



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

[REDACTED]
Lidia B.,¹
Complainant,

v.

Robert Wilkie,
Secretary,
Department of Veterans Affairs
(Veterans Health Administration),
Agency.

Appeal No. 2019001712

Agency No. 20DR-0010-2018103034

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from an Agency decision, dated October 25, 2018, finding that it was in compliance with the terms of a June 29, 2018 settlement agreement. The Commission accepts the appeal. See 29 C.F.R. § 1614.402; 29 C.F.R. § 1614.504(b); and 29 C.F.R. § 1614.405.

BACKGROUND

During the relevant time, Complainant worked for the Agency as a Program Manager, GS-15, at the Veterans Health Administration in Washington, D.C. Believing that the Agency subjected her to unlawful discrimination when she learned that she was being reassigned to a new supervisor, Complainant contacted an Agency EEO Counselor.

During the informal complaint process, on June 29, 2018, Complainant and the Agency entered into a settlement agreement to resolve the matter. The June 29, 2018 settlement agreement provided, in pertinent part, that:

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.

- (2) . . . the Agency shall
- (a) Amend Complainant's time card for the purpose of restoring eight (8) hours of sick leave used by Complainant on March 15, 2018, to list the time heretofore listed as sick leave on that date as normal work duty status and recrediting the 8 hours of sick leave heretofore expended back to Complainant's sick leave balance. The Agency agrees to submit the amended time card and sick leave balance adjustment as soon as is practicable, but no later than 60 calendar days from the effective date of the Agreement. The parties acknowledge that it is a separate agency, the Defense Finance and Accounting Service (DFAS), that restores leave; and the Agency has no control over the DFAS. Consequently, the Agency can make no representation concerning when the DFAS will restore Complainant's leave or the accuracy of the DFAS' calculations. Notwithstanding, the Agency agrees to actively follow up with DFAS to encourage and ensure prompt processing by DFAS to the greatest extent practicable. If the DFAS fails to timely restore this leave, and Complainant so notifies the Agency in writing, the Agency will follow up with the DFAS in an effort to accomplish compliance with this paragraph.
 - (b) Reassign Complainant to the position in the Office of Information and Technology (OIT) to which she is currently detailed, GS-0343-15 Supervisory Program Manager, duty stationed in McLean, VA as a lateral transfer, as soon as is practicable but no later than 60 calendar days from the effective date of this Agreement. No provision of this Agreement prohibits the Agency from possible future geographic relocations of Complainant's workstation, provided such relocation occurs consistent with federal personnel laws of general applicability.
 - i. The Office of Health Informatics (OHI) will relinquish to the OIT the FTE currently encumbered by Complainant, without salary funding, except that the OHI will pay Complainant's salary through the end of Fiscal Year 2018, after which payment of her shall be the responsibility of the OIT.
 - ii. The Agency agrees that OIT will not be notified by Agency management of the existence of [the instant case] in connection with this reassignment and represents that OIT has not been notified of the existence of [the instant case] by Agency management prior to the effective date of this Agreement.

On September 17, 2018, Complainant submitted a “Breach of Settlement Agreement Allegation” form to the Agency. Specifically, Complainant alleged that her transfer, which should have been completed by August 29, 2018, had not be executed. Complainant also noted that management official [O] (hereinafter “HR-O”), “who represented the Agency at settlement, is also my HR Director and has not completed my reassignment as of today.”

Soon thereafter, on September 28, 2018, Agency Counsel (hereafter “OGC-V”) emailed Complainant’s attorney stating: “I just learned and am very disappointed to report that a mistake of material fact has resulted in impossibility of performance with respect to the reassignment of your client to OIT.” According to OGC-V, “OIT does not have such a position, i.e. the position to which your client was detailed is not a FTE that belongs to OIT. The position belongs to OHI, which pays your client’s salary.” The parties were under the “mistaken impression” that Complainant was detailed to an OIT position. OGC-V explained that the EEO office would be informed that the underlying complaint would be reinstated. Finally, OGC-V noted that “perhaps” OIT and OHI would be willing to extend Complainant’s detail for “a period of time”.

In correspondence dated October 3, 2018, Complainant’s counsel, referencing the OGC-V email, reiterated Complainant’s allegation of breach and requested specific performance.

On October 25, 2018, the Agency issued a decision concluding that the June 29, 2018 settlement agreement was void due to mutual mistake of material fact and impossibility of performance. Reiterating the reasoning provided by OGC-V, the Agency explained that the reassignment could not be completed because the position (GS-0343-15 Supervisory Program Manager) “does not exist.” Acknowledging that Complainant was detailed to the position, the Agency asserted that the FTE associated with that position does not belong to OIT, thereby making it “impossible” to reassign Complainant.

Additionally, the Agency described the ongoing process of creating a Financial Management Budget Transition (FMBT) organization. The organization and allocation of FTEs, however, were not yet approved. Enterprise Portfolio Management Division (EPMD) of OIT cited the Executive Director, who “indicated” that the FMBT Supervisory Program Manager position does not exist. The Agency, noted that the Deputy Assistant Secretary for OIT stated there were no positions supporting the FMBT program, making it “impossible to relinquish an FTE from OHI to OIT for the purposes of permanently reassigning [Complainant] . . . to the position.”

In closing, the Agency informed Complainant that she would be returned to status quo ante and the processing of her underlying complaint would resume². Complainant filed the instant appeal.

² The record reflects that the Agency took almost immediate action, even *prior* to Complainant filing the instant appeal. Printouts dated November 13, 2018, reflect Complainant was charged for Sick Leave (SL) hours. On the same date, she was issued a Notice of Right to File Formal Complaint. The record further reflects the continued processing of the underlying complaint. The formal complaint for the “reinstated” matter was filed on November 16, 2019, and later amended

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. See 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, the Agency contends the settlement agreement should be considered void due to mutual mistake. Under the general principles of contract law, a party may avoid an otherwise valid contract because of a mistake. One who attacks a settlement agreement bears the burden of showing fraud or mutual mistake. See Asberry v. United States Postal Service, 692 F. 1378, 1380 (Fed Cir. 1982). The party attempting to avoid the contract must prove that: (1) the mistake related to a basic assumption upon which the contract was made; (2) the mistake had a material effect upon the agreement, and (3) the mistaken parties did not assume or legally bear the risk as to the mistaken fact. Restatement (Second) of Contracts 152, see also Skyline Corp. v. National Labor Relations Board, 613 F.2d 1328 (5th Cir. 1980).

As noted above, the Agency argues that the parties mistakenly believed that Complainant was detailed to an OIT position. The Agency now has determined that OIT does not have such a position and reassignment would be impossible.

On appeal, Complainant's attorney asserts that the "settlement agreement expressly contemplated transferring an FTE from OIH to OIT for Complainant's position" in order to effectuate the reassignment. A review of the settlement language, in provision (2)(b)(i), clearly supports such conclusion.

The Agency's statement that such position simply "does not exist" is false and disingenuous. Complainant has held the position for some time. The agreement itself identifies the position as one within OIH that shall be moved to OIT, complete with specifics regarding the responsibility for Complainant's salary.

to include the denial of a monetary award. Most recently, the case was assigned an investigator on January 15, 2019.

The Agency cites an organization called FMBT in support of its assertion that the Supervisory Program Manager position, previously held by Complainant, is non-existent. The Agency contends that FMBT has not been approved nor assigned positions. We are not persuaded. As noted by Complainant's counsel, the agreement does not even include the term "FMBT" and the position is not characterized as part of such organization. Instead, it is plainly identified as "the position in the OIT to which she is currently detailed, GS-0343-15 Supervisory Program Manager"

The Commission finds that the Agency has not met its burden in establishing mutual mistake. The alleged "mistake" in this case was simply a conclusion reached by Agency counsel after the execution of the agreement, and in the midst of Agency HR officials carrying out its obligations under the settlement. The Agency has not identified any reason why transferring the position, as specifically set forth in the agreement, would be impossible. In fact, the "mistake" at issue was anticipated and addressed by the settlement terms.

The Agency has breached the agreement, with respect to its obligations under both provision (2)(a) and (2)(b). When breach is found, the Commission has two options to remedy the situation: (1) reinstate the complaint or (2) order specific performance. Complainant has requested specific performance. Therefore, the Agency shall restore Complainant's sick leave and reassign her to position GS-0343-15 Supervisory Program Manager in OIT, duty stationed in McLean, Virginia, as set forth in the June 29, 2018 settlement agreement.

Additionally, as the record establishes that the Agency precipitately reinstated Complainant's underlying claim, regarding the reassignment to a new supervisor, such complaint must reflect the instant decision (i.e. the settlement of the reassignment claim).³

CONCLUSION

The Agency's decision voiding the agreement is **REVERSED** and the matter is **REMANDED** to the Agency for remedial relief consistent with the **ORDER** below.

ORDER

Within thirty (30) calendar days of the date this decision was issued, the Agency shall comply with its obligations under the June 29, 2018 settlement agreement. Additionally, the continued processing of the underlying reassignment claim must reflect our determination of a valid settlement of the matter.

³ This decision does not impact any other claims in the complaint, including but not limited to the claim that, "[a]s of January 11, 2019, Complainant has not received a monetary award commiserate with her Outstanding FY 18 performance rating."

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 corrected 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)), she 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 (K0617)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be in the digital format required by the Commission, and submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. 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 (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. 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 filed your appeal with the Commission. 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. **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:

A handwritten signature in blue ink that reads "Carlton M. Hadden". The signature is written over a horizontal line.

Carlton M. Hadden, Director
Office of Federal Operations

May 8, 2019

Date