

# FEDERAL LABOR RELATIONS AUTHORITY

## OFFICE OF THE GENERAL COUNSEL

### LITIGATION MANUAL

The Litigation Manual provides information on prosecuting unfair labor practice cases under the Federal Service Labor-Management Relations Statute (the Statute). The Litigation 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 Litigation Manual is intended to provide a resource tool for Regional Office employees when litigating unfair labor practice complaints under the Statute. The Manual covers each aspect of the trial process—from the issuance of a complaint and notice of hearing and the final issuance of a decision and order.

It refers to relevant case law and contains examples of litigation techniques that will assist the Trial Attorney in developing a litigation strategy. The Manual is divided into two binders. Binder 1 contains the litigation guidance. Binder 2 contains reference materials, forms, guidance and models. For information on preventing, resolving, and investigating unfair labor practice charges, see the Unfair Labor Practice Case Handling Manual.

The Litigation Manual is published in a handbook style format to make it user friendly. The Litigation Manual will be updated annually. Since party understanding of the litigation process and regulatory requirements is critical to the timely and effective processing of unfair labor practice complaints by the Regional Offices, the Litigation Manual is available to all parties and individuals who are involved in filing and litigating unfair labor practice complaints. The Litigation Manual may be accessed from the FLRA web site, [www.FLRA.gov](http://www.FLRA.gov), and is available for purchase from the Government Printing Office.

The Litigation Manual provides guidance for the FLRA, OGC staff when litigating unfair labor practice complaints under the Statute. The Litigation 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 Litigation 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 Litigation Manual when processing cases, the Litigation Manual does not encompass all situations that may be encountered in litigating unfair labor practice complaints. Thus, responsible, professional judgment and experience are required in applying and utilizing these guidelines.

August 2000

### OTHER OFFICE OF THE GENERAL COUNSEL RESOURCE MANUALS

Office of the General Counsel  
Litigation Manual

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 **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 **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 **Unfair Labor Practice Case Handling Manual** (ULPCHM) provides procedural and operational guidance to the General Counsel's staff when processing unfair labor practice charges filed pursuant to Subpart A Part 2423 of the FLRA's regulations. It is divided into 5 Parts that address various topics/issues that arise during distinct phases of the ULP process—from pre-charge through pre and post investigation. It also codifies the OGC's policies with respect to: Facilitation, Intervention, Training, and Education; Quality of Investigators; Scope of Investigations; Injunctions; Prosecutorial Discretion; Settlements; and Appeals. As appropriate, the ULPCHM references relevant case law and provides for uniformity and best practices; criteria and principles governing Regional discretion and judgment; and model and sample forms and letters.

## **HOW TO USE THE LITIGATION MANUAL**

The Litigation Manual is formatted to help Trial Attorneys in Regional Offices prepare for, and litigate, Unfair Labor Practice cases. The subject matters that are discussed throughout the Manual are presented in the following sequence: from the pre-hearing stage of the process through the hearing stage to the post-hearing or final stage of the process. A description of the organization and style of the

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Litigation Manual is discussed below as well as, in order of presentation, a description of the different sections of the Litigation Manual:

1. **Foreword:**

The Foreword explains the purpose of the Manual.

2. **Chart on Unfair Labor Practice Regulatory Time Limits and Document Formatting and Service Requirements:**

This seven-page document includes a chart that summarizes the regulatory requirements governing the particular ULP activity or document that is covered in one or more of the Chapters of the Manual. The information contained in this chart is not covered in detail in the Manual. This chart incorporates the requirements of the post-complaint ULP regulations issued on July 31, 1997. 62 Fed. Reg. 40911 that are set forth at Part 2423--Unfair Labor Practice Proceedings, subparts B, C, and D (§§ 2423.20 through 2423.42). The last page of the document summarizes the Office of the General Counsel's document formatting requirements.

Pre-complaint ULP matters covered by subpart A--Filing, Investigating, Resolving, and Acting on Charges (§§ 2423.1 through 2423.12), are addressed in the ULP Case Handling Manual.

3. **Organization of the Manual into 3 distinct Parts:**

The manual is divided into 3 Parts, and each Part is divided into Chapters;

- [Part 1](#) is entitled "Pre-Hearing" ("Notice of Hearing to Opening of Hearing");
- [Part 2](#) is entitled "Hearing" ("Opening of the Hearing to Close of the Record"); and
- [Part 3](#) is entitled "Post-Hearing";

Parts 1 and 2 are subdivided into several discrete sections:

- Part 1: Initial Matters, Alternatives to Hearing, and Preparation for Hearing
- Part 2: Preliminary matters, General Counsel's Case, Respondent's Case, and Prior to the Close of Hearing.

There is a TAB for each Part of the Manual.

To guide the Trial Attorney, each page has a Header which describes the Chapter, and in the case of Parts 1 and 2, the placement of the Chapter

within a particular section of that Part, and a Footer which indicates that the Office of the General Counsel is the author of the Litigation Manual;

The pages of each Chapter in each of the three 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., 2AA-1 is "2" denotes the second Part--The Hearing, "AA" denotes Chapter AA--Witness Using Notes, "-1" indicates the first page of the Chapter.

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

An Overview describes very generally how the subject matter of the Chapter fits within the scheme of the trial process.

The Objective of each Chapter generally describes what guidance is provided, i.e., what subtopics are covered in each Chapter.


5. **Glossary for the Manual:**


The following abbreviations are used throughout the Litigation Manual:

ALJ	Administrative Law Judge
ALJD	Administrative Law Judge Decision
APA	Administrative Procedure Act
Authority or FLRA	Federal Labor Relations Authority
CA	Charge against Agency
Chief ALJ	Chief Administrative Law Judge
CO	Charge against Labor Organization
Fed. R. Evid.	Federal Rules of Evidence
FRCP	Federal Rules of Civil Procedure
FSIP	Federal Service Impasses Panel
GC	General Counsel
LMI	Litigation Manual
MOU	Memorandum of Understanding
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
RA	Regional Attorney
Region or RO	Regional Office
RD	Regional Director
Regulations	Authority's Rules and Regulations
Statute	Federal Service Labor- Management Relations Statute
ULP	Unfair Labor Practice

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


6. 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 Trial Attorney.

7. OGC Policy:

Any reference to OGC policy is in bold print.

8. 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.

9. [Index:](#)

A subject matter index is located at the back of the Manual. At the end of

the index is a list of examples or models of documents and oral presentations that illustrate matters covered in the Manual.

10. **[Table of Authorities:](#)**

The Table of Authorities is divided into 6 parts: (1) FLRA cases; (2) FLRA ALJD cases; (3) United States Supreme Court cases; (4) United States Court of Appeals cases; (5) United States District Court cases; and (6) NLRB cases. This section is located after the Index.

11. **[ATTACHMENTS:](#)**

The ATTACHMENTS section of the Manual is a compilation of forms, policies, models or examples of matters referred to in a particular Chapter. The number of the ATTACHMENT corresponds with the number of the Part and Chapter where it is referenced, e.g., ATTACHMENT 1M is referred to in Part 1, Chapter M. This section of the Manual, which has a TAB, is located after the Table of Authorities. To the extent that the ATTACHMENTS section of the Manual contains actual documents that have been prepared by staff in the ROs, the document has been sanitized.

12. **[References:](#)**

The References section, which is located after the ATTACHMENTS, contains the [Statute](#), the [Back Pay Act](#) and Subparts B, C, and D of Part 2423 of the [Regulations](#) concerning post-complaint matters.

13. **[Resources:](#)**

This section, which is located after the ATTACHMENTS, contains additional resources consulted in the drafting of certain sections of the Manual. For more in-depth discussion of a particular topic, the user may consult these materials.

14. **[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. For ease of access, each Attachment has been placed on the X-Drive as a separate document. The substantive part of the Manual is on the Regions' R-Drive as well as the X-Drive (accessible to all OGC employees) and all links to an Attachment are to the Attachment that resides on the X-Drive. **Unlike the hard copy of the Attachments, the Attachments on the X-Drive are regular page size but they do not contain page numbers.** The Manual is also accessible via the FLRA home page at [www.flra.gov](http://www.flra.gov), [Volume 55](#) and later FLRA cases that are cited in the Manual 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. In addition, references to various Federal Rules of Evidence, Federal Rules of Civil and Criminal Procedure, and the Federal Register, are also hyperlinked to various sites on the Internet where the full text appears.

## UNFAIR LABOR PRACTICE REGULATORY TIME LIMITS

<u>ACTIVITY/ DOCUMENT</u>	<u>FILE WITH/SERVE UPON</u>	<u>WHEN</u>	<u>NO. OF COPIES</u>	<u>AUTHORITY</u>
Charge	(a) RD	(a) within 6 months after alleged ULP	(a) original & 4 (copies)	2423.6
	(b) Party/ies against which charge is made	(b) same time	(b) 1 (time limit)	7118(a)(4)
Investigation of charge		normally not to commence until 15 days after charge filed		2423.7
Amendment of Charge	(a) RD	before issuance of complaint	(a) orig. & 4	2423.8
	(b) Party/ies against which charge is made		(b) 1 (when)	2423.6 (copies)
Withdraw a Charge	(a) RD (b) Party/ies	before, at, or after hearing	(a) orig. & 4 or 1 if svc. by fax (b) 1	2423.9(a)(1) 2429.25 2429.27

**ACTIVITY/**



<u>DOCUMENT</u>	<u>FILE WITH/SERVE UPON</u>	<u>WHEN</u>	<u>NO. OF COPIES</u>	<u>AUTHORITY</u>
Issuance of Complaint & Notice of Hearing	(a) OALJ and parties (b) All parties by certified mail*		2423.20(a) 2429.12	
Amendment of Complaint	Served on all parties by certified mail* OALJ Served on all party/ies	by RD, if prior to answer if after answer, upon written motion to ALJ before hearing or at hearing	1 2429.12 orig. & 4 or 1 by fax	2423.20(c) 2429.25 2429.27
Withdrawal of Complaint	Served on all parties	by RD before hearing	2423.20(a) 2429.12	
Appeal from RD's Refusal to Issue Complaint	(a) GC (b) RD (c) Party/ies ("should notify other parties")	25 days after service of refusal to issue complaint plus 5 days	(a) orig. & 4 or 1 (fax) (b) 12429.25 (c) 12429.27 2429.22	2423.10(c)   (plus 5 days)

<u>ACTIVITY/ DOCUMENT</u>	<u>FILE WITH/SERVE UPON</u>	<u>WHEN</u>	<u>NO. OF COPIES</u>	<u>AUTHORITY</u>
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Extension of Time to File Appeal	(a) GC (b) RD (c) Party/ies ("should notify other parties")	5 days before date appeal is due (20 days after service of refusal to issue complaint) plus 5 days	(a) orig. & 4 or 1 (fax) (b) 12429.25 (c) 12429.27	2423.10(d)          2429.22
Answer to Complaint	(a) OALJ (b) All Parties	20 days after service of complaint or prior to hearing plus 5 days	(a) orig. & 4 or 1 (fax) (b) 1	2423.20(b) 2429.25
Amendment of Answer	(a) OALJ (b) Party/ies	Before hearing, w/in 20 days after date of svc. of amended complaint or w/in 20 days after answer is filed	(a) orig. & 4 or 1 (fax) (b) 12429.27	2423.20(c) 2429.25
Subpoena Request	(a) OALJ  (b) Presiding ALJ	Not less than 10 days prior to opening of hearing During hearing	12423.28(b)  1	

<b><u>ACTIVITY/ DOCUMENT</u></b>	<b><u>FILE WITH/SERVE UPON</u></b>	<b><u>WHEN</u></b>	<b><u>NO. OF COPIES</u></b>	<b><u>AUTHORITY</u></b>
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Petition to Revoke Subpoena	(a) OALJ (b) Party/ies	Within 5 days after date of service of subpoena plus 5 days	(a) orig. & 4 or 1 fax (b) 12429.25 2429.27	2423.28(e)(1)
	(a) Presiding ALJ (b) Party/ies	During hearing if subpoena requested during hearing	(a) orig. & 4 or 1 fax (b) 1	2429.22
Motions	(a) ALJ	(a) Pre-hearing (10 days before hearing, incl. mot. for Sum. Judg. hearing & post-hear. (filed w/in 10 days after hearing; w/in 10 days of receipt of transcript for mot. to correct)	(a) orig. & 4 or 1 (fax) 2429.25	2423.21 (a), (b) 2423.27
	(b) Authority	(b) Post-transmission of case to Authority	(b) orig. & 4 or 1 (fax)	2423.21 (c) 2429.25
	(c) Party/ies		(c) 1	2429.27

<b><u>ACTIVITY/ DOCUMENT</u></b>	<b><u>FILE WITH/SERVE UPON</u></b>	<b><u>WHEN</u></b>	<b><u>NO. OF COPIES</u></b>	<b><u>AUTHORITY</u></b>
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Response to Motions	(a) ALJ (b) Authority (c) Party/ies	Within 5 days after (a) orig. & 4 or 1 (fax) date of service plus 5 days (unless by fax)	2423.21(b), (c) (b) orig. & 4 or 1 (fax) (c) 1	2423.27(b) 2429.22 2429.25
ALJ Brief	(a) ALJ (b) Party/ies	Time fixed by ALJ, not in excess of 30 days from close of hearing	(a) orig. & 4 or 1 (fax) (b) 1	2423.33 2429.25 2429.27
Motion for Extension of Time to File ALJ Brief	(a) ALJ (b) Party/ies	Not later than 5 days before Brief due	(a) orig. & 4 or 1 (fax) 2423.33 (b) 12429.27	2423.21(a)
Exceptions & Brief to Authority	(a) Authority (b) Party/ies	Within 25 days after service of decision plus 5 days	(a) orig. & 4 or 1 (fax) (b) 1	2423.40(a) 2429.22 2429.27

<u>ACTIVITY/ DOCUMENT</u>	<u>FILE WITH/SERVE UPON</u>	<u>WHEN</u>	<u>NO. OF COPIES</u>	<u>AUTHORITY</u>
Motion for	(a) Authority	Authority must	(a) orig. & 4 or 1 (fax)	2423.21(a)

Extension of Time to File Authority Brief	(b) Party/ies	receive not later than 5 days before date exceptions are due	(b) 1	2429.27
Cross-Exceptions, Opposition to Exceptions & Support. Brief	(a) Authority (b) Party/ies	Within 20 days after service of exceptions plus 5 days	(a) orig. & 4 or 1 (fax) (b) 1	2429.25 2429.27 2429.22
Stipulation & Brief in Support	(a) Authority or ALJ (b) Party/ies	Brief filed w/in 30 days of Joint Motion	(a) orig. & 4 or 1 (fax) (b) 1	2423.26(a), (b) 2429.25 2429.27
Reconsid. of Authority Order	(a) Authority (b) Party/ies	Within 10 days after service of Authority's Decision and Order	(a) orig. & 4 or 1 (fax) (b) 12	2429.17 2429.25 2429.27

## **DOCUMENT FORMATTING AND SERVICE**

### **ALL DOCUMENTS FILED BY OGC TRIAL ATTORNEYS MEET THE FOLLOWING REQUIREMENTS:**

1. 8 ½ x 11 inch paper.
2. 1" margins.
3. Double-spaced text and single-spaced footnotes.
4. Justification on left side only.
5. Arial font; 12-point.

### **SERVICE OF DOCUMENTS:**

1. Complaints and amended complaints before answer filed--certified mail.
2. Compliance letters with Authority orders--first-class mail.
3. All other documents at any stage of the proceedings--whether as a neutral or party--by FAX, where appropriate, or by first-class mail.

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Office of the General Counsel  
Litigation Manual

XXV









# **PART 1**

## **PRE-HEARING**

### **(NOTICE OF HEARING TO TO OPENING OF HEARING)**



## A. ISSUANCE OF ULP COMPLAINT, NOTICE OF HEARING TIME, DATE AND PLACE

### OVERVIEW:

Absent settlement, an RD issues a complaint in cases where it is found that the charge has merit and advises the OGC HQ of such issuance via an internal transmittal memorandum. See [§ 2423.10\(a\)\(4\)](#). Section [2423.20\(a\)\(5\)](#) provides that every complaint shall include notice of the date, time and place (city) fixed for the hearing.

### OBJECTIVE:

To provide guidance concerning the drafting, processing, and service of a complaint, the internal memorandum transmitting the complaint to the OGC HQ, and an overview of matters concerning the notice of hearing such as scheduling of ULP hearings, including calendar calls and arranging for a court reporter.

#### 1. DRAFTING THE COMPLAINT:

##### *a. Role of the Agent:*

- The RD assigns an Agent to draft the complaint; and
- When the complaint issues, the case is assigned to an Attorney who prepares the case for trial, absent settlement.

##### *b. Conforming the charge with the complaint:*

There should be no significant differences between the allegations in the charge and the allegations set forth in

the complaint. The complaint should conform to the allegations in the last amended charge that have not been disposed of by other means.

**2. ISSUANCE OF COMPLAINT:**  
**The Agent follows the OGC Pleading Manual ([ATTACHMENT 1A1](#)) in drafting the complaint.**

a. *Regulatory requirements:*

Pursuant to § [2423.20](#)(a), the complaint sets forth:

- The notice of the charge;
- The basis for jurisdiction;
- The facts alleged to constitute a ULP;

(a) The facts are stated clearly and concisely; (b) describe the acts which are alleged to constitute ULPs, including, where known, approximate dates and places of such acts and (c) the names of the Respondent's agents or other representatives allegedly involved in the commission of the ULP(s).

- The statutory and regulatory sections involved;
- The notice of the date, time, and place that a hearing will take place before an ALJ; and
- A brief statement explaining the nature of the hearing.

b. *Other contents and form of complaint:*

- The allegations of the complaint are set forth in numbered paragraphs;
- Normally, the first paragraph states the facts relating to the filing and service of the original charge and of each amended charge;
- The succeeding paragraphs normally identify the Respondent's agents or representatives alleged to be involved, followed by a chronology of events, or other factual data, and a description of the specific acts alleged to constitute the ULP/s;

- The allegations are sufficiently detailed in order to enable the parties to understand the nature of the alleged violation; and
- The last numbered paragraphs allege that the acts and conduct specified all constitute ULPs within the meaning of § 7116 of the Statute (repeating all subsections alleged to have been violated in the preceding paragraphs).
- **The formatting requirements prescribed are followed (arial font; 12 point; 1.5 spaces between lines in each paragraph; 2.0 spaces between paragraphs; 8.5 by 11 inch paper left justification).**

*c. Service of the complaint:*

The complaint and notice of hearing are served by certified mail on all parties and their designated representatives as soon as possible--service by e-mail or fax is **not** permitted. The following are also served:

- The Chief ALJ;
- The OGC HQ;
- The head/s of the labor organization/s involved; and
- In CA cases only:

Director  
Office of Labor and Employee Relations  
1900 E Street, N.W.  
Washington, D.C. 20415-0001

**3. OALJ ISSUANCE OF ORDER UPON RECEIPT OF COMPLAINT:**

The OALJ issues an Order and Notice of Date and Time for Pre-hearing Conference Call upon the receipt of a complaint. The OALJ also issues a Notice of Settlement Judge Program and issues subpoenas upon request. Requests for subpoenas and other pre-hearing motions are separate documents with their own captions but may be covered by a single service sheet. See LM, Part 1, Chapters K, N and Q concerning Subpoenas,

Preparing Formal Documents and Pre-hearing Disclosure for discussion of these matters.

#### 4. THE TRANSMITTAL MEMORANDUM:

Upon the issuance of a complaint, the RD sends a copy of the complaint to the OGC Headquarters, along with an internal transmittal memorandum which addresses the following:

Whether the case had been discussed with anyone at OGC Headquarters;

- If negotiability is an issue, include a cite to the lead case or an appropriate arrangements analysis if there is no lead case;
- The proposed remedy and why, if necessary.



*In a unilateral change case, if the Region is not asking for a status quo ante remedy, state the reasons. If the Region is proposing a monetary remedy or a nontraditional remedy, state why. See F.E. Warren Air Force Base, 52 FLRA No. 17, 52 FLRA 149, 160-62 (1996) for a list of the factors considered in determining a remedial order and LM, Part 1, Chapter D, concerning Remedy for a more in-depth discussion of remedies, in general.*

- If the facts have an interesting twist, explain it;
- If the case is not a “routine type” of violation, explain why;
- If there is a defense that the Respondent has already raised or that the Region is aware of, state it, and explain why it was rejected (e.g., “covered by”);
- If there is a special trial strategy (hostile witness, subpoena, etc.), explain;
- If there was an issue that was discussed at length at an Agenda, provide these details in the memo;
- If there is controlling OGC Advice or OGC Guidance, provide these citation/s; and
- Cite any particular case that supports the complaint, **excluding** acknowledged precedent.



*A transmittal memorandum 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 transmittal memorandum 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).*

**5. SETTING THE HEARING TIME, DATE AND PLACE:**

**Hearings are set on a date which is within 60 days of the date that the complaint is issued.**

- a. *Ordinarily, hearings are:*
- i. Set by the ALJ and noticed in the complaint; if not, a separate notice of hearing is sent to the ALJ and parties;
  - ii. Set in the city where the alleged violation occurred or in the closest major city to that location;
  - iii. Not set sooner than 25 days after issuance of complaint to provide time for receipt of Respondent’s answer in accordance with §§ [2423.20](#)(b) and [2429.22](#); and
  - iv. Set to begin at 9:00 a.m. unless a later time is required to accommodate the ALJ or parties.



*The notice of hearing need not indicate the exact location or site within the city where the hearing is scheduled to take place.*

*Upon approval by the ALJ, the RD announces the location in a notice that is issued before the hearing or at the pre-hearing conference. See [ATTACHMENT 1A2](#) for an example of a Notice.*

- b. *Changes in hearing location, date and time:*
  - i. An ALJ may, in his/her discretion or upon motion of a party, change the date, time, or place of the hearing.
  - ii. To effect changes in dates or city where hearing is to take place, a party files a motion with Chief ALJ. (See [Part 1, Chapter L](#) on Motions for applicable criteria for filing this motion).
- c. *Calendar call:*

Calendar call is a method of scheduling two or more cases for a hearing on the same date and time, at the same location, and in the same city. The ALJ calls each case at a pre-hearing conference at which time the parties discuss and enter into factual stipulations and settlements. At the end of the pre-hearing conference, the ALJ sets the location, order and dates for hearing the remaining cases. Hearings commence and continue in order until all cases are heard.

## **6. COURT REPORTER:**

Section [2423.30\(f\)](#) provides that an official reporter shall make the only official transcript of a hearing. The Trial Attorney ensures that the following take place:

- a. *After complaint issues, Regional staff calls reporting service to arrange for court reporting coverage at hearing.*
- b. *Send confirmation letter by fax.*
- c. *In the event of settlement before hearing, notify reporting service at least 24 hours before hearing, if possible, otherwise a late cancellation fee is charged.*

**7. ANSWER TO COMPLAINT:**

Pursuant to § [2423.20](#)(b), Respondent has 20 days to file an answer to a complaint.

A Respondent makes an admission when the answer does not deny any allegation in the complaint.

[U.S. Department of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio](#), 55 FLRA No. 159, 55 FLRA 968 (1999) (existence of past practice found where Respondent's **answer** makes clear that existence of past practice of smoking was not in dispute – pursuant to [Fed. R. Civ. P. 8\(d\)](#), “[a]verments in a pleading . . . are admitted when not denied in the responsive pleading” . . . “An admission that is not withdrawn or amended cannot be rebutted by contrary testimony or ignored by the district court simply because it finds the evidence presented by the party against whom the admission operates more credible” . . . “A judge may not simply ignore an admission and find to the contrary, without explaining his disregard of the pleadings).



[Part 1, Chapter D](#) concerning Remedy;

[Part 1, Chapter K](#) concerning Subpoenas;

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

[Part 1, Chapter N](#) concerning Preparing Formal Documents; and

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

RESERVED



## B. CONSOLIDATION ORDER

### OVERVIEW:

Under § [2429.2](#), whenever it appears necessary to effectuate the purposes of the Statute or to avoid unnecessary costs or delay, the RD may consolidate cases within the Region for hearing, or transfer cases to another region for consolidation with pending cases.

### OBJECTIVE:

To provide guidance on the criteria for, and processing of, consolidation of cases.

### 2. CRITERIA FOR CONSOLIDATION:

The RD may consolidate cases where there are:

- a. *Separate ULP charges involving the same Charged Party in each case.*

For example, different employees have filed separate charges against the same agency or labor organization based on the same event or a related event;

- b. *Separate ULP charges involving different Charged Parties but based on the same set of circumstances.*

For example, an employee filed separate charges against an activity and a labor organization alleging complicity in an agreement discriminating against employees who are not members of the union.

- c. *Objections to an election and a ULP charge(s) that involve common issues.*

### 3. PROCESSING:

a. *Issuance of complaint:*

Cases are consolidated simultaneously with the issuance of complaint by issuing an Order Consolidating Cases, Complaint and Notice of Hearing. (See [ATTACHMENT 1B](#)). This format may also be used when consolidating a new complaint with a previously issued complaint. If separate complaints have issued, the cases can be consolidated by an Order Consolidating Cases. (See [ATTACHMENT 1B](#)).



*If consolidating a new case with a previously issued complaint, it is not necessary to issue a new consolidated complaint that includes all of the allegations of the first complaint. In this situation, an Order Consolidating Cases, Complaint and Notice of Hearing issues. The first paragraph of the Order states that the new case is consolidated for hearing with the previously issued complaint and the allegations of the first complaint need not be repeated (see [ATTACHMENT 1B](#)). However, be sure that the caption of the second complaint includes the name and case number of the first complaint and that thereafter, all documents issued include the consolidated case caption.*

b. *After complaint has issued:*

Upon motion of a party pursuant to then-§ 2423.19(k), now § [2423.24](#)(a), the ALJ has discretion to determine if consolidation of cases is warranted. U.S. Small Business Administration, Washington, D.C., 54 FLRA No. 83, 54 FLRA 837, 845 (1998) (SBA).

## C. ANALYSIS OF THE CASE FILE

### OVERVIEW:

After issuance of the complaint, the Trial Attorney's first step in preparing for litigation is to conduct a complete analysis of the case file.

### OBJECTIVE:

To provide guidelines for analyzing the case file in order to:

- Familiarize oneself with the legal theory and evidence in the file;
- Determine Respondent's defenses;
- Determine whether an amendment to the charge and/or complaint is necessary;
- Determine whether any additional investigation or legal research needs to be undertaken;
- Determine what witnesses or documents need to be subpoenaed; and
- Consider whether any alternatives to a trial may be appropriate, e.g., settlement, stipulation, summary judgment.



*(1) It should have been determined during the investigation of the charge, i.e., before the complaint issued, whether an amendment to the charge was necessary. Nevertheless, the Trial Attorney reviews the case file, which includes the complaint, to determine the sufficiency of the charge.*



*(2) If a trial team is assigned to the litigation, the team works out trial assignments.*



*(3) During the initial review of the case file, the Trial Attorney is aware of the need not only to determine the sufficiency of the evidence in the file as to each and every element of the alleged*

*violation(s) but of the need to identify which specific witness or witnesses will present through their testimony the specific evidence to establish each and every element. Consequently, the Trial Attorney not only considers whether additional investigation or legal research must be conducted, but whether additional witnesses must be contacted.*

**1. CASE FILE ANALYSIS:**

*a. Review the Complaint, including Transmittal Memo, and the Charge:*

- Is the underlying charge timely?
- What are the allegations?
- What are the elements of the violation?
- Does the charge properly relate to the complaint?
- Is the complaint legally sufficient?
- Is the date and time of the hearing correct?
- Has a proper location for the hearing been reserved?
- Is it still available?
- Has the reporting service been contacted?

*b. Review of Charge, Amended Charge, Complaint, Amended Complaint*

*i. Review of Charge and Amended Charge*

*(a) Charge*

Pursuant to § [2423.9](#), the Charging Party may amend the charge prior to issuance of complaint.

There is no provision for amendment of the charge after the complaint issues.

However, once the complaint issues, in reviewing the case file, the Trial Attorney ensures that the charge, or amended charge, conforms with the allegations of the complaint, and that the allegations of the complaint conform with the regional determination.



*The charge and complaint need not be identical. The complaint need only bear a relationship to the charge and closely relate to the events cited in the charge. A charge is sufficient if it informs the alleged violator of the general nature of the violation charged; a complaint will be dismissed if defects in a charge prejudice a Respondent. U.S. Department of Justice, Office of Justice Programs, 50 FLRA No. 67, 50 FLRA 472, 476-77 (1995) (charge put Respondent on notice that it had allegedly violated the Statute by failing to provide names of employees receiving awards and outstanding appraisals, even though at time charge was filed, Respondent had not yet denied the union's request); U.S. Department of Justice, Bureau of Prisons, Allenwood Federal Prisons Camp, Montgomery, Pennsylvania, 40 FLRA No. 42, 40 FLRA 449, 455 (1991) (citations omitted) (Respondent understood scope of the allegations concerning its refusal to furnish crediting plan and addressed those allegations in its submission before the Authority).*

*(b) Amended Charge--when to obtain:*

After a complaint has issued, the Trial Attorney obtains an amended charge if:

- The charge does not cover the allegations in the complaint; there is a significant discrepancy between the complaint and the charge; or the amended charge could result in the Respondent raising valid due process or notice objections; and
  - The amended charge may be timely made, i.e., within six months after the events complained of.
- (c) *If amended charge is necessary:*
- The complaint is withdrawn;
  - The Charging Party files an amended charge; and
  - The RD reissues the complaint.



*Again, be careful about obtaining 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. United States Department of Veterans Affairs Medical Center, Amarillo, Texas v. FLRA*, 1 F.3d 19 (D.C. Cir. 1993).*

Prior to reissuance of the complaint, Respondent is given an opportunity to respond to the amended charge.

ii. *Review of Complaint:*

Pursuant to § [2423.20\(c\)](#), the RD may amend a complaint at any time before the answer is filed. The Trial Attorney reviews the complaint to determine the following:

- Are the right parties named, including whether the correct level of the agency or union is named?
- Are the allegations of the complaint found in the charge?
- Are there typographical errors or misspellings?
- Are the allegations specific to put the Respondent on notice of the alleged violations?
- Does the complaint contain all allegations the RD found to be violations?
- Are there additional violations not alleged in the complaint?

iii. *Amended Complaint:*

(a) *Answer not filed:*

- (1) *Issue an amendment to the complaint when:*

changes **are not complicated or extensive** (e.g., correction to a numerical allegation, a minor change in a date, or a misspelling) and the Respondent has not yet filed an answer. The RD issues an **amendment to the complaint** setting forth only the desired changes. An amendment to the complaint replaces only those portions of the complaint identified in the amendment. Answer period begins to run anew (see § [2423.20](#)(c) and subsection c.iii. below).

(2) *Issue an amended complaint when:*

the **changes are complicated, extensive, or raise additional allegations**, and the Respondent has not yet filed an answer. The RD issues an **amended complaint**, which restates the entire complaint including the desired changes. An amended complaint, like an amended charge, supersedes the original complaint. Answer period begins to run anew (see § [2423.20](#)(c) and subsection c.iii. below).

(b) *Answer has been filed:*



Whether or not the changes are complicated, the Trial Attorney files a Motion to Amend the complaint with the ALJ which sets forth the details of the proposed amendment.

See example of [Motion to Amend Complaint](#) at end of Chapter.



*If review of the complaint discloses a discrepancy between the regional decision and/or theory of the case and the allegations of the complaint, the RD amends the complaint, if an answer has not yet been filed, or the Trial Attorney files a Motion to Amend Complaint with the ALJ, if an answer has been filed. (It is not necessary, nor advisable, to file a notice of intent to file a motion to amend complaint at the hearing.) In either instance, a Respondent may not claim lack of notice or violation of due process because there has been a disclosure of the "matters of fact and law at issue." See 5 U.S.C. § 554(b)(3); U.S. Department of Labor, Washington, D.C., 51 FLRA No. 41, 51 FLRA 462, 467 (1995) ("[d]ue process considerations are basic to American jurisprudence. . ."). What constitutes adequate notice will depend on the circumstances of each case. In every instance, however, this notice must afford the Respondent "a meaningful opportunity to litigate the underlying issue." Road Sprinkler Fitters Local Union No. 669 v. NLRB, 778 F.2d 8, 16 (D.C. Cir. 1985). A party's due process concerns are more persuasive if the opposing party has not complied with the pre-hearing disclosure requirements.*

#### **Case Cites--Lack of Notice**

American Federation of Government Employees, Local 2501, Memphis, Tennessee, 51 FLRA No. 139, 51 FLRA 1657, 1660 (1996) (Authority found complaint did not allege the specific statements that allegedly violated the Statute, and there was no evidence that union was on notice that statements were encompassed by complaint, even though union did not contend on exception that it was prejudiced at hearing by the absence of the allegations in the complaint); U.S. Department of Labor, Washington, D.C., 51 FLRA No. 41, 51 FLRA 462, 467-68 (1995) (where sole basis of complaint was alleged violation of Statute in failing to provide

unsanitized data, violation may not be found for failing to provide sanitized data); see also U.S. Department of the Air Force, 56th Support Group, MacDill Air Force Base, Florida, 51 FLRA No. 93, 51 FLRA 1144, 1157 (1996) (to the same effect).

***Case Cite--Adequate Notice Given***

F.E. Warren Air Force Base, Cheyenne, Wyoming, 52 FLRA No. 17, 52 FLRA 149, 150-51 (1996) (complaint was sufficient to put Respondent on notice of alleged liability for all formal discussions related to subject of RIF that manager had in his office during the month).

*c. Review of Answer to Complaint:*

- What was denied?
- What was admitted (actual or constructive)?
- What are the affirmative defenses, if any?
- Do any procedural or substantive issues raised by the Answer need to be addressed?
- Does Respondent raise any motions as part of the Answer?

*i. Answer filed in 20 days*

Section [2423.20](#)(b) provides that "[w]ithin 20 days after the date of service of the complaint, but in any event, prior to the beginning of the hearing, the Respondent shall file and serve . . . an answer with the Office of Administrative Law Judges."

*ii. Requirements of Answer*

Any Answer must admit, deny, explain, or deny knowledge as to each of the allegations in each paragraph of the complaint, or Respondent may admit to all allegations of the complaint. Failure to plead specifically to, or explain any allegation, shall constitute an admission of such allegation. If Respondent does not file an Answer, the Authority will find that the Respondent has admitted each allegation. § [2423.20\(b\)](#).

*iii. Answer to Amendment to Complaint or Amended Complaint*

Pursuant to § [2423.20\(c\)](#), Respondent has an opportunity to file an Answer or amended Answer to an amendment to a complaint or an amended complaint.

*iv. No Timely Answer Filed*

Be sure to determine if an Answer to the complaint or amended complaint has been filed. In appropriate cases, summary judgment may be sought when Respondent has not timely answered. See [Part 1, Chapter F](#) concerning Motions for Summary Judgment.

*d. Review of Evidence:*

- Read affidavits, statements, position papers, memoranda, documents, investigative report and agenda minute;
- Review prior settlement attempts;

- Discuss case with investigator, if necessary; and
- Verify potential witnesses's addresses and telephone numbers.

**2. TRIAL ATTORNEY'S CASE FILE ANALYSIS TASK LIST:**

Upon completion of the case file analysis, the Trial Attorney has completed the following tasks:

- Determined if an amendment of the complaint is necessary;
- Determined what the Respondent's defense(s), if any, will be;
- Determined if additional investigation (including the need for additional witnesses) or legal research needs to be undertaken in order to address issues raised in the GC's case-in-chief or Respondent's defenses;
- Determined who will be witnesses and what documents need to be entered into evidence (including what witnesses and documents must be subpoenaed); and
- Decided whether the case is a candidate for settlement, motion for summary judgment or stipulation. If stipulation is a possibility, begin now.

**3. SETTLEMENT EFFORTS AND POTENTIAL FOR SETTLEMENT:**

After completing the case file analysis, serious consideration is given to settlement possibilities. **It is the GC's policy to continue to actively pursue settlement after the complaint has issued.** In essence, post-complaint settlement efforts are an extension of, and consistent with, the pre-complaint settlement policy and practice. See Part 1, Chapter H below concerning Post Complaint/Pre-hearing Settlements and [ATTACHMENT 1H](#).

Because settlement efforts are attempts to bring the parties together on a common ground, and because the GC does not represent the Charging Party, it is entirely appropriate for the Trial Attorney to assume a facilitator-mediator role when engaging in settlement efforts.

- a. *Initial settlement efforts:*

The Trial Attorney contacts the parties by telephone to explore the parties' interest as well as settlement options. The Trial Attorney is prepared to set forth a bilateral settlement agreement, including one without a posting, if appropriate. In addition, it is appropriate to explore other possible settlements, including those suggested by the parties.

b. *Continued settlement efforts:*

If initial settlement efforts are unsuccessful, conference calls with the parties may encourage settlement.

c. *On-site settlement meeting:*

This option may be appropriate especially if the parties are willing and there is an expectation of success. The Trial Attorney considers whether settlement possibilities would be enhanced in a meeting with all parties or in separate meetings.

d. *Conference calls with the OALJ:*

This option may be productive. However, prior to seeking the assistance of the OALJ, the Trial Attorney advises the RA. The OALJ has its own formal settlement program. The Trial Attorney makes a motion for the Settlement Judge, if appropriate. In addition, the ALJs continue to engage in informal trilateral settlement conference calls.

Settlement efforts may also be made during the pre-hearing conference call. See [Part 1, Chapter Q](#) concerning conference calls.



[Part 1, Chapter F](#) concerning Motions for Summary Judgment;

[Part 1, Chapter H](#) concerning Post-Complaint/Pre-Hearing Settlements;

[Part 1, Chapter I](#) concerning Relationship with Charging Party ;

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

[Part 1, Chapter Q](#) concerning Pre-hearing Conferences; and

[Part 2, Chapter X](#) concerning Violations not Plead in the Complaint.



UNITED STATES OF AMERICA  
BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY  
OFFICE OF ADMINISTRATIVE

VA Eastern Idaho Healthcare System Boise, Idaho	
Respondent	
-AND-	
Service Employees International Union, AFL-CIO, Local 999-M	
Charging Party	

Case No. SF-CA-70586

COMPLAINT

MOTION TO AMEND

On May 3, 1997, a Complaint and Notice of Hearing issued in this matter. Counsel for the General Counsel moves to amend the complaint to include the following new paragraph:

- 7(a). On or about March 6, 1997, in the Respondent's cafeteria, Supervisor, John James told a group of bargaining unit employees that too many grievances were being filed and if the employees knew what was good for them they would start behaving like adults instead of children.

Respectfully submitted,

\_\_\_\_\_  
Counsel for the General Counsel

June 5, 1997

RESERVED





## D. REMEDY

### OVERVIEW:

The investigating Agent, throughout the processing of a ULP charge, and the Trial Attorney, during the litigation of a complaint, determine what evidence will sustain the GC's burden of proof for establishing a remedy for a violation of the Statute. Sections [7105\(g\)\(3\)](#) and [7118\(a\)\(7\)](#) of the Statute, as implemented by [§ 2423.41\(c\)](#), grant broad remedial powers to the FLRA. See [Federal Bureau of Prisons, Washington, D.C.](#), 55 FLRA No. 202, 55 FLRA 1250, 1258-59 (1996) for a discussion of the Authority's broad remedial powers (citing [NTEU v. FLRA](#), 910 F.2d 964 (D.C. Cir. 1990) (en banc)).

### OBJECTIVE:

To set forth the OGC's policy on remedies for ULPs, and to provide guidance on the types of remedies and the elements of proof that are necessary to sustain those remedies.



*See OGC Guidance on Seeking Remedies for Unfair Labor Practices under the Federal Service Labor-Management Relations Statute (ATTACHMENT 1D) for comprehensive guidance on the types of remedies and the elements of proof that are necessary to sustain those remedies **for particular types of violations.***

### 1. STATUTORY AUTHORITY:

#### a. Section [7105\(g\)\(3\)](#):

"(g) In order to carry out its functions under this chapter, the Authority. . .

(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."

b. Section [7118\(a\)\(7\)](#):

"Under this section, upon a determination that an agency or labor organization engaged in an unfair labor practice, the hearing official shall state such findings in writing and shall serve upon 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 § [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 § [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."

**2. OGC REMEDY POLICY:**

The OGC seeks traditional and nontraditional remedies that:

- Recreate the conditions and relationships that would have been had there been no ULP;
- Restore, to the extent possible, the status quo that would have been obtained but for the wrongful act;
- Deter future violations;
- Are not punitive;
- Are responsive to the legitimate interests of the parties; and
- Effectuate and promote the purposes and policies of the Statute.

**3. APPROPRIATE REMEDIES ARE CONSIDERED THROUGHOUT THE PROCESSING OF A ULP CHARGE AND ULP COMPLAINT:**

ROs consider and evaluate potential appropriate remedies at the outset when investigating a ULP charge through the issuance of a complaint, and if necessary, litigation of a complaint:

- a. *Evidence is obtained pertaining to the appropriate remedy during the investigation of the ULP charge:*

During the investigation of a charge, the Agent obtains relevant testimonial and documentary evidence concerning the legitimate interests of the Charging Party in determining the particular remedy to seek. The investigation reveals what remedial action is necessary to effectuate the OGC's remedial policy stated above at # 2. See [ULPCHM, Part 3](#), concerning Investigations for further discussion.

- b. *Cases that are ready for presentation to the RD for decision contain a recommendation for a particular remedy when the recommendation is for issuance of complaint:*

When a case is presented to the RD for a decision on the merits of the charge, any recommendation for issuance of complaint or alternatives resulting in issuance of complaint are accompanied by a recommendation for an appropriate remedy. Just as recommendations for dismissal of complaint are supported by record evidence, recommendations for an appropriate remedy are also supported by record evidence. RD decisions authorizing issuance of complaint, absent settlement, include the decision on the remedy to be sought in litigation. See [ULPCHM, Part 4, Chapter D](#) concerning Regional Director Merit Determinations for further discussion.

- c. *Notice of remedy in complaint:*

Notice of unique or novel remedies is given in the complaint.

- d. *Transmittal memoranda:*

The transmittal memorandum that accompanies the issuance of a complaint sets forth the remedy to be sought in litigation, cites any novel precedent supporting the remedy, and notes any significant facts or issues pertaining to the appropriateness of the remedy and potential difficulties in obtaining that particular remedy. See [Part 1, Chapter A](#) concerning Issuance of the Complaint for further discussion.



*A transmittal memorandum, and other pre-decisional documents are 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 transmittal memorandum 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).*

e. *Preparation for trial:*

In preparing for trial, the Trial Attorney considers the issue of the appropriate remedy. In this regard, the Trial Attorney reviews witness testimony and documentary evidence in the same manner as evidence is reviewed pertaining to establishing the violation. See, [Part 2](#), Chapters I - Q, concerning Preparation for Hearing.

f. *Pre-hearing disclosure requirement:*

Section [2423.23\(c\)](#) requires the GC to disclose a brief statement concerning the theory of the case, **including the relief sought**, at least 14 days before the hearing. If a nontraditional remedy is sought, all parties must be on notice so that no party may claim surprise. Adherence to the pre-hearing disclosure requirements is especially important in this instance. This rule applies to the Charging Party as well because the Charging Party can always argue for a remedy that differs from that which the GC is seeking. This knowledge may impact upon its desire to argue for or against the remedy sought by the GC and/or to argue for another remedy that it believes is more appropriate.

See [Part 1, Chapter N](#) for a discussion of pre-hearing disclosure requirements concerning the GC's theory of the case.

g. *The hearing:*

The Trial Attorney presents witness testimony and documentary evidence pertaining to the appropriate remedy in the same manner as evidence is presented pertaining to establishing the violation. See Part 2 concerning the Hearing.

If notice of the nontraditional remedy, for some reason, is not given as part of the pre-hearing disclosure, the Trial Attorney sends a letter to the parties as soon as the Region determines to seek that remedy. In addition, at hearing, in the opening statement, the Trial Attorney identifies the novel/unique remedy that will be sought. Since the remedy was not noticed as part of pre-hearing disclosure, this may precipitate an objection from Respondent's counsel. However, even at this late date, such notice does give the Respondent the opportunity to address and fully litigate the issues that may be required to rebut the GC's remedy evidence and also provides the Charging Party with a chance to put on evidence in support of its own remedy.

Before the close of the hearing, if evidence has been introduced to support the remedy sought, but notification has not yet been made, state the remedy sought. As stated above, be prepared to respond to an objection. At least this allows the parties to brief the remedy issue and makes the filing of supplemental briefs unnecessary.

h. *Post-hearing briefs:*

All post-hearing briefs have a separate section where the sought remedy is discussed. The brief discusses the relevant precedent and, citing record evidence, explains why the requested remedy is necessary and consistent with the purpose of a remedy and contains a proposed notice and order. See [Part 3, Chapter B](#) concerning Briefs for additional discussion.

i. *Exceptions:*

When a Trial Attorney files exceptions to an ALJ's failure to find a specific violation, those exceptions also specifically encompass the ALJ's failure to order the remedy requested. When an ALJ finds a specific violation but fails to order the complete remedy requested, the Region files exceptions when it determines that, under the totality of the circumstances (including the remedy received, the current situation and the interests of the Charging Party) whether the requested remedy should still be sought. See [Part 3, Chapter F](#) concerning Exceptions for additional discussion.

**4. TRADITIONAL AND NONTRADITIONAL REMEDIES:**

a. *Traditional remedies:*

Traditional remedies, including a cease and desist order accompanied by the posting of a notice to employees that meets the criteria of a remedy, are provided in virtually all cases where a violation is found. F.E. Warren Air Force Base, Cheyenne, Wyoming, 52 FLRA No. 17, 52 FLRA 149, 161 (1996). Unless the specific remedy has given rise to criteria of its own, the Authority does not require specific evidence to establish that traditional remedies are appropriate. Thus, the Authority will presume in the absence of persuasive contrary evidence, that the traditional remedies are: (1) not contrary to external law or the purposes of the Statute; (2) reasonably necessary to recreate the conditions and relationships with which the ULP interfered, and (3) deter future violative conduct.

In addition to a cease and desist order and a posting of a notice, other established or traditional remedies require the Respondent to undertake some form of affirmative action. Such actions may include an order to:

- retroactive bargaining order
- grant of back pay
- release of improperly withheld information, and
- status quo ante remedies which have given rise to criteria of their own.

See F.E. Warren, 52 FLRA at 161 (citing Federal Correctional Institution, 8 FLRA 604 (1982) (setting forth criteria for status quo ante remedies where Respondent failed to bargain over procedures and appropriate arrangements related to a change); and Federal Deposit Insurance Corporation, 41 FLRA 272, 279 (1991) (setting standard for status quo ante remedy where Respondent failed to bargain over substance of a change)).



***See OGC Guidance on Seeking Remedies for Unfair Labor Practices under the Federal Service Labor-Management Relations Statute (ATTACHMENT 1D) for comprehensive guidance on the types of remedies and the elements of proof that are necessary to sustain those remedies for particular types of violations.***

- b. *Nontraditional remedies:*



Remedies that are not routinely granted as a matter of course are non-traditional. They must satisfy the same broad objectives as listed under #2, above. See F.E. Warren, 52 FLRA at 161; U.S. Penitentiary, Leavenworth, Kansas, 55 FLRA No. 127, 55 FLRA 704, 719 (1999) (where warden's actions in making repeated anti-union statements at a mandatory meeting were egregious, and where warden was personally involved in many ULP violations in the case, Authority found it reasonably necessary to require warden's statements to be retracted via a **reading aloud** by the warden, or by an Authority agent in the warden's presence, of the notice at another meeting of all employees). Unlike traditional remedies, nontraditional remedies require an independent factual basis as support. Thus, where the GC asks for a nontraditional remedy, the GC must show why a traditional remedy would **not** be effective (in essence, rebutting the Authority's presumption of the effectiveness of a traditional remedy) and why the evidence shows that a nontraditional remedy is necessary. See, e.g., 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, 1023, 1026 (1998) (nontraditional language in notice to reflect the findings of past violations is necessary to further assure employees that despite a history of violations the agency recognizes the employees' statutory rights and "put[s] both employees and the Respondent on notice of the serious nature of the Respondent's unlawful conduct").

Whether or not a nontraditional remedy is necessary is a factual question. As with other factual questions, the GC bears the burden of proof. Therefore, to prevail, just like obtaining evidence to support the essential elements of a violation, the record must also contain specific evidence to support a nontraditional remedy. Where the record does not establish a need for a nontraditional remedy, i.e., the evidence is either insufficient or lacking, the Authority will deny the GC's request. See id. at 1022 (need for disciplining supervisors not established in the record).



*Record evidence, not mere policy and equity arguments, is essential to establishing the appropriateness of a nontraditional remedy. Thus, as discussed above, it is critical that testimonial and documentary evidence is developed throughout the processing of the ULP charge and complaint.*

## 5. MONETARY RELIEF:

a. *Doctrine of sovereign immunity:*

Applying the legal doctrine of sovereign immunity, the Authority requires the party requesting a monetary remedy to establish that there is statutory authority (other than that provided in the Statute) for the expenditure of such funds.

See [Social Security Administration, Baltimore, Maryland](#), 55 FLRA No. 43, 55 FLRA 246, 250-51 (1999) (Back Pay Act, 5 U.S.C. § 5596(b)(1) and (2)(A), explicitly provides that ULP remedies shall be payable with interest which operates as an explicit waiver of sovereign immunity); [Immigration and Naturalization Service, Los Angeles District, Los Angeles, California](#) 52 FLRA No. 11, 52 FLRA 103, 104-06 (1996) (adopting [Department of the Army, U.S. Commissary, Ft. Benjamin Harrison, Indianapolis, Indiana v. FLRA](#), 56 F.3d 273 (D.C. Cir. 1995) (vacating in part [Department of the Army, U.S. Army Soldier Support Center, Fort Benjamin Harrison, Office of the Director of Finance and Accounting, Indianapolis, Indiana](#), 48 FLRA No. 2, 48 FLRA 6 (1993)).

b. *Equitable relief:*

The Authority will uphold specific remedies that are **equitable** in nature even if the remedy requires the expenditure of money. [U.S. Department of Veterans Affairs](#), 55 FLRA No. 195, 55 FLRA 1213, 1216-17 (2000) (remedy requiring Respondent to reduce parking rates for a period of time necessary to offset the difference between the unlawfully implemented rate and the former rate until such time as the employees have been fully reimbursed is equitable); [U.S. Department of Transportation, Federal Aviation Administration, Northwest Mountain Region, Renton, Washington](#), 55 FLRA No. 46, 55 FLRA 293, 298-99 (1999) (notwithstanding a Respondent's contrary contention, relief ordered by ALJ, to obtain parking spaces for unit employees, at no cost to the employees, in a different location than had been made available by Respondent, is not a remedy for money damages in contravention of the doctrine of sovereign immunity and FAA has authority to obligate funds for interests in property and thus Respondent has authority to expend money to comply with ALJ's order), [petition for review filed sub nom. Department of Transportation, Federal Aviation Administration, Northwest Mountain Region, Renton, Washington v. FLRA](#), (D.C. Cir. Apr. 29, 1999); [Federal Aviation Administration](#), 55 FLRA No. 203, 55 FLRA 1271, 1277 (2000) (Remedy of make-whole relief for lost appraisal-linked awards due to repudiation of MOU is equitable in nature--the relief is the very thing that was improperly withheld).



[Part 1, Chapter A](#) concerning Issuance of Complaint;

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

[Part 3, Chapter B](#) concerning Briefs;

[Part 3, Chapter F](#) concerning Exceptions;

[ULPCHM, Part 4, Chapter D](#) concerning Regional Director Merit Determinations; and

[ULPCHM, Part 5 Chapter J](#) concerning Backpay.



## E. INJUNCTIONS

### OVERVIEW:

Section [7123](#)(d) of Statute provides 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. **OGC Injunction Policy (Oct. 4, 1996)** ([ATTACHMENT 1E](#)) provides criteria that govern the OGC's decisional analysis with respect to injunctive relief.

### OBJECTIVE:

To provide guidance on (1) the applicable criteria used to determine whether to seek injunctive relief; (2) the process used to request permission to seek appropriate relief; and (3) the process used once permission is granted.

#### 1. STATUTORY AUTHORITY--§ [7123](#)(d) OF THE STATUTE:

Sets forth the criteria for a district court of the United States to grant appropriate temporary relief (including temporary restraining orders) in unfair labor practice cases. A court must conclude that:

- a. *Granting such relief is "just and proper";*
- b. *Temporary relief would not "interfere with the ability of the agency to carry out its essential functions"; and*
- c. *There is "probable cause that an unfair labor practice is being committed."*

2. **CRITERIA--WHETHER TO SEEK INJUNCTIVE RELIEF:**

Facts and circumstances considered in determining whether to seek injunctive relief:

**A decision to seek injunctive relief is appropriate only under extraordinary circumstances--"where the status quo must be maintained while the unfair labor practice complaint is processed" to avoid frustrating the purposes of the Statute. OGC Settlement Policy at 1 (Oct. 4, 1996).** All facts and circumstances present in a particular case are examined before a decision is made to seek injunctive relief. Some or all of the following factors, among others, are considered in determining whether a particular case meets the criteria set forth in § [7123](#)(d) of the Statute for injunctive relief:

a. *Seriousness of the violation;*

b. *Legal precedent;*

Is the law clear regarding the violation alleged?

c. *Disruption to the essential functions of the agency Respondent;*

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

d. *Timeliness of the dispute;*

Is the request timely in relationship to the underlying events?

e. *The remedy; and*

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

- f. *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?

**3. PROCESSING REQUEST FOR APPROPRIATE TEMPORARY RELIEF:**

- a. *Parties may make a request to the RD for appropriate temporary relief at any time during the processing of a charge.*
- b. *RDs may recommend to the GC that Authority permission be requested to seek appropriate temporary relief when the above criteria indicate that such relief meets the statutory criteria.*
- c. *RDs establish internal screening systems to identify those charges which warrant an expedited investigation which may be cases where temporary relief is appropriate.*

**4. RD'S OR GC'S DECISION REGARDING TEMPORARY RELIEF IS NOT APPEALABLE:**

A decision not to seek appropriate temporary relief is not subject to appeal whether or not it is (1) the RD's decision not to recommend to the GC or (2) the GC's decision not to ask the Authority for permission to seek appropriate temporary relief. See § [2423.10](#)(b) (GC determination not to seek Authority's approval for temporary relief is not appealable).

**5. PROCEDURE ONCE DETERMINATION IS MADE TO SEEK TEMPORARY RELIEF:**

*a. Issuance of complaint seeking earliest possible hearing date:*

If the GC decides to request from the Authority to seek appropriate § [7123\(d\)](#) relief, the OGC instructs the Region to issue complaint and to seek the earliest possible hearing date (usually 25 days from issuance of the complaint) on the ULP complaint. In certain extraordinary circumstances, the Region may request a hearing at an earlier time.



*The RD does not issue complaint until the OGC informs the Region that the GC has forwarded the Region's recommendation to the Authority.*

*b. Notification to the parties and settlement attempts:*

The Region notifies the parties that the Region is issuing a complaint and that the GC is requesting permission from the Authority to seek immediate relief. Settlement is discussed thoroughly with each party because seeking injunctive relief is often a catalyst for resolution of disputes. Any settlement sought comports with the GC's Settlement Policy. See Part 1, Chapter H. The RO strives to settle the underlying ULP case in its entirety to avoid the need for seeking temporary relief and litigating the case.

*c. Denial of GC's request:*



If the Authority denies the GC's request, the RO orally notifies the parties that:

- The request has been denied;
- The Authority's decision cannot be appealed; and
- The ULP case will be tried, absent settlement, as soon as practical.

d. *Approval of GC's request:*

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

e. *Seeking temporary relief in district court:*

- The Region telephonically informs the parties of its intent to file for injunctive relief and confirms this in writing to the Respondent's counsel of record;

- Settlement is vigorously pursued while the preparation of the pleadings continues; and
- The Region files the appropriate papers in person in the district court having jurisdiction over the matter as soon as possible after the Authority's authorization. Jurisdiction under § [7123\(d\)](#) of the Statute lies in the district court of the United States within which the ULP is alleged to have occurred or in which the party sought to be enjoined resides or transacts business.

f. *Litigation of the ULP complaint after appropriate temporary relief has been obtained:*

Whenever appropriate temporary relief has been obtained, the Region continues efforts to settle the ULP complaint and the injunction action.



[Part 1, Chapter H](#) concerning Post-Complaint/Pre-Hearing Settlements; and

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

RESERVED

## F. MOTIONS FOR SUMMARY JUDGMENT

### OVERVIEW:

Pursuant to § [2423.27](#), ALJs have the authority to rule on Motions for Summary Judgment. The Authority has applied the criteria in [Rule 56 of the FRCP](#) to these motions. Typically, the GC initiates a Motion for Summary Judgment after a Respondent's answer admits all material facts or the Respondent fails to answer the complaint.

### OBJECTIVE:

To provide: (1) criteria for determining whether to file a Motion for Summary Judgment and (2) guidance on processing requirements (when, where, what, and how).

#### 1. CRITERIA FOR FILING:

The Authority has adopted [FRCP Rule 56](#) as the criteria for Motions for Summary Judgment.

U.S. Equal Employment Opportunity Commission, 51 FLRA No. 26, 51 FLRA 248, 252-53 (1995) (citing U.S. Department of the Navy, U.S. Naval Ordnance Station, Louisville, Kentucky, 33 FLRA No. 1, 33 FLRA 3, 4-6 (1988)), rev'd on other grounds sub nom. Department of the Navy, U.S. Naval Ordnance Station, Louisville, Kentucky v. FLRA, No. 88-1861 (D.C. Cir. Aug. 9, 1990) (unpublished)).

a. *When is the filing of a Motion for Summary Judgment appropriate?*

When the facts alleged in the complaint support judgment as a "matter of law." On a Motion for Summary Judgment, the ALJ cannot decide the facts; s/he can only determine whether there are material issues of fact; if so, the motion must be denied.

Three situations in which the filing of a Motion for Summary Judgment is appropriate are:

- i. Where Respondent fails to answer a properly served complaint.

E.g., U.S. Department of Treasury, Customs Service, Washington, D.C. and Customs Service, Region IV, Miami, Florida, 37 FLRA No. 44, 37 FLRA 603, 610 (1990); U.S. Department of Energy, Washington, D.C., OALJD 98-39 (1998)

- ii. Where Respondent admits all material facts alleged in the complaint.

E.g., Department of Veterans Affairs, Veterans Affairs Medical Center, Nashville, Tennessee, 50 FLRA No. 40, 50 FLRA 220, 227 (1995).

- iii. Where Respondent does not admit every fact, but the contested facts can be proven by uncontested documents or affidavits.

Id. at 222 (facts in an affidavit showing that the foreseeable impact of change was more than de minimis were correctly considered by ALJ).



*Motions for Summary Judgment are probably not appropriate in cases where motive or intent is a necessary element of proof. This is typically shown by testimony at the hearing. But see U.S. Customs Service, St. Louis, Missouri, DE-CA-70590, ALJD Rpt. No. 134 (1998) at pages 5-11 (ALJ granted Respondent's motion*

for summary judgment in [7116\(a\)\(1\)](#) and (2) case over GC's objection finding that GC had not made a sufficient showing that Respondent's asserted reasons for taking the allegedly discriminatory action were motivated by consideration of protected activity).



The Trial Attorney discusses the litigation strategy with the RA. Specifically, given the facts and circumstances of a particular case, consideration must be given to whether to file a motion for summary judgment or whether to file a joint motion to rule on a case based on the parties' stipulations of fact.

- b. **Supporting documents, affidavits, applicable precedent, or other appropriate materials:**
  - i. Section [2423.27\(a\)](#) requires that a Motion for Summary Judgment include supporting documents, affidavits, applicable precedent, or other appropriate materials. Presumably, other forms of uncontested evidence would be acceptable to the Authority as "other appropriate materials," such as interrogatories, admissions, or depositions. See [FRCP 56\(a\)](#), and [\(b\)](#).
  - ii. If affidavits are provided by a moving party, the response to the Motion must be countered with affidavits, not mere assertions.

Vreeken v. Davis, 718 F.2d 343, 347 (10th Cir. 1983); Holland v. Bank of America, 673 F. Supp. 1511, 1514 (S.D. Cal. 1987).

- c. **When:**

Although **no rule governs**, to move the process along, file the motion as soon as possible after the Answer is due or has been filed. Judges usually postpone the hearing indefinitely upon receipt of the motion.

d. *What is filed:*

An original and four copies of supporting documents, except when filing is by facsimile when one copy is sufficient. The motion typically consists of at least three documents.

- Motion for Summary Judgment;
- Brief or memorandum in support of the Summary Judgment;
- Supporting affidavit(s), document(s), or other appropriate material(s).

e. *Service:*

- i. All parties must be served with motions. §§ [2423.21\(a\)](#); [2429.27\(b\)](#).
- ii. Service is by certified mail, first-class mail, commercial delivery in person, or by facsimile where appropriate. §§ [2429.24\(e\)](#); [2429.27\(b\)](#).
- iii. Filing date is the date deposited in the mail, or date of personal or commercial

delivery, or the date the facsimile is transmitted. § [2429.27](#)(d).

f. *Response:*

Is made within five days after service (mailing date) plus five days for mailing (if applicable). See § [2423.27](#)(b). When a Motion for Summary Judgment is filed by facsimile transmission, a response must be filed within five days after service. However, an ALJ may issue an Order to Show Cause to the parties providing a set period of time in which to file responses to the Order to Show Cause Why the Motion Should Not Be Granted.

**2. CONTENTS OF THE MOTION FOR SUMMARY JUDGMENT:**

Sets out the procedural background of the case. The motion then either sets out in full the paragraphs of the complaint which were admitted or attaches and incorporates the complaint (and the Answer, if there is one) to show all material facts were plead and the complaint states the basis for a ULP.

**3. CONTENTS OF BRIEF IN SUPPORT OF MOTION COVER FIVE MAIN POINTS:**

- Procedural bases for the motion;
- Discussion of the facts, as admitted;
- Argument that the admitted facts constitute a ULP;
- Discussion of the recommended remedy; and
- Inclusion of references to documents, affidavits, etc., to support motion.

See [ATTACHMENT 1F1](#) for an example of a Motion for Summary Judgment and Supporting Brief and [ATTACHMENT 1F2](#) for an example of an Opposition to a Motion for Summary Judgment noting, in particular, the affidavit in support of the opposition.



4. **CROSS-MOTION FOR SUMMARY JUDGMENT:**

In addition to opposing a Motion for Summary Judgment, the Trial Attorney may file a Cross-Motion for Summary Judgment. This motion asserts that there are no material issues of fact and that judgment should be granted on behalf of the cross-motion--not in favor of the party filing the original Motion for Summary Judgment.

5. **ALJ RULINGS ON MOTIONS FOR SUMMARY JUDGMENT:**

A Motion for Summary Judgment may be granted in whole or in part. § [2423.27\(c\)](#). If all issues are decided by summary judgment, no hearing is held. If summary judgment is denied or is granted only in part, the hearing shall proceed, as necessary.



[Part 1, Chapter G](#) concerning Stipulations; and

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

RESERVED



## G. STIPULATIONS

### OVERVIEW:

Pursuant to § [2423.26](#), all parties may jointly submit a motion to the ALJ or Authority when they agree that no material issue of fact exists, and request that the matter be ruled on based on the parties' stipulations of fact.

### OBJECTIVE:

To provide criteria to identify and process those limited number of ULP cases which, after the RD has issued a complaint, are appropriate candidates for either an ALJ's or the Authority's ruling based on the parties' stipulations of fact.

#### 1. CRITERIA FOR TRANSFER OF CASE TO THE AUTHORITY:

Pursuant to § [2423.26](#)(a), and (c), transfer of the case to the Authority based upon the parties' stipulation is appropriate when based on the following criteria:

- a. *All parties agree that no material issue of fact exists;*
- b. *Stipulation provides an adequate basis for application of clear, established precedent, e.g., mid-contract bargaining; and*
- c. *A decision by an ALJ would not assist the Authority in resolving the case.*

#### 2. TRIAL ATTORNEY TASKS IN ENSURING THAT CASE MEETS THE ABOVE CRITERIA AND IN DEVELOPING STIPULATION:

- a. *The Trial Attorney assigned to the case has thoroughly researched the point of law at issue, and concludes that the case is appropriate for*

*submission to the Authority based on the parties' stipulation.*

That is, the Trial Attorney has researched the point of law at issue and concludes that it is well-settled and knows the material facts that must be presented to the Authority to decide the case and includes those facts in the stipulation.

If all material facts are not presented, the Authority may deny the motion to decide the case by stipulation. See § 2423.26(d); Cf. Bureau of Indian Affairs, Uintah Ouray Area Office, Ft. Duchesne, Utah, 52 FLRA No. 60, 52 FLRA 629, 647-48 (1996) (Chair Segal's dissent) (Chair would have remanded case under prior regulations which permitted remands because she was unable to determine from stipulated facts whether information requested met the particularized-need test applicable under § 7114(b)(4)).

- b. *The Trial Attorney ensures that the parties agree on the material facts but disagree as to the appropriate law, i.e., Respondent has admitted all factual allegations in the complaint.*

This most frequently occurs where the allegation is a violation of § 7116(a)(5), e.g., midtem bargaining where there is a conflict among the circuits.

- c. *The Trial Attorney ensures that the facts stipulated, including any attached exhibits incorporated therein, must be sufficiently detailed and internally consistent to allow the Authority to make the necessary findings.*

Otherwise, the Authority will likely deny the motion to decide the case by stipulation. Cf. Federal Aviation Administration, Washington, D.C., 52 FLRA No. 51, 52 FLRA 548, 552-54 (1996) (under prior regulations case remanded because majority of Members could not determine what proposal was submitted to the agency that led to its refusal to bargain); U.S. Department of Justice, Immigration and Naturalization Service, Chicago District Office, Chicago, Illinois, 52 FLRA No. 66, 52 FLRA 686, 691-93 (1996) (Authority remanded case to develop record because unable to assess defense based on the contract); Social Security Administration, Baltimore, Maryland, 55 FLRA No. 43, 55 FLRA 246, 249 (1999) (remand necessary to determine whether Respondent delayed compliance with an arbitration award and thus committed a ULP).



*As stated above, the Authority will not remand cases. The practice is to deny the parties' motion to decide the case by stipulation. If the Authority grants the parties' motion, the case will be decided by stipulation.*

- d. *The Trial Attorney ensures that the case does not present any issue related to the resolution of the credibility of evidence.*

For example, cases based upon an alleged § [7116](#)(a)(2) violation are not candidates for transfer to the Authority based upon stipulations of fact.

- e. *The Trial Attorney ensures that the parties do not stipulate to legal conclusions, e.g., the impact of a change in a condition of employment.*

- f. *The Trial Attorney ensures that every stipulation contains an agreement stating that if the Authority denies the joint motion to consider the case based on the stipulations of facts, the case will be referred to the ALJ. If the ALJ denies the motion as well, the parties have the option of either (1) making the stipulation a joint exhibit or (2) withdrawing the stipulation.*



*The Trial Attorney discusses all litigation strategy with the RA. Specifically, given the facts and circumstances of a particular case, consideration must be given to whether to file a joint motion to rule on a case based on the parties' stipulations of fact or whether to file a motion for summary judgment. In every case, the RA and Trial Attorney must balance the effort required to develop stipulations of fact against the possibility that the Authority will deny the parties' motion.*

**3. CRITERIA FOR STIPULATIONS TO THE ALJ:**

- a. *All parties agree that no material issue of fact exists; and*
- b. *Decision of ALJ would help Authority to resolve case, i.e., case precedent is not well settled.*

**4. PROCESSING REQUIREMENTS:**

An original and four copies, unless filing is by facsimile in which case one legible copy is filed.  
§§ [2423.24](#) and [2423.25](#).



**[Part 1, Chapter F](#) concerning Motions for Summary Judgment.**





## H. POST-COMPLAINT/PRE-HEARING SETTLEMENTS

### OVERVIEW:

At any time in the proceedings it is **OGC Policy “to seek settlements that enhance the parties’ relationship; resolve the issues that have brought the parties to seek FLRA assistance; and further the purposes of the . . . Statute.”** OGC Settlement Policy (May 25, 1994) ([ATTACHMENT 1H](#)) . OGC Policy recognizes the need for greater flexibility and creativity in assisting the parties to not only resolve cases but improve their overall relationship. To accomplish this goal, a settlement agreement may depart from the traditional view that its content should mirror the remedy anticipated at hearing. In light of this policy, after reviewing and analyzing the case file, the Trial Attorney first considers exploring settlement possibilities with the parties.

### OBJECTIVE:

To provide an overview of the different types of settlements, the Trial Attorney’s role in that process and in the OALJ Settlement Judge Program.

### 1. TYPES OF SETTLEMENTS:

*a. Party Settlements Involving Withdrawal of Charge (PSIWOC): Post-Complaint:*

Occur at any stage of proceedings--policy considerations and applicable criteria for settling cases after issuance of complaint are identical to those prior to dispositive action:

*i. Regulatory authority:*

Pursuant to § [2423.11](#)(a)(1), an RD is authorized to approve such a withdrawal instead of issuing a complaint. This includes PSIWOCs.

ii. *Form:*

- (a) Almost any form is permitted because the parties themselves have negotiated the terms and built the foundation for their future relationship voluntarily without the need for monitoring from the RO. These settlements may have been reached privately (without involving the RO) or with the assistance of the Trial Attorney as facilitator/mediator.
- (b) No matter how simple the agreement may seem, a written memorialization is almost always preferable.
- (c) RD will approve a withdrawal request based on a private party settlement unless it is “repugnant to the purposes and policies of the Statute.” OGC Settlement Policy at 2.

- (d) The Trial Attorney reminds the parties that the agreement, which involves the withdrawal of the charge, will not be monitored by the RO for compliance but rather will have the same affect as an enforceable contract.

iii. *Procedure upon reaching settlement--Trial Attorney:*

- (a) Obtains a withdrawal request from the Charging Party. Often--but not required--the party settlement agreement itself contains explicit language where the Charging Party agrees to request withdrawal;
- (b) Transmits a memorandum to the RD briefly setting forth the allegations of the complaint and the terms of resolution. The Trial Attorney recommends approval; and
- (c) After RD approval and the scheduled trial docket is cleared:
  - Notifies OALJ;
  - Cancels court reporter;

- Cancels reserved hearing space;
- Notifies witnesses, whether or not under subpoena, that there is no hearing; and
- Prepares an Order Withdrawing Complaint and Notice of Hearing for RD's signature.

b. *Informal Settlements:*

i. *Bilateral Settlements*

(a) *Regulatory authority:*

Section [2423.12](#)(a) provides for bilateral (or "all party" if multiple charging parties or Respondents) settlements, defining them as settlements to be approved by the RD, and monitored by the RD to ensure compliance.

(b) *Form:*

- (1) RD will approve any form unless content is "repugnant to the Statute (for example, a settlement agreement in a [7116](#)(a)(2) discrimination

case which provides no relief to the individual discriminatee).” OGC Settlement Policy at 3 (need for creativity in fostering the parties’ overall relationship flexibility to allow for a broad range of solutions).

- (2) Although still permissible, GC settlement agreement forms and FLRA form Notices ([ATTACHMENT 1H](#), incorporating FLRA forms 54, 55, 57, 58 and 64), are no longer required. The Trial Attorney is free to encourage the parties to explore creative solutions while at the same time informing the Charging Party of the benefit of having the RD approve the Settlement Agreement and monitoring compliance with the Agreement.

(c) *Procedure upon reaching settlement--Trial Attorney:*

- (1) *If a traditional format is used:*

Drafts the settlement and proposed notice for submission to both parties simultaneously but only after considering the interests and input of both parties. The Notice explicitly addresses the allegations in the charge and is consistent with FLRA orders in similar cases. An Order Withdrawing Complaint and Notice of Hearing need not be prepared because the form contains applicable language.

(2) *If a creative approach is used:*

Submits the signed agreement to the RD for approval. After approval, prepares and sends a letter to the Charged Party concerning its obligations under the agreement which gives the Charged Party a specified amount of time to report to the RD the steps taken to comply with the agreement. Depending upon regional practice, another regional staff person may complete this task.

As with a party settlement, the Trial Attorney must inform the OALJ,

cancel the court reporter, cancel the hearing space and inform the witnesses that the hearing has been canceled.

- (3) In either case, complete tasks listed under 1.a.iii.(c) above.

ii. *Unilateral settlements*

(a) *Regulatory authority:*

Section [2423.12](#)(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 Respondent, to enter into the agreement and decline to proceed with the complaint. The Charging Party has the right to appeal.

(b) *Form:*

- (1) Identical to a bilateral agreement discussed in preceding section 3.b.i.(b)--FLRA forms may, but need not, be used.

- (2) Consider and apply basic unilateral settlement criteria set forth in OGC Settlement Policy at 4-5 before forwarding it to RD for approval (because the Charging Party is not a party--settlement: (1) has not helped the parties' relationship; (2) has not completely resolved the specific charge; and (3) may be appealed).
- (c) *Procedure upon reaching unilateral settlement--Trial Attorney:*
- (1) Submits the agreement to the RD for signature;
  - (2) Completes tasks listed under 1.a.iii.(c) above;
  - (3) Ensures that the OALJ is apprised that the settlement is unilateral and subject to appeal, so that the OALJ knows that disposition of the case is not final;
  - (4) Prepares a transmittal letter to the Charged Party



announcing approval of the agreement, but noting that the case is subject to appeal and compliance need not commence until further instructions are issued; and

- (5) Prepares a dismissal letter addressed to the Charging Party, setting forth its objections to the agreement and the reasons the RD is nevertheless approving the agreement. The dismissal letter sets forth the Charging Party's appeal rights.

c. *Formal Settlements:*

i. *Regulatory authority:*

- (a) Section [2423.25](#)(a)(2) provides for post-complaint/pre-hearing formal settlements.
- (b) **OGC Settlement Policy provides for seeking formal settlements “in cases in which the Charged Party has shown a deliberate and contumacious unwillingness to abide by the requirements of the Statute.”** Settlement Policy at 1.

In practice, formal settlements are not commonly used.

ii. *Form and Content:*

A formal settlement consists of a record to be submitted to the FLRA including the complaint and a stipulation, where the parties agree to the facts of the case and where the Respondent admits to violating the Statute, and the following:

- Identification of the parties;
- Information relating to the filing, service and receipt of the charge and any amended charge, and to the issuance, service and receipt of the complaint and any amended complaint. Copies of all such documents are attached as exhibits and incorporated by reference;
- A statement that the parties are subject to the jurisdiction of the Statute;
- A statement waiving a formal hearing, ALJ decision, and any other proceedings to which parties might be entitled under the Statute or the Regulations;

- Descriptions of all bargaining units involved;
- A listing of the documents and pleadings which constitute the entire record;
- An admission by Respondent to the statutory violation(s);
- An express consent to entry of an FLRA Order without notice, including the exact provisions of such order;
- An express consent to the entry by an appropriate U.S. Court of Appeals of a decree enforcing the FLRA Order without further notice (see § [2423.25\(a\)\(2\)](#));
- A statement that the formal settlement agreement contains the entire agreement of the parties;
- A statement that the settlement is subject to the approval of the FLRA; and
- A provision for the entry of the signature and title of the authorized

representative of each party and  
the date of the signature.

iii. *Procedure:*

After the RD approves the formal settlement, the RD transmits an original and three copies of the agreement and the exhibits directly to the FLRA for approval.

**2. TRIAL ATTORNEY'S ROLE IN SETTLEMENTS:**

a. *Tasks Trial Attorney performs in initiating conference calls without ALJ settlement judge:*

- i. Contacts both parties to attempt to schedule a conference call.
- ii. During these initial phone calls, obtains input as to each party's interests. The Trial Attorney speaks to each party as simultaneously as practicable so that both parties are actively providing input.
- iii. If the conference call is arranged, may act as a mediator/facilitator because Trial Attorney represents the public interest, not the interest of the Charging Party.
- iv. Suggests ground rules to govern conference calls. For example, no information that is shared will be used

outside the context of the discussion. Therefore, admissions made during settlement discussion cannot be used adversely to the party making these statements.

b. *ALJ Settlement Judge Program:*

OALJ's assistance under the Settlement Judge Program, is a recourse if Trial Attorney's settlement efforts are unsuccessful. [See § 2423.25\(d\)](#). Any party, including the GC, may seek assistance. The Program is designed to supplement, not to supplant, traditional settlement efforts. Unless one of the other parties has requested assistance, the Trial Attorney first tries to get the parties to settle the case without OALJ involvement.

i. *Criteria--When is assistance requested?*

(a) *Easy issues, get parties talking*

If the issues appear easy to resolve, there is no reason to initiate the settlement judge process. Sometimes, however, involvement of the Settlement Judge will spur the parties to talk with each other sooner.

(b) *Reluctant Respondent*

The Settlement Judge Program addresses the concern of Respondents who may be reluctant to engage in meaningful discussions for fear of “giving away its case” by promising complete confidentiality and inadmissibility of any discussions, unless the parties otherwise agree. If the case goes to trial, it will be assigned to a different Judge who will not discuss the case with the Settlement Judge.

- (c) *Difficult parties and issues and/or relationship problems*

The best time to use the Settlement Judge Program is when the Trial Attorney encounters particularly difficult parties and issues and/or who are experiencing problems with their overall relationship.

- (d) *Any other party requests Settlement Judge*

In this situation, the Trial Attorney always participates. However, the Trial Attorney does not participate in “unilateral” discussions, i.e., the Charging Party must agree to participate. If the Settlement Judge program is initiated, the Trial Attorney always participates even if the Charging Party chooses not to participate.

- ii. *Procedure--How to utilize the Settlement Judge Program:*
- Trial Attorney prepares, submits, and serves parties with a written request for assistance to the Chief ALJ as soon as possible after issuance of complaint. The request is usually made well in advance of the anticipated date of the pre-hearing disclosure which, unless otherwise agreed to by the parties or ordered by the ALJ, is 14 days in advance of the hearing. See § [2423.23](#);
  - The request includes telephone and fax numbers of all party representatives so that the Settlement Judge can contact them to schedule a conference call;
  - The conference call is scheduled at least two to three weeks prior to hearing; and
  - During the telephone conference call, the Trial Attorney is a facilitator; however, s/he is always aware that the GC is a party to the litigation.

*iii. Inadmissibility of settlement discussion  
information at hearing:*

As discussed above, § [2423.25](#)(d)(4) provides that “[n]o evidence regarding statements, conduct, offers of settlement, and concessions of the parties made in proceedings before the settlement official shall be admissible in any proceeding before the [ALJ] or Authority, except by stipulation of the parties.”



RESERVED

## I. RELATIONSHIP WITH THE CHARGING PARTY REPRESENTATIVE

### OVERVIEW:

The Trial Attorney must establish a working relationship with the Charging Party's representative and also ensure that the Charging Party understands that you represent the GC, not the Charging Party.

### OBJECTIVE:

To provide guidance concerning a Trial Attorney's pre-hearing responsibilities as they relate to establishing a relationship with the Charging Party representative in settlement discussions and the preparation of witnesses.

#### 1. SETTLEMENT DISCUSSIONS:

- a. Advise the OALJ of name, address, and phone number of the Charging Party's representative for inclusion in all settlement discussions.
- b. The Trial Attorney apprises all parties of the remedy that will be sought by the GC at the hearing. If Charging Party's representative has a differing view, either with respect to the remedy to be sought at hearing or the terms of a settlement agreement, inform the Charging Party of the right to fully state his or her views and opinions.
- c. Inform Charging Party's representative of § [2423.25](#)(b) which provides for the RD to accept a post-complaint formal or informal settlement

agreement that effectuates the policies of the Statute without agreement of the Charging Party.

**2. PREPARATION OF WITNESSES:**

- d. *Inform Charging Party's representative of GC's burden of proof.*

The GC has responsibility of presenting the evidence in support of complaint to prove the allegations of the complaint by a preponderance of the evidence.

- e. *The Charging Party's representative has no right or obligation to be present and participate in the preparation of unit employee witnesses.*

If the Charging Party requests to be present, determine whether it would be helpful to have the person's presence.

**3. OVERALL RELATIONSHIP THE SAME AS WITH ANY OTHER PARTY:**

The Trial Attorney's overall relationship with the Charging Party representative is the same as with any other party to the proceeding with respect to:

- a. *Not providing access to, or copies of, affidavits supplied by any witness.*

§ 2423.8(d); See Internal Revenue Service, Boston District Office, Boston, Massachusetts and Internal Revenue Service, Andover Service Center, Andover, Massachusetts, 5 FLRA No. 96, 5 FLRA 700, 701 n.2 (1981)  
(pre-hearing disclosure of documents supplied by Charging Party witness

during the investigation is violative of regulatory policy and affects weight accorded to the testimony).

b. *Pretrial release of: witness list, documents, and theories of case.*

See [Part 1, Chapter N](#) concerning Pre-hearing Disclosure.

**4. RELEASE OF AFFIDAVITS OR DOCUMENTS TO CHARGING PARTY:**

Situations warranting the release of an affidavit of a Charging Party witness, or the release of documents contained in the file to the Charging Party representative:

- Affiant gives permission for release of the affidavit to the Charging Party representative.
- A copy of the document has already been, or should have been, supplied to the Charging Party representative.
- The documents were discovered pursuant to a subpoena request.



[Part 1, Chapter D](#) concerning Remedy;

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

[Part 2, Chapter E](#) concerning the Role of the Charging Party Representative at the Hearing; and

[Part 2, Chapter Y](#) for Guidance on Handling Difficult Situations with Respondent or Charging Party Representative.

RESERVED

## J. PRE-TRIAL PREPARATION OF WITNESSES

### OVERVIEW:

Pre-trial preparation of GC witnesses is pivotal to successful ULP litigation. This is the Trial Attorney's opportunity to shape the GC's case-in-chief. Rarely does the GC win a case through cross-examination of Respondent's witnesses. Rather, a case is won through careful construction of the case-in-chief.

### OBJECTIVE:

To provide guidance on: (1) the tasks that must be accomplished for effective pre-trial preparation of the GC's witnesses and (2) handling unusual or special circumstances.

### 1. GOALS OF PRE-TRIAL PREPARATION OF WITNESS:

#### a. *Establish rapport with the witness:*

If the Trial Attorney did not investigate the case, the initial meeting for trial preparation is the first opportunity to establish some sort of rapport with each witness. Even if the attorney also investigated the case, there may be witnesses called to testify at trial who were not contacted during the investigation. In any event, the fundamental relationship with Charging Party witnesses is transformed by reason of the RD's issuance of the complaint. The Trial Attorney is no longer a "neutral" investigator; rather, s/he is now an advocate who is responsible for prosecuting an alleged violation of the Statute.

#### b. *Familiarize the witness with the hearing process:*

Ascertain experience level of witness:

- Has witness ever testified at a ULP hearing?
- Has witness ever testified in a courtroom setting?

Explain various aspects of the hearing process:

- That witness may be sequestered.
- That you will question the witness first.
- That witness will be subject to cross-examination, but that it is your role to protect the witness from unfair/improper questioning.
- That ALJ may question witness.
- What happens when objections are made.

Provide general advice to witness:

- Provide copy of document titled "Advice to Witnesses in Preparation for Hearing." ([ATTACHMENT 1J](#))
- Advise the witness **not** to bring notes or other documents to the hearing. (They may be subject to disclosure to Respondent's counsel.)
- Advise the witness to make sure s/he has a clear understanding of the question being asked before giving answer.

- Advise the witness to respond to questions as directly as possible and especially to avoid appearing evasive during cross-examination.
- Advise the witness to maintain composure at all times: do not allow Respondent's counsel to "get to you."
- Discuss the witness's appearance and appropriate attire.

*c. Explain the witness's role in hearing:*

It is critical during pre-trial witness preparation to explain the witness's role in the hearing. At a minimum, this includes an explanation of the GC's theory of violation and a discussion of how the witness's testimony will assist the GC in presenting that theory to the ALJ and the Authority. This accomplishes at least two things: 1) it heightens the witness's sense of purpose in participating in the GC's prosecution of the case; and 2) it helps prepare the witness for cross-examination by Respondent's counsel.

*d. Review testimony:*

*i. Use of witness statements/affidavits pre-hearing:*

- (a) Provide a copy of any statement or affidavit furnished by the witness



during the Region's investigation of the charge;

- (b) Remind witness that the affidavit is "fair game" for Respondent's counsel during cross-examination; and
- (c) Use affidavit to assist in preparing the witness for hearing. This usually provides a workable outline of the major points to be established through the witness' testimony.

*ii. Other uses of witness statements/affidavits at hearing:*

- (a) To refresh a witness' recollection;
- (b) If a witness is still unable to recall, used as past recollection recorded if the witness is able to testify that the contents of the statement were true when the statement was executed; and

See [Part 2, Chapter S](#), Subsection 4 concerning techniques to elicit testimony when witness cannot recall information sought.

- (c) For impeachment purposes.



*Exercise caution in using a statement to refresh recollection or as past recollection recorded because opposing counsel must be afforded the opportunity to review the statement before it is given to the witness.*

- iii. *Where feasible, a complete "dry run" (i.e., from start to finish) of the witness's testimony is accomplished during the final pre-trial meeting with each witness.*



*If possible, the Trial Attorney tries to meet with the witness more than once during trial preparation. There are several benefits to multiple pre-trial meetings with witnesses:*

*First, multiple meetings may help the Trial Attorney to conduct a more detailed investigation of the case than was conducted during the Region's initial investigation.*

*Second, the Trial Attorney may be in a better position to tailor questions to the capabilities of the witness. Some witnesses are competent to handle any situation, while others may only be able to handle a limited number of questions. The scope and detail of the attorney's questions depend on an assessment of the witness's abilities.*

*Third, if more than one session can be arranged, the witness will be in a better position to assimilate the critical elements of his/her testimony. Even a short break before the "dry run" is helpful for most witnesses to allow the important points to gel.*

- e. *Review documentary evidence:*

The Trial Attorney presents the witness with a copy of each document to be introduced through the witness. The Trial Attorney initially confirms that the witness has sufficient first-hand knowledge of each document and

its contents to establish the evidentiary foundation for introduction of the document into evidence. The Trial Attorney also explains to the witness how the document will be presented to the witness during his/her testimony. During the "dry run," the Trial Attorney incorporates the documents into the witness' testimony.



**Concerning extraneous markings on documents:** *Where documents intended to be introduced into evidence contain extraneous markings, such as hand-written notes in the margins of a typed document, the witness is asked during pre-trial preparation if s/he can identify the markings. The witness's testimony then incorporates any explanation concerning the origin of the extraneous markings. This averts possible objection by Respondent's counsel to introduction of the document into evidence by reason of unexplained markings on the document.*

f. *Prepare questions for direct examination:*

The Trial Attorney presents the majority of his/her case through direct examination of GC witnesses. It is critical that the Trial Attorney plan the direct examination of GC witnesses to present the ALJ with a coherent exposition of all elements of each violation alleged in the complaint.

i. *First, assess why each witness is needed:*

What testimony will this witness present and how will the testimony assist the Trial Attorney in establishing an element of proof necessary to the violation, or in rebutting a defense raised by the Respondent.

- ii. *Second, determine the best method of getting the witness's information into the record:*

This is primarily accomplished through the witness's testimony in response to questions posed by the Trial Attorney, but may also be achieved through the introduction of documents which the witness is able to authenticate.

- iii. *Questioning the witness:*

- (a) Background information:

The first series of questions posed to the witness establishes the witness's name, position of employment, duration of employment and, where relevant, status as a member of the bargaining unit, connection with the labor organization, supervisory hierarchy, etc. This background information shows the ALJ that the witness has information potentially relevant to the proceeding.

### **EXAMPLE**

- Q:** Would you please state your name and occupation.

**A:** My name is \_\_\_\_\_ and I work as an Aircraft Mechanic at Hill Air Force Base in Ogden, Utah.

**Q:** How long have you held this position?

**A:** I have been an Aircraft Mechanic at Hill Field since 1983.

**Q:** Are you connected in any way with AFGE Local 1592?

**A:** Yes, I have been on 100% official time as the President of Local 1592 since August 1995.

(b) Relevant factual information:

The next series of questions posed to the witness establish the factual information on which one or more elements of the violation (or on which refutation of one or more of the Respondent's defenses) is based.

The preferred method for presenting the operative facts is through a chronological exposition of events.

**EXAMPLE**

In a unilateral change bargaining case, the witness may testify to his/her first learning of a

proposed change and submitting a request to bargain as follows:

**Q:** Tell us what happened on June 15, 1996.

**A:** The Chief Steward told me that management proposed to change the duty hours of several employees.

**Q:** Was the Union notified concerning this change?

**A:** No.

**Q:** What did you do when the Chief Steward told you of this change?

**A:** I made sure that the Chief Steward had confirmed this with some of the affected employees, and then submitted a request to bargain over procedures and appropriate arrangements for employees adversely affected by the proposed change.

**Q:** I am now handing you what has been marked for identification as General Counsel Exhibit 2. (Hand witness copy of request to bargain.) Can you identify this document?

**A:** Yes, this is the request to bargain I submitted on June 14, 1996 concerning the change in duty hours.

**Q:** Your Honor, the General Counsel moves for admission of General Counsel Exhibit 2 into evidence.

**Respondent's Counsel:** No objection, your Honor.

**ALJ:** General Counsel Exhibit 2 is received into evidence.

iv. *Tips on how to structure the "Q & A":*

(a) Factual testimony:

The Trial Attorney prepares the witness to provide (and the questions are phrased to call for) **factual** responses. For example, the witness is asked to describe what was said (or what happened), rather than to describe his/her impression of a conversation. Testimony such as, "my supervisor told me that my life would be made miserable if I pursued the grievance" is preferable to, "my supervisor made sure I understood not to take my grievance any further." The latter does not tell the ALJ what the supervisor told the witness. The ALJ wants to know factually what was said, the circumstances under which it was said, and how it was said. The ALJ is not typically interested in what

conclusions the witness drew from what was said.

(b) Narrative vs. short and crisp “Q & A”:

Depending on the evidence to be elicited from the witness and the ability of the witness, the Trial Attorney considers whether to ask the witness specific directed questions or to allow the witness to testify in narrative form.



*Narrative testimony may be improper since opposing counsel is unable to raise objections, so the Trial Attorney interjects questions at appropriate times.*

Where credibility concerning a particular statement is at issue, testimony may be more persuasive when the witness describes the statement without “prompting” by the Trial Attorney.

**EXAMPLE**

**Q:** What happened after you sat down in the Director’s office?

**A:** First, he told me that he had heard about my grievance and was not very happy with it. He also told me that my career would be jeopardized if I got a reputation in the agency as a troublemaker. When I told him I only wanted to have my supervisor treat me the way he treated everyone else, the Director told me that going to the Union was not the way to go about getting favorable treatment from my supervisor.



*In this example the witness could have furnished the same factual testimony in response to three or four questions.*



Other situations where testimony may be more effective when provided in response to a single question (as opposed to several short questions) include background information.

**EXAMPLE**

Facts concerning the time, date, place and participants at a pivotal meeting may be obtained in response to a single question (as opposed to 4 separate questions):

**Q:** When was the bargaining session held?

**A:** The meeting was held at 10:00 a.m. on June 17, 1996 in the Director's conference room. Management was represented by the Director, the Deputy Director, and the Chief of Personnel, while the Union was represented by me, the Chief Steward and the Vice President.

At the same time, it may be advantageous at critical junctures to break the witness's testimony down to a series of responses to specific questions.

**EXAMPLE**

Where the Personnel Officer's remarks in response to an information request contain many components, the following colloquy may assist the witness in covering all key points:

**Q:** What did the Personnel Officer tell you regarding management providing the requested information?

**A:** The Personnel Officer told me that the information was not retained on-site, but was contained in employees' personnel records at Headquarters.

**Q:** Did you make any comment concerning the location of these records?

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- A:** I asked the Personnel Officer what it would take for him to obtain the records from Headquarters.
- Q:** What did he say?
- A:** He said it would just be a matter of making a phone call.
- Q:** Did the Personnel Officer indicate any concerns about the Union's need for the information?
- A:** No, in fact, he told me that he understood why the Union needed the information and what the Union planned to use it for.
- Q:** What about the Privacy Act -- did that come up in your conversation with the Personnel Officer?
- A:** No, at no time did the agency ever raise Privacy Act concerns in response to our information request.
- Q:** Then what was the basis for management's denial of your information request?
- A:** It was never put in writing, but the Personnel Officer told me in that same conversation that it would take too much time to pull together records covering a five-year period for the entire local facility?
- Q:** How did you respond to this concern?
- A:** I told him that the Union would be willing to accept the records limited to the Quality Section covering the previous three-year period.
- Q:** How did he respond to this narrowing of your original information request?
- A:** He said that he would get back to me.
- Q:** Did he ever get back to you after that?
- A:** No, and when the Union didn't hear from him, I called and left messages for the Personnel Officer to call me concerning our information request. When we didn't

hear from him for another two weeks, the Union filed this ULP charge.



*The above testimony could be elicited by asking the witness simply to describe what was said during the conversation, with only an occasional prompting question. But where the Trial Attorney wishes to ensure coverage of specific points, directed questions may be more useful.*

No single factor determines whether the Trial Attorney calls for narrative testimony or uses directed questions. The nature and importance of the testimony and the capabilities of the witness guide the Trial Attorney in balancing these two approaches. The Trial Attorney is prepared to use either approach, depending on how the witness performs while testifying at hearing. For example, if during pre-trial preparation, the witness has testified by narrative but does not do so at the hearing, the Trial Attorney must be prepared to ask more directed questions to cover all key points. The ability to go both ways is, of course, dependent on thorough pre-trial preparation of the witness.

(c) Cover all key points:

The Trial Attorney ensures that the witness provides testimony on all significant matters. The Trial Attorney should consider developing a list of key points to be covered by each witness to be checked prior to turning the witness over to Respondent's counsel for cross-examination.

g. *Prepare for cross-examination:*

The Trial Attorney provides advice to the witness on his/her demeanor during cross-examination. The Trial Attorney explores the basis for any discrepancies between the witness's anticipated testimony and any affidavit furnished by the witness during investigation of the charge. The witness is asked to explain any discrepancies, and the Trial Attorney discusses possible ways to minimize the significance of any

discrepancies. Most importantly, the Trial Attorney presents the witness with questions which may be anticipated from opposing counsel during cross-examination. Through the process of trial preparation, the Trial Attorney identifies what parts of the GC's case need to be strengthened. Questioning the witness in this manner provides the Trial Attorney with a view of how the witness may be expected to hold up during cross-examination. It also provides an opportunity to discuss with the witness, how best to ameliorate, the impact of damaging information.

The Trial Attorney explains to a witness that there is nothing improper about working with the Trial Attorney prior to testifying. This prepares the witness for any cross-examination concerning rehearsed testimony or collusion with the Trial Attorney.

**2. UNUSUAL OR SPECIAL CIRCUMSTANCES:**

a. *The reluctant and/or hostile witness:*

When it becomes apparent that the witness is reluctant or hostile, the Trial Attorney first attempts to use all of his/her persuasive powers to overcome the witness's reluctance and/or hostility to the case. If this fails, weigh the importance of the witness's testimony to successful litigation of the case. If the testimony is less than vital (e.g., is merely corroborative on minor points), contemplate releasing the witness from testifying. If the testimony is indispensable, first consider limiting the witness's testimony to that which is essential to establishing the violation. If the witness is still reluctant

to cooperate, consider whether to threaten enforcement of a subpoena to compel the testimony. Where the witness does not wish to appear supportive of the Charging Party's case, issuance of a subpoena may help overcome the witness's reluctance to testify. This is risky because if the witness ignores the subpoena the GC must seek enforcement of the subpoena in a U.S. District Court. The more significant risk, however, is that threatened with enforcement of a subpoena, the reluctant witness will become further alienated and become less cooperative with the GC's case.

b. *GC witnesses talking to Respondent's counsel:*

Respondent's counsel may request to meet with a GC witness to prepare for hearing. Similarly, a GC witness may inquire about what to do if Respondent's counsel requests such a meeting. Authority precedent generally holds that two types of ULPs may be based on agency officials conducting interviews of bargaining unit employees in preparation for third-party proceedings (including ULP hearings): a violation of § [7116](#)(a)(1) if the interview is not voluntary (i.e., is coercive in nature), or a formal discussion violation if all elements of a formal discussion are established and the union is not afforded the opportunity to be represented.

As a practical matter, however, a witness is asked to let the Trial Attorney know if s/he plans to meet with Respondent's counsel prior to the hearing. Advise Respondent's counsel to comply with Authority precedent requiring that the interview be voluntary, be conducted in a non-coercive manner, and that the union

be afforded an opportunity to be represented at such a formal discussion. Provide the same advice to any bargaining unit employee witness who has been approached by an agency Respondent.

The Trial Attorney has no right to insist on being present at the interview. The Trial Attorney likewise does not request the witness require his/her presence. However, the witness may ask for union representation at the meeting because it could be seen as a formal discussion.

***Case citations concerning the formal discussion theory:***

*Formal Discussion and Violation Found*

Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California, 29 FLRA No. 53, 29 FLRA 594, 597-07 (1987) (adoption of the formal discussion theory in holding that the agency's interview of a unit employee who was to be a union witness in preparation for an arbitration proceeding constituted a formal discussion);

Department of Veterans Affairs Medical Center, Phoenix, Arizona, 52 FLRA No. 18, 52 FLRA 182, 203-04 (1996) (ALJD) (extension of formal discussion theory to cover interview of unit employee witnesses in preparation for MSPB hearing);

Veterans Administration Medical Center, Long Beach, California, 41 FLRA No. 106, 41 FLRA 1370, 1379-80

(1991) (VAMC, Long Beach) (violation based on telephone interviews of unit employee in preparation for MSPB hearing) enforced sub nom. FLRA v. Department of Veterans Affairs Medical Center, Long Beach, California, 16 F.3d 1526 (9th Cir. 1994); and U.S. Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah, 36 FLRA No. 78, 36 FLRA 748, 962-70 (1990) (Ogden ALC) (ALJD) (violation based on agency requiring a pre-arbitration interview of unit employee designated to serve as union witness at arbitration).

*No Formal Discussion Found*

General Services Administration, 50 FLRA No. 61, 50 FLRA 401, 406-07 (1995) (GSA) (citation to Department of the Air Force, F.E. Warren Air Force Base, Cheyenne, Wyoming, Local 2354, 31 FLRA No. 35, 31 FLRA 541 (1988) (F.E. Warren) with approval, but finding no violation by agency conducting interviews of bargaining unit employees in preparation for MSPB hearing involving removal of a management official, reasoning that MSPB hearing concerning removal of management official did not meet statutory definition of a "grievance" because it was not a "complaint" by an "employee," "labor organization" or "agency" within the meaning of § [7103](#)(a)(9) of the Statute);

*Formal Discussion But No Violation Found*

F.E. Warren, 31 FLRA at 545-52 (1988) (extension of formal discussion theory to cover ULP hearings where the agency's attorney interviewed a bargaining unit

employee witness in preparation for a ULP hearing, but no ULP because Respondent fulfilled its obligations concerning formal discussions); and United States Immigration and Naturalization Service, United States Border Patrol, El Paso, Texas, 47 FLRA No. 11, 47 FLRA 170, 182-87 (1993) (MSPB deposition of complainant held to be formal discussion, but no violation under circumstances where purpose of § 7114(a)(2)(A)--to provide union an opportunity to safeguard its institutional interests--was satisfied by union being permitted to be present at deposition).

***Case Citations Concerning the Coercive Interrogation Theory in Violation of § 7116(a)(1) of the Statute.***

In Internal Revenue Service and Brookhaven Service Center, 9 FLRA No. 132, 9 FLRA 930, 933 (1982) (Brookhaven), the Authority placed certain limitations on an agency's interview of bargaining unit employees in preparation for third-party proceedings by requiring that:

- (1) management must inform the employee who is to be questioned of the purpose of the questioning, assure the employee that no reprisal will take place if he or she refuses, and obtain the employee's participation on a voluntary basis;
- (2) the questioning must occur in a context which is not coercive in nature; and



(3) the questions must not exceed the scope of the legitimate purpose of the inquiry or otherwise interfere with the employee's statutory rights.

In F.E. Warren, 31 FLRA at 549, the Authority declined to apply a per se rule requiring agency representatives to issue "Brookhaven" safeguards in all situations, instead determining whether the circumstances in which interviews of unit employees in preparation for third-party proceedings occur are coercive. The Authority found no [7116\(a\)\(1\)](#) violation, noting that the employee was told the purpose of the interview, that the employee declined union representation, that the employee was not threatened with repercussions if he refused to cooperate, and that the agency's questioning related strictly to the matters at issue at the ULP hearing.

See also VAMC, Long Beach, 41 FLRA at 1382-85 (agency's telephone interview of a unit employee in preparation for MSPB proceedings was not voluntary and was conducted under coercive conditions and therefore violated the Statute);

Ogden ALC, 36 FLRA at 770-72 (Authority adopted the ALJ's analysis similarly concluding that the agency independently violated § [7116\(a\)\(1\)](#) by the manner in which its agent questioned a known union arbitration witness);

U.S. Department of the Air Force, Griffiss Air Force Base, Rome, New York, 38 FLRA No. 125, 38 FLRA

1552, 1558-60 (1991) (extension of precedent to find a violation based merely on an agency's attempt to coerce participation in such interviews, even when the unit employee witness never answered any questions); and

GSA, 50 FLRA at 406 (Authority reviewed previous decisions and clarified that Brookhaven warnings "apply only where a nexus is established between an agency's interview of a bargaining unit employee in preparation for third-party proceedings and the employee's § [7102](#) rights" but found no nexus here because there was no showing that the union was in any way involved in the MSPB proceeding (concerning removal of a management official) for which the interviews were conducted or that the MSPB proceeding otherwise implicated any rights protected by § [7102](#)).



*Because the Authority in GSA cited F.E. Warren with approval, there should be little doubt that unit employees' participation as witnesses at ULP hearings satisfies the Authority's requirement in GSA that a nexus be established between the pre-trial interview and the employee's § [7102](#) rights.*

c. *Supervisors and management officials as witnesses:*

Agents of agency Respondents (i.e., supervisors and/or management officials in "CA" cases) may be called as GC witnesses in certain circumstances.

i. *The Friendly Supervisor:*

When supervisors approach the Trial Attorney about providing testimony helpful to the GC's case, take care to ensure that:

- (a) The supervisor is aware that s/he has no statutory protection against agency retaliation for providing testimony;
- (b) The supervisor's participation in pre-trial preparation is voluntary; and
- (c) The supervisor is informed that his/her participation in pre-trial preparation and in testifying at hearing must be on his/her own time (i.e., official time will not be authorized).

Pre-trial preparation of the friendly supervisor may therefore be limited. To the extent pre-trial preparation of a friendly supervisor can be arranged, however, follow the guidance outlined above. **OGC policy generally does not require the Trial Attorney to inform an agency Respondent's counsel that its supervisor or management official has approached the Trial Attorney about testifying at hearing or to advise counsel of efforts to pre-try a friendly supervisor. Nor must Respondent's counsel be included in any pre-trial preparation of a friendly supervisor.**

ii. *Former Supervisors and Retired Supervisors:*

Trial Attorneys may engage in pre-trial preparation of current bargaining unit employees, who were supervisors at the time that the events at issue in the hearing occurred, to the same extent and under the same conditions as described above for supervisors and management officials in general. However, retired supervisors, who were supervisors at the time of the event, may be contacted without notifying Respondent's counsel."

iii. *The Hostile Supervisor:*

There may also be occasions when it is necessary to obtain a supervisor's testimony to establish one or more elements of the GC's **prima facie** case. When this need arises, request that a subpoena be issued to compel the supervisor's testimony. Any pre-trial preparation of a hostile supervisor must be coordinated with Respondent's counsel and will likely be refused. There is no obligation on the part of Respondent's counsel to agree to the interview.

iv. *Supervisors who were bargaining unit employees at the time of the events underlying the complaint:*

When testimony is required from a newly-designated supervisor, but where the testimony relates solely to events which occurred when the supervisor was a bargaining unit employee, schedule pre-trial preparation as though the witness were a Charging Party witness, but with the following variation: A subpoena is issued to the witness, and the Trial Attorney arranges for pre-trial preparation by assuring Respondent's counsel that matters discussed with the witness will relate solely to events that transpired when the witness was a member of the bargaining unit.

d. *Depositions in lieu of testimony at hearing:*

i. *Regulatory authority:*

Section [2423.24](#)(a) provides that an ALJ "shall regulate the course . . . of prehearing matters . . . ."

Section [2423.34](#)(b) provides that after issuing a recommended decision and order the ALJ transmits the decision and record, which includes depositions, if any, to the Authority.

ii. *Testimony at hearing is preferred:*

The Trial Attorney contemplates taking a deposition in lieu of testimony at hearing only if necessary. Testimony at hearing is always preferable because it affords the ALJ a better opportunity to assess the witness's demeanor and credibility.

- iii. *Circumstances in which a deposition is considered appropriate:*
- (a) Where deposition is the only way to arrange for timely testimony from a critical witness who is unavailable to testify at hearing if the trial cannot be rescheduled to accommodate the witness's appearance at the hearing.
  - (b) Where there may be questions concerning enforcement of a subpoena but where the witness is willing to provide testimony by deposition, a deposition may be the best means by which to obtain necessary testimony.  
See, e.g., Bureau of Indian Affairs, Isleta Elementary School, Pueblo of Isleta, New Mexico and Indian Educators Federation, 54 FLRA No. 128, 54 FLRA 1428, 1452 n.4 (1998) (ALJD) (critical testimony obtained from the Governor of the Pueblo of Isleta by means of a pre-hearing deposition because it was questionable whether the FLRA had jurisdiction to compel the Governor's testimony by means of a subpoena).
  - (c) Where, upon completion of the hearing, the record is left open for

the receipt of additional evidence and testimony on matters that were unknown or unavailable to the parties at hearing.

*iv. Processing requirements:*

*(a) Pre-hearing depositions:*

File a pre-hearing motion pursuant to § [2423.21](#)(b). However, if the witness and the parties agree concerning the scheduling of a pre-hearing deposition, it is preferable to make arrangements for the deposition, and then to submit a transcript of the deposition testimony into evidence as a Joint Exhibit.

*(b) Post-hearing depositions:*

Are within the ALJ's discretion.

See also [Part 1, Chapter O](#) concerning depositions.

*e. Disclosure of statements and information obtained from the Respondent:*

The Trial Attorney may not share with GC witnesses during pre-trial any materials obtained from the Respondent during the investigation of the charge. See § [2423.8](#)(d). Although the Regulations do not address what sanctions, if any, may be applied to enforce §

[2423.8](#)(d), improper disclosure can only be detrimental to the GC's case. At least two Authority decisions have addressed situations where the Trial Attorney was found in violation of § [2423.8](#)(d). Both generally left the appropriate remedy for such a regulatory violation to the discretion of the ALJ.

***Case citations where Respondent's Motion to Strike Testimony based on improper disclosure is denied but ALJ may consider such improper disclosure in determining the credibility of GC witnesses.***

*Respondent's Statements/Affidavits*

Internal Revenue Service, Boston District Office, Boston, Massachusetts and Internal Revenue Service, Andover Service Center, Andover, Massachusetts, 5 FLRA No. 96, 5 FLRA 700, 701 n.2 (1981) (Authority rejected Respondent's contention that GC's witness's testimony be stricken and that the complaint be dismissed because the GC disclosed to its witness the content of statements furnished by Respondent's witnesses during the investigation of the charges but considered such impropriety in determining credibility).

*Respondent's Documentary Evidence*

Internal Revenue Service and Internal Revenue Service, Brooklyn District, 23 FLRA No. 9, 23 FLRA 63, 80-81 n.4 (1986) (ALJD) (to the same effect).

Section [2423.8](#)(d) specifically applies to the disclosure of the "identity of individuals and the substance of the



statements and information they submit or which is obtained **during the investigation**" and therefore appears not to govern the disclosure of documents obtained from the Respondent by subpoena. The Trial Attorney nevertheless is careful in handling such documents, particularly if the ALJ has issued a protective order covering such documents.

*f. Official Time for GC Witnesses:*

*i. Statutory Provision:*

Section [7131](#)(c) of the Statute provides that "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."

*ii. Regulatory Provision:*

Section [2429.13](#) more broadly provides for official time, which includes travel time, as occurs during the employee's work hours and when the employee would otherwise be in a work or paid leave status, for any employee participating in any phase of any proceeding before the Authority, including unfair labor practice hearings.

***Case citations***

*Official time was authorized*

Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California, 26 FLRA No. 83, 26 FLRA 674, 677-78 (1987) (testimony at hearing), rev'd on other grounds, sub nom. Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California v. FLRA, 877 F.2d 1036 (D.C. Cir. 1989) (McClellan AFB).

Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms and National Treasury Employees Union, 10 FLRA No. 3, 10 FLRA 10, 11-12 (1982) (pre-trial preparation); Department of the Treasury, Internal Revenue Service and Department of the Treasury, Internal Revenue Service, Jacksonville District, 15 FLRA No. 108, 15 FLRA 506, 508-09 (1984) (to the same effect).

*"CO" case where official time was not authorized*

7th Infantry Division (Light), Fort Ord, California, 47 FLRA No. 82, 47 FLRA 864, 868-71 (1993) (Fort Ord).



*The Trial Attorney may request agency management to release employee-witnesses to testify in "CO" cases against unions. As a practical matter, most agencies will not oppose the release of such employee-witnesses on some form of administrative time.*

- g. *Witness Fees--Travel and Per Diem Expenses for Non-Federal Employee Witnesses:*

*i. Statutory provision:*

Section 7132(c) provides that witnesses "shall be paid the same fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States."

*ii. Regulatory provision:*

Section [2429.14](#) provides that witness fees, as well as transportation and per diem expenses "shall be paid by the party that calls the witness to testify" except that Federal employees are not entitled to receive witness fees.

See Federal Aviation Administration, Northwest Mountain Region, Renton, Washington, 51 FLRA No. 81, 51 FLRA 986, 989-92 (1996) (Authority adopted D.C. Circuit's decision in McClellan AFB holding that agencies are not required, under § [7131](#)(c) of the Statute to pay travel and per diem to employees appearing to testify at ULP hearings and rejected § [7132](#)(c) of the Statute as an alternative basis for requiring agency Respondents to pay such travel and per diem expenses).

*iii. Witnesses who are entitled to witness fees:*

Non-federal employees who appear at the insistence of the Trial Attorney, i.e., under subpoena, may submit a claim for reimbursement, Standard Form 1157, Claim for Fees and Mileage of Witness. Two copies of Form 1157 are given to the witness when the subpoena is served. The witness is instructed to complete, sign and return the claim to the Region that issued the subpoena. Upon the RD's approval, both copies of the form are forwarded to the OGC.

iv. *Regional Authorization of travel and per diem:*

The Trial Attorney checks with the RA well in advance of the trial if s/he needs a witness to testify at the trial and ensures that proper procedures are followed once s/he receives authorization.



[Part 1, Chapter O](#) concerning Depositions.



## K. SUBPOENAS

### OVERVIEW:

Section [7132](#) of the Statute provides the statutory basis for issuance of **subpoenas duces tecum** and **ad testificandum** (requiring the production of documents or other evidence or attendance to personally testify). Section [2423.28](#) implements the statutory provisions governing subpoenas.

### OBJECTIVE:

To provide guidance concerning the circumstances that do and do not warrant a request for a subpoena, the processing requirements for subpoena requests, and petition to revoke a subpoena.

#### 1. CIRCUMSTANCES WHEN A SUBPOENA IS REQUESTED:

*a. Generally, why a subpoena is needed:*

A subpoena is issued to mandate the attendance of a witness or the production of a document at a hearing. A subpoena is not needed when the parties agree that the appearance of witnesses or the production of documents is necessary and there is no concern about whether or not the witnesses or document will appear at the hearing.

§ [2423.28](#)(a).

*b. In CO cases, subpoenas are usually needed to ensure the release of witnesses:*

It would be unusual for a Charging Party in a CO case to participate for, or on behalf of a labor organization and therefore to be authorized official time to appear as a witness. See § [7131](#)(c) of the Statute. In this circumstance, a subpoena is issued to ensure the witness's presence at the hearing but the Trial Attorney must evaluate the cost versus the benefit of employing this litigation strategy.

See 7th Infantry Division (Light), Fort Ord, California, 47 FLRA No. 82, 47 FLRA 864, 868-71 (1993).

- c. *A subpoena also can be used to establish the nonexistence of critical documents.*
- d. *A subpoena is necessary to ensure the payment of travel and per diem expenses for GC witnesses.*
- e. *A subpoena for documents must be issued to the person who can authenticate documents for admission into evidence.*
- f. ***But not:*** *Intra-management guidance, advice, counsel, or training within an agency or between an agency and OPM which may be precluded from disclosure by subpoena.*

§ 7132 of the Statute.



*When in doubt, discuss litigation strategy with RA or Litigation Specialist.*

**2. OTHER CONSIDERATION: MILEAGE EXPENSES AND WITNESS FEES:**

Section [7132](#)(c) provides only for the payment of mileage expenses. Mileage expenses do not encompass travel and per diem expenses incurred by witnesses. See [Federal Aviation Administration, Northwest Mountain Region, Renton, Washington](#), 51 FLRA No. 81, 51 FLRA 986, 990-91 (1996).

See [Part 1, Chapter J](#), subsections 2.f. and g. concerning Official Time and Witness Fees.

**3. PROCESSING REQUIREMENTS:**

*a. Subpoena requests to OALJ:*

- Written requests are filed with the OALJ not less than 10 days prior to the opening of hearing or with the ALJ during the hearing.
- “Requests for subpoenas made less than 10 days prior to the hearing shall be granted on sufficient explanation of why the request was not timely filed.”

§ [2423.28](#)(b).



*Unless otherwise directed by the RA or RD, when the RD issues a complaint and notice of hearing, the Region sends a standard form, signed by the RA requesting that the OALJ supply seven subpoenas duces tecum and seven subpoenas ad testificandum. For an example of this form, see [ATTACHMENT 1K](#).*

*b. OALJ procedures:*



- All requests for subpoenas are honored, if timely requested. See [ATTACHMENT 1K](#) for an example of a Notice that the OALJ will issue sending the subpoenas to the Region that were requested.
  - Requests may be made **ex parte**.
- c. *Responsibilities of requester of subpoena:*
- i. Completion of specific information in the subpoena.
  - ii. Requirements of service of the subpoena:
    - By a person who is at least 18 years old;
    - Who is not a party to the proceeding (we interpret this provision to permit a RO employee who is not involved in the case to serve subpoenas);
    - Certification by person who served the subpoena that s/he did so:
      - By delivering it to the witness in person;

- By registered or certified mail; or
- By delivering the subpoena to a responsible person (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.

If this method of service is chosen, the subpoena shall show on its face the name and address of the party on whose behalf the subpoena was issued.



*Although rarely an issue at hearing, remember to include subpoena forms (those issued by the ALJ pursuant to the Trial Attorney's request or blank forms) in your trial briefcase in case it is necessary to serve a subpoena at that time. After the hearing, destroy any unused subpoena forms.*

*d. Content of subpoena:*

Name and identify the witnesses or documents sought and state the reasons therefore. In general, a **subpoena duces tecum** must be reasonable and seek documents which are material and relevant to the

matters at issue in the case. Otherwise, the subpoena may be subject to revocation.

e. *Identifying the person(s) to whom subpoena is directed:*

- i. **Subpoena testificandum** - name and address of the witness sought.
- ii. **Subpoena duces tecum** - name and address of the custodian of the records sought. When in doubt as to the identity of the proper official, name the Respondent's chief official.

Unless the Trial Attorney can independently authenticate documents subpoenaed or if the Respondent will stipulate to authenticity, the Trial Attorney must require the custodian to appear at the hearing.

f. *Examples of ways to identify the documents sought:*

- i. All documents, papers, records or other data, of whatever name, nature or description which concern in any way the proposal dated May 1, 1996 to suspend John E. Smith for three (3) days, and the decision dated June 30, 1996 to suspend John E. Smith for three (3) days.

- ii. All documents of whatever name, nature or description which concern the decision to contract out the work of the switchboard operation at the Respondent's facility in Boston, Massachusetts. Such documents shall include, without limitation, all documents showing any recommendations, deliberations, studies, discussions, considerations and requests for permission, which preceded the Respondent's decision to contract out its telephone switchboard operation.



See [ATTACHMENT 1K](#) for an example of a completed subpoena form.

*Discuss with the RA when to serve the subpoena. Unless the RA determines that different litigation strategy should be employed, all subpoenas are served at least 11 days before the pre-hearing conference is scheduled (allows for the expiration of the five-day period within which a petition to revoke may be filed if filing is by mail).*

#### 4. PETITION TO REVOKE AND RULING ON PETITION TO REVOKE:

##### a. *Filing:*

Any person served with a subpoena who does not intend to comply must file a petition to revoke the subpoena with the OALJ within five days after the date of service of the subpoena. If a petition to revoke is filed during the hearing, it is filed with the presiding ALJ.

§ [2423.28](#)(e)(1).

b. *Service:*

A copy of any petition to revoke a subpoena shall be served on the party on whose behalf the subpoena was issued.

§ [2423.28](#)(e)(1).

c. *Ruling on petition to revoke:*

Grounds for revocation under § [2423.28](#)(e)(2):

The ALJ “shall revoke the subpoena if the person 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 in law the subpoena is invalid.”



*The following is an example of “any other reason in law”:*

*The Trial Attorney files a petition to revoke whenever a member of the RO staff is served with a **subpoena ad testificandum** or **subpoena duces tecum** relying on three grounds: (1) there is a limited evidentiary privilege which protects the informal investigational and trial-preparatory processes of regulatory agencies such as the FLRA. See NLRB v. Silver Spur Casino, 623 F.2d 571, 580 (9th Cir. 1980); Stephens Produce Co. v. NLRB, 515 F.2d 1373, 1376 (8th Cir. 1975); Frank Invaldi, 305 NLRB 493 (1991); G.W. Galloway Co., 281 NLRB 262*

*(1986); (2) the GC has a policy stated in § 2423.8(d) concerning the protection of the identity of individuals and the substance of their statements obtained during the course of the investigation as a means of assuring that all relevant information is obtained; and (3) pursuant to § 2411.11 which concerns compliance with subpoenas, the GC's written consent is required before "files, documents, reports, memoranda, or records" and/or testimony are produced pursuant to subpoena.*

See [ATTACHMENT 1K](#) for 2 examples of a petition to revoke.

d. *Authority case law:*

Internal Revenue Service, Austin District Office, Austin, Texas, 51 FLRA No. 95, 51 FLRA 1166, 1181 (1996) (Authority found no merit to exception to ALJ's issuance of subpoena where Respondent did not petition to revoke subpoena and there was no evidence that Respondent was prevented from doing so if it believed that the subpoena was improperly issued, and in fact there was no evidence that the subpoena was improperly issued).

5. **FAILURE TO COMPLY WITH SUBPOENA:**

See [Part 2, Chapter J](#).



[Part 1, Chapter J](#) subsections 2.a. and c. concerning Subpoenas and the Reluctant/Hostile Witness;

[Part 1, Chapter J](#) subsections 2.f. and g. concerning Official Time and Witness Fees; and

[Part 2, Chapter J](#) concerning Compliance with Subpoena and Sanctions.

RESERVED

## L. MOTIONS

### OVERVIEW:

The requirements of motions procedure are governed by § [2423.21](#) and the filing and service requirements are governed by Part 2429.

### OBJECTIVE:

To provide guidance concerning the different types of motions that are filed during the course of ULP litigation and the corresponding procedural requirements for filing such motions.

### 1. PROCESSING REQUIREMENTS:

a. *When and with whom to file a motion:*

i. Pre-hearing motions are filed:

- In writing, except for motions made at a pre-hearing conference;
- With the ALJ; and
- At least 10 days before the hearing, except for motions made at a pre-hearing conference. Cover a pre-hearing motion that is filed less than 10 days before the hearing with another motion requesting ALJ's permission to file a motion



that is not filed at least 10 days  
before the hearing.

§ [2423.21](#)(a), (b).

- ii. Hearing and post-hearing motions are filed:
  - Orally (hearing) or in writing (post-hearing);
  - With the ALJ; and
  - In the case of a post-hearing motion, within 10 days after the date the hearing closes, or if a motion to correct the transcript, within 10 days after the receipt of the transcript.
- iii. § [2423.21](#)(a), (b).

Post-transmission (after case has been  
transmitted to the Authority) motions are filed:

- In writing; and
- With the Authority.

§ [2423.21](#)(a), (c).

*b. Response to Motions:*

Section [2423.21](#)(b), and (c) require parties who desire to respond to motions to do so within five days of service of motion (plus five days, pursuant to § [2429.22](#), if service of motion was made by mail).



*There is no requirement that a party file a response. If the GC's position has been satisfactorily set forth by the party filing the motion, a response may not be necessary. In most instances, however, a response is filed. Discuss strategy with RA.*

*c. Number of copies:*

An original and four copies, except for one legible copy that meets the facsimile filing requirement.

§§ [2429.24](#) and [2429.25](#).

*d. Requirement for procedural motions:*

All procedural motions, including motions for extension of time, postponement of a hearing, or any other procedural ruling, shall include the position of the other parties on the motion. § [2423.21](#)(a).

Extensions of time to file documents with the Authority will be granted only if a party specifically requests such extension, i.e., the GC, as a non-requesting party, may **not** rely on extension of time granted to the

Charging Party or other allied party. Internal Revenue Service, Philadelphia Service Center, 54 FLRA No. 72, 54 FLRA 674, 681 (1998).

**2. COMMON TYPES OF MOTIONS:**

a. *Motion to Postpone a Hearing:*

- i. *Is filed immediately upon the discovery of the circumstances warranting the postponement.*
- ii. *Criteria for requesting or agreeing to a postponement:*

The GC is expected to be prepared to go to trial on the date scheduled. However, at times, the following factors arise, which individually or cumulatively may support the GC's request for a postponement:

- An essential witness becomes unavailable;
- A settlement appears likely and/or time is needed to consummate a settlement that has been agreed to in principle;
- A significant savings of the government's resources could result by consolidating the case with other cases involving the same parties; and

- Bundling the case(s) for trial with other cases in the same area will result in considerable savings of governmental resources.

In turn, the GC does not oppose a request for a postponement when:

- A delay will not affect the GC's ability to present a strong case;
- A delay will not affect the GC's ability to receive an appropriate remedy;
- The case can be rescheduled within a reasonable period of time;
- There have been no prior postponements;
- The relationship of the parties will not be adversely impacted; **and**
- The Charging Party and/or the Respondent is not opposed to a postponement.

See also [Part 2, Chapter B](#) concerning Postponement or Continuance of Hearing.

*b. Motion for a Bill of Particulars and/or a More Definite Statement:*

Typically this motion is filed with an ALJ after the issuance of a complaint but before an answer is due. The Respondent asserts that it needs additional facts to enable it to file an answer to the complaint and/or to prepare its defense for trial.

*i. First step:*

Determine whether the underlying allegation in the complaint complies with § [2423.20](#)(a) which states that a complaint must set forth the nature of the charge, the basis for jurisdiction, the facts alleged to constitute a ULP, the statutory and regulatory sections involved, and notice of the date, time, and place of the hearing before an ALJ.

*ii. When the complaint does not comply with the requirements:*

File with the ALJ a Response to Motion for Bill of Particulars and Motion to Amend Complaint. Set forth the additional facts or assertions that form the basis of the motion so that Respondent has the facts it needs to file an answer to the

complaint. This may be accomplished in one document entitled “Motion to Amend Complaint and Response to Motion for Bill of Particulars.”

iii. *When the complaint meets the requirements:*

File a response to the Motion for Bill of Particulars in opposition to the motion. If the response asks for facts that are unknown, file a response to that effect.



*Sometimes the name of the person responsible for a particular action, the precise date, time of an event, or the exact location is not known. When this is so, the response may include a statement that the facts being sought are unknown. In other situations, the facts that the GC is asked to divulge are not only unknown but are within the particular knowledge of the Respondent. The GC's response covers this matter.*

c. *Motion to Amend a Complaint:*

- i. If an allegation in a complaint is not fully and fairly litigated, the FLRA will not consider the allegation.

Bureau of Prisons, Office of Internal Affairs,  
Washington, D.C. and Phoenix, Arizona and  
Federal Correctional Institution, El Reno.

Oklahoma, 52 FLRA No. 43, 52 FLRA 421, 428-32 (1996).

- ii. The FLRA may review a matter **sua sponte** and dismiss a complaint because an allegation was not properly plead.

American Federation of Government Employees, Local 2501, Memphis, Tennessee, 51 FLRA No. 139, 51 FLRA 1657, 1660-64 (1996) (Local 2501).

See also discussion above at [Part 1, Chapter C](#), subsection 1.b.iii concerning amended complaint.

- iii. *Trial Attorney considers the following preliminary matters:*

- (a) *Deciding whether to file motion to amend the complaint after answer is filed:*

Whether the motion to amend seeks to make minor changes or make significant substantive changes, the Trial Attorney discusses the need to amend the complaint with the RD or RA before any action is taken.

- (b) *After a decision is made to file a motion to amend the complaint:*

Procedural problems are avoided if all the parties to the proceeding are immediately informed of the GC's intention to move to amend the complaint and the position of the parties is solicited.

See also [Part 1, Chapter C](#) concerning Case File Analysis.

- iv. *Due process arguments raised by Respondent:*

In opposition to a motion to amend a complaint, a Respondent most frequently relies on a claim of "surprise." Motions to amend complaints are often essential and, at times, case determinative. A Respondent asserts that:

- (a) It lacks enough time to properly respond to the amended complaint or to prepare a defense to a new allegation; or
- (b) It has not been afforded an opportunity to respond to the



allegation during the investigatory stage in accordance with § [2423.8](#).

Suggested responses:

- “The facts were unknown until such time as the motion to amend was drafted”;
- The lack of complexity of the allegation and the person accused of engaging in the conduct is present in the courtroom (or readily available) so that there is ample time for Respondent’s representative to consult with that individual and respond to the complaint;
- The addition of this allegation will not result in prolonging this proceeding. But, if the Respondent feels it needs additional time to prepare its defense the Trial Attorney does not oppose a motion to continue or postpone the hearing to a date certain if necessary; and

- The amendment alleges an (or another) instance of (a)(1) conduct and the complaint alleges a discriminatory reassignment of an employee. In this instance, the statement will be offered as evidence of animus and will be placed in evidence whether the amendment is granted or not. Therefore, the hearing will not be prolonged by granting the GC's motion to amend the complaint because the Respondent has to respond to the statement whether or not the amendment is allowed.



*ALJs are reluctant to grant a motion to amend where a Respondent claims prejudice, whether real or potential. On the other hand, an ALJ is expected to act in the interest of justice where the government's resources are at stake.*

- d. *Motion to Dismiss:*
  - i. *Whether to treat as a motion to dismiss:*
    - (a) *Respondent's answer concludes with a request for summary dismissal is not treated as a motion:*

A Respondent's answer that summarily moves for dismissal of the complaint is not treated as a motion to dismiss. The request for summary dismissal is based on the denials in the Respondent's answer. It is not necessary to treat the answer as a motion.

(b) *Motion to dismiss set forth in a separate document with argument and case citations:*

Treat the motion in the same manner as any other motion--refer it to the OALJ.

ii. *At the conclusion of GC's case-in-chief, the evidence must be viewed in the light most favorable to the GC:*

At times, a Respondent will move to dismiss a complaint at the conclusion of the GC's case-in-chief. In responding, it is important to articulate to the ALJ that before such a motion can be granted all of the evidence must be viewed in the light most favorable to the GC.

iii. *After the hearing is closed, a motion to dismiss will be granted by the FLRA if a matter becomes moot:*

Compare Federal Aviation Administration, 55 FLRA No. 44, 55 FLRA 254, 261 (1999) (case is not moot even though particular remedy may no longer be appropriate as long as a cease and desist order and a posting of a notice remain viable remedies) with Defense Mapping Agency, Hydrographic/Topographic Center, Louisville Office, Louisville, Kentucky, 51 FLRA No. 148, 51 FLRA 1751, 1754-58 (1996) (Respondent's motion to dismiss the complaint granted because the alleged violation was no longer capable of being remedied where the Respondent no longer existed and individual rights were not involved).

- e. *Motion for pre-hearing discovery:*
  - i. Section 2423.23 governs pre-hearing disclosure:

Section 2423.23(a), and (b), which provide for the exchange of proposed witness lists, including a brief synopsis of testimony, and copies of documents intended to be offered into evidence at the hearing, at least 14 days before the hearing at a pre-hearing conference, do not violate "the principles of due process." See Bureau of Indian Affairs, Phoenix Area Office, Phoenix, Arizona, 32 FLRA No. 130, 32 FLRA

903, 907 (1988) (referring to predecessor provision § 2423.14(a) on disclosure of witness lists and documents which is not violative of due process).

*ii. No other regulatory provisions exist for pre-hearing discovery:*

Accordingly, it is appropriate for the GC to oppose any motion for discovery filed.

*iii. Depositions and responses to interrogatories:*

An ALJ may order the taking of depositions and order responses to interrogatories. Such authority is restricted by GC's policy of protecting the personal privacy and confidentiality of sources of information set forth at § [2423.8\(d\)](#).

**f.** *Motion to Sever Case or Withdraw Complaint:*

*i. Motion to sever:*

*(a) When is it appropriate to file?*

When one or more cases settle and time does not permit the issuance of an amended complaint.

- (b) *When a motion to sever is filed, remember to amend the case caption if that is impacted.*
  - (c) *A motion to sever any case or cases that have settled is filed with the presiding ALJ at the start of the hearing so that the RD can process the settlement.*
  - (d) *Presiding ALJ has authority to rule on motion prior to issuance of decision.*
- ii. *Motion to withdraw complaint and remand the matter to the RD:*
- (a) *When is it appropriate to file?*

In those situations where all the cases set for hearing settle after the hearing is opened.

- (b) *The presiding ALJ has the authority to rule on the motion to withdraw a complaint.*

§ [2423.31](#)(e)(1). See also Department of Health and Human Services, Social

Security Administration, Social Security Administration Field Operations, New York Region, 32 FLRA No. 6, 32 FLRA 56 (1988).

g. *Motion to Intervene--Who files it and how is it processed:*

i. *Who files it ?*

An agency or labor organization that is not a Charging or Charged party but has a direct interest in a ULP proceeding because of the consequences of the requested remedy. In rare instances, OPM may file a motion to intervene.

ii. *How is it processed?*

A motion to intervene is processed in the same manner as any other motion, see § [2423.22](#), and the GC's position is dictated by the nature of the issues involved.

iii. *Extent of intervenor participation:*

Intervenors may only participate on the issues that the ALJ has determined to affect them.

iv. *Rulings:*

Motions to intervene are granted upon a showing that the outcome is likely to directly affect the movant's rights or duties.

*v. Appeal rights of denial of motion to intervene:*

Denial of a motion to intervene may be appealed pursuant to § [2423.21](#)(d) concerning interlocutory appeals.

*h. Motions for an interlocutory appeal:*

*i. Filing requirements:*

Interlocutory appeal motions are filed with the ALJ within five days of the contested ruling and shall state why interlocutory review is appropriate and why the Authority should modify or reverse the contested ruling. § [2423.31](#)(c). Always request a stay of proceedings when filing a motion for an interlocutory appeal.

See U.S. Department of Veterans Affairs, Veterans Administration Medical Center, San Francisco, California, 40 FLRA No. 30, 40 FLRA 290 (1991) (before the promulgation of § [2423.31](#)(c), Authority granted a joint motion for



an interlocutory appeal in a Title 38 case where ALJ denied Respondent's Motion for Summary Judgment and Authority granted the Motion).

*ii. Rulings:*

The ALJ shall grant the motion and certify the contested ruling to the Authority if:

- The question of law or policy is important and about which there is substantial ground for a difference of opinion; and
- Immediate review will materially advance completion of the proceeding, or denial of review will cause undue harm to a party or the public.

If review is granted, the Trial Attorney requests that the ALJ stay the hearing during the pendency of the appeal. If review is denied, exceptions may be taken in accordance with § [2423.40](#) after issuance of the recommended decision and order.

See [Part 2, Chapter I](#) concerning Interlocutory Appeals.



*In any case where OPM seeks to intervene in a ULP proceeding, the OGC is notified before taking a position.*



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

[Part 1, Chapter F](#) concerning Motions for Summary Judgment;

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

[Part 2, Chapter B](#) concerning Postponement or Continuance of Hearing;

[Part 2, Chapter H](#) concerning Motions made at the Hearing; and

[Part 2, Chapter I](#) concerning Interlocutory Appeals.

RESERVED

## M. TRIAL NOTEBOOK

### OVERVIEW:

A trial notebook is a tool for the Trial Attorney's use in preparing and presenting the GC case before an ALJ. Although there are alternative ways to prepare a trial notebook, use of a model notebook is helpful both to a new attorney who has minimal trial experience and the seasoned advocate who might use it as a checklist to insure that all aspects of the litigation are covered. To that end, the trial notebook ([ATTACHMENT 1M](#)) is a composite of areas that every Trial Attorney addresses in preparing for litigation on behalf of the OGC. The Index provides an outline of the contents of the book. The remaining substantive provisions offer a guide on how to review and address the issues that will be presented at trial. A significant "stand alone" provision of the notebook is the Trial Preparation Checklist which gives each Trial Attorney a snapshot of a particular point in time of the trial preparation process. A supervisor and/or mentor also uses this checklist as a tool to review the Trial Attorney's preparation for trial. Although each Trial Attorney establishes his/her own style for a trial notebook, the model notebook is your guide.

RESERVED

## N. PREPARING FORMAL DOCUMENTS AND PRE-HEARING DISCLOSURE

### OVERVIEW:

Section [2423.23](#), “Prehearing disclosure”, mandates that parties exchange proposed witness lists, copies of documents intended to be offered into evidence at the hearing, and a brief statement of the theory of the case at least 14 days prior to the hearing. The disclosure of the required information is an important device that facilitates dispute resolution, clarifies the matters to be adjudicated, informs the parties of the evidence to be adduced at the hearing, eliminates unnecessary duplication, and facilitates the development of a complete factual record during the hearing.

### OBJECTIVE:

To provide guidance concerning which papers are formal, how they are presented in the record, and pre-trial matters relating to the exchange of documents and witness lists.

### 1. FORMAL PAPERS:

- a. *When are they presented?*
  - i. The Trial Attorney is required to put into evidence two copies of the GC’s formal exhibits at the beginning of each hearing.
  - ii. Ancillary documents, if attached to a charge, must be introduced separately.

b. *What documents are formal?*

At a minimum, the formal documents consist of the Charge, Amended Charge, Complaint, Amended Complaint, written Motions, written responses to Motions, Notice of Time, Date and Location of Hearing, Notice Rescheduling the Hearing, Answer to the Complaint and Amended Answer to the Complaint.

c. *What documents are **not** formal?*

- i. The transmittal memo; and
- ii. Subpoenas, absent extraordinary circumstances (e.g., when an issue relates to the subpoena).



*Subpoenas are a part of the trial notebook. See [Part 1, Chapter M](#).*

d. *How are they presented?*

The formal papers are listed in an index and numbered G.C. Exhibit #1, with each document identified separately by distinct letter. (Example: Charge is G.C. Exhibit #1a, Complaint is G.C. Exhibit #1b, Answer to Complaint is G.C. Exhibit #1c.)

e. *Revision of list of exhibits:*

Trial Attorney is prepared to revise the GC's index of exhibits and numbering of exhibits during the pre-hearing conference in the event the exhibit is no longer needed due to duplication or stipulation.

2. **PRE-HEARING DISCLOSURE--EXCHANGE OF COPIES OF DOCUMENTS,  
WITNESS LISTS, AND THEORIES OF THE CASE:**

a. *What is exchanged and when?*

At least 14 days before hearing, the Trial Attorney exchanges with the party/ies, and, if ordered by the ALJ, copies are served on the ALJ, the following three types of information:

- proposed witness lists (including proposed [611\(c\)](#) witnesses), which includes a brief synopsis of the expected testimony of each witness, i.e., a brief statement of the facts about which the witness would testify or a summary of the testimony the witness would offer. A simple statement of the allegation(s) in the complaint the witness would address would **not** be sufficient because it would not disclose the substance of the testimony;
- copies of documents, including an index, intended to be offered at the hearing;
- a brief statement of the GC's theory of the case, including relief sought.



*Pursuant to § [2423.23\(c\)](#), the Respondent is required to disclose all defenses to the allegations in the complaint. The Trial Attorney specifically addresses this matter at the pre-hearing conference to ensure that the Respondent has raised any and all defenses that it intends to rely upon at the hearing.*



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



*A party may move the ALJ to change the disclosure date if 14 days is not deemed an appropriate time to exchange information in a given case. The Trial Attorney coordinates this with the other parties' representatives. Preferably, the parties will agree and file a joint motion requesting the change in dates for pre-hearing disclosure. Absent agreement, the Trial Attorney considers requesting that the ALJ, in a pre-hearing order, change the schedule for pre-hearing disclosure.*

**b. What is not exchanged?**

Potential rebuttal witnesses or documentary evidence are not identified or exchanged in advance because such evidence must be limited to evidence proffered in rebuttal of the Respondent's case-in-chief, and until Respondent's case has been presented the Trial Attorney is unable to determine what evidence to present on rebuttal.

**c. Motion to compel more definitive pre-hearing disclosure:**

If the Respondent's pre-hearing disclosure does not comply with the specificity required, the Trial Attorney files a Motion to Compel More Definitive Statement. For example, the following single-sentence statements of witnesses are insufficient: "Smith will testify concerning grievance practices" and "Groom will testify concerning his role as Agency representative, Agency practices, and the specifics of the event." These statements are too general, vague, and ambiguous and fall short of the requirements under section [2423.23\(a\)](#). See [ATTACHMENT 1N1](#) for an Example of a Motion to Compel More Definitive Statement.

**d. ALJ's role:**

- i. The ALJ does not participate in the pre-hearing disclosure phase of the proceeding except insofar as the pre-**

hearing order may set the schedule for pre-hearing disclosure.

- ii. The calling of witnesses or introduction of exhibits not exchanged prior to the hearing is subject to the ALJ's discretion. See [Part 2, Chapter J](#) concerning Enforcement of Subpoenas and Sanctions for further discussion.

- f. *The importance of pre-hearing disclosure document in reviewing exceptions:*

The Authority will look at the record, including the parties' pre-hearing disclosure documents, in determining whether a matter was plead in the complaint and admitted to in the Respondent's answer. See [U.S. Department of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio](#), 55 FLRA No. 159, 55 FLRA 970-71 (1999) (Authority found, by examining the complaint, the Respondent's answer and **pre-hearing disclosure document**, and the parties' post-hearing briefs, that it intended to concede the allegation that a past practice had evolved of smoking inside fire stations).

See [ATTACHMENT 1N2](#) for examples of documents that meet the requirements for pre-hearing disclosure discussed above.



[Part 1, Chapter M](#) concerning Trial Notebook (and [ATTACHMENT 1M](#));

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

[Part 2, Chapter J](#) concerning Enforcement of Subpoenas and Sanctions; and

[Part 2, Chapter U](#) concerning Adverse or Hostile Witness, Rule 611(c).

RESERVED

## O. DEPOSITIONS

### OVERVIEW:

Section [2423.24](#)(a) empowers the ALJ to regulate the course of pre-hearing matters. One such pre-hearing matter that is subject to the ALJ's discretionary power is the taking of depositions.

### OBJECTIVE:

To provide guidance concerning the use of, and other administrative matters relating to, depositions.

#### 1. WHEN USE OF A DEPOSITION IS APPROPRIATE:

- a. *To preserve the testimony of a witness who will be unavailable to testify at the hearing.*

For example, a material witness who will be out of the country for an extended period of time prior to the scheduled hearing may necessitate that a request for taking a deposition be made.

- b. *When Respondent's witness testifies about a document or note that is not brought to the trial and appears to be important, the Trial Attorney requests that the record remain open to review the document or note and to depose the witness about the contents of the document or note, if necessary. This saves time because the ALJ does not have to reconvene the hearing.*

- c. *As a rule, use of depositions for purpose of pre-trial discovery is not appropriate.*
- d. *Depositions are authorized at the discretion of the ALJ.*

**2. PRACTICE AND PROCEDURE:**

a. *How to arrange for a deposition:*

Upon discovery that a material witness will be unavailable for the scheduled hearing, the Trial Attorney: (1) requests the ALJ to issue an order for the taking of the deposition, or (2) jointly agrees with opposing counsel for the taking of a deposition.

b. *Other administrative matters:*

- The party for whom the deposed witness will appear arranges for a court reporter and normally bears the cost of that service.
- A suitable conference room for the taking of the deposition is arranged.
- If either party objects during the questioning of a witness, the witness must answer the question.
- Prior to submitting the transcript as substantive evidence at the trial, the Trial Attorney obtains rulings on any evidentiary objections raised during the deposition. If the deposition occurs post-hearing, the court reporter sends a copy to the ALJ who will make the necessary ruling.

c. *Introduction of deposition transcript from related proceeding:*

Opportunities may arise where a deposition transcript from a related proceeding, e.g., EEO proceeding, may be used either:

- i. To impeach the party witness if he testifies at trial inconsistently with the transcript; or
- ii. As a party admission, as substantive evidence in the GC's case-in-chief. In this circumstance, it is appropriate to move those portions of the transcript that contain the admissions into evidence.



[Part 1, Chapter J](#) concerning Pre-trial Preparation of Witnesses;

[Part 1, Chapter P](#) concerning Pre-hearing Order; and

[Part 2, Chapter EE](#) concerning Leaving the Record Open for Additional Evidence.

RESERVED

## P. PRE-HEARING ORDER

### OVERVIEW:

Pursuant to § [2423.24](#)(c), an ALJ may issue a pre-hearing or pre-trial order which governs all pre-hearing matters as well as any hearing matters that are addressed.

### OBJECTIVE:

To provide the Trial Attorney with guidance concerning the pre-hearing order which governs all trial matters that occur pre-hearing.

#### 1. AN ALJ ISSUES A PRE-HEARING ORDER WHICH MAY CONFIRM OR CHANGE THE FOLLOWING MATTERS:

- Date, time, and place of the hearing;
- Schedule for pre-hearing disclosure of witness lists and documents intended to be offered into evidence at the hearing;
- The date for submission of procedural and substantive motions;
- The date, time, and place of the pre-hearing conference; and
- Any other matter pertaining to pre-hearing or hearing procedures.

For example, other matters to be discussed at the pre-hearing conference, such as compliance with subpoenas.

#### 2. TRIAL ATTORNEY PREPARES PROPOSED PRE-HEARING ORDER, AS IS NECESSARY:

The Trial Attorney prepares a motion pursuant to § [2423.21](#) only if required by the circumstances of the case. For example, an answer may raise an issue which prompts a need for a pre-hearing order or when the



disclosure, or failure to disclose, a pre-hearing document raises such an issue. This gives the Trial Attorney an opportunity to shape the course of the litigation.



*The Trial Attorney attempts to agree with Respondent's representative on the method for disclosure of pre-hearing documents. Therefore, there is no need to file a motion for a pre-hearing order concerning the method for disclosure unless the Respondent's representative is uncooperative.*

See [ATTACHMENT 1P](#) for an example of a Motion for Pre-hearing Order.



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

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

## Q. PRE-HEARING CONFERENCE

### OVERVIEW:

Pursuant to § [2423.24](#)(d), unless otherwise determined by the ALJ, pre-hearing conferences will be held at least seven days before the hearing at which time the parties will discuss, narrow, and resolve issues set forth in the complaint and answer, as well as any pre-hearing disclosure matters or disputes.

### OBJECTIVE:

To provide guidance to Trial Attorneys concerning the matters to be discussed at a pre-hearing conference.

#### 1. WHEN IS A PRE-HEARING CONFERENCE REQUESTED?

**It is OGC policy to ask for a pre-hearing conference in every case that is going to hearing.** The Trial Attorney files with the OALJ a Motion for a Pre-hearing Conference simultaneously with the Complaint. The Trial Attorney has the option of using either a separate service sheet for the Complaint and the Motion for Pre-hearing Conference or one service sheet covering both documents as long as the service sheet clearly identifies the documents served.

See [ATTACHMENT 1Q](#) for an example of a Motion for a Pre-hearing Conference.

#### 2. WHEN IS IT CONDUCTED?

Section [2423.24](#)(d) states that a pre-hearing conference shall be conducted by telephone or in person at least seven days before the hearing date unless:

- the ALJ determines that a pre-hearing conference is unnecessary **and**
- No party has moved for a pre-hearing conference.

**3. MANDATORY PARTICIPATION:**

Pursuant to § [2423.24](#)(d), all parties are required to participate in the pre-hearing conference.

For whatever reason, should a Charging Party indicate a reluctance or desire not to participate, the Trial Attorney reminds the Charging Party of the requirement. If the Charging Party nevertheless chooses not to participate (and the ALJ does not mandate such participation) it will not be represented at the pre-hearing conference and the Trial Attorney should state so at the pre-hearing conference. As the Public Prosecutor, the GC represents the public's interest, not the Charging Party's. If settlement is discussed at the pre-hearing conference and the Charging Party is not represented, the Region follows the procedures and principles in the **OGC Settlement Policy** in determining whether a bilateral or a unilateral settlement is appropriate.

**4. CHECKLIST OF MATTERS TO BE DISCUSSED AT PRE-HEARING CONFERENCE:**

The Trial Attorney seeks to ensure that the matters to be discussed at the pre-hearing conference are listed in the pre-hearing order issued by the ALJ. These matters include, but are not limited to:

- Discussion of settlement efforts;
- Pre-hearing disclosure of witness list, including a brief synopsis of the expected testimony of each witness; copies of documents with an index; and a statement of theory of the case including relief requested, and any and all defenses upon which Respondent intends to rely on at the hearing;



*The Trial Attorney must be familiar with the documents that comprise Respondent's pre-hearing disclosure and be prepared to discuss any insufficiency in that which has been provided. The Trial Attorney ensures that s/he has been provided with complete lists of witnesses, documents, and that the Respondent does not intend to rely upon any other defenses not stated in the*

*pre-hearing disclosure document. The Trial Attorney may seek to amend the pre-hearing disclosure document based upon Respondent's pre-hearing disclosure document. For instance, the Trial Attorney may conclude that an additional witness is necessary to provide testimony concerning an affirmative defense raised by the Respondent. The Trial Attorney has acted in good faith in meeting the disclosure requirements and the ALJ should allow the witness list to be amended at hearing. See [62 Fed. Reg. 40911](#), 40913 (July 31, 1997) (parties expected to act in good faith in meeting their pre-hearing disclosure obligations).*

- Admissions of fact, disclosure of contents and authenticity of documents;
- Obtaining ALJ's ruling on outstanding pre-hearing motions, e.g., motion for sequestration, motion to amend complaint;
- Discussion of compliance with subpoenas and possible sanctions and/or seeking enforcement due to non-compliance (if enforcement is contemplated, the Trial Attorney asks for postponement of the hearing), and petitions to revoke, if applicable;
- Stipulations of fact;
- Appropriateness of case for disposition by bench decision; and
- ALJ's preparation of summary of pre-hearing conference.



*At the close of a pre-hearing conference, the Trial Attorney requests that the ALJ prepare a summary of the matters discussed, i.e., agreements between the parties, and actions taken by the ALJ. Under § [2423.24\(d\)](#), it is within the ALJ's discretion whether to prepare a summary of the pre-hearing conference. In the event that the ALJ declines to do so, the Trial Attorney first asks the ALJ if s/he will be presiding at the hearing. If the ALJ answers no, remind the ALJ that a summary is needed*

**Preparation for Hearing  
Pre-hearing Conference**

*for the presiding ALJ as well as for the parties. If the ALJ still refuses to prepare a summary, ask the other parties' counsel if s/he is willing to stipulate to the matters discussed and decided at the pre-hearing conference. In the event that the parties are unwilling to stipulate, the Trial Attorney memorializes the agreements among the parties and the ALJ's rulings in a pre-hearing order, covered by a motion, prepared for the ALJ's signature. If the ALJ prepares a summary, make sure that it comports with your understanding of the actions taken, and the discussion that occurred at the pre-hearing conference.*



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

**[Part 1, Chapter P](#) concerning Pre-hearing Order.**

# **PART 2**

## **HEARING**

### **(OPENING OF THE HEARING TO CLOSE OF THE RECORD)**



## A. ORDER OF HEARING

### OVERVIEW:

The hearing begins with the ALJ's opening of the record, continues with the parties' presentation of their cases, and ends with the ALJ's closing of the record.

### OBJECTIVE:

To provide a concise list of the different stages of a hearing.

### STAGES OF A HEARING:

- a. *ALJ opens the record and makes opening remarks.*
- b. *Appearances by the parties on the record.*
- c. *Preliminary matters considered if not ruled upon at pre-hearing conference:*
  - Motion for sequestration of witnesses;
  - Motion to introduce or admit formal documents;
  - Motion to amend complaint;
  - Motion to amend answer;



- Motions for sanctions or continuance when Respondent has not complied with subpoena;



*If a subpoena has been complied with, the Trial Attorney may want to note that on the record.*

- Motion for admission of stipulations, joint exhibits or GC exhibits to which there will be no objection; and
- Discussion of appropriateness of bench decision.

*d. Opening statements by the parties.*

*e. GC's case-in-chief consists of:*

- Direct examination of GC's witnesses;
- Introduction of GC's exhibits;
- Cross-examination of GC's witnesses (Furnishing of witness' statements to Respondent's counsel, if requested); and
- Re-direct of GC witnesses.

*f. Respondent's case-in-chief consists of:*

- Direct examination of Respondent's witnesses;

- Introduction of Respondent's exhibits;
  - Cross-examination of Respondent's witnesses  
(Furnishing of witness' statements by Respondent's counsel to the Trial Attorney, if requested); and
  - Redirect examination of Respondent's witnesses.
- g. Rebuttal Evidence.*
- h. Closing Argument (optional).*
- i. Closing of Record by ALJ which includes:*
- Setting time for the filing of briefs;
  - Remarks by ALJ regarding matters to be addressed in briefs; and
  - Format of briefs.

RESERVED

## B. POSTPONEMENT OR CONTINUANCE OF HEARING

### OVERVIEW:

Upon a party's motion pursuant to § [2423.21](#), an ALJ may continue a hearing either from day-to-day or adjourn it to a later date or to a different place. After issuance of complaint, motions to change the date of the hearing, i.e., postponement must be made immediately upon discovery of the circumstance which, in the judgment of the moving party, warrants a change in the date of hearing.

### OBJECTIVE:

To provide guidance concerning circumstances when it is

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**Preliminary Matters  
Postponement or Continuance of Hearing**

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**Preliminary Matters  
Postponement or Continuance of Hearing**

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1. PRACTICE:

- a. *When is a request to postpone the hearing or a request to continue the hearing made and to whom?*
  - i. Postponements--Before the hearing to the Chief ALJ.
  - ii. Continuance--At the hearing to the presiding ALJ.
- b. *For what reason?*
  - i. When important witness(es) are unavailable for the scheduled hearing date; and
  - ii. When counsel is unavailable.
- c. *The grant of a continuance is within the discretion of the ALJ:*

ALJ's decision is subject to challenge only if it can be shown that there has been an abuse of discretion in denying a continuance.

See National Labor Relations Board, 46 FLRA No. 14, 46 FLRA 107, 108 n.2 (1992) (NLRB) (ALJ did not abuse discretion in denying GC's request for a continuance to recall, for the purpose of rebuttal testimony, a particular witness who testified during the GC's case-in-chief);

See also Department of the Navy, Navy Resale System, Field Support Office, Commissary Store Group, Norfolk, Virginia, 16 FLRA No. 37, 16 FLRA 257, 257 n.2 (1984) (no prejudicial error where ALJ denied request for continuance but granted Respondent's alternative request that the record remain open in order that a deposition be taken of the unavailable witness); and Professional Air Traffic Controllers Organization, MEBA, AFL-CIO, 7 FLRA No. 10, 7 FLRA 34, 42-43 (1981) (no prejudicial error where ALJ denied Respondent's request for continuance and Respondent failed to indicate an intention to present evidence on particular issues, or to make an offer of proof).

**2. PROCESS OF REQUESTING A CONTINUANCE:**

- a. *Specify on the record all the reasons why the continuance is needed;*



- b. *Specify the prejudice which may result if the continuance is not granted; and*
- c. *Make an offer of proof if the ALJ denies the continuance at hearing.*

For example: “Your Honor, if a continuance were granted, the GC could produce Witness X who would testify as follows . . . regarding Issue X . . . .”

- 3. **OPPOSITION TO A REQUEST FOR A CONTINUANCE, CONSIDER:**
  - a. *Whether the grounds stated for such a continuance are valid given the considerations of additional government cost.*
  - b. *Whether the continuance could have been sought at an earlier point in time.*

RESERVED

## C. TRIAL ATTORNEY'S DECORUM

### OVERVIEW:

Section [2423.31](#)(a), which concerns the conduct of a hearing, states, among other things, that an ALJ “shall conduct the hearing in a fair, impartial, and judicial manner, taking action as needed to . . . maintain order during the proceedings.” Further, the ALJ “may take any action necessary to . . . conduct, . . . and regulate the hearing . . .” Although there are no specific statutory or regulatory references to decorum, this section of the Regulations authorizes an ALJ to exercise discretion in regulating the parties’ conduct at a hearing. Because this is a formal administrative procedure concerning a serious matter, the parties’ conduct is professional at all times.

### OBJECTIVE:

To provide guidance for Trial Attorneys in their conduct and responsibilities with respect to ULP hearings.

#### 1. COURTESY IS PRACTICED AT ALL TIMES AT THE HEARING:

##### a. *To whom is courtesy directed?*

The ALJ, the parties’ representatives, witnesses and any other person involved in the proceeding.

##### b. *How are individuals addressed?*

- Use appropriate language;
- Do not use familiar names;

- The ALJ is normally addressed as “Your Honor”;
- Adhere to ALJ requirements regarding whether to stand when addressing the ALJ or witnesses; and
- Use best judgment, considering the court room setting, the formality of the proceedings, and the particular circumstances of the matter.

c. *How to handle difficult situations:*

- Remain calm;
- A request for a short break or recess may be appropriate in certain situations; and
- Request a few minutes to confer with co-counsel, if available.



*Assertive advocacy in presenting the GC's case is not disrespectful conduct. Rather, it is appropriate and professional behavior that is necessary for the complete presentation of the case.*

- d. *The ALJ is responsible for controlling the hearing.*
- e. *Approaching the bench:*

- i. Each ALJ may have differing requirements with regard to how to approach the bench or how to approach witnesses.
- ii. Always request permission to approach the bench at the beginning of the hearing; the ALJ will give any further instructions in this area.

**2. HEARING ROOMS:**

- a. *The OALJ is responsible for obtaining hearing rooms for the trial and the Trial Attorney assists in ensuring that the rooms are used properly.*

Adhere to rules of usage of Federal court houses and/or Federal office buildings at all times.

- b. *Use of the hearing room if a court room facility is not available:*
  - Arrange furniture in a suitable configuration;
  - Leave the hearing room in the same condition (or better), including replacing furniture and general clean up;

- Comply with no-smoking policies;

Most government buildings have no-smoking policies for working areas, which would include hearing rooms. Even if there is no specific smoking policy, smoking is not be permitted in the hearing room at any time; and

- Comply with other rules, including rules regarding eating and drinking.

Eating and drinking are not normally allowed in hearing rooms, and particularly should not be allowed during the hearing. This is not professional behavior and detracts from the seriousness of the proceedings.

**3. DRESS:**

The Trial Attorney wears appropriate courtroom attire at all times. The Trial Attorney explains to the witness the importance of dressing appropriately for all courtroom appearances.

**4. MEDIA COVERAGE:**

Subject to the ALJ's discretion, administrative hearings are not subject to filming by individuals, activities, unions or news organizations. Photographs are usually not allowed, but, subject to the ALJ's discretion, may be permitted if all the parties agree, and such conduct is discreet and does not disrupt the proceedings. Because administrative hearings are open to the public, unless otherwise ordered by the ALJ, see § [2423.30](#)(a), reporters are allowed to observe, as other members of the public, as long as they are not disruptive.



*If an issue arises regarding conduct at the hearing and/or use of hearing rooms, it is always appropriate to request a recess and call the RA or RD for guidance.*



**[Part 2, Chapter D](#)** concerning the ALJ's Involvement and Decorum at the Hearing.

## D. ALJ INVOLVEMENT AND DECORUM AT THE HEARING

### OVERVIEW:

Section 556(c)(5) of the APA (5 U.S.C. § 556(c)(5)) and § [2423.31](#)(a) of the Regulations empower an ALJ to “regulate the course of a hearing.” ALJs have broad latitude to “receive evidence and inquire fully into the relevant and material facts concerning the matters that are the subject of the hearing.” § [2423.31](#)(b). However, in determining the course of conduct of a hearing, an ALJ must be fair and impartial. § [2423.31](#)(a).

### OBJECTIVE:

To provide guidance to Trial Attorneys concerning an ALJ’s role in inquiring fully into the facts of a case and what the Trial Attorney does when matters concerning an ALJ’s alleged conduct of a hearing in an impartial or unevenhanded manner arise.

#### 1. AN ALJ’S INQUIRY INTO THE FACTS:

##### *a. An ALJ’s questioning of witnesses:*

- Is permissible under § [2423.31](#)(b);
- May occur during direct or cross-examination;
- May raise a matter which you did not wish to pursue;
- Is subject to the same requirements as are the parties’ questions under § [2423.31](#)(b) (materiality, relevance, undue repetition or privilege);
- Is subject to objections to specific questions or lines of questioning; and



- Is subject to objections made to cross-examination questions of your witness on the same grounds as objections to Respondent's questions (badgering, asked and answered, etc.).



*In light of an ALJ's broad latitude to inquire fully into the facts, care is taken before making any objection to an ALJ's questioning. All such objections are made respectfully.*

*b. An ALJ's offering of documentary evidence into the record:*

- Occurs infrequently;
- Is subject to the same requirements as other documentary evidence: authenticity, relevance, materiality, etc.; and
- Is subject to objections.

*c. Include on the record:*

- Any questioning of witnesses by the ALJ or discussion concerning witnesses' testimony or the ALJ's offer of a documentary evidence; or
- A summary/synopsis of the ALJ's questions or comments which occurred off the record, if the questions or comments or the offered documentary evidence may

have material effect on the outcome of the case. (See discussion below on improper ALJ decorum).

- d. *An ALJ's comments, questions or conversations during the hearing:*
- Are a common occurrence. Conversations often occur during opening statements or closing remarks; and
  - Be prepared to respond to any questions concerning relevant case law posed by the ALJ.

**2. ALJ DECORUM AT HEARING:**

- a. *Standard of ALJ conduct of hearing:*

- ALJs must conduct the hearing in an evenhanded manner that is free of bias.

For example, the ALJ may not make “disparaging remarks” nor attempt to “bully Counsel for the General Counsel into agreeing with his position.”

U.S. Department of Veterans Affairs, Medical Center, Jamaica Plain, Massachusetts, 51 FLRA No. 73, 51 FLRA 871, 875, 877 (1996) (ALJ acted inappropriately and failed to conform to minimal standards of judicial behavior and case assigned to a different ALJ on remand); Compare U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C., 55 FLRA No. 20, 55 FLRA 93, 98 n.9 (1999) (Authority remanded

case to Chief ALJ for assignment to different ALJ due to intemperate nature of ALJ's comments at trial which raise significant questions whether the ALJ has predetermined the issue) with National Treasury Employees Union, 53 FLRA No. 138, 53 FLRA 1541, 1556 (1998) ("It is evident that the Judge became frustrated with and upbraided the Charging Party and his counsel in this case. Although the Judge may have uttered some intemperate remarks to the Charging Party and characterized the Charging Party's arguments and activities in a deprecating manner, the Judge's recommended decision does not appear to be tainted by any bias against the Charging Party); see also District No. 1, Pacific Coast District Engineers Beneficial Association, 274 NLRB 1481, 1485-86 (1985) (Member Hunter concurring) (ALJ disqualified on bias grounds based on record which established pattern of injudicious statements including sarcastic repartee).

*b. Procedure when ALJ's conduct of a hearing is improper:*

- Object, on the record, to the questionable conduct to ensure that the transcript reflects such objection and the basis for such objection. The objection may provide the basis for filing an exception to the ALJ's decision;



*Pursuant to § [2423.30\(d\)](#), objections not raised to an ALJ are deemed waived.*

- Review the transcript upon its receipt to ensure that the court reporter has accurately transcribed the objection. If not, file a motion to correct the transcript;



*Pursuant to § [2423.21\(b\)\(4\)](#), motions to correct the transcript must be filed within 10 days after receipt of the transcript.*

- Prepare a memorandum to the RA describing the circumstance at the hearing that gave rise to the objection;
- Expect the RA to forward the memorandum along with the pertinent pages from the transcript to the Deputy GC who will discuss the matter with the GC; and
- Discuss, upon receipt of a decision, with the RA whether to file an exception based upon the ALJ's conduct of the hearing.



[Part 1, Chapter H](#) concerning an ALJ's Involvement in Settlements;

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

[Part 2, Chapter C](#) concerning Trial Attorney's Decorum;

[Part 2, Chapter DD](#) concerning GC's Rebuttal;

[Part 2, Chapter K](#) concerning Evidence, in General; and

[Part 3, Chapter F](#) concerning Exceptions.

RESERVED

## E. THE ROLE OF THE CHARGING PARTY REPRESENTATIVE AT THE HEARING

### OVERVIEW:

Pursuant to § [2423.30](#)(c), concerning the rights of parties, the Charging Party, and all other parties to the proceeding, have the right to appear at any hearing in person, by counsel, or by other representative in order to: examine and cross-examine witnesses; introduce into the record documentary or other relevant evidence; and submit rebuttal evidence, except that the ALJ prescribes the extent of a party's participation.

### OBJECTIVE:

To provide guidance concerning a Trial Attorney's responsibilities at the hearing with regard to continuing the relationship with the Charging Party's representative that was established at the pre-hearing stage of the litigation. See [Part 1, Chapter I](#).

#### 1. BEFORE THE HEARING:

Discuss with Charging Party's representative the degree to which s/he will participate in the hearing. Ascertain to what extent the Charging Party's interests are the same or different.



*Usually, the Charging Party's representative will not actively participate in the hearing by examining or cross-examining witnesses or presenting oral argument. The Charging Party's representative may identify himself/herself on the record but only participate as a technical advisor to the Trial Attorney. The Trial Attorney will be a more effective advocate for the GC if the Charging Party representative's role is determined before the hearing begins.*

**2. CHARGING PARTY'S PARTICIPATION AT THE HEARING:**

*a. The Charging Party has a right to fully participate in the hearing by:*

- Calling witnesses;
- Presenting evidence;
- Presenting oral argument;
- Receiving documentary evidence presented by Respondent;
- Making objections to testimony and documents offered into evidence; and
- Submitting a post-hearing brief.

A Charging Party's right to participate at the hearing shall be subject to the ALJ's discretion. SBA, 54 FLRA No. 83, 54 FLRA 837, 847 (1998). In addition, the GC has the lead role in prosecuting the case. Id.

*b. The Charging Party has **no** right to:*

Expand upon the issues presented in the complaint during the hearing.

**3. TRIAL ATTORNEY'S OBJECTIONS:**

**Preliminary Matters**  
**The Role of the Charging Party Representative at the Hearing**

The Trial Attorney objects to the Charging Party representative's oral or documentary evidence, motions, and argument, to the same extent as deemed appropriate during the Respondent's examination or cross-examination of witnesses. See [Part 2, Chapter Z](#) concerning Objections.



[Part 1, Chapter I](#) concerning Relationship with Charging Party Representative; and

[Part 2, Chapter Z](#) concerning Objections.



RESERVED

## F. ETHICS

### OVERVIEW:

According to the ABA Standards of Professional Conduct “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate.” In representing the GC in ULP proceedings, the Trial Attorney is always mindful of his/her role as the “public prosecutor.”

In addition, § 554(d) of the APA, 5 U.S.C. § 554(d), contains the general prohibition regarding **ex parte** communications: “Except to the extent required for the disposition of **ex parte** matters as authorized by law, [the ALJ] may not--(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate. . . .” [Part 2414](#) of the Authority’s Regulations governs **ex parte** communications. In addition, Executive Order No. 12674, and the Authority’s Regulations at [Part 2415](#), govern matters relating to the ethical conduct of Authority employees.

### OBJECTIVE:

To provide guidance concerning the Trial Attorney’s role as the “public prosecutor” and other ethical matters that may arise during the course of litigation.

#### 1. THE TRIAL ATTORNEY’S ROLE AS PUBLIC PROSECUTOR:

##### *a. General Prosecutorial Obligations--The Trial Attorney considers the following:*

- Are the charges in complaint supported by probable cause?

- Is there evidence sufficient to establish a prima facie case?
  - Is there a good faith argument for application, extension, or modification of existing law in support of the Trial Attorney's theory of the case?
  - Is the remedy sought appropriate for the violation?
  - Do the prosecution and remedy effectuate the purposes of the Statute?
- b. *Relationship with Charging Party:*
- Avoid actions that create the appearance of partiality.
- c. *Relationship with Respondent:*
- Avoid actions that create the appearance of partiality;
  - Know how to communicate with Respondent concerning evidence, witnesses, and law that contravene your position and/or support Respondent's position; and

- Make the proper disclosures before communicating with Respondent's witnesses.
- d. *Relationship with the ALJ and the Authority:*
- Be mindful of the general requirement of candor;
  - Know how to communicate when evidence, witnesses and law that contravenes your position and/or supports Respondent's position arises; and
  - Fulfill responsibility to file exceptions, cross-exceptions, and corresponding supporting briefs.

2. **EX PARTE COMMUNICATION:**

[Part 2414](#) of the Authority's Regulations governs matters relating to **ex parte** communications.

a. *What is an **ex parte** communication?*

An **ex parte** communication is "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given." 5 C.F.R. § [2414.3](#)(b).

b. *Refrain from **ex parte** communications:*

When prosecuting a ULP case the Trial Attorney refrains from partaking in communications prohibited under § [2414.5](#):

- Communications, when written, if copies are not contemporaneously served by the attorney on all parties to the proceeding as required; and
- Communications, when oral, unless advance notice is given by the attorney to all parties to the proceeding and adequate opportunity to be present is afforded.

See, e.g., Department of Veterans Affairs, Finance Center, Austin, Texas, 48 FLRA No. 21, 48 FLRA 247, 251-52 (1993) (ALJ's discussion with one party's counsel during an **in camera** examination of a requested report that related to the merits of the case was a prohibited **ex parte** communication under Part 2414 of the Regulations).

c. *Report prohibited **ex parte** communication:*

A Trial Attorney who is involved in an **ex parte** communication reports such prohibited communication as required by § [2414.8](#). The Authority may invoke a penalty if a Trial Attorney has knowingly or willfully

violated the prohibition against **ex parte** communications. § [2414.9\(c\)](#).

- d. *Under § [2414.6](#), the following oral or written communications are not **ex parte**:*
- Matters which relate solely to what the ALJ or Authority is authorized by law to entertain or dispose of on an **ex parte** basis;
  - Requests for information solely concerning the status of a case;
  - Matters which all parties agree, or which the ALJ or Authority rules, may be made on an **ex parte** basis;
  - Matters that concern proposing settlement or an agreement for disposition of any or all issues in the proceeding; and
  - Matters of general significance to the field of labor-management relations, i.e., not related to any specific proceeding.

**3. OTHER EMPLOYEE RESPONSIBILITIES AND CONDUCT:**

All OGC employees are required to follow the requirements for employee responsibilities and conduct set forth at:

- Part [2415](#) of the Authority's Regulations;
- Exec. Order No. 12674, 54 Fed. Reg. 15159 (1989), as amended  
Exec. Order No. 12731, 55 Fed. Reg. 42547 (1990), 5 U.S.C.  
§ 7301 note, which governs the ethical conduct of government  
officers and employees.

See [Part 2, Chapter O](#) to learn how to handle purloined documents and other "Improperly" obtained evidence.



[Part 1, Chapter I](#) concerning Relationship with Charging Party Representative; and

[Part 2, Chapter O](#) concerning Purloined Documents and Other "Improperly" Obtained Evidence.



RESERVED



## G. SETTLEMENTS AT HEARING

### OVERVIEW:

Section [2423.31](#)(e) specifically sets forth authorization for informal and formal settlements after the hearing is opened.

### OBJECTIVE:

To provide Trial Attorneys with guidance as to how to process settlement agreements reached at hearings.

#### 1. POLICY:

a. *Preference for settlement in lieu of litigation.*

See [Part 1, Chapter H](#) concerning post complaint/pre-hearing settlements.

b. *Policy considerations surrounding the form and content of such agreements are identical to those applied in post-complaint/pre-hearing settlements.*

See [Part 1, Chapter H](#).

#### 2. PROCEDURE:

a. *Informal settlement agreement after opening of hearing:*

- i. First, request a brief recess to contact the RD for approval. Upon such approval,
- ii. Move for permission to withdraw the complaint on behalf of the RD, and, having been granted such permission by the ALJ,
- iii. The RD approves the informal settlement agreement.

See § [2423.31](#)(e)(1).



*This procedure applies whether the informal settlement is bilateral or unilateral. However, prior to submitting a unilateral settlement to the RD for approval, the Trial Attorney obtains the Charging Party's objections and reasons, so that they may be considered by the RD and covered in the dismissal letter.*

- b. *PSIWOC during a hearing:*
  - i. Same procedure applies as stated above in subsection "a" except that the RD ultimately approves a withdrawal request rather than the settlement agreement itself.
  - ii. This procedure also applies if a partial settlement is reached with the added requirement that the Trial Attorney moves

to sever those settled portions of the complaint.



*In neither case is the ALJ required to approve the terms of the settlement agreement or transmit such agreement to the FLRA for approval.*

c. *Formal settlement during the hearing:*

- i. If the parties reach a formal settlement during the hearing, after obtaining the approval of the RD, the Trial Attorney requests, on behalf of the RD, that the ALJ approve the formal settlement itself, and upon such approval, to transmit the agreement to the Authority for approval.

See § [2423.31](#)(e)(2).

- ii. If the formal settlement is **unilateral**, the Trial Attorney does not request the ALJ to approve the agreement until after the Charging Party is given the opportunity to state on the record or in writing its reasons for opposing the agreement.

See § [2423.31](#)(e)(2).



**[Part 1, Chapter H](#)** concerning Post Complaint/Pre-Hearing Settlements.

RESERVED

## H. MOTIONS, in General

### OVERVIEW:

At the opening of the hearing, to the extent that certain matters were not covered during the pre-hearing conference, the Trial Attorney addresses certain preliminary matters before calling any witnesses during the GC's case-in-chief. Such matters include various types of motions, the disposition of which facilitates the orderly presentation of evidence at trial.

### OBJECTIVE:

To provide guidance concerning the various types of motions filed before the start of the hearing: motions for the sequestration of witnesses; motions to amend the complaint; and motions to introduce formal documents, joint exhibits, and stipulations.

#### 1. MOTION FOR SEQUESTRATION:

##### a. *Regulatory authority:*

Under § [2423.31](#)(a), concerning the conduct of the hearing, an ALJ has broad discretion to rule on motions which includes a motion to sequester witnesses.

See, e.g., SBA, 54 FLRA No. 83, 54 FLRA 837, 847 (1998); United States Marine Corps, Marine Corps Logistics Base, Barstow, California, 5 FLRA No. 97, 5 FLRA 725, 736-41 (1981) (MCLB, Barstow) (ALJD) (discussion and application of NLRB rule on sequestration).

- b. [Rule 615](#) of the Federal Rules of Evidence provides:

“At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of:

- i. a party who is a natural person; or
- ii. an officer or employee of a party which is not a natural person designated as its representative by its attorney; or
- iii. a person whose presence is shown by a party to be essential to the presentation of his cause.”

- c. *Purpose of Motion:*

To prevent the shaping of testimony by witnesses to match that given by other witnesses, i.e., to prevent witnesses from modifying their testimony based on the testimony of others.

- d. *Timing of Motion:*



Motion is either made pre-hearing and discussed at the pre-hearing conference or at the outset of the hearing.

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

Whenever the motion is made, the intent is to minimize the witnesses' opportunity to overhear on-the-record discussion of the case, even with respect to discussion of other preliminary matters.

e. *Content of Motion:*

Request that ALJ issue an order preventing the witnesses not only from hearing the testimony of other witnesses, but also from discussing their testimony with each other. Even though such a prohibition is not within the explicit wording of [Rule 615](#), it is necessary to prevent circumvention of the Rule.

f. *General Criteria: Motion to sequester witness is made when:*

- The credibility of witnesses is expected to be an issue and witness may need to testify on rebuttal;
- Where GC witnesses are subject to intimidation or other influence by the presence of supervisors, management officials, or union officials; and

- Where witness is the Charging Party (ask Charging Party to designate a representative in this instance).



*As much as possible, seek to establish an environment in which witnesses are free of any possible influence by the prior testimony of other witnesses or by the presence of such persons during their testimony. To this end, always consider obtaining the testimony of a witness before other testimony is presented. However, this may present a problem if this witness testifies on rebuttal.*

g. *Witnesses subject to sequestration order:*

i. The discriminatee:

In *MCLB, Barstow*, 5 FLRA at 736-37, after the discriminatee had completed his testimony, the Trial Attorney requested that the discriminatee be permitted to remain in the courtroom, and Respondent's counsel objected unless the GC waived its right to recall the discriminatee as a rebuttal witness. The Judge refused to allow the discriminatee to remain in the courtroom based on his determination that the case would "hinge upon close credibility resolutions," noting that the GC would still be permitted to call the discriminatee as a rebuttal witness. (The Authority did not rule on this sequestration order).

NLRB allows limited sequestration to the extent that alleged discriminatees should be excluded from overhearing the testimony of other witnesses but only with respect to events about which the discriminatee testifies or is expected to testify. See *Medite of New Mexico, Inc.*, 314 NLRB 1145, 1148-49 (1994) (discussing rule developed in *Unga Painting Corporation*, 237 NLRB 1306 (1978)). Rule is tempered by ALJ's ultimate discretion to modify its application in specific cases.



*As a practical matter, even if the Trial Attorney believes the alleged discriminatee's unrestricted presence at the hearing*

*would be helpful to prosecute of the case, the Trial Attorney weighs the possible disadvantage should credibility be crucial to successful litigation of the case. It is possible that the discriminatee's presence during critical testimony may unfavorably "color" the ALJ's assessment of the discriminatee's credibility.*

ii. The Technical Advisor:

ALJs often exempt technical advisors from sequestration orders.

See, e.g., Veterans Administration and Veterans Administration Medical Center, Lyons, New Jersey, 24 FLRA No. 31, 24 FLRA 255, 256 (1986) (Authority rejected the Charging Party's claim that ALJ erred in permitting Respondent's technical advisor to testify without having been sequestered); compare F.E. Warren Air Force Base, Cheyenne, Wyoming, 52 FLRA No. 17, 52 FLRA 149, 154-55 (1996) (Noting that content of excluded testimony was not critical to the case, Authority upheld ALJ's ruling that prevented technical advisor from testifying where Respondent made no effort to exempt its technical advisor from general sequestration order).

iii. Respondent's counsel:

If the Trial Attorney has reason to believe that Respondent's counsel plans to testify at hearing, the Trial Attorney advises opposing counsel by letter that s/he will move to preclude opposing counsel from serving as both a witness and Respondent's representative at the hearing.

Cf. United States Department of the Treasury, Internal Revenue Service and United States Department of the Treasury, Internal Revenue Service, Austin Service Center, Austin, Texas, 25 FLRA No. 4, 25 FLRA 71, 78 (1987) (ALJD) (After describing the ethical problems raised by **union attorney's** testimony, ALJ denied Respondent's motion to strike all documents filed by union attorney, who the GC called as a witness, finding that there was no issue because the attorney took no part in the examination of witnesses, made no objections, presented no oral argument, and because the attorney's testimony was wholly uncontroverted).



*If the GC needs the attorney who acts as counsel for party to testify as a witness for the GC, request the party to secure an alternate representation to avoid compromising the credibility of the witness.*

iv. Summary and Expert Witnesses:

(a) Summary witnesses:

Present testimony based on other testimony rather than on own information, and are generally exempt from sequestration. Use of a summary witness is rare in ULP litigation.

(b) Expert witnesses:

Are also rarely used, but when called to testify at a ULP hearing, sequestration may be desirable if credibility is an issue. Where an expert witness does not testify regarding facts, but rather gives an opinion based on the testimony of others, there is little purpose served by sequestration. It may even assist such an expert witness to hear the testimony of others because the expert's testimony will then be based on a more accurate understanding of the others' testimony. United States v. Bertoli, 854 F. Supp. 975, 1037-38 (D.N.J. 1994), aff'd in part,

vacated in part, 40 F.3d 1384 (3d Cir. 1994).

### **EXAMPLE OF MOTION FOR SEQUESTRATION**

**Trial Attorney:** Your Honor, Counsel for the General Counsel moves for the sequestration of all witnesses to this proceeding, including any technical advisors, based on our expectation that credibility of witnesses will be an issue. To this end, the General Counsel requests the ALJ to issue an order to prevent the witnesses from hearing the testimony of other witnesses and also to prevent the witnesses from discussing their testimony with other witnesses until the hearing has been closed.

The sequestration order is ordinarily stated by the ALJ to witnesses present in the courtroom, but the ALJ will generally request that the Trial Attorney and opposing counsel “police” the order by instructing witnesses not to discuss their testimony until the hearing is closed.

**2. MOTION TO AMEND COMPLAINT:**

See [Part 1, Chapter L](#) subsection 2.d. concerning Pre-Hearing Motions.

**3. MOTION TO INTRODUCE FORMAL DOCUMENTS:**

See [Part 1, Chapter N](#).



*The formal documents will be received by the ALJ as a matter of course.*

**4. MOTION TO INTRODUCE JOINT EXHIBITS:**

- a. *Documents which are authentic, relevant and material.*

For example, the parties may stipulate to the introduction of the applicable collective bargaining agreement.

- b. *Early introduction of undisputed documents expedites the hearing.*
- c. *Trial Attorney describes joint exhibits briefly on the record.*
- d. *Two copies are submitted to the ALJ and copies given to each of the parties.*

**5. MOTION TO RECEIVE STIPULATION(S):**

- a. *Regulatory authority:*

Section [2423.26](#)(b) permits the ALJ to receive into evidence stipulations of fact with respect to any issue.

- b. *When to file a motion?*

Whenever possible, agreed-upon relevant facts are introduced into the record in the form of stipulations to streamline presentation.

*c. How presented?*

The motion is presented in either written or oral form. A written stipulation may be introduced as a joint exhibit or may be read into the record. A stipulation which has not been reduced to writing may be orally stated on the record. In either case, each party must signify agreement to the accuracy of the contents and admissibility of the stipulation.

**6. MOTION FOR SUMMARY JUDGMENT:**

See [Part 1, Chapter F](#).

**7. MOTION FOR COMPLIANCE WITH SUBPOENAS:**

See [Part 2, Chapter J](#).



[Part 1, Chapter F](#) concerning Motion for Summary Judgment;

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

[Part 1, Chapter N](#) concerning Formal Documents;

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

[Part 2, Chapter J](#) concerning Enforcement of Subpoenas.





## I. INTERLOCUTORY APPEALS

### OVERVIEW:

An interlocutory appeal is “[a]n appeal of a matter which is not determinable of the controversy, but which is necessary for a suitable adjudication of the merits.” Black’s Law Dictionary 815 (6th ed. 1990). Section [2423.31\(c\)](#) governs motions for an interlocutory appeal.

### OBJECTIVE:

To provide guidance concerning what circumstances warrant seeking permission to file an interlocutory appeal.

#### 1. PRACTICE AND PROCEDURE:

##### *a. Criteria for requesting permission to file:*

A request for special permission to appeal an ALJ’s ruling is grounded upon some showing that the moving party would be prejudiced by the attendant delays in awaiting the ALJ’s decision and then seeking review. Typical circumstances giving rise to such “extraordinary circumstances” might include an ALJ’s ruling to exclude certain evidence or witnesses. When this occurs, it is imperative to articulate the manner in which the evidence will be corrupted and/or the witness’s memory would likely fail if normal administrative delays accrue.

- b.** *Procedure to follow when contemplating the filing of an interlocutory appeal:*
- Coordinate with the RA/RD; and
  - Always request a stay of proceedings or that the record remain open pending the outcome of the interlocutory appeal.
- c.** *The ALJ grants the motion and certifies the contested ruling to the Authority if:*
- The ruling involves an important question of law or policy about which there is substantial ground for a difference of opinion; and
  - Immediate review will materially advance completion of the proceeding, or denial of review will cause undue harm to a party.
- d.** *The ALJ denies the motion to file an interlocutory appeal:*

After issuance of a decision and recommended order, the Trial Attorney may file exceptions to the contested ruling pursuant to § [2423.40](#). § [2423.31](#)(c)(2).

**2. CASE LAW:**

Interlocutory appeals are granted only when extraordinary circumstances are present. See U.S. Department of Justice and Immigration and Naturalization Service, 46 FLRA No. 44, 46 FLRA 492 (1992) (extraordinary circumstances not present where ALJ rejected Respondent's motions and granted partial summary judgment).

See also Veterans Administration, VA Medical Center, San Francisco, California, 33 FLRA No. 27, 33 FLRA 242 (1988) (no extraordinary circumstances despite Respondent's assertion that production of a tape recording for inspection and copying prior to hearing is essential to ensure "judicial fairness and administrative due process"); and

Department of Transportation and Federal Aviation Administration, 32 FLRA No. 23, 32 FLRA 158 (1988) (no extraordinary circumstances despite Respondent's claim that the ALJ lacked subject matter jurisdiction over the compelling need issues in light of Supreme Court's decision in FLRA v. Aberdeen Proving Ground, 485 U.S. 409 (1988)).

RESERVED



## J. ENFORCEMENT OF SUBPOENAS AND SANCTIONS

### OVERVIEW:

Pursuant to § [2423.28](#)(f) the GC may request that the Authority's Solicitor seek enforcement of a subpoena if a party fails to comply with that subpoena. In addition, a party that fails to comply with a subpoena, or any other regulatory requirement governing pre-hearing and hearing matters, is subject to sanctions pursuant to § [2423.24](#)(e).

### OBJECTIVE:

To provide guidance concerning the process of enforcement of a subpoena, a request for sanctions for non-compliance with a subpoena, or a request for sanctions for non-compliance with any other regulatory requirement.

#### 1. ENFORCEMENT OF SUBPOENA:

*a. Action by Authority's Solicitor:*

In the event of non-compliance with a subpoena, upon request of the party on whose behalf the subpoena was issued, the Solicitor shall, on behalf of that party, institute proceedings in the appropriate district court for the enforcement of the subpoena, unless to do so would be inconsistent with law and the policies of the Statute. § [2423.28](#)(f).

*b. Jurisdiction:*

U.S. District Court for the judicial district in which the person to whom the subpoena is addressed resides or is served. § [7132](#)(b) of the Statute.

*c. Motion to Continue:*

Where circumstances indicate the advisability of seeking enforcement of a subpoena, move to continue the hearing to provide the necessary time to take such action.

*d. NLRB case law:*

Duly issued subpoenas are enforced if the agency is seeking information "not plainly incompetent or irrelevant to any lawful purpose." NLRB v. Williams, 396 F.2d 247, 249 (7th Cir. 1968) (quoting Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1943)).

**2. SANCTIONS FOR NON-COMPLIANCE WITH SUBPOENA:**

*a. When to move for sanctions at hearing:*

Move for sanctions at hearing when situations arise where such action is indicated.

For example, you might request the ALJ to exclude testimony and evidence going to the matters raised in the documents which Respondent has failed to produce

in response to the subpoena. In addition, brief the issue to the ALJ.

- b. An ALJ has the discretion to issue protective orders and to order sanctions, including drawing inferences adverse to the position of the party refusing to produce documents.*

Department of Justice, United States Immigration and Naturalization Service, United States Border Patrol, El Paso, Texas, 40 FLRA No. 64, 40 FLRA 792, 803 (1991). For a discussion of adverse inferences, see [Part 2, Chapter L](#).

- c. Case law: Sanctions and Subpoenaed Documents:*

Authority case law concerning requests for sanctions, in-camera examination of subpoenaed documents by the ALJ:

Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, Silver Spring, Maryland, 30 FLRA No. 19, 30 FLRA 127, 138-40 (1987) (NWS) (ALJ did not err in not imposing sanctions for Respondent's non-compliance with subpoena and agreeing only to an in-camera review of the documents by the ALJ because, despite reluctance of courts to permit in-camera review of documents, ALJ minimized the effect of the in-camera review by adequately and accurately describing and clarifying the



content so as to provide meaningful, although limited, direct and cross-examination and argument to the ALJ).

NLRB, 38 FLRA No. 48, 38 FLRA 506, 514-16 (1990), remanded on other grounds sub nom. NLRB v. FLRA, 952 F.2d 523 (D.C. Cir. 1992) (relying on NWS, ALJ did not abuse discretion in denying sanction and adverse inference requests when Respondent refused to comply with a protective order because memorandum was provided for ALJ's in-camera review and ALJ adequately and accurately described the content of the memorandum so as to provide for meaningful, direct and cross-examination).

See also National Park Service, National Capital Region, United States Park Service, 38 FLRA No. 86, 38 FLRA 1027, 1034-35 (1990) (to the same effect), remanded on other grounds sub nom. NLRB v. FLRA, 952 F.2d 523 (D.C. Cir. 1992); and

Department of Veterans Affairs, Finance Center, Austin, Texas, 48 FLRA No. 21, 48 FLRA 247 (1993) (ALJ did not abuse discretion by not requiring Respondent to disclose documents under a protective order, but instead examining the documents in-camera and adequately and accurately describing them so as to provide for meaningful, direct and cross-examination and arguments for counsel for the General Counsel and the Union).

**3. SANCTIONS FOR NON-COMPLIANCE WITH REGULATORY REQUIREMENTS GOVERNING PRE-HEARING AND HEARING MATTERS:**

a. *When to move for sanctions at hearing:*

Move for sanctions at hearing when situations arise where such action is indicated.

b. *Situations when Trial Attorney may move for sanctions:*

i. When Respondent's case deviates from what was disclosed in the pre-hearing disclosure document:

- Respondent seeks to introduce evidence that was not listed on the index of documents provided as part of the pre-hearing disclosure document;
- Respondent seeks the testimony of a witness who was not on the list of witnesses provided by Respondent as part of the pre-hearing disclosure document; and
- Respondent seeks to rely upon an affirmative defense that was not disclosed to the Trial Attorney before the hearing, or in sufficient time to fully and fairly litigate the issue raised by the defense.

- ii. When Respondent fails to meet the regulatory time frames for pre-hearing disclosure or fails to meet the time frames for such disclosure set forth in the ALJ's pre-hearing order (and good cause for such late disclosure has not been shown). See Puerto Rico Air National Guard, 156th Airlift Wing (AMC), Carolina, Puerto Rico, 56 FLRA No. 21, 56 FLRA 174, 177 (2000), petition for review filed sub nom. American Federation of Government Employees, Local 3936, AFL-CIO v. FLRA, 00-1417 (1st Cir. filed Mar. 24, 2000). As a result of the Respondent's failure to participate in pre-hearing disclosure, Authority upheld ALJ's sanctions prohibiting Respondent from introducing evidence to the extent that the Respondent challenged any of the ALJ's evidentiary or factual findings).
- iii. When Respondent fails to comply with an ALJ's pre-hearing order.
- iv. When Respondent fails to participate in the pre-hearing conference.



*In each case in which the Respondent has failed to comply with a requirement, the Trial Attorney proposes a sanction that directly mitigates the harm caused by insufficient notice, e.g., seek to preclude witness from testifying who was not on pre-hearing witness list; seek to preclude introduction of evidence to prove defense not disclosed pre-hearing.*

**EXAMPLE OF MOVING FOR SANCTION**

**Failure to Disclose Affirmative Defense  
"covered by"**

**Trial Attorney:** Respondent has failed to disclose the “covered by” affirmative defense upon which it relies in defending against the § 7116(a)(1) and (5) allegation in the complaint. Respondent failed to comply with § 2423.23(c) in not disclosing this defense as required in the pre-hearing document dated and served by fax on November 11, 1997, nor mentioning this defense during the pre-hearing conference that occurred on November 13, 1997 (see pre-hearing conference summary).

In promulgating new ULP regulations, the Authority stated in the comments that were provided as supporting supplementary material regarding the pre-hearing disclosure regulation: “early prehearing disclosure will enable the parties to knowledgeably and more effectively prepare their cases without having to guess what evidence or theories others in the litigation will offer.” (62 Fed. Reg. 40911, 40919 (July 31, 1997)).

Counsel for the General Counsel has been prejudiced by Respondent’s failure to timely raise this affirmative defense. Because Counsel for the General Counsel has not had the required time to knowledgeably and effectively prepare a case to rebut this defense, we request that the Judge sanction the Respondent and prohibit the raising of the “covered by” affirmative defense at the hearing. Imposition of a sanction is necessary to ensure that Respondent’s failure to comply with the regulatory requirements is not condoned.

In all situations where the Respondent has failed to comply with the pre-hearing requirement to disclose defenses, e.g., Respondent fails to disclose “legitimate justification” for taking action in an (a)(2) discrimination case, the Trial Attorney would make the same argument.



*If the ALJ declines to sanction Respondent, the Trial Attorney preserves this issue for appeal to the Authority on exceptions by objecting on the record to the ALJ's decision.*

*If the Trial Attorney is caught by surprise, ask the ALJ for a brief recess so that the RA or RD can be contacted to provide guidance.*



*The Authority's statutory jurisdiction may be raised at any time, but the facts upon which the Authority determines it has jurisdiction may be challenged only upon timely exception. See NLRB v. Konig, 79 F.3d 354, 360 (3d Cir. 1996) (Court rejected consideration of jurisdictional defense that LPN's were supervisors because that "factual" determination was within Board's purview and was not raised before the Board) (citations omitted).*

*It is the GC's position that the failure to raise an affirmative defense by a responsive pleading and, as required, the Respondent has not raised the defense in a pre-hearing disclosure document, results in waiver of that defense. Note, however, in civil practice that it has been held that there is no waiver if the failure to raise an affirmative defense does not cause prejudice, i.e., the defense is raised in reasonable time. Moore, Owen, Thomas & Co. v. Coffey, 992 F.2d 1439, 1445 (6th Cir. 1993) (citation omitted) (the purpose of a rule requiring Respondent to disclose affirmative defenses is to give the opposing party notice of the defense and a chance to rebut it).*

*In addition, the Trial Attorney should be aware that unlike the Authority's regulations, no pre-hearing disclosure requirement exists under the NLRB's regulations. Miami Rivet of Puerto Rico, Inc., Miami Rivet Co. and Raytech Corp., 318 NLRB 769, 776 (1995) (cannot force pre-hearing disclosure of defenses). If necessary, the Trial Attorney is prepared to point to this difference between the Board's and the Authority's regulations to show prejudice in raising a defense that was not disclosed pre-hearing.*



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

[Part 1, Chapter P](#) concerning Pre-hearing Order;

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

[Part 1, Chapter K](#) concerning Petitions to Revoke Subpoena; and

[Part 2, Chapter L](#) concerning Adverse Inference.

RESERVED

## K. EVIDENCE, in General

### OVERVIEW:

Pursuant to § [7118\(a\)\(6\)](#) of the Statute, parties in a ULP hearing are not bound by rules of evidence whether statutory, common law, or adopted by a court.

- Section [2423.31\(b\)](#) provides that parties are not bound by rules of evidence whether statutory, common law or adopted by a court. An ALJ may receive any evidence, **except** that which may be excluded on the grounds that it is immaterial, irrelevant, unduly repetitious, or customarily privileged.
- Even though the Federal Rules of Evidence are not binding, they offer instructive guidance when dealing with evidentiary disputes. A solid understanding of the Rules is indispensable for the successful litigator. Any reference to the Federal Rules can be persuasive when dealing with objections.

See [24th Combat Support Group, Howard Air Force Base, Republic of Panama](#), 55 FLRA No. 45, 55 FLRA 273, 283 (1999); [United States Customs Service, South Central Region, New Orleans District, New Orleans, Louisiana](#), 53 FLRA No. 67, 53 FLRA 789, 794 (1997) (the determination of the matters to be admitted into evidence is within the broad discretion of an ALJ and the parties are not bound by the rules of evidence); [Indian Health Service, Winslow Service Unit, Winslow, Arizona](#), 54 FLRA No. 17, 54 FLRA 126, 127 (1998) (ALJ did not abuse discretion by denying GC's Trial Attorney an opportunity to recall a prior witness to provide rebuttal testimony); Compare [Air Force Flight Test Center, Edwards Air Force Base, California](#), 55 FLRA No. 21, 55 FLRA 116, 120-21 (1999) (ALJ did not abuse discretion in excluding disputed evidence which came into existence **after** the alleged unilateral changes); with [U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C.](#), 55 FLRA No. 20, 55 FLRA 93, 97-98 (1999) (Authority remanded case to because ALJ abused discretion in refusing to admit relevant evidence).



**[Part 2, Chapter D](#) concerning ALJ Involvement and Decorum at Hearing; and**



[Part 2, Chapters S](#) and [BB](#) concerning Direct Examination, and Cross-Examination where various Fed. R. Evid. are discussed.

## 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

## M. OFFICIAL NOTICE

### OVERVIEW:

Section [2423.31](#) permits an ALJ to take “official notice of material facts when appropriate.”

### OBJECTIVE:

To provide guidance on what the legal concept of “official notice” means and when it is used.

#### 1. DEFINITION OF “OFFICIAL NOTICE”:

Official notice is a “broader concept than judicial notice.” U.S. Department of the Treasury, Customs Service, Washington, D.C., 38 FLRA No. 74, 38 FLRA 875, 878 (1990) (Customs Service) (citing Macleod v. Immigration and Naturalization Service, 802 F.2d 89, 93 n.4 (3d Cir. 1986) and Dayco Corp. v. Federal Trade Commission, 362 F.2d 180, 186 (6th Cir. 1966)). Significantly, official notice includes “the acceptance of commonly known facts as well as matters within the specialized knowledge or expertise of the administrative agency.” Customs Service, 38 FLRA at 878 (citing 4 Stein, Administrative Law § 25.01 (1986)).

#### 2. PRACTICE AND PROCEDURE:

a. *When is request to take official notice requested?*

Before and during the hearing.

b. *Who is request made to?*

The presiding ALJ.

c. *Why make a request to take official notice?*

The grant of such request for official notice obviates the need to introduce evidence as to those facts.



*Typically, the issue of official notice arises subsequent to the hearing where one party requests either the ALJ or the Authority to take official notice of certain facts. In making a request for such official notice it is important to note the following:*

- *Both due process and the APA (§ 556(e)) require that a party be provided the opportunity to offer rebuttal evidence to the noticed fact; and*
- *Be wary of opposing counsel's attempts to use official notice as a means to add to the record, e.g., attachments to briefs, where such matters were not previously presented in a prior proceeding. [See § 2429.5](#); *but see* [Customs Service](#), above. In such a situation, file a Motion to Strike. [See Part 3, Chapter D](#), which addresses Motions to Strike.*

**3. CASE LAW:**

The Authority has endorsed official notice in a variety of circumstances:

See U.S. Department of Veterans Affairs, Veterans Affairs Medical Center, Dallas, Texas, 51 FLRA No. 77, 51 FLRA 945, 953 (1996) (proper to take official notice that performance appraisals and administrative investigations of patient abuse are contained in a system of records);

Social Security Administration, San Francisco Bay Area, 51 FLRA No. 7, 51 FLRA 58, 63 (1995) (proper to take official notice that employee awards data is maintained in a system of records);

Social Security Administration, 47 FLRA No. 32, 47 FLRA 410, 411 (1993) (proper to take official notice of ALJ decisions, including record and transcript in prior case involving same Respondent);

Social Security Administration, 45 FLRA No. 27, 45 FLRA 303, 307-08 (1992) (proper to take official notice of D.C. Circuit decision where decision arises from same facts);

Social Security Administration, Baltimore, Maryland, 22 FLRA No. 41, 22 FLRA 420, 421 n.\* (1986) (Authority agreed that ALJ erred in failing to take “administrative notice” of another ALJ’s factual findings establishing union animus in a related case); Cf. National Park Service, National Capital Region, United States Park Police, 48 FLRA No. 127, 48 FLRA 1151, 1163 n.10 (1993) (rejecting official notice for agency regulations which Respondent failed to cite or address in any previous proceedings);

SBA, 54 FLRA No. 83, 54 FLRA 837, 849-50 (1998) (1- ALJ reasonably took official notice of MSPB decision which issued after close of ULP hearing where those proceedings had been the subject of substantial testimony at the hearing and decision was in “the public domain; and 2- Denial of request to take official notice of evidence presented in a different case after the close of the ULP hearing); compare Department of Justice, U.S. Marshals Service and U.S. Marshals Service, District of New Jersey, 26 FLRA No. 104, 26 FLRA 890, 897 (1987) (ALJD) (ALJ rejected official notice of MSPB and arbitration decision offered by Respondent for purposes of witness’s credibility);

Association of Civilian Technicians, Inc. Rhode Island Chapter and U.S. Department of Defense, Rhode Island National Guard, Providence, Rhode Island, 55 FLRA No. 70, 55 FLRA 420 (1999) (Authority took official notice of technical legislative amendments)



**Part 3, Chapter D concerning Motions to Strike.**



RESERVED



## N. OFFER OF PROOF

### OVERVIEW:

During the course of the hearing the ALJ makes rulings on evidentiary matters. Such rulings may be erroneous because evidence which should have been admitted was excluded. [Fed. R. Evid. 103](#) addresses this matter.

### OBJECTIVE:

To provide guidance concerning how to preserve the record in the event that an ALJ makes an erroneous evidentiary ruling in excluding evidence.

#### 1. FED R. EVID. 103:

##### Rulings on Evidence

- (a) **Effect of erroneous ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
  - (1) **Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
  - (2) **Offer of proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

- (b) **Record of offer and ruling.** The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

2. **PRACTICE AND PROCEDURE:**

a. *When to make an offer of proof:*

When the ALJ sustains an objection to a question or line of questioning and the witness is prevented from answering the question and from testifying on that particular matter.

b. *How to preserve issue for appeal--making an offer of proof:*

- The customary way of making an offer of proof is for the Trial Attorney to state on the record what the witness would say if the ALJ permitted the witness to answer the question and what the Trial Attorney expects to prove by the answer to the question, and
- An offer of proof must be specific and contain the particulars of the witness' testimony. An offer of proof based on conclusions, as opposed to facts, is objectionable.

**EXAMPLE**

**Setting:** The ALJ sustains an objection and excludes evidence that GC believes is relevant and material. The evidence concerns a conversation.

**Trial Attorney:** Your Honor, the General Counsel makes the following offer of proof:

"If allowed to testify, GC witness Smith would testify that on March 1, 1995, she had a conversation with supervisor Jones in Jones' office. During the conversation Jones told Smith, 'you better watch out . . . .'"



[Part 2, Chapter Z](#) concerning Objections.

RESERVED

## O. PURLOINED DOCUMENTS AND OTHER “IMPROPERLY” OBTAINED EVIDENCE

### OVERVIEW:

[Part 3, Chapter M of the ULPCHM](#) provides guidance to investigating Agents on whether to accept and use evidence that may have been improperly obtained or purloined by a party. Such matters could include 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. This Chapter reiterates the principles contained in the ULPCHM.

### OBJECTIVE:

To provide information about the use of evidence supplied by a party which may have been obtained improperly by that party.

#### 1. CRITERIA FOR DETERMINING WHETHER TO USE SUCH EVIDENCE:

Consider the following in determining whether to introduce documents that have been obtained under “questionable circumstances”:

- An agent of the FLRA never engages in complicity in improperly obtaining evidence. If there is evidence of such complicity, the RA is immediately notified (or as appropriate the RD). If the Region has participated in the process of obtaining such information, the Region does **not** use this material at hearing;
- Consider whether liability (criminal or civil) will attach to the individual who provided the evidence to the Region should the evidence be introduced (or an attempt made) at hearing. The Region attempts not to embroil itself in 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

- Whether the cost of introducing (or attempting to introduce) the evidence, i.e., negative impact upon the ULP proceeding, is outweighed by any benefit to the ultimate aim of the hearing process--to determine whether a violation has occurred.

**2. AUTHORITY PRECEDENT: THE AUTHORITY HAS NOT ADDRESSED THIS MATTER IN ANY DECISIONS BUT THE FOLLOWING 2 ALJ DECISIONS ARE INSTRUCTIVE:**

National Labor Relations Board, Region 24, 2-CO-50, ALJD Rpt. No. 5 (1981) (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”).

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”).

**3. 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 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”).



[ULPCHM, Part 3, Chapter M](#) concerning Improperly Obtained or Purloined Information/Evidence

**Trial Evidentiary Matters**  
**Purloined Documents and Other “Improperly” Obtained Evidence**

RESERVED



## P. BURDEN OF PROOF

### OVERVIEW:

Section [2423.32](#) provides that the GC has the burden of presenting the evidence in support of the complaint and also the burden of proving the allegations of the complaint by a preponderance of the evidence.

### OBJECTIVE:

To gain an understanding of the GC's burden of proof and Respondent's burden of proving any affirmative defenses.

#### 1. GC'S BURDEN:

The burden of proof always rests on the GC to present the evidence in support of the complaint, i.e., proving the allegations of the complaint, by a preponderance of the evidence. The burden includes the production of evidence as well as persuading the trier of fact. This burden never shifts to the Respondent.

See Letterkenney Army Depot, 35 FLRA No. 18, 35 FLRA 113 (1990).



*Where the complaint, the Respondent's answer and pre-hearing documents, and the parties' post-hearing briefs establish that the Respondent never disputed an allegation in the complaint, the GC does **not** have the burden to prove the allegation. An ALJ may not ignore a party's admission of a material fact just as s/he may not resolve issues not encompassed in a complaint. See U.S. Department of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio, 55 FLRA No. 159, 55 FLRA 968, 970-71 (1999).*

#### 2. DEFINITION OF PREPONDERANCE OF THE EVIDENCE:

“Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.”

Black's Law Dictionary 1182 (6th ed. 1990).

**3. RESPONDENT'S BURDEN OF PROVING ANY AFFIRMATIVE DEFENSES:**

*a. The burden of persuasion shifts to the Respondent when Respondent raises an affirmative defense.*

See, e.g., Federal Emergency Management Agency, 52 FLRA No. 47, 52 FLRA 486, 490-91 n.2 (1996).

*b. An affirmative defense is a “matter asserted by [a Respondent] which, assuming the complaint to be true, constitutes a defense to it.”*

Black's Law Dictionary 60 (6th ed. 1990).

An example of an affirmative defense raised in a § [7116](#)(a)(2) discrimination case, concerns a Respondent that showed that there was a **legitimate justification** for its action and that the same action would have been taken even in the absence of protected activity. See Department of the Air Force, Warner Robins Air Logistics Center, Warner Robins Air Force Base, Georgia, 52 FLRA No. 58, 52 FLRA 602, 605-06 (1996). Another example of an affirmative defense is the statute of limitations contained in § [7118](#)(a)(4) of the Statute. See U.S. Army Armament Research

Development and Engineering Center, Picatinny Arsenal, New Jersey, 52 FLRA No. 50, 52 FLRA 527, 532 (1996).

- c. *Affirmative defenses are waived unless raised in the pleadings or in a required pre-trial disclosure document or at trial (only with proper notice--full and fair opportunity to litigate).*
- d. *If affirmative defense is raised, the Trial Attorney considers:*
  - i. Whether defense was raised in answer or in document provided to satisfy pre-hearing disclosure requirements;
  - ii. If so, the Trial Attorney had sufficient notice of Respondent's defense. Where possible, Trial Attorney rebuts Respondent's evidence by contradictory or explanatory evidence.
  - iii. If not, the Trial Attorney seeks to preclude Respondent from relying upon the defense.

See [Part 2, Chapter J](#) concerning Sanctions for additional discussion.



[Part 2, Chapter J concerning Sanctions.](#)

RESERVED



## Q. OPENING STATEMENTS

### OVERVIEW:

Before the trial begins, the parties have the opportunity to make opening statements. The Trial Attorney always makes an opening statement.

### OBJECTIVE:

To provide guidance concerning making an effective opening statement.

#### 1. PURPOSE OF OPENING STATEMENT:

To acquaint ALJ and Respondent with nature of GC's case, GC's theory of violation and what GC's proof will be.

#### 2. CHECKLIST FOR AN EFFECTIVE OPENING STATEMENT:

- Be concise, clear and direct;
- Explain key facts and issues;
- Discuss remedy being sought;
- Mention known defenses and how GC will deal with them (e.g., credibility, "covered by");
- Reveal problems that you know will come up;
- Do not overstate case; and
- Do not argue case--opening statement is a short narrative to give ALJ an overview of GC's case.

#### 3. AS THE PUBLIC PROSECUTOR, TRIAL ATTORNEY ALWAYS MAKES OPENING STATEMENT.



*Be ready to answer ALJ's questions regarding legal theory and cases that support or do not support GC's theory. Always respond to questions posed by the ALJ.*

### **EXAMPLE OF OPENING STATEMENT**

Your Honor, the General Counsel is alleging that the Respondent violated § 7116(a)(1) and (5) of the Statute by repudiating a negotiated grievance settlement agreement. The evidence will show:

On August 17, 1995, the Union filed a grievance under the negotiated grievance procedure for bargaining unit employee Bill Smith, contending that Mr. Smith, a GS-14 officer, was due a temporary promotion to a GS-15 for time Respondent detailed him to serve as Acting Associate Chief of Respondent's RO. This is a common grievance situation and the parties call grievances of this nature: higher-graded duty grievances.

On August 9, 1996, after investigating the grievance, after several discussions with the Union, and after receiving guidance from Respondent's National Office, John Sloan, the Chief, and Tom Jackson, the Associate Chief, of the Respondent's RO, signed a written settlement agreement with the Union in full resolution of Mr. Smith's grievance.

The negotiated settlement agreement provided that Mr. Smith would receive a retroactive temporary promotion to the GS-15 level for the period June 2, 1991 to July 25, 1992, the time when he served on detail as the Acting Associate Chief.

It took the Respondent one year to decide to settle Mr. Smith's grievance. We are not here to revisit that decision. We are not here to argue the merits of the Smith grievance.

In October 1996, Respondent notified the Union that it was rejecting the Smith settlement agreement. Since then, Respondent has failed and refused to comply with the terms of the settlement agreement. The Respondent claims as an affirmative defense that the agreement is illegal and has alluded to the Back Pay Act. While the Authority has held that an agreement that is violative of law is unenforceable (GSA, 50 FLRA No. 28, 50 FLRA 136), there is nothing in the Smith

settlement agreement that is contrary to law including the Back Pay Act. Parties have tried this type of defense before without success. The Authority has rejected an after the fact claim that a grievance settlement providing back pay for the performance of higher-graded duties is void as contrary to the Back Pay Act. (DLA New Cumberland PA, 50 FLRA No. 49, 50 FLRA 282). In that case, the third-step deciding official granted a grievance, claiming backpay for higher-graded duties. After that, higher-level management repudiated the resolution claiming it did not comply with the Back Pay Act as the resolution did not contain a finding that the grievants had suffered an “unjustified or unwarranted personnel action . . . [resulting] in the withdrawal or reduction of all or part of the pay” (quoting the Back Pay Act). On review, the Authority and ALJ rejected this defense finding that the grievance settlement was consistent with the Back Pay Act as the third-step official’s decision to grant the grievance and awarding backpay constituted the required “unjustified action resulting in loss of pay” finding for entitlement to backpay under the Back Pay Act. The same applies to the Smith settlement agreement. Respondent’s officials, by signing the Smith agreement, determined that Smith suffered an unjustified personnel action resulting in a loss of pay (i.e., while on detail he performed higher-graded duties without proper compensation). Accordingly, as in the DLA New Cumberland case, Respondent’s affirmative defense will fail.

Counsel for the General Counsel respectfully requests that your Honor find that the Respondent violated § [7116\(a\)\(1\)](#) and (5) of the Statute by repudiating the August 9 Smith settlement agreement and order Respondent to carry out and abide by the terms of the agreement. Specifically, General Counsel requests the award of backpay and interest to Mr. Smith for the period in which he was temporarily promoted, as set out in the settlement agreement. In addition, the General Counsel requests that Respondent be ordered to post an appropriate Notice to All Employees, signed by Robert King, Respondent’s Director, throughout Respondent’s ROs.

RESERVED

## R. DOCUMENTS

### OVERVIEW:

If the parties have not agreed to stipulate all, or a portion, of the exhibits for the trial, the Trial Attorney is responsible for ensuring that all GC exhibits are properly introduced and received into the record. (See [Fed. R. Evid. 1002-1004](#)).

### OBJECTIVE:

To provide guidance to the Trial Attorney concerning the procedural steps involved in introducing a document into evidence and in the **voir dire** of a witness.

### 1. STEPS INVOLVED IN INTRODUCING A DOCUMENT:

- Generally, before the hearing, the Trial Attorney marks the documents for identification with the GC Exhibit Number located in the bottom right hand corner of all documents. This is normally done in conjunction with the creation of an exhibit list. Documents can, of course, be marked at the hearing and the court reporter can be requested to mark the exhibits. The Trial Attorney needs to be flexible;
- Copies go to:
  - The ALJ (to go to the court reporter at end of hearing);
  - The court reporter;
  - Respondent's counsel; and
  - Other parties.
- Authentication of a document by the testimony of the witness;
- Offering of document into evidence;

- Respondent's counsel is permitted to examine document and to make any objections to the document. ALJ may allow **voir dire** of the witness at this time;
- Trial Attorney's response to any objection to the introduction of the document into the record. See [Part 2, Chapter Z](#) concerning Objections;
- ALJ rules on admissibility of document;
- If admitted into evidence, continue questioning witness on direct examination. See [Part 2, Chapters S](#) and [BB](#) concerning Direct and Cross-Examination; and
- If document is rejected, request that it be placed in the rejected exhibit file.

**2. AUTHENTICATION:**

Before any writing (document) may be received in evidence, it must be "authenticated"--a foundation sufficient to support a finding that the document is genuine and what it purports to be must first be laid. [Fed. R. Evid. 901](#).

**3. CONTROL OF DOCUMENTS- -THE TRIAL ATTORNEY:**

- Maintains control of documents at all times during the hearing.*
- Routinely follows a method with regard to the*

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c. *Ensures that adequate numbers of legible copies of documents are available as needed.*

**4. REJECTED EXHIBITS:**

a. *Are placed in a rejected exhibit file.*

- b. *Two copies of such documents are also given to the court reporter, who sends the rejected exhibit file with the documents received into evidence and the transcript to the Region.*



*In order to persuade the ALJ to reverse his/her decision and to allow a document into evidence, or to argue before the Authority that the document should have been entered into the record, the document itself is necessary. Do not withdraw the request to enter the document; rather, it should always be placed in the rejected exhibit file. If the ALJ does not do this automatically, the Trial Attorney requests that the document be placed in the rejected exhibit file.*

**5. USE OF DOCUMENTS OR TESTIMONY AND BEST EVIDENCE RULE:**

If available, it is generally better to use the document itself rather than testimony about the document. Once the document is received into the record, the witness is not asked to read the document. ALJs will routinely sustain objections to these types of questions because the document is already in the record and speaks for itself. This does not mean, of course, that a witness cannot be questioned about the document, such as purposes of the document, its relationship to other correspondence and the sequence of events at issue.

**6. Example of Introduction of Document:**

**Trial Attorney:** Let me show you what has been marked for identification as GC Exhibit 10. Do you recognize this document?

**Witness:** Yes.

**Trial Attorney:** Please state the circumstances when you first saw GC Exhibit 10.

**Witness:** It came in the regular mail delivery at the union office. We date stamp everything that is delivered to the union office; this is our date stamp and it says January 2, 1997.

**Trial Attorney:** Do you know who sent it to you?

**Witness:** Yes. This is from the Commander; this is his signature. I get documents from him all the time. Also, we had discussed this issue over the holidays and he told me he was sending a letter.

**Trial Attorney:** I would like to enter this document into the record as GC Exhibit 10.



*To avoid confusion in the record, remember to refer to Exhibits by their correct identification, such as GC Exhibit 10; Joint Exhibit 2; or Respondent's Exhibit 4 during any examination of a witness with regard to the document.*

## 7. VOIR DIRE:

Is often used with expert testimony as a tool to cast doubt on the witness' opinion testimony. Parties most often use **voir dire** in administrative hearings with regard to the introduction of documents where there is doubt as to the existence of facts supporting the foundation for admission of evidence.

If a Respondent has not laid a proper foundation, the Trial Attorney has two alternative approaches:

- Object to the admission of any document on the basis that a proper foundation has not been laid, or
- Request ALJ's permission to **voir dire** the witness. With an objection, Respondent's counsel and the witness may be able to rephrase their questions and responses to develop the specific information needed to meet the objections and allow the document into evidence. Responses under **voir dire** may elicit

more specific information for the basis of any objection. Even if the document is admitted into evidence, the response to **voir dire** may present adequate information to argue on brief the credibility and usefulness of such evidence.

Another use of **voir dire** is when, after a break in Respondent's direct examination, the Trial Attorney **voir dire**s the witness concerning a possible breach of a sequestration order (see section 9 below for an example).

**8. EXAMPLE OF VOIR DIRE:**

**Trial Attorney:** Your Honor, I request permission to **voir dire** the witness.

**ALJ:** Granted.



*Respondent's counsel may object; be prepared to state basis of your request for **voir dire**, such as to examine this witness regarding his specific knowledge of how the document was created.*

**Trial Attorney:** Let me show you what has been marked for identification as Respondent's Exhibit 5. Did you prepare this document?

**Witness:** No, but I told the Agency at the Headquarters level that we would need a document to show the bargaining history. I know that they assigned John Lewis to look through the copies of the handwritten notes that the former Labor Relations Director took during the 1982 negotiations.

**Trial Attorney:** Do you know how this document was created?

**Witness:** I know I told them to look through the Director's notes and to compile this data based on that.

**Trial Attorney:** Did you look at the notes yourself?

- Witness:** Yes, but I couldn't read the Director's handwriting. Mr. Lewis has had much more experience than me with reading bad handwriting and I know that he didn't have any trouble.
- Trial Attorney:** So, you didn't look at the documents that were the basis of this exhibit?
- Witness:** No.
- Trial Attorney:** And were you present at the 1982 negotiations?
- Witness:** No.
- Trial Attorney:** Did you talk to the Director about these 1992 negotiations or his handwritten notes?
- Witness:** No. He has been dead for 6 years and we didn't talk that much before he died.
- Trial Attorney:** Do you know what this exhibit actually says?
- Witness:** All I know is that I needed something that would help me and I got it.
- Trial Attorney:** Your Honor, I object to the introduction of this document. The Respondent has failed to adequately authenticate this document. This witness has no personal knowledge of the creation of this document and cannot vouch for its accuracy.
- ALJ:** Objection sustained. Exhibit rejected.

**9. EXAMPLE OF VOIR DIRE TO EXAMINE A WITNESS AFTER A BREAK IN RESPONDENT'S DIRECT EXAMINATION, CONCERNING A POSSIBLE BREACH OF THE SEQUESTRATION ORDER:**



**Trial Attorney:** Your Honor, without attempting to impugn the integrity of Respondent's counsel, a question has arisen concerning a breach of the sequestration order during the break. Therefore, I request that I be allowed to examine this witness under **voir dire** with regard to actions that occurred during the break.

**ALJ:** Granted.

**Trial Attorney:** Were you present in the sequestration room during this last break?

**Witness:** Yes.

**Trial Attorney:** Were witnesses for both the Activity and the Union present in the break room?

**Witness:** Yes, at first--but then our lawyer asked all the Union witnesses to leave. And they did.

**Trial Attorney:** Was Mr. Smooth, the Activity's representative, also present in the sequestration room?

**Witness:** Yes.

**Trial Attorney:** Did he give a rendition of the individual testimony that had been presented by witnesses in this proceeding?

**Witness:** Yes.

**Trial Attorney:** Did he ask you specific questions relating to the earlier testimony?

**Witness:** Yes.

**Trial Attorney:** Did you answer his questions?

**Witness:** Yes.

**Trial Attorney:** Did other witnesses also answer his questions?

**Witness:** Yes.

**Trial Attorney:** So all five witnesses for the Activity were present in this room and all five heard the Activity's lawyer discuss previous testimony and participated in the discussion.

**Witness:** Yes.

**Trial Attorney:** Your Honor, based on this information, it appears that the Respondent has violated the sequestration rule. Therefore, I request that this be considered in determining the credibility of the testimony presented by Respondent.



[Part 2, Chapter H](#) concerning Motions and Sequestration of Witnesses; and

[Part 2, Chapter Z](#) concerning Objections.

## S. DIRECT EXAMINATION

### OVERVIEW:

Direct examination is the most important part of the trial. It is during this phase of the trial where the Trial Attorney establishes the GC's case-in-chief.

### OBJECTIVE:

To provide guidance on the organization of direct examination which includes the objectives of direct examination, structuring the questions, what to avoid, and techniques to use to elicit testimony.

#### 1. ORGANIZING THE DIRECT EXAMINATION:

- Introduce the witness;
- Establish witness credibility;
- Elicit information from witness needed to prove or corroborate the elements of GC's case;
- Elicit information from witness to refute proof or credibility of Respondent's case;
- Elicit facts that support accuracy and credibility of witness; and
- Elicit evidence that is not helpful to case, in least harmful manner, to blunt Respondent's cross-examination.

#### 2. STRUCTURING THE QUESTIONS:

##### a. *Testimony must show that evidence is:*

- Relevant--probative of a fact in issue;

- Competent--sufficient foundation to be admissible; and
  - Material--immediate to the facts in issue.
- b. *Sample Direct:*
- i. Introduction--questions to introduce and calm the witness:
    - What is your name?
    - Where do you work?
    - How long have you worked there?
    - What is your position?
  - ii. Background--questions to establish witness is familiar with subject matter.
  - iii. Body of Direct--the substantive part of the examination where the witness in his or her own words tells what s/he knows about the case.
  - iv. Format of questioning--Question and Answer Technique (i.e., who, what, where, and how):
    - Who was present at the meeting?

- Where was the meeting held?
- What was said at the meeting?
- Then what happened?
- Are you familiar with the leave system at your facility?
- Describe how the leave system works.



*The benefit of the Q & A format is that short, simple, and direct questions are easy to answer to structure the testimony so that key points are covered.*

v. Format of questioning--Narrative

“Tell the Judge in your own words what happened . . . and then what happened.”



*Some attorneys favor the narrative approach because it permits the witness to tell his/her story in a natural and convincing manner. To be used successfully, however, the witness must be confident and articulate, and s/he must cover key points without prodding. Be aware that opposing counsel may justifiably object on the basis that narrative testimony does not allow opportunity to preclude, by objection, inadmissible testimony.*

*If narrative questioning is used, the Trial Attorney carefully listens to the testimony and interjects a*

*clarifying question if the witness does not respond properly to the question. Further, the attorney checks notes to ensure that the witness covers all points. If not, the Trial Attorney elicits the testimony with appropriate questions.*

vi. Leading Questions:

- Suggest the answer counsel desires, e.g., “Isn’t it true ...?” “Were you ...?” “Did you ...?”
- Generally are not permitted on direct examination.
- Generally are not helpful or advisable during direct because testimony is perceived as coming from the attorney instead of the witness--may also confuse witness;
- Are permissible:
  - To cover background introductory matters;
  - To cover uncontested matters;
  - To establish a place in time;

- To examine a hostile or adverse witness;
- To examine a confused witness; and
- To establish necessary evidentiary foundations, e.g., was exhibit created in ordinary course of business?

**3. WHAT TO AVOID ON DIRECT:**

- Compound questions--two questions hooked together--are too confusing to answer;
- Questions that call for speculation--e.g., "What would have happened if. . . ?" are objectionable; and
- Verbal Static--echoing the witness' answer--e.g., "Ok", "all right," "thank you," "uh-huh," "I see." These are distracting and add nothing to your presentation.

**4. TECHNIQUES TO ELICIT TESTIMONY WHEN WITNESS CANNOT RECALL INFORMATION SOUGHT:**

- a. *Refreshing recollection--[Fed. R. Evid. 612](#), as it relates to FLRA proceedings, provides in relevant part:*

Writing used to refresh memory

Except as otherwise provided in criminal proceedings by § 3500 of title 18, United States Code, if a witness

uses a writing to refresh memory for the purpose of testifying, either -

- i. while testifying, or
- ii. before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the ALJ shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the FLRA in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the ALJ shall make any order justice requires.

*Questions to refresh a recollection:*

- Determine that the witness cannot recall the information sought;
- Ask the witness whether there is a writing or object that would refresh his/her memory;



- Tender the writing or object to the witness;
- Determine whether the witness' review of the writing or object refreshes his/her memory;
- Determine that the recollection is independent of the writing or object; and
- Once the recollection is refreshed, take writing or object back from the witness and continue with the examination.



*Any object or writing can be used to refresh a witness's recollection and the document does not have to be admissible.*

*The Trial Attorney does **not** introduce the writing or object into evidence because the witness's testimony, not the item used to refresh the witness's recollection, is the evidence to be considered by the fact-finder.*

*The adverse party has the right to examine the writing or object for cross-examination and to introduce the writing or object into evidence.*

#### **EXAMPLE OF REFRESHED RECOLLECTION**

**Setting:** Witness, after prodding with the leading questions, cannot recall the details of a material conversation with management representative Jones.

**Q:** Can you recall what was said during this conversation?

**A:** No.

**Q:** Is there anything that would refresh your recollection of this conversation?

**A:** Yes, the affidavit I gave the Authority.

**Q:** Your Honor, may I hand the witness his affidavit?

**ALJ:** Proceed.  
After witness finishes reviewing the affidavit--

**Q:** Did your review of your affidavit refresh your recollection of this conversation?

**A:** Yes.

**Q:** Can you now tell us what was said during this conversation?

**A:** Yes.

**Trial Attorney:** Let the record reflect that the witness has returned his affidavit to the GC--

**Q:** What was said during this conversation?

**A:** Jones said. . .

*b. Past recollection recorded--[Fed. R. Evid. 803\(5\)](#)  
Hearsay Exception:*

**Recorded recollection.** A memorandum or record concerning a matter about which a

witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

*Questions to introduce evidence of past recollection recorded:*

- Determine that the witness cannot recall the information sought, even with the assistance of written records or documents;
- Determine that the witness once had knowledge of the event referred to in the writing;
- Determine that the writing was prepared by or adopted by the witness when the information was known to him/her and that it accurately reflects his/her knowledge;
- The writing may then be read into the record; but

- Only the adverse party may introduce the writing into evidence as an exhibit.

**EXAMPLE OF PAST RECOLLECTION RECORDED**

**Setting:** Same as above, but the witness after reviewing his affidavit cannot recall what was said during his conversation with Jones.

**Q:** After reviewing your affidavit, can you now recall what was said during this conversation?

**A:** No.

**Q:** Did you once have knowledge of this conversation?

**A:** Yes.

**Q:** When was that?

**A:** When I gave my affidavit.

**Q:** On what date was your affidavit prepared?

**A:** May 15, 1995.

**Q:** When was the conversation with Jones?

**A:** March 1, 1995.

**Q:** When you gave your affidavit was your conversation with Jones fresh in your mind?

**A:** Yes.

**Q:** Did you review your affidavit before you signed it?

**A:** Yes.

**Q:** To ensure it was accurate and complete?

**A:** Yes.

**Q:** Does your affidavit accurately reflect your knowledge of what was said during your conversation with Jones?

**A:** Yes it does.

**Trial Attorney:** Your Honor, I request that the witness be allowed to read into the record that part of his affidavit concerning his conversation with Jones.

**ALJ:** Proceed.

**Witness:** "Jones told me . . . ."

RESERVED





## **T. "JENCKS' ACT"** **(PRODUCTION OF WITNESSES' STATEMENT AT HEARING)**

### **OVERVIEW:**

For purposes of cross-examining the GC's witnesses, upon Respondent's request, the Trial Attorney turns over written statements obtained from that employee-witness.

### **OBJECTIVE:**

To provide general information concerning the evolution of the Jencks' rule in criminal law and how it has been adapted in administrative law; what documents are governed by this rule and the corresponding practice and procedure; and application of the rule to Respondent's witness statements (reverse Jencks Rule).

#### **1. BACKGROUND (CRIMINAL LAW):**

a. *Jencks v. United States, 353 U.S. 657 (1957)*  
*(Jencks)*:

A criminal trial in which two government witnesses testified about written reports they had made to the FBI concerning the defendant's illegal conduct. The witness's statements related to Jencks' alleged false swearing in an affidavit given to the NLRB concerning his affiliation with the Communist Party.

Jencks' defense counsel asked for the statements and was refused; on appeal the Supreme Court reversed the Jencks conviction saying that the defense had a right to such documents if the following two criteria were met:

- There was a demand by the defense for production of specific statements possessed by the Government in order to see them and determine what may be made of them, and
  - The demand was for the statements of actual witnesses as opposed to non-witness informants.
- b. *The Jencks Act (18 U.S.C. § 3500) (1994):*
- i. Applies to all **criminal** proceedings ([Fed. R. Crim. P. 26.2](#)) and has been held to apply to administrative proceedings ([See Section 2](#) below).
  - ii. States that no statements of witnesses in possession of the Government are available until after witness has testified on direct examination. The Trial Attorney need not provide statement if the witness is not going to testify.
  - iii. Allows the defendant to move for production of statements (after direct examination by the Government) which **relate to** the subject matter of the proceedings and for the presiding judge to determine what shall be released to the defendant.

- iv. Allows for sanctions if statement not produced.
- v. Defines the term "statement" to mean:
  - (a) A written statement made by the witness **and** signed or otherwise adopted or approved by him/her;
  - (b) A stenographic, mechanical, electrical, or other type of recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness, and recorded contemporaneously with the making of such oral statement; or
  - (c) A statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

**2. ADMINISTRATIVE PROCEEDINGS--CASE LAW:**

- a. *Harvey Aluminum v. NLRB*, 335 F.2d 749 (9th Cir. 1964):

Applied "rule" of Jencks Act to NLRB proceedings because "the law under which these agencies operate prescribe[s] the fundamentals of fair play . . .," citing Jencks, above.

- b. NLRB v. Clement Bros., 407 F.2d 1027 (5th Cir. 1969):

Applied Jencks' Rule only to statements of witnesses not of every individual who gave statement to the NLRB.

- c. Stride Rite Corp., 228 NLRB 224 (1977):

Jencks' Rule does not apply to GC's notes and memos of conversations with witnesses absent a showing that the witnesses adopted or approved the notes.

- d. Caterpillar Inc., 313 NLRB 626 (1994):

ALJ must excise portions of the affidavit that do not relate to the matters to which the witness testified on or to matters raised by the pleadings.

- e. NLRB v. Champion Labs. Inc., 99 F.3d 223 (7th Cir. 1996):

Under the Jencks' Rule, a Charged Party has access to pre-trial statements of a government witness only after witness has testified. If employer obtained affidavit

before trial, it could effectively discourage employees from testifying and thereby frustrate the NLRA.

f. North American Rockwell Corp. v. NLRB, 389 F.2d 866 (10th Cir. 1968):

Jencks' Rule does not require the prosecutor to turn over any exculpatory evidence uncovered during the investigation. It is limited to the disclosure of pre-trial statements, after witness has testified, for cross-examination.

**3. FLRA CASE LAW:**

In Department of the Treasury, Internal Revenue Service, Memphis Service Center, 16 FLRA No. 100, 16 FLRA 687, 687 n.1 (1984) (Treasury), the Authority stated:

The Charging Party excepted to the Judge's ruling permitting disclosure by the General Counsel to the Respondent, for purposes of cross-examination, of written statements previously obtained from employees to support issuance of the complaint, after such witnesses had testified at the hearing. The Judge relied on the "Jencks Rule" as set forth by the U.S. Supreme Court in Jencks v. United States, 353 U.S. 657 (1957). The Authority specifically adopts the Judge's ruling, for the reasons she stated, noting that the "Jencks Rule" has been held applicable to administrative hearings. See Communist Party of the United States v. Subversive Activities Control Board, 254 F.2d

314 (D.C. Cir. 1958); NLRB v. Adhesive Prods. Corp., 258 F.2d 403 (2d Cir. 1958).

SBA, 54 FLRA No. 83, 54 FLRA 837, 848-49 (1998) (citation omitted) (ALJ properly denied post-hearing motion for documents under Jencks because documents could only be under during cross-examination and ALJ denied request to reopen record).

See also 62 Fed. Reg. 40911, 40913 (July 31, 1997) (maintenance of Jencks rule endorsed in Treasury).

**4. PRACTICE AND PROCEDURE:**

*a. Respondent's rights and responsibilities:*

- GC has no obligation to advise Respondent of its Jencks rights;
- Respondent does not have an automatic right to have GC witness affidavits or statements produced;
- Respondent must request the statement **after** each witness testifies for the GC and before Respondent begins cross-examination of the witness. Respondent waives right to GC statements if it makes request after the witness has been cross-examined and excused, Army Aviation Center, 216 NLRB 435 (1975), or after Respondent is well into its cross-examination of the witness. I-O Services, 218 NLRB 566 (1975); and

- Only provide that which was requested. For example, usually the Respondent asks only for affidavits--provide only the affidavits, if any. Do not provide other documents, such as confirming letters unless specifically asked for.

*b. In addition to GC affidavits the Jencks' Rule applies to:*

- Any statement provided the GC by a witness provided the witness signed or adopted or approved the statement; and
- A document that has been incorporated into a witness statement (e.g., instead of going into background facts in the statement the witness directs the FLRA to review his statement in a prior case or, instead of detailing the remarks made in a letter, the witness specifically incorporates the letter into the statement).



*If one statement is taken for multiple cases, but only one of the cases is the subject of the complaint, the Trial Attorney prepares a sanitized version for Respondent's counsel (i.e., obliterating the facts or contentions in the other cases, if possible) and maintains a "clean" copy for the ALJ's review, **in camera**, in case the Respondent challenges the sanitization.*

- c. *When turning over that which is requested, state on the record that GC is giving a copy of statement to Respondent's counsel.*
- d. *Request that statement be returned after Respondent's counsel has finished cross-examination and indicate on the record that you have received it back. Respondent does not keep GC statements or make a copy of them.*



*However, the Jencks' Act contains no provision regarding the return of a witness's statements must be returned to the Government. United States v. Harloff, 826 F. Supp. 675, 676 (W.D.N.Y. 1993). Compare United States v. Badalamenti, 626 F. Supp. 655 (S.D.N.Y. 1985) (denial of return of Jencks materials directly following cross-examination of witness to whom materials related) with United States v. Fried, 1989 WL 88495 (6th Cir. 1989) (court granted similar request for the return of Jencks materials following their use at trial).*



*Thus, it is within the ALJ's discretion to determine when Jencks materials must be returned to the Trial Attorney.*

**5. "REVERSE" JENCKS--APPLICATION TO RESPONDENT'S WITNESS STATEMENTS:**

If you are aware that Respondent, during its "investigation" of the ULP charge, obtained pre-trial statements from its witnesses, ask for this statement(s) before you cross-examine Respondent's witness. If Respondent's counsel confirms that its witness gave a statement, ask that it be produced for your use in cross-examining the witness. In response to Respondent's objection, point out that [Fed. R. Crim. P. 26.2](#), which implemented the Jencks' requirements, requires that statements of defense witnesses be turned over to the Government. Moreover, Jencks itself covers statements in the hands of the "Government" and Respondent is the "Government."

## U. ADVERSE OR HOSTILE WITNESSES, RULE 611(c)

### OVERVIEW:

[Fed. R. Evid. 611\(c\)](#) of the Federal Rules of Evidence, permits a party to call an “adverse or hostile” witness during that party’s own case and to examine such witness as if on cross-examination. Included under this rule are all persons who are identified with an adverse party.

### OBJECTIVE:

To provide guidance concerning the criteria the Trial Attorney considers in determining whether to invoke Rule 611(c) in the questioning of a witness.

#### 1. [RULE 611\(c\)](#): WHAT IT PROVIDES:

Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness’ testimony. Ordinarily leading questions are permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

#### 2. CRITERIA FOR USE OF [RULE 611\(c\)](#):

- The [611\(c\)](#) witness is most often used to set out definitively the Respondent’s defenses, particularly defenses to a discrimination allegation. The Trial Attorney uses this method to commit or “pin down” the witness in areas which are vulnerable to attack.

For example, once a selecting official who is called as a [611\(c\)](#) witness has testified that an alleged discriminatee was not selected for promotion solely because of poor work attendance, the Trial Attorney can present evidence to counter this assertion, and the selecting official will not be able to later testify credibly that the nonselection was also based on poor work performance.

- A [611\(c\)](#) witness is sometimes called early in the case to secure admissions. This can occur when, before other witnesses and evidence are presented, the [611\(c\)](#) witness is unaware of the significance of a particular fact or point of his/her testimony to the GC's theory of the case.
- Use of a [611\(c\)](#) witness may be necessary if the information is peculiarly within the Respondent's knowledge, or to identify exhibits such as letters or documents which can be identified only by the Respondent.



*Caution is exercised in the use of [611\(c\)](#) witnesses. Where GC witnesses can establish particular facts, [611\(c\)](#) witnesses are not normally used. Unnecessary use of a [611\(c\)](#) witness can impair the advantage of discrediting a witness upon cross-examination or by rebuttal.*

### 3. THE OUTLINE FOR QUESTIONING A [611\(c\)](#) WITNESS:

- Is prepared in detail;
- Reflects a definite objective in calling the witness and shows how to obtain what testimony is desired of that witness; and
- Contains questions that are very explicit.



*For example, when asking for the reason for the discipline in a discrimination case, the Trial Attorney emphasizes that s/he is asking for all reasons for the discipline. Any attempts at evasive testimony are met directly by motions to strike and a repetition of the questions to get direct answers. The Trial Attorney does not ask about [7116\(a\)\(1\)](#) matters unless there are definite reasons for believing the witness will admit the actions which are alleged as [7116\(a\)\(1\)](#) violations. The Trial Attorney remembers that the [611\(c\)](#) witness is called for a limited purpose and quits when that purpose has been met.*

### 4. HOW TO PUT A HOSTILE WITNESS ON THE STAND:

After calling the witness, there are two options:

- The Trial Attorney can declare the witness hostile under Rule [611\(c\)](#) and request permission from the ALJ to cross-examine the witness.
- The Trial Attorney can begin interrogation of the witness using direct examination techniques, and then gradually change to cross-examination of the witness.

In either case, whether or not the Trial Attorney can cross-examine a witness under [611\(c\)](#) is solely up to the discretion of the ALJ. The ALJ may not allow the Trial Attorney to declare the witness hostile or adverse at the beginning of the witness' testimony, and may require the Trial Attorney to demonstrate that the witness is hostile or adverse to the GC's case. In this situation, the Trial Attorney asks the witness questions in order to establish that the witness is an agent of an adverse party, or identified with an adverse party, or so unresponsive to the Trial Attorney's questions as to demonstrate hostility.

**5. THE UNWILLING OR BIASED WITNESS:**

After establishing that the witness is not responsive to your questions, request the ALJ to allow you to ask leading questions as if the witness were adverse or hostile.

This may occur, for example, when a person who is now a supervisor but was a unit employee when the alleged ULP occurred.



**[Part 2, Chapter CC](#) concerning Impeachment of Respondent's Witnesses.**

RESERVED

## V. EXPERT TESTIMONY

### OVERVIEW:

[Fed. R. Evid. 701-706](#) allow for the admission of testimony of expert witnesses, i.e., witnesses with scientific, technical or other specialized knowledge. The Trial Attorney may have the need to call an expert to prove the allegations in the complaint.

### OBJECTIVE:

To remind the Trial Attorney of the potential for the use of expert witnesses and to provide resources for further study if the attorney must deal with an expert witness.

#### 1. WHEN TO CALL AN EXPERT WITNESS:

Although use of an expert witness is rare, there are specific circumstances under which the calling of an expert may be appropriate. Generally, there are 3 reasons for having an expert witness testify:

- As a fact witness;
- As a witness to explain principles in order that the trier of fact can apply those principles to the facts (e.g., a personnel expert); and/or
- As a witness to evaluate the facts.

#### 2. PROCEDURE FOR ARRANGING FOR EXPERT WITNESS:

##### a. *RA approval:*

If the Trial Attorney decides that expert testimony is necessary, that decision must be reviewed and approved by the RA.

b. *Qualifying the witness as an expert witness:*

If the Trial Attorney calls an expert witness, s/he is prepared to qualify the witness as an expert before the witness can begin to provide "expert" testimony. In addition, if the witness is being called to state an expert opinion, the Trial Attorney is careful to lay the proper foundation prior to the witness' testimony as to the expert opinion.

c. *Suggested outline for structuring an expert witness' testimony:*

i. Objectives:

- Qualify the witness as an expert, and
- Introduce witness' opinion into evidence in an understandable, compelling manner.

ii. Method: Lay foundation that permits you to accomplish both objectives; use chronological/logical approach in eliciting the following testimony:

- Establish that the witness is an expert in his/her field;

--full name

- education
- professional education
- license/board certification
- curriculum vitae (have expert discuss)
- occupation/area of specialization

- Tender the expert;
- Stating the expert's opinion;
- The bases for the opinion;
- The factual bases for the expert's conclusion;
- Confront weaknesses; and
- Redirect, if necessary.

**EXAMPLE**

**Establish that witness is an expert in his/her field**

- Trial Attorney:** Please state your name and where you reside.
- Mr. Donovan:** Thomas J. Donovan, I reside in New York City, New York.
- Trial Attorney:** What is your occupation and where are you employed?
- Mr. Donovan:** I am a Document Analyst and Director of the U.S. Postal Inspection Service Crime Laboratory, located in New York City, New York.
- Trial Attorney:** State your experience as a Document Analyst.



**Mr. Donovan:** I was with the New York City Police Department for 17½ years, the last 15 of which I was assigned to their Crime Laboratory as an Examiner of Questioned Documents. I have been employed by the U.S. Postal Service as a Document Analyst since January 1, 1972.

**Trial Attorney:** Please explain the nature of your work as a Document Analyst.

**Mr. Donovan:** My position entails the examination, comparison and identification of questioned handwriting, hand printing and typewriting in cases coming under the investigative jurisdiction of the U.S. Postal Service.

**Trial Attorney:** In your official capacity, how much of your time is devoted to this profession?

**Mr. Donovan:** My full working time.

**Trial Attorney:** Briefly state your qualifications in this field.

**Mr. Donovan:** I have an Associate and Applied Science degree from Brooklyn College, majoring in Police Science, I have a Bachelor of Science degree from John Jay College of Criminal Justice, majoring in Criminology. I trained under retired Captain Joseph P. McNally, New York City Police Department and retired Detective Hugh L. Sang, New York City Police Department, both qualified Document Analysts. I have examined thousands of handwriting, hand printing and typewriting problems; prepared reports and exhibits, qualified in court on handwriting, hand printing and typewriting problems. I have been certified by the U.S. Civil Service Commission as a Document Analyst.

**Trial Attorney:** Are you a member of any scientific or professional organizations?

**Mr. Donovan:** Yes, I am a member of the American Board of Forensic Document Examiners and the American Society of Crime Laboratory Directors.

- Trial Attorney:** What courts have you qualified and testified in previously?
- Mr. Donovan:** State Supreme Courts, Criminal and Civil Parts, in the five counties of New York City, also Criminal Parts of Supreme Courts in Nassau County, Suffolk County and Westchester County in New York and Dauphin County, Pennsylvania and Federal courts in Southern and Eastern District New York, Pennsylvania, Rhode Island, Massachusetts, Maine, Florida and North Carolina.
- Trial Attorney:** Please name some of the technical books you have studied.
- Mr. Donovan:** "Questioned Document Problems" by Albert S. Osborn, "Ames on Forger" by Daniel T. Ames, "Twentieth Century Handwriting Systems" by Albert W. Sommerford, "Scientific Examination of Documents" by Ordway Hilton and "Suspect Document" by Wilson R. Harrison.

#### Tender the Expert

- Trial Attorney:** "Your honor, I move that the witness be accepted as a qualified expert in the field of Questioned Documents."

#### Stating the Expert's Opinion

- Trial Attorney:** I hand you FLRA Exhibit 1 and ask you whether you have previously examined this document?
- Mr. Donovan:** Yes, I received this exhibit from Postal Inspector Smith.
- Trial Attorney:** I hand you FLRA Exhibit 2 (known handwriting specimens) and ask you whether you have previously examined them?

**Mr. Donovan:** Yes I have. This Exhibit (Specimen Handwriting) was submitted to the Crime Laboratory by Postal Inspector Smith.

**Trial Attorney:** Did you make a comparison between the questioned writing on FLRA Exhibit 1 and the specimen writing, FLRA Exhibit 2?

**Mr. Donovan:** Yes.

**Trial Attorney:** Did you form any conclusions with respect to the questioned and known writings?

**Mr. Donovan:** Yes.

**Trial Attorney:** Will you state your findings?

**Mr. Donovan:** The questioned writings were authored by the same person who authored the known writings.

#### **The Bases for the Opinion**

**Trial Attorney:** Did you prepare or cause to be prepared any photographic enlargements of the writings contained in FLRA Exhibits 1 and 2?

**Mr. Donovan:** Yes.

**Trial Attorney:** For what purpose?

**Mr. Donovan:** To demonstrate the basis for my findings.

#### **Factual Bases for the Expert's Conclusion**

**Trial Attorney:** Did you compare them with the originals?

**Mr. Donovan:** Yes, and I find them to be true copies.

**Trial Attorney:** Do you have the photographic enlargements with you?

**Mr. Donovan:** Yes.

**Trial Attorney:** Will you produce it please. (Photographic copy is offered for identification and so marked as FLRA Exhibit 4).

**Trial Attorney:** Will you, with the aid of this chart, FLRA Exhibit 3, explain to the Administrative Law Judge the basis for the laboratory findings previously expressed?

**Mr. Donovan:** (Expert witness explains).

### **Confront Weaknesses**

**Trial Attorney:** “Mr. Donovan, in reaching your conclusion as to the author of the questioned documents, did you take into consideration the fact that FLRA Exhibit 1 was written with a magic marker and FLRA Exhibit 2 was written with a ballpoint pen?”

**Mr. Donovan:** Yes.

**Trial Attorney:** “What effect did that information have upon your conclusion and why?”

**Mr. Donovan:** No effect, the handwriting pattern of an individual is constant regardless of the type or writing instrument utilized.



*If Respondent's counsel cross-examines the expert, the Trial Attorney is prepared to examine the witness on redirect, if necessary. See [Part 2, Chapter W](#) concerning Redirect Examination.*



**[Part 2, Chapter W](#) concerning Redirect Examination.**

RESERVED

## W. REDIRECT EXAMINATION

### OVERVIEW:

After a GC witness has been cross-examined, the GC may conduct a redirect examination to rebut, explain or further develop matters raised on cross-examination. In addition, the ALJ has discretion to vary the normal order of proof and allow a party to bring out on redirect examination a matter which is relevant to the case but due to an oversight was not elicited on direct. The decision to conduct a redirect requires careful analysis of whether this is necessary to strengthen the GC's case-in-chief. If redirect will not strengthen GC's case, it is not done.

### OBJECTIVE:

To provide guidelines for determining whether to call a witness on redirect examination.

### WHEN TO CONDUCT REDIRECT EXAMINATION?

- To correct mistakes or lapses in memory made by a witness during cross-examination;
- To allow the witness the opportunity, if necessary and important, to explain answers made during cross-examination;



*This is risky as further testimony by a witness may harm the GC's case.*

- To examine the witness on matters newly raised on cross-examination;



*Redirect is not to rehash testimony given on direct.*

- To remedy key oversights on direct; and



*If a key point was omitted on direct, attempt to cover it on redirect. If the Charged Party **justifiably objects** on the ground that redirect exceeds the scope of cross-examination seek permission to expand scope of redirect to cover a key point inadvertently not addressed on direct. Argue no harm to Charged Party since it can address new area. Also argue that it is more efficient since you would have to recall the witness later to address this matter.*



*Avoid the instinct to have the last word--a solid direct is rarely damaged by cross-examination.*

To rehabilitate a witness.

After a witness has been impeached on cross-examination by a prior inconsistent statement the witness can be “rehabilitated” on redirect by explaining how or why the inconsistency occurred. This presumes, of course, that there is a reasonable and logical explanation for the inconsistency. The witness can also be rehabilitated by use of a prior consistent statement. [Fed. R. Evid. 801\(d\)\(1\)\(B\)](#).

**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  
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**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).*



[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



## Y. DIFFICULT REPRESENTATIVES

### OVERVIEW:

Establishing a good working relationship with the Charging Party's representative and a cordial relationship with the Respondent's representative helps the Trial Attorney to effectively present the GC's case.

### OBJECTIVE:

To provide guidance to the Trial Attorney in dealing with a difficult Charging Party representative and/or a difficult Respondent representative.

#### 1. DIFFICULT RESPONDENT REPRESENTATIVE:

##### a. *Minor attacks on Trial Attorney:*

On occasion, opposing counsel attempts to harass the Trial Attorney by making inappropriate personal comments, criticizing the Trial Attorney's motives, or generally impugning the integrity of OGC employees and, in particular, the RO. The best defense the Trial Attorney has is to keep a sense of humor and to stay calm. Such attacks are usually tactics and the Trial Attorney should recognize them as such. Minor attacks can usually be brushed aside.

##### b. *Serious attacks on Trial Attorney:*

If a serious attack is made, the Trial Attorney upholds his/her integrity and that of the FLRA, and makes a short reply statement. Such a statement should not be

taken personally and should not lead to argument on the points of the attack. The remarks are directed through the ALJ, not directly to the opposing party, with the Trial Attorney asking the ALJ to instruct opposing counsel to refrain from such statements. Indulging in petty bickering damages the Trial Attorney's own credibility, impugns the integrity of the OGC, obfuscates the issues, and directs the Trial Attorney's attention away from the essential elements of the case.

**2. DIFFICULT CHARGING PARTY REPRESENTATIVE:**

a. *At pre-trial:*

The best way to avoid problems with a difficult Charging Party representative during the course of a trial is through careful pre-trial preparation. If the Trial Attorney includes the Charging Party representative in pre-trial preparation of witnesses, the representative will understand how each witness contributes to the GC's theory of the case. Where the Charging Party's theory differs from that of the GC, the Trial Attorney discusses these differences with the representative and, if necessary, explains the limits of the role of the Charging Party representative. Where it is not possible or desirable for the Charging Party representative to be present during the preparation of witnesses, it is essential that the Trial Attorney have a pre-trial discussion with the Charging Party representative concerning the GC's theory of the case and planned method of trial presentation. The Trial Attorney can

explain to the representative that disputes during the trial between the Trial Attorney and the Charging Party are likely to benefit only the Respondent.

b. *At trial:*

If despite pre-trial discussion, the Trial Attorney encounters a difficult Charging Party representative at trial, the Trial Attorney maintains a professional demeanor and continues with the planned presentation of the GC's case. The Trial Attorney ensures that the ALJ understands the GC's theory of the case, and any significant differences between the GC's position and the position presented by the Charging Party representative.



*The Trial Attorney can object to the Charging Party's witnesses, exhibits, and line of questioning of a witness.*



**[Part 1, Chapter I](#) concerning Relationship with Charging Party Representative.**





## Z. OBJECTIONS

### OVERVIEW:

Unlike the parties to proceedings before the NLRB, under § 7118(a)(6) of the Statute and § 2423.31(b) of the Regulations, the parties to FLRA hearings are not bound by the Federal Rules of Evidence. See, e.g., Department of Veterans Affairs, Medical Center, Denver Colorado and Veterans Canteen Service, Denver, Colorado, 52 FLRA No. 2, 52 FLRA 16, 22 (1996) (VAMC, Canteen Service). However, reliance on rules of evidence in trial preparation and presentation as the basis for an objection is a way to ensure the orderly introduction of evidence.

### OBJECTIVE:

To provide guidance concerning the specific grounds for objecting to evidence; when and how to make objections; and when and how to respond to opposing counsel's objections.

#### 1. CRITERIA FOR ADMISSION OF EVIDENCE:

- a. *Pursuant to § 2423.31(b), the rules of evidence are not strictly followed.*
- b. *The ALJ may exclude any evidence which is immaterial, irrelevant, unduly repetitious or customarily privileged.*

#### 2. RULES GOVERNING OBJECTIONS:

- a. § 2423.30(d):

- Objections are oral or written complaints concerning the conduct of a hearing; and
  - Any objection not raised to an ALJ is deemed waived.
- b. *ALJ's ruling on objections:*
- An ALJ has broad discretion to rule on objections;

See VAMC, Canteen Service, 52 FLRA at 22 (ALJ has broad discretion to rule on evidence or testimony offered).

- Appeals of adverse rulings are not made until exceptions to the ALJ's decision are filed with the Authority. See § [2423.40](#), which covers exceptions to the decision of the ALJ.

See [Part 2, Chapter I](#) concerning interlocutory appeals.

### 3. **WHEN TO OBJECT:**

Objections are appropriate when:

- There is a legal basis for one; and
- When, by objecting, the Trial Attorney can prevent harm to his/her case.



*It is not necessary nor wise to object every time there is a basis to object. The strategic use of objections is a useful tool. Judges do not appreciate "technical" objections particularly when the objection is to otherwise admissible evidence. It is generally not good form to object merely to interrupt the flow of testimony of a witness; such an interruption usually only results in the repetition of the troubling testimony or argument.*

**4. HOW TO OBJECT:**

Objections are addressed to the court only. The Trial Attorney briefly explains his/her position regarding the objection (or his/her response to an objection). Generally, an objection is made in the following manner:

"Objection, Your Honor, on the basis (or grounds) of . . ."  
[followed by the specific reasons for the objection].

**5. FORMS OF OBJECTIONS:**

*a. General objections:*

Are usually worded: "We object," or "Objection," or "Objection, irrelevant." General objections can be made first and then followed by a more specific objection if the judge so requests.

*b. Specific objections:*

Are made with specific bases stated. Every basis for such an objection should be stated. For example:

"Objection, Your Honor, the question is leading, there is no foundation established for it, and concerns evidence not in the record."

**c.** *Continuing objections:*

May be made to an entire line of questioning. For example:

“Your Honor, I object to this entire line of questioning [describe the issue or subject under inquiry]. [Explain the bases]. I ask the court to please note this continuing objection.”

The Trial Attorney may renew the continuing objection at the end of the testimony and then make a motion to strike based on the original objection to the line of questioning.

**6. SPECIFIC OBJECTIONS TO QUESTIONS:**

**a.** *Irrelevant:*

The question calls for an answer which will not tend to make any consequential fact more or less probable.

**b.** *Immaterial:*

The question calls for evidence which is not relevant and which does not go to substantial matters in the dispute. Material evidence goes to an issue which has bearing on the ultimate decision.

**c.** *Incompetent witness:*

The witness lacks the qualification of oath or mental capacity. [Fed. R. Evid. 601--605](#):

- 601 General Rule of Competency
- 602 Lack of Personal Knowledge
- 603 Oath or Affirmation
- 604 Interpreters
- 605 Competency of Judge as witness

d. *Best evidence rule:*

A question that calls for the witness to testify as to the content of a document is objectionable. The Trial Attorney argues that the document or an authenticated copy must be entered into evidence or its absence explained and that the document “speaks for itself.” [Fed. R. Evid. 1002](#).

e. *Privileged communication:*

The question calls for testimony which would violate a recognized privilege such as attorney-client privilege, attorney work product, and union representative-employee. See § [2423.31](#)(b).

See Long Beach Naval Shipyard, Long Beach, California, 44 FLRA No. 83, 44 FLRA 1021, 1038-39 (1992); U.S. Department of the Treasury, Customs Service, Washington, D.C., 38 FLRA No. 103, 38 FLRA 1300, 1308-09 (1991) (recognition of union representative/unit employee privilege).

f. *Calls for conclusion:*

The question calls for the witness to make a conclusion rather than to testify as to the facts. A non-expert witness cannot make an inference or conclusion about a matter unless it is “rationally based on the perception of the witness” or “is helpful to the clear understanding of his testimony or the determination of the fact in issue.” [Fed. R. Evid. 701](#).

Exception: An expert witness may make conclusions based on evidence in the record or based upon a hypothetical within his/her expertise. [Fed. R. Evid. 602](#).

g. *Calls for opinion (by an incompetent witness):*

Witness asked to give a lay opinion about a matter which is not within the witness' expertise. [Fed. R. Evid. 701](#) .

i. Trial court has broad discretion to determine whether a lay witness is qualified to testify on a matter of opinion.

U.S. v. Borrelli, 621 F.2d 1092 (10th Cir. 1980).

- ii. Areas where lay opinion is allowed:
    - Handwriting (where one is familiar with it);
    - Physical condition (when based on facts--person was drunk because s/he appeared disheveled, stumbled and smelled of alcohol); and
    - Another person's knowledge or intent (co-worker testifies that another co-worker knew and understood the regulations).
  - iii. Areas where lay opinion is not admissible:
    - Truth of a matter;
    - Meaning of someone else's words; and
    - Legal conclusions.
- h. Narrative answer:*
- i. The question is so broad that it allows the witness to ramble and possibly present



hearsay or other incompetent evidence.  
[Fed. R. Evid. 611\(a\)](#).

- ii. The ALJ has broad discretion to allow narrative testimony. ALJ may allow narrative testimony when it would save time and make the testimony clearer. This is balanced against opposing counsel's right to object to inadmissible testimony before it is uttered.

- i. *Hearsay:*

- i. *Definition:*

The question calls for the witness to make "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." [Fed. R. Evid. 801\(c\)](#) .

- ii. *Hearsay is admissible in FLRA hearings:*

However, the reliability and probative weight of the statement is weighed by the ALJ. U.S. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 1-CA-00279, ALJD Rpt. No. 96 at p. 12 n.12 (1991); Veterans Administration Medical Center, John Cochran Division, St. Louis, Missouri, 7-CA-726, ALJD Rpt. No. 14 at p. 7 (1982).

- iii. *Statements which are not hearsay--[Fed. R. Evid. 801\(d\)](#):*
- (a) Prior statement by a witness which:
- Is either inconsistent with his/her hearing testimony; or
  - Is consistent with hearing testimony **and** is offered to rebut a charge of recent fabrication; or
  - Identifies a person made after perceiving him, or
- (b) Admission by party-opponent and which is:
- His/her own statement in either his/her own or representative capacity; or
  - A statement of which s/he has shown manifested an adoption or belief in its truth; or
  - A statement made by a person authorized to do so; or

- A statement made by an agent (or servant) in the scope of his agency, made during the existence of the relationship.

iv. *Exceptions to the hearsay rule--[Fed. R. Evid. 803](#):*

Although hearsay, these statements or documents are reliable and admissible and apply whether or not the declarant is available to testify if they fit into one of the following categories:

- *Present sense impression;*  
Statement describes or explains a condition or event and is made while the declarant was perceiving the event or condition.
- *Excited utterance;*  
Statement related to a startling event or condition while the declarant is experiencing it.
- *Then existing mental, emotional, or physical condition;*

Statement of the declarant's state of mind, emotion, sensation or physical condition. (Example: "She said she was sick and was going home").

- *Medical diagnosis or treatment;*

Statements about a medical diagnosis or treatment; describing medical history, such as mental or conditions (pain, temperature, lucidity).

- *Recorded recollection;*

A memorandum or record concerning a matter about which the witness once had recollection, but no longer does. If efforts to refresh the witness' recollection fail, the document may be entered into evidence as proof of a fact.

- *Records of regularly-scheduled activity;*

A memorandum, report, or other document, in any form, kept in the regular course of business in a

routine manner, if identified by the custodian of the record.

- *Public records and reports;*

Records, reports, statements or data compilations, in any form, of public offices or agencies which set forth--

- The activities of the office or agency, or
- Matters observed pursuant to the required activities or duties where the record was required by law.

- *Learned treatises;*

May be used to cross-examine expert witnesses. If admitted in testimony, the treatise is not received into evidence.

- *Reputation--character; and*

Among the person's associates or in the community.

- *Other exceptions--the "catch-all"*

Allows the introduction of evidence which is--

- Evidence of a material fact;
- More probative on the point than any other evidence which can be reasonably obtained; and
- Serves the purposes of the Fed. R. of Evid. and justice.

v. *Exceptions where declarant is unavailable--[Rule 804](#):*

(a) Unavailability means any of the following:

- Exempted by court ruling or privilege;
- Persists in refusing to testify despite court order;
- Testifies that s/he does not recall;

- Unable to be present due to physical or mental illness or death; and
- Absent from hearing and proponent of his statement could not secure the witness' presence by process or otherwise reasonable means. For example, witness is in Europe and will not return for the hearing.

(b) Specific Exceptions:

Former testimony of the unavailable witness--transcript of hearing or deposition or sworn interrogatories.

(c) Other exceptions--the "catch all"--evidence is admissible if:

- It is offered as evidence of material fact;
- It is more probative than any other evidence; and
- The purposes of rules and interests of justice would be

served by the admission of  
the evidence.

Proponent of the statement must give  
advance notice to the adverse party that  
s/he intends to use the statement or  
document, including the name and  
address of the declarant.

*j. Leading question:*

Question invites a particular answer. [Fed. R. Evid. 611\(c\)](#). Leading questions are generally not allowed during direct examination.

See [Part 2, Chapter S](#) concerning Leading Questions on Direct Examination.



*Objections to leading questions are waived if not made. The ALJ has no duty to stop leading questions in the absence of an objection.*

*k. Repetitive/asked and answered:*

Question calls for an answer which has been previously given.

*l. Beyond the scope of direct, cross or re-direct:*

Question calls for an answer about facts beyond the information elicited on direct, cross or re-direct.



*m. Assumes facts not in evidence:*

Question calls for an answer which depends on facts not presented. The judge usually will allow the questioner to “back up” and establish a foundation by putting in the facts “not in evidence.”

*n. Confusing, ambiguous, vague:*

Objection goes to the form of the question, not to the evidence it elicits.

*o. Calls for speculation:*

Calls for an answer about which the witness lacks knowledge.

*p. Compound/double question:*

Asks more than one question.

*q. Argumentative:*

Calls for a particular answer suggested by attorney, similar to leading; also, attorney’s questioning is really quibbling with the witness.

*r. Misstates facts in evidence:*

Attorney's question misstates evidence in the record-- similar to a question calling for evidence not in the record. The effect is to mislead the witness.

**s.** *Cumulative:*

Question calls for facts or testimony previously provided.

**t.** *Question calls for testimony barred by court order:*

This could occur where sanctions are granted for failure to comply with a subpoena, or where sequestration rules have been violated. In these circumstances, the ALJ would bar certain evidence or testimony.

**7. OBJECTIONS TO ANSWERS:**

Even though a question may be properly stated, the answer given may contain impermissible characteristics. Therefore, answers are objectionable for many of the same bases as discussed above (e.g., Irrelevant; Immaterial; Privileged; Conclusion; Opinion; and Hearsay) and on the grounds that:

- The narrative answer goes on without interruption, making it difficult for Trial Attorney to properly object to questions and answers;

- The answer contains an improper characterization which is an opinion for which there is no basis or conclusion, i.e., answer is speculative;
- Rather than testimony about a document, there is the document itself which contains the evidence requested, i.e., Best Evidence Rule;
- Witness blurts out remarks which may or may not be responsive to something going on in the court room; however, witnesses should respond to questions only, i.e., no question pending; and
- Witness' answers are uncontrolled, unresponsive, or volunteered.

**8. WHEN TO MAKE OBJECTIONS TO TESTIMONY:**

Allow the witness to finish answering the question before objecting to the answer. If the objection is sustained, move to have the objectionable answer stricken from the record.

**9. OBJECTIONS TO EXHIBITS:**

Documents, like questions and testimony, are subject to objections.

*a. Specific objections to exhibits:*

- Irrelevant;
- Immaterial;
- No foundation;
- No authentication;

The document has not been identified by a person competent to do so, i.e., record keeper, writer, recipient.

- Contains hearsay/double hearsay;
- Violates best evidence rule;
- Prejudice outweighs probative value;
- Contains inadmissible matter (matters subject to limiting sanctions, unreliable hearsay, self-serving statements, notations not identified or authenticated);
- Reading from exhibit not in evidence--not allowed unless the document is used to refresh recollection. Once refreshed, the witness must testify from memory, not the document; and
- Reading from exhibit unfairly or out of context--if a portion comes in, the rest may come in for clarity and fairness.

See [Fed. R. Evid. 106](#)--"Rule of Completeness."

*b. When to make:*

After opposing attorney moves to enter the exhibit into evidence. Usually, the ALJ will ask if there are any objections.

**10. OBJECTIONS TO OPENING STATEMENTS:**

Opening statements are not evidence. The purpose of an opening statement is to summarize the case the attorney will present through witnesses and documents. Therefore, opening arguments are objectionable on the following grounds:

- *Arguing law;*
- *Argumentative;*
- *Inadmissible evidence mentioned;*

A very rare instance, since all evidence is admissible, except evidence which is immaterial, irrelevant, unduly repetitious or customarily privileged. If sanctions have been imposed, evidence covered by the sanctions may not be argued or mentioned.

- *Mentions "unprovable" points;*
- *Gives personal opinions; and*
- *Anticipates Respondent's evidence;*

Unless the answer provides the Respondent's defense, this is speculation. Often, however, the Trial Attorney knows what defenses will be presented and mentioning them is not improper.

**11. OBJECTIONS TO CLOSING ARGUMENTS:**

- a. *May become more important in cases which are argued orally without submission of a brief.*
- b. *Are rarely made since most cases have not been orally argued.*
- c. *The most common type of objections to closing statements are:*

- Misstates the evidence;
- Misstates the law;
- Gives personal opinions;
- Personal attacks on parties or trial attorney;
- Argues facts not in evidence; and
- Uses exhibits not in evidence.

12. **RESPONDING TO RESPONDENT'S OBJECTIONS:**

a. *When:*

The ALJ usually asks the Trial Attorney to respond to an objection. If the ALJ does not so request, the Trial Attorney asks the judge for an opportunity to do so. This request is appropriate after the objection is made and before the ALJ rules.

b. *How to respond:*

Trial Attorney addresses the reasons why the testimony or document is admissible, based on the specific objections made.



*Acknowledge when the opposing attorney has stated appropriate grounds for an objection and the Trial Attorney does not have a sufficient explanation. In this instance, withdraw the question,*

*rephrase the question, or do whatever is appropriate under the circumstances.*

*If a Respondent's objection is sustained without explanation, the Trial Attorney may ask the ALJ for an explanation. This is helpful if you are not sure why the form of your question was objectionable.*



Trial Notebook, [ATTACHMENT 1M](#), Objections Checklist.

RESERVED





## AA. WITNESS USING NOTES



*The Trial Attorney always insists on inspecting notes used by a witness for the Respondent. The Trial Attorney then questions the witness to determine whether the notes are being used to refresh the witness' present recollection, or whether the witness no longer has an independent recollection of the matters to which s/he is testifying. If the witness claims to have a present recollection, the Trial Attorney can argue that the use of notes diminishes the witness' credibility. If the witness has no independent recollection, the Trial Attorney may argue that the testimony be excluded as hearsay unless all the requirements of [Fed. R. Evid. 803\(5\)](#) are met.*



**[Part 2, Chapter S](#) subsection 4 concerning techniques on direct examination to elicit testimony when witness cannot recall information sought.**

RESERVED

## BB. CROSS-EXAMINATION

### OVERVIEW:

Cross-examination is “[t]he examination of a witness . . . by the party opposed to the one who produced him, upon his evidence given in chief, to test its truth, to further develop it, or for other purposes.” Black’s Law Dictionary 376 (6th ed. 1990).

### OBJECTIVE:

To provide guidance on whether to cross-examine a witness; the purposes of cross-examination; elements of cross-examination; rules for cross-examination; techniques of cross-examination; methods to test credibility; and a checklist for cross-examination.

#### 1. WHEN TO CROSS-EXAMINE A WITNESS:

There is no requirement to cross-examine a witness, and at times, it is best not to question a witness at all. Nevertheless, it is relatively rare to pass a witness without asking any questions. The key to a successful cross-examination is the same as a successful direct examination--proper preparation. Listen carefully to the witness’s testimony on direct and pay particular attention to those areas that you expect to be in dispute (based on pre-trial preparation). After the direct examination is completed ask yourself the following questions:

*a. Has the witness hurt your case?*

Not every witness’s testimony has the same impact. Some witnesses merely set forth corroborating evidence or refer to matters that are not in dispute. If this is the case, it may not be necessary to cross-examine the witness.

b. *Is the witness important?*

Not all witnesses's testimony is equally important. If a witness is not central to a case, or the testimony of a witness is not crucial, it may not be necessary to cross-examine the witness.

c. *Was the witness's testimony credible?*

If a witness's testimony is not credible, it may be better to leave well enough alone and not cross-examine. You do not want to provide the witness with an opportunity to rehabilitate himself/herself.

d. *Did the witness give less than expected?*

Sometimes a witness leaves something out that is important or opposing counsel forgets to ask an important question or to clarify a matter. If you cross-examine the witness, you will provide the witness and opposing counsel with an opportunity to rectify the error. It is important to remember that testimony unfavorable to your position that is elicited on cross-examination can be particularly damaging.

e. *What are your realistic expectations on cross?*

Do you have any valid points that need to be made and, more importantly, are you able to make them effectively? ULP cases are tried before an ALJ, not a jury. Therefore, if the witness was credible and there is no way to impeach the witness's credibility, e.g., prior inconsistent statement, it may be better to pass on cross-examining the witness.

f. *What risks do you need to take?*

If the trial has progressed as expected, and you are satisfied with the presentation of the GC's case, do not take any undue risks. On the other hand, if things have not gone well and the case is turning into a probable loser, it may be appropriate to conduct a risky cross-examination and hope for a breakthrough.

**2. TWO PURPOSES OF CROSS-EXAMINATION:**

a. *Eliciting favorable testimony (first purpose):*

Too often an attorney is overwhelmed by the idea of destroying a witness's credibility and overlooks an opportunity to have the witness agree to facts that support his/her case or the theory of the case. This can usually be done with little risk and can be extremely effective or even outcome determinative.

*b. Destructive cross-examination (second purpose):*

The objective of a destructive cross-examination is to ask questions that will discredit the witness.

*c. Interplay between the two types of cross-examination:*

Even though a Trial Attorney can elicit favorable testimony and conduct a destructive cross-examination during the same examination, it is preferable to elicit favorable testimony first since a witness's credibility will usually be at its highest level at the conclusion of direct.

Also, eliciting favorable facts after a destructive cross can prove more difficult because the witness is less likely to be in a cooperative frame of mind. In addition, you may elicit so much favorable testimony that a destructive cross is unnecessary.

**3. ELEMENTS OF CROSS-EXAMINATION:**

A successful cross-examination follows a planned structure that gives the examination a logical and persuasive order. That structure is based on the following considerations:

*a. Establish a few basic points:*

It is always best to establish a few good points. If you try to accomplish too much, you could end up accomplishing nothing.

*b. Make strongest points at the start and at the end:*

The first and last points made during cross-examination are the most important. A point made at the start will set the mood and tone for the entire examination and the point made at the end can be the most remembered.

**c.**     *Vary the order of your subject matter:*

Varying the order of cross-examination will make it difficult for the witness to anticipate where you are going with a particular line of questioning. It can help you make a point before a witness can adjust.

**d.**     *Do not repeat direct examination:*

Too often, an attorney asks a witness to repeat what was already stated on direct. The reality of this approach is that it allows the witness a second opportunity to tell the same story. Only where the witness's testimony appears memorized or where major parts of the direct examination support your theory can this approach be beneficial.

**4.     RULES OF CONDUCTING CROSS-EXAMINATION:**

There are no "hard and fast" rules for cross-examination. Nevertheless, certain rules have withstood the test of time and following them is usually the safest course.

**a.**     *Start and end quickly:*



Do not beat around the bush. Make a point and move on. You do not want the witness to be able to relax or become complacent. In addition, you want to keep the ALJ interested in the case.

**b.**     *Know the probable answers to questions:*

If you have prepared properly, you will have a good idea what the witness will say in response to your questions.

You do not want to explore unknown matters. While you may not know the precise answer to a question, you only want to ask a question that will evoke a response that is not unexpected. The more you deviate from this point, the greater the risk.

**c.**     *Listen to the witness's answers:*

Frequently, the best ideas for an effective cross-examination flow from the witness's direct exam. Listen carefully to everything that is said as well as the way it is said. If a witness has trouble responding to a particular line of questioning, that may be indicative of the fact that the witness has no real memory of what happened or that the witness is not telling the truth.

**d.**     *Do not argue with the witness:*

Absolutely nothing is gained by arguing with a witness. No matter how frustrated you become with a witness, it is important to maintain composure at all times.

e. *Do not ask the witness to explain:*

Be as specific as possible; questions that ask “what”, “where”, or “why” are too general and may elicit unwanted testimony. In rare instances, however, a witness can be placed in a situation where there is no explanation. In that case, it might be worth the risk to ask the witness for an explanation.

f. *Restrict the witness's answers:*

The less room provided to a witness during cross-examination, the greater the control. Questions designed to evoke simple “yes” or “no” responses work well. In addition, use of leading questions keeps the witness under control.

g. *Do not ask one more question than is necessary:*

One question too many may result in a bad response or an unexpected response that will hurt your case. Always remember, you do not want to give the witness or the opposing counsel an opportunity to recover.

h. *Stop when finished:*

One of the toughest calls is to know when to stop. If things are going well, you may have a tendency to want to keep going. If things are going badly, you may try to make something out of nothing. This may confuse the record and create undue risks. Once you have covered the points you intend to cover, stop.

**5. TECHNIQUES OF CROSS-EXAMINATION:**

Cross-examination is different from direct examination. During direct examination the focus is on the witness. During cross-examination, because of the unrehearsed spontaneity involved, the focus is equally on the attorney asking the questions. The following techniques facilitate effective cross-examination:

**a.** *Use leading questions:*

A leading question is one that suggests the answer. Proper use of leading questions facilitates a Trial Attorney's ability to control a witness and the tempo of the case. Train yourself to routinely ask leading questions on cross-examination so that they flow naturally.

**b.** *Make statements of fact and ask for agreement:*

It is preferable to make statements and ask the witness to agree or disagree. The objective is to prevent the witness from having the opportunity to give a long self-serving answer.

**c.** *Use short, clear questions:*

Short, clear questions are the safest and most effective to use in cross-examination. If you combine questions, you will provide the witness an opportunity to say more than what is necessary.

**d.**     *Project a confident attitude:*

On cross-examination, you are the focal point. Project confidence and knowledge of the case.

**e.**     *Be natural:*

Utilize a style that you feel is natural. If you try to be something you are not, you will create an extra burden. Remember, there is no correct or incorrect style that is suitable for everyone.

**6.     METHODS TO TEST CREDIBILITY:**

**a.**     *Memory:*

Exploring aspects of memory may be the basis of an effective cross-examination because a witness is usually testifying about something that occurred in the past. A witness's testimony can be too good since a normal person would not remember certain things with precision because of the passage of time.

**b.**     *Perception:*

A witness often testifies about something that was seen. What you see, however, can be impacted by a number of things that can be explored. Does the witness wear glasses? What was the weather if the event took place outside? Was it nighttime? How close was the witness to the event? Was the witness involved or a bystander?

c. *Competency:*

Whenever a witness expresses an opinion, the competency of that witness is subject to cross-examination. Does the witness have the proper training or background to support the opinion?

d. *Bias:*

A witness may have a stake in the matter. Is the witness a personal friend of a stakeholder? a relative? a fellow member of management?

7. **CHECKLIST FOR CROSS-EXAMINATION:**

a. *Do I need to cross-examine the witness?*

- Has the witness hurt my case?
- Is the witness important?
- What are my reasonable expectations?
- What, risks, if any, should I take?

- b. *What favorable testimony can I elicit?*
- What parts of direct helped me?
  - What parts of my case can be corroborated?
  - What must the witness admit?
  - What should the witness admit?
- c. *What testimony can I discredit or impeach?*
- Can I discredit testimony? (Perception, memory, competency, bias)
  - Can I discredit conduct?



[Part 2, Chapter CC](#) concerning Impeachment of Respondent's Witness.



## CC. IMPEACHMENT

### OVERVIEW:

Impeachment, in the broad sense, encompasses any attack on an opposing witness, including attacks upon the witness's present interest, bias or prejudice as well as the presentation of evidence of prior inconsistent statements or actions. Although impeachment normally occurs during cross-examination, it may also take place with the introduction of rebuttal witnesses or even in oral or written argument. However, for purposes of this discussion the technique of impeachment on cross-examination is being considered.

### OBJECTIVE:

To provide guidance on the principles for impeaching a witness; practical examples; and matters to consider when deciding whether to impeach on cross-examination.

#### 1. PRINCIPLES OF IMPEACHMENT:

- Commit the witness to the vulnerable testimony before impeaching. This rule is essential for impeachment of the testimony of an opposition witness;
- Do not impeach the insignificant;
- Use leading questions which clearly set forth weaknesses in the testimony;
- Use leading questions which permit complete control of the witness during impeachment;
- Be precise when quoting the testimony of the opposing witness;
- Attack, rather than assist, the witness;



- Know when not to attack on cross-examination;

See also [Part 2, Chapter U](#) concerning Adverse or Hostile Witness, [Rule 611\(c\)](#) (same techniques are used).

**2. PRACTICAL EXAMPLES:**

a. *Use of direct questions to commit witness:*

**Hypothetical** - The complaint alleges a violation of § [7116](#)(a)(1) and (2) based upon the suspension of Mr. Jones, a Union steward, in retaliation for his grievance activity. Mr. Smith, a secretary, has provided an affidavit that the manager who made the decision to suspend rides in his car pool. On the way home from work one evening, the manager told the secretary that she was tired of Mr. Jones filing grievances and was going to tell him the following day that she planned to suspend him for a day to see if Jones would get the message. Upon arriving home that evening, Mr. Smith made a written notation of what the manager had told him. That notation is dated November 11, 1996. The manager testified on direct examination that it was her decision and hers alone to suspend Mr. Jones and that she did not discuss that decision with anyone else. Moreover, she testified that in accordance with her usual practice, she made the decision and

promptly told Mr. Jones her decision the following day.

**Q.** You testified on direct examination that you decided to suspend Mr. Jones and you gave him written notice of that proposal the very next day.

**A.** That is correct.

**Q.** Your proposal to suspend him is dated November 12, 1996.

**A.** Yes.

**Q.** Prior to November 12, 1996, did you tell anyone of your decision to suspend Mr. Jones?

**A.** No one.

**Q.** You're sure of that?

**A.** Yes.

**Q.** No doubt in your mind?

**A.** None.

b. *Use of leading questions to commit witness:*

- *Do **not** use complex language to phrase your questions.*

If a witness testifies to "x" now and testified [or made statements] to "y" on a prior occasion, make the ALJ aware of this by your impeachment questions in the most simple and straightforward way possible. Use of leading questions is virtually mandatory, as it permits you to fashion your attack in the terms most favorable to the GC.

- *Control the opposition witness:*

Do not tolerate non-responsive answers. Explanations must not be permitted. The use of leading questions is required.

- *Confront the witness with the witness's exact words:*

If your questions do not accurately reflect the facts, the witness may be able to correct the cross-examiner and thereby diminish, if not destroy, the impact of impeachment.

- *Impeachment is an attack upon an opposing witness--Conduct it as such:*

There are times to be friendly to a witness on cross-examination, but impeachment is not one of them. Do not assist the opposition witness by helping the person either to "recall" his/her past testimony or statements or to refresh his/her recollection.

For example, do not ask if the witness recalls testifying in a proceeding before the MSPB. Rather, tell the witness that he testified on such and such a date in the matter of Doe v. Agency, before an MSPB AJ at the MSPB office at 99 Summer Street, Suite 1800, Boston, Massachusetts. As a general rule, do not hand the witness an earlier statement or a transcript of the witness's earlier testimony to help the witness refresh recollection. Exceptions would include requests by the Judge, the opposing counsel, or the witness to permit the witness's examination of the document.

**Hypothetical** - The complaint alleges a violation of § [7116](#)(a)(1) and (2) when the Respondent refused to rehire Mr. Doe, a former Union President, because of Doe's representational activities on behalf of the Union when he previously worked for the Respondent. Doe had quit his job as an electrician in the Respondent's

Public Works Department to accept employment in the private sector. Things did not work out for him and he applied for a vacancy for the same position he had left. His former second-level supervisor was the deciding official and he did not select Doe. Doe complained to his Congressman who submitted an inquiry to the Respondent. The response to the Congressman was written by the second-level supervisor, but it was signed by Major Collins, the Public Works Department Director. In that response, the Respondent told the Congressman that Doe was not rehired because he was a poor employee who was not technically skilled in the type of electrical work commonly encountered by the incumbent of the position for which he had applied. In addition, he was not a reliable employee. However, the investigation disclosed that [1] Doe had received "outstanding" performance ratings for each of the five years prior to Doe's resignation and the supervisor had signed off on those ratings, and [2] for the nine months prior to his resignation, the Public Works Foreman position was vacant and he was made the Acting Foreman.

**Q.** You were the selecting official for the electrician's job that Mr. Doe applied for?

**A.** Yes.

**Q.** You made the decision not to select him?

**A.** Yes.

**Q.** Sometime after you made that decision, the Public Works Department received a letter from Congressman Perkins asking why Mr. Doe wasn't rehired?

**A.** Yes.

**Q.** Inquiries from Congress are important to the Agency?

**A.** Yes.

**Q.** It is important to respond truthfully to members of Congress?.

**A.** It is.

**Q.** You wrote the Public Works Department's response to Congressman Perkins inquiry?

**A.** That's right.

**Q.** Major Collins signed that response?

**A.** He did.

**Q.** You gave the Congressman the reasons why you did not rehire Mr. Doe?

**A.** I did.

**Q.** You told Congressman Perkins that one reason why Mr. Doe was not rehired was because he was a poor employee who was not technically skilled in the type of electrical work commonly encountered by the incumbent of the position for which he had applied?

**A.** Yes.

**Q.** You also told the Congressman that Mr. Doe was not a reliable employee?

**A.** I did.

**Q.** Those were the only reasons you gave to Congressman Perkins for not rehiring Mr. Doe?

**A.** Yes.

**Q.** Those were all of your reasons for not rehiring him; correct?

**A.** Yes.

**Q.** There were no other reasons for not rehiring him?

**A.** That's right.

**Q.** You're absolutely sure of that?

**A.** I am.

c. *Impeachment of witness:*

**Q.** At the time of Mr. Doe's resignation on August 3, 1995, you were his second-level supervisor?

**A.** I was.

**Q.** You had been his second-level supervisor since 1988?

**A.** Yes.



**Q.** The electrician's job Mr. Doe had while you were his second-level supervisor was the same electrician's job which he applied for and for which you did not select him; correct?

**A.** Yes.

**Q.** As his second-level supervisor, you approved Mr. Doe's performance ratings in that electrician's job, right?

**A.** Yes.

**Q.** For the performance periods ending in 1991, 1992, 1993, 1994 and 1995 Mr. Doe's performance as an electrician was rated "Outstanding?"

**A.** Yes.

**Q.** And you approved each of those performance ratings?

**A.** Yes.

**Q.** The Foreman of Public Works reports directly to you?

A. Yes.

Q. The Foreman's job is an important one in the Public Works organization?

A. Yes it is.

Q. It is important that the Public Works Foreman be a reliable employee?

A. Yes.

Q. For the nine months prior to his resignation in 1995, Mr. Doe was the Acting Foreman for Public Works?

A. He was.

**3. DECIDING WHETHER TO ATTACK ON CROSS:**

There are occasions when the best impeachment on cross-examination is no impeachment. An opposition witness may often testify to something you decide can be attacked. The Trial Attorney decides whether to conduct the attack on cross, in rebuttal or in argument. Attacking on cross normally is a contest between examiner and witness. The ALJ sees the result of that encounter. Most of the time there will be a winner and a loser. If you believe, following careful consideration of all the facts and knowing what you have in your briefcase that you will win, you will likely impeach by attacking on cross.



[Part 2, Chapter BB](#) concerning Cross-Examination.



## DD. GENERAL COUNSEL'S REBUTTAL

### OVERVIEW:

Pursuant to § [2423.30](#)(c), a party who has the right to appear at a hearing has the right to submit rebuttal evidence. After Respondent rests, the GC has what is usually a last opportunity to present evidence that rebuts the Respondent's case.

### OBJECTIVE:

To provide guidance on what the Trial Attorney considers in determining whether to put on rebuttal evidence when the Respondent has rested its case.

### FACTORS CONSIDERED IN DETERMINING WHETHER TO PRESENT REBUTTAL:

Rebuttal evidence is limited to addressing claims and evidence presented by the Respondent during its defense. Rebuttal is not for the purpose of addressing matters raised in the GC's case-in-chief. The decision to offer rebuttal evidence requires careful and objective consideration of the state of the record. If Respondent has presented a potentially meritorious defense and the failure to address this evidence will hurt the GC's case, then rebuttal is appropriate. Note, however, that in Indian Health Service, Winslow Service Unit, Winslow, Arizona, 54 FLRA No. 17, 54 FLRA 126, 127 (1998), the Authority found that the ALJ did not abuse discretion by denying GC's Trial Attorney an opportunity to recall a prior witness to provide rebuttal testimony.

RESERVED

## EE. LEAVING THE RECORD OPEN FOR ADDITIONAL EVIDENCE

### OVERVIEW:

Pursuant to § [2423.31](#)(a), which concerns the conduct of a hearing, an ALJ “may take any action necessary to schedule, conduct, continue, control, and regulate the hearing, including ruling on motions. . . .” This authority includes ruling on motions to leave the record open for additional evidence.

### OBJECTIVE:

To provide guidance to Trial Attorneys as to the criteria for requesting to leave open the record for additional evidence; support needed for such motion; and preserving the record to cross-examine witnesses.

### 1. CRITERIA FOR REQUESTING TO LEAVE RECORD OPEN:

Under the following circumstances the Trial Attorney may request the ALJ to leave the record open until a certain date in order to take a deposition from the witness who is unavailable, or request the ALJ to continue the hearing at a later date to hear the testimony of the witness:

- A witness is unavailable to testify at a hearing due to unforeseen circumstances;
- The Trial Attorney was unaware of the existence of the witness prior to the hearing;
- A document is unavailable for introduction into evidence at a hearing due to unforeseen circumstances;
- The Trial Attorney was unaware of the existence of the document prior to the hearing;

- Certain reports or documents which are relevant to the proceedings have not as yet been issued, but will be issued within a definite time frame. Under these circumstances, the Trial Attorney may request the ALJ to leave the record open until a certain date for the submission of the document; and
- A document has been introduced into evidence which is not a good copy. Under this circumstance the Trial Attorney may request the ALJ to leave the record open until a certain date so that a good copy of the document can be obtained.

**2. WHAT TRIAL ATTORNEY MUST SHOW IN SUPPORT OF THE MOTION:**

- The Trial Attorney establishes that the witness or document for which the record is to be left open will offer testimony or present evidence which is relevant to the proceedings.*
- That the Trial Attorney was unable to obtain the testimony of the witness at the hearing, or was unable to obtain the document for introduction into evidence at the hearing.*



*The Trial Attorney objects to Respondent counsel's motion to leave open the record when Respondent has not met these same standards.*

**3. PRESERVE RIGHT TO CROSS-EXAMINE WITNESS:**

The Trial Attorney preserves on the record the right of the GC to cross-examine the witness or to object to the document for which Respondent's counsel is seeking to leave the record open.

## FF. REOPENING OF THE GENERAL COUNSEL'S CASE

### OVERVIEW:

After the GC's case has been presented and Respondent has rested its case and the Trial Attorney discovers that either an element of proof was not addressed in the presentation of the GC's case-in-chief, or that evidence that supports the GC's case was not presented, the Trial Attorney moves to reopen the GC's case-in-chief. If the record is closed, a motion to reopen the record may be filed as long as the ALJD has not been issued.

### OBJECTIVE:

To provide guidance concerning when to move to reopen the GC's case and the law applicable.

#### 1. CASE LAW: AFTER THE RECORD HAS BEEN CLOSED:

- a. *An ALJ has discretion to determine whether to reopen the record for receipt of additional evidence.*

SBA, 54 FLRA 837, 848 (1998) (Authority upheld ALJ's exercise of discretion in not reopening record when request to reopen record was based on individual's lack of active participation in the hearing); Pension Benefit Guaranty Corporation, 52 FLRA No. 132, 52 FLRA 1390, 1398 (1997) (citations omitted) (PBGC), aff'd sub nom. Power v. FLRA, 146 F.3d 995 (D.C. Cir. 1998).



- b. *Generally, motions to reopen a record are disfavored; they are reserved for extraordinary circumstances.*

Id. at 1399 (citations omitted) (“strong public policy in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases”).

Cf. International Brotherhood of Electrical Workers, Local 648 v. NLRB, 440 F.2d 1184, 1185 (6th Cir. 1971) (Local 648) (court approved of trial examiner’s reopening of the record, referring to Supreme Court’s admonition that courts “should not deprive employees of their lawful rights because of neglect on the part of the NLRB”). For example, an ALJ may exercise discretion to reopen the record if a motion is made before s/he has issued a decision and within days after the close of the hearing. Id.

**2. WHEN TO MOVE TO REOPEN RECORD FOR RECEIPT OF ADDITIONAL EVIDENCE:**

- a. *Either at the hearing, or after record is closed, if an element of proof was not addressed in the presentation of GC's case.*
- b. *If evidence is discovered after the hearing that was not introduced and is critical to the GC's case.*

Compare PBGC, 52 FLRA at 1399 (evidence not in existence at the time of the original hearing weighs against reopening because it would

“perpetuate continuation of all trials”) (citation omitted) with U.S. Department of Treasury, Internal Revenue Service, Washington, D.C., 40 FLRA No. 31, 40 FLRA 303, 309 (1991) (Authority suggested that parties file to reopen the record to introduce exhibits that were not in existence prior to the close of the hearing).



*(1) Always make your best argument in favor of reopening the record. As stated above, the decision to reopen the record is within the ALJ's discretionary power.*



*(2) The closer to the hearing that a motion is made, the greater the likelihood that the motion may be granted. Compare Local 648 (motion filed within days of the close of the hearing granted) with PBGC (motion filed after case remanded by D.C. Circuit to FLRA and from FLRA to ALJ denied where evidence did not exist at time of original trial).*



*(3) If the motion is granted, the topics covered under the headings “General Counsel’s Case” and “Respondent’s Case” apply.*

RESERVED

## GG. CLOSING ARGUMENT

### OVERVIEW:

Section [2423.30\(e\)](#) states that “[a]ny party shall be entitled, upon request, to a reasonable period prior to the close of the hearing for oral argument, which shall be included in the official transcript of the hearing.” Traditionally, the Trial Attorney submits written briefs to the ALJ in support of the complaint, although oral arguments are also available. Generally, when oral argument is presented at the hearing, the Trial Attorney also submits a written brief to the ALJ.

### OBJECTIVE:

To provide guidance to Trial Attorneys on the benefits derived from presenting an oral argument; criteria for presenting oral argument in lieu of filing a brief; and an outline of the topics to cover during the presentation of an oral argument.

#### 1. **BENEFITS DERIVED FROM PRESENTATION OF CLOSING ARGUMENT:**

- Trial Attorney ensures that Respondent has notice of the GC’s legal theory of the case;
- Trial Attorney has the opportunity to amend the complaint, if necessary;
- Trial Attorney explains any previous amendments;
- Trial Attorney can persuade ALJ on credibility determinations while testimony is still fresh; and
- Trial Attorney sets forth the evidence presented, summarizes the important points and how they relate to the legal theories upon which the GC bases its case.

#### 2. **ORAL ARGUMENT IN LIEU OF FILING A BRIEF:**

Generally, the Trial Attorney does not waive the right to file a brief when s/he makes a closing argument. However, if all sides agree to waive the filing of written briefs, the Trial Attorney, after consulting with the RA, as necessary, could also waive that right.

*Criteria:*

If oral argument is to be used as a substitute for the written brief, the Trial Attorney considers the following criteria:

- Factual evidence lends itself to oral presentation;
- GC theory and legal precedent clear;
- Ability to analyze facts and relate to precedent;
- Ability to appropriately address Respondent's defenses;
- Ability to prepare in short period of time; and
- Requested remedy lends itself to oral presentation, with appropriate case cites.

**3. OUTLINE OF ORAL ARGUMENT IN LIEU OF BRIEF:**

If the above criteria are met, the Trial Attorney crafts a closing argument that succinctly sets forth the evidence at the hearing, as well as responds to the defenses raised. The relevant case law is set forth and an analysis of the evidence to the case law that clearly presents the GC's theory is presented. Presentation of an oral argument generally follows the guidelines for a written brief. See [Part 3, Chapter B](#) concerning Brief Writing. The presentation follows this outline:

- Restatement of allegations of complaint, including any explanation of amendments;
- GC evidence, both testimony and documents, in as much detail as is necessary to fully argue the matter. Any basis for credibility determinations;

- Any response to the defenses of the Respondent, including any arguments regarding credibility. Note any instances where Respondent has failed to deny or has admitted conduct;
- Relevant case law, with appropriate citations. Analysis of particular evidence to case law; and
- Conclusion, including references to requested remedy and basis of same.

**4. GREATER CONSIDERATION IS GIVEN TO DOING AN ORAL ARGUMENT IN ADDITION TO FILING A BRIEF WHEN IT IS NECESSARY TO:**

- Make sure legal theory is understood by ALJ and opposing counsel;
- Emphasize a point;
- Argue the credibility of witnesses;
- Ask for adverse inferences;
- Clarify certain points/matters if either the ALJ or opposing counsel appears to be confused; and
- Utilize the particularly adept oral advocacy skills of the Trial Attorney.

**5. ORAL ARGUMENT IN EACH CASE DECIDED BY BENCH DECISION:**

In each case decided by a bench decision, the Trial Attorney presents a brief closing argument. It is important to present oral argument because it will be included in the official transcript of the hearing and may prove to be important should the case be presented to the Authority on exceptions filed by a party. See § 2423.30(e).



*The Trial Attorney is flexible and is prepared to respond to any questions and/or comments from the ALJ. If the above criteria are met, the Trial Attorney comes to the hearing prepared to orally argue the case. If the*

*ALJ voices a preference for oral argument, that wish is respected,  
especially if the above criteria are met.*

**EXAMPLE OF CLOSING ARGUMENT  
IN FORMAL DISCUSSION CASE**

Your Honor, the complaint in this matter alleges that the Respondent violated the Federal Service Labor-Management Relations Statute by conducting a formal meeting with bargaining unit employees, without first notifying the Union and allowing it the opportunity to be present. The evidence clearly supports a finding that the meeting at issue was formal within the meaning of § 7114(a)(2)(A) of the Statute, and that the Respondent's failure to provide the Union notice of the meeting and the opportunity to be present was violative of § 7116(a)(1) and (8) of the Statute.

The General Counsel presented three witnesses during the hearing. The Union President, Amanda Forthright, credibly testified that she is the representative who normally receives notice of formal meetings from management officials, and that she then selects the appropriate Union official and/or steward to attend the meeting on behalf of the Union. The meeting at issue in this matter occurred on June 2, 1997 and involved employees in the Research Department. The Union did not receive any prior notice that a meeting was scheduled. Forthright works in the Development Department and does not have daily contact with the Research Department which is located in another building on Respondent's facility. The Union steward assigned to that area had been on extended sick leave during May and June 1997.

The General Counsel's other witnesses, Virginia Trueblue and Maria Sincere, both consistently testified regarding the manner in which the meeting was called and conducted. In that regard, all employees in the Research Department received an e-mail announcement on May 28, 1997, stating that there would be a meeting in the auditorium on June 2. On June 2, both Trueblue and Sincere were reminded by their individual supervisors that there was a 10 a.m. meeting. All employees of the Research Department who were at work that day came to the auditorium on June 2 at 10 am. Present for the Respondent were the first line supervisors and the Department Director. Also present was the Labor Relations Specialist and two Management Analysts from Headquarters. Trueblue is a member of the union and did not see any union representatives at the meeting.

The Department Director ran the meeting and did almost all of the talking. At the beginning of the meeting he announced that he was going to discuss the upcoming

budget conference at Headquarters and the possibility of a reduction-in-force in the Research Department as a result of the conference. According to Trueblue and Sincere, he proceeded to inform the employees that due to political pressures, it appeared that certain portions of the agency budget that had been dedicated to the Research Department were being transferred to other departments within the agency. In part this was due to lack of marketable results from the Research Department in the last 6 months, in part due to Congressional interest in funding projects developed in other departments. The Department Director indicated that no decision had been made regarding the budget, but that he wanted employees to know that there were serious indications of a substantial loss of funding and that employees could be subject to a reduction-in-force. There was also the possibility that certain employees could be transferred to other departments at the same location or even different agency locations. However, he reiterated that no decisions had been made and that no criteria had been established for these types of decisions.

Trueblue and Sincere both testified that the employees were quite upset, both because of the budget issues and the possibility that a reduction-in-force would lead to losing jobs and/or being transferred to other departments and locations. Also, they were upset because of the apparent targeting of the Research Department and the lack of understanding by Headquarters of the importance of their work. Several employees raised issues regarding seniority, performance appraisals and the alternative work schedule. The Department Director did not answer any questions, but indicated he would check into several issues and get back with the employees. The meeting lasted about 20 to 30 minutes.

The Respondent presented the Department Director and the Labor Relations Specialist as witnesses. The Department Director indicated that he had called the meeting to inform the employees of the issue of the budget since rumors had been rampant for several days and he wanted to maintain his good relationship with his employees. He assumed that the union steward was at the meeting, although he did not specifically look for her. The Labor Relations Specialist asserted that the meeting did not meet the formality requirements of the Statute, since it only lasted about 20 minutes, there was no formal agenda, no minutes were taken, and the presence of employees was not mandatory.

In order to find that a formal discussion occurred, the evidence must show that there was (1) a discussion, (2) that was "formal," (3) between one or more representatives of the agency and one or more unit employees or their representatives, (4) concerning any grievance or any personnel policy or practice or other general condition of employment. As the Authority stated in U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution (Ray Brook, New



York), 29 FLRA No. 52, 29 FLRA 584 (1987), in making determinations under § 7114(a)(2)(A), the Authority is “guided by that section’s intent and purpose--to provide the union with an opportunity to safeguard its interests and the interests of employees in the bargaining unit--viewed in the context of a union’s full range of responsibilities under the Statute.”

In this matter, the General Counsel asserts that evidence presented today clearly establishes that all of the elements of a formal discussion set forth in § 7114(a)(2)(A) of the Statute have been met, and that the Respondent has failed to abide by such requirements by holding a meeting without giving the union notice and opportunity to be present. The evidence clearly shows that the June 2 meeting was a discussion between representatives of the Respondent and unit employees concerning a general condition of employment, specifically the budget issues and possibility of a reduction in force for the employees in Research Department. With regard to the issue of whether the discussion was “formal”, the General Counsel, relying on the Authority’s analysis in F.E. Warren Air Force Base, Cheyenne, Wyoming, 52 FLRA No. 17, 52 FLRA 149 (1996), asserts that the purpose of the discussion in this matter is sufficient in itself to establish formality. The purpose of the meeting was to inform employees that the budget of the Research Department was under scrutiny and could be drastically reduced and that the employees could be subject to a reduction-in-force, including the possibility of loss of jobs and transfer to other positions and locations. After reviewing the totality of the facts and circumstances, the evidence establishes that the June 2, 1997 meeting was a formal discussion of which the union should have been notified in advance.

However, even if the Administrative Law Judge fails to find that the purpose and subject matter of the meeting establishes formality, the General Counsel asserts that a review of the evidence in light of certain factors set forth in Authority decisions, including U.S. Department of Labor, Office of the Assistant Secretary for Administration and Management, Chicago, Illinois, 32 FLRA No. 69, 32 FLRA 465 (1988), establishes formality. In this regard, the meeting was announced on May 28, 1997, three working days before the meeting, and that employees were reminded of the meeting on June 2, 1997. Although the Respondent argues that the meeting was not mandatory, the testimony of Trueblue and Sincere shows that all employees believed that they were required to attend the meeting and that, in fact, all of the employees in the Research Department did attend the meeting. The meeting was conducted in the auditorium, which is separate from the employees’ normal work locations. Although there was no formal agenda for the meeting, the meeting had been called for the specific purpose of informing the employees of the budget issues and the possibility of a reduction-in-force, which the Department Director relayed to all employees. The meeting was clearly organized and controlled for this single purpose, and a formal agenda was therefore not

necessary. Although the meeting only lasted between 20 and 30 minutes, and no notes were taken, the General Counsel asserts that the lack of these elements, in view of the totality of the facts and circumstances in the June 2, 1997 meeting, is not sufficient to overcome a finding of formality.

In conclusion, the General Counsel asserts that the evidence establishes that the Respondent conducted a formal meeting with bargaining unit employees in the Research Department on June 2, 1997 and failed to give the union notice and the opportunity to be present. Under these circumstances, the General Counsel requests that the Administrative Law Judge find that the Respondent has violated § 7116(a)(1) and (8) of the Statute by failing to abide by the requirements of § 7114(a)(2)(A) of the Statute. As set forth in the opening statement, the General Counsel is seeking a remedy that includes the posting of a notice to employees, signed by the Respondent's Director.



*The remedy requested above is only one potential remedy that the GC may seek in a formal discussion case. There are other remedies (non-traditional) that the GC may seek in a formal discussion case depending upon the circumstances of the case. Consult the RA or litigation specialist on this matter and see [Part 1, Chapter D](#) concerning Remedy.*



[Part 1, Chapter D](#) concerning Remedy;

[Part 2, Chapter HH](#) concerning Bench Decision; and

[Part 3, Chapter B](#) concerning Brief Writing.

RESERVED

## HH. BENCH DECISION AND POST-HEARING BRIEF INQUIRY/SUGGESTIONS

### OVERVIEW:

At the end of the hearing the ALJ will either render a bench decision if so moved by the parties pursuant to § [2423.31](#)(d), or address what issues s/he may want the parties to address in a post-hearing brief.

### OBJECTIVE:

To provide guidance concerning either the discussion of post-hearing briefs at the end of a hearing or the bench decision.

#### 1. BRIEF INQUIRY/SUGGESTIONS:

If the case is decided by a post-hearing recommended decision and order, prior to the close of the hearing, the ALJ sets a date for the filing of briefs. At this time it is appropriate for the Trial Attorney to solicit from the ALJ what issues s/he may want the parties to address specifically in their briefs. The ALJ may indicate that it would be appropriate for the parties to limit their briefs to specific topics and/or legal issues. During the closing stages of the hearing the Trial Attorney has thought about the filing of a post-hearing brief and is prepared to discuss this matter with the ALJ.

#### 2. BENCH DECISION:

If the case is decided by a bench decision it is particularly important for the Trial Attorney to listen attentively to the ALJ's announcement of the decision orally at the end of the hearing. A copy of the oral decision will appear in the transcript and be excerpted for transmission to the Authority in accordance with §§ [2423.31](#)(d) and [2423.34](#)(b).

The Trial Attorney takes notes, as necessary, during the ALJ's announcement of the bench decision. These notes will be useful when reading the transcript and in determining whether to file exceptions to the ALJ's decision and recommended order.

## 1999 Bench Decisions

See American Federation of Government Employees, Local 400, Case No. DE-CO-80520, ALJD Rpt. No. 143 (1999) (ALJ granted parties' joint motion for a bench decision and found that Respondent violated § 7116(b)(1) and (8) of the Statute); Puerto Rico Air National Guard, 156th Airlift Wing (AMC), Carolina, Puerto Rico, OALJD 99-24 (Apr. 28, 1999) (where Respondent alleged no jurisdiction at the pre-hearing conference and failed to appear at the hearing, the ALJ issued a bench decision finding that Respondent interfered with unit employees right to engage in information picketing thereby violating § 7116(a)(1)); U.S. Department of Veterans Affairs, Veterans Affairs Medical Center, Coatesville, Pennsylvania, OALJD 00-13 (Jan. 11, 2000) (ALJ found violation of § 7116(a)(1), (5) and (8) by failing to comply with an arbitrator's order, by refusing to recognize the union's designation of its president as its representative, and by refusing to grant him access and to hold arbitration hearings at a location off of the premises).



**Part 1, Chapter Q** concerning Pre-hearing Conference;

**Part 2, Chapter GG** concerning Closing Argument; and

**Part 3, Chapter F** concerning Exceptions.

# **PART 3**

# **POST-HEARING**



## A. POST-HEARING SETTLEMENTS

### OVERVIEW:

As discussed in [Part 1, Chapter H](#) concerning Post complaint/Pre-hearing settlements, and [Part 2, Chapter G](#) concerning Settlements at Hearing, it is **OGC Policy “to seek settlements that enhance the parties’ relationship; resolve the issues that have brought the parties to seek FLRA assistance; and further the purposes of the Statute.” OGC Settlement Policy (May 25, 1994) (ATTACHMENT 1H)**. Section [2423.31](#)(e) specifically authorizes informal and formal settlements after the hearing is opened.

### OBJECTIVE:

To provide guidance to Trial Attorneys concerning how to process settlement agreements reached after the close of hearings.

#### 1. POLICY:

See [Part 1, Chapter H](#) and [Part 2, Chapter G](#).

#### 2. PROCEDURE:

- a. *Settlement agreement post-hearing but before case transferred to FLRA:*
  - i. *Informal Settlement Agreement including unilateral settlement agreement or PSIWOCs--§ [2423.31](#)(e)(1):*

If an informal settlement agreement or PSIWOC is reached, the Trial Attorney:



- Upon the RD's approval, files with the ALJ a written motion for permission to withdraw the complaint; and
- After the ALJ grants permission, the RD approves the informal settlement or withdrawal request as applicable.

ii. *Formal Settlement Agreement--Section [2423.31\(e\)\(2\) and \(3\)](#):*

If the parties reach a formal settlement ((e)(2)) after the hearing, the Trial Attorney:

- Obtains the approval of the RD;
- Requests the ALJ to approve settlement agreement; and
- Requests, upon such approval, the ALJ to transmit agreement to the Authority for approval.

If the formal settlement is unilateral, the Trial Attorney:

- Gives the Charging Party an opportunity to state in writing its reasons for opposing the agreement;
- Requests the ALJ to approve the agreement; and

- Requests, upon such approval, the ALJ to transmit agreement to the Authority for approval.
- b. *Settlement agreement after case is transferred to Authority but before decision, the Trial Attorney:*
- Drafts a Motion to the FLRA to remand the case to the RD for action consistent with the applicable agreement, e.g., approval of withdrawal request or approval of informal settlement agreement/PSIWOC.
  - In the unlikely event that a formal settlement is agreed to at this stage, transmits for RD an original and three copies to the OGC, which, in turn, transmits a Motion to the FLRA requesting approval.



[Part 1, Chapter H](#) concerning Post Complaint/Pre-hearing Settlements; and

[Part 2, Chapter G](#) concerning Settlements at Hearing.

RESERVED

## B. BRIEFS

### OVERVIEW:

Section [2423.33](#) provides for the filing of a post-hearing brief with an ALJ and § [2423.40](#) provides for the filing of exceptions, oppositions and cross-exceptions, and supporting briefs with the Authority (See [Part 3, Chapter F](#) concerning Exceptions). Section [2423.26](#)(c) and (d) provides for the filing of a brief directly with the Authority after the Authority has granted the parties' joint motion to decide the case based on the parties' stipulations of fact.

### OBJECTIVE:

To establish quality standards to ensure that briefs submitted on behalf of the GC are of a high level of quality and that those standards of quality will be the same regardless of which RO submits the brief; to establish a standard format for briefs filed with the OALJ or the Authority; and to provide guidance concerning filing and service requirements.

#### 1. QUALITY STANDARD CRITERIA APPLICABLE TO ALL BRIEFS:

- The brief is well organized, thorough, and clearly written;
- The facts relied upon to establish the violation and the remedy are supported by citation to the record or by stipulation;
- The brief accurately represents the GC's position as reflected in Guidance Memoranda; Advice Memoranda; and other Policy Pronouncements;
- The lead, most current and relevant precedent is cited to support all legal arguments, including, as appropriate, a statutory analysis; the Statute's legislative history; relevant Authority and court decisions; applicable NLRB decisions; and other applicable court and/or administrative decisions;

- Legal arguments are concisely and persuasively presented and are well reasoned;
- All relevant issues are addressed in the brief, including all elements of the alleged violation, defenses that have been raised and the appropriate remedy requested; and
- All regulatory processing requirements are met.

**2. EXPLANATION OF CRITERIA:**

*a. The brief is well organized, thorough, and clearly written:*

The brief represents the GC's last chance to persuade either the ALJ or the Authority, on review of exceptions or in a stipulation, that the GC has sustained the burden of proof. Briefs are organized by a logical sequence of presentation of issues, facts, law and argument. Briefs set forth all factual and legal issues necessary for a determination, and are understandable. Each portion of the brief addressing the facts, legal support, argument, and remedy is accurately and persuasively presented.

*b. The facts relied upon to establish the violation and the remedy are supported by citation to the record or stipulation:*

In briefs to ALJs and on exception to the Authority, the facts set forth are supported by evidence in the record or by facts contained in the stipulation. The brief contains citations to record testimony, exhibits, and stipulated facts.

*c. The brief accurately represents the GC's position as reflected in guidance memoranda; advice memoranda; and other policy pronouncements:*

The brief accurately reflects the position taken by the GC in internal and external GC pronouncements, such

as advice memoranda, Guidance Memoranda and other policy pronouncements that have been communicated to the Regions. These pronouncements, when applicable, are applied to the particular factual situations and nuances of the case.

- d. *The lead, most current and relevant precedent is cited to support all legal arguments, including, as appropriate, a statutory analysis; the statute's legislative history; relevant authority; court decisions; analogous NLRB decisions; and other applicable court and administrative decisions:*

The brief reflects that all relevant issues, whether relating to procedural matters, the legal elements of the violation or the appropriate remedy, have been thoroughly researched. The brief relies, in descending order, on the plain wording of the Statute, its legislative history, relevant Authority and court decisions, applicable NLRB decisions and other applicable court and administrative decisions to support the GC's interpretation of the Statute or other controlling laws and regulations.

- e. *Legal arguments are concisely and persuasively presented and are well reasoned:*

Legal arguments, which include the application of the law to the facts, are presented in a concise and persuasive manner. Legal arguments are well thought-out and possible shortcomings are explored and addressed. The facts, the law, and legal arguments are presented in a persuasive and supportable manner.

- f. All relevant issues are addressed in the brief, including all elements of the alleged violation(s), defenses that have been raised, and the appropriate remedy:*

Briefs to ALJs and to the Authority address all relevant issues, including the elements of the violation, defenses to the allegations and the remedy. Briefs in opposition to exceptions address the arguments raised in the exceptions. A brief to an ALJ also is responsive to any concerns raised by the ALJ at the hearing or suggested by the ALJ to be included in the brief.

- g. All regulatory processing requirements are met:*

All regulatory requirements for filing and serving a brief are met. Briefs are timely and properly filed and properly served.

### **3. FORMAT FOR BRIEFS FILED EITHER BEFORE THE AUTHORITY OR AN ALJ:**

Each brief filed by a Trial Attorney on behalf of the GC follows the following format:

- Title Page;
- Table of Contents;
- Table of Authorities if brief is 25 or more pages (§ [2423.40\(a\)\(3\)](#); **(it is OGC policy to include a Table of Authorities in briefs of 25 or more pages filed with an ALJ)**);
- Statement of the Case (procedural case history including date of hearing; allegations with explanation and dates);

- Issues (may include defenses, as necessary) (See [ATTACHMENT 3B1](#) for examples of Issues);
- Statement of Facts (with citations to the transcript; topic sentences; no cites to cases; recognition of opposing facts in footnotes);
- Argument (mirror for each issue; state law with citation to Authority lead cases; argue credibility; address defenses; no string cites unless necessary; use parentheticals to give purpose or holding of case; citation to volume 50 and later cases);
- Remedy (explain why; proposed Notice and Order);
- Conclusion (what Trial Attorney wants ALJ to find); and
- Draft of Proposed Order.

See [ATTACHMENT 3B2](#) for an example of a Brief filed in Defense Logistics Agency, Defense Distribution Region East, Defense Depot Susquehanna, New Cumberland, Pennsylvania, OALJD 98-15 (Jan. 29, 1998) (no exceptions filed) (finding that in denying the union access to conduct asbestos tests, Respondent failed to furnish the union with information under § [7114](#)(b)(4) and thereby violated § [7116](#)(a)(1), (5) and (8) of the Statute).

#### 4. FILING AND SERVICE REQUIREMENTS:

All briefs filed with either the Authority or an ALJ must comply with the filing and service requirements set forth at Part 2429 of the Regulations.



[Part 3, Chapter F](#) concerning Exceptions.



RESERVED

## C. ALJ ANALYSIS

### OVERVIEW:

An ALJ Analysis informs the GC about decisions issued by an ALJ concerning ULP complaints which have issued under the GC's statutory authority, and provides information to the GC so that OGC exceptions and oppositions to exceptions can be coordinated.

### OBJECTIVE:

To provide guidance concerning the characteristics of, and information contained in, an ALJ analysis.

#### 1. AN ALJ ANALYSIS IS:

- a. *Normally completed on the internal OGC form at [ATTACHMENT 3C](#);*
- b. *An internal, confidential document that is not disclosable to the parties or the public;*
- c. *Drafted by the Trial Attorney who tried the case;*
- d. *Sent to the Deputy GC by fax within one week after the Region receives the ALJ decision; and*
- e. *Completed and faxed only when an ALJ has issued a decision.*

#### 2. INFORMATION CONTAINED IN AN ALJ ANALYSIS:

The following information is included in an ALJ analysis. Additional information may be submitted if necessary. RAs may discuss the filing of exceptions with the Deputy GC at their option prior to filing the ALJ Analysis:

- Case name;
- Trial Attorney's name;
- Whether the OGC was involved in the decision to issue complaint. If so, Advice Memorandum No., date of appeals remand or date of oral advice;
- Allegations in the complaint and the affirmative remedy sought, if any;
- Name of the ALJ;
- Date of the original complaint;
- Date of the hearing;
- Date of the GC brief;
- Date of the ALJ decision;
- ALJ holding (List for each allegation the result and affirmative order, if any);
- If whole or partial dismissal, or proposed affirmative remedy is rejected--give the ALJ's reason. (Note whether determinative facts changed from those discovered during the investigation, or if new facts appeared at the hearing not known to the Region, or if the ALJ found the GC witness not credible, or if the ALJ rejected the GC's statement of the law, or if the ALJ rejected the GC's application of the law.);
- Exceptions (Discuss the Region's intent to file exceptions. If no exceptions to a partial or whole dismissal are being filed, explain why and discuss what has changed since issuance of the complaint, other than the ALJ's decision); and
- Any other applicable comments.

## D. POST-HEARING MOTIONS

### OVERVIEW:

After the hearing closes there are certain matters that the Trial Attorney addresses in post-hearing motions to the ALJ or the Authority.

### OBJECTIVE:

To provide guidance concerning the type of motions that are filed post-hearing, both before an ALJD and after an ALJD but before an Authority decision.

#### 1. BEFORE AN ALJD:

##### a. *Motion to strike:*

A motion to strike is filed by a party seeking to remove evidence and/or an argument from the record. A motion to strike is appropriate if a brief refers to matters not in evidence or part of the record. See [ATTACHMENT 3D](#) for an example of a Motion to Strike.

##### b. *Motion to reopen the record:*

See [Part 2, Chapter FF](#), above.

##### c. *Motion to correct the transcript:*

Upon receipt of the official transcript of a hearing, the Trial Attorney reads the transcript to ensure that the testimony and evidentiary rulings are accurately

recorded. The Trial Attorney files a written Motion to Correct the Transcript with the ALJ if a correction needs to be made to the transcript. Pursuant to § [2423.21\(b\)\(4\)](#), this motion is filed within 10 days after receipt of the transcript.

See, e.g., Veterans Administration, Washington, D.C. and Veterans Administration Medical Center, Leavenworth, Kansas, 32 FLRA No. 126, 32 FLRA 855, 861 n.1 (1988) (ALJD) (Granting GC's unopposed motion to correct the Transcript); and Department of Veterans Affairs Medical Center, Denver Colorado, 52 FLRA No. 2, 52 FLRA 16, 30 n.2 (1996) (ALJ granted unopposed motion to correct the transcript).

**2. EITHER BEFORE AN ALJD OR BEFORE AN AUTHORITY DECISION:**

a. *Motion to Strike:*

The Trial Attorney files a Motion to Strike when a Respondent refers to matters or documents that were not made a part of the record either before the ALJ or included as part of a stipulation, and when a response to the GC's exceptions is untimely filed.

See 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, 1004-05 n.10 (1998) (Authority granted GC's motion to strike two exhibits attached to Respondent's exceptions that were not presented to the ALJ); SBA, 54 FLRA No. 83, 54 FLRA 837, 843-44 n.5 (1998) (Authority granted Respondent's motion to strike exhibits attached to Charging Party's exceptions which were pleadings or exhibits filed in other forums **but denied** motion to strike exhibits that were either matters of public record or matters already in the record in the case); USDA Forest Service Pacific Northwest Region, Portland, Oregon, 48 FLRA No. 89, 48 FLRA 857, 857 n.1 (1993) (FLRA granted the GC's motion to strike portions of the Respondent's brief which referred to documents not included as part of a stipulation); U.S. Department of Health and Human

Services, Social Security Administration, 50 FLRA No. 50, 50 FLRA 296, 298 (1995) (motion to strike a response to exceptions that was untimely filed is appropriate).

b. *Motion for Expedited Treatment:*

At times the issues involved in a particular case are novel and may be the basis for decisions in other cases. In these instances, and after consultation with the Deputy GC, it is appropriate to file a motion with the presiding ALJ or the FLRA, as appropriate, requesting expedited treatment. There may also be particular cases where excessive delay might adversely impact the ability of the FLRA to remedy the ULP allegations. While temporary relief under the OGC's Injunction Policy ([see Part 1, Chapter E](#)) may not be appropriate, expedited treatment by the ALJ and/or the FLRA would be appropriate.

**3. AFTER AN ALJD BUT BEFORE AN AUTHORITY DECISION:**

*Motion for Oral Argument to the Authority:*

At times the issues involved in a particular case will significantly impact the Federal labor relations program. In these instances, and after consultation with the Deputy GC, it is appropriate to file a motion with the FLRA requesting permission to argue the case orally. Although § [2423.30](#)(e) provides for the right to argue orally before the ALJ, there is no automatic right to argue orally before the FLRA, and oral arguments have only occurred in a limited number of instances. Even if the request is denied, it will place the FLRA on notice that the case is significant.



*The Authority may set oral argument **sua sponte**. See, e.g., Social Security Administration, 52 FLRA No. 114, 52 FLRA 1159, 1164 n.4 (1997) (in a novel case on remand from the D.C. Circuit, Authority published a Notice of Oral Argument and provided interested parties the opportunity to submit **amicus curiae** briefs).*

**4. AFTER AN AUTHORITY DECISION:**

*Motion for Reconsideration:*

After a final decision or order by the FLRA, a party who can establish "extraordinary circumstances" is permitted to file a motion for reconsideration with the FLRA under § [2429.17](#). Extraordinary

circumstances have only been found in a limited number of situations which include:

- An intervening court decision or change in the law affected dispositive issues;
- Evidence, information or issues crucial to the decision, had not been presented to the Authority;
- The Authority had erred in its remedial order, process, conclusion of law, or factual finding; and
- A party has not been provided with an opportunity to address an issue raised **sua sponte** by the FLRA.

U.S. Department of the Air Force, 375th Combat Support Group, Scott Air Force Base, Illinois, 50 FLRA No. 16, 50 FLRA 84, 86-87 (1995) and cases cited at nn.1-7; United States Department of Agriculture, Farm Service Agency, Kansas City, Missouri, 55 FLRA No. 10, 55 FLRA 22, 24 (1998) (Authority rejected consideration of procedurally deficient document).

The Deputy GC is consulted on whether to file a Motion for Reconsideration.



*(1) Mere disagreement with the FLRA's conclusion does not satisfy the extraordinary circumstances requirement. Id. at 87.*



*(2) The Trial Attorney files timely responses to all Motions for Reconsideration filed by the opposing party's counsel.*

## 5. PROCESSING REQUIREMENTS:

See [Part 1, Chapter L](#) (subsection 1).



[Part 1, Chapter E](#) concerning Injunctions;

[Part 1, Chapter L](#) concerning Pre-hearing Motions; and

[Part 2, Chapter FF](#) concerning Reopening of GC's Case.

## E. INJUNCTIONS AFTER ALJ ISSUES DECISION

### OVERVIEW:

After issuance of an ALJD, as applicable, the Regions address matters concerning injunctions.

### OBJECTIVE:

To provide guidance concerning advising district courts of the dismissal of a complaint; settlement of injunction matters; and injunctions after issuance of an Authority decision and order.

#### 1. **ALJ RECOMMENDS THAT COMPLAINT BE DISMISSED AFTER APPROPRIATE TEMPORARY RELIEF OBTAINED:**

If subsequent to obtaining appropriate temporary relief, an ALJ recommends that the complaint be dismissed, in whole or in part, the Region, in accordance with § [2423.10\(d\)](#), informs the district court which granted the temporary relief of the possible change in circumstances arising out of the ALJD.

#### 2. **SETTLEMENT OF INJUNCTION MATTER AND THE ULP AFTER ISSUANCE OF ALJD:**

The Regions continue to pursue settlement of the injunction action and the underlying ULP complaint even after an ALJ issues a decision. The Regions attempt to resolve both matters simultaneously, although RDs have discretion to resolve only the injunction action if it will effectuate the purposes and policies of the Statute.

#### 3. **INJUNCTIONS AFTER ISSUANCE OF AN AUTHORITY DECISION AND ORDER:**

Pursuant to § [7123\(c\)](#) of the Statute, upon the filing of a petition for judicial review by party or a petition for enforcement by the Authority with a United States circuit court of appeals, the court has jurisdiction to grant any temporary relief (including a restraining order). The Authority's Solicitor's Office represents the GC in court.





[Part 1, Chapter E](#) concerning Injunctions.

## F. EXCEPTIONS

### OVERVIEW:

The contents of exceptions include: (1) the specific findings, conclusions, determinations, rulings, or recommendations being challenged; (2) the grounds relied upon; and (3) the relief sought. Briefs supporting exceptions set forth: (1) all relevant facts; (2) the issues to be addressed; and (3) a separate argument for each issue. See [Part 3, Chapter B](#), above. Any party may file an opposition to exceptions and/or cross-exceptions. Exceptions are filed in a separate document along with a supporting brief.

### OBJECTIVE:

To provide guidance on: (1) circumstances warranting the filing of exceptions to an ALJD; (2) substantive and procedural considerations; and (3) criteria and issues relating to the filing of cross-exceptions and/or oppositions to exceptions.

#### 1. BASES FOR FILING EXCEPTIONS:

The Trial Attorney files exceptions if one or more of the following is present in the case:

- An opportunity to develop legal precedent;
- The ALJ has either misapplied, ignored, or distorted an existing legal doctrine or analytical standard;
- The ALJ has failed to make specific factual findings supported by the record or the ALJ has made the required factual finding but failed to consider this factual finding in reaching his/her conclusion of law;
- The ALJ's credibility determinations are erroneous and are based on considerations **other than** witness demeanor, such as: (1) the witness's opportunity and capacity to observe the event in question; (2) the witness's character as it relates to honesty; (3) prior inconsistent statements by the witness; (4) the witness's

bias or lack thereof; (5) the consistency of the witness's testimony with other record evidence; and (6) the inherent improbability of the witness's testimony. [Department of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia](#), 55 FLRA No. 194, 55 FLRA 120, 1204-05 (2000) ([Warner Robins](#)) (citations omitted); [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, 1006-07 (1998) (where credibility determinations are based on considerations other than witness demeanor, the Authority reviews the record as a whole, i.e., reasons for deferring to the ALJ are less compelling).

Thus, before filing exceptions to an ALJ's credibility determination, the Region needs to establish that: (1) the error in the credibility determination concerned material facts that would result in a finding of a violation; and (2) there is record evidence supporting one of the five factors listed above that shows that the ALJ clearly erred in making a credibility determination. Where a credibility determination is made solely on the basis of the ALJ's judgment regarding a witness's demeanor, no exceptions are filed. [24th Combat Support Group, Howard Air Force Base, Republic of Panama](#), 55 FLRA No. 45, 55 FLRA 273, 279 (1999); [American Federation of Government Employees, Local 3615, AFL-CIO](#), 53 FLRA No. 123, 53 FLRA 1374, 1375 (1998) (Authority will not overrule an ALJ's credibility determination unless a clear preponderance of all relevant evidence demonstrates that the determination is incorrect because only an ALJ has had the benefit of observing the witnesses while they testified); [Bureau of Engraving and Printing, Western Currency Facility, Fort Worth, Texas](#), 51 FLRA No. 85, 51 FLRA 1014, 1015 (1996) (citing standard for overruling an ALJ's credibility determination); [see also ULPCHM Part 4, Chapter D](#) concerning Regional Director Merit Determinations; compare [Warner Robins](#), 55 FLRA at 1204.

- The ALJ failed to address a particular remedial request. [See U.S. Department of Health and Human Resources, Social Security Administration](#), 50 FLRA No. 50, 50 FLRA 296, 298-300 (1995) (GC excepted to ALJ's failure to address request for make-whole relief).
- The ALJ's conduct at the hearing failed to conform to minimal standards of judicial behavior. [U.S. Department of Veterans](#)

Affairs, Medical Center, Jamaica Plain, Massachusetts, 51 FLRA No. 73, 51 FLRA 871, 875, 877 (1996) (GC excepted to ALJ's inappropriate behavior, interrupting counsel six times, refusing to allow counsel to complete a sentence repeating a phrase "that's a lot of hot air").

The Trial Attorney examines the ALJD in light of the above factors and makes a recommendation to the RA. **The Deputy GC is contacted if a determination is made not to file exceptions, and the reasons for this conclusion are included in the ALJ Analysis.**

## 2. FORMAT AND CONTENT OF EXCEPTIONS:

### a. *Format:*

Exceptions and the supporting brief are **two** documents with separate title pages and headings for each. They may be stapled together but should easily be identifiable as two separate documents.



*But see [Air Force Flight Test Center, Edwards Air Force Base, California](#), 55 FLRA No. 21, 55 FLRA 116, 118 (1999) (Respondent's labeling of "issues to be argued" considered as "exceptions" and §§ [2423.26-.28](#) do not require parties to file exceptions and supporting brief in two separate documents).*

### b. *Content:*

- Exceptions should mirror sections of the Argument in the brief — discuss violation and elements of; and
- Address other specific findings of ALJ alleged to be in error. If the Trial Attorney fails to file exceptions to specific factual findings that may relate to other factual findings that were excepted to, the Authority may nevertheless adopt the findings without precedential significance pursuant to § [2423.41](#). See, e.g., [U.S. Department of Housing and Urban Development, Rocky Mountain Area, Denver, Colorado](#), 55 FLRA No. 99, 55 FLRA 571, 573 (1999) (complaint alleging unilateral change dismissed notwithstanding past practice of deviating from a provision that requires a union official to sign in and out of work — no exceptions filed concerning ALJ's finding with respect to

another provision of the parties' agreement that bars any local arrangements that contradict the agreement).

See [ATTACHMENT 3F1](#) for examples of Exceptions and [ATTACHMENT 3F2](#) for an outline of a brief specifically showing how Exceptions have been incorporated.

3. WAIVER AND THE SUFFICIENT PARTICULARITY STANDARD:
  - a. *Exception not argued is waived:*

If issues of law or fact were not preserved for appeal during the trial stage, review is precluded.

See § 2429.5 which states that “[t]he Authority will not consider evidence offered by a party, or any issue, which was not presented in the proceedings before the . . . Administrative Law Judge . . . .” [Federal Aviation Administration](#), 55 FLRA No. 203, 55 FLRA 1271, 1274 (2000) (exception dismissed because Respondent failed to raise the rescinded OPM regulation before the ALJ as its defense for repudiating an MOU); [Department of Transportation, Federal Aviation Administration, Fort Worth Texas](#), 55 FLRA No. 157, 55 FLRA 951, 956-57 (1999) (arguments concerning enforceability of MOU which could have been raised in defending the alleged repudiation and cannot be made for the first time in exceptions); [U.S. Penitentiary, Leavenworth, Kansas](#), 55 FLRA No. 127, 55 FLRA 704, 716 (1999) (Authority did not consider “covered by” argument because Respondent did not raise “covered by” defense before the ALJ); [24th Combat Support Group, Howard Air Force Base, Republic of Panama](#), 55 FLRA No. 45, 55 FLRA 273, 281 n.12 (1999); [U.S.](#)

[Department of Justice, Federal Bureau of Prisons, FCI Danbury, Connecticut](#), 55 FLRA No. 37, 55 FLRA 201, 204 (1999) (Authority declined to consider management right issue not raised to ALJ and “changes of position on an issue dealt with below are covered under the general rule prohibiting the raising of new issues on appeal”); [U.S. Department of Energy, Western Area Power Administration, Golden, Colorado](#), 56 FLRA No. 2, 56 FLRA 9 (2000) (Respondent is precluded from relying on certain provisions of parties’ agreement where the argument was not based on such provisions before the ALJ) petition for review filed sub nom. U.S. Department of Energy, Western Area Power Administration, Golden, Colorado v. FLRA, No. 00-1162 (D.C. Cir. filed Apr. 14, 2000); [Department of Veterans Affairs, Medical Center, Muskogee, Oklahoma](#), 53 FLRA No. 103, 53 FLRA 1228, 1229 (1998) (rejecting exceptions based upon evidence or issues that could have been, but were not, raised before ALJ); [Social Security Administration, Baltimore, Maryland](#), 53 FLRA No. 87, 53 FLRA 1053, 1060 (1997) (to the same effect); [National Naval Medical Center](#), 54 FLRA No. 93, 54 FLRA 1078, 1079 and n.1 (1998) (mere mentioning of pay and Thrift Savings Plan issues in opening statement is not sufficient notice to Respondent that issues are in dispute; claim that seeks monetary relief that was not sought before the ALJ was not properly before the Authority); [U.S. Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Illinois](#), 51 FLRA No. 54, 51 FLRA 599, 599-600 n.1 (1995) (rejecting GC’s argument which had not been argued before the ALJ); but cf. U.S.

[Department of Transportation, Federal Aviation Administration, Northwest Mountain Region, Renton, Washington](#), 55 FLRA No. 46, 55 FLRA 293, 298 n.6 (1999) (Authority denied GC’s motion to strike the Respondent’s references to the cost of complying with the ALJ’s order, finding such evidence that was directed toward compliance with the ALJ’s remedy and to alleged deficiencies in that remedy could not have been presented to the ALJ), [petition for review filed sub nom. Department of Transportation, Federal Aviation Administration, Northwest Mountain Region, Renton, Washington v. FLRA](#), (D.C. Cir. Apr. 29, 1999).



*But, the Authority will consider an argument made in response to an ALJ’s finding which was not argued or alleged in the complaint, and, as such, could not have been made prior to the ALJD. [Department of the Air Force, Grissom Air Force Base, Indiana](#), 51 FLRA No. 2, 51 FLRA 7, 11 (1995) (GC’s argument based on ALJ’s finding considered by Authority).*

b. “Sufficient particularity” standard:

The Authority has historically avoided rejecting exceptions or supporting briefs because they fail to comply with certain requirements relating to the content of exceptions and briefs. [See United States Customs Service, South Central Region, New Orleans District, New Orleans, Louisiana](#), 53 FLRA No. 67, 53 FLRA 789, 794 (1997) ([Customs Service, South Central Region](#)) (exceptions set forth portions of ALJ decision with “sufficient particularity” under then-§ [2423.27\(a\)\(2\)](#)); [U.S. Department of Veterans Affairs, Veterans Affairs Medical Center, Dallas, Texas](#), 51 FLRA No. 77, 51 FLRA 945, 950-51 (1996) (to the

same effect); Long Beach Naval Shipyard, 44 FLRA No. 83, 44 FLRA 1021, 1036 (1992) (brief in support of exceptions is sufficient under then-§ [2423.28\(a\)](#)).

However, under § [2423.41\(a\)](#), the “[f]ailure to comply with any filing requirement established in § [2423.40](#) **may** result in the information furnished being disregarded” (emphasis added).



*Where no ground is stated to support an exception, the Authority adopts the ALJ’s conclusion. E.g., Internal Revenue Service, Austin District Office, Austin, Texas, 51 FLRA No. 95, 51 FLRA 1166, 1176 (1996).*

c. *Reference to evidence not in record not considered:*

Section 2429.5 of the Regulations provides that the Authority will not consider evidence offered by a party that was not first presented in the proceedings before the ALJ. Customs Service, South Central Region, 53 FLRA at 794.

d. *ALJ findings adopted without precedential significance:*

Pursuant to § [2423.29\(a\)](#), the Authority will adopt, without precedential significance, those findings to which no exceptions were filed. 24th Combat Support Group, Howard Air Force Base, Republic of Panama, 55 FLRA No. 45, 55 FLRA 273, 281 n.13 (1999).



4. CRITERIA FOR FILING CROSS-EXCEPTIONS AND OPPOSITION:

a. *Cross-exceptions: Situations which may require the filing of cross-exceptions:*

- The ALJ has failed to provide all the remedies sought by the GC;

See, e.g., F.E. Warren Air Force Base, Cheyenne, Wyoming, 52 FLRA No. 17, 52 FLRA 149, 153 (1996) (GC excepted to ALJ's failure to recommend order that was neither onerous nor punitive).

- The ALJ has found a violation but on a different ground than that argued by the GC or has rejected a particular theory that the GC wishes to raise on appeal. See, e.g., U.S. Department of Justice, Immigration and Naturalization Service, New York, Office of Asylum, Rosedale, New York, 55 FLRA No. 170, 55 FLRA 1032 (1999) (Authority agreed with underlying basis of GC's cross-exception that ALJ correctly found a violation of § 7114(a)(2)(A) because the meeting concerned a grievance **not** a personnel policy); and

- The GC has prevailed on a major issue in the case and the OGC had decided to accept the remedy ordered, but after

the Respondent filed exceptions, the OGC decided to file cross-exceptions to raise the remedy issue.

b. *Opposition to exceptions:*

- **It is OGC policy to file an opposition to Respondent’s exceptions** even where the exceptions raise nothing new and constitute mere disagreement with the ALJ’s conclusions; and
- GC may simply incorporate by reference his/her post-hearing brief to the ALJ.



(1) *A failure to file an opposition may lead the Authority to speculate why no opposition was filed;*



(2) *A party which has missed the deadline for timely filing an opposition may file a motion to strike in an attempt to challenge the GC’s exceptions. See Department of the Air Force, Grissom Air Force Base, Indiana, 51 FLRA No. 2, 51 FLRA 7, 10-11 (1995) (Authority rejected Respondent’s motion to strike);*



(3) *The Regulations do not provide for the filing of a response to an opposition. U.S. Department of Labor, Washington, D.C., 51 FLRA No. 41, 51 FLRA 462, 463 n.1 (1995) (Authority declined to consider GC’s motion to correct the record because it was construed as a response to an opposition); and*



(4) *Mootness -- Where Respondent files an exception alleging mootness, the Trial Attorney files an opposition because a case*

*does not become moot simply because a particular remedy may no longer be appropriate. When a cease and desist order and the posting of notice remain viable remedies, a case is not moot unless the former exclusive representative is no longer recognized, and no individual rights are involved. See Federal Aviation Administration, 55 FLRA No. 44, 55 FLRA 254, 261 (1999) (citation omitted).*

**5. EXTENSIONS OF TIME:**

Extensions of time to file documents with the Authority will be granted only if a party specifically requests such extension, i.e., GC, as a non-requesting party, may **not** rely on extension of time granted to Charging Party or other allied party. Internal Revenue Service, Philadelphia Service Center, 54 FLRA No. 72, 54 FLRA 674, 681 (1998).



[Part 3, Chapter B](#) concerning Briefs.

## G. COMPLIANCE WITH AUTHORITY DECISIONS

### OVERVIEW:

Pursuant to § [2423.41](#)(c), the Authority, upon finding of a violation of the Statute, “shall, in accordance with 5 U.S.C. [§] [7118](#)(a)(7), issue an order directing the violator, as appropriate, to cease and desist from any unfair labor practice, or to take any other action to effectuate the purposes of the . . . Statute.” The RO attempts to obtain prompt and complete voluntary compliance with the terms of an Authority Order. In the case of a partial win, compliance efforts proceed notwithstanding the filing of a motion for reconsideration.

### OBJECTIVE:

To describe the responsibilities of the RO in effecting compliance with Authority remedial orders.

### RO RESPONSIBILITIES WHEN REMEDIAL ORDER ISSUES:

- Analyze the steps necessary to effectuate compliance;
- Initiate, monitor, and report the status of compliance efforts;
- Investigate alleged failures to comply;
- Report to the RD, as required by section [2423.41](#)(e), that the required remedial action has been effected;
- Make appropriate recommendations for further formal action, where the Respondent allegedly fails to comply; and
- Participate, where appropriate, in the institution and maintenance of any formal action required.

RESERVED

## H. ATTORNEY FEES

### OVERVIEW:

The Back Pay Act provides, in part, that an employee who is found to have been "affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee" is entitled to receive "all or any part of the pay, allowances, or differentials" which the employee normally would have earned or received during the period if the personnel action had not occurred and "**reasonable attorney fees** . . . awarded in accordance with standards established under section 7701(g) of this title . . . ." 5 U.S.C. § [5596](#)(b)(1)(A)(i) and (ii) and OPM's implementing regulations, specifically at 5 C.F.R. § 550.807, which concern the payment of reasonable attorney fees.

Pursuant to Part [2430](#), which implements the Equal Access to Justice Act, 5 U.S.C. § 504, (EAJA), an award of attorney fees may be made to eligible individuals and entities who are parties and prevail in a ULP proceeding.

### OBJECTIVE:

To describe when prevailing individuals or entities are entitled to attorney fees in proceedings before the OGC and the Authority under either the Back Pay Act or EAJA and the Region's role in (1) deciding attorney fee requests during the settlement process based on an analytical framework; (2) refraining from taking a position should the ULP be litigated before an ALJ and/or the Authority; and (3) responding to fee requests made by a Charging Party under the EAJA.

## BACK PAY ACT

**1. RDS HAVE DISCRETION ON WHETHER TO AWARD ATTORNEY FEES IN SETTling ULPs PRIOR AND SUBSEQUENT TO ISSUANCE OF COMPLAINT BUT BEFORE LITIGATION:**

Before litigation ensues, whether before or after issuance of complaint, the settlement stage of a ULP involves the exercise of an RD's discretion, as delegated by the GC. As part of this discretion, RDs may determine whether attorney fees under the Back Pay Act are warranted. An RD may decide to accept a settlement agreement without the imposition of attorney fees.

**2. SUMMARY OF ANALYTICAL FRAMEWORK FOR MAKING ATTORNEY FEE DETERMINATIONS WITH RESPECT TO SETTLEMENTS:**

a. *Threshold requirements:*

The settlement of the ULP charge or complaint must be an informal settlement agreement approved by the RD that requires the payment of backpay under the provisions of the Back Pay Act and that the Region would have litigated the alleged ULP but for the approved settlement agreement.

b. *Standards for awarding attorney fees:*

If the initial threshold determinations have satisfied the Back Pay Act, 5 U.S.C. § [5596](#)(b)(1)(A)(ii) provides that fee requests must be judged under the following standards for awarding attorney fees provided in 5 U.S.C. § 7701(g):

i. Who may incur attorney fees?

Incurrence of attorney fees may be incurred by a union's staff attorney, an attorney retained by the union, or an attorney retained by the individual employee.

ii. The employee must be the prevailing party.

This requirement is met if the employee has obtained all or a significant part of the relief sought.

iii. The interest of justice standard is met.

See Allen v. United States Postal Service, 2 MSPR 420 (1980) where, if any of five criteria is satisfied, an award of attorney fees is warranted under the interest of justice standard; see also National Association of Government Employees, Local R5-188 and U.S. Department of the Air Force, Seymour Johnson Air Force Base, North Carolina, 54 FLRA No. 122, 54 FLRA 1401 (1998) (discussion of "interest of justice" standard).

Only if this standard is met may an RD approve a settlement with attorney fees. If the standard is not met, no attorney fees are approved in the settlement agreement and a unilateral settlement agreement is approved, accompanied by a letter which states, among other things, both the reasons why attorney fees were not approved and the right to appeal such determination to the GC.

iv. The amount of the award must be reasonable.

The RD can, but need not, decide an exact amount in approving a settlement agreement. In a bilateral settlement agreement, the parties may agree to incorporate an exact amount of attorney fees as a term of the agreement or they may agree to work out the details in compliance. In any event, hours must be reasonably expended and the rate is judged according to the "market rate." See National Association of Government Employees, Local R4-6 and the U.S. Department of the Army, Fort Eustis, Virginia, 54 FLRA No. 137, 54 FLRA 1594 (1998) (reasonableness of the amount of attorney fees); and American Federation of Government Employees, Local 2241 and U.S. Department of Veterans Affairs, Medical Center, Denver, Colorado, 49 FLRA No. 127, 49 FLRA 1403 (1998) (reasonableness of amount of attorney fees).

### **3. ATTORNEY FEES REQUESTS BEFORE AN ALJ:**

A union can request attorney fees before an ALJ at the hearing, in post-hearing brief, or on motion to the ALJ after the ALJ has recommended a decision and order. In keeping with the Regions' role as a neutral third



party representing the public interest, it is inappropriate for the OGC to take a position as to whether attorney fees are warranted and the amount of any such fees.

**4. WHEN A CHARGING PARTY REQUESTS ATTORNEY FEES FROM THE AUTHORITY IN CASE WHERE AUTHORITY HAS FOUND A ULP:**

As in the preceding paragraph, the Trial Attorney refrains from taking a position with respect to the attorney fees request and the amount of any such fees.

**EQUAL ACCESS TO JUSTICE ACT (EAJA)**

**1. APPLICABLE PRINCIPLES UNDER THE (EAJA):**

A Respondent Union that prevails in a ULP proceeding before the Authority may not prevail in a request for attorney fees under the EAJA from the OGC, notwithstanding eligibility and success, if the GC's "position in the proceeding was substantially justified, or special circumstances make an award unjust." § [2430.1](#). "Substantially justified" depends on whether the position has a "reasonable basis in law or fact." [American Federation of Government Employees, Local 987](#), 55 FLRA No. 71, 55 FLRA 432, 434-35 (1999) (citations omitted).

**2. REGIONS FILE OPPOSITION TO ATTORNEY FEES REQUESTED UNDER EAJA:**

Even if the Charged Party prevails, the GC's position may be "substantially justified." [Id.](#) at 436 (where the Authority had not previously ruled on dispositive issues it decided in case, even though GC did not prevail, GC had a reasonable basis in fact and law to pursue the litigation).

a. *Opposition to fee application before the ALJ:*

Where a Union prevails in a ULP case before the ALJ, and files a fee application asserting that the GC's position was not substantially justified, the Region files an opposition to the fee application that explains in detail the reasonable basis/es in law and fact for maintaining the litigation.

b. *Exceptions filed with the Authority:*

Should a Union prevail before the ALJ, the Trial Attorney files exceptions with the Authority.

RESERVED

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