



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

[REDACTED]  
Nathanial E.,<sup>1</sup>  
Complainant,

v.

Denis R. McDonough,  
Secretary,  
Department of Veterans Affairs  
(Veterans Health Administration),  
Agency.

Appeal No. 2020001247

Hearing No. 520-2019-00045X

Agency No. 200H-0523-2017105261

**DECISION**

On November 24, 2019, through his attorney, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from a November 27, 2019 final Agency decision (FAD) concerning his equal employment opportunity (EEO) complaint alleging 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 worked as a Nurse (Resident Assessment Coordinator), VN-0610-II, at the Agency's Veterans Affairs Boston Health Care System, Geriatrics and Extended Care in Brockton, Massachusetts.

On October 27, 2017, Complainant filed an EEO complaint alleging that the Agency subjected him to discrimination and a hostile work environment based on his disability (post-traumatic stress disorder, generalized anxiety disorder, chronic major depressive disorder) and reprisal for prior protected EEO activity under the Rehabilitation Act when:

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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.

1. On September 13, 2017, the Chief of Human Resources Management denied his reasonable accommodation request to be transferred/detailed.
2. On September 18, 2017, his first line supervisor, the Director of Geriatrics and Extended Care, denied his request to extend his leave without pay (LWOP).

The Agency dismissed the hostile work environment claim. Reasoning the alleged incidents were not sufficiently severe or pervasive to rise to the level of actionable harassment, but accepted issues 1 and 2 as independently actionable claims. Thereafter, the Agency conducted an EEO investigation, and gave Complainant notice of his right to request a hearing before an EEOC Administrative Judge (AJ).

Complainant requested a hearing. However, the AJ dismissed his hearing request as a sanction, concluding Complainant had not complied with the AJ's August 22, 2019 "Case Acknowledgment; Prehearing Order; Notice of Prehearing Conference" to file a joint prehearing statement five days before the scheduled September 18, 2019 prehearing conference.

The record shows that on September 11, 2019, Agency counsel emailed Complainant that he was working on the joint prehearing statement required by the AJ, wanted to coordinate with him, and asked if he was represented. Complainant replied on September 12, 2019, that he was not aware of the statement and would be represented by a named attorney. Later, on the same day, Complainant's attorney emailed Agency counsel that he had tentatively just decided (on the same day as the email) to represent Complainant, and asked Agency counsel to email him the joint prehearing statement so that after he had a chance to meet with Complainant he could prepare his portion. Agency counsel emailed the draft prehearing statement the same day. Less than 1½ hours later, Complainant's attorney returned the draft to Agency counsel inserting an introductory statement identifying himself, explaining he was just retained by Complainant on September 12, 2019, he had not yet had a chance to meet him to prepare his portion of the joint prehearing statement, but expected to do so on September 13, 2019, and would email Complainant's portion as soon as possible prior to the September 18, 2019 prehearing conference.

On September 12, 2019, the Agency filed the "Prehearing Statement" that, among other things, contained the language described above from Complainant's counsel. Complainant met with his attorney on Saturday, September 14, 2019, and on Monday, September 16, 2019, filed "Complainant's Prehearing Statement."

However, later the same day (September 16, 2019), the AJ dismissed Complainant's hearing request concluding no *joint* prehearing statement was filed by the ordered deadline (Friday, September 13, 2019). The AJ wrote that Complainant's intent to unilaterally file his portion of the prehearing statement was unacceptably noncompliant with his order to file a joint prehearing statement.

The AJ wrote Complainant did not ask for a postponement of the deadline and recounted that the August 22, 2019 order warned noncompliance would subject him to sanctions including dismissal. In dismissing Complainant's hearing request, the AJ concluded that Complainant's failure to respond indicated he was indifferent to the EEO process, violated the AJ's order, and failed to prosecute his complaint. As a sanction, the AJ dismissed Complainant's hearing request and remanded the complaint to the Agency to issue a FAD based on the evidence developed during the investigation.

In mid-afternoon September 16, 2019, Complainant's attorney emailed the AJ requesting he rescind his dismissal because Complainant's medical conditions prevented him from meeting with him until Saturday September 14, 2019, to prepare his prehearing statement, and it was submitted the next business day (Monday September 16, 2019). The AJ did not act on the request.

On remand, the Agency issued a FAD finding no discrimination. The instant appeal followed.

On appeal, Complainant argues that the AJ wrongly dismissed his hearing request. He argues that while the prehearing statement was due by September 13, 2019, he was unable to meet with his attorney to get help drafting it until September 14, 2019, because assembling the information led to a panic attack that completely shut him down without the ability to concentrate, and he was unable to gather himself until September 14, 2019. He argues this was a one-time unintentional event caused by his medical disabilities.

In reply to Complainant's appeal, the Agency argues that the AJ's dismissal of Complainant's hearing request was not an abuse of discretion and that the FAD should be affirmed.

### ANALYSIS AND FINDINGS

The Commission's regulations confer upon its administrative judges (AJs) broad responsibility for adjudicating an EEO complaint once a complainant's hearing request has been granted, and that responsibility gives the AJs wide latitude in directing the terms, conduct, or course of EEO administrative hearings. Chere S. v. Gen. Serv. Admin., EEOC Appeal No. 0720180012 (Nov. 30, 2018). The AJ's discretionary authority includes the power to impose sanctions upon a party that fails to comply with his orders. *Id.* When the a party fails without good cause shown to respond fully and in timely fashion to an order of an administrative judge, or requests for the investigative file, for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the administrative judge shall, in appropriate circumstances: (i) draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information; (ii) consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party; (iii) exclude other evidence offered by the party failing to produce the requested information or witness; (iv) issue a decision fully or partially in favor of the opposing party; or (v) take such other actions as appropriate. 29 C.F.R. § 1614.109(f)(3).

Sanctions serve a dual purpose. On the one hand, they aim to deter the underlying conduct of the non-complying party and prevent similar misconduct in the future. Barbour v. U.S. Postal Serv., EEOC 07A30133 (June 16, 2005). On the other hand, they are corrective and provide equitable remedies to the opposing party.

Given these dual purposes, sanctions must be tailored to each situation by applying the least severe sanction necessary to respond to a party's failure to show good cause for its actions and to equitably remedy the opposing party. Royal v. Dep't of Veterans Affairs, EEOC Request No. 0520080052 (Sept. 25, 2009). Factors pertinent to "tailoring" a sanction, or determining whether a sanction is even warranted, include: (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; (4) the number of times the party has engaged in such conduct; and (5) the effect on the integrity of the EEO process as a whole. Id.

Here, the record establishes that Complainant retained an attorney on September 12, 2019, one day before the joint prehearing statement was due. While Complainant's attorney did not formally file a request for postponement with the AJ, he did, via a prominent insert in the Agency's Prehearing Statement filed on September 12, 2019, state he was just retained by Complainant, needed to meet with him, and would supplement the prehearing statement as soon as possible. Again, this was one day before the Joint Prehearing Statement was due.

We agree with the AJ's point that Complainant's unilateral prehearing statement did not technically comply with his order to the parties to coordinate with each other and file one joint prehearing statement. However, because Complainant retained the attorney just one day before the joint prehearing statement was due, there was insufficient time to coordinate a joint statement with the Agency. The same day the attorney was retained, he got in touch with Agency counsel, and notified the AJ via the inserted language in the prehearing statement filed by the Agency counsel that Complainant retained him the same day and why more time was needed. While inartful, a fair interpretation of this is that it was a request for a brief extension.

We have consistently held in recent decisions that dismissal of a hearing request as a sanction is only appropriate in extreme circumstances. One such circumstance is when the complainant engages in contumacious conduct, not merely negligence. Cassey B. v. Dep't of Veterans Affairs, EEOC Appeal No. 2019004838 (Sept. 24, 2020); Cecile T. v. Dep't of the Treasury, EEOC Appeal No. 2019002373 (Sept. 22, 2020); Carolyn M. v. U.S. Postal Serv., EEOC Request No. 2019004843 (Mar. 10, 2020). Examples of contumacious conduct warranting dismissal of hearing requests include: Charlie K. v. Dep't of Veterans Affairs, EEOC Appeal No. 2019002293 (Sept. 22, 2020) (failure to provide investigative affidavit during agency investigation and failure to provide answers to interrogatories during discovery despite being granted multiple extensions in both phases of the proceeding, as well as failure to appear at pre-hearing conference); and Cleo S. v. U.S. Postal Serv., EEOC Appeal No. 0120181406 (Feb. 28, 2020) (failure to participate in email communications being sought by the Agency and to

produce documentation ordered by AJ in a manner demonstrating disregard for administrative process and unwillingness to comply with AJ's orders despite warning of consequences). Absent a showing of contumacious conduct, hearing requests may also be dismissed where the complainant fails to pursue his or her claim with due diligence. Alice S. v. Soc. Sec. Admin., EEOC Appeal No. 2019002475 (Sept. 22, 2020) (failure to respond to emails from AJ that included initial conference order and order to show cause due to overlooking those emails); Robert A. v. U.S. Postal Serv., EEOC Appeal No. 0120182698 (Feb. 21, 2020) (failure to respond to order to show cause despite having received order from AJ via email, and failure to provide evidence that he was incapacitated and unable to comply with the order).

In other words, there must be a showing that Complainant either willfully disobeyed the AJ's orders or unreasonably failed to respond to those orders in order to justify dismissal of the hearing request as a sanction. In the absence of either circumstance, we cannot as a matter of law find that the integrity of the administrative EEO complaints process had been so compromised as to warrant the most severe sanction. Here, we do not find that the actions of Complainant through his attorney were either willful disobedience to the AJ's order or unreasonable under the circumstances. The AJ was notified, via the language in the timely filing by the Agency, that Complainant had just acquired an attorney, was meeting with him within a matter of a few days and expected to file a supplemental prehearing submission several days in advance of the scheduled prehearing conference. In this case, we can find no evidence that Complainant either engaged in contumacious conduct of the type that was present in Charlie K. or Cleo S. or failed to exercise due diligence in pursuing her claim as in Alice S. and Robert A. The dismissal decision ignored Complainant's request for a brief extension, which was made for good cause. Complainant's counsel exercised good faith by scrambling the same day he was retained to September 16, 2019, including the weekend, to comply as much as he could with August 22, 2019 order, but ran out of time.

We therefore determine that the AJ's dismissal of Complainant's hearing request as a sanction was improper under the specific circumstances presented here. None of the factors that need to be shown to warrant this sanction are present in this case. Accordingly, we VACATE the Agency's final decision and remand this matter for a hearing in accordance with the Order below.

### ORDER

Within 30 calendar days from the date this decision is issued, the Agency shall submit a request for a hearing on Complainant's behalf to the appropriate EEOC Hearings Unit, as well as the entire complaint file and a copy of this appellate decision. Thereafter, the AJ shall process the complaint 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.

The Agency shall provide a copy of hearing request to Complainant, as well as the Compliance Officer as referenced below.

### 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 (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>

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:



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Carlton M. Hadden, Director  
Office of Federal Operations

July 28, 2021

Date