



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]  
Alfonso T.,<sup>1</sup>  
Complainant,

v.

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

Appeal No. 2021001207

Agency No. 200H-VI01-2020104808

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated October 16, 2020, dismissing his formal 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., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

**BACKGROUND**

During the period at issue, Complainant was a former Agency employee and applicant for various positions at the Agency's five VA Medical Centers located in various cities.

On June 25, 2020, Complainant initiated EEO Counselor contact. Informal efforts at resolution were not successful.

On August 17, 2020, Complainant filed a formal EEO complaint that was subsequently amended.<sup>2</sup>

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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.

<sup>2</sup> Complainant's formal complaint initially only included two non-selections which occurred on June 15 and 19, 2020. The Agency identifies these non-selections as claims 4 and 5.

According to the Agency, Complainant claimed that he was discriminated against based on race, sex, and age when he was non-selected for a total of twenty-two positions.

In its October 16, 2020 decision, the Agency first accepted fourteen of the twenty-two non-selections as timely raised before an EEO Counselor. The Agency identified the fourteen accepted non-selections as the following:

1. on June 16, 2020, Complainant learned he was not selected for the Program Analyst position he applied for (Job Announcement Number CBTD-10701646-20-JM);
2. on August 11, 2020, Complainant was notified that the tentative offer he had received for the Education Services Specialist position he had applied for had been cancelled (Job Announcement Number CBTD-10682997-20-JP);
3. as of August 17, 2020, Complainant had not been selected for the Program Analyst position he applied for (Job Announcement Number CARZ-10711830-20-LAL);
4. on June 15, 2020, Complainant learned he was not selected for the Health System Specialist (GHATP Trainee) position he applied for (Job Announcement Number CBTD-10717879-20-SC);
5. on June 19, 2020, Complainant learned he was not selected for the Health System Specialist position he applied for (Job Announcement Number CBTD-10806149-20-DB);
6. as of August 17, 2020, Complainant had not been selected for the Management Analyst position he applied for (Job Announcement Number CARZ-10711699-20-LJJ);
7. on August 3, 2020, Complainant was notified that he had not been selected for the Paralegal Specialist position he applied for (Job Announcement Number CBAF-OGC-10718265-AA);
8. as of August 17, 2020, Complainant had not been selected for the Auditor (Performance) position he applied for (Job Announcement Number 20-VAOIG-202);
9. on June 26, 2020, Complainant was notified that he was not referred for the Safety and Occupational Health Specialist position he applied for (Job Announcement Number CARZ-10840960-20-DLe);

10. on July 14, 2020, Complainant was notified that he was not referred the Supervisory Health Systems Specialist position he applied for (Job Announcement Number CARZ-10847130-20-NDG);
11. on July 16, 2020, Complainant was notified that he was not referred for the Grants Management Specialist position he applied for (Job Announcement Number CARZ-10852703-20-SER);
12. on September 10, 2020, Complainant was notified that he was not referred for the Health Science Specialist position he applied for (Job Announcement Number CARZ-10903727-20-JDC);
13. on September 10, 2020, Complainant was notified that he was not referred for the Financial Management Specialist position he applied for (Job Announcement Number CBTD-10862043-20-MG);
14. on October 1, 2020, Complainant was notified that he was not referred for the Program Specialist position he applied for (Job Announcement Number CARZ-10919057-20-CMB);<sup>3</sup>

The Agency then dismissed the remaining eight claims, pursuant to 29 C.F.R. § 1614.107(a)(2), for untimely EEO Counselor contact. The Agency determined that Complainant initiated EEO Counselor contact on June 25, 2020, which it found to be beyond the limitation period. The Agency identified the remaining eight non-selections as follows:

- A. on January 31, 2020, Complainant was notified that he was not referred for the Emergency Management Specialist position he applied (Job Announcement Number CBTD-10681185-20-JM);
- B. on January 31, 2020, Complainant was notified that he was not referred for the Program Specialist position he applied (Job Announcement Number CARZ-10701533-20-MIZ);
- C. on February 12, 2020, Complainant was notified that he was not referred for the Program Analyst position he applied (Job Announcement Number CARZ-10708454-20-MJM);

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<sup>3</sup> Because these vacancy announcements involved different VA Medical Centers, the Agency grouped these claims by location. Consequently, claims 1 – 3 are identified under Agency Case Number 200H-0518-2020106644; claims 4 – 6 are identified as Agency Case Number 200H-0523-2020106645; claim 7 is identified as Agency Case Number 200H-X002-2020106647; claim 8 is identified as Agency Case Number 20DR-0050-2021100047; and claims 9 – 14 are identified under Agency Case Number 200H-VI01-2020106676.

- D. on March 4, 2020, Complainant was notified that he was not selected for the Health Systems Specialist position he applied (Job Announcement Number CBTD-10699597-20-DB);
- E. on March 11, 2020, Complainant was notified that he was not selected for the Cyberseminar Coordinator position he applied;
- F. on April 2, 2020, Complainant was notified that he was not referred for the Health Science Specialist position he applied (Job Announcement Number CARZ-107570190-20-BMB);
- G. on April 10, 2020, Complainant was notified that he was not referred for the Health System Specialist position he applied (Job Announcement Number CARZ-10758576-20-MIZ);
- H. on April 21, 2020, Complainant was notified that he was not selected for the Program Specialist position he applied (Job Announcement Number 301-20-BJ-10753526).

The instant appeal followed.<sup>4</sup>

On appeal, Complainant argues that he repeatedly was not selected for various positions at the Agency over a period of time. Complainant further asserts that he timely contacted an EEO Counselor when he reasonable suspected that he was being discriminated against. Complainant states that it was only after he contacted Human Resources following his non-selections that he determined that the “peculiar explanations” provided for his non-selections made it clear to him that discriminatory practices were at play. Consequently, Complainant requests that the dismissed non-selections be adjudicated with the other non-selections the Agency accepted.

#### ANALYSIS AND FINDINGS

EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination should be brought to the attention of the Equal Employment Opportunity Counselor within forty-five (45) days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within forty-five (45) days of the effective date of the action.

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<sup>4</sup> By regulation, we do not consider an appeal from a partial dismissal of some claims in a complaint until the entire complaint is adjudicated. 29 C.F.R. 1614.107(b). However, it appears that the Agency has subsequently broken the accepted non-selections into new separate complaints by location. See Note 3 of this decision. Under these unique circumstances, we have decided to accept this appeal concerning the dismissed claims.

Our review of the record indicates that Complainant initiated EEO Counselor contact on June 25, 2020. Because non-selections are at issue, Complainant had to have EEO Counselor contact within 45 days of the effective date of these non-selections. With EEO Counselor contact occurring on June 25, 2020, timely non-selections would have to have occurred on or after May 11, 2020. For this reason, the Agency dismissed claims A through H as untimely raised because the effective date of these non-selections occurred before May 11, 2020.

However, the Commission has adopted a “reasonable suspicion” standard to determine when the forty-five (45) day limitation period is triggered. See Howard v. Dep’t of the Navy, EEOC Request No. 05970852 (Feb. 11, 1999). Thus, the time limitation is not triggered until a complainant reasonably suspects discrimination, but before all the facts that support a charge of discrimination have become apparent.

Here, Complainant has asserted that he had no reason to suspect discrimination upon initially learning of his non-selections. We agree. Complainant asserts that there was nothing in the non-selection notifications that would prompt him to believe that his non-selection was discriminatory. Complainant was notified only that he was deemed ineligible for the positions. Complainant asserts that he did not have reasonable suspicion that he was being discriminated against until an August 11, 2020 mediation. During the August 11, 2020 mediation, Complainant states that he was provided information regarding the race, gender, age, and qualifications of the candidates selected or referred as eligible for the positions for which he applied. Complainant explained that he did not understand why a selection was made for a candidate who did not meet the requisite experience and education qualifications for the GS-11 position, even though Complainant had met the education requirements and had previously worked at the Agency. Complainant has persuasively asserted that he concluded the applicant information provided during the August 11, 2020 mediation indicated he may have been discriminated against because he *now* knew that other candidates, who did not have the requisite experience or education qualifications, were selected over him. Once this suspicion of discrimination was raised, Complainant identified a total of twenty-two non-selections he wanted to be considered in his formal complaint. Because Complainant did not develop reasonable suspicion until August 11, 2020, the 45-day limitation period began on this date and Complainant had until September 25, 2020, not June 25, 2020, to timely contact an EEO Counselor. As such, we conclude Complainant’s EEO counselor contact for the non-selections at issue should be deemed timely made and should not have been dismissed.

### CONCLUSION

We REVERSE the Agency’s final decision dismissing claims A – H for untimely EEO Counselor contact. We REMAND this matter to the Agency for further processing in accordance with the ORDER below.

ORDER (E0618)

The Agency is ordered to process the remanded claims (claim A through H) concerning Complainant's non-selections in accordance with 29 C.F.R. § 1614.108 et seq.<sup>5</sup> 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.

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<sup>5</sup> We remand the dismissed claims back to the Agency for continued processing as a separate complaint unless both Complainant and the Agency mutually agree that it is still feasible to process some or all of these claims with the various complaints currently being processed on the originally accepted claims.

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).

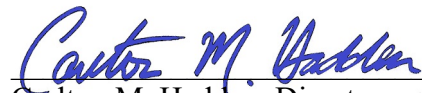
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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

June 8, 2021  
Date