

L. ADVERSE INFERENCE

OVERVIEW:

Under certain circumstances, the Trial Attorney requests that an ALJ draw an adverse inference.

OBJECTIVE:

To provide guidance concerning when a Trial Attorney requests an ALJ to draw an adverse inference.

1. WHEN TO REQUEST AN ADVERSE INFERENCE BE DRAWN:

When Respondent's counsel fails to call an available witness who is likely to have knowledge of a particular matter and who is likely to be favorably disposed to the Respondent's case, or fails to produce documents, whether or not subpoenaed by the GC, the Trial Attorney requests that an inference be drawn that such testimony would have been adverse to the Respondent's case and consistent with the GC's case. The request that an ALJ draw an adverse inference is made whenever the Trial Attorney has the opportunity to do so--at the trial, in the closing argument, and in the Argument section of the post-hearing brief but.

2. DRAWING OF ADVERSE INFERENCE IS NOT MANDATORY:

An abuse of discretion standard applies to reviewing an ALJ's decision not to draw an adverse inference.

NLRB, 38 FLRA No. 48, 38 FLRA 506, 515 (1990), remanded on other grounds sub nom. NLRB v. FLRA, 952 F.2d 523 (D.C. Cir. 1992) (decision whether to draw an adverse inference is discretionary matter for ALJ).

3. PARTICULAR CIRCUMSTANCES:

a. *Failure to call as a witness:*

Internal Revenue Service, Philadelphia Service Center, 54 FLRA No. 72, 54 FLRA 674, 682 (1998) (Respondent's failure to call missing management witness who was the selecting official to explain the basis for nonselection warrants concluding that there was no legitimate justification for failure to select); U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Oceans Service, Coast Guard and Geodetic Survey, Aeronautical Charting Division, Washington, D.C., 54 FLRA No. 92, 54 FLRA 987, 1017-18 (1998) (Commerce) (ALJ reasonably drew adverse inference from the Respondent's failure to call employee's second-level supervisor to testify because such testimony **would not have been merely cumulative**, it could have explained what his specific role was in the discipline).

U.S. Department of Justice, Immigration and Naturalization Service, 51 FLRA No. 75, 51 FLRA 914, 925 (1996) (ALJD) (ALJ drew adverse inference from Respondent's failure to call the deciding official to testify concerning alleged discriminatory denial of a performance award);

Federal Bureau of Prisons, Allenwood Federal Prison Camp, Montgomery, Pennsylvania, 51 FLRA No. 58, 51 FLRA 650, 671 (1995) (ALJD) (ALJ drew adverse inference from Respondent's failure to call selecting official to testify concerning alleged discriminatory denial of promotion); and

Bureau of Engraving and Printing, 28 FLRA No. 105, 28 FLRA 796, 802 (1987) (ALJ drew adverse inference from Respondent's failure to call its Labor Relations Specialist to corroborate manager's denial of (a)(1) statements attributed to manager).

✎ *An adverse inference **many not be drawn** when a witness's disposition towards one party or the other cannot be reasonably assessed. Commerce, 54 FLRA at 1018.*

b. *Failure of witness to testify regarding a particular matter:*

An ALJ may rely on a witness's failure to testify regarding a particular matter to draw an adverse inference regarding that witness.

See [U.S. Penitentiary, Leavenworth, Kansas](#), 55 FLRA No. 127, 55 FLRA 704, 707-08 (1999) (Authority upheld drawing of adverse inference concerning a statement allegedly made by the warden at a meeting when the record contained mutually corroborative testimony of two individuals who were at the meeting)

c. *Failure to produce documents or other evidence:*

[Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, Silver Spring, Maryland](#), 30 FLRA No. 19, 30 FLRA 127, 138-40 (1987) (ALJ may draw adverse inference based on Respondent's refusal to produce subpoenaed documents); [American Federation of Government Employees, Local 3475](#), 45 FLRA No. 47, 45 FLRA 537 n.4 (1992) (to the same effect); [Air Force Flight Test Center, Edwards Air Force Base, California](#), 55 FLRA No. 21, 55 FLRA 116, 121 (1999) (ALJ did not abuse discretion in declining to draw any inference from the GC's failure to produce a tape of a meeting allegedly in the GC's possession where Respondent neither proved the existence of the tape nor moved for the ALJ to compel the GC to offer it into evidence); [Department of Defense, Army and Air Force Exchange Service, Fort Eustis, Virginia](#), 20 FLRA No. 32, 20 FLRA 248, 260 (1985) (although noting that an adverse inference "should be drawn from Respondent's failure to present its supervisor," ALJ declined to do so because he questioned the credibility of the GC's witness and also credited a corroborating management witness's denial that the statement was made).

RESERVED