



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

[REDACTED]
Augustine P.,¹
Complainant,

v.

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

Appeal No. 2022002667

Agency No. AREUWIES16NOV04515

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from a final decision (FAD) by the Agency dated April 20, 2022, 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.

At the time of events giving rise to this complaint, Complainant worked as an Information Technology Specialist at the Agency's Signal Command Regional Cyber Center - Europe in Wiesbaden, Germany. Believing that the Agency subjected him to unlawful discrimination based on race and in reprisal for prior protected activity under Title VII of the Civil Rights Act of 1964, as amended, Complainant contacted an Agency EEO Counselor to initiate the EEO complaint process.

On August 29, 2019, Complainant and the Agency entered into a settlement agreement to resolve the matter. The settlement agreement provided, in pertinent part, that:

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.

Term 4:

- b. To provide back pay with interest and benefits, including any applicable step increases, from August 1, 2016, to the present for the Complainant's accretion of duties. Initiation will occur within thirty (30) days of the effective date of this Agreement.
- c. To restore three hundred (300) hours of sick leave to the Complainant. Initiation will occur within thirty (30) days of the effective date of this Agreement.
- e. To recommend and endorse to the approval authority approval of the Complainant's request that his overseas tour, ending December 1, 2019, be extended one (1) year until December 1, 2020. The Agency will confirm in writing when this recommendation and endorsement is submitted.
- h. The Agency will confirm in writing when payment has been requested under subsection 4(f)² and 4(g)³ above. The Parties acknowledge that the payment action identified in subsections 4(f) and 4(g) above is made by Department of Finance and Administration (DFAS) and is not under the Agency's control and that a delay by DFAS will not amount to a breach of this Agreement. Complainant understands that the Agency is not responsible for any DFAS delays. The Agency will make reasonable efforts and inquiries to DFAS upon Complainant's request.

By letter to the Agency dated January 26, 2022, Complainant alleged that the Agency was in breach of the settlement agreement and requested that the Agency specifically implement its terms. Regarding term 4(b), Complainant alleged that the Agency failed to complete its payroll obligations to completely process the back pay with DFAS. He noted that his last contact regarding the matter was with the Agency's Human Resources (HR) Department on December 28, 2021. Complainant asserted that the delay impacted his tax filings, noting that he had yet to receive the corrected income tax forms for years 2016 through 2020. Regarding term 4(c), Complainant claimed that the Agency failed to provide the final DFAS documents for the sick leave adjustments. Regarding term 4(e), Complainant alleged that the Agency did not follow guidance and regulation on the one-year extension that was agreed upon. Specifically, that attempts were made to force him to violate the settlement agreement by signing up for the Priority Placement Program (PPP). Complainant noted that the Agency also threatened to terminate his employment, and then terminated his employment in July 2021. Complainant noted that this has led to further EEO complaints and a wrongful termination appeal with the Merit Systems Protection Board (MSPB).

In its April 20, 2022, determination letter, the Agency found, without specificity, that Complainant knew of the alleged breach at least by the end of 2019.

² Term 4(f) was not contested and concerned payment of \$14,000.00 to Complainant's attorney.

³ Term 4(g) was not contested and concerned payment of \$86,000.00 to Complainant.

However, the Agency noted that Complainant did not allege breach of the agreement until January 26, 2022 (more than two years later). The Agency asserted that the breach claim should therefore be dismissed as untimely pursuant to 29 C.F.R. § 1614.504(a). Nevertheless, the Agency also issued a decision on the merits. The Agency concluded that it was in substantial compliance with the August 20, 2019, settlement agreement. The Agency noted that each of the terms were of initiating action, and that the Agency had timely initiated each term. It stated that the paying organization, DFAS, was not a party to the agreement, as noted in term 4(h) and that the Agency could not be held responsible for any delays on part of DFAS.

Regarding term 4(b), the Agency determined that the delay in back pay calculations was solely due to Complainant's failure to comply with the follow up questions by DFAS. Specifically, in a questionnaire to determine back pay, Complainant indicated that he was unable to work during the back pay period (question 9). Based on this response, DFAS would not continue processing the form without an additional response from Complainant. The Agency asserted that despite following up with Complainant, he never responded to the question. The Agency also denied responsibility for any tax statements as this was never a negotiated term. However, it asserted that it contacted DFAS to assist Complainant obtain the tax records for 2016 through 2020. DFAS responded and noted that funds are taxed the year they are paid out and therefore, there would be no corrected W2 forms to date. Regarding term 4(c), the Agency stated that it was obligated to restore three hundred (300) hours of sick leave and that it took action to do so on November 8, 2019. The Agency asserted that any delay to produce necessary documentation relating to the sick leave was DFAS's responsibility, not the Agency. Regarding term 4(e), the Agency noted that it went beyond the one-year extension and extended it to July 1, 2021 and was therefore not in breach.

Lastly, the Agency asserted that discussion of Complainant's other EEO complaints, the PPP, termination, and MSPB appeal were unrelated to the settlement agreement, and therefore would not address those matters.

CONTENTIONS ON APPEAL

On appeal, Complainant asserts that his breach claim is timely. Complainant asserts that every time he contacted the Agency, he believed they were working on his settlement agreement. After a long period of time, Complainant began to suspect that the Agency was not working towards compliance.

Regarding term 4(b), Complainant acknowledges in an email, dated March 22, 2022, to the Agency that adjustments regarding his backpay were made and that he was requesting the correct income tax forms from the transaction. Appeal File (AF) at 113. Additionally, he asserts he is entitled to a payment of a tax offset for receiving the lump back pay. Regarding term 4(c), Complainant asserts that he was not provided proof of compliance. Complainant requests that the Agency provide documentation to him so that he can further coordinate with DFAS to ensure he obtains the 300 hours of sick leave.

Regarding term 4(e), Complainant clarifies that the Agency did not breach term 4(e). Complainant also acknowledges that the Agency recommended and endorsed his request to extend the tour. Complainant clarifies that his breach allegation concerned the Agency's attempt to force Complainant to breach term 4(e) by directing him to sign up on a PPP *prior* to the end of the extension. Complainant discussed at length his concerns surrounding the PPP and how the Agency proceeded with the extension request. Complainant also discussed at length his allegation of wrongful termination and his appeal with the MSPB.

In response, the Agency asserts that it timely complied with all provisions of the settlement agreement. The Agency reiterates that any delay in receiving funds were due to Complainant's own lack of response. The Agency attached several documents demonstrating its compliance with the settlement agreement.

ANALYSIS

As a preliminary matter, we note that on appeal Complainant addressed several matters that were not part of his settlement agreement, such as his other EEO complaints, the PPP, termination, and his MSPB appeal. These matters are unrelated to the settlement agreement and will not be addressed.

Timeliness

As a threshold matter, the Commission determines that Complainant's breach claim was timely raised. In the Agency's final April 20, 2022, determination, the Agency stated that Complainant knew of the breach at least by the end of 2019. However, the Agency did not provide documentation to support this determination. We note that on appeal, Complainant acknowledged that the first time he became aware of a *potential* breach was in January 2020, concerning term 4(e). When the matter was seemingly resolved, he did not believe there was breach. Complainant asserted that he began to suspect breach when time passed, and the terms were seemingly still not processed. Based on the record, the Commission uses our discretion to address the merits of Complainant's breach claim.

Settlement Agreement

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 Vet. Aff., 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).

Regarding term 4(b), on March 22, 2022, Complainant acknowledged in an email to the Agency that adjustments regarding his backpay were made and that he was requesting the correct income tax forms from the transaction. Appeal File (AF) at 113. Since Complainant now acknowledges that the terms of 4(b) have been met, we find no breach. Regarding Complainant's appellate assertions that he is entitled to a tax offset for term 4(b), we note that the terms of the settlement agreement are those that are found within the four corners of the document itself. The settlement agreement had no written portion regarding any potential tax offsets. Therefore, we conclude that the Agency did not breach term 4(b) when it did not provide Complainant any tax off sets.

Regarding term 4(c), Complainant alleged that he was not provided with proof of compliance. On appeal, the Agency stated that it had fully complied when it timely *initiated* the restoration of 300 sick leave hours on November 8, 2019. The Agency provided documentation in Exhibit 3 of its appellate brief that purportedly demonstrated compliance. A review of the attached Exhibit 3 fails to clearly demonstrate that the 300 hours were restored to Complainant. Agency Brief (AB) at 13. Specifically, Exhibit 3 contains an internal Agency email dated August 20, 2019, that requests certain information be provided so that processing of the settlement agreement can begin. There is no discussion of restoration of sick leave hours to Complainant. A review of other attached documents also makes no mention of the restoration of hours. Additionally, an attached affidavit by the Supervisory Human Resources Specialist only noted that the Agency processed all required actions but failed to reference the restoration of leave. AB at 15. Moreover, initiating the process to restore 300 hours of leave is not the same as actual restoration. Lastly, we note Complainant's inclusion of internal Agency email exchanges dated between March 16 to 18, 2022, questioning whether the 300 hours of sick leave were processed. AF at 53-9. Accordingly, we find that the Agency has not shown that it has complied with term 4(c).

Regarding term 4(e), Complainant clarified on appeal that the Agency did not breach term 4(e). Complainant acknowledged that the Agency recommended and endorsed his request to extend the tour. Complainant's concerns were his belief that the Agency attempted to get Complainant to breach the term himself. Based on a review of the record, we do not find a breach regarding term 4(e).

CONCLUSION

Accordingly, we AFFIRM the Agency's determination that it has complied with terms 4(b) and 4(e) of the settlement agreement. However, we REVERSE the Agency's determination regarding term 4(c) and REMAND the matter to the Agency for further processing in accordance with the ORDER below.

ORDER

The Agency shall within **sixty (60) calendar days** of the date this decision is issued provide the Commission with evidence that it has complied with term 4(c) of the settlement agreement.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

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>. 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).

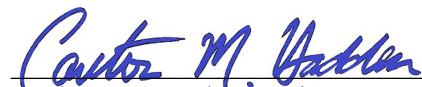
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

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

December 12, 2022
Date