

# CHAPTER 1

## GENERAL PRINCIPLES AND ADVICE

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### I. WHEN CAN PARTIES SETTLE A DISPUTE?

Settlement can be approached without third-party involvement. Parties most commonly engage in settlement discussions:

- Before filing an MSPB appeal: under 5 CFR § 1201.22, although an employee has 30 days to appeal, the agency and employee can now extend the time period to appeal by 30 days (in writing) to attempt to resolve their dispute;
- After an appeal is filed with the MSPB;
- In EEOC cases, during counseling and throughout processing and litigation of cases (29 CFR § 1614.504(a));
- During grievances under a bargaining unit contract; and
- Under a collective bargaining contract: additional opportunities may exist in individual agencies under a collective bargaining unit contract or other agency processes such as alternative dispute resolution.

Beyond the more common opportunities for resolution of claims, parties may approach settlement early when disputes or personnel actions are being contemplated or processed. Such agreements are contracts and will be looked at as such if challenges are made later on. The Board found that a settlement agreement that is not made a part of the Board's record and is reached free of Board intervention is treated as a contract and interpreted as a matter of law based on the words in the agreement itself. See *Swink v. USPS*, 111 MSPR 620, ¶ 9, 109 LRP 43576 (2009); *Mahoney v. Dept. of Labor*, 56 MSPR 69, 92 FMSR 5551 (1992); *Sanchez v. USPS*, DA-0752-11-0017-I-2m 112 LRP 6788 (2012 nonprecedential), citing *Perry v. USPS*, 78 MSPR 272, 276, 97 FMSR 5332 (1997). The Board does not have the authority to enforce a settlement agreement not entered into the record for enforcement purposes. It may consider the validity of such an agreement, including one that was entered into during a proceeding not before the Board, "so as to determine its effect on a personnel action before the Board." *Sullivan v. VA*, 79 MSPR 81, 84, 98 FMSR 5232 (1998); see also *Swidecki v. USPS*, 101 MSPR 110, 106 LRP 9260 (2006), review dismissed, 182 Fed. Appx. 992 (Fed. Cir. 2006 nonprecedential).

In bargaining unit grievance proceedings, the employee loses the right to appeal the underlying action unless he specifically reserves Board appeal rights. In *DeBlock v. USPS*, 107 MSPR 90, 107 LRP 58401 ¶ 12 (2007), it was noted that a presumption exists that Board appeal rights are waived when an appealable action is settled through a grievance procedure and settlement of that grievance does not specifically reserve the right to file a Board appeal.

In many cases, the agency will reach an agreement with an employee before the agency takes a proposed personnel action against the employee or the case is in third party litigation. An agency cannot coerce a settlement based on a charge/accusation that it knows or should have known it could not substantiate. See *Fassett v. USPS*, 85 MSPR 677, 679, 100 FMSR 5277 (2000) (...we must set aside the second LCSA as involuntary due to the agency's coercion in removing the appellant on a charge that it should have known it could not substantiate); *Schultz v. Dept. of Navy*, 810 F.2d 1133, 1136 (Fed. Cir. 1987) (an appellant may demonstrate that a settlement agreement was coerced, and therefore involuntary, by showing that the agency threatened to take a future disciplinary action that it knew or should have known could not be substantiated).

### II. CAN JUDGES FORCE SETTLEMENT AND DO COMPLAINANTS HAVE A "RIGHT" TO SETTLEMENT CONFERENCES?

Although discussion and consideration of settlement is a normal part of the litigation process and is favored as a matter of public policy, parties are never required to settle a case. Parties are strongly encouraged and may even feel coerced to settle cases. In EEOC cases handled by certain offices, agencies are frequently ordered to appear for repeated settlement conferences, and parties can be sanctioned for failure to appear at a required settlement conference. Despite all the pressure to settle EEO cases, regardless of the merits, an agency is under no obligation to settle any EEO complaint. See *Twisdale v. Dept. of Treasury*, 01996474, 101 FEOR 20684 (2002). The problem of repeat filers or repeat forced settlement is much less common before the MSPB than in the EEO system, but the Board has cautioned that a party "need not enter into any settlement agreement that he does believe adequately protects his interests and that does not settle the matter to his satisfaction." See *Melvin v. USPS*, 86 MSPR 125, 131, 100 FMSR 5312 (2000).

Repeatedly saying no, without qualification, may be uncomfortable but it is eventually effective. If there is no interest served in settling the case, then say it up front and mean it. Otherwise, a great deal of time will be wasted negotiating.

Some complainants feel they have a right to settlement conferences once the case reaches the EEOC. EEO regulations and guidance make it permissible, not mandatory, for AJs to hold settlement conferences. See 29 CFR § 1614.109(c)(2) ("Any time after the parties have received notice that an administrative judge has been appointed to conduct a hearing, but not later than 30 days prior to the hearing, the agency may make an offer of resolution to the complainant..."); Equal Employment Opportunity Management Directive for 29 CFR Part 1614 (EEO MD-110), at 7-14 (Nov. 9, 1999) ("The Administrative Judge may engage the parties in discussion aimed at reaching a settlement agreement or may allow the parties such time as they may need to discuss settlement."); see also *Fluker v. USPS*, 0520110345, 111 LRP 43732 (2011) (complainant was not improperly denied a settlement conference); *Porterfield v. DHS*, 0120103510, 112 LRP 28355 (2012).

### III. WISDOM OF THE AGREEMENT

Neither the EEOC nor the MSPB takes responsibility for the provisions reached in agreements. The Board will enforce the agreement as drafted by the parties; it is not a party to the agreement. *Dos-Santos v. Dept. of VA*, 56 MSPR 399 (1993). Under the general principles of settlement construction, the words of the agreement itself are of paramount importance, as noted in *Allen v. VA*, 112 MSPR 659, 109 LRP 79759 (2009), *aff'd*, 420 Fed. Appx.

980 (Fed. Cir. 2011 nonprecedential). In construing the terms of a settlement agreement, the Board examines the four corners (meaning only what is in the document) of the agreement to determine the parties' intent. See *Kelley v. Dept. of Air Force*, 50 MSPR 635, 642, 91 FMSR 5596 (1991). A party is entitled to no more than is provided by the terms of the agreement. As noted in *Kelliham v. Dept. of Navy*, 72 MSPR 47, 50, 96 FMSR 5340 (1996), the Board lacks the authority to make unilateral modifications of material terms in a settlement agreement. See *Rivas v. USPS*, 72 MSPR 383, 389, 96 FMSR 5427 (1996). The Board has also found that it cannot guard the interests of the parties. In *Farrero v. NASA*, 83 MSPR 487, 99 FMSR 5399 (1999), *aff'd*, No. 00-3064 (Fed. Cir. 2000) (Table), the Board found that while "it might have been prudent" for the appellant to have bargained for an additional term, he did not do so, and the Board may not add a term. An appellant's post-settlement disagreement with the provisions of a settlement agreement is not a basis for setting aside the agreement. See *Marshall v. USPS*, 111 LRP 45623, NY-0353-10-0255-I-1 (2011 nonprecedential); *Thompson v. VA*, 52 MSPR 233, 237, 92 FMSR 5015 (1992); *Ali v. Dept. of Army*, 50 MSPR 563, 569, 91 FMSR 5582 (1991).

Post-settlement remorse and change of heart do not serve as a basis for setting aside a valid settlement agreement. See *Garcia v. Dept. of Defense*, DE-0432-11-0414-I-1, 112 LRP 22148 (2012 nonprecedential), *citing Potter v. VA*, 111 MSPR 374, ¶ 6, 109 LRP 31692 (2009). In *Ruckriegel v. Dept. of Army*, 0120101357, 110 LRP 47985 (2010), the employee argued that the agreement's terms were disadvantageous to her. The agency provided consideration when it fulfilled the agreement's terms, and the agreement contained terms that were of substantial benefit to complainant. The EEOC held the agency did not negotiate the agreement in bad faith. An otherwise valid agreement cannot be invalidated just because a complainant made a bad bargain and now wants to renegotiate the terms. *Williams v. Dept. of Army*, 0120065312, 107 LRP 24353 (2007); *Miller v. Dept. of Treasury*, 05960622 (December 5, 1997). In *Jenkins-Nye v. GSA*, 01851903, 87 FEOR 1025 (1987), the Commission found that if a settlement agreement is made in good faith and is otherwise valid, it will not be set aside simply because it appears that one of the parties made a poor bargain. See also *Ruckriegel v. Dept. of Army*, 0120101357, 110 LRP 47985 (2010); *Miller v. Dept. of Treasury*, 05960622 (December 5, 1997).

The Board does not apply a *status quo ante* analysis in the construction of the terms of a settlement agreement. See *Kelley v. Dept. of Air Force*, 50 MSPR 635, 642, 91 FMSR 5596 (1991) ("The parties are free, within the confines of the law, to settle a case on whatever terms they agree to; thus, the Board will not simply assume that a provision as important as back pay and benefits is subsumed in the absence of their specification of such a term."); *Kuykendall v. VA*, 68 MSPR 314, 320-21, 95 FMSR 5286 (1995) ("Unlike the Board's adjudication in... the settlement agreement in the latter situation, the settlement agreement generally does not specify or imply that the underlying personnel action was wrong, and the Board is not enforcing its own determinations but rather the parties' bargained-for agreement, based on contract law principles.")

The Commission generally does not concern itself with the adequacy or fairness of consideration, as long as some legal detriment is incurred as part of the bargain. See *Rush v. USPS*, 0120090859, 110 LRP 72572 (2010); *Terracina v. DHHS*, 05910888, 92 FEOR 3422 (March 11, 1992); *Brooks v. Dept. of Army*, 01994999, 101 FEOR 1161 (2001); *Moyer v. USPS*, 01A11202, 101 FEOR 1200 (2001). But see also *Morita v. Dept. of Air Force*, 05960450, 98 FEOR 3095 (December 12, 1997) (discussing expungement of negative materials; and in such cases, the Commission sometimes looks beyond the words of the agreement in search of "equity").

If the parties to the agreement incur some legal detriment—that is, commit themselves to do something they were not already obligated to do—the settlement agreement will not be set aside for lack of consideration. See *Pagan-Pumphrey v. Dept. of Air Force*, 0120091992, 109 LRP 58394 (2009); *Morita v. Dept. of Air Force*, 05960450, 98 FEOR 3095 (December 12, 1997). If an agreement is specific, the Commission will not generally expand on the terms. In *Johnson v. Secretary of Interior*, 01921610, 92 FEOR 21187 (1992), the settlement agreement required the agency to provide the complainant with vacancy announcements for specific jobs. The agency however did not provide him with announcements for other similar jobs, and the Commission found no breach. In *Demerson v. Dept. of Energy*, 0120120484, 112 LRP 15607 (2012), the agency agreed to expunge appellant's 3 day suspension from any and all system records and to purge her OPF of certain SF-52s and SF-50s. The EEOC agreed with the agency that appellant's performance appraisals for FY06 and FY07 referenced in complainant's allegation of breach did not fall under any of the terms of the settlement agreement, and could not constitute grounds for a breach of the settlement agreement. To the extent that complainant interpreted the provisions of the settlement agreement as requiring the agency to purge her performance appraisals for FY06 and FY07, such an expectation should have been reduced to writing as part of the settlement agreement.

The MSPB does not "approve" agreements, it "accepts" them if the Board's criteria are met. *Littlejohn v. DHUD*, 47 MSPR 331, 332 n. 1, 91 FMSR 5106 (1991). The MSPB likewise alerts parties that an enforcement petition cannot be used to obtain a benefit that was not included in the agreement. See *Pittman v. USPS*, 29 MSPR 339, 85 FMSR 5466 (1985). A party is entitled to no more than is provided by the terms of the agreement. See *Rodriguez v. Dept. of Justice*, 84 MSPR 685 (2000), *citing Kelliham v. Dept. of Navy*, 72 MSPR 47, 50, 96 FMSR 5340 (1996).

Agreements must clearly state the parties' intent; do not assume that the other party knows your intent. If a term is not in the agreement, it cannot be enforced. See *Davis v. EPA*, 10985079 (1999). In *Booker-Kemker v. Postmaster General*, 01A11850, 2002 LRP 251 (2002), the agreement specified that neutral references would be provided. Later, the complainant "maintained that the agreement should be set aside because she had changed her mind, as she did not really know or pay attention to some of the clauses in the agreement." The complainant's regret, however, was not cause for setting it aside.

#### IV. SETTLEMENTS CAN COST MORE THAN LITIGATION

Settlements usually achieve the desired purpose—an end to protracted disputes with both parties receiving something valuable to them. Parties to a dispute may choose to settle to avoid the expensive and potential public nature of taking the dispute to hearing. The time and effort of all concerned parties is wasted when agreements fail because of vague or unenforceable provisions. A poorly drafted agreement can be even more expensive than losing the original case.

In an MSPB settlement concerning a 28-calendar day suspension, the appellant claimed a breach of a job reference term and litigation regarding the term continued for 10 years. In the end, the employee was reinstated with back pay. *Poett v. Dept. of Agric.*, 98 MSPR 628, 105 LRP 23289 (2005).

In *Baker v. Dept. of Navy*, SE-0752-92-0220-X-1, 111 LRP 38597 (2011 nonprecedential), the parties settled appellant's removal appeal in 1992. In December 2009, appellant alleged a breach when he found that the Standard Form (SF) 50 documenting his separation from the agency reflected his resignation "AS A CONDITION OF A PREVIOUS AGREEMENT." The agency made a number of arguments, one of which was there no harm to appellant. The Board found:

Finally, to the extent that the agency is arguing that there was no harm because there is no showing that the SF-50 was shown to other individuals, it is unnecessary to establish actual harm in order to prove breach of a nondisclosure agreement. See *Poett v. Department of Agriculture*, 98 M.S.P.R. 628, ¶ 17 (2005). The appellant bargained for removal from his OPF and other personnel records of all evidence relating to his removal. We agree with the administrative judge that this provision was a matter of vital importance and that the agency materially breached that provision by its reference on the SF-50 to the appellant's resignation as A CONDITION OF A PREVIOUS AGREEMENT.

The case was remanded for hearing.

In *Lambert v. USPS*, 01963936, 98 FEOR 1258 (1998), *reconsideration request denied*, 05980891 (2001), a settlement reached in 1981 was breached, and the case was not resolved until 1998. Back pay for two successive promotions was due for the 17 year period. See also *Ralph v. Dept. of Treasury*, 01974175, 101 FEOR 1178 (2001) (the agency did not respond to a breach allegation from a 1994 agreement; the agreement provided for reinstatement in the event of a breach, and the agency was ordered to reinstate the complainant).

## V. LAW OF CONTRACTS

Settlement agreements are contracts, and their interpretation is a question of law. If the agreement is not clearly written and fails to spell out the meaning of its terms using plain English, then the contract is susceptible to differing interpretations. The meaning of a term used in a settlement agreement is the meaning the parties intended it to convey. See 17A C.J.S. CONTRACTS § 300 (1963). When the parties hold reasonable but different views regarding an ambiguous term that goes to the heart of the contract, no contract was formed due to a lack of mutual assent. RESTATEMENT (SECOND) OF CONTRACTS, § 20 (1979).

*Black's Law Dictionary* 394 (4th ed. 1968) defines a contract as: "an agreement between two or more persons which creates an obligation to do or not to do a particular thing." As defined in RESTATEMENT, SECOND, CONTRACTS § 3 (1979): "a contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." An offer, "to be legally operative and to create a power of acceptance must contain all the terms of the contract to be made."

The Supreme Court, in a decision upholding the validity of consent decrees, stated: "[t]he scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it...the instrument must be constructed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation." *United States v. Armour & Co.*, 402 U.S. 673, 681–82 (1971).

To determine whether a failure to perform under the contract is material, the following circumstances are significant:

- (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
- (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
- (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; and
- (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

RESTATEMENT (SECOND) OF CONTRACTS, § 241 (1981); see also *Hansen Bancorp, Inc. v. United States*, 367 F.3d 1297, 1311–1312 (Fed. Cir. 2004). In interpreting the meaning of one term of an agreement, that provision must be read in conjunction with the rest of the agreement. See RESTATEMENT (SECOND) OF CONTRACTS, § 202(2) (1979) ("a writing is interpreted as a whole"). An interpretation that gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation that renders a portion of the agreement unreasonable, unlawful, or of no effect. See RESTATEMENT (SECOND) OF CONTRACTS § 203(a) (1981). Restated, the construction of contracts follows the "general rule of contract interpretation that terms of a contract should not be interpreted so as to render them ineffective or superfluous." *Hernandez v. Dept. of Defense*, 325 Fed. Appx. 905, 109 LRP 24539 (2009 nonprecedential), citing *Abraham v. Rockwell Int'l Corp.*, 326 F.3d 1242, 1254 (Fed. Cir. 2003); see also *Pac. Gas & Elec. Co. v. United States*, 536 F.3d 1282, 1288 (Fed. Cir. 2008); RESTATEMENT (SECOND) OF CONTRACTS § 203(a) (1981) ("[A]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.").

As the goal of a settlement agreement is to bring closure to the issues between the parties, it is essential that the parties have a meeting of the minds. See RESTATEMENT (SECOND) OF CONTRACTS, § 20(2) (1979) ("The manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties if (a) that party does not know of any different meaning attached by the other, and the other knows the meaning attached by the first party; or (b) that party has no reason to know of any different meaning attached by the other, and the other has reason to know the meaning attached by the first party.") If the parties give substantially different meanings to the words of a contract, and neither party knew or had reason to know what the other meant or understood by the words, there is no reason for choosing one interpretation rather than the other. ARTHUR L. CORBIN, CORBIN ON CONTRACTS, 538, 564-65 (1960); RESTATEMENT (SECOND) OF CONTRACTS § 202(01) (1979). Neither party has reason to rely on the understanding of the other party. There is no question of one party materially changing its position in reliance on a different meaning of a term in the contract. See CORBIN, *supra* 538 at 563 (the testimony of a party as to his own meaning becomes immaterial as soon as it is established that he knew of or had reason to know that the other party had a different meaning and has materially changed his position in reliance thereon). Under these circumstances, and where each party's interpretation is reasonable, there is no basis for choosing one party's interpretation over the other's. Third parties can construe contract language that is susceptible to multiple meanings against the drafter. See *generally* RESTATEMENT (SECOND) OF CONTRACTS § 206; CORBIN ON CONTRACTS § 24.27.

As with all things, exceptions exist. Generally, because a settlement agreement is a contract, claims of breach must be adjudicated in accordance with contract law. See *Greco v. Dept. of Army*, 852 F.2d 558, 560, 88 FMSR 7025 (Fed. Cir. 1988). That is not the case, however, with respect to a waiver of rights and claims under the Age Discrimination in Employment Act (ADEA). The Older Worker's Benefit Protection Act (OWBPA) sets up its own regime for assessing the effect of ADEA waivers, separate and apart from contract law. *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427, 99 FEOR 9001 (1998). The OWBPA governs the effect under federal law of waivers or releases on ADEA claims.

## VI. GENERAL OVERVIEW OF EEOC AND MSPB LAW OF CONTRACTS

### A. MUTUAL CONSIDERATION

For an agreement to be valid, consideration must have been provided to both parties. “Consideration” as used in settlement agreements merely means something of value given in return for a performance or a promise of performance by another. See *Black’s Law Dictionary*, 379 (4th ed. 1968). Restated, both parties are providing something of value to the other. A complainant or appellant is usually bargaining to withdraw his or her appeal or EEO complaint in return for certain actions by the agency. The agency is usually giving something of value as well, such as a reduction in penalty or restoration of leave. In some cases, the consideration is not always clear; such agreements are then found to have failed to provide meaningful consideration.

Consideration cannot be illusory. If a party already has a duty to do something, that is not consideration. There must be a bargained for performance or a return promise that does not involve a pre-existing duty. See *Aviation Contractor Employees, Inc. v. United States*, 945 F.2d 1568, 1574 (Fed. Cir. 1991); *Thompson v. Dept. of Treasury*, 100 MSPR 545, ¶ 9, 105 LRP 59009 (2005).

In *Hernandez v. Dept. of Defense*, 325 Fed. Appx. 905, 109 LRP 24539 (2009 nonprecedential), the court found it was plain from the face of the agreement that in exchange for dismissing his appeal, the agency agreed to allow Hernandez to be enrolled in the Priority Placement Program (PPP) for a one-year period after the effective date of the agreement. The agency agreed (a) that it would remove a reprimand from Hernandez’s record, (b) that “[b]ecause of the removal of the Decision of Reprimand, the appellant is now eligible to be re-considered for registration” in the PPP under the agency’s regulations, and (c) that Hernandez would be “re-considered for placement in the PPP for a period of one year beginning 7 calendar days after the last signature on this Agreement.” Hernandez received no other consideration under the agreement. Construing the settlement agreement as giving the agency the option not to enroll Hernandez in the PPP would come close to rendering the settlement agreement illusory. Such a construction is disfavored. “When the words of the contract indicate that a party has promised to perform, such words should not be interpreted so as to make the promise illusory, even if the context may show an intent to leave performance subject to the party’s broad discretion. We thus construe the settlement agreement as requiring the agency to enroll Hernandez in the PPP program for twelve months after the effective date of the settlement agreement.” See 5 MARGARET N. KNIFFIN, CORBIN ON CONTRACTS § 24.22 at 234–35 (rev. ed. 1998).

In *Baker v. Chicago Fire & Burglary Detection, Inc.*, 489 F.2d 953, 955 (7th Cir. 1973), the court held that a valid contract must be based upon consideration where some right, interest, profit, or benefit accrues to one party or some forbearance, detriment, loss, or responsibility is given, suffered, or undertaken by the other. Where the promisor receives no benefit and the promisee suffers no detriment, the whole transaction is a nullity. In *Rachal, Sr. v. USPS*, 0120102818, 112 LRP 21237 (2012), the EEOC found the agreement void where complainant received no consideration. See *Collins v. USPS*, 05900082, 90 FEOR 24247 (April 26, 1990) (a settlement agreement that is not based upon adequate consideration is unenforceable).

#### 1. Void for Lack of Consideration

What is consideration from an agency? Consideration for an appellant’s waiver of appeal rights can include, but is not limited to, an agency’s agreement to reduce a removal to a suspension or holding a removal in abeyance for a period of time. *Gonzales v. Dept. of Air Force*, 38 MSPR 162, 164, 88 FMSR 5475 (1988); *Ferby v. USPS*, 26 MSPR 451, 454, 456, 85 FMSR 5090 (1985); *McCall v. USPS*, 839 F.2d 664, 667 (Fed. Cir. 1988) (discussing the “substantial benefit” the appellant derived from the settlement and what he “gave up” in return for it). Suspending the employee for 14 days, as proposed, and placing various requirements upon the appellant regarding attendance and participation in the agency’s Employee Assistance Program, with the threat of a removal and a waiver of appeal rights, did not constitute mutual consideration. There was no consideration in this last chance agreement “flowing from the agency to the appellant in exchange for the appellant’s waiver of appeal rights.” *Tetrault v. USPS*, 71 MSPR 376, 380, 96 FMSR 5286 (1996).

Lack of consideration arises more frequently in EEOC cases because the issues are sometimes viewed as trivial, and the agency cannot see rewarding an employee, who may even be viewed as harassing management, by providing something of real value. The EEOC is not generally concerned with the adequacy or fairness of the consideration in a settlement agreement, as long as some legal detriment is incurred as part of the bargain. *Brooks v. Dept. of Army*, 01994999, 101 FEOR 1161 (2001); *Moyer v. USPS*, 01A11202, 101 FEOR 1200 (2001); *Terracina v. DHHS*, 05910888, 92 FEOR 3422 (March 11, 1992); *Lowrance v. USPS*, 01A10685, 101 FEOR 1134 (2001). When one of the parties to a settlement “incurs no legal detriment,” the agreement will be set aside for lack of consideration. In *Brooks*, a settlement stating that the agency will “consider” creating a position was not a legal detriment because the agency was not obligated to do anything. The “something” does not have to be much, but the agency’s detriment must be real. In *Danzel v. USPS*, 01A10712, 101 FEOR 19034 (2001), the Commission gave a fuller explanation of how it would analyze consideration:

In the settlement agreement, the agency agreed that it would treat complainant with “dignity, respect, and in a professional manner” and in the same manner it treats other employees. Complainant, in turn, agreed to withdraw his complaint. We find that the agency, in merely agreeing to treat complainant in accordance with existing statutes and regulations, provided complainant nothing more than that to which he was entitled as an employee. Therefore, he received no consideration for his agreement to withdraw his complaint. Moreover, we have generally held such provisions regarding treating employees with respect and dignity are too vague to allow a determination as to whether the agency has complied with such an agreement. See *Bruns v. United States Postal Service*, EEOC Appeal No. 01965395 (June 24, 1997).

In *Rush v. USPS*, 0120090859, 110 LRP 72572 (2010), the EEOC found that a term promising that “[complainant and complainant’s first-level supervisor] shall communicate to each other in a respectful manner and normal conversation without yelling or harassment” and “shall speak directly to each other on work issues” was void for lack of consideration. The EEOC found:

Regarding provision (5), we find that this provision is unenforceable and void for lack of consideration. The Commission is not generally concerned with the adequacy or fairness of the consideration in a settlement agreement, as long as some legal detriment is incurred as part of the bargain. See *Terracina v. Dep’t of Health & Human Serv.*, EEOC Request No. 05910888 (Mar. 11, 1992). In this regard, when one of the parties to a settlement incurs no legal detriment, the agreement will be set aside for lack of consideration. See *Morita v. Dep’t of the Air Force*, EEOC Request No. 05960450 (Dec. 12, 1997). Accordingly, we find that this provision is void because it does not provide Complainant with anything that she was not already entitled to receive as an Agency employee. See *Bruns v. USPS*, EEOC Appeal No. 01965395 (June 24, 1997) (provision in settlement agreement that complainant be treated fairly with dignity and respect was too vague to allow a determination as to whether the agency complied with such a provision); *Dove v. USPS*, EEOC Appeal No. 01963814 (Jan. 3, 1997) (provision in settlement

agreement requiring management to act in a professional manner when dealing with complainant was too vague to permit enforcement of that provision). To the extent that Complainant's allegation of breach may constitute a separate act of discrimination, Complainant may wish to contact an EEO Counselor pursuant to 29 C.F.R. § 1614.105 to pursue such an allegation as a separate non-breach allegation of discrimination.

The Commission found no consideration where an agency agreed to "allow" an employee to file a grievance pertaining to her claims and to treat her with dignity and respect. *Tamura-Wageman v. Dept. of Army*, 01A11459, 102 FEOR 13396 (2002). Providing a complainant a reassignment to a specific position was not consideration in *Pagan-Nunez v. Dept. of Army*, 0120120257, 112 LRP 11706 (2012), because the agency had already assigned the complainant to said position prior to the execution of the agreement. Agreeing to take a letter out of an employee's file that had already been removed because of a union grievance is not consideration. *McGautha v. USPS*, 01A33022, 103 LRP 40596 (2012).

In *Mark v. Dept. of Air Force*, 01A23979, 102 LRP 39082 (2002), the agency agreed to follow "laws and regulations" when assigning supervisors. This was "no imposition" on the agency, as agencies are already required to follow "laws and regulations." There was no consideration. An agreement in which the agency promised not to take reprisal action is not consideration. *Ward v. Dept. of Air Force*, 01986812 (2000). An agreement in which the agency vowed to process EEO complaints in a timely manner and have EEO counselors carry out their responsibilities is not consideration. *Shults v. Barram, GSA*, 01983547 (1998). An agreement "to discuss" a pay increase is not consideration. *Moyer v. USPS*, 01A11202, 101 FEOR 1200 (2001). In Board law, while an agency is expected not to engage in unlawful behavior, violations may constitute noncompliance with an agreement. *Kuykendall v. VA*, 68 MSPR 314, 95 FMSR 5286 (1995); *Womack v. USPS*, 67 MSPR 58, 61 (1995). Agreeing to follow a bargaining unit agreement is not consideration. *DuBerry v. USPS*, 0120090754, 110 LRP 34333 (2010).

Sometimes, an agency will promise to do something, only to find that a subsequent event has rendered its promise impotent. A hiring freeze in place during the relevant time period effectively made it impossible for a complainant to receive the priority consideration for the position for which she had bargained. The Commission found that the settlement agreement was void for lack of consideration. *Lee v. Dept. of Army*, 01A20577, 102 FEOR 14492 (2002). Changing circumstances after a period of time may not be a breach. *Han v. USPS*, 0120072161, 109 LRP 51672 (2009).

In MSPB cases, if an agency is obligated to follow its own policy, that is not consideration. *Black v. Dept. of Transp.*, 116 MSPR 87, 111 LRP 7556 (2011). MSPB law and EEOC law are alike in this area.

Paying attorney fees is not enough to provide consideration. In *Davidson v. SSA*, 0520120150, 112 LRP 28366 (2012), the EEOC reiterated that the attorney fees paid to a complainant's attorney are not considered a part of the same category of relief as that received by a complainant for his or her own benefit (e.g., an award of back pay, compensatory damages, restoration of leave, or other personnel action). As the EEOC explained in *Holmes v. Dept. of Agric.*, 01962207 (1999), *req. for recon. den.*, 05990764 (2000):

A subsequent breach of a settlement agreement by the agency does not alter the [complainant's] status as a prevailing party as of the time he or she settled the complaint. Nor are the attorney's fees paid to a complainant's attorney in the same category of relief as that received by a complainant for his or her own benefit, such as an award of back pay, compensatory damages, restoration of leave, or other personnel action. Our decisions requiring the restoration of *status quo ante* as a precondition to the reinstatement of a complaint are premised on the principle that a complainant should not be able to retain the benefits previously received at the same time that he or she wins the right to prosecute anew the very complaint which was previously settled. However, attorney's fees paid to his or her attorney for the previously successful prosecution of the complaint to the point of settlement are not in the category of relief retained by the [complainant] for his or her own benefit. Nor can [a complainant] expect his or her attorney to return the fees previously received by the attorney for the successful rendition of services merely because the other party to the settlement subsequently breached the settlement.

## B. EEOC LAW

EEOC regulation at 29 CFR 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 *Niemen v. VA*, 0120121379, 112 LRP 34110 (2012), citing *Herrington v. Dept. of Defense*, 05960032, 97 FEOR 3064 (1996). Parties "may contractually agree to a wide variety of measures to settle a complaint." *Epstein v. Secretary of DHHS*, 01952695, 97 FEOR 11102 (1997).

The Commission holds that the intent of the parties as expressed in the contract controls the contract's construction. *Eggleston v. VA*, 05900795, 90 FEOR 21339 (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. USPS*, 05910787, 92 FEOR 3174 (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. *Montgomery Elevator Co. v. Building Eng'g Servs. Co.*, 730 F.2d 377 (5th Cir. 1984). The EEOC generally holds true to this premise. In *Novak v. Dept. of Defense*, 0120100900, 111 LRP 41802 (2011), the EEOC found that a debt owed by complainant was not forgiven by the settlement agreement and added "[i]f Complainant wanted relief from any obligations on the debt subsequent to his resignation from the Agency, he should have negotiated such a provision into the SA." In *Klein v. DHUD*, 05940033, 94 FEOR 30377 (June 30, 1994), the EEOC stated that it would not resort to extrinsic evidence, outside the four corners of the agreement, to determine the meaning of a writing that appeared to be facially plain and unambiguous.

In fairly rare circumstances, the Commission will look beyond the four corners of the agreement to determine the intent of the parties when equity requires. *Billingsley v. Dept. of Army*, 01976026, 98 FEOR 15330 (1998); *Ingram v. GSA*, 05880565, 88 FEOR 24743 (June 14, 1988). In *Wong v. USPS*, 05931097, 94 FEOR 3400 (April 29, 1994), the EEOC stated that "where the terms of the document are ambiguous or for equitable reasons, the Commission may go beyond the language of the agreement and look at the intent of the parties to the agreement." See also *Thrash v. Dept. of Army*, 0120092905, 110 LRP 522 (2009).

As explained by Ernest C. Hadley, *A Guide to Federal Sector Equal Employment Opportunity Law & Practice* (in his tome, updated yearly by [Dewey Publications Inc.](#)):

[T]he Commission interprets settlement agreements by attempting to discern the true intent of the parties. Generally speaking, the

Commission follows traditional contract law. First, the Commission will look to the language of the agreement itself, giving the words and phrases their plain English meaning. If the language of the agreement is clear and unambiguous, the Commission will not look outside the four corners of the agreement to determine the intent of the parties. However, the Commission does not adhere strictly to the parol evidence rule. If the language of the agreement is not clear, the Commission will review factors outside the four corners of the agreement that bear on the intent of the parties at the time the settlement agreement was entered. Ultimately, as the Commission explained in *Martin v. Secretary of Defense*, 01934244, 4078/A9 (1994), if by review of the language and outside factors, the Commission cannot determine the intent of the parties, it will set aside the agreement on the basis that there was no meeting of the minds.

The terms of a settlement agreement are to be accorded their commonly accepted meanings, unless it is clear that the parties intended to ascribe peculiar or unusual meanings to those terms. See *First Commodity Traders Inc. v. Heinhold Commodities, Inc.*, 766 F.2d 1007, 1014 (7th Cir. 1985); *Montgomery Elevator Co. v. Building Eng'g Servs. Co.*, 730 F.2d 377, 381 (5th Cir. 1984). Despite the Commission's application of the plain meaning rule in reviewing settlement agreements, on occasion parol or extrinsic evidence beyond the four corners of the document will be considered to clarify ambiguous settlement terms or for equitable reasons. *Eggleston v. VA*, EEOC 01901569, 90 FEOR 22980 (1990), *request to reopen denied*, 05900795, 90 FEOR 21339 (1990). Because the Commission focuses on the overall meaning of the agreement, it is especially important to spell out exactly what the term provides for and what it does not. A party may not focus on one clause of a provision to the exclusion of another clause to support its interpretation of an agreement. *Wong v. USPS*, 05931097, 94 FEOR 3400 (1994) ("In reviewing the terms of a settlement agreement to determine whether a breach has occurred, we are obligated to consider the full context of the language cited therein").

The EEOC may deviate from its usual rule in cases where it believes that "equity" requires it to imply terms that were not in the agreement. *Billingsley v. Dept. of Army*, 01976026, 98 FEOR 15330 (1998); *Dupuich v. DLA*, 0120073901, 107 LRP 64908 (2007).

### C. MERIT SYSTEMS PROTECTION BOARD LAW

In researching Board law, a party is well-advised to also review Federal Circuit precedent. Generally, the Board is strict in its interpretation of agreements and does not add terms when the intent from the wording of the agreement is clear. This has changed somewhat, however, and the Board law is now consistent with the Court of Appeals for the Federal Circuit in areas concerning "clean record" settlements, resignations, and expungement terms.

#### 1. Applying Basic Principles of Contract Law

The Board follows basic principles of contract law in consistently holding that the mutual assent necessary for the formation of a contract takes the form of an offer and an acceptance. *Nicart v. OPM*, 43 MSPR 154, 90 FMSR 1012 (1990). A settlement agreement is a contract, and basic contract principles are applied unless precluded by law. *Tretchick v. Dept. of Transp.*, 109 F.3d 749, 752, 97 FMSR 7010 (Fed. Cir. 1997). Settlement agreements are contracts that must be read as a whole and interpreted to give to all parts meaning and in such a way that none of them are in conflict. *Dixon v. Dept. of Army*, 80 MSPR 51, 98 FMSR 5344 (1998).

#### 2. The Importance of Specificity

In order to protect against broad interpretations, the language in the agreement must be specific. Settlements involving expungement or removal of certain documents or records must expressly state that there will be no adjustment of records of any kind beyond those specifically listed in the agreement. *Knight v. Dept. of Treasury*, 113 MSPR 548, 110 LRP 24935 (2010). In a case involving a return to work, although the agreement did not state whether the position would be part-time or full time, the Board found the language unambiguous and that the agreement terms meant the position was full-time. *Flores v. USPS*, 115 MSPR 189, 110 LRP 64445 (2010). If a party wishes to ensure the interpretation will go as desired, the language must be specific, clear and complete. Do not try to lull the other party into signing an agreement by leaving out language that might not be accepted.

#### 3. Language Controls

For the most part, the language of the agreement itself controls the outcome, without other terms being implied. The MSPB looks first to the terms of the agreement itself in order to determine the intent of the parties at the time they contracted. *Greco v. Dept. of Army*, 852 F.2d 558, 560, 88 FMSR 7025 (Fed. Cir. 1988).

In *Urena v. USPS*, SF-0353-09-0650-C-1, 111 LRP 52472 (2011 nonprecedential), the Board cited the general premises regarding settlements:

A settlement agreement is a contract, and the Board will therefore adjudicate a petition to enforce a settlement agreement in accordance with contract law. *Id.* (citing *Greco v. Department of the Army*, 852 F.2d 558, 560 (Fed. Cir. 1988)). ...In construing the terms of a settlement agreement, the words of the agreement itself are of paramount importance in determining the intent and obligations of the parties. *Greco*, 852 F.2d at 560; *Rodriguez v. Department of Justice*, 84 M.S.P.R. 685, ¶ 8 (2000).

A case that illustrates strict adherence to the terms of the agreement is *Slattery v. Dept. of Justice*, 590 F.3d 1345, 110 LRP 807 (Fed. Cir. 2010). Ms. Slattery was employed by the agency as a supervisory immigration officer, GS-12, when she was arrested and charged with the crime of obtaining money under false pretenses. Ms. Slattery pleaded *nolo contendere*, paid restitution, and fulfilled the sentence of community service. The agency first suspended and then removed Ms. Slattery from service. During her appeal, the parties entered into a last chance agreement (LCA). Under the LCA, the agency agreed to reinstate Ms. Slattery to a non-law enforcement position with back pay and attorney fees, established a three-year probationary period during which she was required to comply with specified "Last Chance Provisions," and barred her from applying for any law enforcement or officer corps position within the agency for one year. The relevant paragraph of the LCA includes:

It is further agreed that Ms. Slattery will remain in this position with the Agency, and its successor component within the Department of Homeland Security ("DHS"), for a period of not less than one year from the date of this Agreement. During this year, Ms. Slattery is barred from applying for any law enforcement position or officer corps position within the DHS. Nothing in this agreement is intended to prevent Ms. Slattery from applying for another position with an Agency other than DHS.

After the one-year bar expired, Ms. Slattery applied for twenty-four positions in the agency in the area of law enforcement. She was not selected for any of them. The Federal Circuit found that the LCA did not require the agency to ignore Ms. Slattery's history and that "good faith" does not require pretending that this history does not exist. An integration clause was helpful here as the agreement stated that "no other promises shall be binding unless placed in writing and signed by both parties." The Federal Circuit noted this integration clause in its decision.

#### a. Ambiguous Language

In construing the terms of a written settlement agreement, the words of the agreement itself are of paramount importance and parol evidence will be considered only if the written agreement is ambiguous. *Greco*, 852 F.2d at 560; see also *Young v. USPS*, 113 MSPR 609, 110 LRP 30066 (2010); *Weber v. Dept. of Agric.*, 86 MSPR 25, 100 FMSR 5291 (2000). A contract is ambiguous when it is susceptible to differing, reasonable interpretations. *Gullette v. USPS*, 70 MSPR 569, 572-73, 98 FMSR 5039 (1996). When a term of an agreement is ambiguous, the AJ should resolve the ambiguity in a manner consistent with the purpose and effect of the agreement and with the intent of the parties in mind. *Vaughan v. USPS*, 77 MSPR 541, 546 (1998). Parol evidence is admissible only if there is ambiguity in the words of the agreement. *Ammons v. VA*, Fed. Cir. 2011-3156, 112 LRP 18539 (2012 nonprecedential), citing *Greco v. Dept. of Army*, 852 F.2d 558, 560, 88 FMSR 7025 (Fed. Cir. 1988). Parol evidence refers to extraneous evidence, that is not included in the relevant written document. For example, in *Kraft v. Dept. of Agric.*, U.S. District Court, North Dakota, 1:04-cv-084, 107 LRP 45240 (2007), Kraft proffered additional evidence relating to pre-contract negotiations and post-contract performance that appeared to be relevant to the construction of the agreement.

When the parties hold reasonable but different views of an ambiguous term that goes to the heart of the contract, no contract was formed due to a lack of mutual assent. *Gullette v. USPS*, 70 MSPR 569, 576, 96 FMSR 5209 (1996); RESTATEMENT (SECOND) OF CONTRACTS § 20 (1979).

#### b. The Board Will Not Add or Modify Terms

The Board's newest members, as of the writing of this book, have not cited the following cases, but the Board's general approach is reflected in cases such as *Farrero v. NASA*, 83 MSPR 487, 99 FMSR 5399 (1999), wherein the Board held "[w]hile it might have been prudent for the appellant to have bargained for an additional term providing that the settlement agreement would become null and void should OPM determine that he was not entitled to a retirement annuity, he did not do so, and the Board may not add such a term." See *Murphy v. USPS*, 54 MSPR 202, 205, 92 FMSR 5304 (1992) (parol evidence may not be used to add additional terms to a settlement agreement). The words of the agreement are of paramount importance in determining the intent of the agreement. *Shafer v. Dept. of Air Force*, 46 MSPR 164, 90 FMSR 5493 (1990); *aff'd*, 935 F.2d 280 (1991) (Table). The Board will not interpret the language of a settlement agreement in a way that unilaterally modifies the agreement. *Coon v. USPS*, 62 MSPR 180, 184, 94 FMSR 5220 (1994). In a case that was remanded on other grounds, the MSPB held that there was no agreement to purge an earlier suspension, so an appellant's later argument that it should have been expunged along with a removal action was without merit. *Gonzales v. USPS*, 44 MSPR 517, 519-20, 90 FMSR 5247 (1990). Absent any evidence of an ambiguity in its terms, the Board lacks authority to unilaterally modify its terms or read a nonexistent term into the agreement. *Harbour v. Dept. of Commerce*, SF-3330-11-0206-C-1, 112 LRP 19378 (2012); *Flores v. USPS*, 115 MSPR 189, ¶ 10, 110 LRP 64445 (2010).

#### c. Silence; Absence of a Term

In *Haefele v. Dept. of Air Force*, 108 MSPR 630, 108 LRP 28136 (2008), the absence of a term in an oral settlement agreement indicating that the agreement was conditioned upon it being reduced to writing and signed by the parties did not mean that the agreement was ambiguous on that point. Citing to *Principe v. USPS*, 100 MSPR 66, ¶ 5 (2005), the Board found that "[i]n construing the terms of a settlement agreement, the words of the agreement itself are of paramount importance, and parol evidence will be considered only if the agreement is ambiguous." In *Haefele*, there was nothing ambiguous in the language of the settlement agreement regarding whether it needed to be reduced to writing and signed to bind the parties. The Board therefore did not consider the agency's assertions regarding the intent or understanding of the parties at the time of the settlement agreement.

#### d. Terms of Art

Special care should be taken when using terms of art [refer to the later section on "Terms of Art in Agreements"]. The importance of fully defining terms in an agreement is apparent in *Pope v. FCC*, 311 F.3d 1379, 102 LRP 36486 (Fed. Cir. 2002). The agreement in *Pope* provided appellant three opportunities for "priority referral" but the agreement stated that this did not mean he was "guaranteed an interview or selection even if he met all the qualifications for the position." The court found that:

It is settled law that, as a term of art, "priority consideration" means that an employee will receive *bona fide* consideration by the selecting official before any other candidate is referred for consideration and that the employee will not be considered in competition with other candidates and will not be compared with them.

The *Pope* court agreed with the appellant that the language in the agreement was not a "separate definition of priority consideration but instead is simply a partial description of what occurs when priority consideration is given." *Id.* The case was reversed and remanded for the agency to provide the three opportunities provided for in the agreement.

### 4. Interpreting Terms

In interpreting the meaning of one term of an agreement, it must be read in conjunction with the rest of the agreement. *Saunders v. USPS*, 75 MSPR 225, 232, 97 FMSR 5262 (1997), citing RESTATEMENT (SECOND) OF CONTRACTS, § 202(2) (1979). An agreement "violates the rules of contract interpretation to give effect to one term of a settlement while ignoring another. In interpreting a settlement agreement, words are assigned their ordinary meaning, unless it is shown the parties intended otherwise." *Weber v. Dept. of Agric.*, 86 MSPR 25, 100 FMSR 5291 (2000).

Conduct occurring after the agreement was reached may be relevant in determining the original intent of later-disputed terms. In *McDavid v. Dept. of Army*, 58 MSPR 673, 93 FMSR 5353 (1993), the Board noted:

[T]he parties' conduct after they have entered into a settlement agreement may be relevant to an interpretation of terms in the agreement.

See *Laborers Health & Welfare Trust Fund for Northern California v. Kaufman & Broad of Northern California*, 707 F.2d 412, 418 (9th Cir. 1983) (in determining the intent of parties to a contract whose meaning is not clear on its face, the trier of fact may consider the parties' conduct subsequent to contract formation); see also *Noell v. American Design, Inc., Profit Sharing Plan*, 764 F.2d 827, 832 (11th Cir. 1985), quoting *Flagg-Utica Corp. v. City of Florence*, 275 Ala. 475 (1963) (“[d]ealings of parties subsequent to the written contract are important as going to show construction by parties themselves while friendly”); *Lex Tex Ltd. v. Avtex Fibers, Inc.* (In re Yarn Processing Patent Validity Litigation), 462 F. Supp. 340, 342 (S.D. Fla. 1978), quoting *Brown v. Financial Service Corp., International*, 489 F.2d 144, 151 (5th Cir. 1974) (an “established rule of contract interpretation...is that courts may look to subsequent action of the parties to determine the interpretation that they themselves placed on the contractual language”).

When it comes to enforcing settlement agreements, the MSPB's and Federal Circuit's authority exceeds their normal jurisdiction. “[W]hen the issue is compliance with a settlement agreement, compliance review is not limited to those aspects of the settlement for which an independent appeal is available.” *Manley v. Dept. of the Air Force*, 91 F.3d 117, 96 FMSR 7026 (Fed. Cir. 1996).

#### **D. REVIEW BY THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

The U.S. Court of Appeals for the Federal Circuit reviews decisions of the MSPB. *Slattery v. Dept. of Justice*, 590 F.3d 1345, 110 LRP 807 (Fed. Cir. 2010). Settlement agreement disputes are governed by contract principles. *Kasarsky v. MSPB*, 296 F.3d 1331, 1336, 2002 LRP 414 (Fed. Cir. 2002). “A settlement agreement is a contract, and its construction is a question of law which this court reviews *de novo*.” *Conant v. OPM*, 255 F.3d 1371, 1376, 101 FMSR 7037 (Fed. Cir. 2001); see also *Harris v. VA*, 142 F.3d 1463, 1467, 98 FMSR 7011 (Fed. Cir. 1998); *Tretchick v. Dept. of Transp.*, 109 F.3d 749, 752, 97 FMSR 7010 (Fed. Cir. 1997). “If there is an ambiguity in the formation of the agreement or during its performance, we implement the intent of the parties at the time the agreement was struck.” *Harris v. VA*, 142 F.3d 1463, 1467, 98 FMSR 7011 (Fed. Cir. 1998). Words of the agreement are given their ordinary meaning unless the parties intended otherwise.

As discussed in *Harris v. VA*, 142 F.3d 1463, 1467, 98 FMSR 7011 (Fed. Cir. 1998), a settlement agreement is interpreted in the following manner:

[W]e first ascertain whether the agreement clearly states the understanding between the parties. If there is an ambiguity in the formation of the agreement or during its performance, we implement the intent of the parties at the time the agreement was struck. We give the words of the agreement their ordinary meaning unless the parties mutually intended and agreed to an alternative meaning.

The Court of Appeals for the Federal Circuit may reverse a decision of the Board only if it is: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, or regulation having been followed; or (3) unsupported by substantial evidence. 5 USC 7703(c); see also *Gibson v. VA*, 160 F.3d 722, 725 (Fed. Cir. 1998).

The court considers settlement agreements without deference to the Board's rulings. To the extent the settlement agreement is clearly stated and understood by the parties, it is enforced according to its terms. If the agreement does not clearly state the parties' understanding or if there was “an ambiguity during its formation or performance,” the court will “implement the intent of the parties at the time the deal was struck.” *Pagan v. VA*, 170 F.3d 1368, 99 FMSR 7005 (Fed. Cir. 1999), citing *King v. Dept. of Navy*, 130 F.3d 1031, 1033 (Fed. Cir. 1997); see *Foreman v. Dept. of Army*, 241 F.3d 1349 (Fed. Cir. 2001); *Harris v. VA*, 142 F.3d 1463 (Fed. Cir. 1998); *Massie v. United States*, 166 F.3d 1184, 1187 (Fed. Cir. 1999).

In *Conant v. OPM*, 255 F.3d 1371, 101 FMSR 7037 (Fed. Cir. 2001), the court found that the agency breached a settlement agreement when it submitted an SF-50 showing appellant's removal and filled out disability paperwork that described the appellant's alleged misconduct. The agreement called for the agency to rescind the SF-50 reflecting appellant's removal and to replace it with an SF-50 noting a resignation for personal reasons. The agency also agreed to effectuate its “best efforts” to help the appellant obtain disability retirement. The court determined that the word “rescind” meant that the agency promised to destroy the SF-50, erasing the “removal and all reasons for it” from the agency's “professional” records. The court found that the agency did not use its “best efforts” to help appellant get disability retirement when it “sabotaged” her application through “unproved allegations of misconduct.” The court remanded the case to the Board for a redetermination and ordered it not to consider any allegations or documents that were “infected by the breach of the Conant-IRS settlement agreement.”

In cases not involving the construction or interpretation of an agreement, the court does not necessarily conduct a *de novo* review. In *Parker v. Labor*, 99-3242 (Fed. Cir. 1999 nonprecedential), a case in which appellant stated he had not voluntarily agreed to the settlement even though he was there and signed it, the court held that new evidence not submitted to either the AJ or the Board would not be considered by the court either. The court held that it would review the Board's “decision to dismiss the appeal in light of the settlement agreement for abuse of discretion.” *Id.* citing *Asberry v. USPS*, 692 F.2d 1378, 1380 (Fed. Cir. 1982). A similar discussion was held in *Sargent v. DHHS*, 229 F.3d 1088, 1091 (2000). The petitioner claimed that no settlement was actually reached, or alternatively, that the settlement was not voluntary, but he had not raised these issues before the Board. The court refused to consider the claims, stating:

Our precedent clearly establishes the impropriety of seeking a reversal of the board's decision on the basis of assertions never presented to the presiding official or to the board. *Rockwell v. Dept. of Transp.*, 789 F.2d 908, 913 (Fed. Cir. 1986); *Oshiver v. Office of Personnel Mgmt.*, 896 F.2d 540, 542 (Fed. Cir. 1990); see also *Wallace v. Dept. of Air Force*, 879 F.2d 829, 832 (Fed. Cir. 1989) (petitioner's failure to raise issue at Board precluded review by the Federal Circuit on appeal); *Stokes v. Fed. Aviation Admin.*, 761 F.2d 682, 684 n.1 (Fed. Cir. 1985). We see no reason to apply a different rule merely because a settlement agreement is involved.

#### **E. REVIEW OF AGREEMENTS BY THE U.S. COURT OF FEDERAL CLAIMS FOR CASES INVOLVING MONEY AND PAYMENTS FROM THE FEDERAL GOVERNMENT**

A few cases will reach the U.S. Court of Federal Claims for review. Such cases involve money payments and the Tucker Act. In *Holmes v. United States*, 657 F.3d 1303, 111 LRP 61282 (2011), the court remanded a Title VII settlement agreement to the Court of Federal Claims for further proceedings. It found, in relevant part:

The Court of Federal Claims derives its jurisdiction from the Tucker Act, which, in relevant part, gives the court “jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States...” 28 U.S.C. § 1491(a)(1). The Tucker Act does not

create substantive rights. Rather, it is a jurisdictional provision “that operate[s] to waive sovereign immunity for claims premised on other sources of law (e.g., statutes or contracts).” *United States v. Navajo Nation*, 556 U.S. 287, 129 S. Ct. 1547, 1551, 173 L. Ed. 2d 429 (2009). The other source of law need not explicitly provide that the right or duty it creates is enforceable through a suit for damages, but it triggers liability only if it “can fairly be interpreted as mandating compensation by the Federal Government.” *Id.* at 1552 (quoting *United States v. Testan*, 424 U.S. 392, 400, 96 S. Ct. 948, 47 L. Ed. 2d 114 (1976)). This “fair interpretation” rule demands a showing demonstrably lower than the standard for the initial waiver of sovereign immunity. *White Mountain Apache Tribe*, 537 U.S. at 472. Thus, it is enough that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages. *Id.* at 473. While the premise to a Tucker Act claim will not be “lightly inferred,” a fair inference will do. *Id.* (quoting *United States v. Mitchell*, 463 U.S. 206, 218, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983)).

We agree with the D.C. Circuit, as well as Court of Federal Claims cases which have reached a similar conclusion, that Tucker Act jurisdiction may be exercised in a suit alleging breach of a Title VII settlement agreement. We do not view Title VII’s comprehensive scheme as a bar to the exercise of such jurisdiction. In *Massie v. United States*, 166 F.3d 1184, 1188-89 (Fed. Cir. 1999), we held that a claim to enforce a contract resolving a dispute arising under the Military Claims Act fell within the Court of Federal Claims’s jurisdiction, even though the agency decision out of which the dispute arose was not subject to judicial review. Likewise, in *Del-Rio Drilling Programs Inc. v. United States*, 146 F.3d 1358, 1367 (Fed. Cir. 1998), we stated that the broad jurisdictional grant set forth in 28 U.S.C. § 1491(a)(1) does not exempt contract claims that turn on the construction of statutes. We said: “It is often necessary to interpret or apply statutory or common law principles in order to resolve contract claims, but the fact that the resolution of a contract claim may turn on the interpretation of a statute does not deprive the Court of Federal Claims of jurisdiction over that claim.” *Id.* In *Del-Rio Drilling Programs*, we concluded that the plaintiffs, who sought to recover damages from the government for alleged breach of its duties under lease contracts, were entitled to sue in the Court of Federal Claims for enforcement of the contracts, even though the court might have to interpret the Tribal Consent Act or other state and federal law in order to resolve the contract claims. *Id.* at 1367-68. Similarly, although the 1996 and 2001 Agreements arose out of Title VII litigation, Mr. Holmes’s suit for breach of contract is just that: a suit to enforce a contract with the government. See generally *Kokkonen*, 511 U.S. 375, 114 S. Ct. 1673, 128 L. Ed. 2d 391. In sum, we agree with the parties and hold that settlement agreements resolving Title VII disputes are not *per se* beyond the Tucker Act jurisdiction of the Court of Federal Claims.

That is not to say, however, that the existence of a contract always means that Tucker Act jurisdiction exists. A contract expressly disavowing money damages would not give rise to Tucker Act jurisdiction, and we have found Tucker Act jurisdiction lacking in the case of an agreement “entirely concerned with the conduct of the parties in a criminal case.” *Sanders*, 252 F.3d at 1334; see also *Kania v. United States*, 650 F.2d 264, 268-69, 227 Ct. Cl. 458 (Ct. Cl. 1981). In short, “[t]he government’s consent to suit under the Tucker Act does not extend to every contract.” *Rick’s Mushroom*, 521 F.3d at 1343.

## F. REVIEW OF EEO AGREEMENTS BY DISTRICT COURTS

Can district courts interpret EEO and enforce EEO agreements? Like most things concerning law, it depends. In at least some jurisdictions, district and other courts will review settlements reached before the EEOC. In a case involving two agreements reached outside of district court, the court reviewed the settlements and determined that the agency had not complied, in part, with the settlement terms after complainant exhausted her claims before the EEOC. In *Kraft v. Dept. of Agric.*, U.S. District Court, North Dakota, 1:04-cv-084, 107 LRP 45240 (2007), in pertinent part, the court footnoted the following:

The Seventh Circuit has held that Congress intended to provide the EEOC with a federal forum to enforce conciliation agreements. *EEOC v. Liberty Trucking Co.*, 695 F.2d 1038, 1040 (7th Cir. 1982). Although the *Liberty Trucking* court did not “reach the question whether a distinction should be made between conciliation agreements, which are statutory creatures and which follow an EEOC investigation and determination of reasonable cause, and settlement agreements which are a device created by the EEOC to resolve complaints prior to investigation,” the Court noted that its decision “turn[ed] on the voluntary nature of conciliation agreements and not upon an administrative finding of reasonable cause.” *Id.* at 1044 n. 7. Recognizing that settlement agreements are just as effective as conciliation agreements in promoting voluntary compliance with Title VII, other courts have held actions to enforce pre-determination settlement agreements are ones brought under Title VII and accordingly, federal courts have jurisdiction over such actions. *Eatmon v. Bristol Steel & Iron Works, Inc.*, 769 F.2d 1503, 1513 (11th Cir. 1985); *EEOC v. Henry Beck Co.*, 729 F.2d 301, 305-06 (4th Cir. 1984); *Sherman v. Standard Rate Data Serv., Inc.*, 709 F. Supp. 1433, 1440 (N.D. Ill. 1989).

## VII. TERMS OF ART IN AGREEMENTS

Some terms or phrases are considered “terms of art” and have specific definitions that may not be apparent to the unwary. A term of art in a contract should be accorded its commonly understood meaning “unless there are very strong counterbalancing reasons.” *General Builders Supply Co. v. United States*, 409 F.2d 246, 249–50, 187 Ct. Cl. 477, 482–83 (1969). In construing contracts, words will be given their “ordinary and commonly accepted meaning unless it is shown that the parties intended otherwise.” *Perry v. Dept. of Army*, 992 F.2d 1575 (Fed. Cir. 1993), citing *Hol-Gar Mfg. Corp. v. United States*, 351 F.2d 972, 976 (Ct. Cl. 1965); *Sweet v. USPS*, 89 MSPR 28, 32, 101 FMSR 5299 (2001); *Kellihan v. Dept. of Navy*, 72 MSPR 47, 50, 96 FMSR 5340 (1996). For example, when a settlement agreement provides for “back pay” without further defining this term of art, the Board will apply the regulatory or statutory definition of the term, unless the agreement reveals a contrary intent. *Bergquist v. Dept. of Interior*, 99 MSPR 516, ¶ 8, 105 LRP 24633 (2005).

Examples of phrases that are generally considered “terms of art” in federal sector personnel practice are provided below, along with case citations.

### Terms of Art

- priority consideration for vacancies (*Pope v. FCC*, 311 F.3d 1379, 102 LRP 36486 (Fed. Cir. 2002); *Becker v. Dept. of Navy*, 0195587 (1996); *Kreckel v. Secretary of Army*, 01966181 (1997))
- priority consideration for restoration following an injury (*Rodriquez v. Dept. of Justice*, 84 MSPR 685 (2000))
- priority placement (*Cunningham v. Secretary of Air Force*, 01965768, 98 FEOR 1229 (1998))
- priority referral (see *Pope*, above, for how this phrase was treated and *Perry v. Dept. of Army*, 992 F.2d 1575 (Fed. Cir. 1993))
- reemployment priority rights (5 CFR part 330; *Sturdy v. Dept. of Army*, 88 MSPR 502 (2001); *Rodriquez v. Dept. of Justice*, 84 MSPR 685 (2000); *Ryan v. ICC*, 70 MSPR 17 (1996))
- reinstatement or restoration (*Lenssen v. Dept. of Navy*, 29 MSPR 180 (1985))
- return to duty (*Coon v. USPS*, 62 MSPR 180 (1994))
- basic pay (*Herrington v. Secretary of Defense*, 05960032 (1996))
- back pay (*Galatis v. USPS*, 110 MSPR 399, 109 LRP 4348 (2009); *Raymond v. Navy*, 116 MSPR 223, 111 LRP 9545 (2011); *Jackson v. USPS*, 81 MSPR 286 (1999); *Bergquist v. Dept. of Interior*, 99 MSPR 516, 105 LRP 24633 (2005); *Lebron v. USPS*, 05990016 (2000); *Sheehy v. National Security Agency*, 0520080753, 112 LRP 11769 (2012))
- front pay (*Ulloa v. USPS*, 01972750 (2000))
- pay retention and grade retention (*Day v. Dept. of Air Force*, 78 MSPR 364 (1998))
- moot (*Sweet v. USPS*, 89 MSPR 28 (2001); *Kuo v. Dept. of Navy*, 05970343 (July 10, 1998))
- suspension (*Labinski v. USPS*, 88 MSPR 125, 127–28 ¶ 5 (2001))
- paper suspension (*Beaudoin v. VA*, 99 MSPR 489 (2005))

If you decide to use a term of art in a settlement agreement, be sure you know what the term means and how the controlling bodies have interpreted it. Keep in mind that where a settlement agreement uses a term of art *without defining it*, the Board may apply the regulatory or statutory definition of that term *unless it is shown that the parties intended otherwise*. The safest course, if the term is capable of more than one meaning, is to spell out everything meant by the term and how it will be applied to the specific clauses of the agreement. It is also prudent to include information about what is not meant, if there is a chance that a third party could read a different intent. Partial definitions or explanations about how parts of the process will be carried out may not override the commonly understood meaning of the term; define terms fully or risk the term being interpreted as a “term of art.” *Pope v. FCC*, 311 F.3d 1379, 102 LRP 36486 (Fed. Cir. 2002).

In *O’Neil v. DHUD*, 220 F.3d 1354, 100 FMSR 7024 (2000), a case dealing with criminal charges, the court described how it will examine the use of “terms of art” if no “contrary direction” is given:

And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

The same advice regarding the definition of terms applies to agency-specific terms or other terms where parties assume their definitions would be the same. In *Montes v. Dept. of Navy*, 01972610, 98 FEOR 14996 (1998), an agreement provided for “cross-training” and “technical training,” but the terms were not defined in the agreement. Although in the *Montes* case the trouble appeared to be poor drafting versus a “term of art” definition problem, the Commission stated that it was precluded from determining agency compliance and remanded the case for a supplemental investigation. The Commission ordered the agency to define and explain its agency “terms of art.” Later, the agency dismissed the remanded *Montes* matter, because complainant had resigned. The Commission found that the agency improperly dismissed complainant’s breach allegation on the grounds of mootness, because complainant’s departure did not nullify the existing settlement agreement; however, the EEOC agreed that *Montes* resignation “...may render further execution of some provisions of the agreement difficult or impossible.” *Montes v. Dept. of Navy*, 01995960, 102 FEOR 12798 (2002).

In *Hernandez v. Dept. of Defense*, 325 Fed. Appx. 905, 109 LRP 24539 (2009 nonprecedential), the Federal Circuit applied the “most natural meaning” to an ambiguous term, namely the word “reconsider”:

To “reconsider” is “to think over, discuss, or debate (as a plan, decision) esp[ecially] with a view to changing or reversing.” *Webster’s Third New International Dictionary* 1897 (Merriam-Webster 2002); see also *Webster’s Unabridged Dictionary* 1612 (Random House 2d ed. 1998) (defining “reconsider” as “to consider again, esp[ecially] with a view to change of decision or action”). In the judicial context, reconsideration frequently means action that changes a result. Thus to “reconsider” a result could well mean either that the result would be reviewed, or that the result would be changed. The most natural meaning of “reconsider” here is that *Hernandez’s* enrollment in the PPP would be changed so that he would be enrolled for twelve months following the effective date of the settlement agreement.

In *Laufer v. FMCS*, 01992069, 102 LRP 15491 (2002), the term “mail” in the agreement caused a dispute when the agency did not allow complainant access to email. With so much cyber terminology in existence, parties may wish to define any form of communications in an agreement.

In *Buzitsky v. USPS*, 82 MSPR 388, 99 FMSR 5229 (1999), the Board could not discern what was meant by providing appellant “indefinite saved grade”

since the agreement did not define the term. The case was remanded to allow the parties an additional opportunity to submit evidence and argument to substantiate or refute the appellant's assertions that the agency breached the settlement agreement.

If a party intends a certain interpretation of an agreement term, a definition of that term should be reduced to writing as part of the settlement agreement. *Jenkins-Nye v. GSA*, 01851903, 87 FEOR 1025 (1987). If an explicit definition is in the settlement agreement and it is not reasonably susceptible to more than one interpretation, parol evidence is unnecessary and inadmissible to clarify the intent of the parties. *Rothwell v. USPS*, 64 MSPR 473, 477 (1994) (discussing why a "zipper" clause is wise). If a party wants to restrict what a term means, it should negotiate the restrictions and write them in the agreement. *Batchelor v. VA*, 01997215, 101 FEOR 15696 (2000). Where a settlement agreement provided that the appellant would be given priority consideration for any GS-12 position, the agency may not argue that a position posted as being a GS-12/13 was actually a GS-13 position. *Landis v. Secretary of Veterans Affairs*, 01966903, 97 FEOR 10801 (1997).

Given all the case law discussing interpretations of the parties' intent, the best course is to define all terms that are capable of more than one meaning and not to rely on side-bar conversations to show intent. All terms should be spelled out clearly, including what the term does not mean if there is any chance of ambiguity. Then a "zipper" clause should be added to integrate the agreement. A "zipper" clause (also commonly called an "integration" clause) is a phrase used to indicate that the agreement is "as is" and that no other terms exist.

## VIII. WRITTEN AGREEMENTS

Advocates are advised to abide by the following rule: make no agreement unless it is in writing. Oral agreements are not advisable. In cases involving Older Worker's Benefit Protection Act claims, an agreement is not valid unless it is in writing. *Schwartz v. Dept. of Educ.*, 113 MSPR 601, 110 LRP 30072 (2010).

Oral agreements are not uncommon, and they can be binding. Judges often encourage, and some would say force, the parties to settle. Many times this occurs on the day of the hearing before parties have time to consider all the ramifications of the terms, and the agreement terms are simply dictated into the record. You do not have to make the judge happy. Protect the interests of your client and insist that there is no agreement until all terms are in writing and signed by all the parties.

A clear, concise, written agreement is best; in the worst case scenario, it will at least provide a basis for later argument or interpretation if there is an allegation of breach or a dispute over the meaning of a term. Taking the time to reduce an agreement to writing allows parties the benefit of carefully drafting the language, reviewing case law, or checking on the feasibility of certain provisions. Unless the terms reached are so simple that no one could ever question them (payment of attorney fees with a specific amount might be an example), and, if you represent the agency, you have all the waiver language needed in an agreement at your fingertips and can read all parts of the waiver agreement language into the record, do not enter into an oral agreement.

To fashion a written agreement, first provide a draft to the other side and then exchange comments between the parties until a clear understanding is reached on all terms. Label drafts as such. Add a provision requiring all the signatures in order for the agreement to be binding. *Kilpatrick v. Dept. of Energy*, 01980808, 98 FEOR 15508 (1998). Prepare and save notes of the parties' discussions concerning the various terms of the agreement in case there is a later dispute over interpretation. Agency representatives should consider placing a term in the agreement calling for review by their Office of General Counsel, other expert, or higher level management. If the term is not in the agreement, then it is very difficult to make an argument that the individual signing did not have the authority or that the terms should otherwise not be carried out. *Benardout v. Dept. of Commerce*, 01A01439, 102 FEOR 12903 (2002). The fact that the Commission demands that agreements be in writing does not mean that a less formal "written" agreement cannot be binding in some circumstances. If there is some written communication indicating that an agreement has been reached, this may be sufficient in the EEOC's view to bind the parties. *Walker v. Postmaster General*, 01961066, 97 FEOR 10918 (1997).

## IX. ORAL AGREEMENTS

Don't agree to oral settlements. Despite the advice to always put agreements in writing, oral agreements are fairly common. There are times in the course of litigation when a representative can reasonably anticipate that the topic of settlement will come up. Prehearing conferences and just before a hearing are examples of such times. Make sure you are prepared and have sample language with you in the event that an oral agreement is suggested and acceptable to your client. Waiver language is especially important for agency representatives to have on hand. Where an oral agreement is reached, the terms and all appropriate waiver language should be read into the record for enforcement purposes.

If an oral agreement is reached, it is binding and cannot be set aside because a party later wants to reduce the agreement to writing or add more terms, waivers, or nondisclosure provisions. *Opler v. Secretary, Dept. of Commerce*, 01A11610, 102 LRP 24110 (2002). The Commission noted that if the agency had intended the agreement to be reduced to writing, it did not state this on the transcript; further, both parties agreed on the record that the agreement was complete and that they understood the terms. The EEOC will not find an agreement binding where the transcript of a hearing before an EEOC AJ reflected that the parties had reached a tentative settlement agreement, had drafted a proposed agreement and that they understood that the terms of the agreement as read into the hearing transcript were not the final terms of the agreement. *Gelin v. Dept. of Treasury*, 01924271, 93 FEOR 1061 (1992).

The Board and Federal Circuit have ruled that an oral settlement agreement is valid and binding on the parties and have enforced an oral agreement where the appellant has subsequently declined to sign a written document memorializing the terms of the earlier oral agreement. *Tiburzi v. Dept. of Justice*, 269 F.3d 1346, 1351–52 (Fed. Cir. 2001); *Martin v. Dept. of Air Force*, 91 MSPR 36, ¶ 7 (2002); *Ali v. Dept. of Army*, 50 MSPR 563, 569 (1991). Even where there is language suggesting that the oral agreement will be reduced to writing, that alone is insufficient to invalidate an otherwise valid oral agreement. *Tiburzi*, 269 F.3d at 1351; *Martin*, 91 MSPR at ¶ 7. Only where the record shows that the parties did not intend to be bound until the agreement was reduced to writing and signed is an oral settlement agreement not binding on the parties. *Martin*, 91 MSPR at, ¶ 7.

The above advice does not mean that oral agreements are never effective if clearly worded and appropriate waiver language is read into the record. In *Jackson v. Dept. of Treasury*, 01A54710, 105 LRP 59952 (2005), complainant agreed, in part to, "...never seek or accept employment in any capacity with the Internal Revenue Service (IRS) in any office." Complainant later expressed that she did not think the agreement meant the entire IRS and attempted to void the agreement. The EEOC found in pertinent part, that complainant was to be paid \$5,000 in exchange for her withdrawal of her EEO complaint and agreeing not to ever apply or work for the IRS in any office. The EEOC declined to void the agreement.