



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]  
Arturo B.,<sup>1</sup>  
Complainant,

v.

Lloyd J. Austin III,  
Secretary,  
Department of Defense  
(National Geospatial-Intelligence Agency),  
Agency.

Appeal No. 2021003276

Agency No. NGA-0014-2020

**DECISION**

On May 18, 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 April 16, 2021, final decision concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 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 was an applicant for employment for the position of Police Officer, Pay Band 2, at the Agency's campuses in Arnold, Missouri and St. Louis, Missouri. See Report of Investigation (ROI) at 183.

According to the vacancy announcement, applicants for the position needed to be able to: work indoors and outdoors; work in excessive heat and cold; withstand exposure to fumes, smoke, gasses; engage in heavy lifting and carry 45 pounds and over; and be capable of engaging in a variety of physical activities. ROI at 183-86. To ensure that candidates would be capable of perform these duties, the Agency formally enshrined these qualifications in its Standard Operating Procedure (SOP) for the recruitment of Police Officers. Id. at 274.

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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.

On April 1, 2019, the Agency notified Complainant that he had progressed to the next stage of the application process, consisting, in relevant part, of a timed physical fitness test. ROI at 7 and 17. The test required Complainant to run 1.5 miles and perform 19 pushups within the allotted time period. Though Complainant suffered a mild heart attack just a year prior, he passed the test without any issues. Id. Ultimately, the Agency conditionally selected Complainant for the position on May 22, 2019, subject to additional pre-employment screenings, including a medical examination. Id. at 193.

Complainant underwent the required medical examination on July 31, 2019. During the medical examination, Complainant disclosed, in relevant part, that he had diabetes mellitus, coronary artery disease, history of myocardial infarction, anxiety, and posttraumatic stress disorder. Though Complainant passed the medical examination, the Contract Physician who examined Complainant, nevertheless requested medical records from Complainant's private physicians pursuant to the Agency's SOP. ROI at 7-8.

The Contract Physician subsequently received the requested records. Physician-1 provided an endocrinology letter opining that Complainant's diabetes was well-controlled with the use of an insulin pump and did not need any special considerations "with the exception of the ability to have access to food and to be able to take an appropriate break if blood sugars became either too low or high." ROI at 111-112, 150, and 154. Physician-1 added that while the insulin in Complainant's pump was heat sensitive, it could be managed using a cooling packet on the pump. Id. Physician-2 provided a letter concerning Complainant's mental health. Id. at 113. While Physician-2 acknowledged that Complainant's anxiety increased following his heart attack, he opined that the issue was now well controlled. Id. Physician-2 emphasized that Complainant was not a threat or risk of harm to himself or any coworker and was under no physical or mental restrictions. Id. Physician-3 provided a cardiology letter opining that Complainant was physically capable of fulfilling the required job duties with no restrictions, as he had been asymptotic for a year following his heart attack. Id. at 114.

Upon reviewing these medical records, the Contract Physician became concerned that: 1) Complainant had end-organ disease as a result of his cardiovascular disease and prior myocardial infarction; 2) would need access to food to control his blood sugar; 3) would need to take breaks if his blood sugars became too low or high; 4) would need to avoid prolonged exposure to temperatures above 100 degrees without a cooling pump given the heat sensitivity of insulin; 5) had unstable diabetes; 6) had uncontrolled PTSD. ROI at 119-20. The Contract Physician then forwarded her concerns to a Medical Board consisting of three physicians (including her), a psychologist, and a physician assistant. Id. The Medical Board met on two days in August 2019 to discuss Complainant's health and ultimately concluded that Complainant was not medically qualified for the position. Id. Based on this determination, the Agency withdrew Complainant's offer of employment on October 31, 2019, citing Complainant's inability to pass the physical examination. Id. at 195.

On January 23, 2020, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of disability (diabetes) when on October 31, 2019, he received a memorandum from NGA Human Development Directorate, stating that he was not medically qualified for and therefore denied a Pay Band 2 Police Officer position with the Agency.

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). In accordance with Complainant's request, 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 finding no discrimination, the Agency analyzed the underlying allegation under the legal standard for disparate treatment. Having reviewed the record, the Agency determined that it had legitimate, nondiscriminatory reasons for rescinding Complainant's conditional offer of employment, as the record showed that the Contract Physician, as "the physician most familiar with the details of the NGA Medical Services Standard Operating Procedure 001 – Police Medical Qualification, did not find him medically qualified for the position." While the Agency acknowledged that Complainant's treating physicians found him to be medically qualified, the Agency dismissed their opinions based on their lack of familiarity with Agency policies and their summary assessment of Complainant's conditions. In contrast, the Contract Physician "requested additional information [each medical condition at issue], reviewed that information, presented that information to other medical providers during their weekly meetings and eventually determined that Complainant's multiple health limiting conditions were disqualifying." The Agency emphasized that "[d]espite Complainant's contention that he was primarily disqualified for his diabetes which he believed could be reasonably accommodated at no cost, the evidence clearly established that [the Contract Physician's] decision was based on the combination of all of the noted medical conditions, and each alone was a potential disqualifier." For these reasons, the Agency concluded that "[t]he circumstances of Complainant's medical examination and disqualification do not give rise to an inference of discrimination."

This appeal followed.

### CONTENTIONS ON APPEAL

We will discuss Complainant's contentions, *infra*. The Agency did not submit any contentions on appeal.

### STANDARD OF REVIEW

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 (EEO MD-110), 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”).

### ANALYSIS AND FINDINGS

For claims of disparate treatment under the Rehabilitation Act, where the agency denies that its decisions were motivated by a complainant’s disability and there is no direct evidence of discrimination, we apply the burden-shifting method of proof set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) See Heyman v. Queens Village Comm. for Mental Health for Jamaica Cmty. Adolescent Program, 198 F.3d 68 (2d Cir. 1999).

First, complainant must establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, *i.e.*, that a prohibited consideration was a factor in the adverse employment action. McDonnell Douglas, 411 U.S. at 802. In order to make out a prima facie case of discrimination on the basis of disability, Complainant must show that: (1) he was an “individual with a disability”; (2) he was “qualified” for the position held or desired; and (3) he was subjected to an adverse employment action. The burden of production then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for the adverse employment action. In order to satisfy his burden of proof, Complainant must then demonstrate by a preponderance of the evidence that the Agency’s proffered reason was a pretext for discrimination. Id.

As the Agency in this case found that Complainant was an “individual with a disability” who was subjected to an adverse action, we need not revisit elements 1 and 3 on appeal and shall proceed directly to element 2, regarding whether Complainant was qualified for the position.

Though the Agency, in its final decision, found that Complainant’s non-selection was based on his inability to medically qualify for position, we note that Complainant vigorously disputes that determination. Complainant contends, in relevant part, that the Agency “regularly discriminates against applicants for their police officer position by using a standard operating procedure [SOP] that identifies diabetes, cardiac conditions, and anxiety as a medical disqualifier for the position without relating it to the impact of performing the duties of the position. He argues that the Agency’s “SOP has allowed [the Contract Physician] and the medical review board to eliminate any applicant that has had one of the medical disqualifiers in their past medical history no matter how physically and mentally fit they are to perform the duties of the position.”

In so arguing, Complainant maintains that the Contract Physician’s assessment of his diabetes as uncontrolled is contrary to the endocrinology letter from his Physician-1, who opined that Complainant had “overall excellent glycemic control.” Complainant also disputes the Contract Physician’s finding that he had end organ damage/disease, as it made him seem like he was in declining health and could drop dead at any second.

To the contrary, Complainant notes that Physician-3, who is a specialist in cardiology, made no such assessment and even found him to be capable of performing the law enforcement functions without any restrictions. Finally, Complainant clarifies that while he has been prescribed Xanax up to twice daily for the treatment of insomnia, he has never been diagnosed with PTSD, much less uncontrolled PTSD as determined by the Contract Physician.

Having reviewed the record, we find that Complainant has shown more likely than not that he was subjected to discrimination when the Agency rescinded its conditional offer of employment based on the concerns raised by the Contract Physician. We are particularly perplexed as to how the Agency found Complainant to be medically unqualified to perform the essential functions of the Police Officer position. Here, our review of the record shows that all of Complainant's physicians found Complainant's conditions to be well-controlled. They also found no barriers that would preclude Complainant from working in law enforcement and imposed no restrictions on Complainant's ability to perform the essential functions of the Police Officer position. While the Agency relied on Contract Physician's knowledge of the SOP and her thoroughness in detailing her findings to find no discrimination, we are disinclined to defer to the Contract Physician regarding Complainant's own abilities and medical status over Complainant's own treating physicians, who, unlike the Contract Physician, were specialists in their respective fields.

In reaching this conclusion, we recognize that in some situations, diabetes may render a person medical unqualified to perform the essential functions of the desired position. For example, in Haviland v. U.S. Postal Serv., EEOC Appeal No. 01A30375 (May 4, 2004), the Commission found that the complainant failed to show that he was a qualified for Data Collection Technician position, as the record showed that he was unable to work swing or rotating shifts, which were part of the essential functions of the position. However, in that case, "complainant's endocrinologist and the agency's physician both concluded that complainant could not work swing shifts and could only work the daytime shift."

Given the opinion evidence from Complainant's treating physicians, as well as his demonstrated success on the physical fitness test, we find no persuasive evidence that Complainant's history would prevent him from performing the essential functions of the position he desired. We ultimately find that the Contract Physician, and the members of the Medical Board who concurred with the Contract Physician's analysis, made unwarranted assumptions about what Complainant could do despite ample medical evidence to contrary. In so doing, they subjected him to discrimination in violation of the Rehabilitation Act.<sup>2</sup>

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<sup>2</sup> We need not address the issue of "direct threat," as the Agency did not expressly raise it as an affirmative defense.

### CONCLUSION

Based on a thorough review of the record, we REVERSE the Agency's final decision and REMAND the matter to the Agency for further processing. The Agency shall comply with the relief in the Order below.

### ORDER

1. The Agency shall within 30 calendar days of the date of this decision becomes final, promote Complainant to a substantially equivalent, Police Officer, Pay Band 2, position at the Agency's campuses in Arnold, Missouri and St. Louis, Missouri, retroactive to May 22, 2019 (date of conditional offer). The Agency shall retroactively promote Complainant to the next appropriate step and/or grade, respectively, if appropriate, on the one-year anniversary of his promotion and then on an annual basis or according to Agency policy.
2. Within 60 calendar days of the date of this decision, the Agency shall determine the appropriate amount of back pay (if any) with interest, and other benefits due to Complainant, pursuant to 29 C.F.R. § 1614.501. Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due, and provide all relevant information requested by the Agency. 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 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."
3. Within 30 days from the date the backpay amount is paid to Complainant, the Agency shall request that Complainant submit his claim for compensation for all additional income-tax liability associated with lump sum payments. The Agency shall afford Complainant 60 days to submit his claim and supporting documents. The burden of proof to establish the amount of additional tax liability, if any, is on Complainant. The calculation of additional tax liability must be based on the taxes Complainant would have paid had he received the backpay in the form of regular salary during the backpay period, versus the additional taxes he paid due to receiving the back-pay in a lump-sum award. Thereafter, the Agency shall issue a decision regarding claimed additional tax liability within 60 days after the time period expires for Complainant to submit his claim for additional tax liability.
4. Within 60 calendar days of the date this decision is issued, the Agency shall conduct a supplemental investigation to determine whether Complainant is entitled to compensatory damages as a result of the Agency's discriminatory actions. During the course of the investigation, the Agency shall afford Complainant the opportunity to present evidence in



support of his compensatory damages claim. See Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993). Complainant, in turn, shall cooperate with the Agency's investigation, to include responding to the Agency's requests for documentation and completing Agency forms within 30 calendar days of the Agency's request.

5. After completing the investigation into Complainant's entitlement to compensatory damages, the Agency shall have 60 calendar days to issue a final decision as to whether Complainant is entitled to such damages. The Agency shall expeditiously pay Complainant the compensatory damages as determined by the Agency and submit a copy of the final decision on compensatory damages to the Compliance Officer at the address set forth herein.
6. Within 90 calendar days of the date this decision is issued, the Agency shall provide eight hours of training to the responsible management officials, namely the Contract Physician and the members of the Medical Board. The training shall address the Agency's obligations under the Rehabilitation Act. The Agency may, if it so chooses, contact the EEOC Office of Federal Operation's Training and Outreach Division for assistance in obtaining the necessary training.
7. Within 120 calendar days from the date this decision is issued, the Agency shall consider disciplining the Contract Physician and the members of the Medical Board. The Commission does not consider training to be 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 these individuals 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 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 Agency's campuses in Arnold, Missouri and St. Louis, Missouri 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).

#### ATTORNEY'S FEES (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she/he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of receipt of this decision. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

#### 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

August 29, 2022  
Date