



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

[REDACTED]
Valentine F,¹
Complainant,

v.

William P. Barr,
Attorney General,
Department of Justice
(Executive Office of the U.S. Attorneys),
Agency.

Appeal No. 2020002169

Agency No. USA201900421

DECISION

Complainant timely appealed with the Equal Employment Opportunity Commission (“EEOC” or “Commission”) from a November 19, 2019 final agency decision (“FAD”) that found the Agency 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 worked as an Assistant United States Attorney at the Agency’s United States Attorney’s Office for the Southern District of California, located in San Diego, California.

On May 23, 2019, Complainant and the Agency entered into a negotiated settlement agreement (“the Agreement”) to resolve a discrimination complaint that Complainant raised with an EEO Counselor. At issue is Provision II(b) of the Agreement, which states:

The Agency agrees that no later than September 20, 2019, the United States Attorney will consider whether the November 2, 2018 letter of reprimand has served its purpose. If the United States Attorney determines that the letter of reprimand has served its purpose, he will consider whether to exercise his discretion

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.

to remove the letter of reprimand from the Official Personnel File prior to its expiration on November 2, 2021.

On October 9, 2019, Complainant notified his EEO Counselor that the November 2, 2018 Letter of Reprimand (“LOR”) was still in his Official Personnel File (“OPF”), and that despite the September 20, 2019 deadline, no one had contacted him about whether the United States Attorney considered if his LOR “served its purpose,” and if would be removed from his OPF. The Agency removed the LOR from Complainant’s OPF the following week. Complainant was notified in person on October 21, 2019.

On October 18, 2019, Complainant provided Agency management officials with formal written notice that the Agency was in breach of the Agreement, and requested that the Agency reinstate his underlying EEO complaint for further processing.

The FAD determined that the Agency was not in breach of the Agreement. The instant appeal followed.

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). 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).

The regulation set forth in 29 C.F.R. 1614.504(b) provides that after notification by a complainant of alleged noncompliance with a settlement agreement, that agency should resolve the matter and respond to the complainant. The Commission has interpreted this provision as allowing the agency the opportunity to cure any breach that may have occurred. See Covington v. United States Postal Serv., EEOC Appeal No. 01913211 (Sept. 30, 1991), see also Grant v. Dep’t of Health & Human serv., EEOC Appeal No. 012000759 (Apr. 24, 2000) citing Child v. Dep’t of Transportation, EEOC Appeal No. 01952080 (Jan. 26, 1996).

In the instant case, Complainant placed the Agency on notice that it was in breach of the September 20, 2019 deadline specified in Provision II(b) on October 9, 2019, through his EEO Counselor.

He followed up by email on October 16, 2019, and formally notified Management on October 18, 2019. Based on any of these dates, we find the Agency timely cured any breach of Provision II(b) when it removed the LOR from Complainant's OPF by October 21, 2019.

On appeal, Complainant disputes the Agency's evidence of compliance with Provision II(b), a sworn statement by a management official with knowledge of the matter, that the United States Attorney considered the LOR on or about September 16, 2019. Specifically, Complainant noted that he did not hear from the Agency until after he raised the breach allegation, and cited a lack of contemporaneous notes or calendar entries that would show the United States Attorney considered the LOR prior to September 20, 2019. Notwithstanding the Agency's compliance by curing the breach, the language of the Agreement does not require the Agency to maintain documentary evidence or notify Complainant of its compliance with Provision II(b), therefore, failure to do so is not a breach of the Agreement. See Carter v. Dep't of the Army, EEOC Appeal No. 01985009 (Jul. 2, 1999) (finding no breach where, the agency, per a settlement agreement, conducted a reconsideration of the complainant's performance appraisal but failed to notify him of the results, as the settlement agreement did not require it).

Complainant also alleges that the Agency breached the Agreement when it "needlessly failed to disclose [Provision II(b)] to the United States Attorney until the time had nearly run, thereby prolonging the excessive punishment." The plain language of the Agreement provides a deadline of September 20, 2019. To the extent that Complainant interpreted the Agreement as mandating that the Agency fulfill its obligation under II(b) sooner, such interpretation should have been reduced to writing as part of the Agreement, and in the absence of a writing cannot be enforced. See Jenkins-Nye v. Gen. Servs. Admin., EEOC Appeal No. 019851903 (Mar. 4, 1987). While Complainant asserts he experienced some professional setbacks as a result of the LOR remaining in his OPF, the existence of harm or regret arising from the terms of a settlement agreement does not in itself establish breach. See, e.g. Jonay H. v. United States Postal Serv., EEOC Appeal No. 0120182421 (Mar. 14, 2019) (the complainant's breach claim discussed her disappointment with the outcome of the settlement agreement, where the agency made the required payment, but did not compensate or acknowledge the hardship she and her family endured due to a delay in paying her full wages).

CONCLUSION

Accordingly, we AFFIRM the Agency's finding that it did not breach the May 23, 2019 Agreement as alleged.

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