



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

[REDACTED]  
Lamar D.,<sup>1</sup>  
Complainant,

v.

Alejandro N. Mayorkas,  
Secretary,  
Department of Homeland Security  
(Immigration and Customs Enforcement),  
Agency.

Appeal No. 2022000740

Hearing No. 570-2021-00363X

Agency No. HS-ICE-00402-2020

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated October 21, 2021, dismissing his complaint of unlawful 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. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, we REVERSE the Agency's final decision and REMAND the matter for further processing.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Criminal Investigator (Special Agent/Computer Forensics Agent), GS-1811-13, at the Agency's Homeland Security Investigations, Operational Technology and Cyber Division in Massena, New York.

On September 28, 2017, the Agency offered Complainant a temporary, not-to-exceed (NTE) two-year promotion to a GS-14, Step 4, Criminal Investigator position at the Agency's headquarters in Fairfax, Virginia. See Report of Investigation (ROI) at 131. The Agency gave Complainant the temporary promotion through its Temporary Change of Station (TCS) program, which allowed 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.

Agency to offer employees a headquarters assignment. Id. at 119-120. In July 2018, the Agency began to phase out the TCS program and phase in the Temporary Promotion Permanent Change of Station (TPPCS) program. Id. at 132. The TPPCS program allowed management to reassign GS-13s to headquarters, temporarily promote them to the GS-14 grade level and offer them a permanent change of station (PCS) to facilitate the reassignment. Id.

As part of the TPPCS program rollout, the Agency provided guidance in the form of Frequently Asked Questions (FAQs). ROI at 128-29. One of the FAQs in the guidance specifically addressed whether an employee assigned to headquarters on a TCS, such as Complainant, could be converted under the TPPCS program. Id. The guidance explicitly stated that employees on a TCS could not be converted under the TPPCS program. Id. The guidance clarified that employees who were currently assigned to a 24-month TCS had to be approved for a permanent reassignment or a promotional opportunity (e.g., a TPPCS) before the employee would have the option of either continuing the TCS or accepting the new assignment. Id.

To be eligible for an appointment through TPPCS, GS-13s had to apply for and be among the best qualified on a current Special Agent (SA) GS-14 Promotional Opportunity (SA-14) list at the time of selection. ROI at 128-29. Employees who passed the required tests were placed on the hiring certificate; however, those who failed were required to wait a year before they could retake the tests. Id.

On May 13, 2019, the Deputy Assistant Director for the Cyber Crimes Center (Deputy Assistant Director) asked the Assistant Director for Domestic Operations (Assistant Director) for permission to convert Complainant's status from TCS to TPPCS based on "increasing operational requirements." ROI at 77-8. The request was then routed to the Acting Assistant Director for the Operational Technology and Cyber Division (Acting Assistant Director). Id. at 72-3. According to the Agency, the Acting Assistant Director erroneously granted the Deputy Assistant Director's request to convert Complainant to TPPCS on June 18, 2019. See Agency's Motion to Dismiss (Agency's MTD) at 6-7. The following day, the Unit Chief sent an office-wide email, congratulating Complainant on his conversion to TPPCS. Id. at 85. On July 16, 2019, the Acting Assistant Director sought permission to extend Complainant's tour under the TCS program.

While the Agency was considering the Deputy Assistant Director's conversion request for Complainant, Complainant separately applied for the GS-14 "Special Agent Promotional Opportunity" that the Agency announced in early June 2019. See Agency's MTD at 26-30. Complainant took the required supervisory situational judgment test for the position; however, on July 20, 2019, Complainant received notification from the Office of Personnel Management (OPM) that he was ineligible for the promotional opportunity because he failed to attain the minimum score on the required assessment for the position.<sup>2</sup> Agency's MTD at 39-40.

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<sup>2</sup> Complainant received the same notification on August 21, 2019. See Agency's MTD at 41-42.

On July 29, 2019, the Deputy Assistant Director learned that Complainant was ineligible for the promotional opportunity. See Agency's MTD at 49-50. Though the Deputy Assistant Director asked the Acting Assistant Director for her assistance, the Acting Assistant Director ultimately informed the Deputy Assistant Director on August 22, 2019, that Complainant could not be selected through the TPPCS program because Complainant did not pass the testing phase of the application process. Id. at 53. That same day, the Deputy Assistant Director informed Complainant's direct supervisors that upper management was unwilling to permanently assign Complainant to headquarters. Id. at 56-7. On August 28, 2019, Complainant received an email requesting that he complete a relocation questionnaire to facilitate his return to his home office in Massena, New York. Id. at 67. Complainant's Unit Chief, however, advised Complainant on September 13, 2019, not to complete the questionnaire. ROI at 89.

Despite attempts by Complainant's direct supervisors to retain Complainant, Complainant's reassignment became effective on September 29, 2019. ROI at 126. According to Complainant, a management official told him that he was required to return to New York by November 1, 2019. Id. at 20. Ultimately, Complainant's return was delayed until November 15, 2019, due to attempts by his direct supervisors to retain him and delays in obtaining a cost estimate for funding Complainant's return. Id. at 66 and 150.

Complainant contacted an EEO Counselor on November 4, 2019. When the matter was not resolved, on February 18, 2020, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the bases of race (Caucasian), color (white), national origin (Italian), age (over 40), and sex (male) when:<sup>3</sup>

1. On or around October 31, 2019, Complainant was notified that his TCS as a GS-14 Computer Forensics Agent in the Cyber Crime Center would be reassigned through a management directed reassignment outside of the D.C. area to New York.
2. On or around October 31, 2019, Complainant was denied a TPPCS.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the ROI and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant elected a hearing.

Following the initial conference, the Agency filed a motion to dismiss on the grounds that Complainant's initial EEO contact on November 4, 2019, was untimely because he had reasonable suspicion to suspect discrimination as early as August 28, 2019, when Agency management notified him that all requests to retain him or extend his TCS assignment were denied and sent him paperwork to facilitate his return to his permanent duty station.

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<sup>3</sup> For ease of reference, we have framed the claims in the same manner as the AJ.

Complainant, however, argued that since the effective date of the personnel action was November 1, 2019; his initial EEO contact on November 4, 2019, was indeed timely. Complainant also argued that “the limitations period should be subject to equitable tolling, as there were conflicting messages sent by the Agency regarding his position status.”

On September 20, 2021, the AJ granted the Agency’s motion to dismiss and issued an order of dismissal. In the decision, the AJ initially acknowledged that Complainant “made initial EEO contact within 45-days [of] the effective date of the personnel action, i.e., his reassignment.” However, based on Commission’s decision in Purcell v. Departmentt of the Army, EEOC No. 05931188 (March 17, 1994), the AJ determined that the controlling factor was the date when Complainant became aware that the Agency would not extend his TCS tour. The AJ ultimately determined that Complainant’s initial EEO contact was untimely because “Complainant is alleging the denial of an extension of his TCS was discriminatory, which he became aware on September 13, 2019.”

In reaching this conclusion, the AJ acknowledged that in Bennie v. Department of Energy, EEOC Appeal No, 0520160070 (March 29, 2016), the Commission found that EEO contact was timely because the complainant had initiated EEO contact within 45 days of the effective date of the personnel action. However, the AJ distinguished Bennie from Purcell because “the action Complainant alleges as discriminatory is the denial of the request to remain at Agency headquarters and not the personnel action that resulted, which was his reassignment back to the New York location.”

As for claim 2, the AJ also found Complainant’s allegation to be untimely because “[a]though the Agency sent conflicting messages regarding Complainant’s TPPCS status, the record is clear that on September 13, 2019, Complainant was aware that he had been denied a TPPCS or a ‘waiver.’” The AJ ultimately denied Complainant’s request for equitable tolling based on the conflicting messages sent by the Agency regarding status because “[t]he only uncertainty that remained after September 13<sup>th</sup>, according to the record, was the exact date [that] Complainant would have to report to New York.” Based on the foregoing, the AJ concluded that Complainant’s initial EEO contact on November 4, 2019, was untimely.

This appeal followed.

### CONTENTIONS ON APPEAL

Through his attorney, Complainant argues that the AJ’s reliance on Purcell is misplaced. Contrary to the AJ’s conclusion, Complainant maintains that the Commission’s regulation at 29 C.F.R § 1614.105(a)(1) clearly states “[a]n aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discrimination or, in the case of personnel action, within 45 days of the effective date of the action.” Complainant contends that his case is distinguishable from Purcell because unlike the complainant in Purcell, who had been issued travel orders, “[t]here was no official directive for [him] to do anything when he received that notice in September” and he had specifically been told “to wait for the travel order.”

Thus, Complainant argues that the September 13, 2019, notice cited in the AJ's decision did not constitute a personnel action. Complainant also argues that his case is distinguishable from Bennie because in that case, the complainant was looking for a change in status, whereas here, Complainant is looking to stop a change in status. Complainant maintains that distinction means that the "the effective date should be the date his change in status stops." Finally, Complainant reiterates his prior contention that the "the limitations period should be subject to equitable tolling, as there were conflicting messages sent by the Agency regarding his position status."

The Agency opposes the appeal and requests that the Commission affirm its final order on the grounds that Complainant knew about the management directed reassignment more than 45 days prior to his date of initial EEO contact.

### ANALYSIS AND FINDINGS

EEOC Regulation 29 C.F.R. § 1614.107(a)(2) requires agencies to dismiss a complaint or a portion of a complaint which fails to comply with the time limitations set forth in 29 C.F.R. § 1614.105(a). An aggrieved person is required to initiate contact with an EEO counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action. See 29 C.F.R. § 1614.105(a)(1). The Commission has adopted a "reasonable suspicion" standard (as opposed to a "supportive facts" standard) to determine when the forty-five (45) day limitation period is triggered. See Howard v. Dep't of the Navy, EEOC Request No. 05970852 (Feb. 11, 1999). Thus, the time limitation is not triggered until a complainant reasonably suspects discrimination, but before all the facts that support a charge of discrimination are known.

While we certainly understand the Agency's contention that Complainant was well aware prior to the date of his initial EEO contact that upper management wanted to transfer him back to his permanent duty station, we agree with Complainant that the dispositive factor in this case is the effective date of the Agency's personnel action. In finding the effective date of the personnel action to be dispositive, we considered the AJ's citations to Purcell and Bennie; however, we nevertheless remain unpersuaded for the reasons discussed in Complainant's appellate brief. As our review of the record clearly shows that the effective date of the Agency's personnel action occurred on September 29, 2019, we ultimately conclude that Complainant's date of initial EEO contact on November 4, 2019, was indeed timely under 29 C.F.R. § 1614.105(a)(1). See Complainant v. Dep't of the Army, EEOC Appeal No. 0120133312 (Feb. 11, 2014) (finding complainant's EEO contact to be timely because she initiated EEO contact within 45-days of the "final decision" directing her reassignment).

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency's final order and REMAND the matter to the Agency for further processing in accordance with the order below.

### ORDER

The Agency is directed to submit a copy of the complaint file to the Washington Field Office Hearings Unit within thirty (30) calendar days of the date this decision becomes final. The Agency shall provide written notification to the Compliance Officer of the assignment of the new hearing number at the address set forth below that the complaint file has been transmitted to the Washington Field Office Hearings Unit within five (5) days. Thereafter, the Administrative Judge shall issue a decision on 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.

The Agency shall acknowledge to the Complainant that it has received the remanded claims within thirty (30) calendar days of the date this decision is issued.

### 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

November 2, 2022

Date