

CHAPTER 7

COMMON SETTLEMENT TERMS

The issues that can be covered under agreements in MSPB and EEOC law are without limit. Creativity is one advantage of settling that is not available when a third party is left to determine the outcome; but the agreement must clearly define what will, and in some cases, what will not be provided, and the parties must follow the agreed-upon terms. The sample terms in the following sections provide ideas that can be tailored to meet the needs of the parties. Give significant thought to whether any sample meets your needs before casually adding it to an agreement. Remember the earlier advice to read the agreement as a whole and write the agreement so that none of the terms conflict. In interpreting the meaning of one term of an agreement, that provision must be read in conjunction with the rest of the agreement. When reviewing a draft agreement, ensure that one term does not modify another term, unless that is the intent.

Some types of clauses or terms arise frequently. The following sections describe the terms not already described elsewhere. No term is foolproof, however, and some of the terms included in the following sections are not recommended by the author.

I. BEHAVIORAL ISSUES

A. BROAD BEHAVIOR ISSUES

Some agreements have terms that cover a wide range of behaviors the employee must avoid. Agreements can last for years so it is not a bad idea to add terms broader than the specific problem currently being settled. Examples of cases involving one year agreements are *Green v. DHHS*, 38 MSPR 577 (1988) and *Ferby v. USPS*, 26 MSPR 451 (1985), *post*; an example of a two year agreement is *Smith v. Martin, Dept. of Labor*, 03910017 (1991); an example of a three year agreement is *Harris v. Dept. of Air Force*, 81 MSPR 537 (1999). If you include broad terms and want future appeal rights waived as to the broader terms, then the waiver of current and future appeal rights should specifically address those terms. *Harris v. Dept. of Air Force*, 81 MSPR 537 (1999).

Samples:

1. The employee agrees, understands, and accepts that immediate termination from his position will occur for violation of any of the following events:
 - a. Any instance of failure to follow instructions or uncooperative conduct;
 - b. Any AWOL;
 - c. Any failures to follow the detailed procedures for requesting and using leave, as identified in term #3, below;

- d. Failure to attend and participate in the recommended treatments by the EAP counselor;
- e. Failure to provide the requested EAP documentation of attendance and participation;
- f. Falsification or alteration of government or other documents related to his employment and this agreement, to include, but not limited to, requests for leave or medical documentation;
- g. Failure to perform at the fully successful level or above on all critical elements.

2. The employee pledges that, in the future, he will avoid misconduct. The employee understands that if he engaged or engages in other misconduct (other misconduct is defined as anything other than AWOL charges which predate the date of this agreement), this agreement does not preclude the agency from taking action on other misconduct not covered by this agreement. The Agency and the employee understand that management does not intend to pursue other prior possible AWOL charges or violations that predate the proposal letter of March 4, 200_ or predate this agreement. The employee also understands that this agreement satisfies all requirements to be considered a prior offense in any subsequent actions and that Standard Forms 52 and 50 documenting the 30 day suspension will become a permanent part of his Official Personnel Folder.

3. That he pledges to avoid all misconduct and to perform in accordance with his performance standards and instructions. The employee understands that if he engages in further misconduct or is not performing according to expectations, he will be terminated from employment without due process. The employee also acknowledges and understands that this agreement satisfies all requirements to be considered a prior offense in any subsequent actions and that the agreement alone satisfies all necessary requirements to prove that the agency could have removed him for the current charges and proposal, but instead, has decided to try to rehabilitate him.

4. The employee will refrain from outbursts, yelling, insubordination, failure to follow instructions or any uncooperative or other disruptive behavior in, or related to, the workplace. He will not telephone, visit, write, harass, or otherwise bother or contact agency employees outside of the workplace. He acknowledges that any such behavior is not excused by his diagnosed condition of pathological liar and he must seek, accept and attend EAP counseling as outlined in Term #2 of this agreement in order to remain employed. He has been advised by his attorney and agrees that his condition is not a disability under the Rehabilitation Act of 1973, as amended, and that his medical provider agrees that this is not a disability, but a personality disorder.

B. LAST CHANCE/ALTERNATIVE DISCIPLINE AGREEMENTS

Throughout this text are examples of clauses that can be used in last chance or alternative discipline agreements. Samples of entire agreements appear in the appendix at the back of this book. The list of possible subjects and terms is endless and is only restricted by the imagination of the parties, their patience, and the agency's pocketbook. Take care with creativity and word agreements carefully; alternative discipline and last chance agreements are still contracts and all

the advice about properly writing waivers and terms is essentially the same. In *Kannikal v. Dept. of Justice*, 01A24572 (2003), a last chance agreement could not be used to dismiss an EEO complaint over a removal because the *subsequent* removal postdated the agreement. Waivers are only valid as of the date of the agreement and not for future events, even if contemplated in the agreement. Reference should be made to the discussion in Chapter 6, "Pre-Appeal Agreements."

One terrific advantage of these agreements, from an agency perspective, is that the tool can be very useful in bringing about long-term rehabilitation in an employee. A short suspension may do little to stop an employee with personal problems from being AWOL again, but the loss of the job hanging over the employee's head, with specific instructions on what she must do or avoid in order to keep her job, can help. The agreement's terms can last for years. *Harris v. Dept. of Air Force*, 81 MSPR 537 (1999). "That three-year period is analogous to an extended probationary period." An example of a two year agreement is *Smith v. Martin, Dept. of Labor*, 03910017 (1991).

Last chance agreements are common. The Federal Circuit court and the MSPB have found them to be a valid tool. *Girani v. FAA*, 924 F.2d 237 (Fed. Cir. 1991); *Hamilton v. USPS.*, 824 F.2d 976 (Fed. Cir. 1987 nonprecedential); *Sullivan v. USPS*, 56 MSPR 196, *aff'd*, 11 F.3d 1073 (Fed. Cir. 1993) (Table); *Walton v. Dept. of Navy*, 24 MSPR 565 (1984).

C. PERFORMANCE ISSUES

Exercise caution when including words such as "all" and "reasonable" in settlement agreements because compliance may be difficult to judge. In *Burford v. USPS*, 56 MSPR 460 (1993), the appellant was removed for performance reasons and a settlement was reached which not only encompassed the difficulties that were in the proposal letter, but included "all areas of responsibility in order to prevent future irregularities." *Id.* at 462. Attached to that specific term was a promise that management would provide "all reasonable assistance . . . in implementing these corrective measures and ensuring their success." *Id.* The case was remanded because, "if the appellant requested 'reasonable' assistance in areas other than those stated in the removal proposal notice and the agency denied him such assistance, the agency is in breach of the settlement agreement." *Id.* at 462-63.

In the EEOC forum, be careful not to use language that may imply intent not specified in the agreement. In *Patel v. Secretary of Transp.*, 01971929 (1998), the agency specifically agreed to modify the complainant's performance appraisal for the period ending October 31, 1995, by "whiting-out" the "unsatisfactory" rating. The agreement specified that the performance appraisal would still reflect a rating of "needs improvement." The complainant later alleged a breach because the agency whited out the agreed to words, but drew a line through the accompanying description of the rating. The Commission found that: "Clearly, the express intent of provision 5 of the agreement was for the unsatisfactory rating to be expunged from appellant's records. By drawing a line through the descriptive text accompanying the rating unnecessarily draws attention to the rating description, even though an "unsatisfactory" rating was not issued, i.e., defeating the purpose of removing the specific rating." The Commission remanded the case to the agency to sanitize the offending portion of the rating by carefully deleting the marking that had been drawn across the descriptive text.

Samples: