



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

[REDACTED]
Tuan P.,¹
Complainant,

v.

Gina M. Raimondo,
Secretary,
Department of Commerce
(National Oceanic & Atmospheric Administration),
Agency.

Appeal No. 2022001986

Agency Nos. 54-2016-00271 & 54-2018-00009

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from a final Agency decision (FAD), dated February 9, 2022, finding that it was not able to comply 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

During the relevant time, Complainant worked as a Senior Scientist, Leader at the Agency's National Marine Fisheries Service, Southwest Fisheries Science Center, Fisheries Resources Division, in La Jolla, California.

Believing that the Agency subjected him to unlawful discrimination, Complainant filed two EEO complaints. While the cases were pending a hearing before an EEOC Administrative Judge, the parties entered into a settlement agreement to resolve the matter. The May 5, 2021 settlement agreement provided, in pertinent part:

(3a) **SERVICE CREDIT.** Within 10 days from the Effective Date of this Agreement, Agency will initiate the administrative process to reclassify Complainant's service from June 17, 1991 to March 18, 1995, as creditable

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.

service for the purposes of calculating retirement eligibility under the Federal Employees Retirement System (FERS). The Agency will ensure the service credit is complete at least thirty (30) days in advance of Complainant's retirement date.

By email to the Agency dated January 7, 2022, Complainant, through his attorney, alleged that the Agency was in breach of the settlement agreement, and requested that the Agency specifically implement its terms. Specifically, Complainant's attorney alleged that he learned, from the U.S. Office of Special Counsel, that the Agency would not credit Complainant for the service time as required by provision 3a.

In its February 9, 2022 FAD, the Agency concluded that it did not comply with provision 3a because of its legal inability to do so. The Agency reasoned that a mutual mistake occurred during the formation of the agreement when the parties believed that Complainant's service from June 17, 1991 to March 18, 1995 could be reclassified as creditable service for the purposes of calculating eligibility under the Federal Employees Retirement System (FERS). According to the Agency, due to the mutual mistake, the entire agreement was void for lack of consideration as the Agency did not incur any legal detriment. It stated that the underlying complaints would be reinstated.

Complainant filed the instant appeal. On appeal, Complainant urges specific performance of what the Agency agreed to do in this matter. Alternatively, Complainant's attorney requests that Complainant be offered a remedy equal to or better than set forth in provision 3a.

In response, the Agency reiterates the reasoning in its decision.

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, in exchange for Complainant's withdrawal of two EEO complaints that were pending before an EEOC AJ, the Agency agreed to reclassify Complainant's service.

It now asserts that, due to Office of Personnel Management (OPM) guidance, it is legally prevented from complying with its obligation under the settlement. The Agency argues that agreement should be considered void due to mutual mistake. We are not persuaded.

Under the general principles of contract law, a party may avoid an otherwise valid contract because of a mistake. One who attacks a settlement agreement bears the burden of showing fraud or mutual mistake. See Asberry v. United States Postal Service, 692 F. 1378, 1380 (Fed Cir. 1982). The party attempting to avoid the contract must prove that: (1) the mistake related to a basic assumption upon which the contract was made; (2) the mistake had a material effect upon the agreement, and (3) the mistaken parties did not assume or legally bear the risk as to the mistaken fact. Restatement (Second) of Contracts 152, see also Skyline Corp. v. National Labor Relations Board, 613 F.2d 1328 (5th Cir. 1980).

The Agency has failed to meet its burden in establishing mutual mistake. Rather, any “mistake” was made by the Agency itself. The settlement agreement was reviewed and signed by several Agency officials who should have been aware of the relevant policies, guidances, and regulations impacting its obligations under provision 3a.

As the Agency has not complied with the requirements of 3a, we find that it is in breach of the settlement agreement. Where breach is found, the Commission has two options to remedy the situation: 1) reinstate the complaint, or 2) order specific performance. In the instant case, reinstatement of the underlying complaints is appropriate because OPM will not allow the Agency to comply.

Lastly, the instant record reflects that this is not the first time Complainant has attempted to obtain compliance from the Agency. On June 14, 2021, Complainant’s attorney alleged breach of provision 3a. In a July 20, 2021 decision, the Agency acknowledged that it was in breach citing “unintentional oversight due to changes in personnel. . . .” Further, it reasoned that “inasmuch as it is now taking steps to reclassify Complainant’s service” it had “substantially complied.” Yet, approximately six months later, Complainant was compelled to again claim breach of provision 3a, resulting in the decision at issue here. In light of our finding of breach, we find that Complainant is entitled to attorney’s fees.

CONCLUSION

The Agency’s decision is hereby REVERSED and the case is REMANDED to the Agency for further processing, from the point processing ceased, in accordance with this decision and the Order below.

ORDER

To the extent it has not already done so, the Agency shall submit to the Hearings Unit of the EEOC Los Angeles District Office the request for a hearing on the two underlying EEO complaints within fifteen (15) calendar days of the date this decision is issued. Further, the Agency is directed to submit a copy of the relevant complaint files to the EEOC Hearings Unit within fifteen (15) calendar days of the date this decision is issued. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit. Thereafter, the EEOC Administrative Judge shall issue a decision on the complaints in accordance with 29 C.F.R. § 1614.109 and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

A copy of the Agency's letter of acknowledgment to Complainant and a copy of the notice that transmits the investigative file and notice of rights 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)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

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](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

July 5, 2022
Date