



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013

[REDACTED]
Everette C.,¹
Complainant,

v.

Dr. Mark T. Esper,
Secretary,
Department of the Army,
Agency.

Appeal No. 0120172167

Agency No. AREUBENEL12OCT04307

DECISION

Complainant filed an appeal on June 2, 2017, with the Equal Employment Opportunity Commission (EEOC or Commission) from a final decision by the Agency dated April 28, 2017, finding that it had failed to comply with the terms of the settlement agreement into which the parties entered. See 29 C.F.R. § 1614.402; 29 C.F.R. § 1614.504(b); and 29 C.F.R. § 1614.405.

BACKGROUND

On January 27, 2017, Complainant and the Agency entered into a settlement agreement to resolve all pending claims brought by Complainant. The settlement agreement provided, in pertinent part, that the Agency agreed to:

- a. Within seven (7) days of the effective date of this Agreement, to initiate a request to the Defense Finance and Accounting Service (DFAS), to pay Complainant the lump sum of \$150,000.00 in lieu of all monetary damages and remedies...
- b. The Agency shall contact DFAS to make reasonable attempts to facilitate and expedite payment if Complainant or his representative notifies the Agency that payment is still due, and more than 60 days have elapsed since the effective date...

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.

- d. Within seven (7) days of the effective date of this Agreement, to initiate a request to the Defense Finance and Accounting Service (DFAS) to restore one hundred and twenty (120) hours of sick leave to the Complainant.
- e. Within thirty (30) days of the effective date of this Agreement, to remove and expunge from the Complainant's Official Personnel File (OPF) the SF-50 reflecting his twelve (12) day suspension and substitute with accurate Agency records.
- f. Within thirty (30) days of the effective date of the effective (sic) of this Agreement, to remove and expunge from the Complainant's Official Personnel File (OPF) the SF-50 reflecting his indefinite suspension and substitute with accurate Agency records.
- g. Within thirty (30) days of the effective date of the effective (sic) of this Agreement, to remove and expunge from the Complainant's Official Personnel File (OPF) the Letter of Counseling dated April 3, 2012 and substitute with accurate Agency records.
- h. Within thirty (30) days of the effective date of the effective (sic) of this Agreement, to remove and expunge from the Complainant's Official Personnel File (OPF) the April 2, 2012 charge of Absences Without Approved Leave (AWOL) and substitute with accurate Agency records by correcting the charge to Leave Without Pay (LWOP).

By letter to the Agency dated March 29, 2017, Complainant alleged that the Agency was in breach of the settlement agreement and requested that the Agency specifically implement its terms. Specifically, Complainant alleged that the Agency failed to comply with provisions (d), (e), (f), (g) and (h) of the agreement. Complainant also stated that prior to the damages hearing in the underlying complaint, the Commission ordered the Agency to schedule and pay for a hearing court reporter. Complainant stated that the Agency failed to do so and his attorney's law firm instead bore the cost. Complainant requested that the Agency pay the \$225.00 cost for a court reporter to his attorney's law firm.

In its April 28, 2017 final decision, the Agency stated that Complainant claimed that provisions (d), (e), (f), (g) and (h) of the settlement agreement had been breached. The Agency noted that Complainant's attorney acknowledged that the Agency Labor Counselor informed him that all of the requests were sent to DFAS, and that the Agency was waiting for Complainant's new federal employer, the Department of the Navy, to transfer his OPF in order to complete processing.

With regard to the specific breach claims, the Agency stated that it submitted corrected timecards for the restoration of 120 hours of sick leave to DFAS on February 17, 2017. The Agency stated that DFAS subsequently requested changes from the Agency, which were submitted to DFAS on March 3, 2017. As for the suspensions, the Agency asserted that a ticket was sent to Agency Civilian Human Resources on February 17, 2017. According to the Agency, the removal of the suspensions from Complainant's OPF has not been accomplished because it is still waiting for the Department of the Navy to transmit the OPF. The Agency stated that the changes will be affected once the Navy forwards Complainant's OPF. The Agency stated that Letters of Counseling were

not placed in OPFs and therefore no further action is necessary to comply with this term of the agreement. With respect to the AWOL, the Agency asserted that there was no AWOL in Complainant's OPF, and therefore no further action is required pertaining to this term.

The Agency determined that it breached provisions (d), (e) and (f) of the settlement agreement. In terms of provision (d), the Agency stated that it failed to submit evidence of compliance. The Agency noted that it did not submit the ticket or a statement from DFAS that it received the request to restore 120 hours of sick leave and the project date of when it would be completed. The Agency further noted that SF Form – 1150, Record of Leave Data, does not show any hours of restored leave.

As for the suspensions, the Agency acknowledged that they were supposed to have been removed/expunged from Complainant's OPF within 30 days of the execution of the settlement agreement. The Agency stated that it has not complied with the relevant provisions but that blame should be assigned to the Department of the Navy instead. The Agency reasoned that simply requesting Complainant's OPF from the Navy and waiting for it to be forwarded does not reflect sufficient effort to comply with the agreement in a timely manner. The Agency noted that it was 60 days beyond the agreed-to date of compliance and the Agency continues to wait for the OPF. The Agency determined that provisions (g) and (h) were void for lack of consideration. However, the Agency reasoned that since consideration was exchanged through the other provisions of the agreement, the entire settlement is not invalid but rather reformed without the void provisions. The Agency ordered that it fully implement terms (d), (e) and (f) of the agreement.

The Agency noted with regard to Complainant's claim for \$225.00 in court reporter costs that this item was not addressed in the settlement agreement. The Agency concluded that a breach therefore cannot be found as to its nonpayment of court reporter costs. The Agency noted that it has made arrangements to reimburse the law firm representing Complainant for court reporter costs and that if the law firm was not satisfied with its action on this matter, it can file a motion with the Commission for relief/sanctions. Finally, the Agency stated that Complainant was entitled to attorney's fees incurred in obtaining compliance with the settlement agreement.

On appeal, Complainant contends that compliance with the settlement agreement has not been fully met despite the Agency's assertion on May 17, 2017, that compliance had been completed. Complainant maintains there are SF-50s in his OPF that tend to demonstrate he was not in a paid duty status. Complainant cites one SF-50 that states "Questions regarding the Notification of Personnel Action (SF-50) should be addressed to either your servicing CPAC or first line supervisor Replaces RPA 17FEB0C0JUCPAC938439." Complainant argues that it is clear that such a SF-50 replaces a former SF-50, and he has no information concerning what would be provided to a reader when he/she contacts his/her servicing CPAC or front-line supervisor. Complainant argues as a result that the relevant documents have not been rescinded from his OPF. Complainant also contends that his leave balance does not reflect any adjustment in his sick leave balance. Complainant requests that he be paid \$4,521.52 in attorneys' fees related to seeking the Agency's full compliance with the settlement agreement.

In response, the Agency asserts that it is currently in full compliance with the settlement agreement. According to the Agency, sick leave was restored to Complainant on or about May 26, 2017. With regard to the language on a SF-50 cited by Complainant, the Agency states that this language is boilerplate on all SF-50s and is not prejudicial to Complainant or peculiar to his OPF. According to the Agency, the language was mandated by Headquarters because employees kept contacting higher leadership when they questioned their SF-50s.

ANALYSIS

EEOC Regulation 29 C.F.R. § 1614.504(a) provides that any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process, shall be binding on both parties. The Commission has held that a settlement agreement constitutes a contract between the employee and the Agency, to which ordinary rules of contract construction apply. See Herrington v. Dep't of Def., EEOC Request No. 05960032 (December 9, 1996). The Commission has further held that it is the intent of the parties as expressed in the contract, not some unexpressed intention, that controls the contract's construction. Eggleston v. Dep't of Veterans Affairs, EEOC Request No. 05900795 (Aug. 23, 1990). In ascertaining the intent of the parties with regard to the terms of a settlement agreement, the Commission has generally relied on the plain meaning rule. See Hyon O v. U.S. Postal Serv., EEOC Request No. 05910787 (Dec. 2, 1991). This rule states that if the writing appears to be plain and unambiguous on its face, its meaning must be determined from the four corners of the instrument without resort to extrinsic evidence of any nature. See Montgomery Elevator Co. v. Bldg. Eng'g Servs. Co., 730 F.2d 377 (5th Cir. 1984).

In the instant case, it is clear that a breach of the settlement agreement occurred. In fact, the Agency determined that a breach occurred. With respect to provision (d), the record reveals that on May 26, 2017, 120 hours of sick leave were restored to Complainant. The Agency also stated that on May 11, 2017, that Complainant's OPF had been purged of the suspensions at issue in provisions (e) and (f). We find that this establishes that the Agency cured the breach that occurred. Complainant maintains that the referenced language on his SF-50 forms suggests that a SF-50 form has been replaced and therefore the suspensions have not truly been expunged. We find that this argument lacks merit. We discern no valid reason to discount the Agency's explanation that this is boilerplate language not prejudicial to Complainant or peculiar to his OPF.

Complainant raises the issue of his entitlement to attorney's fees. Attorney's fees are available for successful compliance efforts when such efforts are necessary. Peralta v. Dep't of Agric., EEOC Appeal No. 01961850 (May 5, 1997). The Commission has awarded attorney's fees and costs in connection with securing compliance with a settlement agreement. See e.g., Peralta, EEOC Appeal No. 01961850 (awarding attorney's fees and costs where attorney's actions, including filing of an appeal, helped secure compliance with a settlement agreement); O'Neal v. U.S. Postal Serv., EEOC Appeal No. 0120062891 (Apr. 18, 2008) (awarding attorney's fees and costs where there was no finding of breach but attorney's efforts secured compliance).

The settlement agreement was executed on January 27, 2017. The Agency should have completed its compliance with the terms of the agreement by the end of February 2017. However, compliance

did not occur until May 2017. Complainant's attorney informed the Agency that it was not in compliance with the agreement. The Agency does not contest that it cured the breach only after Complainant's compliance efforts. We find that Complainant is entitled to attorney's fees and costs for his efforts in securing compliance with the settlement agreement.

CONCLUSION

The Agency's final decision that determined it was in breach of the settlement agreement is **AFFIRMED**. Subsequent to the issuance of its final decision, the Agency has cured its breach. Despite its cure of the breach, the complaint is **REMANDED** to the Agency to determine attorney's fees for Complainant's efforts in securing compliance.

ORDER

Complainant, through counsel, shall submit a request for attorney's fees and costs associated with compliance in accordance with the Attorney's Fees paragraph set forth below. The Agency is ordered to process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501. The Agency shall provide Complainant with a final decision regarding his claim for attorney's fees within 45 calendar days from the date this decision is issued. The decision shall include a notice of right to appeal to the EEOC along with EEOC Form 573, Notice of Appeal/Petition and shall include the specific reasons for determining the amount of the award.

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation verifying that the corrective action has been implemented.

ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of the date this decision was issued. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0618)

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.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tend to establish 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.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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. If you file a request to reconsider and also file a civil action, 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:



Carlton M. Hadden, Director
Office of Federal Operations

March 14, 2019

Date