



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

[REDACTED]
Emery S.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2023002265

Agency No. 200J-0647-2018103008

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from a final decision (FAD) by the Agency dated February 8, 2023, 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

A settlement agreement (the Agreement) was reached on July 15, 2021, between Complainant and Agency management to resolve an EEO complaint identified as Agency No. 200J-0647-2018103008. Complainant subsequently alleged the Agency was not in compliance with the terms of the agreement. On March 28, 2022, the Agency issued a FAD finding that it was in compliance with the settlement agreement. On September 26, 2022, the EEOC vacated the Agency's decision, ordering the Agency to provide evidence that it was in compliance with the settlement agreement and reissue a decision. On February 8, 2023, the Agency issued a new FAD finding that it was not in breach of the Agreement. The instant appeal followed.

Complainant alleged that the Agency failed to comply with term 2(b), which states that the Agency will, "reinstatement Complainant retroactive to May 15, 2020, at his last grade and step for the purpose of converting his removal from a Performance removal to a voluntary Medical Inability removal. Calculation of reinstatement figures require [Defense Finance and Accounting Service] DFAS

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.

involvement. The John J. Pershing VAMC facility has no ability to interfere with that process. Complainant will not return to duty during or after that process.” Specifically, Complainant stated that the Agency did not provide the appropriate forms to process the Agreement and did not pay Complainant backpay and TSP contributions. See Administrative File at p. 96.

In its updated decision, the Agency stated that all forms had been provided to the appropriate Human Resources officials and that the Agency was waiting for DFAS to, “advise when they can move forward with processing [the Complainant’s] SF-50, timecards, and TSP.” Id. at p. 6. The Agency states that Complainant identified issues with backpay calculations requiring the Agency to investigate and address, which has stalled Complainant’s processing. Id. at p. 6-7. The Agency states that the Agreement does not refer to backpay and/or a timeframe in which backpay would be issued, concluding that because DFAS is its own entity, requiring several administrative steps, which have been delayed due to Complainant identifying issues with backpay calculations that require Agency investigation, the Agency is not in breach of the Agreement.

In the instant appeal, Complainant argues the Agency is in breach of the Agreement because the Agency has not made payments towards, “TSP, backpay, court-ordered pay, and disability pay,” from October 2019 to present.

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, we find that the agency was bound to pay the backpay, TSP contributions, and other entitlements calculated from May 15, 2020, to July 16, 2021.. A reasonable reading of the term “reinstatement figures” would include payments to Complainant by the Agency of backpay and all other benefits Complainant would be entitled to from the time of his reinstatement and subsequent medical termination pursuant to the dates previously stated. This is buttressed by the Agency’s own FAD, at p. 4, in which the Agency’s Supervisory HR Specialist “advised that the Agency must make Mr. O’Rourke “whole” as if he was employed from May 15, 2020, to July 16, 2021, and that his backpay, TSP contributions and other entitlements would be calculated based on that period.”

While the Agency argues that without specific timeframes, they make take a reasonable amount of time to process these payments to Complainant, we find that the Agency has taken an unreasonable amount of time in this case, given that some two years had passed without payment being made to Complainant.

CONCLUSION

We REVERSE the Agency's dismissal of Complainant's complaint and REMAND the complaint for further processing, in accordance with the Order below.

ORDER (E0618)

The Agency is ordered to process payment to Complainant of backpay, TSP contributions, and other entitlements pursuant to section 2(b) of the Agreement based upon the timeframe of May 15, 2020, to July 16, 2021. The Agency shall process these payments **within sixty (60) calendar days** of the date this decision was issued. The Agency shall acknowledge to the Complainant that it has received the remanded claims **within thirty (30) calendar days** of the date this decision was issued.

As provided in the statement entitled "Implementation of the Commission's Decision," the Agency must send to the Compliance Officer: 1) a copy of the Agency's letter of acknowledgment to Complainant, 2) a copy of the relevant documents showing that Complainant has been paid the backpay and other benefits he is entitled to pursuant to the Settlement Agreement.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

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.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0124.1)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that 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 for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within 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).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at <https://publicportal.eoc.gov/Portal/Login.aspx>. Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request.

Any supporting documentation must be submitted together with the 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(f).

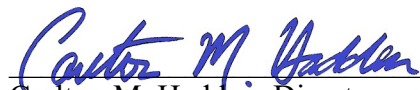
COMPLAINANT’S RIGHT TO FILE A CIVIL ACTION (R0124)

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 their 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:



Carlton M. Hadden, Director
Office of Federal Operations

January 22, 2024
Date