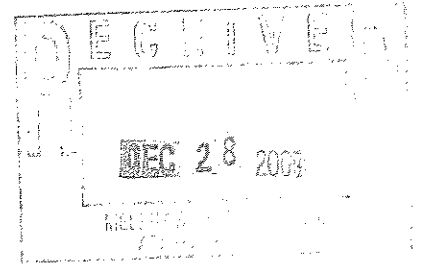




U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013



██████████
Complainant,

v.

Pete Geren,
Secretary,
Department of the Army,
Agency.

Appeal No. 0120092905

Agency No. ARBELVOIR08SEP03729

DECISION

Complainant filed a timely appeal with this Commission from a final agency decision dated June 19, 2009, finding that it was in compliance with the terms of a March 11, 2009 settlement agreement into which the parties entered. See 29 C.F.R. §§ 1614.402; 1614.405; and 1614.504(b).

Background

Complainant (African American) was employed by the agency from October 1989 until his removal in April 2009. In total, he had combined military and federal service of approximately 26 years, and held the position of Information Technology Specialist, GS-14 in the Office of Public and Congressional Affairs, at the time of his removal. In October 2007, complainant filed an EEO complaint alleging race and gender discrimination against his first-line supervisor concerning a low performance appraisal. This complaint was settled through mediation, with the agency agreeing to increase the performance appraisal at issue. However, in October 2008, complainant filed a second EEO complaint asserting the same first-line supervisor engaged in ongoing harassment in retaliation for the first complaint, as well as because of his race and gender. The parties again entered into settlement negotiations concerning this second complaint, which eventually resulted in the March 11, 2009 settlement agreement at issue in the present appeal. The record establishes that during the negotiations, the agency informed complainant that the first-line supervisor was in the process of preparing a notice of proposed removal, although one was not issued prior to the execution of the agreement.

The settlement agreement provided, in pertinent part, that:

3. The Agency agrees:

- a. Not to proceed with the proposal to remove the Complainant from the federal service that is currently being prepared by management and would be considered as a 3rd offense.
- b. The Agency agrees to remove the prior two suspensions from the Complainant's OPF and from all official records except for the purpose of enforcing the terms of this agreement as referenced below. The time suspended will be changed to Leave Without Pay.
- c. To restore 128 hours of annual leave. . . .
- e. Change the Complainant's performance appraisal for the period of 1 July 2007 through 30 June 2008 from a 4 block to 3 block.
- f. Allow the Complainant to participate in the [agency] Shared Neutrals program within the dictates of mission requirements as determined by Complainant's supervisor. . . .

4. The Complainant agrees . . .

- c. That this agreement will be maintained in his OPF for a period of three (3) years or until he leaves the employment of the Agency whichever occurs first.
- d. If [complainant] engages in misconduct of any nature within the life of this agreement, as defined in paragraph 4C above, that the prior two suspensions will be reinstated for purposes of supporting a charge of a 3rd offense which will automatically result in the Complainant's removal from the federal service without the right to appeal. If the 1st line supervisor believes that Complainant has engaged in misconduct and therefore has breached this agreement, he/she will so advise the Complainant in writing. Complainant will be given the opportunity to present an oral and or written reply to the 2nd line supervisor whose decision will be final and binding. Complainant understands that he is waiving the right to appeal the decision of the 2nd line supervisor even in the case of the removal action.

Within weeks of the execution of the settlement agreement, complainant's first-line supervisor served him with written notice that he believed complainant had engaged in misconduct on five separate occasions in violation of provision 4(d) of the agreement, which would justify his termination. Complainant filed a written response denying the charges. On April 28, 2009, the agency removed complainant from employment for purportedly engaging in misconduct on two

occasions¹ in violation of the agreement – for departing about 55 minutes early without prior permission (AWOL) on March 13, 2009, and for arriving to work 14 minutes late on March 17, 2009.

By letter to the agency dated May 21, 2009, complainant alleged that the agency breached the settlement agreement, and requested that the agency specifically implement its terms and reinstate complainant. Specifically, complainant alleged that the agency: (1) on April 28, 2009, removed him from his position for reasons that did not constitute misconduct under the agreement, (2) continued with a proposal to remove complainant from his position, (3) failed to remove two prior suspensions from complainant's official personnel file, (4) failed to restore 128 hours of annual leave to complainant, (5) failed to change complainant's performance appraisal from a 4 block to a 3 block for the July 2007 to June 2008 rating period, and (6) did not allow complainant to participate in the agency Shared Neutrals program.

In its June 19 final decision, the agency concluded that it was in compliance with the March 11 agreement. Specifically, the agency stated that it removed complainant from Federal service, on April 28, 2009, for misconduct of absence without office leave (AWOL) and tardiness; it did not remove complainant's two prior suspensions from his official personnel file (OPF) because he engaged in misconduct less than two days after signing the instant settlement agreement, so it did not have time to do so; complainant will receive the 128 hours of restored leave once it is processed by an organization over which the agency has no control – the Defense Finance and Accounting Service; the agency amended the 2007-2008 performance rating from a "4" to a "3;" and complainant did not participate in the Shared Neutrals Program because of his misconduct within two days of the settlement agreement. The agency stated that it acted within the confines of the agreement.

The instant appeal from complainant followed the final decision. On appeal, complainant stated that the agency failed to respond to his breach allegation or to accept a new EEO complaint regarding his termination, so he filed a separate appeal on each matter.² Further, complainant stated that the agency acted in bad faith and inappropriately identified the two attendance matters as misconduct.

Analysis and Findings

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

¹ The deciding official on the removal was complainant's second-line supervisor, who determined only two of the five charges of misconduct lodged by the first-line supervisor were supported.

² We note that, since filing the instant appeal, complainant informed the Commission that the agency accepted an EEO complaint regarding his termination so that matter is now moot.

contract between the employee and the agency, to which ordinary rules of contract construction apply. See *Herrington v. Department of Defense*, 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. Department 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. United States Postal Service*, 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). However, if the terms of the agreement are ambiguous, the Commission may go beyond the language and look at the intent of the parties. *Wong v. United States Postal Service*, EEOC Request No. 05931097 (April 29, 1994).

Complainant argues that the agency did not carry out its obligations under the settlement agreement in good faith, resulting in his termination being proposed within weeks of the agreement's execution. The Commission notes that the agreement required the agency, among other things, to not proceed with its planned proposed removal, to remove two prior suspensions from complainant's record, and to only remove complainant for future "misconduct," although this term was not defined in the agreement. After thorough review of the record and consideration of the arguments submitted by both parties on appeal, we are persuaded that there is evidence of bad faith in the agency's implementation of the March 11, 2009 settlement agreement. The extraordinary close proximity between the execution of the agreement (in which management promised not to proceed with its planned removal action) and the notice by agency management that it was proceeding with a removal action, the failure to provide a definition of the critical term "misconduct" in the agreement, the fact that three of the five "misconduct" charges lodged by the first-line supervisor were not upheld by upper-level management, and the relatively minor nature of the alleged "misconduct" used to end a 26-year government career, all point to the fact that it is more likely than not that the agency fully intended to continue with its planned pre-agreement removal action and only signed the agreement to dispose of complainant's pending EEO complaint before he was removed. In addition, the agency took the opportunity to convince complainant, who was not represented by counsel during the negotiations, to waive his right to appeal a subsequent removal. Under the facts of this case, we conclude that the record supports a finding of bad faith by the agency in the implementation of the agreement.

The Commission has previously found that bad faith in implementing a settlement agreement constitutes a breach. *Todd v. Social Security Administration*, EEOC Request No. 05950169 (June 12, 1997); *Dupuich v. Department of the Army*, EEOC Appeal No. 0120073901 (November 2, 2007). Applying this precedent, that Commission concludes that a bad faith

breach has occurred in the instant case. As a result, we are voiding the settlement agreement³ and are remanding the matter back to the agency to resume processing of complainant's underlying EEO complaint in accordance with the following Order. This complaint shall be consolidated with the EEO complaint the agency is currently processing concerning the removal action itself. *See, supra*, note 2.

ORDER

The agency is ordered to resume processing the remanded claims in the EEO complaint that was settled on March 11, 2009 in accordance with 29 C.F.R. § 1614.108 *et seq.* The agency shall acknowledge to the complainant that it has received the remanded claims **within thirty (30) calendar days** of the date this decision becomes final. The remanded complaint shall be consolidated with the complaint currently pending before the agency on the April 28, 2009 removal action. The agency shall issue to complainant a copy of the investigative file and also shall notify complainant of the appropriate rights **within one hundred fifty (150) calendar days** of the date this decision becomes final, unless the matter is otherwise resolved prior to that time. If the complainant requests a final decision without a hearing, the agency shall issue a final decision **within sixty (60) days** of receipt of complainant's request.

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.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0408)

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 submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. 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.

³ It should be noted that the settlement agreement is voided for all purposes, including serving as a "last chance" agreement.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M1208)

The Commission may, in its discretion, reconsider the decision in this case if the complainant or the agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. *See* 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. *See* 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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 (R0408)

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 (Z1008)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. *See* Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above (“Right to File A Civil Action”).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

DEC 24 2009

Date