



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Catherina B.,¹
Complainant,

v.

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

Appeal No. 2021000819

Agency No. 2004-0688-2020103966

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated October 6, 2020, dismissing her complaint alleging unlawful 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Medical Administrative Officer, GS-14, in the Business Office at the Agency's VA Medical Center in Washington, DC.

On May 7, 2020, Complainant initiated equal employment opportunity (EEO) contact alleging that the Agency subjected her to discrimination based on reprisal for prior protected EEO activity (November 2019 EEO complaint) when, on April 20, 2020, management issued a corrective action to demote Complainant from GS-14 Chief of Business Office to GS-11 Program Analyst.

Following the EEO counseling period, on August 6, 2020, an EEO Counselor emailed Complainant (and her legal representative) a Notice of Right to File a Discrimination Complaint

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.

(NORF).² The NORF stated, “If you decide to file a formal complaint, you have 15 calendar days from receipt of this notice in which to do so.” On August 25, 2020, via her legal representative, Complainant filed a formal EEO complaint alleging that the Agency retaliated against her when, on April 20, 2020, management proposed Complainant’s demotion.

In a final decision dated October 6, 2020, the Agency dismissed Complainant’s complaint pursuant to 29 C.F.R. § 1614.107(a)(2), for untimely filing of the formal complaint. The Agency cited August 6 as the NORF receipt date.

The instant appeal from Complainant followed. On appeal, Complainant stated, several days after completion of the Agency investigation but prior to requesting a hearing, she attempted to amend her November 22, 2019 complaint with the instant matter.³ Complainant stated that the Agency erroneously processed it as a separate EEO complaint. Further, Complainant stated that she filed the instant formal complaint within 15 days of receipt of the NORF. Complainant stated that she and her attorney did not receive the NORF until August 13, 2020.

In opposition, the Agency stated that the instant matter could not be treated as an amendment because Complainant requested a hearing on her November 2019 complaint on May 6 or 7, 2020. The Agency stated that Complainant did not challenge the accuracy of the August 6 NORF date when she received the duplicate NORF on August 13.

ANALYSIS AND FINDINGS

The regulation set forth at 29 C.F.R. § 1614.107(a)(2) states, in pertinent part, that an agency shall dismiss a complaint which fails to comply with the applicable time limits contained in 29 C.F.R. § 1614.106. EEOC Regulation 29 C.F.R. § 1614.106(b) requires that complaints of discrimination be filed within fifteen (15) calendar days of receipt of the Notice of Right to File a Discrimination Complaint. However, these time limits are subject to waiver, estoppel and equitable tolling. 29 C.F.R. § 1614.604(c).

Where there is an issue of timeliness, “[a]n agency always bears the burden of obtaining sufficient information to support a reasoned determination as to timeliness.” Guy v. Dep’t of Energy, EEOC Request No. 05930703 (January 4, 1994) (quoting Williams v. Dep’t of Defense, EEOC Request No. 05920506 (August 25, 1992)).

² The record shows that the NORF email was delivered to Complainant on August 6, 2020 at 6:25 p.m. For her attorney, the record states, “Delivery to these recipients is complete . . . but no delivery notification was sent by destination server.” On August 13, 2020, the Agency issued a duplicate NORF to Complainant and her attorney, indicating that the original date of August 6 remains the notice date.

³ We note that Complainant’s November 2019 EEO complaint is pending at the hearing stage. The Commission docketed the matter as Hearing No. 570-2020-01045X. Complainant filed her hearing request on May 8, 2020.

In addition, in Ericson v. Dep't of the Army, EEOC Request No. 05920623 (January 14, 1993), the Commission stated that “the agency has the burden of providing evidence and/or proof to support its final decisions.” See also Gens v. Dep't of Defense, EEOC Request No. 05910837 (January 31, 1992).

We find that while the record as submitted by the Agency shows that Complainant received a NORF email on August 6, 2020, the record does not confirm that her legal representative received the NORF prior to August 13. Pursuant to 29 C.F.R. § 1614.605(d), “When the complainant designates an attorney as representative, service of all official correspondence shall be made on the attorney and the complainant, but time frames for receipt of materials shall be computed from the time of receipt by the attorney.” Here, the record shows that the NORF email was delivered to Complainant on August 6, 2020 at 6:25 p.m. For her attorney, the record states, “Delivery to these recipients is complete . . . but no delivery notification was sent by destination server.” The Agency emailed a duplicate NORF to Complainant and her attorney on August 13, 2020. Complainant stated that August 13 is when they first received the NORF. Complainant filed her formal complaint on August 25, 2020, which is within the 15-day timeframe articulated in 29 C.F.R. § 1614.106(b).

It is the burden of an agency to provide the evidence or proof to substantiate its final decision. See Marshall v. Dep't of the Navy, EEOC Request No. 05910685 (September 6, 1991). As the Agency has not met its burden to show that Complainant’s attorney received the NORF prior to August 13, we find the Agency has not substantiated its decision and dismissal was improper.

CONCLUSION

Accordingly, we REVERSE the Agency's final decision dismissing Complainant's complaint and REMAND the matter to the Agency for further processing.

ORDER (E0618)

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

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

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and § 1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (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)

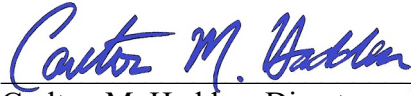
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this 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:



Carlton M. Hadden, Director
Office of Federal Operations

April 27, 2021
Date