



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

[REDACTED]  
Monroe C,<sup>1</sup>  
Complainant,

v.

Matthew P. Donovan,  
Acting Secretary,  
Department of the Air Force,  
Agency.

Appeal No. 2020000996

Agency No. 9V1M09190

**DECISION**

Complainant timely appealed with the Equal Employment Opportunity Commission (“EEOC” or “Commission”) from a November 4, 2019 final agency decision (“FAD”)<sup>2</sup> 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**

During the relevant time period, Complainant worked in the Aircraft Maintenance Group (“AMXG”) organization at Tinker Air Force Base in Oklahoma.

On July 23, 2009, Complainant and the Agency entered into a negotiated settlement agreement (“NSA” or “Agreement”) to resolve a discrimination complaint that Complainant raised with an EEO Counselor. Under Provision 3 of the NSA, the Agency agreed to:

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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.

<sup>2</sup> The Agency failed to issue a FAD, so we will treat the November 4, 2019 Agency email informing Complainant and his representative that the Agency could not enforce the NSA, as the Agency’s decision on this matter.

- 3(a) Raise the overall appraisal from 72 to 75. Specifically raising factors 1, 3, and 9 from a rating to 8 to 9. Paperwork will be submitted to 72 FSS no later than 14 calendar days after coordination of the settlement agreement. [and]
- 3(b) To keep the Complainant on graveyard shift for as long as [named supervisor] remains in the current chain of command and there is a graveyard shift available within the organization.

On or about November 4, 2019, Complainant's (non-legal) representative notified the Agency that it was in breach of the NSA, and requested that the Agency specifically implement its terms. Of the Agency's two obligations under the NSA, it appears the alleged breach only referred to Term 3(b), based on emails in the record and the time frame stipulated in Term 3(a).<sup>3</sup> Also, on appeal the Agency provided an October 30, 2019 Memorandum informing Complainant that his work schedule was going to change effective November 25, 2019.

In response, the Agency issued an email to complainant's representative which we will view as its decision, along with subsequent submissions to the Commission in support thereof.<sup>4</sup>

When the Agency official Complainant's representative contacted about the matter responded that the Agency was not in breach of the NSA, Complainant, through his representative filed this appeal.

### 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 (Dec. 9, 1996).

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<sup>3</sup> Complainant's representative did not explain the alleged breach or provide copies of Complainant's formal written notice of breach. On appeal, Complainant did not dispute the Agency's interpretation of his allegation to mean Term (b) only, and that it was in reference to the October 30, 2019 Memorandum notifying him of the change of schedule.

<sup>4</sup> The evidence was accepted in light of confusion or processing issues that may have arisen due to the lack of clarity in the breach claim, and the lack of a FAD. Our guidance states that "as a general rule, no new evidence will be considered on appeal unless there is an affirmative showing that the evidence was not reasonably available prior to or during the investigation or during the hearing process." See MD-110 Ch. 9 § VI, A(3) While the Commission retains the right to supplement the record on appeal, it is intended that this right will be exercised only in rare instances to avoid a miscarriage of justice. MD-110 at Ch. 9 § V, B.

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 (Aug. 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. United States Postal Serv., EEOC Request No. 05910787 (Dec. 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); Complainant v. United States Postal Serv., EEOC Appeal No. 0120140143 (Feb. 20, 2014).

Applying the plain meaning rule, we find that in order for Term 3(b) to be enforceable, two ongoing conditions must both be met at the time of the alleged breach. First, Complainant's supervisor must remain in his chain of command, and second, there must be a graveyard shift available. The Agency contends that it did not breach the NSA because neither condition in Term 3(b) could be met when the alleged breach occurred on or about October 30, 2019.

Although the complaint file was devoid of evidence to support the Agency's contention that no breach occurred, the Agency's response to Complainant's appeal included official personnel records establishing that the supervisor referenced in Term 3(b) retired effective August 31, 2019.<sup>5</sup> We find that Term 3(b) of the NSA was rendered unenforceable on September 1, 2019, as the supervisor was no longer within Complainant's chain of command, making it impossible to meet both conditions under Term 3(b). Therefore, the October 30, 2019 Memorandum changing Complainant's schedule to a non-graveyard shift does not violate Term 3(b) of the NSA because it was issued after the supervisor retired.

Alternately, we find no breach occurred based on a change in conditions. The EEOC has long held that it is not proper to interpret a negotiated settlement agreement as providing indefinite employment in an exact position. See, e.g. Johnson v. United States Postal Serv., EEOC Appeal No. 0120092081 (May 27, 2010) (finding no breach occurred where the Agency changed the complainant's work schedule which was agreed upon in a settlement agreement over three years

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<sup>5</sup> We remind the Agency that it is required, under 29 C.F.R. § 1614.108(b) to create an impartial and appropriate factual record upon which to make findings on the claims raised by the written complaint. Notwithstanding the lack of a written complaint, FAD, notice of appeal rights and receipt, the complaint file contains zero evidence to support the Agency's reasons for finding no breach, even though they are articulated in the November 4, 2019 email in the complaint file. The reason the record is sufficiently developed for us to render a decision is that to mitigate any processing confusion caused by the lack of FAD or written breach notice, we accepted documentation from the Agency's legal representative on appeal. We strongly suggest the Agency review our guidance in the EEOC Management Directive (Aug. 5, 2015) ("EEO MD-110), specifically EEO MD-110 at Ch. 6 § XIII, D & E (Development of Impartial and Appropriate Factual Records). MD-110 at Appx. L (Complainant File Format), Appx. Q EEO MD-110 (Quick Reference Chart, documentation required to close compliance).

later, when, it underwent a realignment that eliminated the complainant's position); see also Buck v. Dep't of Veterans Affairs, EEOC Appeal No. 01A12839 (July 6, 2001) (finding no breach where the Agency transferred a complainant to another position as a condition of a settlement agreement and then, over a year later, reclassified and ultimately downgraded that position.) Additionally, where a complainant has been placed in a position as a result of a settlement agreement, and holds that position for a "reasonable length of time" the Agency will not be in breach of the settlement agreement if it transfers the complainant. See Jones v. U.S. Postal Serv., EEOC Appeal No. 0120100853 (May 27, 2011).

Even if Term 3(b) could be enforced without meeting the condition that the supervisor remain in Complainant's chain of command, we find Complainant held the graveyard shift stipulated in Term 3(b) for a "reasonable" amount of time. At the time of the alleged breach, the NSA had been in place for nearly 10 years. Therefore, due to the age of the Agreement, a change in schedule to a shift other than the graveyard shift does not constitute breach.

### CONCLUSION

Accordingly, the Agency's finding that it was not in breach of the Agreement 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

September 9, 2020

Date