



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

[REDACTED]  
Sol W.,<sup>1</sup>  
Complainant,

v.

Alejandro N. Mayorkas,  
Secretary,  
Department of Homeland Security  
(Customs and Border Protection),  
Agency.

Appeal No. 2021003419

Hearing No. 470-2019-00426X

Agency No. HS-CBP-00648-2019

**DECISION**

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's April 26, 2021 final order concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, the Commission REVERSES the Agency's final order and REMANDS the complaint for further action.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Customs and Border Patrol (CPB) Officer at the Agency's Detroit Metropolitan Airport Port of Entry in Romulus, Michigan. On February 14, 2019, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the bases of national origin (Lebanese), and religion (Muslim), and in reprisal for protected EEO activity,<sup>2</sup> when on January 10, 2019, the

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<sup>1</sup> This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

<sup>2</sup> The reprisal basis was added during the hearing process. Memorandum of Initial Status Conference and Order at 1.

Agency rescinded Complainant's computer access, government-issued firearm, and credentials; and placed him on administrative duties. The Agency accepted this claim for investigation.

However, the Agency dismissed Complainant's claim alleging discrimination when, on December 10, 2018, Complainant was subjected to an inspection and questioned by two CBP Officers at the Detroit Metropolitan Airport upon his return from Lebanon; and his personal property was detained for examination and not yet returned. The Agency found that the action occurred when Complainant returned from personal travel and was not work-related. In addition, while Complainant alleged retaliation by his coworkers, his claim was based on his refusal to translate for them, which did not fall within EEO regulations. Accordingly, the Agency dismissed this claim for failing to state an actionable claim.<sup>3</sup> Report of Investigation (ROI) at 47-8.

After its investigation into the complaint, the Agency provided Complainant with a copy of the ROI and notice of right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing.

On October 30, 2020, the Agency filed a Motion to Dismiss for Lack of Jurisdiction because the Commission does not have the jurisdiction to review the substance of the Agency's decision to suspend a security clearance or the validity of a security clearance requirement itself. The Agency cited to Kitt v. Dep't of the Navy, EEOC Appeal No. 0120110624 (September 5, 2012) and Dep't of the Navy v. Egan, 484 U.S. 518 (1987).

The Agency asserted that Complainant alleged that he was discriminated against when his computer access, weapon, and credentials were revoked, and he was placed on administrative duty. However, these actions were a consequence of Complainant being the subject of an investigation involving national security concerns and ongoing concerns regarding his security clearance. The Agency also noted that Complainant averred that "[t]here is a lot of information that I cannot disclose because of security clearances." ROI at 13. As such, the Commission did not have the jurisdiction to review the substance of the Agency's decision to suspend a security clearance, or the validity of a security clearance requirement itself, and the Agency requested the dismissal of the complaint. Complainant opposed the Agency's motion.

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<sup>3</sup> The Administrative Judge (AJ) allowed Complainant to challenge the dismissal of this claim. Memorandum of Initial Status Conference and Order at 1. There is no indication that Complainant challenged the dismissal before the AJ. Further, we note that the Commission has the discretion to review only those issues specifically raised in an appeal. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chap. 9, § IV.A.3 (Aug. 5, 2015). On appeal, Complainant did not contest the dismissal of this claim; as such, we will not address it in the instant decision.

On March 23, 2021, the AJ granted the Agency's motion. The AJ found that the Commission has held that it is precluded from reviewing the substance of a security clearance decision or the validity of the security requirement itself, and it lacked jurisdiction where the Agency had revoked a complainant's security clearance when he was under investigation.

The AJ noted that Complainant argued that the facts of his case did not implicate Egan because the record did not support that the alleged retaliation was based in any part on national security concerns and he cited to Chien v. Sherman, 323 F.Supp.3d 1 (D.C. Cir. 2018) and Ames v. Johnson, 121 F.Supp.3d 126 (D.C. Cir. 2018). However, the AJ determined that these cases were distinguishable because neither required the review of the merits of a security clearance or rescission of same. The AJ found that the record clearly showed that the decision to rescind Complainant's firearm and credentials was related to national security concerns.

The AJ stated that the most dispositive factor in this case was the fact that none of the parties appeared to have the ability to be transparent as to exactly why Complainant was under investigation when his firearm, badge, and credentials were rescinded, and they only responded that the information was "law enforcement sensitive" and could not be disclosed because of security clearances. The AJ would need to review the merits of the Agency's decision in order to determine whether there was discrimination or retaliation. However, the Commission is precluded from reviewing the substance of a security clearance decision or the validity of the security requirement itself. Accordingly, the AJ granted the Agency's motion to dismiss Complainant's complaint.

The Agency issued a final order adopting the AJ's dismissal. The instant appeal followed.

### CONTENTIONS ON APPEAL

Through his attorney, Complainant argues that the Agency's national security "excuse" should never have been considered as a valid defense. Complainant asserts that the Agency could easily have shown any relevant documents to the AJ "in camera," without any risk of that information getting back to Complainant, and that the AJ should have requested as much, but failed to do so. Complainant also alleges that there is no evidence indicating that the adverse decision against him was based on national security concerns, and that it cannot yet be determined for purposes of applying the Egan exception because there is simply no evidence in the record to indicate that it was the basis. Complainant requests that the Commission reverse the AJ's dismissal.

The Agency counters that the complaint was properly dismissed for lack of jurisdiction. Specifically, the Agency asserts that Complainant's claim falls within the ambit of actions controlled by Egan, and that Complainant is improperly seeking for the Commission to insert itself into the process surrounding the revocation of his security clearance and his eligibility to hold a national security position.

While Complainant contends that the Agency should allow the AJ to review the substance of the investigation and the information that supported the decision to revoke Complainant's security clearance to determine whether discrimination or retaliation occurred, this is exactly what Egan forbids. The Agency requests that the Commission affirm the dismissal of Complainant's complaint.

### ANALYSIS AND FINDINGS

In accordance with the national security exception contained in Section 703(g) of Title VII, 5 U.S.C. Chapter 75, and Egan, supra, and its progeny, the EEOC has long held that it does not have jurisdiction, and therefore will not, review an agency's determination concerning the substance of a security decision. However, the EEOC does have jurisdiction to review whether an agency has suspended a complainant's security clearance in a discriminatory manner. See Schroeder v. Dep't of Def., EEOC Request No. 05930248 (Apr. 14, 1994); Lyons v. Dep't of the Navy, EEOC Request No. 05890839 (Mar. 22, 1990).

In this case, the AJ dismissed the complaint finding that the Agency's decision to rescind Complainant's firearm and credentials was related to national security concerns, and as such, the Commission did not have jurisdiction over the complaint. However, we find that Egan does not apply here. Complainant alleged discrimination when the Agency rescinded his computer access, government-issued firearm, and credentials; and placed him on administrative duties. While we note that the Agency explained that these actions resulted from the Agency's investigation into Complainant, his complaint did not include claims challenging the Agency's investigation or security clearance determination, and there is no need to review the Agency's determination concerning the substance of a security decision. See Al H. v. Dep't of State, EEOC Appeal No. 0120181043 (Jun. 18, 2019) (finding that complainant's claims regarding denial of promotions and delay in the processing of renewal of his security clearance due to information in his security file did not implicate Egan because complaint did not regard contents of a security clearance file being used to make a security clearance determination). Accordingly, we find that Complainant's accepted claim of discrimination does not fall within the national security exception, and that the dismissal was inappropriate.

Further, we find that the Agency's explanation that the complained of actions occurred due to an investigation and/or national security concerns is the Agency's legitimate, nondiscriminatory reason for its actions, which goes to the merits of the complaint. The Commission has consistently held that it is improper to address the merits of a complaint in a procedural dismissal. See Lis v. U.S. Postal Serv., EEOC Appeal No. 0120103655 (Feb. 10, 2011); Yisa v. Dep't of Commerce, EEOC Appeal No. 0120110067 (Jan. 13, 2011); Harmon v. U.S. Postal Serv., EEOC Appeal No. 0120091902 (Oct. 29, 2010). As such, we REVERSE the Agency's final order and REMAND the matter for further action, in accordance with the Order below.

### CONCLUSION

Therefore, after a careful review of the record, including Complainant's arguments on appeal, the Agency's response, and arguments and evidence not specifically discussed in this decision, we REVERSE the Agency's final action and REMAND the matter to the Agency in accordance with this decision and the Order below.

### ORDER

The Agency is directed to submit a copy of the complaint file to the EEOC Detroit Field Office's Hearings Unit within fifteen (15) calendar days of the date this decision becomes final. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit. Thereafter, the Administrative Judge shall resume the processing of the complaint in accordance with 29 C.F.R. § 1614.109 and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

### 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).

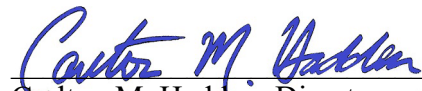
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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:

  
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Carlton M. Hadden, Director  
Office of Federal Operations

June 27, 2022  
Date