



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

[REDACTED]
Ken M.,¹
Complainant,

v.

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

Appeal No. 2022000861

Agency No. ARBELVOIR21JUN02098

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from an Agency final decision (FAD), dated December 1, 2021, finding that it was in compliance with the terms of the settlement agreement into which the parties entered. The Commission accepts the appeal. 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 Deputy Project Manager, NH-04, at the Agency's Program Executive Office - Enterprise Information Systems (PEO EIS) in Fort Belvoir, Virginia.

Believing that the Agency subjected him to unlawful discrimination, Complainant contacted an EEO Counselor to initiate the EEO complaint process. On September 3, 2021, Complainant and the Agency entered into a settlement agreement to resolve the matter. The agreement provided, in pertinent part, that:

- 3(b) The Agency Agrees to remove the Letter of Reprimand dated July 2, 2021 and issue a Written Counseling for the same conduct. The Written Counseling will remain in the possession of Deputy PEO

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.

...

- 3(e) The Agency Agrees to pay the Complainant's Representative a lump sum payment of five thousand dollars \$5,000.00 in full satisfaction of all claims of attorney fees in connection with the above captioned matter."
- (i) The Parties acknowledge that DFAS is a Department of Defense (DoD) activity. As such, the Agency cannot guarantee to a date for receipt of payment. However, if payment has not been received within sixty (60) days of the Agency's request for payment, then, upon notice from Complainant, the Agency will contact DFAS and make reasonable attempts to facilitate and expedite the payment.

By letter to the Agency dated November 2, 2021, Complainant alleged that the Agency was in breach of provision 3(b) of the agreement and requested that the Agency specifically implement its terms or reinstate the complaint. Specifically, Complainant alleged that the Agency failed to remove the Letter of Reprimand ("LOR") from his electronic Official Personnel File ("eOPF") "as of this date, the last remaining date to file this Notice of Breach of the Settlement Agreement." (Complaint File, p. 72).

In its December 1, 2021 FAD ("FAD-1"), the Agency concluded management had complied with the terms of the settlement. The Agency stated the LOR was removed from Complainant's eOPF on November 4, 2021. The Agency acknowledged Complainant had been sent an email from the Deputy PEO (acting) on October 14, 2021, stating that the LOR had been removed and a written counseling for the same conduct had been issued. Thereafter, on October 19, 2021 Complainant emailed Deputy PEO (acting) to inform him the LOR was still in his eOPF. Deputy PEO (acting) responded the following day that he would work with the Human Resources Director to have the LOR removed. On October 26, 2021, a Senior Lead Human Resources Specialist stated she did not have access to Complainant's eOPF, but she had submitted a request to remove the LOR. She stated the request could take up to two weeks to complete. The LOR was removed on November 4, 2021, according to the Agency.

On December 2, 2021, Complainant filed the instant appeal regarding FAD-1. Complainant did not file a brief in support of his appeal. However, he submitted documents indicating the Agency was also in breach of provision 3(e) of the settlement agreement, including a November 30, 2021 letter from his former attorney stating that payment had not been received from the Agency.

Instead of submitting an appellate brief, on December 16, 2021, the Agency issued a second FAD ("FAD-2") noting that it was "in response to the documentation Complainant filed with [the Commission] as part of his appeal of the [FAD-1]." In FAD-2, the Agency concluded that it was in compliance with its obligations under provision 3(e), noting that the parties expressly acknowledged, as set forth in paragraph 3(i), that payment would be processed by DFAS and, therefore the Agency could not guarantee a payment date. Additionally, explained the Agency, the agreement provided that, if payment was not received within 60 days of the Agency's request

for payment, then, upon notice from Complainant, the Agency would contact DFAS and make reasonable attempts to facilitate and expedite payment. The Agency again acknowledged some processing delays occurred, but stated that a December 10, 2021 screenshot showed that its request for payment had been made and was pending with DFAS.

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).

As a preliminary matter, we note that the instant record does not reflect that Complainant filed an allegation of breach regarding 3(e) directly with the Agency, as is required by 29 C.F.R. § 1614.504(a). Nevertheless, the Agency has responded to the allegation, by issuing the December 16, 2021 decision and submitting it to the Commission in response to the instant appeal. While the matter may be technically premature, as Complainant has not filed a separate appeal of the December 16, 2021 FAD, we shall consider it herein in the interest of judicial economy.

Provision 3(b) – Removal of Letter of Reprimand

The record reflects that while the LOR had been removed from Complainant's paper file by October 14, 2021, it remained as part of his eOPF. However, after Complainant notified the Agency of this (informally by email to Deputy PEO (acting) on October 19, 2021, and formally with a notice of breach allegation on November 2, 2021), the LOR was removed from Complainant's eOPF on November 4, 2021. The Commission has held that, pursuant to 29 C.F.R. § 1614.504(b), an agency has 35 days from the receipt of a Complainant's allegation of noncompliance to resolve the matter or cure any breach that occurred. The Commission has held that if an Agency cures a breach during the 35-day period after filing a breach claim, it will be deemed in compliance. See Soo C. v. U.S. Postal Serv., Appeal No. 2021001817 (April 29, 2021); Eckholm v. Dep't. of Veterans Affairs, EEOC Appeal No. 0120091193 (April 29, 2009). To the extent that 3(b) of the settlement agreement was breached, we find that the Agency has cured the violation and is in compliance.

Provision 3(e) – Payment of Attorney’s Fees

The Agency does not dispute that the lump sum payment of \$5,000.00 in attorney’s fees, required by 3(e) of the settlement, had not been paid at the time of FAD-2. Rather, the Agency relies on paragraph 3(i) of the agreement in asserting that it did not guarantee a date by which payment would be made and that Complainant was obligated to notify the Agency if payment was not received within 60 days.

The record reflects the Agency had not completed submission of a payment request to DFAS when Complainant notified the Agency, via his appeal on December 2, 2021, that payment had not been received. The Agency confirmed that on December 10, 2021 the appropriate documents had been submitted to DFAS for final resolution and disbursement of funds. While, the Agency argues its actions illustrate it made “reasonable attempts to facilitate and expedite the payment” in compliance with the agreement terms, we disagree. Rather, the Agency’s actions reflect that it did not submit its *initial* request for payment from DFAS until more than three months after the agreement was executed. The record does not indicate that any subsequent efforts were made by the Agency to “contact DFAS” in accordance with 3(i), following Complainant’s December 2, 2021 assertion that payment had not been received.

A fair reading of the settlement agreement reflects that Complainant’s representative would receive payment at some point. Instead, approximately eight months later, there is no evidence that the Agency has made any contact with DFAS, following its delayed initial request, to expedite the payment nor is there any documentation reflecting that payment has been received. Consequently, we do not find the Agency is in compliance with 3(e) of the September 3, 2021 agreement.

CONCLUSION

Accordingly, the Agency’s decision finding it was in compliance with provision 3(b) is **AFFIRMED**. The Agency’s decision finding it was in compliance with provision 3(e) is **REVERSED** and the matter is **REMANDED** in accordance with this decision and the Order below.

ORDER

Within thirty (30) calendar days after the date this decision becomes final, if DFAS or the Agency has not already made payments to Complainant or his representative for attorney’s fees, the Agency shall issue a letter to Complainant notifying him that underlying complaint is reinstated from the point processing ceased. If the referenced payment was made to Complainant, or his representative, prior to the date of this decision, the complaint will not be reinstated but will be considered fully resolved through settlement.

The Agency must submit evidence of compliance as referenced below. The evidence shall include the above letter to Complainant, which must specify whether his claims have been reinstated.

If the Agency does not reinstate the claims, evidence of compliance must also include documentation that payment to Complainant or his representative for a lump sum of \$5,000.00 was made prior to the date of this decision. Any extension request to complete compliance must be accompanied by: (1) an explanation of the continued delay; and (2) emails or other dated documentation of the Agency's continued efforts to work with DFAS, including, if applicable, actions taken to escalate this matter within DFAS to expedite its resolution.

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).

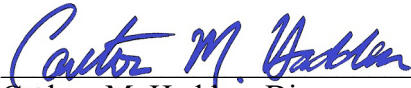
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. 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 on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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

June 13, 2022

Date