Nos. 2023002951, 2023002952, 2023002953, 2023002954, 2023002955, 2023002956,
2023002957, 2023002958, 2023002959, & 2023002960

Request Nos. 2022000893, 2022000894, 2022000896, 2022000898, 2022000899, 2022000900,
2022000902, 2022000903, 2022000905, & 2022000906

Appeal Nos. 2020003894, 2020003895, 2020003896, 2020003897, 2020003898, 2020003899,
2020003900, 2020003901, 2020003902, & 2020003903

Hearing Nos. 570-2015-00469X, 570-2015-00470X, 570-2015-00471X, 570-2015-00472X,
570-2015-00473X, 570-2015-00474X, 570-2015-00475X, 570-2015-00476X,
570-2015-00477X, & 570-2015-00478X

Agency Nos. 2010-PFPA-073, 2010-PFPA-077, 2010-PFPA-086, 2010-PFPA-088,
2010-PFPA-089, 2010-PFPA-090, 2010-PFPA-091, 2010-PFPA-094, 2010-PFPA-095,
& 2010-PFPA-100

DECISION ON A PETITION FOR ENFORCEMENT

On April 21, 2023, the Equal Employment Opportunity Commission (EEOC or Commission) docketed a second petition for enforcement to examine the enforcement of an Order set forth in

EEOC Appeal Nos. 2020003894, 2020003895, 2020003896, 2020003897, 2020003898, 2020003899, 2020003900, 2020003901, 2020003902, and 2020003903 (November 17, 2021) (together referred to as 2020003894 et al.), req. for recon. den., EEOC Request Nos. 2022000893, 2022000894, 2022000896, 2022000898, 2022000899, 2022000900, 2022000902, 2022000903, 2022000905, 2022000906 (April 4, 2022) (together referred to as 2022000893 et al.). Specifically, the Commission docketed the instant petition to address the dispute between the parties regarding the adequacy and effectiveness of the reasonable accommodation the Agency stated that it would offer in compliance with the Commission's previous orders. The Commission accepts this petition for enforcement pursuant to 29 C.F.R. § 1614.503. For the following reasons, the Commission GRANTS the petition for enforcement.

ISSUE PRESENTED

Whether the Agency has complied with the Commission's Order requiring the Agency to provide reasonable accommodation alternative options (waiver or alternative equipment) for those with appropriate medical documentation to the clean-shaven rule.

BACKGROUND

During the relevant period, Petitioners worked as Police Officers, AD-0083, within the Pentagon Force Protection Agency (PFPA) located in Washington, D.C. Petitioners filed complaints in which they alleged that the Agency discriminated against them on the bases of race (African American), color (black), and disability (Pseudo folliculitis Barbae (PFB))¹ in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. when on July 27, 2010, the Agency directed them to shave their facial hair consistent with the Agency's new policy, or face a job reassignment with possible pay reduction or termination.

Petitioners appealed the Agency's final decision to the Commission, and in Appeal Nos. 2020003894 et al., the Commission concluded that the Agency's imposition of a blanket policy requiring all PFPA Officers to be clean-shaven regardless of their medical condition violated the Rehabilitation Act.

The Commission ordered the Agency to: (1) offer Petitioners reinstatement into the position of Police Officer from which they were removed if removal had occurred; (2) place Petitioners in the Police Officer position retroactive to the date they were removed for purposes of seniority and benefits if reinstatement were accepted; (3) determine appropriate backpay and other benefits due; (4) provide reasonable accommodation alternative options (waiver or alternative equipment) for those with appropriate medical documentation to the clean-shaven rule; (5) remove records of disciplinary action related to failure to comply with qualification standards; (6) conduct supplemental investigations on Petitioners' entitlement to compensatory damages; and (7) provide EEO training for responsible management officials.

¹ Petitioners ultimately withdrew the bases of race and color from their claims.

The Agency was further instructed to post a notice indicating that the Washington, D.C. facility was found to have strictly applied a job qualification standard that screened out a number of employees based on their disability without an appropriate individualized assessment or an offer of reasonable alternate options.

The Agency subsequently filed a Request for Reconsideration reiterating the same arguments that it had offered on appeal. In its decision, Request Nos. 2022000893 et al., the Commission found no clearly erroneous interpretation in the initial appellate decision and denied the Request. The matter was assigned to a Compliance Officer and docketed as Compliance Nos. 2022002608, 2022002609, 2022002610, 2022002611, 2022002612, 2022002613, 2022002614, 2022002615, 2022002616, and 2022002617 on April 12, 2022.

In EEOC Petition Nos. 2022003567, 2022003568, 2022003569, 2022003570, 2022003571, 2022003572, 2022003573, 2022003574, 2022003575, & 2022003576 (June 28, 2022) (together referred to as 2022003567 et al.), the Commission granted Petitioners' petitions for enforcement, finding that the Agency blatantly disregarded the Commission's authority to ensure compliance with its orders pursuant to a finding of discrimination. The Commission cautioned the Agency that ongoing non-compliance with Commission orders would result in the Agency having to provide a written report to the Director, Federal Sector Programs, Office of Federal Operations regarding deficiencies in compliance and a detailed action plan for addressing its failure to comply with Commission orders.

On September 29, 2022, the Agency issued a Policy Memorandum (PM) informing PFPA Police Officers that it would be offering a potential reasonable accommodation option for law enforcement and response personnel who were subject to the Agency's occupational health program and who had a medical condition that impacted their ability to properly wear a fitted respirator mask. The PM stated, in pertinent part, that the accommodation option would allow covered employees who serve as first responders "to maintain limited facial hair no longer than one quarter (1/4) inch of growth, so long as the following conditions are continuously met:

- The covered employee must not allow the facial hair to grow in excess of one quarter inch long.
- At all times while on duty, the covered employee must carry with them a portable razor/shaver, (including rechargeable electric or battery-operated razor/shaver). The covered employee must be prepared to use the razor/shaver, upon request of a management official with appropriate authority or in the event of an emergency, to quickly shave at a moment's notice to come into compliance with applicable Occupational Safety and Health Administration (OSHA) requirements for tight-fitting respirators. The covered employee must be able to achieve that shave without the use of water, a mirror, or access to an electrical outlet. The covered employee is responsible for acquiring the razor/shaver and for ensuring that it is in operable condition, including having necessary charge or sufficient remaining battery power, at all times while on duty.

- At the annual mask fit test, the covered employee must be adequately shaved with the razor/shaver prior to administration of the test. The covered employee must immediately thereafter pass the annual mask fit test. Individual must shave their entire face to a good seal. The covered employee must immediately thereafter pass the annual mask test.”

Subsequently, the parties submitted correspondence to the Commission regarding the Agency’s belief that it had provided a reasonable accommodation to Petitioners in compliance with the Commission’s Orders, and Petitioners’ disagreement that the Agency had offered an effective accommodation.

On April 21, 2023, the Commission docketed the instant Petitions for Enforcement to address the dispute between the parties regarding the adequacy and effectiveness of the reasonable accommodation the Agency stated that it would offer in compliance with the previous appellate orders.

CONTENTIONS ON PETITIONS FOR ENFORCEMENT

Petitioners argue that the Agency failed to submit final compliance reports and reiterate their position that the Agency has not substantially complied with the Commission’s previous orders because it has not reasonably accommodated Petitioners, employees who are unable to shave. According to Petitioners, OSHA regulations are subject to varying interpretations and are not a bar to the Agency providing Petitioners with reasonable accommodations. Petitioners posit that the Agency should be required to accommodate Petitioners with a loose-fitting positive pressure powered air-purifying respirator (PAPR) if it is unwilling to allow Petitioners to use the issued Avon C-50 mask with closely groomed facial hair. In support, Petitioners highlight testimony from the Agency’s safety expert indicating that the Agency could have satisfied its obligation to reasonably accommodate Petitioners. Petitioners contend that the Commission should sanction the Agency for its failure to comply with Commission orders and issue a show cause notice to the Agency Secretary.

Regarding the effectiveness of the accommodation offered by the Agency, Petitioners contend that the offered reasonable accommodation is not feasible, is unduly burdensome, conflicts with their physicians’ advice that they shouldn’t shave, and does not constitute reasonable accommodation. Petitioners point to issues with carrying razors/shavers on their uniform, sanitation problems, and shaving time, and further argue that the Agency allows alternative equipment for individuals requesting religious accommodations.

Finally, Petitioners contend that the Commission should order the Agency to comply with the 2023 Fitzpatrick Matrix when it issues its compliance reports setting forth Petitioners’ attorney fees and damages.

The Agency opposes the petition and contends that issuing Petitioners loose-fitting respirators would not be a reasonable or effective accommodation.

Specifically, the Agency argues that loose-fitting respirators would pose an undue hardship because they would compromise the Agency's ability to accomplish its law enforcement mission. The Agency contends that the loose-fitting respirator is not compatible with the ballistic helmets that Police Officers must frequently wear at the same time, makes communication difficult, covers gear that might need to be accessed, and could potentially be grabbed and dislodged.² The Agency further contends that a Police Officer wearing a loose-fitting respirator will not be able to don the respirator quickly and may need assistance in doing so.

According to the Agency, it created a policy under which Petitioners and similarly situated employees could maintain closely cropped hair "most of the time" if they always carried a personal electric shaver while on duty. The policy would require Petitioners to shave just prior to wearing a tight-fitting respirator. The Agency goes on to describe the medical documentation submitted by a few of the Petitioners as generally stating that individuals with PFB may experience extreme inflammation of the skin in response to shaving. Noting that Petitioners' medical providers recommended that the individuals be permitted to not shave cleanly, and to maintain short facial hair, the Agency asserts that its new policy is reasonable because it allows individuals with PFB to significantly reduce the frequency with which they are required to shave. As such, the Agency argues that it complied with the Commission's previous Orders.

The Agency rejects Petitioners' argument that the Fitzpatrick Matrix should be applied to the calculation for attorney's fees because the attorney's fees owed in the matter were largely accrued long before its existence.

STANDARD OF REVIEW

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.³

ANALYSIS

When a request for reconsideration is denied, as is the case here, the agency shall provide the relief ordered and there is no further right to delay implementation of the ordered relief. 29 C.F.R. § 1614.502(c). Here, the Agency was ordered to provide reasonable accommodation alternative options (waiver or alternative equipment) for those with appropriate medical documentation to the clean-shaven rule. However, during the pendency of this matter, the Agency has held the position that it is unable to offer Petitioners a waiver or alternative equipment because doing so would pose an undue hardship.

² The Agency submitted photographs and videos to in support of its arguments comparing tight- and loose-fitting respirators, which were reviewed in reaching the instant decision.

³ Here, Request Nos. 2022000893, et al. are the Commission's final decisions.

In the instant matter, the Agency argues that it offered Petitioners an alternative accommodation which it claims is effective and these Petitions for Enforcement were docketed to address the dispute between the parties regarding the adequacy and effectiveness of the reasonable accommodation the Agency has stated it offered in compliance with the previous appellate orders. However, we conclude that the proffered alternative accommodation, as presented in the PM, does not provide an effective accommodation as ordered. In doing so, we closely examined the photographs and videos that the Agency provided to support its claims that loose-fitting respirators are not a viable option for Petitioners. However, upon review, we are not swayed from the position that the Agency has not complied with the order to provide Petitioners with a reasonable alternative accommodation.

Notably, the Agency has never disputed the effects of shaving on Petitioners' health, and we find the offered alternative to be ineffective because it still requires Petitioners to be clean shaven despite medical documentation indicating that they should not. See Linda A. v. Dep't of the Army, EEOC Appeal No. 2022000831 (Mar. 15, 2023) (finding that the agency offered an ineffective alternative accommodation when the alternative did not effectively address Complainant's limitations and the agency never disputed the claimed effects). Moreover, the Agency appears to have substituted its judgment for that of the treating physicians and determined that shaving with five minutes' notice without the use of water or a mirror would be sufficient to accommodate Petitioners. Nothing in Petitioners' medical documentation stated that shaving less frequently would be sufficient, nor has the Agency offered other evidence to support its contention that the PM requiring less frequent shaving would be an effective accommodation. Under these circumstances, we find that the Agency did not engage in good-faith efforts to accommodate Petitioners and has failed to comply with our previous Orders. See Alonso T. v. Equal Empl. Opp. Comm'n., EEOC Appeal No. 0120162340 (Jan. 15, 2020) (finding that the agency did not engage in good faith efforts to accommodate complainant when it provided her with one day of telework while the medical documentation recommended three days of telework, the Commission reasoned that an Agency official substituted her judgment for that of complainant's doctor).

To the extent the Agency contends that OSHA regulations prohibit its ability to provide a reasonable accommodation outside of the PM, the underlying record revealed that OSHA's regulation 29 C.F.R. § 1910.134 contemplates providing Powered Air-Purifying Respirators to those who cannot use a negative pressure mask due to a medical condition. As for the Agency's arguments regarding the limitations of a loose-fitting respirator, we remind the Agency that a reasonable accommodation may involve acquisition or modifications of equipment or devices. 29 C.F.R. § 1630.2(o)(2)(ii). In the initial appeal, 2020003894 et al., the Commission explained that to exclude an individual with a disability based on the possibility of future injury, the Agency must prove through evidence that there is a significant risk of substantial harm. A speculative or remote risk is insufficient, and the Agency must show more than that an individual with a disability stands some slightly increased risk of harm. Here, the Agency has not done so, as the arguments pertaining to the loose-fitting respirator are generally speculative.

Regarding the argument that Petitioners needed to apply for reasonable accommodation under the Agency's new policy, the Agency was ordered to provide reasonable accommodations for those with appropriate medical documentation and we are unable to discern why Petitioners would need to separately apply under a new policy. While Petitioners were required to cooperate with the Agency in the process, the Agency was already in possession of medical documentation from Petitioners indicating that they had PFB, a permanent condition, which restricted their abilities to be clean shaven.

Based on the foregoing, we find the Agency has not satisfied its obligation to provide Petitioners with an accommodation as ordered. The Commission has the inherent power to control and prevent abuse of its orders, processes, and procedures. The Commission can impose sanctions for Agency malfeasance. Complainant v. Dep't of Housing and Urban Dev., EEOC Petition No. 0420110011 (June 12, 2012) (citing Complainant v. Dep't of the Interior, EEOC Petition NO. 04980037 (Aug. 5, 1999) and Complainant v. Dep't of Agric., EEOC Petition No. 04980004 (Dec. 12, 1997)). To that end, should the Agency fail to comply with the actions mandated by the Order set forth below, the Commission may issue a "Show Cause" notice to the Agency to appear in person before the Commission to explain the Agency's continued failure to comply. 29 C.F.R. § 1614.503(e). We remind the Agency that it was cautioned in the previous Decision on Petitions for Enforcement that ongoing non-compliance with Commission orders would result in the requirement to issue a written report to the Director, Federal Sector Programs, Office of Federal Operations regarding deficiencies in compliance and a detailed action plan for addressing its failure to comply with Commission orders.

Finally, with respect to the parties' arguments concerning attorney's fees, there is no indication that the Agency has issued its final decision on these matters. Therefore, these matters are not currently before us. Once the Agency issues its final decisions on damages and attorney's fees, Petitioners may appeal those decisions if they wish.

CONCLUSION

Accordingly, the Petition for Enforcement is GRANTED, and the matter is REMANDED to the Agency for further action as ORDERED below.

ORDER

Unless otherwise noted, within sixty (60) calendar days of the date this decision is issued, the Agency shall take the following actions:

1. To the extent Petitioner(s) were removed from their PFPA Police Officer positions due to failure to comply with the qualification standard at issue, the Agency shall offer Petitioner (s) reinstatement into the position of Police Officer from which they were removed. The Agency shall afford Petitioner(s) fifteen (15) calendar days to determine whether to accept reinstatement. Should Petitioner(s) reject the offer of reinstatement, their entitlement to back pay shall terminate as of the date of the rejection.

2. If Petitioner(s) accept the reinstatement offer, the Agency shall place Petitioner(s) in the Police Officer position retroactive to the date they were removed, for the purpose of seniority and other employment benefits (including within-grade salary increases and career ladder promotions) tied to seniority.
3. Consistent with reinstatement from paragraph (1) above, the Agency shall determine the appropriate amount of back pay, with interest, and other benefits due to Petitioner(s), pursuant to 29 C.F.R. § 1614.501. Petitioner(s) shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to Petitioner(s) for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. Petitioner(s) may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled, "Implementation of the Commission's Decision."
4. Provide reasonable accommodation alternative options (waiver or alternative equipment) for those with appropriate medical documentation to the clean-shaven rule.
5. Remove record of disciplinary action related to failure to comply with the qualification standard from official personnel records of Petitioner(s).
6. Conduct supplemental investigations on entitlement to compensatory damages and provide Petitioner(s) an opportunity to submit evidence of pecuniary and nonpecuniary damages. For guidance on what evidence is necessary to prove entitlement to pecuniary and non-pecuniary damages, the parties are directed to EEOC Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991, EEOC No. 915-002 (July 14, 1992) (available at eoc.gov) and Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993). The Agency shall complete the investigation and issue a final decision, appealable to this Commission, determining the appropriate amount of damages within 120 calendar days of the date of this decision. Petitioner(s) shall cooperate with the Agency's investigation. If there is a dispute regarding the exact amount of compensatory damages, the Agency shall issue a check to Petitioner(s) for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due.
7. The Agency shall provide eight (8) hours of EEO training for the responsible management official(s) involved herein. The training shall emphasize the Rehabilitation Act's requirements with respect to the Agency's medical/physical standards and medical waiver programs to ensure that similar violations do not occur.

The Agency is further directed to submit a 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). Further, the report must include evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Washington D.C. facility copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (H1019)

If Petitioners have been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she/he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of receipt of this decision. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

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 Petitioners and their representative.

If the Agency does not comply with the Commission's order, the Petitioner may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a).

The Petitioners also have 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 Petitioners have 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 Petitioners file 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.

PETITIONERS' 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 Petitioners' Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

July 22, 2024
Date