

X. VIOLATIONS NOT PLEAD IN COMPLAINT

OVERVIEW:

Although the complaint should include all violations which the GC intends to litigate at hearing, and, if possible, all amendments should be made prior to hearing, on occasion, developments occur during the hearing which warrant amending the complaint at hearing to include an additional violation. With the advent of the pre-hearing disclosure requirements, amending the complaint at the hearing should be a rare occurrence.

OBJECTIVE:

To provide guidance concerning what a Trial Attorney does when a complaint is silent concerning issues that are raised at a hearing.

1. FULL AND FAIR LITIGATION SATISFIES DUE PROCESS:

Even though a complaint is silent or ambiguous about specific issues later raised at the hearing, a violation may be found if the issues were fully and fairly litigated.

The test is one of "fairness under the circumstances of each case--whether the employer knew what conduct was in issue and had a fair opportunity to present a defense." Department of Labor, Washington, D.C., 51 FLRA No. 41, 51 FLRA 462, 467 (1995) (quoting Soule Glass and Glazing Co. v. NLRB, 652 F.2d 1055, 1074 (1st Cir. 1981)).

See also Department of Veterans Affairs, Veterans Affairs Medical Center, Washington, D.C., 51 FLRA No. 74, 51 FLRA 896, 900 (1996) (where complaint alleged that employee did not receive incentive award promised by supervisor, but did not allege that supervisor failed to recommend employee for award, Authority found that Respondent had notice and fully litigated the issue where: (1) GC's Trial Attorney's opening statement included the latter allegation; (2) Respondent addressed it in its opening statement; and (3) Respondent presented evidence to rebut the allegation); Air Force Materiel Command, Warner Robins Air Logistics

Center, Robins Air Force Base, Georgia, 54 FLRA No. 134, 54 FLRA 1529, 1531 n.2 (1998) (“Although complaint was limited to the September 4 e-mail, the parties fully disclosed both that message and the September 27 e-mail before the Judge and in their briefs” thereby fully and fairly litigating the issue whether the September 27 e-mail changed conditions of employment in violation of § 7116(a)(1) and (5)); OLAM Southwest Air Defense Sector (TAC), Point Arena Air Force Station, Point Arena, California, 51 FLRA No. 69, 51 FLRA 797, 807-08 (1996) (although complaint erroneously referred to affected technicians as WG-8 employees record established that the activity was fully aware that the case involved WG-11 technicians); Department of Defense, U.S. Army Reserve Personnel Command, St. Louis, Missouri, 55 FLRA No. 211, 55 FLRA 1309, 1314-15 (2000) (even though the complaint’s reference to the removal of “two notices” was ambiguous, the Authority concluded that the record (testimony and post-hearing briefs) established that the alleged removal of a certain posting was litigated).

Compare Bureau of Prisons, Office of Internal Affairs and FCI El Reno, 52 FLRA No. 43, 52 FLRA 421, 428, 431-32 (1996) (Authority adopted, over Member Wasserman’s dissent, ALJ’s conclusion that the complaint allegation that “the Respondents denied active representation by the union representative, including the right to confer privately, during the examination” did not encompass allegation that “the Union representative was prevented from [asking] clarifying questions” even though GC’s Trial Attorney referred to the “allegation” in the opening statement. Key point: Authority concluded that there was no evidence adduced specifically addressing the issue and no basis to conclude that Respondent acknowledged or defended against the “allegation”), with United States Customs Service, South Central Region, New Orleans, Louisiana, 53 FLRA No. 67, 53 FLRA 789, 795-96 (1997) (violation of due process where complaint alleges that Respondent refused to furnish information for a four-year period but ALJ found violation based on refusal to furnish information for a one-year period and union testimony shows that it was unwilling to narrow or modify its request) with Department of Veterans Affairs, Medical Center, Muskogee, Oklahoma, 53 FLRA No. 103, 53 FLRA 1228, 1229 (1998) (Respondent not deprived of fair opportunity to defend itself where record reflects that it knew what issue was being litigated).

2. WHAT THE TRIAL ATTORNEY DOES IF VIOLATION IS NOT DISCLOSED PRE-HEARING YET IS FULLY LITIGATED AT HEARING:

a. *Before close of hearing:*

If a violation was fully litigated, the Trial Attorney makes a motion to amend the complaint to include any violation that was not plead in the complaint. See [Part 1, Chapters C](#) and [L](#) concerning Analysis of Case File and Motions, respectively.

b. *After close of hearing:*

The Trial Attorney considers making a motion to reopen the record in order to amend the complaint. The Trial Attorney files this post-hearing motion within 10 days after the date the hearing closed pursuant to § [2423.21\(b\)\(3\)](#). See [Part 1, Chapters C](#) and [L](#) concerning Analysis of Case File and Motions, respectively.

 *Given the pre-hearing disclosure requirement in § [2423.23](#), and the subsequent pre-hearing conference as required by § [2423.24\(d\)](#), it will be very difficult to amend a complaint at the hearing or post-hearing but it is not too late to move to amend a complaint at the pre-hearing conference. See [Department of Transportation, Federal Aviation Administration, Fort Worth Texas](#), 55 FLRA No. 157, 55 FLRA 951, 954-55 (1999) (allegation in the amended complaint bore a relationship to the charge and the original complaint which put Respondent on notice that the GC alleged a continuing violation of the MOU).*

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[Part 1, Chapter C](#) concerning Analysis of Case File;

[Part 1, Chapter L](#) concerning Motions;

[Part 1, Chapter N](#) concerning Pre-hearing Disclosure; and

[Part 1, Chapter Q](#) concerning Pre-hearing Conference.

RESERVED