



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Bart M.,¹
Complainant,

v.

Deb A. Haaland,
Secretary,
Department of the Interior
(Bureau of Land Management),
Agency.

Appeal No. 2021004846

Agency No. DOI-BLM-15-0116

DECISION

On August 31, 2021, 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 July 12, 2021, final decision on remedies 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 MODIFIES the Agency's final decision on remedies.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Supervisory Fire Engine Captain, GS-0455-7, at the Agency's Twin Falls District facility in Kimberly, Idaho. On January 19, 2015, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of sex (sexual orientation: homosexual) when, on December 11, 2014, he learned that he was not selected for the GS-7/8 Assistant Fire Operations Supervisor (AFOS) position advertised under vacancy announcement ID-Merit-2015-0003.

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 Equal Employment Opportunity Commission Administrative Judge (AJ).

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.

When Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f), the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The Agency concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

In EEOC Appeal No. 0120160543 (January 22, 2021), the Commission found that Complainant established that he was subjected to discrimination based on sex. We determined that the preponderance of the evidence in the record established that the Agency's legitimate, nondiscriminatory reasons for not selecting Complainant were pretext for discrimination based on sexual orientation.

As relief, we ordered the Agency to: (1) offer Complainant the Assistant Fire Operations Supervisor, GS-7 with promotion potential to GS-8, or a substantially equivalent position; (2) determine the appropriate amount of back pay, with interest, and other benefits due Complainant, and pay Complainant that amount; (3) conduct a supplemental investigation on Complainant's entitlement to compensatory damages and issue a final decision on the appropriate amount of damages; (4) post a notice; (5) provide eight hours of in-person EEO training to the responsible management officials, including S1, S2, S3, and S4; and (6) consider discipline against the responsible management officials, including S1, S2, S3, and S4.

On January 26, 2021, the Commission docketed EEOC Compliance No. 2021001857 to examine compliance with our order in EEOC Appeal No. 0120160543.

On July 12, 2021, the Agency issued a final decision on remedies. The Agency awarded Complainant \$2,180 in pecuniary compensatory damages for past medical expenses and \$40,000 in nonpecuniary compensatory damages. The Agency did not award any attorney's fees because Complainant was not represented by an attorney. The Agency found that Complainant was entitled to reinstatement of 35 hours of sick leave. The final decision ordered the Agency to calculate back pay, including interest, and pay Complainant that amount within 60 days of the final decision becoming final. The final decision also stated that, in the event Complainant submitted documentation establishing increased tax burden as a result of receiving back pay in a lump sum payment, the Agency was to pay Complainant the established amount of the increased tax liability within 60 days of receipt of Complainant's documentation.

Concerning the calculation of back pay, the final decision on remedies stated that, after Complainant was not selected for the GS-7/8 AFOS position, he continued to work as a Supervisory Fire Engine Captain, GS-7, step 6, until he was promoted to the position of Fire Operations Supervisor, GS-8, step 5, effective September 17, 2017. According to the Agency, if he had been selected for the AFOS position, Complainant would have received detail assignments that would have made him eligible for promotion to the GS-8 level within nine months. Therefore, the final decision ordered the Agency to calculate and pay Complainant back pay starting nine months after the pay period following Complainant's notification that he was not selected, or September 20, 2015, to the date of Complainant's promotion to the GS-8 level, September 17, 2017.

The instant appeal followed.

On appeal, Complainant contends that the Agency's final decision on remedies erred in its discussion regarding back pay. According to Complainant, he was not promoted to the position of Fire Operations Supervisor, GS-8, until April 14, 2019, and, at that time, he was promoted to GS-8, step 6 rather than to GS-8, step 5.² Complainant provided a copy of a Notification of Personnel Action form showing his promotion from GS-7, step 7 to GS-8, step 6 effective April 14, 2019, and requests that his back pay be calculated through that date.

In response to Complainant's appeal, the Agency notified the Compliance Officer assigned to EEOC Compliance No. 2021001857 that it would be pausing future compliance reports pending adjudication of the appeal.

ANALYSIS AND FINDINGS

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chap. 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

On appeal, Complainant has not challenged the Agency's final decision regarding Complainant's entitlement to compensatory damages, his entitlement to attorney's fees and costs, and reinstatement of leave. As such, we shall not address these determinations. Complainant only contends the Agency's final decision on remedies contained an error regarding the back pay period and our decision shall be limited to this remedy.

Our appellate decision ordered the Agency to determine the appropriate amount of back pay, with interest, and other benefits due Complainant, pursuant to 29 C.F.R. § 1614.501. The purpose of a back pay award is to restore to a complainant the income he would have otherwise earned but for the discrimination. Albemarle Paper Co. v. Moody, 442 U.S. 405, 418-19 (1975); Davis v. U.S. Postal Serv., EEOC Petition No. 04900010 (Nov. 29, 1990).

² Complainant suggests that the final decision may have erroneously determined that he was promoted to GS-8, step 5 effective September 17, 2017, based on a Notification of Personnel Action form approved on March 11, 2021, after the Commission found that the Agency subjected Complainant to discrimination.

Gross back pay should include all forms of compensation and must reflect fluctuations in working time, overtime rates, penalty overtime, Sunday premium and night work, changing rate of pay, transfers, promotions, and privileges of employment to which Complainant would have been entitled but for the discrimination. Ulloa v. U.S. Postal Serv., EEOC Petition No. 04A30025 (Aug. 3, 2004) (citing Allen v. Dep't of the Air Force, EEOC Petition No. 04940006 (May 31, 1996)).

Although the Agency has not yet determined the amount of back pay and benefits due Complainant, the final decision on remedies addressed the issue of back pay. Upon review, we agree with Complainant that the final decision on remedies erred in stating that Complainant's entitlement to back pay should end on September 17, 2017. We further note that Complainant's entitlement to back pay does not end on April 14, 2019, the date he was promoted to GS-8, step 6 position. Instead, the back pay period begins on the date Complainant would have started in the GS-7/8 AFOS position absent discrimination and extends to the date he either declined retroactive placement, or was retroactively placed, in the GS-7/8 AFOS position.³ This back pay period would restore Complainant to the position he would have occupied absent discrimination. According to the record, Complainant accepted retroactive placement into the GS-7/8 AFOS position, and the effective date of Complainant's reassignment to the GS-7/8 AFOS position was November 16, 2014. Complaint File (CF) at 284. However, the appellate record does not show what date Complainant was retroactively placed into the GS-7/8 AFOS position, which is the end of the back pay period.⁴ CF at 262-84. Once the Agency has calculated the proper amount of back pay, the Agency will allow Complainant to be given the opportunity to present the Agency with evidence regarding any adverse tax consequences based on a lump sum payment of back pay.

Accordingly, we will modify the portion of the Agency's final decision on remedies concerning back pay and remand the matter to the Agency for further action in accordance with this decision and the Order below. As the Agency has instructed the Compliance Officer that it has paused any future compliance reports pending adjudication of the instant appeal, we restate our order in EEOC Appeal No. 0120160543, modified to reflect that Complainant has accepted the GS-7/8 AFOS position.

³ Although Complainant would have been selected for the AFOS position at the same GS-7 level as his Supervisory Fire Engine Captain position, the back pay period begins on the date he would have been reassigned to the GS-7 AFOS position absent discrimination. It is possible that Complainant may have been entitled to additional pay or benefits in the GS-7 AFOS position compared to in the GS-7 Supervisory Fire Engine Captain position.

⁴ The Agency provided Notification of Personnel Action forms showing Complainant was retroactively placed in the AFOS position in personnel actions approved between March 4-11, 2021.

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 decision on remedies and REMAND the matter to the Agency for further action in accordance with this decision and the ORDER below.

ORDER

The Agency is ORDERED to take the following remedial action:

1. The Agency shall determine the amount of back pay, with interest and other benefits due Complainant, pay Complainant that amount, and compensate Complainant for any adverse tax consequences of receiving back pay as a lump sum:
 - a. Within 60 calendar days of the date this decision is issued, the Agency shall determine the amount of back pay, with interest, and other benefits due Complainant, pursuant to 29 C.F.R. § 1614.501, beginning from the effective date Complainant would have been reassigned to the GS-7/8 AFOS position (November 16, 2014) and continuing until the effective date of Complainant's retroactive placement into the GS-7/8 AFOS position in 2021.
 - i. Complainant 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 within 30 calendar days of any Agency request(s) for information where the information is appropriate and relevant to calculating a back pay determination.
 - ii. The Agency shall provide to Complainant a clear and detailed plain language explanation of its back-pay calculations, including the calculation of all benefits provided to Complainant. The Agency shall also provide documentation supporting its calculations and information concerning who prepared the computations and any relevant Agency policy or Office of Personnel Management guidelines. The Agency shall provide Complainant with a reasonable opportunity to respond to its back pay and other calculations.
 - b. Within 60 calendar days of the date the Agency determines the amount of back pay, with interest, and other benefits due Complainant, the Agency shall pay Complainant that amount. 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. Complainant may file a petition for enforcement or clarification regarding 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."

- c. 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.
2. To the extent it has not already done so, within 60 calendar days of the date this decision is issued, the Agency shall pay Complainant \$42,180.00 in compensatory damages.
3. To the extent it has not already done so, within 60 calendar days of the date this decision is issued, the Agency shall restore 35 hours of sick leave to Complainant.
4. To the extent it has not already done so, within 30 calendar days of the date this decision is issued; the Agency shall post a notice in accordance with the statement entitled "Posting Order."
5. To the extent it has not already done so, within 90 calendar days of the date this decision is issued, the Agency shall provide a minimum of eight hours of in-person EEO training to the responsible management officials, including S1, S2, S3, and S4.
6. To the extent it has not already done so, within 120 calendar days of the date this decision is issued, the Agency shall consider discipline against the responsible management officials, including S1, S2, S3, and S4. The Commission does not consider training to be a disciplinary action. The Agency shall report its decision to the Compliance Officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).

The Agency is further directed to submit a report of compliance, 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 Bureau of Land Management Twin Falls District 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.

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).

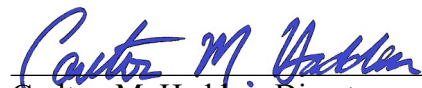
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. 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 on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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. If you file a request to reconsider and also file a civil action, **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

November 17, 2022

Date