



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Alvaro P.,¹
Complainant,

v.

Frank Kendall,
Secretary,
Department of the Air Force,
Agency.

Appeal No. 2021004984

Hearing No. 540201800029X

Agency No. 6X1S17003T

DECISION

Complainant file a timely appeal with the Equal Employment Opportunity Commission (“EEOC” or “Commission”), pursuant to 29 C.F.R. § 1614.504(b),² regarding compliance with the Agency’s May 17, 2021 final order concerning his equal employment opportunity (“EEO”) complaint 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.

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.

² EEOC Regulation 29 C.F.R. § 1614.504 provides that if a complainant believes the agency has failed to comply with its own final action on an EEO complaint, the complainant shall notify the agency EEO Director, in writing of the alleged noncompliance. If the agency does not respond to the complainant, in writing, or the complainant is not satisfied with the agency’s attempt to resolve the matter, the complainant may appeal to the Commission for a determination as to whether the agency has complied. Here, the record is clear that Complainant has complied with these requirements. However, the record does not establish that he ever received a final determination from the Agency.

ISSUE PRESENTED

The issue presented in this appeal is whether or not the Agency properly implemented its own final action, which fully adopted an EEOC Administrative Judge's (AJ's) finding of discrimination and remedial orders, concerning Complainant's retroactive placement to the position of Contract Specialist, NH-1102-03, advertised under Vacancy Announcement No. 6XAFPC1796872743737MMU.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was an applicant for employment with the Agency as a Contract Specialist, NH-1102-03, at the Agency's Peterson Air Force Base ("AFB"),³ located in Colorado Springs, Colorado.

On March 1, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of disability (hearing impairment/deaf) and in retaliation for prior protected EEO activity when:

1. On January 4, 2017, he was denied a reasonable accommodation and was not selected for the position of Contract Specialist, NH-1102-03, (Vacancy Announcement No. 6XAFPC1796872743737MMU) at Peterson AFB,

On May 13, 2019, the following claims were added in accordance with the AJ's Order Granting Complainant's Motion to Amend Complaint:

A. Pre-Job Offer Disability-Related Inquiries

2. On or around September 12, 2016, Complainant was asked to identify and provide documentation that substantiated his disability.
3. On October 5, 2016, a member of the interview panel ("P1") asked one of Complainant's references about the Complainant's disability/reasonable accommodation.
4. On or around October 7, 2016, the selecting official ("SO") asked Complainant if Complainant could work without a reasonable accommodation.
5. On or around October 24, 2016, an HR Specialist ("H1") asked Complainant a series of questions about Complainant's disability/reasonable accommodations.

³ In 2019, Peterson AFB was designated as a Space Force Base ("SFB").

B. Confidentiality of Medical Information

6. Between approximately October 7, 2016 and December 12, 2016, SO disclosed Complainant's confidential medical information/record and/or Complainant's reasonable accommodation to multiple persons, including but not limited to H1, P1, and a staffing specialist.
7. Between approximately October 7, 2016 and December 12, 2016, H1 disclosed Complainant's confidential medical information/record and/or Complainant's reasonable accommodation to multiple persons, including but not limited to SO, and various Agency staffing, HR, and Disability Program personnel who were not "need to know."
8. On or around December 12, 2016, the Chief of Affirmative Employment at Peterson AFB, forwarded an email containing confidential medical information/record and/or Complainant's reasonable accommodation to SO and six Agency staffing and other officials at Peterson AFB and Joint Base Andrews in Maryland, who were not "need to know."

C. Reprisal for engaging in protected EEO activity⁴

9. On or around November 29, 2016, H1 terminated the interactive process with Complainant.
10. H1 did not inform Complainant of the Agency's December 12, 2016 decision on his reasonable accommodation request by failing to provide written notice of the decision denying his request, or notice of his appeal rights, per Agency policy.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an EEOC Administrative Judge ("AJ").

⁴ Complainant's claimed protected EEO activity included disclosing his Schedule A (disability) status to the Agency with his September 12, 2016 application, requesting an ASL Interpreter as a reasonable accommodation prior to his October 5, 2016 phone interview, and sending a November 29, 2016 email to H1, where he advised H1 that, typically, candidates do not receive questions about a reasonable accommodation prior to receiving a tentative job offer. H1, after consulting the Agency's Disability Program Manager, believed the email meant that Complainant "was considering legal action of some kind" so she ceased all communications with him.

Complainant timely requested a hearing and the AJ assigned to the matter held a hearing on August 25, 2020, and on December 15-17, 2020. On December 1, 2021, the AJ issued an “Order Entering Partial Decision Without a Hearing,” for Claims 2 and 5-10, and on February 16, 2021, the AJ issued a “Hearing Decision and Order” for Claims 1, 3, and 4. Both of the AJ’s decisions found that Complainant established, by a preponderance of the evidence, that the Agency, subjected him to discrimination on the bases of disability and retaliation, with respect to all 10 Claims, in violation of the Rehabilitation Act.

The AJ ordered the Agency to retroactively reinstate Complainant to the position of Contract Specialist, NH-1102-03/03, or a substantially equivalent position at Peterson SFB, to “include all seniority, promotions, and grade step increases to which Complainant would have been entitled but for the discrimination,” specifying that the Agency was to allow Complainant to relocate to Colorado and secure an SAP clearance, and to allow for the recruiting and hiring of and/or contracting with two cleared on-site or remote ASL interpreters. The AJ also ordered the Agency to determine and pay the appropriate amount of back-pay with interest and other benefits due to Complainant, pay Complainant \$40,000 in non-pecuniary compensatory damages, provide Complainant with a lump sum payment to offset any tax burden resulting from the AJ’s ordered relief, and pay Complainant’s attorney’s fees and costs. As equitable relief, the AJ ordered the Agency to post notice of the finding of discrimination, provide 8 hours of live training to the responding management officials and all HR Specialists, Supervisors, and Managers at Peterson SFB, and to establish a Reasonable Accommodation Office at Peterson SFB. The Agency subsequently issued a Final Order to adopt and fully implement the AJ’s February 16, 2021 Decision and Order.

In dispute in the current appeal is whether the Agency properly implemented the portion of the Agency’s Final Order, which fully adopted the AJ’s remedial orders, concerning Complainant’s reinstatement.

The record, including the parties’ submissions in reference to the instant appeal, provides the following relevant facts.

In September 2016, the Agency advertised, and Complainant applied for the position of Contract Specialist, NH-1102-03, (also referenced as an “NH-III” Contract Specialist) for the Agency’s 21st Contracting Squadron (“21 CONS”), which served all of the contracting needs for the Peterson AFB installation, including for Air Force Space Command classified missions. The position required Top Secret (“TS”) clearance with Sensitive Compartmented Information (“SCI”) and Special Access Program (“SAP”). Complainant would have started work in April 2017 but for the Agency’s discriminatory nonselection.

At the time of the AJ’s order for the Agency to reinstate Complainant as a remedy for the nonselection, the 2016 iteration of the NH-III Contract Specialist no longer existed.

Due to a 2018 realignment, 2020 reorganization, and a mission change related to the standup of the Agency's Space Force, all TS/SCI/SAP positions within 21 CONS were NH-IV Contracting Officer⁵ positions, and none of the NH-III Contracting Specialists serviced classified missions.

The Agency provides a sworn statement from the then-Chief of the Contracting Operations Division, Air Force Installation Contracting Agency, at Peterson SFB, who states that he was responsible for hiring "several dozen" 21 Space Wing personnel into a new unit, the Enterprise Solutions Directorate ("ESD"), in 2018. The Contracting Operations Chief explained that ESD would be comprised of new positions that reported to the Executive Director, Headquarters Air Force Space Command (the senior civilian within the entire command). The "majority" of the positions were sourced from 21 CONS. Individuals, including all NH-III Contracting Specialists within the unit where Complainant would have been assigned, whose position would be converted to ESD were "essentially placed into a temporary duty capacity to support ESD operations" but they "were not ESD employees by default." Once the position descriptions were revised, all billets for ESD were filled by competitive interview. The positions in the new ESD organization were a mix of NH-III and NH-IV Program Managers and Contracting Officers.

In 2020, ESD transitioned and is now known as the Space Acquisitions Management-Delta (SAM-D"). SAM-D is the contracting activity that services the classified space mission. Complainant asserts that but for his discriminatory nonselection in 2016, he would be working as a NH-IV Contracting Officer in SAM-D.

The Agency stated that Complainant was essentially requesting a promotion, which was outside the scope of the AJ's Order. The Agency provided two job offers to Complainant that it asserts are "substantially equivalent" to 2016 iteration of the NH-III Contract Specialist position.

Job Offer # 1

On May 20, 2021, the Agency notified Complainant that it located a substantially equivalent NH-1102-03 Contract Specialist position with 21 CONS at Peterson SFB, and extended a tentative job offer on July 15, 2021 ("Job Offer 1"). Complainant initially accepted, but withdrew his acceptance when he became aware that the position would not require TS/SCI/SAP clearance. Complainant explained that for a position to be "substantially equivalent" to the one he applied for in 2016, it would have to service a classified mission, with TS/SCI/SAP security requirements, noting that the crux of the Agency's argument for denying him the position in 2016 was that it would be an undue hardship to provide him with a reasonable accommodation for a TS/SCI/SAP position.

The Agency responded that due to reorganization, realignment, and mission changes, 21 CONS no longer serviced classified missions, as it had in 2016, so none of the current NH-III Contract Specialist positions within 21 CONS require TS/SCI/SAP clearance.

⁵ Contracting Officer is in the same series as Contracting Specialist. The Agency did not provide position descriptions.

However, the Agency agreed to make a good faith effort to locate an NH-III Contract Specialist position elsewhere that serviced a classified mission and required TS/SCI/SAP clearance.

Job Offer # 2

On August 18, 2021, the Agency notified Complainant that it had identified “another” substantially equivalent NH-1102-03 Contract Specialist position, and extended a tentative offer to Complainant on September 9, 2021 (“Job Offer 2”). Job Offer 2 required TS/SCI/SAP clearance, as it serviced a classified mission (a mobility command and control program), with duties requiring some work to be conducted on a classified system located in a SCIF. This NH-III Contract Specialist position would entail obtaining a 10M limited warrant within 6 months of the start date. Although Job Offer 2 was located on Peterson SFB, the position fell within the Agency’s Life Cycle Management Center (“AFLCMC”), a tenant organization that was not part of 21 CONS, SAM-D, or otherwise affiliated with base command structure. AFLCMC assigned a small number of personnel at Peterson SFB, including the referenced NH-III Contract Specialist position, and had offices among several other Agency installations as well. The supervisor for Job Offer 2 worked at Offutt Air Force Base, Nebraska.

Complainant declined Job Offer 2, explaining that had he been hired in 2016 as a NH-1102-03 Contract Specialist with 21 CONS, under SO and P3, he would have transitioned to NH-IV Contract Specialist in SAM-D as a result of the 2018 and 2020 reorganization and realignment. The Agency reasoned that the AJ’s Order specified that Complainant was to be retroactively reinstated at NH-3. Upon review, the Agency determined that Complainant’s conversion to NH-IV would not have been “automatic” therefore it could not be assumed he would be in a NH-IV position within SAM-D but for the Agency’s discriminatory actions.

On September 10, 2021, Complainant filed the instant appeal, alleging that the Agency failed to comply with its Final Order when it did not offer to reinstate him to the position of NH-4 Contract Officer in SAM-D as “make-whole” relief.

ANALYSIS AND FINDINGS

When discrimination is found, an agency must provide a complainant with a remedy that constitutes full, make-whole relief. See Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976), Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-419 (1975), Lazaro G. v. Dep’t of Commerce, EEOC Appeal No. 0120170802 (May 17, 2019). In instances of discriminatory nonselection, “make-whole” relief includes offering the complainant the position they would have occupied but for the discrimination they experienced, or, if justified by the circumstances, a “substantially equivalent” position. 29 C.F.R. § 1614.501(a); EEO-MD-110, Ch. 11 (Aug. 5, 2015).

A substantially equivalent position is one with compensation, promotional opportunities, job responsibilities, working conditions, and job status which are similar to the position discriminatorily lost. Hernandez v. Soc. Sec. Admin., EEOC Request No. 05A60218 (Dec. 29, 2005); see also Petitioner v. Dep't of Veterans Affairs, EEOC Petition No. 0420110006 (Jan. 31, 2014) (“the Commission recognizes that in some instances, such as the instant case, a person cannot be offered the originally occupied position because it has been abolished for non-discriminatory reasons, or the functions of the position have been relocated or consolidated with other duties). Make-whole relief can include subsequent promotions that Complainant likely would have received if they had been selected for the position in the first instance. See, e.g. Mehta v. Dep't of Housing & Urban Devel., EEOC Appeal No. 01A32842 (Sep. 28, 2004).

The measure of “substantial equivalence” should be based on the position that was the subject of the original complaint as it originally existed. See Hafiz v. Dep't. of Def., EEOC Petition No. 049600021 (Jul. 11, 1997), Monroig v. United States Commission on Civil Rights, EEOC Request No. 05A20762 (Apr. 9, 2003), Geraldine G. v. United States Postal Serv., EEOC Petition No. 0420170001 (May 4, 2017). The burden to prove substantial equivalency rests with the agency. Shaw v. Dep't. of the Air Force, EEOC Request No. 05930370 (Jul. 15, 1994).

Here, we conclude that the Agency has not met its burden to establish that it offered Complainant a “substantially equivalent” position to the 2016 NH-III Contract Specialist position, in light of the NH-IV Contract Specialist position at SAM-D.

The Agency maintains that Job Offer 1 is “substantially equivalent” to the position Complainant applied for in 2016, as it falls within in the same organization (21 CONS), with the same title, series, and grade, and (according to the Agency) comparable duties. Yet, the Agency concedes that this position no longer services classified missions, and no longer requires TS/SCI/SAP. The Agency did not provide the Commission with an updated position description or explain how, given the emphasis on the clearance requirements throughout the hearing, a NH-III Contract Specialist position without duties requiring TS/SCI/SAP can still be “substantially equivalent” to the one Complainant was unlawfully denied. We have previously found that even when done “in good faith,” simply offering a complainant reinstatement to the “most comparable position to the original position at issue,” does not satisfy an agency’s obligation to provide make-whole relief, where the offered position lacks the level of responsibility of the original position. Woodard v. Dep't of Labor, EEOC Petition No. 04A10009 (Oct. 16, 2002).

Similarly, Offer 2 includes many of the same elements of the 2016 NH-III Contract Specialist position, including TS/SCI/SAP, but, in light of the SAM-D NH-IV Contract Specialist position, falls short of “make-whole” relief. The remedy phase of an action seeks to turn back the clock to the moment before discrimination occurred and, if possible, to move forward from that point without discrimination. See Deering v. United States Postal Serv., EEOC Petition No. 04A10008 (Jul. 27, 2001), citing Michael Miller, et. al. v. Dep't of the Interior, EEOC Request No. 05980293 (Sept. 2, 1999).

Here, the Agency has not provided sufficient evidence, such as a position description, to show that Offer 2, which is with a tenant organization, entails “substantially equivalent” responsibilities, opportunities and status as Complainant would have received had the discrimination not occurred.

Specifically, neither Offer 1 nor Offer 2 provides an opportunity for Complainant to work in a Contract Specialist position in SAM-D, where the majority of the NH-III Contract Specialists in the 21 CONS unit were placed following realignment.

We further conclude that Complainant has presented sufficient evidence of the likelihood that but for his discriminatory nonselection, he would have been promoted to NH-IV Contract Specialist at SAM-D.

Remedial relief includes any subsequent promotion that a complaint would likely have received if they had been selected for the position at issue. Allen v. Dep’t of Def., EEOC Request No. 05900807 (Sept. 11, 1990). In its determination, the agency should consider and place in the record evidence with respect to: (1) whether appellant is qualified for further promotion, and (2) whether promotion would have normally occurred during the time since the complainant's discriminatory non-selection. See Martinez v. Dep’t of Energy, EEOC Appeal No. 01920768 (Jul. 22, 1992) citing Rai v. Dep’t of the Interior, EEOC Request No. 05880596 (Aug. 12, 1988) & EEOC Appeal No. 01201186 (May 17, 1990). We note, in making this assessment, the Commission has held that it is not dispositive simply because “subsequent promotions would have [only] been obtained through the competitive process...” Rai v. Dep’t of the Interior, EEOC Appeal No. 019011863 (May 17, 1990).

The Commission has previously found that where a complainant’s position has since been abolished, one method for determining the promotions a complainant would likely have received, absent discrimination, is to examine similarly situated employees during the relevant time period. Tuala v. Dep’t of the Navy, EEOC Petition No. 04A00026 (Apr. 11, 2002); King v. Dep’t of Transport., EEOC Appeal No. 07A40003 (Sept. 29, 2005); Miller v. Dep’t of the Navy, EEOC Appeal No. 0120053382 (Feb. 9, 2007).

Here, Complainant argues that 11 of the 13 Contract Specialists, working in the 21 CONS unit he would have been assigned to but for the discriminatory nonselection, were converted to NH-IV following the realignment. As evidence of the likelihood that he too would have been converted during realignment, he provides copies of his email correspondence with the Agency’s attorney for employment matters and with the Peterson SFB Chief for Recruitment and Placement, which contain detailed discussions about Offers 1 and 2, as well as how the realignment and mission changes impacted the 2016 NH-III Contract specialists. We note that Complainant’s emails inquired multiple times when he was deciding whether to accept Offer 2, why, as an NH-III in a unit where nearly all of the NH-IIIs were converted to NH-IV ESD positions, it was presumed that he would not also have qualified. The Agency’s responses do not dispute (or even address) whether Complainant is qualified for the NH-IV position with SAM-D, but asserts that he is not entitled to a promotion, as he would have had to interview for the position.

The Agency acknowledges that had the other NH-IIIs in Complainant's former unit been automatically converted to NH-IVs during the reorganization, then he would have "a compelling argument that he too should be promoted to NH-IV." However, the Agency determined that "no 21 CONS personnel were automatically laterally transitioned or promoted to ESD." Moreover, the Agency asserts that all 21 CONS personnel who temporarily occupied positions that transferred to ESD (this would have included Complainant) were "competitively selected." The Agency states that those who were not competitively selected were transferred to vacant 21 CONS billets. The Agency does not offer details as to the competitive selection process other than the interview requirement.

Particularly relevant to the instant complaint is Mehta v. Department of Housing and Urban Development, EEOC Appeal No. 01A32842 (Sep. 28, 2004), where the agency was ordered to reinstate the complainant to his former GS-13 Staff Accountant position, which had since been eliminated. The Agency placed the complainant in a GS-13 Operations Specialist position, finding that placement in a GS-14 position would result in "more than make-whole relief" and that it was "speculative" whether the complainant would have been promoted. The Commission disagreed, noting that "nearly all" of the individuals who held the GS-13 Staff Accountant position at the time it was abolished had since been promoted to the GS-14 or GS-15 level, the agency offered no documentary evidence as to how it reassigned individuals when the Staff Accountant position was abolished, and there was no evidence to suggest that the complainant would not have been fully successful at the GS-14 level, or would not have qualified for the GS-15 level after completing the necessary training.

Likewise, the Agency in this case, has not established that Complainant is not entitled to a promotion to NH-IV as make-whole relief, merely because the promotion was not "automatic" for all other NH-III in the 21 CONS unit where he would have worked but for the discriminatory nonselection. Although the newly-created NH-IV positions were advertised agency-wide, the Agency's documentary evidence indicates that all of these positions were filled with personnel from 21 CONS. During the realignment, all of the NH-III Contract Specialists, in the 21 CONS unit where Complainant would have worked, were temporarily placed in the ESD Contract Specialist until the position could be permanently filled. Similar to the agency in Mehta, the Agency in this case offers no evidence to suggest that Complainant's performance as an NH-III, or in the temporary ESD position would have been unsatisfactory, or that at that point in his employment he would lack the necessary training and security requirements to qualify for conversion to NH-IV. Also, despite Complainant's email queries in the record, the Agency never addresses whether Complainant is qualified for the position, and the record lacks a position description for the NH-IV Contract Specialist within ESD (now SAM-D).

We also find that the Agency failed to address its obligation to timely provide a reasonable accommodation as part Complainant's reinstatement.

In order to *fully comply* with the AJ's reinstatement order, the Agency must demonstrate that it obtained the necessary reasonable accommodation, as identified by the AJ (two ASL interpreters with TS/SCI/SAP) for Complainant. Although the position where Complainant will ultimately be reinstated is in question, it is undisputed that upon reinstatement, Complainant will require this reasonable accommodation.

The AJ's decision identifies the following additional examples of resources the Agency could have contacted: the Colorado Commission on the Deaf and Hard of Hearing ("CCDHH"), the Computer/Electronic Accommodations Program ("CAP"), the Board for Evaluation of Interpreters ("BEI"), the Job Accommodation Network ("JAN"), or the National Association for the Deaf ("NAD"). The AJ also noted that H1 failed to consult the EEOC Technical Assistance Manual or "consider alternatives, such as borrowing cleared interpreters from other agencies, publishing nationwide requests for proposals for interpreting services, or cleared interpreters working remotely from another SCIF located elsewhere, such as the Washington, D.C. area, where there is a greater concentration of cleared interpreters."

The AJ also cites witness testimony from the Director of Marketing for Sorenson Communications, the largest video relay services ("VRS") provider in the country, providing VRS, video remote interpreting ("VRI"), community interpreting, and computer-assisted real-time transcription ("CART") services. Specifically, the AJ found that the witness "credibly testified that there are over five hundred ASL interpreting agencies nationwide and twenty agencies in Colorado alone, including a chapter of the (Colorado) Registry of Interpreters for the Deaf ("RID" or "CRID") and the CCDHH." The witness also "identified Deaf in Government ("DIG") as an organization of members of the deaf community who work in federal government and which has a sub-group of members who work in the intelligence community, all of whom need and use interpretive services, suggesting the availability of interpreters with clearances." The AJ noted that this witness's knowledge extended to his personal experience as a consumer of interpretive services, and with training interpreters.

The AJ's Order acknowledges that if the Agency hires/contracts interpreters who do not already possess the necessary clearances, obtaining TS and SCI clearances can take up to 14 months, while SAP clearances take between one week and a few months. The Commission notes that it has been nearly 9 months since the Agency adopted the AJ's order to reinstate Complainant, and initiated "good faith" efforts to locate a "substantially equivalent" position for Complainant, yet the record is devoid of evidence that the Agency is working to ensure Complainant will have a reasonable accommodation upon reinstatement, or shortly thereafter.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we MODIFY the Agency's Final Order with respect to its implementation of the AJ's orders concerning retroactive placement and backpay.

ORDER (D0617)

The agency is ordered to take the following remedial action:

1. Reinstatement. Within **sixty (60) calendar days** of this Decision, the Agency shall retroactively reinstate Complainant to the position of Contract Specialist, NH-1102-03/03 at Peterson AFB/SFB in Colorado Springs, Colorado with an appointment date effective October 7, 2016, and a start date of April 3, 2017 (pay period 7). The retroactive reinstatement shall include all seniority, promotions, and grade and step increases to which Complainant would have been entitled but for the discrimination, including the 2018 temporary assignment and subsequent promotion/hire to an NH-IV Contracting Officer position within the Enterprise Solutions Directorate (“ESD”), now Space Acquisitions Management-Delta (SAM-D”). The date of the promotion/hire to NH-IV shall be calculated based on the effective promotion/hire date for the first of the NH-III Contract Specialists within the 21 CONS unit where Complainant would have been assigned but for the discrimination, to receive a promotion to NH-IV Contract Officer.
2. Training and SAP. Within **thirty (30) calendar days** of his placement in the NH-IV Contract Officer position, the Agency shall provide Complainant, in an accelerated fashion, with all training necessary to successfully perform at the NH-IV level as a Contracting Officer in SAM-D, and, if necessary, the Agency shall assist Complainant with securing an SAP clearance.
3. Reasonable Accommodation. The Agency shall ensure that two cleared on-site or remote ASL interpreters are available as a reasonable accommodation for Complainant.
4. Backpay. Within **sixty (60) calendar days** of this Decision, to the extent that it has not already done so, the Agency shall:
 - (a) Pay Complainant the difference, if any, between what he would have earned had he been selected for the Contract Specialist position, NH-1102-03/03, on October 7, 2016, and he had started on April 3, 2017 (Pay Period 7), initially earning at least the equivalent of a GS-12, Step 3, and what he earned through the date this back pay award is finally paid to Complainant.
 - (b) Pay Complainant pre-judgment interest on lost back-pay and benefits at the annual percentage rate or rates established by the U.S. Secretary of the Treasury under 26 U.S.C. § 6621(a), and 5 C.F.R. § 550.806(d)-(e) from the date Complainant was eligible or entitled to such additional compensation to the date that the monetary amount is paid by the Agency.

- (c) Provide Complainant with a detailed statement of the Agency's calculations regarding all the components of Complainant's backpay, other applicable employment benefits, and interest. The statement shall be in "plain language" and shall include the formulas and methods the Agency used to calculate Complainant's backpay.

If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the Complainant for the undisputed amount within **sixty (60) calendar days** of the date the Agency determines the amount it believes to be due. The Complainant may petition for enforcement or clarification of the amount in dispute. 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. Tax Consequences. Pay Complainant for any increased tax burden resulting from the backpay award provided Complainant provides the Agency with documentation proving the increased tax burden.
6. Attorney Fees. If applicable, the Agency is to pay Complainant an award for the additional attorney's fees and reasonable costs associated with the preparation of this appeal. (See Attorney's Fee paragraph below).
7. Report of Compliance. The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal ("FedSEP"). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

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

March 14, 2022

Date