

June 20, 2017


LOS ANGELES FIRE DEPARTMENT



RALPH M. TERRAZAS
FIRE CHIEF

June 5, 2017

BOARD OF FIRE COMMISSIONERS
FILE NO. 17 - 072

TO: Board of Fire Commissioners
FROM:  Ralph M. Terrazas, Fire Chief
SUBJECT: SETTLEMENT OF DISCIPLINE CASES

FINAL ACTION:	<input type="checkbox"/> Approved	<input type="checkbox"/> Approved w/Corrections	<input type="checkbox"/> Withdrawn
	<input type="checkbox"/> Denied	<input type="checkbox"/> Received & Filed	<input type="checkbox"/> Other

SUMMARY

The Fire Department strives to provide the public with the highest level of service and professionalism. The Department expects members to conduct themselves in a manner consistent with its core values, on and off duty. When members fail to adhere to the standards of excellence, discipline or corrective action may be warranted. Traditional discipline, which includes reprimand, suspension, demotion or removal, may not always be the best approach to modify employee misbehavior.

Over the past few years, the Los Angeles Fire Department has discussed with the Board of Fire Commissioners the need to modify the discipline philosophy and consider alternatives to traditional discipline. At the Board of Fire Commissioners' meeting on January 21, 2014, the Board of Fire Commissioners directed the Fire Chief to explore updates to the discipline process to allow the Department to adjudicate complaints with other alternatives such as corrective action, training and counseling, even when there is a relevant traditional disciplinary guideline.

The Department is proposing to move to a public service discipline model, where settlement of individual discipline cases may be authorized, where appropriate and in the interest of maintaining high standards of professionalism within the Los Angeles Fire Department. As part of the development of the new discipline model, the Department has been entering into disciplinary settlement agreements with individual members on a pilot basis since Summer 2015 to resolve eligible discipline cases. The Department is seeking approval from the Board to formally establish the criteria and procedures that will govern disciplinary settlement agreements in the spirit of the proposed Modifications to Discipline Philosophy report (BOFC # 17 - 066).

RECOMMENDATION

That the Board:

Receive and approve the report.

FISCAL IMPACT

The Department anticipates that the use of disciplinary settlement agreements will result in cost savings through reductions of overtime costs related to member suspensions or member-requested Board of Rights hearings; however, the actual cost savings are yet to be determined.

For settlements involving education-based discipline, currently, there is no cost to the Department or the member for the courses on the approved course list. There may be a cost for future courses added to the approved course list.

DISCUSSION

The Fire Department strives to provide the public with the highest level of service and professionalism. The Department expects members to conduct themselves in a manner consistent with its core values, on and off duty. When members fail to adhere to the standards of excellence, discipline or corrective action may be warranted.

Under the prior discipline philosophy, the Department was only able to impose traditional discipline actions when members were found culpable of misconduct. Traditional discipline is limited to reprimands, suspensions without pay (up to 6 months), or termination. However, these traditional penalties do not always allow for the most effective approaches to modify employee behavior. Further, any alternatives to traditional discipline penalties require a settlement agreement with the member.

Where the Department has established by a preponderance of the evidence that the member engaged in misconduct, the adjudicator sets the appropriate penalty, using the LAFD Penalty Guidelines for Sworn Members adopted in October 2008 (the Penalty Guidelines), as well as the twelve factors first enunciated in *Douglas v. Veteran's Administration* 5 M.S.P.R. 280, 306 (1981).¹ The final *Douglas* factor to be considered

¹ The twelve factors first identified by the Merit Systems Protection Board in *Douglas v. Veteran's Administration*, 5 M.S.P.R. 280, 305-306, include:

1. The nature and seriousness of the offense, and its relation to the employee's duties position and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
3. The employee's past disciplinary record;
4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
6. Consistency of the penalty with those imposed upon other employees for the same or similar offenses;

in fashioning the appropriate level of discipline is the adequacy and effectiveness of alternative sanctions to deter misconduct by the employee and others.

Under the proposed Modifications to Discipline Philosophy report (BOFC Report # 17 - 006), once a disciplinary investigation has been completed, adjudicated, and a disciplinary penalty has been proposed, the Department would now be authorized to further use the *Douglas* factors and other specific criteria to determine if a member should be eligible for alternatives to traditional discipline penalties through disciplinary settlement agreements.

A disciplinary settlement agreement is a written settlement agreement solely between, and executed by, the member and the Department. All settlement agreements must be approved by the Fire Chief. The types of alternative discipline that may be incorporated into disciplinary settlement agreements include "last chance" agreements, training, and education-based discipline. In the context of settlement, training refers to remediation of operational skill deficiencies and education-based discipline refers to remediation of behavioral problems (e.g. anger management). Alternative Discipline may be employed in lieu of or in combination with traditional discipline measures. For example, a settlement agreement may impose an anger management course in combination with 5 suspension days rather than impose 15 suspension days that might have been dictated by the traditional guidelines.

In order to provide education-based discipline, the Department has identified a series of courses for members to take, which are intended to educate the member on the standards of excellence expected from the Department, provide him/her with skills for meeting the Department's behavioral expectations, and deter future misconduct. At this time, most of these courses are offered through a partnership with the Los Angeles Sheriff's Department to provide that agency's educational courses to members. The Department is concurrently presenting a specific report on education-based discipline and accompanying policy to the BOFC for adoption.

In many cases, alternative discipline can be more effective than the consequences available through traditional discipline. Offering training or last chance agreement alternatives in certain cases may lessen the chances of recidivism. For example, a last chance agreement in lieu of a Board of Rights hearing in a substance abuse case may reduce the likelihood the member will be under the influence while on duty. It is only

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7. Consistency of the penalty with any applicable agency table of penalties;
 8. The notoriety of the offense or its impact upon the reputation of the agency;
 9. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
 10. Potential for the employee's rehabilitation;
 11. Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
 12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

through settlement that requirements for random testing or a specified dependency treatment program can be imposed.

In cases where education-based discipline is applied, the Department expects that members who attend these courses as part of alternative discipline will not return to the discipline system, since the courses are designed to provide members with tools to assist them in adhering to the standards expected from the Department.

An additional benefit of settlement agreements is achieving finality. Based on the settlement agreement of the parties, the member voluntarily waives the right to pursue further administrative and/or judicial remedies related to the case.

This report and attached policy (Exhibit 1) formally establish the criteria and process to determine if disciplinary settlement agreement may be considered and, if so, what alternatives to traditional discipline should be included in that agreement. In all cases, any decision to employ a disciplinary settlement agreement must be in keeping with the core concepts of the Public Service Discipline Model² and in the best interest of maintaining the high standards of professionalism within the Los Angeles Fire Department.

Settlement Process and Criteria

All settlements must be approved by the Fire Chief. The process for securing authority to resolve a particular discipline case through a settlement is as follows:

- 1) Eligibility for settlement is established by Commander, Professional Standards Division in accordance with the criteria approved by the Board of Fire Commissioners.

² Since summer 2015, the Department has been moving away from a punitive discipline model and toward a Public Service Discipline model, based on four core concepts, which provides the Department with structure in determining the appropriate level of corrective or punitive action necessary to modify a member's behavior while maintaining a high level of public service.

Concept One:	The Department's first and foremost consideration is maintaining its high level of public service to the City and the public;
Concept Two:	The Department's second consideration is to balance the interests of the City, the public, the Fire Service, the Department, its members and the accused member;
Concept Three:	Third, the Department strives to use the appropriate level of corrective or punitive action that will ensure the delivery of public service and correct the member's long-term behavior to conform to the Department's expectations; and
Concept Four:	Finally, in determining the appropriate level of corrective or punitive action, the Department considers (1) the harm to the public service; (2) the circumstances surrounding the incident and (3) the likelihood of reoccurrence.

- 2) A settlement proposal is developed by the Professional Standards Division in accordance with the criteria approved by the BOFC.
- 3) The Commander, Professional Standards Division will prepare a settlement proposal memorandum that explains the eligibility for settlement and justification for the proposed settlement agreement.
- 4) The Fire Chief reviews the settlement agreement. The Fire Chief signifies agreement by signing the settlement authorization. Only after settlement authority has been obtained from the Fire Chief can the settlement agreement be provided to the member.
- 5) The settlement agreement is provided to the member for final execution.

To properly assess individual discipline cases for settlement, the Department has developed criteria to ensure consistent application of the principles of the Public Service Discipline Model. Not every case is amenable to settlement or an alternative discipline.

There are certain cases in which settlement will not be permitted. These include cases where the member is convicted of a felony or where the member is found to have engaged in heinous misconduct, such as child molestation or possession of child pornography, even absent a felony conviction. Additionally, in cases where the member has already been disciplined for a same or similar offenses or has a history of varied discipline, settlement may not be in the interests of the Department.

Each case should be considered for settlement based on its own unique facts and circumstances. The *Douglas* factors recognize the individual approach to penalty determination of each case, expressly identifying that the employee's past disciplinary record (factor 3), work record (factor 4), potential for rehabilitation (factor 10) and the unique mitigating circumstances surrounding the misconduct (factor 11) need to be considered when assessing the appropriate penalty. These individual mitigating or aggravating factors are equally important to consider when assessing eligibility for settlement and any settlement proposal.

In addition to the *Douglas* factors, uniform criteria should be applied to determine what, *if any*, alternative discipline proposal should be offered to resolve a particular case. The proposed criteria are:

1. Whether the Misconduct Harmed the Public Service

When misconduct has significantly harmed the public service, it is more likely to warrant traditional disciplinary action. Likewise, where recurrence of the misconduct could cause significant harm to the public, alternative discipline may not be advisable. The Department will consider the extent to which the misconduct created widespread bad publicity for the Department or its members, or brought discredit to the reputation of the Department in determining whether to extend a settlement proposal.

Any consideration of settlement should factor in the actual or potential harm to the public service posed by the misconduct.

2. Whether the Misconduct is Likely to Recur

The Department will consider the likelihood of recurrence. Further, the Department will examine whether the member has demonstrated remorse and accepted responsibility for the misconduct, whether the member has made restitution (where appropriate) or has taken other proactive steps to correct the member's behavior (such as enrolling in chemical dependency treatment, where applicable). The member's past discipline history (whether involving the same/similar behavior or not) is relevant in determining whether the misconduct is likely to be repeated and if it can be corrected through alternative discipline.

3. Whether the Misconduct or the Harm Caused by the Misconduct is Serious

The Department will consider the seriousness of the misconduct or the harm caused by the misconduct. There is prohibition against settling certain cases of serious misconduct (see Exhibit 1); however, even when settlement is not expressly prohibited, the eligibility for settlement should reflect the severity of the misconduct or the gravity of the harm resulting from the misconduct. Further, any proposed settlement agreement should reflect the same.

4. Whether the Department is Likely to Prevail in a Board of Rights Hearing

The Department will assess its chances of prevailing in a Board of Rights hearing when considering settlement prospects in individual cases.³ When considering settlement of a particular case, the Department should assess if there are any problems, that developed since the adjudication, with the availability of the witnesses or evidence that could adversely impact a Board of Rights hearing. The Department should also determine if the same or similar level of discipline would be imposed at a Board of Rights hearing as would be possible to achieve through settlement. The Department will document evidence of this in the settlement justification memorandum.

When there are significant evidentiary problems facing the Department to proceed with a Board of Rights hearing, or there is little to gain by proceeding with a hearing over settlement, the Department may seek to resolve the case through settlement.

5. Whether Alternative Sanctions Would Likely Deter Future Conduct

The Department will consider whether alternative discipline measures are more appropriate for the given circumstance to meet the spirit and goal of the Public Service Discipline philosophy. The Department will further consider the extent to which

³ Under the City Charter, Section 1060, a member who disputes a disciplinary notice is entitled to proceed to a Board of Rights hearing before three Chief Officers, who will determine after taking evidence and testimony whether the charges are proven by a preponderance of the evidence. A member who disagrees with the decision of the Board of Rights can also seek arbitration.

alternative sanctions are likely to be effective to correct member behavior when considering a settlement proposal.

These criteria and procedures required for disciplinary settlement agreements are established in the attached Professional Standards Division policy (Exhibit 1).

Settlement Documentation and Ongoing Review

Per this report and attached policy, the Department will properly document its settlement decisions to ensure consistent application of the settlement criteria and detail its assessment of the merits of each discipline case so that it is clear to an independent reviewer the propriety of settlement and the offered settlement. To ensure consistency in the approach to settlements in disciplinary cases, the Department shall document in a memorandum, at minimum, the application of five settlement criteria, as well as any other mitigating and aggravating circumstances presented in the case (e.g. Douglas Factors), and document the justification and eligibility for settlement and the settlement proposal to be offered in each case, which shall be approved by the Fire Chief before the agreement is executed.

All settlement agreements shall include a provision acknowledging that the discipline case in question may be subject to review by the Office of the Independent Assessor.

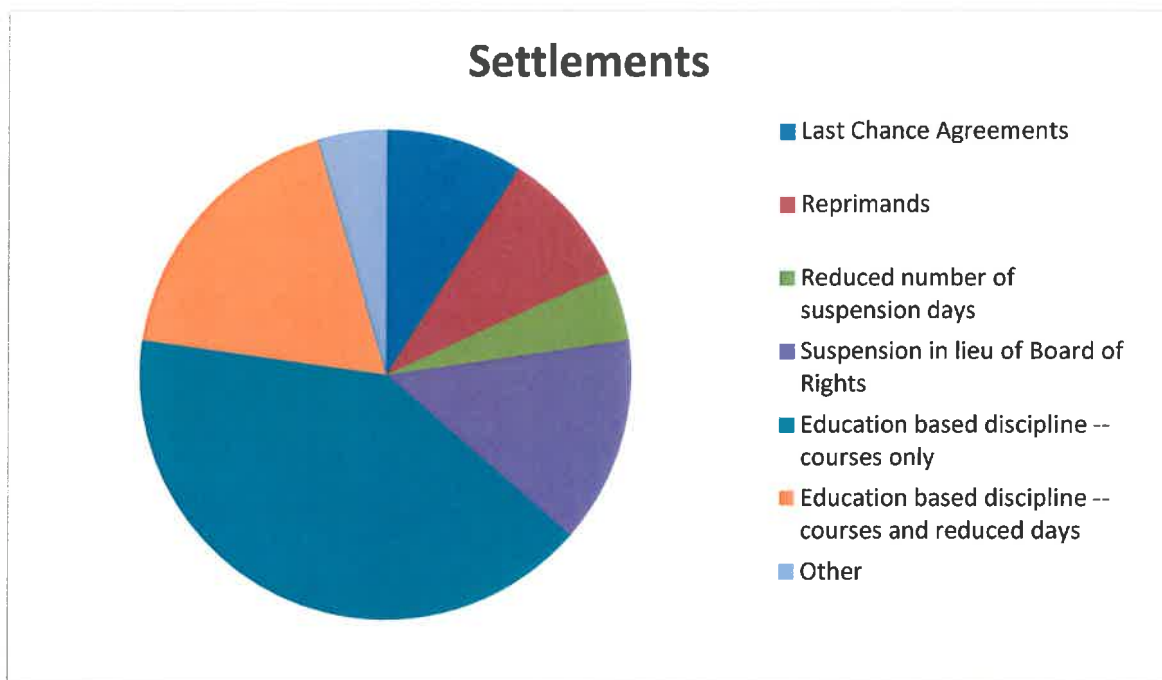
The Independent Assessor will review settlements of discipline cases on an ongoing basis to determine the quality and effectiveness of the settlements as well as their adherence to BOFC-approved guidelines. At minimum, the Independent Assessor will provide a report on settlements as part of an overall annual "Discipline Review" report to the BOFC. Additional reviews and reports to the Board may be provided as deemed necessary by either the Independent Assessor or the BOFC.

Pilot Program Results

At this point, most of the settlement agreements were entered within the last calendar year, so it is too early to properly assess their effectiveness. However, the Department has not received additional complaints against the members who resolved discipline cases by settlement agreement in the past year. Moreover, several members who attended courses have reported that the courses have been helpful to them for their work. Some members have thanked the Department for suggesting the courses.

Since the early part of 2016, the Department has settled 27 cases involving 24 members. During that time, the Department entered two last chance agreements involving substance abuse (alcohol or drugs). The Department agreed to issuance of a reprimand in place of the originally proposed penalty in three cases. The Department reduced the number of suspension days in one case. The Department agreed to a set number of suspension days in three cases, where the Department originally requested a Board of Rights hearing. The Department resolved one case by agreeing to waive the suspension dates, due to the punitive transfer imposed on the member prior to the completion of the investigation. The Department agreed to a set number of suspension

days and removal from the promotional process in one case. Finally, the Department entered education-based discipline settlements in thirteen cases. Ten were settled with coursework only and three with a combination of courses and a reduced number of suspension days.



CONCLUSION

Allowing for settlements that can be applied to appropriate cases and designed to develop and educate members about the high standards and behavioral expectations of the Department will benefit both the members and the Department.

The Department is seeking approval of this report and accompanying policy to ensure that settlements are applied and documented appropriately, with consistency, fairness, and in the spirit of the Public Service Discipline Philosophy.

Board report prepared by Karen Richter, Acting Commander, Professional Standards Division, and Erin Joyce, Chief Special Investigator, Professional Standards Division.

Attachment

POLICY

DISCIPLINE SETTLEMENT AGREEMENTS

PURPOSE: When a member of the Los Angeles Fire Department (LAFD) has been found to have engaged in misconduct and is facing suspension or termination from duty, the member and the Department may enter into a settlement agreement if the LAFD determines that an alternative form of discipline will better serve the individual and the Department to modify an employee's behavior and maintain high standards of professionalism. Alternative forms of discipline include training, counseling, education-based discipline, substance abuse or addiction treatment programs, or "last chance agreements."

This policy sets forth the criteria for determining if a case is eligible for a settlement agreement, and the procedures for implementing settlement agreements; to ensure consistency, objectivity and accountability.

APPLICABILITY: The criteria and procedures set forth in this policy apply to all cases in which a member has been served with a suspension from duty, or has been directed by the Fire Chief to a Board of Rights, and the Department and the individual member have agreed to an alternative to the discipline originally imposed.

DEFINITIONS: For purposes of this policy, the following definitions apply.

- *Training:* Time spent remediating operational skill deficiencies.
- *Education-based discipline:* Classes aimed at remediating behavioral issues.
- *Last Chance Agreement:* A written agreement between an LAFD member and the LAFD, which gives an employee who has committed serious misconduct one last chance to keep his/her job. Violation of the agreement results in the employee's termination from employment.
- *Douglas Factors:* In *Douglas v. Veterans Administration* (1981).¹ The Merit Systems Protection Board created a non-exhaustive list of factors that federal government agencies are to consider when imposing discipline on employees. These factors are used by the LAFD to determine the appropriate level of discipline.
 - The nature and seriousness of the offense, and its relation to the employee's duties, position and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
 - The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
 - The employee's past disciplinary record;
 - The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
 - The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;

¹ Merit Systems Protection Board (MSPB), 313 (1981).

- Consistency of the penalty with those imposed upon other employees for the same or similar offenses;
 - Consistency of the penalty with any applicable agency table of penalties;
 - The notoriety of the offense or its impact upon the reputation of the agency;
 - The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
 - Potential for the employee's rehabilitation;
 - Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
 - The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.
- *Public Service Discipline philosophy:* A discipline philosophy based on four concepts, which provides the Department with a structure for determining the appropriate level of corrective or punitive action necessary to modify a member's behavior while maintaining a high level of public service.

Concept One: The Department's first and foremost consideration is maintaining its high level of public service to the City and the public;

Concept Two: The Department's second consideration is to balance the interests of the City, the public, the Fire Service, the Department, its members and the accused member;

Concept Three: Third, the Department strives to use the appropriate level of corrective or punitive action that will ensure the delivery of public service and correct the member's long-term behavior to conform to the Department's expectations; and

Concept Four: Finally, in determining the appropriate level of corrective or punitive action, the Department considers (1) the harm to the public service; (2) the circumstances surrounding the incident and (3) the likelihood of reoccurrence.

A. CRITERIA FOR DETERMINING ELIGIBILITY FOR SETTLEMENT

The Department will determine if a discipline case is eligible for settlement based on the following criteria:

1. Did the misconduct harm the Public Service?
 - Was there significant harm to the public service?
 - Is it more likely to warrant traditional disciplinary action?
 - Will recurrence of the misconduct cause significant harm to the public?
 - Did the misconduct result in widespread bad publicity for the Department or its members, or bring discredit to the reputation of the Department?

- What was the actual or potential harm to the public service posed by the misconduct?
2. Is the Misconduct Likely to Recur?
 - Has the member demonstrated remorse and accepted responsibility for the misconduct?
 - Has the member made restitution (where appropriate)
 - Has the member taken proactive steps to correct his/her behavior (such as enrolling in chemical dependency treatment, where applicable)?
 - Has the member been disciplined in the past (whether involving the same/similar behavior or not)?
 3. Was the Misconduct or the Harm Caused by the Misconduct Serious?
 - Cases in which a member has been convicted of a felony or where the member is found to have engaged in heinous misconduct, such as child molestation or possession of child pornography, even absent a felony conviction, shall not be eligible for a settlement agreement.
 4. Whether the Department is Likely to Prevail in a Board of Rights Hearing
 - Have any evidentiary problems developed, since the adjudication, with the availability of the witnesses or evidence that could adversely impact a Board of Rights hearing.
 - Would the same or similar level of discipline be imposed at a Board of Rights hearing?
 5. Will Alternative Sanctions Likely Deter Future Conduct?
 - Are alternative discipline measures more appropriate for the given circumstance to meet the spirit and goal of the Public Service Discipline philosophy?
 6. Are there mitigating or aggravating circumstances, pursuant to the *Douglas Factors* that were not considered when the case was originally adjudicated?

B. PROCEDURES

The following procedures shall be followed when the Department enters into a settlement agreement with a member.

1. The Department will determine if a discipline case is eligible to be settled using the criteria listed above.
2. If a discipline case is eligible for settlement, the Department will develop a settlement proposal.

3. The Commanding Officer of Professional Standards Division (PSD) will prepare a settlement memorandum that explains the eligibility for settlement and the justification for the proposed settlement agreement.²
4. The settlement memorandum will be presented to the Fire Chief. If the Fire Chief agrees with the eligibility and proposal, the memorandum will be signed by the Fire Chief.
5. After the Fire Chief agrees and signs the memorandum, the settlement agreement will be presented to the member for final execution.
6. PSD shall upload the signed settlement agreement into the Discipline Tracking System within five days of the final execution of the agreement.
7. Within 14 days of adoption of this policy, PSD shall designate a monitor from within PSD who shall be responsible for monitoring members' compliance with all settlement agreements.

Additional Notes

1. All settlement agreements shall include a provision acknowledging that the discipline case in question may be subject to review by the Office of the Independent Assessor.
2. Any application of Education-based Discipline within settlements must conform to the relevant policies and procedures approved in BOFC #17-071 and in PSD Policy Education-Based Discipline.

² Per BOFC #17-072, the Department will properly document its settlement decisions to ensure consistent application of the settlement criteria and detail its assessment of the merits of each discipline case so that it is clear to an independent reviewer the propriety of settlement and the offered settlement. To ensure consistency in the approach to settlements in disciplinary cases, the Department shall document in its memorandum, at minimum, the application of five settlement criteria, as well as any other mitigating and aggravating circumstances presented in the case (e.g. Douglas Factors), and document the justification and eligibility for settlement and the settlement proposal to be offered in each case.