U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON FIELD OFFICE
131 M Street, N.E., Suite 4NW02F
Washington, D.C. 20507

[redacted] Complainant, v. Kirstjen Nielsen, Secretary, U.S. Department of Homeland Security, Agency.	EEOC No. [redacted] Agency No. [redacted] Date: August 20, 2018

ORDER ENTERING JUDGMENT

For the reasons set forth in the enclosed Decision, judgment in the above-captioned matter is hereby entered. A Notice to The Parties explaining their appeal rights and responsibilities is attached to the Decision. The Order and Decision have been uploaded to the FEDSEP docket for this case, and the hearing record has been mailed to the Agency's EEO office.

It is so ORDERED.

For the Commission:

Antoinette Eates
Administrative Judge

Hearing Record send by first class postal mail on August 21, 2018, to:

Department of Homeland Security
Office of Civil Rights and Civil Liberties/MS0800
245 Murray Lane, SW, Bldg. 410
Washington, D.C. 20528

Order and Decision emailed on August 20, 2018 to:

[redacted]

Tom Gagliardo
tomgagliardo@gmail.com

Steven Giballa
steven.giballa@usss.dhs.gov

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON FIELD OFFICE
131 M Street, N.E., Suite 4NW02F
Washington, D.C. 20507

[redacted] Complainant, v. Kirstjen Nielsen, Secretary, U.S. Department of Homeland Security, Agency.	EEOC No. [redacted] Agency No. [redacted] Date: August 20, 2018

DECISION

This decision is issued pursuant to 29 C.F.R. § 1614.109(g) (2017). [redacted] ("Complainant") filed a formal complaint of discrimination against the U.S. Department of Homeland Security, U.S. Secret Service (Agency) on December 19, 2014, alleging that the Agency discriminated against him in violation of Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. § 791, *as amended*, when he was not selected for an Information Technology (IT) Program Manager position. Complainant requested a hearing with the Equal Employment Opportunity Commission (EEOC) following the Agency's investigation.

On December 23, 2015, Supervisory Administrative Judge Gladys Collazo issued an Order of Acknowledgment and Scheduling of Initial Teleconference. The case was subsequently assigned to me, and I held an Initial Teleconference on February 1, 2016, after which I issued a Case Management Order dated February 1, 2016, confirming the issue for adjudication and setting forth hearing procedures and deadlines for discovery, dispositive motions and responses.[1]

[1] After the Initial Teleconference, the Agency filed a Motion to Dismiss (MTD) arguing, among other things, that the Commission lacked jurisdiction to review the non-selection at issue because it arose from a decision by the Agency to terminate Complainant's security background check. *See Department of the Navy v. Egan*, 484 U.S. 527 (1988). By order dated August 10, 2016, I denied the Agency's MTD, finding that the Commission had jurisdiction to review Complainant's allegation because it involved a claim that the security background check process was conducted in a discriminatory manner, rather than a challenge to the Agency's ultimate security clearance determination itself. Also by order dated August 10, 2016, I granted Complainant's Motion to Compel production of the audio and/or video recording of Complainant's polygraph examination and all documents related to the polygraph examination, including the examination questions. On October 4, 2016, Complainant filed a motion for sanctions for spoliation of evidence because the audio recording of the polygraph examination was not audible in

After discovery, the Agency filed a Motion for Decision Without a Hearing ("Agency's MSJ" or "Agency's Motion") on December 1, 2016; the Complainant filed an Opposition to the Agency's MSJ ("Opposition") on January 9, 2017; and the Agency filed a Reply in Support of its Motion for Judgment Without a Hearing ("Agency Reply") on January 17, 2017.

After a review of the entire record, which includes the Report of Investigation ("ROI") and the parties' filings, and construing the facts in the light most favorable to Complainant, I find that it is appropriate to GRANT the Agency's MSJ and to issue a decision without a hearing.

ISSUE

Whether Complainant was subjected to discrimination on the basis of disability (Obsessive Compulsive Disorder) when on or about October 28, 2014, he was not selected for the position of IT Program Manager (GS-2210-15), Announcement TEC-AS166-MP.

FACTS[2]

1. In September 2013, Complainant applied for a position as an IT Program Manager with the Agency. ROI, Exhibit (Ex.) A-1 at 4.

2. All positions with the U.S. Secret Service are deemed "Critical Sensitive" and require a Top Secret security clearance. ROI, Ex. E-5, Ex. D-5, p. 2.

3. Complainant submitted a Schedule A disability letter with his application to demonstrate his eligibility for a Schedule A Excepted Service appointment. ROI, Ex. D-4b. In the letter, which is dated January 6, 2010, Complainant's psychiatrist stated that Complainant has been diagnosed with Obsessive-Compulsive Disorder (OCD), an anxiety disorder that is a type of mental illness, and that he had been receiving medical treatment for OCD since 1998, which included medication and psychotherapy. ROI, Ex. D-4b. Complainant

significant part. The Agency filed its opposition to the motion for sanctions on October 13, 2016, in which it attached an affidavit from Special Agent Ellen Ripperger, the polygraph examiner, attesting that the audio recording that was provided was a copy of the complete and unaltered recording of the original examination as created and maintained by the Agency. Ripperger attested as to the contents of the audio recording, parts of which were inaudible entirely or only audible at the highest volume setting, and described her process for creating the audio, denying any intentional or negligent destruction or alteration of the recording. I confirmed Ripperger's description of the audio recording through my own review of the audiotape. Based on my assessment of the parties' filings, the audio recording, and the parties' arguments during a teleconference on the motion, which included information that several other audio recordings from polygraph examinations by Ripperger around the time of Complainant's were also damaged in her computer recording program, I denied Complainant's motion for sanctions by order dated October 21, 2016, finding no evidence that spoliation had occurred.

[2] I find the Agency's Statement of Material Facts contained in its MSJ to be accurate, and it is incorporated herein with additional facts as needed. Complainant does not dispute the Agency's statement of facts in his Opposition, but rather merely presents additional facts for consideration.

was included on the "Schedule A Listing of Eligibles" for the position at issue. ROI, Ex. B-10 at 5.

4. In December 2013, Complainant interviewed with several Agency management officials for the IT Program Manager position. At that time, Complainant informed the management officials that he had OCD. ROI, Ex. A-1 at 4.

5. On July 17, 2014, Complainant received a conditional offer of employment as an IT Program Manager GS-2210-15, contingent upon the successful completion of a background investigation. ROI, Ex. B-4.

6. On August 19, 2014, Complainant met with Special Agent (SA) George Stakias in the Baltimore Field Office for his security interview. During that meeting, Complainant was directed to provide a statement explaining the purpose of the mental health treatment he had listed on his SF-86, Questionnaire for National Security Purposes. ROI, Ex. A-1 at 6.

7. Successful completion of a Law Enforcement Pre-Employment Test (LEPET) polygraph examination is a required part of the background investigation for the IT Program Manager position. ROI, Ex. B-9 at 2; Ex. D-5, p. 3.

8. On September 18, 2014, Complainant took a LEPET polygraph examination administered by SA Ellen Ripperger at the Agency's Washington Field Office. *Id.*; MSJ Ex. 1 (Polygraph scoring charts).

9. Prior to administering the polygraph examination, SA Ripperger asked Complainant which medications he took within the last 24 hours, how much, the reason he took the medications, if he was under a physician's care, which medications he had been prescribed in the last 12 months, whether he experienced a variety of medical conditions, and whether he had ever consulted a doctor about a nervous or mental condition. MSJ Ex. 2 (Polygraph Data Sheet); *see also* ROI, Ex. D-3 at 3.

10. Complainant informed SA Ripperger that he took various medications for a variety of conditions, including OCD. *Id.*

11. SA Ripperger and the Complainant agreed that Complainant was fit to take a polygraph examination on September 18, 2014. *Id.;* MSJ Ex. 3 (Complainant's Deposition) at 21:1-3; *see also* ROI Ex. D-3 at 3, 5.

12. Complainant's polygraph examination consisted of two scored series of relevant questions. MSJ Ex. 1. The first scored series consisted of four charts, each of which asked the same three relevant questions (R24, R26, and R28). *Id.* The second scored series consisted of three charts, each of which asked the same two relevant questions (R4 and R6). *Id.*

13. The same questions are asked of each Agency applicant undergoing a polygraph examination, including questions about illegal drug use history and serious criminal history. ROI, Ex. D-3 at 4.

14. During the polygraph examination, SA Ripperger informed Complainant that he had significant or inconclusive responses on the questions involving serious crimes and illegal drug use, which indicated deception, and she stopped the examination to ask Complainant follow-up questions. Complainant denied engaging in serious crimes or illegal drug use. ROI, Ex. A-1 at 6; ROI, Ex. D-3 at 4-5; MSJ Ex. 3 at 26:17-19.

15. SA Ripperger's analyses of both series of questions were reviewed by SA Edward Alston and Sgt. William Magnuson. MSJ Ex. 1.

16. SA Ripperger, SA Alston, and Sgt. Magnuson all agreed that the final evaluation for the first scored series in Complainant's polygraph evaluation was inconclusive (INC). *Id.*

17. SA Ripperger, SA Alston, and Sgt. Magnusson all agreed that the final evaluation for the second scored series on Complainant's polygraph evaluation was Significant Response (SR). *Id.*

18. Pursuant to written Secret Service polygraph policy, a significant response to any relevant question is considered a significant response to the entire the polygraph examination. MSJ Ex. 4 (Polygraph Manual Section) at 2.

19. After Complainant's polygraph examination, the Agency's Polygraph Branch submitted a report to the Security Clearance Division containing a summary of the examination results. MSJ Ex. 5 (Polygraph Report).

20. The Polygraph Report (Ex. 5) was reviewed by the Agency's Chief of the Security Clearance Division, Robin Deprospero-Philpot. ROI, Ex. D-5 at 4. Chief Deprospero-Philpot stated that the report of the polygraph examination, which had been subject to quality-control review, showed that Complainant had significant responses and inconclusive responses on the questions concerning serious crime and involvement with illegal drugs, and that the significant response resulted in Complainant failing the polygraph examination. *Id.* She stated further that because Complainant made no admissions related to these questions, Agency policy did not permit a polygraph re-test. *Id.*

21. Chief Deprospero-Philpot determined that because Complainant's polygraph examination included a significant response to a relevant question, and there were no mitigating circumstances, Complainant should be discontinued from the hiring process for the IT Program Manager position. ROI, Ex. D-5 at 5*;* MSJ Ex. 8 at 21:12-19.

22. On October 16, 2014, the Security Clearance Division informed the Human Capital Division that Complainant was no longer a best qualified applicant for the position of IT

Program Manager and that he was no longer being considered for a position with the Secret Service. MSJ Ex. 6.

23. Complainant was informed by email on October 28, 2014, that he was not selected for the IT Program Manager position, because he was no longer the best-qualified applicant. ROI Ex. A-1 at 8.

STANDARD FOR DECISION WITHOUT A HEARING

Summary judgment is appropriate if the pleadings, answers to interrogatories, admissions, affidavits and other evidence establish no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *See* 29 C.F.R. § 1614.109(g); *see also Murphy v. Dep't of the Army*, EEOC Appeal No. 01A04099 at 3 (July 11, 2003) (noting that the regulation governing decisions without a hearing is modeled after the Federal Rules of Civil Procedure, Rule 56). Only disputes over facts that might affect the outcome of the suit under governing law, and not irrelevant or unnecessary factual disputes, will preclude the entry of summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). There is no genuine issue of material fact if the relevant evidence in the record, taken as a whole, indicates that a reasonable fact-finder could not return a verdict for the party opposing summary judgment. *Id.* Where the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *Anderson*, 477 U.S. at 249-50. Where the factual context renders his position implausible, the party opposing summary judgment must come forward with strong persuasive evidence to defeat it. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In doing so, a complainant "may not rest upon … mere allegations." *Anderson*, 477 U.S. at 248; *see also* Fed. R. Civ. P. 56(c). Instead, he "must set forth specific facts showing that there is a genuine issue" that requires a hearing. *Id.* To establish a factual dispute, affidavits must "be made on personal knowledge, …set[ting] [forth such] facts as would be admissible in evidence." Fed. R. Civ. P. 56(c)(4); *see also Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999). Issues of material fact are not "genuine" merely because there is "some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586.

In this administrative process, summary judgment may only be granted when the record is sufficiently developed to support a decision without a hearing, keeping in mind the quasi-investigative nature of these proceedings. *See Petty v. Dep't of Defense*, EEOC Appeal No. 01A24206 (July 11, 2003); *Murphy, supra.* Here, I find that the investigative record has been

adequately developed, and both parties have engaged in discovery. Complainant was given ample notice of the Agency's MSJ, the Agency provided a comprehensive statement of the undisputed facts, and Complainant had the opportunity to respond to the Agency's MSJ, and did respond.

Because there are no genuine issues of disputed material fact in this case, I find that summary judgment in favor of the Agency is appropriate.

PRINCIPLES OF LAW AND ANALYSIS[3]

In the absence of direct evidence of discrimination, a claim of disability-based disparate treatment is examined under the three-part test set forth in *McDonnell-Douglas Corporation v. Green*, 411 U.S. 792 (1973). A complainant must demonstrate that: (1) he is an individual with a disability within the meaning of the Rehabilitation Act; (2) he is qualified for the position with or without accommodation; and (3) he was subjected to an adverse employment action because of his disability. *See Duncan v. Washington Metro. Area Transit Auth.*, 240 F.3d 1110, 1114 (D.C. Cir. 2001) (*en banc*); *Lawson v. CSX Transp., Inc.*, 245 F.3d 916 (7th Cir. 2001)*; Heyman v. Queens Village Comm. for Mental Health for Jamaica Cmty. Adolescent Program*, 198 F.3d 68 (2d Cir. 1999)*; Swanks v. Washington Metro.Area Transit Auth.*, 179 F.3d 929, 933-34 (D.C. Cir. 1999); *James E. Shaw v. Sec'y Dept. of Veterans Affairs*, EEOC Appeal No. 01A40904 (March 29, 2004).

Once a *prima facie* case is established, the burden shifts to the agency to articulate a legitimate, nondiscriminatory reason for the challenged actions. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *McDonnell-Douglas*, 411 U.S. at 802. Ultimately, a complainant must prove, by a preponderance of the evidence, that the agency's articulated reason for its action was not its true reason, but a sham or pretext for unlawful discrimination. *Burdine,*

[3] Complainant informed me in April 2018 that the Agency's Inspector General (IG) is investigating the inaudible recording of his polygraph examination and whether misconduct occurred. Complainant asserts that it would thus be inappropriate for me to rule on the Agency MSJ until after the IG investigation is concluded because "the validity of Complainant's] polygraph examination" is a "critical, predicate fact" to my decision. *See* email from Complainant's representative dated April 23, 2018. As of August 16, 2018, the IG was unable to provide an estimated timeframe for completion of its investigation. *See* email dated August 16, 2018 from Michael T. Benedict, Senior Special Agent of the Agency's IG office. Regardless, I find it unnecessary to wait for the conclusion of the IG investigation before issuing this decision, as Complainant's claims regarding the audibility of the polygraph examination are not germane to the legal analysis of whether disability discrimination has occurred in this case. Moreover, any analysis by me of the "validity" of the Agency's polygraph examination would arguably be outside my jurisdiction and prohibited by *Egan*.

450 U.S. at 253; *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000); *Hicks*, 509 U.S. at 511; *McDonnell-Douglas*, 411 U.S. at 804.

Assuming, *arguendo*, Complainant is an individual with a disability, I find that he fails to establish a *prima facie* case of discrimination because he is not qualified for the position at issue. The Commission has held that an individual's failure to pass a required polygraph examination renders him unqualified for the position at issue. *See Complainant v. Holder*, EEOC Appeal No. 0120130689 (March 9, 2015); req. for recon. denied, EEOC Request No. 0520150325 (September 2, 2015) (FBI applicant who failed polygraph examination was not a qualified individual with a disability because "the requirement to pass the polygraph examination is an essential requirement, necessary for national security reasons, which the Agency cannot be compelled to waive."); *see also Lindsay v. Gonzalez*, Appeal No. 0120072285 (2007). Complainant was unable to meet this requirement, and he is accordingly not qualified for the position at issue and fails to establish a *prima facie* case of discrimination.

Even if Complainant had established a *prima facie* case, the Agency has asserted a legitimate, non-discriminatory reason for his non-selection, *i.e*. his failure to successfully complete the background check for this position due to the results of his polygraph examination. Complainant's polygraph examination included a significant response to a relevant question concerning past serious crimes and an inconclusive response regarding illegal drug use. The polygraph examination evaluation was first reviewed by the Agency's quality control reviewers and then submitted to the Agency's Chief of the Security Clearance Division, Security Officer Robin DeProspero-Philpot, who determined that Complainant "should be discontinued from the hiring process based on the results of the polygraph examination." ROI, Ex. D-5 at 4. Thus, the Agency has provided a legitimate, non-discriminatory reason for not selecting Complainant for the IT Project Manager position.

The burden then shifts to Complainant to produce legally sufficient evidence of a genuine dispute as to the legitimacy of the Agency's reasons for his non-selection or other evidence of pretext sufficient to satisfy his burden at the summary judgment stage.

In an effort to show pretext, in his Opposition Complainant primarily challenges the validity and science of the Agency's polygraph examination.[4] He relies on the statement of a

[4] See Complainant's Opposition statement of the issues that he believes need to be resolved: "(1) was the polygraph examination conducted properly; (2) were [Complainant's] responses to the questions asked during the examination

non-Agency polygraph examiner, Danny Seiler, who uses a different scoring method than that used by the Agency.[5] Despite his preference for a different scoring method, Seiler agrees with the assessment that Complainant had a significant response to a relevant question on his polygraph examination. *See* MSJ Ex. 7, 31: 20-22; 33: 2-9. Complainant also attempts to re-litigate the spoliation arguments made in his motion for sanctions, which I previously addressed and rejected. *See* footnote 1 *supra.* His arguments about the validity and science of the polygraph examination fail to raise a genuine issue of material fact on the question of Agency pretext for disability discrimination.[6]

Complainant also argues in his Opposition that a non-disabled applicant, Stephen Tignor, was treated more favorably because Tignor was permitted to take a polygraph re-test and then hired by the Agency. I find that Complainant fails to put forth legally sufficient evidence that Tignor is a similarly situated comparator. Tignor had been previously employed by the Agency in a non-law enforcement position from 2000-2007, then worked for several years as a Virginia State Trooper. He applied to be a Special Agent with the Agency in 2011 and took a polygraph examination that he passed without incident. Reply, Ex. I. Before Tignor came onboard the Agency implemented a hiring freeze. In 2013, the Agency could hire again, and Tignor had to re-take the polygraph examination because the 2011 exam had expired. Reply, Ex. II. Tignor had a significant response on his 2013 polygraph examination administered by SA Ripperger[7], and Chief DeProspero-Philpot thus found him to no longer be the best-qualified applicant. Reply, Exs. III, IV. Subsequently, staff from the Agency's Office of the Assistant Director for Investigations, which oversees the hiring of Special Agents, authorized Tignor to take a third polygraph examination, which he passed with no significant responses and was thus hired as a

---

properly interpreted; and (3) was another applicant for employment who was not disabled treated more favorably than [Complainant]." Only the third identified issue is probative to the question of disability discrimination in this case.

[5] Complainant makes these arguments despite my statement in the Order Denying Agency's Motion to Dismiss and Granting Complainant's Motion to Compel dated August 10, 2016, that neither the validity of the Agency's polygraph examinations nor the science of the polygraph examination are relevant to an analysis of whether disability discrimination occurred here.

[6] In addition, the Agency's Reply accurately identifies several instances where Complainant misstates the record evidence. I will not repeat these instances herein, but hereby incorporate the Agency's Reply in my analysis.

[7] Ripperger states that she did not know whether Tignor had a disability. Opposition, Ex. (Ripperger Deposition), 154: 8-10.

Special Agent. Reply, Ex. V. I find that Tignor, an applicant for a Special Agent position, was not similarly situated to Complainant because he had previously passed a polygraph examination prior to the hiring freeze, and the individuals involved in permitting Tignor to take a third polygraph examination after his significant response were not involved in Complainant's hiring for the IT position at issue. In fact, the record shows that SA Ripperger and Chief Deprospero-Philpot, who were involved in the hiring process of both Tignor and Complainant, treated Complainant and Tignor in exactly the same manner. No inference of differential treatment therefore arises.

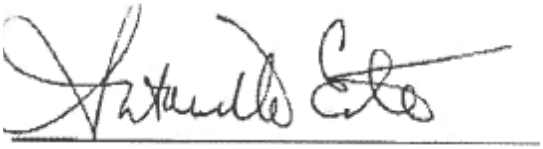
Considering all the arguments and evidence put forth by Complainant, including arguments not specifically addressed herein, I cannot conclude that a reasonable trier of fact could find in favor of Complainant in determining that discriminatory animus based on his disability played a role in his non-selection for the position at issue. Consequently, I find that summary judgment in favor of the Agency must be granted.

CONCLUSION

Upon review of the parties' submissions and the entire record, and construing the evidence in the light most favorable to Complainant, I find that there are no disputed issues of material fact that could affect the outcome of this case, and no reasonable fact finder could resolve the claims in Complainant's favor. As such, summary judgment for the Agency is appropriate, and the Agency's Motion for Summary Judgment is **GRANTED**.

It is so ORDERED.

For the Commission:



Antoinette Eates
Administrative Judge

NOTICE TO THE PARTIES

TO THE AGENCY:

Within forty (40) days of receiving this decision and the hearing record, you are required to issue a final order notifying the complainant whether or not you will fully implement this decision. You should also send a copy of your final order to the Administrative Judge.

Your final order must contain a notice of the complainant's right to appeal to the Office of Federal Operations, the right to file a civil action in a federal district court, the name of the proper defendant in any such lawsuit, the right to request the appointment of counsel and waiver of court costs or fees, and the applicable time limits for such appeal or lawsuit. A copy of EEOC Form 573 (Notice of Appeal/Petition) must be attached to your final order.

If your final order does not fully implement this decision, you must simultaneously file an appeal with the Office of Federal Operations in accordance with 29 C.F.R. 1614.403, and append a copy of your appeal to your final order. *See* EEOC Management Directive 110, August 5, 2015, Appendix O. You must also comply with the Interim Relief regulation set forth at 29 C.F.R. § 1614.505.

TO THE COMPLAINANT:

You may file an appeal with the Commission's Office of Federal Operations when you receive a final order from the agency informing you whether the agency will or will not fully implement this decision. 29 C.F.R. § 1614.110(a). From the time you receive the agency's final order, you will have thirty (30) days to file an appeal. If the agency fails to issue a final order, you have the right to file your own appeal any time after the conclusion of the agency's (40) day period for issuing a final order. *See* EEO MD-110, 9-3. In either case, please attach a copy of this decision with your appeal.

Do not send your appeal to the Administrative Judge. Your appeal must be filed with the Office of Federal Operations at the address set forth below, and you must send a copy of your appeal to the agency at the same time that you file it with the Office of Federal Operations. In or attached to your appeal to the Office of Federal Operations, you must certify the date and method by which you sent a copy of your appeal to the agency.

WHERE TO FILE AN APPEAL:

All appeals to the Commission must be filed by mail, hand delivery or facsimile.

BY MAIL:

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

BY PERSONAL DELIVERY:

U.S. Equal Employment Opportunity Commission
Office of Federal Operations
131 M Street, NE
Suite 5SW12G
Washington, DC 20507

BY FACSIMILE:

Number: (202) 663-7022

Facsimile transmissions of more than ten (10) pages will not be accepted.

COMPLIANCE WITH AN AGENCY FINAL ACTION

Pursuant to 29 C.F.R. § 1614.504, an agency's final action that has not been the subject of an appeal to the Commission or a civil action is binding on the agency. If the complainant believes that the agency has failed to comply with the terms of this decision, the complainant shall notify the agency's EEO Director, in writing, of the alleged noncompliance within 30 days of when the complainant knew or should have known of the alleged noncompliance. The agency shall resolve the matter and respond to the complainant in writing. If the agency has not responded to the complainant, in writing, or if the complainant is not satisfied with the agency's attempt to resolve the matter, the complainant may appeal to the Commission for a determination of whether the agency has complied with the terms of its final action. The complainant may file such an appeal 35 days after serving the agency with the allegations of non-compliance, but must file an appeal within 30 days of receiving the agency's determination. A copy of the appeal must be served on the agency, and the agency may submit a response to the Commission within 30 days of receiving the notice of appeal.