



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

[REDACTED]
Jesse R.,¹
Complainant,

v.

Pete Buttigieg,
Secretary,
Department of Transportation,
Agency.

Appeal No. 2021003413

Agency No. DOT-2018-27820-FAA-06

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from a final decision (FAD) by the Agency dated April 29, 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 a Communications Engineering Group Manager, FV-801-K, at the Agency's Federal Aviation Authority, Seattle Headquarters facility, in Des Moines, Washington.

Believing that the Agency subjected him to unlawful discrimination, Complainant contacted an Agency EEO Counselor to initiate the EEO complaint process. On March 17, 2020, Complainant and the Agency entered into a settlement agreement to resolve the matter. The settlement agreement provided, in pertinent part, that the Agency would:

- (2)b. Provide the complainant with priority consideration for any L-band or Group Manager position, bid through a vacancy announcement, for which he is qualified, in the Western Service Area Service Center, for a period of two (2) years from the date this agreement becomes effective/final. The

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.

servicing human resources staffing office responsible for servicing the WSC in that vacancy announcement process will make the determination regarding Complainant's qualifications for the position. If Complainant is deemed minimally qualified for the position he shall be placed on the "priority" referral list for that vacancy announcement. Once Complainant is placed onto the priority referral list he shall be considered, consistent with HRPM EMP 1.9, paragraph 4, Category 5.

By email to the Agency dated December 28, 2020, Complainant alleged that the Agency was in breach of the settlement agreement and requested that the Agency reopen his complaint. Specifically, Complainant alleged that the Agency failed to hire him for a senior management position (PRG Group Manager) at the Western Service Center.

In its April 29, 2021 FAD, the Agency concluded it was not in breach of the Agreement. Specifically, the Agency found that on October 20, 2020, the servicing Human Resources Staffing Office responsible for servicing the Western Service Center (WSC) had provided the Complainant with priority consideration for an L-band or Group Manager position under vacancy announcement # ANM-ATO-20-1906002-69185, Supervisory Aviation Technical Systems Specialist, FV-2186-L, a position for which Complainant was deemed minimally qualified. The Agency further found that this occurred within the two-year period following the date of the agreement, and that once he was placed on the priority referral list, Complainant was considered, consistent with HRPM EMP 1.9, paragraph 4, Category 5, but not selected for the position. The Agency noted that the Agreement did not require the Agency to place Complainant in a position of his choosing, only to offer priority referral, and that the Agency had complied with this requirement.

The instant appeal from Complainant 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 (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).

Here, the Agency correctly points out that the Agreement did not guarantee Complainant a position. Instead, the Agreement promised to offer Complainant “priority consideration” but does not define what that term means. The Agency maintains that Complainant was given priority consideration for the position in question, but nevertheless was not selected for the position. Again, however, the FAD does not explain, and the record does not show, how Complainant was given priority consideration. The Commission has held, when interpreting another settlement agreement, that: “The commonly accepted meaning of the term ‘priority consideration’ is that the selecting official reviews and makes a determination on the priority candidate’s application before soliciting or considering the applications of other candidates.” Wilson v. Equal Employment Opportunity Comm’n, EEOC Appeal No. 01881684 (Oct. 13, 1989); accord Bishop v. Department of Transportation, EEOC Request No. 05910148 (Apr. 10, 1991). The Commission explained, however, that “[p]riority consideration does not guarantee selection.” Id. The Commission held that a person receiving priority consideration must be “given bona fide consideration on [her] own merit, without competition with other potential candidates.” Id. See also Johnson v. Dep’t of Health and Human Services, EEOC Appeal No. 01941916 (December 20, 1994).

Following a review of the record we find that the Agency has not shown, nor even claimed, that the selecting official reviewed and made a determination on Complainant’s application before soliciting or considering the applications of other candidates. Instead, the record shows that interviews with the other, non-priority, candidates were conducted first, in December 2020 and January 2021, and that Complainant was interviewed last, on February 1, 2021. Even assuming that conducting applicant interviews does not constitute “reviewing and making a determination” the available evidence shows that Complainant’s application was reviewed either alongside, or after, the applications of three other non-priority candidates. Such a sequence of events runs counter to the Commission’s interpretation of the term “priority consideration.”

In explaining why he chose for selection someone other than Complainant, the selecting official (SO) said in an email dated March 24, 2021 that:

When reviewing the selection process documentation and conducting second level interviews with the final 4 candidates, I focused on which candidates could bring experience from outside the ATO. The PRG and Engineering Services (ES) relationship was stagnant, and experience from outside PRG and ES was desired. See attached “application” sensitivity chart. [Candidate’s name omitted] (Candidate 1)(overall top scoring candidate) and [Candidate’s name omitted] (Candidate 2) both had extensive experience outside the ATO. [Candidate 1] was selected, but turned down the position. [Candidate 2] was selected for his extensive experience in the FAA Airports Division, and my belief that he would be an excellent fit for the PRG GM. Although I don’t score second level interviews, [Candidate 2]’s enthusiasm and energy during the second level interview far exceeded the other two candidates.

According to the SO then, Complainant's candidacy was considered alongside those of the three other candidates, not before. Furthermore, the SO has explained why he selected Candidate 2 but has not explained why he did not select Complainant despite the fact that Complainant was entitled to priority consideration. See Pakele v. Department of the Air Force, EEOC Request No. 05931008 (July 7, 1994) (noting that in priority consideration, the employee was entitled to the position unless the agency "could document specific, legally permissible reasons for [the] nonselection.").

To the extent the Agency may argue that Complainant's candidacy was considered and rejected "consistent with HRPM EMP 1.9, paragraph 4, Category 5," we note that the Agency has not provided a copy of that regulation or rule explaining what it says. The Agency attorney, however, provided a lengthy email, dated March 11, 2020, "to provide clarification regarding HRPM EMP 1.9." In that email, the attorney provided various scenarios detailing under what conditions, despite being given priority consideration, Complainant might still not be selected. We note that none of those scenarios matches the fact-pattern in the instant case. While we have 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, supra, we note that an Agency attorney is presumed to know and understand the meaning of Agency regulations and rules and hence, absent an actual copy of that provision, we adopt the Attorney's interpretation of HRPM EMP 1.9, paragraph 4, Category 5, as being accurate.

For the above reasons we find that the Agency has not shown that it offered Complainant bona fide priority consideration when it selected a candidate other than Complainant for the position at issue. Accordingly, we find that Complainant has shown a breach of the Agreement. Where we find a breach, the Commission has two options to remedy the situation: 1) reinstate the complaint or 2) order specific performance. Complainant has stated that he wishes to reinstate his complaint. We note, however, that if a complaint is reinstated for further processing, the parties must be returned to the status quo at the time that the parties entered into the settlement agreement. This would require that Complainant return or forego any benefits received pursuant to the settlement agreement. See, e.g., Armour v. Dep't of Defense, EEOC Appeal No. 01965593 (June 24, 1997). The record shows that, in addition to promising to offer Complainant priority consideration, the Agency agreed to pay Complainant the sum of \$9,999.99. Assuming this payment was made to Complainant, should his complaint be reinstated, he would have to repay this sum to the Agency.

CONCLUSION

Accordingly, we find that the Agency breached the settlement agreement and the matter is REMANDED to the Agency for further processing as set forth in the ORDER below.

ORDER

Within thirty (30) calendar days of the date this decision is issued, the Agency shall notify Complainant of his option to either:

- (a) return to the status quo prior to the signing of the March 17, 2020 settlement agreement and having his underlying complaint reinstated, or
- (b) having the terms of the March 17, 2020 settlement agreement specifically enforced with regard to future positions.

The Agency shall also notify Complainant that he has fifteen (15) calendar days from the date of his receipt of the Agency's notice within which to notify the Agency of his choice. Complainant shall be informed that in order to return to the status quo ante, he must return any benefits received pursuant to the agreement. If Complainant elects to return to the status quo ante, and all benefits are returned, the Agency shall resume processing Complainant's underlying complaint from the point processing ceased pursuant to 29 C.F.R. § 1614.108 et seq. If, however, Complainant elects not to return to the status quo ante, the Agency shall notify Complainant that the terms of the settlement agreement will be specifically enforced with regard to the next suitable position that becomes available.

A copy of the Agency's notice to Complainant regarding his options, as well as a copy of either the correspondence reinstating the complaint for processing or the correspondence notifying complainant that the terms of the agreement will be specifically enforced and evidence of such performance, must be sent to the Compliance officer, as referenced below.

ATTORNEY'S FEES (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she/he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- not to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of receipt of this decision. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be in the digital format required by the Commission, and submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a).

The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

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 (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. 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. **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

November 4, 2021

Date