



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

[REDACTED]  
Sidney S,<sup>1</sup>  
Complainant,

v.

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

Appeal No. 2021004173

Agency No. 200I-VI08-2021102420

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated June 16, 2021, dismissing a formal complaint of 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**

During the period at issue, Complainant worked for the Agency as an Assistant Medical Director in Fayetteville, North Carolina.

On February 25, 2021, Complainant initiated EEO Counselor contact. Informal efforts at resolution were not successful. On May 24, 2021, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination based on race. The Agency determined that the formal complaint was comprised of the following claims:

1. Whether Complainant was discriminated against based on race (Black) when on February 28, 2020, he was not selected for the position of Health System Administrator (Associate Director), GS-0670-15, vacancy announcement no. CBDG-10634188-20-AEM.

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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.

2. Whether Complainant was discriminated against based on race (Black) when on August 10, 2020, he was not selected for the position of Health System Administrator (Associate Director), GS-067015, vacancy announcement no, CBDG-1079843-20-AEM.
3. Whether Complainant was discriminated against based on race (Black), when on September 10, 2020 he was not selected for the position of Health System Administrator (Assistant Medical Director), GS-0670-14, vacancy announcement no. CBTC-10839287-20-SAF.
4. Whether Complainant was discriminated against based on race (Black) when on January 8, 2021, he was not selected for the position of Health System Administrator (Associate Director), GS-0670-15, vacancy announcement no. CBTC-10848635-20-SAF.

The Agency dismissed the formal complaint for untimely EEO Counselor contact. The Agency reasoned the alleged incidents occurred on February 28, 2020, August 10, 2020, September 10, 2020 and January 8, 2021, but that Complainant initiated EEO contact on February 25, 2021, outside of the applicable time period. The Agency further asserted that Complainant was aware of the 45-day time limit through trainings and postings at his facility.

The instant appeal followed. On appeal, Complaint requests that we reverse the Agency's final decision dismissing his formal complaint. Complainant, through his attorney, asserts that he did not suspect discrimination regarding the vacancies set forth in claims (1) - (4) until around February 20, 2021, after being alerted to a post on the Agency's website by a co-worker and he discovered that the selectee for the most recent opening (Vacancy Announcement No. BTC-10848635-20-SA) was of a different race (Caucasian). Complainant asserts that he informed the Agency's EEO Counselor, through his attorney, that he did not suspect discrimination until February 20, 2021.

#### 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 a personnel action, within forty-five (45) days of the effective date of the action. The Commission has adopted a "reasonable suspicion" standard (as opposed to a "supportive facts" 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.

The Agency improperly dismissed Complainant's complaint for untimely EEO Counselor contact. Complainant submits, on appeal, a copy of an email from his attorney to the EEO Counselor dated March 11, 2021.

Therein, Complainant's attorney asserts that Complainant did not reasonably suspect discrimination regarding the vacancies set forth in claims (1)-(4) until February 20, 2021, when he viewed the Agency's webpage and discovered that the selectee for the most recent position was of a different race (Caucasian).

Complainant also submits, as part of his appeal, a declaration under penalty of perjury. Therein, Complainant asserts that he did not reasonably suspect discrimination until around February 20, 2021, when he discovered the race and identity of the selectee when viewing the Agency's website. Complainant alleges that the vacancies set forth in claims (1), (2), and (4) were for the same position, Associate Director, GS-15, and that the Agency did not select a candidate until the most recent vacancy (CBTC-10848635-20-SAF) (claim (4)).<sup>2</sup> In an initial contact form, Complainant alleged that the selecting official was the same individual for the vacancies set forth in claims (1)-(4) and that the Agency keeps vacancies open or re-posts them but that minorities are not selected.<sup>3</sup> According to the Initial Contact Form, Complainant became aware on February 20, 2021 that the selectee for the Associate Director, GS-15 position was Caucasian (a different race). Based on the foregoing, we find that Complainant did not reasonably suspect race discrimination, regarding the vacancies set forth in claims (1)-(4), until February 20, 2021, when he became aware of the race of the selectee for the most recent position (claim (4)). Thus, we find Complainant timely initiated EEO contact on February 25, 2021.

### CONCLUSION

We REVERSE the Agency's final decision dismissing Complainant's complaint and 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 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.

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<sup>2</sup> The record reflects that Complainant received notifications that there were no selections made for the vacancies set forth in claims (1) and (2). Complainant File at 67, 86.

<sup>3</sup> The record reflects that Complainant also received a notification that there were no selections made for the vacancy set forth in claim (3), Assistant Medical Director, GS-14. Complaint File at 104.

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

October 20, 2021

Date