

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ANDREW G. MCCABE,	)	
	)	
<i>Plaintiff,</i>	)	
	)	
v.	)	
	)	Civil Action No. 19-2399 (RDM)
MERRICK B. GARLAND,	)	
in his official capacity as	)	
ATTORNEY GENERAL OF THE	)	
UNITED STATES, <i>et al.</i> ,	)	
	)	
<i>Defendants.</i>	)	
	)	

SETTLEMENT AGREEMENT

Plaintiff Andrew G. McCabe, by and through his undersigned counsel, and Defendants Merrick B. Garland (in his official capacity as Attorney General of the United States, and including his agents and successors in office), the U.S. Department of Justice (“DOJ”), the Federal Bureau of Investigation (“FBI”), and Christopher A. Wray (in his official capacity as Director of the FBI, and including his agents and successors in office) (collectively, “the Parties”), by and through undersigned counsel, hereby enter into this Settlement Agreement (also “Agreement”) and stipulate and agree as follows:

RECITALS

WHEREAS, on August 8, 2019, Plaintiff filed the complaint (“Complaint”) in the above-captioned action (“Action”) raising claims against Defendants under the First and Fifth Amendments to the U.S. Constitution and, in the alternative, under 28 U.S.C. § 1361, and alleging, *inter alia*, that Defendants unlawfully removed Plaintiff from the FBI and civil service and that improper political influence affected his removal proceedings; and

WHEREAS, Defendants deny these claims and deny that they violated the Constitution or any law, regulation, or policy when investigating and removing Plaintiff; and

WHEREAS, the Parties agree that Executive Branch officials outside the Department of Justice and its components should not comment publicly on ongoing career civil service employee disciplinary matters, except as provided by statute or regulation, so as not to create any appearance of improper political influence; and

WHEREAS, the Parties have engaged in arm's length negotiations through counsel concerning this agreement; and

WHEREAS, this Settlement Agreement is neither an admission of liability by Defendants nor a concession by Plaintiff that his claims are not well-founded; and

WHEREAS, the Parties wish to resolve this dispute amicably, without the costs and burdens that would result from further litigation;

NOW, THEREFORE, the Parties agree, through their respective authorized representatives, to be bound by the terms and conditions set forth below:

TERMS AND CONDITIONS

In consideration for the mutual promises and obligations in this Agreement, and with full authority to enter into this Agreement, and intending to be bound thereby, the Parties agree to the rescission of Plaintiff's removal from the FBI and the civil service and to the conferral upon Plaintiff of the benefits specified herein. As detailed below, the FBI's records will be amended to reflect that Mr. McCabe was employed continuously by the FBI from July 1996 until he retired on March 19, 2018 as the FBI Deputy Director and a member of the Senior Executive Service, and to ensure Mr. McCabe's receipt of the following benefits:

Defendants' Consideration to Plaintiff

1. Within 30 days of the execution of this Settlement Agreement, Defendants will rescind their removal of Plaintiff from the FBI and the civil service, and will rescind and vacate former Attorney General Jefferson B. Sessions's March 16, 2018 removal decision ("DOJ Removal Decision"), and the March 16, 2018 removal recommendation that was submitted to Attorney General Sessions ("DOJ Removal Recommendation").

2. The Parties agree that Plaintiff's electronic Official Personnel Folder will reflect that he was employed continuously by the FBI from July 1996 until his retirement on March 19, 2018, as the FBI Deputy Director and a member of the Senior Executive Service ("SES"), after becoming 50 years of age and completing over 20 years of service.

3. Within 30 days of the execution of this Settlement Agreement, the government will remove from Plaintiff's electronic Official Personnel Folder all documents that reflect or reference his removal, and replace them with documents reflecting that Plaintiff was continuously employed by the FBI until his retirement on March 19, 2018. Defendants will then provide to Plaintiff a copy of his revised electronic Official Personnel Folder.

4. Plaintiff will be deemed to have retired from the FBI on March 19, 2018.

5. Plaintiff will be deemed to have separated from the FBI in good standing for the purposes of 18 U.S.C. § 926C(c)(1).

6. Defendants will complete all actions necessary to ensure that Plaintiff will be recorded as having entered the federal retirement system effective March 19, 2018, with an annuity commencement date of April 1, 2018, *see* 5 U.S.C. § 8464(a)(1)(A), 5 C.F.R. § 842.208(b), and will receive:

- a. a payment of a lump sum representing all retirement annuity payments, including annuity supplement payments, that he would otherwise have received from the April 1, 2018 annuity commencement date until the day before he is paid his first regular monthly payment, which will be computed in accordance with all relevant statutory and regulatory provisions, and which will not deduct or withhold any amounts for benefits not received or for taxes not owed during the time period specified above, unless such deductions and/or withholdings are required by relevant statutory or regulatory provisions;
- b. prospectively from the date of his first regular monthly payment, through the federal retirement system, all periodic annuity payments, including annuity supplement payments, consistent with his March 19, 2018 retirement date;
- c. the ability to enroll in the BCBS Standard Option Self and Family health insurance coverage, which will take effect on the first day of the month his first regular monthly annuity payment occurs after full execution of this Agreement; and
- d. the following additional benefits:
 - i. Plaintiff's official FBI credentials, badge, and time-in-service award keys mounted in the format typically provided to retiring FBI Deputy Directors and other senior executives;
 - ii. retired FBI credentials, as are typically provided to retiring FBI Deputy Directors and other senior executives;
 - iii. the identification card defined in 18 U.S.C. § 926C(d)(2)(A); and
 - iv. Senior Executive Service cufflinks.

7. Defendants agree to pay \$539,348.15 to Plaintiff, pursuant to the Equal Access to Justice Act, and in full settlement and satisfaction of all attorney's fees, costs, and expenses. Payment shall be made to Plaintiff via electronic funds transfer to Arnold & Porter Kaye Scholer LLP, as promptly as practicable, consistent with the normal processing procedures followed by the Department of Justice and the Department of the Treasury, following the dismissal of the above-captioned civil action. This provision does not constitute an admission that Defendants' position was not substantially justified under 28 U.S.C. § 2412(d)(1)(A).

8. Compliance with all applicable federal, state, and local tax requirements shall be the sole responsibility of Plaintiff. This Settlement Agreement is executed without reliance upon any representation by any Defendant as to tax consequences, and Plaintiff is responsible for the payment of all taxes that may be associated with payments related to this agreement. Further, nothing in this Settlement Agreement waives or modifies federal, state, or local law pertaining to taxes, offsets, levies, and liens that may apply to this Settlement Agreement or the settlement proceeds, and this Settlement Agreement is executed without reliance on any representation by any Defendant as to the application of any such law.

Plaintiff's Consideration to Defendants

9. Plaintiff, for himself and any heirs and personal representatives, fully and forever releases and discharges Defendants (and their components, agents, officers and former officers, and employees and former employees, either in their official or individual capacities) from any and all claims, demands, and causes of action of every kind, nature, or description, whether known or unknown, which Plaintiff may have had, may now have, or may hereafter discover arising out of or in connection with any event complained of in or giving rise to the Complaint, including, without limitation, events relating to Plaintiff's removal from the FBI and the civil service. In

connection with such waiver and relinquishment, Plaintiff acknowledges that he is aware that he may hereafter discover claims presently unknown or unsuspected, or facts in addition to or different from those which he now knows, with respect to the matters released herein. Nevertheless, it is the intention of Plaintiff through this release, with the advice of counsel, to settle and release all claims of which he knew or should have known arising out of or in connection with the events complained of in or giving rise to the Complaint, including, without limitation, events relating to Plaintiff's removal from the FBI and the civil service, occurring prior to the date of this Settlement Agreement.

10. Simultaneously with the execution of this Settlement Agreement, Plaintiff and Defendants, by their attorneys, shall execute the Stipulation of Dismissal with Prejudice, which is attached as Exhibit A to this Agreement. Within three (3) business days of the execution of the Settlement Agreement, Plaintiff shall file with the Court the fully executed Stipulation of Dismissal with Prejudice, thereby dismissing this Action with prejudice under Fed. R. Civ. P. 41(a)(1)(A)(ii).

Additional Provisions

11. This Settlement Agreement is not and shall not be construed as an admission by any Defendant of the truth of any allegation or the validity of any claim asserted in this lawsuit, or of any Defendant's liability therein. Furthermore, none of the terms of the Settlement Agreement may be offered in evidence by any of the Parties in any civil or administrative action or proceeding against another of the Parties, other than as necessary to consummate, implement, or enforce this Settlement Agreement. The terms of this Settlement Agreement shall not be construed as an admission by any Defendant that the consideration to be provided hereunder represents the relief, if any, that could be recovered after trial.

12. The terms and conditions of this Settlement Agreement may be enforced by Plaintiff only as follows:

- a. Upon the basis of an alleged breach of the Agreement by Defendants, Plaintiff may file a Motion for Relief from a Judgment or Order pursuant to Fed. R. Civ. P. 60(b)(6) with the Court seeking relief from the dismissal entered pursuant to ¶ 10, above, and reinstatement of this Action.
- b. To the extent a motion asserted pursuant to ¶ 12(a), above, is consistent with the requirements and limitations of this ¶ 12, and the requirements and limitations of Fed. R. Civ. P. 60(b)(6), Defendants hereby agree not to oppose the filing of such motion, but otherwise reserve any and all available defenses to such motion, including without limitation any and all jurisdictional defenses and any right or authority to contend that no breach of this Settlement Agreement has occurred.
- c. The exclusive procedure for bringing a claim to enforce the terms and conditions of this Settlement Agreement pursuant to this ¶ 12 shall be as follows:
 - i. Prior to filing any motion pursuant to ¶ 12(a), above, counsel for Plaintiff shall submit written notice alleging a breach of this Settlement Agreement to counsel for Defendants. Such notice shall be submitted by electronic mail, shall attach a fully executed copy of this Settlement Agreement, shall specify precisely the basis for the alleged breach, shall describe with particularity all of the facts and circumstances supporting such claim or claims, and shall state that Plaintiff intends to seek relief from the Court through a motion filed under Fed. R. Civ. P. 60(b)(6) as set forth in ¶ 12(a), above. Plaintiff shall not inform the Court of his allegation(s) at that time.

- ii. Defendants shall have a period of sixty (60) days after the receipt of such notice described in ¶ 12(c)(i), above, to consider appropriate action to resolve the alleged claim.
- iii. If any assertion of breach by Plaintiff is not resolved after consultation between the Parties' counsel within the sixty (60) day period set forth in ¶ 12(c)(ii), above, or if, prior to the expiration of such sixty (60) day period, counsel for Defendants advise counsel for Plaintiff that no further action will be taken by Defendants, Plaintiff may seek relief from the Court as set forth in ¶ 12(a), above. Under no other circumstances may Plaintiff seek such relief from the Court.

13. Each Party shall bear its own costs, fees, and expenses, except as provided in ¶ 7 of this Agreement.

14. Plaintiff represents and warrants that he is the sole and lawful owner of all rights, title and interests in and to every claim and other matter which Plaintiff purports to release herein, and that he has not assigned or transferred, or purported or attempted to assign or transfer to any person or entity any claims or other matters herein released. Plaintiff shall indemnify Defendants, and any of Defendants' departments, components and current or former employees, whether in their official or individual capacities, against, and defend and hold harmless from, any claims arising out of or relating to any such assignment or transfer of any claims or other matters released herein.

15. This Settlement Agreement contains the entire agreement between the Parties hereto, and Plaintiff acknowledges and agrees that no promise or representation not contained in this agreement has been made to him, and he acknowledges and represents that this Settlement

Agreement contains the entire understanding between the Parties, and contains all terms and conditions pertaining to the compromise and settlement of the disputes referenced herein. No statement, remark, agreement, or understanding, oral or written, that is not contained herein shall be recognized or enforced; nor does this Settlement Agreement reflect any agreed-upon purpose other than the desire of the Parties to reach a full and final conclusion of the litigation and to resolve that suit without the time and expense of further litigation.

16. This Settlement Agreement cannot be modified or amended except by an instrument in writing, agreed to and signed by the Parties, nor shall any provision hereof be waived other than by a written waiver, signed by the Parties.

17. This Settlement Agreement shall be binding upon and inure to the benefit of Plaintiff and Defendants and their respective heirs, executors, successors, assigns, and personal representatives, including any person, entity, department, or agency succeeding to the interests or obligations of any party hereto, or having an interest herein.

18. The Parties acknowledge that they have discussed this Settlement Agreement with their respective counsel, who have explained these documents to them, and that they understand all of the terms and conditions of this Settlement Agreement. The Parties further acknowledge that they have read this Settlement Agreement, understand its contents, and execute this Settlement Agreement of their own free acts and deeds. The undersigned represent that they are fully authorized to enter into this agreement.

19. Plaintiff hereby covenants that he will not commence against Defendants any action, claim, suit, or administrative proceeding on account of any claim or cause of action that has been released or discharged by this Settlement Agreement.

20. The following rules of construction apply to the Settlement Agreement:
- a. This Settlement Agreement shall be considered a jointly drafted agreement and shall not be construed against any party as the drafter.
 - b. This Settlement Agreement shall be construed in a manner to ensure its consistency with federal law. Nothing contained in this Settlement Agreement shall impose upon Defendants any duty, obligation, or requirement, the performance of which would be inconsistent with federal statutes, rules, or regulations in effect at the time of such performance.
21. Each person signing this Settlement Agreement represents and warrants that he or she has full authority to execute the Settlement Agreement on behalf of himself or herself, or on behalf of the party or entity on whose behalf he or she signs this Settlement Agreement.
22. This Settlement Agreement may be executed and delivered in counterparts. Each counterpart, when executed, shall be considered one and the same instrument, which shall comprise the Settlement Agreement, which takes effect on the date of execution.
23. No part of this Agreement is or will be considered confidential by the Parties.
24. This Agreement is effective on the date of the signature of the last signatory to the Agreement.

* * * * *

IN WITNESS WHEREOF, the Parties have executed this Agreement and/or caused this Agreement to be executed by their respective duly authorized counsel:

For Plaintiff Andrew G. McCabe:



Andrew G. McCabe

Date: 10/13/2021



Howard N. Cayne (D.C. Bar. No. 331306)
Murad Hussain (D.C. Bar. No. 999278)
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Date: 10/14/21

For Defendants:

BRIAN NETTER
Acting Assistant Attorney General

CHRISTOPHER R. HALL
Assistant Branch Director

JUSTIN
SANDBERG

Digitally signed by
JUSTIN SANDBERG
Date: 2021.10.14
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