



Region 4 Review

Eastern Area

EEO ADR Newsletter

JULY 2008 – Volume One



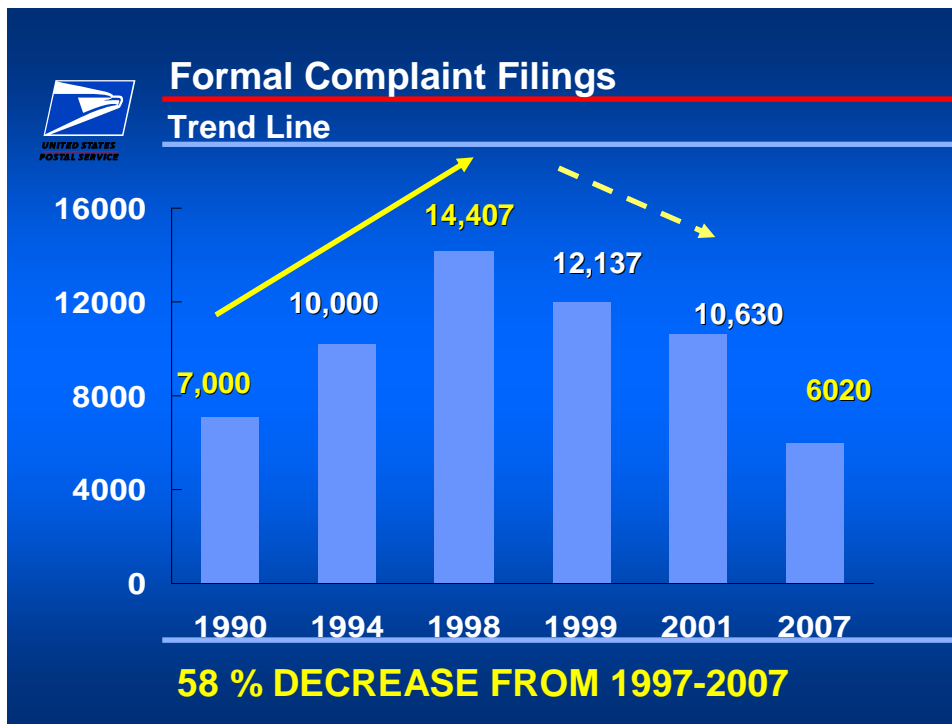
Dear Mediators,

Welcome aboard !

I am very pleased to announce that William Coutu has been named as our new Regional Manager, EEO Compliance and Appeals. Bill officially assumed the position in June 2008, but has been involved in the EEO function for many years. He's held a variety of positions, most recently as the EEO ADR Program Analyst-Headquarters and prior to that, the Northeast Area EEO Manager, Compliance and Appeals.

Bill is domiciled in Providence, Rhode Island but will oversee the entire EEO function for the Eastern, New York Metro and Northeast Areas.

Congratulations Bill !



“Since the use of Transformative Mediation”

The information above is presented to all of you in an effort to demonstrate how the Transformative model of mediation has positively impacted the Postal Service since its inception in 1998. We continue to reduce the number of formal complaints filed on a national level while simultaneously improving the work environment by opening lines of communication between parties in conflict. As you can see, until the use of the transformative model, formal complaints nearly doubled from 1990 to 1998. However, during the past ten (10) years, we have successfully achieved a 58% decrease in the filing of formal complaints with approximately 14,339 filed in Fiscal Year 1997 to only 6020 filed in Fiscal Year 2007. This is quite an accomplishment since settlement was never the primary focus of REDRESS mediation.

The parties must be in control of the mediation process in order to achieve a sense of satisfaction. They must be given ample opportunity to voice their opinions and concerns at their own pace, without being rushed to an early resolve by the mediator. Far too often, mediators trivialize issues by neatly packaging them into very ‘resolvable’ problems despite the parties ongoing desire to be ‘heard’. When parties are gently coerced into settlement without feeling as though all of their concerns have been satisfied, the resolution can be short-lived as breaches and/or new complaints are subsequently filed. Therefore, it is essential that the mediator remain true to the transformative framework which is so very critical to the success of REDRESS.



GOOD & BAD SETTLEMENTS



A Settlement Agreement is a legally binding contract, reduced to writing and signed by the parties, that involves a mutual exchange of ideas and promises.

The **Equal Employment Opportunity Commission (EEOC)** views a Settlement Agreement as a written contract between the parties to which ordinary rules of construct apply. It is the intent of the parties as expressed in the contract, and not some unexpressed intention, that controls the contract's construction. 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.

What does that actually mean? In simple terms, the intent of the parties is gleaned from the specific language of the settlement agreement as well as the party's understandings at the time of the signing and the actions of the parties subsequent to the signing. When the settlement terms are clear and unambiguous, the language alone is the controlling factor. When the contract is not conclusive, the precise language is subject to interpretation which can lead to a *'breach'* of settlement.

Therefore, what factors should be considered when drafting a Settlement Agreement?

1. **CONSIDERATION** – 'Consideration' is a term used frequently in conjunction with Settlement Agreements. A Settlement Agreement is essentially a 'contract' and is only valid when something of value is exchanged. The EEOC, for example, declares a settlement null and void or 'nudum pactum' ('naked promise'), when the agency does not confer any benefit upon the complainant by only agreeing to provide something to which he/she is already entitled to receive. More specifically, a promise by the agency, for example, to treat the complainant "fairly and equitably" or with "dignity and respect" as it does all other employees does NOT constitute consideration for withdrawal of a complaint. Similarly, there is no *consideration* when an agency merely agrees to treat the complainant in accordance with agency regulations and the collective bargaining agreement in exchange for withdrawing his complaint. The following is an example of such a Settlement Agreement: "*Management agrees to follow all postal rules and regulations.*" In this instance, management is required to follow postal services regulations and has bestowed upon the individual nothing of consideration.
2. **COLLECTIVE BARGAINING AGREEMENTS** – The terms and conditions of a settlement agreement cannot violate a provision of the applicable collective bargaining agreement. In these instances, an individual may elect to renegotiate the terms of the agreement or may have their complaint reinstated. To avoid such situations, management should seek technical advice from a Labor Relations professional prior to mediation OR should request that the Labor Relations Specialist be present in mediation or during the settlement process.
3. **POSTAL REGULATIONS / LAW** – As with the Collective Bargaining Agreements, it is critical that the negotiated terms and conditions of a Settlement Agreement do NOT violate Postal Service

regulations and/or State / Federal law. As standard practice, the parties should consult with Labor Relations, Human Resources or the Law Department.

4. **AUTHORITY LEVELS AND LIMITS** – It is critical that the representative of the Agency be cognizant of his/her level of settlement authority during any stage of complaint processing. Once management becomes aware of the specific complaint and the requested remedies, he/she should ask the following questions before signing a settlement: Does management have the proper authorization to sign this settlement? Does management have written delegation of authority? If so, what is his/her authorized monetary limit? If unsure of his/her authorization, who should he/she consult to obtain the proper authorization (i.e., Manager, Human Resources, Area Vice President, Manager Labor Relations, Law Department)?
5. **CLEARLY DEFINED TERMS & TIME FRAMES** – In addition to having ‘consideration’ in a Settlement Agreement, it is important that the terms and conditions are clearly defined so as to avoid any misinterpretation by the parties, as well as potential misinterpretation by a third-party neutral, such as an Administrative Judge, who may be required to make a decision relative to an allegation of breach. It is also important to include realistic timeframes for compliance as you may not be in control of the processing time. [Example One](#): When an agreement stipulates that an individual will receive monetary back pay relief, indicate that while you will process the proper documentation, you cannot guarantee the processing time as it may be out of your jurisdictional control. [Example Two](#): When entering into an Agreement that is contingent upon certain performance levels for an interim period, ensure that the language clearly specifies what happens in the event where the contingent items cannot be met. More specifically, if you agree to grant an individual the opportunity to satisfactorily perform in a higher level capacity for a period of three (3) months, make certain that the Settlement clearly outlines how the individual will be evaluated during that timeframe and what occurs if he/she does not perform in a satisfactory manner. [Example Three](#): Settlements should outline WHO will do WHAT by WHEN. For example, instead of a signing an agreement that states the ‘*individual will receive supervisory training*’, fully clarify and define the agreement by stating ‘*while it is understood that the individual has not been accepted into the Associate Supervisory Program (ASP) at this time, the parties agree that he/she will receive 80 hours of on-the-job training to be conducted by the level 17 Supervisor in that facility. The training will occur in two (2) 40 hour segments to be completed no later than two (2) months from the signing of this settlement agreement.*’
6. **THIRD PARTY INVOLVEMENT** – The parties should not involve individuals who are not present during the settlement process or who have no knowledge or involvement in the matter. [Example](#): If a settlement agreement stipulates that an individual will be returned to duty as a city carrier in a different office, you need to ensure that A) you are contractually permitted to do so, B.) a vacant position is available in that office, and C) you have the proper authorization by a higher level authority and installation head of that facility, before you can agree to such a settlement. Ensure that you have approval from the individuals or departmental functions who are directly involved in the settlement agreement and that they fully understand their role in the settlement process.
7. **COMPLIANCE** – It is essential that the parties comply with the terms of any Settlement Agreement and failure to do so may result in breach allegations, sanctions, additional monetary penalties and/or further court litigation.

Let’s take a look at a few Settlement Agreements !

*Are they **GOOD** or **BAD** Settlements and **WHY**????*

Allegation # 1: Complainant alleges that she was denied a promotion to Budget Analyst on June 29, 2008 because of her race and sex.

Settlement Agreement:

1. Complainant will be given 'Priority Consideration' when she applies for the next two (2) Budget Analyst positions in the upcoming Fiscal Year.
2. If Complainant does not get selected for either position, she will be given a Developmental detail.
3. As such, Complainant agrees to withdraw this complaint and her companion grievance related to this matter.

Is this a **GOOD Settlement? If not, explain how to make it better.**

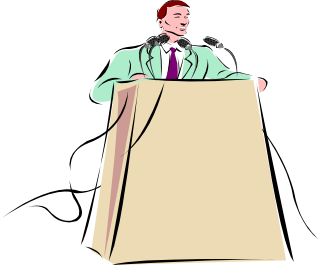
1. What is 'Priority Consideration'? What consideration did the Agency bestow upon complainant? Nothing. She has not been promised a position in the next Fiscal Year, so what happens after that?
2. What type of Development Assignment? What Department? What will be duration of assignment? When will it begin and when will it end? Details are critical to avoid a breach allegation should this not occur.
3. Complainant is settling her case by withdrawing based on the contingencies above, however can she withdraw a companion grievance if there is NO Union Official present at mediation? NO. In fact, if you refer to any EEO Settlement Agreement form, you will note that specific language is included that states the following: "*If there are related grievances (beyond Step 1) which the counselee would like to withdraw an authorized union officail must sign below.*" **It is in everybody's best interest for the mediator to review the entire Settlement Agreement prior to the drafting of settlement term(s).**

Allegation # 2: Complainant alleges that other employees in her department who have the same job description as she, is treated more favorably relative to work assignments and overtime.

Settlement Agreement:

1. Management agrees to follow all postal regulations and collective bargaining contract relative to the issuance of overtime.
2. Management agrees to treat complainant with 'dignity and respect'.
3. Management will not retaliate against employee for the filing of this complaint.

Is this a **GOOD Settlement? Answer: **NO.**** All three (3) stipulations provide the complainant with NO 'consideration'. Management is already obligated to follow all postal rules/regulations/collective bargaining agreements and *everybody* is entitled to 'dignity and respect'. Federal law prohibits 'retaliation' of any kind, so why include such a stipulation? A mediator may view this mediation as successful simply because it settled. We would view this as problematic. Why? Because it appears that complainant did not reach a level of trust with management and simply wanted something in writing so that he/she could resurrect this Agreement in the future. All settlement agreements of this kind do eventually result in a 'breach' allegation. When this occurs, the complainant may request enforcement of the Agreement or reinstatement of the underlying complaint. In either case, the Agency is required to conduct a full investigation into the matter and follow-up appropriately in accordance with EEOC regulations.



Training Opportunities

www.transformativemediation.org

The Postal Service is neither sponsoring nor soliciting for this organization

CURRENT TRAINING SESSION OFFERED:

[July 21 - 25th, 2008 Certified Civil Mediation Training: The Transformative Model - Minneapolis, MN](#)

[July 21-25 2008 Family Mediation Training 2008 - Bemidji, MN](#)

[September 22nd – 26th 2008 40 Hour Family Training - Eagleville, PA](#)

[September 24th, 25th & 26th, 2008 Advanced Mediation Training \(Introduction to the Transformative Model\) - Minneapolis, MN](#)

[October 3rd, 10th, 17th, 24th & 31st Advanced Mediation Training \(Introduction to the Transformative Model\) - Minneapolis, MN](#)

[October 17- 19, 2008 Mediation And Conflict Transformation Skills: Focusing on Sources of Conflict and Systems - Baltimore, MD](#)

[October 23rd and 24th 2008 Advanced Skills Intensive Training - Eagleville, PA](#)

[October 27-30, 2008 Workplace Mediation Seminar 2008 - Manitoba, Canada](#)

[Dec. 1 - 5 2008 Certified Civil Mediation Training: The Transformative Model - Minneapolis, MN](#)

[January 4th – 9th, 2009 Certified Family and Divorce Mediation Training: The Transformative Model - Minneapolis, MN](#)

Mediator MailBag – Q & A Corner



Situation: A mediator recently conducted a mediation that resulted in a vague settlement agreement containing ‘no consideration’ which can ultimately result in a future breach claim. The settlement stated that management would treat the counselee with “*basic respect that anyone would hope for, free of harassment, threats and intimidation*”. When the mediator was questioned by the Area Dispute Resolution Coordinator as to what proactive measures were taken by the mediator during the settlement process, the mediator responded by indicating that she could not tell the complainant to withdraw the complaint nor could she dictate settlement terms. Also, the mediator felt that the complainant simply wanted to be heard and if that was the agreement that she could live with, there was nothing more for the mediator to do or say.

Response: The Settlement process is an administrative one and subject to adherence of EEOC and Postal Service regulations. Proactivity does not preclude a mediator from being ‘transformative’ during settlement. On the contrary; a mediator’s role is to help ‘part the fog’ so that parties are clear on the issues. This would apply to settlement terms as well as to any issues discussing during the actual mediation conversation. As long as a mediator does not force what they perceive as good settlement terms upon the parties, then the mediator is performing their function. For example, before settlement terms are drafted, a good mediator would review the entire Settlement Agreement form so that the parties are in complete understanding of the process. They should be made aware that any breach allegation arising out of the implementation of or compliance with the settlement agreement must be reported, in writing, to the Regional EEO Manager at the address notated on the Agreement form. Additionally, the mediator should review and explain the section pertaining to the applicable Collective Bargaining Agreement or more specifically, the section that states ‘if the terms of this agreement are determined to violate a provision of the applicable collective bargaining agreement, the agreement will be ‘null and void’. The review of the Settlement Agreement form opens the door to discussion on other concerns, such as ‘consideration’. The mediator should explain that vague settlements or settlements that do not confer ‘consideration’ to complainant or anything more than what they are not already entitled to, are problematic, difficult to uphold and can be voided in the future.

Please continue to submit your questions and concerns to me at the following email address:

Karen Malizia – Dispute Resolution Coordinator – Eastern Area – Karen.E.Malizia@usps.gov