



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

[REDACTED]
Alba H.,¹
Complainant,

v.

Frank Kendall III,
Secretary,
Department of the Air Force,
Agency.

Request No. 2021003352

Appeal No. 2021001578

Agency No. 5W1C17004

DECISION ON REQUEST FOR RECONSIDERATION

The Agency timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in EEOC Appeal No. 2021001578 (April 22, 2021). EEOC regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision issued pursuant to 29 C.F.R. § 1614.405(a), where the requesting party demonstrates 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. See 29 C.F.R. § 1614.405(c). For the following reasons, the Commission GRANTS the Agency's request.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was employed by the Agency and served as a Union Steward/President of the local branch of the American Federation of Government Employees (AFGE) at Shaw Air Force Base (AFB) in South Carolina.

Believing that the Agency subjected her to unlawful discrimination, Complainant filed a formal equal employment opportunity (EEO) complaint. After the investigation of her complaint, she requested a hearing before an EEOC Administrative Judge.

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.

While the matter was pending before the assigned AJ, on November 3, 2020 Complainant and the Agency entered into a negotiated settlement agreement (NSA) to resolve the matter. The NSA provided, in relevant part, that:

2. The Agency agrees to the following terms:

- a. The Agency agrees to make one (1) settlement agreement (*sic*) in the amount of one hundred thousand dollars and zero cents (\$100,000.00) payable to Complainant [name omitted].
- b. The Agency shall make a request to the Defense Finance and Accounting Service (DFAS) to pay Complainant the settlement payment of \$100,000.00 (as described in Paragraph 2.a.) within forty-five (45) calendar days of the date an original of this Agreement has been signed by all parties and served on [named Agency Litigation Attorney (A1)]. Complainant understands and acknowledges that the settlement payment is made by DFAS and is not under Agency control. The Agency's initiation of the afore-described settlement payment process shall fulfill its obligations under this paragraph.

8. In accordance with 29 C.F.R. Section 1614.504, the parties further agree that, if Complainant believes that the provisions of this negotiated settlement agreement are being violated, she may take the following actions:

- a. Complainant must notify the EEO Director at Shaw Air Base's Equal Employment Opportunity Office, in writing of the alleged noncompliance within thirty (30) calendar days of becoming aware of the noncompliance.
- c. If, after thirty (30) calendar days from the date of the Agency's receipt of Complainant's written allegation of noncompliance with the Settlement Agreement, the Agency has not responded to Complainant in writing, or if Complainant is not satisfied with the Agency's attempt to resolve the matter, Complainant may appeal to the Commission for a determination as to whether the Agency has complied with the terms of the settlement agreement. Complainant may file such an appeal thirty-five (35) calendar days after service of the allegations of noncompliance but must file an appeal within thirty (30) calendar days of receipt of an Agency's determination.

Based on the terms of Paragraph 2.b. of the settlement agreement, the Agency had until December 18, 2020, to initiate the "afore-described settlement payment process." On November 29, 2020, approximately 26 calendar days after the parties entered into the NSA, Complainant first notified A1 via email that she had not received a direct deposit in the amount of \$100,000. See Complaint File at 162. In response to Complainant's inquiry, A1 promised Complainant that he would look into the matter. Id. at 161-62.

When Complainant failed to receive the promised payment by December 8, 2010, the 35th calendar day after the parties entered into the NSA, she sent an email to the Shaw AFB Superintendent, Equal Opportunity Dispute Resolution Program Manager (PM), alleging that the Agency had “officially breached the [NSA]” when A1 falsely told her that the Agency was “gathering the information that they had submitted to DFAS.” See Complaint File at 2030-31. Specifically, she said that neither her bank, nor DFAS, had a record of payment of the \$100,000 settlement award. Id. Complainant stated that she wanted to file a new EEO complaint alleging reprisal. PM acknowledged Complainant’s breach allegation and informed her that the Agency would send her a formal reply. Id. at 2036. In replying to Complainant, the PM carbon copied the AFB’s EEO Director. Id.

A few hours later, Complainant received an email from A1, informing her that the Agency submitted the payment request to DFAS on December 2, 2020, and “[a]ccordingly, the Agency has satisfied its obligation under Paragraph 2(a) of the Settlement Agreement.” Complaint File at 170-71. Complainant subsequently notified the Agency on December 10, 2020, that neither DFAS nor the AF Personnel Office had any record of a payment request for \$100,000 to Complainant by the AFB Finance Office on December 2, 2020, or any other date. Id. at 170.

On December 16, 2020, the EEO Director informed Complainant that she “was recently made aware of [Complainant’s] concerns regarding [her] settlement agreement.” Complaint File at 2037. The EEO Director attempted to contact Complainant by telephone but was unsuccessful. Id.

On the morning of December 17, 2020, A1 notified Complainant that the EEO Director had forwarded him the email that she had received from Complainant regarding Complainant’s allegation of breach. Complaint File at 2047. In his email to Complainant, A1 asserted that the Agency was not in breach of the NSA because the Agency had submitted a payment request to DFAS in accordance with Paragraph 2.a. of the NSA. Id. A1 emphasized that the NSA only required the Agency “to initiate the settlement payment request to DFAS and DFAS, who the Agency does not control, is responsible for making the settlement payment.” Id.

That afternoon, Complainant sent a mass email to several individuals, including A1, the EEO Director, and the AFB Budget Officer, notifying them that she had confirmed with DFAS that there was still no record of a \$100,000 payment or pending payment under her name within the DFAS system, nor was there any record that the AFB Finance Office initiated such a payment. Complaint File at 168-69. Complainant also confirmed with the Office of Personnel Management (OPM) that a payment of a settlement award should have been processed through the AFB Finance Office, and that neither OPM nor AFB Personnel had any record in her personnel file that she was to receive a \$100,000 payment. Id. Complainant also stated that OPM and DFAS informed her that because there was no record on their end, the Agency must take the next steps to resolve the matter by contacting DFAS, and submitting a “Remedy Ticket,” to find the missing payment. Id. Complainant further stated that DFAS checked for her and no remedy tickets were in the DFAS system for a payment to Complainant. Id. Complainant concluded her email by informing the recipients that she was “effectively moving

forward” with her complaint. Unbeknownst to Complainant, DFAS had physically mailed a check to her on December 16, 2020, in the amount of \$100,000, just a day prior to her mass email. See Agency’s Request for Reconsideration File at 13-27.

On December 18, 2020, Complainant filed a Notice of Appeal/Petition with the Commission’s Office of Federal Operations, alleging that the Agency was in breach of the Agreement. The Commission docketed the matter as Appeal No. 2021001578. See Complainant’s Notice of Appeal/Petition in Appeal No. 2021001578.

On December 21, 2020, the Agency notified Complainant that the \$100,000 payment had been deposited in her personal bank account on December 16, 2020. The Agency provided Complainant with a DFAS voucher number and bank transaction code to use when following up with her financial institution. Complaint File at 167.

On January 21, 2021, the Agency filed a motion with the Commission seeking to dismiss Complainant’s appeal. In its motion, the Agency argued that it was not in breach because it had submitted a payment request to DFAS on December 2, 2020, and Complainant received the \$100,000 payment, referenced in Paragraph 2, on December 16, 2020. Complaint File at 146-50. Additionally, the Agency argued that Complainant had breached Paragraph 8 of the NSA, when she “proceeded to file an EEOC OFO appeal alleging a breach of the Settlement Agreement two (2) days after she received the Agency’s settlement payment.” Id. To remedy the breach, the Agency sought to recoup its \$100,000 payment to Complainant. Id.

The following day, Complainant sent an email to several individuals, including A1 and the Budget Officer, notifying them that “DFAS had mailed the check instead of direct deposit into [her] bank account” despite her submission of direct deposit forms and that “the DFAS check arrived on January 4, 2021.” Complaint File at 2007. Complainant also apologized for not notifying the Agency earlier, as she “just realized that this message was pending in the outbox.” Id.

In Appeal No. 2021001578 (Apr. 22, 2021), the appellate decision initially found Complainant’s appeal to be premature, but nevertheless accepted Complainant’s breach allegation as timely by construing the Agency’s January 21, 2021, motion as its final agency decision. The appellate decision then addressed the Agency’s contention that it had fully complied with the terms of the NSA.

Upon review, the appellate decision determined that while Paragraph 2.b. required the Agency to initiate a payment request with DFAS within 45 days of the effective date of the NSA, the Agency was nevertheless obligated to pay Complainant the promised \$100,000 within “a reasonable amount of time.” The appellate decision ultimately found insufficient evidence to determine whether the Agency had actually complied with the NSA. In this regard, while the appellate decision considered the Agency’s contention that it did in fact pay Complainant, the appellate decision noted that Complainant claimed to have never received the payment. As the appellate decision found no supporting evidence that the Agency complied with its obligations

under the NSA, the appellate decision concluded that the Agency failed to meet its burden of providing sufficient evidence to substantiate its final decision. In so finding, the appellate decision clarified that “[a]cceptable proof of payment includes screen shots indicating an [electronic] funds transfer, copies of canceled checks, or written confirmation by the complainant or their representative that payment was received.”

Consequently, the appellate decision ordered the Agency to conduct a supplemental inquiry as to whether payment was actually sent to Complainant’s bank account and supplement the record with evidence of such. The appellate decision also ordered the Agency to issue a new final decision addressing whether the Agency complied with Paragraph 2 of the NSA. In response to the appellate decision, the Agency filed the instant request for reconsideration.

AGENCY’S REQUEST

In requesting reconsideration, the Agency argues that the Commission, in finding in favor of Complainant, “failed to adhere to the language of the [NSA] in which the parties acknowledged that DFAS is a separate entity and is not under Agency control and appeared to hold the Agency accountable for making a settlement payment which is solely under DFAS’ control.” The Agency maintains that the NSA only required the Agency to initiate the payment process within 45 calendar days of the effective date of the NSA, and that it fully complied with this provision. Furthermore, the Agency emphasizes that Complainant received a physical check from DFAS on January 4, 2021, and that the Commission should have checked with Complainant about the payment before finding the Agency in breach. In support of such contention, the Agency includes with its request a copy of the DFAS check that was sent to Complainant and subsequently deposited with her financial institution.

Lastly, the Agency reiterates that Complainant was the one who violated the NSA by filing an appeal with the Commission before providing the Agency with an opportunity to remedy the alleged breach of the NSA. In this regard, the Agency points to Paragraph 8 of the NSA, which provides an agreed upon process for Complainant to follow if she believes that the Agency violated the NSA. The Agency maintains that “[s]ince Complainant has been permitted to proceed with this appeal and has not been required to comply with Paragraph 8 of the [NSA], the parties should return to a *status quo ante* and the Commission should compel Complainant to return her settlement payment to the Agency during the pendency of her appeal.” The Agency asserts that such action is necessary to prevent Complainant from incurring an unjust windfall.

Complainant subsequently filed a response dated June 15, 2021. In her response, Complainant recollects the alleged discriminatory incidents in detail. However, she does not address the Agency’s concerns regarding the appellate decision. Notably, in her response, Complainant again admits to having received the DFAS check on January 4, 2021.²

² After Complainant submitted her brief, the Agency filed a motion seeking to strike Complainant’s brief as irrelevant. The following month, Complainant filed an objection to the

ANALYSIS

After reviewing the appellate decision and the entire record, the Commission finds that the request meets the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to GRANT the request. This decision is based on three grounds.

First, the Commission finds that the appellate decision, in requiring the Agency to pay Complainant within a reasonable period, made a clearly erroneous interpretation of material fact or law by failing to recognize that the NSA imposed no such obligation. Indeed, the Commission notes that under the expressed terms of Paragraph 2.b. of the NSA, the Agency was only obligated to *initiate* the payment process within 45-days of the effective date of the NSA. Furthermore, as the NSA expressly included a specific time frame for performance (i.e., initiation of payment), the Commission finds that the appellate decision should not have construed the NSA as requiring the Agency to pay Complainant within a reasonable period. This is particularly true given that Complainant voluntarily entered into the NSA with full knowledge that the Agency had no control over DFAS and agreed that the “Agency’s initiation of the afore-described settlement payment process [would] fulfill its obligations...” Given these factors, the Commission concludes that the appellate decision involved a clearly erroneous interpretation of material fact or law with regard to its interpretation of the NSA.

Second, the Commission finds that the appellate decision involved a clearly erroneous interpretation of material fact or law in rejecting the Agency’s evidence showing that it had fully complied with Paragraph 2 of the NSA. As discussed above, the Agency argued on appeal that it was in full compliance because it had submitted a payment request to DFAS on December 2, 2020, and DFAS had paid Complainant the \$100,000.00 on December 16, 2020. In support of its contention, the Agency provided the applicable DFAS voucher number that it had provided to Complainant by email on December 21, 2020. The underlying appellate decision ultimately rejected the Agency’s offered evidence because “[a]ccording to Complainant, DFAS has no record of the Agency’s payment request, and she never received payment.” On reconsideration, the Commission finds the originally submitted evidence to be sufficient, as that evidence clearly and unequivocally shows that the Agency initiated the payment process prior to December 18, 2020, in full compliance with the NSA.

Third, while the appellate decision vacated the Agency’s final decision on the grounds that the Agency failed to provide any evidence showing that it had paid Complainant, the Commission finds that the original record did in fact contain evidence of such. Specifically, the Commission notes that the original record contained Complainant’s January 22, 2021 email, wherein Complainant admitted to receiving payment from DFAS shortly after she filed her appeal with the Commission. This evidence is located on page 2007 of the underlying complaint file. On

Agency’s motion. As our regulations do not allow for the submission of multiple briefs, we will only consider the briefs that the parties initially submitted. See 29 C.F.R. § 1614.403(d); see also Rios-Ortega v. Dep’t of Def., EEOC Appeal No. 0120111979 (Nov. 5, 2012) (declining to address complainant's submission of multiple briefs).

reconsideration, the Commission finds that this undisputed proof of payment suffices as written confirmation that the Agency fully complied with the NSA.

Based on the foregoing, the Commission hereby GRANTS the Agency's request, REVERSES the appellate decision in its entirety, and AFFIRMS the Agency's final decision finding that it did not breach the NSA. In issuing this decision, we decline to return the parties to the *status quo ante*, as Complainant has only alleged a breach of the settlement agreement. We return the parties to *status quo ante* only where we have found a breach of settlement *and* the complainant has requested reinstatement of the complaint, which is not the case herein. There is no further right of administrative appeal of the decision of the Commission on this request.

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (P0610)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. 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.

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:

/s/ Shelley E. Kahn

Shelley E. Kahn
Acting Executive Officer
Executive Secretariat

March 4, 2022

Date