



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

[REDACTED]
Nenita S.,¹
Complainant,

v.

Alex M. Azar, II,
Secretary,
US Department of Health and Human Services
(Office of the Secretary),
Agency.

Appeal No. 2020003859

Agency Nos. HHS-OS-0034-2015, HHS-OS-0034-2016

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) following her April 2, 2020 notice to the Agency of her breach claim. After the Agency failed to respond to her claim, Complainant filed this appeal with the Commission, arguing that the Agency was not 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 compliance action, Complainant worked as a Director, Office of Small and Disadvantaged Business Utilization (SES) at the Agency's Office of the Secretary facility in Washington, DC.

On September 28, 2018, Complainant and the Agency entered into a settlement agreement to resolve the above-referenced EEO matters. The settlement agreement provided, in pertinent part, that:

- (15) The Agency agrees to increase Complainant's basic rate of pay to the maximum rate of basic pay permitted by 5 C.F.R. 534.403 for Senior Executive Service employees (level II of the Executive Schedule for senior

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.

executives in an agency who are covered by a performance appraisal system certified by the Office of Personnel Management) on January 6, 2019. The Agency asserts that its SES performance appraisal system has been certified by the OPM through October 21, 2019. The Agency agrees that in the event its SES performance appraisal system is suspended by the Office of Personnel Management, Complainant's basic rate of pay will not decrease, as permitted by 5 C.F.R. 534.403(b).

...

- (19) Complainant agrees to voluntarily transfer, resign, or retire from the Agency on or before December 31, 2020. This voluntary transfer, resignation or retirement is irrevocable.

...

- (29) This Agreement constitutes the complete understanding between Complainant and the Agency with respect to the matters encompassed in this Agreement. No other promises or agreements will be binding unless this Agreement is amended by a writing signed by both parties.

By letter to the Agency dated April 2, 2020, Complainant alleged that the Agency was in breach of the settlement agreement provision 15. Specifically, Complainant alleged that the Agency failed to provide her with a second increase as of January 1, 2020. She asserted that the Agency should have increased her salary from \$194,000 to \$197,000.

The Agency acknowledged that it did not issue a decision regarding's Complainant's breach claim. The Agency contends it did not receive the breach claim due to the pandemic. In response to Complainant's appeal, the Agency states in its brief that it complied with the requirements of the Agreement when it increased Complainant's salary to \$192,254, the maximum rate permitted as of January 6, 2019. In addition, the Agency provided Complainant with a 1% pay increase, which brought her salary to \$194,223.

On appeal, Complainant asserts that she is entitled to receive another adjustment, in addition to the adjustment as of January 2019, to reach the maximum rate permitted as of January 2020.

In response, the Agency says the parties only agreed to increase Complainant's salary to the maximum legally permitted level on January 6, 2019, and that the Agreement was silent regarding any future pay increases.

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, the Agreement required the Agency to increase Complainant's basic rate of pay to the maximum rate of basic pay permitted as of January 6, 2019. The record shows that the Agency provided that adjustment. To the extent that Complainant expected the Agency to provide additional adjustments, that was not made clear in the Agreement.

We find, therefore, that Complainant failed to show that the Agency violated the expressed terms of the Agreement.

CONCLUSION

Accordingly, we find Complainant failed to prove her breach claim.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0620)

The Commission may, in its discretion, reconsider this appellate decision if the 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 his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>.

Alternatively, complainant can submit his or her 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, 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 his or her 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(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

January 4, 2021

Date