



Settlement Agreements

**U.S. Office of Personnel Management
Employee and Labor Relations
Roundtable**

Peter Broida
President of Dewey Publications, Inc.

Sarah S. Tuck
U.S. Department of Agriculture

When is a Good Time to Discuss Settlement?

- Under 5 CFR § 1201.22, usually 30 days to appeal. Agency/employee can now extend 30 more days (in writing) to attempt to resolve their dispute
- After appeal is filed with MSPB
- In EEOC cases, during counseling and throughout processing. 29 C.F.R. § 1614.504(a)
- Arguably, can be done at any time.

Swink v. U.S. Postal Service, 111 M.S.P.R. 620, ¶ 9 (2009); *Mahoney v. Dept. of Labor*, 56 M.S.P.R. 69 (1992); *Green and Swerda v. GSA*, 220 F.3d 1313 (Fed. Cir. 2000); *Middleton v. Department of Defense*, 185 F.3d 1374, 1378 (Fed. Cir. 1999)

When is a Good Time to Discuss Settlement?

- Good cause must exist in Board cases, however.

Fassett v. U.S. Postal Serv., 85 M.S.P.R. 677, 679 (2000); *Perry v. U.S. Postal Serv.*, 78 M.S.P.R. 272, 279 (1997); *Evans v. Merit Systems Protection Board*, 206 Fed. Appx. 587 (Fed. Cir. 2009 , unpublished)

Basic Contract Law and the MSPB

– The MSPB Basics of Contract law



- Consideration
- Four Corners
- Say What you Mean and Mean What you Say
- Meeting of the Minds
- Keep it Legal!

Greco v. DOA, 852 F.2d 558 (Fed. Cir. 1988)

Good Faith Required

- ***Restatement (Second) of Contracts, § 205 (1979)***
- There is an implied covenant of good faith in every settlement
- The agency is promising the employee it is dealing with the employee honestly
- The party acting in bad faith has breached the agreement and the terms could be unenforceable

Stewart v. U.S. Postal Service., 926 F. 2d 1146, 149 (Fed. Cir. 1991); 105 M.S.P.R. 466 (2007). *Willis v. Dept. of Defense*, 105 M.S.P.R. 466 (2007); *Hernandez v. DOD*, 2010 MSPB 227(2010)

Help by the MSPB as to Wisdom/Terms in Agreements



- **Kellihan v. Dept. of the Navy, 72 M.S.P.R. 47, 50 (1996)**
- **Farrero v. NASA, 83 M.S.P.R. 487 (1996) aff'd Fed. Cir. 2000**
- **Galatis v. U.S. Postal Service, 109 M.S.P.R. 651, ¶ 10 (2008)**

Entry into the Record – the Judge’s Duties

- Settlement exists
- Understood Terms
- Intent for MSPB to Enforce
- Facially lawful
- Freely Entered
- **Within Board’s Jurisdiction**

Crumpler v. DOD, 114 M.S.P.R. 115 (May 17, 2010),



Preparation for Settlement - What to Avoid and Include

- **Unlawful Terms** *Stipp v. Dept of Army*, 61 M.S.P.R. 415 (1994); *Mansfield v. National Mediation Board*, 103 M.S.P.R. 237 (2006)
- **Terms of Art** *Pope v. FCC*, 311 F.3d 1379 (Fed. Cir. 2002); *Raymond v. Department of the Navy*, 2011 MSPB 15 (February 8, 2011)
- **Ambiguous Terms** *Flores v. USPS*, M.S.P.R. 189, (2010); *Joan M. Young v. USPS*, 113 M.S.P.R. 609 (May 21, 2010)
- **Conflicting Terms** *Saunders v. USPS*, 75 M.S.P.R. 225 (1997)

Avoiding Ambiguity

- Use plain language
- Make sure words are not subject to multiple interpretations
- Define any term that could mean more than one thing.
Gose v. U.S. Postal Service, 451 F.3d 831 (2006); Young v. USPS, 2010 MSPB 92 (May 21, 2010)
- Avoid Terms of Art

Preparation for Settlement - What to Avoid and Include

- **Broad, Poorly Defined Terms**
- **“Respect” and other Meaningless terms**
- **Waiving Future EEO Rights.**

Kannikal v. Justice, 01A24572 (2003)

Preparation for Settlement - What to Avoid and Include

- **Oral (dis)Agreements!!!!!!**



Oral (dis)Agreements

- *Schwartz v. Department of Education*
113 M.S.P.R. 601 (2010)
- *Futrell-Rawls v. Department of Veterans Affairs*, 2010 MSPB 238 (12/8/10)
- *Tiburzi v. Department of Justice*, 269 F.3d 1346, 1351-54 (Fed. Cir. 2001); *Martin v. Department of the Air Force*, 91 M.S.P.R. 36 (2002)

Preparation for Settlement - What to Avoid and Include

- Clear and broad waivers

Lawrence v. Office of Personnel Management, 108 M.S.P.R. 325, ¶ 6, *aff'd*, 318 F. App'x 895 (Fed. Cir. 2008)

- Clear Language

- ADEA Language As Appropriate

Schwartz v. Department of Education, 113 M.S.P.R. 601 (2010)

Parole (a.k.a. “extrinsic” Evidence)

- Blend of law and facts

Gilbert v. Dept. of Justice, 334 F3d 1065, 1071 (Fed. Cir. 2003)

- Parole evidence – only if ambiguous

DeLuna v. Department of the Navy 526 M.S.P.R., 530 (1993); *Young v. USPS*, 113 M.S.P.R. 609 (May 21, 2010)



Settlement Agreements



Persistent Trouble Areas

- Confidentiality Agreements
- Clean Records & References
- Retirement Issues
- Last Chance Agreements

Confidentiality Terms

Pros:

- *Theresa Papademetriou v. Library of Congress*- \$250,000.00.



Cons:

- *Diehl v. USPS*, 82 M.S.P.R. 620 (1999)
- *King- Roberts v. USPS*, 79 M.S.P.R. 464 (1998)
- *Sena v. DOD*, 66 M.S.P.R. 458 (1995)
- *Thomas v DHUD*, 124 F3d. 1439 (Fed. Cir. 1995)

Clean Records & References

- *Principe v. U.S. Postal Service*, 100 M.S.P.R. 66, ¶ 6 (2005) (citing *Conant v. Office of Personnel Management*, 255 F.3d 1371, 1374, 1376 (Fed. Cir. 2001))
- *Pagan v. Department of Veterans Affairs*, 170 F.3d 1368, 1371-72 (Fed. Cir. 1999)
- *Poett v. Dept. of Agriculture*, 98 M.S.P.R. 628 (2005).
- *Vance v. Dept. of Interior*, 114 M.S.P.R. 679 (2010)

Tips on Clean Records/References

- Choose your words carefully. (e.g., “remove” or “replace” v. “rescind” or “cancel.”) *Knight v. Dept of the Treasury*, 113 M.S.P.R. 548 (2010); *Allen v. Dept. of Veterans Affairs*, 2009 MSPB 238 (12/2009)
- Add waivers as to any other documents. *Knight*
- One point of contact for references –appellant responsibility. *Conant v. Office of Personnel Management*, 255 F.3d 1371, 1374, 1376 (Fed. Cir. 2001)
- Give a reference letter and nothing else
- Have time limits on references and agreed to specific language

Retirement Issues

- *<http://www.opm.gov/settlementguidelines>*
- *Parker v. OPM*, 93 M.S.P.R. 529, ¶ 18 (2003), *aff'd*, 91 F. App'x 660 (Fed. Cir. 2004)
- *James C. Stevenson v. OPM*, 103 M.S.P.R. 481 (2006)
- *Lary v. U.S. Postal Service*, 472 F.3d 1363, 1368-69 (Fed. Cir. 2006), *pet. for reh'g denied*, 493 F.3d 1355 (Fed. Cir. 2007)

Last Chance Agreements

- Alternative form of discipline
- Voluntary contract between an agency and an employee in proposed removal situations (performance-based or adverse action)
- Employee must knowingly and voluntarily waive his or her rights in exchange for non-imposition of an immediate removal.

Rice v. MSPB, 522 F.3d 1311 Fed. Cir. (2008);

Rhett v. USPS, 2010 MSPB 21 (January 27, 2010)

Last Chance Agreements

Invalid when:

- (1) he complied;
- (2) the agency materially breached the agreement or acted in bad faith;
- (3) he did not voluntarily enter into the agreement; or
- (4) the last-chance settlement agreement resulted from fraud or mutual mistake

Covington v. Department of the Army, 85 M.S.P.R. 612, ¶ 12 (2000)

Last Chance Agreements

- Where an employee raises a nonfrivolous factual issue of compliance with a last chance settlement agreement, the MSPB must resolve that issue before addressing the scope and applicability of a waiver of appeal rights.

Lizzio v. Department of the Army, 107 LRP 16671, 105 M.S.P.R. 322 (MSPB 2007), *citing Stewart v. U.S. Postal Service*, 91 FMSR 7004, 926 F.2d 1146 (Fed. Cir. 1991).

Comparative Situations

- *Spahn v. Justice*, 93 M.S.P.R. 195 (2003)
- *Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657 (2010) (citing *Williams v. Social Security Administration*, 586 F.3d 1365 (Fed. Cir. 2009))

Enforcement of Agreements by the MSPB

- Enforcement v. Limited Review on Validity
- Settlements – same as other orders
- Complaining party has burden
- Material v. non material

Proving Compliance

- ***Raymond v. Department of the Navy*** , 2011 MSPB 15 (February 8, 2011)
- An agency has a duty to produce evidence of its compliance with its settlement agreements. The agency's evidence of compliance must include a clear explanation of its compliance efforts, supported by understandable documentary evidence.
- Although the BURDEN is on the complaining party, but agency still has the above duty
- Evidence must be relevant, material, and credible