

UNITED STATES DEPARTMENT OF JUSTICE

Bureau of Prisons

In the Matter of

Thomas Heyer

Docket No. 18-1

**SUPERSEDING RECOMMENDED RULINGS, FINDINGS OF
FACT, CONCLUSIONS OF LAW, AND DECISION OF THE
ADMINISTRATIVE LAW JUDGE¹**

Complainant Thomas Heyer has been civilly detained pursuant to the Adam Walsh Child Protection and Safety Act of 2006 since December 31, 2008.² Heyer, who is deaf, submitted an informal request for a videophone, along with several other accommodations, on March 21, 2016. ALJ Ex. 10 at 3. Heyer exhausted his administrative remedies with the Bureau of Prisons (BOP), Respondent herein (ALJ Exs. 12-13), and, subsequently, filed an administrative complaint with the Director of EEO at the Department of Justice on March 3, 2017 (ALJ Ex. 4). That complaint began these administrative proceedings. After BOP investigated Heyer's administrative complaint, it submitted its position to the BOP Equal Opportunity Officer, who is the "Responsible Official" within the meaning of 28 C.F.R. § 39.170. ALJ Ex. 16; *see* 28 C.F.R. § 39.103. The Responsible Official heard from both parties and then issued a Letter of Findings on September 5, 2017. ALJ Ex. 17. Heyer appealed this Letter of Findings and requested a hearing on October 4, 2017. ALJ Ex. 18. The parties thereafter requested, and were granted, multiple stays as they

¹ This Recommended Decision supersedes the Recommended Decision issued on July 16, 2021.

² A complete summary of the procedural history of this case can be found in the tribunal's May 20, 2021 Order Denying the Government's Motion to Stay Proceedings, Denying the Government's Motion to Dismiss, Granting, in Part, Complainant's Motion for Partial Summary Disposition, and Order for Prehearing Statements (ALJ Ex. 66), which is attached to, and incorporated into, this Recommended Decision.

pursued parallel proceedings in federal court.³ This tribunal has jurisdiction over these administrative proceedings under 28 C.F.R. § 39.170(k)(1).

After extensive litigation in the parallel proceedings, including a bench trial, the Fourth Circuit ruled in Heyer's favor, holding that BOP's ban on point-to-point technology violated Heyer's First Amendment right. *See Heyer v. United States Bureau of Prisons (Heyer II)*, 984 F.3d 347, 357 (4th Cir. 2021). After *Heyer II*, this tribunal conducted two status conferences (ALJ Exs. 44, 48) and the parties submitted two statements of position (ALJ Exs. 45-46, 49-50). Those pleadings reduced the issues in this case down to three: (1) Heyer's claim for a videophone, (2) his claim for qualified ASL interpreters for the GED self-study program, and (3) his claim for visual notifications of non-emergency announcements. *See* ALJ Ex. 52. Heyer moved for summary disposition on the first two issues (ALJ Ex. 56) and BOP moved to dismiss Heyer's administrative complaint for failure to state a claim (ALJ Ex. 54). This tribunal granted summary disposition in Heyer's favor on the videophone issue, denied summary disposition on his GED self-study claim, and denied BOP's motion to dismiss for failure to state a claim. ALJ Ex. 66 (May 20, 2021 Order Denying the Government's Motion to Stay Proceedings, Denying the Government's Motion to Dismiss, Granting, in Part, Complainant's Motion for Partial Summary Disposition, and Order for Prehearing Statements).

After this tribunal's May 20, 2021 Order, there remained two unresolved issues in these administrative proceedings: (1) Heyer's request for qualified ASL interpreters for the GED self-study program, and (2) his request for visual notifications for non-emergency announcements. This tribunal's May 20, 2021 Order set filing deadlines for Prehearing Statements and scheduled a Prehearing Conference. ALJ Ex. 66. After the May 20, 2021 Order, the parties twice jointly moved to suspend deadlines (ALJ Exs. 67, 69), which this tribunal denied, although the tribunal did extend the pleading deadlines. (ALJ Exs. 68, 70). On July 8, 2021, Heyer filed a Notice of Voluntary Dismissal of Certain Claims without Prejudice and Request for Entry of Recommended Decision, which BOP did not oppose.⁴ ALJ Ex. 71. The tribunal then suspended all pending deadlines in this case in its Second Order for Prehearing Statements. ALJ Ex. 72.

³ On December 19, 2017, Administrative Law Judge Mark Dowd was appointed to preside over these administrative proceedings. Upon the retirement of Judge Dowd, this case was reassigned to the undersigned on December 29, 2020. ALJ Ex. 39.

⁴ It is not clear from the regulations that Heyer has the ability to dismiss claims "without prejudice" because, if he wished to bring these claims again, he would still be subject to the time limitation

Given that there are no remaining unresolved issues in these administrative proceedings, it is **ORDERED** that the tribunal's May 20, 2021 Order Denying the Government's Motion to Stay Proceedings, Denying the Government's Motion to Dismiss, Granting, in Part, Complainant's Motion for Partial Summary Disposition, and Order for Prehearing Statements (ALJ Ex. 66) is **INCORPORATED BY REFERENCE** as part of this Recommended Decision. In accordance with the May 20, 2021 Order, Heyer's claim for the use of a videophone, or the functional equivalent in which two ASL users see each other, is **SUSTAINED**. This Recommended Decision is made pursuant to 28 C.F.R. § 39.170(k)(6).

RECOMMENDED REMEDY ORDER

Based on the foregoing, and in accordance with 28 C.F.R. § 39.170(k)(6), it is respectfully recommended that the following orders issue to the parties forthwith:

1. Respondent BOP is herein **ORDERED**, within thirty (30) days of the date of final Agency action in this matter, to ensure that a fully operational videophone (or its functional equivalent as defined in this tribunal's May 20, 2021 Order) is available for use by Complainant Thomas Heyer at Federal Correctional Institution Butner.⁵
2. Complainant Heyer's claim for qualified ASL interpreters in connection with the BOP self-study GED Program is **DISMISSED**.
3. Complainant Heyer's claim for visual notification of non-emergency announcements is **DISMISSED**.

Date: July 20, 2021

Teresa A. Wallbaum

TERESA A. WALLBAUM
Administrative Law Judge

set out in the regulations. *See* 28 C.F.R. 39.170(i) ("Notice of appeal to the Complaint Adjudication Officer, with or without a request for hearing, shall be filed by the complainant or the respondent with the Responsible Official within 30 days of receipt from the Official of the letter required by paragraph (h) of this section."). The tribunal, however, need not decide whether the claims are dismissed with or without prejudice.

⁵ Nothing in this order shall be interpreted to limit or abridge the authority of BOP to implement reasonable security measure or to limit access to the videophone in the same manner that access of all inmates may be limited under the inmate telephone program.

CERTIFICATE OF SERVICE

This is to certify that the undersigned, on July 20, 2021, caused a copy of the foregoing to be delivered to the following recipients: (1) Ian Hoffman, Esq., Counsel for Complainant, at Ian.Hoffman@arnoldporter.com; and (2) Christina A. Kelley, Esq., Counsel for Respondent, at c4thompson@bop.gov, Holly P. Pratesi, Esq., Counsel for Respondent, at hpratesi@bop.gov, and Mallory Brooks Storus, Esq., Counsel for Respondent, at mstorus@bop.gov.

Aniayah Beckford

Aniayah Beckford,
Secretary to Judge Wallbaum