CHAPTER ONE
INTRODUCTION

Sitting in a bunker, here behind my wall,
Waiting for the worms to come
In perfect isolation, here behind my wall
Waiting for the worms to come
Waiting…waiting…waiting

—Pink Floyd

The epigraph is from what many critics call it the greatest rock album of all time. *The Wall* by Pink Floyd, in 1979, is a beautifully crafted haunting mini-biography told by a series of songs, through which runs the recurring theme of walls. Every song in the album dispirits listeners with the variations. The walls of Pink Floyd all have nightmarish and stifling oppressive qualities. They are walls of oppression, walls of loathing, walls of horror, and walls of intolerance. Yet what they all have in common is that they are all walls that we build ourselves. Walls we build against one another, walls that people build against us, and walls that we build within ourselves.

This is exactly what happens during management/employee disputes in federal service—a lot of people building a lot of walls. They are rarely walls of discrimination or mistreatment. They are usually walls of anger, fear, misunderstanding, distrust, and vindictiveness. Something happens to people during these types of disputes that is worse than in other management/employee disagreements—it gets personal.

In many employee-initiated legal disputes in federal service, the opposing parties still get along famously. Workers' compensation claims or overtime claims under the Fair Labor Standards Act may get disagreeable, but they rarely get personal. As Abe Vigoda said to Robert Duvall in *The Godfather* before his execution for betraying Al Pacino, "Tell Mike it was only business, nothing personal." Inject a union grievance, an unfair labor practice charge, an MSPB appeal, or the most deeply personal—an EEO complaint—into the worksite, and there is no medical metaphor that adequately describes what it does to the organization and its people. The walls it creates are monstrous. These are the walls we must tear down.

For all managers, supervisors, labor relations professionals, and EEO professionals, resolving disputes is one of our top priorities. It is our job to resolve the case, avoid protracted litigation, and get the two parties working together again. And we must do it quickly, because everybody is waiting…waiting…waiting. The

longer that wait goes on, the less the chances are for a favorable resolution. Positions become solidified, and the parties become entrenched. The parties in these disputes are quietly and angrily sitting in their bunkers behind their walls and waiting. If we do not grab a hammer, no one else will.

You have to smash those walls and get the two parties together with a settlement. This is nothing more than an agreement between the parties to start working together again to rebuild the relationship they had before. The employee agrees to drop his or her case, and management gives in return. Parties can give as much or as little as they want in a settlement: it's whatever we work out with each side.

We must start by remembering a crucial point: there is no such thing as a case that cannot or should not help settle. To settle a case is not an admission of wrongdoing or weakness. It is always to everybody's advantage to reach a settlement. No matter what side we are on, or whether we are in the middle, no case is too weak or too strong to settle. If we do it right, both parties will gain some advantage. If we do it really right, both sides will gain a lot.

WHY SETTLEMENT IS IMPORTANT

Most management/employee disputes, especially discrimination complaints, are a long and tortuous procedure. Complaints that drag on for years are not uncommon. Yet, this ponderous system strongly pushes both sides towards settlement. All third parties—the Equal Employment Opportunity Commission (EEOC), the Merit Systems Protection Board (MSPB), and the Federal Labor Relations Authority (FLRA)—have made settlement a top priority in dealing with complaints, appeals, and other charges.

Administrative Judges and other deciding officials from all these forums have become stridently aggressive in pushing both sides towards settlements. The most obvious reason for this is money. These cases cost the government and the courts a tremendous amount of time and money. But the reasons for the pushy behavior of third-parties involve far more than merely trying to save the government a few dollars or lessen the caseload of appellate and judicial tribunals. Settling cases is the right way to do business for many other reasons.

It Creates the Right Outcomes

First, and most important, settlements allow parties to craft outcomes that are far more just and equitable than would be the result should the case end up with a third-party decision. When a case finally goes before a third party, whether it is a judge from the EEOC, MSPB, or FLRA, a federal judge, or a labor arbitrator, he or she must give total victory to one party. One side wins and the other side loses. Judges are not allowed to create a reasonable outcome

that give each side what it really deserves. Either the employee wins and gets what he or she is legally entitled to., or management wins and the employee gets nothing. The outcome cannot be a clever adjustment that recognizes the merits and weaknesses of both sides. (Although some labor arbitrators fashion remedies that benefit both sides.)

In most government management/employee disputes, neither side is completely guilty or innocent. Rarely does an employee who files a grievance or complaint have absolutely no case. It is equally rare for management's hands to be dripping with blood and to have acted in a totally illegal or discriminatory fashion. It is most always somewhere in between. An employee filing a complaint of discrimination over a nonselection might not have been as well suited for the job as the selectee, but management asked horribly inappropriate questions during the interviews. In a disciplinary case, the supervisor might have had no discriminatory motive and the employee deserved what he or she got, but for other reasons other employees have been allowed to get away with the same offense for which the employee was punished.

Settlement allows us to craft an outcome that recognizes and balances these strengths and weaknesses. If the employee did not deserve to be selected, but management bruised some rules in the selection process, then we will design a settlement that does not give the employee the job or any preferential treatment, but, instead, cleans up the process, slap some hands if necessary, and makes some improvements to ensure that nobody is ever harmed in the future and everybody gets treated right. If an employee was disciplined more harshly than others, we will create some clever form of alternative discipline that gets wiped off the books if the employee does not repeat the offense. Then we will straighten out the mess and admonish and educate the supervisors who are not enforcing the rules.

The Destructive Power of Disputes

The second important reason to seek settlement is the terrible divisiveness that lengthy dispute proceedings have on an office and agency. It has nothing to do with money or wasted time. It is what happens when we have any sort of drawn-out struggle between an employee and management in any organization. The longer it lasts, the worse it gets. Fear and distrust between a supervisor and employees are diseases that are often fatal to an organization. They can be cured, but like most fatal diseases, only if they are caught and treated early. If they are not, they will spread and destroy an organization.

Gradually, employees start taking sides. They never do it for the right reasons, because they never really know what is going on. It is natural for the supervisor and the employee to begin treating each other differently than they normally would. Either the supervisor starts taking subtle reprisal actions or bends over

so far backwards to avoid reprisal that he or she does all the wrong things. The employee becomes more than a little bit paranoid, and refuses to speak to the supervisor without his or her lawyer. What it does to an organization is not something we want to experience. Nobody wins, no matter what the outcome.

BARRIERS TO SETTLEMENTS

If it is that obvious, then why doesn't everybody do it? To better work with both parties, we must be sensitive to why they are reluctant to pursue settlements as vigorously as they should. Let us take look at the most common reasons agencies and employees do not do enough to settle cases.

Fear of Perceived Weakness

This fear is an obvious fear, and is always more prevalent with management than with employees. The problem is that most agency supervisors, HR staff, and employees still think that if we settle a case, it is because we have a weak one. If we discipline an employee and then give him something after he files a complaint, it must be because he did not deserve to be disciplined and would have won his case on appeal, right? Not necessarily.

The agency might want to settle because it could craft the agreement in such a way that a lower penalty would have the same deterrent value. Or perhaps the agency received a waiver of future appeal rights, and other strong concessions in exchange for another chance under strict conditions. The agency could have had a variety of excellent reasons, none of which were caused by a weak case, that would have given it a motive to want to settle. Similarly, just because an employee accepted anything less than retroactive promotion, with full back pay, and attorney fees does not mean that the person is admitting that the case was not as strong as he or she initially portrayed it.

All a settlement means is that while a party still feels it has a strong case, it wants to work things out and rebuild the relationship—even at the expense of giving up some things it probably would have gotten had the case gone through litigation. The way to make the parties see that a settlement is not a sign of weakness is to make them understand that when we bargain from interests, rather than positions, we do not have to compromise.

In traditional positional negotiating, each party takes stands that they progressively weaken and erode through a series of sequential compromises. The settlement then becomes the sum of all compromises, and interests are harmonized.

As we will see in the next chapter, in interest-based settlement negotiating, each side retains and protects its interests throughout the process. Neither side

compromises its own basic interests. Rather, each side finds imaginative ways that the settlement can serve the interests of both parties.

Many excellent settlements never require either side to appear weak or to give something up. To overcome their fear of being seen as weak, what we must do is to help both parties define their own interests in the case. Illustrate to them the difference between positions and interests. Show them that by dealing from their underlying interests, they can make settling a case a resolution from strength, not from weakness.

Another problem related to this fear of perceived weakness is fear of legal consequences. Many supervisors worry that if we settle a case, somebody might use it against them in some future proceeding to prove a pattern of guilt or discrimination. This is the easiest concern to deal with because it is unfounded. It is well established in law that settlements are no-fault. Nothing about settling a case can ever be used later to show a pattern of wrongdoing on the part of the individuals who settle.

Fear of Inspiring More Complaints

This fear is another common reason that supervisors and other management officials give for not settling cases. They worry that if they settle a case and appear to concede a point, it will only encourage other employees to file a complaint. This is a legitimate, but overrated concern.

Most employees recognize that filing a complaint is a no-win game, no matter what tangible benefits they might achieve in the short run. Let's not sugarcoat this: most employees know that being branded as a "complainer" is one of the worst labels you can wear. Sure, the laws and regulations protect employees from reprisal, but unless the reprisal act follows close to the complaint, it is awfully hard to prove. Forget about ever being picked for a higher-level position or getting a good recommendation when applying for that dream job. Sure, the law prohibits reprisal, but just try to prove it five years from now when a promotion is denied.

If you're advising management, recognize that management's concern is valid and we have to treat it with respect. We have to face up to the fact that extensive complaint processing costs, far too many agencies routinely settle complaints by giving employees—even those with totally unfounded complaints—delicious tangible settlements, and that practice clearly invites abuse.

One agency started giving most EEO complainants $5,000 when they filed formal complaints, no matter how weak their cases. On paper it looks great and the accountants and lawyers love us for it. They figure that it is going to cost us, say, $100,000 in administrative costs to take a grievance, appeal, or EEO