



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

[REDACTED]  
Stacie D.,<sup>1</sup>  
Complainant,

v.

Ryan D. McCarthy,  
Secretary,  
Department of the Army,  
Agency.

Appeal No. 2019005382

EEOC Hearing Nos. 550-2017-00308X, 550-2018-00106X, 550-2018-00478X

Agency Nos. ARPOM16AUG03141, ARPOM16OCT04100, ARPOM17AUG02963

**DECISION**

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) 30 days after she notified the Agency of her breach claim. Thereafter, the Agency issued a final decision (FAD), dated July 30, 2019, finding that it was only partially 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 worked as a Chief, Manpower and Force Analysis, GS-343-13, at the Agency's Defense Language Institute Foreign Language Center Resource Management facility in Presidio of Monterey, California.

On February 28, 2019, Complainant and the Agency entered into a settlement agreement to resolve the EEO matters. The settlement agreement provided, in pertinent part, that the Agency agreed:

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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.

- (3a) To pay the Appellant/Complainant, [Complainant's name], \$62,198.46 Sixty Two Thousand One Hundred Ninety-Eight U.S. Dollars and Forty-Six Cents) for all non-pecuniary compensatory damages that she alleged she suffered in relation to all matters that are the subject of this agreement. This payment does not constitute wages or back pay. Payment will be made by electronic funds transfer or check. . . The Agency will submit all paperwork necessary for the processing of this payment within thirty (30) calendar days of the effective date of this agreement, assuming the Appellant/Complainant and her attorneys have provided to the Agency the necessary account and taxpayer identification information. However, because payment will be processed by the Defense Finance and Accounting Service (DFAS), a Department of Defense organization, the Agency cannot guarantee a date for receipt of payment. Relevant account information must be provided to the Budget Officer. . . If payment is not received by Complainant, within thirty (30) calendar days of submission by the Agency of the necessary paperwork, upon notice from Complainant or her attorneys, the Agency will make reasonable attempts to facilitate and expedite the payment.
- (3b) To rescind and delete the Agency's performance appraisal, dated on or about September 2017, which rated the Appellant/Complainant's performance as "unsatisfactory," within 60 calendar days of this Agreement being fully executed by all the Parties hereto.
- (3c) To amend the Agency's basis for removal of the Appellant/Complainant within 60 calendar days [from when] this Agreement is fully executed by all the Parties hereto. The Agency's stated basis for removal on the Notification of Personnel Action, SF-50 shall be corrected to "inability to perform on the basis of a medical condition."
- (3d) To correct the Absent Without Leave (AWOL) charges to ATAAPS for the Appellant/Complainant, beginning on or about February 2018; to Leave without Pay (LWOP) within 90 calendar days of this Agreement being fully executed by all the Parties hereto.
- (3e) To provide a neutral employment reference for Appellant/Complainant.

By letter to the Agency dated June 20, 2019, Complainant alleged that the Agency was in breach of the settlement agreement. Specifically, Complainant alleged that there is no indication that the Agency had paid the disbursement required by provision 3a. She also alleged that the Agency failed to rescind and delete Complainant's September 2017 "unsatisfactory" performance evaluation within 60 days, convert the AWOL charges to LWOP, or amend the SF-50 regarding the stated reason for Complainant's removal. Complainant requested specific performance and reimbursement for the interest that would have accrued had the Agency paid Complainant in a timely manner.

On July 2, 2019, the Agency “informally” responded to Complainant’s Notice of Noncompliance. The Agency stated that it “has complied fully with the Negotiated Settlement Agreement in all matters under its immediate control.” The Agency acknowledged that it has not yet complied with the monetary payment to Complainant. The Agency stated that DFAS is the payment agent and that the Army has no control over DFAS and cannot guarantee a date for payment. The Agency also stated that the Agreement did not specify that the Agency will provide Complainant with a written neutral reference.

After its informal response, Complainant appealed. On appeal, Complainant maintains that the Agency has not cured the breach regarding the payment of the money and failed to provide confirmation or evidence that it complied with the other terms of the Agreement.

Her appeal preceded the Agency’s issuance of the July 30, 2019 decision. In that decision, the Agency concluded that it was in partial compliance with the Agreement. Regarding provision 3a, the Agency reasoned that it submitted the payment request to DFAS and there was no evidence that the Activity acted in bad faith or failed to exercise due diligence. The Agency acknowledged that Complainant had not been paid, but blamed DFAS. Regarding term 3b, the Agency found that the Activity had not demonstrated compliance because it had not produced documentation evidencing that the deletion of the performance appraisal occurred. Regarding 3c, the Agency found that the Activity had complied with the requirement to change the reason for removal. Regarding 3d, the Agency maintains that the portion of the Agreement requiring the conversion of time in ATAAPS prior to the pay period beginning March 4, 2018, is not valid and should be severed from the Agreement. The Agency contends that it was unaware when it executed the Agreement that ATAAPS will only allow changes going back one year. The needed corrections extend beyond a year. The Agency nevertheless found that it had not fully complied with provision 3d, because it had not converted the time that Complainant was marked AWOL beginning February 2018 through March 3, 2018. The Agency concluded that it was otherwise in compliance with the Agreement.

In its response to the appeal, the Agency now asserts that “the only item in the NSA [settlement agreement] yet to be complied with is monetary payment to Complainant.” The Agency noted that DFAS is the payment agent, not the Army, and that the Agreement stated that the Agency cannot guarantee a date for payment. The Agency also stated that it is “our understanding from DFAS is that their processing team currently has the necessary information and that payment will be effected soon.” The Agency opposes Complainant’s request for interest on any payments and asserts that the request for interest should be directed to DFAS, not the Army.

### 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).

We find the Agreement to be valid and binding on both parties.

#### *Provisions 3a, 3b, 3c and 3e*

The parties agreed that Complainant would be provided a monetary disbursement of \$62,198.46 and that the Agency would make reasonable attempts to facilitate and expedite the payment. We acknowledge that the Agreement did not guarantee a date for payment, but the parties did agree that payment would be made. We agree with Complainant that the Agency has not shown it has made sufficient efforts to execute its obligations. The Agency cannot rely on DFAS as a bypass to the terms of the Agreement. We find that the Agency has not established that it has complied with provision 3a.

The Agreement at provision 3b also required the rescission and deletion of the performance appraisals for 2017. We find that the record is insufficient to show compliance. As the Agency itself noted, the Activity produced no documentation evidencing that the deletion occurred, such as a database record reflecting that the deletion occurred on the date on which it occurred, and a list of actions taken by the Agency in Complainant's eOFP evidencing that the performance rating in question no longer appears in her eOPF. As the Agency acknowledged in its decision finding non-compliance, it would not be difficult to offer proof of completion if the Agency had in fact complied.

We find the Agency has established compliance with the provision 3c, that required the amendment in official personnel records of the stated basis for Complainant's removal.

Regarding provision 3e ("to provide a neutral employment reference for Complainant), we note that Complainant has raised this issue on appeal. We find the record does not show that the Agency complied with the requirement. We also are not persuaded by the Agency's claim that it was not required to provide a written reference.

*Provision 3d*

Regarding provision 3d, the Agency has conceded that not all hours originally charged as AWOL have been corrected in the ATAAPS system to LWOP. Therefore, we find that the Agency has also breached this provision. The Agency explains its breach by stating that it was unaware when it executed the Agreement that ATAAPS will only allow changes going back one year. However, even if this is correct, the Agency conceded that it had not even converted the time that Complainant was marked AWOL within this one-year period. Thus, the Agency is also in breach of Provision 3d. If the Agency is unable to correct all of the hours originally charged as AWOL to LWOP as agreed due to ATAAPS rules, the Agency shall provide Complainant with a written statement indicating that all the hours agreed to should be LWOP rather than AWOL and that any indication in ATAAPS system to the contrary is in error. A copy of this document shall also be placed in any personnel records for Complainant which the Agency retains.

Where this Commission finds that the settlement agreement has been breached, the only two remedies usually available are specific performance of the terms of the agreement or reinstatement of the underlying EEO complaint at the point processing ceased. See 29 C.F.R. § 1614.504 (c). In this case, however, we find that Complainant has clearly specified that she is requesting specific performance. We grant Complainant's request for specific enforcement of the terms of the Agreement.

To the extent that Complainant wishes to address new claims of discrimination regarding other actions that occurred after the execution of the Agreement, she should initiate EEO counseling with the Agency as those other subsequent claims must be addressed in a separate complaint.

CONCLUSION

We find that the Agency breached the February 28, 2019 Agreement. Accordingly, we MODIFY the Agency's Breach Decision to the extent that it found that it was in partial compliance with provisions 3a, 3b, 3d and 3e. We AFFIRM the part of the decision that found that it breached the Agreement, and we REMAND the matter in accordance with the ORDER below.

### ORDER

The Agency is ordered to take the following remedial action:

1. Within thirty (30) calendar days of the date of this decision, the Agency is ordered to execute the terms of the Agreement and properly document the steps it took to fully comply with provision 3a, 3b and 3e.
2. Within thirty (30) calendar days of the date of this decision, the Agency is ordered to take the following steps to comply with provision 3d: (1) to the extent allowed by the ATTAPS system's one-year rule, convert Complainant's AWOL charges to LWOP and, (2) provide Complainant with a written statement indicating that all the hours agreed to in settlement should be LWOP rather than AWOL and that any indication in ATAAPS system to the contrary is in error. A copy of this document shall also be placed in any personnel records for Complainant which the Agency retains.
3. The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation of the Agency's calculation of monetary payment and other benefits due Complainant, including evidence that all of the corrective action has been implemented.

### ATTORNEY'S FEES

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 this breach claim. 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 this decision becoming final. 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 (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:

  
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Carlton M. Hadden, Director  
Office of Federal Operations

September 9, 2020

Date