



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

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]  
Johnson P.,<sup>1</sup>  
Complainant,

v.

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

Appeal No. 2021004567

Agency No. 2004-0581-2021104248

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated July 21, 2021, dismissing his complaint alleging unlawful employment discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Housekeeping Aide, WG-2, at the Agency's VA Medical Center in Huntington, West Virginia.

On July 7, 2021, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the basis of age when, on April 26, 2021, Complainant was not selected for the Housekeeping Aide Supervisor position advertised under Vacancy Announcement number 11006963-21-JR-Group B.

The Agency dismissed the complaint, pursuant to 29 C.F.R. § 1614.107(a)(2), for untimely EEO counselor contact. In its dismissal, the Agency determined that April 26, 2021, was the date for determining timeliness because that was the date that Complainant alleged the discriminatory event took place. However, Complainant did not contact an EEO counselor until June 16, 2021, which was beyond the 45-day time requirement.

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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.

The instant appeal followed. Complainant asserts that the Agency delayed giving him and his Union representative the other applicants' scores, which he requested to review "to see if [he] could file an EEO." Complainant also requests a hearing. In response, the Agency reiterates its position that Complainant's contact with an EEO counselor was untimely, noting that Complainant was advised of the 45-day deadline.

### 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. § 1614.105(a)(1), in which in turn, requires that complaints of discrimination should be brought to the attention of the EEO Counselor within 45 days of the date of the matter alleged to be discriminatory or in the case of a personnel action, within 45 days of the effective date of the action.

Here, Complainant indicated on his formal complaint that the alleged event at issue occurred on April 26, 2021 and the record shows that he did not contact an EEO counselor until June 16, 2021, which is beyond the 45-day time limit. We acknowledge that Complainant has indicated that he was waiting on additional information prior to initiating his claim. However, the Commission has adopted a "reasonable suspicion" standard (as opposed to a "supportive facts" standard) to determine when the 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 complaint reasonably suspects discrimination, but before all the facts that support a charge of discrimination have become apparent. Therefore, we find the time limitation was triggered on April 26, 2021, when Complainant alleged that he was not selected for the position at issue. Furthermore, to the extent Complainant raises the fact that he had engaged the Union towards participation in that process as relating to his delay in initiating EEO Counselor contact, the Commission has consistently held that the utilization of agency procedures, union grievances, and other remedial processes does not toll the time limit for contacting an EEO Counselor. See Ellis v. United States Postal Service, EEOC Appeal No. 01992093 (November 29, 2000). We find Complainant has failed to provide sufficient justification for extending or tolling the time limit and, for these reasons, the Agency properly dismissed the formal complaint on the grounds of untimely EEO Counselor contact.

Accordingly, the Agency's final decision dismissing Complainant's complaint is AFFIRMED.

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 (S0610)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. 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. If you file a request to reconsider and also file a civil action, **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

December 22, 2021

Date