



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

████████████████████  
Ward B.,<sup>1</sup>  
Complainant,

v.

Megan J. Brennan,  
Postmaster General,  
United States Postal Service,  
Agency.

Appeal No. 2019001570

Hearing No. 560-2017-00238X

Agency No. 4-630-0028-17

**DECISION**

On December 15, 2018, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's November 8, 2018 final order concerning his equal employment opportunity (EEO) complaint alleging 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 Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. Our review is de novo. For the following reasons, the Commission VACATES the Agency's final order and REMANDS the matter for a hearing.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a City Letter Carrier, Q-01, at the Agency's Des Peres Branch in St. Louis, Missouri. On February 9, 2017, Complainant filed an EEO complaint wherein he claimed that the Agency discriminated against him on the bases of his race (Caucasian) and disability (chronic obstructive pulmonary disease and pulmonary fibrosis) when on June 21, 2016, he was issued a Notice of Removal that became effective on November 18, 2016.

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<sup>1</sup> 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.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant requested a hearing, but the AJ remanded the complaint to the Agency as a sanction pursuant to Complainant's failure to timely file an initial conference report. The Agency issued a final order pursuant to 29 C.F.R. § 1614.110(b) wherein it determined that no discrimination occurred.

### DISMISSAL OF HEARING REQUEST

The record shows that on October 4, 2018, the AJ issued an Order of Dismissal with regard to the instant complaint. The AJ stated that on August 16, 2018, the parties were emailed an Order Scheduling an Initial Conference for October 1, 2018. We observe that Complainant was informed that the Initial Conference Report was to be submitted at least five days before the Initial Conference scheduled for October 1, 2018. In that Order, the AJ stated **"The Parties are also hereby notified that failure to follow this order, including failing to timely submit an Initial Conference Report as described in Section 2, or other orders of the Administrative Judge may result in sanctions pursuant to 29 C.F.R. § 1614.109(f)(3)...including the denial of a right to a hearing..."** The AJ stated that the attorney for Complainant submitted his Initial Conference Report on October 1, 2018, the date of the initial conference. According to the AJ, when Complainant's attorney was asked why his submission was untimely, the attorney replied that he was a solo practitioner and he had other due dates on his other cases. The AJ stated that Complainant's attorney did not file a request for an extension of the deadline. The AJ found that Complainant failed to show good cause for his deliberate disregard of the deadlines provided in the Scheduling Order.

On appeal, Complainant contends that the AJ erred by dismissing his request for a hearing. Complainant argues that the sanction was overly harsh. According to Complainant's attorney, the requirement of a submission of an initial conference report five days prior to the initial conference was a new requirement that he overlooked by mistake. The attorney stated that he nonetheless submitted the Initial Conference Report five hours before the initial conference.

### ANALYSIS AND FINDINGS

An AJ has the authority to sanction either party for failure without good cause shown to fully comply with an order. 29 C.F.R. § 1614.109(f)(3). Such sanctions may include an adverse inference that the requested information would have reflected unfavorably on the party refusing to provide the requested information, exclusion of other information offered by the party refusing to provide the requested information, or issuance of a decision fully or partially in favor of the opposing party, or other actions, as appropriate. *Id.* The Commission has held repeatedly that sanctions must be tailored to each situation, applying the least severe sanction necessary to respond to the party's failure to show good cause for its actions, as well as to equitably remedy the opposing party. See Gray v. Dep't of Def., EEOC Appeal No. 07A50030 (March 1, 2007); Rountree v. Dep't of the Treasury, EEOC Appeal No. 07A00015 (July 13, 2001); Hale v. Dep't of Justice, EEOC Appeal No. 01A03341 (Dec. 8, 2000).

The Commission's interest lies in deterring the underlying conduct of the non-complying party and protecting its administrative process from abuse by either party to ensure that agencies, as well as complainants, abide by its regulations. See Royal v. Dep't of Veterans Affairs, EEOC Request No. 0520080052 (Sept. 25, 2009). The factors pertinent to "tailoring" a sanction, or determining whether a sanction is, in fact, warranted, include the following: (1) the extent and nature of the non-compliance, including the justification presented by the non-complying party; (2) the prejudicial effect of the non-compliance on the opposing party; (3) the consequences resulting from the delay in justice, if any; and (4) the effect on the integrity of the EEO process. Id.; see also Gray, EEOC Appeal No. 07A50030; Vovsest v. Soc. Sec. Admin., EEOC Appeal No. 01A35340 (Jan. 18, 2005).

In this case, we find that the sanction imposed by the AJ was too harsh and a lesser sanction would serve the purpose of deterring similar conduct in the future. The AJ should have tailored the sanction to what was lost by the failure on Complainant's part to submit the Initial Conference Report in a timely manner, rather than a dismissal of the hearing request in its entirety. The report was supposed to contain the parties identification in the Report of Investigation (ROI) of the evidence in support of the parties' positions; identification of any missing evidence from the ROI; and Complainant's statement of damages. While the report was submitted late, 5 hours before the conference rather than 5 days, the prejudicial effect on the Agency and consequences of the late submission were negligible. Rather than dismissing the hearing, the disallowance of further discovery would appear to have been a more tailored sanction for the failure of Complainant's representative. The Commission finds a lesser sanction would have sufficed to prevent Complainant or his representative from failing to adhere to the AJ's orders in the future. On remand, we advise the AJ to consider imposing a lesser sanction to appropriately address the conduct at issue. Accordingly, we vacate the Agency's final order and remand this matter for a hearing in accordance with our Order below.

### CONCLUSION

Accordingly, this Commission VACATES the Agency's final decision and REMANDS this matter to the Agency for further processing in accordance with the ORDER below.

### ORDER

The Agency shall submit to the Hearings Unit of the EEOC St. Louis District Office a request for a hearing within 15 calendar days of the date this decision is issued. The Agency is directed to submit a copy of the complaint file to the EEOC Hearings Unit within 15 calendar days of the date this decision is issued. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit. Thereafter, the Administrative Judge shall issue a decision in accordance with 29 C.F.R. § 1614.109 and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

### 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:

  
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Carlton M. Hadden, Director  
Office of Federal Operations

May 12, 2020  
Date