



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

[REDACTED]  
Priscilla H.,<sup>1</sup>  
Complainant,

v.

Kilolo Kijakazi,  
Acting Commissioner,  
Social Security Administration,  
Agency.

Request No. 2022001994

Appeal No. 2021001678

Agency No. L-20-0254

**DECISION ON REQUEST FOR RECONSIDERATION**

The Agency requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in EEOC Appeal No. 2021001678 (January 18, 2022). 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). The Agency's request for reconsideration is DENIED.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Claims Specialist (GS-11) at the Agency's Field Office in Nashville, Tennessee.

On May 13, 2020, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (African American), sex (female), and color (brown), and in

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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.

reprisal for prior protected EEO activity, when, in relevant part, on December 16, 2019, Complainant was not selected for the GS-0105-12 Operations Supervisor positions advertised under Vacancy Announcement Numbers SG-10532095-19-MBJ and SG-10427129-19-MBJ.

Following an investigation into the claims, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b), in accordance with Complainant's request. The Agency concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged. Complainant appealed the Agency's final decision.

On January 18, 2022, the Commission issued a decision reversing the Agency's decision for the non-selection claim and affirming the Agency's findings of no discrimination for the remaining claims. Regarding the non-selection claim, the Commission found that Complainant established a prima facie case of discrimination based on her race, sex, and color because she was deemed qualified for the position and referred to the selecting official; not selected; and those selected for the positions were outside her protected groups.<sup>2</sup> Priscilla H. v. Social Sec. Admin., EEOC Appeal No. 2021001678 (Jan. 18, 2022).

The Commission then found that the Agency failed to meet its burden to provide a legitimate, nondiscriminatory explanation for not selecting Complainant. While the selecting officials asserted that the decisions were based on the recommendations received from the candidates' supervisors, the record contained no record of any recommendation for Complainant or the other applicants, including the two selectees. Further, the identities of the supervisors providing the recommendations were not provided, nor were these supervisors interviewed. In addition, the selecting officials did not recall the names of the alleged recommending supervisors and there was no documentation of the specific recommendations for any of the candidates in question. While the selecting officials asserted that Complainant was recommended and the two selectees highly recommended, it was not apparent from the record why the selectees received a highly recommended rating whereas Complainant only received a recommended rating, nor was there evidence that those were, in fact, the respective recommendations at all. The Commission concluded that the Agency did not meet its burden to provide specific, clear, and individualized explanations for its selection decisions.

Because the Agency failed to overcome Complainant's prima facie case of race, sex, and color discrimination, the Commission found that Complainant had prevailed without having to prove pretext. The Commission ordered the Agency to take further action to award appropriate remedies, including offering Complainant the position of a GS-12 Operations Supervisor, or a substantially equivalent position.

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<sup>2</sup> The Commission found that it was not necessary to address whether the Agency's actions were also motivated by reprisal because Complainant would not be entitled to any additional remedies.

On February 17, 2022, the Agency requested reconsideration of the appellate decision. As an initial matter, the Agency states that it is only challenging the decision for the non-selection claim. The Agency argues that the Commission was provided with an incomplete record that could not possibly have permitted a factfinder to draw accurate conclusions as to whether discrimination occurred. Specifically, statements or other evidence from the relevant management officials who provided supervisory recommendations for the candidates were absent; and the record contained several damaged, unreadable exhibits, including the vacancy announcements at issue and a portion of Complainant's application.

The Agency also asserts that the Commission made a clearly erroneous interpretation of material fact when finding that the identities of the supervisors providing recommendations were not provided. With its request, the Agency submits new evidence, including testimonial evidence from the recommending officials, and it requests that the Commission consider this new evidence.

Complainant did not file a response to the Agency's request for reconsideration.

### ANALYSIS AND FINDINGS

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 Agency's request.

In support of its argument for the Commission to consider its newly provided evidence, the Agency relies upon Stuart M. v. Department of Justice, EEOC Request No. 2021000275 (December 29, 2020). However, in Stuart M., the Commission noted that it has consistently held that arguments and/or evidence presented for the first time in a request for reconsideration cannot be considered. See Orval T. v. Dep't of the Navy, EEOC Request No. 2020004014 (Nov. 19, 2020), citing Sierra P. v. U.S. Postal Serv., EEOC Request No. 0520170104 (Mar. 9, 2017) ("The presentation of new evidence is not one of the stated grounds for reconsideration").

While the Commission considered the Agency's new evidence in Stuart M., it did so in the interest of administrative economy since the underlying appeal ordered a supplemental investigation, and the new evidence addressed the evidentiary deficiencies noted in the previous appellate decision. In this case, the Commission did not determine that a supplemental investigation was warranted and did not order the Agency to submit additional evidence.

To the extent that the Agency asserts that the Commission relied upon an incomplete record, this was due to the Agency's failure to comply with Commission regulation to provide an appropriate factual record. See 29 C.F.R. § 1614.108(b). We will not allow the Agency's admitted failure to comply with the Commission's regulations to justify the consideration of new evidence submitted for the first time with a request for reconsideration.

The Agency also argues that the Commission's determination that "the identities of the supervisors providing recommendations were not provided" was a clearly erroneous interpretation of material fact. The Agency asserts that the selecting officials stated that they contacted the first-line supervisor listed on each candidate's SSA-45 for a supervisory recommendation, and that the EEO investigator obtained the SSA-45s, "so it is especially troubling that there is no indication in the record that any effort was made to reach any of the recommending supervisors, nor is there any indication that these individuals were unavailable to provide a statement for the record."

However, we are not persuaded that this is a material fact. A fact is "material" if it has the potential to affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Even if the identities of the recommending officials were included in other parts of the record, the selecting officials offered no specific, clear, and individualized explanations for their selection decisions. While the Agency finds it "troubling" that no effort was made to obtain affidavits from the recommending officials, it was the Agency that made no effort. The Agency further argues that, had the EEO investigator obtained statements and other evidence from these relevant management officials, the Agency would have had the opportunity to fully articulate its legitimate, nondiscriminatory reasons for not selecting Complainant. However, in its argument, we find that the Agency effectively concedes that it did not provide legitimate, nondiscriminatory reasons for its actions.

We find that the Agency has not met its burden to show that the appellate decision involved a clearly erroneous interpretation of material fact or law. The Agency's request for reconsideration therefore is DENIED, and the decision in EEOC Appeal No. 2021001678 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 (D0617)

The Agency is ordered to take the following remedial action:

- I. Within thirty (30) calendar days of the date this decision is issued, the Agency shall offer Complainant the position of Operations Supervisor, or a substantially equivalent position. Complainant shall have fifteen (15) days, from the date of the offer, to accept or decline the position. If Complainant should decline the Agency's offer, the date of her rejection shall be the end date for any back pay due Complainant.
- II. The Agency shall pay Complainant back pay, with interest, from the date on which it is determined Complainant would have started in the Operations Supervisor position. The Agency shall determine the appropriate amount of back pay, with interest, and other benefits due the Complainant, pursuant to 29 C.F.R. § 1614.501, no later than sixty (60) calendar days after the date this decision was issued.
- III. The Agency shall also pay compensation for the adverse tax consequences of receiving back pay as a lump sum. Complainant has the burden of establishing the amount of

increased tax liability, if any. Once the Agency has calculated the proper amount of back pay, Complainant shall be given the opportunity to present the Agency with evidence regarding the adverse tax consequences, if any, for which Complainant shall then be compensated. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to Complainant for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. 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."

- IV. The Agency shall conduct and complete a supplemental investigation on the issue of Complainant's entitlement to compensatory damages and will afford her an opportunity to establish a causal relationship between the Agency's discriminatory action and her pecuniary or non-pecuniary losses, if any. Within fifteen (15) calendar days of the date this decision is issued; the Agency shall give Complainant notice of her right to submit objective evidence (pursuant to the guidance given in Carle v. Dep't. of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)) in support of her claim for compensatory damages. Complainant shall have forty-five (45) calendar days from the date the Complainant receives the Agency's notice to submit her compensatory damages evidence. The Agency shall issue a final decision, with appeal rights to the Commission, on the issue of compensatory damages. 29 C.F.R. § 1614.110. The Agency shall submit a copy of the final decision to the Compliance Officer at the address set forth herein. Within thirty (30) calendar days of determining the amount of compensatory damages due Complainant, the Agency shall pay that amount to Complainant.
- V. Within ninety (90) days from the date the decision is issued, the Agency is directed to conduct eight (8) hours of in-person or interactive training for the selecting officials for the Operation Supervisor's position.<sup>3</sup> The Agency shall address management's responsibilities with respect to eliminating discrimination in the workplace and training in EEOC regulations concerning the maintenance of records under 29 C.F.R. § 1602.14. Within thirty (30) calendar days of the date the training is completed, the Agency shall submit to the Compliance Officer appropriate documentation evidencing completion of such training.
- VI. Within sixty (60) days from the date the decision is issued, the Agency shall consider disciplining the selecting officials for the Operations Specialist position. The Commission does not consider training to constitute disciplinary action. The Agency shall report its decision to the Compliance Officer. If the Agency decides not to issue any disciplinary action, it shall set forth the reason(s) for its decision. If any of the named

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<sup>3</sup> The selecting officials were the Assistant District Manager and Nashville District Manager, as identified in the report of investigation on pages 134 and 146.

management officials is no longer employed by the Agency, the Agency shall furnish proof of the date(s) of separation.

- VII. The Agency shall, within thirty (30) days of the date this decision is issued, post a notice in accordance with the Order below.

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.

#### POSTING ORDER (G0617)

The Agency is ordered to post at its Nashville, Tennessee Field Office 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).

#### 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:

  
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Carlton M. Hadden, Director  
Office of Federal Operations

June 30, 2022

Date