



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

[REDACTED]  
Levi P.,<sup>1</sup>  
Complainant,

v.

Christine Wormuth,  
Secretary,  
Department of the Army,  
Agency.

Appeal No. 2021003634

Agency No. APROM12OCT04375

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from a final decision (FAD) by the Agency dated June 23, 2021, 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 worked as an Academic Specialist at the Agency's Defense Language Institute in Monterey, California.

Believing that the Agency subjected him to unlawful discrimination, Complainant contacted an Agency EEO Counselor to initiate the EEO complaint process. On March 10, 2014, Complainant and the Agency resolved his complaint by entering into a settlement agreement (Agreement), from which the instant claim arose.

The Agreement, in pertinent part, required the Agency to:

- (1) Revise Complainant's performance appraisal for the rating period October 1, 2011 through September 30, 2012 to reflect an overall rating of Level 2 within 30 days of this Agreement is fully executed by all parties thereto,

---

<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.

- (2) Revise Complainant's performance appraisal for the rating period October 1, 2012 through March 20, 2013 to reflect an overall rating of Level 2 within 30 days of this Agreement is fully executed by all parties thereto,
- (3) To reassign Complainant to the Middle East 3 (MIII) School on or before April 1, 2014 to perform the duties of Academic Specialist in accordance with all the associated performance standards associated with said position.

In addition, the Agreement stated:

If the Complainant believes that the Agency has failed to comply with the terms of this settlement agreement, he will notify the Director, EEO Compliance and Complaints Review . . . in writing of the alleged noncompliance within 30 calendar days of when he knew or should have known of the alleged noncompliance. A copy should also be sent to the processing EEO Officer at the US Army . . . The Complainant may request that the terms of the settlement agreement be specifically implemented or alternatively the complaints be reinstated for further processing.

By letter to the Agency dated May 27, 2021, 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 breached provisions 1 and 2 by failing to change his performance rating to a Level 2 for the 2011-2012 period and 2012- 2013 period. In addition, Complainant alleged that the Agency breached provision 3 by not assuring him that he would be returned to an Academic Specialist position if he did not successfully re compete for his supervisory position.

On June 23, 2021, the Agency issued a final agency decision (FAD). The Agency dismissed the claims pertaining to the performance appraisals as untimely. In addition, the Agency determined that it had complied with the terms of Agreement.

On appeal, Complainant, through his attorney, argues that the FAD should be reversed. The Agency submitted a brief in response.

### 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).

#### *Provisions 1 and 2*

Here, we find the settlement agreement is plain and unambiguous on its face with respect to the obligations as provided in provisions 1 and 2. Provisions 1 and 2 imposed upon the Agency the obligation to raise Complainant's 2011-2012 and 2012-2013 appraisal ratings to Level 2 within 30 days of March 10, 2014. Regarding breach of provision 1, the Agency determined that upon notification by Complainant of its breach, it cured its breach by raising his 2011-2012 appraisal rating to Level 2. Regarding breach of provision 2, the Agency determined that Complainant failed to establish that a breach occurred because Complainant's rating for 2012-2013 was raised to Level 1, which is higher than the rating agreed upon in the Agreement. On appeal, Complainant argues that he has not received the upgraded ratings and they do not appear in his electronic Official Personnel Folder (eOPF). In its response brief, the Agency indicated that it had since provided Complainant with a copy of the upgraded performance ratings. The Agency indicated that the performance records were completed in TAPES and are not in Complainant's eOPF file because the Agency "no longer uses the TAPES performance appraisal system." We note that the Agency attached copies of the upgraded ratings to its response brief. The attached performance rating for 2011-2012 is Level 2 and the performance rating for 2012-2013 is Level 1, therefore we find the Agency has complied with provisions 1 and 2.

On appeal, Complainant argues that he should get a salary increase for the higher performance ratings. However, this request was not incorporated in the Agreement. The Commission has long 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. Department of Veterans Affairs, EEOC Request No. 05900795 (August 23, 1990). Therefore, a salary increase cannot be enforced because the terms of the Agreement.

Finally, we note that the Agency argues that the claims pertaining to the performance appraisals should be dismissed, because Complainant's breach notice was not submitted timely. We find that the Agency did not provide evidence to support its conclusion that the claims were untimely. We also find that the Agency may have contributed to the delay since the performance appraisals are not in Complainant's eOPF file. Therefore, we do not find that Complainant's performance appraisal claims should be dismissed as untimely filed.

### *Provision 3*

We find the settlement agreement is plain and unambiguous on its face with respect to the obligations as provided in provision 3. Provision 3 imposed upon the Agency the obligation to place Complainant in an Academic Specialist position. In its FAD, the Agency determined that Complainant failed to establish that a breach occurred. In doing so, the Agency cited Complainant's own acknowledgement that he had occupied an Academic Specialist position Middle East 3 School and pointed out that he remained in that position for a year before accepting a supervisor's position. We agree with the Agency, Complainant's acknowledgement that he worked as an Academic Specialist at the Middle East 3 School shows the Agency performed its obligations under provision 3. We note that when Complainant left the Academic Specialist position to become a supervisor he did so voluntarily. Despite Complainant's argument, a 'plain meaning' interpretation of the Agreement does not identify how long he could stay in the Academic Specialist position, and the Agreement did not state that the Agency had an obligation to keep the position open for him indefinitely.

### CONCLUSION

Accordingly, the Agency's final decision is AFFIRMED.

### STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0920)

The Commission may, in its discretion, reconsider this appellate decision if 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, a 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

December 14, 2021

Date