



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

[REDACTED]
Catherine P.,¹
Complainant,

v.

Merrick B. Garland,
Attorney General,
Department of Justice
(Executive Office of the U.S. Attorneys),
Agency.

Request No. 2021003986

Appeal No. 2021001118

Hearing Nos. 551-2014-00068X
550-2018-00077X

Agency Nos. USA-2012-00560
USA-2013-00204
USA-2017-00410
USA-2019-01029

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. 2021001118 (June 3, 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 reasons that follow, the Commission GRANTS the Agency's request.

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Information Technology Specialist at the United States Attorney's Office for the District of Oregon in Portland, Oregon. Starting on March 7, 2012, Complainant filed EEO complaints alleging that the Agency discriminated against her based on her age, sex, and in reprisal for protected EEO activity.

On August 6, 2014, the Agency removed Complainant. She received a payout for her accrued annual leave of 200.75 hours. Complainant appealed her removal to the Merit Systems Protection Board (MSPB), which reversed the removal action. In its initial decision, the MSPB found that the Agency discriminated against Complainant based on her age and sex, but not in retaliation for her protected EEO activity. Both parties filed petitions for review of the MSPB's initial decision.² The Agency provided interim relief of reinstatement, effective December 23, 2016.

On November 8, 2019, the parties entered into a settlement agreement to resolve Complainant's pending EEO and MSPB matters for a total settlement payment of \$910,000, with \$325,000 for attorney's fees and costs. The settlement agreement provided, in pertinent part, that:

1.b. The Parties agree that the remainder sum of \$585,000 (five hundred and eighty-five thousand dollars) shall be used by the Agency to implement a retroactive promotion to GS-13, Step 8, per [the paragraph below], with the remaining amount ("final disbursement") to be paid to [Complainant]...All of the amounts to be paid in connection with the retroactive promotion will be allocated as back pay and back benefits, and will include appropriate deductions and withholdings for, among other items, FICA-OASDI (Social Security), FERS (retirement), and FEHB (health insurance) in accordance with the U.S. Office of Personnel Management ("OPM") regulations...

1.b.1. The Agency agrees to retroactively promote [Complainant] pursuant to the following estimated scheduled: GS-13, Step 6, effective pay period 15 of 2014; GS-13, Step 7 effective pay period 15 of 2015; and GS-13, Step 8 effective pay period 15 of 2016.

Attached to the settlement agreement, the Agency provided a spreadsheet with the breakdown of the estimated payments to Complainant. As consideration, Complainant agreed to retire. After Complainant's retirement, she received a lump-sum payment for the annual leave balance she had accrued since her reinstatement of 376 hours.

On October 2, 2020, Complainant alleged that the Agency breached the settlement agreement by not restoring 522 hours of annual leave, which she would have earned between the period of her termination in August 2014 and reinstatement in December 2016. Complainant asserted that the

² On April 5, 2022, the MSPB issued a final order dismissing the parties' petitions for review based on the November 8, 2019 settlement agreement.

Agency breached the term related to the application of OPM regulations to the calculation of her back pay benefits, and that 5 U.S.C. § 5596 and 5 C.F.R. part 550, subpart H provide for the restoration of annual leave.

The Agency determined that there was no breach of the settlement agreement because there was no term requiring a restoration of 522 hours of annual leave. The Agency noted that, while OPM regulation 5 C.F.R. Part 550, Subpart H addressed calculation of back pay, it only applied when there had been a determination by an appropriate authority that an employee had been subjected to an unjustified personnel action. In this case, the back pay was pursuant to a settlement agreement, so the OPM regulation did not apply. Complainant appealed the Agency's decision.

On June 3, 2021, the Commission issued an appellate decision finding a breach of the settlement agreement. While it was unambiguous that the settlement agreement did not provide for the restoration of 522 hours of annual leave, the appellate decision disagreed with the Agency's reading of the terms. Specifically, the terms of the settlement agreement explicitly indicated that the back pay benefits would be calculated in accordance with OPM regulations (5 C.F.R. § 550.805(e)(2)(iv)), which includes annual leave. Catherine P. v. Dep't of Justice, EEOC Appeal No. 2021001118 (Jun. 3, 2021).

Citing to Eaton v. Airforce, 55 M.S.P.R. 12, 14 (1992), the appellate decision found that, when an unjustified or unwarranted separation is cancelled and the employee is restored to duty, the lump-sum payment for annual leave is considered an erroneous payment and must be set off against the employee's back pay award and the annual leave reccredited to the employee. As such, the Agency was ordered to make a lump-sum payment to Complainant, with interest, for the annual leave she would have earned had she continued to be employed by the Agency after her termination in August 2014, through her reinstatement in December 2016, with a deduction of the lump-sum payment made to Complainant for her August 2014 termination of 200.75 hours of annual leave.

The Agency filed the instant request for reconsideration. The Agency asserts that the appellate decision contains clearly erroneous interpretations of the Back Pay Act and its implementing regulations. The Agency reiterates that the cited regulations only apply when an "appropriate authority" finds an unjustified or unwarranted personnel action, with an "appropriate authority" including OPM, the MSPB, and the EEOC. While the appellate decision relied upon Eaton, that decision involved the MSPB's cancellation of an employee's removal and ordered reinstatement, while here, there was no final adjudication by an appropriate authority of an unjustified or unwarranted personnel action. Further, the parties negotiated a global settlement, in which the Agency specifically denied any allegations of wrongdoing. As such, the agency contends Complainant was never entitled to full relief under the Back Pay Act, Title VII, or any other law.

The Agency also argues that the appellate decision reflects a clearly erroneous interpretation of material provisions of the settlement agreement. The Agency asserts that the settlement agreement makes no reference to the Back Pay Act, 5 U.S.C. § 5596, or back pay regulations;

further, that the reference to “OPM regulations” is directly related to specific benefits, such as FICA-OASDI, FERS, and FEHB. The Agency urges that there was no intent for the parties to incorporate the specific regulation 5 C.F.R. § 550.805(e)(2)(iv). The Agency also notes that the settlement agreement is totally devoid of a reference to the restoration of 522 hours of annual leave and posits that the parties’ clear intent must control. The Agency contends that the effect of the appellate decision was a unilateral modification to the terms of the agreement that was contrary to the parties’ intent.

Further, the Agency avers that the appellate decision will have a substantial impact on its policies, practices, and operations because it will substantially alter pending and future settlements due to a presumption that settlements referencing back pay will include the full panoply of benefits set forth in the Back Pay Act and its regulations. This will eliminate the Agency’s ability to circumscribe back pay to specific terms in a settlement agreement and substantially diminish its ability to creatively and effectively resolve disputes with employees. The Agency requests reversal or modification of the appellate decision.

Complainant opposes the Agency’s request for reconsideration, asserting that the appellate decision did not involve a clearly erroneous interpretation of material fact or law, nor will it have any impact on the Agency’s policies, practices, or operations. Complainant requests that the Commission affirm the appellate decision.

ANALYSIS

After reconsidering the previous 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 Agency’s request. We find a clearly erroneous interpretation of material fact or law regarding the terms of the settlement agreement.

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 (Dec. 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 (Dec. 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 its request for reconsideration, the Agency argues the appellate decision reflects a clearly erroneous interpretation of material provisions of the settlement agreement related to Complainant’s back pay. While the settlement agreement includes a reference to “OPM

regulations” for the calculation of back pay, it does not specify which OPM regulation. We find that the application of 5 C.F.R. § 550.805(e)(2)(iv) to the settlement agreement is not contained within the four corners of the settlement agreement and is an unexpressed intention. This specific regulation stipulates that, when computing a net amount of back pay, an erroneous payment of a lump-sum for annual leave that was received as a result of an unjustified or unwarranted personnel action must be recovered.³ While the MSPB found discrimination in its initial decision, this finding was not contained in the Final Order, which dismissed the parties’ petitions for review as settled. As such, Complainant was provided back pay pursuant to the global settlement agreement to resolve her pending complaints, and not due to the MSPB’s initial finding.

Further, term 1.b.2 of the settlement agreement explicitly addressed the issue of back pay and interest:

Pursuant to the Agency’s calculations, back pay is estimated to be \$289,173 and interest on the back pay is estimated to be \$52,602 for an estimated total of \$341,775. [Complainant] understands and acknowledges that the back pay and interest figures are a good faith estimate made by the Agency. She also understands and acknowledges that the actual amount that is ultimately deducted and withheld may differ from the good faith estimate.

The Commission’s decision on appeal was premised upon the settlement agreement’s reference to “OPM regulations” for the calculation of back pay. The inclusion of the terms “OPM regulations” and “back pay,” together, seemingly invoked the application of 5 C.F.R. § 550.805(e)(2)(iv). However, in reviewing the record, it is evident that the settlement agreement only intended to restore as much annual leave as would be necessary for Complainant to retain her annual leave accrued since reinstatement, while using restored annual leave only if the restored sick leave was insufficient to cover the parties’ intention for Complainant to remain out of the office until her retirement.

The Agency attached a spreadsheet to the settlement agreement containing detailed calculations of the back pay for each relevant pay period and showing that there was no back pay for any leave. The language and figures in the settlement agreement specify the parties’ agreement regarding back pay calculations, and Complainant’s contention that her back pay should have incorporated additional payments for annual leave, pursuant to 5 C.F.R. § 550.805(e)(2)(iv), was not supported by the explicit terms of the document.

There is no reference to restoration of 522 hours of annual leave in the settlement agreement. The Commission has found that an interpretation of a term should have been reduced to writing as part of the settlement agreement, and in the absence of a writing, it cannot be enforced. See Jenkins-Nye v. Gen. Servs. Admin., EEOC Appeal No. 019851903 (Mar. 4, 1987).

³ In her initial appeal, Complainant indicated that the Agency had not attempted to recover payment for the 200.75 hours of annual leave she received in August 2014. Complainant Appeal Brief at 7.

The settlement agreement references restoration of 256 hours of sick leave in paragraph 1c. The settlement agreement also references the possible restoration of annual leave in paragraph 3b, as well as sick leave “in order to maintain her in a paid leave status without any negative leave balance until the effective date of her retirement.” Settlement Agreement, pp. 3-4. Accordingly, we find that the appellate decision clearly erred when it concluded the settlement agreement required the restoration of 522 hours of annual leave.

Although not necessary for the resolution of this appeal, on occasion, parol or extrinsic evidence beyond the settlement agreement can be considered where the terms of the settlement are ambiguous, or for equitable reasons. See Herrington, *supra*. While it is not necessary to consider evidence outside of the settlement agreement, we acknowledge that the evidence in the record supports the parties’ intent to specifically exclude the 522 hours of annual leave from the settlement agreement.

Neither Complainant nor her attorney have identified any provision in the executed agreement which obligated the agency to restore 522 hours of annual leave. As such, we find that the parties’ clear intent to exclude the 522 hours of annual leave was expressed with its omission in the final executed settlement agreement. We find that Complainant has not established a breach of the settlement agreement related to the 522 hours of annual leave.

After reconsidering the previous decision and the entire record, the Commission finds that the agency’s request meets the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to GRANT the request. The decision of the Commission in Appeal No. 2021001118 is REVERSED. There is no further right of administrative appeal on the decision of the Commission on a Request to Reconsider.

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/Raymond Windmiller

Raymond Windmiller
Executive Officer
Executive Secretariat

February 26, 2024

Date