



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

[REDACTED]
Brendan D.,¹
Petitioner,

v.

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

Petition No. 2020001938

Appeal No. 0120172594

Hearing No. 550-2014-00226X

Agency No. 200P-570-2009-101601

DECISION ON A PETITION FOR ENFORCEMENT

On January 21, 2020, the Equal Employment Opportunity Commission (EEOC or Commission) docketed a petition for enforcement to examine the enforcement of an Order set forth in EEOC Appeal No. 0120172594 (February 12, 2019). The Commission accepts this petition for enforcement pursuant to 29 C.F.R. § 1614.503.

BACKGROUND

Since 1990, Petitioner has been a Staff Physician in the Surgical Service of the Veterans Administration Central California Health Care System (CCHCS) in Fresno, California.

Petitioner's educational background includes Yale (B.S. 1974) and Harvard (M.D. 1978), followed by internships and residencies at Johns Hopkins Hospital and St. Luke's-Roosevelt Hospital Center. He also performed research and surgical oncology fellowships at the Memorial Sloan-Kettering Cancer Center.

¹ This case has been randomly assigned a pseudonym which will replace Petitioner's name when the decision is published to non-parties and the Commission's website.

Immediately preceding his position with the Agency, Petitioner spent two years as an instructor and assistant professor of oncology and surgery at Howard University.

In 1998, following the investigation of an operating room death at the Agency, Petitioner voluntarily relinquished his invasive surgical procedure privileges. The Board of Investigations (hereinafter “Board”) recommended that he be granted temporary privileges to treat clinic patients and perform non-invasive surgical procedures until his return to invasive surgical procedures. Petitioner expected his “proctoring” for invasive surgical procedures would begin in January 1999. However, in the years that followed, the Agency delayed plans for proctoring. Moreover, the proctoring that was eventually provided was limited. Consequently, in the absence of successfully completed proctoring for numerous procedures, Petitioner’s privileges remained reduced.

On May 18, 2009, Petitioner filed a formal EEO complaint. Complainant claimed that he was subjected to unlawful discrimination based on his race (African-American) in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. Specifically, Petitioner claimed that:

On February 12, 2009 and continuing, his requests to reinstate his privileges for major abdominal surgery and major soft tissue surgery were denied.²

Following an investigation, the Agency provided Petitioner with a copy of the Report of Investigation (ROI) and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Petitioner timely requested a hearing. While the matter was pending a hearing, on January 16, 2013, the parties executed a settlement agreement.

The settlement agreement, in relevant part, required the Agency to:

2. Within 60 days, Chief of Staff, Central California Health Care System will contact the VISN 21 Chief Medical Officer to send a request to all VISN 21 facilities to determine which facility would be willing to accept [Petitioner] for proctoring. If [Chief of Staff] does not receive a response to his request within 30 days, he will request that the VISN 21 Chief Medical Officer submit a request to the remaining 22 VISN Chief Medical Officers to determine which facility would

² In initially dismissing the complaint for failure to state a claim, pursuant to 29 C.F.R. 1614.107(a)(1), the Agency framed the claim as: “on February 12, 2009, the Chief of Surgical Service advised Complainant to submit a list of completed cases in response to Complainant’s February 10, 2009 request as to what he needed to do, to have his invasive surgical procedure privileges restored.” On appeal, the Commission determined that a fair reading of the complaint reflected more than the particular incident and reframed the claim as stated above. See Complainant v. Dep’t of Veterans Affairs, EEOC Appeal No. 0120093470 (Nov. 12, 2009). The Agency’s dismissal was reversed and the matter remanded for further processing. See id.

be willing to accept [Petitioner] for proctoring. The surgical procedures [Petitioner] will be proctored on include the surgical procedures identified on [Petitioner's] Application for Clinical Privileges - Surgical Service; General Surgery Core Privileges attached as Exhibit "A" to this Agreement.³

[Petitioner] does not expect to be proctored on those items on page 2 of 4 which he has lined out.

The proctoring should focus on colorectal surgical procedures; and soft tissue surgical cases including wide local excision of malignant melanoma, soft tissue sarcoma surgery, breast conservation surgery, mastectomies with axillary lymph node dissection, and axillary and groin lymph node dissections.

...

4. The Agency will request that the facility which accepts [Petitioner] work out an acceptable proctoring plan with him, which will then be submitted to that facility's Professional Standards Board for approval.

5. . . . Provided [Petitioner] successfully completes the proctoring process, his privileges will be restored by the Agency for the performance of all general surgical procedures as requested and set forth in Exhibit A to this Settlement Agreement and Release."

Approximately one year later, in January 2014, when the Agency failed to locate and enroll Petitioner in a proctoring program, Petitioner informed the Agency that he would be proceeding with his EEO complaint. Treating Petitioner's contact as an allegation of breach, the Agency issued a decision on March 14, 2014, finding the agreement was void and reinstating Petitioner's underlying complaint. The case went to a hearing before an EEOC AJ.

On December 18, 2016, the AJ issued a decision finding that Petitioner was subjected to discrimination as alleged. The AJ viewed Petitioner's complaint as one of "disparate treatment extending back to at least 1998, when as a result of the root cause case, Petitioner's surgical privileges were summarily suspended while those of the attending Caucasian anesthesiologist, apparently also culpable, were not."

³ Some of the procedures listed in Exhibit A included: conditions, illnesses and injuries of the Alimentary Tract; breasts, skin and soft tissue, including breast biopsy; endoscopic procedures, including rigid and flexible proctosigmoidoscopy, operative choledochoscopy, laryngoscopy, bronchoscopy, esophagoscopy, gastroscopy, PEG tube placement, colonoscopy, and peritoneoscopy, gastroenterology stent placement; basic and advanced laparoscopy, surgical oncology; complete care of crucially ill patients with underlying surgical conditions in the ER and ICU; insertion and management of chest tubes and central venous catheters, pulmonary artery and arterial catheters.

An in-depth inquiry by the Board resulted in several recommendations, including the development and implementation of a more formal proctoring process. The Chief of Surgical Services assured the Board of his willingness to develop such standards and program, as well as to work with Petitioner regarding the suggestions. However, the AJ determined that, instead, the Chief of Surgical Services had no intention of providing Petitioner with proctoring. The AJ explicitly noted that he found Petitioner to be credible and the Chief of Surgical Services to not be credible. For example, the AJ found no evidentiary support for the Chief's statement to the EEO Investigator that Petitioner's "deficit included poor surgical judgment" which required "an extended period of retraining." According to the AJ, during approximately the same time period that Petitioner initially sought to regain his surgical privileges, another Caucasian physician also lost privileges, only to have them restored one year later. The AJ stated that in this case, the Chief of Surgical Services "obstruction of Petitioner's proctoring" extended for years. At the time of the AJ's decision, seventeen years after their suspension, Petitioner's privileges had yet to be restored. Reflecting the AJ's observation that "...the Agency's proctoring, or lack thereof, is at the heart of the matters herein", the AJ's award of remedies specifically included the following actions:

Within thirty (30) days of the date that this decision or any appellate decision becomes final, whichever is later, the Petitioner and the Agency will develop a schedule for proctoring the Complainant in all surgical procedures in which the Complainant remains interested and for which he is otherwise qualified absent such proctoring. Within sixty (60) days of the date that this decision or any appellate decision becomes final, whichever is later, Complainant's proctoring should commence. [Chief of Surgical Services] should not be involved in either the development or implementation of the proctoring schedule or in the evaluation of the Complainant's proctoring. C.F. Complainant v. [Dep't of Justice], EEOC Appeal No. 0720140036 (September 22, 2015). Upon the completion of such proctoring, Complainant's assignments will be adjusted to reflect such surgical procedures for which he is fully qualified.

The Agency issued a final order, dated May 2, 2017, fully implementing the AJ's decision. The decision restated⁴ the remedies ordered by the AJ, including the provision regarding proctoring.

In June 2017, purportedly in compliance with the EEOC AJ's uncontested order, the Agency provided Petitioner with a Surgery Proctor Memorandum. The memo stated that although he currently held surgical privileges for open inguinal hernia repair and open umbilical hernia repair, more than two years had passed since Petitioner had performed such procedures and he was therefore required to scrub in on at least five cases of each repair. The memo did not specify whether the plan allowed Petitioner "all surgical procedures in which the Petitioner remains interested and for which he is otherwise qualified absent such proctoring."

⁴ The Agency's order did not include the time limits set by the AJ.

Believing that the memo did not comply with the wording or spirit of the AJ's order, in accordance with 29 C.F.R. 1614.504, Petitioner informed the Agency's EEO Director. Petitioner asserted that he should not have been restricted to performing only open umbilical hernia repair and/or open inguinal hernia repair. Further, according to Petitioner, the Agency never held a meeting regarding what surgical procedures he was still interested and qualified to perform. When the Agency failed to address his concerns, Petitioner contacted the Commission.

In our prior decision, limited to consideration of the Agency's compliance with the proctoring provision, we concluded that the Agency had not taken the ordered actions. See Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120172594 (Feb. 12, 2019). Despite the AJ's clear directive that "Complainant *and* the Agency will develop a schedule for proctoring the Complainant in *all surgical procedures in which the Complainant remains interested* and for which he is otherwise qualified absent such proctoring" (emphasis added), Petitioner was never contacted for input. See id. Moreover, the proctoring schedule only provided for two types of surgeries. See id. The case was remanded to the Agency for full compliance within sixty calendar days of issuance of the decision.⁵ See id.

Three months later, Petitioner submitted the instant Petition for Enforcement (PFE). On June 19, 2019, the Agency submitted a compliance report which included the following: a proctoring plan, list of proctoring meetings, and details about adjusted assignments. In December 2019, Petitioner reiterated his belief that the Agency had not complied with the Commission's order as it had neither set a schedule for proctoring nor adjusted his assignments. On January 21, 2020, the Commission docketed the petition now before us.

ANALYSIS AND FINDINGS

On June 21, 2019, the Agency submitted a compliance report to the Commission. The report was comprised of three sections: Proctoring Plan, Proctoring Meetings, and Adjustment of Assignments. A review of the documents, however, reveal that they only concern Agency actions taken *prior* to our decision in EEOC Appeal No. 0120172594, and therefore clearly are not in response to the Commission's order. For example, in the "Proctoring Meetings" section, all the notes relate to meetings that were held in 2017. In fact, many of the documents submitted were referenced in our February 12, 2019 decision in concluding that compliance had *not* been established.

The "Adjustment of Assignments" shows that Petitioner held privileges for two surgical procedures (open inguinal hernia repairs and umbilical hernia repairs). This is precisely one of the issues raised in EEOC Appeal No. 0120172594, namely that the Agency had not provided proctoring for "all surgical procedures in which Complainant remains interested. . . ."

⁵ The matter was assigned to a Compliance Officer and docketed as Compliance No. 2019001717.

The Agency was required, first by the AJ's December 2016 decision and again by our February 2019 appellate decision, to collaborate with Petitioner in developing a proctoring plan for all surgical procedures Petitioner was interested in and otherwise qualified for. The Agency's compliance report fails to show the ordered actions were taken.

In response to the instant petition, the Agency yet again attempts to persuade the Commission of its compliance by pointing to the proctoring completed with respect to inguinal hernia and umbilical hernia repairs. As clearly set forth above, Petitioner held privileges for these two surgical procedures even at the time he filed his EEO complaint. Rather, it is the reinstatement of privileges for *additional* surgical procedures, through proctoring, that was the focus of the EEO complaint and is presently the compliance issue before us. Therefore, such argument is rejected.

Additionally, the Agency appears to imply that Petitioner is not qualified to receive proctoring and has instead suggested that he apply and enter "an accredited surgical re-entry program". Petitioner describes a June 25, 2019 meeting with Agency officials where he was provided information on private organizations that offered such re-entry/retaining courses. Viewing such programs as necessary for physicians who were not in active practice, Petitioner rejected the Agency's offer to finance such training. He emphasized that his surgical practice was uninterrupted and noted his 2018 re-certification by the American Board of Surgery.

Further discussion of a re-entry program ensued, via email, between Petitioner and then Chief of Staff (hereinafter Chief-W). According to Petitioner, Chief-W explained that his lack of demonstrated competency on procedures for more than one year was the equivalent of having left the practice of such procedure. Moreover, the Agency was willing to finance Petitioner's enrollment in such a program because the facility "does not currently have the bandwidth to provide attending physician re-entry training in the breadth of procedures you have requested".

The Commission declines to accept the Agency efforts to replace proctoring with enrollment in a private re-entry program as compliance. It may not substitute the remedy awarded to Petitioner by the Commission with one of its own choosing.

Before proceeding, we shall examine the ordered remedial action of "proctoring". The EEO Investigator, citing Agency policy, defined the "Proctoring Process" as "done for supervision for a defined period of time". As noted repeatedly throughout the record, while the Agency has discriminatorily delayed the process in Petitioner's case, proctoring for a surgical procedure is typically completed within a three-month period. As stated in a December 23, 2019 email from the Acting Chief of Staff to Petitioner, when seeking additional privileges "a proctor is assigned to assess competence". The proctor is tasked with observing another practitioner in the performance of a specified activity and report on those observations. According to the Acting Chief of Staff, while a proctor must have clinical privileges, she must not be directly involved with the care being delivered. If a proctor is required to impart knowledge, skill, or aptitude to ensure appropriate and effective care, this no longer constitutes proctoring, but rather, supervising.

Yet testimony during the EEO hearing also reflected the view that the proctor may participate in pre-operative evaluation of the patient, assist during the operation, and contribute to post-operative care. Proctoring was said to be used when a new technique was being learned or when a physician had not mastered a procedure. In this case, the Agency was found to have discriminated against Petitioner during his efforts to regain privileges for additional surgical procedures. Specifically, the then-Chief of Surgical Services was found to have obstructed Petitioner's opportunities to receive and complete the proctoring necessary to reinstate his privileges.

Since choosing to fully implement the AJ's decision in May 2017, the Agency has not taken the actions required to do so to by providing Petitioner with proctoring to permit the reinstatement of privileges. Its excuses, repeated over the years, include the following actions: a lack of interest by Petitioner; the facility's inability to fulfill the numerous procedures requested; and Petitioner's purported ineligibility for proctoring due largely to the passage of time. As asserted by Petitioner in his petition, the Agency's contention that it cannot proctor him on additional surgical procedures because he has not demonstrated recent competencies or experience "goes to the very heart of the EEO complaint." Any deficiency in Petitioner's experience is due to the Agency's prior discriminatory conduct and its continued failure to provide the awarded remedy. Petitioner aptly noted that "the Agency's main argument regarding compliance problematically rests on its own prior acts of discrimination."

The Commission is clearly not in the position to assess the qualifications of a surgeon. Nevertheless, we find that the instant record to be informative as to the procedures Petitioner has expressed interest and methods for ensuring he is fit for proctoring. In July 2019, in response to Chief-W's request for his top preferences for surgical procedures, Petitioner stated: (1) conditions, illness, and injuries of the beak, skin and soft tissue, including breast biopsy; (2) colonoscopy, central line placement, arterial line placement; and (3) open colon resection, hemorrhoidectomy. Chief-W did not object to any of the identified procedures, and began efforts to locate a physician to perform the proctoring.⁶ In a December 23, 2019 email, the Acting Chief of Staff acknowledged Petitioner's desire to add the following surgical procedures to his credentialing privileges: (1) colorectal surgical procedures, (2) soft tissue surgical cases including wide local excision cases, (3) soft tissue sarcoma surgery, (4) breast conservation surgery and mastectomies, (5) axillary and groin lymph nodes dissection, and (6) open and laparoscopic cholecystectomies. Additionally, as set forth in the January 2013 settlement, the Agency agreed to proctor Petitioner in numerous procedures. See footnote 3.

The record does not establish that Petitioner requires a re-entry program in place to qualify for proctoring. Such method would appear to unfairly impart additional delay and further harm to Petitioner's career. Instead, the record indicates that any perceived or actual deficits in Petitioner's readiness for proctoring can be resolved through a mentoring process.

⁶ According to Complainant, Chief-W located an Agency surgeon in Philadelphia who was interested in proctoring him on endoscopic procedures. But Chief-W left the facility before her tentative arrangements came to fruition.

Petitioner is amenable to receive “mentoring” for surgical procedures he has not performed in more than two years.

The initial mentoring period will be immediately followed by proctoring. Previous Commission orders required collaboration between Petitioner and the Agency in creating a proctoring plan and implementation of proctoring. In light of the history of this case, we emphasize the Agency’s obligation in these efforts. The instant record contains many instances where management officials primarily placed the responsibility upon Petitioner to locate and obtain physicians willing to proctor in the surgical procedures of his interests. The Agency is reminded that it has been found to have discriminated against Petitioner and in order to remedy that discrimination it must provide proctoring. Therefore, the efforts necessary to fulfill this requirement lies with the Agency. We also stress the need for swift compliance by the Agency in this matter. In the approximately *five years* that have followed since the Agency agreed to the finding of discrimination, Petitioner has not received proctoring and regained privileges for any additional surgical procedures.

CONCLUSION

Accordingly, we **GRANT** this petition for enforcement and **REMAND** this matter to the Agency so that it can take further actions consistent with this decision and the **ORDER** set forth below.

ORDER

To the extent it has not already done so, the Agency is ordered to take the following remedial actions:

- (1) Within 30 calendar days of the date this decision was issued, the Agency shall meet with Petitioner to review and discuss all surgical procedures in which Petitioner remains interested and is otherwise qualified absent the passage of time. Petitioner shall prioritize his desired procedures and the parties shall begin efforts to obtain an appropriate mentor(s) for his top five procedures.
- (2) Within two weeks of the parties’ meeting, Petitioner shall be assigned a mentor and begin the mentoring process for at least three of his top five procedures.
- (3) Within 60 days of the start of the mentoring process, the mentor shall assess Petitioner’s readiness to receive proctoring on the surgical procedures mentored.
 - a. If found to be eligible for proctoring, the Agency will begin proctoring within 30 days of the conclusion of mentoring.

- b. If not found to be eligible for proctoring, the Agency shall extend the mentoring process for an additional 30 days. Following the extension of mentoring a reassessment for proctoring will be immediately conducted.
- (4) Proctoring for the successfully mentored surgical procedures shall be completed within three to six months of initiation. Following the conclusion of proctoring, Petitioner may request to be evaluated for privileges for those surgical procedures.
- (5) The following methods and time frames for mentoring and proctoring shall be repeated to address the remaining surgical procedures identified by Petitioner at the initial meeting.
- (6) Upon the completion of proctoring, Petitioner's assignments will be adjusted to reflect such surgical procedures for which he has been granted privileges.

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation of the Agency's implementation of the corrective actions ordered.

ATTORNEY'S FEES (H1019)

If Petitioner 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 Petitioner and his/her representative.

If the Agency does not comply with the Commission's order, the Petitioner may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a).

The Petitioner 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 Petitioner 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 Petitioner 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.

PETITIONER'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 Petitioner's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

June 2, 2021

Date