



**U.S. Department of
Transportation**

Office of the Secretary
of Transportation

Departmental Office of
Civil Rights

Compliance Branch
1200 New Jersey Avenue, S.E., W76-401
Washington, DC 20590

VIA EMAIL ONLY (Read Receipt Requested)

April 6, 2023

David McCollum
c/o Nichols Kaster, PLLP and Norwood & Atchley
4700 IDS Center 254 Court Avenue, 2nd Floor
80 South 8th Street Memphis, TN 38103
Minneapolis, MN 55402

RE: *McCollum v. FAA*
 DOT Complaint No. 5-04-5026
 EEOC No. 450-2023-00004X (formerly 450-2007-00109X and 310-2004-00322X)

Dear Mr. McCollum:

FINAL AGENCY ORDER

This transmits the U.S. Department of Transportation's (the Agency's) Final Agency Order on the attached Order Granting Class Agent's Unopposed Motion and Memorandum of Points and Authorities in Support of Settlement Approval. The Agency fully implements and adopts the administrative judge's finding that the resolution of the class complaint is fair, adequate, and reasonable to the class as a whole and rejection of all petitions to vacate the resolution. **The resolution is binding on all members of the class.** See 29 C.F.R. 1614.204(g).

NOTICE OF RIGHT TO APPEAL TO THE EEOC

Any class member who filed a petition to vacate the resolution ("petitioner") has the following appeal rights to the Office of Federal Operation, Equal Employment Opportunity Commission:

Within 30 days of receipt of this Notice of Final Agency Order, a petitioner may appeal this final decision to:

Director, Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, DC 20013
ofe.eeoc@eeoc.gov

You may file your appeal by faxing it to (202) 633-7022, or submitting it through the Commission's electronic submission portal. (If you are a petitioner, EEOC Form 573, Notice of Appeal/Petition, is attached for this purpose.)

If a petitioner files an appeal, the petitioner must name the agency head, The Honorable Peter Buttigieg, Secretary of Transportation, as the agency being charged with discrimination. Failure to provide the name or official title of the agency head may result in dismissal of your appeal. A copy of the appeal must be sent to the Agency, addressed to The Honorable Peter Buttigieg, Secretary of Transportation, 1200 New Jersey Avenue S.E., Washington, D.C. 20590 at the same time that it is filed with the Commission. The Notice of Appeal must also include or have attached a certification of the date and method by which service was made on the Agency. Any statement or brief on behalf of a petitioner in support of an appeal must be submitted to the Office of Federal Operations within 30 days of filing the Notice of Appeal. Any statement or brief on behalf of the agency in opposition to an appeal must be submitted to the Commission and served on the opposing party within 30 days of receipt of the statement or brief supporting the appeal, or, if no statement or brief supporting the appeal is filed, within 60 days of receipt of the appeal pursuant to 29 C.F.R. 1614.403.

NOTICE OF RIGHT TO FILE A COMPLAINT IN FEDERAL COURT

Class members **may** have the right to file a complaint in federal court, **and a court may determine such a right does not exist.** If a class member decides to file a civil action, it should be filed:

Within 90 days of receipt of this Final Agency Order if no appeal has been filed or within 90 days after receipt of the EEOC's final decision on appeal, or after 180 days from the date of filing an appeal with the Commission if there has been no final decision by the Commission.

You must name the person who is the agency head and his or her official title as the defendant in your complaint. In your case, you must name the following official as the defendant:

**The Honorable Peter Buttigieg
Secretary of Transportation
1200 New Jersey Avenue S.E.
Washington, D.C. 20590**

Failure to provide the name or official title of the agency head may result in dismissal of your case.

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an

attorney does not extend your time in which to file a civil action. Both the request and the civil action MUST BE FILED WITHIN NINETY (90) CALENDAR DAYS of the date you receive the Final Agency Order or final decision from the Commission.

IF YOU TIMELY RETURN A COMPLETED CLAIM FORM AND RELEASE IN THIS CASE AND YOU FILE A LAWSUIT IN FEDERAL COURT, YOUR CLAIM FORM AND RELEASE WILL BE VOID AND YOU WILL NOT RECEIVE A PAYMENT IN THIS SETTLEMENT.

THE AGENCY HAS NOT WAIVED ANY DEFENSE TO ANY CLAIM THAT YOU MAY FILE IN FEDERAL COURT AND, PER THE CLASS SETTLEMENT, THERE IS NO ADMISSION OF LIABILITY BY THE AGENCY. IF YOU DECIDE TO FILE A COMPLAINT IN FEDERAL COURT AND NOT PARTICIPATE IN THE CLASS SETTLEMENT, YOU TAKE THE RISK THAT YOUR COMPLAINT WILL BE DISMISSED BY THE FEDERAL COURT AND YOU TAKE THE RISK THAT YOU WILL RECEIVE NOTHING.

Sincerely,

Irene B. Marion

Irene Marion, Director
Departmental Office of Civil Rights
Office of the Secretary
U.S. Department of Transportation

Enclosures: 1) EEOC Final Decision Approving Class Settlement and
Order of Dismissal, dated March 16, 2023
2) EEOC Form 573

cc: ASW-9
w/ Enclosure

Class Agent

David McCollum
Via E-mail only: Buster77384@earthlink.net
w/ Enclosure

Class Counsel

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w/ Enclosures

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w/ Enclosures

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Veronica A. Cuadra
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Dallas District Office
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Dallas, TX 75202-4726
Via E-mail Only: veronica.cuadra@eeoc.gov
w/o Enclosure



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Dallas District Office

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FAX: (214) 253-2720
Website: www.eeoc.gov

Dallas District Office
San Antonio Field Office
El Paso Area Office

David McCollum, et. al.,
Class Agent,

v.

Peter P.M. Buttigieg, Secretary,
U.S. Department of Transportation,
Agency.

EEOC No. 450-2023-00004X
Agency No. 5-04-5026

Date: March 16, 2023

FINAL DECISION APPROVING CLASS SETTLEMENT
AND ORDER OF DISMISSAL

This confidential decision^1 restores the class definition for purposes of settlement and approves the parties' class settlement. See 29 C.F.R. § 1614.204(g)(4). The petitions to vacate the class settlement are denied. The class complaint is dismissed pursuant to the parties' settlement.

I. INTRODUCTION

The parties engaged in mediation while this case was on appeal before the Office of Federal Operations (OFO). Their negotiations culminated in the execution of the settlement (Settlement Agreement) in July 2021. The parties requested dismissal of their cross-appeals so that the case could be returned to the Administrative Judge for a decision as to whether the Settlement Agreement should be approved. OFO granted the request and issued a dismissal of appeal

^1 This document is issued as part of a confidential EEOC proceeding and may not be disseminated, except as provided by order, EEOC regulations, or the Settlement Agreement.

(Dismissal of Appeal due to Settlement).² The Dallas District Office docketed the case for assignment. *See* Notice of Assignment issued on October 6, 2022.

In support of the Settlement Agreement, Class Agent submitted his Unopposed Motion and Memorandum of Points and Authorities in Support of Settlement Approval (Motion for Approval of Settlement). *See* Class Agent’s Filing of the Unopposed Motion for Settlement pursuant to Order on Prior Submissions dated October 26, 2022.³ The Administrative Judge held conferences with the parties’ representatives on October 21, 2022, January 6, 2023, January 31, 2023, and February 15, 2023. These conferences were held to clarify the terms and intended implementation of the settlement.

II. CLASS NOTICES AND CLAIMS PROCESS

EEOC regulations do not require preliminary approval of the settlement terms before a notice of resolution is disseminated to class members. On July 22, 2022, the Notice of Resolution (NOR) and Questionnaire were issued⁴ to 3,561 class members (Class Members) while the parties were before OFO. *See* Settlement Agreement at Exhibits A-B. The NOR attached a copy of the Settlement Agreement. *See* Settlement Agreement at Exhibit A.

The NOR informed Class Members about the process to file a petition to vacate the settlement. Twenty-two Class Members submitted notices to vacate the Settlement Agreement. Motion to Approve Settlement at 28.

The Settlement Agreement provides that, if the Administrative Judge issues a decision approving the settlement, the Agency will issue the notice of final agency order within 21 days. *See* Settlement Agreement at 6.5. The Settlement Administrator will send “copies of the final agency order, notice of right to appeal to the EEOC, notice of right to file a complaint in federal

² The appeal dismissal was issued on August 10, 2022 and provided a 30-day period for filing of request for reconsideration.

³ The parties were ordered to instructed to upload the documents emailed to the Administrative Judge prior to the Notice of Assignment.

⁴ CPT Group (Settlement Administrator) was hired to administer the settlement, which includes processing of notices, allocations, claims, and distributions.

court, and the Claim and Release Form to the Class via mail and e-mail, if available.” *See* Settlement Agreement at 6.6. The ADEA waiver language contained in the Claims and Release Form (Settlement Agreement at exhibit C) complies with the applicable OWBPA requirements. *See* 29 U.S.C. § 626(f)(2).

Class Members who submit the Claim and Release Form as indicated in the Settlement Agreement are eligible for payment pursuant to the allocation formula and to unclaimed or unused funds, if any, reallocated pursuant to the Settlement Agreement. *See* Settlement Agreement at 9.1; 10.1. The parties agreed that no payment will be made to those who file in federal court for claims covered by the Settlement Agreement. *See* Settlement Agreement at 7.11. The Settlement Agreement does not prevent the Agency from asserting defenses, whether procedural or substantive, in response to any Class Member’s federal court lawsuit.

III. CLASS COMPLAINT

In 1981, approximately 11,000 Air Traffic Control Specialist (ATCS) employees who were members of the Professional Air Traffic Controllers Organization (PATCO) union went on strike and were terminated for striking. Rehiring of the terminated PATCO members was banned until August 1993, when the ban was lifted, making them eligible to apply for FAA openings without preference. The Agency then issued Recruitment Notice 93-01, which was open to reinstatement and transfer eligible applicants who were separated because of the PATCO strike. PATCO applicants who successfully applied to Recruitment Notice 93-01 were part of the PATCO inventory (PATCO Inventory).

In 2004, Class Agent filed an individual EEO complaint alleging that the Agency had failed to hire him based on age. Later that year, Class Agent amended his complaint to also allege a non-selection class claim on behalf of terminated PATCO members. In 2006, the Administrative Judge issued a certification decision, which the Agency appealed.

On appeal, OFO issued a decision which defined the certified class as follows:

Whether the Agency discriminated against PATCO Inventory applicants on the basis of age when they were not selected for Air Traffic Control Specialist vacancies on September 16, 2003, and thereafter.

(OFO class definition). *See McCollum, et. al. v. Dep't of Transportation*, EEOC Appeal No. 07A60055 (October 26, 2006) (2006 Class Certification Decision), *reconsideration denied*, EEOC Request No. 0520070177 (January 5, 2007).

Following extensive discovery and the filing of dispositive and decertification motions, the Administrative Judge issued the Decision Modifying Class Certification (Decision Modifying Class) dated September 15, 2017, which modified the class definition as follows:

From September 2003 through September 2006, did the Agency discriminate against PATCO Inventory applicants on the basis of age when they were not selected for Air Traffic Control Specialist vacancies within the Southwest Region or within the Central Service Area (Central Enroute & Oceanic Service Area and/or the Central Terminal Service Area)?

From October 2006 through approximately October 2012, did the Agency discriminate against PATCO Inventory applicants on the basis of age when they were not selected for Air Traffic Control Specialist vacancies nationally or within the Western Service Area (Western Enroute & Oceanic Service Area and/or the Western Terminal Service Area), the Central Service Area (Central Enroute & Oceanic Service Area and/or the Central Terminal Service Area), and/or Eastern Service Area (Eastern Enroute & Oceanic Service Area and/or the Eastern Terminal Service Area)?

A liability hearing using the modified class definitions was conducted on the following dates: October 30-November 17, November 27-December 1, 2017; November 15-16, 19-20, 2018; and March 20, 2019. After the hearing, each side submitted written closing arguments/briefs and responses to the other party's closing arguments. The post-hearing closing submissions period ended on July 31, 2019.

The Administrative Judge issued a Class Action Interim Hearing Decision on September 24, 2020, which was finalized in the Decision on Class Action Complaint Merits (Decision on the Merits) issued on March 11, 2021. The Decision on the Merits found that a pattern

or practice claim of age discrimination in ATCS selections existed from October 2006 through approximately October 2012 and ordered systemic relief. This was the period during which the Agency used the Centralized Selection Process (CSP) to fill ATCS vacancies. Class Agent did not prevail on the remainder of the claims heard.

The Agency and Class Agent had the opportunity to file their appeals before the case proceeded to the individual damages remedy phase. In their cross-appeals, the parties appealed multiple rulings, including the Decision Modifying Class and the Decision on the Merits.

The Decision Modifying Class Certification was not final and was subject to reversal at the appellate level. Thus, Class Agent continued to represent all Class Members during the appeals process and during the negotiations with the Agency.

The Settlement Agreement resolves and settles the class complaint as stated by the OFO certified class definition. The parties' request to restore the OFO class definition for the purpose of settlement is granted.

IV. SETTLEMENT CONSIDERATION

The Agency agreed to pay \$47,500,000.00 (Settlement Amount) into a qualified settlement fund (Settlement Fund). From the Settlement Fund, Class Agent will pay \$9,875,000.00 in attorneys' fees and up to \$1,000,000.00 as out-of-pocket litigation costs. Class Agent will use \$36,625,000.00 (Claims Fund) for payment of the following: Class Members' claims/releases; service payments to Class Agent and specific Class Members; taxes on wages (FICA, FUTA, SUTA); and, to pay costs/expenses relating to the administration of the settlement terms, including Settlement Administrator fees. The parties agreed that a portion of the Claims Fund will be placed in a reserve fund of \$250,000.00 for use in effectuating the purpose of the agreement, including resolving any challenges regarding settlement payment amounts to Class Members or unforeseen settlement administration costs. Monies remaining in the reserve fund will be reallocated to Class Members who submitted claims/releases.

The Settlement Agreement states that the following method (allocation formula) will be used to calculate allocations to Class Members “on a proportional basis using a uniform, nondiscretionary formula that considers” the following factors:

(1) whether the Class Member was still in the PATCO Inventory during the October 2006 through approximately October 2012 period in which the Administrative Judge found a pattern or practice of age discrimination; (2) projected lost wages and benefits using uniform assumptions; (3) any mitigating compensation the Class Member earned; (4) whether the Class Member believes he or she would have been medically cleared to control air traffic; (5) whether the Class Member was convicted of a felony, rendering them ineligible for rehire; and (6) for class members who submit a Claim and Release Form, a minimum allocation of \$10,000.00 applied to class members who remained in the PATCO Inventory as of October 2006 and later and a minimum allocation of \$1,000.00 for class members who were removed from the PATCO Inventory prior to October 2006.

In connection with factor number one, the allocation formula divides Class Members into “Group 1” and “Group 2.” Group 1 consists of Class Members who remained in the PATCO Inventory as of October 2006 and later. Group 2 consists of Class Members who were removed from the PATCO Inventory prior to October 2006. Pursuant to the Settlement Agreement, Group 2 claims may be “discounted between 80-90% relative” to Group 1 claims.

As to factor number two, the assumption is that each Class Member was rehired into a Level 10 facility on the start date of that group’s recovery period and retired 12 years later. The recovery periods for Groups 1 and 2 start in 2003 and 2006, respectively. Based on those assumptions, a uniform projected figure for lost wages and lost benefits is assigned to each year of the groups’ recovery period.

For factor number three, the formula accounts for information collected on the Class Member’s Questionnaire Form. To account for mitigation of damages, the average of the Class Member’s actual compensation earned during the recovery period will be deducted from the formula’s projected lost wages assumption. A uniform percentage of the average compensation will be deducted from the projected lost benefits calculation.

Under factor number four, if the Class Member reported inability to be medically cleared to control air traffic, then beginning that year, “little to no” projected lost wages or benefits will be assumed. Similarly, for factor number five, “little to no” projected lost wages or benefits will be assumed beginning the year the Class Member was convicted of a felony.

The Settlement Agreement explains that each person’s claim allocation will ultimately depend on the number of Class Members returning both the Questionnaire Forms and Claim and Release Forms.

The Agency also agreed to provide training to managers and other personnel who are in a position to process and consider applications from former controllers for ATCS positions with EEO training emphasizing the Agency’s obligation under the ADEA to make selection decisions free of differential treatment based on age. The Agency will also modify EEO training the Agency provides to its Air Traffic Organization workforce to include instruction on the pernicious effects of age-based stereotypes and stigma in the workplace. A segment of this training will inform that improperly basing a selection decision on age may result in individuals protected by the ADEA seeking recourse via the EEO process and the federal district courts. Also, the training may include more specific information about the maximum entry age rules. The training would encourage consultation with human resources, or other knowledgeable personnel, with respect to availability of exemptions from the mandatory separation age for particular candidates.

In exchange for the Agency’s settlement payment and other consideration, Class Agent released all class claims. The parties agreed that once the EEOC Administrative Judge rules that the Settlement Agreement is “fair, adequate, and reasonable to the class as a whole,” the Settlement Agreement “controls the claims of all Class Members and binds all Class Members, and no Class Members may opt out.” *See* Settlement Agreement at 6.8.

As partly stated in paragraph 12.6, the Settlement Agreement “is intended to bar all claims of the Class and/or Class Members, arising out of the same transaction or occurrence as was at issue in this case, that were or could have been brought in this case.” This provision does not apply to “any class members who timely file their claim in federal court.” *See* Settlement Agreement

at 12.6. Paragraph 12.7 states: “[t]his Release does not apply to any Class Member who timely files a claim in federal court against the Agency raising the same allegations as were at issue in this case.”

V. FACTORS SUPPORTING APPROVAL OF CLASS SETTLEMENT

EEOC regulations provide that a settlement of a class complaint shall be approved if it is fair, adequate, and reasonable to the class as a whole, and does not solely benefit the class agent. 29 C.F.R. § 1614.204(g)(4). Federal Rule of Civil Procedure 23(e)(2) provides guidelines to federal district judges for use in determining whether a class action settlement is fair, adequate, and reasonable. While those guidelines are not controlling in EEOC proceedings, the Administrative Judge may reference them in the exercise of discretion.

A. Class Representation

Class Agent, with the assistance of Class Counsel, vigorously litigated the class case, which has included multiple appeals, extensive discovery,⁵ a voluminous record, numerous contested motions, thirteen expert reports from four different expert witnesses, preparation for hearing, a hearing⁶ lasting several weeks, post-hearing closing briefs, and appellate briefs. *See* Motion to Approve Settlement at 6.

Class Agent spent significant time to support the prosecution of the class action. Class Agent filed the class complaint and remained involved in all phases of the litigation, including through settlement negotiations. *See* Motion to Approve Settlement at 16-17. Class Agent, with the assistance of Class Counsel, has adequately represented the Class. *See* Fed. R. Civ. P. 23(e)(2)(A).

⁵ Approximately 100 depositions were conducted.

⁶ The liability hearing included live testimony of thirty-six fact witness and four expert witnesses. Additionally, the designated deposition excerpts of twenty-six fact witnesses were introduced.

B. Negotiation of Settlement Agreement

The parties settled the class action over a ten-month period while their cross-appeals were pending. Their negotiations began with a two-day mediation in September 2021 and continued until the execution date of the Settlement Agreement in July 2022. Class Agent reported that the private mediator used by the parties is a highly regarded private mediator who assisted them in reaching a compromise on the Settlement Amount. *See* Motion to Approve Settlement at 14. The parties demonstrated that the Settlement Agreement was negotiated at arm's length. *See* Rule 23(e)(2)(B).

C. Relief to the Class

The relief provided for the class is adequate considering the future costs, risks, and delay involved. *See* Fed. R. Civ. P. 23(e)(2)(C)(i). This class litigation included complex legal and factual issues. At the time of settlement, the parties' cross-appeals were pending before OFO. Given the range of possible outcomes at the appellate level, continued litigation would have resulted in additional cost, significant risk, and more time in already very lengthy class action proceedings.

The Settlement Agreement formula treats Class Members equitably relative to other similarly situated Class Members. The parties agreed that the monetary allocations to Class Members will be made on a proportional basis pursuant to the formula stated in the Settlement Agreement.

The allocation formula accounts for the fact that the pattern and practice finding only applied to a portion of the class. Group 1 consists of Class Members who were covered by that finding. The remaining Class Members are in Group 2, and this group faced significantly greater risk and uncertainty if the litigation were to continue. The formula accounts for this difference by applying a discount to the Group 2 allocations and by assigning a lower minimum allocation to Class Members in that group.

The Settlement Agreement includes an efficient process for the filing of claims and releases by Class Members. The process is not overly complex, thus facilitating the monetary distributions. Those who opted to submit the questionnaire responses pursuant to the terms of the Settlement Agreement would receive an individualized offer, and those who did not would receive the established minimum amount offers.

D. Attorney's Fees, Litigation Costs, and Service Payments

Class Agent seeks approval of payment of \$9,875,000.00 from the Settlement Fund for Class Counsel's attorneys' fees. The attorneys' fees constitute approximately 20.8% of the Settlement Fund. Courts have applied the "common fund" doctrine to approve payment of attorneys' fees from the class settlement fund. This doctrine is appropriate in situations such as here, where the attorneys procure a class action settlement which benefits clients and non-clients. *See, e.g., Boeing Co. v. Van Gemert*, 444 U.S. 472, 478–79 (1980) (The Supreme Court has "recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole").

In view of the amount of legal work required to sustain this lengthy litigation, litigate complex issues, and obtain favorable results, the request to approve 20.8% of the Settlement Amount in attorneys' fees is reasonable and well within the typical range of accepted percentages. *See, e.g., Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491 (E.D. Cal. 2010) ("The typical range of acceptable attorneys' fees in the Ninth Circuit is 20% to 33 1/3% of the total settlement value"); *see also Complainant v. U.S. Postal Service*, EEOC Appeal No. 0120141801 (Nov. 13, 2014) (class action settlement agreement provided for 25% in attorneys' fees); *Staton v. Boeing Co.*, 327 F.3d 938 (9th Cir. 2003) (Ninth Circuit's benchmark for award of attorney's fees is 25% of common fund).

The Settlement Agreement also provides for payment of up to \$1,000,000.00 as reimbursement of Class Counsel's out-of-pocket litigation costs. The declarations by Class

Counsel support a finding that the incurred costs were reasonable. *See* Desai Declaration; Atchley Declaration.

The Settlement Agreement provides for service payments of \$50,000.00 to Class Agent and \$5,000.00 to eleven Class Members. Class Agent's involvement in support of the class action included his attendance and testimony at the Hearing. The eleven Class Members traveled to the Hearing and either testified or were prepared to do so. These service payments appear reasonable in view of the time and effort spent in support of the class litigation, which also benefitted the other Class Members.

E. Petitions to Vacate

Class members may file petitions to vacate the resolution of the class complaint. *See* 29 C.F.R. § 1614.204(g)(4). The Administrative Judge may either approve the resolution or vacate it. The Administrative Judge does not have the authority to modify the Settlement Agreement. *Id.*

Twenty-two Class Members (Petitioners) timely submitted petitions to vacate the Settlement Agreement. Class Agent responded to these submissions. *See* Motion to Approve Settlement at 40-56; Class Agent's Response to Order on Correspondence Related to Settlement Agreement dated November 5, 2022. The Administrative Judge agrees with Class Agent that the petitions to vacate are insufficient to vacate the Settlement Agreement.

Some Petitioners referred to being aggrieved by alleged discrimination which predated the beginning of the class period. Those claims were properly excluded from the Settlement Agreement as they were never part of the class definition.

Several Petitioners objected to the settlement relief as being insufficient. A few of them compared this settlement to the monetary value of other class action settlements by the Agency. Every settlement must be evaluated based on the circumstances of the class action case being resolved.

Some Petitioners suggested that the monetary consideration to the class should have been greater. Others argued that there should have been other types of relief offered, such as retirement benefits or reinstatement. However, these types of objections fail to consider that entitlement to personal relief depends on the evidence surrounding the specific disputed vacancy or vacancies. In *Hamrick v. Dep't of Transportation*, EEOC Appeal No. 01A10972 (June 19, 2002), *reconsideration denied*, *Hamrick v. Dep't of Transportation*, EEOC Request No. 01A10972 (October 3, 2002), there was direct evidence of age discrimination in the non-selection of the complainant, a PATCO Inventory member. OFO affirmed denial of the ATCS position to the complainant because the Agency showed that he would not have been selected “even absent illegal age discrimination.” *Id.*

Class Members in Group 1 faced risk in continuing to litigate. The discrimination finding which benefitted them was not final and could be overturned. Even if the discrimination finding were sustained on appeal, the covered Class Members would proceed to the damages phase. While a presumption of age discrimination would apply in the remedy phase, the extent of each Class Member’s remedy would depend on the specific circumstances of the vacancy or vacancies for which the person was referred. Individual claims filed would be subject to challenges by the Agency seeking to reduce or eliminate the Class Member’s relief.⁷

As to the allocation formula, Group 2 Petitioners objected to the application of a discount to that group’s allocations and use of a minimum allocation amount which was lower than Group 1’s. Class Agent explained that these provisions properly accounted for the group’s different appellate postures on appeal. Group 2 claims faced greater risk, cost, and duration. Depending on the outcome on appeal, claims by this group might continue as part of a class or proceed as individual complaints. However, regardless of the outcome, Group 2’s claims would not benefit from the discrimination presumption already rendered as to Group 1’s class claim. Thus, continued litigation involved the risk of proving discrimination. In an individual⁸ complaint,

⁷ In non-selection cases, an agency may defend against a covered individual’s specific claim “by clear and convincing evidence that a class member is not entitled to relief.” *See* 29 C.F.R. § 1614.204(1)(3).

⁸ Whether the “clear and convincing” or the *Babb* standard would apply in the remedy phase of an age-based class action before the EEOC is unsettled.

even if age discrimination was established, entitlement to personal relief, such as reinstatement or back pay, would require showing “that age discrimination was a but-for cause” of not being hired for the specific ATCS vacancy or vacancies in question. *Babb v. Wilkie*, 140 S.Ct. 1168 (2020).

Some of the Petitioners objected to specific factors in the allocation formula, such as the level of wages used for individualized calculations. Class Agent explained that the wages used in the formula corresponded to pay at a level 10 facility.⁹ Class Agent stated that this level of wages was used as a uniform factor in the formula as it represented an average wages level for ATCS employees. Another Petitioner argued that the formula should not account for whether a Class Member would have been medically cleared to control air traffic. Class Agent noted that, depending on the timing of each situation, medical clearance may have disqualified a Class Member from being hired. While the formula used in the Settlement Agreement could have included additional or different factors, the ultimate choices were reasonable and favored a simpler method, which would aid to efficiently distribute the funds.

Several of the Group 2 Petitioners objected to their removal from the PATCO Inventory. In 2005, the Agency implemented a “circularization” process where the Agency sought to update the PATCO Inventory information and documentation. Those who did not respond to the requests or indicated that they were no longer interested were removed. Two Petitioners stated that they did not receive the Agency’s circularization correspondence because they had moved from the address on file with the Agency. Another Petitioner stated that his document submission was rejected as untimely. Individuals who had reached, or passed, the mandatory ATCS retirement age of 56, were also removed. Four Petitioners¹⁰ objected to their removal from the PATCO Inventory on this basis. These types of individual circumstances related to removal from the PATCO Inventory are insufficient to reject the class-wide settlement.

One Petitioner’s individual EEO complaint was subsumed into this class action as it raised the same claims. If a class complaint is certified, individual complaints that raise claims identical

⁹ This wages level translated to a GS-12 level III at the time of the PATCO strike termination.

¹⁰ A least one of these Petitioners continued to apply for an ATCS position via reinstatement vacancy announcements.

to the definition of the class claim are subsumed within the class complaint. Under the terms of the Settlement Agreement, individual EEO complaints which were subsumed into the class, would be barred. Class Agent explained that this was in line with EEOC regulations, which do not provide the option of opting out of the class. Class Agent also stated that this Petitioner “may have the option to forgo the class settlement, and pursue his individual merits claim in federal court, *if a federal court were to determine he is eligible to do so.*” Motion for Approval of Settlement at 48 (emphasis added). As alluded to by that comment, Class Counsel and Agency Counsel agreed that how any federal district court would handle such a lawsuit was unknown.

VI. ORDER OF DISMISSAL

The Settlement Agreement is approved on the basis that it is fair, adequate, and reasonable to the class as a whole, and does not solely benefit the class agent. Based on the approved Settlement Agreement, the following class complaint is dismissed:

Whether the Agency discriminated against PATCO Inventory applicants on the basis of age when they were not selected for Air Traffic Control Specialist vacancies on September 16, 2003, and thereafter.

VII. FINAL AGENCY ORDER AND NOTICE TO PETITIONERS

Following receipt of this decision and order, the Agency shall serve its notice of final agency order on Class Counsel pursuant to the Settlement Agreement terms.

EEO MD-110 states that if the resolution is approved, then the “decision must inform the petitioner of the right to appeal the decision to the Commission.” A class member “may appeal a final decision on a petition pursuant to § 1614.204(g)(4).” *See* 29 C.F.R. § 1614.401(c). EEOC regulations provide that the appeal of a final decision approving a class action resolution must be filed within 30 days of receipt of the “dismissal, final action or decision.” *See* 29 C.F.R. § 1614.402(a)-(b).

This is notice that within 30 days of receipt of the notice of agency final order, petitioners who timely filed petitions to vacate the Settlement Agreement may file an appeal by using EEOC Form 573,¹¹ Notice of Appeal/Petition (copy attached).

It is so ORDERED.



Veronica A. Cuadra
Administrative Judge

¹¹ The Dismissal of Appeal instructed that the Administrative Judge’s decision “must include a copy of EEOC Form 573, Notice of Appeal/Petition. *See* 29 C.F.R. § 1614.204(g)(4); Equal Employment Opportunity Management Directive [EEO MD-110] for 29 C.F.R. Part 1614, at Chap. 8, § VIII (Aug. 5, 2015).

Certificate of Service

On this date, I caused to be delivered to the below-named parties or their representatives by the method(s) indicated, a true copy of the attached instrument.

Reena I. Desai
Matthew H. Morgan
Rachhana T. Srey
Nichols Kaster, PLLP
4700 IDS Center
80 South 8th Street
Minneapolis, MN 55402-2100
Class Representatives
VIA EEOC ELECTRONIC PORTALS ONLY

Jeffery L. Atchley
Norwood & Atchley
254 Court Avenue, 2nd Floor
Memphis, TN 38103-2361
Class Representative
VIA EEOC ELECTRONIC PORTALS ONLY

Compliance Operations Division
Departmental Office of Civil Rights
US Department of Transportation
1200 New Jersey Avenue, SE., W76-401
Washington, DC 20590-0001
VIA EEOC FEDSEP PORTAL ONLY

Benjamin J. Carter
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800 Independence Avenue, SW, AGC-100
Washington, DC 20553-0001
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Sarah G. Besnoff
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2050 M Street NW
Washington, DC 20036-3357
Agency's Representatives
VIA EEOC ELECTRONIC PORTALS ONLY

Date: March 16, 2023



Alvin Negron-Paez
Legal Assistant, Federal Hearings Unit
Dallas District Office

NOTICE OF APPEAL/PETITION
TO THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
OFFICE OF FEDERAL OPERATIONS
P.O. Box 77960
Washington, DC, 20013

Complainant Information: (Please Print or Type)

| | |
|---|--|
| Complainant's name (Last, First, M.I.): | |
| Home/mailling address: | |
| City, State, ZIP Code: | |
| Daytime Telephone # (with area code): | |
| E-mail address (if any): | |

Attorney/Representative Information (if any):

| | |
|-----------------------------------|--|
| Attorney name: | |
| Non-Attorney Representative name: | |
| Address: | |
| City, State, ZIP Code: | |
| Telephone number (if applicable): | |
| E-mail address (if any): | |

General Information:

| | |
|--|---|
| Name of the agency being charged with discrimination: | |
| Identify the Agency's complaint number: | |
| Location of the duty station or local facility in which the complaint arose: | |
| Has a final action been taken by the agency, an Arbitrator, FLRA, or MSPB on this complaint? | <input type="checkbox"/> Yes Date Received _____ (Remember to attach a copy) <input type="checkbox"/> No <input type="checkbox"/> This appeal alleges a breach of a settlement agreement |
| Has a complaint been filed on this same matter with the EEOC, another agency, or through any other administrative or collective bargaining procedures? | <input type="checkbox"/> No <input type="checkbox"/> Yes (Indicate the agency or procedure, complaint/docket number, and attach a copy, if appropriate) |
| Has a civil action (lawsuit) been filed in connection with this complaint? | <input type="checkbox"/> No <input type="checkbox"/> Yes (Attach a copy of the civil action filed) |

NOTICE: Please **attach a copy of the final decision or order** from which you are appealing. If a hearing was requested, please attach a copy of the agency's final order and a copy of the EEOC Administrative Judge's decision. Any comments or brief in support of this appeal **MUST** be filed with the EEOC and with the agency **within 30 days** of the date this appeal is filed. The date the appeal is filed is the date on which it is postmarked, hand delivered, or faxed to the EEOC at the address above.

| | |
|---|--|
| Signature of complainant or complainant's representative: | |
| Date: | |

PRIVACY ACT STATEMENT ON REVERSE SIDE.

PRIVACY ACT STATEMENT

(This form is covered by the Privacy Act of 1974, Public Law 93-597. Authority for requesting the personal data and the use thereof are given below.)

1. **FORM NUMBER/TITLE/DATE:** EEOC Form 573, Notice of Appeal/Petition, February 2009
2. **AUTHORITY:** 42 U.S.C. § 2000e-16
3. **PRINCIPAL PURPOSE:** The purpose of this questionnaire is to solicit information to enable the Commission to properly and efficiently adjudicate appeals filed by Federal employees, former Federal employees, and applicants for Federal employment.
4. **ROUTINE USES:** Information provided on this form will be used by Commission employees to determine: (a) the appropriate agency from which to request relevant files; (b) whether the appeal is timely; (c) whether the Commission has jurisdiction over the issue(s) raised in the appeal, and (d) generally, to assist the Commission in properly processing and deciding appeals. Decisions of the Commission are final administrative decisions, and, as such, are available to the public under the provisions of the Freedom of Information Act. Some information may also be used in depersonalized form as a data base for statistical purposes.
5. **WHETHER DISCLOSURE IS MANDATORY OR VOLUNTARY AND EFFECT ON INDIVIDUAL FOR NOT PROVIDING INFORMATION:** Since your appeal is a voluntary action, you are not required to provide any personal information in connection with it. However, failure to supply the Commission with the requested information could hinder timely processing of your case, or even result in the rejection or dismissal of your appeal.

Send your appeal to:

**The Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington, D.C. 20013**

**NOTICE OF APPEAL/PETITION
TO THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

OFFICE OF FEDERAL OPERATIONS
P.O. Box 19848
Washington, DC 20036

Complainant Information: (Please Print or Type)

| | |
|---|--|
| Complainant's name (Last, First, M.I.): | |
| Home/mailling address: | |
| City, State, ZIP Code: | |
| Daytime Telephone # (with area code): | |
| E-mail address (if any): | |

Attorney/Representative Information (if any):

| | |
|-----------------------------------|--|
| Attorney name: | |
| Non-Attorney Representative name: | |
| Address: | |
| City, State, ZIP Code: | |
| Telephone number (if applicable): | |
| E-mail address (if any): | |

General Information:

| | |
|---|--|
| Name of the agency being charged with discrimination: | |
| Identify the Agency's complaint number: | |
| Location of the duty station or local facility in which the | |

| | |
|--|---|
| complaint arose: | |
| Has a final action been taken by the agency, an Arbitrator, FLRA, or MSPB on this complaint? | <input type="checkbox"/> Yes; Date Received _____ (Remember to attach a copy) <input type="checkbox"/> No <input type="checkbox"/> This appeal alleges a breach of settlement agreement |
| Has a complaint been filed on this same matter with the EEOC, <u>another</u> agency, or through any <u>other</u> administrative or collective bargaining procedures? | <input type="checkbox"/> No <input type="checkbox"/> Yes (Indicate the agency or procedure, complaint/docket number, and attach a copy, if appropriate) |
| Has a civil action (lawsuit) been filed in connection with this complaint? | <input type="checkbox"/> No <input type="checkbox"/> Yes (Attach a copy of the civil action filed) |

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| | |
|---|--|
| Signature of complainant or complainant's representative: | |
| Date: | |

EEOC Form 573 REV 1/01

PRIVACY ACT STATEMENT

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Send your appeal to:

The Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, D.C. 20036

Figure 4-17 Notice of Appeal/Petition to Equal Employment Opportunity
Commission