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

Claude A.,
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2020003160
Agency Nos. 200H-0526-2018102807, 200H-0500-2018103296

DECISION

On April 3, 2020, 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 March 3, 2020 final decision concerning his consolidated equal employment opportunity (EEO) complaints alleging discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission AFFIRMS the Agency’s final decision and REMANDS the matter for corrective action.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Captain/Supervisory Police Officer, GS-0083-09, at the Agency’s James J. Peters VA Medical Center at the Bronx VA Medical Center in Bronx, New York. Complainant filed two EEO complaints alleging that the Agency discriminated against him on the bases of disability (perceived and actual physical and mental, Post-Traumatic Stress Disorder (PTSD) and sleep apnea) and in reprisal for prior protected EEO activity.

\[1\] 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.
Complaint A (Agency No. 200H-0526-2018102807)

1. In February 2018, his private medical records were accessed by Agency officials without authorization;

2. On March 2, 2018, his supervisor, the Chief of Police (Chief), instructed him to turn in his badge, credentials, and weapon and informed him that he no longer had authority as an instructor and supervisor;

3. On March 5, 2018, the Chief issued him a Suspension of Arrest Authority and Firearms Authority Letter, that restricted him to administrative duties and instructed him to wear civilian clothing instead of his uniform while at work;

4. On March 15, 2018, the Chief and the Human Resources (HR) official denied his request to investigate his contention that he did not undergo a psychological examination at the Albany VAMC; and

5. On April 3, 2018, the Deputy Chief of Police (Deputy Chief) did not allow him to attend recertification training until the Suspension of Authority issue was resolved.

Complaint B (Agency No. 200H-0500-2018103296)

6. On February 14, 2018, an HR Specialist informed Complainant that his tentative job offer for the Deputy Chief of Police position at the Albany VAMC, (Vacancy ID No. 528D-18-TPS-059) was withdrawn because of Complainant's incomplete annual physical that was performed at the Bronx VAMC;

7. On or about February 27, 2018, a Nurse Practitioner failed Complainant on the pre-employment physical examination because of his disability rating and annual physical exam results which disqualified Complainant for employment;

8. On March 1, 2018, HR officials at the Albany VAMC sent Complainant a Withdrawal of Tentative Employment Offer letter regarding the Deputy Chief of Police position;

9. On or about March 1, 2018, a member of the Albany Stratton VAMC reported to Complainant’s supervisor at the Bronx VAMC that Complainant failed the psychological examination in connection with his application for the Deputy Chief of Police position; and

10. On March 15, 2018, HR officials failed to investigate Complainant's allegation that he did not undergo a psychological examination at the Albany VAMC, which later resulted in the suspension of his police authority.
Complainant's first-level supervisor was the Bronx VAMC Deputy Chief of Police. Complainant's second-level supervisor was the Bronx VAMC Chief of Police. (Report of Investigation Complaint A (ROIA), Tabs 7-1; 7-2; 7-3). The complaint alleges discrimination by Agency personnel at both the Bronx and Albany facilities.

Complainant applied for a Deputy Chief of Police position at the VAMC in Albany, New York, and received a written tentative offer on February 6, 2018, but the tentative offer was rescinded on February 14, 2018, after the Nurse Practitioner for Occupational Health reported to Human Resources (HR) that Complainant did not pass his pre-employment examination because he failed the requirements and, thus, was not fit for police duty. (Report of Investigation Complaint B (ROB), Tab 7-1; 74 7-16; 7-17). The Nurse Practitioner reported to Albany VAMC HR that Complainant failed his psychological evaluation prior to Psychologist 1 reporting his opinion of Complainant's mental fitness on February 20, 2018.

On March 2, 2018, HR Albany VAMC contacted its counterparts at the Bronx VAMC and relayed that Complainant failed a psychological evaluation, as reported by the Nurse Practitioner, and, therefore, was ineligible for police work. In response, on March 2, 2018, the Bronx Police Chief suspended Complainant’s firearms and arrest authorities. The Bronx Police Chief testified that Complainant's firearms and arrest authorities were returned to him, and Complainant resumed his police duties on April 30, 2018. (ROIA, Tab 7-2; supp2 ROL Tabs 7-1; 7-2; 7-3).

At the conclusion of the investigation and supplemental investigations of the consolidated complaints, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). In accordance with Complainant’s request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

In the Agency’s decision, regarding the claims related to Deputy Chief of Police job offer rescission, the Nurse Practitioner and HR officials testified that HR withdrew Complainant's tentative job offer on February 14, 2018, because the Nurse Practitioner informed them that Complainant did not meet the psychological requirements of the position. The Nurse Practitioner testified that Complainant did “not meet the community standard for mental emotional stability” due to his record of PTSD. The Nurse Practitioner informed HR that Complainant did not meet the community standard for mental emotional stability based on her own review of Complainant's medical and personnel records and based on Psychologist 1’s review of Complainant’s records. However, Psychologist 1 stated he never conducted an in-person assessment of Complainant’s mental health and instead reviewed Complainant’s personnel and medical records. In addition, the Nurse Practitioner testified that Complainant failed his preemployment examination in part due to his untreated sleep apnea despite record evidence indicating that Complainant was in treatment for the condition. The Agency concluded that management’s reasons were pretextual and not based on an individualized assessment as to whether Complainant would present a direct threat because of his condition.
Next, regarding the claims related to the suspension of his police duties at the Bronx VAMC, the Bronx Police Chief testified that he suspended Complainant’s firearms and arrest authorities after he was informed that Complainant failed a psychological evaluation associated with the preemployment examination at the Albany VAMC. The Agency determined that the Bronx Police Chief however failed to conduct an individualized assessment as to Complainant’s mental and emotional ability to safely carry out the duties of his police officer position while his firearms and arrest authorities were suspended from March 6, 2018 through April 30, 2018. Thus, the Agency found that management failed to show that Complainant would pose a direct threat because of his condition. As a result, the Agency found that Complainant had been subjected to discrimination as to the claims related to the rescission of the job offer and the suspension of his police officer duties. The Agency found, however, that Complainant was not subjected to reprisal as to these claims. Finally, the Agency concluded that the medical information shared between HR officials at the Albany and Bronx VAMCs was authorized and did not violate the Rehabilitation Act.

Regarding relief, the Agency ordered that Complainant be immediately reinstated with a tentative job offer for the position of Deputy Police Chief at the Albany VAMC in Albany, New York, or a substantially equivalent position agreeable to Complainant. In addition, the Agency found that Complainant was entitled to back pay covering the period beginning February 14, 2018 (when Complainant’s tentative job offer was first rescinded by HR based on the discriminatory report by the Nurse Practitioner) to the date Complainant is placed in the position, the date Complainant declines such a position, or the date of expiration of the offer. The Agency granted Complainant restoration of all leave taken as a result of the discrimination and expungement from all official agency records any reference to Complainant's discriminatory preemployment examination, the withdrawal of Complainant's tentative job offer for the Deputy Police Chief position, and the suspension of Complainant's firearms and arrest authority. Further, the Agency ordered a supplemental investigation into Complainant’s entitlement to compensatory damages. Finally, the Agency ordered EEO training and the consideration of discipline for the identified responsible management official and to post a notice.

The instant appeal followed. Complainant did not file a brief in support of his appeal. In response to the appeal, the Agency contends that Complainant presented no evidence or argument to show the Agency’s decision should be disturbed.

**ANALYSIS AND FINDINGS**

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review “requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker,” and that EEOC “review the documents, statements, and testimony of record, including any timely and relevant submissions of the
parties, and . . . issue its decision based on the Commission’s own assessment of the record and its interpretation of the law”
).

As an initial matter, we note that neither party challenges the Agency’s finding of disability discrimination as to the claims related to the rescission of the job offer and the removal of his police duties and the remedies ordered. As a result, the Commission AFFIRMS the Agency’s finding of discrimination regarding those matters. Accordingly, this decision will only address the remaining claim that Complainant did not prevail upon (unauthorized medical information disclosure).

Unauthorized Disclosure of Confidential Medical Information

The Rehabilitation Act prohibits disclosure of confidential medical information except in certain limited situations, including when managers need to be informed regarding necessary accommodations. 29 C.F.R. § 1630.14(c). Consequently, where unauthorized disclosure of medical information is at issue, it is not necessary to prove the existence of a discriminatory motivation in order to establish a violation of the Rehabilitation Act; mere disclosure of such information without justification is enough. See e.g. Velva B., et al. v. U.S. Postal Serv., EEOC Appeal Nos. 0720160006 & 0720160007 (Sept. 25, 2017); req. for reconsider. den’d EEOC Request Nos. 0520180094 & 0520180095 (Mar. 9, 2018).

We find no basis to disturb the Agency’s finding that there was no unauthorized confidential medical information disclosure by the HR officials at the Albany and Bronx VAMCs. The record establishes that the officials were acting within their official duties and their actions were based on legitimate, business necessity. Accordingly, the Commission finds that Complainant has not demonstrated that the Agency unlawfully disclosed his confidential medical information in violation of the Rehabilitation Act. Furthermore, to the extent that Complainant alleges that this constituted reprisal, we find that the Agency articulated legitimate, non-retaliatory reasons for its actions as noted above and Complainant has not rebutted them as pretextual. As a result, the Commission finds that the Agency properly found that Complainant was not subjected to reprisal as to this claim.

CONCLUSION

Accordingly, we AFFIRM the Agency’s final decision. We REMAND this matter to the Agency to take the corrective actions, as slightly modified, in accordance with the following Order.

__________________________
2 We note that Complainant’s claims that Agency officials did not investigate further his contention that he did not undergo a psychological evaluation at the Albany VAMC are essentially addressed by the finding that officials at both facilities failed to conduct an individualized assessment as to whether he could safely perform the duties of either position. Likewise, as the Agency noted, Complainant’s allegation that he was denied permission to attend recertification training merged with Complainant’s claim that he was discriminatorily relieved of his arrest and firearms authorities and is addressed in the relief ordered.
ORDER

The Agency is ORDERED to take the following remedial actions:

1. Within 30 calendar days of the date of this decision issued, the Agency shall reinstate the offer of employment to the Deputy Chief position at the Albany VAMC, or a substantially equivalent position agreeable to Complainant. If Complainant accepts the offer, the Agency shall resume the preemployment process where it left off prior to the discriminatory preemployment examination. The Agency, as part of the resumed preemployment process, will conduct a complete preemployment examination, free from discrimination and conducted by medical professionals who are unrelated to this complaint. If Complainant is determined to be fit for duty for the Deputy Police Chief position, the Agency shall immediately offer to place him in that position or a substantially equivalent position agreeable to him with back pay (less interim earnings), interest, and any and all benefits or training that he would otherwise have earned or received but for the prohibited discrimination. The offer of employment shall be made in writing and provide Complainant 15 days from receipt of the letter to respond. The written offer shall inform Complainant that failure to respond within 15 days shall be construed as declination of the offer. Back pay liability shall cease on the date of Complainant’s placement in a position that conforms with the requirements of this Order, the date Complainant declines such a position, or the date of expiration of the offer.

2. The Agency shall determine the appropriate amount of back pay, with interest, and other benefits due the Complainant, pursuant to 29 C.F.R. § 1614.501, no later than 60 calendar days after the date this decision was issued. The Complainant 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 the Complainant for the undisputed amount within 60 calendar days of the date the Agency determines the amount it believes to be due. The Complainant 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.”

3. Within 90 days of the date this decision is issued, the Agency shall conduct a supplemental investigation to determine whether Complainant is entitled to compensatory damages incurred as a result of the Agency's discriminatory actions. Within 15 calendar days of the date this decision is issued, the Agency shall give Complainant notice of his right to submit objective evidence (pursuant to the guidance given in Carle v. Dept of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)) in support of his claims for compensatory damages within 45 calendar days of the date the Complainant receive the Agency's notice. The Agency shall complete the investigations on the claim for compensatory damages within 45 calendar days of the
date the Agency receives Complainant's claim for compensatory damages. Thereafter, the Agency shall process the claim in accordance with 29 C.F.R. § 1614.110.

4. Within 30 calendar days of the date of this decision, the Agency shall expunge from all official agency records any reference to Complainant’s discriminatory preemployment examination, the withdrawal of Complainant’s tentative job offer for the Deputy Police Chief position, and the suspension of Complainant’s firearms and arrest authority from March 5, 2018 through April 30, 2018;

5. Within 30 calendar days of the date this decision is issued, the Agency shall restore any leave (annual, sick, or leave without pay) used as a result of the discrimination.

6. Within 90 days of the date of this decision, the Agency shall provide at least eight hours of training to the Agency officials identified in this decision (the Nurse Practitioner and the Bronx VAMC Police Chief) if still employed, regarding their responsibilities under the EEO laws, with a special emphasis on the Rehabilitation Act and its requirements of individual assessments for direct threat, and medical confidentiality;

7. Within 90 days of the date of this decision, the agency shall consider taking appropriate disciplinary action against the named responsible management officials (the Nurse Practitioner and the Bronx VAMC Police Chief), if still employed by the Agency. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the Compliance Officer referenced herein. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If any of the responsible management officials have left the Agency’s employment, the Agency shall furnish documentation of their departure date(s).

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 supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

**POSTING ORDER (G0617)**

The Agency is ordered to post at its VA Medical Center, Bronx facility and the VA Medical Center in Albany 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 Complainant has 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 (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.
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 supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

**STATEMENT OF RIGHTS - ON APPEAL**

**RECONSIDERATION (M0920)**

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 his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at [https://publicportal.eeoc.gov/Portal/Login.aspx](https://publicportal.eeoc.gov/Portal/Login.aspx). Alternatively, Complainant can submit his or her 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 his or her 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(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

May 25, 2021
Date