



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

[REDACTED]
Markus C.,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Transportation Security Administration),
Agency.

Request No. 2023001180

Appeal No. 2022004363

Agency No. HS-TSA-01983-2022

DECISION ON REQUEST FOR RECONSIDERATION

Complainant timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in Markus C. v. Department of Homeland Security, EEOC Appeal No. 2022004363 (November 14, 2022). EEOC Regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision issued pursuant to 29 C.F.R. § 1614.405(a), where the requesting party demonstrates that: (1) the appellate decision involved a clearly erroneous interpretation of material fact or law; or (2) the appellate decision will have a substantial impact on the policies, practices, or operations of the agency. See 29 C.F.R. § 1614.405(c).

ISSUE PRESENTED

The issue presented herein is whether the prior decision properly affirmed the Agency's final decision dismissing the matter pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim.

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was an applicant for the position of Transportation Security Officer (TSO) with the Transportation Security Administration (Agency) at the Newark Liberty International Airport in Newark, New Jersey.

On March 14, 2022, after reviewing the Complainant's responses to the Questionnaire for National Security Positions Standard Form (SF)-86, as part of the Agency's preliminary vetting process, the Agency informed Complainant that he was deemed unfit to begin federal employment with TSA in the TSO position. On June 14, 2022, Complainant filed a formal complaint alleging that the Agency subjected him to unlawful retaliation for prior protected EEO activity when he was not considered for the TSO position and when the Agency failed to show how Complainant did not meet the requirement to fulfill the condition of employment for the TSO position.

On July 26, 2022, the Agency issued its final decision. In its decision, the Agency framed Complainant's claim as whether the Agency discriminated against Complainant, an applicant for employment, in reprisal for prior EEO activity when on March 14, 2022, the Agency informed Complainant that he did not pass the personnel security suitability process for a TSO position. The Agency dismissed Complainant's complaint, pursuant to 29 C.F.R. § 1614.107(a), for failure to state a claim, arguing the Commission is precluded from reviewing the substance and validity of an employer's security clearance process. Complainant appealed the decision without specific comment.

In affirming the dismissal, the Commission's prior decision found that Complainant contested the security investigator's interpretation of information in his SF-86 and that such a dispute of the validity of the security investigator's findings falls squarely within the rubric of the type of security clearance determination that is beyond the Commission's jurisdiction. Schroeder v. Dep't of Def., EEOC Request No. 05930248 (Apr. 14, 1994). The instant request followed.

In his request for reconsideration, Complainant contends that, among other things, he is challenging the Agency's application of suitability standards in concluding that he did not meet the Agency's current employment requirements. Complainant asserts that the nature of his claim is not a security clearance issue but an allegation of discrimination and retaliation in regard to a suitability determination and related employment action. Complainant argues that, because such determinations and actions are subject to EEO review, his complaint was improperly dismissed for failure to state a claim. The Agency did not provide a response to Complainant's request for reconsideration.

ANALYSIS AND FINDING

The Commission has previously held that an allegation that an agency withdrew an offer of employment based on the discriminatory application of a suitability determination states a claim

within EEOC jurisdiction. See, e.g. Henry S. v. Dep't of Def., EEOC Appeal No. 0720170020 (Mar. 28, 2018). Conversely, the Commission will not review an agency's determination regarding the substance of a security clearance decision. See Rezaee v. Dep't of the Air Force, EEOC Appeal No. 01A60451 (Apr. 25, 2006) (citing Policy Guidance on the Use of National Security Exception Contained in § 703(g) of Title VII of the Civil Rights Act of 1964, as amended (EEOC National Security Guidance), EEOC Notice No. N-915-041 (May 1, 1989)); Carr v. Dep't of the Army, EEOC Appeal No. 01A44011 (Nov. 4, 2004) (citing EEOC National Security Guidance); and Thierjung v. Dep't of Def., EEOC Request No. 05880664 (Nov. 2, 1989).

While the Agency initially framed the claim as involving Complainant's failure to pass the personnel security suitability process for a TSO position, the Agency reviewed Complainant's claim as a challenge to the security clearance process, and dismissed Complainant's claim accordingly. In reviewing the Agency's decision, the Commission likewise considered Complainant's challenge to be against the Agency's security clearance decision and concluded that Complainant failed to state a claim because an agency's security clearance decision is not reviewable.

Both the Agency decision and the Commission's prior decision correctly note that a complainant may not challenge an agency's security clearance decision. However, as noted previously, a complainant may challenge an agency's suitability determination. In this case, the Agency's suitability determination correspondence incorporated terms such as "personnel security," in citing the Agency's policy that governs decisionmaking on suitability determinations. Undoubtedly, the terminology "personnel security" is akin to language used in security clearance determination correspondence, when discussing an agency's determination during the security clearance process. Because of the similarities in terminology, the processes, at times, might be mistakenly viewed as identical, or interchangeable. However, these processes – security clearance decision and suitability determination – are distinct, and, importantly, result in different outcomes regarding Complainant's ability to assert a claim of discrimination and the Commission's jurisdiction over the claim.

Accordingly, it is crucial that we correctly delineate whether Complainant was challenging the agency's security clearance decision or, instead, the suitability determination. In this case, upon review of the record, we determine that Complainant challenged the Agency's suitability determination and not a security clearance determination. Specifically, the document at issue is the determination by the Personnel Security Specialist that Complainant does not meet the Agency's current employment standards. As such, we find that the complaint involved the Agency's preliminary vetting process for Complainant as an applicant for a position with the Agency. In other words, Complainant challenged the Agency's preliminary suitability determination, not a security clearance determination.

In misconstruing the nature of Complainant's allegation, the Commission's prior decision did not appropriately consider whether Complainant's complaint stated a justiciable claim. See John D. Callaway v. Dep't of Homeland Sec., EEOC Request No. 0520100416 (Apr. 8, 2011)

(vacating prior Commission decision affirming the agency's procedural dismissal as a security clearance matter versus reviewing matter as a suitability determination); see also Ken M. v. Dep't of Homeland Sec., EEOC Appeal No. 2022005600 (Feb. 22, 2023) (Commission determined that complaint concerned rejection of complainant's application for employment in reprisal for prior protected activity; as such, the complaint stated a justiciable claim and should not have been dismissed).

The Agency's finding that Complainant was unfit for employment based on an unfavorable determination concerns a suitability determination only. Complainant's allegations that the Agency was motivated by discriminatory and retaliatory animus when it conducted a suitability determination in a discriminatory manner and ultimately denied employment fall within EEOC's jurisdiction. See Glynda S. v. Dep't of Com., EEOC Appeal No. 2022000548 (Apr. 18, 2022). Accordingly, we find that the Agency's dismissal was improper.

After reconsidering the previous decision and the record, the Commission finds that Complainant's request meets the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to GRANT the request. The decision of the Commission in Appeal No. 2022004363 and the Agency's final decision are reversed. There is no further right of administrative appeal on the decision of the Commission on a Request to Reconsider.

CONCLUSION

The decision in EEOC Appeal No. 2022004363 and the Agency's final decision are REVERSED and the matter is REMANDED for further processing.

ORDER (E0618)

The Agency is ordered to process the remanded claims in accordance with 29 C.F.R. § 1614.108. The Agency shall acknowledge to the Complainant that it has received the remanded claims **within thirty (30) calendar days** of the date this decision was issued. The Agency shall issue to Complainant a copy of the investigative file and also shall notify Complainant of the appropriate rights **within one hundred fifty (150) calendar days** of the date this decision was issued, unless the matter is otherwise resolved prior to that time. If the Complainant requests a final decision without a hearing, the Agency shall issue a final decision **within sixty (60) days** of receipt of Complainant's request.

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

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and § 1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (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:

/s/Raymond Windmiller

Raymond Windmiller
Executive Officer
Executive Secretariat

February 29, 2024

Date