

..... **FEDERAL LABOR
RELATIONS AUTHORITY**

OFFICE OF THE GENERAL COUNSEL

**UNFAIR LABOR PRACTICE
CASE HANDLING MANUAL**

FOREWORD

The Unfair Labor Practice Manual (ULP Manual) provides information on preventing, resolving, and investigating unfair labor practice charges under the Federal Service Labor-Management Relations Statute (the Statute). The ULP Manual has been prepared by the Federal Labor Relations Authority (FLRA), Office of the General Counsel (OGC) pursuant to section 7104(f) of the Statute. The ULP Manual is intended to provide a resource tool for Regional Office employees when processing unfair labor practice charges under the Statute. The ULP Manual covers each aspect of processing unfair labor practice charges—from filing to disposition. The Manual references relevant case law and provides for: (1) uniformity and best practices among the Regional Offices; (2) criteria and principles that govern discretion and judgment; and (3) Model and Sample Forms and Letters. For information on litigating an unfair labor practice complaint, see the Litigation Manual.

The ULP Manual is published in a handbook style format to make it user friendly. The Manual will be updated annually. Since party understanding of the unfair labor practice investigatory process and regulatory requirements is critical to the timely and effective processing of unfair labor practice charges by the Regional Offices, the ULP Manual is available to all parties and individuals who are involved in the processing unfair labor practice charges. The ULP Manual may be accessed from the FLRA web site, www.FLRA.gov, and is available for purchase from the Government Printing Office.

The ULP Manual provides guidance for the FLRA, OGC staff when processing unfair labor practice charges under the Statute. The ULP Manual is not intended to be a condensed version of all substantive law, nor is it intended to be a substitute for knowledge of the law. The ULP Manual is not a ruling or directive, nor is it binding upon the FLRA General Counsel, FLRA Administrative Law Judges or the FLRA decisional component. Although the Regional Office staff refers to the ULP Manual when processing cases, the Manual does not encompass all situations that may be encountered in processing unfair labor practice charges. Thus, responsible, professional judgment and experience are required in applying and utilizing these guidelines.

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**OTHER OFFICE OF THE GENERAL COUNSEL
RESOURCE MANUALS**

Office of the General Counsel
ULPCHM

The **Representation Case Handling Manual** (REP CHM) provides procedural and operational guidance to the General Counsel's staff when processing representation petitions filed pursuant to Part 2422 of the FLRA's regulations. Part One discusses processing petitions from providing substantive issues to investigating and resolving the underlying representation matters, and to issuing a certification or taking other final action. Part One tracks, for the most part, the subject matter format in the representation regulations. Part Two consists of resources that the General Counsel's staff uses when processing petitions, including a Cross Reference Table, Flow Charts, Appendices, FLRA Forms and Documents, and sample Figures.

The **Representation Case Law Guide** (RCL) presents a variety of relevant substantive issues that arise when processing representation petitions and unfair labor practice cases that raise representation issues. The RCL defines each topic, discusses relevant case law and sets forth an analytical framework for deciding each case consistently and properly.

The **Hearing Officer's Guide** (HOG) describes techniques for conducting hearings in FLRA representation proceedings. The first part provides instructions and guidance on preparing for and conducting hearings. It includes a sample script and discusses specific procedural issues, some commonplace, others novel, that arise during hearings. The second part discusses a variety of evidentiary representation issues and employee categories. Each topic is defined and includes an outline of issues and questions to assist the Hearing Officer and the parties to develop a complete record.

The **Litigation Manual** (LM) provides comprehensive guidance to regional Trial Attorneys in prosecuting ULP cases. The Manual covers each aspect of the trial process—from the issuance of a complaint and notice of hearing to the Authority's decision and order. Where appropriate, it refers to OGC Policy and relevant case law, and contains many examples of litigation techniques, both in the body of the Manual (Binder I) which concerns substantive litigation guidelines, and in the Attachments section of the Manual (Binder II) which contains a compilation of forms, policies, OGC Guidances, or models relating to the subject matter covered in Binder I.

HOW TO USE THE UNFAIR LABOR PRACTICE CASE HANDLING MANUAL

The Unfair Labor Practice Case Handling Manual is formatted to help Agents in Regional Offices in preventing, resolving, processing and investigating Unfair Labor Practice cases. The subject matters that are discussed throughout the Manual are presented in the following sequence: from the pre-charge stage through the filing and investigation stages to the post-charge stage of the process. A description of the organization and style of the Manual is discussed below as well as, in order of presentation, a description of the different sections of the Manual:

1. **Foreword:**

The Foreword explains the purpose of the Manual.

2. **Organization of the Manual into five distinct Parts:**

- The manual is divided into five Parts, and each Part is divided into Chapters;
- [Part 1](#) is entitled “Pre-Charge”;
- [Part 2](#) is entitled “The Charge”;
- [Part 3](#) is entitled “The Investigation”;
- [Part 4](#) is entitled “Post-Investigation”;
- [Part 5](#) is entitled “Post-Decision and Administrative Matters”
- To guide the Agent, each page has a Header which describes the Part and Chapter, and a Footer which indicates that the Office of the General Counsel is the author of the Manual; and
- The pages of each Chapter in each of the five Parts of the Manual are numbered consecutively. The first number corresponds with the Part, the second number corresponds with the Chapter, and the third number indicates the page, e.g., 3F-2 is the third Part--The Investigation, Chapter F--Evidence, in General, -2 indicates the second page.

3. **Overview and Objective for each Chapter:**

- An Overview describes very generally how and where in the Unfair Labor Practice Process the subject matter of the Chapter relates.
- The Objective of each Chapter generally describes what guidance is provided, i.e., what subtopics are covered in each Chapter.

4. Glossary:

The following abbreviations are used throughout the Unfair Labor Practice Case Handling Manual:

ADR	Alternative Dispute Resolution
ALJ	Administrative Law Judge
ALJD	Administrative Law Judge Decision
Authority or FLRA	Federal Labor Relations Authority
CA	Charge against Agency
CO	Charge against Labor Organization
DOL	Department of Labor
DRD	Deputy Regional Director
E.O.	Executive Order
FIR	Final Investigative Report
FRCP	Federal Rules of Civil Procedure
FSIP	Federal Service Impasses Panel
GAO	General Accounting Office
GC	General Counsel
HQ	Headquarters
IG	Inspector General of the FLRA
LM	Litigation Manual
MSPB	Merit Systems Protections Board
NLRB	National Labor Relations Board
OALJ	Office of Administrative Law Judges
OGC	Office of General Counsel

OPM	Office of Personnel Management
PSIWOC	Party Settlement Involving Withdrawal of Charge
RCHM	Representation Casehandling Manual
RA	Regional Attorney
RD	Regional Director
Regulations	Authority's Rules and Regulations
RO	Regional Office
Statute	Federal Service Labor- Management Relations Statute
TRO	Temporary restraining order
ULP	Unfair Labor Practice
ULPCHM	Unfair Labor Practice Case Handling Manual

Note: Unless otherwise indicated, all references to sections in the Manual are to a section of the Regulations.

5. Use of the symbol :

 is a symbol that is used throughout the Manual to indicate that what follows (in italics) are “practice pointers” or tips for the Agent.

6. Use of the symbol 

 is a symbol that is used throughout the Manual at the end of most Chapters to indicate cross-references, where appropriate. Cross-references to specific pages are indicated where the same or similar subject matter is covered elsewhere in the Manual with respect to another stage in the trial process.

7. Use of the symbol +P:

+P is a symbol that is used throughout the Manual to alert the reader that the text that follows lists “criteria and principles” that are applicable in the exercise of discretion.

8. Use of the symbol :

 is a symbol that is used throughout the Manual to indicate a uniform, “by-the-book”, rule of practice.

9. [Table of Authorities](#):

The Table of Authorities is divided into 8 subparts: (1) FLRA cases; (2) FLRA ALJD cases; (3) United States Supreme Court case; (4) United States Courts of Appeals cases; (5) United States District Court cases; (6) NLRB cases; (7) Comptroller General cases; and (8) a Miscellaneous Reference. This section is located after the Manual.

10. [Index](#):

A subject matter index is located after the Table of Authorities.

11. [The ATTACHMENTS](#):

The ATTACHMENTS section of the Manual is a compilation of model and sample forms and letters which are referred to in a particular Chapter. A “model” form or letter is **used verbatim in all cases** whereas a “sample” is but one example of an acceptable form or letter. The number of the ATTACHMENT corresponds with the

number of the Part, Chapter and sequence within Chapter where it is referenced, e.g., ATTACHMENT 302 is referred to in Part 3, Chapter O, and is the second Attachment in this Chapter. This section of the Manual, which has a TAB, is located after the Index.

12. [References](#):

The References section, which is located after the ATTACHMENTS, contains the [Statute](#) and the General Counsel's regulations set forth at [Subpart A](#) to Part 2423 of the Regulations.

13. [Computer accessibility](#):

For ease of use, the Manual is comprehensively hyperlinked throughout the entire document. Use the hyperlink function of Word Perfect 8 to move throughout the Manual and Attachments with ease. The Manual is also accessible via the FLRA home page at www.flra.gov. [Volume 55](#) and later FLRA cases are accessible by computer by clicking on the case citation which will take you to the FLRA home page where the decision appears. Click on Volume 55 in the preceding sentence and you will go directly to the FLRA Decisions Navigator.

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PART 1

PRE-CHARGE

A. PRE-CHARGE ASSISTANCE

- OVERVIEW:** Before a party files a charge, ROs are frequently contacted by unions, activities, or other persons to discuss various labor-management matters. The Agent is prepared to give guidance and information in accordance with the specific needs expressed.
- OBJECTIVE:** To provide the Agent with a list of matters that s/he is prepared to cover if pre-charge assistance is required: (1) general pre-filing technical assistance; (2) drafting the charge; (3) collecting and organizing supporting evidence; and (4) legal impediments precluding the filing of a charge.

1. GENERAL PRE-FILING TECHNICAL ASSISTANCE:

Upon request, an Agent may provide a person/s the following types of assistance:

- Explain generally the rights and obligations under the Statute;
- Explain ULP procedures under the Regulations;
- The FLRA's Internet Home Page Web address--www.flra.gov--and the types of information found there;
- Furnish appropriate forms and reasonable technical assistance regarding completion of forms, including drafting language describing the basis of charge; and
- Public written materials.



The Agent clarifies, whether orally, in writing, or by e-mail, that s/he is providing technical assistance only; that s/he cannot advise a party on what course of action to pursue; and that should a charge be filed, the charge will be investigated and a decision will be made by the RD on the evidence adduced during the investigation.

2. DRAFTING THE CHARGE:

- a. Generally, describe with specificity, the underlying basis of the charge, including locations, dates, and names and titles of Agency or Union representatives involved.
- b. Examples:
 - i. Independent § [7116](#)(a)(1) charge:

Do not include names of employees involved.
 - ii. Section [7116](#)(a)(2) discrimination charge:
 - (1) All known discriminatees should be named and may be included in the same charge if subject to same circumstances or events constituting the discrimination; and
 - (2) Where names of all discriminatees are not known, the charge states: “the discriminatees include, but are not limited to, those named.”

3. COLLECTING AND ORGANIZING SUPPORTING EVIDENCE:

The Agent explains to the person the types of information that are necessary to gather to support a charge:

- Witnesses - with a brief synopsis as to what each witness will testify to, and a telephone number for each witness;
- Collective bargaining agreement;
- Documents; and

- Interests.

See [ATTACHMENT 1A1](#) for a Sample Letter describing what a person needs to do before filing a charge.

4. LEGAL IMPEDIMENTS PRECLUDING THE FILING OF A CHARGE:

a. *Contractual notification requirements:*

An agreement between a union and an activity, which contains a requirement for pre-charge filing, notification, or settlement efforts, is enforceable. Headquarters, Fort Sam Houston, Department of the Army and American Federation of Government Employees, AFL-CIO, Local 2154, 8 FLRA No. 81, 8 FLRA 394, 395 (1982). If the Region finds that the Charging Party has not followed a required procedure, the charge is dismissed.



Contractual notification requirements are not binding on persons who file charges as individuals.

b. *Grievance bar:*

- i. Second sentence of § [7116](#)(d) governs whether ULP charge is barred by a previously-filed grievance: and
- ii. ULP charge is barred by an earlier-filed grievance if “the unfair labor practice charge arose from the same set of factual circumstances as the grievance and the theory advanced in support of the ULP charge and the grievance are substantially similar.” Olam Southwest Air Defense Sector (TAC), Point Arena Air Force Station, Point Arena, California, 51 FLRA No. 69, 51 FLRA 797, 801-02 (1996) (citation omitted).



The charge form requires that the Charging Party state whether the matter raised in the charge has been raised previously in a grievance procedure. See § [2423.4](#)(a)(i).

c. *Charge is untimely:*

Agent advises if action may be untimely under § 7118(a)(4) of the Statute. See EEOC, Washington, D.C., 53 FLRA No. 54, 53 FLRA 487 (1997) (EEOC); Air Force Flight Test Center, Edwards Air Force Base, California, 55 FLRA No. 21, 55 FLRA 116, 120 (1999) (Charge was timely filed where although changes in program were made more than six months before the charge was filed, charge alleges incident upon which charge was based occurred in the month preceding the charge, i.e., meeting that occurred in month preceding charge modified conditions of employment from those set forth in memorandum which issued more than six months prior to the filing of the charge). See also Part 2, Chapter A concerning Filing a Charge.



If any of the legal impediments described above applies, the Agent informs the person. But, the Agent advises person that s/he has the right to file a charge and a determination will be made by the RD.

5. E-mail and Pre-Charge Assistance:

Agents may reply by e-mail to inquiries received by e-mail. All Agents check their e-mail for messages with the same frequency that they check their telephone messages.

6. CONFIRMATION AND DOCUMENTATION OF TECHNICAL ASSISTANCE:

a. Confirmation:

Under no circumstances is it permissible for an Agent to allow a technical assistance call to be taped. An Agent who is advised that a conversation is actually being taped informs the caller that taping is against OGC policy and then terminates the conversation. If asked, the Agent may inform the caller that if the caller makes a specific inquiry in writing, the Region will respond in writing.

b. Documentation:

Calls approximating at least five minutes duration are documented on the Technical Assistance form. Calls of shorter duration are not documented.



[Part 2, Chapter A](#) concerning Filing a Charge.

B. ALTERNATIVE DISPUTE RESOLUTION SERVICES

OVERVIEW: The provision of ADR services supports the FLRA's Agency-wide initiative to assist labor and management parties to evaluate the success of their current labor-management relationship and develop the type of labor-management that best meets their interests. The OGC furthers its mission to provide leadership in promoting stable and productive labor-management relationships in the Federal sector by providing ADR programs both before and after a charge has been filed. See § [2423.1](#)(a) and (b). Section [2423.2](#) codifies the OGC's ADR services.

OBJECTIVE: To list the types of ADR services the OGC provides to parties and to describe how they promote stable and productive labor-management relationships in the Federal sector.

1. WHAT ADR SERVICES ARE PROVIDED:

Pursuant to § [2423.2](#)(b), the parties may request the following services:

- Facilitation - Assisting the parties in improving their labor-management relationship;
- Intervention - Using an interest-based technique, intervening when parties are experiencing or expect significant ULP disputes;
- Training - Training union and management representatives on their rights and responsibilities under the Statute, and how to avoid litigation over those rights; and
- Education - Working with the parties to recognize the benefits of, and establish processes for, avoiding disputes without the need for litigation.

2. BENEFITS OF ADR SERVICES:

- Ensure understanding of, and compliance with, the Statute;
- Assist the parties in developing the type of labor-management relationship that best suits them;
- Enable Federal agencies and their employees to deliver the highest quality services; and
- Enhance the quality of work life and the well-being of employees and managers.

3. ADR SERVICES PROVIDE LEADERSHIP AND PROMOTE STABLE AND PRODUCTIVE LABOR-MANAGEMENT RELATIONSHIPS:

a. *OGC ADR programs are designed to do the following:*

- Identify and assess the needs of Federal sector Unions and Agencies for facilitation, intervention, training and education services;
- Facilitate the parties' development and maintenance of effective labor-management relationships;
- Provide intervention assistance to resolve pending disputes without litigation;
- Provide skills training jointly to Federal sector labor and management;
- Provide training on the Statute which enables the parties to understand the legal doctrines and their effect on day-to-day labor-management relations;

- Create innovative programs that are responsive to the needs of the parties;
- Effectively commit resources based on established criteria;
- Promote alternative dispute resolution approaches to resolving disputes;
- Evaluate the effectiveness of the ADR programs used in furtherance of this policy; and
- Use OGC employees' labor law and problem-solving expertise to assist Federal employees, Unions and Agency management in avoiding and resolving disputes.

b. Description of ADR Programs:

- Training for union and management representatives on the rights and duties of employees, unions, and management under the Statute to ensure that the Statute's purposes are understood and supported and to assist the parties to improve their labor-management relationships within the requirements of the Statute;
- Assistance provided to union and management representatives which supports their efforts to improve and strengthen their working relationships.
- Services provided to union and management representatives who are experiencing or expect significant ULP activity due to relationship difficulties or external influences, and agree to

use OGC ADR methods to try to resolve their conflicts and disputes.

- Training for union and management representatives on interest-based negotiation and problem-solving techniques for contract negotiations; and
- Training for union and management representatives to assist them in designing ADR approaches to meet their needs.



[ATTACHMENT 1B1](#) contains a more exhaustive description of the above services.

c. Examples of situations when ADR assistance is appropriate:

- Newly certified unit - statutory training for union officers and agency managers;
- Numerous ULP charges are filed at one activity - intervention.

d. Examples of symptoms that indicate assistance is appropriate:

- Adversarial nature of negotiations; contract negotiations have been ongoing for too long a

period of time; actual or potential ULP charges;
and

- General interactions between union and management representatives are poor, e.g., parties do not talk to each other; no joint meetings are held; allegations are personalized; extraneous matters are raised; actual or potential ULP charges.

e.  **+P** *Criteria for providing ADR services:*

The OGC concentrates its limited resources where they have the potential to achieve the greatest results. Based on this objective, RDs consider specific factors in determining whether ADR programs and services are undertaken. Not all of the following factors are relevant to each situation:

- **Commitment of the parties to improve their labor-management relationship:**

The OGC expends its limited resources only when both parties are committed to improve their relationship. Parties must be willing to be represented by officials who are committed to the process undertaken and empowered with the authority to commit their principals to specific actions intended to improve their relationship. Resources are not committed if either party fails to empower its representatives.

- **Availability of OGC employees to meet the parties' needs:**

A program is not undertaken unless there are employees available to assign to the specific program. RDs only assign those employees who are experienced in the type of ADR program undertaken and who are available at a time agreeable to both parties.

- **Balancing resource needs among OGC programs:**

The OGC continues to administer effectively its limited resources to achieve the maximum results in fulfilling its statutory mission. RDs thus take into consideration the pending ULP and representation caseload, the

geographic location and timing of the program, the Agency's agreement to pay the travel and per diem of the RO employees involved and the size of the group which is involved in the ADR program.

- **Organizational level of the Agency and Union:**

The relative organizational level of the Agency and Union that would be involved in the program is taken into consideration in order to maximize resources. For example, RDs evaluate whether the parties are at a Department, bureau, Agency-wide or facility level and whether the Union involved has national recognition, is a national council or a local affiliate.

- **Character of labor-management relationships:**

As part of the decision-making process, an evaluation of the character of the current labor-management relationship is undertaken. For example, RDs take into consideration the extent of the parties' reliance on third-party procedures and whether there are current pending disputes before a third-party neutral.

- **The OGC's commitment to, and the parties' need for, continued assistance:**

In determining whether to commit resources to a program, the OGC evaluates previous commitments to, and the need for, continued assistance. RDs evaluate whether the parties are continuing a course of action designed to improve their relationship, as well as their continued need for ADR assistance.

- **Nature and extent of prior assistance:**

Similarly, an evaluation is made of the nature and extent of prior assistance provided to the parties through an ADR program or any other type of assistance.

- **Acceptability of OGC assistance by the Agency and Union:**

The acceptability of RO assistance by the Agency and Union also is evaluated. The weight of this factor varies depending upon the type of

ADR program under consideration. For example, the degree of acceptability should be greater in a facilitation to improve a relationship, as compared to an intervention to resolve a pending ULP or representation dispute.

- **OGC involvement furthers dispute resolution:**

All ADR programs further the OGC's mission to provide leadership and promote stable and productive labor-management relationships in the Federal sector. The Regions do not undertake an ADR program which is not intended to further the mission.

f.  **+P** *Additional criteria if request is for pre-charge ADR assistance pursuant to § [2423.1\(a\)](#):*

- Whether or not dispute involves a ULP;
- How close is it to the 6-month time limit for filing a charge;
- Parties are informed about the 6-month time period for filing charge is not tolled; and
- Magnitude of the violation.

Among other things, the Region considers whether there is potential for the situation to get worse in a short period of time.

4. **HOW ADR SERVICES ARE INITIATED:**

ADR services may be initiated by the OGC or by a request or agreement of the parties. Depending upon the type of ADR service requested, it may be appropriate to require that the parties jointly agree that the Region provide such services. In any event, the Region provides such services consistent with OGC criteria.

For example, parties may jointly request skills training or assistance in enhancing their labor-management relationship, or the OGC may suggest to the parties that they may benefit from such training or assistance. Irrespective of how these ADR services are initiated, the OGC creates innovative programs that are responsive to the varying needs of the parties.

5. DECIDING WHETHER TO PROVIDE AN ADR SERVICE:

Upon receipt of a joint request or a request from a Union or Agency for an ADR service, the Region explains the process for delivering an ADR program and obtains sufficient information from the parties to enable the RD to:

- Diagnose the needs of the parties;
- Apply the criteria listed above; and
- Determine which, if any, ADR program will be offered.

6. Notification of the Parent or National Organization:

Before providing an ADR program, the Agent discusses with the parties whether the parties' national or parent organization should be notified of the use of any ADR program, and if so, how it will be accomplished.



[Part 3, Chapter B](#) concerning Alternative Case Processing Procedure.

RESERVED

PART 2

THE CHARGE

A. FILING A CHARGE

OVERVIEW: No investigatory action is taken unless and until a charge is filed by any activity, Agency, labor organization or other person which alleges a violation under § [7116](#) of the Statute seeking vindication of the rights accorded under the Statute.

OBJECTIVE: To provide guidance concerning the who, what, when, where and how, of filing a ULP charge.

1. WHO MAY FILE A CHARGE:

Section [2423.3](#) states:

“Any person may charge an activity, agency or labor organization with having engaged in, or engaging in, any unfair labor practice prohibited under 5 U.S.C. 7116.”

“Person” is defined as “an individual, labor organization, or agency.” Section 2421.2 (incorporating the definition at § [7103](#)(a)(1) of the Statute).

2. WHERE TO FILE A CHARGE:

a. *Place of occurrence:* Section [2423.6\(a\)](#):

- i. A charge is filed with the RD for the region in which the alleged ULP has occurred or is occurring. See [ATTACHMENT 2A1](#) for a geographic jurisdictional list for ROs.
- ii. If the alleged ULP occurred or is occurring in more than one region, a charge may be filed with the RD in either region. Id.

- b. *Filing in incorrect region:*
 - i. Charge is date stamped and is deemed filed and is then sent by fax to the proper RO with jurisdiction over matter for docketing; and
 - ii. Parties are made aware that incorrect filing delays an investigation.

3. WHEN TO FILE A CHARGE:

- a. *General requirement:*

Under § [7118\(a\)\(4\)\(A\)](#) of the Statute, a charge normally may not be acted upon if the alleged ULP occurred more than six months before the filing of the charge.

- b. *Exceptions:*

- i.* Failure to perform a duty owed:

An RD may issue complaint on a charge that would otherwise have been found untimely if it is found that the Charging Party was prevented from filing the charge in a timely manner due to failure of an Agency or Union to perform a duty owed to the charging party. See Section [7118\(a\)\(4\)\(B\)\(i\)](#); cf. U.S. Nuclear Regulatory Commission, Washington, D.C., 44 FLRA No. 30, 44 FLRA 370, 381 (1992) (NRC) (because agency had no duty to inform union of employee's detail to a supervisory position,

charge, which was filed more than six months after detailee's attendance at union executive board meeting, is untimely).

ii. Concealment:

An RD may issue complaint on a charge that would otherwise have been found untimely if it is found that the Charging Party was prevented from filing the charge in a timely manner due to the Agency's concealment which prevented the discovery of the alleged ULP during the six-month period. See Section [7118](#)(a)(4)(B)(i); cf. NRC, 44 FLRA at 381 (record evidence fails to show that detail was concealed from union).

iii. Equitable tolling:

Factors to weigh in determining whether the six-month period is equitably tolled:

- Lack of actual notice of the filing requirements;
- Lack of constructive knowledge of the filing requirements;
- Diligence in pursuing one's rights;
- Absence of prejudice to the Charged Party; and

- A Charging Party's reasonableness in remaining ignorant of the notice requirements.

See EEOC, 53 FLRA at 498-99 (1997) (filing action in wrong forum does not justify invoking equitable tolling of statute of limitations).

4. WHAT TO FILE:

- a. *Completion of the Charge Form: § [2423.4](#):*
- Charges are filed on either a CA or CO standardized form (FLRA Forms 22 and 23) (Revised 1998) or on a form that is substantially similar;
 - Charging Party provides a clear statement of the ULP allegation which includes the specific sections of Statute allegedly violated;
 - Certificate of service section on CO or CA form indicating method of service and name, title, location and date of service is completed;
 - Number of copies: One copy of charge is filed; and
 - No attachments: Supporting evidence and documents are submitted to the RO under separate cover.



RO staff is available to give technical advice concerning completion of the Charge form. (See [Part 1, Chapter A](#) concerning Pre-Charge Assistance).

5. HOW TO FILE A CHARGE:



Pursuant to § [2423.6\(c\)](#), the Charging Party files a charge by mail, delivery service, in person, or by fax with the appropriate RD. Filings by e-mail are **not** permitted. Filings are required to be made during normal business hours. **The following additional rules apply to service by fax:**

- Charges are transmitted to a RO fax machine that is dedicated to receiving incoming documents;
- A charge must not exceed a two-page limitation;



If Charging Party exceeds the two-page limitation, the Region accepts the charge if it is the first time that the Charging Party has exceeded the two-page limitation. In this instance, the Region calls the Charging Party on the telephone and informs the Charging Party of the two-page regulatory requirement and informs the Charging Party that the Region will not accept charges that exceed the two-page limitation in the future.

- Charging Party assumes the risk if fax machine malfunctions;
- Original signature of Charging Party is not required but a signature is required (can be a copy);
- Charging Party need not submit follow-up hard copy of charge; and
- RO fax machine will record time and date of receipt of the charge.



Each Region's dedicated fax machine for incoming faxes reflects the correct time and date at all times.

6. CHARGES MAY BE TRANSFERRED AMONG THE REGIONS:

See [Part 2, Chapter D](#) and [Part 5, Chapter D](#) concerning Reviewing the Charge and Parity and [ATTACHMENT 2A2](#) for a Sample Order Transferring Case.



[Part 1, Chapter A](#) concerning Pre-Charge Assistance;

[Part 2, Chapter D](#) concerning Reviewing the Charge; and

[Part 5, Chapter D](#) concerning Parity.

RESERVED

B. DOCKETING THE CHARGE

OVERVIEW: Docketing a charge is the first official action a RO takes when a charge is received.

OBJECTIVE: To describe what actions take place at the time a RO docket a charge, which include entering the case into case tracking and sending the parties the opening letter.

1. DOCKETING CHARGES RECEIVED BY FAX OR MAIL:

a.  Upon receipt, a charge is reviewed and is **not** docketed if it is deficient in one or more of the following ways:

- There is no signature;
- The Charging Party or Charged Party is not identified;
- Some basis for the charge is not stated; and
- The Charge form is not substantially completed (the matters in each block are not addressed in some way).

If the charge is deficient but it can be determined who filed the charge, it is returned to that person with a notation as to why it has been returned. The Party is also informed that it may be sent to the Region again once the deficiency has been corrected but that it is not considered filed until the deficiency is corrected. Also, a reference is made to timeliness matters. See [ATTACHMENT 2B1](#) for a Sample letter.



*A charge filed on the wrong form is **not** deficient and is docketed as to what it should have been. For example, a charge filed on a CO form against an Agency is docketed as if it had been filed on a CA form.*

b. *Assigning a case number:*

Once it has been determined to docket the charge, the Region assigns a case number which consists of two letters indicating the Region (AT, BN, CH, DA, DE, SF, or WA) followed by a two-letter designation which indicates the type of case (CA or CO), followed by a five-digit number (the first digit indicates the last digit of the fiscal year in which the charge was filed and the other four digits indicate the sequential number of the case filed in the Region during the fiscal year).

EXAMPLE

“WA-CA-90001” is the case number given to the first charge against an Agency filed in FY 99 in the Washington Region.

- c. *Docketing similar charges:*
- i. A grouping of charges filed on the same day or within days that raise identical issues received by a Region are counted as one case (i.e., are assigned the same case number, for case tracking purposes) even though there may be different Charging Party individuals;
 - ii. In the unlikely event that the dispositive actions may be different, the RD contacts OGC Headquarters to discuss the best way to capture the action; and

- iii. Regions explain to parties that the assignment of a number in no way affects their rights.

2. CLARIFICATION OF CHARGE IS REQUIRED:

- a. *Amended charge necessary before investigation begins:*

A charge may not be deficient, but nevertheless may need to be clarified in order to begin the investigation, e.g., the underlying basis of the charge is not clear. In this circumstance, it is docketed and a letter is sent to the Charging Party's representative requesting that the charge be clarified by filing an amended charge within 10 days of the date of the letter. The Charging Party is also advised that the charge may be dismissed if the amended charge is not received by the RO within the required 10 days. See [Part 3, Chapter O](#), concerning Duty of a Charging Party, for additional discussion on dismissals for lack of cooperation.

The Region does **not** send a copy of the charge to the Charged Party, nor is an opening letter sent (see #5, below), until it receives the Charging Party's clarification in an amended charge.

Once the charge has been sufficiently clarified, the charge and the amended charge are served on the Charged Party.

- b. *Clarification during the course of the investigation:*

If, during the investigation, it is necessary to clarify the scope of the charge, a confirming letter, affidavit, or amended charge may be used. Since the Charged Party was put on notice of the basis of the charge when it was filed, there is no need to copy the Charged Party.

3. DOCKETING CHARGES HANDED TO AN AGENT IN THE FIELD:

After determining that there are no deficiencies that would preclude docketing, the Agent contacts the Region for a number and affixes the number and date of filing on the charge.

4. ENTRY INTO ORACLE CASE TRACKING:

At the time a case number is assigned, the case is entered into the Oracle case tracking system. See OGC Administrative Manual for details concerning case tracking.

5. THE OPENING LETTER—FIRST WRITTEN CONTACT WITH THE PARTIES AFTER A CHARGE IS DOCKETED:



One standard opening letter ([ATTACHMENT 2B2](#)) is sent to the parties that includes:

- Acknowledgment of receipt of charge;
- Point of RO contact (name, phone and e-mail--might not be the assigned Agent);
- Case number;
- Designation of representative form;
- Copy of charge;
- Attachment that describes ULP process with reference to ADR processes (See [ATTACHMENT 2B3](#));
- Notification that a RO Agent will be contacting the parties soon and is prepared to discuss their legal position, relevant contract provisions, facts, documents and witnesses, as applicable; and
- If Charged Party representative does not understand the underlying basis of the charge, s/he should either contact the RO point of contact or assigned Agent.



[Part 3, Chapter O](#) concerning Duty of the Charging Party.

C. THE CASE FILE

- OVERVIEW:** The case file is created after a case is docketed and assigned to an Agent for investigation. It contains a compendium of all communication with the parties, relevant evidence and other information discovered, disclosed, or submitted during the investigation as well as information pertaining to post-investigation regional decision-making.
- OBJECTIVE:** To provide guidance concerning the contents of a case file, including the documents contained in the case file and the organization of the case file.

1. CREATION OF CASE FILE:

 *Contents of Case File:*

Before a case is assigned to an Agent for investigation, a six-sided case file folder is created and maintained for each charge filed and docketed. The case file contains all relevant evidence and information, correspondence, intra-office and OGC memoranda, and other documents discovered, submitted and developed from any source during the processing of the case to disposition in accordance with [Part 3, Chapters C and D](#) concerning Quality Standards for Investigations and the Scope of Investigations.

2. TYPES OF DOCUMENTS OR MATERIALS IN THE CASE FILE:

The minimum requirements for a case file are that it contain all relevant evidence and information discovered or submitted during the course of the investigation. See [Part 3, Chapter C](#), which discusses Quality Standards for investigations. These documents include:

a. A case log:

A case log reflects the manner in which the case was processed, which includes the occurrence of each substantive discussion between anyone in the Region

and any of the parties, their representatives or their witnesses about the merits of the case or the manner in which the case is being processed. The case log lists, in chronological order (most recent entry on top (first)):

- Dates of all substantive contacts;
- Names of each person contacted;
- Either a brief description of each case-processing matter discussed or a reference to a separate file memorandum; and



*Discussion of case-processing matters is **not** evidence. Evidence is contained in other sections of the case file.*

- Notations on any case processing decisions made by the Region during the processing and reviewing of the case. For example, determinations concerning the appropriateness of injunctive relief and decisions concerning the type and scope of the investigation pursuant to the [Part 3, Chapters C](#) and [D](#) concerning the Quality Standards and Scope of ULP Investigations.

Evidence or background information bearing on the merits of the case does **not** appear in the case log but is documented elsewhere in the file.

b. Affidavits or confirming letters:

In cases which do not proceed solely on documentary evidence, the Agent secures either: (a) a signed and sworn affidavit (or, if appropriate, a signed and sworn questionnaire) from the lead witness in the case; or (b) a letter to the lead witness which confirms all relevant details of the Agent's interview. If the file does not contain a signed and sworn affidavit or questionnaire

from the lead witness when one is indicated, it must contain an explanation of the Region's decision not to require that evidence. The file also discloses what steps the Region has taken to obtain evidence or information from the parties.

c. *Written pre-decisional report:*

Except in cases where disposition (usually on technical grounds) is unmistakable, the case file contains a written pre-decisional report and recommendation by the investigating Agent and/or a written post-decisional report. See [Part 4, Chapter D](#), which discusses the requirements of an FIR.

d. *Agenda Minute:*

The file contains an agenda minute or other statement of the RD's reasons for not issuing a complaint on any portion of a charge whenever the RD's decision differs from the Agent's pre-decisional recommendation, unless the reasons for the RD's decision are fully stated in the dismissal letter. Similarly, whenever the RD decides to issue a complaint on any portion of a charge for reasons different from those in the agent's recommendation, the case file contains an explanation of that decision. See [Part 4, Chapter D](#) for a discussion of an Agenda Minute.

e. *Notes to the file explaining case processing decisions:*

The Agent ensures that the case file contains notes to the file to explain the reasons why a case has been processed in a certain manner. For example, whether an Agent solicited withdrawal prior to a RD determination on the merits and the results of that solicitation; whether injunctive relief was considered; how the file was reviewed to ensure that the quality standards are met; and whether the scope of the investigation was limited.

f. Memos to the file:

Memos to the file to reflect conversations which resulted in background information, but not evidence to be relied upon in deciding the merits of the charge, are also contained in the case file.



Agents may communicate with the parties via e-mail concerning procedural case processing matters, e.g., requesting a party to contact the Agent due to unsuccessful attempts to contact the party telephonically; requesting documents; confirming site visits. The record contains copies of these communications with certifications of their delivery.

Documents described under subsections a, b, c, d, e, and f are not subject to disclosure under the Freedom of Information Act as they are exempt from disclosure under Exemption 5. See 5 U.S.C. § 552(b)(5). They come within the deliberative process privilege which has the purpose of "prevent[ing] injury to the quality of agency decisions." NLRB v. Sears, Roebuck, & Co., 421 U.S. 132, 151 (1975). Documents described under subsection b also are subject to the confidentiality requirements set forth at § 2423.8(d) and, if applicable, the FOIA disclosure exemptions set forth at Exemption 7 concerning records or information compiled for law enforcement purposes. See 5 U.S.C. § 552(b)(7).

g. Legal research:

Any legal research performed in the case is put in the case file.



In addition to the minimum requirements listed above, the Regions may develop and include in their case files any other internal documents which they consider material to the disposition of the case and consistent with the Quality Standards for Investigations in [Part 3, Chapter C](#).

3. ORGANIZATION OF THE CASE FILE:

a. Benefits of uniform case file organization:

- Easy retrieval, identification and use of all file documents;
- Facilitates review, both in the Region and at OGC Headquarters, of cases appealed; and
- Facilitates process of transferring cases between Regions.

b.  Contents of each side of case file:

- **SIDE 1: OFFICIAL DOCUMENTS/CORRESPONDENCE**
 - Charge/Statement of Service
 - Amended Charge/Statement of Service
 - Designation of Representative
 - Opening Letter to Parties
 - Party/Designated Representative Information Sheet
 - Withdrawal Request Approval Form
 - Dismissal letter/revocation of dismissal letter
 - Complaint and Notice of Hearing, Memorandum Upon Issuance of Complaint

- Request for Settlement Judge
- Respondent's Answer
- Settlement Agreement, Notice To Employee/Members, Related Correspondence
- Formal Papers
- Prehearing disclosure filings, documents and Orders;
- Order and notice of time for prehearing conference call
- Subpoena requests, Subpoenas
- ALJ/FLRA decision of the case
- Compliance correspondence/documents
- Joint letters to Charging and Charged Parties



Regions differentiate between documents supplied with the charge as supporting evidence and documents attached and incorporated by reference in the body of the charge. If a document is specifically referenced in the charge and therefore may be a part of the formal papers prepared for litigation, it remains with the charge in the file and, if desired, copied for placement in the Charging Party Evidence (side 5) section of the case file. All other documents are placed in the Charging Party Evidence section of the case file.

If an Agent takes materials out of the formal case file at any time, copy the material, and return the original to the formal case file. The formal case file is always complete and contains the required documents.

- **SIDE 2: INTER/INTRA-REGIONAL/OGC DOCUMENTS**

- Chronology log, Case file summary, telephone log
- Initial Charged Party contact form
- Intra-office memoranda/memos to the file
- Inter-office routing/assignment forms
- Pre-Post Agenda memoranda, FIR, managerial memoranda in reply
- Oracle data entry form
- RO quality checklists, forms
- Research
- Advice request, advice memo
- Appeal, comment on appeal, appeal determination



If the identification of a document received from either the Charging or Charged Party is self-evident on its face, there is no need to further identify the document. If not self-evident throughout, the document is identified in the file. For example, if only a portion of an Agency manual, regulation, directive, etc., is contained in the file, the file includes the first page or otherwise identifies the regulation by its name, effective date, and authority. If the meaning of a document is self-evident on its face, there is no need to further explain how to read the document. If not self-evident on its face, the file explains how to read the document. For example, if time and attendance records or other similar documents are in the file and it is unclear how to read the document, the file contains an explanation of how to read the document.

- **SIDE 3: CHARGED PARTY EVIDENCE, INFORMATION, AND CORRESPONDENCE**
 - Charged Party Statement of Position in response to charge
 - All documentary evidence supplied by the Charged Party and Charged Party witnesses
 - Agent correspondence to/from Charged Party/Charged Party witnesses/representative

- **SIDE 4: CHARGED PARTY WITNESS STATEMENTS**
 - Affidavits, confirming letters, interview notes of Charged Party witnesses
 - Completed Questionnaires supplied by Charged Party witnesses
 - Affidavits from individuals whose testimony supports the Charged Party

- **SIDE 5: CHARGING PARTY EVIDENCE, INFORMATION, AND CORRESPONDENCE**
 - Agent correspondence to/from Charging Party/Charging Party witnesses/representative
 - Collective Bargaining Agreement and related provisions
 - Memoranda of Agreement

- All documentary evidence supplied by the Charging Party and Charging Party witnesses
- **SIDE 6: CHARGING PARTY WITNESS STATEMENTS**
 - Affidavits, confirming letters, interview notes of Charging Party witnesses
 - Completed Questionnaires supplied by Charging Party witnesses
 - Affidavits from individuals whose testimony supports the Charging Party



It is extremely helpful, although not required, that the contents of each side of the file be in chronological order (most recent document on top (first)).



[Part 3, Chapter C](#) concerning Quality Standards for Investigations;

[Part 3, Chapter D](#) concerning the Scope of Investigations; and

[Part 4, Chapter D](#) concerning Regional Director Merit Determinations.

RESERVED

D. REVIEWING THE CHARGE

OVERVIEW: Soon after a charge is docketed and either before or after it is assigned to an Agent, it is reviewed to determine whether the Charging Party addressed certain matters.

OBJECTIVE: To provide guidance concerning what types of general matters are reviewed after a charge is docketed.

1.  **GENERAL MATTERS THAT ARE REVIEWED IN EVERY CASE AFTER A CHARGE IS DOCKETED:**

- Jurisdiction;
- Sufficiency of the charge;
- Whether an ADR program is a possibility (See [Part 1, Chapter B](#) which describes ADR programs);
- Whether there are related cases--representation, negotiability, FSIP, DOL, MSPB, or other ULPs (See [Part 2, Chapters I, J, K, L](#) for a discussion of related case filings). If there are related charges in another Region, fax a copy and/or e-mail a notice of such to the appropriate region. Fax charge to all Regions if it is nationwide in nature. The Regions jointly coordinate (transfer cases, as necessary) where there are related charges or charges that are nationwide in nature. In coordinating the cases, the Regions need to ensure that the legal analysis applied in each Region is consistent (See [ATTACHMENT 2D1](#) for a Sample e-mail notice). See [Part 4, Chapter C](#) concerning matters submitted to the OGC for Advice;
- Whether the case involves novel issues to be submitted for advice;
- Whether the case fits injunction criteria (See [Part 2, Chapter E](#) describing such criteria);
- Whether proper charged party/ies are indicated;

- Whether the contract contains notification requirement (See [Part 1, Chapter A](#) for a discussion of contractual notification requirements);
- Certificate of service box is completed. Failure to sign does not affect the filing of the charge if, in fact, service was made. The RD serves a copy on all parties but is not responsible for such service. The Charging Party is still required to provide service; and
- Whether the stated allegation/s need clarification and, if so, whether clarification is accomplished by confirming letter or by amended charge with notice to charged party. See [Part 2, Chapter H](#) on Amending the Charge for a discussion on how this is accomplished.

2. TRANSFER OF CASE TO ANOTHER REGION:

A transfer may take place if any of the following circumstances applies:

- There is another case/s that is/are related;
- Regional resources require consideration of transfer; or
- Parity concept (See [Part 5, Chapter D](#) for a discussion of parity) needs to be applied.

See also [Part 2, Chapter A](#) on Filing a Charge.

3. CONSIDERATION OF ADR PROGRAM OR ALTERNATIVE CASE PROCESSING PROCEDURE:

When initially reviewing the charge, the Agent considers whether these factors, among others, are present in determining whether to recommend to the RD at this stage of the investigation that ADR services be offered:

- The charge/s does not involve differing legal interpretations of the Statute;
- The charge/s, in essence, involves disputes between a particular Union representative and a particular Agency official that do not directly involve institutional rights;

- The charge/s involves ongoing disputes over section [7131](#)(d) official time and/or other contract benefits;
- The parties seldom meet and communicate in writing or by e-mail;
- The charge/s evidences a basic lack of understanding of the parties' respective rights and obligations under the Statute; and
- The charge/s involves a basic disagreement over a matter, such as the level of bargaining in a nationwide unit, which impacts the labor-management relationship on a consistent basis.

See [Part 1, Chapter B](#) and [Part 3, Chapter B](#), which describe ADR Programs and Alternative Case Processing Procedures and the protocol for making determinations as to which service, if any, will be offered.



[Part 1, Chapter B](#) concerning ADR Services;

[Part 2, Chapter A](#) concerning Filing a Charge;

[Part 2, Chapter H](#) concerning Amending the Charge;

[Part 2, Chapter I](#) concerning Processing Charges Related to FSIP Requests for Assistance;

[Part 2, Chapter J](#) concerning Processing Charges Related to Pending Negotiability Appeals;

[Part 2, Chapter K](#) concerning Processing Charges Related to a Pending Representation Petition;

[Part 2, Chapter L](#) concerning Processing Charges Related to a Pending MSPB, Special Counsel or DOL Case;

[Part 3, Chapter B](#) concerning Alternative Case Processing Procedure;

[Part 4, Chapter C](#) concerning Consultation, Advice and Clearance;
and

[Part 5, Chapter D](#) concerning Parity.

E. INJUNCTIONS

OVERVIEW: Section [7123\(d\)](#) of the Statute, and § [2423.10\(b\)](#) and (c) provide for the GC, with Authority approval, to seek appropriate temporary relief from an appropriate United States Federal District Court when specific conditions have been met.

OBJECTIVE: To provide guidance concerning the identification and processing of cases where appropriate temporary relief is warranted. The Chapter provides an overview of the statutory criteria as well as criteria and principles for ROs to apply in implementing the statutory criteria. The Chapter provides the ROs with a consistent approach in investigating and making recommendations in ULP cases where interim temporary relief is necessary to effectuate the purposes and policies of the Statute.

1.  **RO REVIEWS ALL CHARGES TO DETERMINE WHETHER TO SEEK TEMPORARY RELIEF:**

The Regions review all ULP charges to determine whether the purposes of the Statute will be frustrated if the status quo is not maintained while the ULP complaint is being processed. In those extraordinary circumstances where the status quo must be maintained, the GC requests Authority permission to seek appropriate temporary relief. The Regions fully inform all parties of the various steps involved in processing injunction cases and the parties are afforded the opportunity to resolve the dispute in accordance with [Part 4, Chapter G](#) concerning Settlements.

2. **SECTION [7123\(d\)](#) OF THE STATUTE:**

Section [7123\(d\)](#) of the Statute sets forth the criteria for a district court of the United States to grant appropriate temporary relief (including the right to grant temporary restraining orders) in ULP cases. A court must conclude that granting such relief is "just and proper" before temporary relief can be granted. In addition, a court cannot grant any temporary relief "if it would interfere with the ability of the Agency to carry out its

essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed."

3. CASE LAW:

Cases where the GC successfully has petitioned district courts for temporary relief:

- A strike by a labor organization (United States v. PATCO, Inc., 524 F. Supp. 160 (D.D.C. 1981));
- A unilateral reorganization resulting in the involuntary transfer and relocation of bargaining unit employees from one state to another (Smith v. Federal Aviation Administration, Civil Action No. C83-1538 C (D. Wash. Nov. 23, 1983));
- The refusal to recognize and enter into collective bargaining negotiations with a newly certified exclusive representative (Reuben v. Federal Deposit Insurance Corporation, 760 F. Supp. 934 (D.D.C. 1991); and
- The unilateral elimination of on-base housing by a military activity where other suitable housing for civilian employees was not available (Petrucci v. United States Southern Command, Department of Defense, Republic of Panama and United States Army South, Republic of Panama, Civil Action No. 94-3786 (E.D. La. Nov. 29, 1994) (unpublished)).

4. C+P FACTORS THAT DETERMINE WHETHER § 7123(d) INJUNCTIVE CRITERIA ARE MET:

- **SERIOUSNESS OF THE VIOLATION**

Is the violation serious?

Not all violations of the Statute are as serious as others. For example, a failure to accord recognition to a union after a valid representation election is more serious than a failure to afford the union an opportunity to be represented at a routine formal discussion. Moreover, there are degrees of harm within the same category of ULPs. For example, a decision to move the office of one employee to a different floor at the same facility is

quite different from a decision to close an entire facility and transfer 100 employees to another state. The RDs consider the seriousness of the violation in deciding whether to recommend that appropriate temporary relief be sought.

- **LEGAL PRECEDENT**

Is the law clear regarding the violation alleged?

Courts consider the likelihood of success on the merits in deciding whether to grant injunctive relief. Accordingly, the RDs take into account whether a case involves a violation supported by well-established precedent or if it poses a novel legal theory.

- **DISRUPTION TO THE ESSENTIAL FUNCTIONS OF THE AGENCY RESPONDENT**

Would the granting of an injunction interfere with the ability of an Agency to fulfill an essential function?

The Statute prohibits a court from granting injunctive relief if an injunction would prevent an Agency from carrying out its essential functions. The RDs, therefore, consider whether temporary relief would interfere with those essential functions.

- **TIMELINESS OF THE DISPUTE**

Is the request timely in relationship to the underlying events?

Courts often are concerned with the current status of a case before the Authority and may be reluctant to grant injunctive relief if the facts establish that the matter has not been processed expeditiously. Therefore, consideration is given to the timeliness of a determination to recommend temporary relief in relationship to when the violation took place as well as the time it has taken to investigate and process the case.

- **THE REMEDY**

Will the failure to maintain the status quo frustrate the remedial purposes of the Statute?

Absent appropriate temporary relief, certain violations cannot be remedied effectively after they have been implemented. For example, implementation of a major reorganization that results in the relocation of employees, forced resignations and retirements, or other types of dislocations ordinarily cannot be remedied effectively after implementation. Unless appropriate temporary relief is granted, it is difficult, if not impossible, to restore the status quo through the ULP process because of the passage of time. In other instances where whole and status quo remedies are available, the RDs consider whether the failure to maintain the status quo frustrates the remedial purposes of the Statute in deciding whether to recommend that appropriate temporary relief be sought.

- **HARM TO THE STATUTORY RIGHT TO ORGANIZE AND BE REPRESENTED**

Does the violation undermine the fundamental right to organize and/or engage in collective bargaining?

Certain violations of the Statute undermine the bargaining relationship. For example, a refusal to recognize and deal with the employees' exclusive representative after certification denies employees the benefits of representation until the matter is ultimately resolved. Similarly, targeting union officials for a reduction-in-force renders a union unable to carry out its statutory duties as the exclusive representative, undermines the status of the exclusive representative and chills bargaining unit employees in exercising their protected statutory rights. The RDs consider whether the violation undermines the fundamental right to organize and/or engage in collective bargaining when deciding whether to recommend that appropriate temporary relief be sought.

5. IMPLEMENTATION:

The following process is followed by the Regions to determine if a charge is a candidate for [§ 7123\(d\)](#) relief:

a. *Review all charges:*

Each Region initially reviews all ULP charges and evidence which supports the charge to consider whether the issues and the supporting

evidence are of the type which indicate that the GC should consider requesting Authority permission to seek appropriate temporary relief.

In addition, a Charging Party may also request when filing a ULP charge, or during the processing of a charge, that the GC consider requesting Authority permission to seek appropriate temporary relief. See § 2423.10(b) . If requesting such relief, the Charging Party specifically must make its request in the body of the charge or in writing during the course of the investigation. All charges are reviewed by the Regions for the potential for seeking appropriate temporary relief in the same manner and under the same standards and time frames whether or not a Charging Party specifically requests appropriate temporary relief.

b. *Initial inquiry:*

In those cases where the charges and supporting evidence are of the type which indicate that the GC should consider requesting Authority permission to seek appropriate temporary relief, the Regions conduct an initial inquiry. All charges are reviewed by the Regions and receive similar treatment whether or not a Charging Party requests such relief. A Charging Party's request for appropriate temporary relief does not require the Region to conduct an initial inquiry into whether the charge warrants expedited treatment. Initial inquiries are made when the charge and supporting evidence are of the type which indicates that the GC should consider requesting Authority permission to seek appropriate temporary relief. There is no appeal to the GC or the Authority from an RD's determination not to conduct an initial inquiry.

The Regions document the file on those cases where the Region determines to conduct an initial inquiry. The purpose of the initial inquiry is to determine whether an expedited investigation is warranted to determine the merits of the charge and whether the Region recommends to the GC that temporary relief is appropriate under the standards in § 7123(d) of the Statute. The purpose and scope of the initial inquiry is clearly discussed by the Region with the Charging Party. The Regions decide whether to expedite an investigation by examining the evidence obtained during the initial inquiry to determine whether there appears to be probable cause that a ULP has occurred, or is continuing to occur, and by applying the six criteria set forth in #4, above, to determine whether it appears that appropriate temporary relief should be sought. All discussions with the parties concerning the initial inquiry are documented in the file.

In deciding whether to expedite investigation of a charge, the Regions require probative evidence to support the allegations of the ULP, as well as the reasons why the Charging Party contends that appropriate temporary relief is just and proper. The Regions have discretion to determine the extent of the initial inquiry and the evidence and other documentation required for the Region to determine whether an expedited investigation is warranted.

6. EXPEDITED INVESTIGATION:

a. Notification of regional determination on expedited investigation:

If the Region determines that the initial inquiry does not support an expedited investigation, the file is documented and the case is processed in the same manner as other cases that did not involve the potential for appropriate temporary relief. If a Charging Party had specifically requested appropriate temporary relief and the Region decides not to expedite the investigation, the Region: (a) notifies the Charging Party that the investigation will not be expedited; (b) explains the basis of that decision and that there is no appeal of this determination; (c) informs the Charging Party that the charge will be fully investigated as soon as practicable; and (d) documents the file. There is no appeal to the GC or the Authority of the Region's decision not to expedite an investigation. If the Charged Party was involved in the initial inquiry, the Region also notifies the Charged Party that there will be no expedited investigation and documents the file.

If the Region decides that an expedited investigation is warranted, the Region initially notifies the parties that

they are to be prepared for an expedited investigation, the potential for § [7123\(d\)](#) relief and documents the file.

- b. *The parties' responsibilities in an expedited investigation:*

Charging Party's responsibilities

The Charging Party must be prepared to commence immediately the investigation as soon as the Region advises the Charging Party that it is undertaking an expedited investigation because of the potential for temporary relief. The Charging Party must be prepared to provide the Region with all requested documents and to insure, to the best of the Charging Party's ability, that witnesses are identified by name, telephone number, and work hours and are available for an expeditious investigation. Similarly, the Charging Party must be prepared to present its documented and testimonial evidence to the Region to support the merits of the charge. Use of the fax machine and e-mail may help expedite the investigation.

If an investigation is expedited, the Charging Party must be prepared to present all relevant evidence pertaining to the merits of the charge. The Charging Party also must be prepared to address the six criteria discussed in this Policy (see section 4 above) which the Region evaluates to determine whether appropriate temporary relief should be pursued.

In all cases, during the expedited investigation, a Charging Party must be prepared to present evidence:

- Supporting all elements of the alleged ULP;
- Supporting a determination that immediacy in stopping the alleged unlawful event is imperative since a final order of the Authority would be rendered meaningless or ineffectual by the passage of time that is normally required for the processing of a case through the administrative procedure;

- Establishing why a subsequent remedy as a result of the prosecution of the ULP case would not satisfactorily remedy the violation;
- Establishing how the alleged violative act might undermine the purposes and policies of the Statute, e.g., the effect of the violation on an exclusive representative or Agency institutional right or the effect of the violation on individual employee rights.
- Establishing the impact, if any, on unit employees of the alleged violative act/s, e.g., loss of benefits, relocation, termination and/or reduction-in-force) and the number of employees affected;
- Concerning whether the essential functions of an Agency Charged Party would be interfered with by the granting of temporary relief.

Charged Party responsibilities

Similarly, a Charged Party must be prepared to cooperate in the expedited investigation and present its evidence and argument pertaining to the merits of the charge and the appropriateness of temporary relief. An expedited investigation is not delayed due to a Charged Party's delay in presenting evidence and argument.

c. Agent conducts expedited investigation:

Once the decision has been made to expedite the investigation of a charge, the Agent conducts, where possible, an on-site investigation of the charge. If a telephonic investigation is undertaken, affidavits are returned by fax. The investigation is completed within the shortest time period possible.

Affidavits are obtained as part of an investigation. The affidavit is appropriate for submission to a Federal

district court; it is typed and addresses the proof elements of the violation and the criteria in § [7123](#) of the Statute. Specifically, the affidavit addresses the elements of the alleged ULP(s) to show "probable cause" that a violation has occurred or is occurring and to establish the nature of the harm to the remedial purposes of the Statute. See [Part 3, Chapter H](#) on Affidavits.

The RD determines whether to recommend to the GC that temporary relief be sought based on the six criteria in this Policy.

7. **RD Determination on the Merits of the Charge and the Appropriateness of Temporary Relief:**

Once the investigation has been completed, the RD makes a determination on the merits of the ULP and on whether to recommend to the GC that temporary relief should be sought.

- If the determination is made that the charge has no merit, the decision is explained to the Charging Party, withdrawal of the charge is solicited, and absent withdrawal, a dismissal letter is issued to both parties.
- If a determination is made that the charge has merit but that temporary relief is not appropriate, the Region informs the parties of the basis of the decision and continues processing the charge.
- If a determination is made that the charge has merit and that the seeking of appropriate temporary relief is being recommended to the GC, the parties are informed: (a) of the basis of the decision

on the merits; (b) that the case will be submitted to the GC; and (c) of the process that will be followed.

There is no appeal to the GC or the Authority from the RD's determination whether or not to recommend the seeking of temporary relief. The parties are encouraged to settle the case. The Region emphasizes that it is preferable to resolve all aspects of the case, both the injunction action and the underlying merits of the charge.

8. PROCESSING OF REQUEST FOR TEMPORARY RELIEF - OGC:

a. Submission of the Request for Appropriate Temporary Relief to the OGC:

The Region orally submits its recommendation to the OGC HQ and also forwards a Memorandum and draft complaint to OGC HQ. The Region also forwards documentation concerning the case that will be submitted to the Authority if the GC decides to seek Authority permission to seek § 7123(d) relief.

i. Oral recommendation:

If the RD decides that a request for a TRO is warranted, immediately after such decision is made, the OGC HQ is notified by e-mail, telephone or fax.

ii. Memorandum and draft complaint:

The Region transmits a memorandum in support of the requested temporary relief to the OGC HQ by e-mail or fax. The following outline is used for each memorandum:

The first section of legal memorandum analyzes the § 7123(d) elements, concludes that there is probable cause that a ULP is being/has been committed, and discusses as applicable:

- The Statute;

- Authority precedent;
- Judicial decisions reviewing Authority actions or determinations;
- Law of other administrative agencies, e.g., NLRB, MSPB, OSC;
- Judicial decisions reviewing other agency actions or determinations;
- Facts and legal theories that would support a violation; and
- Arguments responding to anticipated arguments that respondent will make in opposition to the claim that there is probable cause to believe that a ULP is being committed.

The second section of memorandum concludes that temporary relief would not interfere with the Agency's ability to carry out its essential functions and discusses:

- The Agency functions that will be affected by the temporary relief sought; and
- Arguments responding to anticipated arguments that respondent will make in opposition to the claim that the temporary relief will not interfere with Agency's ability to carry out its essential functions.

The third section of memorandum concludes that temporary relief is just and proper and analyzes and discusses:

- Traditional equitable criteria:
 - The likelihood of success on the merits;
 - The irreparable harm if relief is not granted;

- The extent that the balance of hardships favors the respective parties; and
 - Whether and how the public interest will be advanced by granting preliminary relief.
 - Other applicable criteria establishing that temporary relief is just and proper;
 - The FLRA's and NLRB's experience (in cases arising under 29 U.S.C. § 10(j)) in seeking temporary relief in analogous cases, particularly cases arising in the jurisdiction of the U.S. Circuit Court where this case arose; and
 - Arguments anticipated that respondent will make in opposition to the claim that temporary relief is just and proper.
- iii. Documentation concerning the case to be submitted to the Authority
- Charge/s filed by the Charging Party;
 - Complaint/s issued including any attachments; and
 - Any written submissions of the respondent in response to the charge, complaint, or attempt by the GC to seek temporary relief.
- b. *If the GC decides that temporary relief should not be sought:*
- i. The GC advises the Region to contact the parties and inform them of the basis for this decision.
 - ii. The GC's decision not to seek approval from the Authority for such temporary relief is final and may not be appealed to the Authority. See § 2423.10(b).
- c. *If the GC decides to forward the Region's request to the Authority:*

- i. The OGC instructs the Region to issue complaint and to seek the earliest possible hearing date on the ULP complaint. The parties are notified that the Region is issuing a complaint and that the GC is requesting Authority permission to seek immediate relief.
- ii. Settlement is discussed thoroughly with each party since seeking injunctive relief is often a catalyst for resolution of disputes. Any settlement sought comports with the GC's Settlement Policy and serves the interests of the parties and the purposes and policies of the Statute. The RO strives to settle the underlying ULP case in its entirety to avoid the need for seeking temporary relief and litigating the case.

9. THE AUTHORITY'S ACTION ON THE GC'S REQUEST:

a. *Authority denial of request:*

If the Authority denies the GC's request, the RO orally notifies the parties of the denial of the request, that this decision cannot be appealed, and that the case will be tried, absent settlement, as soon as practical.

b. *Authority approval of request:*

If the Authority approves the GC's request, the OGC notifies the Region processing the case, and all other ROs. Further, the OGC informs the national level of the Charged Party of the intent to seek temporary relief and urges officials at that level to assist in settling the case.

10. SEEKING TEMPORARY RELIEF IN DISTRICT COURT:

The Region telephonically informs the parties of its intent to file for injunctive relief. This notice is confirmed in writing to the counsel of record for the Respondent. Settlement is vigorously pursued while the preparation of the pleadings continues.

The Region files the appropriate papers in person in the Federal district court having jurisdiction over the matter as soon as possible after the Authority's authorization. See Section 2423.10(c) .

11. LITIGATION OF THE ULP COMPLAINT AFTER APPROPRIATE TEMPORARY RELIEF HAS BEEN OBTAINED:

Whenever appropriate temporary relief has been obtained, the Region continues to try to settle the ULP complaint and the injunction action. If subsequent to obtaining appropriate temporary relief an ALJ recommends that the complaint be dismissed, in whole or in part, the Region informs the Federal district court which granted the temporary relief of the possible change in circumstances arising out of the decision of the ALJ.



[Part 3, Chapter H](#) concerning Affidavits Taken in Person; and

[Part 4, Chapter G](#) concerning Settlements.

RESERVED

F. ASSIGNING THE CASE

OVERVIEW: Either before or after the initial review of the charge has been completed, the case is assigned to an Agent for investigation.

OBJECTIVE: To provide criteria and principles to be applied when assigning cases and to give examples of the way in which cases are assigned in the Regions.

1. **C+P FACTORS CONSIDERED IN THE ASSIGNMENT OF CASES:**

- Make efficient use of travel and human resources;
- Maximize customer service;
- Maintain a balance in employee caseload based on case types, complexity, and travel;
- Enhance employee effectiveness (may be enhanced by giving employees input in the types and locations of cases; consideration of employees' leave plans and other assignments);
- Assign, investigate, and dispose of cases expeditiously; and
- Minimize the need to reassign cases.

2. **EXAMPLES OF PRACTICES IN THE ASSIGNMENT OF CASES:**

- RD/RA/DRD assigns charges to a team leader who assigns them to team members based on certain factors identified above, e.g., caseload, geographical location, complexity of case and experience level of employee, and status of current cases;
- RD/RA/DRD assigns charges to all agents/attorneys;
- RD/RA/DRD assigns charges to teams based on above factors;

The Charge
Assigning the Case

- RD/RA/DRD assigns cases to new employees and remaining employees select cases; and
- RD/RA/DRD assigns cases requiring expedited treatment, e.g., a TRO request.

G. PRE-INVESTIGATION: INITIAL WRITTEN OR ORAL CONTACT WITH THE PARTIES

OVERVIEW: After the case is assigned to an Agent, s/he reviews the file and contacts the parties' representatives by letter or by telephone. This occurs after the RO has sent the opening letter to the parties. This pre-investigatory process is the first opportunity that the Agent has to begin to build a relationship of trust with the parties and to lay the foundation for the Agent's control and conduct of a timely investigation.

OBJECTIVE: To provide a list of matters that an Agent considers addressing in the first written or oral communication with the parties.

1.  **AFTER RECEIPT OF A CASE FILE, THE AGENT DRAFTS A LETTER OR TELEPHONES THE PARTIES' REPRESENTATIVES:**

The Agent contacts the Charging and Charged Party representatives identified by the Charging Party on the charge form, except where a party has put the Region on notice that another individual is to be contacted as the representative. In this situation, the Agent contacts the person previously designated who is not the individual identified on the charge form. The Agent discusses, as necessary, the following matters:

- Introduction of Agent including the Agent's e-mail, telephone number and office fax number;



Agents may inquire if a party has an e-mail address and if so, whether the Agent may communicate at times with the party by e-mail. All e-mail communications with parties are sent certified and the record contains evidence of certification of delivery.

- Discussion of ULP process, e.g., clarify the OGC's and the party's expectations for the investigation, and scheduling of investigation, as necessary;

- A request that certain documents be sent to the Region, e.g., collective bargaining agreement;
- A request that certain documents and other information be made available when on-site for the investigation;
- A request that the Charging Party prepare a witness list with a short description of what information the particular witness will provide;
- Send questionnaire, as appropriate to case, e.g., information case) to be filled out, signed, and returned by a date certain;
- Clarify the issues to assure that the charge represents the intent of the Charging Party. This can be accomplished by confirming letter or by the filing of an amended charge (See [Part 2, Chapter H](#) on amending the charge (be careful about timeliness issue as it relates to amended charges in particular)), in an affidavit, or, as appropriate, in a conference call with both parties followed up by a confirming letter;
- Ascertain whether there are any statutory bars to the charge;
- Express expectation of cooperation by informing:
Charging Party of its obligation to provide evidence and to participate fully in the investigation; and
Charged Party of the expectation of cooperation and encouraging cooperation during the investigation, e.g., affidavits of Charged Party witnesses, Statement of Position;
- Optional reference in the letter to “Elements of the Violation” ([ATTACHMENT 2G1](#)) to educate the parties on the burdens of proof to establish and rebut prima facie cases; and
- Optional reference to the ADR FAQs ([ATTACHMENT 1B1](#)). See [ATTACHMENT 3A1](#) for practical pointers on dealing with the parties, case processing techniques, and general guidance on how to use the computer to organize case files



To meet the quality element concerning the timely processing of charges, initial mailing needs to be accomplished expeditiously. See [Part 3, Chapter C](#) on Quality Standards for Investigations.



The Agent uses his/her professional judgment concerning whether the initial telephone contact should be confirmed by a letter. At a minimum, the Agent documents the conversation in the case file log.

2. CONSIDERATION OF ADR PROGRAM OR ALTERNATIVE CASE PROCESSING PROCEDURE:

At any stage of the investigation, including the early stage when the parties are contacted by telephone or by letter for the first time, the Agent considers whether the case may be an appropriate candidate for the ADR Program ([Part 1, Chapter B](#)) or Alternative Case Processing Procedure ([Part 3, Chapter B](#)). If appropriate, upon review of case file and after discussion with RD/RA/mentor, as is necessary, the Agent may discuss option of using as ADR Program or Alternative Case Processing Procedure. If both parties so request, the RD applies the specified criteria and, if appropriate, assists the parties in improving their relationship.



**[Part 1, Chapter B](#) concerning ADR Services;
[Part 2, Chapter H](#) concerning Amending the Charge;**

[Part 3, Chapter B](#) concerning Alternative Case Processing Procedure; and

[Part 3, Chapter C](#) concerning Quality Standards for Investigations.

RESERVED

H. AMENDING THE CHARGE

- OVERVIEW:** After a charge is filed, the Charging Party may determine on its own that it is necessary to amend the charge or, upon review, the Agent may determine that it is necessary to clarify or correct the original charge. A charge may be amended at any time before issuance of a complaint but care is taken to do so in a timely manner. See § [2423.9](#).
- OBJECTIVE:** To provide guidance concerning the process of amending a charge and a list of issues and considerations that may arise when a charge is amended.

1. EXAMPLES OF SITUATIONS REQUIRING THAT A CHARGE BE AMENDED:

a. *To add an additional allegation:*

For example, during an investigation where the Charging Party alleges a violation of § [7116](#)(a)(1), (5) and (8) of the Statute based on the Agency's failure to provide information, it is disclosed that a supervisor stated something to the effect that the Union representative would not get the information requested because the Union representative spends too much time making requests for information and too little time doing the work that he was hired to do. In this case, the Agent has the Charging Party amend the charge to include an independent violation of § [7116](#)(a)(1) of the Statute, based on the interference with the person's right to engage in protected activity.

a. *To correct a typographical error in the dates the alleged violation occurred:*

See U.S. Penitentiary, Florence, Colorado, 53 FLRA No. 124, 53 FLRA 1393, 1402 (1998).

- c. *To ensure that the proper parties are charged: interference above the level of exclusive recognition:*

An Agency's higher-level management is charged when it has directed or required management at a subordinate level of exclusive recognition to act in a manner that is inconsistent with the subordinate level's bargaining obligations under § [7116](#)(a)(1) and (5) of the Statute.

See, e.g., U.S. Department of the Interior, Bureau of Reclamation, Washington, D.C., 46 FLRA No. 2, 46 FLRA 9, 29 (1992), enforcement denied on other grounds sub nom. United States Department of Interior, Bureau of Reclamation v. FLRA, 23 F.3d 518 (D.C. Cir. 1994) (citing Department of the Interior, Water and Power Resources Service, Grand Coulee Project, Grand Coulee, Washington, 9 FLRA No. 46, 9 FLRA 385, 388 (1982) (level of management where exclusive recognition lies is not found to have violated § [7116](#)(a)(1) and (5) where it has no choice but to ministerially follow the dictates of the Department); and

Headquarters, National Aeronautics and Space Administration, Washington, D.C., 50 FLRA No. 82, 50 FLRA 601, 620-22 (1995) (finding of violation against Headquarters where it is responsible for actions which affect one of its subcomponents), enforced sub nom. FLRA v. National Aeronautics and Space Administration, Washington, D.C., 120 F.3d 1208 (11th

Cir. 1997), affirmed sub nom. National Aeronautics and Space Administration v. FLRA, 119 S. Ct. 1979 (1999).

2. TIME CONSIDERATIONS UNDER § 7118(a)(4)(A) OF THE STATUTE:

Do not obtain an amended charge alleging violative conduct occurring more than six months prior to the date of the amended charge. If the amended charge does not also include conduct encompassed by the original charge, a complaint based on allegations in the amended charge may be found untimely. Amended charges that are closely related to events or matters complained of in the charge and are based on events occurring within the six-month period preceding the charge are not barred by § 7118(a)(4)(A) of the Statute. United States Department of Veterans Affairs, Washington, D.C., Veterans Administration Medical Center, Amarillo, Texas, 42 FLRA No. 27, 42 FLRA 333, 340 (1991), rev'd on other grounds sub nom. U.S. Department of Veterans Affairs, Washington, D.C. v. FLRA, 1 F.3d 19 (D.C. Cir. 1993); and NRC, 44 FLRA at 379-80 (1992) (participation in the operation of a union (original charge) and an attempt to oust the union (amended charge) are two separate and distinct activities and therefore amended charge allegations were not encompassed within timely filed original charge).

3. WHAT IS REQUIRED TO AMEND A CHARGE:

a. *Amended FLRA Form 22 or 23:*

An amended FLRA Form 22 or FLRA Form 23 with a designation on the face of the form "FIRST AMENDED" or "SECOND AMENDED" before the word "charge." The amended charge contains the charge as amended in its entirety, including amendments. See [ATTACHMENT 2H1](#) for a Sample Letter and Amended Charge Form to be signed and returned.

b. *Mechanisms to withdraw specific allegations:*

A Charging Party who wishes to withdraw allegations in the charge may do so by:

- Filing an amended charge; or
- By a written statement; or
- The Agent may prepare a confirming letter of a telephone conversation with the Charging Party during which the Charging Party expressed the desire to withdraw certain allegations.

4. Service Requirements:

The service requirements discussed in [Part 2, Chapter A](#) regarding original charges also apply to amended charges. No matter which method described above is used to amend a charge, the Charging Party is required to serve the Charged Party with the amended charge.

5. RO EMPLOYEES ARE AVAILABLE AT ALL TIMES TO ASSIST THE CHARGING PARTY IN AMENDING A CHARGE:

See [Part 1, Chapter A](#) concerning Pre-Charge Assistance.

6. CHARGED PARTY OPPORTUNITY TO RESPOND TO AMENDED CHARGE:

The Region gives a Charged Party the opportunity to respond to an amended charge if the amendment is something other than a technical amendment, e.g., removing theories and not changing or adding a collateral theory. During the time in which the Charged Party is given an opportunity to respond, the Region takes no action on the amended charge. The Charged Party's representative is asked to submit any evidence, argument, or statement of position, that has not already been provided, within 5 days of the receipt of the amended charge. The amendment may be sent by fax to the Charged Party.



[Part 1, Chapter A](#) concerning Pre-Charge Assistance; and
[Part 2, Chapter A](#) concerning Filing a Charge.

I. PROCESSING CHARGES RELATED TO FSIP REQUESTS FOR ASSISTANCE

OVERVIEW: Occasionally, where a Union and an Agency have reached an impasse in negotiations, a Union files a ULP charge and a request for assistance from FSIP under Part 2471 of the Regulations.

OBJECTIVE: To provide guidance to ROs on how to proceed when a Union has filed both a ULP charge and a request for assistance from FSIP.

WHEN THE UNDERLYING ALLEGATIONS OF A ULP CHARGE CONCERN A NEGOTIATION IMPASSE:

- The RO checks Charge Form 22 to determine if the Union has also filed a request for FSIP's assistance (See § 2423.4(a)(6)(ii));
- If so, the RO contacts the OGC Headquarters with case-identifying information;
- The RO does **not** defer investigation of the ULP charge or any attempts at resolving the ULP charge;
- The RO processes the ULP charge up to an RD decision;
- The RD takes dispositive action if the charge is **non-meritorious**; and
- The RD **does not** take dispositive action if the charge is **meritorious**--the RD notifies OGC Headquarters.

RESERVED

J. PROCESSING CHARGES RELATED TO PENDING NEGOTIABILITY APPEALS

OVERVIEW: Occasionally, a Union files a ULP charge when the underlying allegation is also the subject of a negotiability petition that the Union has filed with the Authority.

OBJECTIVE: To describe the processing of a ULP charge when there is a pending negotiability appeal concerning the same underlying negotiability dispute.

1. CHECK THE CHARGE FORM 22:

When a Union files a ULP charge which involves a negotiability issue, the RO checks to determine whether the Union has also filed a negotiability petition for review of the same negotiability issue with the Authority. See § [2423.4\(a\)\(6\)\(iii\)](#). Check the Charge Form to determine whether the Union has checked “yes” in box 7 indicating that the matter has been raised before the Authority.

2. NOTIFY OGC HEADQUARTERS:

Notify and discuss how the negotiability case impacts on the issues raised by the allegations underlying the ULP charge.

RESERVED

K. PROCESSING CHARGES RELATED TO A PENDING REPRESENTATION PETITION

OVERVIEW: Occasionally, a Charging Party files a charge that is related to a representation petition that has already been filed. Absent the filing of a request to proceed, an election is not held when a ULP charge is filed by a party to a representation case and is based on conduct which would have a tendency to interfere with the free choice of the employees in the election. See RCHM, Chapter 60 concerning concurrent representation and ULP cases, for additional discussion.

OBJECTIVE: To provide guidance concerning the processing of a ULP charge that relates to a pending representation petition or that contains a representation issue in it.

1. PRIORITY GIVEN TO ULP CHARGES THAT “BLOCK” REPRESENTATION PETITIONS:

Because the speedy resolution of representation questions is of the utmost importance, a ULP charge that blocks a representation election petition is given the highest priority by the ROs in the investigatory phase of the case.

2. NON-MERIT DETERMINATION OF THE ULP CHARGE “UNBLOCKS” A REPRESENTATION CASE:

Disposition of a charge does not serve to “unblock” the representation proceeding until either: (1) the appeal period expires and no appeal is filed, or (2) if an appeal is filed, and the GC denies the appeal. If the GC remands the case to the RD, the representation case continues to be blocked.

3. DEFER PROCESSING ULP CHARGE UNTIL RESOLUTION OF PENDING REPRESENTATION CASE:

Where a ULP charge (that is not “blocking” an election) is so related to an unresolved representation matter that the processing of the representation case will resolve significant issues, the RD makes a determination to defer processing of the ULP charge.

For example, a pending ULP charge with a threshold issue of **unit eligibility** may be deferred pending a petition that seeks clarification of the unit status of the employee/s who are the subject of the ULP charge. By informing the parties of deferral of the charge, the Region retains jurisdiction while resolving the question concerning the unit employee/s’ bargaining unit status. See [ATTACHMENT 2K1](#) for a Sample Letter Deferring ULP Charge.

4. RO RECEIPT OF ULP CHARGE THAT RAISES REPRESENTATION ISSUE:

- RO encourages and solicits representation petitions whenever it receives ULP charges that raise a representation matter; and
- If a representation petition is then filed, the RO defers processing the ULP case (if it is not “blocking” an election) during the pendency of the representation case.
- Once the representation issue is resolved, the RD processes the merits of the ULP charge.



In certain cases, it may be necessary to obtain additional evidence if there are other issues besides whether an employee is in the unit.

L. PROCESSING CHARGES RELATED TO A PENDING MSPB, SPECIAL COUNSEL OR DOL CASE

OVERVIEW: Occasionally, a Charging Party files a charge that is related to a pending MSPB, Special Counsel or DOL case.

OBJECTIVE: To provide guidance concerning how a ULP that relates to a pending MSPB, Special Counsel or DOL case is processed.

1. EXPEDITIOUS IDENTIFICATION AND DISPOSITION OF ULP CHARGES THAT RELATE TO CASES BEFORE ANOTHER ADJUDICATORY FORUM:

a. Charging Party identifies pending related charge:

A Charging Party may indicate that the issue raised in the charge is also pending in another forum (e.g., by checking the appropriate box of the charge form). See § 2423.4(a)(6)(ii). In this situation, the Agent, in the initial contact with the Charging Party, ascertains the specific details underlying the charge and the matter that is pending in the other administrative forum, including the case identifying number, if any. This may also become apparent after the investigation has begun, e.g., the Charged Party's Statement of Position mentions that matter is pending in another forum.

b. RD's options:

- i FLRA clearly lacks jurisdiction:

Absent withdrawal, the RD dismisses a charge if it is determined that it concerns an issue over which some other forum has jurisdiction. For example, ULP charges concerning internal Union matters and which raise issues with respect to noncompliance with § [7120](#) of the Statute are dismissed for lack of jurisdiction. They are appropriately resolved through the procedures established by the DOL pursuant to § [7120](#). See American Federation of Government Employees, Local 2419, 53 FLRA No. 69, 53 FLRA 835, 841-42 (1997). See [Part 3, Chapter D](#) concerning the Scope of Investigations for additional discussion.

ii. FLRA has jurisdiction:

If ULP charge is related to, **but clearly distinguishable from**, an issue which would be within the DOL's jurisdiction under § [7120](#), the Region proceeds to process the charge.

iii. May defer charge:

If the charge concerns an issue that the Region believes may necessitate deferral of the charge pending resolution of a related issue in another forum, the RD **submits to OGC HQ for advice**.

iv. Undecided whether FLRA has jurisdiction:

If the Region is undecided about whether the FLRA has jurisdiction, the RD **submits to OGC HQ for advice.**

2. LIAISON WITH MSPB, SPECIAL COUNSEL AND DOL:

Each Region establishes a liaison or contact person with the MSPB, Special Counsel and DOL within the RO's jurisdiction to:

- Communicate that the FLRA has a case related to one pending at the other Agency;
- Request that any documents that are related to the case and are releaseable to the public be sent to the RO; and
- Provide update to the other Agency when the RD has taken final dispositive action.

3. REQUEST FOR INFORMATION FROM CASE FILE:

All requests for information from open case files are referred to OGC HQ before releasing information.

PART 3

THE INVESTIGATION

**Office of the General Counsel
ULPCHM**

A. PREPARATION FOR INVESTIGATION

OVERVIEW: Before beginning an investigation, each Agent's preparation is consistent with OGC policies.

OBJECTIVE: To provide guidance to the Agent on matters s/he considers in the initial stages of preparing to investigate a ULP.

1. THE AGENT COMPLIES WITH OGC POLICIES IN DEVELOPING INVESTIGATIVE PLAN:



An Agent always has an investigative plan that is consistent with the following OGC policies:

- Quality of investigations - sets forth a general framework to guide Agents in determining investigative methodology (See [Part 3, Chapter C](#));
- Scope of investigations - provides guidance on reviewing the charge and initial contacts to determine the extent of investigation required to permit RD to make a determination on the merits (See [Part 3, Chapter D](#));
- Injunction - requires an initial review of charges to determine if the criteria for processing under the Injunction Policy are met (See [Part 2, Chapter E](#));
- Settlement - outlines appropriate activities Agents can engage in while preparing for an investigation (See [Part 4, Chapter G](#)); and
- Prosecutorial discretion - provides criteria for declining to issue complaint even though violation has occurred (See [Part 4, Chapter F](#)).

2.  **FACTORS CONSIDERED IN DETERMINING WHETHER THE INVESTIGATIVE PLAN IS WRITTEN:**
 - Experience level of Agent;
All new employees discuss plan with supervisor/mentor.
 - Number of issues in the charge;
 - Complexity of issues in the charge;
 - Number of witnesses; and
 - Prior experiences with the party.

3. **STEPS TO PREPARE FOR AN INVESTIGATION:**
 - Identify the issues of the charge;
 - Review the information and documents received to date to develop areas of inquiry;
 - Research relevant case law;
 - Identify witnesses and ensure that they will cover all allegations, as appropriate;
 - Depending on situation, the Agent may contact witnesses directly or have the Charging Party contact and advise witnesses of the date, time, location, and purpose of the investigation;
 - Identify and arrange for documents to be made available on site or have documents sent to Agent;
 - Explore potential for on-site settlement with parties (See [Part 4, Chapter G](#) concerning Settlements);
 - Determine if any related cases have been filed in the Region or in any other Region or before any other administrative body; and

- Consider providing ADR programs. See [Part 1, Chapter B](#) concerning ADR Services.

See [Part 2, Chapters I, J, K, and L](#), which describe the process to follow in certain specific situations where there is/are related case/s.



See [ATTACHMENT 3A1](#) for practical pointers on case processing including preparing for an investigation.



[Part 1, Chapter B](#) concerning ADR Services;

[Part 2, Chapter E](#) concerning Injunctions;

[Part 2, Chapter I](#) concerning Processing Charges Related to FSIP Requests for Assistance;

[Part 2, Chapter J](#) concerning Processing Charges Related to Pending Negotiability Appeals;

[Part 2, Chapter K](#) concerning Processing Charges Related to a Pending Representation Petition;

[Part 2, Chapter L](#) concerning Processing Charges Related to a Pending MSPB, Special Counsel or DOL Case;

[Part 3, Chapter C](#) concerning Quality Standards for Investigations;

[Part 3, Chapter D](#) concerning Scope of Investigations;

[Part 4, Chapter F](#) concerning Prosecutorial Discretion; and

[Part 4, Chapter G](#) concerning Settlements.

RESERVED

B. ALTERNATIVE CASE PROCESSING PROCEDURE

OVERVIEW: Pursuant to § [2423.7](#), the OGC provides a voluntary ADR procedure to assist parties in resolving pending ULP charges prior to an RD determination on the merits of the charge.

OBJECTIVE: To provide guidance concerning the objectives of an alternative case processing procedure; criteria for determining whether to offer the procedure; an explanation of the process; and ground rules for the parties to adhere to during the intervention.

1.  **GENERAL DESCRIPTION OF THE ALTERNATIVE CASE PROCESSING PROCEDURE:**

Under specified criteria described below, and if both parties agree, an RD utilizes an alternative case-processing technique to assist the parties in resolving the dispute underlying the pending charge by facilitating an interest-based problem-solving approach, rather than initially investigating the particular facts and determining the merits of the charge. Since the merits of the charge are not relevant to this ADR procedure, no evidence on the ULP charge is gathered during the procedure. The process and role of the OGC are fully explained to the parties.

2. **OBJECTIVES WHEN USING AN ALTERNATIVE CASE PROCESSING PROCEDURE:**

- To establish an approach to be applied by all the Regions when determining whether a charge is initially investigated and evidence and positions are obtained and a determination is made on the merits of the charge, or whether an alternative case processing approach is suggested to the parties.
- To establish the criteria which govern when certain charges may be processed under an alternative approach to resolve the underlying dispute.
- To allow the OGC to proceed in a manner that affords the parties an opportunity to enhance their relationship regardless of whether a charge warrants a full investigation and issuance of a complaint or a dismissal letter.

- To encourage the parties to resolve their problems at the earliest stage possible after the filing with a third party.
- To allow the charge to be fully investigated and decided on the merits if the alternative case processing efforts do not result in a resolution of the dispute (See § [2423.7\(c\)](#)).

3.  **CRITERIA APPLIED IN DETERMINING WHETHER TO OFFER THE ADR PROCEDURE TO THE PARTIES:**

- **NUMBER OF PENDING CHARGES INVOLVING THE PARTIES**

Is there a block of charges filed within the same time frame involving the parties?

The filing of a block of charges involving the same parties within a short time frame may indicate that the dispute arises from a lack of communication and understanding between the parties rather than a legal dispute over statutory rights and obligations. RDs consider this factor in determining whether to offer intervention as an alternative case processing technique.

- **AGREEMENT OF THE PARTIES TO PARTICIPATE**

Do both parties agree to participate in an intervention?

The parties must agree to participate in the alternative case processing procedure before the OGC assists them in resolving the dispute underlying the charge. Absent their agreement, the OGC does not suspend an investigation and then facilitate a resolution of the dispute under the alternative case processing procedure.

- **COMMITMENT TO THE PROCESS AND AUTHORITY TO RESOLVE THE ISSUES**

Are both parties committed to resolving their dispute and will both parties send representatives who are empowered to resolve the underlying dispute?

To show their commitment to the alternative case processing procedure, the parties must empower their representatives by authorizing them to settle the dispute. Absent the parties' agreement to send empowered representatives to the intervention, the OGC does not undertake to facilitate resolution of the dispute under the alternative case processing procedure and does not suspend an investigation.

- **TYPE OF DISPUTE**

What is the nature of the basis of the charge/s?

Some charges concern institutional and relationship issues, such as the duty to bargain and the duty to furnish information, while other charges are more focused on individual statutory rights to engage in protected activity.

In determining whether to offer the alternative case processing procedure, the RD examines the type of dispute and determines whether the dispute concerns an institutional and relationship matter as opposed to an individual statutory right which is a legal issue. Similarly, some disputes are isolated in nature and others are more recurring. The RD examines whether the dispute is ongoing and represents an inability to resolve problems without third-party assistance in deciding whether to offer the alternative case processing procedure.

- **EXPERIENCE OF THE PARTIES**

Are the parties experienced in Federal sector labor-management relations?

The degree of experience of the parties varies. For example, inexperienced leadership may result from changes in Union leadership and in Agency management. The alternative case processing procedure may help educate the parties on their various rights and responsibilities under the Statute, as well as introduce ADR techniques to give the parties an opportunity to resolve their dispute without the need for a third party. The RDs consider the experience of the parties when determining whether to offer intervention as an alternative case processing technique.

- **RIPENESS OF THE DISPUTE FOR RESOLUTION**

Does the dispute lend itself to resolution within a reasonable period of time?

Some disputes are not ripe for resolution because of the need to wait for some future occurrence before the parties are willing or able to resolve the matter. For example, a Union may choose not to resolve a matter until after the election of new officers. Similarly, an Agency may not be in a position to resolve a matter until a new manager or labor relations adviser scheduled to join the Agency actually joins the management team. In other situations, the parties may be unable to resolve the matter because of some event or force over which they have no control, such as an order from a higher level in the Agency or Union hierarchy. RDs consider these types of situations in determining whether the dispute is ripe for resolution and whether to offer the alternative case processing procedure.

- **OGC ABILITY TO PROVIDE FOLLOW-UP**

Can the OGC provide requested follow-up services to the parties?

Sometimes, after a successful intervention, the parties jointly request the OGC to continue to provide support to the parties' improving relationship. This could constitute a request for such services as interest-based problem-solving training, or ADR design. RDs consider the ability of the OGC to provide these services when deciding whether to offer the alternative case processing procedure as an option to the parties.

4. **EXPLANATION OF THE ALTERNATIVE CASE PROCESSING PROCEDURE:**

Before OGC employees utilize the alternative case processing procedure to assist the parties in resolving disputes underlying ULP charges, they fully explain and disclose the role of the RO agent. **The alternative case processing procedure does not proceed unless both parties accept that role and the Agent fully explains the following:**

- The purpose of the alternative case processing procedure is to resolve the underlying dispute without determining the merits of the charge (See § [2423.7\(b\)](#));
- The role of the Agent is to assist the parties in that endeavor by facilitating an interest-based problem solving approach;

- The alternative case processing procedure allows the parties an environment to use an interest-based approach to resolve their dispute;
 - Since the merits of the charge are not relevant to the alternative case processing procedure, no evidence on the ULP charge is gathered during the intervention;
 - Although some facts surrounding the dispute, of necessity, will probably be disclosed during the alternative case processing procedure, no evidence is received by the Agent. Similarly, no positions of the parties on the merits of the charge are solicited or received by the Agent;
 - The Agent makes no notations in the RO case file concerning the merits of the case or any other matters discussed during the intervention;
 - If the parties are unable to resolve the dispute, the Region conducts a full investigation on the merits of the charge and processes the case as if there had been no intervention efforts;
 - The alternative case processing procedure is another form of resolution and the information disclosed during the intervention is treated in the same manner as information disclosed and positions taken during settlement discussions;
 - Any investigation is separate and distinct from any resolution or intervention efforts;
-  *If evidence has already been taken, the Region may decide to attempt to resolve the dispute as part of the investigative process rather than curtailing the investigation in favor of the alternative case processing procedure.*
- If the alternative case processing procedure does not result in resolution of the dispute and the withdrawal of the charge, and an investigation on the merits is required, the RD assigns another RO Agent to the investigation, unless the parties and the RD agree otherwise. (See § [2423.7\(c\)](#)); and

- The parties agree to certain required ground rules:
 - The alternative case processing procedure is viewed as a resolution discussion--there are no attributions of what is said during the session--"what's said in the room stays in the room." For example, the union will not publish a report in the union newsletter of what a particular management official or management in general said during the session and management will not discuss with a local newspaper reporter what a particular union official or the union in general said during the session;
 - Neither party takes any reprisal for any statements made during the session;
 - All participants conduct themselves within the range of acceptable behavior at the session;
 - No ULP charges or grievances are filed based on any occurrences at the session; and
 - All participants feel free to express their interests and honestly attempt to resolve the dispute.



If the alternative case processing procedure proves unsuccessful and another Agent undertakes an investigation, there is no communication about the facts or merits of the case or the positions of the parties, but communication concerning matters involving the ADR process is permissible. The Agent informs the parties of this expectation at the beginning of the alternative case processing procedure. Maintaining this "Chinese Wall" is necessary to ensure the integrity of the RO and the OGC.

See [ATTACHMENT 1B1](#) which describes the alternative case processing procedure.

5. NOTIFICATION OF THE PARENT OR NATIONAL ORGANIZATION:

The Agent discusses with the parties if it is desired that the parties' National or parent organization be notified of the use of an alternative case processing procedure and, if so, how it will be accomplished.

6. ENFORCEMENT:

A party who fails to comply with the terms of any agreement reached as a result of this process may be found to have repudiated that agreement in violation of § [7116](#)(a)(1) and (5) of the Statute. See Department of Defense Dependents Schools, 50 FLRA No. 62, 50 FLRA 424, 426 (1995).

RESERVED

C. QUALITY STANDARDS FOR INVESTIGATIONS

OVERVIEW: This Chapter discusses the OGC's Quality Standards for Investigations which are applicable to all RO employees.

OBJECTIVE: To list and explain the standards which guide the field Agent in conducting a quality investigation and to enlighten the parties as to these standards.

1. OBJECTIVES OF QUALITY STANDARDS:

- Every participant in the investigation of a ULP charge has a right to expect that the investigation undertaken will meet certain basic standards of quality, even though the investigatory method and the scope of all investigations need not be the same for each particular charge.
- Every participant also has a right to expect that those standards of quality will be the same, regardless of which RO may be conducting the investigation.

2. QUALITY STANDARDS APPLICABLE TO EVERY INVESTIGATION:

- Regardless of the investigative methodology, every investigation meets the quality standards;
- The investigation obtains the best possible evidence;
- All evidence is relevant and assists the RD in reaching a proper disposition of the case;
- The case file contains all relevant evidence and information discovered or submitted during the investigation;
- All participants in the investigation are treated fairly and equitably and the GC's investigative methods are explained to the participants; and

- Charges are processed as expeditiously as possible.

3. EXPLANATION OF THE STANDARDS:

- **REGARDLESS OF THE INVESTIGATIVE METHODOLOGY, EVERY INVESTIGATION MEETS THE QUALITY STANDARDS**

RDs have discretion to utilize a variety of techniques to obtain evidence during an investigation of ULP charges: (a) the taking of affidavits in person; (b) the collection of documentary evidence; (c) the taking of a sworn affidavit through the use of a telephone interview; (d) the use of sworn interrogatories transmitted to and from the Region by mail; and (d) the use of letters from the RO confirming information obtained orally from a party.

- **THE INVESTIGATION OBTAINS THE BEST POSSIBLE EVIDENCE**

In investigating ULP charges, the Regions may obtain a variety of types of evidence: (a) sworn testimonial evidence; (b) documentary evidence; (c) physical evidence; (d) sworn questionnaires and (e) letters confirming conversations. Evidence obtained from Charged Parties meets the same standards as evidence obtained from Charging Parties.

Regions also obtain other non-evidentiary types of information: (a) unsworn written testimonial information; (b) unsworn oral information, and (c) position statements and legal arguments.

The Regions explain to the parties why various types of evidence and information are appropriate to the investigation and the differences between that information which is, and that which is not, evidence.

- **ALL EVIDENCE IS RELEVANT AND ASSISTS THE RD IN REACHING A PROPER DISPOSITION OF THE CASE**

The test for determining relevancy during the investigation is whether the evidence can reasonably be expected to assist the RD in reaching a proper disposition of the case. Significant hearsay statements may be accepted during the investigation even though their use may be limited at trial. There is no obligation to accept evidence which clearly makes no independent contribution to an understanding of the case or its resolution or which is duplicative.

- **THE CASE FILE CONTAINS ALL RELEVANT EVIDENCE AND OTHER INFORMATION DISCOVERED OR SUBMITTED DURING THE INVESTIGATION**

The case file contains all relevant documentary and testimonial evidence discovered and submitted during the investigation and other non-evidentiary information. See [Part 3, Chapter F](#) concerning Evidence, in General, for a discussion of what is, and is not, evidence.

- **ALL PARTICIPANTS IN THE INVESTIGATION ARE TREATED FAIRLY AND EQUITABLY AND THE INVESTIGATIVE PROCESS IS EXPLAINED TO THE PARTICIPANTS**

The object of a ULP investigation includes not only the formal disposition of a charge, but also the goal of assisting the parties in resolving their differences through cooperation rather than litigation. It is critical that the parties have faith in the investigative process, that they perceive the investigating agent as neutral and impartial, and that they accept the investigation as fairly identifying their interests and their views of the case. Thus, the manner in which the investigation is conducted is as important as the evidence it obtains.

To achieve this standard, all investigating Agents:

- Clarify, whenever appropriate, the purposes and procedures of the investigation;
- Answer any questions about how the Region has decided to conduct the investigation;
- Avoid giving an impression of coercing a participant toward a particular result;

- Give no indication of favoring one party's position over that of another; and
- Conform to appropriate ethical standards of behavior at all times. See [Part 5, Chapter B](#), which discusses Ethics issues.

- **CHARGES ARE PROCESSED AS EXPEDITIOUSLY AS POSSIBLE**

ULP charges are processed as expeditiously as possible, taking into consideration the resources available to the RO and the number of pending cases.

4. IMPLEMENTATION OF QUALITY STANDARDS:

All RDs ensure that each ULP investigation conforms as closely as possible to the quality standards. Each Region develops and implements procedures to:

- Ensure that investigations and decision-making are conducted in a timely and efficient manner;
- Enable all RO employees to understand the importance of maintaining a high level of quality in investigations and to understand the standards for quality in the OGC;
- Identify any assistance and training which OGC employees may require to meet quality standards;
- Assess the quality of the investigation in every ULP case;
- Ensure that applicable quality standards have been met before taking any dispositive action; and
- Provide that high levels of quality continue to be maintained in all investigations.
- Explain to the Region's customers the intent of these policies and how they will be applied to their cases;
- Obtain continuing feedback from the participants on the quality of ULP investigations;

- Identify any practices which might reasonably lead those participants to question whether they have been treated fairly and equitably; and
- Correct any deficiencies which may exist.



To implement the overall goal of conducting a quality investigation, RDs meet periodically with employees to develop, implement, and modify, as required, an action plan which addresses the above.



[Part 3, Chapter F](#) concerning Evidence, in General; and

[Part 5, Chapter B](#) concerning Ethics.

RESERVED

D. SCOPE OF INVESTIGATIONS

OVERVIEW: After a charge is docketed and assigned to an Agent, the process of investigating the alleged ULP/s begins. This Chapter sets forth a policy and uniform criteria that RDs apply in determining the type and extent of an investigation of a charge.

OBJECTIVE: To provide principles and applicable criteria that govern the scope of an Agent's investigation of a ULP charge.

1.  **SCOPE OF ULP INVESTIGATIONS:**

RDs, under the direction and supervision of the GC, conduct such investigations of ULP charges as deemed appropriate under the totality of the circumstances surrounding the charge. All ULPs are investigated to the extent that the RD has sufficient information to render a determination on the merits of the charge. See § 2423.8(a). Not all charges, however, are required to be investigated in the same manner and to the same extent.

2.  **+P CRITERIA FOR DETERMINING THE SCOPE OF INVESTIGATIONS:**

To process expeditiously and decide ULP charges fairly and consistently, RDs utilize the following established criteria to determine the scope of an investigation:

- Whether the facts support a determination that a violation of the Statute has occurred or is occurring; or
- Whether the case law supports the theory of violation alleged in the charge; or
- Whether there is jurisdiction over the charge; or
- Whether all elements of the statutory violation are established; or

- Whether, even assuming the charge has merit, prosecutorial discretion not to issue a complaint should be exercised applying the prosecutorial discretion criteria set forth at [Part 4, Chapter F](#).

3. RDS MAY CONCLUDE AN INVESTIGATION:

a. *When:*

If, during the investigation, the RD determines that any of the first four criteria (section 2, above) have not been met or that prosecutorial discretion should be exercised, the RD may decide to conclude the investigation.

b. *The Agent does the following once the RD has decided to conclude an investigation:*

- Explains to the Charging Party the basis for the RD's decision to conclude the investigation;
- Solicits withdrawal of the charge; and
- Absent withdrawal, explains to the Charging Party that the RD will dismiss the charge.



See [Part 4, Chapter A](#) concerning an Agent's Involvement in Withdrawal Requests Prior to an RD determination for discussion of limited circumstances when an Agent may solicit withdrawal of a charge **before** an RD determination of the merits of a charge.

4. EXPLANATION OF THE CRITERIA:

- **WHETHER THE FACTS SUPPORT A DETERMINATION THAT A VIOLATION OF THE STATUTE HAS OCCURRED OR IS OCCURRING**

Are there sufficient facts for the RD to render a determination on the merits of the charge?

ULP charges are investigated to the extent that sufficient information has been revealed which permits the RD to render a determination on the merits of the charge. Not all charges, however, are required to be investigated to the same extent in order to obtain that information necessary to render a merit determination. All investigations, regardless of the scope of the investigation, are conducted in accordance with the quality standards set forth in [Part 3, Chapter C](#).

- **WHETHER THE CASE LAW SUPPORTS THE THEORY OF VIOLATION ALLEGED IN THE CHARGE**

Is the case law clear that the charge has no merit?

Sometimes, after an Agent has an initial discussion with the Charging Party concerning the theory of violation contained in the charge, it is clear that there would be no ULP finding even if all allegations in the charge, and all allegations made by the Charging Party while discussing the charge, are true. In these circumstances, the Agent provides a copy of the controlling Authority case law to the Charging Party. No withdrawal is solicited and the charge is not dismissed under this criterion without providing the Charging Party an opportunity, as appropriate, to discuss the background of the charge and the basic facts and theory of violation supporting the charge.

- **WHETHER THERE IS JURISDICTION OVER THE CHARGE**

Is it clear that there is no jurisdiction over the charge?

In other limited situations, after an initial discussion of the dispute contained in the charge, it is clear that the Authority has no jurisdiction over the dispute.

Examples of no jurisdiction over the charge

- **Untimely filing**-- the exceptions in § [7118\(a\)\(4\)\(B\)](#) of the Statute are inapplicable, and the violation is not of a continuing nature. See [EEOC](#), 53 FLRA at 493-96 (1997) (viewing use of a continuing violation theory with disfavor).
- **[7116\(d\)](#) bar**-- the charge may clearly be barred by a previously filed grievance under § [7116\(d\)](#) of the Statute and there is no

question that the parties and the issues in the previously filed grievance are identical under Authority precedent.

- **ULP is not stated on the face of the charge**
- **Charge filed with the wrong third party**

In these particular circumstances, the Agent fully explains the basis for the RD's decision not to issue complaint. No withdrawal is solicited and the charge is not dismissed under this criterion (no jurisdiction) without first providing the Charging Party an opportunity, as appropriate, to discuss the background of the charge and the basic facts and theory of violation supporting the charge.

- **WHETHER ALL ELEMENTS OF THE STATUTORY VIOLATION ARE ESTABLISHED**

Is it clear that an element of the statutory violation is missing?

After the initiation of the investigation it becomes uncontested that an element of the statutory violation is missing. In most of these instances, it is the Charging Party which readily admits, when giving the details of the occurrences underlying the charge, that evidence required to support an element of proof of the alleged violation is missing.

Examples where elements of statutory violation are not established:

- **Weingarten examination element is missing--** a Charging Party witness may state that no request was made for a union representative at an investigatory examination. See § [7114](#)(a)(2)(B) of the Statute.
- **Formal discussion element is missing--** it may become undisputed that the exclusive representative received actual, timely notice of a formal discussion. See § [7114](#)(a)(2)(A) of the Statute.

In these types of situations, absent unusual circumstances, the RD concludes that the investigation has been completed to the extent that the RD can render a well-informed and supportable decision on the merits of the charge. No withdrawal is solicited and the charge is not dismissed under this criterion without providing the Charging Party an opportunity, as

appropriate, to discuss the background of the charge and the basic facts and theory of violation supporting the charge.

- **WHETHER, EVEN ASSUMING THE CHARGE HAS MERIT, PROSECUTORIAL DISCRETION SHOULD BE EXERCISED UNDER THE CRITERIA SET FORTH IN [PART 4, CHAPTER F](#)**

Should prosecutorial discretion be exercised under the applicable criteria?

In some situations, after an investigation has been initiated, it becomes clear that even if all the allegations in the charge and the allegations made by the Charging Party when discussing the case are true, the charge may nonetheless be dismissed, absent withdrawal, by applying the prosecutorial discretion criteria. In these circumstances, the Region assumes that the charge has merit and the scope of the investigation focuses on gathering information responsive to the prosecutorial discretion criteria to determine if prosecutorial discretion is applicable to the charge.

If the RD determines, based on the application of the prosecutorial discretion criteria, that the charge should be dismissed, absent withdrawal, the Agent explains the criteria to the Charging Party and the basis for the RD's application of the criteria to the charge. If the RD determines that prosecutorial discretion is inapplicable, the Region completes the investigation consistent with the scope of investigations criteria in this chapter and the Quality Standards for Investigations set forth in [Part 3, Chapter C](#).



Even in situations where it appears clear, consistent with the above criteria, that a charge has no merit, the Agent always gives a Charging Party an opportunity, as appropriate, to discuss the background of the charge and the basic facts and theory of violation supporting the charge. No withdrawal is solicited, and no dismissal letter is issued, until the Charging Party has been given this opportunity. See § [2423.8\(a\)](#), which requires that all parties involved in an investigation be given an opportunity to present their evidence and views to the RD. The Agent documents in the case file that s/he has provided this opportunity.

5. RD DISAGREES WITH AGENT'S DECISION TO SOLICIT A WITHDRAWAL:

Should an RD disagree with an Agent's decision to solicit withdrawal and determine that more evidence is needed, another Agent will be assigned to investigate the case unless the parties and the RD do not object to the same Agent continuing the investigation. See also Part 4, Chapter A.



[Part 3, Chapter C](#) concerning Quality Standards for Investigation;

[Part 4, Chapter A](#) concerning Agent's Involvement in Withdrawal Requests Prior to a Regional Director Merit Determination;

[Part 4, Chapter F](#) concerning Prosecutorial Discretion; and

[Part 5, Chapter B](#) concerning Ethics.

E. ARRANGING ON-SITE INVESTIGATIONS

- OVERVIEW:** After developing an investigatory plan, as applicable, the Agent next considers making plans to do an on-site investigation of the alleged ULP/s.
- OBJECTIVE:** To provide guidance concerning when it is appropriate to conduct an on-site investigation and the administrative matters that an Agent considers such as notifying the Agency of plan to go on-site, arranging for official time for witnesses and what to do if Agency management declines to make a witness available.

1. WHEN TO DO AN ON-SITE INVESTIGATION:



The Agent considers the following in deciding whether to do an on-site investigation:

- Agent first has an initial discussion with the Charging Party before deciding whether to go on-site;
- The type of charge determines whether to go on-site, e.g., when there is physical evidence on-site that must be seen;
- Generally, go on-site if case is local;
- Generally, go on-site when cost is not a factor;
- Generally, go on-site when difficult credibility disputes are present;
- Generally, go on-site when the Charging Party alleges a § [7116\(a\)\(2\)](#) violation unless the RD/RA/DRD approves otherwise under the scope of investigations criteria (see [Part 3, Chapter D](#) concerning the Scope of Investigations);
- Go on-site when there are multiple ULPs to be investigated;
- Consider going on-site if settlement would be facilitated; and/or

- Consider going on-site when the parties are new to the ULP process.



In all cases, the Agent reviews the case file and applies the Quality Standards for Investigations ([Part 3, Chapter C](#)) and Scope of Investigations ([Part 3, Chapter D](#)) to determine if the case warrants an on-site investigation.

2. Notification to Agency of Plan to go On-Site:



Under all circumstances, when an Agent plans to go on-site for an investigation, s/he gives timely notification to the Agency's representative. This rule applies whether or not official time for an employee witness has been requested, e.g., the Agent is merely going to the Union office. Confirmation of an on-site visit is permitted by e-mail.

3. OFFICIAL TIME FOR WITNESSES:

- a. *Official time under Section [7131\(c\)](#) of the Statute:*

Contact the designated Agency representative by telephone or by letter and make a request. The request covers the following matters:

- List of persons needed for the interview;
- Advise that other witnesses may be identified once on-site;
- Arrange for the location of interviews;
- Telephone affidavits (See [Part 3, Chapter I](#));

- Advise that another on-site interview may be necessary; and
- Ask that supervisors be informed to arrange for release.



Official time is only requested if it is [7131\(c\)](#) time. It is not requested if it falls under Section [7131\(d\)](#) (contract time, for example, the representative is entitled to 100% official time under the contract). In the latter instance, it is the responsibility of the witness to arrange for official time in accordance with the agreement with the Agency.

See [ATTACHMENT 3E1](#) for a Sample Letter requesting Official Time.

- b. *Special circumstances:*
 - i. Request official time for witness to do either of the following on duty time:
 - Review a telephone affidavit sent by the Agent (request the amount of time that would have been taken had the affidavit been taken on-site); or
 - Complete a questionnaire or an interrogatory.



The Agent indicates in the official time request to the Agency that, in lieu of an on-site affidavit, the Region has determined that a reasonable amount of official time is needed to, e.g., review a telephone affidavit or complete a questionnaire). Tell the Agency when the document has to be returned. If the Agency asks how much time is necessary, i.e., what “reasonable” means,

ask for that amount of time that would have been asked for had the investigation been completed on-site.

ii. Shift changes:

- It is permissible to request an employee's change of shift to facilitate the interview. Discuss with the employee first before contacting the Charged Party's representative and inform the representative that the Charged Party is not required to accommodate request; or
- If no shift change can be arranged, the Agent adjusts the his/her schedule, if conflict is known in advance.



Do not request that an employee be paid overtime to provide an affidavit.

iii. Options when the shift ends before the interview is completed (while on official time):

- Conclude the interview, provide the witness with a date certain to submit further evidence to the Agent, and send confirming letter; or
- If the RD approves, extend travel to continue the interview and make a note in case file.



When planning the investigation, in order to conduct an efficient and effective interview, it is the Agent's responsibility to arrange carefully interviews with special consideration given to employees' work schedules. In only the rarest of instances should an Agent be faced with the end of a shift and an employee who does not wish to be detained any longer.

- c. *Agent's responsibilities with respect to official time granted a witness:*
- If requested, verify the use of official time at the time it is used;
 - If requested after official time is used, decline to provide a statement or otherwise verify official time and cite regulation, § 2411.11 and [2423.8\(c\)](#) stating that the Agent cannot become a witness in any proceedings that Agency may take against employee unless the GC approves.

4.



MANAGEMENT DECLINES TO MAKE A WITNESS AVAILABLE:

- If the reasons are legitimate, e.g., work exigencies, make other arrangements;
- If no other purpose is apparent other than to delay/impede the investigation, first make the request in writing. If that is declined, the RD/RA makes a request to higher-level management.
- If Agent arrives on-site and a management official overruled the decision to make the employee/s available or the person is on annual leave, the Agent:
 - Tries to work around the situation if the reason the employee does not show for the interview appears to be legitimate; or
 - Talks to a management official on-site about making the employee available; and
 - Gathers as much evidence as is possible.



The Agent telephones the RD/RA/DRD for guidance, if necessary. The Agency's interference with the investigation may be grounds for a new charge.



[Part 3, Chapter C](#) concerning Quality Standards for Investigations;

[Part 3, Chapter D](#) concerning Scope of Investigations; and

[Part 3, Chapter I](#) concerning Telephonic Affidavits.

RESERVED

F. EVIDENCE, IN GENERAL

OVERVIEW: The material facts that are used by an RD to decide the case are substantiated in accordance with the Quality Standards for Investigation ([Part 3, Chapter C](#)). It is the Agent's responsibility to investigate the ULP charge and to obtain the best evidence upon which the RD may base a decision.

OBJECTIVE: To provide an overview of the types of evidence that may be relied upon in deciding a ULP charge and the assessment of the relevance and weight of that evidence.

1. EVIDENCE V. INFORMATION:

a. Evidence is any type of proof, or probative matter, if presented at trial, could be the basis for finding facts at issue.

For example:

- Witness statements;
- Records;
- Documents;
- Signed confirming letters; and
- Objects.

b. Information is knowledge that is obtained from an investigation that helps to understand and

process the ULP, but that by itself, cannot provide a basis upon which an RD decides a case.

For example:

- Oral statements to an Agent; and
- Charged Party's Statement of Position. An Agent may receive an e-mail concerning a Statement of Position.



*For example--in a § [7116\(a\)\(1\)](#) and (5) unilateral change case, where an Agent receives information from the Charged Party that alleges that the Agency gave oral notification of the change to the Union well before the change took place, the Agent may "test" that **information** with the Charging Party, i.e., the Agent develops a line of questioning specifically concerning the alleged oral notification of the change. The Charging Party's response to these questions, captured in an affidavit, constitutes **evidence** that the RD may use in deciding the case.*

*Another example--in a Section [7116\(b\)\(1\)](#) and (8) duty of fair representation case, where an Agent receives information from the Charged Party that states that the Agency had informed the Charging Party that s/he was obligated to provide information to the Union in order for the Union to be able to determine the merits of the grievance, the Agent may "test" that **information** with the individual Charging Party. The Charging Party's response to these questions, captured in an affidavit, constitutes **evidence** that the RD may use in deciding the case.*

2. DETERMINING THE BEST METHOD OF OBTAINING EVIDENCE:

The following investigative techniques are not mutually exclusive and may be combined during the investigation dependent upon the particular case situation:

- The taking of affidavits and collection of documentary evidence in person;
- The taking of a sworn affidavit through use of a telephone interview;
- The use of sworn interrogatories transmitted to and from the Region by mail; and
- The use of letters from the RO confirming information obtained orally from a party.

3.  THE INVESTIGATION OBTAINS THE BEST POSSIBLE EVIDENCE:

In investigating ULP charges, Agents may obtain a variety of types of evidence and information: (a) sworn testimonial evidence; (b) documentary evidence; (c) unsworn written testimonial information; (d) unsworn oral information, and (e) position statements and legal arguments.

4. CHOOSING BETWEEN DOCUMENTARY AND SWORN TESTIMONIAL EVIDENCE:

a. *Preference for documentary evidence:*

Documentary evidence is evidence which has been reduced to writing prior to the investigation for purposes unrelated to the investigation itself, thus enhancing its credibility.

This type of evidence, when available, is almost always preferable to testimonial evidence on the same point because testimonial evidence is directly related to the investigation itself, thereby diminishing its credibility.

The Agent always determines whether relevant documentary evidence exists and emphasizes its importance to the parties who have access to that evidence .

b. *Situations where documentary evidence is critical:*
In some cases, documentary evidence may be so critical that no decision on the merits can be made without it, regardless of testimony.

For example:

- contract interpretation - no case which turns on a question of contract interpretation is decided without the relevant portions of the contract at hand; and
- [7116\(d\)](#) grievance bar - no decision on a contested [§ 7116\(d\)](#) grievance bar is made without a copy of the grievance.

c. *Situations where testimonial evidence suffices:*

Only when it is clear that the parties are unable to produce documents which are known to exist does the Agent attempt to reproduce that evidence through testimony.

5. ASSESSING RELEVANCE AND WEIGHT OF EVIDENCE:

a. *Relevance:*

- i. The Agent's responsibility is to ensure that all evidence assembled in the case file, whether documentary or testimonial, is relevant.
- ii. The test for determining relevance is whether it can reasonably be expected to assist the RD in reaching a proper disposition of the case.

iii. Examples:

- Otherwise significant hearsay statements may be accepted during the investigation even though their use would be limited at trial.
- An Agent has no obligation to accept evidence which clearly makes no independent contribution to an understanding of the case or its resolution-
-including:
 - Obviously irrelevant material; and
 - Material which merely duplicates evidence already obtained.



Although the Agent, not the parties, is responsible for deciding during the investigation whether proffered evidence is relevant, any doubts are resolved by accepting the documents.

The taking of evidence is always as balanced as possible, and includes not only material which tends to support the allegations in the charge but any available and relevant material which tends to refute the allegations as well. Thus, as a neutral investigator, an Agent explores all potential evidence, whether supportive of the charge or exculpatory. The purpose of the investigation is to obtain all relevant facts to enable a decision on the merits of the charge, not to prepare a charge for the possibility of a hearing before an ALJ.

b. *Weight:*

- i. The Agent's responsibility is:

- To develop all factual evidence that would assist the RD in assessing the weight of the evidence:

The Agent inquires into the source of all evidence when that source is not otherwise apparent:

- In the case of documentary evidence, the Agent establishes the purpose for which the document was originally prepared and the circumstances of its preparation.
- In the case of testimonial evidence, the Agent establishes the competence of the witness and the witness's interests, if any, in the case.
- To maintain neutrality while taking evidence and the integrity of the decision-making process.
- **Not** to present opinions to the Charging Party without supervisory approval. See the discussion below and [Part 4, Chapter A](#) concerning an Agent's Involvement in Withdrawal Requests Prior to a RD Determination (in particular page [4A-3](#) which discusses solicitation of a withdrawal prior to an RD decision on the merits based on an agent's evaluation of the weight of the evidence).



Absent supervisory approval, the views of the Agent on the applicable law, weight of the evidence and the application of the law to the evidence is presented at the Region's agenda, not to

the Charging Party prior to a Regional decision in the case. Presenting personal opinions prior to the Region's decision, which may not ultimately be adopted by the Region, will incorrectly cause Charging Parties to perceive that their charge was neither fully investigated nor fairly decided. In most cases, the Agent is the Charging Party's sole contact with the Region. It is, therefore, imperative that all Agents recognize the critical role they fill in representing the Region to the parties. Thus, an Agent is extremely cautious when assisting the parties in resolving their dispute prior to an RD decision on the merits. S/he maintains his/her neutrality and conveys to the parties that, absent resolution of the dispute, the RD will render a decision on the merits of the charge.

- ii. The RD ultimately determines the weight of the evidence. However, an Agent may be authorized to solicit withdrawal prior to an RD merits decision:
 - After receiving supervisory approval, the Agent may have a frank discussion with the Charging Party about the Agent's view of the evidence obtained thus far in an investigation; or
 - Without supervisory approval, on a case-by-case basis according to the RD's exercise of discretion, the Agent discusses with the Charging Party his/her view of the weight of the evidence.

6. BALANCE BETWEEN THE AMOUNT OF NECESSARY EVIDENCE AND THE AMOUNT OF EVIDENCE THAT THE CHARGING PARTY INSISTS ON SUBMITTING:

The RD exercises discretion in determining the amount of evidence required to complete an investigation by applying the scope of investigations criteria set forth at [Part 3, Chapter D](#). If a party insists on submitting additional evidence beyond that required by the Agent, the Agent explains why the evidence is not required, but that documentary evidence or additional statements submitted by a date certain will be accepted and considered. See § [2423.8\(a\)](#), which states that "all parties involved are afforded an opportunity to present their evidence and views to the Regional Director."

If the Charging Party insists that more affidavits should be obtained from other witnesses not deemed necessary by the Agent, the Agent explains why those statements are not necessary and confirms, in that person's affidavit, a confirming letter, or a memorandum to the file, the substance of the witness's testimony according to the Charging Party. The Agent also informs the Charging Party that if the Charging Party still wants to submit additional information, signed and sworn statements and documentary evidence will be received by the Region up to a date certain.



[Part 3, Chapter C](#) concerning Quality Standards for Investigations;

[Part 3, Chapter D](#) concerning Scope of Investigations; and

[Part 4, Chapter A](#) concerning Agent's Involvement in Withdrawal Requests Prior to a RD Determination.

RESERVED

G. DOCUMENTARY EVIDENCE

OVERVIEW: In preparing for the investigation, the Agent considers what types of documentary evidence, from either the Charging or Charged Party, are necessary to be able to develop the most complete record possible.

OBJECTIVE: To explain the utility of obtaining documentary evidence during the investigation.

1. DEFINITION OF DOCUMENTARY EVIDENCE:

Documentary evidence is evidence which has been reduced to writing prior to the investigation for purposes unrelated to the investigation itself. Because it has been created for purposes other than the investigation, it is inherently more probative than affidavits or other forms of evidence which have come into existence solely as a result of the investigation. See [Part 3, Chapter F](#) concerning the discussion on documents as best evidence.

2. REQUIREMENTS OF CASE FILE:

a. *Original or clean copies of the document;*



*An Agent may receive evidentiary documents that were created electronically as an attachment to an e-mail. The RD may rely on these in making a merit decision **but**, prior to issuance of complaint, a hard copy of the document must be in the case file.*

b. *Source of documentary evidence:*

The case file identifies where the documentary evidence came from--its original source.

c. *Meaning of documentary evidence:*

The case file contains evidence which explains the meaning of the documentary evidence. If the document "speaks for itself," no other evidence is required to explain its meaning. If, however, it may be subject to differing interpretations or explanations, the case file contains evidence, either documentary or testimonial, which explains its meaning. See [Part 2,](#)

[Chapter C](#) concerning organization of the case file for additional discussion.

3. Use of the Internet:

The Internet is a valuable source for obtaining documentary evidence from sources other than the parties. For example, many Government regulations, directives, and other publications are contained on the Internet. See FLRA Librarian's Guide to the World Wide Web for a listing of many of these sites.



[Part 2, Chapter C](#) concerning the Case File; and

[Part 3, Chapter F](#) concerning Evidence, in General.

H. AFFIDAVITS TAKEN IN PERSON

OVERVIEW: An affidavit is the preferred means of recording any witness's testimony during an investigation of charges involving the facts that are in dispute.

OBJECTIVE: To provide guidance concerning the mechanics of taking an affidavit, the characteristics of a quality affidavit, and the right to representation at interviews.

1.  **GENERAL RULES PERTAINING TO ALL AFFIDAVITS:**

a. *Preparing the witness:*

Prior to taking an affidavit in person, the investigating Agent interviews the witness at the witness' work site, at the RO, or at any other mutually convenient location. The Agent prepares the witness's affidavit during the interview or shortly thereafter.

a. *Length and content of any affidavit:*

The nature of the case governs the length and content of any affidavit. Before preparing any affidavit (and, whenever possible, before opening the interview), the Agent anticipates whether the proof to be secured will be predominantly testimonial or documentary.

Examples:

- i. Predominantly testimonial: Formal discussion:

Charges alleging formal discussions or coercive statements normally turn on what witnesses heard other people say, and the Agent can expect in such cases to ask for short, focused statements from a number of individuals.

- ii. Predominantly documentary: Refusal to bargain or to provide information:

In charges alleging a refusal to bargain or to provide information, the evidence has often already been reduced to writing. Very little testimony may be necessary in such cases and the investigation may be better served by sworn questionnaires. If testimony is not required, the affidavit does not merely refer to existing documentary evidence but instead concentrates on such things as whether and how the Union orally explained its request to the Agency or described its need for the information requested.

- b. Where testimony of two or more witnesses conflicts:*

In this instance, care is taken to ensure that each witness is testifying about the same thing and has similar competence to do so. It is not unusual for each witness to a formal discussion or a coercive statement to remember a slightly different version of what was said, and the cumulative weight of this testimony may prove more persuasive than any single statement alone.

If witnesses contradict each other, however, the Agent is careful to establish whether they were in the same location at the same time and in a position to hear the same thing being said. Any factors which might contribute to their different recollections (bias, for example) are explored.

c. Witness reviewing the affidavit:

Whenever possible, the Agent gives the affidavit to the witness for review, correction and signature while the witness and the Agent are still at the same location. If this is done, the affidavit may be handwritten. Or, if the Agent prefers, the affidavit may be typed on a laptop computer. In unusual cases, depending on time and resources, it may be necessary to prepare the affidavit at the RO or elsewhere and mail it to the witness for signature.



For example, if the employee's shift has ended and the interview must be terminated because the employee is unwilling to continue the interview, the Agent may prepare the affidavit at the RO after the interview has been terminated. See [Part 3, Chapter E](#) concerning Arranging On-Site Investigations and issues relating to official time for witnesses. In these cases, even though the affidavit follows from a personal interview, it is

administratively handled as if it were a telephone affidavit as discussed in [Part 3, Chapter I](#).

2.



BASIC STEPS OF TAKING AN ON-SITE AFFIDAVIT: THE AGENT DOES THE FOLLOWING:

- Introduces him/herself and describes his/her role and the ULP process;

- Explains why s/he is there;
- Gives a general statement of the case and issues;
- Explains the confidentiality attached to the interview and use of affidavits (identity of the individual who submits a statement and/or information will not be disclosed unless it becomes necessary to produce the statement if the witness testifies at trial but the **substance or content** of the statement may be disclosed as part of the investigatory process);
- Explains that the affiant will have a chance to read the affidavit, to make changes by initialing and crossing-out, and to discuss if certain representations are inaccurate;
- Explains that issues concerning significant changes to the affidavit will be discussed;
- Explains the role of a representative, if one is present, i.e., the Agent reminds the witness that it is his/her testimony that is sought, not the representative's testimony; and
- Explains the necessity of affirming the truth of the matters asserted (last page of affidavit) after the affiant agrees to the contents of the affidavit.

See [ATTACHMENT 3H1](#) for a Sample Form for an Affidavit.

3. CHARGING PARTY WITNESS AFFIDAVIT/S--THEORY OF THE CASE AND ESSENTIAL FACTUAL ELEMENTS:

Each case file contains documentation that establishes a clear explanation of the theory of allegations that underlies the charge and the essential factual elements in the case in sufficient detail and accuracy to permit the RD to make a determination. In certain situations where the GC will seek a nontraditional remedy, the case file contains documentation concerning why it is necessary to order a nontraditional remedy. This critical

information is often provided by a single person in the form of an affidavit. However, in some instances the person who has knowledge of the facts is not the same person who can explain the theory underlying the allegation/s. Thus, it is necessary to obtain more than one affidavit to cover the theory of the allegation and the essential facts. Whether prepared after an in-person or a telephone interview, such affidavits:

- Set out all the essential factual elements in the case;
- Are obtained from individuals with first-hand knowledge of the events giving rise to the charge--in many cases, the person who signed the charge; and
- Contain a clear explanation of the allegations in the charge if the particular affiant signed charge.



There is no requirement that the person filing the charge be the individual with the essential facts, as long as that person can refer the Region to such a witness to obtain an affidavit. If the affidavit is taken from a witness other than the individual who signed the charge, the allegations of the charge are explained or clarified in either an affidavit from, or a confirming letter to, the individual who signed the charge. In this case, the Agent ensures that the individual who provides the affidavit or confirming letter has the authority to bind the Charging Party and that the affidavit or confirming letter contains a statement to this effect.

4. **ADDITIONAL AFFIDAVITS:**

Additional affidavits may be necessary to: (1) corroborate the testimony in the affidavit that sets out the essential elements in the case and/or contains a clear explanation of the allegations in the charge, or (2) describe significant facts not known to the other witnesses. Each affidavit ideally complements the remainder of evidence in the case file without duplication or digression. Other affidavits, which serve neither of the latter purposes nor contribute to the investigation, are discouraged. For example, an affidavit which merely states that the affiant agrees with the statement of another affiant instead of independently stating the affiant's

testimony is not useful. See [Part 3, Chapter F](#) concerning relevant evidence.

5.  **CHARACTERISTICS OF A QUALITY AFFIDAVIT:**

A quality affidavit contains:

- **A full identification of the witness and of the witness's competence for testifying--qualify the witness:**

For example, for a union witness, this includes such things as the witness's union affiliation, union offices held, position at work and, when relevant, brief employment history. It also is clear from the affidavit how the witness came to know the facts s/he or she is describing. ("I attended the meeting of June 14 and I heard the director say that unions were a waste of time" or "I did not attend the meeting, but my supervisor told me the next day what the director said.")

- **A restatement or clarification of the allegations;**
- **An unambiguous chronological account of all the factual elements of the alleged violation about which the witness has direct knowledge:**

This requires that before opening the interview the Agent has a clear understanding of the elements of the violation. In a bargaining case, for example, the Agent must establish, among other things, whether the witness can testify about notice. In a formal discussion case, the witness is asked about the elements of formality.

- **An equally clear identification of those elements about which the witness does not have knowledge;**

If the bargaining case alleges a change in practice, and the witness is a union officer who might be expected to know about notice, but does not, the affidavit reflects that the witness does not know if the union was notified in advance of the change. If the witness has no idea whether attendance at the discussion was mandatory, the affidavit reflects that the witness did not know if employees were required to attend the meeting. **This confirms that the Agent has asked the essential question addressing an element of a violation.**

- **A full explanation of any legal or conclusionary assertions which the witness may offer;**

The Agent ordinarily resists any attempt by a witness to insert summary or judgmental comments into an affidavit, and does not allow such comments to stand alone. For example, the Agent does not permit a witness to testify that a supervisor made derogatory remarks about the Union, without being required to recount just what those remarks were.

- **No paraphrasing or rephrasing of what is in a document;**

The document speaks for itself. But, the affidavit may discuss the circumstances, intent, state of mind, clarify what is in the document, and discuss something that is not in the document itself.

- **Information about contracts, grievances and other related matters;**

- **Post-charge information to bring the situation up to date for prosecutorial discretion, settlement and remedy purposes;**

- **No quotation marks--state what the witness says;**

State what the witness said rather than trying to quote the witness's recollection of what someone else said. This protects the credibility of the witness should the witness testify at trial.

Only in rare instances is it appropriate to use quotations in an affidavit, e.g., an (a)(1) statement where the statement is significant and exact.

- **No blank spaces (draw a line through the unused portion of any page) to protect the integrity of the document; and**

- **No statement that the Agent provided a copy of affidavit to affiant.**



The Agent inserts anything else that seems appropriate to the situation (such as statements reflecting that the witness has nothing more to add about what the witness heard at the meeting or the witness does not remember any other discussions with the Union about the status of the grievance). At the same time, the

Agent remembers that the taking of an investigative affidavit is not an exercise in trial preparation. Thus, the determination as to whether information is relevant is not whether the information would be admissible at trial, but whether it can reasonably be expected to assist the RD, in conjunction with other evidence, in reaching a proper conclusion of the case--whether to issue a complaint and notice of hearing, absent settlement. Although hearsay statements may not be admissible, they may nonetheless contain useful information which could lead to direct evidence or corroborate other evidence.



DOCUMENTS REFERRED TO IN THE AFFIDAVIT:

- Do not attach documents referred to in an affidavit to the affidavit;
- Make sure that documents referred to in an affidavit are in the case file; and
- Specifically reference and incorporate previous affidavits only if necessary.



AFFIDAVITS COVERING MULTIPLE CHARGES:

Charges not related:

If affidavits covering multiple charges are not related, the Agent takes background information separately and then takes evidence separately for each charge, i.e., separate affidavits are prepared for the witness.

Charges are related:

If the charges are related, before the Agent takes evidence on each of the charges, s/he may first take background information that is applicable to all of the charges, and then take statements for each charge.



After the background information, start a new page when taking evidence pertaining to a specific charge. Start another new page when you begin taking evidence pertaining to a different charge. This will facilitate the sanitization process that will be required in the event that complaint issues with respect to only one of the charges and the affiant testifies at trial, and it becomes necessary to turn over that witness's affidavit to respondent's counsel. See

LM Part 2, Chapter T concerning Jencks Act and the Production of Witness's Statement at Hearing (p. 162).



REPRESENTATION OF THE CHARGING PARTY, CHARGED PARTY, AND NEUTRAL WITNESSES:

Witnesses have a right to representation at an interview:

It is preferable, based on sound investigative practices, to interview all prospective witnesses alone. All persons interviewed have a right, upon individual request, to be represented at the interview by a representative of the individual's choice.

Interview of an agent of a party:

- Contact the designated representative before contacting a witness who is an agent of a party.



*A representative who also has personal knowledge of the events which underlie the charge **may not** be a witness because of the inherent credibility issues presented.*

- If a witness is an agent of a party, i.e., a Union steward, the **party** has the right to be present, if requested. The agent has no right to a personal representative because the right to a representative is exercised by the **Union** supplying the representative. The right is waived if no request is made.

Exception: If an agent of a party requests that no party representative be present, there is no need to contact the party representative if the agent of the party understands the process.



If a supervisor comes forward on his/her own and asks to be a witness, the Agent makes sure that the supervisor understands that s/he is not protected under the Statute and that the affidavit contains a statement that the supervisor declined representation.

Exception: If a representative is also a witness s/he cannot be a representative for any other witness.

- The notice of a right of parties to be present is explained in a statement describing the ULP process that is sent with the opening letter (See [Part 2, Chapter B](#), concerning the opening letter).

· *Witnesses whose status has changed from the time of the events to the time of the interview:*

- If the witness was a Union agent at time of events but is a temporary or permanent supervisor at the time of the interview, then treat the witness as a Union agent; or
- If the witness was an employee at time of events but is a temporary or permanent supervisor at the time of the interview, then treat the witness as an employee; or
- If the witness was a supervisor at time of the event but in the unit at the time of the interview, then treat the witness as an agent of Agency; or
- If the witness was a Union agent at time of the event but is in the unit at the time of the interview, then treat as an agent of Union; or
- If the witness was an agent of the Agency or Union representative at the time of event, but is in a different Agency at the time of the interview, then there is no need to contact the charged Agency or Union representative before interviewing the witness; or
- If the witness was a temporary or permanent supervisor at time of event, but is in a different Activity at the same Agency at the time of the interview, then contact the Agency representative before interviewing the witness; or
- If the witness was an agent of the Agency or Union at the time of the event, but is retired at the time of the interview, then there is no need to contact the charged Agency or Union representative before interviewing the witness.



[Part 2, Chapter B](#) concerning Docketing the Charge;

[Part 3, Chapter E](#) concerning Arranging On-Site Investigations;

[Part 3, Chapter F](#) concerning Evidence, in General;

[Part 3, Chapter I](#) concerning Telephonic Affidavits;

LM, Part 2, Chapter T concerning Jencks Act.

I. TELEPHONIC AFFIDAVITS

- OVERVIEW:** Under certain circumstances, the Agent takes a witness's affidavit over the telephone instead of in person.
- OBJECTIVE:** To provide guidance on the criteria for taking a telephone affidavit and the mechanics of taking an affidavit over the telephone. See [Part 3, Chapter E](#) for discussion of requesting official time for taking and reviewing a telephonic affidavit.



CRITERIA FOR TAKING A TELEPHONIC AFFIDAVIT:

Whenever practical, prudent, and consistent with the Scope of Investigations Policy, Regions conduct on-site investigations of ULP charges and obtain affidavits in person. However, RDs have discretion to authorize utilizing telephonic affidavits, under the following criteria:

- **No jurisdiction; untimely-filed charge; charge is barred**

The charge on its face, the supporting evidence submitted with the charge, and the conversation with the Charging Party, confirm that there is no jurisdiction over the dispute; the charge is clearly untimely; or that the charge is clearly barred by an earlier-filed grievance; or

- **Prosecutorial discretion**

The charge on its face, the supporting evidence submitted with the charge, and the conversation with the Charging Party reveal that, based on the application of the prosecutorial discretion factors, further processing of the charge is not warranted; or

- **Remote witnesses**

The witnesses are in a remote location (a remote location with several cases, however, is given consideration for an on-site investigation); or

- **Costs**

The costs involved in an on-site investigation, the parties' relationship, the issues involved, the nature of the case and expected testimony, and the number of charges involved indicate that an on-site investigation would not enhance the parties' relationship or be a prudent use of OGC resources.



Section [7116\(a\)\(2\)](#) discrimination allegations and difficult credibility disputes normally would not be appropriate for telephonic affidavits.



HOW TO TAKE A TELEPHONIC AFFIDAVIT:

The Agent generally applies the same rules as when on-site and also considers the following:

- Inquire as to who is in the room and/or can hear;
- Do not affirm over the phone;
- The affidavit form has the affirmation on it (the form need not be notarized);
- The Agent's signature is not on the affidavit;
- The affidavit is prepared after a telephone interview and is either mailed, faxed or e-mailed to the witness, covered by a letter or a message setting a date for its return. The affiant is advised to make any changes in pen on a hard copy of the affidavit (or a print-out in the case of e-mail). The affiant is requested to sign and return the copy to the RO. The letter or message states that if the affidavit is not returned by the requested date, a decision will be made without it or the charge will be dismissed for lack of cooperation if no additional evidence has been submitted;
- If the affidavit is prepared in the RO, it is typewritten; and

See [ATTACHMENT 3I1](#) for a Sample Telephonic Affidavit.

- Fax is an acceptable means of delivery, both for the parties to send documents to the RO and for the Agent to send documents to the parties.



Dispositive action normally is not taken in a case before all the witness affidavits have been signed and returned. Any instance in which a witness fails or refuses to return an affidavit is noted in the case file. If a witness/s fails to provide an affidavit/s that sets forth the essential factual elements in the case and a clear explanation of the allegations in the charge, the case is dismissed for lack of cooperation. See [Part 4, Chapter H](#), concerning dismissal letters.

As in every other aspect of the investigation, the Region takes all reasonable steps to ensure that all parties or witnesses have been fairly and equitably treated and that the Region's investigative methods and rationale for decision making have been explained.

USE OF UNSIGNED/UNRETURNED TELEPHONIC AFFIDAVITS:

Unsigned/unreturned telephonic affidavits are **not** evidence--they are information. See [Part 3, Chapter F](#) which discusses the difference between evidence and information.



[Part 3, Chapter E](#) concerning Arranging On-Site Investigations;

[Part 3, Chapter F](#) concerning Evidence, in General; and
[Part 4, Chapter H](#) concerning Dismissal Letters.

RESERVED

J. SWORN QUESTIONNAIRES TRANSMITTED TO AND FROM THE REGION BY MAIL

OVERVIEW: Use of a questionnaire, which is defined as a sworn interrogatory, can be an effective means of gathering evidence during an investigation.

OBJECTIVE: To provide guidance concerning the circumstances when it is appropriate to use a questionnaire during an investigation and the mechanics of doing so.

WHEN TO USE A SWORN QUESTIONNAIRE:

 RDs have discretion to use this alternative case processing technique of gathering evidence when there are no material issues of fact in dispute in the case. The Regions have discretion to develop their own questionnaires in situations where they deem this technique useful. In any event, a questionnaire is **not** sent until after the Agent has made a telephonic contact with the party.

These types of cases normally are based upon evidence which is impersonal, and predominantly documentary, involving undisputed facts which set forth the material information required to make a decision. In some cases, effective use is made of questionnaires, which are often shorter and more quickly prepared than affidavits and which do not require a personal interview of the witness.

*An example of **appropriate** use of a questionnaire:*

- Bargaining and information cases which consist primarily of correspondence.

- *An example of when the use of an **affidavit** would be **appropriate**, i.e., use of an **questionnaire** would usually be **inappropriate**:*
- Cases which potentially turn on a witness's credibility--what a witness has seen or heard, e.g., (a)(1) statement cases, Weingarten cases.



In almost every case, the decision to prepare a questionnaire rather than an affidavit is guided by the initial interview with the Charging Party. If the Agent decides that a questionnaire is appropriate, this decision is explained to the Charging Party before the questionnaire is sent to the Charging Party.



Also note that parties, on their own volition, may submit interrogatories or position papers when filing or responding to a charge.



CHARACTERISTICS OF A QUALITY QUESTIONNAIRE:

- It is prepared after an exploratory interview with the witness or, if the witness is known to be competent and cooperative, no interview is required;
- It typically consists of questions appropriate to the type of violation alleged;
- When sent from the RO, it is administratively handled in the same manner as telephone affidavits are processed--typewritten and accompanied by a cover letter to either the Charging or Charged Party explaining:
 - The purpose and importance of the questionnaire;
 - The manner in which the questionnaire is to be completed, including the date by which it must be returned;
 - The options for processing the charge after the questionnaire is received by the Region; and

**The Investigation
Sworn Questionnaires Transmitted
to and from the Region by Mail**

- Because the questionnaire, in select cases, is the equivalent of an affidavit that establishes the essential elements in the case and contains a clear explanation of the allegations in the charge, the Charging Party's failure to timely return the sworn and signed questionnaire constitutes a failure to cooperate in the investigation and will result in dismissal of the charge.

See [ATTACHMENT 3J1](#) for a Sample Cover Letter for a Questionnaire.

- Contains the same oath as contained in a sworn affidavit and there is no need that it be notarized;
- Functions as a checklist for the elements of proof associated with each allegation in a charge;
- In some circumstances, it may need to be supplemented by collateral affidavits or other statements;
- It is as self-contained as possible and is drafted to include all the elements of proof of the statutory violation and proposed remedy, and any other matters which the Region deems relevant in those type of violations; and
- Is drafted with a high degree of clarity and precision because it constitutes a series of questions prepared from the point of view of the Agent rather than that of the witness. It may be an informal supplement to the investigation or may be a substitute for a sworn affidavit.

REGIONS SHARE QUESTIONNAIRES VIA E-MAIL:

See [ATTACHMENT 3J2](#) for an example of a Questionnaire.

**The Investigation
Sworn Questionnaires Transmitted
to and from the Region by Mail**

RESERVED

K. INVESTIGATORY SUBPOENAS

OVERVIEW: The investigatory subpoena is a rarely used investigatory technique to obtain evidence from the Charged Party or a Third Party. The GC has authority under § [7132\(a\)](#) of the Statute to issue an investigatory subpoena and to enforce an investigatory subpoena in an appropriate United States district court under § [7132\(b\)](#). Section [2423.8\(c\)](#) of the Regulations addresses the issuance and enforcement of investigatory subpoenas.

OBJECTIVE: To provide guidance concerning: (a) the criteria for requesting that the GC issue an investigatory subpoena; (b) the process for requesting and obtaining an investigatory subpoena; (c) service of investigatory subpoena; (d) revocation of an investigatory subpoena and (e) enforcement of investigatory subpoena.

· **WHEN DOES AN RD CONSIDER REQUESTING THAT THE GC ISSUE AN INVESTIGATORY SUBPOENA:**

An RD considers requesting the issuance of an investigatory subpoena when a Charged Party fails or refuses to cooperate during an investigation and the criteria listed below are satisfied. It may also be requested when a Third Party has critical evidence it is not willing to provide.

· ** P CRITERIA RD'S APPLY IN DETERMINING WHETHER TO REQUEST THAT THE GC ISSUE AN INVESTIGATORY SUBPOENA:**

- Whether the evidence submitted by the Charging Party and any neutral witnesses establishes a potential violation (if the Region has sufficient evidence for the RD to decide the merits of the charge, it is not necessary to require the Charged Party to produce additional evidence);
- Whether the evidence sought is relevant and material and is neither privileged, unduly repetitious nor unreasonably cumulative;

- Whether the evidence is necessary to decide a factual issue which must be resolved to determine whether or not a violation of the Statute has occurred, and that evidence is not otherwise available;



Cases which turn on the credibility of a witness, e.g., § 7116(a)(1), (2) and (b)(1) are normally not proper candidates for consideration of the issuance of an investigatory subpoena to take a witness's statement but it may be necessary to subpoena a crucial document(s) deemed material to the case under § 7116(a)(1) and (2).

- Whether the evidence sought is not within the control of the Charging Party;
- Whether the evidence can be produced without an undue burden and is specific, narrowly tailored, and reasonable;
- Whether the Charged Party is likely to comply with the subpoena, and failing that, the prospect for successful enforcement of the subpoena in court.

PROCESS FOR REQUESTING AND OBTAINING GC'S ISSUANCE OF INVESTIGATORY SUBPOENA:

- The Agent seeks voluntary cooperation (do **not** discuss matter of investigatory subpoena with the Charged Party's representative) and documents contacts with a confirming letter or in a memo to the file;
- If cooperation is not given, then, based on the above criteria, the Agent requests that the RD request the GC to issue an investigatory subpoena;
- RD decides whether to request the GC to issue the investigatory subpoena based on the above criteria. Such request is made by memorandum (no discussion with the Charged Party's representative about investigatory subpoena occurs); and



The memorandum states the allegation, the evidence obtained thus far and how the criteria listed above are applied.

- GC decides to issue the subpoena or denies the request.

• **BEFORE THE SUBPOENA ISSUES, THE CHARGED PARTY HAS A LAST CHANCE TO COOPERATE WITH THE INVESTIGATION:**

After the GC grants the RD's request to issue an investigatory subpoena, the Agent expeditiously contacts the Charged Party's representative and gives the Charged Party a last chance to cooperate with the investigation. The Agent informs the Charged Party's representative that, absent voluntary compliance, a subpoena will issue, and, absent compliance with the subpoena, enforcement will be sought in an appropriate United States district court.



The Agent documents this contact with the Charged Party's representative in the case file.

See [ATTACHMENT 3K1](#) for a Sample Investigatory Subpoena.

• **SERVICE OF SUBPOENA:**

Any individual who is at least 18 years old and who is not a party to the proceeding may serve a subpoena and certify that s/he did so by:

- Delivering it to the witness in person;
- Registered or certified mail; or
- Delivering the subpoena to a responsible individual (named in the document certifying the delivery) at the residence or place of business (as appropriate) of the person for whom the subpoena was intended.

• **REVOCATION OF SUBPOENA:**

• *Procedural requirements:*

Any person who does not intend to comply with a subpoena has five days from the date of service of the subpoena to petition in writing to revoke the subpoena. Such a person is required to serve the GC with a copy of the petition to revoke.

Standards governing the GC's ruling on a petition to revoke:

The GC revokes the subpoena if: (a) witness or evidence which is required to be produced is not material and relevant to the matters under investigation or in question in the proceedings; (b) if the petition does not describe with sufficient particularity the evidence sought; or (c) if for any other reason sufficient in law, the subpoena is invalid.

ENFORCEMENT PROCEEDINGS:

Upon the failure of any person to comply with a subpoena, the RD contacts OGC HQ immediately for the GC's determination whether to institute proceedings in a United States district court for the enforcement of the subpoena.

If it is determined to institute enforcement proceedings, OGC HQ will coordinate such action with the RD.



LM, Part 1, Chapter K concerning Subpoenas at Trial.

L. INTERVIEWS WHEN NO AFFIDAVITS ARE TAKEN

OVERVIEW: During the course of the investigation, the Agent sometimes interviews a witness when no affidavit is taken. Instead, the Agent will record a note to the file or draft a confirming letter.

OBJECTIVE: To provide guidance on the use of confirming letters and notes to the file.

A MEMORANDUM TO THE FILE IS NOT EVIDENCE:

If an Agent obtains substantive information orally that is to be relied upon by an RD in making a decision, the information is contained in either a sworn affidavit, documentary evidence, sworn questionnaire or a confirming letter. Other information, which does not constitute material facts and which is not relied upon by the RD in making a merits determination, may be noted in a memorandum to the file to be used for background purposes. Conversely, evidence or substantive information bearing on the merits is **not** noted in the case log.



CONFIRMING LETTERS OF CHARGING PARTY WITNESS:

When a confirming letter is used:

A confirming letter, properly obtained, may be used by the Region in determining the merits of the case.

Not every conversation with a party or a witness results in evidence suitable for trial, but often these conversations do result in information which can be useful in resolving the case. In order to rely on information received orally, the Agent confirms any relevant substantive information received about the case in a letter to the party or witness who provided it. A confirming letter may be used to clarify allegations of a charge or for corroborating evidence.

Examples of appropriate use of a confirming letter:

- Charging Party informs the Agent telephonically that the events giving rise to the charge arose outside the timeliness provisions of

the Statute (§ 7118(a)(4)(A)) and the conversation reveals that none of the exceptions apply (§ 7118(a)(4)(B)); and

- A party telephonically informs an Agent that it is challenging an action clearly outside the jurisdiction of the Statute.

• *Contents of a confirming letter:*

Confirming letters clearly state the factual information received from the party or witness, explain that the information will be considered by the RD in deciding the merits of the case, and give the party or witness a reasonable period of time to advise the Agent of any inaccuracies or changes in the information.

Confirming letters do **not** include the Agent's assessment of the case. The Agent does not discuss his/her assessment of the case with either party unless, under the criteria stated in [Part 4, Chapter A](#) concerning Solicitation of Withdrawals, the Agent is permitted to solicit a withdrawal prior to an RD's decision on the merits.

Confirming letters are **not** used to revise a charge that requires more than a minor clarification. Rather, an amended charge is required. See [Part 2, Chapter B](#) concerning Docketing the Charge and, in particular, when an Amended Charge is necessary.



There is no requirement that a Charging Party witness sign a confirming letter. If it is determined that it is necessary for the Charging Party witness to affirm certain facts, an affidavit or supplemental affidavit remains the preferred means of recording witness testimony involving facts that are in dispute. However, Regions have discretion to require a Charging Party witness to sign and return a confirming letter.

See [ATTACHMENT 3L1](#) for a Sample Confirming Letter for Charging Party Witness that is used to support a Dismissal of the Charge; and [ATTACHMENT 3L2](#) for a Sample Confirming Letter for Charging Party Witness that supports the Charging Party.

• **INTERVIEWS WITH CHARGED PARTY REPRESENTATIVES AND OTHER AGENTS WHEN NO AFFIDAVITS ARE TAKEN:**

- *Charged Party's legal position is presented orally in interview with representative:*

An oral presentation of a legal position is not evidence. It may be used for background and information purposes only and does not bind a Charged Party to any legal position. See [Part 3, Chapter F](#) for a discussion of evidence v. information.

- *Use of facts presented orally in the interview with Charged Party representatives and other agents:*

An oral presentation of the facts is not evidence and it may be used for background and information purposes only.

- *Charged Party confirming letters:*
 - Only use if the representative or agent agrees to such use, understands the process, and can partake in the process, e.g., do not use if the representative indicates that s/he is not permitted by the Agency or Union to confirm or not confirm;
 - If the party is represented, make sure the representative gets a copy; and
 - A signature is necessary to use as evidence to support dismissal or complaint.

Rationale for obtaining a signature on Charged Party confirming letters and not for Charging Party confirming letters. Unlike Charging Party confirming letters, which need not be signed in order to be used in determining the merits of a charge, a confirming letter of a Charged Party witness may not be used in determining the merits of a charge unless it is signed. For purposes of using a confirming letter to support the dismissal of a charge, it is quite different to rely on something stated, but not sworn to, by a Charging Party witness to dismiss a charge, than to rely on something stated, but not sworn to, by a Charged Party witness to dismiss a charge. Thus, it is required that Charged Party confirming letters be signed. For the purposes of using a confirming letter to support issuance of complaint, very seldom, if ever, would a complaint issue absent a signed/sworn Charging Party statement. Moreover, for the purposes of providing further support for the issuance of a complaint, it is acceptable to rely on an unsigned Charging Party's confirming letter and corroborating evidence already obtained, because that witness can be pre-tried and called as a GC witness at trial to obtain direct testimony. On

the other hand, do not rely on an unsigned Charged Party witness confirming letter to support issuance of a complaint because of the uncertainty of that person's testimony at trial.

Thus, the above policy was adopted to require Charged Party confirming letters to be signed, as well as requiring the Agent to ensure that the Charged Party witness agrees to the use of a confirming letter, understands the process, and indicates the authority to confirm or not to confirm by their party.

See [ATTACHMENT 3L3](#) for a Sample Confirming Letter of a Charged Party Witness.

· **INTERVIEWS WITH NON-PARTY WITNESSES GIVING FACTS WHEN NO AFFIDAVITS ARE TAKEN:**

- *Use of facts presented orally in an interview with non-party witnesses:*

As stated above, oral presentations of facts are not evidence and may be used solely for background and information purposes.

- *Confirming letters:*

- Are used for corroborating evidence;
- Are used to obtain additional facts after on-site investigation; and
- Need not be signed.

See [ATTACHMENT 3L4](#) for a Sample Confirming Letter of a Non-party witness.



[Part 2, Chapter B](#) concerning Docketing the Charge

[Part 3, Chapter F](#) concerning Evidence, in General; and

[Part 4, Chapter A](#) concerning Agent's Involvement in Withdrawal Requests Prior to a Regional Director Merit Determination.

RESERVED

M. IMPROPERLY OBTAINED OR PURLOINED INFORMATION/EVIDENCE

OVERVIEW: During the course of an investigation, a witness or party's representative may provide, or seek to provide, evidence that may have been improperly obtained or purloined by that party. Such evidence could include documents obtained by a party or individual under "questionable circumstances," or other evidence, such as a tape recording or videotape, that may have been surreptitiously recorded without the consent of one or both of the parties. The OGC has an interest in obtaining the best evidence upon which to base an RD decision as well as to maintain the highest ethical standards.

OBJECTIVE: To provide guidance concerning the Agent's decision whether to accept and use evidence that may have been improperly obtained or purloined by a party.

1.  **AN AGENT OF THE FLRA NEVER ENGAGES IN COMPLICITY IN IMPROPERLY OBTAINING EVIDENCE**
2. **AN AGENT IS ADVISED THAT A WITNESS HAS EVIDENCE THAT MAY HAVE BEEN IMPROPERLY OBTAINED/PURLOINED:**

If, during the course of an investigation, a party's representative or witness wishes to provide evidence that s/he identifies as having been improperly obtained or purloined, the Agent:

- a. *Warns the individual of the potential consequences of providing evidence:*

The Agent informs the individual who is attempting to provide the evidence that the individual may be subject to disciplinary or legal charges if the Region uses the evidence and it is disclosed who provided it. The individual is cautioned and advised that the Region cannot protect his/her identity. If the Region decides to use the evidence, it cannot ensure that the individual's identity will be kept confidential. After being appropriately

cautioned, if the individual decides that s/he does not want the Region to use the evidence, the Agent does not accept the evidence.

b. *Notification to RD/RA/DRD:*

If, after advising the individual as above, the individual still decides to submit evidence which has been identified as having been improperly obtained or purloined, the Agent contacts the RA/DRD/RD immediately for guidance to determine whether to accept the evidence.

3.  **CRITERIA FOR DETERMINING WHETHER TO ACCEPT AND USE SUCH EVIDENCE:**

Consider the following in determining whether to accept documents that have been improperly obtained or purloined:

- Will liability (criminal or civil) attach to the individual who provided the evidence to the Region should a complaint issue and the evidence is ultimately introduced (or an attempt is made to introduce) at the hearing? The Region attempts to avoid a situation in which its Agents may be called upon to testify in an arbitration, administrative, civil or criminal proceedings related to evidence it introduced, or attempted to introduce, at hearing; and
- Does the cost of accepting the evidence and using it for a merit determination, and perhaps ultimately at trial outweigh any benefit to be gained by accepting and using the evidence? In other words, is the negative impact upon the ULP proceeding and the integrity of the OGC outweighed by any benefit of achieving the ultimate goal of determining whether a violation has occurred?



In deciding whether to accept the improperly obtained or purloined evidence, the Region may review the evidence. Thus, if the evidence is an improperly obtained tape or video recording, the Region may listen to the tape or view the video as part of deciding whether to accept the evidence. If the evidence is a document that is presented directly to the Agent in the field or is received by mail, the evidence also may be reviewed as part of the process in applying the above criteria to determine if the evidence should be accepted. If the evidence is not accepted, however, it is not used in determining the merits of the charge. However, the Region may follow up and attempt to discover other

evidence which may then be properly obtained on the subject matter of the rejected evidence.

4. AUTHORITY PRECEDENT: THE AUTHORITY HAS NOT ADDRESSED THIS MATTER IN ANY DECISIONS BUT THE FOLLOWING TWO ALJ DECISIONS ARE INSTRUCTIVE:

National Labor Relations Board, Region 24, Case No. 2-CO-50, ALJD Rpt. No. 5 (1981) (NLRB, Region 24) (In a ULP proceeding against the union for surreptitiously taping a bargaining session, the ALJ, in dicta, found that, in deciding that the union had violated the Statute, “the National Labor Relations Board has refused to admit the tape as evidence in a refusal to bargain proceeding, on the ground that such a recording would inhibit severely the willingness of parties to express themselves freely, and seriously impair the collective bargaining process”); see also Sport Air Traffic Controllers Organization (SATCO), 52 FLRA No. 32, 52 FLRA 339, 345-46 (1996) (Adopting ALJ’s finding, in which he relied upon NLRB, Region 24, that respondent union violated § 7116(b)(1) and (5) by insisting to impasse on the tape recording of the parties’ collective bargaining negotiations).

U.S. Department of Justice, Immigration and Naturalization Service, Border Patrol, Case No. 6-CA-90255, ALJD Rpt. No. 94 (1991) (ALJ stated in response to the GC’s argument that respondent’s evidence should be given no weight since it was not provided to the Region during the investigation: “An Administrative Law Judge is not charged with the responsibility of policing investigations and overseeing the collection of evidence necessary to prove or disprove the allegations of a charge. Absent a showing that evidence was somehow obtained illegally, the Administrative Law Judge’s sole function with respect to documentary evidence proffered at a hearing is to determine its relevance and legal sufficiency”).

5. NLRB/COURT PRECEDENT:

a. *Initial strict exclusionary rule:*

Hoosier Cardinal Corp., 67 NLRB 49 (1946) (Board agent obtained records from an officer of a cited union organization who was secretly a member of

a rival union and Board indicated it would not consider evidence in order “to refrain from any appearance of surreptitious dealing with one of the parties”).

- b. *Loosening of the strict rule: Evidence allowed as long as Board Agent not involved in improper activity:*

Air Line Pilots Association, 97 NLRB 929 (1951) and General Engineering, 123 NLRB 586 (1959) (Board held that it would allow the introduction of allegedly illegally-obtained evidence as long as government agents were not involved in the taking of the documents).

Cory Coffee Services, Div. of Cory Food Services, Inc., 242 NLRB 601 (1979) (where Board attorney asserted that the purloined document came to Board agents during its investigation and that no Board agent “obtained it from Respondent’s office,” the ALJ stated that he could not find that the Board’s attorney or its agents knew these documents had been stolen or that the Board had any involvement in the taking of the documents, and therefore was “unable to conclude that the proceedings should be dismissed outright on the basis that respondent has been denied due process of law or that its rights have been seriously prejudiced by the Region’s clandestine use of this ‘purloined evidence’”).

NLRB v. South Bay Daily Breeze, 415 F.2d 360, 365 (9th Cir.1969) (in upholding Board’s decision, court stated that “where the Board merely accepts and makes use of evidence illegally obtained by private individuals, exclusion of such evidence is not required by the Act”).

N. DISCLOSURE OF EVIDENCE-- DISCUSSING THE CONTENTS AND FURNISHING COPIES

OVERVIEW: The Agent gathers evidence and information during the course of an investigation. At times, s/he uses that evidence to develop other evidence so that the case file contains the best evidence needed for the RD to make a merit determination.

OBJECTIVE: To provide guidance concerning under what circumstances various types of evidence may be disclosed to the other party and how evidence that is not disclosed may be used to obtain additional evidence.

1.  **DISCLOSURE OF A PARTY'S DOCUMENTARY OR PHYSICAL EVIDENCE:**

- a. *Distinction between public and non-public evidence:*
 - i. The rule of confidentiality applies to non-public evidence, See Section 2423.8(c). Non-public evidence is evidence that is within an Agency's or Union's internal control and is not distributed externally, e.g., minutes of a Union or Agency-management meeting; intra-management or intra-union memorandum; or an employee's performance appraisal.
 - ii. If the evidence is public information it can be discussed with, shown and provided to, the other party if it is necessary to obtain the complete facts.

- b. *The document may be shared if, on its face, it shows that the other party has already obtained it.*

- c. *If the document is internal, i.e., non-public:*

- i. Ask the party who provided it for permission to furnish a copy to the other party.
- ii. If permission is granted, it can be discussed with, shown to, and provided to the other party.
- iii. If such permission is declined, and the document purports to establish a fact, then the Agent informs the other party that s/he has a document establishing a certain fact that is disclosed and discussed, but does not identify, show, or furnish the document to that party.

2. DISCLOSURE OF AFFIDAVITS, SWORN QUESTIONNAIRES, AND CONFIRMING LETTERS:

- a. *The rule of confidentiality applies to affidavits, sworn questionnaires and confirming letters and the affidavit form refers to the confidentiality rule. See § [2423.8\(c\)](#).*

See [Part 3, Chapter H](#) concerning Affidavits Taken in Person, which discusses this rule.

- b. *How to obtain a party's response to facts represented in an affidavit, confirming letter or sworn questionnaire:*

The Agent uses the fact to frame questions but is careful not to disclose its origin, or show, or furnish copies, of the evidence.



[Part 3, Chapter H](#) concerning Affidavits Taken in Person.

O. DUTY OF THE CHARGING PARTY

- OVERVIEW:** Section [2423.8\(b\)](#) codifies the duty of a Charging Party to cooperate: “In connection with the investigation of charges, all persons are expected to cooperate fully with the Regional Director.”
- OBJECTIVE:** To provide guidance concerning what actions are taken when a Charging Party is uncooperative during the course of an investigation.

1. PURSUANT TO § [2423.8\(b\)\(1\)](#), COOPERATION INCLUDES:

- Making Union officials, employees and Agency supervisors and managers available to give sworn/affirmed testimony regarding matters under investigation;
- Producing documentary evidence pertinent to the matters under investigation; and
- Providing statements of position on the matters under investigation.

2.  DISMISSALS FOR LACK OF COOPERATION AND DISMISSALS ON THE MERITS FOR PARTIAL COOPERATION:

- a. *When the Charging Party does not respond to the Agent's request that charge be clarified by amended charge:*

If, after the Region docket the charge, it is determined that the charge needs to be clarified before the investigation can be started, the Agent assigned to the case contacts the Charging Party representative by telephone to advise of the need for clarification by an amended charge. A confirming letter of the conversation is sent advising that if the clarification is not provided by a date certain (within 10 days of date of letter), the charge will be dismissed, absent withdrawal. If an attempt at contacting by telephone was unsuccessful, Charging Party is either sent a letter or an e-mail message (record contains copy of message and certification of receipt) stating the need to clarify within a date certain or the charge will be dismissed, absent withdrawal. See [Part 2, Chapter B](#) concerning

Docketing the Charge, and in particular, clarification and the need for an amended charge.

See [ATTACHMENT 3O1](#) for a Sample Letter to Charging Party - Dismissal for Lack of Cooperation in failing to provide clarification of charge.

b. *Lack of cooperation at the outset of an investigation--no evidence submitted:*

The Agent advises the Charging Party's representative, at least once by telephone, and in a confirming letter, that the Region is considering dismissing the charge for noncooperation, and provides the Charging Party with a reasonable period of time to respond. If still unable to contact the representative by telephone, the Agent sends a letter setting forth the Region's particular concerns. Charge is not dismissed until a reasonable effort to contact the Charging Party's representative by telephone has been made and s/he has been given a reasonable time to receive the letter. If the Charging Party fails to submit the evidence requested despite the opportunity to do so, the charge is dismissed for lack of cooperation. The case file contains documentation of the unsuccessful attempts to contact the Charging Party.

See [ATTACHMENT 3O2](#) for a Sample Letter to Charging Party - Dismissal for Lack of Cooperation during the Investigation.

c. *Dismissal on the merits--additional evidence not submitted during investigation:*

This situation arises where the Charging Party has submitted some evidence that is either insufficient or incomplete and the Agent has requested that additional evidence be submitted. If the Charging Party has been given a fair opportunity to submit the evidence but did not do so, the Region dismisses the charge on the merits with a notation to that effect in the case file. Examples include:

- Repeatedly not returning phone calls;
- Not keeping telephone or meeting appointments;
- Not returning telephone affidavits;
- Not submitting documents; and
- Not providing knowledgeable witnesses.

- d. *When the Region is contacted after an established deadline but before a dismissal letter issues for failure to cooperate or before a dismissal letter issues on the merits:*

The Agent advises Charging Party's representative that a dismissal letter is being prepared but that its issuance will be delayed if the evidence is submitted within a specific time (as deemed appropriate by RA/DRD/RD). The Agent also tells the representative that any evidence received will be presented to the RD for a determination regarding whether to reopen the case for further investigation or go forward with the dismissal.

- e. *Evidence received after the established deadline but before dismissal letter issues for failure to cooperate or before dismissal issues on the merits:*

Similarly, evidence that is actually received **after** the deadline imposed but before issuance of the dismissal letter will be considered by the RD for a determination whether to reopen the case for further investigation or to go forward with the dismissal.

- f. *When a witness refuses to continue an investigative interview due to end of shift:*

See [Part 3, Chapter E](#) concerning Arranging On-Site Investigations and issues relating to official time for witnesses.

- g. *When a party continuously files a substantial block of charges at one time that have routinely been dismissed or withdrawn after a non-merit determination:*

Despite regional efforts to train/educate the Charging Party concerning the Statute and to improve labor-management relations, RDs have discretion to require these Charging Parties to submit their supporting evidence or respond in writing to questions concerning the charges, **before** determining the scope and method of the investigation. If there is no timely response, the charges are processed like other situations where the Charging Party fails to cooperate in an investigation.

- h. *Circumstances arise during the investigation where conduct inhibits investigation and Agent's response:*

- i. If a scheduled witness does not show up for an interview, the Agent gives the witness a date certain to provide the

information and/or to take a telephone affidavit. This is confirmed in a letter to the Charging Party with an admonition concerning the lack of cooperation and consequences should there be non-compliance by a date certain, i.e., dismissal.

- ii. If a representative does not make certain documents available when the Agent is on-site, as had been pre-arranged, the Agent gives the Charging Party a date certain to produce the documents and confirms this in a letter with an admonition concerning lack of cooperation and consequences should there be non-compliance by a date certain, i.e., dismissal.



The lack of cooperation discussed here does not include abusive behavior on the part of representatives or witnesses. That subject is covered in [Part 3, Chapter S](#) concerning Dealing with Parties that Display Abusive Behavior During an Investigation.

3. CASE PROCESSING TECHNIQUES:

As part of the investigatory process, RDs may exercise discretion to mandate certain case-processing techniques, such as to require attendance with a RO representative to discuss the charge.



RDs apply the following criteria in determining whether to use an alternative case-processing technique:

- If the charge evidences a relationship issue between the parties;
- The charge is a repeat filing;
- The charge is one of many charges concerning the same event that underlies each charge;
- The parties have participated in previous ADR programs; and
- The Charged Party is willing to cooperate in the alternative case-processing technique.

See [ATTACHMENT 303](#) for a Sample Letter to the parties which mandates implementation of an alternative case processing technique.



Although the Charging Party may be required to participate in the above alternative case processing technique, it cannot be required to settle a charge.



[Part 2, Chapter B](#) concerning Docketing the Charge;

[Part 3, Chapter E](#) concerning Arranging On-Site Investigations; and

[Part 3, Chapter S](#) concerning Dealing with Parties that Display Abusive Behavior During an Investigation.

RESERVED

P. DUTY OF THE CHARGED PARTY

OVERVIEW: An investigation is conducted effectively and obtains the best evidence upon which an RD may rely if the Charged Party, as well as the Charging Party, cooperates during an investigation. Such cooperation is contemplated under § [2423.8\(b\)](#), which does not distinguish between the level of cooperation given by the two parties.

OBJECTIVE: To provide guidance concerning the Charged Party's duty to cooperate during the course of an investigation.

1. CHARGED PARTY COOPERATION IS SOUGHT THROUGHOUT THE ENTIRE PROCESSING OF THE CHARGE:

A Charged Party's cooperation is specifically sought concerning the following matters:

- In the opening letter and the first telephone contact with the Charged Party's representative where the benefits of cooperation are explained;
- In arranging for § [7131\(c\)](#) official time;
- In seeking a position statement and documents, even if the Charged Party will not allow witnesses to be interviewed, or has no witnesses (See § [2423.8\(b\)\(3\)](#)); and
- In seeking background information even if no evidence through witnesses and/or documents is provided. For example, this information may be in the form of:
 - Unsworn position statements; or
 - Personal telephone interviews which do not lead to affidavits or confirming letters.



Evidence obtained from Charged Parties meet the same standards as evidence obtained from Charging Parties. The Agent does not close an investigation without determining

whether the Charged Party will provide evidence meeting these standards.

2. USE OF THE INVESTIGATORY SUBPOENA:

Where a Charged Party fails or refuses to cooperate and the RD has deemed such cooperation appropriate, the GC may, in appropriate cases, exercise authority pursuant to § [7132](#) of the Statute to issue an investigatory subpoena. See [Part 3 Chapter K](#) for a discussion of investigatory subpoenas including criteria for determining when to request issuance of an investigatory subpoena.



[Part 3, Chapter K](#) concerning Investigatory Subpoenas.

Q. RESOLVING DISPUTES DURING INVESTIGATIONS AND PRIOR TO A MERIT DETERMINATION

OVERVIEW: RO Agents encourage the informal resolution of the allegations in the ULP charge throughout the investigation prior to a determination on the merits of the charge. See § [2423.1\(b\)](#). Agents assist the parties, using an interest-based problem-solving approach, in resolving the dispute which gave rise to the filing of the charge.

OBJECTIVE: To provide the Agent with the principles and general techniques which facilitate the informal resolution of ULP charges.

1. GUIDELINES WHEN ASSISTING THE PARTIES IN RESOLVING THEIR DISPUTE:

- Agents employ an interest-based problem-solving approach, that utilizes skills, techniques, and strategies, when assisting the parties in resolving the dispute which gave rise to the filing of the ULP charge;
- This dispute resolution technique is employed as part of the investigation of the charge and does not constitute a separate alternative case processing procedure, as discussed in [Part 3, Chapter B](#);



Attempts to resolve the dispute informally do not delay the investigation or the RD's decision on the merits of the charge. Rather, as part of initially exploring the allegations and facts of the case, the Agent utilizes his/her experience, knowledge of the parties, and acceptance as a neutral, to uncover the parties' respective interests in the matter in dispute and suggest options which resolve the dispute and result in the withdrawal of the charge.

- The Agent explains the benefits of resolution and clarifies the relationship between the attempt to resolve the dispute prior to an

RD determination on the merits of the charge and the taking of positions and evidence;

- Discussions occur on site or telephonically, if possible, with both parties together. If not possible, the Agent communicates separately with the parties but continues to employ an interest-based approach;
- Agents propose solutions and prepare draft resolutions, but the parties must adopt any resolution as their own, share a common understanding of both parties' commitments under the resolution and understand the process to resolve any allegations of non-compliance with that resolution; and
- If the parties are unable to resolve their dispute during initial conversations, the Agent begins taking evidence and, as appropriate during the investigation, continues to attempt resolution of the dispute.

2. +P CRITERIA AND PRINCIPLES GOVERNING THE RESOLUTION OF ULP CHARGES:

An Agent applies these criteria and principles when assisting the parties in resolving the dispute which gave rise to the filing of the ULP charge prior to an RD determination on the merits of the charge:

- Attempt to resolve only those charges that lend themselves to a party resolution. For example, charges which fall within the scope of investigations criteria, listed at [Part 3, Chapter D](#), concerning Scope of Investigations, may not be appropriate;
- Utilize interest-based problem-solving principles (issues, interests, options, criteria and solutions);
- Avoid “shuttle diplomacy”, i.e., acting as a messenger between the parties’ offers and counteroffers;
- Explore both parties’ interests, not just what the charged party is willing “to give up” to “get rid of” the charge;
- Attempt to discuss the resolution with both parties together, but the same techniques can be utilized with separate discussions;

- Time is of the essence. If there is no resolution and withdrawal of the charge, the taking of evidence immediately commences if on-site or as soon as practicable if discussions were telephonic;
- No evidence (testimonial or documentary) is initially taken on the merits of the charge, although facts may be discussed to place the issue and the parties' interests in context;
- No discussion of the merits of the charge;
- The applicable law may be discussed, as appropriate, especially when exploring the parties' respective best alternatives to a negotiated agreement (BATNAs);
- Both parties understand how the investigation proceeds before beginning; that is, attempts to resolve the dispute and then the taking of evidence; and
- The criterion utilized in reaching agreement is whether the resolution is legal and consistent with the purposes and policies of the Statute, just as when unsolicited withdrawals are submitted based on a party agreement.

3. 

**APPLICATION OF INTEREST-BASED PROBLEM-SOLVING
PROCESS TO RESOLUTION OF ULP CHARGES:**

- Agent describes the process:
 - No evidence (affidavits or documentary) is initially taken on the merits of the charge--although facts may be discussed to place the issue and the parties' interests in context;
 - No discussion of the merits of the charge--although the applicable law may be discussed;
 - If no mutual resolution of the dispute and Charging Party withdrawal of the charge, the investigation proceeds with the taking of evidence, but resolution still may occur anytime thereafter;
 - Party resolution has the same force and effect as any other party agreement resulting in the withdrawal of the charge;

- The parties own any agreement and must agree and understand both parties' commitments;
- Initial time limits on discussions are established; and
- Clarification of the necessity to empower the parties' representatives to agree to resolution.
- The Agent clarifies and identifies the **dispute** that caused the filing of the charge and tests that identification with the parties respectively.
- The Agent understands the **parties' respective interests** and tests that understanding with the parties respectively.
- The Agent **explains the approach** to developing a resolution. The Agent and parties present options, which are explored and modified, and no party commits until final agreement is reached.
- The Agent **controls and implements** the process, exploring the parties' alternatives, as appropriate.
- The Agent assists the parties in **memorializing** their agreement and the charge is **withdrawn**.



[Part 3, Chapter B](#) concerning Alternative Case Processing Procedure;
and

[Part 3, Chapter D](#) concerning Scope of Investigations.

R. ENSURING EMPLOYEE SAFETY DURING AN INVESTIGATION

OVERVIEW: It is essential to ensure the safety of Agents and other people who are involved in an investigation. The Agent must know what to do should a situation arise that may compromise personal safety, whether at the RO or in the field.

OBJECTIVE: To provide guidance concerning safety during an investigation and the procedure to follow when a safety concern arises during the course of an investigation.

1. DEFINITIONS OF POTENTIALLY THREATENING SITUATIONS^{*/}:

a. *Workplace violence:*

An aggressive action intended to cause, or capable of causing, death or serious bodily injury to oneself or others, or damage to property. Workplace violence includes abuse of authority, intimidating or harassing behavior, threats, and hostile and abusive language.

b. *Assault:*

To attack someone physically or verbally, causing bodily or emotional injury, pain and/or distress. This might involve the use of a weapon, and includes actions, such as hitting, punching, pushing, poking, or kicking.

c. *Intimidating or harassing behavior:*

^{*/} HEALTH AND HUMAN SERVICES DEPARTMENT, GUIDELINES FOR UNDERSTANDING AND RESPONDING TO VIOLENCE IN THE WORKPLACE 3-5 (1996).

Threats or other conduct which create a hostile environment, impairs Agency operations, or frightens, alarms or inhibits others. Psychological intimidation or harassment includes making statements which may be false, malicious, disparaging, derogatory, rude, disrespectful, abusive, obnoxious, insubordinate, or which have the intent to hurt others' reputation. Physical intimidation or harassment may include holding, impeding or blocking movement, following, stalking, touching or any other inappropriate physical contact or advances.

d. *Stalking:*

Malicious approach or pursuit of another person with intent to create fear of serious bodily injury or death.

e. *Threat:*

Any oral or written expression or gesture that conveys an intent to cause physical harm to people or property. Statements such as, "I'll get him" or "if you don't see it my way you'll end up just like those people at the Post Office" are examples of threatening expressions.



The above definitions are not all inclusive. Employees should report incidents of workplace violence even if they might not fall within a particular definition. There is no standardized profile of a potentially threatening person or situation and an individual's "gut feeling" may be the best judge of a situation. Put simply, an employee knows a threat or intimidation or other disruptive behavior when s/he experiences it. Always err on the side of caution. All reports of incidents will be taken seriously.

2. ROLES AND RESPONSIBILITIES OF ALL EMPLOYEES:

- To report promptly any acts of violence, threats, and similar disruptive behavior according to the procedure detailed below;

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- To interact responsibly with those persons who are involved in the investigation, including all witnesses, the public, and other employees;
- To cooperate fully in any internal or external investigations/assessments of allegations of workplace violence; and
- If a manager, to take whatever action is appropriate under the circumstances to ensure the safety of all employees; to report all incidents to the FLRA's OIG; and to implement any corrective measures identified by the OIG or other management authority with the responsibility and authority to make such recommendation.

**3. STEPS TO FOLLOW WHEN CONFRONTED BY THREATENING BEHAVIOR
POSING AN IMMINENT DANGER:**

Situations are so varied that it is difficult to draw up a set of procedures that work in all situations. The following list of steps is intended as a guide:

- Remain as calm as possible;
- Secure your own safety--never stand directly in front of or make sudden movements with a violent or hostile person and, if possible, remove yourself from the room;
- Immediately dial 911 to summon the local authorities;
- Continue to remain calm, speaking slowly, softly and clearly;
- Ask the person to sit down; see if s/he is able to follow directions; and
- Be careful not to provoke the person by being critical or judgmental and not appearing to be empathetic.

4. REPORTING POTENTIALLY THREATENING INCIDENT:

- As soon as possible after a potentially threatening incident occurs, the Agent calls regional management and reports the incident;
- The appropriate regional manager notifies the IG at 202-482-6570, immediately and then notifies the OGC;
- Within the next business day, the Agent prepares a written report of the incident regional management explaining the facts;
- The incident is documented in the case file; and
- The IG takes action, as appropriate.

5. CONTENTS OF THE AGENT'S REPORT:

A report of a threatening incident contains the following information:

- Name of the person making threats and his/her relationship to the FLRA;
- Name of the potential victim;
- Name of any witnesses;
- Where/when (date) the incident occurred;
- The specific language of the threat or harassing behavior; and
- If known, any precursor events to the incident.

6. RD CONSIDERS CHANGES IN THE RELATIONSHIP WITH A PARTY IN LIGHT OF AN INCIDENT:

After the threatening incident has occurred, the RD exercises discretion in considering whether it is necessary to change the way in which the RO relates with the party in light of the circumstances concerning the incident. Before doing so, the RD consults with OGC HQ. For example, a policy determination may be made concerning whether future contact with a party will be by telephone or require the party to come to the RO.



At any time during the course of an investigation, it is appropriate for the Agent to terminate an investigatory activity s/he is engaged in if the Agent perceives that his/her safety is an issue.

7. STEPS TO REPORT NON-THREATENING INCIDENTS:

See [Part 3, Chapter S](#) concerning Dealing with Parties that Display Abusive Behavior During an Investigation. These instances do not involve behavior which could reasonably be construed to be a threat. Examples are:
(a) making false statements; (b) disrupting an

interview; (c) continued use of profanity after the individual has been requested to cease its use; (d) making harassing statements; and (e) other inappropriate disrespectful behavior. The Agent reports the incident to regional management as soon as possible.



[Part 3, Chapter S](#) concerning Dealing with Parties who Display Abusive Behavior During an Investigation.

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RESERVED

**S. DEALING WITH PARTIES WHO DISPLAY ABUSIVE
BEHAVIOR DURING AN INVESTIGATION**

OVERVIEW: It is the policy of the OGC to treat its customers in a professional manner with respect and courtesy, and to expect that OGC employees will be treated similarly by its customers. Abusive behavior, including the use of profanity or other offensive language, will not be tolerated. A party's representative or witness's behavior during an investigation that interferes with the investigation, but does not threaten employee safety or constitute a lack of cooperation within the meaning of § 2423.8(b) (see [Part 3, Chapter 0](#) concerning Duty of the Charging Party), may constitute such abusive behavior. This type of behavior, which may occur telephonically or on-site, is unacceptable and will not be tolerated. **It is important to note that to determine whether a particular action constitutes abusive behavior requires an exercise of judgment.** For example, an Agent must differentiate between an individual who is simply frustrated with his/her circumstances and an individual whose behavior is, in fact, abusive.

OBJECTIVE: To provide guidance and the procedure to follow when a representative or witness is abusive during the course of an investigation.

1. DEFINITION OF ABUSIVE BEHAVIOR:

Abusive behavior is conduct which does not threaten the safety of an Agent, but which interferes with the

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ability of an Agent to perform his/her duties.
Examples of abusive behavior are:

- Disrupting an interview;
- Continued use of profanity after the Agent has requested that its use cease;
- Making harassing, malicious, rude, derogatory, insubordinate or disparaging statements;
- Insisting on discussing disputes with, or disagreements about the actions of, or allegations against, the OGC, the Region, the FLRA, or a particular OGC employee, or other extraneous matters, after the Agent has requested the individual to restrict any comments to the investigation; and
- Other inappropriate or disrespectful behavior that interferes with the Agent's ability to conduct the investigation.



*Employees are encouraged to report incidents that involve abusive behavior that might not fall within these particular definitions. There is no standardized profile of behavior that interferes with an investigation and subjects an Agent to abuse. If an Agent is unsure whether the conduct s/he has been subjected to is abusive behavior by a representative or a witness, the Agent reports the situation to the Region. In addition, see [Part 3, Chapter R](#) concerning Ensuring Employee Safety During an Investigation for a discussion of how to handle **threatening** situations.*

2. ROLES AND RESPONSIBILITIES OF ALL EMPLOYEES:

- To report promptly, under the below procedure, when an employee believes that s/he is being subjected to abusive behavior;

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- To interact responsibly with those persons who are involved in the investigation, including all witnesses, the public, and other employees;
- To inform those persons who are involved in the investigation, including all witnesses, the public, and other employees, when the Agent perceives that their behavior is unacceptable and request that the behavior cease; and
- If a manager, to take whatever action is appropriate under the circumstances to ensure that investigations are not interfered with and that Agents are not abused.

3. STEPS TO FOLLOW IF EXPERIENCING ABUSIVE BEHAVIOR:

a. *General situations:*

Situations are so varied that it is difficult to draw up a set of procedures that work in all situations. The following list of steps is intended as a guide:

- Do not respond in kind to the individual;
- In general, inform the individual in a professional and calm manner that: (a) the displayed behavior is unacceptable and (b) the Agent will terminate the conversation if the behavior continues.

b. *Conduct during a telephone conversation:*

If the conduct occurs during a telephone conversation, and after the above general protocol is followed, the conduct continues, inform the individual that the Agent will not continue the call while the behavior continues and that the Agent will call back to continue the conversation at a later date. The Agent then makes a note to the file and discusses the matter with RO management.

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- c. *Conduct in the RO or during an on-site visit in the RO city:*

If the conduct occurs in the RO or during an on-site visit in the RO city, and after the above general protocol is followed, the conduct continues, inform the individual that the Agent is taking a break to allow the individual to modify the behavior. Prior to terminating the investigation, the Agent contacts regional management to obtain guidance on whether the interview should be continued or whether other action is necessary. The Agent then makes a note to the file and follows the guidance received.

- d. *Conduct occurs during an on-site visit outside of the RO city:*

If the conduct occurs during an on-site visit outside of the RO city, and after the above general protocol is followed the conduct continues, inform the individual that the Agent is taking a break to allow the individual to modify the behavior. Unless previously discussed with regional management, the Agent calls regional management to obtain guidance on whether the interview should be continued if the behavior continues after the break. The Agent then makes a note to the file and follows the guidance received.

4. THE RD CONSIDERS CHANGES IN THE RELATIONSHIP WITH A PARTY IN LIGHT OF AN INCIDENT:

A situation may arise when, despite following the above protocol, a particular representative of a party continues a pattern of abusive behavior during investigations, which, although neither threatening nor uncooperative, interferes with the investigation. Prior to changing the manner in which the Region will deal with the party (for example, limiting future contact with the party to telephone or meetings at the RO), the RD consults with OGC HQ.



Part 3, Chapter 0 concerning Duty of the Charging Party; and

The Investigation
Dealing with Parties Who Display
Abusive Behavior During an Investigation

[Part 3, Chapter R](#) concerning Ensuring Employee Safety
During an Investigation.

PART 4

POST-INVESTIGATION

**A. AGENT'S INVOLVEMENT IN WITHDRAWAL REQUESTS
PRIOR TO A REGIONAL DIRECTOR
MERIT DETERMINATION**

OVERVIEW: An Agent may solicit the withdrawal of a charge before an RD determination on the merits in limited circumstances.

OBJECTIVE: To provide criteria to guide an Agent in determining whether s/he may solicit withdrawal in a given case before an RD merit determination.

1.  **+P STANDARDS UNDER WHICH RO AGENTS CAN SOLICIT
WITHDRAWAL OF A CHARGE BEFORE A MERIT DETERMINATION:**

a. *The Standards:*

An Agent may solicit withdrawal of a charge prior to an RD decision on the merits and without supervisory approval only in the following limited circumstances:

- **It is manifestly clear under the case law that the charge has no merit.**

It is manifestly clear that even if all the allegations in the charge, and all the allegations made by the Charging Party while discussing the charge, are true, there would be no ULP and the RD would dismiss the charge, absent withdrawal.

- **It is manifestly clear that there is no jurisdiction over the charge.**

For example, (1) the charge was filed untimely, the exceptions in § [7118](#)(a)(4)(B) of the Statute are inapplicable, and the violation is not alleged to be of a continuing nature; (2)

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the charge is barred by § 7116(d) of the Statute and there is no question that the issues are identical under Authority precedent; (3) the charge on its face and the discussion with the Charging Party reveals that an ULP has not been stated; or (4) the Charged Party has filed with the wrong third party.

- **It is manifestly clear that an element of the statutory violation is missing.**

For example, it is undisputed that no request was made for a Union representative at an investigatory examination or the exclusive representative received actual, timely notice of a formal discussion.



Agents may always, at any time, contact their supervisor telephonically, or in person, to discuss whether withdrawal should be solicited prior to an RD decision. Similarly, a supervisor may always instruct an Agent in a particular case not to solicit withdrawal for any reason absent supervisory approval. All discussions with a supervisor and with the Charging Party concerning solicitation of a withdrawal prior to a RD decision are documented in the file, even if a withdrawal request is not received.

- b.  *The Agent's explanation accompanying the solicitation:*

It is critical to the integrity of the investigative and decision-making process that the parties have faith in the process. The following disclosures are intended to ensure that the Charging Party is aware of the right to receive an RD decision on a charge and that the RD has not prejudged the charge. This disclosure is required regardless of the criteria relied upon by the Agent when soliciting withdrawal prior to a RD decision on the merits.

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If an Agent solicits the withdrawal of a charge prior to an RD decision on the merits under these criteria, the Agent informs the Charging Party that:

- The basis for the Agent's withdrawal solicitation reflects only the Agent's view of the evidence collected thus far;
- Only the RD makes decisions on the merits of a charge, the RD has not yet made any decision on the charge, and the RD may evaluate the issues and evidence differently than the Agent;
- The Charging Party has a right to such further investigation of the charge (if not withdrawn) to be decided by the Region, if the RD does not dismiss the charge at this stage of the investigation consistent with the Quality Standards for Investigations set forth in [Part 3, Chapter C](#), and the Scope of Investigations criteria set forth at [Part 3, Chapter D](#);
- The RD has not prejudged the charge; and
- The Charging Party may consider seeking a party resolution of the dispute prior to completion of the investigation and an RD decision on the merits.



Withdrawal of a charge prior to an RD decision on the merits never occurs without providing the Charging Party an opportunity, as appropriate, to discuss the background of the charge and the basic facts and theory supporting the charge. Thus, no withdrawal is solicited until there has been this initial opportunity provided to the Charging Party.

2. SOLICITATION OF A WITHDRAWAL PRIOR TO AN RD DECISION ON THE MERITS BASED ON AN AGENT'S EVALUATION OF THE WEIGHT OF THE EVIDENCE :

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The solicitation of a withdrawal of a charge based on the weight of the evidence differs from a solicitation based on the three standards discussed above in #1. Unlike the three standards above, which are based on a clear legal analysis, an evaluation of the weight of the evidence requires a deliberative, decision-making approach.

RDs retain the discretion to authorize individual Agents to discuss the Agent's view of the weight of the evidence and solicit a withdrawal of the charge based on that assessment without supervisory approval on a case-by-case basis. In this instance, an Agent may have a frank discussion of his/her view of the evidence and solicit a withdrawal of a charge prior to an RD's merit decision based on the Agent's assessment of the weight of the evidence obtained thus far in an investigation.



Supervisory approval normally is required prior to solicitation of a withdrawal based on the Agent's view of the evidence to maintain the integrity of the decision-making process. The best reasoned decisions supported by rational argument are obtained through the Agenda process whereby different ideas are discussed and different perspectives of the evidence are presented and debated before the decision-maker, the RD. The Agenda process also provides a valuable opportunity to train employees and educate all agenda participants on an on-going basis. For these reasons, Agents only solicit withdrawal based on the Agent's view of the evidence prior to an RD merits decision after supervisory approval or based on prior pre-investigation supervisory authorization.

3. HOW THE AGENT PROCEEDS IF A WITHDRAWAL REQUEST IS, OR IS NOT, SUBMITTED:

- a. *The Charging Party submits withdrawal request:*
The Agent informs the RD and notes in the file the standard relied upon and the rationale for the Agent's

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solicitation to enable the RD to determine whether to approve the withdrawal. The RD issues a letter to both parties confirming that a charge has been withdrawn based on the Charging Party's request. Confirmation of withdrawal of the charge may **not** be made by e-mail.

- b. *The Charging Party does **not** submit withdrawal request:*

In addition to documenting the file, the Agent ceases taking additional evidence and informs RO management so that the RD, under the Quality Standards for Investigations ([Part 3, Chapter C](#)) and the Scope of Investigations ([Part 3, Chapter D](#)), can determine whether the investigation is complete and an RD decision on the merits is rendered at this stage of processing of the charge. The Agent ensures that the investigative file contains the information upon which the Agent based the solicitation.



No additional evidence is taken because the Agent has concluded, in essence, that: (a) under the scope of investigation criteria, the investigation has been completed; (b) there is no merit to the charge, and (c) the case is presented to the RD for decision on the merits. Thus, it would not be possible then to complete an investigation without the Charging Party also perceiving that any additional investigation is either unfair or not impartial.

4. WHEN THE RD DISAGREES WITH AN AGENT'S DECISION TO SOLICIT A WITHDRAWAL:

Should an RD disagree with an Agent's decision to solicit withdrawal and determine that more evidence is needed, another Agent will be assigned to investigate the case, unless the parties and the RD do not object to the same Agent continuing the investigation.



[Part 3, Chapter C](#) concerning Quality Standards for Investigations;

Part 3, Chapter D concerning Scope of Investigations;
and

Part 4, Chapter B concerning Regional Director Approval
of Request to Withdraw Charge Prior to a Regional
Director Merit Determination.

**Post-Investigation
Agent's Involvement in Withdrawal Requests
Prior to an RD Merit Determination**

RESERVED

**B. REGIONAL DIRECTOR APPROVAL OF
REQUEST TO WITHDRAW CHARGE PRIOR TO A
REGIONAL DIRECTOR MERIT DETERMINATION**

OVERVIEW: After a Charging Party has submitted a withdrawal request before a merit determination has been made, the Agent forwards the case file to the RD for review and approval of the withdrawal request.

OBJECTIVE: To provide guidance concerning the process of withdrawal requests and the process by which a withdrawal request may be rescinded.

1. A WITHDRAWAL REQUEST PRIOR TO A NON-MERIT DETERMINATION:

The Agent notes in the case file whether the withdrawal request was solicited or unsolicited.

See [ATTACHMENT 4B1](#) for a Sample Letter Approving a Withdrawal Request.

2. WITHDRAWAL REQUEST WHEN RESOLUTION IS A PSIWOC:

a.  *Regions record a resolution as a PSIWOC:*

i. When a resolution is a PSIWOC:

If the Region obtains some evidence or has some indication (oral or written) as to the terms of the resolution, and determines that the resolution settles the ULP dispute and is consistent with the purposes and policies of the Statute resulting in the withdrawal of the charge, it is recorded as a PSIWOC.



*If the parties do not provide some evidence of the terms of a resolution, it is recorded as a withdrawal, **not** as a PSIWOC.*

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- ii. Case file documentation of PSIWOC:
 - The Agent's notes on his/her involvement in obtaining the resolution; and
 - Includes a copy of the resolution or describes the terms of the resolution.

b. *Enforcement of PSIWOC:*

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3. **PARTIAL WITHDRAWAL:**

Occasionally, the Charging Party will request that certain allegations contained within the charge be withdrawn. The Agent notes in the case file whether the withdrawal request was solicited or unsolicited.

See [ATTACHMENT 4B2](#) for a Sample Letter Approving a Partial Withdrawal.

4. **RESCINDING A WITHDRAWAL REQUEST:**



In the interest of finality, fairness and uniformity, the following applies:

a. *When approval of request has not yet been mailed:*

The Region approves the request to rescind the withdrawal request. This usually occurs within a brief period (usually within a few hours) of the same day when the request was made because the Charging Party has reconsidered.

b. *When the letter approving request has been mailed before the request to rescind the withdrawal was received:*

A party has to show cause why approval of the request to rescind the withdrawal request should be granted. Only for **extraordinary reasons** will request be granted. For example:

- An OGC administrative error occurred which is linked to the party's lack of understanding evidencing no intent to withdraw; or
- The Charging Party's representative lacked authority to withdraw the charge.

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Charge Prior to an RD Merit Determination**

See [ATTACHMENT 4B3](#) for a Model Dismissal Letter which includes a Footnote Approving a Request to Rescind a Request to Withdraw a Charge.



LM, Part , Chapter H concerning Post-Complaint/Pre-hearing Settlements.

**Post-Investigation
RD Approval of Request to Withdraw
Charge Prior to an RD Merit Determination**

RESERVED

C. CONSULTATION, ADVICE AND CLEARANCE

OVERVIEW: Regions contact the OGC HQ to: (a) discuss novel legal issues, either generally or case-specific; (b) to ask questions relating to this Manual or (c) seek legal Advice pertaining to a certain case.

OBJECTIVE: To provide guidance concerning the circumstances when it is appropriate for a Region to request Consultation, Advice or Clearance from the OGC and the method for doing so.

1. CONSULTATION:

RDs/RAs/DRDs and other staff with regional management approval are encouraged to call the OGC to discuss novel issues or questions relating to this Manual. The discussions allow for the mutual exchange of ideas that may serve as a precipitating factor in developing a national policy on a certain issue; and may provide a basis for clarifying or revising the ULPCHM.

2. ADVICE:

a. *When advice is requested:*

An RD requests advice by memorandum or telephone concerning a novel issue in a case, as the circumstances require. These include:

- Novel legal questions or factual situations;
- Issues involving OGC policy;
- Issues that may arise in different Regions with the same Unions (e.g., interpretation of a contract clause in a nationwide contract);
- An alleged violation of § [7116](#)(b)(7) of the Statute;

- A request for injunctive relief pursuant to § [7123](#)(d) of the Statute where the RD has determined that issuance of a complaint is warranted;
- The enforcement of a subpoena issued by the ALJ; and
- Issues specifically referenced in GC memoranda, Guidances, Policies, other advice memoranda, strategies, and any other documents which state that certain issues are submitted for advice.

b. *Contents of memorandum requesting advice:*

A request for advice is usually processed by memorandum, and a copy is sent by e-mail to the OGC, which sets forth the following:

- The allegation;
- The issue;
- The relevant facts;
- The applicable law;
- A thorough analysis of the law as applied to the facts in the case;
- The pros and cons as to the outcomes of the case;
- The recommendation as to the disposition; and
- The proposed remedy, if applicable.



Advice is rendered based on the facts as found by the RD in the memorandum requesting advice.

3. CLEARANCE :

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The RD obtains approval or clearance before taking any action based on the following:

- Alleged noncompliance with an Authority decision;
- A challenge to the Authority's jurisdiction;
- Contemplated approval of an unsolicited withdrawal request after injunctive relief has been obtained;
- Approval of a remedy different than that authorized in an advice memo from OGC; and
- Issues specifically referenced in GC memoranda, Guidances, Policies, other advice memoranda, strategies, and any other documents which state that certain issues are submitted for clearance.

RESERVED

D. REGIONAL DIRECTOR MERIT DETERMINATIONS

OVERVIEW: Once an investigation has been completed and in the absence of a settlement or withdrawal of the charge, the case is ready to present to the RD for a merit determination.

OBJECTIVE: To provide guidance on matters relating to an RD's merit determination which include: (a) knowing when a case is ready for decision; (b) descriptions of different ways in which a case is presented to an RD for decision; (c) how to address credibility issues; and (d) documenting the decision in the case file.

1. WHEN A CASE IS READY FOR PRESENTATION TO THE RD FOR DECISION:

In accordance with the Chapter entitled Scope of Investigations, [Part 3, Chapter D](#), ULP charges are investigated to the extent that sufficient information has been revealed which permits the RD to render a determination on the merits of the charge.



*For example, a case is considered ready for presentation to the RD if the investigation reveals that an element of a violation has not been established. In a discrimination case, where the Charging Party alleges a violation of § [7116\(a\)\(1\), \(2\)](#), if the investigation discloses that the unit employee against whom the alleged discriminatory action was taken **was not** involved in protected activity, the case has been investigated consistent with the scope of investigations requirement and is ready to present to the RD.*

2. PRESENTATION OF THE CASE TO THE RD:

a. *Documenting the decision in the case file:*

Except in cases where the disposition (usually on technical grounds) is unmistakable, a written pre-decisional report and recommendation by the investigating Agent/team and/or a written post-decisional report is completed. Either report, whether it precedes or follows the Region's decision, addresses every allegation of the charge by: (a) defining the nature of the claimed violation; (b) describing and assessing the relevant evidence; (c) identifying the applicable legal principles; and, (d) recommending an appropriate disposition--including, if a complaint is to be issued, recommendations on remedy and settlement prospects. The report also notes any defects of timeliness, jurisdiction or service of the charge, as well as any difficulties in obtaining cooperation from the parties.



Whatever technique is used to present the case to the RD, it must contain the Agent's recommendation

Whenever an RD decides not to issue a complaint on any portion of a charge and his/her reasons for doing so differ from those of the Agent, the case file contains a statement supporting the RD's rationale, unless the reasons for the RD's decision are fully stated in the dismissal letter (see [Part 4, Chapter H](#) concerning Dismissal Letters). Similarly, whenever an RD decides to issue a complaint on any portion of a charge for reasons different from those in the Agent's recommendation, the case file contains an explanation of that decision.

b. *Methods of presentation of the case to the RD:*

RDs have discretion in determining how a case is presented for review and the format for presenting a case in the chosen method. Among the methods for presenting the case are the following:

- **FINAL INVESTIGATIVE REPORT**

The purpose of an FIR is to give the RD a clear, concise, and comprehensive summary of the case including the following information: (a) the parties; (b) the date the charge was filed; (c) the method of investigation; (d) the allegations; (e) material facts; (f) applicable law; (g) analysis (application of law to facts); and (h) recommendations.

In addition, as applicable, the FIR addresses: (a) relevant contract provisions; (b) related cases; (c) experience with ADR programs; (d) results of settlements efforts, if any; (e) proposed remedy if meritorious, including documentation in the case file supporting a nontraditional remedy; and (f) triable issues (if meritorious).

The FIR is a self-contained document, i.e., the RD should not need to refer to the case file for a thorough understanding of the facts and issues in the case.

See [ATTACHMENT 4D1](#) for a Sample FIR.

- **AGENDA**

The goal of an Agenda conference is the same as that of an FIR described above. An Agenda may be held in cases where an FIR has also been completed or, as appropriate, in cases where it is not necessary to complete an FIR. The Agenda is used when regional staff come together to discuss case/s. Attendance at the Agenda may vary according to the particular case and practices of the region. Staff present at an Agenda may be the RD, RA/DRD, team leaders, other agents who have similar cases, trial attorney (if known) and new employees. Because all staff are encouraged to contribute to the discussion, unlike an FIR, an Agenda gives the RD the added benefit of oral staff input before s/he makes a merit determination. New employees benefit by attending Agenda conferences because it can be used as an effective training tool.

The results of an agenda conference are documented in an Agenda Minute. See [ATTACHMENT 4D2](#) for a Sample Agenda Minute.

- **OTHER DECISION-MAKING ALTERNATIVES**

The RD may exercise his/her discretion to utilize other decision-making alternatives such as: (a) team presentation to RD; and (b) delegation to the RA/DRD to make the decision on certain cases based on certain criteria:

+P Criteria governing the delegation of decision-making:

- RA/DRD agreement with the Agent's conclusion is required (if there is no agreement, the case is either presented to the RD or the Agent resumes the investigation);
- The case must not be complex;
- There must be clear case precedent;
- The charge may be duplicative; and
- The case may be disposed of on jurisdictional grounds.

c. *Merit determinations:*

It is especially important in cases where the pre-decisional report (FIR, Agenda Minute) recommends issuance of a complaint, to make sure the discussion of the witnesses, their testimony and the documentary evidence, is complete and accurate, and proves the violation and remedy. Also, the Agent indicates those documents that should be considered for subpoena. This helps both to ensure that the complaint is complete and accurate and to prepare for eventual litigation of the case.

3. **WEIGHING THE EVIDENCE IN THE INVESTIGATIVE AND DECISION-MAKING PROCESS:**

The purpose of an investigation of a ULP charge is to ascertain, analyze and apply relevant facts in order to determine whether a violation of the Statute has occurred.

a. *How to weigh the evidence and reconcile*

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All relevant evidence is evaluated in light of the totality of the evidence adduced during the investigation to determine if it is more probable than not that the event underlying the ULP occurred as the Charging Party has alleged. In this regard, consideration is given to:

- The existence of corroborating evidence;

Is there other testimonial or documentary evidence supporting the Charging Party's allegations?
- The witness's opportunity and capacity to observe the event;

- Whether other witnesses had the opportunity and capacity to observe the event;
- Consistency of the witness's statement;
- Contradiction, by or consistency, with other evidence;
- Inherent improbability;
- How likely is it that the event occurred in the manner described by the testimony?

See 24th Combat Support Group, Howard Air Force Base, Republic of Panama, 55 FLRA No. 45, 55 FLRA 273 (1999) (citing U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Ocean Service, Coast and Geodetic Survey, Aeronautical Charting Division, Washington, D.C., 54 FLRA No. 92, 54 FLRA 987, 54 FLRA 987, 1006-07 and n.11 (1998) (citing Hillen v. Department of the Army, 35 MSPR 453, 458 (1987)).

- b. *The RD does not issue complaint when there is insufficient credible evidence:*

An RD need not issue a complaint when the Charging Party witness presents a story which, although not contradicted by another witness, tends to be incredible when evaluated in light of the factors above. The consideration in deciding whether to issue a complaint is whether the evidence, taken as a whole, establishes that a violation has occurred. A witness's credibility is one of many factors that goes into the consideration.

In dismissing a case because of insufficient credible evidence, the record contains sufficient documentation supporting the decision which explains the reason for the dismissal.

4. PRE-COMPLAINT UNILATERAL SETTLEMENT AGREEMENTS WHERE THE RD HAS MADE A MERIT DETERMINATION:

a. *Regulatory authority:*

Section [2423.11](#)(b) authorizes RDs, upon a belief that the policies of the Statute would be effectuated and when the Charging Party refuses to enter into an informal settlement offered by the Charged Party, to enter into the agreement and decline to issue the complaint. See [Part 4, Chapter G](#) for a listing of the criteria an RD applies in approving a settlement agreement. The Charging Party has the right to appeal.

b. *Notification upon approval:*

i. Notification to the Charged Party:

When the RD approves an informal unilateral settlement agreement, the Charged Party is notified by letter along with a copy of the approved agreement and a notice, if applicable, and instructions that the performance of the terms of the agreement will be deferred until the Charged Party has been advised that the Charging Party has not filed an appeal or that the GC has sustained the action of the RD. See [ATTACHMENT 4D3](#) for a Sample Letter to Charged Party and [4D4](#) for a Sample Letter to Charged Party after GC denied appeal and Respondent should begin compliance.

ii. Notification to the Charging Party:

The Charging Party is also notified by letter of the approval of the agreement. See [ATTACHMENT 4D5](#) for a Sample Letter. In the letter, the Charging Party is given the reasons why its objections to the settlement agreement were not considered sufficient to bar the approval of the unilateral settlement by the RD. The Charging Party is also apprised of its appeal rights to the GC and is sent a copy of the approved agreement.

5. **PRE-COMPLAINT BILATERAL SETTLEMENT AGREEMENTS WHERE RD HAS MADE A MERIT DETERMINATION:**

a. *Regulatory authority:*

Section [2423.12](#)(a) provides for bilateral (or "all party" if there are multiple Charging Parties or Charged Parties) settlements, defining them as settlements to be approved by the RD, and monitored by the RD to ensure compliance.

b. *Notification upon approval:*

i. Notification to the Charged Party:

When the RD approves a bilateral settlement agreement, the Charged Party is notified by letter along with a copy of the approved agreement and instructions to take immediately the action(s) detailed in the agreement. If the agreement provides for the posting of a notice, the notice is also sent to the Charged Party for signing, dating, duplicating and posting. See [ATTACHMENT 4D6](#) for a Sample Letter.

ii. Notification to the Charging Party:

The Charging Party and other interested parties are also sent copies of such notification.

See [Part 4, Chapter G](#) for a more in-depth discussion of settlements.



[Part 4, Chapter G](#) concerning Settlements; and

[Part 4, Chapter H](#) concerning Dismissal Letters.

RESERVED

**E. SOLICITING WITHDRAWAL AFTER A
REGIONAL DIRECTOR NON-MERIT DETERMINATION**

OVERVIEW: After an RD makes a non-merit determination and before the charge is dismissed, the Agent contacts the Charging Party and explains the basis for the non-merit determination and solicits the Charging Party's withdrawal of the ULP charge. See § 2423.11(a).

OBJECTIVE: To provide guidance concerning what the Agent explains to a Charging Party when s/he solicits the Charging Party's withdrawal of the charge after an RD has made a non-merit determination and the matters the Agent discusses with the Charged Party.

1. THE AGENT SOLICITS WITHDRAWAL OF CHARGE:

After an RD determines that an investigation is complete and a ULP complaint is not warranted, the Agent solicits a withdrawal of the charge by telephonically contacting and informing the Charging Party's representative of the following:

- The RD's decision that the charge does not warrant issuance of a complaint;
- The basis in fact and law for the decision;
- The Charging Party's option to withdraw the charge within a reasonable time (normally no less than two and no more than three days except if an extension for doing so is granted (see #4 below)) or have the RD issue a public dismissal letter to both parties, with an appeal right to the OGC;
- That the Charged Party will be informed of the decision to dismiss if the Charged Party makes an inquiry as to the status of the case after the

Charging Party has been informed of the decision to dismiss but during the time it is deciding whether to withdraw the charge;

- The Region does not delay issuance of the dismissal letter to afford the Charging Party an opportunity to seek a resolution from the Charged Party on the charge;
- The Region does not become involved in facilitating any specific adjustments of the charge after a RD non-merit decision (although the Region is available, upon joint request, to assist the parties in improving their relationship); and

See #6 below for how to respond to a Charged Party inquiry as to the status of a case.

2. THE PROTOCOL FOR THE AGENT'S EXPLANATION OF BASIS FOR THE NON-MERIT DECISION:

- a. *An Agent **does** the following in discussing and explaining the basis of the RD's decision:*
 - Engages in such discussion as is necessary to explain the basis of the RD's decision;
 - Acknowledges that the Charging Party's facts and legal arguments were considered fully, although they were insufficient to establish a basis for a complaint; and
 - May discuss that there were varying issues explored at the Agenda, but that the decision just communicated is the final decision of the Region.
- b. *An Agent **does not** do the following in discussing and explaining the basis of the RD's decision:*

- Personalize the discussion by disclosing the particular positions taken by the participants in the Agenda; or
- Offer his/her own personal opinion on the correctness of the Region's decision. Rather, the Agent's views on the applicable law, weight of the evidence and the application of the law to the evidence are presented at the Region's agenda, not to the Charging Party after the RD has made a decision.



Once the RD has rendered a decision on the merits, that decision becomes the decision of the Region and the Agent acts as the Region's representative in soliciting withdrawal. The Agent's ability to explain the rationale of the Region's decision to the Charging Party and the Agent's support of the Region's decision is critical to the credibility of the decision-making process. Presenting personal opinions inconsistent with the Region's decision incorrectly causes Charging Parties to perceive that their charge was either not fully investigated or not fairly decided. In most cases, the Agent is the Charging Party's sole contact with the Region. Therefore, it is imperative that all Agents recognize the critical role they fill in representing the Region to the parties.

3. HOW THE CHARGING PARTY REQUESTS TO WITHDRAW CHARGE:

- a. Charging parties may submit a withdrawal request in writing or telephonically. The RD issues a letter to both parties confirming that a charge has been withdrawn based on the Charging Party's request. Confirmation of the withdrawal of the charge may **not** be made by e-mail.

- b. *Opportunity for a Charging Party to rescind a withdrawal request when the Regional Director reconsiders a previous partial merit decision.*

Sometimes, when a Charging Party is informed that the RD has determined that some allegations have merit and others do not, the Charging Party submits a withdrawal request of the non-merit allegations. In situations where the RD reconsiders that initial merit decision and determines that there is no merit to the remaining allegations, the Charging Party is afforded an opportunity to rescind its withdrawal request and receive a dismissal letter for all of the non-merit allegations, both those initially withdrawn and those redetermined to have no merit.

4. **EXTENSION OF TIME TO SUBMIT WITHDRAWAL REQUEST:**

- a.  *Factors **considered** when determining whether to grant an extension of time to submit withdrawal:*

The Regions have discretion to extend the time to submit a withdrawal request dependent upon such factors as:

- The Region's past dealings with the party, e.g., whether in the past the Charging Party has requested extensions to withdraw and the results of those extensions;
- The type of issue involved in the charge, e.g., whether the Charging Party needs to explore what other third-party avenues are still available; and

- The reason for the extension, e.g., whether the Charging Party is required to contact an individual employee, a particular Union official or a particular management official.



If additional time is granted for the submission of a withdrawal request under the above criteria, there is no need to inform the Charged Party of this extension since the extension would not have been granted to allow the Charging Party to obtain a pre-dismissal adjustment. If a Charged Party requests the status of the case during this period, the Agent informs the Charged Party that the RD has made a decision to dismiss, absent withdrawal. The extension has no impact on the disclosure process.

- b. *The Region **denies** the Charging Party's request for additional time to seek adjustment from Charged Party:*

The Region denies a Charging Party's request for an extension of time to submit a withdrawal request and defers the issuance of a dismissal letter to allow the Charging Party an opportunity to seek some sort of adjustment from the Charged Party on the charge. After an RD has determined that a complaint is not warranted, RO employees have no involvement in party settlements of disputes raised in charges.

- c. *The Agent informs the Charged Party of Charging Party's intent to seek an adjustment of charge:*

If a Charging Party informs an Agent that the party intends to seek an adjustment from the Charged Party on the charge after the Agent has communicated the Region's non-merit determination, the Agent informs the Charging Party that the Agent will expeditiously inform the Charged Party that there has been a non-merit determination. Then, the Agent contacts the Charged Party.

5. THE AGENT IS UNABLE TO CONTACT THE CHARGING PARTY:

If the Agent is unable to contact the Charging Party's representative by telephone after the RD decision, a message is left indicating that the Charging Party should contact the Agent as soon as possible to discuss the charge. If the Charging Party does not respond expeditiously, the Region leaves another message stating that the charge will be dismissed in a public letter by a date certain if it is not withdrawn.

6. RO DISCLOSURE TO THE CHARGED PARTY AFTER AN RD NON-MERIT DECISION:

- a. *The Region denies the Charged Party's "blanket" request for notification of RD's decision:*

The Regions do not grant "blanket" requests requiring the Region, in all charges involving a particular Charged Party, to notify automatically the Charged Party whenever an RD decision has been made to dismiss, absent withdrawal, but before a withdrawal has been approved or a dismissal letter issued. These requests are considered on an individual case basis.

- b. *Communication with the Charged Party after the Charging Party has been informed of RD's non-merit determination:*

- i. Before the Charging Party has withdrawn the charge:

If a Charged Party requests the status of a charge after the RD decides that a complaint is not warranted, and if the Region has already informed the Charging Party of that decision and the Charging Party has not yet withdrawn the charge, the Region informs the Charged Party of the decision to dismiss, absent withdrawal. If the Charged Party further requests the basis for the decision, the Region has discretion in choosing from various options for the manner in which it responds. Among these options are:

- A full discussion of the legal issues involved;
 - A simple statement that the evidence was insufficient to support the allegation;
 - A discussion that prosecutorial discretion may not be appropriate if there is a recurrence of the action involved; and
 - A discussion that, although there is not an actionable ULP, the parties have a relationship problem which should be addressed in some other manner.
- ii. After the Charging Party has withdrawn the charge:

If a Charged Party requests the reasons for the withdrawal of a charge **after** a charge has been withdrawn, the Agent advises the Charged Party that the case is now closed and that the Charged Party should contact the Charging Party to obtain any information concerning the Charging Party's motivation for withdrawing the charge.



This process enables the Charged Party to have the same knowledge as to the status of the case as the Charging Party while the case is open. The failure to disclose information upon request could cause the Region to be viewed as assisting the Charging Party in obtaining a settlement of a charge which has been determined by the RD to be dismissed, absent a withdrawal. After the charge is withdrawn, however, the case is considered closed and the Charged Party has the same knowledge of the status of the case as the Charging Party when the Charged Party receives a copy of the approved or confirmed withdrawal request.

7. THE AGENT DOCUMENTS ALL PARTY CONTACTS IN THE CASE FILE:

All RO contacts and attempted contacts with either party are documented in the file. If, during the discussion soliciting withdrawal, the Charging Party

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RD Non-Merit Determination**

asserts that there is additional evidence which has not been provided to the Region, the Agent:

- Asks the Charging Party to explain: (a) why the evidence was not presented during the investigation and (b) the nature of the evidence and documents the answer in the file; and
- Informs the RD of this assertion.

The RD, when reviewing the file, then has discretion to determine whether to issue the dismissal letter or reopen the investigation.

RESERVED

F. PROSECUTORIAL DISCRETION

OVERVIEW: The OGC exercises discretion to dismiss meritorious ULPs when litigation does not effectuate the purposes and policies of the Statute.

OBJECTIVE: To provide guidance and criteria to be applied to the particular circumstances of each individual case where a violation of the Statute has occurred to determine if litigation is warranted.

1. THE GOAL OF EXERCISING PROSECUTORIAL DISCRETION:

The proper exercise of prosecutorial discretion is essential to the establishment of a sound Federal sector labor-management relations program. Concentrating on more important cases allows the OGC to prosecute vigorously the underlying violations in those cases and to seek more innovative and creative remedies. In this way, the effectiveness of the Statute is enhanced, the parties' relationship is improved, and OGC resources are used more effectively.

2. +P PROSECUTORIAL DISCRETION CRITERIA:

All the facts and circumstances present in a particular case are examined under the following criteria before an RD decides to invoke his/her prosecutorial discretion authority. The importance of the various factors varies depending upon the particular circumstances of each case. These factors are not all inclusive and other special circumstances may be considered. Even though one criterion may indicate that prosecutorial discretion should be invoked in a particular case, other criteria may outweigh that consideration and indicate that prosecution of the violation, in the totality of the circumstances, would effectuate the purposes and policies of the Statute.

- **NATURE OF THE VIOLATION**

What is the seriousness of the violation?

Not all violations of the Statute are as serious as others. Similarly, there are degrees of seriousness within the same category of ULPs. Still other violations are more technical in nature. The magnitude/seriousness of the violation is taken into consideration when determining whether to exercise prosecutorial discretion.

- **HARM TO THE BARGAINING RELATIONSHIP**

What is the degree and nature of the harm to the Union/Agency as an institution?

The degree and nature of the harm to the Union/Agency as an institution can vary widely depending on the particular circumstances. A violation of the Statute may interfere with the Union as an institution so that it cannot function effectively as an exclusive representative or interfere with an Agency to a such a degree where the mission cannot be accomplished. Other violations may have no or little impact on the Union or the Agency as an institution. This factor is examined to determine if prosecution is warranted.

- **HARM TO EMPLOYEES**

What is the degree of harm to employees resulting from the violation?

The magnitude of the harm to a particular employee or employees generally caused by a violation may also vary substantially depending upon the particular circumstances. The harm to employees caused by a violation is another factor examined prior to invoking prosecutorial discretion.

- **PATTERN OF CONDUCT**

Has the same or similar conduct occurred in the past?

Repeated violations of the same or similar conduct normally are not viewed the same as isolated unlawful conduct. Distinctions also may be warranted based on the level of the individual charged with committing the violation. The past history of the Charged Party is another factor considered when determining whether litigation would further the purposes and policies of the Statute.

- **CURE**

Has the violation been cured by the Charged Party?

Litigation of a meritorious charge may not be warranted where the Charged Party rescinds the violative conduct and there either is no identifiable harm caused by the violation or the Charged Party has voluntarily mitigated any adverse impact caused by the violation. Whether a violation has been effectively cured is another factor examined prior to exercising prosecutorial discretion.

- **THE REMEDY**

Is there an appropriate remedy for the violation?

Circumstances may be present which preclude an effective remedy. The lack of the need for an affirmative remedy is another factor that is considered in exercising prosecutorial discretion. Before a case is dismissed because there is no effective remedy, the RD gives consideration to whether some novel or exceptional remedy might be available.

- **CHANGED CIRCUMSTANCES**

Have circumstances changed since the violation occurred which render litigation inappropriate or render the dispute moot?

The facts existing at the time a charge is filed can change by the time an investigation is completed or before a trial is held. The RDs examine whether such changed circumstances make the case a likely candidate for the exercise of prosecutorial discretion.

- **PRECEDENT**

Does the case present a novel issue which could affect the interpretation and application of the Statute?

A fact pattern may create an opportunity to establish an important legal or remedial precedent for future cases. This factor is also examined when making prosecutorial discretion determinations.

3. CONSIDERATION OF PROSECUTORIAL DISCRETION DURING THE INVESTIGATION AND AFTER A MERIT DETERMINATION:

a. During the investigation:

While the merits of a charge are being investigated, it may become clear that, even if all the allegations in the charge and the allegations made by the Charging Party when discussing the case are true, the RD may, absent withdrawal, exercise his/her prosecutorial discretion and dismiss the charge. In this circumstance, the Agent assumes that the charge has merit and focuses the investigation on gathering information responsive to the prosecutorial discretion criteria. If the RD determines to dismiss the charge, absent a withdrawal, based on the application of prosecutorial discretion, the Agent explains the criteria and the basis for the RD's application of the criteria to the charge. If the RD determines that prosecutorial discretion is inapplicable, the Agent completes the investigation consistent with [Part 3, Chapters C and D](#), above concerning the Quality Standards for Investigations and Scope of Investigations.

b. After the merits of a charge have been fully investigated:

When prosecutorial discretion is exercised after the merits of the charge have been fully investigated, the case file contains evidence on the applicable prosecutorial discretion criteria.



[Part 3, Chapters C & D](#) concerning Quality Standards for Investigations & Scope of Investigations.

G. SETTLEMENTS

OVERVIEW: The OGC's efforts to resolve ULP disputes after a ULP charge is filed are continuous. OGC Agents seek to resolve disputes before an RD has made a determination on the merit of the charge and continue to seek resolution when a charge is found to have merit.

OBJECTIVE: To provide guidance concerning: (a) the goals of seeking settlements in ULP cases; (b) the manner in which settlements are reached; (c) the criteria RDs apply in determining whether to approve settlement agreements; and (d) issues concerning approval of formal settlement agreements.

1.  **THE GENERAL GOAL OF ALL SETTLEMENTS:**

To enhance the relationship between the parties; resolve the issues that have brought the parties to seek FLRA assistance; and further the purposes and policies of the Statute. See § [2423.12](#).

2. **THE SPECIFIC GOALS OF SETTLEMENTS:**

- To resolve the specific issue brought before the OGC to the satisfaction of the parties;
- To bring the parties together and to enhance their relationship by resolving underlying disputes while improving the parties' relationship and their communication;
- To involve the parties in developing a remedy which satisfies their legitimate needs and promotes the purposes and policies of the Statute;

- To ensure that the OGC is expending its resources on meaningful issues and that the Regions are abiding by uniform policies;
- To provide flexibility for the parties, with OGC assistance, to craft solutions responsive to their particular interests in each case;
- To broaden the circumstances in which unilateral settlements will be approved without rigidly requiring the same remedy as that which might be sought at a hearing;
- To enhance the bargaining relationship between the parties by seeking meaningful, creative remedies. This Policy may lead to more litigation when it is determined that a novel and creative remedy is required; and
- To provide for formal settlements, to be approved by the Authority and enforced in court, when other avenues of settlement have been exhausted and a party continues to be a recidivistic violator of the Statute.

For a discussion of unilateral and bilateral settlement agreements see [Part 4, Chapter D](#) concerning RD merit determinations.

3. IMPLEMENTATION OF SETTLEMENTS:

RDs, in implementing settlements:

- Do not approve any settlements, bilateral or unilateral, which are repugnant to the Statute, e.g., a settlement agreement in a § [7116](#)(a)(2) discrimination case which provides no relief to the individual employee/discriminatee);
- Approve bilateral settlement agreements acceptable to the parties, absent unusual circumstances, that allow for creativity and a broad range of solutions and are not otherwise

repugnant to the purposes and policies of the Statute;

- Involve the parties in developing the remedy which best meets their interests and obtain the parties' input concerning their interests prior to proposing remedies;
- Explore creative remedies which meet the needs of the parties and which further the purposes and policies of the Statute even if

not substantially similar to the traditional remedies ordered by the Authority after litigation.

Examples of creative remedies are: (a) mandatory training for supervisors or union officials; (b) specifying the names of supervisors or union officials in notices who committed the acts constituting the violations; (c) communications from managers to supervisors or from union presidents to stewards regarding their obligations under the Statute; (d) ordering parties to bargain an agreement on specific issues; (e) requiring a Charged Party to pay travel and per diem for bargaining sessions; and (f) establishing a process for obtaining information and/or the use of time tables for bargaining;

- Have the authority to approve unilateral settlement agreements in accordance with established criteria which effectively remedy the allegations of the complaint but do **not** approve such in a CA/CO unless the unilateral settlement addresses the charge against both parties;
- Seek to resolve not only the specific issue but also to improve broader relationship issues;
- Seek formal settlement agreements in cases in which the Charged Party has shown a contumacious unwillingness to abide by the requirements of the Statute;

- Draft settlement agreements without regard to format requirements;
- Approve settlement agreements which indicate that the Region is responsible for monitoring compliance and that non-compliance results in revocation of the settlement agreement and the issuance of a complaint; and
- May approve settlement agreements which allow for limited postings, no postings, a posting of something other than an FLRA Notice To All Employees (such as a memorandum of understanding, letter, announcements in facility newspapers or newsletters, verbal announcements to individuals or groups of employees, e-mail, etc.), or whatever creative remedy the parties agree upon.

4.  **CRITERIA FOR AN RD'S APPROVAL OF A UNILATERAL SETTLEMENT AGREEMENT:**

RDs apply the following criteria prior to approving or disapproving a unilateral settlement agreement:

- Does the agreement remedy the specific allegations of the complaint?
- Does the agreement remedy the specific harm to the individual and/or the institution caused by the violation?
- Has the Charged Party committed the same or similar violation repeatedly?
- Does the agreement enhance the relationship of the parties?
- Has the Charging Party raised valid objections to the settlement?
- What purpose does the settlement serve?
- What are the benefits of litigation, i.e., consider the criteria set forth under

Prosecutorial Discretion: (a) nature of the violation; (b) harm to the bargaining relationship; (c) harm to employees; pattern of conduct; cure; (d) changed circumstances; and/or (e) precedential value? See [Part 4, Chapter F](#) concerning Prosecutorial Discretion.

- How does the settlement communicate to employees their rights under the Statute and communicate to affected employees the terms of the settlement?
- What is the cost (time, resources and travel) involved in litigating the case in relation to the nature of the violation?
- Does a non-admissions clause undermine the effectiveness of the remedy under all the circumstances of the case?



The importance of any of the above factors varies according to the particular circumstances of each case. The factors are not all inclusive and other special circumstances may be considered. Even though one factor may indicate that a unilateral settlement agreement should not be approved, other criteria may outweigh that consideration and indicate that the settlement, in the totality of the circumstances, effectuates the purposes and policies of the Statute. Similarly, even though a unilateral settlement agreement may provide for the traditional remedy which the Authority has ordered in similar circumstances, all the criteria are considered to determine whether a novel remedy beyond that normally granted is appropriate.

5. FORMAL SETTLEMENT AGREEMENT:

- a. *Approval is appropriate when:*

The Charged Party has demonstrated its unwillingness to abide by the Statute.

- i. Such conduct could be demonstrated by repeatedly violating the Statute in a certain area of law (such as bypass, formal discussion, etc.), even though it has signed settlement agreements, posted notices, received training and other creative solutions have been proposed and accepted.
- ii In cases involving nationwide bargaining units or consolidated bargaining units, the other Regions are kept informed of the status of proposed formal settlements.

See [ATTACHMENT 4G1](#) for a Sample Stipulation and Formal Settlement Agreement and Request for Approval of Formal Settlement Agreement. See Social Security Administration, Baltimore, Maryland, 57 FLRA No. 38, 57 FLRA ____ (May 10, 2001) for an Authority decision approving the parties' stipulation and Formal Settlement Agreement.

- b. *The parties' agreement to something other than a formal settlement agreement:*

Although a Region may have determined that a formal settlement is the appropriate course of action, the parties may agree to something other than a formal settlement agreement. Normally, an RD does not approve a bilateral settlement agreement at this stage of the proceeding. The RD may approve a Charging Party's withdrawal request, however, based on the

parties' private agreement and after considering the above criteria.

6. ENFORCEMENT OF SETTLEMENT AGREEMENT :

A party who fails to comply with the terms of a settlement agreement may be found to have repudiated that agreement in violation of § [7116](#)(a)(1) and (5) of the Statute.

H. DISMISSAL LETTERS

OVERVIEW: If, after having been given an opportunity to withdraw the charge because the RD has determined that the charge lacks merit (see [Part 4, Chapter E](#)), and a Charging Party chooses not to withdraw the charge, the RD issues a dismissal letter. See § [2423.11\(b\)](#). The dismissal letter is a legal document that is written on behalf of the GC which explains the basis on which a charge is dismissed.

OBJECTIVE: To provide guidance concerning: (a) the bases upon which a ULP charge may be dismissed; (b) the characteristics of a quality dismissal letter; (c) the notification requirements when a charge is dismissed; (d) partial dismissals; and (e) dismissals based upon prosecutorial discretion.

1. BASES FOR DISMISSAL OF A CHARGE:

An RD may dismiss a charge for, but not be limited to, any of the following reasons:

- Failure to comply with the filing requirements set forth in the Regulations;
- Charge is untimely filed (see [ATTACHMENT 3L1](#) for a Confirming Letter of Charging Party witness which confirms that charge was untimely filed);
- Lack of jurisdiction pursuant to § [7103\(a\)\(2\)](#), (3) or (4) of the Statute;
- Failure to allege a ULP under § [7116\(a\)](#) or (b);
- Lack of cooperation by the Charging Party;

- Lack of sufficient evidence to support the allegation;
- Processing is prohibited by § [7116](#)(d) of the Statute; and/or
- Prosecutorial discretion.

2.  **CRITERIA OF A QUALITY DISMISSAL LETTER:**

- Opening paragraph contains a clear statement of the allegations or issues as clarified during the investigation;
- A succinct statement of the facts;



Minimize inclusion of background facts. In a straightforward manner, include only those facts which must be considered to determine whether a violation has occurred. Only the substance of testimony may be provided; do not identify the person who provided it. Statements of Position may be attributed to a party. Do not attribute facts to a particular affiant. See [Part 3, Chapter H](#), concerning Affidavits Taken in Person which discusses the confidentiality requirement.

- Statement of applicable law with supporting case cite/s;



Ensure that the case cited is still good law. It is preferable that the case cited be precedent-setting, which may or may not be the most recent case. A citation to the most recent case, which also contains a citation to the precedent-setting case, is acceptable (include a parenthetical indicating that the Authority relied on, cited, applied, etc., the precedent-

setting case). Also, the case law may need to be explained briefly in a parenthetical after the case cite.

- Application of the case law to the facts of the case;



The legal analysis includes a discussion and explanation of why the application of the law to the facts in the case has resulted in a finding of no violation in this case. Each allegation contained in the charge must be addressed.

- Conclusion; and
- Appeal rights.

See [ATTACHMENT 4H1](#) for a Model Dismissal Letter which contains language for the Appeal Rights of the Charging Party.

3. PARTIAL DISMISSALS:

Occasionally, the RD dismisses certain allegations in the charge but finds merit and issues complaint with respect to other allegations of the charge. The Charging Party is given an opportunity to amend the charge, or to submit a withdrawal, to delete those allegations that will not be included in the complaint.

Absent such amendment or withdrawal, the RD dismisses such allegations. The letter delineates the RD's decision as to which allegations are being dismissed and which are the basis upon which a complaint is issued. The letter also states that no further action will be taken on the meritorious allegations until either the appeal period has expired or, if applicable, until after the GC rules on the appeal.

See [ATTACHMENT 4H2](#) for a Model Partial Dismissal Letter.

4. DISMISSALS BASED ON PROSECUTORIAL DISCRETION:

As appropriate after applying certain criteria, an RD exercises discretion to dismiss meritorious ULPs when litigation does not effectuate the purposes and policies of the Statute. See [Part 4, Chapter F](#) which discusses Prosecutorial Discretion. In this instance, the dismissal letter contains a discussion and application of the criteria to the facts of the case.

5. REVOCATION OF DISMISSAL:

After an RD has issued a dismissal letter and during the period when an appeal may be filed or while an appeal is under consideration (see [Part 5, Chapter C](#) concerning the Appeals Process), the RD may decide to revoke the dismissal due to:

- The submission of a withdrawal request; or
- The Charging Party establishes that there is new evidence that did not exist at the time of the investigation or that the Charging Party could not have reasonably known about the existence of such evidence.

If the RD determines that valid grounds exist to revoke a dismissal letter, the parties are notified of such revocation and are given a date certain within which to submit additional arguments concerning the grounds upon which the dismissal was revoked. The Agent ensures that the case file contains the revocation letter. Only after the parties have been given this opportunity to submit additional arguments does the RD reissue the dismissal letter.

See [ATTACHMENT 4H3](#) for a Sample Letter Notifying the Parties of a Revocation of a Dismissal Letter (revocation of dismissal letter is not always based on what is stated in the Charging Party's appeal).



*After a dismissal letter has issued, a Region does **not** do any further investigation before determining whether to revoke the dismissal. That decision is based upon the case file that existed at the time the charge was initially*

dismissed. Once the decision is made to revoke the dismissal and to reconsider the merits of the case, it is then appropriate to notify the parties concerning the specific issues about which any additional investigation will be conducted. If the Region requests the parties to submit evidence by mail or fax, provide a date certain for doing so.

6. SERVICE OF DISMISSAL LETTER AND REVOCATION OF DISMISSAL LETTER:

Service is accomplished by regular mail; service by e-mail is **not** permitted.



[Part 4, Chapter F](#) concerning Prosecutorial Discretion;
and

[Part 5, Chapter C](#) concerning Appeals Process.

PART 5

POST-DECISION

AND

ADMINISTRATIVE MATTERS

A. CUSTOMER STANDARDS

OVERVIEW: *Setting Customer Service Standards*, E.O. 12862, September 11, 1993, provides that in order to carry out the principles of the National Performance Review, the Federal Government must be customer-driven.

OBJECTIVE: To provide OGC employees with an understanding of OGC's customer standards which implement the Executive Order.

1. THE FLRA CUSTOMER SERVICE STANDARDS:

- We treat our customers with respect, understand their needs and merit their trust by our professional conduct;
- Our customers can rely upon our National and Field Offices to interpret the Statute with clarity, consistency, and uniformity;
- We provide innovative and effective education, training and intervention programs tailored to our customers' needs, enabling them to develop productive labor-management relationships and reduce the cost of conflict;
- We consistently provide high quality service that timely resolves disputes in the Federal labor-management relations community; and
- Our customers view us as fair-minded, professional leaders who provide services vital to the development of successful labor-management relationships.

2. THE OGC IMPLEMENTS THE FLRA CUSTOMER SERVICE STANDARDS IN THE FOLLOWING MANNER:

- We use our expertise in labor law and problem solving to enforce the Statute fairly and impartially and to promote collective bargaining that serves the public interest;
- We timely resolve disputes by establishing time-processing goals for ULPs, from the date of filing to initial disposition, and for issuance of decisions on appeals of RD decisions not to issue a complaint;
- We establish OGC case processing policies and quality standards to ensure that customers are treated fairly, and to ensure that the Statute is interpreted with consistency and clarity across the OGC;
- We give our customers respect by explaining our investigative processes and by explaining the rationale for our decisions;
- We enable our customers to view us as fair-minded, impartial professionals by training OGC employees in the delivery of effective communications, quality investigations and legally sound decision-making;
- We enable our customers to develop productive labor-management relationships and resolve disputes by providing innovative and effective education, training intervention programs tailored to our customers' needs;
- We enable our customers to accomplish effectively the mission of their agencies by providing them with ADR procedures which create savings and enhances labor-management relationships; and
- We survey our customers to determine the kind of services they want and their level of satisfaction with the OGC's existing services.

B. ETHICS

OVERVIEW: OGC employees, as employees of the Executive Branch of the Federal Government, adhere to the general principles of ethical conduct which are set forth in Executive Order 12674 (April 12, 1989), as modified by Executive Order 12731 (October 17, 1990), *Principles of Ethical Conduct for Government Officers and Employees*. This Chapter does not provide a complete statement of the Rules of Ethics. Questions concerning Rules of Ethics that arise during the investigation of a case are referred to the RD.

OGC employees also adhere to the U.S. Office of Government Ethics Regulations, [Standards of Ethical Conduct for Employees of the Executive Branch](#), 5 C.F.R. Part 2635.

OBJECTIVE: To provide guidance on fostering high ethical standards of conduct for employees and how to strengthen the confidence and understanding of OGC customers that the OGC's mission is accomplished with impartiality and integrity.

1. TWO OF THE CORE CONCEPTS THAT FORM THE UNDERPINNINGS OF THE 14 GENERAL PRINCIPLES SET FORTH IN E.O. 12674, AS AMENDED BY E.O. 12731:

- Employees shall not use public office for private gain; and
- Employees shall act impartially and not give preferential treatment to any private organization or individual.

In addition, employees must strive to avoid any action that would create the appearance that they are violating the law or ethical standards.

2.  **ALL PARTICIPANTS IN AN INVESTIGATION ARE TREATED FAIRLY AND EQUITABLY AND THE OGC'S INVESTIGATIVE METHODS WILL BE EXPLAINED TO THE PARTICIPANTS:**

- The Charged and Charging Parties are provided an opportunity to provide evidence and fully participate in the investigation;
- The taking of evidence is always as balanced as possible and includes not only material which tends to support the allegations in the charge but any available and relevant material which tends to refute the allegations as well;
- OGC employees provide notice to Charged Party Agency representatives when requested prior to obtaining evidence from the Charged Party's supervisory and managerial officials; and
- During the investigation, OGC employees remain completely neutral and avoid any appearance of favoring a party.

3. **APPLICATION OF SELECTED PROVISIONS OF THE STANDARDS OF ETHICAL CONDUCT DURING ULP INVESTIGATIONS:**

a. Gifts From Outside Sources:

- i. Generally, employees may not accept gifts that are given because of their official position or that come from sources that have pending cases with the OGC or are regulated by the FLRA.
- ii. **Exception:** Items such as modest refreshments, plaques and other items of little intrinsic value, rewards and prizes

open to the general public are considered an exception to the general rule and may be accepted without any limitations:

EXAMPLE

Employees may accept a gift of appreciation such as a plaque, pen set, or paperweight, tote bag or other item whose value is less than \$20.00, which is provided to all speakers for a presentation or speech.

EXAMPLE

An Agent investigating a ULP is offered two tickets to the Buffalo Bisons, a popular Triple A league baseball team, by the local Union President, a season ticket holder, who filed the pending charge. Although the value of this gift is less than \$20.00, it should not be accepted because acceptance creates an appearance of impropriety.

EXAMPLE

An Agent conducts an investigatory interview that continues beyond the scheduled duty hours. The witness offers to buy the Agent dinner. A gift of this

nature should not be accepted because it creates an appearance of impropriety.



Meals with a party: *During an investigation, an Agent does not meet a party for a non-working meal. Working meals should be avoided, but if deemed necessary, the Agent should give notice to the other party and hold the working meal off-site, if possible. When engaged in a working meal, make sure that it is clear to anyone observing that you are working.*



Rides provided by a party: *Generally, Agents avoid accepting offers to ride with a party, but in special circumstances it is permissible but notify the other party, if possible.*

see also [5 C.F.R. Part 2635, Subpart B](#), and criminal statutes [18 U.S.C. § 201\(c\)\(1\)](#) (prohibition against solicitation or receipt of illegal gratuities), [18 U.S.C. § 201\(b\)\(2\)](#) (prohibition against solicitation or receipt of bribes), and related statutory authorities, [5 C.F.R. § 2635.902](#).

b. Impartiality in Performing Official Duties:

Employees must take appropriate steps to avoid any appearance of the loss of impartiality in the performance of official duties.

EXAMPLE

During the investigation of a ULP, the Agent can avoid the appearance of the loss of impartiality when soliciting a withdrawal prior to an RD decision on the merits by

informing the Charging Party that: (a) the basis for the Agent's withdrawal solicitation reflects only the Agent's view of the evidence; (b) only the RD makes decisions on the merits and has not prejudged the case; and (c) the Charging Party has a right to such further investigation as deemed necessary by the Region to provide the RD with sufficient evidence to render a decision. (See [Part 3, Chapter D](#) concerning Scope of Investigations).

EXAMPLE

After completion of a ULP investigation, the RD renders a decision not to issue a complaint. When the Agent communicates the decision to dismiss the charge to the Charged Party, the Charging Party requests a delay in issuance of the dismissal letter to afford the Charging Party an opportunity to seek resolution. To avoid the appearance of a loss of impartiality, the Agent must advise the Charging Party that the dismissal letter will not be delayed and that the Charged Party will be informed that the RD has decided to dismiss the charge, absent withdrawal.

EXAMPLE

After the completion of a ULP investigation, the RD renders a decision not to issue a complaint. The Agent orally advises the Charging Party representative of the decision to dismiss the charge. The Agent may state that there were varying issues and opinions explored at the Agenda, but that the decision just communicated was the final decision of the RO. The Agent, however, must not personalize the discussion by disclosing the particular positions taken by the participants in the agenda or offering a personal opinion on the correctness of the RD's decision.

c. *Misuse of Position:*

Employees must not use their public office for their own or another's private gain, or allow the improper use of nonpublic information to further their own private interest or the private interest of a friend, associate or relative.

EXAMPLE

During settlement discussions of a ULP under investigation, the Agent assigned to the case assists in the development of a settlement agreement which includes the delivery of interest-based problem-solving training for Union and Agency management representatives. During the settlement discussions, the OGC Agent provides an informational brochure regarding a particular private consultant company that provides interest-based bargaining training and facilitation services. The private company is owned by the spouse of the OGC employee. Under the circumstances, such action would constitute a misuse of position for financial gain of the employee's spouse.

d. *Purloined documents and other "improperly" obtained evidence (see [Part 3, Chapter M](#) for a more exhaustive discussion of this topic):*

i. What are purloined documents and other "improperly" obtained evidence?

Purloined documents and other "improperly" obtained evidence are documents obtained by a party or individual under "questionable circumstances" and provided to the Region during the investigation or other evidence such as a tape recording or videotape that may have been surreptitiously recorded without the consent of one or both parties. An Agent never engages in complicity to obtain evidence improperly.

ii. Considerations concerning whether or not to accept and/or use purloined evidence:

In determining whether to accept knowingly the purloined or improperly obtained evidence, the Agent considers whether use of the evidence

during the investigation will result in criminal or civil liability to the individual who provided the evidence and whether the use of the evidence will negatively and adversely impact the investigatory process so as to outweigh any potential value from its use. In addition, the Agent considers the materiality of the information the evidence represents and explores other investigatory techniques to document the material fact without use of improperly obtained or purloined evidence. (See [Part 3, Chapter M](#) for additional discussion of improperly obtained evidence).

e. *Confidential sources/release of witness affidavits:*

Confidential sources and witness affidavits are protected from disclosure consistent with OGC policies and the regulatory requirements set forth at § [2423.8\(c\)](#). (See [Part 3, Chapter G](#) concerning Documentary Evidence for additional discussion). Agents ensure that information contained in case files is protected and secure at all times during the course of an investigation and is not disclosed except as required under the FOIA.

f. *Subpoenas issued to OGC employees:*

Section 2411.11--Compliance with subpoenas states that no OGC employee:

shall produce or present any files, documents, reports, memoranda, or records of the Authority, the Panel or the General Counsel, or testify in behalf of any party to any cause pending in any arbitration or in any court or before the Authority or the Panel, or any other board, commission, or administrative agency of the United States, territory, or the District of Columbia with respect to any

information, facts, or other matter to their knowledge in their official capacity or with respect to the contents of any files, documents, reports, memoranda, or records of the Authority, the Panel or the General Counsel, whether in answer to a subpoena, subpoena duces tecum, or otherwise without the written consent of the General Counsel.

4 . **ROLE OF OGC EMPLOYEES IN THE DELIVERY OF ALTERNATIVE CASE PROCESSING PROCEDURE :**

a. *The information obtained is not evidence:*

The successful delivery of the Alternative Case Processing Procedure may involve the discussion of factual information that is pertinent to the underlying dispute. Factual information obtained during the ADR Procedure, however, does not constitute evidence for the purpose of aiding the RD in reaching a decision on the merits of the ULP. Such information will not become a part of the investigative record if the dispute is not resolved.

b. *The information obtained is **not** disclosed to the investigating Agent and is not used in deciding the ULP:*

The OGC employee facilitating the ADR procedure/s is prohibited from supplying any factual information obtained during the ADR procedures to anyone in the

RO involved in investigating and deciding the ULP, and is prohibited from participating in any way in any discussion regarding the merits of the ULP.

See [Part 3, Chapter B](#) for a complete discussion of the Alternative Case Processing Procedure.



[Part 3, Chapter B](#) concerning Alternative Case Processing Procedure; and

[Part 3, Chapter D](#) concerning Scope of Investigations;

[Part 3, Chapter G](#) concerning Documentary Evidence; and

[Part 3 Chapter M](#) concerning Improperly Obtained or Purloined Evidence.

RESERVED

C. APPEALS PROCESS

- OVERVIEW:** A Charging Party may obtain a review of an RD's decision not to issue a complaint by filing an appeal with the GC in accordance with § [2423.11\(c\)](#). The Region assigned the case for review is known as the Working Region. The Region that investigated and decided the case is known as the Dismissing Region.
- OBJECTIVE:** To provide guidance concerning the standards for granting an appeal and the manner in which appeals are processed and decided.

1. NOTIFICATION OF APPEAL RIGHTS:

a. At the end of the dismissal letter:

A Charging Party is apprised of its appeal rights at the end of every dismissal letter. See [ATTACHMENT 4H1](#) for the notification of appeal rights language.

b. A Public Announcement as an enclosure with dismissal letter:

A Public Announcement explaining the standards for appeal and how they may be established is issued as an attachment to every dismissal letter. See [ATTACHMENT 5C1](#) for a copy of the Public Announcement. The Public Announcement also answers frequently-asked questions about the appeals process.

2. WHERE APPEALS ARE FILED:

All appeals are filed with the OGC HQ and a copy is served on the Dismissing RD. If the appeal is timely filed, the OGC HQ acknowledges receipt to both parties and the Dismissing RD.

If the appeal is untimely, the Dismissing Region is advised not to send the case file to the OGC HQ.

3. The APPEALS CASE FILE:

If an appeal is timely filed, an appeals case file, containing the following documents, is created:

- The appeal;
- The letter acknowledging receipt of the appeal;
- The dismissal letter;
- A blank Appeals Review form ([ATTACHMENT 5C2](#));
- An Appeals Case Log ([ATTACHMENT 5C3](#));
- Any requests and rulings on extensions of time;
- Any Dismissing Region comments on appeal; and
- An Oracle Data Entry Form.



A completed Appeals Review Form, Appeals Case Log, and any comments regarding the appeal, either by the Working or Dismissing Region, are not subject to disclosure under the Freedom of Information Act as they are exempted from disclosure under Exemption 5. See 5 U.S.C. § 552(b)(5). A case file analysis comes within the deliberative process privilege which has the purpose of "prevent[ing] injury to the quality of agency decisions." NLRB v. Sears Roebuck & Co., 421 U.S. 132, 151 (1975).

4. THE DISMISSING REGION'S RESPONSIBILITIES:

a. *Transmittal of investigative file:*

Upon the receipt of a copy of the appeal, the Dismissing Region sends the case file within one day, by two-day mail. No transmittal document of any kind is necessary.

b. *Dismissing Region's comments on appeal:*

There is no requirement that a Dismissing Region comment on an appeal and, as a matter of course, the Regions should not comment. The Regions are not barred, however, from submitting comments whenever the Region deems it appropriate, i.e., the comments contribute information which is not contained in the case file and which add to the Working Region's understanding of the Dismissing Region's rationale for its dismissal and the method and scope of the Dismissing Region's investigation.

c. *The process for withdrawing the dismissal letter:*

Dismissing Regions may withdraw the dismissal letter upon review of the appeal if the dismissing RD determines that further investigation or issuance of a complaint is warranted. Withdrawals of dismissals, however, should be accomplished as soon as the appeal has been filed, with immediate telephonic notification to the OGC HQ and entry of the action into the Oracle Casetracking Database (Oracle). The Dismissing Region should issue a letter to all parties, with a copy to HQ, withdrawing the dismissal and stating that as a result of the withdrawal of the dismissal the case has been returned to the Region for further processing.

The letter rescinding the dismissal letter notifies the parties of the issue/s that form the basis for the rescission of the dismissal letter and the process by which the parties may address this issue. For example, as to the process, the letter should state that the parties will be contacted by the Region for further investigation, or that the parties should contact the Region within a specified period of time if they wish to present additional evidence or a statement of position on the stated issue/s.

Upon receipt of the Dismissing Region's letter rescinding the dismissal letter, OGC HQ will close the appeal and issue a letter notifying the parties of the closing of the appeal.

5. THE ASSIGNMENT OF AN APPEALS CASE FOR REVIEW:

a. *The Assistant GC assigns an appeals case to a RO:*

Each appeals case is assigned by the Assistant GC for Appeals to an RO or HQ for review and development of a draft decision. The final decision on disposition of the appeals case is made by the HQ. An appeals case is never assigned to the RO that investigated the ULP that is on appeal. Appeals cases are distributed equally among each Working RO. The HQ transmits the appeals file and the complete investigative file to the Working Region for review.

b. *Assignment of cases to OGC HQ:*

An Appeals case that involves any one of the following concerns is assigned to the HQ for review:

- Timeliness of the appeal;
- Dismissals issued pursuant to an Advice Memorandum from the OGC HQ;
- Serious allegations that the investigation was not properly conducted;
- Unilateral settlements;
- Partial dismissals;

- Major policy issues which may require an advice memorandum;
 - Motions for Reconsideration of a previously-issued appeal determination;
 - Complex factual or legal issues with voluminous files;
 - Congressional inquiries; or
 - Cases which, on their face, present no merit.
- c. *The selection of RO employees to process appeals:*

To achieve fully the objectives of the Appeals policy, each Region seeks to distribute appeals cases to as many RO employees as possible. The distribution of cases among employees shall seek to meet the following interests:

- A fair distribution of appeals among employees;
- No limitation on the flexibility and potential of teams that may be developed in the Regions;
- Timely and quality processing of appeals;

- Utilization of RO expertise, experience, and perspective;
- Exposure of RO Agents to the case processing techniques and work product of the other Regions;
- Allowing employees an opportunity to perform a function and to develop skills that vary in some respects from their current functions and skills; and
- Create a workload that is manageable and complements the processing of open cases.



The following basic criteria are applied in the assignment of appeals cases, consistent with the way other case assignments are made in the Region:

- Appeals may be assigned to any professional who has sufficient experience investigating and processing ULP cases, and familiarity with OGC policies;
- Appeals will not normally be assigned to managers;
- Working ROs need not assign appeals in an identical manner; and
- RDs may maintain lists of appeal case assignments in order to ensure parity in assignments and to provide a record of each employee's workload.

6. CONDUCTING AN APPEALS REVIEW:

- a. *Review is not de novo:*

An appeals review is not a **de novo** review of the case. Rather, an appeals review is conducted to determine whether the law and the factual evidence contained in the RO case file support the RD's decision to dismiss the case. The reviewer does not substitute his/her judgment for the judgment of the Dismissing RD.

b. Consider each appeal standard in each case:

In every case, the Working Region considers all five grounds for granting an appeal (#7, below) in its review.

c.  *The protocol for review of an appeals case is:*

- i. First, conduct a legal review of the issues presented to determine if the decision is supported by the law and whether the material facts upon which the decision is based are supported by the evidence obtained or supplied during the investigation which is contained in the case file.
- ii. Second, after completion of the legal review, a quality review of the case file is conducted to determine whether the case processing was completed in accordance with OGC policies, e.g., Chapters on the Quality Standards for Investigations and Scope of Investigations set forth at [Part 3, Chapters C and D](#) and the ULPCHM and section #12 below concerning quality standards applicable to appeals case processing.

- iii. A party may not submit new evidence on appeal unless it is established that the evidence either did not exist during the investigation or that the Charging Party could not have reasonably known about the existence of the evidence.
- iv. The Appeals Review Form ([ATTACHMENT 5C2](#)), which contains questions to facilitate the legal and factual review, and the Appeals Case Log ([ATTACHMENT 5C3](#)), are completed and approved by the Working RD in each case. All recommended appeals decisions are the recommendations of the Working RD and not the OGC employee who conducted the review. The recommended decision is transmitted to the HQ for review and final decision. All final decisions are the decisions of the GC.
- v. When necessary, a telephone Agenda is conducted to discuss the Working Region's recommended decision.
- vi. To ensure the integrity of the process, no discussion takes place about an appeals case between the Dismissing and Working Regions.

7. GROUNDS FOR GRANTING AN APPEAL OF AN RD'S DECISION SET FORTH AT § 2423.11(e):

An appeal may be granted if one of the following grounds for appeal is established:

- a. *The RD's decision did not consider material facts that would have resulted in issuance of a complaint:*

To establish this ground, the appeal:

- States the material facts which were not addressed in the investigation;
- States what evidence supports those facts, e.g., certain documents or testimony from a specific witness; and
- Explains how those facts would result in the finding of a ULP.

- b. *The RD's decision is based on a finding of a material fact that is clearly erroneous:*

To establish this ground, the appeal:

- States the material fact which is clearly erroneous;
- States what evidence establishes that the material fact is clearly erroneous; and
- Explains how a different factual finding would result in the finding of an ULP.

- c. *The RD's decision is based on an incorrect statement of the applicable rule of law:*

To establish this ground, the appeal:

- States what rule of law relied upon by the RD is incorrect;
- States why that rule of law is incorrect;
- States what the correct rule of law should be; and
- Explains how the application of the correct rule of law would result in the finding of a ULP.

d. *There is no Authority precedent on the legal issue in the case:*

To establish this ground, the appeal:

- States the legal issue for which there is no rule of law under Authority precedent; and
- States the rule of law that should be presented to the Authority.

e. *The manner in which the Region conducted the investigation has resulted in prejudicial error:*

To establish this ground, the appeal:

- Describes the improper manner in which the investigation was conducted;
- Explains why this manner of investigation was improper; and
- Explains how this manner of investigation resulted in prejudicial error.

8. DISPOSITION OF THE APPEAL:

a. *When grounds **are** established:*

If grounds for the appeal are established, the case is remanded to the Dismissing Region for: (1) further investigation; (2) further analysis; or (3) issuance of a complaint and notice of hearing.

a. *When grounds **are not** established:*

If one of the standards for appeal is not established, the appeal is denied and the case is closed. All parties are notified of the appeal decision.

b. *When grounds **are** established as to one allegation but **not** another allegation:*

The appeal in a case involving multiple allegations may be sustained in part and denied in part, as warranted.

9. PREPARING THE DRAFT APPEAL DETERMINATION LETTER:

a. *A recommended decision to deny the appeal:*

i. Standard form letter:

A standard form determination letter is used in those cases where it is determined that the grounds for granting an appeal have not been met. The use of the form letter indicates the adoption of the analysis and decision set forth in

the dismissal letter. See [ATTACHMENT 5C4](#) for a Model Letter Denying the Appeal.

ii. Modified form denial letter:

In selected cases, where it would be instructive to the Charging Party, the Working RD has the discretion to modify the form appeal letter to add no more than a few sentences, if necessary, to address specifically an issue raised in the appeal that is not clearly or sufficiently addressed in the dismissal letter or to educate the Charging Party.

No other modifications may be made to the denial letter. Modified form denial letters sent to the OGC HQ for issuance will normally be adopted and issued without editing. See [ATTACHMENT 5C5](#) for a Sample Modified Letter Denying the Appeal and the following examples:

EXAMPLE

The case was dismissed pursuant to § [7116\(d\)](#) of the Statute because of an earlier-filed grievance on the same issue that arose at the second step of the grievance processing. The appeal argued that the issues presented in the grievance and the ULP were different and, therefore, the dismissal was in error. The addition of the following language to the standard form letter is appropriate:

It is noted that, at the second step of the Union's grievance filed on July 21, 1997, the Union raised the issue of the failure to provide the grievant with due process by not attempting to resolve the matter through the agreed upon alternate dispute resolution agreement. This is the same issue raised by the ULP charge filed on August 27, 1997. Since the same issue was raised in the grievance which was filed before the charge, the Regional Director properly concluded that this charge was barred by § [7116](#)(d) of the Statute. See Olam, 51 FLRA No. 69, 51 FLRA 797, 801-02 (1996).

EXAMPLE

In the appeal, the Charging Party maintains that the RD did not consider a material fact because the Agent did not interview all of the witnesses supplied by the Charging Party.

The addition of the following language to the standard form letter is appropriate:

"Contrary to the allegations you raise on appeal, the investigation was conducted consistent with the Office of the General Counsel's Quality and Scope of Investigations policies."

- b. A recommended decision to grant the appeal and remand to the RO for further investigation and analysis:*

If one of the appeals standards has been established, the Working Region prepares a draft decision letter. The Working Region also prepares a draft Case File Analysis, which is an internal management document that discusses the basis for the decision to remand the case and the investigatory process and/or legal analysis that the Dismissing Region follows upon receipt of the remand. See [ATTACHMENT 5C6](#) for a Sample Letter Granting an Appeal.

10. CASE FILE ANALYSIS:

a. Remand cases:

A Case File Analysis ([ATTACHMENT 5C7](#)) is issued in every remand case. The Case File Analysis format addresses the following:

- The Charge

A brief statement of the charge, including the parties and the issue/s presented as set forth in the dismissal letter.

- The RD Rationale for Dismissal

Set forth the legal conclusion/s which forms the basis of the dismissal letter, without editing or restatement.

- Appeal Determination

Set forth the recommended appeal determination, including the following:

- The specific ground for granting an appeal that has been established if the case is being remanded;
- The factual question or legal issue which could not be decided based on the investigation and the element of the ULP violation which concerned that factual determination;
- The legal precedent which was not considered in the decision-making process;
- The particular investigatory or procedural matter which raises issues of consistency with the Quality and Scope Policies with a specific reference to the applicable provision of the ULP Case Handling Manual; and/or
- The specific action the Dismissing RD should take upon remand of the case.



All recommended Case File Analysis memoranda are prepared in a positive, instructional manner.



A Case File Analysis is not subject to disclosure under the Freedom of Information Act as it is exempted from disclosure under Exemption 5. See 5 U.S.C. § 552(b)(5). A case file analysis comes within the deliberative process privilege which has the purpose of "prevent[ing] injury to the quality of agency decisions." NLRB v. Sears Roebuck & Co., 421 U.S. 132, 151 (1975).

b. *Issuance of a case file analysis without remand:*

Although the legal decision to dismiss may be correct and supported by the record, a Case File Analysis may

also be issued in those cases where it is determined that the processing of the case was not in accordance with the Quality Standards for Investigations and Scope of Investigations criteria set forth at [Part 3, Chapters C and D](#). The draft Case File Analysis in this instance follows the same format as [ATTACHMENT 5C7](#) and includes a specific reference to the OGC requirement that was not met.

11. THE COMPLETION OF AN APPEALS REVIEW:

a. *Forward case file to OGC HQ:*

Upon completion of an appeals review, the Working RD submits the appeal recommendation, case file and appeals case file to the OGC HQ via two-day mail. The Working Region does not prepare a draft of the form denial letter. However, if the recommendation is a modified denial letter, a grant of appeal remanding the case, or a case file analysis without remand, the recommendation (Draft appeal determination letter and draft case file analysis) are submitted to OGC HQ via e-mail with a printed copy of the draft documents secured in the case file. No documents from the case file may be maintained by the Working RO.

b. *Appeal determination:*

The final appeal determination is made by OGC HQ. When necessary for a full understanding of the Working Region's recommendation and a full understanding of the issues presented in the case, a teleconference agenda with the Working Region (RD, RA and employee or team) and the GC and/or Deputy GC may be conducted.

c. *Oral communication with the Dismissing and Working Regions:*

The Assistant GC for Appeals will discuss all appeal recommendations and determinations that involve a remand or issuance of a Case File Analysis without remand with the Working RD and the Dismissing RD prior to issuance of the appeal determination. No appeal decision involving a remand or Case File Analysis without remand will issue until both the Working and Dismissing RDs have been notified. The Assistant GC also

will inform Working RDs when a recommendation to issue a case file analysis or to remand a case has not been adopted.

d. *Advice memorandum:*

If the grant or denial of the appeal raises any policy or novel issue, an Advice Memorandum will be prepared for issuance OGC-wide.

e. *Service of an appeal determination:*

The parties are served with the appeal determination letter by regular mail. Service by e-mail is **not** permitted. Copies of appeal determination letters that involve a Case File Analysis are distributed to each RO.

12. QUALITY STANDARDS FOR APPEALS CASE PROCESSING:

a. *The Quality Standards applicable to the Working Region are:*

- Timely processing of appeals in accordance with time targets;
- Timely and accurate Oracle casetracking entries;
- Proper completion of the Appeals Case Log;
- Proper completion of the Appeals Review form; and
- Recommended disposition of appeals and case file analyses are developed in accordance with the Grounds for granting an appeal, Quality Standards, Scope of Investigation criteria, Authority precedent and previously issued OGC advice and guidance.

b. *The Quality Standards applicable to OGC HQ are:*

- Timely processing of appeals in accordance with time targets;
- Timely and accurate Oracle casetracking entries;
- Proper completion of the Appeals Case Log;
- Issuance of case file analyses in accordance with the Grounds for granting an appeal, Quality Standards, Scope of Investigation

criteria, Authority precedent and previously issued OGC advice and guidance;

- Denial and grant of appeals in accordance with the Grounds for granting an appeal, Quality Standards, Scope of Investigation criteria, Authority precedent and previously issued OGC advice and guidance; and
- Communication with dismissing RD when appeals are granted and/or case file review analyses are issued; and with Working RDs when recommendations are not adopted and when case file analyses are issued.



[Part 3, Chapter C](#) concerning Quality Standards for Investigations;
and

[Part 3, Chapter D](#) concerning Scope of Investigations.

RESERVED

D. PARITY

OVERVIEW: For a variety of reasons, the caseload in ROs may fluctuate over time. The OGC implements the concept of parity, whereby attempts are made to assist ROs with caseload imbalances.

OBJECTIVE: To provide a policy and procedure for the OGC and RDs to discuss, on a quarterly basis, regional caseload concerns and to make the necessary adjustments to certain regional caseloads, as needed.

1. THE GOALS OF PARITY:

- To respond quickly to temporary fluctuations in a RO's caseload;
- To provide timely and efficient case-processing services to the FLRA's customers; and
- To maintain caseload and staffing balance among the ROs.

2. HOW PARITY IS IMPLEMENTED:

The OGC monitors RO caseload on a quarterly basis and reassigns cases among ROs to meet temporary caseload imbalances. At regularly-scheduled management meetings, OGC Headquarters staff and RDs discuss current case and staffing data. A consensus is reached on which RO/s are in the best position to assist another Region in processing its current caseload.

RESERVED

E. TRANSFERRING CASES BETWEEN REGIONS

OVERVIEW: Other than for parity reasons, cases may be transferred between ROs.

OBJECTIVE: To describe the situations that may result in the transferring of cases between ROs and the process for doing so.

1. The Goals of Transfer Policy:

- To provide consistent case processing decisions to the FLRA's customers across RO jurisdictional boundaries.
- To ensure that case issues are processed consistently among ROs when the same or substantially similar issues are presented nationally.
- To assist another RO in the development of that RO's staff members.
- To maximize the use of OGC resources by not duplicating effort in two or more ROs.

2. **HOW A TRANSFER OF CASES BETWEEN ROs IS IMPLEMENTED:**

a. *How potential transfer cases are identified:*

- Other ROs are notified of related cases based upon either an RD or an OGC HQ determination.
- RDs contact each other to discuss possible transfer of cases that meet the above reasons for transfer; and
- The OGC may be contacted by any RD to assist in the discussion/facilitation of the possible transfer of cases between the Regions.

b. *How to process the transfer of cases between Regions:*

**Post-Decision and Administrative Matters
Transferring Cases Between Regions**

- Notify the parties;
- Keep the same ULP number initially assigned;
- Transfer the case as expeditiously as possible according to the circumstances of the case; and
- The RDs coordinate this process.

See [ATTACHMENT 2A2](#) for a Sample Order Transferring Case to Another Region.

F. PERIODIC GEOGRAPHIC JURISDICTION REVIEW

OVERVIEW: The geographic jurisdictions of the seven Regions are reviewed periodically to ensure the work is apportioned evenly and that resources are used effectively to accomplish the mission of the OGC.

OBJECTIVE: To describe how geographic jurisdiction review decisions are made and the basis upon which such determinations are made.

1. GOALS OF GEOGRAPHIC JURISDICTION REVIEW:

- To conduct a comprehensive, empirical analysis of RO caseloads on a periodic basis to correct systemic caseload imbalances which constitute long-term changes in case filings;
- To provide timely and efficient customer service; and
- To sustain current RO structure and staffing parity among ROs. See [Part 5, Chapter D](#) concerning the Parity.
- To maximize the resources of the OGC.

2. HOW REVIEW IS IMPLEMENTED:

- Review is undertaken by OGC Headquarters, with RD input, every two years;
- Review is based on four complete years of fiscal data;
- Current representational case data is considered; and
- Travel by RO staff is considered in terms of cost and ability of RO staff to provide efficient service to the FLRA's customers.

3. CHANGES IN REGIONAL JURISDICTIONS:

Any changes that result after review of regional geographic jurisdiction are published in the Federal Register and are incorporated in the Code of Federal Regulations at Appendix A to 5 C.F.R. Chapter XIV.



[Part 5, Chapter D](#) concerning Parity.

G. COMPLIANCE WITH AUTHORITY ULP ORDERS

OVERVIEW: Regions are responsible for attempting to obtain prompt, complete and voluntary compliance with the terms of an Authority Order. Should compliance become an issue, the RD is in contact with the OGC HQ and efforts to obtain compliance and/or enforcement of the Authority's Order are coordinated with the Authority pursuant to § 2423.41(e).

OBJECTIVE: To provide guidance concerning the process of obtaining compliance with an Authority ULP Decision and Order, which includes regional responsibilities for monitoring compliance, what to do if noncompliance becomes an issue and a recommendation to the Authority to make application for enforcement in a U.S. Court of Appeals.

1. EFFECTUATING COMPLIANCE:

a. *RO responsibilities:*

ROs are responsible for all routine actions to effect compliance with Authority remedial orders in ULP cases. The RO is responsible for determining the steps to be taken by the Respondent to comply with an Authority Decision and Order, which include:

- Analyzing the steps necessary to effectuate compliance;
- Initiating, monitoring and reporting the status of compliance efforts;
- Investigating alleged failures to comply;
- Making appropriate recommendations for further formal action, where the respondent allegedly fails to comply; and
- Participating, where appropriate, in the institution and maintenance of any formal action required.

b. *Initial contact with respondent:*

The Region's initial contact with the respondent regarding compliance is made following the RO's receipt of an Authority Decision and Order. Immediately upon receipt of the Decision and Order, the Region is responsible for issuing a letter instructing the respondent of the steps to be taken to achieve compliance and for transmitting a copy of the remedial notice to be posted. See [ATTACHMENT 5G1](#) for a Sample Letter. The Region is required to send only one completed notice form containing the language required by the Authority's Decision and Order. No blank forms are sent unless the respondent specifically requests.



The RD cannot change the Authority's Order in any way.

c. Suspension of compliance efforts:

Compliance efforts are **not** suspended while a Motion for Reconsideration of the Authority Decision and Order is pending, unless the Authority orders such a stay.

2. Postings:

a. Posting Locations:

The locations where a Notice is to be posted are usually specified in the Order. Absent such specification, however, the respondent is directed to post the Notice in all places where the affected employees and/or members are located.

b. Special notice procedures:

Based on the circumstances of the case, an Authority Order may require the respondent to mail copies of the Notice directly to its employees or members, or it may require the publication of the Notice in a newsletter. In such cases, the respondent must certify or submit proof that the requested action has been taken.

c. Notice checks:

Routine checks of posted Notices are made by RO personnel who are in the vicinity of an activity where a Notice has been posted. If it appears that the posting is inadequate or inappropriate, the matter is brought to the attention of the RD.

3. AFFIRMATIVE PROVISIONS OTHER THAN BACKPAY:

The RO is completely familiar with the remedial order and all of the facts of the case which affect the remedy. The RO takes the necessary steps to ensure that there is compliance with the affirmative provisions of the Order such as:

a. Reinstatement Order:

Ordinarily, a reinstatement Order provides for full reinstatement to the employee's former position without prejudice to seniority or any other rights, entitlements and privileges (such as pay rate, seniority, leave category, etc.) that the employee would have received had there been no ULP. If the employee would normally have been promoted or transferred during the period of separation from employment, the restored position

should be that to which the employee would have been promoted or transferred had the ULP not occurred. Thus, the Region determines the employee's employment history. If an employee cannot be returned to his/her former position, e.g., the job has been abolished, the Order usually will require that an offer of reinstatement be made to a substantially equivalent position.

b. Rescission Order:

Where the respondent has been ordered to rescind a particular document or policy, the Region ensures that such rescission, in fact, has been properly effected.

c. Order to negotiate or to undertake other affirmative action:

If the respondent has been ordered to negotiate over a matter, to resume negotiating a collective bargaining agreement, to comply with an arbitration award, or to take some other affirmative action, the Region ensures that such an Order has been satisfied.

4. Investigating Allegations of Noncompliance:

Where an allegation of noncompliance with an Authority Order is brought to the Region's attention, the basis of the allegation is ascertained and supporting evidence is obtained by an appropriate investigation.

5. Closing a Case or Referring a Case to the Authority:

a. No allegations of noncompliance:

The RO is also responsible for issuing the letter closing the case after compliance has been effected. A case is closed and a letter is issued after the RO has determined that:

- The Charged Party has complied with the posting requirements contained in the Authority's Order;
- The Charged Party has complied with other affirmative action required by the Authority's Order; and
- There are no allegations that the Charged Party has not complied with the Authority's Order.

Copies of such Closing Letters are served on all of the parties. See [ATTACHMENT 5G2](#) for a Sample Letter closing a case. The Authority's Director of Case Control is not to be served.

*b. An allegation of noncompliance and an RD determination that compliance **has been** effected:*

- i. The RD closes the case on compliance **without** further submission or referral to the OGC or the Authority:

After an investigation of an allegation of noncompliance has been completed, in those instances where the RD has determined that compliance in fact has been achieved, the RD issues a letter to the parties setting forth the allegation of noncompliance, the facts adduced by the investigation, the conclusion that the Authority - Order, in fact, has been complied with, and a statement that the case is, therefore, closed. No appeal rights are to be set forth in

this letter. Copies of such closing letters are not served on the Authority's Director of Case Control.

ii. This Letter and FIR are forwarded to OGC:

The internal FIR (or Agenda Minute) prepared in the RO is attached to the copy of the closing letter forwarded to the OGC. The internal FIR is not to be sent to the parties or to the Authority's Director of Case Control.

c. *An allegation of noncompliance and an RD determination that compliance has **not** been effected:*

Where the RD has determined that there has not been compliance with an Authority Order, or that the issue of compliance involves an interpretation of the Authority Order, and the Region has not been able to achieve voluntary compliance, the matter should be referred to the OGC through a report on compliance.

The RO Report on Compliance, summarizing the investigatory findings and conclusions, includes, but is not necessarily limited to, the following:

- The substance of the Authority's Order;
- The allegation of noncompliance and its initiator;
- The findings of the compliance investigation, noting factual disputes, if any;
- The existence of any dispute as to what affirmative actions are required under the Authority's Order to constitute compliance; and
- The RD's conclusions and recommendations concerning the above matters.

The Region sends the compliance case file along with the Report on Compliance.

i. Referral to the Authority:

The OGC refers matters of alleged noncompliance to the Authority with an appropriate recommendation and serves a copy of such referral on the RO.

- ii Notification to the parties of the referral of the noncompliance issue to the Authority:

When the Region subsequently receives the OGC memorandum to the Authority referring the matter of alleged noncompliance to the Authority, with an appropriate recommendation, the Region then notifies the parties in writing that the matter has been referred to the Authority for appropriate action. The OGC memorandum to the Authority is not served on the parties.

6. REGIONAL ACTION AFTER REFERRAL OF AN ALLEGATION OF NONCOMPLIANCE TO THE AUTHORITY:

- a. *Effectuation of alleged voluntary compliance after referral of enforcement recommendation:*

After the referral of an enforcement recommendation, the RD, OGC or the Authority may receive communications alleging that compliance with the Authority's Order **has been effectuated** subsequent to the initial RD determination of noncompliance which renders enforcement proceedings unnecessary. The following procedures apply when such **written** communications are received. The party contacting the RD, OGC or Authority is advised that no action will be taken until a **written** confirmation is received:

- i. Receipt by Authority:

The Authority communicates with the OGC concerning compliance matters that are raised to the Authority in the first instance. In turn, OGC Headquarters communicates with the RD.

ii. Receipt by RO:

The RD notifies the OGC promptly of such communication and commences a follow-up compliance investigation. The OGC promptly notifies the Authority.

iii. Receipt by OGC:

The OGC promptly notifies the Authority that the matter is being referred to the RD for further investigation. The OGC will communicate with the RO as appropriate concerning the need for a follow-up investigation and report.

b. A communication of a party's willingness to comply after the referral of an enforcement recommendation:

When a party communicates, in **writing**, a willingness to comply **in full** with a final order of the Authority after the OGC has referred the matter to the Authority with a recommendation for enforcement, each office (the OGC, RO and Authority), provides notification. Once the RO has notified the party to proceed with compliance and is advised in turn that compliance has been effectuated,

the RO conducts a follow-up compliance investigation, as required, and prepares a report for the OGC.

- c. A communication of a party's willingness to take specific actions in an attempt to comply after referral of an enforcement recommendation:*

After the OGC has referred a recommendation for enforcement to the Authority, a party may communicate a willingness to take specific actions in an attempt to comply with the Authority's Order.

- i. Receipt by the Authority:

The Authority communicates with the OGC concerning compliance matters that are raised to the Authority in the first instance. In turn, OGC Headquarters communicates with the RD. Once the RO has notified the party to proceed with compliance and is advised in turn that compliance has been effectuated, the RO conducts a follow-up compliance investigation, as required, and prepares a report for the OGC. Where additional factual information is required before it can be determined that the offer to comply is not clearly inconsistent with the terms of the Authority's Order, the information request is forwarded to the OGC where it is then forwarded to the appropriate Region.

- ii. The receipt by the RO and RD concludes that the offer, if effectuated, **would** constitute compliance:

If the RD concludes that the party's offer to take specific actions, if effectuated, would constitute compliance with the Authority's Order, the RD promptly notifies the OGC. The OGC then notifies the Authority that the RO has received such communication and will conduct a follow-up investigation to ascertain whether compliance has been effectuated.

- iii. The receipt by the RO and RD concludes that the offer, even if effectuated, **would not** constitute full compliance:

The RD promptly notifies the OGC in writing of the offer and the reasons for the Region's finding that such actions do not constitute compliance.

7. Enforcement Proceedings:

a. Petition for review of an Authority Order:

Compliance efforts continue even though a Petition for Review of an Authority Order has been filed with a U.S. Court of Appeals, unless a stay has been ordered by the court. Should compliance be achieved prior to a court decree, the procedure set forth in #5, above, is followed.

b. Compliance actions after enforcement decree:

Where a court decree fully or partially enforces an Authority Order, the Region continues compliance efforts with respect to the portion of the Order that has been enforced. Even if the respondent seeks rehearing by the court or a **writ of certiorari**, compliance efforts should continue, unless a stay has been ordered by the court or Supreme Court. Where a court decree fails to enforce an Order in whole or in part, the RD will be notified by the OGC of any required further action.

c. Contempt proceedings:

Upon respondent's failure or unwillingness to comply with a court decree enforcing an Authority Order, the RD submits an internal report of investigation on noncompliance with a court decree to the OGC which sets forth the efforts undertaken to achieve compliance and which includes a recommendation with respect to the institution of contempt proceedings.

8. RESPONDENT FILES A PETITION FOR REVIEW OR STATES AN INTENT NOT TO COMPLY:

d. The noncomplying party files a petition for review with the appropriate court of appeals:

- i. When a noncomplying party, who the Authority has ordered to take certain affirmative action or to cease and desist from engaging in certain conduct, files a petition for review of the Authority's Order, an RD takes no action

with respect to the case once a party has filed such a petition.

- ii RDs take the following actions when they are informed that a petition for review has been filed by a party:
 - Telephonically advise the OGC that such petition has been filed;
 - Follow up in writing or e-mail which will be forwarded to the Authority; and
 - Note the case on the Region's Overage Compliance Case Report.

The RD does not need to submit a report on compliance or compliance case file to the OGC HQ. The OGC HQ will forward to the Region a copy of the Authority's cross-application for enforcement when filed by the Authority.

- b. *The party informs the RO that it will not comply but has not filed a petition for review within the 60-day time period under § [7123\(a\)](#) of the Statute:*

Where a party that is ordered to take a certain affirmative action or to cease and desist from engaging in certain conduct informs the RO that it does not intend to comply with an Authority Order and intends to seek review of the Authority Order **but has not yet filed a petition** with the court, the Region advises the OGC and follows up in writing. No report on compliance or the compliance case file need be submitted to the OGC. If the Authority files an application for enforcement, a copy is sent to the Region. Should the party file a petition for review within the 60-day period prior to the Authority's filing of an application for enforcement, the OGC sends the Region a copy of the Authority's cross-application for enforcement.

H. PROCESSING ULP CHARGES ALLEGING NONCOMPLIANCE WITH AN INFORMAL SETTLEMENT AGREEMENT

OVERVIEW: After the RD has approved an informal settlement agreement, a Charging Party may file a ULP alleging noncompliance with an informal settlement agreement.

OBJECTIVE: To provide guidance concerning how to process a charge alleging noncompliance with an informal settlement agreement.

1. SCOPE OF INVESTIGATION OF ULP CHARGE:

The investigation of a ULP charge alleging noncompliance with an informal settlement agreement approved by an RD is limited to the issue of whether the charge, in fact, alleges noncompliance or if the charge alleges a new, independent ULP.

1. NO NEW INDEPENDENT ULP:

The failure to comply with an Authority remedial order is not a ULP. American Federation of Government Employees, Local 987, 53 FLRA No. 45, 53 FLRA 364, 369 (1997).

a. *Request Charging Party to Withdraw Charge:*

Upon finding that the charge, in fact, alleges noncompliance, the Region requests the Charging Party to withdraw the charge so that the Region can investigate the noncompliance allegation.

b. *Dismiss the Charge if Charging Party Refuses to Withdraw:*

If the Charging Party refuses to withdraw a charge alleging noncompliance, the RD dismisses the charge on the basis that it "fails to state an unfair labor practice." The Charging Party is informed of its right to appeal the dismissal to the OGC. The sole issue on appeal is whether the charge alleges a new ULP or noncompliance. The merits of any noncompliance issue will **not** be reviewed on appeal.

3. AN INVESTIGATION OF ALLEGED NONCOMPLIANCE:

Upon withdrawal of the charge, or upon denial of an appeal, the RO conducts the compliance investigation.

4. ALLEGATION OF NONCOMPLIANCE NOT SUBSTANTIATED:

If the RD determines that there has been compliance, s/he closes the case (or the prior closing of the case on compliance is affirmed). The RD's determination of compliance or noncompliance with the previously-approved settlement agreement is not subject to appeal.

5. ALLEGATION OF NONCOMPLIANCE SUBSTANTIATED:

In this instance, the RD revokes approval of the settlement agreement and complaint issues (or reissues). The revocation of the informal settlement agreement is set forth in the complaint. The Region is prepared to establish, by a preponderance of the evidence at the hearing that the settlement agreement was not complied with in addition to the underlying ULP which gave rise to the settlement agreement.

I. PROCESSING ALLEGED NONCOMPLIANCE WITH AUTHORITY DECISIONS AND ORDERS ON NEGOTIABILITY ISSUES

OVERVIEW: Regions do not become involved in negotiability disputes between an Agency and a Union unless and until the Authority issues a Decision and Order on negotiability issues and the Union files a ULP charge alleging noncompliance with the Decision and Order.

OBJECTIVE: To provide guidance how the Regions process a ULP charge alleging noncompliance with an Authority decision and order on negotiability issues, including the requirements for, and reporting of, an investigation.

1. AN RD'S AUTHORITY:

a. *Requirement that noncompliance allegations be investigated:*

Allegations of noncompliance with Authority Decisions and Orders on Negotiability Issues are investigated in the same manner as are investigations of allegations of noncompliance with Authority Decisions and Orders in ULP cases.

b. *Report the results of investigation to the OGC and Authority:*

After the investigation is completed, the RD transmits an internal report of the investigation on the allegations of

noncompliance, including recommendations to the OGC, which refers the matter to the Authority.

Unlike ULP cases, RDs have **no** authority to close negotiability cases on compliance even if the investigation reveals that compliance has been effected.

- c. Report any change with respect to voluntary compliance after submission of report:*

The RD reports to the OGC any change with respect to voluntary compliance after submission of the report on investigation of noncompliance.

5. PROCESSING ULP CHARGES ALLEGING NONCOMPLIANCE WITH AUTHORITY NEGOTIABILITY ORDERS:

- a. Process the charge the same way as allegations of noncompliance in ULP cases:*

If an allegation of noncompliance is raised in a ULP charge, the charge is processed in the same manner as charges which raise allegations of noncompliance with Authority Decisions and Orders and previously approved settlement agreements in ULP cases.

- b. Request the Charging Party to withdraw charge:*

The investigation is limited to the issue whether the charge alleges only noncompliance with the negotiability Order or if the charge also alleges independent conduct constituting a ULP. If the former, the Region requests the Charging Party to withdraw the charge so that it can investigate the noncompliance allegation. Upon withdrawal of the charge, the RD's determination of compliance or noncompliance with the Authority's negotiability Order is not subject to the appeal

procedures, but rather is to be transmitted internally to the Authority through the OGC as discussed above.

c. *Dismiss the charge if the Charging Party refuses to withdraw:*

If the Charging Party refuses to withdraw a charge alleging only noncompliance with an Authority negotiability order, the RD dismisses the charge on the basis that it "fails to state an unfair labor practice." The Charging Party is informed of its right to appeal the dismissal to the OGC. The sole issue on appeal is whether the charge alleges a new ULP or only noncompliance, i.e., the merits of any noncompliance issue are **not** reviewed on appeal. Upon denial of such an appeal, the Region investigates the noncompliance issue and makes its compliance determination.

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J. BACKPAY

OVERVIEW: Section [7118\(a\)\(7\)\(C\)](#) of the Statute empowers the Authority to award backpay to an employee as a remedy for a ULP. When the Authority determines that an employee is entitled to be made whole or receive backpay, the Region computes the amount of backpay owed pursuant to applicable OPM regulations (5 C.F.R. Part 550, subpart H §§ 550.801-550.807 implementing the Back Pay Act of 1966, 5 U.S.C. § 5596) and GAO rulings.

OBJECTIVE: To provide guidance concerning the computation of backpay and formal backpay proceedings pursuant to § 2423.42.

1. BACKPAY PERIOD:

Unless otherwise specifically set forth in the Authority Order, the backpay period is usually computed from the effective date of the ULP which gave rise to the backpay remedy to the date the respondent rescinds the action which gave rise to the ULP finding.

For example, in discharge cases, the backpay period runs from the date the employee was discharged to when the respondent makes a proper and bona fide offer of reinstatement. In a unilateral change case, the backpay period runs from the date of the change to the date the respondent ceases to implement the change in conditions of employment and returns to the preexisting practice.

2. Interest on Backpay:

Pursuant to 5 U.S.C. § 5596, “interest must be paid” on backpay awards. See, e.g., U.S. Department of the Navy, Naval Training Center, Orlando, Florida and International Union of Operating Engineers, Local 673, 53 FLRA No. 15, 53 FLRA 103, 109 (1997) (citation omitted); U. S. Department of Defense, Department of Defense Dependents Schools and Federal Education Association, 54 FLRA No. 79, 54 FLRA 773 (1998). Interest is “computed at the rate or rates in effect under section 6621(a)(1) of the Internal Revenue Code of 1986.” U.S. Department of the Interior,

[Bureau of Indian Affairs, Wapato Irrigation Project and National Federation of Federal Employees, Local 341](#), 55 FLRA No. 25, 55 FLRA 157 (1999) (quoting 5 U.S.C. § 5596(b)(2)(B)(ii))

3. PREPARATION OF BACKPAY COMPUTATION:

In computing backpay, the Region obtains, examines, and analyzes data relevant to the amount of pay, allowances, and differentials the employee would have earned had the ULP not occurred. Such pay includes all premium pay the employee would have earned and any changes in pay and allowances such as a periodic step increase or shift change. In addition to changes made by wage surveys, laws, or other changes of general application which would have affected the employee's pay, the Region also considers allowances and differentials had the ULP not occurred.



It may be necessary to examine records of other employees similarly situated and the records of the employee or employees who actually performed work during the pendency of the ULP in order to reconstruct what the employee's pay history would have been absent the ULP, e.g., overtime patterns, shift changes, work details, etc. Much of this data should have been obtained during the investigation of the underlying ULP charge.

4. BACKPAY COMPUTATION:

a. In general:

i. Time that is **included in backpay computations:**

When an Authority Order requires the payment of backpay, the employee/s affected are deemed to have performed service for the respondent during the period covered by the ULP. For the period covered by the ULP, the backpay computation computes the pay, allowances, and differentials the employee/s would have received if the unjustified or unwarranted personnel action (ULP) had not occurred. No employee is granted more pay, allowances, and differentials than what the employee would have been entitled to receive if the ULP had not occurred.

- ii. Some time periods are **excluded** from backpay computations:

In computing backpay, any period during which an employee was not ready, willing and able to perform the employee's duties because of an incapacitating illness or injury or any period during which the employee was unavailable for the performance of duties for reasons other than those related to, or caused by, the ULP, is **not** included in the period to be calculated.

Exception: The respondent must grant, upon request of an employee entitled to backpay, any sick or annual leave available to the employee for such period of incapacitation if the employee can establish that the period of incapacitation was a result of illness or injury.

- b. *Leave:*

An employee who is restored to duty after a separation is re-credited with sick and annual leave that the employee would have accrued during the period of separation without forfeiture of leave in excess of the employee's annual leave ceiling. Any leave in excess of the maximum leave accumulation authorized by law is credited to a separate leave account for use by the employee in accordance with appropriate OPM regulations and guidance.

c. Set-off of outside earnings from backpay:

Any amounts earned by an employee from other employment during the period covered by the backpay award are deducted from the backpay award. Only employment which the employee undertook to take the place of employment from which s/he had been separated by the ULP is deemed to be such other employment.

Earnings from such other employment during the period of the improper action may **not** be set-off against Federal backpay on a pay period basis. Rather, **total** private sector earnings toward the entire backpay period must be set-off against **total** Federal backpay. Where income was generated from part-time teaching, lecturing and writing activities prior to the ULP, only the added increment from such activities during the period covered by the backpay remedy is deducted from backpay. The determination as to the amount of the added increment may be based upon a comparison of the amount of such work prior to and after separation.

d. Set-off of erroneous payments received from the Government:

Any erroneous payments received from the Government as a result of the ULP are deducted from the backpay award. The lump-sum leave payment that an erroneously-separated employee received upon removal is set off against the backpay award, and the leave

which that payment represents, shall be re-credited to that employee's leave account. There is no authority to permit an employee to elect an option of retaining the lump-sum payment and canceling the annual leave.

e. Set-off of severance pay:

Severance pay, paid to an employee who is covered by a backpay remedy at the time of the employee's removal, is a proper item for deduction from backpay awarded upon restoration to duty. Severance pay is conditioned upon actual separation from the service. Since a restored employee is considered, for all purposes, to have performed duty during the period of separation, the employee may not simultaneously receive severance pay and backpay.

f. Unemployment compensation:

Where an employee receives unemployment compensation during the period of separation, such unemployment compensation is **not** a proper item for deduction from backpay upon reinstatement **unless**: (1) the applicable state law requires the employer, and not the employee, to reimburse the state for overpayments; (2) the appropriate state Agency has determined that an overpayment has occurred; and (3) the appropriate state Agency has so notified the employing Agency. 71 Comp. Gen. 114, 117 n.1 (1991) (citing 65 Comp. Gen. 865 (1986)).

g. Period of active military service:

An employee subject to a backpay remedy may not receive backpay for the period during the separation that the employee was on active military duty. While on active duty the employee could not accept an obligation to render concurrent civilian service and thus was unavailable for the performance of the civilian position.

h. Where outside interim earnings exceed the backpay award:

An employee whose interim earnings exceed the backpay calculation may retain the interim earnings but is not entitled to any backpay.

i. Past Union dues:

Past Union dues which had been checked-off prior to separation are not paid out of a backpay award unless the employee specifically requests such deduction.

5. FORMAL BACKPAY PROCEEDINGS:

After the expiration of the time limit to appeal an Authority Order which directs payment of backpay, or after the entry of a court decree enforcing such an Order, if it appears to the RD that a controversy exists between the respondent and the Authority which cannot be resolved without a formal proceeding, the RD issues a Notice of Hearing setting forth the issues to be resolved. Thereafter, the ULP hearing procedures are followed with an ALJ ultimately determining the amount of backpay. See § 2423.42.

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ATTACHMENTS

**Office of the General Counsel
ULPCHM**

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[The Statute](#)

[Subpart A](#) of Part 2423 (2423.1-2423.13)

ATTACHMENT 1A1

SAMPLE LETTER DESCRIBING POTENTIAL CHARGING PARTY'S PRE-FILING ACTIVITIES

(date)

Potential Charging Party
(name and address)

Dear Mr./Ms. (name):

I am writing in response to your inquiry concerning the filing of an unfair labor practice charge. Before a charge is filed we suggest that the parties to a dispute communicate with each other and discuss the situation with the goal of reaching a solution that meets the needs of both parties. We have found that resolutions reached by parties without relying upon outside assistance have a better chance of permanently enhancing the parties' relationship. However, should the parties agree that the FLRA's assistance is desirable, you should jointly request this service (See enclosure which describes the alternative dispute resolution services we provide). We provide assistance to the maximum extent possible consistent with staff availability.

In the event that you decide to file an unfair labor practice charge, I have enclosed FLRA Form 22, Charge Against an Agency which you should complete and send to this Office. Before you complete the form you should take time to organize your thoughts and collect supporting documents and other evidence. You should ask yourself the following questions: What part of subsection of section 7116 of the Federal Service Labor-Management Relations Statute (Statute) has been violated? How do I support this allegation? What witnesses will support my allegation and what will they say? Do the provisions of the parties' collective bargaining agreement have any impact upon the allegations? What are my interests in this case and what remedy am I seeking?

After you have organized your information you should complete the Charge Form. Make sure to sign and date the form and provide the information asked for in each part of the form. You are required to serve a copy of the charge upon the party against whom the charge is made and to provide this office with a written statement of such service. Also to support of your allegations that an unfair labor practice has been committed, enclose with your charge any documentary evidence and names/telephone numbers of witnesses. If you choose to file a charge by facsimile transmission, as is permitted by our regulations, do not exceed the five (5) page

limitation. In any event, our regulations do **not** permit you to send supporting evidence and documents to us by facsimile transmission. See 5 C.F.R. § 2423.5.

The general rule of drafting a charge is to answer the “who, what, when, where, and how” questions when describing the alleged violative acts (section 6 of the form).

- Who, for the Charged Party, violated the Statute (list title)?
- What occurred to cause the alleged violations?
- When did the alleged violation occur (dates)?

A lengthy allegation is unnecessary and is not required.

Shortly after the Region docket the charge, the case will be assigned to an FLRA Field Agent for investigation. The Agent will contact you at that time to acquaint you with the process. If you have any additional questions about the unfair labor practice process, feel free to contact this office for additional assistance.

Very truly yours,

Regional Director

enclosure

ATTACHMENT 1B1

ALTERNATIVE DISPUTE RESOLUTION

The Office of the General Counsel (OGC) Alternative Dispute Resolution (ADR) Services Program supports the FLRA's Agency-wide Collaboration and ADR (CADR) initiative by providing dispute resolution services to resolve parties' labor-management disputes and to assist parties in developing the type of labor-management relationship that is best suited to their own needs. The OGC will work with the parties to customize a program that assists them. The OGC furthers its mission to provide leadership in promoting stable and productive labor-management relationships in the Federal sector by providing ADR programs both before and after an unfair labor practice charge or a representation petition has been filed. The OGC's ADR program is codified in the Regulations. See section 2423.1(a) and (b), 2423.2 and 2423.7 (for ULP disputes) and section 2422.13(a) and (b) (for representation matters).

FAQs

- [Does the OGC provide ADR services before a charge is filed?](#)
- [Specifically, what types of services does the OGC provide?](#)
- [In lieu of an investigation, does the Region ever use an alternative approach to processing a ULP charge?](#)
- [Is the Regional Office available to help parties with representation issues that arise before a petition has been filed?](#)
- [Generally, what are the benefits of the ADR services that the OGC provides?](#)
- [What types of ADR programs not directly related to a pending ULP case might you consider requesting that the OGC provide?](#)
- [Specifically, what are some examples of ADR services that the OGC has provided?](#)
- [Does the OGC provide ADR services that are not directly related to a pending ULP case to requesters in all cases?](#)
- [Can a union force an agency, or an agency force a union, to participate in a dispute resolution program offered by the OGC?](#)
- [How do you initiate a request for an ADR service that is unrelated to a pending ULP charge?](#)
- [What is the cost of providing an ADR service?](#)
- [Who should you contact about requesting the delivery of an ADR service?](#)
- [What was the OGC's experience regarding the delivery of ADR services for FY 2000?](#)

ANSWERS

Does the OGC provide ADR services before a charge is filed?

Yes. Upon a joint request of the parties, Regional Office Agents assist parties in resolving unfair labor practice (ULP) disputes prior to the filing of a ULP charge. See section 2423.1(a) of the Regulations. It is the General Counsel's policy to encourage all parties to meet and attempt to resolve ULP disputes before a charge is filed. To that end, if requested or agreed to by both parties, a representative of the Regional Office may be available, in appropriate circumstances, to assist the parties in identifying the underlying issues and their interests and in resolving their dispute.

Specifically, what types of services does the OGC provide?

Under section 2423.(b), the parties may request that an OGC Agent provide any of the following services:

- Facilitation – Assisting the parties in improving their labor management relationship
- Intervention – Using an interest-based technique, intervening when parties are experiencing or expect significant ULP disputes
- Training – Training union and management representatives on their rights and responsibilities under the Statute, and how to avoid litigation over those rights
- Education – Working with the parties to recognize the benefits of, and establish processes for, avoiding disputes and resolving disputes by consensual rather than adversarial means

The above services may be requested at any time, i.e., they do not have to be related to a charge. In addition, after the initiation of an investigation, a Region may suggest to parties, as appropriate, that they may benefit from the ADR services.

In lieu of an investigation, does the Region ever use an alternative approach to processing a ULP charge?

Yes. The OGC provides an alternative case processing procedure that is codified at section 2423.7 of the Regulations. Among other things, the features of this ADR technique are as follows:

- The procedure is voluntary

- Interest-based problem solving technique is used
- No evidence is taken – the Agent facilitates a solution rather than conducts an investigation
- No evidence becomes part of the case file
- If the parties are unable to resolve the dispute, the case is investigated in the normal manner
- There is no communication between the Agent who was involved in the alternative case processing procedure and the Agent assigned to do the investigation on the merits, should that be necessary

Is the Regional Office available to help parties with representation issues that arise before a petition has been filed?

Yes. Just like in the ULP arena, upon the joint request of the parties, Regions are available to assist in resolving and narrowing representation issues prior to the filing of a representation petition, see section 2422.13(a) of the Regulations, and after a petition has been filed, see section 2422.13(b).

Generally, what are the benefits of the ADR services that the OGC provides?

- Ensure understanding of, and compliance with, the Statute
- Assist the parties in developing the type of labor-management relationship that best suits them
- Enable Federal agencies and their employees to deliver the highest quality services
- Enhance the quality of work life and the well-being of employees and managers

What types of ADR programs not directly related to a pending ULP case might you consider requesting that the OGC provide?

Upon joint request of the parties, the OGC is available to assist the parties to evaluate the success of their current labor-management relationship and develop the type of labor-management relationship that best meets their interests. The OGC will work with the parties to customize a program, that meets their needs. This could include statutory training as well as presentation of information about the types of labor-management relationships options and their characteristics, facilitating a discussion of the parties' respective interests, and, if both parties

agree, assisting the parties in developing options and selecting a course of action to achieve their interests.

Specifically, what are some examples of ADR services that the OGC has provided?

- Provided advanced statutory training to union and agency representatives at both the national and local levels. The training gave the participants an opportunity to discuss the law and strategies to interpret and apply the law in a manner that fosters productive labor-management relationships.
- Facilitated the resolution of multiple ULP and representation issues arising from the announced closing of a facility. The parties agreed to develop options for the placement of employees. The ULP charges were withdrawn and the parties' relationship improved.
- Provided mediation services to end protracted contract negotiations for a nationwide bargaining unit of approximately 45,000 employees. The parties had been negotiating a successor agreement to replace an expired contract. The "super mediation" session, which was the culmination of six years of contract negotiations, ULP charges and Federal Service Impasses Panel proceedings, resulted in the parties reaching agreement on all outstanding issues.
- Helped parties affected by government-wide reorganizations by facilitating agreements that minimized the need for litigation concerning the reorganization.
- Provided training and facilitation services to assist parties in addressing disputes involving representation issues, such as successorship and accretion created by reorganizations, resulting in a narrowing of the issues and an agreement on the number of petitions to be filed to resolve the representation matters.
- Conducted pre-representation petition filing meeting to explore the effects of a scheduled reorganization affecting several existing bargaining units and assisted the parties in agreeing on the manner in which representational rights would be effectuated during the processing of the representation petitions.

Does the OGC provide ADR services that are not directly related to a pending ULP case to requesters in all cases?

No. The OGC concentrates its limited resources where they have the potential to achieve the greatest results. Based on this objective, Regional Directors consider

specific factors in determining whether ADR programs and services are undertaken. Not all of the following factors are relevant to each situation:

- Commitment of the parties to improve their labor-management relationship
- Availability of OGC employees to meet the parties' needs
- Balancing of resource needs among OGC programs
- Organizational level of the Agency and Union
- Character of labor-management relationships
- The OGC's commitment to, and the parties' need for, continued assistance
- Nature and extent of prior assistance
- Acceptability of OGC assistance by the Agency and Union
- OGC involvement furthers dispute resolution

See ULPCHM, Part 1, Chapter B for a more in-depth discussion of each of the criteria listed above.

Can a union force an agency, or an agency force a union, to participate in a dispute resolution program offered by the OGC?

No. These services are only offered upon the parties' joint request. However, as part of processing a ULP charge, the OGC may suggest to the parties, as appropriate, that they may benefit from these ADR services.

How do you initiate a request for an ADR service that is unrelated to a pending ULP charge?

- ADR services may be initiated by the OGC or by a request or agreement of the parties. Depending upon the type of ADR service requested, it may be appropriate to require that the parties jointly agree that the Region provide such services. In any event, the Region provides such services consistent with OGC criteria.
- For example, parties may jointly request skills training or assistance in enhancing their labor-management relationship, or the OGC may suggest to the parties that they may benefit from such training or assistance. Irrespective of how these ADR services are initiated, the OGC creates

innovative programs that are responsive to the varying needs of the parties.

What is the cost of providing an ADR service?

Costs may include reimbursement for travel expenses and expenses for training materials

Who should you contact about requesting the delivery of an ADR service?

As assigned by each Regional Director, Regional Dispute Resolution Specialists (RDRSs), along with the Regional Office Agents, deliver OGC ADR services within their respective Regions. The RDRS coordinates the day-to-day delivery of such services within their Regional Office and provides coaching and mentoring to Regional Office Agents on the OGC ADR Program. Visit the Regional Office page on the web site, www.FLRA.gov, for the address and telephone number of each of the Regions and the e-mail address and telephone number for each RDRSs.

What was the OGC's experience regarding the delivery of ADR services for FY 2001?

For FY 2001, the OGC delivered 2100 ADR services to labor and management parties. The OGC has delivered over 175 facilitation, intervention, training, and education ADR Programs. Over 5900 employees, union representatives, managers and supervisors attended ADR programs sponsored by the OGC. ADR was utilized to resolve over 1375 charges without the need for litigation.

ATTACHMENT 2A1

FEDERAL LABOR RELATIONS AUTHORITY OFFICE OF THE GENERAL COUNSEL REGIONAL OFFICES

FLRA Regional Offices, located in the following areas, serve over 2.1 million Federal employees worldwide:

REGIONAL OFFICE

Atlanta Regional Office
Marquis Two Tower, Suite 701
285 Peachtree Center Avenue
Atlanta, GA 30303-1270
(404) 331-5300
Fax: (404) 331-5280

JURISDICTION

Alabama, Florida, Georgia,
Mississippi, South Carolina, and
Virgin Islands

REGIONAL OFFICE

Boston Regional Office
99 Summer Street, Suite 1500
Boston, MA 02110-1200
(617) 424-5730
Fax: (617) 424-5743

JURISDICTION

Connecticut, Maine, Massachusetts,
New Hampshire, New Jersey, New
York, Pennsylvania, Rhode Island,
Vermont, and Puerto Rico

REGIONAL OFFICE

Chicago Regional Office
55 West Monroe, Suite 1150
Chicago, IL 60603-9729
(312) 353-6306
Fax: (312) 886-5977

JURISDICTION

Illinois, Indiana, Iowa, Kentucky,
Michigan, Minnesota, North Dakota,
Ohio, Tennessee, and Wisconsin

Dallas Regional Office

525 South Griffin Street, Suite 926,
LB 107
Dallas, TX 75202-1906
(214) 767-4996
Fax: (214) 767-0156

Denver Regional Office

1244 Speer Boulevard, Suite 100
Denver, CO 80204-3581
(303) 844-5224
Fax: (303) 844-2774

San Francisco Regional Office

901 Market Street, Suite 220
San Francisco, CA 94103-1791
(415) 356-5000
Fax: (415) 356-5017

Washington Regional Office

Tech World Plaza
800 K Street, NW, Suite 910N
Washington, DC 20001-8000
(202) 482-6700
Fax: (202) 482-6724

JURISDICTION

Arkansas, Louisiana, New Mexico,
Oklahoma, Texas, and Panama
(limited jurisdiction)

JURISDICTION

Arizona, Colorado, Kansas,
Missouri, Montana, Nebraska, South
Dakota, Utah, and Wyoming

JURISDICTION

Alaska, California, Hawaii, Idaho,
Nevada, Oregon, Washington, and
all land and water areas west of the
continents of North and South
America (except coastal areas) to
long. 90 degrees E

JURISDICTION

Delaware, District of Columbia,
Maryland, North Carolina, Virginia,
West Virginia, and all land and
water areas east of the continents of
North and South America to long.
90 degrees E., except the Virgin
Islands, Panama (limited
jurisdiction), Puerto Rico and
coastal islands

ATTACHMENT 2A2

SAMPLE ORDER TRANSFERRING CASE

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
() REGION

(Agency Name)
Charged Party

and Case No. ()

(Charging Party's Name)
Charging Party

ORDER TRANSFERRING CASE

Pursuant to 5 C.F.R. § 2429.2, in order to effectuate the purposes of the Federal Service Labor-Management Relations Statute and to avoid unnecessary costs or delay, this case is transferred for further proceedings from the _____ Regional Office to the _____ Regional Office. Any inquiries about this case after this date should be addressed to the Regional Director of the Region to whom this case is being transferred:

_____(Name)
Regional Director, ()Region
(Address)
(Tel. #)

_____(Name)
Regional Director, ()Region
(Address)

DATED: (date)

ATTACHMENT 2B1

**SAMPLE LETTER RETURNING DEFICIENT CHARGE
TO CHARGING PARTY**

(DATE)

(Charging Party)
(address)

Dear Mr./Ms. (Name)

I am returning the unfair labor practice charge (enclosed) that you sent to this Office which is dated (date). A Charging Party is required to complete every box on the form before a Regional Office considers it appropriate to docket and file the charge.

In your case, I have determined that your charge is deficient because you have (insert case specific deficiency, e.g., failed to identify the Charged Party; failed to sign the charge form in the appropriate box). Specifically, you must (insert appropriate action to cure deficiency, e.g., clearly identify the Charged Party in the appropriate space of the Charge Form (Form 22 enclosed); sign the charge form at the bottom in box #8) and send the charge to this Regional Office where it will be docketed and filed. In completing these actions you are reminded of the time requirements for filing a ULP charge--absent certain exceptions--a charge must be filed within six months of the event which is alleged to be a ULP. Section 7118(a)(4) of the Federal Service Labor-Management Relations Statute contains this time limitation.

If you have any questions concerning this letter or any other aspect of the ULP procedure or would like assistance, feel free to call this office at the above telephone number.

Very truly yours,

Regional Director

enclosures

ATTACHMENT 2B2

MODEL UNIFORM OPENING LETTER

Re: Charged Party and Charging Party
Agency, Local facility (if needed)
City, State
Case No. XX-CX-XXXXX

Dear (Charging and Charged Party Representative):

Enclosed is a copy of the unfair labor practice charge which has been filed with this Office and assigned the case number shown above. You will be contacted shortly by the Agent who has been, or will be, assigned to investigate the charge. If you have any questions please contact directly either the Agent or Regional Point of Contact indicated below.

If you are the party who filed the charge (Charging Party), and have not done so already, please promptly submit to this Office any documentary evidence that is available to support your charge. It is also important that you prepare to discuss with the Agent the facts relating to your charge, identify any witnesses upon whom you intend to rely to prove the allegations in your charge and gather any documents relating to the charge.

If you are the party against whom this charge is filed (Charged Party), you are requested to review the allegations in the charge and submit a written position to this Office. If you do not understand the underlying basis for the charge, contact (assigned Agent or Regional Point of Contact named below). You also are expected to cooperate fully in the investigation and will be asked by the agent to supply documentary evidence or witnesses as is deemed necessary.

To assist both parties in understanding how an unfair labor practice charge is processed, I have enclosed an information sheet describing the investigatory process. Also, if someone other than you will be representing your party in this matter, please complete the enclosed "Notice of Designation of Representative."

The policies and practices of the Federal Service Labor-Management Relations Statute are best served by informal resolution of unfair labor practice disputes. The General Counsel encourages the informal resolution of unfair labor practice charges prior to the issuance of a complaint. The Agent assigned to the case, as part of the investigation, will assist the parties in informally resolving the dispute that resulted in the filing of this charge. In addition, the parties may request that the Region conduct a Alternative Case Processing Procedure. Participation in the Alternative

Case Processing Procedure is voluntary. Also enclosed is an information sheet, in a question and answer format, describing the dispute resolution services offered by the Office of the General Counsel, including the Alternative Case Processing Procedure. Please read the description of Alternative Dispute Resolution Services we provide and consider whether any of these services would be beneficial to the parties.

Sincerely,

Regional Director

Assigned Agent or Regional Point of Contact: (Name, phone number, e-mail address)

Enclosed: Description of Unfair Labor Practice Investigation Procedure
 Alternative Dispute Resolution Services Q&As
 Notice of Designation of Representative

ATTACHMENT 2B3

DESCRIPTION OF THE UNFAIR LABOR PRACTICE INVESTIGATION PROCEDURE

What happens after a charge is received by a Regional Office?

After a charge is received, it is docketed and given a case number. An opening letter is then sent to both parties with a copy of the charge, a notice of designation of representative form, and an information sheet on alternative dispute resolution services. Both parties are informed of their obligations to cooperate fully in the investigation and are encouraged to resolve informally the dispute that gave rise to the charge.

Can the charge be transferred to a different Regional Office?

Yes. Occasionally, when necessary to avoid unnecessary costs or delay and to effectuate the purposes of the Statute, a charge may be transferred to a different Regional Office. The charge is processed in the same manner regardless of the Region processing the charge.

When will I first speak with the Agent?

Soon after the charge is filed, the assigned Agent contacts both parties and: (1) clarifies the allegation(s) in the charge; (2) describes each party's obligation to cooperate in the investigation; (3) reviews each party's testimonial and documentary evidence; (4) explains how the case will be investigated; and (4) clarifies and determines whether official time is needed for any employees.

Will the Agent assist the parties in resolving the dispute that gave rise to the charge?

Yes. The General Counsel encourages the informal resolution of unfair labor practice allegations subsequent to the filing of a charge and prior to the issuance of a complaint by a Regional Director. A representative of the appropriate Regional Office, as part of the investigation, assists the parties in informally resolving their dispute. The charge may be resolved and withdrawn by the Charging Party at any stage of the investigation. More information is contained in the ADR Services questions and answers.

Can the Office of the General Counsel assist the parties in resolving a dispute that gave rise to a pending unfair labor practice charge without deciding whether an unfair labor practice occurred?

Yes. Upon joint agreement by the parties, the Regional Director may determine to utilize an alternative case processing technique to assist the parties in resolving the dispute underlying the pending charge by facilitating a problem solving approach, in lieu of initially investigating the particular facts and determining the merits of the charge.

How will the charge be investigated?

The Regions utilize a variety of investigative techniques to obtain the best possible, relevant evidence. The investigation may involve: (1) an on-site visit and the taking of signed and affirmed affidavits and the gathering of documents; (2) the taking of affidavits over the telephone; (3) parties filling out signed and affirmed questionnaires; and (4) letters confirming information discussed telephonically. The RD relies upon this evidence in deciding whether or not the ULP charge has merit. Agencies are always notified before an Agent visits the workplace.

When are employees entitled to official time?

Employees deemed necessary by the Region to give evidence during the investigation are granted official time under section 7131(c) of the Statute. Employees requested to complete a questionnaire and to review a telephone affidavit also are entitled to reasonable official time. The Agent arranges such time with the agency. Official time to gather information during the course of the investigation depends upon the parties' contract and past practices and does not involve Regional Office authorization.

How do the parties cooperate with the Region during an investigation?

Cooperation includes, as determined by the Regional Director: (1) making union officials, employees and agency supervisors and managers available to give sworn/affirmed testimony regarding matters under investigation; (2) producing documentary evidence pertinent to the matters under investigation; and (3) providing statements of position in the matters under investigation.

What happens if a party does not cooperate in the investigation?

A Charging Party's failure to cooperate could result in a dismissal of the charge for lack of cooperation. A Charged Party's failure to cooperate, as requested, could result in the issuance and enforcement of an investigative subpoena.

When is an investigation completed?

An investigation is completed when each party has been given a reasonable opportunity to provide relevant evidence and there are sufficient facts for the Regional Director to render a decision on the merits of the charge.

What happens if the Regional Director determines that the charge does not have merit?

If the Regional Director determines that the charge does not have merit and therefore should be dismissed, the Charging Party is afforded a brief opportunity to withdraw the charge without issuance of a written dismissal. If the charge is not withdrawn or is not withdrawn promptly, a written dismissal issues and is served on the parties. The dismissal letter describes the allegation(s), the facts disclosed during the investigation, the applicable law and the reasoning upon which the Regional Director's decision to dismiss is based.

Can that dismissal decision be appealed?

Yes. A dismissal is appealable to the Office of the General Counsel in Washington, D.C. The General Counsel may dismiss the appeal and close the case or remand the case for further investigation or issuance of a complaint. The General Counsel's decision to deny an appeal and close a case is not subject to review.

What happens if the Regional Director determines that the charge has merit?

If the Regional Director determines that the evidence supports issuance of a complaint, the Region, as the public prosecutor, attempts to settle the charge prior to issuance of a complaint and notice of hearing which schedules the matter for trial before a FLRA Administrative Law Judge. The complaint sets forth the allegations to be prosecuted and is served on all parties to the charge.

ATTACHMENT 2D1

SAMPLE E-MAIL NOTICE TO ALL REGIONS OF CHARGE THAT MAY HAVE NATIONWIDE IMPLICATIONS

To: All RDs, RAs/DRD, Lit. Specialists

From: RD/RA/DRD

Subject: Agency, Case No. , docketed (date)

Date:

The Union is alleging that the Agency violated the Statute when its internal audit people conducted interviews with bargaining unit employees in the State of New Jersey without affording the union an opportunity to be represented and/or without honoring the request of the employees for union representation. These meetings were held in connection with recent criticism lodged against the IRS to determine if employees were being pressured to engage in inappropriate behavior or had knowledge of such behavior. Follow-up interviews were held with these employees for the purpose of comparing their answers at each interview. We have completed our investigation and are likely to issue complaint alleging formal discussion and Weingarten violations. The Agency's position is that its audit employees were only taking a survey of opinions within the bounds of the law.

The Agency's conduct may not be limited to the State of New Jersey. If any similar cases arise in your regions, we need to coordinate our litigation efforts. Please notify me by e-mail (copy to the Deputy General Counsel) whether or not you have any pending related cases. By FAX, I am sending you the charge in this case.

ATTACHMENT 2G1

ELEMENTS OF COMMON VIOLATIONS

Violations of section 7116(a)(1) and (8) of the Statute:

FORMAL DISCUSSION - Section 7114(a)(2)(A) of the Statute

An exclusive representative has the right to be present at:

- Discussion that was--
- Formal (was meeting scheduled in advance; whether employees were required to attend; whether management officials above employees' first line supervisor attended; whether the meeting was held outside the regular work area; whether the meeting had an agenda, the duration of the meeting; whether minutes were taken of the meeting)--
- Between 1 or more Agency representatives and 1 or more unit employees or their representatives--
- Concerning any grievance or any personnel policy or practice or other general condition of employment.

See, e.g., F.E. Warren Air Force Base, Cheyenne, Wyoming, 52 FLRA No. 17, 52 FLRA 149, 155 (1996).

WEINGARTEN VIOLATION - Section 7114(a)(2)(B) of the Statute

An exclusive representative has the right to be present at:

- Examination of a unit employee in connection with investigation;
- By a representative of the Agency;
- Employee reasonably believes that examination may result in disciplinary action against employee; and
- Employee requests representation

See, e.g., Headquarters, National Aeronautics and Space Administration, Washington, D.C., 50 FLRA No. 82, 50 FLRA 601, 606-22 (1995) (finding of violation against Headquarters where it is responsible for actions which affect one of its subcomponents), enforced sub nom. FLRA v. National Aeronautics and Space Administration, Washington, D.C., 120 F.3d 1208 (11th Cir. 1997), affirmed sub nom. National Aeronautics and Space Administration v. FLRA, 119 S. Ct. 1979 (1999).



For an in-depth discussion of formal discussion and Weingarten violations, see the [GC's Guidance on Meetings](#) (Jan. 2001).

Violation of section 7116(a)(1), (5) and (8) of the Statute:

DATA INFORMATION - Section 7114(b)(4)

To the extent not prohibited by law (e.g., the Privacy Act), an exclusive representative has the right to receive data from the agency, upon request, which is:

- Normally maintained;
 - Reasonably available;
 - Necessary
- union's particularized need weighed, if applicable,
- against agency's countervailing interest; and
- Information requested **must not** be guidance, advice, counsel, or training for management officials relating to collective bargaining.

See, e.g., Department of Health and Human Services, Social Security Administration, New York Region, New York, New York, 52 FLRA No. 113, 53 FLRA 1133, 1139-50 (1996).

Violation of section 7116(a)(1) and (2):

- Unit employee against whom the alleged discriminatory action was taken was involved in protected activity; and
- Such activity was a motivating factor in the Agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment

and

after GC meets burden, Respondent does not show, as an affirmative defense, that:

- There was a legitimate justification for its action; and
- The same action would have been taken even in the absence of protected activity.

See, e.g., United States Air Force Academy, Colorado Springs, Colorado, 52 FLRA 874, 878-79 (1997) (citing Letterkenny Army Depot, 35 FLRA No. 15, 35 FLRA 113 (1990)).

Violation of section 7116(a)(1) and (5):

UNILATERAL CHANGE IN CONDITIONS OF EMPLOYMENT:

- Without regard to the contract, the Agency gave no notice and opportunity to bargain over a change in condition of employment, and
- Change had more than de minimis impact on unit employees' conditions of employment--consideration of:
 - nature and extent of the effect (e.g., temporary or permanent, major or minor) or
 - reasonable foreseeable effect of the change

if established, consider whether Respondent has established "covered by" affirmative defense

See, e.g., General Services Administration, Region 9, San Francisco, California, 52 FLRA No. 112, 52 FLRA 1107, 1111 (1997); Air Force Materiel Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, 53 FLRA No. 88, 53 FLRA 1092, 1093 (1998) (rejection of "covered by" affirmative defense).

REPUDIATION OF THE PARTIES AGREEMENT:

- Nature and scope of the alleged breach of agreement (i.e., was the breach clear and patent); and

- Nature of the agreement provision allegedly breached (i.e., did the provision go to the heart of the parties' agreement).

See, e.g., Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Illinois, 51 FLRA No. 72, 51 FLRA 858, 861-62 (1996) (citing Department of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, 40 FLRA No. 106, 40 FLRA 1211 (1991).

Violation of section 7116(a)(1):

The standard for determining a violation:

Whether, under the circumstances, the Agency's statement or conduct would tend to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive influence from the statement.

See, e.g., U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky, 49 FLRA No. 97, 49 FLRA 1020, 1034 (1994).

INVESTIGATING AN ALLEGED MID-TERM CHANGE: SAMPLE QUESTIONS

To the charging party and witnesses:

Grievances: Has a grievance been filed which is any way related to this dispute? In writing?

The change: What was the alleged change? When did it occur? When did you first learn of the change? Do you have a practice and/or contractual procedure which requires notice and/or a settlement effort before a charge is filed? Why the delay in filing the charge after learning of the change?

Implementation: Was the change implemented or announced by a written document, for example, by memorandum? Do you have a copy? When and how did you or the union receive or become aware of this writing? Who else might have a copy if you don't? Can you point up the change as it appears in this writing? Was the announcement or implementation oral? Who was present? How were you informed if you weren't present? What was said?

Collective bargaining agreement(s): Please provide a copy of the applicable collective bargaining agreement(s)? Is the change here at issue related to anything in the collective bargaining agreement(s)? How is the Union usually informed of such matters? Are you claiming that the collective bargaining was violated or repudiated? How?

Negotiations/discussions at other levels: Have Union and Agency management representatives above the local (or below the national) discussed and/or negotiated concerning this issue? What is the relationship between those discussions and/or negotiations and this dispute?

Impact: How are employees affected by the change? Will they be doing different work or be expected to do more? Will they perform higher or lower graded work or work for which they are unsuited? Will they have different starting or quitting times, be away from their usual colleagues, or work in unusual, variable, or out of the way locations? Under differing supervision? Is there an impact outside of their work hours?

Contacts between the parties: Have you raised an issue about the change with Agency management, in writing or orally? Any documents exchanged? If there were oral contacts, when did they occur, who was present and what was said? Did you ask for information? Did you request bargaining? Were you asked to provide proposals? What were the proposals? What was management's reaction? Are

any further exchanges in writing or meetings planned? Do you need and desire settlement assistance?

Resolution desired: What settlement do you seek?

To the Charged Party

The Union is claiming that _____.

Change: Has there been a change? A change which affects employees' conditions of employment? A change which doesn't affect conditions of employment?

Implementation: If there was any change, how and when was the change implemented? In writing? Can you provide a copy? Orally? Who made the announcement, to whom? Can I speak to that person? Under what circumstances? Is there a unusual practice for notification? Was this practice followed? Any reason for a different practice on this occasion? Did the Union respond? Was a response requested?

Impact: Any affect on what work is performed, or when, where, how, or by whom it is performed? Any change in employee supervision or the manner in which employees will be appraised? Any change in employees' physical working conditions? A change in employees' contact with other employees or other persons?

Settlement discussions: Have management and union representatives discussed this issue? When? Who was present? Are the discussions continuing? Has management requested or received Union proposals? A management response?

Contact with management officials and supervisors: May we speak to the management officials and/or supervisors who were directly involved in the action which is being complained of. What would induce you to allow us to have such discussions?

Scope of bargaining issues and procedures: Have you claimed that the subject is outside of your duty to bargain under the Statute? In writing? Were there any other exchanges in writing between the parties connected with this dispute?

INVESTIGATING AN “EXAMINATION” OR “WEINGARTEN” SITUATION: SAMPLE QUESTIONS

Meeting: When did the meeting occur? Who initiated the meeting? Who was present? Was the employee and/or Union informed in advance? How? Was anything said before or during the meeting about the presence of a Union representative? Who said what on that subject? Was it done in writing?

Subject: What was discussed? Was that known in advance? Was the employee questioned? About the employee’s work, conduct or behavior? About others’ work, conduct or behavior?

Implications: Was anything said about discipline for anyone? For this employee or any other employee? Was the employee told that he or she had to answer the questions or that they must answer honestly? Was anything said about immunity from discipline for anyone? Are employees disciplined for the matters discussed at the meeting? How severe is the penalty, if any? Has discipline been proposed or imposed on anyone in connection with the matters discussed at the meeting?

Representation: Did the employee say or write anything before or during this meeting about his or her need or desire for Union assistance or Union representation? Concerning any assistance or representation? Did management’s representatives respond? Any back and forth on this subject? Was the meeting delayed for this purpose? For how long? When and how was the union informed of the need for representation, if any? Do the parties have a common practice for these situations? How did it work here? Anything special or unusual about this situation?

Further investigation: Who else has direct knowledge of this situation? May we speak to them directly? Does any written record exist for what happened before, during, or as a result of this meeting?

Investigating an Allegation of “Discrimination”: SAMPLE QUESTIONS

Charging Party

Management’s Action: What management action is being complained of? When, how, where, and by whom was the action implemented or announced? Who was affected? How? What explanation was given, if any? Do you know of any records that exist or may exist which would show whether the action was or was not justified?

Protected Activity (to Union representatives and employee witnesses): Have any employees affected by the action been acting as Union representatives or been represented by the Union? Have they been promoting Union activity or trying to induce employees to engage in such activities? What were those activities? When did they take place? Does a written record of such activities exist? Were meetings involved? What was the subject of the meetings? Who was present? To your knowledge, what management officials were involved? How were they involved? Were the management officials involved the action complained of affected by these employee activities? Directly? Indirectly?

Is there any reason why the management officials taking the action might be sensitive to the employee’s protected activity, because of what they’ve done, how they did it, or behaved? Have these people, management officials and employees, had difficulties with each other?

Management’s action and animus: Did these management officials complain of the affected employees’ protected activities, to you or anyone else, orally or in writing? What comments? By whom? When?

Other explanations for the actions: Have these management actions or like actions been taken concerning the affected employees at other times? When? What explanations, if any, were given? Are there any explanations for the actions other than the explanation in your charge? Do you know of, or can you think of, any other explanation?

Charged Party

Management’s action: The Union is referring to _____ and is alleging that this action was taken in retaliation for employees’ protected activity. Can you furnish the written record(s) used to justify the action, if any, and any written record

of the action itself? Can I speak with and take information from the management officials directly involved?

What action was taken? When? Who was affected? What explanation has been given or is being given for the action? Has this action or similar actions been taken for these employees at other times? When? Any written records? Who would explain the basis for the action?

Employees protected activities: What management officials were involved in the employees' protected activities, by being affected by the employees' protected activities or while acting as representatives for management? What other experiences have these management officials had in dealing with these employees, other employees, or Union representatives on these or related matters? Any other contacts of this type at all? Does any written record exist concerning these matters? Any witnesses?

Animus: Were any oral or written comments made to the affected employees or others regarding their protected activities? Is there any reason why the management officials taking the action might be sensitive to the employee's protected activity because of what the employees did, how they did it, or the way they behaved? Have these people, management officials and employees, had difficulties with each other?

INVESTIGATING AN “INFORMATION” ALLEGATION: SAMPLE QUESTIONS

Information request: What information or data was requested? Was the request made orally or in writing? When was the request made? Who made the request? To whom was the request made? Was this request made the way requests are usually made? Anything unusual about the request here?

Why is the Union making this request? What is the representation issue? How would this information, if furnished, help the Union with the representation issue? How does the Union expect to use this information? Was this explained to management, orally or in writing, when the request was made? In conjunction with or separate from the information request?

If the information concerns individual employees and the identity of the employees could be determined from the information supplied, by name, social security number, or other means, did the Union ask that the information be supplied with this data? Without such data? If the Union asked for the information with the personal identifier data included, did the Union explain why it needed the information in that form? As compared to getting the information without such data?

Management response: Did management respond to the request, orally or in writing? Did management ask for a clarification of what was being asked for? Did it ask for an explanation or clarification on why the Union needed this information or why the Union needed the information in the form in which it was requested? With or without personal identifiers? Did management inquire into how the Union planned to use the information?

Did management object to furnishing the information for any reason; for example, any of the reasons it could refer to under section 7114(b)(4)? What reasons? What rationale has management given or will not give to support this response?

If the information does contain personal identifiers data, is this information maintained in a system of records in accordance with the Privacy Act? What system of records? What are the “routine uses?” Is the Union a routine user?

Union response to management: Has the Union responded in any way to management’s response to the request? Orally or in writing? Can the Union adjust or narrow its request so that it meets management’s concerns or objections and still satisfy the Union’s informational need? Has the Union made such an effort? Has it been communicated to management?

Discussions and negotiations: Have one or both parties attempted to work out any disagreement(s) they may have about the request? Can management suggest a method for adjusting the request or its response to satisfy its concerns or objections and the Union's informational needs?

INVESTIGATING AN INDEPENDENT STATEMENT CASE OR (A)(1) VIOLATION: SAMPLE QUESTIONS

Independent (a)(1) violations: An independent (a)(1) violation arises when a statement is made by a management official or supervisor orally or in writing which expressly or impliedly interferes with, restrains, coerces any employee in the exercise by the employee of any right under the Statute. Statements which are not seen or heard and statements made by persons who lack influence over employees do not interfere with, restrain, or coerce employees.

Written statement: What is the written statement? Do you have a copy? Who wrote the statement? What is their position? Did someone else originate the statement or require or influence its writing? What is their position? How did you come to have a copy? Who else may have a copy? How was the statement distributed, if at all? Was it intended to be made available to a select group? Was it posted on a bulletin board? Who knows of the statement's existence and its contents? How did they come to know?

Was the statement in response to an action or statement by others? What action(s) or statement(s)? Has anything occurred regarding the statement's contents since it was made?

Oral statement: What was said? When? Who was present? Is it possible that someone not present heard the statement? Someone near the area or who may have been passing by? How do you know of the statement if you were not present? How did others, if any, come to learn of what was said?

Who made the statement? Was there anything in their statement, their behavior, or the context to suggest that they were speaking for themselves or others? Was the statement made in reaction to what others said or did? What may have been said or done? Has anything occurred regarding the statement's contents since it was made?

Purpose or effect: What is there in the context, when the statement was made, to explain its meaning? A history? What is the best interpretation of this statement that you could give, in favor of the writer or speaker? If the purpose or effect complained of is not readily apparent from the writing or what was said, how do you account for or explain that purpose or effect?

What is the problem with this statement? From your point of view? From others' point of view?

Remedy: What would remedy your complaint about this statement? How would you implement the remedy? Will this remedy improve or harm the parties' relationship in any way?

ATTACHMENT 2H1

SAMPLE LETTER RE: AMENDMENT OF CHARGE

(Date)

Charging Party Rep.
(Name and address)

Re: Case Name and Case Number

Dear Mr./Ms. (Name):

Pursuant to our telephone conversation of (date), enclosed is the (First) Amended Charge in this case. In addition to the original allegations, you intend to (state added allegations or correction of errors). Please sign, and date the amended charge and return it as soon as possible. A copy must be served on the Charged Party.

If you have any questions, please contact me at (telephone #).

Sincerely,

Field Agent

ATTACHMENT 2K1

SAMPLE LETTER DEFERRING ULP CHARGE DURING PENDENCY OF REPRESENTATION PETITION

(Date)

Charging Party Rep.
(Name and Address)

Charged Party Rep.
(Name and Address)

Re: Case Name and Case Number

Dear Mr./Ms. (Name) & Mr./Ms. (Name):

This Office docketed the captioned unfair labor practice (ULP) charge on (date). Also pending at this time is a representation petition, (case name and case number) which has an issue that is related to the issue underlying the ULP charge. Because the processing of the representation case will resolve a significant issue that will impact on the processing of the ULP charge, it best effectuates the purposes and policies of the Federal Service Labor-Management Relations Statute to defer processing the ULP charge until the representation proceedings are completed. In this way, both matters will not be processed simultaneously thus avoiding a duplication of efforts.

Upon completion of the processing of the related representation case, the Regional Office will (continue to) process the ULP charge.

Sincerely,

Regional Director, Region ()

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ATTACHMENT 3A1

PRACTICAL POINTERS TO PROCESS PROMPTLY

A ULP CHARGE

—

OFFICE ORGANIZATION

&

CASE PROCESSING TIPS

GENERAL OFFICE ORGANIZATION TIPS

A. Organization of the day/week in Office

1. Keep a daily list--“ To Do,” “To Call,” “To Write”
2. The first thing in the morning, read decisions for one hour or work on a thorny research issue or write a difficult dismissal letter.
3. Keep some kind of calendar on the desk or wall--it is good to be able to take it along in briefcase.
4. Keep a one page list of all current cases, date of filing and status.
5. Make use of sticky notes attached to files as reminder of status/next step in investigation.
6. Maintain current phone numbers and fax numbers of parties in a take-along phone book.
7. Make sure your voice mail message is current.

B. Computer and Word Processing Tools

1. Macros:
 - Legal analysis & case cites by issue
 - Affidavits
 - Other forms: fax sheets, service sheets, memo, MOA's
 - Address macros — use the last name for the command
 - Forms: letters, complaints, fax, affidavit, affidavit fax, withdraw form, file memo form, dismissals, etc.
2. Computer file/folder organization
3. E-mail to parties
4. Cut & Paste: affidavit to FIR. Excise factual and legal facts to dismissal letter carefully
5. Quick correct — great for such things as “FLRA”, “7116 (a) (1) (2)”, etc.

CAA\	Tips.222	FIR\	
	Fore.222	Forms\	
	Libra.222	Macros\	
	Walls.222	Organize\	
Forms\		Settle\	
	Opening.page	REPRESENTATION	
	Lined.page	ABCD\	
	Closing.page	CERTS\	
Union\		DGA\	
	Brown.222	Election\	
	Jones.222	Forms\	
	Smith.222	HOG\	
Witnesss\		VaSpring\	
	Brown.222	TRAINING\	
	Jones.222	IBB.ng\	
	Smith.222	Main.agenda\	
VAMC\		Main.ibb\	
	Brown.222	Main.partner\	
	Jones.222	Main.statute\	
	Smith.222	Misc\	
MEMO\		Pdi\	
MOU\			
Forms\	Confirming.ltr		
	FAX		
	Info.ltr		
	Inquiry.ltr		
	Itinerary		
	Memo.wd		
	Affidavit.ltr		
Misc\			
	Service.reps		

CASE PROCESSING TIPS

A. Contacts with the parties

1. To encourage parties to be cooperative and responsive, you need to build trust, confidence and respect. Remember--trust is built up over time, but it may be lost in an instant.
2. Assess both representatives' personalities and skills and adjust your communication methods accordingly. Learn the theories and facts before expressing any views about the case.
3. Call early from the date of assignment. After one week if there is no response/contact, then send a letter. From the beginning, if you suspect the party may not be fully cooperative and/or responsive, set specific reasonable response dates for documents or answers to questions and confirm these time deadlines in writing. Consider putting the case aside for a few weeks, but make sure that the parties are actually doing something for you during those early weeks. At least the next call is not the first, "cold" call and you have some idea as to what you are facing.
4. Explain the process and keep parties posted on the status of the investigation.
5. Explain what evidence is needed to support/refute an allegation based on the case law. When advising parties of an RD decision, refer back to this discussion in reviewing what evidence did or did not come to light in the investigation.
6. Use confirming letters used early in the case to help confirm key facts.
7. Keep the parties posted on the potential date for investigation or contact.
8. Use fax and e-mail. Encourage the parties to use e-mail because it allows you to put the evidence and positions into your computer investigation files.
9. Follow through on what you tell the parties you are going to do (call them or send them something).

10. Return phone calls. Check for messages when you are out of the office and try to return the calls. As stated above, make sure that your voice-mail message is current at all times.
11. If you do not know, or are unsure of an answer to a question, do not hesitate to tell the party that you have to check out the answer before you respond.
12. Do not require the parties to provide information that you do not know if you will need, i.e., do not waste their time.
13. Check with others in your office as to how they have dealt with the parties in the past.
14. Be as straightforward with the parties as you possibly can. The relationship you establish with the current case may affect how easily you will be able to deal with them on other future cases.

B. Organization at the on-site investigation

1. Set a schedule & clear official time for witnesses prior to arrival.
2. The investigation should be conducted in a private room with a phone--not the Union office or an office in or near the Personnel Office or Director's Office.
3. Union space is fine as long as it is reserved for the use of the investigation.
4. Keep a running list of documents and witnesses needed.
5. Make sure to have the phone number and schedule of the Union rep/Agency rep to contact if necessary.

C. How to conclude a case upon completion of investigation

1. Prepare a pre-Agenda memo ASAP after the investigation is finished (while it is still fresh in your mind). Schedule the time for the necessary research and writeup.
2. Keep track of the pre-Agenda writeup and schedule an Agenda for the case.
3. Get the decision to the parties, by phone, fax, etc.
4. Schedule a time to do the final actions-dismissals, complaints.

ATTACHMENT 3E1

SAMPLE LETTER REQUESTING OFFICIAL TIME

(Date)

Charged Party Rep.
(Name and Address)

Re: Case Name and Case Number

Dear Mr./Ms. (Name):

As we discussed last week when I spoke with you by telephone regarding the captioned unfair labor practice charge, I will be coming to your facility next week to conduct an investigation. This investigation will take place on (date) at (time). Pursuant to section 7131(c) of the Federal Service Labor-Management Relations Statute, I am requesting that the Agency make the following unit employees available on official time for an interview at the following times:

(Name) 8:00 A.M.
(Name) 10:00 A.M.
(Name) 12:00 P.M.

I anticipate that each interview will last for approximately two hours. Once I am on-site, it may be necessary to arrange for the interview of an additional witness(es). I will notify you should that occur. Please call or contact me at (telephone # and e-mail address) to confirm that the individuals will be released and to let me know of the location that will be made available for the purpose of the interviews. In addition, please inform the employees' supervisors to ensure their release at the appointed time for the interview. Should another on-site investigation be necessary after next week, I will contact you to make the necessary arrangements.

Thank you for your cooperation.

Sincerely,

Field Agent

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ATTACHMENT 3H1

AFFIDAVIT TAKEN IN PERSON

UNITED STATES OF AMERICA

BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY

() REGION

AFFIDAVIT

State of _____

Case Name _____

Case Number _____

I, (name), make the following voluntary statement in cooperation with an official investigation being conducted pursuant to the Federal Service Labor-Management Relations Statute. I have been assured by an Agent of the Federal Labor Relations Authority that this statement will be considered confidential by the United States Government and will not be disclosed as long as the case remains open, unless I testify at a formal hearing and it then becomes necessary to produce the statement at the hearing. Upon the closing of the case, the statement may be subject to disclosure in accordance with the Freedom of Information Act, as amended.

Home Address: _____

Home Telephone Number: _____

Work Telephone Number: _____

Work Position: _____

Work Location: _____

Years worked with Employer: _____

Page 1 of ____

Affiant's Initials _____

Union Position: _____

-

Page 2 of ____

Affiant's Initials _____

-

Page 3 of ____

Affiant's Initials _____

I have read, and have had an opportunity to correct, this affidavit consisting of (number) pages, including the signature page, and affirm that the facts asserted are true and correct to the best of my knowledge and belief.

(Signature)

(Date)

Subscribed and affirmed before me
on this date (date).

Field Agent

Page () of ____

Affiant's Initials _____

ATTACHMENT 311

SAMPLE COVER LETTER AND AFFIDAVIT OF CHARGING PARTY TAKEN TELEPHONICALLY

(Date)

(Name and Address)

Re: (Case Name and Number)

Dear Mr./Ms. (Name):

Enclosed is an affidavit that I have prepared based on our telephone conversation on (date) concerning the captioned case. Please review the affidavit and make any necessary **minor** corrections, changes or additions. Draw a line through words as needed or insert additional words as needed. Initial each change and initial in the space provided at the bottom of each page. Please call me if there is a **major** correction, change, or addition that you would like to make to the affidavit. As we agreed upon, please return the original signed affidavit by (). Should you fail to return the signed affidavit by the required date, the Regional Director may decide the case without your affidavit, or the case may be dismissed for lack of cooperation if no other evidence has been submitted.

Thank you very much for your cooperation in this matter.

Sincerely,

Field Agent

Enclosure

UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY

() REGION

AFFIDAVIT

State of _____

Case Name _____

Case Number _____

I, (name), make the following voluntary statement in cooperation with an official investigation being conducted pursuant to the Federal Service Labor-Management Relations Statute. I have been assured by an Agent of the Federal Labor Relations Authority that this statement will be considered confidential by the United States Government and will not be disclosed as long as the case remains open, unless I testify at a formal hearing and it then becomes necessary to produce the statement at the hearing. Upon the closing of the case, the statement may be subject to disclosure in accordance with the Freedom of Information Act, as amended.

Home Address: _____

Home Telephone Number: _____

Work Telephone Number: _____

Work Position: _____

Work Location: _____

Years worked with Employer: _____

Union Position: _____

Page 1 of _____

Affiant's Initials _____

Page 2 of ____

Affiant's Initials _____

Page 3 of ____

Affiant's Initials _____

I have read, and have had an opportunity to correct, this affidavit consisting of (number) pages, including the signature page, and affirm that the facts asserted are true and correct to the best of my knowledge and belief.

(Signature)

(Date)

Page () of ____

Affiant's Initials _____

ATTACHMENT 3J1

SAMPLE COVER LETTER FOR QUESTIONNAIRE

(Date)

Charging Party Rep.
(Name and Address)

Re: Case Name and Case No.

Dear Mr./Ms. (Name):

I am sending you a questionnaire which you must complete as part of the investigation in the captioned unfair labor case. Please complete this questionnaire promptly so that I will be able to complete the investigation expeditiously.

We often ask Charging Parties to complete this questionnaire in light of many Authority decisions that have significantly impacted the manner in which unfair labor practice charges alleging a refusal to furnish information under section 7114(b)(4) of the Federal Service Labor-Management Relations Statute should be investigated and decided.

If the Regional Director determines that your charge lacks merit after applying the law to the facts of the case as described in your answers to the questions in the questionnaire, you will be given an opportunity to withdraw the charge and to resubmit the information request to the Agency. If you resubmit your request, make sure that you follow the guidelines set forth in the Authority's decisions. Enclosed is the Guidance Memorandum that the General Counsel has issued on Investigating, Deciding, and Resolving Information Disputes. This Memorandum discusses the Authority's decisions in this area and describes ways in which the parties can narrow and resolve their dispute in lieu of time-consuming and costly litigation. We also provide sample forms both for unions when submitting information requests and for agencies when responding to those requests.

Do the best that you can in answering the questions and signing the affirmation at the bottom of page three. Feel free to contact me at the telephone number below if you have any questions about the questionnaire or any other matter related to the investigation. In deciding the merits of the case, the Regional Director will rely upon your answers and any other documents that you present.

I ask that you submit the answers to this questionnaire by **(date)**. The failure to comply with this request would impact greatly the Region's effort to obtain the evidence necessary for the Regional Director to decide the case. Thus, should you fail to return the completed questionnaire by the required date, the Regional Director may decide the case without your answers, or the case may be dismissed for lack of cooperation if no other evidence has been submitted.

Sincerely,

Field Agent
(telephone number)

Enclosures

ATTACHMENT 3J2

SAMPLE QUESTIONNAIRE: INFORMATION CASE

If your answer to any question does not fit in the space provided, you may attach additional sheets. Please indicate which sheet corresponds to which question.

Case Name and Number: _____

I, _____, in cooperation with an official investigation being conducted by the Federal Labor Relations Authority pursuant to the Federal Service Labor-Management Relations Statute, supply the following information voluntarily.

My full name is _____

My Union position/title is _____

My mailing address is _____

My phone number is ()- _____

1. On what date(s) did you make the information request? _____

2. What is the name of the requesting union? _____

3. If not you, what is the name, position, mailing address and phone number of the union representative who submitted the request?

4. What is the name, position, mailing address and phone number of the agency representative to whom the request was made? _____

5(a). How was the request made: _____ in writing; _____ orally; or _____ both in writing and orally?

5(b). If in writing, please attach a copy of the request.

5(c). If orally, either instead of a written request or in addition to a written request: state to whom you spoke; the date of the conversation(s); and, as closely as you

can, exactly HOW YOU DESCRIBED the information what you were requesting. ____

6(a). Did you specifically request that the agency either include or delete personal identifiers (such as names, social security numbers or other matters identifying individual employees)? ____ Yes ____ No.

6(b). Was this done: ____ in writing; ____ orally; or ____ both in writing and orally?

7(a). Did you explain why the union needed the requested information: ____ in writing; ____ orally; or ____ both in writing and orally?

7(b). If in writing, please attach a copy of the request.

7(c). If orally, either instead of a written request or in addition to a written request: state to whom you spoke; the date of the conversation(s); and, as closely as you can, exactly WHAT YOU SAID to explain why the union needed the information you were requesting.

8(a). Do you know if the requested information is contained within a system of records under the Privacy Act? ____ Yes ____ No. If you do know, please identify that system of records. _____

Only answer the next two questions, 8(b) and 8(c), if your answer to number 8 is Yes.

8(b). If you know that the requested information is within a system of records under the Privacy Act, why doesn't the Privacy Act bar disclosure of the requested information, including any personal identifiers? _____

8(c). Did you state this to the agency representative? ___ Yes ___ No. If yes, describe as best you can exactly WHAT YOU SAID, to whom and when.

9(a). Did the agency respond to your request: ___ in writing; ___ orally; ___ both in writing and orally; or ___ not at all?

9(b). If in writing, attach a copy of the written response.

9(c). If orally, either instead of a written response or in addition to a written request; state to whom you spoke; the date of the conversation(s); and, as closely as you can, exactly what the agency representative SAID TO YOU.

10(a). Does the Union still want copies of the information as requested? ___ Yes ___ No.

10(b). If yes, please explain how the Union intends to use the information?

11. Have the parties attempted to resolve this dispute themselves? ___ Yes ___ No. If yes, please describe as specifically as you can what efforts have been undertaken, by whom, when, and the results. _____

12. Discuss any other matters not listed above which relate to the union's information request and any agency response. _____

I have read the information above consisting of (number) pages, including any attachments, and affirm to the best of my knowledge and the belief that it is true.

(Date)

(Name)

ATTACHMENT 3K1

SUBPOENA DUCES TECUM

**UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF THE GENERAL COUNSEL**

TO: John Jackson
Labor Relations Specialist
Bureau of Water Treatment
Division of Water Resources
Department of the Interior
999 Pond Rd.
Denver, CO 80209

Request having been made by (Margo Thomas, Regional Director), whose address is (1244 Speer Blvd., Suite 100, Denver, CO 80204) concerning disclosure of a document in

Case Name: Bureau of Water Treatment

Case No.: DE-CA-80700

YOU ARE HEREBY REQUIRED AND DIRECTED TO PRODUCE THE FOLLOWING DOCUMENT at the (Denver Regional Office, 124 Speer Blvd., Suite 100, Denver, CO 80204) by (5:00 p.m. on August 28, 1998). Any method of delivery of the document is permitted provided that the Regional Office receives the document by (5:00 p.m. on August 28, 1998):

(Overtime Rosters for the Blue Unit for the period beginning July 1, 1997 through June 30, 1998).



In testimony whereof, the seal of the FEDERAL LABOR RELATIONS AUTHORITY is affixed hereto and the undersigned has hereunto set his hand and authorized the issuance hereof.

(Signature)
General Counsel

NOTE:

5 C.F.R. § 2423.8(c)(4) provides a mechanism for enforcement of a subpoena should a person fail to comply with a subpoena.

ATTACHMENT 3L1

SAMPLE CONFIRMING LETTER FOR CHARGING PARTY WITNESS (§ 7118(a)(4) - UNTIMELY FILED CHARGE)

(date)

Name of Witness
(Address)

Re: Case Name and Case Number

Dear Mr./Ms. (Name):

This letter confirms our telephone conversation today concerning the investigation of the unfair labor practice charge in the captioned case which was filed with this Office on (date). Specifically, we discussed the Union's allegation that the Agency violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute when management unilaterally removed a phone from the machine shop area without first providing the Union with notice and an opportunity to bargain.

You stated that management implemented this change on (date - more than six months prior to the filing of the charge) and that you discussed this matter with a unit employee the day after management implemented the change.

If the facts as described above are in error or are incomplete in any way, please contact me by telephone at (number) or in writing on or before (date). If I do not hear from you by that date, I will assume that the facts as described are correct. In

addition, this letter will be submitted to the Regional Director as evidence that s/he will consider in deciding this case.

I appreciate your cooperation in the investigation of this case.

Sincerely,

Field Agent

ATTACHMENT 3L2

SAMPLE CONFIRMING LETTER FOR CHARGING PARTY WITNESS

(date)

Name of Witness
(Address)

Re: Case Name and Case Number

Dear Mr./Ms. (Name):

This letter confirms our telephone conversation today concerning the investigation of the unfair labor practice charge in the captioned case. During this conversation you stated that since you provided an affidavit last week concerning the allegations underlying the unfair labor practice charge, the Agency has, on (date) given you a notice of suspension for 10 days, to be effective on (date).

If the above fact is inaccurate or incomplete please contact me by telephone or in writing on or before (date). If I do not hear from you by that date, I will assume that the facts as described are correct. In addition, this letter will be submitted to the Regional Director as evidence that s/he will consider in deciding the case.

I appreciate your continued cooperation in the investigation of this case.

Sincerely,

Field Agent

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ATTACHMENT 3L3

SAMPLE CONFIRMING LETTER FOR CHARGED PARTY WITNESS

(date)

Name of Witness
(Address)

Re: Case Name and Number

Dear Mr./Ms. (Name):

This letter confirms our telephone conversation today concerning the investigation of the unfair labor practice charge in the captioned case. Specifically, we discussed the Union's allegation that (name) was denied a Union representative at a meeting to discuss delinquent charges on her government credit card account.

As we discussed, the meeting at issue was held on (date) and was attended by (names). You stated to (name) that the purpose of the meeting was primarily to counsel (name) regarding a report of a delinquency in (her/his) Government American Express card account. You stated that you began the meeting by first asking (name) whether she had the card with her. She said that she did not and then left the room briefly to retrieve it. After (name) returned with the card and gave it to you, you wrote the card number down on a piece of paper.

When (name) returned she handed you the card and you then showed it to (name) who compared the account number with the number on the delinquency report. You recalled that (name) kept stating that she paid her bills, or words to that effect. You

asked her about her use of the card and she responded that she did not remember for what purpose the card was used because it had been many months since she used the card. You then informed her of potential disciplinary action that could result if it were determined that the card was misused.

Finally, you stated that before you began to ask (name) questions that she requested representation. You stated that you denied the request because you did not believe the meeting to be investigation. Rather, you believed that it was a counseling session, and that under these circumstances (name) was not entitled to representation.

If any of the above-described facts are in error or are incomplete in any way, please contact me by telephone at (number) or in writing on or before (date). If the facts as described are accurate and complete, please sign in the space below in which you acknowledge that the facts as presented are accurate and complete. In addition, this letter will be submitted to the Regional Director as evidence that s/he will consider in deciding this case.

I appreciate your cooperation in the investigation of this case.

Sincerely,

Field Agent

I, _____, acknowledge that the facts contained in this letter are accurate and complete.

cc: Charged Party Rep.
(Name & Address)

ATTACHMENT 3L4

SAMPLE CONFIRMING LETTER FOR NON-PARTY WITNESS

(date)

Name of Witness
(Address)

Re: Case Name and Number

Dear Mr./Ms. (Name):

This letter confirms our telephone conversation today concerning the investigation of the unfair labor practice charge in the captioned case. You stated that you were not present during a conversation between (name) and (his/her) supervisor (name). During the morning of (date) you attended an off-site training program.

If the above fact is inaccurate or incomplete please contact me by telephone or in writing on or before (date). If I do not hear from you by that date, I will assume that the facts as described are correct. In addition, this letter will be submitted to the Regional Director as evidence that s/he will consider in deciding the case.

I appreciate your cooperation in the investigation of this case.

Sincerely,

Field Agent

Παγε 1 οφ 1

ATTACHMENT 301

SAMPLE LETTER
RE: CHARGING PARTY FAILURE TO PROVIDE CLARIFICATION OF CHARGE--
WARNING OF POTENTIAL DISMISSAL

(date)

Charging Party
(Name and Address)

Re: Case Name and Case Number
Request for Amended Charge

Dear Mr./Ms. (Name):

In preparing to investigate the captioned case which the Region docketed on (date), I have determined that it is necessary that the Charge be amended. I tried to contact you by telephone yesterday and today but I was unsuccessful.

The allegation and the theory of the violation are unclear as stated on the charge. The Region cannot begin to investigate the charge until you have filed an amended charge to clarify the allegation and theory of the violation. Once you have sufficiently clarified the allegations and theory of the violation in an amended charge, I will contact the parties to begin the investigation.

Please submit the amended charged which contains the clarification of the charge to the Regional Director at the above address by (date). Failure to submit the amended charge by (date) may result in dismissal of the charge for lack of cooperation. You are reminded to serve the Charged Party with the amended

charge as required by section 2423.6(d) of the FLRA's regulations. If you have any questions concerning this matter, feel free to contact me at (telephone number).

Sincerely,

Field Agent

ATTACHMENT 302

SAMPLE LETTER
RE: CHARGING PARTY FAILURE TO COOPERATE DURING INVESTIGATION--
WARNING OF POTENTIAL DISMISSAL

(date)

Charging Party
(Name and Address)

Re: Case Name and Case Number

Dear Mr./Ms. (Name):

This letter concerns the investigation of the captioned case which this office docketed on (date). The charge concerned an allegation that the Agency refused to provide the Charging Party with information under section 7114(b)(4) of the Federal Service Labor-Management Relations Statute and therefore violated section 7116(a)(1), (5), and (8) of the Statute.

On (date) I spoke with you by telephone about this case. During this conversation, you agreed to provide certain documentation in support of the charge. On (date), having not yet received the documentation, I telephoned you and left a voice mail message to that effect but you did not respond to my message. Again, two weeks later, on (date), I attempted on numerous occasions to leave messages but your voice-mail box was full. Today I left a voice mail message asking that you contact me as soon as possible regarding the investigation of this charge.

Our regulations state that “[a]ll persons are expected to cooperate fully with the Regional Director in the investigation of charges” which includes “[p]roducing “documentary evidence pertinent to the matters under investigation.” See 5 C.F.R. § 2423.8(b). In light of this requirement, I request that you either provide the documentation required by (date) or contact me by telephone before that date. In the event that the Union is no longer interested in pursuing this charge, please let me know so that I can arrange to have the Regional Director approve your request to withdraw the charge.

Should you fail to send me the required documentation or contact me on or before (date), I will recommend that the Regional Director dismiss the charge for failure to cooperate during the investigation.

Sincerely,

Field Agent

ATTACHMENT 3O3

SAMPLE LETTER TO PARTIES MANDATING ALTERNATIVE CASE PROCESSING TECHNIQUE

(Date)

Charging Party Rep.
(Name and Address)

and

Charged Party Rep.
(Name and Address)

Re: Case Name and Case No.

Dear Mr./Ms. (Name):

Section 2423.7(a) of the Regulations provides that a Regional Director conduct such investigation of a charge as is deemed necessary. Upon reviewing the unfair labor practice charge in this case, I have concluded that it is appropriate to utilize an alternative case-processing method. Based on my understanding of the dispute that underlies the charge, I am of the view that the parties could benefit from the opportunity to meet and discuss their dispute in the presence of a Regional Office agent. In discussions with Field Agent (name), both the Charged Party and the Charging Party have agreed to participate in such a meeting.

Representatives of the Charging and Charged parties will jointly meet with (name Regional Office participant(s)) of my office on (time and date) at (place). At this meeting, (name Regional Office participant(s)) will facilitate your discussion of the underlying dispute, interests concerning the subject matter of the dispute, and the various options for resolution which would serve your interests. The goal is to narrow the issues in dispute and seek, if possible, a resolution of the dispute which will result in the withdrawal of the charge and improve the parties' on-going relationship. Neither party is required to agree to any resolution of the dispute. However, both parties are expected to attend the meeting and to fully cooperate.

Please confirm your receipt of this letter to (name Regional Office representative) by telephone, fax, or letter at the numbers and addresses shown below at your earliest convenience. Also, please inform (name Regional Office representative) of any logistical reasons why you cannot attend this meeting at the date and time noted above so that alternative dates can be arranged. Also indicate whether alternative or additional representatives are necessary to ensure a productive discussion.

Sincerely,

Regional Director

ATTACHMENT 4B1

SAMPLE LETTER APPROVING WITHDRAWAL REQUEST

(date)

Charging Party Rep.
(Name and Address)

Re: Case Name and Case Number

Dear Mr./Ms. (Name):

This confirms your telephone conversation on (date) with Field Agent (name), in which you requested to withdraw the unfair labor practice charge in the captioned case.

Based upon your request to withdraw, I approve the withdrawal of the charge.

Very truly yours,

Regional Director

cc: Charged Party Rep.

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(Name and Address)

ATTACHMENT 4B2

SAMPLE LETTER APPROVING PARTIAL WITHDRAWAL REQUEST

(date)

Charging Party Rep.
(Name and Address)

Re: Case Name and Case Number

Dear Mr./Ms. (Name):

This confirms your telephone conversation on (date), with Field Attorney, (Name), in which you intend to withdraw the 5 U.S.C. §§ 7116(a)(2) and (8) allegations in the captioned case.

These allegations have been withdrawn with my approval. The remaining independent 5 U.S.C. § 7116(a)(1) allegation underlying the unfair labor practice charge will continue to be processed.

Very truly yours,

Regional Director

cc: Charged Party Rep.

(Name and Address)

ATTACHMENT 4B3

**MODEL DISMISSAL LETTER WITH FOOTNOTE APPROVING
REQUEST TO RESCIND REQUEST TO WITHDRAW CHARGE
(AFTER RD APPROVED IN WRITING
REQUEST TO WITHDRAW CHARGE)**

(Date)

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Charging Party
(Address)

Re: Case Name and Number

Dear Mr./Ms. (Name):

1st ¶ Clear Statement of the allegations or issues as clarified during the investigation; [footnote at end of first sentence]^{**/}

2nd ¶ Succinct statement of the facts;

^{**/} On (date) I approved your request to withdraw the charge in this case. In addition, on (date) you requested to rescind withdrawal of your request to withdraw charge. I approve your request to rescind your withdrawal request and, for the reasons explained in this letter, dismiss the charge.

3rd ¶ Statement of applicable law with supporting case cite(s);

4th ¶ Application of the case law to the facts of the case (including application of prosecutorial discretion criteria);

5th ¶ etc. Conclusion and Appeal rights – insert the following:

Accordingly, I am refusing to issue a complaint in this (these) case(s) and I am dismissing you charges. If you do not agree with my decision, you may file an appeal with the General Counsel at the address below. Your appeal should include the Case Number (insert #) and be addressed to the:

Federal Labor Relations Authority
Office of the General Counsel
607 14th Street, N.W.
Suite 210 Attn: Appeals
Washington, D.C. 20424-0001

You can file your appeal by mail or by hand delivery. Whichever method you choose, please note that the last day for filing an appeal of the dismissal is **(date)**. This means that an appeal that is mailed must be postmarked, or an appeal must be hand delivered, no later than **(date)**. Please send a copy of your appeal to the Regional Director.

If you need more time to prepare your appeal, you may ask for an extension of time. Mail or hand deliver you request for an extension of time to the Office of the General Counsel at the

address listed above. Because requests for an extension of time must be **received** at least five days before the date the appeal is due, any request for an extension of time in this case must be **received** at the above address no later than **(date)**.

The procedures, time limits, and grounds for filing an appeal are set forth in the Authority's Regulations at section 2423.10(c) through (e) (Volume 5 of the Code of Regulations).

5 C.F.R. § 2423.10(c)-(e). The regulations may be found at any Authority Regional Office, public law library, some large general purpose libraries, Federal Personnel Offices and the Authority's Home Page internet site- **www.FLRA.gov**. I have also enclosed a document which summarizes commonly-asked questions and answers regarding the Office of the General Counsel's unfair labor practice appeals process.

Sincerely,

Regional Director

Enclosures

cc: Charged Party Rep.
(Name and Address)

ATTACHMENT 4D1

SAMPLE FINAL INVESTIGATIVE REPORT

Case Name:

Case No.:

Date Charge Filed:

Method of Investigation:

Recommendation:

ALLEGATION(S)

BACKGROUND FACTS, AS RELEVANT (e.g., experience with ADR programs, results of settlement efforts, if any)

MATERIAL FACTS

APPLICABLE LAW

ANALYSIS (application of law to facts)

RECOMMENDATION/S (include proposed remedy, if applicable, and triable issues, if meritorious)

ATTACHMENT 4D2

SAMPLE AGENDA MINUTE OUTLINE FORMAT

Case Name:

Case No.:

Agenda Date:

Agent:

Present:

Brief Description of Allegation:

Summary of Agenda Discussion and Decision on each Allegation:

Remedy:

Action Required:

Trial Matters, If applicable:

Witness(es), subpoena issues?

Documents, subpoena issues?

ATTACHMENT 4D3

FIRST SAMPLE LETTER TO CHARGED PARTY
RE: UNILATERAL SETTLEMENT AGREEMENT

(date)

Charged Party Rep.
(Name and Address)

Re: (case name and #)

Dear Mr./Ms. (Name):

Enclosed is a copy of a Settlement Agreement and cover letter
I have approved in the captioned case.

Because the Charging Party is not a party to the Settlement
Agreement, the Respondent does **not** commence performance of the
terms and provisions of the agreement until you have been
notified that no appeal has been filed or that the General
Counsel has sustained the Regional Director. Upon such
notification, you should promptly take the actions described
in the Settlement Agreement.

Please direct all other communications and any requests for
assistance or information to the Authority Agent named below.

Sincerely,

Παγε 1 οφ 2

Regional Director

Authority Agent: (name)

Enclosure

cc: Charging Party

ATTACHMENT 4D4

SECOND SAMPLE LETTER TO CHARGED PARTY
RE: UNILATERAL SETTLEMENT AGREEMENT
APPEAL DENIED--BEGIN COMPLIANCE

(date)

Charged Party Rep.
(Name and Address)

Re: (case name and #)

Dear Mr./Ms. (Name):

On (date), I approved a Settlement Agreement in this case which Respondent executed. On (date), the General Counsel denied the Charging Party's appeal of my decision to approve the Agreement. Respondent now should begin to comply with the terms of the Agreement.

A copy of the Agreement and six (6) copies of the Notice to All Employees are enclosed. As specified in the Agreement, copies of the Notice should be posted in conspicuous places, including all bulletin boards and other places where notices to employees represented by the (union) are customarily posted, for a period of at least sixty (60) consecutive days from the date of the posting. The (Agency/Union) is responsible for making a sufficient number of copies to fulfill that obligation. The (Agency/Union) also must take

steps to ensure that the Notice is not altered, defaced, or covered by other material.

Finally, the (Agency/Union) is required to notify me in writing within five (5) days of your receipt of this letter of the steps taken to comply with the requirements of the Agreement. Upon the expiration of the 60-day posting period, the (Agency/Union) must certify to me in writing that the requisite posting of the Notice has been completed. The (Agency/Union) should be served with copies of the notification and the certification.

If you require any assistance or further information concerning compliance in this matter, please contact the Agent named below.

Sincerely,

Regional Director

Agent: (Name and Tel. #)
enclosure

ATTACHMENT 4D5

SAMPLE LETTER TO CHARGING PARTY
RE: UNILATERAL SETTLEMENT AGREEMENT

(date)

Charging Party Rep.
(Name and Address)

Re: (case name and #)

Dear Mr./Ms. (Name):

Enclosed is a copy of the Settlement Agreement which I approved in the captioned case. By executing this agreement, the Charged Party has, among other things, agreed to (insert action(s)). You object to the Settlement Agreement because you believe that (insert reason(s)).

Pursuant to the General Counsel's policy regarding the settlement of unfair labor practice cases, Regional Directors have authority to approve settlement agreements unilaterally.

In exercising this authority, Regional Directors consider certain criteria which includes, but is not limited to:

1. Does the agreement remedy the specific allegations of the complaint?

2. Does the agreement remedy the specific harm caused by the violation--to the individual and/or the institution?
3. Has the Charging Party raised valid objections to the agreement?
4. How does the agreement communicated to employees their rights under the Statute and communicate to affected employees the terms of the agreement?
5. What is the cost (time, resources, and travel) involved in litigating the case in relation to the nature of the violation?

Applying the above criteria to the facts of this case, I have concluded that approval of the Settlement Agreement effectuates the purposes and policies of the Statute. (Insert a couple of sentences explaining why).

The Charged Party will not implement the terms of this Settlement Agreement until after either the time for filing an appeal of my approval of this Settlement Agreement has expired, or the General Counsel has denied such appeal. At that time, I will instruct the Charged Party to implement to implement the terms of the Settlement Agreement.

You may file an appeal from the Regional Director's decision in this case. Include the Case Number in your appeal and address it to:

Federal Labor Relations Authority
Office of the General Counsel
607 14th Street, N.W.

Suite 210 Attn: Appeals
Washington, D.C. 20424-0001

You can file your appeal by mail or by hand delivery. Whichever method you choose, please note that the last day for filing an appeal of this Settlement Agreement is **(date)**. This means that an appeal that is mailed must be postmarked, or an appeal must be hand delivered, no later than **(date)**. Please send a copy of your appeal to the Regional Director.

If you need more time to prepare your appeal, you may ask for an extension of time. Mail or hand deliver you request for an extension of time to the Office of the General Counsel at the address listed above. Because requests for an extension of time must be **received** at least five days before the date the appeal is due, any request for an extension of time in this case must be **received** at the above address no later than **(date)**.

The procedures, time limits, and grounds for filing an appeal are set forth in the Authority's Regulations at section 2423.11(c) through (e) (Volume 5 of the Code of Regulations).

5 C.F.R. § 2423.11(c)-(e). The regulations may be found at any Authority Regional Office, public law library, some large general purpose libraries, Federal Personnel Offices and the FLRA's Home Page internet site - www.FLRA.gov. I have also enclosed a document which summarizes commonly-asked questions and answers regarding the Office of the General Counsel's unfair labor practice appeals process.

Sincerely,

Regional Director

Παγε 3 οφ 3

Enclosures

cc: Charged Party Rep.
(Name and Address)

ATTACHMENT 4D6

SAMPLE LETTER TO CHARGED PARTY
RE: BILATERAL SETTLEMENT AGREEMENT

(Date)

Charged Party Rep.
(Name and Address)

Re: Case Name and Case Number

Dear Mr./Ms. (Name) and Mr./Ms. (Name):

I have approved the Settlement Agreement executed in the captioned case. The (agency/union) now should begin to comply with the terms of the Agreement.

A copy of the Agreement and six (6) copies of the Notice to All Employees are enclosed. As specified in the Agreement, copies of the Notice should be posted in conspicuous places, including all bulletin boards and other places where notices to employees represented by the (union) are customarily posted, for a period of at least sixty (60) consecutive days from the date of the posting. The (Agency/Union) is responsible for making a sufficient number of copies to fulfill that obligation. The (Agency/Union) also must take steps to ensure that the Notice is not altered, defaced, or covered by other material.

Finally, the (Agency/Union) is required to notify me in writing within five (5) days of your receipt of this letter of the steps taken to comply with the requirements of the Agreement. Upon the expiration of the 60-day posting period, the (Agency/Union) must certify to me in writing that the requisite posting of the Notice has been completed. The (Agency/Union) should be served with copies of the notification and the certification.

If you require any assistance or further information concerning compliance in this matter, please contact the Agent named below.

Sincerely,

Regional Director

Agent: (Name and Tel. #)
enclosure

cc: Charging Party Rep.
(Name and Address)

ATTACHMENT 4G1

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON REGIONAL OFFICE

AGENCY (NAME) (Respondent)
-AND-
UNION (NAME) (Charging Party)

Case No: WA-CA-00003

**STIPULATION AND
FORMAL SETTLEMENT AGREEMENT**

Pursuant to § 2423.25 of the Authority's Regulations, this Stipulation is entered into between the Agency (Name) (Respondent); the Union (Name); and the General Counsel of the Federal Labor Relations Authority (General Counsel) as a formal settlement of unfair labor practice Case No. WA-CA-00003. The parties hereby stipulate and agree as follows:

Procedural Background

1. The Charging Party filed a charge in Case No. WA-CA-00003 with the Regional Director of the Federal Labor Relations Authority, Washington Region (Regional Director) on October 1, 1999. The Respondent acknowledges receipt of the charge. The Charging Party filed a first amended charge with the Regional Director on February 22, 2000. The Respondent acknowledges receipt of the first amended charge.
2. Pursuant to § 7104(f)(2)(B) of the Federal Service Labor-Management Relations Statute (Statute) and based on this charge, the Regional Director issued a complaint and notice of hearing on February 23, 2000. The Respondent and the Charging Party were timely served copies of this complaint.
3. On March 15, 2000, the Acting Regional Director approved a Settlement Agreement in this case in which the Respondent agreed that it would post a notice to all employees; provide the Charging Party with copies of all correspondence received from bargaining unit employees in response to its solicitation of comments on August 31, 1999, September 3, 1999, November 4, 1999, and January 4, 2000; and hold a video teleconference (IVT) meeting similar to the meeting held on August 31, 1999, providing the Charging Party with prior notice and an opportunity to attend and participate in the meeting.

4. On October 4, 2000, the Regional Director rescinded the bilateral settlement because the Respondent had failed to hold a video teleconference (IVT) meeting similar to the meeting held on August 31, 1999, providing the Charging Party with prior notice and an opportunity to attend and participate in the meeting.
5. On October 5, 2000, the Regional Director reissued the complaint and notice of hearing in this case. The Respondent and the Charging Party were timely served copies of this complaint.
6. On October 24, 2000, the Respondent filed an answer to the reissued complaint.

Jurisdiction

7. The Agency (name) is an agency under 5 U.S.C. § 7103(a)(3).
8. Union (name) is a labor organization under 5 U.S.C. § 7103(a) (4) and is the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent.
9. Union (name) (if applicable, e.g., Council) is an agent of Union (name) for the purpose of representing employees in the Respondent's Office (name of Office) within the unit described in paragraph 8.

10. The parties are subject to the jurisdiction of the Statute.

Facts Supporting Violations

11. During the time period covered by this complaint, each person listed below occupied the position opposite his or her name:

(name)	Deputy Commissioner, Agency (name)
(name)	Associate Commissioner, Agency (name)
(name)	Regional Chief Judge, (name of Region)
(name)	Regional Chief Judge, (name of Office)

12. During the time period covered by this complaint, the persons named in paragraph 11 were supervisors and/or management officials under 5 U.S.C. § 7103(a)(10) and (11) at the Respondent.

13. During the time period covered by this complaint, Employee (name) occupied the position of Administrative Law Judge, (Office).

14. During the time period covered by this complaint, the person named in paragraph 13 was an agent of the Respondent.

15. During the time period covered by this complaint, the persons named in paragraphs 11 and 13 were acting on behalf of the Respondent.
16. On August 31, 1999, the Respondent, by (name), (name), (name), (name) and (name), held a meeting via interactive video teleconference (IVT) with employees in the bargaining unit described in paragraph 8.
17. The Respondent discussed the Hearing Process Improvement (HPI) Plan at the meeting described in paragraph 16.
18. The meeting described in paragraph 16 was formal in nature.
19. The meeting described in paragraph 16 was held without affording the Charging Party notice and an opportunity to be represented.
20. The Respondent, by employee (name), solicited suggestions and comments from employees in the bargaining unit described in paragraph 8 at the meeting described in paragraph 16.
21. The Respondent was bargaining with the Charging Party over HPI during August 1999 and during the months that followed.

22. On or about September 3, 1999, the Respondent solicited comments about HPI from employees in the bargaining unit described in paragraph 8.
23. On or about November 4, 1999, the Respondent solicited comments about HPI from employees in the bargaining unit described in paragraph 8.
24. On or about January 4, 2000, the Respondent solicited comments about HPI from employees in the bargaining unit described in paragraph 8.

Legal Conclusions

25. By the conduct described in paragraphs 16 through 19, the Respondent failed to comply with 5 U.S.C. § 7114(a)(2)(A).
26. By the conduct described in paragraphs 16 through 19, and paragraph 25, the Respondent committed an unfair labor practice in violation of 5 U.S.C. § 7116(a)(1) and (8).
27. By the conduct described in paragraphs 20, 22, 23, and 24, the Respondent committed unfair labor practices in violation of 5 U.S.C. § 7116(a)(1) and (5).

28. The parties hereby waive their right to a formal hearing, a decision by an Administrative Law Judge, and any other proceedings to which they might be entitled under the Statute or the Regulations.

29. Based on this Stipulation and record, the parties hereby consent to the entry without further notice of an FLRA Order providing as follows:

The Respondent shall:

(1) Cease and desist from

(a) Conducting formal discussions with bargaining unit employees without affording the Union (name) the exclusive representative of the employees, prior notice and an opportunity to be represented at the formal discussion, including formal discussions held by interactive video teleconference (IVT).

(b) Failing and refusing to bargain in good faith with the Union by bypassing the Union and dealing directly with bargaining unit employees concerning proposed changes in their conditions of employment, including the hearing process improvement (HPI) initiative.

(c) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of rights assured to them by the Federal Service Labor-Management Relations Statute.

(2) Take the following affirmative actions in order to effectuate the policies of the Statute:

(a) Hold a video teleconference (IVT) session about HPI on (date), from 1:00 pm to 2:30 pm (Eastern), including all bargaining unit employees in Office (name), and allow the Charging Party an opportunity to be represented and to participate to the extent required by the Statute. Should the Respondent be unable to broadcast on (date), due to circumstances beyond its control such as system failure or act of God, it will hold the IVT session no later than (date).

(b) Post at all facilities where bargaining unit employees are located copies of the Notice to All Employees, attached hereto as Appendix A, on forms to be furnished by the Regional Director. On receipt of such forms, they shall be signed the Associate Commissioner for (Office) and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including

all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to § 2423.41 of the Authority's Rules and Regulations, notify the Washington Regional Director, in writing, after 5 days and again after 60 days from the date of this Order, as to what steps have been taken to comply.

30. A U.S. Court of Appeals for any appropriate circuit may, upon application by the Authority, enter its decree enforcing the Order of the Authority consistent with paragraph 29. The Respondent waives all defenses to entry of the decree enforcing compliance with the Order of the Authority, and its right to receive notice of the filing of an application for the entry of such decree, provided that the decree is consistent with paragraph 29 herein. After the entry of the decree, the Respondent shall be required to comply with the affirmative provisions of the Authority's Order to the extent that it has not already done so.

31. This Stipulation, together with the attached appendix, shall constitute the entire record of this matter and the entire agreement of the parties, there

being no other agreement of any kind which varies, alters, or adds to this Stipulation.

32. This Stipulation, together with the other documents constituting the record, shall be filed with the Authority in accordance with § 2423.25(c) of the Authority's Regulations, and is subject to the approval of the Authority. This Stipulation shall be of no force and effect until the Authority has granted such approval. Upon approval of the Stipulation by the Authority, the Respondent shall immediately comply with the provisions of the Authority Order, consistent with paragraph 29 hereof.

Agency (name)

By _____

(name), Associate Commissioner

Office (name)

Union (name)

By _____

(name), President

Date

Date

Federal Labor Relations Authority
Washington Region

By _____
(name), Counsel for the General Counsel

Date

APPROVED:

(name), Regional Director
FLRA, Washington Region

Date

**UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON REGIONAL OFFICE**

<u>AGENCY (NAME)</u> (Respondent)	Case No: WA-CA-00003
-AND-	
UNION (NAME) (Charging Party)	

REQUEST FOR APPROVAL OF FORMAL SETTLEMENT

Pursuant to section 2423.25(a)(2) of the Authority's Regulations, all parties to this matter entered into a Formal Settlement, which I have approved. Pursuant to section 2423.25(c) of the Regulations, the Formal Settlement is hereby forwarded to the Authority for approval.

By the Formal Settlement Agreement, the Respondent has acknowledged that unfair labor practices were committed when it held an (date), meeting with bargaining unit employees of the Office (name) without providing the Union (name)

with prior notice and an opportunity to be represented, and when it solicited input directly from bargaining unit employees at this meeting. The Respondent has further acknowledged that unfair labor practices were committed on (date); (date); and (date), when it again solicited input from bargaining unit employees.

The Formal Settlement provides a complete remedy for the unfair labor practices, including an agreement that the Respondent will hold another meeting with employees on (date), with the Union present and post a Notice To All Employees. Accordingly, approval of the Formal Settlement should be found to effectuate the purposes and policies of the Statute.

**CERTIFICATE OF SERVICE
CASE NO. WA-CA-00003**

I hereby certify that on March 19, 2001, I served the foregoing STIPULATION AND FORMAL SETTLEMENT AGREEMENT upon the interested parties in this action by placing a true copy, postage prepaid, in the United States Post Office mailbox at Washington DC, addressed as follows:

The Honorable (name)
Administrative Law Judge
Federal Labor Relations Authority
607 14th St., NW
Washington, DC 20424-0001
202-482-6630 fax: 202-482-6629 CERTIFIED No.

Agency (name)
Address
Tel. # fax: CERTIFIED No.

Union (name)
Address
Tel.# fax: CERTIFIED No.

(name)
Deputy General Counsel
Office of the General Counsel
Federal Labor Relations Authority
607 14th St., NW
Washington, DC 20424-0001 By regular mail

ATTACHMENT 4H1

MODEL DISMISSAL LETTER

(Date)

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Charging Party
(Address)

Re: Case Name & Number

Dear Mr./Ms. (Name):

1st ¶ Clear Statement of the allegations or issues as clarified during the investigation;

2nd ¶ Succinct statement of the facts;

3rd ¶ Statement of applicable law with supporting case cite(s);

4th ¶ Application of the case law to the facts of the case (including application of prosecutorial discretion criteria, if appropriate);

5th ¶ etc. Conclusion and Appeal rights -- insert the following:

Accordingly, I am refusing to issue a complaint in this (these) case(s) and I am dismissing you charges. If you do not agree with my decision, you may file an appeal with the General Counsel at the address below. Your appeal should include the Case Number (insert #) and be addressed to the:

Federal Labor Relations Authority
Office of the General Counsel
607 14th Street, N.W.
Suite 210 Attn: Appeals
Washington, D.C. 20424-0001

You can file your appeal by mail or by hand delivery. Whichever method you choose, please note that the last day for filing an appeal of the dismissal is **(date)**. This means that an appeal that is mailed must be postmarked, or an appeal must be hand delivered, no later than **(date)**. Please send a copy of your appeal to the Regional Director.

If you need more time to prepare your appeal, you may ask for an extension of time. Mail or hand deliver you request for an extension of time to the Office of the General Counsel at the address listed above. Because requests for an extension of time must be **received** at least five days before the date the appeal is due, any request for an extension of time in this case must be **received** at the above address no later than **(date)**.

The procedures, time limits, and grounds for filing an appeal are set forth in the Authority's Regulations at section 2423.11(c)-(e) (Volume 5 of the Code of Regulations). 5 C.F.R. § 2423.11(c)-(e). The regulations may be found at any Authority Regional Office, public law library, some large general purpose libraries, Federal Personnel Offices and the Authority's Home Page internet site- www.FLRA.gov. I have also enclosed a document which summarizes commonly-asked questions and answers regarding the Office of the General Counsel's unfair labor practice appeals process.

Sincerely,

Regional Director

Enclosures

cc: Charged Party Rep.
(Name and Address)

ATTACHMENT 4H2

MODEL PARTIAL DISMISSAL LETTER

(Date)

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Charging Party
(Address)

Re: Case Name
Case #

Dear Mr./Ms. (Name):

- 1st ¶ Clear statement of all of the allegations or issues as clarified during the investigation;
- 2nd ¶ Describe the issues upon which complaint will issue.
- 3rd ¶ Succinct statement of the facts that are the basis of the dismissal;
- 4th ¶ Statement of applicable law with case cite(s) that support the dismissal;

5th ¶ Application of the case law to the facts of the case (including application of prosecutorial discretion criteria);
6th ¶ etc. Conclusion and Appeal rights – insert the following:

Accordingly, I am refusing to issue a complaint on this (these) allegation(s) and I am dismissing you charges. If you do not agree with my decision, you may file an appeal with the General Counsel at the address below. In addition, no further action will be taken on the meritorious allegations until either the appeal period has expired or, if applicable, until after the GC rules on the appeal. Should you file an appeal, it should include the Case Number (insert #) and be addressed to the:

Federal Labor Relations Authority
Office of the General Counsel
607 14th Street, N.W.
Suite 210 Attn: Appeals
Washington, D.C. 20424-0001

You can file your appeal by mail or by hand delivery. Whichever method you choose, please note that the last day for filing an appeal of the dismissal is **(date)**. This means that an appeal that is mailed must be postmarked, or an appeal must be hand delivered, no later than **(date)**. Please send a copy of your appeal to the Regional Director.

If you need more time to prepare your appeal, you may ask for an extension of time. Mail or hand deliver you request for an extension of time to the Office of the General Counsel at the address listed above. Because requests for an extension of time must be **received** at least five days before the date the

appeal is due, any request for an extension of time in this case must be **received** at the above address no later than **(date)**.

The procedures, time limits, and grounds for filing an appeal are contained in Volume 5 of the Code of Federal Regulations at section 2423.11(c)-(g). 5 C.F.R. § 2423.11(c)-(g). The regulations may be found at any FLRA Regional Office, public law library, some large general purpose libraries, Federal Personnel Offices and the Authority's Home Page internet site- **www.FLRA.gov**. I have also enclosed a document which summarizes frequently-asked questions and answers regarding the Office of the General Counsel's unfair labor practice appeals process.

Sincerely,

Regional Director

Enclosures

cc: Charged Party Rep.
(Name and Address)

ATTACHMENT 4H3

**SAMPLE LETTER NOTIFYING PARTIES
OF REVOCATION OF DISMISSAL LETTER AFTER APPEAL**

(Date)

Charging Party Rep.
(Name and Address)

Charged Party Rep.
(Name and Address)

Re: Case Name and Case Number

Dear Mr./Ms. (Name) and Mr./Ms. (Name):

On (date), I received a copy of the Charging Party's appeal in the captioned case from the Office of the General Counsel. Based on the issues raised in the appeal and a review of the record, I am revoking the dismissal letter dated (), and am reopening the case for further to investigate (insert issue/s). I encourage the parties to cooperate fully in the investigation which will commence shortly.

Sincerely,

Regional Director

cc: David L. Feder
Deputy General Counsel
Office of the General Counsel
Federal Labor Relations Authority

Παγε 1 οφ 1

607 14th Street, NW, Suite 210
Washington, DC 20424-0001

ATTACHMENT 5C1

**QUESTIONS AND ANSWERS ABOUT UNFAIR LABOR PRACTICE APPEALS TO THE
OFFICE OF THE GENERAL COUNSEL
FEDERAL LABOR RELATIONS AUTHORITY**

Q #1: What are the grounds for granting an appeal and what must your appeal establish to be granted?

The grounds for granting an appeal are set forth in Section 2423.11(e) of the Rules and Regulations. An appeal may be granted if it establishes at least one of the following grounds:

- 1. The Regional Director's decision did not consider material facts that would have resulted in issuance of a complaint.**

To establish this ground, your appeal:

- a. States the material facts which were not addressed in the investigation;
- b. States what evidence supports those facts; for example, certain documents or testimony from a specific witness; and
- c. Explains how those facts would result in the finding of an unfair labor practice.

2. The Regional Director's decision is based on a finding of a material fact that is clearly erroneous.

To establish this ground, your appeal:

- a. States the material fact which is clearly erroneous;
- b. States what evidence establishes that the material fact is clearly erroneous; and
- c. Explains how a different factual finding would result in the finding of an unfair labor practice.

3. The Regional Director's decision is based on an incorrect statement of the applicable rule of law.

To establish this ground, your appeal:

- a. States what rule of law relied upon by the Regional Director is incorrect;
- b. States why that rule of law is incorrect;
- c. States what the correct rule of law should be; and
- d. Explains how the application of the correct rule of law

would result in the finding
of an unfair labor practice.

**4. There is no Authority precedent on the
legal issue in the case.**

To establish this ground, your appeal:

- a. States the legal issue for
which there is no rule of law
under Authority precedent;
and
- b. States the rule of law which you
believe should be presented to the
Authority.

**5. The manner in which the Region conducted the
investigation has resulted in prejudicial error.**

To establish this ground, your appeal:

- a. Describes the improper manner
in which the investigation
was conducted;
- b. Explains why this manner of
investigation was improper;
and
- c. Explains how this manner of
investigation resulted in
prejudicial error.

Your appeal must address the reasons why you believe one or more of the above five grounds have been satisfied. Appeals that do not establish at least one of these grounds are denied.

Q #2: What happens after you file an appeal?

You will receive written notification that your appeal has been received. The appeals review will be conducted by a Regional Office within the office of the General Counsel which did not investigate your case. The appeals review includes a review of your appeal and the evidence in the file obtained during the investigation. The Regional Office conducting the appeals review will submit a recommendation to grant or deny the appeal to the General Counsel. You will receive a written decision letter signed by the Deputy General Counsel on behalf of the General Counsel which: 1) grants your appeal and orders further investigation of specific factual issues or issuance of a complaint over a specific violation; or 2) denies your appeal because none of the grounds for granting an appeal have been established.

Q #3: What will the appeal letter state if your appeal is granted?

If your appeal meets one of the grounds for granting an appeal, the appeal letter will: (1) state the ground that has been met; (2) grant your appeal; and (3) order either further investigation of specific factual issues and analysis of legal issues, or issuance of a complaint, absent settlement, over a specific violation.

Q #4: What will the appeal letter state if your appeal is

denied?

The appeal denial letter: (1) sets forth the grounds for review; (2) concludes that the appeal has not established any of those grounds; (3) reaffirms the Regional Director's decision; and (4) informs the appealing party that the reasons set forth in the Regional Director's dismissal letter are adopted by the General Counsel as the reasons why a complaint was not issued.

Q #5: Is it possible for an appeal to be partially granted?

Yes. Where an appeal of a Regional Director's dismissal of a charge that contains more than one alleged violation of the Statute meets one of the grounds for granting an appeal with respect to one or more of the allegations, but does not establish those grounds with respect to one or more of the remaining allegations, a letter partially granting the appeal is issued. In this event, the appeals letter first specifies which grounds of the appeal have been met and then states which grounds of the appeal have not been met. In accordance with the directions contained in the appeal letter, when the case is returned to the Region, the Regional Director will reconsider **only** the factual or legal issues relating to the allegation(s) which provided the basis for granting the appeal.

Q #6: Does the use of a form appeal denial letter mean that your appeal was not carefully considered?

No. As noted above, appeals reviews are conducted by Office of the General Counsel employees and managers who were not involved in the investigation of your case. This review includes a review of the Regional Director's dismissal letter,

your appeal, and the evidence obtained during the investigation. Recommendations to grant or deny the appeal are submitted to the General Counsel. The appeal review process involves no fewer than three, and sometimes as many as six, Office of the General Counsel employees and managers.

Q #7: Why then doesn't the appeal letter address each and every argument made in the appeal?

When an appeal is denied, the appeal decision is to affirm and adopt the Regional Director's determination of the material facts, the applicable law and rationale and reasoning for the finding that the evidence does not establish an unfair labor practice. Therefore, if the factual and legal issues have been correctly and sufficiently addressed by the Regional Director, the appeal determination letter does not restate this discussion. Rather, the appeal determination letter incorporates by reference the full discussion of the facts and the law as set forth in the Regional Director's dismissal letter. Similarly, if the appeal establishes that one of the grounds for review has been met, the appeal determination letter does not discuss each and every argument presented in the appeal. In those cases, the appeal determination letter granting an appeal sets aside the Regional Director's decision with a statement of the ground for granting the appeal that was established and the future case processing action to be taken by the Regional Director.

Q #8: Is there any appeal of the decision on your appeal?

The decision on the appeal is final. Section 2423.11 of the Rules and Regulations sets forth the appeals process. Paragraph (g) of this section provides that the Charging Party may file a motion for reconsideration of the final decision if

it can establish with particularity extraordinary circumstances which are supported by citations to Authority case law. The motion must be filed within 10 days after the date on which the General Counsel's decision is postmarked. The General Counsel's decision on a motion for reconsideration is final.

Q #9: Should you include any of your evidence with my appeal?

No. All of the evidence that you gave to the Region during the investigation is in the

investigative file and will be reviewed. You do not need to submit any evidence you have already given the Region during the investigation. However, you may refer to that evidence in your appeal.

Q #10: May you submit new evidence not given to the Region?

No. No new evidence will be considered unless you can establish in your appeal that the evidence either did not exist during the investigation or that you could not have reasonably known about the existence of the evidence.

Q #11: Can you discuss the merits of my appeal with anyone from the Office of the General Counsel while your appeal is being decided?

No. The appeal process is not an investigative process. The decision will be based on your appeal and the investigative file. The Office of the General Counsel will notify you as soon as a decision is reached. If your appeal is granted, the case will be returned to the Regional Office and you will be

contacted by the Region for further processing of the case.

Q #12: To whom can you speak if you have any questions about how your charge was processed and decided?

Parties may always contact the Regional Offices or the Office of the General Counsel if they have questions about the processing of their charge, do not understand the basis for the dismissal of their charge, or to seek further assistance.

Q #13: How many appeals are granted by the Office of the General Counsel?

Historically, since the enactment of the Federal Service Labor-Management Statute in 1979, the Office of the General Counsel has granted about 5% of the appeals of Regional Director's dismissals of unfair labor practice charges. Of the 495 appeals decided during Fiscal Year 1998, approximately 27 or 5% of the appeals were granted. In Fiscal Year 1999, of the 485 appeals decided, approximately 21 or 4.3% of the appeals were granted. In Fiscal Year 2000, of the 490 appeals decided, approximately 21 or 4.3% of the appeals were granted.

Q #14: Why are so few appeals granted?

Regional Directors make initial decisions on unfair labor practice charges using essentially the same evidentiary and legal standards that are applied during a review of that decision on appeal. Appeals are granted only in those cases where the appeal establishes, based on one or more of the grounds listed above, that the Regional Director's decision to dismiss the charge should be reversed or remanded.

*If you have further questions about the appeals process,
please contact
any Regional Office or the Office of the General Counsel or
visit
the FLRA's home page on the Internet at www.FLRA.gov*

ATTACHMENT 5C2

APPEALS REVIEW FORM

Case No(s): _____

Dismissing Region: _____ Working Region: _____

- **Perform the legal review by applying the grounds for granting an appeal which are set forth in the Rules and Regulations at section 2423.11(e), and in the Office of the General Counsel's Revised Appeal Policy.**
- **Perform a Quality Review based on the Office of the General Counsel's Quality Standards, Scope of Investigation criteria and ULP Case Handling Manual.**

Complete the following:

1. Did the Regional Director's decision consider all of the material facts?
___ Yes ___ No. Comments:

2. Is the Regional Director's decision based on a finding of a material fact that is clearly erroneous?
___ Yes ___ No. Comments:

3. Is the Regional Director's decision based on an incorrect statement of the applicable rule of law.

Yes No. Comments:

4. Does the case present legal issues for which there is no Authority precedent?

Yes No. Comments:

5. Does the case file reflect that the manner in which the Region conducted the investigation has resulted in prejudicial error?

Yes No. Comments:

6. Does the case file reflect that, under the particular circumstances of the case, the investigation obtained the best possible evidence?

Yes No. Comments:

7. Does the case file reflect that evidence was obtained on all of the elements of the alleged violation(s) and that all of the allegations were investigated and decided?
___ Yes ___ No. Comments:
8. Does the case file reveal how the case was processed?
___ Yes ___ No. Comments:
9. Does the case file reflect that the parties were treated fairly and equitably?
___ Yes ___ No. Comments:
10. Was the charge processed as expeditiously as possible from the time the investigation began to issuance of the decision without any periods of unexplained inactivity?
___ Yes ___ No. Comments:

This form was approved by:

Regional Director

Date

ATTACHMENT 5C3

APPEALS CASE LOG

This form is maintained in the Appeal Case File and is to be completed by both OGC HQ and the Working Region. Fill in the applicable dates or other information as appropriate.

TO BE COMPLETED BY OGC HQ:

Case No. _____

Dismissed by the _____ Region

Processed by _____ Region

Consolidated on appeal with Case No(s): _____

Date dismissed: _____

Date appeal filed: _____

Date investigative file sent by Dismissing Region to OGC HQ: _____

Dismissing Region comments on appeal: Yes ___ No ___

Date investigative file received by OGC: _____

Date files sent by OGC HQ to Working Region: _____

TO BE COMPLETED BY WORKING REGION:

Date files received by Working Region: _____

Date appeal assigned: _____

Date appeal ready for recommended decision by RD: _____

Date Working Region's recommended decision sent by E-mail: _____

Working Region recommendation: Deny appeal w/ form dismissal letter: _____

Deny appeal w/modified form
dismissal letter: _____

Case file analysis recommended:

Yes ___ No ___

Grant appeal: Yes ___ No ___

Further investigation: _____

Further analysis: _____

Reversal/Issuance of
complaint: _____

Date files and recommendations sent by Working Region to OGC HQ: _____

TO BE COMPLETED BY OGC HQ

Dismissal letter rescinded by Dismissing Region RD/Appeal case closed _____

Date files received by OGC HQ: _____

Date appeal issued by OGC HQ: _____

Final OGC HQ decision:

Deny appeal: _____

Grant appeal: _____

Further investigation: _____

Further Analysis: _____

Reversal/Issuance of complaint: _____

CFA issued: Yes _____ No _____

Date Director informs Dismissing Region of grant of an appeal and/or issuance of a
CFA: _____

Date Director informs Working Region if appeal recommendation is adopted or not
adopted: _____

Date Motion for Reconsideration filed: _____

Date of decision on Motion for Reconsideration: _____

Reconsideration decision: Granted: _____ Denied: _____

ATTACHMENT 5C4

MODEL FORM LETTER DENYING APPEAL

Charging Party Rep.
(Name and Address)

Re: Charged Party
City, State
Case No. XX-CX-XXXXX

Dear Mr./Ms. (Name):

Your appeal of the dismissal of the unfair labor practice charge in this case by the _____ Regional Director has been carefully considered.

Your appeal has been denied because the appeal has failed to establish that: (1) the Regional Director's decision did not consider a material fact that would have resulted in issuance of complaint; (2) the Regional Director's decision is based on a finding of a material fact that is clearly erroneous; (3) the Regional Director's decision is based on an incorrect statement of the applicable rule of law; (4) there is no Authority precedent on the legal issue in the case; or (5) the manner in which the Region conducted the investigation has resulted in prejudicial error.

The appeal has established no ground for reversing the Regional Director's decision or remanding the case for further investigation in accordance with section 2423.11(e) of the

General Counsel's regulations. The dismissal letter issued by the Regional Director constitutes the written statement of the reasons for not issuing a complaint as required by section 7118(a)(1) of the Statute. The Regional Director's reasons for not issuing a complaint are hereby affirmed. Your appeal is denied and the case is closed.

For the General Counsel.

Sincerely,

Deputy General Counsel

ATTACHMENT 5C5

MODIFIED FORM APPEAL DENIAL LETTER

RE: Case Caption
Case No.

Your appeal of the dismissal of the unfair labor practice charge in this case by the _____ Regional Director has been carefully considered.

Your appeal has been denied because the appeal has failed to establish that: (1) the Regional Director's decision did not consider material facts that would have resulted in issuance of complaint; (2) the Regional Director's decision is based on a finding of a material fact that is clearly erroneous; (3) the Regional Director's decision is based on an incorrect statement of the applicable rule of law; (4) there is no Authority precedent on the legal issue in the case; or (5) the manner in which the Region conducted the investigation has resulted in prejudicial error.

Examples of additional sentences which may be added:

"The new material you submitted with your appeal has not been reviewed since you have not established that the evidence either did not exist during the investigation or that you could not have reasonably known about the existence of the evidence."

"Contrary to the allegations you raise on appeal, the investigation was conducted consistent with the Office of the General Counsel's Quality Standards and Scope of Investigation criteria."

"It has been determined that your claim of bias on the part of the investigator is unfounded. The Appeals review establishes that you were treated fairly and equitably in accordance with the Office of the General Counsel's Quality Standards."

“In particular, the evidence establishes that the Agency had a legitimate reason for reassigning the employee and would have taken the same action in the absence of its consideration of the employee’s protected union activity.” Indian Health Service, Winslow Service Unit, Winslow, Arizona, 54 FLRA 126 (1998) (an employee was detailed to another position for a legitimate reason).

The appeal has established no ground for reversing the Regional Director’s decision or remanding the case for further investigation in accordance with section 2423.11(e) of the General Counsel’s regulations. The dismissal letter issued by the Regional Director constitutes the written statement of the reasons for not issuing a complaint as required by section 7118(a)(1) of the Statute. The Regional Director’s reasons for not issuing a complaint are hereby affirmed. Your appeal is denied and the case is closed.

For the General Counsel.

Sincerely,

Deputy General Counsel

ATTACHMENT 5C6

SAMPLE LETTER GRANTING APPEAL

(Date)

Charging Party Rep.
(Name and Address)

Re: Charged Party
City, State
Case No. XX-CX-XXXXX

Dear Mr./Ms. (Name):

Your appeal of the dismissal of the unfair labor practice charge in this case by the (insert Region) Regional Director has been carefully considered.

Your appeal has been granted because the appeal has established that the Regional Director did not consider material facts which may result in the issuance of a complaint. I am therefore remanding this case for further investigation into the allegation that the Activity violated sections 7116(a)(1), (2) and (4) of the Federal Service Labor-Management Relations Statute by failing to award you a time off for duty award.

If the further investigation produces evidence establishing that the reasons for the denial of the award were unlawful, the Regional Director will issue a complaint and notice of hearing, absent settlement. Should the Regional Director

conclude that no violation occurred in connection with the denial of the time off award, the charge will be dismissed, absent withdrawal. A new right to appeal that dismissal will be given.

For the General Counsel.

Sincerely,

Deputy General Counsel

ATTACHMENT 5C7

CASE FILE ANALYSIS FORMAT

To: (Dismissing Regional Director)

From: Deputy General Counsel

Subject: (Caption of the Case)

Date:

CASE FILE ANALYSIS

The Charge

(A brief statement of the charge, including the parties and the issue(s) presented as set forth in the dismissal letter.)

Regional Director Rationale for Dismissal

(Set forth the legal conclusion(s) which forms the basis of the dismissal letter, without editing or restatement.)

Appeal Determination

(Set forth the recommended appeal determination, including the following:

1. Whether the appeal is granted or denied. If the appeal has been granted, identify which of the enumerated appeal standards has been established. remand recommendation.
2. A reference to any applicable Authority decision, OGC Policy (Quality or Scope of Investigation), advice memoranda or case handling manual that forms the basis for the case file analysis.
3. A concise discussion and analysis of any facts or case law necessary for a full understanding of the basis for the Case File Analysis
4. Specific case handling guidance to the Dismissing Region, as deemed necessary, in cases involving a remand for further investigation, further analysis or issuance of a complaint.)

ATTACHMENT 5G1

SAMPLE LETTER TO RESPONDENT RE: COMPLIANCE

(Date)

Respondent's Representative
(Name and Address)

Re: (Case Name, Case #, FLRA No.)

Dear Mr./Ms. (Name):

Enclosed is a copy of the Decision and Order of the Federal Labor Relations Authority in the captioned case.

The Decision and Order requires, in part, the posting of notices on forms to be furnished by the Authority. Enclosed is one completed copy of the notice containing the language required by the Decision and Order. Please add the date, signature and title of the (appropriate signing official).

The Decision and Order requires that the notices be posted at (all locations specified in the Authority's Decision and Order). If you do not have suitable reproduction facilities to reproduce the quantity of notice forms required to satisfy the posting requirement, the (insert Region) Regional Director will provide you with additional blank forms upon request.

Please notify the (insert Region) Regional Director, within 30 days of the date of the Decision and Order, of the steps taken to comply with the requirements of the Decision and Order, and send a copy to the person(s) or parties on the service sheet enclosed with this letter. Include a signed and dated copy of the notice with your submission.

Upon the expiration of the 60-day posting period, please certify, by letter to the (insert Region) Regional Director, with a copy to all persons or parties listed on the service sheet, that the Respondent has completed the requisite posting and any other remaining remedial action(s) required by the Decision and Order.

If you require any assistance or have any questions concerning compliance in this matter, please contact (name, address, and telephone number of the appropriate Regional Director).

For the Authority.

Sincerely,

Regional Director, (Region)

Enclosures (3)

Decision and Order
Notice (completed copy)
Service Sheet

ATTACHMENT 5G2

SAMPLE LETTER CLOSING THE CASE

(Date)

Charged Party Rep.
(Name and Address)

Dear Mr./Ms. (Name):

I have reviewed all aspects of compliance in this case. I have determined that the Respondent has met its obligations with regard to the terms and provisions of the Federal Labor Relations Authority's Decision and Order, FLRA No. (), dated ().

Accordingly, this matter is closed and will remain closed conditioned upon continued compliance with the Decision and Order.

In the event that subsequent violations of the Federal Service Labor-Management Relations Statute occur, this matter may be reopened.

Sincerely,

Regional Director

Παγε 1 οφ 1

cc: Charging Party Rep.
(Name and Address)

REFERENCES

THE STATUTE

TITLE 5 OF THE UNITED STATES CODE
GOVERNMENT ORGANIZATION AND EMPLOYEES
PART III—EMPLOYEES
SUBPART F—LABOR—MANAGEMENT AND
EMPLOYEE RELATIONS
CHAPTER 71
LABOR—MANAGEMENT RELATIONS

SUBCHAPTER I—GENERAL PROVISIONS

Sec.

- [7101.](#) Findings and purpose.
- [7102.](#) Employees' rights.
- [7103.](#) Definitions; application.
- [7104.](#) Federal Labor Relations Authority.
- [7105.](#) Powers and duties of the Authority.
- [7106.](#) Management rights.

SUBCHAPTER II—RIGHTS AND DUTIES OF AGENCIES
AND LABOR ORGANIZATIONS

- [7111.](#) Exclusive recognition of labor organizations.
- [7112.](#) Determination of appropriate units for labor organization representation.
- [7113.](#) National consultation rights.
- [7114.](#) Representation rights and duties.
- [7115.](#) Allotments to representatives.
- [7116.](#) Unfair labor practices.
- [7117.](#) Duty to bargain in good faith; compelling need; duty to consult.
- [7118.](#) Prevention of unfair labor practices.
- [7119.](#) Negotiation impasses; Federal Service Impasses Panel.
- [7120.](#) Standards of conduct for labor organizations.

SUBCHAPTER III—GRIEVANCES, APPEALS, AND REVIEW

- [7121.](#) Grievance procedures.
- [7122.](#) Exceptions to arbitral awards.
- [7123.](#) Judicial review; enforcement.

SUBCHAPTER IV—ADMINISTRATIVE AND OTHER PROVISIONS

- [7131.](#) Official time.
- [7132.](#) Subpenas.
- [7133.](#) Compilation and publication of data.
- [7134.](#) Regulations.
- [7135.](#) Continuation of existing laws, recognitions, agreements, and procedures.

§ 7101. Findings and purpose

(a) The Congress finds that-

(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them-

(A) safeguards the public interest,

(B) contributes to the effective conduct of public business, and

(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

(b) It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.

§ 7102. Employees' rights

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right-

(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

§ 7103. Definitions; application

(a) For the purpose of this chapter-

(1) "person" means an individual, labor organization, or agency;

(2) "employee" means an individual-

(A) employed in an agency; or

(B) whose employment in an agency has ceased because of any unfair labor practice under section 7116 of this title and who has not obtained any other regular and substantially equivalent employment, as determined under regulations prescribed by the Federal Labor Relations Authority;

but does not include-

(i) an alien or noncitizen of the United States who occupies a position outside the United States;

(ii) a member of the uniformed services;

(iii) a supervisor or a management official;

(iv) an officer or employee in the Foreign Service of the United States employed in the Department of State, the International Communication Agency, the United States International Development Cooperation Agency, the Department of Agriculture, or the Department of Commerce; or

(v) any person who participates in a strike in violation of section 7311 of this title;

(3) "agency" means an Executive agency (including a nonappropriated fund instrumentality described in section 2105(c) of this title and the Veterans' Canteen Service, Department of Veterans Affairs), the Library of Congress, and the Government Printing Office, but does not include—

(A) the General Accounting Office;

(B) the Federal Bureau of Investigation;

(C) the Central Intelligence Agency;

(D) the National Security Agency;

(E) the Tennessee Valley Authority;

(F) the Federal Labor Relations Authority;

or

(G) the Federal Service Impasses Panel.

(4) "labor organization" means an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning

grievances and conditions of employment, but does not include-

(A) an organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(B) an organization which advocates the overthrow of the constitutional form of government of the United States;

(C) an organization sponsored by an agency; or

(D) an organization which participates in the conduct of a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike;

(5) "dues" means dues, fees, and assessments;

(6) "Authority" means the Federal Labor Relations Authority described in section 7104(a) of this title;

(7) "Panel" means the Federal Service Impasses Panel described in section 7119(c) of this title;

(8) "collective bargaining agreement" means an agreement entered into as a result of collective bargaining pursuant to the provisions of this chapter;

(9) "grievance" means any complaint-

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee, labor organization, or agency concerning—

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

(10) "supervisor" means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term "supervisor" includes only those individuals who devote a preponderance of their employment time to exercising such authority;

(11) "management official" means an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency;

(12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting

such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession;

(13) "confidential employee" means an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations;

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute;

(15) "professional employee" means—

(A) an employee engaged in the performance of work—

(i) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital (as distinguished from knowledge acquired by a general academic education, or from an apprenticeship, or from training in the performance of routine

mental, manual, mechanical, or physical activities);

(ii) requiring the consistent exercise of discretion and judgment in its performance;

(iii) which is predominantly intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work); and

(iv) which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time; or

(B) an employee who has completed the courses of specialized intellectual instruction and study described in subparagraph (A) (i) of this paragraph and is performing related work under appropriate direction or guidance to qualify the employee as a professional employee described in subparagraph (A) of this paragraph;

(16) "exclusive representative" means any labor organization which—

(A) is certified as the exclusive representative of employees in an appropriate unit pursuant to section 7111 of this title; or

(B) was recognized by an agency immediately before the effective date of this chapter as the exclusive representative of employees in an appropriate unit—

(i) on the basis of an election; or

(ii) on any basis other than an election,

and continues to be so recognized in accordance with the provisions of this chapter;

(17) "firefighter" means any employee engaged in the performance of work directly connected with the control and extinguishment of fires or the maintenance and use firefighting apparatus and equipment; and

(18) "United States" means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, the Trust Territory of the Pacific Islands, and any territory or possession of the United States.

(b)(1) The President may issue an order excluding any agency or subdivision thereof from coverage under this chapter if the President determines that—

(A) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work, and

(B) the provisions of this chapter cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.

(2) The President may issue an order suspending any provision of this chapter with respect to any agency, installation, or activity located outside the 50 States and the District of Columbia, if the President determines that the suspension is necessary in the interest of national security.

§ 7104. Federal Labor Relations Authority

(a) The Federal Labor Relations Authority is composed of three members, not more than 2 of whom may be adherents of the same political party. No member shall engage in any other business or employment or hold another office or position in

the Government of the United States except as otherwise provided by law.

(b) Members of the Authority shall be appointed by the President by and with the advice and consent of the Senate, and may be removed by the President only upon notice and hearing and only for inefficiency, neglect of duty, or malfeasance in office. The President shall designate one member to serve as Chairman of the Authority. The Chairman is the chief executive and administrative officer of the Authority.

(c) A member of the Authority shall be appointed for a term of 5 years. An individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced. The term of any member shall not expire before the earlier of—

(1) the date on which the member's successor takes office, or

(2) the last day of the Congress beginning after the date on which the member's term of office would (but for this paragraph) expire.

(d) A vacancy in the Authority shall not impair the right of the remaining members to exercise all of the powers of the Authority.

(e) The Authority shall make an annual report to the President for transmittal to the Congress which shall include information as to the cases it has heard and decisions it has rendered.

(f)(1) The General Counsel of the Authority shall be appointed by the President, by and with the advice and consent of the Senate, for a term of 5 years. The General Counsel may be removed at any time by the President. The General Counsel shall hold no other office or position in the Government of the United States except as provided by law.

(2) The General Counsel may—

(A) investigate alleged unfair labor practices under this chapter,

(B) file and prosecute complaints under this chapter, and

(C) exercise such other powers of the Authority as the Authority may prescribe.

(3) The General Counsel shall have direct authority over, and responsibility for, all employees in the office of General Counsel, including employees of the General Counsel in the regional offices of the Authority.

§ 7105. Powers and duties of the Authority

(a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;

(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

(E) resolve issues relating to the duty to bargain in good faith under section 7117(c) of this title;

(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

(b) The Authority shall adopt an official seal which shall be judicially noticed.

(c) The principal office of the Authority shall be in or about the District of Columbia, but the Authority may meet and exercise any or all of its powers at any time or place. Except as otherwise expressly provided by law, the Authority may, by one or more of its members or by such agents as it may designate, make any appropriate inquiry necessary to carry out its duties wherever persons subject to this chapter are located. Any member who participates in the inquiry shall not be disqualified from later participating in a decision of the Authority in any case relating to the inquiry.

(d) The Authority shall appoint an Executive Director and such regional directors, administrative law judges under section 3105 of this title, and other individuals as it may from time to time find necessary for the proper performance of

its functions. The Authority may delegate to officers and employees appointed under this subsection authority to perform such duties and make such expenditures as may be necessary.

(e)(1) The Authority may delegate to any regional director its authority under this chapter—

(A) to determine whether a group of employees is an appropriate unit;

(B) to conduct investigations and to provide for hearings;

(C) to determine whether a question of representation exists and to direct an election; and

(D) to supervise or conduct secret ballot elections and certify the results thereof.

(2) The Authority may delegate to any administrative law judge appointed under subsection (d) of this section its authority under section 7118 of this title to determine whether any person has engaged in or is engaging in an unfair labor practice.

(f) If the Authority delegates any authority to any regional director or administrative law judge to take any action pursuant to subsection (e) of this section, the Authority may, upon application by any interested person filed within 60 days after the date of the action, review such action, but the review shall not, unless specifically ordered by the Authority, operate as a stay of action. The Authority may affirm, modify, or reverse any action reviewed under this subsection. If the Authority does not undertake to grant review of the action under this subsection within 60 days after the later of—

(1) the date of the action; or

(2) the date of the filing of any application

under this subsection for review of the action;

the action shall become the action of the Authority at the end of such 60-day period.

(g) In order to carry out its functions under this chapter, the Authority may-

(1) hold hearings;

(2) administer oaths, take the testimony or deposition of any person under oath, and issue subpoenas as provided in section 7132 of this title; and

(3) may require an agency or a labor organization to cease and desist from violations of this chapter and require it to take any remedial action it considers appropriate to carry out the policies of this chapter.

(h) Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Authority may appear for the Authority and represent the Authority in any civil action brought in connection with any function carried out by the Authority pursuant to this title or as otherwise authorized by law.

(i) In the exercise of the functions of the Authority under this title, the Authority may request from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or policy directives issued by the Office of Personnel Management in connection with any matter before the Authority.

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency-

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws-

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from-

- (i) among properly ranked and certified candidates for promotion; or
- (ii) any other appropriate source;

and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating-

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

§ 7111. Exclusive recognition of labor organizations

(a) An agency shall accord exclusive recognition to a labor organization if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in the election.

(b) If a petition is filed with the Authority-

(1) by any person alleging-

(A) in the case of an appropriate unit for which there is no exclusive representative, that 30 percent of the employees in the appropriate unit wish to be represented for the purpose of collective bargaining by an exclusive representative, or

(B) in the case of an appropriate unit for which there is an exclusive representative, that 30 percent of the employees in the unit allege that the exclusive representative is no longer the representative of the majority of the employees in the unit; or

(2) by any person seeking clarification of, or an amendment to, a certification then in effect or a matter relating to representation;

the Authority shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists, it shall provide an opportunity for a hearing (for which a transcript shall be kept) after a reasonable notice. If the Authority finds on the record of the hearing that a question of representation exists, the Authority shall supervise or conduct an election on the question by secret ballot and shall certify the results thereof. An election under this subsection shall not be conducted in any appropriate unit or in any subdivision thereof within which, in the preceding 12 calendar months, a valid election under this subsection has been held.

(c) A labor organization which—

(1) has been designated by at least 10 percent of the employees in the unit specified in any petition filed pursuant to subsection (b) of this section;

(2) has submitted a valid copy of a current or recently expired collective bargaining agreement for the unit; or

(3) has submitted other evidence that it is the exclusive representative of the employees involved; may intervene with respect to a petition filed pursuant to subsection (b) of this section and shall be placed on the ballot of any election under such subsection (b) with respect to the petition.

(d) The Authority shall determine who is eligible to vote in any election under this section and shall establish rules governing any such election, which shall include rules allowing employees eligible to vote the opportunity to choose—

(1) from labor organizations on the ballot, that labor organization which the employees wish to have represent them; or

(2) not to be represented by a labor organization.

In any election in which no choice on the ballot receives a majority of the votes cast, a runoff election shall be conducted between the two choices receiving the highest number of votes. A labor organization which receives the majority of the votes cast in an election shall be certified by the Authority as the exclusive representative.

(e) A labor organization seeking exclusive recognition shall submit to the Authority and the agency involved a roster of its officers and representatives, a copy of its constitution and bylaws, and a statement of its objectives.

(f) Exclusive recognition shall not be accorded to a labor organization—

(1) if the Authority determines that the labor organization is subject to corrupt influences or influences opposed to democratic principles;

(2) in the case of a petition filed pursuant to subsection (b)(1)(A) of this section, if there is not credible evidence that at least 30 percent of the employees in the unit specified in the petition wish to be represented for the purpose of collective bargaining by the labor organization seeking exclusive recognition;

(3) if there is then in effect a lawful written collective bargaining agreement between the agency involved and an exclusive representative (other than the labor organization seeking exclusive recognition) covering any employees included in the unit specified in the petition, unless-

(A) the collective bargaining agreement has been in effect for more than 3 years, or

(B) the petition for exclusive recognition is filed not more than 105 days and not less than 60 days before the expiration date of the collective bargaining agreement; or

(4) if the Authority has, within the previous 12 calendar months, conducted a secret ballot election for the unit described in any petition under this section and in such election a majority of the employees voting chose a labor organization for certification as the unit's exclusive representative.

(g) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules or decisions of the Authority.

§ 7112. Determination of appropriate units for labor organization representation

(a) The Authority shall determine the appropriateness of any unit. The Authority shall determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this chapter, the appropriate unit should be established on an agency, plant, installation, functional, or other basis and shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of the agency involved.

(b) A unit shall not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be determined to be appropriate if it includes—

- (1) except as provided under section 7135(a)(2) of this title, any management official or supervisor;
- (2) a confidential employee;
- (3) an employee engaged in personnel work in other than a purely clerical capacity;
- (4) an employee engaged in administering the provisions of this chapter;
- (5) both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;
- (6) any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or
- (7) any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties

directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

(c) Any employee who is engaged in administering any provision of law relating to labor-management relations may not be represented by a labor organization-

(1) which represents other individuals to whom such provision applies; or

(2) which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision applies.

(d) Two or more units which are in an agency and for which a labor organization is the exclusive representative may, upon petition by the agency or labor organization, be consolidated with or without an election into a single larger unit if the Authority considers the larger unit to be appropriate. The Authority shall certify the labor organization as the exclusive representative of the new larger unit.

§ 7113. National consultation rights

(a) If, in connection with any agency, no labor organization has been accorded exclusive recognition on an agency basis, a labor organization which is the exclusive representative of a substantial number of the employees of the agency, as determined in accordance with criteria prescribed by the Authority, shall be granted national consultation rights by the agency. National consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to any labor organization's eligibility for, or continuation of,

national consultation rights shall be subject to determination by the Authority.

(b)(1) Any labor organization having national consultation rights in connection with any agency under subsection (a) of this section shall-

(A) be informed of any substantive change in conditions of employment proposed by the agency, and

(B) be permitted reasonable time to present its views and recommendations regarding the changes.

(2) If any views or recommendations are presented under paragraph (1) of this subsection to an agency by any labor organization-

(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

(c) Nothing in this section shall be construed to limit the right of any agency or exclusive representative to engage in collective bargaining.

§ 7114. Representation rights and duties

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at-

(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if-

(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

(ii) the employee requests representation.

(3) Each agency shall annually inform its employees of their rights under paragraph (2)(B) of this subsection.

(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.

(5) The rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from-

(A) being represented by an attorney or other representative, other than the exclusive representative, of the employee's own choosing in any grievance or appeal action; or

(B) exercising grievance or appellate rights established by law, rule, or regulation;

except in the case of grievance or appeal procedures negotiated under this chapter.

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation-

(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data-

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and

(5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.

(c)(1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.

(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision).

(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation.

(4) A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement or, if none, under regulations prescribed by the agency.

§ 7115. Allotments to representatives

(a) If an agency has received from an employee in an appropriate unit a written assignment which authorizes the agency to deduct from the pay of the employee amounts for the payment of regular and periodic dues of the exclusive representative of the unit, the agency shall honor the assignment and make an appropriate allotment pursuant to the assignment. Any such allotment shall be made at no cost to the exclusive representative or the employee. Except as provided under subsection (b) of this section, any such assignment may not be revoked for a period of 1 year.

(b) An allotment under subsection (a) of this section for the deduction of dues with respect to any employee shall terminate when-

(1) the agreement between the agency and the exclusive representative involved ceases to be applicable to the employee; or

(2) the employee is suspended or expelled from membership in the exclusive representative.

(c)(1) Subject to paragraph (2) of this subsection, if a petition has been filed with the Authority by a labor organization alleging that 10 percent of the employees in an appropriate unit in an agency have membership in the labor organization, the Authority shall investigate the petition to determine its validity. Upon certification by the Authority of the validity of the petition, the agency shall have a duty to negotiate with the labor organization solely concerning the deduction of dues of the labor organization from the pay of the members of the labor organization who are employees in the unit and who make a voluntary allotment for such purpose.

(2)(A) The provisions of paragraph (1) of this subsection shall not apply in the case of any appropriate unit for which there is an exclusive representative.

(B) Any agreement under paragraph (1) of this subsection between a labor organization and an agency with respect to an appropriate unit shall be null and void upon the certification of an exclusive representative of the unit.

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization-

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;

(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as

punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(4) to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7)(A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or

(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

(c) For the purpose of this chapter it shall be an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by such exclusive representative except for failure—

(1) to meet reasonable occupational standards uniformly required for admission, or

(2) to tender dues uniformly required as a condition of acquiring and retaining membership. This subsection does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this chapter.

(d) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

(e) The expression of any personal view, argument, opinion or the making of any statement which-

(1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election,

(2) corrects the record with respect to any false or misleading statement made by any person, or

(3) informs employees of the Government's policy relating to labor-management relations and representation,

shall not, if the expression contains no threat or reprisal or force or promise of benefit or was not made under coercive conditions, (A) constitute an unfair labor practice under any provision of this chapter, or (B) constitute grounds for the setting aside of any election conducted under any provisions of this chapter.

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

(b)(1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a)(3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with regulations prescribed by the Authority, whether such a compelling need exists.

(2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if-

(A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or

(B) the Authority determines that a compelling need for a rule or regulation does not exist.

(3) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall be expedited to the extent practicable and shall not include the General Counsel as a party.

(4) The agency, or primary national subdivision, as the case may be, which issued the rule or regulation shall be a necessary party at any hearing under this subsection.

(c)(1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.

(2) The exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation referred to in paragraph (1) of this subsection, institute an appeal under this subsection by-

(A) filing a petition with the Authority; and

(B) furnishing a copy of the petition to the head of the agency.

(3) On or before the 30th day after the date of the receipt by the head of the agency of the copy of the petition under paragraph (2)(B) of this subsection, the agency shall-

(A) file with the Authority a statement—
 (i) withdrawing the allegation; or
 (ii) setting forth in full its reasons
supporting the allegation; and
(B) furnish a copy of such statement to the
exclusive representative.

(4) On or before the 15th day after the date of the receipt by the exclusive representative of a copy of a statement under paragraph (3)(B) of this subsection, the exclusive representative shall file with the Authority its response to the statement.

(5) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall not include the General Counsel as a party.

(6) The Authority shall expedite proceedings under this subsection to the extent practicable and shall issue to the exclusive representative and to the agency a written decision on the allegation and specific reasons therefor at the earliest practicable date.

(d)(1) A labor organization which is the exclusive representative of a substantial number of employees, determined in accordance with criteria prescribed by the Authority, shall be granted consultation rights by any agency with respect to any Government-wide rule or regulation issued by the agency effecting any substantive change in any condition of employment. Such consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to a labor organization's eligibility for, or continuation of, such consultation rights shall be subject to determination by the Authority.

(2) A labor organization having consultation rights under paragraph (1) of this subsection shall—

(A) be informed of any substantive change in conditions of employment proposed by the agency, and

(B) shall be permitted reasonable time to present its views and recommendations regarding the changes.

(3) If any views or recommendations are presented under paragraph (2) of this subsection to an agency by any labor organization—

(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

§ 7118. Prevention of unfair labor practices

(a)(1) If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the charge a written statement of the reasons for not issuing a complaint.

(2) Any complaint under paragraph (1) of this subsection shall contain a notice—

(A) of the charge;

(B) that a hearing will be held before the Authority (or any member thereof or before an individual employed by the authority and designated for such purpose); and

(C) of the time and place fixed for the hearing.

(3) The labor organization or agency involved shall have the right to file an answer to the original and any amended complaint and to appear in person or otherwise and give testimony at the time and place fixed in the complaint for the hearing.

(4) (A) Except as provided in subparagraph (B) of this paragraph, no complaint shall be issued on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority.

(B) If the General Counsel determines that the person filing any charge was prevented from filing the charge during the 6-month period referred to in subparagraph (A) of this paragraph by reason of—

(i) any failure of the agency or labor organization against which the charge is made to perform a duty owed to the person, or

(ii) any concealment which prevented discovery of the alleged unfair labor practice during the 6-month period,

the General Counsel may issue a complaint based on the charge if the charge was filed during the 6-month period beginning on the day of the discovery by the person of the alleged unfair labor practice.

(5) The General Counsel may prescribe regulations providing for informal methods by which the alleged unfair labor practice may be resolved prior to the issuance of a complaint.

(6) The Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) shall conduct a hearing on the complaint not earlier than 5 days after the date on which the complaint is served. In the discretion of the individual or individuals conducting the hearing, any person involved may be allowed to intervene

in the hearing and to present testimony. Any such hearing shall, to the extent practicable, be conducted in accordance with the provisions of subchapter II of chapter 5 of this title, except that the parties shall not be bound by rules of evidence, whether statutory, common law, or adopted by a court. A transcript shall be kept of the hearing. After such a hearing the Authority, in its discretion, may upon notice receive further evidence or hear argument.

(7) If the Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) determines after any hearing on a complaint under paragraph (5) of this subsection that the preponderance of the evidence received demonstrates that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, then the individual or individuals conducting the hearing shall state in writing their findings of fact and shall issue and cause to be served on the agency or labor organization an order—

(A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged;

(B) requiring the parties to renegotiate a collective bargaining agreement in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect;

(C) requiring reinstatement of an employee with backpay in accordance with section 5596 of this title; or

(D) including any combination of the actions described in subparagraphs (A) through (C) of this paragraph or such other action as will carry out the purpose of this chapter.

If any such order requires reinstatement of any employee with backpay, backpay may be required of the agency (as provided in

section 5596 of this title) or of the labor organization, as the case may be, which is found to have engaged in the unfair labor practice involved.

(8) If the individual or individuals conducting the hearing determine that the preponderance of the evidence received fails to demonstrate that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, the individual or individuals shall state in writing their findings of fact and shall issue an order dismissing the complaint.

(b) In connection with any matter before the Authority in any proceeding under this section, the Authority may request, in accordance with the provisions of section 7105(i) of this title, from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or other policy directives issued by the Office of Personnel Management.

§ 7119. Negotiation impasses; Federal Service Impasses Panel

(a) The Federal Mediation and Conciliation Service shall provide services and assistance to agencies and exclusive representatives in the resolution of negotiation impasses. The Service shall determine under what circumstances and in what matter it shall provide services and assistance.

(b) If voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or any other third-party mediation, fail to resolve a negotiation impasse—

(1) either party may request the Federal Service Impasses Panel to consider the matter, or

(2) the parties may agree to adopt a procedure for binding arbitration of the negotiation impasses, but only if the procedure is approved by the Panel.

(c)(1) The Federal Service Impasses Panel is an entity within the Authority, the function of which is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives.

(2) The Panel shall be composed of a Chairman and at least six other members, who shall be appointed by the President, solely on the basis of fitness to perform duties and functions involved, from among individuals who are familiar with Government operations and knowledgeable in labor-management relations.

(3) Of the original members of the Panel, 2 members shall be appointed for a term of 1 year, 2 members shall be appointed for a term of 3 years, and the Chairman and the remaining members shall be appointed for a term of 5 years. Thereafter each member shall be appointed for a term of 5 years, except that an individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced. Any member of the Panel may be removed by the President.

(4) The Panel may appoint an Executive Director and any other individuals it may from time to time find necessary for the proper performance of its duties. Each member of the Panel who is not an employee (as defined in section 2105 of this title) is entitled to pay at a rate equal to the daily equivalent of the maximum annual rate of basic pay then currently paid under the General Schedule for each day he is engaged in the performance of official business of the Panel, including travel time, and is entitled to travel expenses as provided under section 5703 of this title.

(5)(A) The Panel or its designee shall promptly investigate any impasse presented to it under subsection (b) of this section. The Panel shall consider the impasse and shall either-

(i) recommend to the parties procedures for the resolution of the impasse; or

(ii) assist the parties in resolving the impasse through whatever methods and procedures, including factfinding and recommendations, it may consider appropriate to accomplish the purpose of this section.

(B) If the parties do not arrive at a settlement after assistance by the Panel under subparagraph (A) of this paragraph, the Panel may—

(i) hold hearings;

(ii) administer oaths, take the testimony or deposition of any person under oath, and issue subpoenas as provided in section 7132 of this title; and

(iii) take whatever action is necessary and not inconsistent with this chapter to resolve the impasse.

(C) Notice of any final action of the Panel under this section shall be promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement, unless the parties agree otherwise.

§ 7120. Standards of conduct for labor organizations

(a) An agency shall only accord recognition to a labor organization that is free from corrupt influences and influences opposed to basic democratic principles. Except as provided in subsection (b) of this section, an organization is not required to prove that it is free from such influences if it is subject to governing requirements adopted by the organization or by a national or international labor organization or federation of labor organizations with which it is affiliated, or in which it participates, containing explicit and detailed provisions to which it subscribes calling for—

(1) the maintenance of democratic procedures and practices including provisions for periodic elections to be conducted subject to recognized safeguards and provisions defining and securing the right of individual members to participate in the affairs of the organization, to receive fair and equal treatment under the governing rules of the organization, and to receive fair process in disciplinary proceedings;

(2) the exclusion from office in the organization of persons affiliated with communist or other totalitarian movements and persons identified with corrupt influences;

(3) the prohibition of business or financial interests on the part of organization officers and agents which conflict with their duty to the organization and its members; and

(4) the maintenance of fiscal integrity in the conduct of the affairs of the organization, including provisions for accounting and financial controls and regular financial reports or summaries to be made available to members.

(b) Notwithstanding the fact that a labor organization has adopted or subscribed to standards of conduct as provided in subsection (a) of this section, the organization is required to furnish evidence of its freedom from corrupt influences or influences opposed to basic democratic principles if there is reasonable cause to believe that-

(1) the organization has been suspended or expelled from, or is subject to other sanction, by a parent labor organization, or federation of organizations with which it had been affiliated, because it has demonstrated an unwillingness or inability to comply with governing requirements

comparable in purpose to those required by subsection (a) of this section; or

(2) the organization is in fact subject to influences that would preclude recognition under this chapter.

(c) A labor organization which has or seeks recognition as a representative of employees under this chapter shall file financial and other reports with the Assistant Secretary of Labor for Labor Management Relations, provide for bonding of officials and employees of the organization, and comply with trusteeship and election standards.

(d) The Assistant Secretary shall prescribe such regulations as are necessary to carry out the purposes of this section. Such regulations shall conform generally to the principles applied to labor organizations in the private sector. Complaints of violations of this section shall be filed with the Assistant Secretary. In any matter arising under this section, the Assistant Secretary may require a labor organization to cease and desist from violations of this section and require it to take such actions as he considers appropriate to carry out the policies of this section.

(e) This chapter does not authorize participation in the management of a labor organization or acting as a representative of a labor organization by a management official, a supervisor, or a confidential employee, except as specifically provided in this chapter, or by an employee if the participation or activity would result in a conflict or apparent conflict of interest or would otherwise be incompatible with law or with the official duties of the employee.

(f) In the case of any labor organization which by omission or commission has willfully and intentionally, with regard to any strike, work stoppage, or slowdown, violated

section 7116(b)(7) of this title, the Authority shall, upon an appropriate finding by the Authority of such violation-

(1) revoke the exclusive recognition status of the labor organization, which shall then immediately cease to be legally entitled and obligated to represent employees in the unit; or

(2) take any other appropriate disciplinary action.

§ 7121. Grievance procedures

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e) and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b)(1) Any negotiated grievance procedure referred to in subsection (a) of this section shall-

(A) be fair and simple,

(B) provide for expeditious processing, and

(C) include procedures that-

(i) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(ii) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right

to be present during the grievance proceeding;
and

(iii) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

(2)(A) The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (1)(C)(iii) shall, if or to the extent that an alleged prohibited personnel practice is involved, allow the arbitrator to order-

(i) a stay of any personnel action in a manner similar to the manner described in section 1221(c) with respect to the Merit Systems Protection Board; and

(ii) the taking, by an agency, of any disciplinary action identified under section 1215(a)(3) that is otherwise within the authority of such agency to take.

(B) Any employee who is the subject of any disciplinary action ordered under subparagraph (A)(ii) may appeal such action to the same extent and in the same manner as if the agency had taken the disciplinary action absent arbitration.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning-

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

(d) An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first. Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit Systems Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

(e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the

negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

(2) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable.

(f) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board. In matters similar to those covered under sections 4303 and 7512 of this title which arise under other personnel systems and which an aggrieved employee has raised under the negotiated grievance procedure, judicial review of an arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures.

(g)(1) This subsection applies with respect to a prohibited personnel practice other than a prohibited personnel practice to which subsection (d) applies.

(2) An aggrieved employee affected by a prohibited personnel practice described in paragraph (1) may elect not more than one of the remedies described in paragraph (3) with respect thereto. For purposes of the preceding sentence, a

determination as to whether a particular remedy has been elected shall be made as set forth under paragraph (4).

(3) The remedies described in this paragraph are as follows:

(A) An appeal to the Merit Systems Protection Board under section 7701.

(B) A negotiated grievance procedure under this section.

(C) Procedures for seeking corrective action under subchapters II and III of chapter 12.

(4) For the purpose of this subsection, a person shall be considered to have elected—

(A) the remedy described in paragraph (3)(A) if such person has timely filed a notice of appeal under the applicable appellate procedures;

(B) the remedy described in paragraph (3)(B) if such person has timely filed a grievance in writing, in accordance with the provisions of the parties' negotiated procedure; or

(C) the remedy described in paragraph (3)(C) if such person has sought corrective action from the Office of Special Counsel by making an allegation under section 1214(a)(1).

§ 7122. Exceptions to arbitral awards

(a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient—

(1) because it is contrary to any law, rule, or regulation; or

(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

(b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title).

§ 7123. Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under—

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before

the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(d) The Authority may, upon issuance of a complaint as provided in section 7118 of this title charging that any person has engaged in or is engaging in an unfair labor practice, petition any United States district court within any district in which the unfair labor practice in question is alleged to have occurred or in which such person resides or transacts business for appropriate temporary relief (including a restraining order). Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant any temporary relief (including a temporary restraining order) it considers just and proper. A court shall not grant any temporary relief under this section if it would interfere with the ability of the agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed.

§ 7131. Official time

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

(b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a nonduty status.

(c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.

(d) Except as provided in the preceding subsections of this section—

(1) any employee representing an exclusive representative, or

(2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative, shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

§ 7132. Subpenas

(a) Any member of the Authority, the General Counsel, or the Panel, any administrative law judge appointed by the Authority under section 3105 of this title, and any employee of the Authority designated by the Authority may—

(1) issue subpoenas requiring the attendance and testimony of witnesses and the production of documentary or other evidence from any place in the United States; and

(2) administer oaths, take or order the taking of depositions, order responses to written interrogatories, examine witnesses, and receive evidence.

No subpoena shall be issued under this section which requires the disclosure of intramanagement guidance, advice, counsel, or training within an agency or between an agency and the Office of Personnel Management.

(b) In the case of contumacy or failure to obey a subpoena issued under subsection (a)(1) of this section, the United States district court for the judicial district in which the person to whom the subpoena is addressed resides or is served may issue an order requiring such person to appear at any designated place to testify or to produce documentary or other evidence. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

(c) Witnesses (whether appearing voluntarily or under subpoena) shall be paid the same fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States.

§ 7133. Compilation and publication of data

(a) The Authority shall maintain a file of its proceedings and copies of all available agreements and

arbitration decisions, and shall publish the texts of its decisions and the actions taken by the Panel under section 7119 of this title.

(b) All files maintained under subsection (a) of this section shall be open to inspection and reproduction in accordance with the provisions of sections 552 and 552a of this title.

§ 7134. Regulations

The Authority, the General Counsel, the Federal Mediation and Conciliation Service, the Assistant Secretary of Labor for Labor Management Relations, and the Panel shall each prescribe rules and regulations to carry out the provisions of this chapter applicable to each of them, respectively. Provisions of subchapter II of chapter 5 of this title shall be applicable to the issuance, revision, or repeal of any such rule or regulation.

§ 7135. Continuation of existing laws, recognitions, agreements, and procedures

(a) Nothing contained in this chapter shall preclude—

(1) the renewal or continuation of an exclusive recognition, certification of an exclusive representative, or a lawful agreement between an agency and an exclusive representative of its employees, which is entered into before the effective date of this chapter; or

(2) the renewal, continuation, or initial according of recognition for units of management officials or supervisors represented by labor organizations which historically or traditionally

represent management officials or supervisors in private industry and which hold exclusive recognition for units of such officials or supervisors in any agency on the effective date of this chapter.

(b) Policies, regulations, and procedures established under and decisions issued under Executive Orders 11491, 11616, 11636, 11787, and 11838, or under any other Executive order, as in effect on the effective date of this chapter, shall remain in full force and effect until revised or revoked by the President, or unless superseded by specific provisions of this chapter or by regulations or decisions issued pursuant to this chapter.

THE REGULATIONS
SUBPART A OF PART 2423

SUBCHAPTER C--FEDERAL LABOR RELATIONS AUTHORITY AND GENERAL
COUNSEL OF THE FEDERAL LABOR RELATIONS AUTHORITY
PART 2423--UNFAIR LABOR PRACTICE PROCEEDINGS

SUBPART A--FILING, INVESTIGATING, RESOLVING, AND ACTING ON
CHARGES

§ [2423.1](#) Resolution of unfair labor practice disputes prior to a Regional Director determination whether to issue a complaint.

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§§ 2423.13 to 2423.19 [Reserved]

§ 2423.1 Resolution of unfair labor practice disputes prior to a Regional Director determination whether to issue a complaint.

(a) Resolving unfair labor practice disputes prior to filing a charge. The purposes and policies of the Federal Service Labor-Management Relations Statute can best be achieved by the collaborative efforts of all persons covered by that law. The General Counsel encourages all persons to meet and, in good faith, attempt to resolve unfair labor practice disputes prior to filing unfair labor practice charges. If requested, or agreed to, by both parties, a representative of the Regional Office, in appropriate circumstances, may participate in these meetings to assist the parties in identifying the issues and their interests and in resolving the dispute. Attempts to resolve unfair labor practice disputes prior to filing an unfair labor practice charge do not toll the time limitations for filing a charge set forth at 5 U.S.C. 7118(a)(4).

(b) Resolving unfair labor practice disputes after filing a charge. The General Counsel encourages the informal resolution of unfair labor practice allegations subsequent to the filing of a charge and prior to a determination on the merits of the charge by a Regional Director. A representative of the appropriate Regional Office, as part of the investigation, may assist the parties in informally resolving their dispute.

§ 2423.2 Alternative Dispute Resolution (ADR) services.

(a) *Purpose of ADR services.* The Office of the General Counsel furthers its mission and implements the agency-wide Federal Labor Relations Authority Collaboration and Alternative Dispute Resolution Program by promoting stable and productive labor-management relationships governed by the Federal Service Labor-Management Relations Statute and by providing services which assist labor organizations and agencies, on a voluntary basis: To develop collaborative labor-management relationships; to avoid unfair labor practice disputes; and to resolve any unfair labor practice disputes informally.

(b) *Types of ADR Services.* Agencies and labor organizations may jointly request, or agree to, the provision of the following services by the Office of the General Counsel:

(1) *Facilitation.* Assisting the parties in improving their labor-management relationship as governed by the Federal Service Labor-Management Relations Statute;

(2) *Intervention.* Intervening when parties are experiencing or expect significant unfair labor practice disputes;

(3) *Training.* Training labor organization officials and agency representatives on their rights and responsibilities under the Federal Service Labor-Management Relations Statute and how to avoid litigation over those rights and responsibilities, and on utilizing problem solving and ADR skills, techniques, and strategies to resolve informally unfair labor practice disputes; and

(4) *Education.* Working with the parties to recognize the benefits of, and establish processes for, avoiding unfair labor practice disputes, and resolving any

unfair labor practice disputes that arise by consensual, rather than adversarial, methods.

(c) *ADR services after initiation of an investigation.*

As part of processing an unfair labor practice charge, the Office of the General Counsel may suggest to the parties, as appropriate, that they may benefit from these ADR services.

§ 2423.3 Who may file charges.

(a) *Filing charges.* Any person may charge an activity, agency or labor organization with having engaged in, or engaging in, any unfair labor practice prohibited under 5 U.S.C. 7116.

(b) *Charging Party.* Charging Party means the individual, labor organization, activity or agency filing an unfair labor practice charge with a Regional Director.

(c) *Charged Party.* Charged Party means the activity, agency or labor organization charged with allegedly having engaged in, or engaging in, an unfair labor practice.

§ 2423.4 Contents of the charge; supporting evidence and documents.

(a) *What to file.* The Charging Party may file a charge alleging a violation of 5 U.S.C. 7116 by completing a form prescribed by the General Counsel, or on a substantially similar form, that contains the following information:

- (1) The name, address, telephone number, and facsimile number (where facsimile equipment is available) of the Charging Party;
- (2) The name, address, telephone number, and facsimile number (where facsimile equipment is available) of the Charged Party;
- (3) The name, address, telephone number, and facsimile number (where facsimile equipment is available) of the Charging Party's point of contact;
- (4) The name, address, telephone number, and facsimile number (where facsimile equipment is available) of the Charged Party's point of contact;
- (5) A clear and concise statement of the facts alleged to constitute an unfair labor practice, a statement of the section(s) and paragraph(s) of the Federal Service Labor-Management Relations Statute alleged to have been violated, and the date and place of occurrence of the particular acts; and
- (6) A statement whether the subject matter raised in the charge:
 - (i) Has been raised previously in a grievance procedure;
 - (ii) Has been referred to the Federal Service Impasses Panel, the Federal Mediation and Conciliation Service, the Equal Employment Opportunity Commission, the Merit Systems Protection Board, or the Office of the Special Counsel for consideration or action;
 - (iii) Involves a negotiability issue raised by the Charging Party in a petition pending before the Authority pursuant to part 2424 of this subchapter; or
 - (iv) Has been the subject of any other administrative or judicial proceeding.
- (7) A statement describing the result or status of any proceeding identified in paragraph (a)(6) of this section.

(b) *Declarations of truth and statement of service.* A charge shall be in writing and signed, and shall contain a declaration by the individual signing the charge, under the penalties of the Criminal Code (18 U.S.C. 1001), that its contents are true and correct to the best of that individual's knowledge and belief.

(c) *Statement of service.* A charge shall also contain a statement that the Charging Party served the charge on the Charged Party, and shall list the name, title and location of the individual served, and the method of service.

(d) *Self-contained document.* A charge shall be a self-contained document describing the alleged unfair labor practice without a need to refer to supporting evidence documents submitted under paragraph (e) of this section.

(e) *Submitting supporting evidence and documents and identifying potential witnesses.* When filing a charge, the Charging Party shall submit to the Regional Director any supporting evidence and documents, including, but not limited to, correspondence and memoranda, records, reports, applicable collective bargaining agreement clauses, memoranda of understanding, minutes of meetings, applicable regulations, statements of position and other documentary evidence. The Charging Party also shall identify potential witnesses and shall provide a brief synopsis of their expected testimony.

§ 2423.5 [Reserved]

§ 2423.6 Filing and service of copies.

(a) *Where to file.* A Charging Party shall file the charge with the Regional Director for the region in which the alleged unfair labor practice has occurred or is occurring. A charge alleging that an unfair labor practice has occurred or is occurring in two or more regions may be filed with the Regional Director in any of those regions.

(b) *Filing date.* A charge is deemed filed when it is received by a Regional Director.

(c) *Method of filing.* A Charging Party may file a charge with the Regional Director in person or by commercial delivery, first-class mail, or certified mail. Notwithstanding § 2429.24(e) of this subchapter, a Charging Party also may file a charge by facsimile transmission if the charge does not exceed 2 pages. If filing by facsimile transmission, the Charging Party is not required to file an original copy of the charge with the Region. A Charging Party assumes responsibility for receipt of a charge. Supporting evidence and documents shall be submitted to the Regional Director in person, by commercial delivery, first-class mail, or certified mail, not by facsimile transmission. Charges shall not be filed by electronic mail.

(d) *Service of the charge.* The Charging Party shall serve a copy of the charge (without supporting evidence and documents) on the Charged Party. Where facsimile equipment is available, the charge may be served by facsimile transmission in accordance with paragraph (c) of this section. The Region routinely serves a copy of the charge on the Charged Party, but the Charging Party

remains responsible for serving the charge in accordance with this paragraph.

§ 2423.7 Alternative case processing procedure.

(a) *Alternative case processing procedure.* The Region may utilize an alternative case processing procedure to assist the parties in resolving their unfair labor practice dispute, if the parties voluntarily agree, by facilitating a problem-solving approach, rather than initially investigating the particular facts and determining the merits of the charge.

(b) *No evidence is taken.* The purpose of the alternative case processing procedure is to resolve the underlying unfair labor practice dispute without determining the merits of the charge. The role of the agent is to assist the parties in that endeavor by facilitating a solution rather than conducting an investigation. No testimonial or documentary evidence or positions on the merits of the charge shall be gathered during the alternative case processing procedure or entered into the case file.

(c) *Investigation is not waived.* If the parties are unable to resolve the dispute, the Region conducts an investigation on the merits of the charge. The agent who is involved in the alternative case processing procedure shall not be involved in any subsequent investigation on the merits of the charge, unless the parties and the Regional Director agree otherwise.

§ 2423.8 Investigation of charges.

(a) *Investigation.* The Regional Director, on behalf of the General Counsel, conducts such investigation of the charge as the Regional Director deems necessary. During the course of the investigation, all parties involved are afforded an opportunity to present their evidence and views to the Regional Director.

(b) *Cooperation.* The purposes and policies of the Federal Service Labor- Management Relations Statute can best be achieved by the full cooperation of all parties involved and the timely submission of all potentially relevant information from all potential sources during the course of the investigation. All persons shall cooperate fully with the Regional Director in the investigation of charges. Cooperation includes any of the following actions, when deemed appropriate by the Regional Director:

- (1) Making union officials, employees, and agency supervisors and managers available to give sworn/affirmed testimony regarding matters under investigation;
- (2) Producing documentary evidence pertinent to the matters under investigation; and
- (3) Providing statements of position on the matters under investigation.

(c) *Investigatory subpoenas.* If a person fails to cooperate with the Regional Director in the investigation of a charge, the General Counsel, upon recommendation of a Regional Director, may decide in appropriate circumstances to issue a subpoena under 5 U.S.C. 7132 for the attendance and testimony of witnesses and the production of documentary or other evidence. However, no subpoena shall be issued under this section which requires the disclosure of intramanagement guidance, advice, counsel or training

within an agency or between an agency and the Office of Personnel Management.

(1) A subpoena shall be served by any individual who is at least 18 years old and who is not a party to the proceeding. The individual who served the subpoena must certify that he or she did so:

(i) By delivering it to the witness in person;

(ii) By registered or certified mail; or

(iii) By delivering the subpoena to a responsible individual (named in the document certifying the delivery) at the residence or place of business (as appropriate) of the person for whom the subpoena was intended. The subpoena shall show on its face the name and address of the Regional Director and the General Counsel.

(2) Any person served with a subpoena who does not intend to comply shall, within 5 days after the date of service of the subpoena upon such person, petition in writing to revoke the subpoena. A copy of any petition to revoke shall be served on the General Counsel.

(3) The General Counsel shall revoke the subpoena if the witness or evidence, the production of which is required, is not material and relevant to the matters under investigation or in question in the proceedings, or the subpoena does not describe with sufficient particularity the evidence the production of which is required, or if for any other reason sufficient in law the subpoena is invalid. The General Counsel shall state the procedural or other grounds for the ruling on the petition to revoke. The petition to revoke, shall become part of the official record if there is a hearing under subpart C of this part.

(4) Upon the failure of any person to comply with a subpoena issued by the General Counsel, the General Counsel shall determine whether to institute proceedings in the appropriate district court for the

enforcement of the subpoena. Enforcement shall not be sought if to do so would be inconsistent with law, including the Federal Service Labor-Management Relations Statute.

(d) *Confidentiality.* It is the General Counsel's policy to protect the identity of individuals who submit statements and information during the investigation, and to protect against the disclosure of documents obtained during the investigation, as a means of ensuring the General Counsel's continuing ability to obtain all relevant information. After issuance of a complaint and in preparation for a hearing, however, identification of witnesses, a synopsis of their expected testimony and documents proposed to be offered into evidence at the hearing may be disclosed as required by the prehearing disclosure requirements in § 2423.23.

§ 2423.9 Amendment of charges.

Prior to the issuance of a complaint, the Charging Party may amend the charge in accordance with the requirements set forth in § 2423.6.

§ 2423.10 Action by the Regional Director.

(a) *Regional Director action.* The Regional Director may take any of the following actions, as appropriate:

- (1) Approve a request to withdraw a charge;
- (2) Refuse to issue a complaint;
- (3) Approve a written settlement agreement in accordance with the provisions of § 2423.12;
- (4) Issue a complaint; or

(5) Withdraw a complaint.

(b) *Request for appropriate temporary relief.* Parties may request the General Counsel to seek appropriate temporary relief (including a restraining order) under 5 U.S.C. 7123(d). The General Counsel may initiate and prosecute injunctive proceedings under 5 U.S.C. 7123(d) only upon approval of the Authority. A determination by the General Counsel not to seek approval of the Authority to seek such appropriate temporary relief is final and shall not be appealed to the Authority.

(c) *General Counsel requests to the Authority.* When a complaint issues and the Authority approves the General Counsel's request to seek appropriate temporary relief (including a restraining order) under 5 U.S.C. 7123(d), the General Counsel may make application for appropriate temporary relief (including a restraining order) in the district court of the United States within which the unfair labor practice is alleged to have occurred or in which the party sought to be enjoined resides or transacts business. Temporary relief may be sought if it is just and proper and the record establishes probable cause that an unfair labor practice is being committed. Temporary relief shall not be sought if it would interfere with the ability of the agency to carry out its essential functions.

(d) *Actions subsequent to obtaining appropriate temporary relief.* The General Counsel shall inform the district court which granted temporary relief pursuant to 5 U.S.C. 7123(d) whenever an Administrative Law Judge recommends dismissal of the complaint, in whole or in part.

§ 2423.11 Determination not to issue complaint; review of action by the Regional Director.

(a) *Opportunity to withdraw a charge.* If upon the completion of an investigation under § 2423.8, the Regional Director, on behalf of the General Counsel, determines that issuance of a complaint is not warranted because the charge has not been timely filed, that the charge fails to state an unfair labor practice, or for other appropriate reasons, the Regional Director may request the Charging Party to withdraw the charge.

(b) *Dismissal letter.* If the Charging Party does not withdraw the charge within a reasonable period of time, the Regional Director may, on behalf of the General Counsel, dismiss the charge and provide the parties with a written statement of the reasons for not issuing a complaint.

(c) *Appeal of a dismissal letter.* The Charging Party may obtain review of the Regional Director's decision not to issue a complaint by filing an appeal with the General Counsel within 25 days after service of the Regional Director's decision. A Charging Party shall serve a copy of the appeal on the Regional Director. The Office of the General Counsel shall serve notice on the Charged Party that an appeal has been filed.

(d) *Extension of time.* The Charging Party may file a request, in writing, for an extension of time to file an appeal, which shall be received by the General Counsel not later than 5 days before the date the appeal is due. A Charging Party shall serve a copy of the request for an extension of time on the Regional Director.

(e) *Grounds for granting an appeal.* The General Counsel may grant an appeal when the appeal establishes at least one of the following grounds:

(1) The Regional Director's decision did not consider material facts that would have resulted in issuance of complaint;

(2) The Regional Director's decision is based on a finding of a material fact that is clearly erroneous;

(3) The Regional Director's decision is based on an incorrect statement of the applicable rule of law;

(4) There is no Authority precedent on the legal issue in the case; or

(5) The manner in which the Region conducted the investigation has resulted in prejudicial error.

(f) *General Counsel action.* The General Counsel may deny the appeal of the Regional Director's refusal to issue a complaint, or may grant the appeal and remand the case to the Regional Director to take further action. The General Counsel's decision on the appeal states the grounds listed in paragraph (e) of this section for denying or granting the appeal, and is served on all the parties. Absent a timely motion for reconsideration, the decision of the General Counsel is final.

(g) *Reconsideration.* After the General Counsel issues a final decision, the Charging Party may move for reconsideration of the final decision if it can establish extraordinary circumstances in its moving papers. The motion shall be filed within 10 days after the date on which the General Counsel's final decision is postmarked. A motion for reconsideration shall state with particularity the extraordinary circumstances claimed and shall be supported by

appropriate citations. The decision of the General Counsel on a motion for reconsideration is final.

§ 2423.12 Settlement of unfair labor practice charges after a Regional Director determination to issue a complaint but prior to issuance of a complaint.

(a) *Bilateral informal settlement agreement.* Prior to issuing a complaint, the Regional Director may afford the Charging Party and the Charged Party a reasonable period of time to enter into an informal settlement agreement to be approved by the Regional Director. When a Charged Party complies with the terms of an informal settlement agreement approved by the Regional Director, no further action is taken in the case. If the Charged Party fails to perform its obligations under the approved informal settlement agreement, the Regional Director may institute further proceedings.

(b) *Unilateral informal settlement agreement.* If the Charging Party elects not to become a party to an informal settlement agreement which the Regional Director concludes effectuates the policies of the Federal Service Labor-Management Relations Statute, the agreement may be between the Charged Party and the Regional Director. The Regional Director, on behalf of the General Counsel, shall issue a letter stating the grounds for approving the settlement agreement and declining to issue a complaint. The Charging Party may obtain review of the Regional Director's action by filing an appeal with the General Counsel in accordance with § 2423.11(c) and (d). The General Counsel shall take action on the appeal as set forth in § 2423.11(e)-(g).

§§ 2423.13 to 2423.19 [Reserved]