INTRODUCTION

The assumption is that you are using this book because you have decided to settle a personnel case. You and your client are commended for reaching that decision. Now the question is how to implement that decision and achieve a comprehensive settlement.

I. SETTLEMENT TECHNIQUES

Although there are many variations and combinations of settlement techniques, in personnel litigation before the MSPB and EEOC, as well as in grievance arbitration, the principal approaches to settlement are: lawyer to lawyer; assistance by the adjudicator; facilitation through a settlement judge (not an option in arbitration); use of a mediator; and direct negotiations between the real parties in interest.

Settlement discussion between the lawyers for the parties is efficient, because it can be conducted without involving and educating third parties, but it can be ineffective if the lawyers cannot cooperate with each other or have difficulties in obtaining the cooperation of their own clients in the settlement process. Negotiations among lawyers may be ineffective because the lawyers lack the experience or knowledge of the law to recognize potential routes to an accord. Or settlement negotiations between hard-charging counsel may break down because they cannot fathom that the case should be settled—or at least settled at some cost to or compromise by their own client.

Involvement of the adjudicator in settlement discussions, whether the adjudicator be a judge or an arbitrator, can be useful if the parties are willing to discuss their positions and their settlement requirements candidly with the adjudicator and if the adjudicator can obtain the agreement of the parties to discuss these matters with the parties on an *ex parte* basis. The real advantage of working with the adjudicator in fashioning a settlement is that the adjudicator, who should have some knowledge of the case through the pleadings that have been filed or through discussions with the representatives of the parties, can, usually on an *ex parte* basis, offer risk assessment. Risk assessment refers to the ability of the adjudicator to explain to a party the adjudicator's assessment of the strengths and weaknesses, and possibly the likely outcome, of that party's case should the case go to adjudication and should the facts and law remain the same at the point of adjudication. By pointing out weaknesses of a party's case to that party and his or her representative, settlement expectations or demands can be adjusted to reflect the reality of the likely outcome should the case not settle. The disadvantages of working on settlement with an adjudication judge: the judge may become frustrated should the case not be settled; or the judge may make incautious comments during the course of settlement discussions, and one party or another may conclude that the adjudication judge cannot fairly assess the case on the merits if the case goes to a hearing; or a party may surmise that the adjudication judge will not be able to disregard what he or she has learned during the course of settlement discussions if the case proceeds through adjudication.

The MSPB has long allowed a party to request assistance of a settlement judge. The settlement judge is not the judge to whom is entrusted adjudication of the appeal. The settlement judge is another judge in the MSPB regional office who has an existing case load but who, for the purpose of your case, assumes responsibility for assisting the parties in their settlement efforts. Although EEOC's settlement processes are in transition and not as uniform as they may be at MSPB, EEOC offices may have a settlement judge program.

The settlement judge learns something of the case by reading the case file on the e-file repository and by discussion with the parties and counsel. The settlement judge normally secures agreement of the parties to discuss the case with them on an *ex parte* basis. The advantage of using a settlement judge is that conversations on the merits of the case between the parties, their representatives, and the settlement judge are not supposed to be shared with the adjudication judge. The role of the adjudication judge in the settlement process becomes quite attenuated. When a settlement judge is used, the adjudication judge informs the settlement judge of the status of the case and the adjudication judge will only learn from the settlement judge whether the case did or did not settle. If the appeal does not settle, it returns to the adjudication judge for continued adjudication. The adjudication judge is isolated from the conversations—often involving candid discussion of the facts and law—that have occurred during the settlement process with the settlement judge. The disadvantage of the settlement judge process is that the settlement judge may not be able to offer effective case analysis or risk assessment because the views of the settlement judge will not carry the weight of the views of the

adjudication judge. Whether the settlement judge thinks that one party or another has weaknesses in a case will not necessarily reflect the same assessment of the appeal by the adjudication judge, although on obvious points of law, or clear problems with the facts, there should not be much variation between the views of the settlement judge and the adjudication judge.

Whether the parties are using an adjudication judge or settlement judge to assist them, the judge will probably suggest some approaches to settlement that the parties may not have considered, and the judge may assist the parties in drafting a settlement agreement. More often than not in the MSPB and EEOC, the judges leave to the parties the task of drafting the agreement. If a settlement judge is used and no settlement results, the process does not end, for the adjudication judge will still attempt to assist the parties in reaching settlement through whatever means are available to the judge with whatever constraints are imposed upon the judge by the parties and the hearing schedule.

In MSPB cases the process of settlement with the assistance of either the adjudication or settlement judge is almost always conducted through telephone conferences. The parties can suggest, and judges have been known to honor, a request for in–person conferences, generally held at the local MSPB office. But that is the exception. With EEOC, depending on the demographics, judges are more likely to have the parties and their representatives come into the office or, if the case involves an individual who remains an agency employee, a settlement conference could take place at the agency's offices. EEOC has the better approach. Telephonic conferences are impersonal, and they may not inspire much confidence in the process. There is a lot to be said for personal interaction in the settlement of personnel disputes. Even a Zoom session should result in more interaction than a phone conference.

On the matter of personal interaction, within the past decade mediation has become a much-favored form of dispute resolution, frequently leading to settlement of MSPB and EEOC cases. Mediation is almost always conducted through personal conferences of the parties and their representatives. There are many sources of mediators. Some commercial firms provide mediators, often former judges in federal or state courts, at a cost to the parties; there are sources of voluntary mediators, particularly in the federal sector. Labor arbitrators can serve as mediators. MSPB operates a program using its own employees as mediators. EEOC is developing a program using private sector counsel as mediators; some EEOC offices may have an employee trained and designated as a mediator. Many federal agencies have their own cadre of mediators, although those mediators may not be specifically trained in personnel disputes (often their expertise is in contract disputes). The Office of Special Counsel has a mediation program. The Federal Labor Relations Authority conducts mediation with the assistance of the Federal Mediation and Conciliation Service.

Mediation, involving conferences of the parties and mediator, and separate "breakout" sessions between the mediator and each side, may take the better part of a day, or it may take several sessions over several days, meaning that a mediator will probably spend a lot more time with the parties than an adjudication or settlement judge conducting telephone conferences. The advantage of mediation is that some rapport is developed between the mediator, the parties, and their counsel. The mediator knows that the process is voluntary and that the mediator will have no influence on the resolution of the case if the case does not settle.

For mediation to be successful, there must be good communication among participants who have some trust or faith in the process. Many mediators have a lot of experience in employment litigation and enough knowledge about the law so that they may be able to provide suggestions as to settlement terms that the parties have not considered. Some mediators, particularly those who are employed by MSPB or EEOC, may know a lot about the law but may not have as much experience as other mediators in practical approaches to the adjustment of employment disputes. A good mediator will take plenty of time to listen, during *ex parte* discussions, to the travails related by the appellant, complainant, and management officials or supervisors (and counsel) attending the mediation. Extensive and effective interactions between a mediator and the parties often have a cathartic effect that breaks through the emotional overlay of the case and addresses the parties' core problems and possible solutions. Some mediators assist in drafting settlement agreements, although responsibility for the final language of any settlement is that of the parties and their counsel. The mediator cannot disclose what happened in mediation or why the mediator thought one or another provision of the settlement was important. The final settlement document must—to use a bad phrase—speak for itself.

Returning to the modes of settlement, the parties can discuss approaches to settlement without involvement of lawyers, settlement or adjudication judges, or mediators. For this to occur, the parties must have some respect for each other and a specific agreement that nothing said during the course of settlement discussions will be used as evidence in the case—a condition that is common to all forms of settlement discussion. There are some cases where the people

involved can speak frankly to one another and come to an understanding of what it takes to resolve the problem, leaving the drafting of the settlement to the lawyers.

Despite the best intentions and extensive discussions, not all cases settle. Some cases will go through settlement discussions or mediation and not settle at the point of those discussions, but they may later settle. Efforts to resolve a problem arising in the workplace are never wasted. If the case can be resolved through settlement, it should always be through a written settlement—never through an oral settlement. The parties can informally recognize the basic components of settlement, but the parties should always explicitly state and understand at the onset of settlement discussions that the case is not settled without a written, final, signed agreement.

II. SETTLEMENT TERMS

The beauty of a decent settlement agreement lies in its flexibility, its completeness, its clarity. The parties have to use their understanding of the workplace and of the law to fashion a workable, comprehensive, and comprehensible agreement. No book concerning the settlement process or containing sample forms of settlement provisions substitutes for careful consideration of the detailed terms of agreement by the parties, their lawyers, and judges or mediators who facilitate the settlement process. Structuring a good settlement agreement requires, in addition to the dynamic development of the bases upon which the agreement is to be created, careful, precise drafting that encompasses an appreciation for the future implications of the present terms of a settlement resolving past employment difficulties. Given the complexities of federal personnel litigation, creation of a good settlement agreement also requires knowledge of the law underlying the employment dispute and governing the enforceability of the settlement agreement before MSPB, EEOC, FLRA, or in the federal courts.

There are some problems that arise in the course of settlements that create so much litigation that these specific areas of concern will be noted here, but to list a few topics that often lead to enforcement or compliance litigation is not to suggest that only these areas should receive your careful attention as negotiators and drafters of settlement agreements.

A. Clean Paper Agreements

From the vantage point of an employee or ex-employee, a settlement agreement may be necessary to expunge adverse personnel documentation and give the employee the ability to apply for future jobs or promotions untainted by personnel problems past and present. From the vantage point of the employer, expungement of past adverse information, with the understanding that no adverse information will be provided in the future as to that employee or ex-employee, may be unpalatable to managers who may believe that it would be dishonest to present a future employer with information that does not truly reflect the background of the employee. Although clean paper agreements are often used, their utility is subject to debate. Most federal job applications and associated security clearance questionnaires ask not only whether the applicant has been fired from a job, but also whether the applicant ever departed a job under unfavorable circumstances. For an individual who settles with a revision in the paper record of an adverse action, the fact remains that the individual's departure from the agency was under unfavorable circumstances. Failure to properly acknowledge and explain the true state of events may lead to a later adverse action for failure to honestly complete an employment or security questionnaire. Historical events are subject to revisionist interpretation, but the underlying facts are not.

However the parties resolve the issue of what information will be retained or destroyed, any agreement that is made must be explicit and directed to specific files and documents. Considerable litigation has ensued because settlement agreements did not specify what documentation would be altered or expunged. For example, if an agency agrees to destroy all adverse information as to an appellant in an MSPB case, it may implicitly be agreeing to destroy files relating to investigations by the agency Inspector General or documentation maintained by agency security offices. If an agency agrees to destroy all adverse information, without specification, it becomes the agency's problem when some file surfaces that the agency representative did not previously know of but which, after the settlement, is discovered by the employee whose prospects for a future position are impaired by continued existence of that file or by disclosure of its contents.

B. Employment References

The individual who seeks to restore employability through a settlement agreement will likely seek a good reference

from the agency. Lack of precision in a settlement provision concerning the source or content of a reference results in innumerable cases before the MSPB and the EEOC in which agencies are accused of violating reference provisions.

If an agency agrees that it will provide only favorable information, or agrees that it will provide no unfavorable information concerning an individual to a future employer, the agency has then essentially agreed that no one in the agency will say anything derogatory about that individual. That agreement presents problems because agencies comprise many individuals, some of whom may have opinions of the employee that are not known to, or beyond the control of, agency managers and lawyers involved in the settlement process. Under those conditions, a rogue reference can destroy the benefit of the bargain between the parties when the individual's future employment prospects are impaired by that reference. Agencies do better by specifying in a settlement agreement who will provide a reference and what reference will be provided, as well as by requiring in the agreement that the employee refer anyone needing a reference to the person or persons identified in the settlement agreement. Some agencies resolve the problem concerning references by agreeing to release only neutral information through a personnel officer upon inquiry to the personnel office. Some agencies resolve the issue through an agreement that, although there will be no assurances as to verbal references, a written reference letter, attached as an exhibit to the settlement agreement, will be the reference used by the employee in future employment applications. Some agencies refuse to provide any reference because managers are reluctant to agree to provide references that are inconsistent with their views of the individual's past performance or conduct.

C. Provisions Relating to Retirement Benefits

The Office of Personnel Management takes an unfavorable view of settlement agreements that transfer the financial burden of the settlement to the retirement trust fund. If the settlement agreement establishes a means for an individual to secure a retirement annuity that the individual is not entitled to but for the settlement, it is possible that when OPM reviews the retirement application that is submitted after the settlement agreement is signed, OPM may refuse to grant the annuity, leading to a failure of the settlement agreement, with a resultant challenge to the settlement and, possibly, to a separate appeal by the individual to MSPB from OPM's denial of the retirement annuity. Before an agreement is structured that affects an entitlement to an annuity, OPM expects (and provides instructions on its website) that the provisions be discussed in advance of final settlement with representatives of the OPM Office of General Counsel.

D. Provisions Relating to Particular Benefits

If the agreement will confer back pay or another financial benefit upon an individual, spell out the nature of the benefit in the agreement and avoid litigation later over ambiguous provisions. For example, if a removal is being changed to a suspension, specify whether back pay will be provided. If counsel fees are to be paid, specify the amount; do not leave the amount unspecified for later litigation or resolution by MSPB or EEOC. If compensatory damages are to be paid, state the amount rather than allowing later litigation to determine the amount. In short, the settlement agreement should make clear the obligations and benefits the parties intend to undertake and provide.

Agreements calling for "priority consideration" for promotions or future positions cause problems because there is not a common understanding of what is meant by "priority consideration." Cases decided by MSPB, EEOC, and arbitrators provide their own interpretation of what is meant by the term. Rather than leaving construction of the phrase to compliance litigation, define the term in the settlement. Define with care other phrases that may be ambiguous but that impose specific obligations on the parties.

E. Provisions Relating to Acceptance of the Settlement Agreement for Purposes of Enforcement by the Adjudicator

EEOC requires that settlement agreements be included in the complaint file. But with MSPB, a settlement is placed into the record of MSPB proceedings for enforcement only if it is the agreement of both parties to do so. Settlements in MSPB appeals do not have to be entered into the record of MSPB for enforcement, and if they do not find their way there, they are unenforceable by MSPB. The settlement should state if the parties intend to enter into the MSPB record for purposes of enforcement. If that is the intent, the agreement may also state that the agreement is of no effect (and the appeal continues through adjudication) if MSPB declines to accept the settlement for enforcement.

III. RECORDS OF SETTLEMENT DISCUSSIONS

As a representative, you need to keep your client well informed of the progress and substance of settlement discussions so that you are not confronted with the unfortunate situation of arriving at a settlement that you think is acceptable, only to have it rejected by your client. If you represent the complainant or appellant, the client should always sign the agreement.

If you are a management representative, unless you have a specific, written, delegation of authority or authorization from a manager or executive, you should not sign a settlement agreement on behalf of the agency. Instead, you should have a manager or executive sign the agreement. You do not want to be in the position of signing an agreement and then having a manager or executives say that you were not authorized to undertake the agreement on behalf of the agency.

To avoid disputes concerning your authority as an individual's (or agency's) representative, you should never enter into an oral agreement of settlement.

Once settlement discussions begin, and until the time that they are concluded through a signed agreement, you, as the representative, should maintain legible memoranda to your file explaining each significant step in the settlement negotiations. And keep copies of all settlement drafts (accompanied by those memoranda). They provide an historical record not only of the drafts of the settlement agreement as they are passed back and forth during the course of negotiations, but also of discussions that occur with the judge, opposing counsel, and your client. The settlement drafts and your explanatory notes should be maintained in a chronologically indexed and tabbed settlement file.

The first reason for maintaining a record of the development of the settlement is to enable you to tell your own client later, should there be questions, how the settlement evolved. A second reason for developing a settlement file is to permit you to explain the meaning (through historical information) of settlement provisions during any compliance or enforcement litigation in which the meaning or validity of provisions of the settlement (or alleged understandings that were not included in the settlement document) is questioned. You may be called as a witness concerning the intent of a settlement, particularly provisions of an agreement that in hindsight appear to be ambiguous. A third reason for creating a settlement file is to allow someone who enters or reviews the case after your work is done to figure out how the settlement developed.

IV. USE OF SETTLEMENT CLAUSES IN THIS BOOK

Each settlement agreement addresses the parties' unique circumstances. The agreement does so sentence by sentence, paragraph by paragraph. Provisions in other settlement agreements drafted by other lawyers for other parties and under other circumstances should not be incorporated into your agreement without careful consideration of whether the clauses are appropriate to the circumstances of your case. Clauses that appear in this book address recurring situations, with minor variations among similar clauses. These clauses should not be included in your settlement agreement without tailoring them to the circumstances presented by your client and the litigation. Clauses in this book should not be simply copied into agreements. These clauses are meant to provide ideas that you can use in developing your own language for settlements. The clauses may provide suggestions to you concerning novel approaches toward settlement. That a clause appears in this book is no warranty of the appropriateness of that clause for a given case.

As the late Arthur Goldberg, former Secretary of Labor and Associate Justice of the Supreme Court, once said as to his success as a mediator, "the trick is to be there when it settles." That is but a quarter of the effort. The real work is in drafting a durable settlement agreement—one that is appropriate to the circumstances, entirely comprehensible, and complete. Professional satisfaction can be achieved through settlement of litigation. This book is designed to assist in developing settlements that will benefit both your client and the adjudication system we serve.

ACCESS TO AND RETURN OF AGENCY PROPERTY; ACCESS TO FACILITIES

The Agency agrees to forward to Appellant his email and regular mail until [date].

The Agency will cancel the order barring the Appellant from accessing Agency facilities, issued [date].

Appellant agrees to obtain advance written approval from his supervisor when he seeks to enter Agency property.

Appellant may have access to the Agency job site to remove personal effects, but only after arrangements are made, at least a week in advance with [name of manager].

The Agency agrees to forward the Complainant's email to her at her designated private email account and to forward her personal correspondence to her home address.

During the period of his detail to [name of agency], the Agency will maintain the Appellant's telephone number and password and permit him access to his phone to retrieve his voicemail messages.

Except for legitimate business-related purposes in connection with her acting as a representative in Agency matters, and then only on advance reasonable notice to the Labor Relations Officer [name], the Appellant agrees she will never enter the Agency site(s) at [location(s)].

Appellant agrees that he will contact the designated Agency representative to arrange access to the Agency if he wishes to enter nonpublic areas between the date of this Agreement and [date]. Although that access will be granted for good cause shown, other than the access granted above, Appellant will not enter the Agency after [date].

Complainant agrees that during the LWOP period he will not enter, or attempt to enter, the Agency's building, contact any Agency employees during regular business hours, or otherwise involve himself with Agency activities. Complainant may, however, contact the Agency EEO Office or its Personnel Office concerning matters pertaining to benefits administration or other routine personnel matters.

Complainant agrees to return any Agency documents and property still in his possession before payments required by this Settlement Agreement can be issued. If Complainant has no Agency property or documents, other than copies of his own work product or email correspondence, Complainant will sign the attached attestation that he has no Agency property covered by his Agreement.

Should the Appellant seek to enter the Agency's premises, he must secure advance authorization from the Agency's security office and the Agency's Personnel Office, to be coordinated through [name of official] at least five working days in advance of his desired access to the facility, and only upon good reason for that access, to be determined by the Chief of Personnel. The Agency reserves the right to have a member of the security office in plainclothes accompany the Appellant during access to the facility.

Other than with advance written authorization from the Agency, Appellant may not enter Agency facilities in the future, including as a contractor employee. If a contractor requests the Agency to explain why Appellant cannot have facility access, the contractor will be informed that Appellant agreed to that condition as part of a settlement of a personnel action. Appellant may enter Agency facilities for functions open to the general public and under the same security or other restrictions applied to other visitors.

ACTIONS UPON BREACH; CONSEQUENCES OF BREACH

Practice Tip

When MSPB or EEOC finds a breach of a settlement agreement, the appellant or complainant has the option of either securing a remedy for the breach, if that is possible, or he or she may wish to return to litigating the case on the merits. MSPB and EEOC offer the option of rescission of the settlement agreement based on a material breach and restoration and resumption of the underlying appeal or complaint. Some settlement agreements provide the option in the language of the agreement. The hope of the parties is that the settlement agreement will be implemented without difficulty, but when there is a serious breach, it will be the appellant's or complainant's choice to determine whether to resume the underlying litigation. One matter that can be negotiated is a provision in the settlement agreement that calls for restoration to the agency of any benefits the agency has paid to the employee as part of the settlement if the settlement is going to be rescinded and if the parties are then to restore the *status quo*, that is, if the parties are to resume the litigation at the point the litigation stood immediately prior to the settlement.

Appellant agrees that he will institute no further claim against the Agency, unless this Settlement Agreement is materially violated by the Agency.

Should either party fail or refuse to comply with the terms of this Agreement, the other party is discharged from compliance with remaining unfilled commitments under the Agreement.

Should Complainant materially breach this Settlement, the Agency may revoke this Settlement and withdraw or recover the benefits it provides. If the Agency materially breaches this Settlement Agreement, Complainant may rescind the resignation that this Settlement requires.

Should the Complainant determine that the Agency failed to comply with any provision of this Agreement, the Complainant may pursue the procedures established at 29 CFR 1614.504.

Should either Party violate a material term of this Agreement, the other Party can take action in any forum to secure performance or decline to fulfill its obligations under this Agreement.

If either party contends that the other party has breached this Agreement, the party seeking enforcement shall first notify the opposing party of the alleged noncompliance prior to initiating litigation to enforce the Agreement.

The waiver by either party to this Agreement of enforcement of any provision will not waive a breach of any other provision, and the failure to immediately to enforce a provision will not waive future enforcement of the provision.

If there is a material breach of this Agreement by the Agency, as determined by MSPB, the Appellant's MSPB appeal will be reinstated and his EEO complaints will return to processing by the Agency in accordance with EEOC regulations.

Breach of any of the material provisions of this Agreement will be sufficient cause, on the part of the non-breaching party, for rescission of the entire Agreement if the breach remains uncorrected 15 days after notice of the breach is provided to the other party and its counsel.

Should Appellant fail to take any material action required by the Agreement, or take any action materially contrary to the Agreement, the Agency has the right at its election to continue to act under the Agreement, or to cancel the Agreement and resume procedures to remove Appellant from federal employment.

Should Appellant breach any material term of this Agreement, and fail promptly to cure that breach upon notice to him and to his counsel, the Agency will reinstate his removal through summary termination of his Appellant's employment, and the Appellant waives any appeal, complaint, or other protest or claim as to that termination.

Should the Agency materially breach this Agreement, Appellant will have the option of seeking enforcement of the Agreement or rescinding the Agreement. If the Agreement is rescinded, the parties will return to the *status quo*, that is, Appellant's grievance will be reinstated and placed back into arbitration with the same arbitrator, if possible, originally appointed.

In the event that the Appellant initiates any action that results in the cancelation or rescission of this Agreement, as a precondition to continuation of the litigation of the underlying appeal, the Appellant will first repay to the Agency all funds that he received from the Agency through the settlement as well as all funds that were paid to his counsel under the Agreement.

The Appellant understands that the requirements imposed on her in paragraph(s) [number(s)] are in exchange for a clean record, back pay, and counsel fees as well as other benefits to her. Should the Appellant fail to comply with the requirements imposed upon her by this Settlement, the Agency will be entitled to recoup from her the funds paid to her and to her counsel under the Agreement.

The parties agree that, in accordance with 29 CFR 1614.504, if the Agency fails to comply with this Agreement, the Complainant shall notify the Agency, in writing, of the alleged noncompliance within 30 days of when she knew, or reasonably should have known, of the noncompliance, and upon that notification, shall permit the Agency to cure the noncompliance for at least 30 days prior to seeking a remedy with the EEOC.

Should the Complainant believe there has been a breach of this Agreement, she will notify [name, title, address] in writing within [number] days from when she knew or should have known of the alleged noncompliance and she may request in that notice that the terms of the Agreement be specifically implemented or, alternatively, that her complaint be reinstated for further processing from the point processing ceased under this Agreement.

Upon acceptance of this Agreement by MSPB for purposes of enforcement, it is agreed by the Appellant that the MSPB will dismiss his appeal as settled and that Appellant will not file any other claim, grievance, complaint, or EEO charge or complaint relating to his appeal, to this Settlement, or to the events leading to the appeal and the Settlement except that Appellant retains the right to secure enforcement of this Agreement by the MSPB pursuant to its regulations.

Appellant agrees his material failure to satisfy any of these terms will result in breach of this Agreement and management will, if it has not committed a material breach of this Agreement, finalize the action removing Appellant from federal service. The removal will be effective on a date chosen by the Agency, without prior notice; and the Appellant agrees that the removal promotes the efficiency of the service. The proposed removal will be the stated basis for the removal from federal service. The Appellant waives any prior notice of the removal.

If, within [number] years from the effective date of this Agreement, the Grievant and Union jointly allege noncompliance with this Settlement Agreement, the grievance proceedings will be reinstated at the level of a hearing on the grievance with [arbitrator] or a substituted arbitrator selected by the parties from an FMCS list. Before reconvening the hearing, the Grievant and Union will provide [number] days' notice of the alleged breach of the Agreement to the [title or name of Agency official], during which time the Agency will attempt to resolve the allegation of noncompliance.

If the Grievant asserts that the Agency breached or failed to comply with this Agreement, the Grievant, or the Union, will provide notice in writing of the allegations of breach or noncompliance to [name] within 20 days from the day that the Grievant or Union first knew of the breach or noncompliance. The parties will then have 14 calendar days in which to resolve the dispute, but should that resolution either not be offered or be unsatisfactory, the Union may then refer the issue of breach or noncompliance to the arbitrator originally selected to resolve the grievance. If that arbitrator is not available, the Union and the Agency will use the FMCS selection process to secure appointment of another arbitrator.

The Complainant agrees that if he believes the Agency has failed to comply with this Agreement, he may, pursuant to 29 CFR 1614.504, submit written notice to the EEO Director within 30 days from the alleged breach or violation of this Agreement, requesting that the breach be remedied or, alternatively, the Complainant may request that his EEO complaint be reinstated for further processing from the point when processing ceased prior to this Settlement. The Complainant may appeal to EEOC pursuant to § 1614.504 if he believes that the Agency either has not properly implemented the Agreement or has failed properly to reinstate his EEO complaint.

Should the Complainant believe that there is any violation of this Agreement by the Agency, the allegation of the violation shall be placed in writing to [name and address], EEO Director, within 30 days of the date that Complainant