



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

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[REDACTED] Orlando O.,
[REDACTED] Jeffery J.,
[REDACTED] Shane L.,
[REDACTED] Jay C., &
[REDACTED] Gilbert B.,
Complainants,¹

v.

Lloyd J. Austin III,
Secretary,
Department of Defense
(Office of the Secretary of Defense),
Agency.

Appeal Nos. 2020003894, 2020003895, 2020003896, 2020003897, 2020003898, 2020003899,
2020003900, 2020003901, 2020003902, & 2020003903

Hearing Nos. 570-2015-00469X, -00470X, -00471X, -00472X, -00473X, -00474X,
-00475X, -00476X, -00477X, & -00478X

Agency Nos. 2010-PFPA-073, -077, -086, -088, -089, -090,
-091, -094, -095, & -100

DECISION

On June 17, 2020, the ten Complainants filed appeals with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's May 29, 2020 consolidated final decision concerning their essentially identical equal employment opportunity (EEO) complaints alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission REVERSES the Agency's final decision.

¹ This case has been randomly assigned pseudonyms which will replace the Complainants' names when the decision is published to non-parties and the Commission's website.

BACKGROUND

During the relevant period, Complainants worked as Police Officers, AD-0083, within the Pentagon Force Protection Agency (PFPA) located in Washington, D.C. As PFPA Police Officers, Complainants were responsible for security and law enforcement in the National Capital Region (NCR) for people, facilities, and infrastructure at the Pentagon Reservation and for Department of Defense activities and occupied facilities not under the authority of a military department. Police Officers were required to wear protective clothing and use personal protective equipment (PPE). Police Officers were required to defend themselves and others against possible exposure to explosives, chemicals, or other weapons of mass destruction.

Complainants all have a condition known as Pseudofolliculitis Barbae or PFB. PFB is a chronic bacterial skin disorder brought by shaving facial hair. PFB causes pain, skin irritation, pustules, rashes, sores, bleeding, scarring, and infection. Medically, PFB requires abstinence from being clean-shaven and predominantly affects African American males.²

On July 27, 2010, the Agency issued a new regulation which stated:

Supervisors shall ensure that all emergency response personnel are able to safely wear the Level C [Chemical-Biological-Radiological-Nuclear (CBRN)] PPE Ensemble at any time: facial hair that comes between the sealing surface of the face piece and the face or that interferes with the valve function is prohibited. Emergency response personnel who have a condition that interferes with the face-

² In a letter to the Agency dated November 13, 2008, a dermatologist for one of the complainants described the skin disorder, stating the following.

[Pseudofolliculitis Barbae] is seen most commonly in blacks with inherently curly hair. In this condition, the hairs, when shaved, then curve back into the skin and create ingrown hairs. . . pustules and large inflammatory papules develop which may persist and progress to scars and keloids.

Unfortunately there is no cure for the condition, and the only remedy is to allow the affected individual to wear a beard. The length of the beard need not be excessive and may be kept neatly trimmed.

In a letter to the Agency dated May 20, 2010, another dermatologist stated:

Pseudodofolliculitis Barbae . . . is an inflammatory condition of the hair follicles in the area. It is aggravated by shaving. Please allow [Complainant] to keep his beard area neatly groomed to help keep this disorder under control.

to-face piece seal or valve function shall not be permitted to wear the Level C CBRN PPE Ensemble.³

PFPA Regulation No. 9420, *Level C Protective Equipment*, at § VI.C.2.

Prior to this, the Agency had operated under General Order 1004.02 (August 1, 2002), which stated that Police Officers were required to be “clean, neat, and well-groomed at all times.” The General Order did not allow beards or goatees on Police Officers, with the exception of Officers with medical documentation from a physician. Officers who were unable to shave due to a medical condition could obtain a medical waiver for a period of time by submitting documentation from a physician. Officers who obtained waivers were permitted to have facial hair not to exceed one-quarter inch in length. Complainants had obtained waivers under this order to keep their facial hair, and had passed their annual Respirator Mask Fit Test.

According to the Director, the Chief of Police, and other management officials, PFPA Regulation No. 9420 was issued in accordance with Occupational Safety and Health Administration (OSHA) regulations, which address facial hair and respirator fit. Specifically, OSHA Respiratory Protection standard, 29 C.F.R. § 1910.134(g)(1)(i)(A), states that respirators shall not be worn when facial hair comes between the sealing surface of the facepiece and face or interferes with valve function. Therefore, PFPA Regulation No. 9420 announced that Police Officers would not be permitted to have facial hair that interfered with the respirator valve function or that came between the sealing surface of the APR mask and the face.

A July 2010 memorandum regarding PFPA Regulation No. 9420 further announced, in pertinent part, that:

1. The [clean shaven] requirement would not be waived for personnel under any circumstance;
2. Police Officers whose physical conditions were deemed permanent by the Medical Review Board would receive assistance in finding another position within PFPA or Washington Headquarters Services (WHS); and
3. Police Officers with insufficient documentation would be required to shave or face disciplinary action or removal.

³ The Level C PPE Ensemble included the use of a respirator for protection from chemical, physical, and biological hazards that could be encountered during the course of CBRN hazardous materials operations. The respirator used by the Agency in the PPE Ensemble was a tight-fitting Air Purifying Respirator (APR). The mask portion in the front of the APR seals on contact with the chin, cheeks, and forehead, and the back is pulled tight with a strap assembly. The APR works by negative pressure, so when the wearer breathes in air, the mask will collapse on the face (suction) enforcing a seal. Police Officers were required to carry the APR mask with them in a bag at all times.

According to the Director of the PFPA, the Agency began enforcing a complete zero tolerance policy on any facial hair. The Director averred that hair length changes constantly and it would be difficult for supervisors to monitor the length of employees' facial hair on a daily basis.

Complainants requested that the Agency, if it would not allow for even very close-cropped facial hair, provide them with Powered Air-Purifying Respirators (PAPR) which allow for facial hair per OSHA regulations. But the Director stated that it was not possible to provide alternative PAPRs to the affected Officers because the Agency needed to have uniformity in its use of safety equipment because it needed to assign interchangeable equipment to any officer at any time. The Director also stated that the Agency had to be able to train everyone on the same equipment and everyone needed to be familiar with that equipment. The Director stated, however, that he was not aware if the Agency actually looked at other respirators with respect to PFPA Regulation No. 9420.

After the implementation of PFPA Regulation No. 9420, some of the Complainants submitted a shaving waiver request as they had in the past and been approved. This time, however, they were placed on light duty until they complied with the regulation. Other Complainants were fearful that they could be kept on light duty, reassigned, or terminated pursuant to PFPA Regulation No. 9420, and decided to fully shave their faces against the recommendation of their dermatologist. These Complainants stated that they experienced physical as well as emotional pain and distress as a result of shaving, including sadness, skin irritation, facial bumps, and facial burning, among other symptoms.

Between September 24, 2010 and November 8, 2010, the ten Complainants separately filed EEO complaints alleging discrimination on the bases of race (African American), color (Black),⁴ and disability (Pseudofolliculitis Barbae) when, on July 27, 2010, the Agency directed them to shave their facial hair consistent with the Agency's new policy, or face a job reassignment with possible pay reduction or termination.

In November 2010, Complainants filed a class complaint, which in June 2014, was denied by an EEOC Administrative Judge (AJ). The AJ remanded the matter to the Agency for individual complaint processing. The Agency accepted the Complainants' individual complaints, consolidated them for processing, and investigated the matter. After completing the EEO investigation, the Agency informed Complainants of the right to request a hearing before an EEOC AJ or request an immediate final agency decision.

Complainants initially requested a hearing, but later withdrew the request, as well as all alleged bases other than disability. On May 5, 2016, the EEOC AJ issued an Order Dismissing Hearing Requests based on Complainants' withdrawals.

⁴ Subsequently, Complainants withdrew the bases of race and color from their complaints.

On September 30, 2016, the Agency issued a consolidated final decision (FAD). The FAD found that Complainants were not individuals with a disability because their skin disorder did not substantially limit their employment. Additionally, the Agency concluded it did not discriminate against Complainants or deny them reasonable accommodation because it acted within the safety and health regulation guidelines on facial hair and respirator fit.

Complainants filed appeals with this Commission from the Agency's consolidated FAD. The Commission docketed the appeals as EEOC Appeal Nos. 0120170405, 0120170406, 0120170407, 0120170408, 0120170409, 0120170410, 0120170411, 0120170412, 0120170413, and 0120170414 (together referred to as "0120170405 et al.").

In EEOC Appeal Nos. 0120170405 et al., the Commission determined that the Agency's FAD erred in several respects. First, the Commission found the Agency erred in finding that Complainants were not individuals with a disability. It found that Complainants were individuals with a disability under the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), because "Pseudofolliculitis Barbae is a physical impairment that substantially limits Complainants in the operation of major bodily functions, including the immune system and skin."

Second, the Commission concluded that the Agency erred in failing to analyze Complainants' claims as implicating a potentially discriminatory qualification standard. The Rehabilitation Act prohibits the use of a qualification standard that screens out or tends to screen out a person with a disability or a class of persons with disabilities, unless the Agency can show that: (1) the standard is "job-related and consistent with business necessity;" and (2) there is no accommodation that would enable the person to meet the existing standard or no alternative approach (itself a form of accommodation) through which the Agency can determine whether the person can perform the essential function. The Commission found that the Agency's FAD failed to apply this framework when analyzing Complainants' disability claims.

Third, the Commission found that the Agency erred in finding that Complainants were a direct threat to themselves and others because the Agency never performed individualized assessments of whether Complainants posed a direct threat of substantial harm. The Commission found that the Agency "merely applied a blanket policy that did not allow for an individualized determination as to whether there was a significant risk of substantial harm that could not be eliminated or reduced through accommodation."

Fourth, we noted that the Agency attempted to justify its policy and qualification standard on the grounds that it properly applied the OSHA regulation governing facial hair and respirator fit, 29 C.F.R. § 1910.134. Specifically, the Agency referenced 29 C.F.R. § 1910.134(g)(1)(i)(A), which states that respirators with tight-fitting facepieces shall not be worn when facial hair comes between the sealing surface of the facepiece and face. However, our appellate decision noted that another related provision of the OSHA regulations, 29 C.F.R. § 1910.134(e)(6)(ii), contemplated providing Powered Air-Purifying Respirators to those who cannot use a negative pressure mask due to a medical condition.

Specifically, 29 C.F.R. § 1910.134(e)(6)(ii) states, in pertinent part:

If the respirator is a negative pressure respirator and [a physician or other licensed health care professional] finds a medical condition that may place the employee's health at increased risk if the respirator is used, the employer shall provide a PAPR if the [physician's] medical evaluation finds that the employee can use such a respirator.

The Commission found this regulatory provision potentially relevant to answering the qualification standard-related question of whether there were accommodations that would enable Complainants to meet the standard or alternative approaches (alternative standards, the waiver of the standard, or other reasonable accommodations) that would otherwise enable Complainants to perform the job of a police officer. The Commission concluded the Agency's decision failed to address whether this regulatory provision is relevant and applicable to the claims at issue here.

The Commission concluded by vacating the Agency's FAD because the Agency had not applied the proper qualification standards framework to analyzing Complainants' disability claims, neither party considered nor raised the qualification standards issue on appeal, and the matter was never properly briefed before the Commission. The Commission remanded the ten complaints to the Agency to conduct a supplemental investigation and to issue a consolidated final decision, with specific instructions to apply the "qualification standards" framework in determining whether the Agency violated the Rehabilitation Act.

On remand, the Agency issued its supplemental investigative report on March 22, 2019. It stated that it utilized Occupational Safety and Health Branch Industrial Hygienists and Safety Specialists to conduct the investigation. It stated that the instances when Police Officers need to use a respirator are: (1) for annual OSHA required fit-test, (2) a training exercise, or (3) when in contact with or in response to an incident with hazardous materials. The Agency stated that it uses the Avon C-50 Air Purifying Respirator, which offers protection against chemical, biological, nuclear, and radiological agents and toxic industrial chemicals/materials. The Avon C-50 respirator is able to operate as a negative-pressure air purifying respirator or a positive-pressure powered air-purifying respirator.

The Agency stated: (1) proper fitting respirator equipment is essential for the duties of the PFPA Police Officer position to prevent acute incapacitation or illness, and enable escape; and (2) OSHA regulation 29 C.F.R. § 1910.134(g)(1)(i)(A) prohibits tight-fitting face masks being worn by employees with facial hair that comes between the sealing surface and face or interferes with valve function, regardless if use is routine or occasional. Further, the Agency stated: "[3] In some cases, tight-fitting respirators (negative or positive pressure masks) can achieve an adequate seal with faces that have a small degree of facial hair between the sealing surface of the mask and face. However, multiple studies have shown that fit factors are reduced and/or the probability for leakage increases. OSHA's position is that a respirator fit achieved with facial hair is unpredictable/subject to change and with change daily depending on hair length, density, and position. . . .

[4] Some types of respirators do not require a facial seal and can usually be worn by bearded employees. Specifically, these are positive-pressure respirators of the hood and helmet type. PFPA does not believe hood and helmet type respirators provide the visual field and dexterity to best enable an officer to fulfill their mission requirements and do not offer these type respirators for use. . . . [5] An employee's personal desire to have facial hair would not qualify as a medical condition requiring a PAPR option."

Summarily, the Agency argued that it, as employer, has the right to decide what equipment is best suited for its Police Officers and what will have the greatest chance of success. The Agency stated that it selected a "tight fitting" respirator rather than "loose fitting," and that the Avon-C50 is both a positive pressure and negative pressure mask. The Agency stated that there was no alternative accommodation that would allow Complainants to perform the essential functions of the Police Officer position. It noted that the hood-type mask goes over the shoulders down to the waist and could interfere with an Officer reaching for his weapon or assisting others. The Agency stated, as a first responder, wearing a mask that works properly is an essential function of their position. The Agency stated that if an Officer becomes incapacitated during an emergency, they can not protect themselves or the 45,000 Agency employees who work there. The Agency stated that the issue is not the frequency in which they wear the mask but the ability to wear it properly in an emergency when needed. The Agency stated that its policy that Officers be able to properly use the Avon C-50 mask is job-related and consistent with business necessity.

The instant appeals from the Complainants followed.

Complainants state that they all have PFB, work as Police Officers for the Agency, obtained medical waivers to have facial hair no more than ¼ inch in length under the 2002 regulation, and, prior to July 27, 2010 regulation, passed the "fit test" with that facial hair. Complainants stated that management informed them that there were no exceptions to the July 2010 regulation and that anyone who did not immediately comply was placed on light duty, stripped of their firearm, and relegated to performing menial tasks. Complainants stated that the Agency failed to provide sufficient legal justification for its discriminatory qualification standard of the no waiver of zero facial hair policy. Complainants stated that the Agency gave conclusory statements as to the qualification standard and did not adhere to the inquiry recommended by the Commission. Complainants argue: "The Agency has failed to produce evidence adequate to show the business necessity of wearing a tight-fitting negative pressure protective mask while clean shaven." Complainants stated that the Agency did not provide substantive evidence that hood-or helmet-type respirators would not have worked with facial hair. Complainants stated that the Agency failed to show why alternative respirators, specifically the 3M Breathe Easy Hood-type PAPR or 3M Versaflo Helmet-type, could not be used as an effective alternative to the Avon C50. Complainants stated that the Agency did not offer other accommodations, such as some facial hair in places that do not conflict with the seal. Complainants stated that the Agency is dismissive of the necessity to grow facial hair to prevent PFB symptoms.

In sum, Complainants assert that the Agency failed to show undue hardship to allow them to wear facial hair of ¼ inch or less as management already had to monitor employee facial hair and other changes that might affect the fit of the mask. Complainants stated that the Agency interpreted OSHA requirements more strictly than necessary.

ANALYSIS AND FINDINGS

The Rehabilitation Act prohibits employment discrimination against a qualified federal employee with a disability. The Commission's implementing regulations make it clear that it is unlawful for an employing agency to use a qualification standard that screens out or tends to screen out an individual or class of individuals on the basis of disability unless the standard is shown to be job-related and consistent with business necessity. 29 C.F.R. § 1630.9. The employing agency is also required to make reasonable accommodations to the known physical and mental limitations of an otherwise qualified individual with a disability unless the agency can show that accommodation would cause an undue hardship.

In our prior appellate decisions in this matter (EEOC Appeal Nos. 0120170405 et al.) we have already determined that Complainants are individuals with a disability within the meaning of the Rehabilitation Act. Complainants have each been diagnosed with a serious skin condition, PFB, which causes various painful symptoms when shaving, such as pustules, stinging, irritation, bleeding, infection, a burning sensation, and scarring. The symptoms result from ingrown hairs that occur when facial hair is completely shaven. In Appeal Nos. 0120170405 et al., we found that Complainants were individuals with a disability because “Pseudofolliculitis Barbae is a physical impairment that substantially limits Complainants in the operation of major bodily functions, including the immune system and skin.”

Complainants must also show that they were “qualified” individuals with a disability. A qualified individual with a disability is an individual with a disability who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of the position. 29 C.F.R. § 1630.2(m).

Here, the Agency does not dispute that Complainants satisfied the requisite skill, experience, education, and other job-related requirements of the position of Police Officer. Instead, the Agency asserts that Complainants are unable to meet its safety-related qualification standard that requires that all Police Officers, without exception, to have clean-shaven facial skin at all times in order to wear a specifically identified respirator mask. As such, it is undisputed that the Agency's qualification standard has and will continue to screen out Complainants, and others with PFB who cannot be clean shaven, from the Police Officer position because of their disability.

As stated in our underlying decision in EEOC Appeal Nos. 0120170405 et al., the question of whether Complainants are “qualified” to perform the job of Police Officer hinges on whether the qualification standard they are unable to meet (wearing the Avon C50 respirator with clean-shaven facial skin) has been justified by the Agency and, if it has been justified, whether there is a reasonable accommodation that would enable them to meet the standard. In other words, to defend itself against the charge that the application of the qualification standard screens out or tends to screen out an individual or class of individuals because of disability violates the Rehabilitation Act, the Agency must establish that:

- 1) the standard is “job-related and consistent with business necessity;” and
- 2) there is no accommodation that would enable the Complainants to meet the existing standard or no alternative approach (itself a form of accommodation) through which the employer can determine whether the person can perform the essential function involved.

See 42 U.S.C. § 12113(a); 29 C.F.R. § 1630.15(b)(1); Gwendolyn G. v. U.S. Postal Service, EEOC Appeal No. 0120080613 (December 23, 2013).

When determining if a qualification standard is job-related and consistent with business necessity, the central question is whether the standard is “carefully tailored to measure [an individual’s or individuals’] actual ability to [perform] the essential function of the job.” H.R. Rep. 101-485(11) at 36, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 303, 353-5. Here, Complainants’ disability prevents them from being clean shaven, which the Agency maintains disqualifies them from wearing the required tightfitting respirator masks because, in the Agency’s opinion, the masks could not create an adequate protective seal with their facial skin. Therefore, the Agency asserts Complainants’ disability prevented them from meeting the Agency’s respirator mask/clean-shaven standard. This resulted in Complainants being stripped of their Police Officer duties and placed on light duty until they chose to comply and fully shave their faces or face disciplinary action including removal. Complainants, however, argue that prior to the Agency’s new standard they held medical waivers to have facial hair up to ¼ inch long and they were able to pass respirator fit tests with the facial hair. They also argue that the Agency refused to consider alternatives to the tight-fitting masks, such as the hood-or helmet-type (loose fitting) masks.

In its supplemental investigation in response to the Commission’s Order in EEOC Appeal No. 0120170405 et al., Agency witnesses stated that Police Officers need to use a respirator: (1) for annual OSHA required fit-test, (2) for a training exercise, or (3) when in contact with or in response to an incident with hazardous materials. The Agency witnesses stated that the Avon C-50 that is able to operate as a negative-pressure or positive-pressure air purifying respirator. They stated the Avon C-50 offers protection against chemical, biological, nuclear, and radiological agents and toxic industrial chemicals/materials and proper fitting respirator equipment is essential for the duties of the PFPA Police Officer position, to prevent acute incapacitation or illness, and enable escape.

The Agency noted that OSHA regulation 29 C.F.R. § 1910.134(g)(1)(i)(A) prohibits tight-fitting face masks being worn by employees with facial hair that comes between the sealing surface and face or interferes with valve function, regardless if use is routine or occasional. The Agency stated that its policy that Officers be able to properly use the Avon C-50 mask is job-related and consistent with business necessity.

Based on the evidence of record, we conclude that the Agency has established that the ability to wear a respirator mask by its Police Officers is job-related and consistent with business necessity. As first responders, wearing a mask that works properly is an essential function of their position, and the issue is not the frequency in which Officers wear the mask but the ability to wear it properly in an emergency, when needed. The question to be determined, however, is whether or not Officers whose disability impacts their ability to be completely clean shaven can be provided with an accommodation such as a waiver of the rule to permit closely cropped facial hair like the ¼ inch they were previously permitted or the provision of another type of respirator that is not impacted by facial hair?

Here, we conclude that the Agency has failed to make this showing. The Agency acknowledged, in some instances, tight-fitting respirators (negative or positive pressure masks) can achieve an adequate seal with faces that have a small degree of facial hair between the sealing surface of the mask and face. However, the Agency stated that studies have shown that fit factors are reduced by facial hair and/or there is a higher probability for leakage. The Agency added that OSHA's position is that a respirator fit achieved with facial hair is unpredictable and subject to change depending on facial hair length, density, and position. In response to the question of alternative equipment, the Agency stated that the respirators that do not require a facial seal and can usually be worn by bearded employees (such as positive-pressure respirators of the hood-and helmet-type) do not provide the visual field and dexterity needed for an Officer to fulfill PFPA requirements.

In order to exclude an individual with a disability based on the possibility of future injury, the Agency must prove through evidence that there is a significant risk of substantial harm. A speculative or remote risk is insufficient, and the Agency must show more than that an individual with a disability stands some slightly increased risk of harm. The burden of showing a significant risk is on the Agency. Selix v. U.S. Postal Service, EEOC Appeal No. 01970153 (March 16, 2000). Here, we find that the general conclusory statements by the Agency as to a potential risk of a mask seal failure in an emergency situation for Officers with closely cropped facial hair are without adequate evidentiary support despite its opportunity to collect such evidence during the supplemental investigation. We particularly note that prior to the passage of the current rule requiring all Police Officers, without exception, to be clean shaven, the Agency had a 2002 regulation that allowed for a medical waiver for a small amount of facial hair (1/4 inch) for its Officers. The Complainants all qualified for the waiver, passed their annual mask fit tests, and there is no evidence that they were unable to perform the essential functions of their position with the waiver or that any incident occurred where they were in danger or risked danger to others due to a respirator mask failure in an emergency situation.

We also note that the record shows that OSHA's regulation 29 C.F.R. § 1910.134 contemplates providing Powered Air-Purifying Respirators to those who cannot use a negative pressure mask due to a medical condition. While arguing alternative masks would interfere with the ability of Officers to perform their essential duties, beyond these general contentions, the Agency has again not adequately substantiated its claims with evidence. In sum, the Agency has failed to meet its burden of proving that there is no accommodation that would enable the Complainants to meet the existing standard or no alternative approach (itself a form of accommodation) through which the employer can determine whether the person can perform the essential function involved. Under these circumstances, the Agency's imposition of a blanket policy requiring all Officers to be clean-shaven regardless of their medical condition violates the Rehabilitation Act.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency's consolidated final decision and REMAND the matter to the Agency for remedial action in accordance with this decision and the Order below.

ORDER

Unless otherwise noted, within sixty (60) calendar days of the date this decision is issued, the Agency shall take the following actions:

1. To the extent Complainant(s) were removed from their PFFA Police Officer positions due to failure to comply with the qualification standard at issue, the Agency shall offer Complainant(s) reinstatement into the position of Police Officer from which they were removed. The Agency shall afford Complainant(s) fifteen (15) calendar days to determine whether to accept reinstatement. Should Complainant(s) reject the offer of reinstatement, their entitlement to back pay shall terminate as of the date of the rejection.
2. If Complainant(s) accept the reinstatement offer, the Agency shall place Complainant(s) in the Police Officer position retroactive to the date they were removed, for the purpose of seniority and other employment benefits (including within-grade salary increases and career ladder promotions) tied to seniority.
3. Consistent with reinstatement from paragraph (1) above, the Agency shall determine the appropriate amount of back pay, with interest, and other benefits due to Complainant(s), pursuant to 29 C.F.R. § 1614.501. Complainant(s) shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to Complainant(s) for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. Complainant(s) may petition for enforcement or clarification of the amount in dispute.

4. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled, "Implementation of the Commission's Decision."
5. Provide reasonable accommodation alternative options (waiver or alternative equipment) for those with appropriate medical documentation to the clean-shaven rule.
6. Remove record of disciplinary action related to failure to comply with the qualification standard from official personnel records of Complainant(s).
7. Conduct supplemental investigations on entitlement to compensatory damages and provide Complainant(s) an opportunity to submit evidence of pecuniary and nonpecuniary damages. For guidance on what evidence is necessary to prove entitlement to pecuniary and non-pecuniary damages, the parties are directed to EEOC Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991, EEOC No. 915-002 (July 14, 1992) (available at eeoc.gov) and Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (January 5, 1993). The Agency shall complete the investigation and issue a final decision, appealable to this Commission, determining the appropriate amount of damages within 120 calendar days of the date of this decision. Complainant(s) shall cooperate with the Agency's investigation. If there is a dispute regarding the exact amount of compensatory damages, the Agency shall issue a check to Complainant(s) for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due.
8. The Agency shall provide eight (8) hours of EEO training for the responsible management official(s) involved herein. The training shall emphasize the Rehabilitation Act's requirements with respect to the Agency's medical/physical standards and medical waiver programs to ensure that similar violations do not occur.

POSTING ORDER (G0617)

The Agency is ordered to post at its Washington, DC facility copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (H1019)

If Complainant 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 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

November 17, 2021

Date