



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.,
Complainants¹

v.

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

Request Nos. 2022000893, 2022000894, 2022000896, 2022000898, 2022000899, 2022000900,
2022000902, 2022000903, 2022000905, 2022000906

Appeal Nos. 2020003894, 2020003895, 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 REQUEST FOR RECONSIDERATION

The Agency timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in EEOC Appeal Nos. 2020003894, 2020003895, 2020003897, 2020003898, 2020003899, 2020003900, 2020003901, 2020003902, and 2020003903 (November 17, 2021) (together referred as “2020003894 et al.”).

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

EEOC Regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision issued pursuant to 29 C.F.R. § 1614.405(a), where the requesting party demonstrates 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. See 29 C.F.R. § 1614.405(c).

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. PFPA Police Officers were required to wear protective clothing and use personal protective equipment (PPE). PFPA 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 Pseudo folliculitis Barbae (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.

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

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

Complainants filed EEO complaints, separately, alleging discrimination on the bases of race (African American), color (Black), and disability (PFB) 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. After an investigation, the Agency issued a consolidated final decision finding no discrimination. In a previously issued appellate decision, the Commission vacated the Agency's decision and remanded the complaints back to the Agency for a supplemental investigation into its qualification standard, individualized assessment of direct threat, and alternative respirator options. See EEOC Appeal Nos. 0120170405 et al. (December 5, 2016). Following this supplemental investigation, the Agency issued a second final decision on June 17, 2020, again concluding no discrimination was established.

EEOC Appeal Nos. 2020003894 et al.

In EEOC Appeal Nos. 2020003894 et al. (November 17, 2021), the Commission found that the Agency established that the qualification standard at issue was job-related and consistent with business necessity. The Commission determined, therefore, that the question to be answered was whether or not PFPA Police Officers whose disability impacted their ability to be completely clean shaven could have been provided with an accommodation such as a waiver of the rule to permit closely cropped facial hair like the quarter-inch they were previously permitted or the provision of another type of respirator that is not impacted by facial hair.

The Commission concluded that the Agency failed to meet its burden of proving that there was no accommodation that would enable Complainants to meet the standard or that there was no alternative approach (itself a form of accommodation) through which it could determine whether Complainants could perform the essential functions of their position. The Commission particularly noted that prior to the passage of the rule requiring all PFPA Police Officers, without exception, to be clean shaven, the Agency had allowed for a medical waiver for a small amount of facial hair (quarter inch) for PFPA Officers. Complainants had all qualified for the waiver, passed their annual mask fit tests, and there was 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. The Commission also noted that the record contained evidence that there were alternative masks available for those who cannot use a negative pressure mask due to a medical condition.

While arguing alternative masks would interfere with the ability of PFPA Police Officers to perform their essential duties, beyond these general contentions, the Agency again did not adequately substantiate its claims with evidence. In sum, the Commission found the Agency failed to meet its burden of proving that there was no reasonable accommodation that would enable Complainants to meet the existing standard or an alternative approach that would still allow the PFPA Officers to perform the essential functions of their position. The decision concluded the Agency's imposition of a blanket policy requiring all PFPA Officers to be clean-shaven regardless of their medical condition violated the Rehabilitation Act.

The final agency decision was reversed, and the matter remanded for remedial relief, including the reinstatement of PFPA Officers who were impacted by the rule and the provision of reasonable accommodation for PFPA Officers whose medical conditions prevented them from being clean shaven.

Agency's Request for Reconsideration

In its request for reconsideration, the Agency argues that the previous decision contains multiple errors of material fact and law.

First, the Agency asserts that the prior decision defined the qualification standard inconsistently by reframing the qualification standard at issue as “the ability to wear a respirator mask” when the qualification standard was previously identified as PFPA’s policy requiring police officers to “wear a negative pressure protective mask with clean-shaven skin.” The Agency argues that, as a result, the previous decision changes the inquiry from whether the Agency discriminated against Complainants based on their disability when it established its policy requiring Complainant’s to be “clean shaven,” to whether the Agency discriminated against Complainants based on their disability when it required Complainants to be able to properly wear a respirator during an emergency.

The Agency once again argues that Complainants’ requested shaving waivers are neither effective nor reasonable based on Occupational Safety and Health Administration (OSHA) standards. Similarly, the Agency contends that the Commission failed to give consideration and deference to its mask selection when evaluating whether it would be appropriate to permit Complainants to wear an alternate respirator as an accommodation.

According to the Agency, the Commission erred in its interpretation of 29 C.F.R. § 1910.134(e)(6)(ii) by misinterpreting the plain language of the regulation and inappropriately placing requirements not contemplated by OSHA on the Agency. Specifically, the Agency contends that the Commission incorrectly interpreted the provision to require the Agency to provide a different type of respirator to Complainant than the standard issue.

ANALYSIS AND FINDINGS

As an initial matter, we note that many of the Agency’s arguments reflect disagreement with the instruction to apply the “Qualification Standard” analysis, which was previously considered and addressed.

The regulations define “qualification standard” as “the personal and professional attributes, including the skill, experience, education, physical, medical, safety, and other requirements established by a physical, medical, safety and other requirements which an individual must meet in order to be eligible for the position held or desired.” 29 C.F.R. § 1630.2(q). The term “qualification standard” may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace. 29 C.F.R. §1630.15(b)(2).

It is unlawful for a covered entity to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job related for the position in question and is consistent with business necessity. 29 C.F.R. §1630.10(a).

In its reconsideration request, the Agency argues that the Commission inconsistently defined the qualification standard in the previous decision.

However, the previous decision, in addition to our initial decision, states that the qualification standard Complainants were unable to meet was wearing the Agency-selected respirator with clean-shaven facial skin. The previous decision explicitly states that “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.” Regarding the Agency’s argument that the previous decision reflects a clear issue of material fact in concluding that it was undisputed that Complainants were “qualified” under the Rehabilitation Act, the Agency mischaracterizes the prior decision. In support, the Agency takes the opportunity to reiterate a position that was considered and addressed in each of our prior decisions. The distinction the Agency attempts to make lacks merit because the result is the same in that the previous decision clearly notes the Agency’s assertion that Complainants were unable to meet its safety-related qualification standard that requires all Police Officers, without exception, to have clean-shaven facial skin at all times in order to wear a specifically identified respirator mask.

To the extent the Agency argues that the previous decision erroneously shifted Complainants’ burden of establishing a *prima facie* case of disability onto the Agency when applying the qualification standards framework, we disagree. While the Agency sufficiently demonstrated that the qualifications standard was job-related and consistent with business necessity, it failed to satisfy the question of whether a reasonable accommodation would enable Complainants to meet the qualification standard. 29 C.F.R. §1630.15(b)(1).

The Agency reiterates its position that a waiver was not an appropriate accommodation. However, Complainants had 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. In the previous decision, the Commission noted that the record contained evidence that there were alternative masks available for those who cannot use a negative pressure mask due to a medical condition. The Agency asserts, without providing evidence, that the provision of an alternative respirator would have a deleterious effect on Agency operations by creating a liability for the Agency. While the Agency argues that it was inappropriate to require it to provide evidence, statements and speculation without evidence do not suffice to satisfy the question of whether a reasonable accommodation was appropriate in these circumstances.

Turning to the Agency’s arguments concerning the interpretation of 29 C.F.R. § 1910.134(e)(6)(ii), the Agency asserts that the requirement to provide an employee with a Powered Air Purifying Respirator (PAPR) is only implicated if a physician opines that the employee is medically incapable of using a negative pressure respirator and is medically capable of using a PAPR.

Here, Complainants' use of the waiver process prior to the implementation of the qualification standard at issue and subsequent waiver requests indicate that Complainants were medically incapable of using the selected respirator, which operated as a negative or positive pressure respirator, and medically capable of using a PAPR as demonstrated on previous fit tests. Despite the Agency's contentions, the Commission considered the Agency's arguments regarding its duties under OSHA standards and we find no error in the rejection of those arguments.

As for the Agency's contention that the "Commission inexplicably subjected the alleged qualification standard at issue to a direct threat test," we note that the Agency's own final decision provided a direct threat analysis. Moreover, with regard to safety requirements that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, an employer can demonstrate that the requirement is job related and consistent with business necessity by showing that the requirement satisfies a direct threat analysis. 29 C.F.R. §1630.2(r), 29 C.F.R. 1630 App. 1630.15(b) and (c); Nathan v. Dep't of Justice, EEOC Appeal No. 0720070014 (July 19, 2013).

The Commission emphasizes that a request for reconsideration is not a second appeal. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (Aug. 5, 2015); see, e.g., Lopez v. Dep't of Agric., EEOC Request No. 0520070736 (Aug. 20, 2007). Rather, a reconsideration request is an opportunity to demonstrate that the appellate decision involved a clearly erroneous interpretation of material fact or law, or will have a substantial impact on the policies, practices, or operations of the Agency. The Agency has not done so here. Rather, the Agency is attempting to relitigate the appeal raising contentions that were either already considered and rejected or could have been raised below.

After reviewing the previous decision and the entire record, the Commission finds that the request fails to meet the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to deny the request. The decision in EEOC Appeal No. 2020003894, 2020003895, 2020003897, 2020003898, 2020003899, 2020003900, 2020003901, 2020003902, and 2020003903 remains the Commission's decision. There is no further right of administrative appeal on the decision of the Commission on this request. The Agency shall comply with the Order as set forth 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 PFPA 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 D.C. 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.

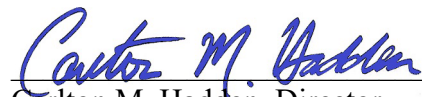
COMPLAINANT’S RIGHT TO FILE A CIVIL ACTION (P0610)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission’s decision. 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.

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

April 4, 2022
Date