



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

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

v.

Frank Kendall,  
Secretary,  
Department of the Air Force,  
Agency.

Appeal No. 2022002645

Hearing Nos. 540-2018-00008X, 540-2019-00209X,  
540-2019-00341X, 540-2020-00034X, 540-2020-00035X

Agency Nos. 710J1613, 710J1800732H19,  
710J1800739, 710J1900329H20, 710J1900328H20

**DECISION**

On April 8, 2022, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), regarding the Agency's non-compliance with its December 31, 2021, final order implementing the decision of an EEOC Administrative Judge (AJ) finding that Complainant was subjected to employment discrimination in reprisal for her protected EEO activity in violation of Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 626, and issued remedial actions. The Commission accepts the appeal in accordance with 29 C.F.R. § 1614.504.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Contract Specialist, GS-11 at the Agency's 56th Contracting Squadron facility at Luke Air Force Base (AFB), Arizona.

Complainant filed five EEO complaints alleging she was discriminated against based on her age and in reprisal for prior EEO activity in violation of the ADEA when:

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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.

1. On or around September 6, 2016, she was not selected for the position of GS-1102-12, Non-Supervisory, Procurement Analyst, LGCP Flight, 561h Contracting Squadron, Luke AFB;
2. She was non-selected for the position of GS-1102-13. Supervisory Contract Specialist, LGCB. Flight, 56th Contracting Squadron, Luke AFB, AZ;
3. she was non-selected for the position of GS-1102-12, Lead Contract Specialist, LGCB Flight, 56th Contracting Squadron, Luke AFB, AZ;
4. She was non-selected for the position of GS-1102-12, LGCB Team Lead, 561h Contracting Squadron, Luke AFB, AZ; and
5. She was non-selected for the position of GS-1102-12, LGCA Team Lead, 56th Contracting Squadron, Luke AFB, AZ.

Complainant timely requested a hearing on all five EEO complaints. The Equal Employment Opportunity Commission Administrative Judge (AJ) consolidated the complaints and held a hearing on the matter on August 26 and 27, 2021. On October 8, 2021, the AJ issued a decision finding that Complainant established her claim of unlawful retaliation with respect to the non-selection alleged in claim 4 only; the AJ found that Complainant had not proven discrimination as to claims 1, 2, 3, and 5. In relevant part, the AJ ordered the Agency to take the following remedial actions:

A. Offer of Placement Into Position

The Agency shall make Complainant an unconditional offer of placement into the position of LGCB Team Lead (GS-1102-12) or a substantially equivalent position, at the grade and step where she would have been absent the discrimination, no later than thirty (30) days from the date on which this decision is final. 29 C.F.R. § 1614.501(a)(3). If the offer is accepted, the Agency shall place Complainant into the position no later than 30 days from the date of acceptance. The Agency offer shall include a notice that, if Complainant either does not respond or declines the job offer within 20 days of receipt, her right to receive further back pay and other benefits based on the job offer shall terminate as of that date. 29 C.F.R. § 1614.501(b)(1), (c)(1). If the offer is declined, the Agency shall award Complainant a sum equal to the back pay she would have received from the date she would have been appointed to the fourth position until the date the offer was declined. 29 C.F.R. § 1614.501(b)(iii).

## B. Back Pay

1. As a remedy for the Agency's discriminatory failure to promote Complainant, the Agency shall compensate Complainant for all back pay and applicable benefits she was denied from the date she would have been appointed to the LGCB Team Lead position, to the later of the date Complainant provides the notice required above, or the date she begins the new position. See 29 C.F.R. § 1614.501(a)(4). Gross back pay includes all forms of compensation such as wages, bonuses, vacation pay, and all other elements of reimbursement and fringe benefits such as contributions to thrift savings, as well as pensions and health insurance. Reynolds v. U.S. Postal Serv., EEOC Appeal No. 0120111944 (Sept. 13, 2013); Kalra v. Dep't of Transp., EEOC Appeal No. 05940516 (May 31, 1996).

Net back pay shall be paid by the Agency within sixty (60) days of this Decision being final for the period up to the date of the unconditional offer. No more than (45) days thereafter, the Agency shall pay the remainder of the back pay, a calculation based on the date on which Complainant accepts or declines and, if accepting, begins the new position, as described above.

2. Within sixty (60) days from the date this Decision becomes final, the Agency shall provide Complainant with a detailed statement of the Agency's calculations regarding all of the components of Complainant's back pay and other applicable employment benefits. The statement shall be in "plain language" and shall include the formulas and methods the Agency used to calculate Complainant's back pay. See Goldberg v. Dep't of State, EEOC Appeal No. 0420100006 (Sept. 23, 2011). The Agency also shall provide Complainant, within sixty (60) days of the date this Decision becomes final, all letters, e-mails, and other correspondence sent to the Office of Personnel Management regarding Complainant's updated earnings. Within ninety (90) days of the Hearing Decision and Order becoming final, the Agency shall engage qualified consultants to advise and assist the Agency with implementing the elements of the equitable relief ordered herein. The qualified consultants may be licensed attorneys employed by or contracted with the Agency's legal departments.

The Agency issued a final order adopting the AJ's decision on December 31, 2021.

On April 6, 2022, Complainant's attorney communicated with the AJ that the Agency had not provided Complainant with the ordered relief that was due on March 10, 2022. Complainant's attorney indicated that the Agency responded that they are complying with the order and suggested a conference call with the presiding AJ. On April 7, 2022, the AJ notified Complainant's attorney that the AJ no longer had jurisdiction over the case and the proper venue to raise this issue with was the EEOC's Office of Federal Operations. On April 8, 2022, Complainant filed the instant appeal.

### CONTENTIONS ON APPEAL

Complainant asserts that the Agency did not provide her with net back pay and the applicable benefits; calculation of net back pay; or all letters, emails, and correspondence to the Office of Personnel Management concerning Complainant's updated earnings, all of which were due by March 11, 2022.

The Agency responds that all orders, with the exception of back pay, have been complied with. The Agency explains that back pay, benefits, and calculations with a detailed statement are pending and that these are with the Defense Finance and Accounting Service (DFAS) for action, which is experiencing a backlog. The Agency claims that DFAS processing times are beyond the Agency's control.

### ANALYSIS AND FINDINGS

The AJ's decision and the Agency's final order implementing the AJ's decision directed the Agency to, in relevant part, provide Complainant with: an offer of placement in to the LGCB Team Lead (GS-1102-12) or a substantially equivalent position; back pay and applicable benefits to include all forms of compensation outlined above within 60 days; a detailed statement of the Agency's calculations regarding all of the components of Complainant's back pay and other applicable employment benefits within 60 days; and, within 45 days thereafter, pay the remainder of the back pay, a calculation based on the date on which Complainant accepts or declines and, if accepting, begins the new position. We note that the Agency has provided the Commission with a copy of Complainant's SF-50 placing her into the offered position. Complainant did not challenge the placement on appeal.

In response to Complainant's appeal, the Agency provided a May 13, 2022, email to Complainant's attorney stating that they had reached out to the Civilian Personnel Office and the back pay and benefits were still being processed through DFAS. Interim Compliance Report at 7. Upon review of the Agency's submission, we find that the Agency has not provided evidence of its compliance with the back pay orders. We note that the Agency failed to provide us or Complainant with a detailed statement of its calculations regarding components of Complainant's back pay and other applicable employment benefits. Furthermore, the Agency did not provide evidence of submission to DFAS. Nor did they provide any communication with DFAS to demonstrate that, in fact, the Agency has requested payment of the back pay to Complainant. As such, we cannot find that the Agency has complied as it has asserted.

### CONCLUSION

As set forth above, we find that the Agency has not complied with its Final Agency Action. In light of the foregoing, the Agency shall comply with the Order below, which directs the Agency, to the extent that it has not already done so, to provide the relief ordered by the AJ. If the Agency does not comply, Complainant may file a petition for enforcement of the Order below, pursuant to 29 C.F.R. § 1614.503.

ORDER

To the extent that it has not already done so, the Agency is ordered to take the following remedial action:

1. As a remedy for the Agency's discriminatory failure to promote Complainant, the Agency shall compensate Complainant for all back pay and applicable benefits she was denied from the date she would have been appointed to the LGCB Team Lead position, to the later of the date Complainant provides the notice required above, or the date she begins the new position. See 29 C.F.R. § 1614.501(a)(4). Gross back pay includes all forms of compensation such as wages, bonuses, vacation pay, and all other elements of reimbursement and fringe benefits such as contributions to thrift savings, as well as pensions and health insurance. Reynolds v. U.S. Postal Serv., EEOC Appeal No. 0120111944 (Sept. 13, 2013); Kalra v. Dep't of Transp., EEOC Appeal No. 05940516 (May 31, 1996).

Net back pay shall be paid by the Agency within sixty (60) days of this decision is issued for the period up to the date of the unconditional offer. No more than (45) days thereafter, the Agency shall pay the remainder of the back pay, a calculation based on the date on which Complainant accepts or declines and, if accepting, begins the new position, as described above.

2. Within sixty (60) days from the date this decision is issued, the Agency shall provide Complainant with a detailed statement of the Agency's calculations regarding all of the components of Complainant's back pay and other applicable employment benefits. The statement shall be in "plain language" and shall include the formulas and methods the Agency used to calculate Complainant's back pay. See Goldberg v. Dep't of State, EEOC Appeal No. 0420100006 (Sept. 23, 2011). The Agency also shall provide Complainant, within sixty (60) days of the date this Decision becomes final, all letters, e-mails, and other correspondence sent to the Office of Personnel Management regarding Complainant's updated earnings. Within ninety (90) days of the Hearing Decision and Order becoming final, the Agency shall engage qualified consultants to advise and assist the Agency with implementing the elements of the equitable relief ordered herein. The qualified consultants may be licensed attorneys employed by or contracted with the Agency's legal departments.

The 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. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the Complainant for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. The 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."

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.

#### 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)

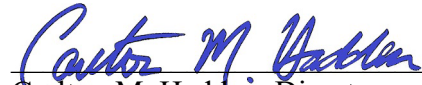
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from 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:

  
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Carlton M. Hadden, Director  
Office of Federal Operations

March 2, 2023  
Date