



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

[REDACTED]
Garret W.,¹
Complainant,

v.

Chad F. Wolf,
Secretary,
Department of Homeland Security
(U.S. Coast Guard),
Agency.

Appeal No. 2019004937

Agency No. HS-USCG-00403-2019

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from a final Agency decision (FAD) dated June 12, 2020, dismissing his complaint of unlawful employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was employed by the Agency as a Real Property Specialist, GS-1170-12, Step 4 at the Civil Engineering Unit Providence in Warwick, Rhode Island.

On January 31, 2019, Complainant filed an equal employment opportunity (EEO) complaint which the Agency defined as alleging that management subjected him to unlawful retaliation for prior protected EEO activity under the Rehabilitation Act when, on November 26, 2018, he discovered that he was denied within grade increases for 2015, 2017, and 2018.

Previously, on December 2, 2018, Complainant filed an appeal with the Merit Systems Protection Board (MSPB) alleging that the Agency denied him within grade increases with the motivation to harass and retaliate against him.

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.

The Agency dismissed the EEO complaint under 29 C.F.R. § 1614.107(a)(4) because Complainant elected to bring his claim in the MSPB forum by filing his appeal with the MSPB before filing his EEO complaint. The instant appeal followed.

On appeal, Complainant submits materials he filed with the MSPB in June 2019. Among other things, the materials show he was seeking compensatory damages and lost Thrift Savings Plan (TSP) deposits which “still had not been restored.”

In her September 5, 2019 reply to Complainant’s appeal, the Agency’s legal representative argues that the FAD should be affirmed because Complainant elected the MSPB forum, and despite the Agency’s argument to the MSPB that it lacked jurisdiction, his case was still pending there.

ANALYSIS AND FINDINGS

We take administrative notice that on March 12, 2020, the MSPB issued an initial decision on Complainant’s appeal with the MSPB. Therein, the MSPB recounted the applicable waiting periods for Complainant to advance steps – to Step 5 in August 2015, to Step 6 in August 2017, and to Step 7 in August 2019. The MSPB recounted that in December 2018, the Agency late-processed Steps 5 and 6 with back pay, and that Complainant received his Step 7 increase on August 4, 2019. The MSPB dismissed Complainant’s appeal for lack of jurisdiction, in relevant part, because the Board’s jurisdiction to review the denial of a within grade increase only attaches after an agency has issued a reconsideration decision, which never occurred. MSPB Docket No. PH-531D-19-0073-I-1, 2020 WL 1238136 (Mar. 12, 2020).²

Where the agency or the MSPB questions the MSPB’s jurisdiction over the appeal on the same matter as the complaint, the agency shall hold the mixed case complaint in abeyance until the MSPB rules on the jurisdictional issue, and notify the complainant that it is doing so. During this time, all time limitations for processing or filing under this part are tolled. If the MSPB finds that it does not have jurisdiction over the matter, the agency shall recommence processing of the mixed case complaint as a non-mixed case EEO complaint. EEOC Regulation 29 C.F.R. § 1614.302(c)(ii).

Applying this regulation, the Agency must recommence processing Complainant’s EEO complaint as a non-mixed complaint from the point processing ceased, i.e., just prior to commencing an EEO investigation. The Agency’s submissions to the Commission did not include copies of the EEO counseling papers nor Complainant’s EEO complaint papers. As recounted above, the Agency captured Complainant’s claim in his EEO complaint that on November 26, 2018, he discovered that he was denied within grade increases for 2015, 2017, and 2018. But in the absence of the EEO counseling and EEO complaint papers in this case we cannot assess if the Agency captured all the issues Complainant alleged and intended as actionable claims in his EEO complaint. On remand, the Agency conduct an EEO investigation on all the above claims.

² In response to a Commission status inquiry, on August 13, 2020, the MSPB answered that it had no record of a petition for review to the Board from the initial decision.

ORDER (E0618)

The Agency is ordered to process the remanded claims in accordance with 29 C.F.R. § 1614.108. The Agency shall acknowledge to the Complainant that it has received the remanded claims **within thirty (30) calendar days** of the date this decision was issued. The Agency shall issue to Complainant a copy of the investigative file and also shall notify Complainant of the appropriate rights **within one hundred fifty (150) calendar days** of the date this decision was issued, unless the matter is otherwise resolved prior to that time. If the Complainant requests a final decision without a hearing, the Agency shall issue a final decision **within sixty (60) days** of receipt of Complainant's request.

As provided in the statement entitled "Implementation of the Commission's Decision," the Agency must send to the Compliance Officer: 1) a copy of the Agency's letter of acknowledgment to Complainant, 2) a copy of the Agency's notice that transmits the investigative file and notice of rights, and 3) either a copy of the complainant's request for a hearing, a copy of complainant's request for a FAD, or a statement from the agency that it did not receive a response from complainant by the end of the election period.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

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 his/her 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.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in 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). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)


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 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. **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

September 17, 2020
Date