



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

[REDACTED]  
Lupe M,<sup>1</sup>  
Complainant,

v.

Steven T. Mnuchin,  
Secretary,  
Department of the Treasury,  
Agency.

Appeal No. 2019002273

Agency No. TIGTA-16-0184-F

**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 22, 2019, 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 applicant for a position at the Agency's Inspector General for Tax Administration (TIGTA) facility in Cincinnati, Ohio.

Believing that the Agency subjected him to unlawful discrimination, Complainant contacted an Agency EEO Counselor to initiate the EEO complaint process. On December 11, 2017, Complainant and the Agency entered into a settlement agreement to resolve the matter. The settlement agreement provided, in pertinent part, that:

- (3)(a) Within 30 calendar days of execution of this Agreement, the Agency will offer Complainant the position of TIGTA Criminal Investigator (Special Agent), GS-1811-9, Step 10, at the Cincinnati, OH, Post of Duty conditioned on his passing a preemployment fitness for duty examination, the specifics of which are described herein, and successfully completing a

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<sup>1</sup> 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.

background investigation, which includes a determination of eligibility for a Top Secret security clearance. When these conditions are met, the Complainant's hiring effective date will be reflected as July 12, 2015, and the Agency will notify him in writing when to report for duty.

By letter to the Agency dated October 8, 2018, 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 back-date his hiring effective date to July 12, 2015.

In its February 22, 2019 FAD, the Agency concluded there was no breach of the Agreement because the term in Paragraph (3)(a) is unenforceable. The Agency further found that the parties were unaware of this fact at the time of signing the agreement and that this constitutes a mutual mistake. The Agency further found that ordinarily, a mutual mistake would void the Agreement but that in the instant case, the Agreement contains a severability clause that states "If the terms of this Settlement Agreement are inconsistent with any applicable law, regulation, or policy, then only those portions of this Agreement which are determined to be inconsistent shall be invalid. The terms and conditions not affected by such an inconsistency shall remain in full force and effect." As such, the Agency found, the Agreement is not void even though Paragraph (3)(a) is unenforceable.

### 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 recognizes that it has not complied with Paragraph (3)(a) of the Agreement but maintains that it is unable to do so under the doctrine of impossibility. The Agency argues that its administrative personnel office found that the back-dated start date clause could not be implemented because doing so would create a "dual appointment" due to the fact that Complainant was employed by another Federal agency through April 16, 2016.

The Agency noted that “the dual appointment would cause major issues with respect to retirement benefits because two separate pension plans were involved.” The Agency further noted that on April 3, 2018, it “began efforts to contact the Office of Personnel Management (OPM) to determine whether current policy and law would permit the Agency to backdate the SF-50 to make it effective prior to the actual EOD date. On October 30, 2018, OPM advised TIGTA that the Agreement cannot be honored in its current form.” The Agency has thus shown that the Agreement was the product of a “mutual mistake” in that both parties believed that Complainant’s start-date could be pushed back to July 12, 2015, when in fact this was not possible.

It is clear that the intent of the paragraph was that Complainant would have an earlier start date, but it appears both parties erred as to the date this could be done. Because of Complainant’s employment at another Federal agency, Complainant’s start date could be no earlier than April 17, 2016, which is the day after he left his prior position with the other Agency, and this is the date that should have been used.

Given the mutual mistake, the Commission has two options to remedy the situation: 1) reinstate the underlying settled EEO complaint, or 2) order specific performance using the April 17, 2016, date. We note, however, that if the complaint is reinstated for further processing, the parties must be returned to the *status quo* at the time that the parties entered into the settlement agreement. This would require that Complainant return or forego any benefits received pursuant to the settlement agreement. See, e.g., *Armour v. Department of Defense*, EEOC Appeal No. 01965593 (June 24, 1997). The Agreement included a one-time payment of \$50,000.00 and placement in his current position of Criminal Investigator (Special Agent), GS-1811-9, Step 10, at the Cincinnati, OH, Post of Duty. Should his underlying EEO complaint be reinstated, Complainant should understand that these provisions, as well as any other benefits gained from the Agreement, would no longer apply and he would have to return the \$50,000.00 payment, give up his position and forego any other benefits.

### CONCLUSION

The complaint is hereby REMANDED to the Agency for further processing in accordance with the ORDER below. On remand, Complainant shall be advised that in order to reinstate his complaint, a condition precedent is the return of any benefits received through the execution of the provisions of the agreement, which in this case would mean the return of \$50,000.00 and the surrender of his Criminal Investigator (Special Agent), GS-1811-9, Step 10, position at the Cincinnati, OH, Post of Duty, in addition to other benefits. In view of this requirement, we give Complainant the option, in accordance with the ORDER below, of either returning the benefits conferred pursuant to the agreement and reinstating the complaint, or keeping the benefits conferred pursuant to the agreement and having the agreement specifically enforced, as reformed with an entry on duty date of April 17, 2016.

### ORDER

The Agency is ORDERED to notify Complainant of the option to return to the *status quo* prior to the signing of the agreement and having his underlying EEO complaint reinstated or having the terms of the agreement specifically enforced. The Agency shall notify Complainant of these options within fifteen (15) calendar days of the date this decision is issued. The agency shall also notify Complainant that he has fifteen (15) calendar days from the date of his receipt of the Agency's notice within which to notify the agency of his choice.

Complainant shall be notified that in order to return to the *status quo ante*, he must return any benefits received pursuant to the settlement agreement. If Complainant elects to return to the *status quo ante* and returns any benefits owing to the Agency, as specified above, the Agency shall resume processing the complaint from the point processing ceased. If Complainant elects not to return to the *status quo ante* (or does not respond in a timely manner), the Agency shall notify Complainant that the terms of the settlement agreement will be specifically enforced, as reformed, which means that his start date would be back-dated to April 17, 2016, the earliest possible date that does not create a “dual appointment” conflict with his prior Federal position at another agency.

### IMPLEMENTATION OF THE COMMISSION’S DECISION (K0719)

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.

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 (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)

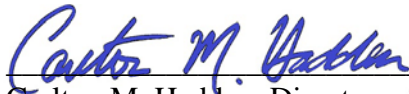
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this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



Carlton M. Hadden, Director  
Office of Federal Operations

January 28, 2020

Date