



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

[REDACTED]  
Nancy S.,<sup>1</sup>  
Complainant,

v.

Denis R. McDonough,  
Secretary,  
Department of Veterans Affairs,  
Agency.

Request No. 2022001962

Appeal No. 2021000961

Hearing No. 520-2019-00447X

Agency No. 200H-0528-2019100545

**DECISION ON REQUEST FOR RECONSIDERATION**

Complainant timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in EEOC Appeal No. 2021000961 (February 15, 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).

During the relevant time, Complainant worked as a Lead Medical Support Assistant Trainer, GS-07, at the Agency's Medical Center facility in Buffalo, New York.

Complainant filed a formal complaint, claiming discrimination based on race, sex, and in reprisal for prior protected activity. Complainant alleged that she was not selected for the position of Human Resources (HR) Specialist, Recruitment & Staffing; Administrative Officer; or HR Specialist, Reasonable Accommodation.

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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.

After an investigation, Complainant requested a hearing before an EEOC Administrative Judge (AJ), but she subsequently withdrew her request. Thereafter, the Agency issued a final decision (FAD) concluding the evidence of record did not establish any discrimination. Complainant appealed.

On appeal, Complainant made several allegations relating to the processing of her complaint. She alleged that the EEO investigation was deficient, stating that the Agency informed her that they were unable to locate the records relating to the HR Specialist Recruitment & Staffing position selection and they did not have the rating scores of applicants for either of the HR Specialist positions at issue. Complainant noted that she added additional documents to the record that she obtained via Freedom of Information Act (FOIA) requests, including interview scores for the HR Specialist, Recruitment & Staffing position. She also alleged the Agency failed to timely issue a FAD as ordered.

Complainant also addressed the merits of her claims. Regarding the HR Specialist, Recruitment & Staffing position, she asserted that the Agency indicated the position was filled non-competitively from a veteran's certificate. However, Complainant noted that, while she received one selectee's score, she did not receive the interview notes or ranking information used in the selection process.

Regarding the Administrative Officer position, Complainant noted that the original posting for the position was canceled and the position was reposted. Complainant alleged that the Agency indicated she did not apply to the vacancy at issue after it was cancelled and reposted; but she submitted the confirmation notice of her application for the position. Complainant also noted that the selecting official indicated the selectee was chosen based on PBI interview techniques, but the Agency did not provide the interview notes or ranking information.

Regarding the HR Specialist, Reasonable Accommodation position, Complainant noted that she was considered qualified and referred to the hiring manager for this position. She also noted that the selecting official indicated that there was an independent resume review for the position and that the Agency could not explain why Complainant was not included in that review of applicants. Complainant noted the Agency provided no proof of the rating or scoring of the applicants. Complainant also noted that the Agency indicated Complainant was not selected for an interview because the selection was made from a veteran's certificate. Complainant asserted that the position was competitive and there were interviews conducted. She also asserted that the Agency did not comply with the EEO investigator's request for the interview notes.

Complainant argued that the Agency had a duty to develop the record and timely provide the FAD as ordered. She further argued that the Agency should be sanctioned for failing to do so and that a default judgment was warranted.

Complainant also argued that the non-selections were in reprisal for her prior protected activity and that she established a prima facie case on the bases of race and sex. She argued that the Agency failed to articulate legitimate non-discriminatory reasons and that the Agency's reasons were pretext for discrimination.

In EEOC Appeal No. 2021000961, the Commission affirmed the Agency's final order implementing the AJ's finding of no discrimination. In so doing, the Commission found that the Agency asserted legitimate nondiscriminatory reasons for not selecting Complainant for each of the positions at issue. The Agency noted that, regarding the two HR Specialist positions, the Agency explained that Complainant was not selected because the selectees were selected under Veterans Recruitment Appointment (VRA). The Agency noted that Complainant was not selected for the Administrative Officer position because, although she applied to the initial posting and was found to be eligible for the position, the announcement had to be removed and reposted and there was no evidence that Complainant ever applied for the new position posting.

On request for reconsideration, Complainant asserts that, regarding the HR Specialist positions, the Commission's prior decision erroneously states that the selectees were selected under VRA; she also notes that there were two vacancies for the Recruitment & Staffing position and the Agency did not address why Complainant was not selected for the second position. Complainant also asserts that the Agency's explanation that the HR Specialist positions were filled as non-competitive VRA appointments was pretext, arguing that the selection process was competitive. Regarding the Administrative Officer position, Complainant notes that she submitted evidence that she did apply for the position at issue.

Based on a review of the record, we conclude that the present record lacks the necessary information upon which to adequately determine whether the Agency subjected Complainant to discrimination as alleged, particularly as the record does not contain sufficient documentation regarding the selection process for each of the positions at issue. These insufficiencies include that the record does not establish how many positions were filled for each announcement and whether the vacancies were advertised and filled competitively or non-competitively under VRA. The record also does not contain sufficient interview notes, scoring data, and/or ranking of candidates to determine how the Agency came to select the selectees for each of the positions at issue. We remind the Agency that it had a duty to keep all relevant documentation pertaining to the nonselection claims at issue once an EEO complaint had been filed, and failure to produce such evidence may result in an adverse inference that such evidence would have been favorable to Complainant's claims.

Accordingly, we remand the entire complaint to the Agency to conduct a supplemental investigation.<sup>2</sup>

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<sup>2</sup> Because we are remanding the entire complaint, we decline to address Complainant's requests for sanctions for the untimely FAD.

### CONCLUSION

After reconsidering the previous decision and the entire record, the Commission finds that complainant's 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. However, upon its own motion, the Commission VACATES the decision in Appeal No. 2021000961. The Agency's final action is REVERSED and REMANDED for a supplemental investigation. There is no further right of administrative appeal on the decision of the Commission on a Request to Reconsider. The Agency shall comply with the Order as set forth below.

### ORDER TO SUPPLEMENT THE RECORD (B0622)

The Commission's prior decision has been vacated and the Agency's final action has been reversed and remanded for a supplemental investigation.

Within 60 days, the Agency shall conduct and complete a supplemental investigation, to include the following actions:

- a. Obtain all records relating to the selection process for each of the positions at issue, including, but not limited to, all interview notes, candidate scoring and ranking, and any and all information submitted, used, or obtained during the process;
- b. Obtain copies of any and all correspondence to any and all applicants for the positions advising them of their status in the application process;
- c. Obtain copies of the vacancy postings for the positions at issue;
- d. Obtain affidavits of all Agency personnel involved in the selection process for each of the positions at issue, to include specific answers about the selection process for each vacancy, including explanations for the selection of each selectee as well as explanations for any advertised vacancy that was not fulfilled;
- e. Obtain affidavits of Human Resources Specialists, as expert witnesses, to explain the hiring authorities used to fulfill each position at issue; and
- f. Upon completion of the investigation, provide a complete copy of a supplemental report of investigation to Complainant.

Upon completion of the investigation, the Agency must provide the Complainant with a copy of the supplemental record and findings and shall notify Complainant of the appropriate rights. If the Complainant requests a final decision without a hearing, the Agency shall issue a final decision within thirty (30) days of receipt of Complainant's request, including appeal rights.

As provided in the statement entitled "Implementation of the Commission's Decision," the Agency must send to the Compliance Officer: 1) a copy of the Agency's letter of acknowledgment to Complainant, 2) a copy of the Agency's notice that transmits the investigative file and notice of rights, and 3) either a copy of the complainant's request for a hearing, a copy of complainant's request for a FAD, or a statement from the agency that it did not receive a response from complainant by the end of the election period.

In accordance with Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § IX.E (Aug. 5, 2015), the Agency shall give priority to this remanded case in order to comply with the time frames contained in this Order. The Office of Federal Operations will issue sanctions against agencies when it determines that agencies are not making reasonable efforts to comply with a Commission order to investigate a complaint.

#### 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

August 15, 2022  
Date