



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

[REDACTED]
Felton Z.,¹
Complainant,

v.

Sonny Perdue,
Secretary,
Department of Agriculture,
Agency.

Appeal Nos. 0120172385
0120181028

Agency No. APHIS-2013-00819

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from a final decision (FAD) by the Agency dated May 31, 2017, finding that it was in compliance 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

At the time of events giving rise to this complaint, Complainant was an Environmental Protection Specialist, GS-0028-13, at the Agency's work facility in Riverdale, Maryland. Believing that the Agency subjected him to unlawful discrimination, Complainant contacted an Agency EEO Counselor to initiate the EEO complaint process. On September 18, 2013, Complainant and the Agency entered into a settlement agreement to resolve the matter. The settlement agreement provided, in pertinent part, that:

- (2) That the Agency will not issue the Letter of Reprimand that Complainant's current first line supervisor discussed with him on July 30, 2013. Accordingly, this Letter of Reprimand will not be placed in Complainant's Official Personnel File (OPF). The Agency will expunge the (non-issued) Letter of Reprimand (including drafts) from any supervisory desk file/supervisory performance file concerning

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.

Complainant, and provide a statement or documentation that this action to Complainant within 30 calendar days after the effective date of this Agreement. The bases of this (non-issued) Letter of Reprimand may not be considered as progressive discipline in any future administrative actions against Complainant. However, this Agreement does not prevent the Agency from taking future, appropriate administrative action against Complainant in accordance with all generally applicable laws, regulations, and policies, including performance and conduct requirements, under the direction of the Agency.

By letter to the Agency dated April 19, 2017, Complainant alleged that the Agency was in breach of the aforementioned provision of settlement agreement. Complainant stated that he had filed another EEO complaint and that during the discovery process of this second complaint the Agency produced documents in response to his discovery requests. According to Complainant, the Agency produced documents that included the non-issued Letter of Reprimand, an "evidence file" concerning the non-issued Letter of Reprimand, and e-mail correspondence referencing the non-issued Letter of Reprimand. Complainant claimed that the Agency did not comply with the settlement agreement by failing to expunge the Letter of Reprimand, and he requested that the Agency specifically implement its terms.

By letter dated May 31, 2017, the Agency wrote a letter indicating to Complainant that it was in compliance with the settlement agreement. The Agency stated that the Letter of Reprimand has been a mute issue since August 2013 and that it surmises the documents in question were somehow inadvertently retained. The Agency stated that it has not taken any progressive discipline actions over the past four years against Complainant based upon the Letter of Reprimand, and therefore Complainant suffered no harm due to the documents in question.

On July 5, 2017, Complainant filed the instant appeal with the Commission in response to this letter.

In its final decision dated December 22, 2017, the Agency determined that it had breached the settlement agreement. The Agency stated that although it appeared to have made efforts to expunge the non-issued Letter of Reprimand, it ultimately failed to do so. Further, the Agency determined that it saw no evidence that it transmitted any statement or documentation to Complainant that the expungement occurred, as required by the terms of the agreement. The Agency stated that it failed to properly ensure all documents relating to the non-issued Letter of Reprimand, including drafts, were completely expunged. The Agency stated that it would notify Complainant of his right to choose between specific performance of the terms of the settlement agreement or reinstatement of his underlying EEO complaint.

On January 25, 2018, the Agency issued a final decision wherein it rescinded its previous final decision. The Agency stated that at the time it issued the previous decision, it was unaware that Complainant had an appeal concerning his breach claim pending before the Commission. The Agency stated that it therefore lacked jurisdiction to adjudicate the complaint.

Thereafter, Complainant filed an appeal with the Commission that was docketed as EEOC Appeal No. 0120181028. In light of the fact that both EEOC Appeal No. 0120172385 and EEOC Appeal No. 0120181028 concern the same alleged breach of the settlement agreement, we are consolidating the two appeals within this decision.

CONTENTIONS ON APPEAL

On appeal, Complainant requests that the Agency immediately expunge the Letter of Reprimand and associated documents referencing or supporting the Letter of Reprimand, as specified in the settlement agreement, and that the Agency provide him with confirmation. Complainant also requests reasonable attorney fees and expenses with regard to attempting to remedy the Agency's noncompliance.

In response, the Agency asserts that Complainant's Supervisor did not issue the Letter of Reprimand to Complainant. The Agency states that the Supervisor also deleted all copies of the draft letter of reprimand from her supervisory performance and desk files. The Agency acknowledges that the Supervisor had a copy of the draft Letter of Reprimand in her e-mail. According to the Agency, the settlement agreement did not require the Agency to remove copies of the draft Letter of Reprimand from all e-mails or electronic files. The Agency notes that the agreement referred to the Supervisor's desk files, performance files and Complainant's Official Personnel File. The Agency maintains that the Supervisor has since deleted all e-mails which included the draft Letter of Reprimand. The Agency states that in response to Complainant's Document Request in another complaint, it provided a copy of the draft Letter of Reprimand which was part of the Supervisor's electronic files, not her desk files.

The Agency asserts that it did not breach the settlement agreement because the Supervisor did not keep a copy of the draft Letter of Reprimand in either her desk or performance files. The Agency argues that assuming arguendo that it breached the agreement, it has since complied with the agreement in that the Supervisor has deleted the draft Letter of Reprimand from her electronic files. The Agency maintains that Complainant was not harmed as the only people who received a copy of the draft Letter of Reprimand were Complainant, his attorney and the Agency representative. The Agency states that it has specifically performed the agreement and there is no further relief available to Complainant.

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 (August 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 (December 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. Building Eng'g Servs. Co., 730 F.2d 377 (5th Cir. 1984).

In the instant case, initially we observe that the Agency acted appropriately in rescinding its final decision dated December 22, 2017. Complainant filed an appeal with the Commission on July 5, 2017, pertaining to his claim that the Agency breached the settlement agreement. Therefore, the Agency lacked jurisdiction to issue the final decision dated December 22, 2017.

As to the merits of Complainant's breach claim, we observe that the settlement agreement states that the Agency will expunge the non-issued Letter of Reprimand, including drafts, from any supervisory desk file/supervisory performance file concerning Complainant. The agreement did not state that the non-issued Letter of Reprimand, including drafts, had to be removed from all e-mails or electronic files. As such, we find that the presence of the draft Letter of Reprimand among the e-mails did not constitute a breach of the settlement agreement. Further, to the extent that the agreement might have been breached, the Agency cured any such breach when the Supervisor deleted the e-mails which included the draft Letter of Reprimand.

CONCLUSION

The Agency's determination that no breach occurred is AFFIRMED.

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 (S0610)

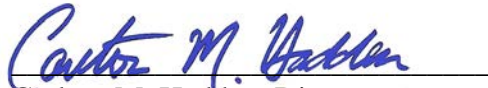
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department 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

October 11, 2018

Date