

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