



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

██████████
Otto D.,¹
Complainant,

v.

Chad P. Wolf,
Acting Secretary,
Department of Homeland Security
(Customs and Border Protection),
Agency.

Request No. 2020000284

Appeal No. 0120181852

Hearing No. 450-2015-00019X

Agency No. HS-CBP-02166-2013

DECISION ON REQUEST FOR RECONSIDERATION

The Agency timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in EEOC Appeal No. 0120181852 (July 24, 2019). EEOC Regulations provide that the Commission may, in its discretion, 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). For the reasons that follow, the Agency's request is GRANTED.

ISSUE PRESENTED

The issue presented is whether the Agency satisfied the criteria for reconsideration of our previous decision, which found that Complainant was an employee for purposes of filing an administrative EEO complaint.

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 his complaint, Complainant was a Lieutenant Commander in the Commissioned Officer Corps, U.S. Public Health Service (UPHS), Department of Health and Human Services (DHHS). On September 1, 2011, Complainant started a detail assignment as a Program Manager/General Engineer assigned to the Agency's Air and Marine Facilities (AMF) Program in Eules, Texas. Complainant's first-line supervisor (S1) (multicultural) was the Branch Chief of the AMF, and his second-line supervisor (S2) (Black) was the Director of the AMF.

Complainant filed an EEO complaint on December 11, 2013, alleging that the Agency discriminated against him based on race (African-American) when it subjected him to a hostile work environment from October 2012 through October 23, 2013. Following an investigation, Complainant requested a hearing before an EEOC Administrative Judge (AJ). The Agency filed a Motion to Dismiss for Lack of Jurisdiction, which the AJ granted. The AJ found that Complainant was a commissioned officer serving in the UPHS, occupying an active-duty military status. The AJ noted that the Commission's jurisdiction over complaints by federal employees did not extend to uniformed military personnel. The Agency issued a final order fully implementing the AJ's decision to dismiss the complaint.

Complainant filed an appeal with the Commission's Office of Federal Operations (OFO). In the previous decision, OFO noted, in pertinent part, that although Complainant was a commissioned officer of the UPHS, he was detailed to a different, non-military agency to work. The Agency, according to OFO, exercised enough control over Complainant's job to find that he should be considered an employee for the purposes of bringing a Title VII discrimination complaint against the Agency. In reaching this determination, the previous decision noted that Complainant worked out of the Eules office; S2 stated that the Agency "recruited" Complainant under a vacancy announcement for a General Engineer; and S1 gave Complainant a performance evaluation on November 8, 2013, and sent numerous emails giving Complainant projects, instructions, and feedback on his performance. Additionally, S1 sent a memo to the Commissioned Corps Liaison to request the end of Complainant's detail assignment. Consequently, the Commission vacated the Agency's final order and ordered the Agency to continue processing the EEO complaint.

ARGUMENTS ON RECONSIDERATION

On August 16, 2019, the Agency filed a Request for Reconsideration. The Agency argues that the appellate decision involves clearly erroneous interpretations of fact and law in that the decision runs contrary to the Federal statute stating that officers of the Commissioned Corps of the UPHS are not covered by anti-discrimination laws enforced by the Commission. The Agency also argues that OFO's decision erred: (1) in its interpretation of established OFO decisions regarding EEOC jurisdiction over claims brought by officers of the Commissioned Corps of the UPHS; and (2) in misinterpreting the employment relationship between Complainant and the Agency. Finally, the Agency argues that the decision will have a substantial impact on the policies, practices, or operations of the Agency by, among other things, creating confusion regarding how discrimination complaints involving military personnel are handled.

The Agency requests that the Commission reverse the appellate decision and uphold the AJ's finding that Complainant, as an active-duty officer in the Commissioned Corps of the UPHS, is not among the persons covered by the administrative process set forth at 29 C.F.R. Part 1614.

In response, Complainant, through his attorney, argues that the Agency failed to establish that (1) the decision involved a clearly erroneous interpretation of material facts or law or (2) the decision will have a substantial impact on the policies, practices, or operations of the Agency. Complainant maintains that the evidence clearly shows that Complainant, for purposes of filing an EEO complaint, was an employee of the Agency, as the Agency had control of when, where, and how he performed his duties. Complainant reasserts that the Agency was responsible for the discrimination that he suffered, and that, while he remained on active-duty, he worked at the direction and under the control of the Agency, not the UHPS or the DHHS.

Complainant further maintains that the previous decision did not contradict precedent regarding discrimination complaints filed by Commissioned Corps Officers. Complainant maintains that he is not bringing a claim of discrimination in his capacity as a commissioned officer of the UPHS or against the Service. All actions at issue in the present case occurred while Complainant worked under the direction and control of the Agency, i.e., the complaint is based entirely on the actions taken against him as a federal civilian employee and against a non-military agency.

Finally, Complainant argues that the Agency failed to establish that the decision will have a substantial impact on the Agency's policies, practices, and operations. Contrary to the Agency's argument that consistency regarding the processing of EEO cases is needed, Complainant asserts that this decision is in line with precedent. Complainant maintains that the Commission for the last nineteen years has held that "when an individual is under the direction and control of an Agency then they are treated as an employee of that agency and entitled to the benefits and burdens that come with the position."

ANALYSIS

A request for reconsideration is not a second appeal to the Commission. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110) (Aug. 5, 2015), at 9-18; see, e.g., Lopez v. Dep't of Agriculture, EEOC Request No. 0520070736 (Aug. 20, 2007). Rather, a reconsideration request is an opportunity to demonstrate that the previous decision involved a clearly erroneous interpretation of material fact or law; or (2) will have a substantial impact on the policies, practices, or operations of the Agency. After reviewing the previous decision and the entire record, we find that the appellate decision involved a clearly erroneous interpretation of material fact or law. Because the matter is determined by statutory exclusions from our jurisdiction for active duty Commissioned Corps Officers of the PHS detailed to DHS, it is unnecessary to determine whether the Agency exercised sufficient control over the complainant for him to be considered an "employee."

The Commission has long held that the Commission's jurisdiction in the federal sector complaint process under Title VII extends to employees and applicants for federal employment. See 42 U.S.C. § 2000e-16(a). This coverage is extended to most executive agencies within the federal government, including “military departments as defined in 5 U.S.C. § 102.” 29 C.F.R. § 1614.103(b)(1). Nonetheless, “uniformed members of military departments” are not covered by the federal sector process. 29 C.F.R. § 1614.103(d)(1). Further, uniformed military personnel of any branch of the armed forces are not covered under Title VII. See DeGroat v. Dep’t of the Air Force, EEOC Request No. 05900409 (July 20, 1990) (denying request to reconsider dismissal of fulltime, active-duty military personnel's allegation of discrimination).

The status of Commissioned officers of the UPHS was clarified by The Health Professions Education Partnerships (HPEP) Act of 1998, PL 105-392 (November 13, 1998), as it amended the Public Health Service Act, 42 U.S.C. § 201 et seq. The HPEP Act states, in relevant part:

(a) ANTI-DISCRIMINATION LAWS.—Amend section 212 of the Public Health Service Act (42 U.S.C. 213) by adding the following new subsection at the end thereof:

***“(f) Active service of commissioned officers of the Service shall be deemed to be active military service in the Armed Forces of the United States for purposes of all laws related to discrimination on the basis of race, color, sex, ethnicity, age, religion, and disability.”

The Commission previously has acknowledged the effect of this provision. Raymond v. Dep’t of Health and Human Services, EEOC Appeal No. 01987012 (Oct. 13, 2000). Because an individual who is a commissioned officer in the UPHS is deemed to be active-duty military, such an individual is excluded from coverage under Title VII. In this regard, we note that Complainant acknowledges that he remained on active duty with the UPHS during his detail to the Agency.

The Commission notes that, while on the surface, this complaint seems analogous to complaints against the National Guard Bureau (NGB) by “dual status” technicians, in fact the two are readily distinguishable. Dual-status technicians occupy hybrid positions within NGB, wherein they have both military *and* civilian status. When an alleged discriminatory action occurs in the course of carrying out their civilian duties, by statute they are covered under Title VII. See 32 U.S.C. § 709(f)(5); cf. 32 U.S.C. § 709(f)(4) (no recourse beyond the adjutant general for actions occurring while in military status). No such statutory provision exists for commissioned members of the UPHS.

Further, we note that the underlying decision failed to recognize that there was a Memorandum of Agreement (MOA) between the Agency and HHS. The MOA “sets forth the mutually agreed upon rules and procedures governing the detail of Commissioned Corps Officers of the U.S. Public Health Service ... for an indefinite term of service” with the Agency.

The relevant provision of the MOA to the instant complaint stated that EEO actions “will be handled under the rules and procedures for such actions set forth in the [policies,] directives and instructions contained in the [electronic Commissioned Corps Issuance System] eCCIS,” which is now called the Commissioned Corps Management Information System (CCMIS). Moreover, the Commissioned Corps Personnel Manual states that Commissioned officers are deemed to be active military service and are not covered by antidiscrimination legislation. The MOA set out the established procedures to be used.²

CONCLUSION

For the foregoing reasons, we find that Complainant failed to state a claim because, due to his status as an active-duty military officer in the UPHS, the EEOC lacks jurisdiction over the complaint. Accordingly, the decision in EEOC Appeal No. 0120181852 is REVERSED and the Agency’s final order dismissing Complainant’s complaint is AFFIRMED. There is no further right of administrative appeal on the decision of the Commission on this request.

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (P0610)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. 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 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.

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.

² The Commission observes, however, that the MOA is a document that merely implements the preexisting statutory basis for our denial of jurisdiction, rather than an interagency agreement which in any respect determines it.

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/ Bernadette B. Wilson

Bernadette B. Wilson

Executive Officer

Executive Secretariat

July 6, 2020

Date