

RACHEL BENNETT,)
Complainant,) **EEOC Appeal No: 2020002487**
) **Agency Number: P2220001, P2193924**
) **EEOC Hearing No: 541-2013-00127X**
))
) **v.**)
))
Deborah Lee James,)
Secretary,)
DOD Department of the Air Force,)
Agency.) **Office of Federal Operations, EEOC**
) **Date: 5 October 2020**
))

Restatement of Agency’s Position the EEOC Has No Jurisdiction

1. The Agency through its designated representation files this restatement of its position raised repeatedly in the underlying EEOC cases that the EEOC has no jurisdiction over the matters involved herein and affirmatively states the Agency will not comply with any further processing or orders in this matter.

2. **Discussion:** The Agency maintains and asserted in 2013 that the EEOC does not have jurisdiction over the Complainant’s 2013 filings concerning Agency’s actions in removing Complainant in 2012 from her dual status technician position with the Wyoming Air National Guard and not selecting her for another dual status technician position in 2013. At all times relevant to these filings, the Adjutant General of the Wyoming National Guard was the final appeal authority for actions involving dual status Title 32 military technicians such as Complainant in accordance with 32 U.S.C. §709. On 3 Dec 2014, the Adjutant General of Wyoming found no discrimination or reprisal and closed the two complaints by Complainant. On 26 Jan 2015, the Agency notified the EEOC in these complaints the Agency considered the matter closed.

3. In December 2016, Congress revised 32 U.S.C. §709 and provided for the first time dual status Title 32 military technicians an appeal right to either the EEOC or the Merit System Protection Board (MSPB). The Agency continues to assert this law change was NOT retroactive by its very terms and basic statutory interpretation principles that if Congress intended to make it retroactive it would have so stated. In fact, the MSPB has since followed that interpretation and denied any retroactive application of the change in the statute. Further, the Agency has stated repeatedly throughout the past 7+ years these cases have languished it would not and could not comply with any Orders of the EEOC. This remained the Agency’s position at the Damages Hearing on 22 August 2019 and was communicated on the record to Judge Nancy Weeks at the beginning and at the conclusion of the hearing.

4. Over the past four years, Federal District and Circuit Courts have unanimously found the EEOC does NOT have jurisdiction over all pre-December 2016 allegations involving dual status federal technicians both because the law change does not say it is retroactive and based on the

doctrine first established by the U. S. Supreme Court in *Feres v. United States*, 340 U.S. 135, 146 (1950). The Agency asserts it will raise the jurisdiction issue based on these principles in any action attempting to enforce any order from the EEOC in this matter in Federal District Court.

5. **Conclusion:** The Agency requests the Office of Federal Operations of the EEOC terminate this appeal and close this matter permanently.

Dated this 5th day of October 2020.

Christopher L. Smith, Colonel, WYANG
Agency Representative
Telephone: 307-772-5277
Email: christopher.smith@us.af.mil

CERTIFICATE OF SERVICE

I certify that on 5 October 2020, I uploaded to the EEOC's FEDSEP under Appeal Number **2020002487** this Restatement of Position

Christopher L. Smith
Agency Representative