ORAL ARGUMENT NOT YET SCHEDULED

No. 13-1261

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JARED R. CLARK,

Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,

Respondent.

ON PETITION FOR REVIEW OF A DECISION BY THE GENERAL COUNSEL OF THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Appearing below in the administrative proceeding before the Federal Labor Relations Authority ("FLRA" or "Authority") were the General Counsel of the Federal Labor Relations Authority, the American Federation of Government Employees, Local 1945, and Jared R. Clark, as Charging Party. In this Court proceeding, Jared R. Clark is the petitioner; the Authority is the respondent.

B. Ruling Under Review

Petitioner Clark is seeking review of the General Counsel's decision to accept a pre-hearing unilateral settlement and withdrawal of the complaint arising out of Clark's unfair labor practice charges in *AFGE Local 1945,* FLRA Case No. AT-CO-12-0190 (Aug. 29, 2013). As discussed below, the Authority contends that the Court does not possess subject matter jurisdiction to review the General Counsel's exercise of prosecutorial discretion. The General Counsel's letter denying Clark's appeal of the unilateral settlement is at JA 88-89.

C. Related Cases

This case has not previously been before this Court or any other court. Counsel for the Authority is unaware of any cases pending before this Court which are related to this case within the meaning of Circuit Rule 28(a)(1)(C).

/s/ Fred B. Jacob
Fred B. Jacob
Solicitor, Federal Labor Relations Authority

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GLOSSARY

Agency	Anniston Army Depot
Authority	Three-Member adjudicatory component of the Federal Labor Relations Authority
Br.	Brief on behalf of Petitioner Clark and Amicus
FLRA	Federal Labor Relations Authority
JA	Joint Appendix
NLRA	National Labor Relations Act, 29 U.S.C. § 151 *et seq.*
NLRB	National Labor Relations Board
RD	Regional Director
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135
ULP	Unfair Labor Practice
Union	American Federation of Government Employees, Local 1945

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This Court has no jurisdiction over the petition for review. Petitioner Jared R. Clark challenges the prosecutorial decision of the General Counsel of the Federal Labor Relations Authority ("FLRA") to dismiss an unfair labor practice complaint based on an informal settlement agreement over Clark's objections.[1] The Federal

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[1] References to Clark and the arguments he makes refer to the Amicus Brief, filed May 6, 2014, which Petitioner Clark joined on May 9, 2014.

Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2006) ("the Statute"), however, limits judicial review to "final order[s] of the Authority," the three-Member board Congress vested with adjudicatory, policy-making, and rulemaking powers. *See* 5 U.S.C. § 7123(a). Supreme Court and in-circuit law, as well as the FLRA's own regulations, make clear that the General Counsel's prosecutorial decisions—including the unilateral acceptance of a settlement and withdrawal of a complaint—do not constitute a "final order of the Authority."[2] Accordingly, this Court lacks jurisdiction over this matter and should dismiss Clark's petition for review.

The FLRA had subject matter jurisdiction over Clark's unfair labor practice charge pursuant to Section 7118(a)(1) of the Statute. 5 U.S.C. § 7118(a)(1). To the extent the time limit to file a petition for review under Section 7123 applies here, Clark's petition was timely filed within 60 days of the General Counsel's denial of his appeal.

[2] *See Patent Office Prof'l Ass'n v. FLRA,* 128 F.3d 751, 753 (D.C. Cir. 1997); *Turgeon v. FLRA*, 677 F.2d 937, 938 (D.C. Cir. 1982); *see also* 5 C.F.R. § 2423.11(f). *Cf. NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 126 (1987).

STATEMENT OF THE ISSUE PRESENTED

Whether the Court has subject matter jurisdiction to review a prosecutorial decision by the FLRA's General Counsel to enter into a settlement agreement instead of taking a complaint to hearing.

RELEVANT STATUTORY BACKGROUND

The Statute provides a general framework for regulating labor-management relations for the federal government. It grants federal employees the right to organize, provides for collective bargaining, and defines unfair labor practices ("ULPs"). *See* 5 U.S.C. §§ 7114(a)(1), 7116.

The Authority is responsible for implementing the Statute through the exercise of broad adjudicatory, policy-making, and rulemaking powers. Under the Statute, the responsibilities of the Authority are performed by a three-Member independent and bipartisan body. 5 U.S.C. § 7104. The Authority's role is analogous to that of the National Labor Relations Board ("the NLRB") in the private sector. *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 92-93 (1983).

The Statute also provides for an independent General Counsel who is responsible for investigating ULP charges and, where the investigation so warrants, filing and prosecuting ULP complaints. 5 U.S.C. § 7104(f). The General Counsel performs her investigatory and prosecutorial functions through a staff located in seven regional offices throughout the country. *See* 5 C.F.R. § 2423.8; Appx. A to 5 C.F.R. Chapter XIV. Under 5 C.F.R. § 2423.10, the Regional Director ("RD") acts on

behalf of the General Counsel in investigating, processing, and prosecuting a charge. Upon the filing of a ULP charge by any individual, labor organization, or employing agency, an RD conducts such investigation of the charge as he or she deems necessary. 5 C.F.R. §§ 2423.4, 2423.6, 2423.8. Following this investigation, the RD may approve a request to withdraw a charge, dismiss the charge, approve a written settlement of the charge, issue a complaint, settle a complaint, or withdraw a complaint. 5 C.F.R. §§ 2423.10(a), 2423.25.

With respect to post-complaint, prehearing settlements (the context of Clark's petition of review), the FLRA regulations provide:

> If the Charging Party fails or refuses to become a party to an informal settlement agreement offered by the Respondent, and the Regional Director concludes that the offered settlement will effectuate the policies of the Federal Service Labor-Management Relations Statute, the Regional Director shall enter into the agreement with the Respondent and shall withdraw the complaint. The Charging Party then may obtain a review of the Regional Director's action by filing an appeal with the General Counsel as provided in subpart A of this part.

5 C.F.R. § 2423.25(b). Pursuant to the procedures set forth in subpart A, the General Counsel "may grant an appeal when the [c]harging [p]arty has shown that the [RD]'s approval of a unilateral settlement agreement does not fulfill the purposes and policies of the Statute." 5 C.F.R. § 2423.12(b).

The decision of the General Counsel on an appeal is final, absent a timely motion for reconsideration. 5 C.F.R. § 2423.11(f). The charging party may move for reconsideration of the General Counsel's decision if he can establish "extraordinary

circumstances" in his moving papers. 5 C.F.R. § 2423.11(g). The General Counsel's decision on a motion for reconsideration is final. *Id.* Post complaint informal settlements "provide for withdrawal of the complaint by the Regional Director and are not subject to approval by or an order of the Authority." 5 C.F.R. § 2423.25(a)(1).

As noted above, the Statute provides for judicial review of only a "final order of the Authority." 5 U.S.C. § 7123. Decisions of the General Counsel are absent from the Statute's grant of appellate jurisdiction. *Id.*

All relevant statutory and regulatory provisions are contained in the attached Statutory Addendum.

STATEMENT OF THE CASE

This case arises out of a ULP charge Clark filed against the American Federation of Government Employees, Local 1945 ("the Union"), which represents employees at the federal agency where he worked. Following an investigation of his charge by the FLRA's Atlanta Regional Director ("RD"), the RD issued a complaint and notice of hearing before an administrative law judge. After the RD issued the complaint but before the hearing, he entered into settlement discussions with the parties, which resulted in an informal settlement agreement. Although the charged party Union agreed to settle the matter on terms satisfactory to the RD, Clark refused to enter into the agreement. The RD, after determining that the informal settlement agreement effectuated the policies of the Statute, entered into the agreement with the charged party and notified Clark of his right to file an appeal with the FLRA's General

Counsel. Clark did file an appeal, which the General Counsel denied. As Clark did not file a motion for reconsideration, the General Counsel's decision became final. Clark now seeks review of the General Counsel's decision to affirm the Atlanta RD's unilateral approval of the agreement that settled the complaint. As explained below, the Court lacks jurisdiction to review that prosecutorial decision.

STATEMENT OF THE FACTS

A. Background, the Union's Grievance, and Its Subsequent Settlement with the Agency

The Union is the exclusive representative for all employees in a collective-bargaining unit at Anniston Army Depot ("the Agency") in Anniston, Alabama. Although Clark is a bargaining unit employee, he does not pay dues and is not a member of the Union. (JA 39.)[3]

After the Union became aware that the Agency was assigning certain employees to higher-graded duties but not providing them any additional pay, the Union filed a grievance on behalf of all affected bargaining-unit employees. (JA 59 ¶ 9.) To resolve the grievance, on April 27, 2010, the Agency entered into a settlement agreement with the Union in which employees who performed the higher-graded duties would receive compensation. As part of the settlement, the Union was required to provide the

[3] The facts described here largely come from Clark's charge, the RD's complaint, the RD's correspondence with Clark, and the described settlement agreements. As there was no hearing in this case, there are no findings of fact by an Administrative Law Judge. Additionally, as the case was never before the Authority Members of the FLRA, the Authority made no findings of fact.

Agency with a list of employees who would be reimbursed. (JA 59 ¶¶ 10-11.) After back and forth discussions over employee eligibility, the Union and Agency entered into a final settlement agreement in August 2011, which required the Agency to pay employees on the designated list between $300 and $1,970. (JA 59 ¶¶ 12-13.)[4]

B. Clark Files Charges with the FLRA's Atlanta Regional Office

Although Clark felt he deserved compensation for the higher-graded work that he performed, he was not included in the settlement. He contacted the Union, but did not achieve the results he desired. So Clark filed a charge with the FLRA's Atlanta Regional Office, alleging that the Union committed ULPs by excluding him and other non-members from the settlement agreement. (JA 39, 59.)

Following an investigation, the RD issued a complaint on March 29, 2013, alleging that the Union violated 5 U.S.C. § 7116(b)(8) of the Statute by giving preferential treatment to dues-paying members over non-members in the processing of the settlement. With the complaint, the RD also scheduled a hearing before an administrative law judge. (JA 58-61.)

C. Over Clark's Objections, the RD Settles the ULP Complaint, and the General Counsel Denies Clark's Appeal

After the RD issued the complaint but before a hearing took place, the Union agreed to settle the matter. Accordingly, the RD entered into a settlement agreement

[4] The backpay recovery period for grievances involving the performance of higher-graded duties is normally limited to 120 days. *See U.S Dep't of Veterans Affairs Medical Center, Washington, D.C.*, 67 FLRA 194, 197-98 (2014) (discussing the requirements of 5 C.F.R. § 335.103(c)).

with the Union. As part of the settlement, the Union agreed to pay Clark $1,970 (the largest sum paid to an individual employee under the earlier settlement agreement) and the other non-dues paying employees $200 each. In addition, the agreement required the Union to include a notice with its checks describing Clark's unfair labor practice charges and how it resolved the allegations. (JA 66-67.) Clark refused to sign on to the settlement agreement with the RD and Union because he did not think it adequately compensated him or other employees, nor did he believe that it would deter future unlawful conduct. (JA 62.)

After considering Clark's objections, the RD concluded that the settlement effectuated the purposes of the Statute and approved it. (JA 63.) As the RD made clear, the complaint, if successful, would only require the Union to fairly process nonmembers' claims to determine whether they should have shared in the Union's original settlement; that remedy, according to the RD, would result in "speculative and unpredictable" relief for the nonmembers. The RD's settlement, however, would provide compensation for the nonmembers in line with the Union's original agreement with the Agency, with Clark receiving $1970, putting him "in the best possible situation had the Union not allegedly considered [his] membership status." (JA 63.) The RD rejected Clark's objections to the settlement, noting that potential success on the merits of the complaint was far from certain, that Clark was compensated as if he had been included in the Union's original settlement with the Agency, and that the Union's monetary liability and its notice to the alleged

discriminatees would help deter future violations of the Statute. (JA 63-64.) The RD closed the letter by explaining the process for appealing his decision to the General Counsel. (JA 64.)

On July 5, Clark filed an appeal. (JA 68-86.) On August 29, the General Counsel, through her Assistant General Counsel for Appeals, denied it. (JA 88-89.) Addressing Clark's claims, the General Counsel determined that, given the facts and circumstances of the case, the settlement agreement remedied the violation and fully supported the purposes underlying the Statute. (*Id.*) At no time did the three-Member Authority issue a final order regarding the ULP complaint.

SUMMARY OF THE ARGUMENT

Two dispositive cases require this Court to dismiss Clark's petition for review. First, in *Turgeon v. FLRA*, 677 F.2d 937 (D.C. Cir. 1982) ("*Turgeon*"), this Court held that Congress did not provide for judicial review of the FLRA General Counsel's refusal to issue an unfair labor practice complaint. In finding that Congress gave the General Counsel final prosecutorial discretion, the Court relied upon the statutory language restricting judicial review to orders of the adjudicative Authority and the Statute's legislative history. Importantly, the Court also recognized a congressional intent to model the FLRA's structure and operations on the National Labor Relations Board, where the NLRB's General Counsel exercises exclusive prosecutorial authority akin to the FLRA's General Counsel. Second, following *Turgeon*, the Supreme Court held in *NLRB v. United Food & Commercial Workers Union, Local 23,* 484 U.S. 112 (1987) ("*UFCW, Local 23*"), that the NLRB General Counsel's prosecutorial discretion necessarily includes the unilateral power to withdraw a complaint in favor of an informal settlement, even without a charging party's consent. Together, these cases dictate that the General Counsel's decision to file a complaint—or to withdraw a complaint based on an informal settlement agreement—is a prosecutorial determination immune from judicial review.

Clark cannot topple this controlling authority. *UFCW, Local 23* soundly rejected his arguments in the context of analogous NLRB procedures; indeed, *UFCW, Local 23* is notably absent from Clark's opening brief. Even if properly before the

Court, Clark's ancillary claims provide him no relief. Simply put, this Court has no jurisdiction over Clark's petition for review.

STANDARD OF REVIEW

Review by the Court is limited. While the Court must independently determine its own jurisdiction *de novo*, *see Blue Ridge Envtl. Def. League v. NRC*, 668 F.3d 747, 753 (D.C. Cir. 2012), the Authority's interpretation of its own Statute is subject to substantial deference, *see NASA v. FLRA*, 527 U.S. 229, 234-35 (1999). Thus, to the extent this case turns on the Authority's interpretation of its organic statute in prescribing regulations that give the General Counsel the sole discretion to accept a unilateral settlement after complaint, the Court should defer to the Authority's view. *Cf. UFCW, Local 23*, 484 U.S. at 130 (deferring to the National Labor Relations Board's interpretation of its statute under almost identical circumstances). *See also National Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1129 (D.C. Cir. 1997) (internal citations omitted); *accord American Fed'n Gov't Employees v. FLRA*, 778 F.2d 850, 856 (D.C. Cir. 1985) ("As a court of review . . . we are not positioned to choose from plausible readings of the interpretation we think best.").

ARGUMENT

THE COURT LACKS SUBJECT MATTER JURISDICTION TO REVIEW THE GENERAL COUNSEL'S DECISION TO ENTER INTO A SETTLEMENT AGREEMENT AND WITHDRAW A COMPLAINT

A. The FLRA General Counsel's Prosecutorial Decisions, Including Pre-Hearing Withdrawal of a Complaint Upon Settlement, Are Not Subject to Judicial Review Because They Are Not Final Orders of the Authority

As this Court recently recognized, the "'first and fundamental'" question that the Court has to address is whether it has jurisdiction to consider Clark's petition for review. *National Treasury Employees Union v. FLRA*, No. 12-1199, slip op. at 10-11, 2014 U.S. App. LEXIS 11208, at *15 (D.C. Cir. June 17, 2014) (quoting *Bancoult v. McNamara*, 445 F.3d 427, 432 (D.C. Cir. 2006)). Under the specific statutory scheme that Congress prescribed for judicial review in the Statute, Clark's petition is not properly before the Court. The only provision creating jurisdiction for review is set forth at § 7123 of the Statute, 5 U.S.C. § 7123, which provides review only of a "final order of the Authority." *See Turgeon*, 677 F.2d at 938 (where the Authority has not acted at all in a case, it is clear that there is no "final order of the Authority" and hence no decision for the Court to review pursuant to § 7123). Without a final order from the Authority, no jurisdiction exists for court review. *See*, *e.g.*, *Patent Office Prof'l Ass'n v. FLRA,* 128 F.3d 751, 753 (D.C. Cir. 1997) ("*POPA*"); *Turgeon*, 677 F.2d at 939.

This Court has twice held that Section 7123 does not provide for judicial review of the FLRA General Counsel's refusal to issue an unfair labor practice complaint. *See POPA,* 128 F.3d at 753; *Turgeon*, 677 F.2d at 939. First, in *Turgeon*, a disappointed charging party—like Clark here—attempted to persuade this Court to review the General Counsel's decision to dismiss an unfair labor practice charge instead of issuing a complaint. The Court, however, soundly rejected the plea. In doing so, it relied on the Statute's language providing for review only of "Authority" final orders, legislative history emphasizing that "[t]he General Counsel's decision as to whether a complaint should issue shall not be subject to review," and the well-established comparison to procedures under the National Labor Relations Act ("the NLRA"), which recognized that "the NLRB's General Counsel has unreviewable discretion in such matters." *Turgeon*, 677 F.2d at 940 (internal quotations omitted). Fifteen years later, in *Patent Office Professional Association v. FLRA*, this Court revisited *Turgeon* in light of intervening precedent. Again drawing on caselaw recognizing prosecutorial discretion substantially identical to the General Counsel of the NLRB, the Court reaffirmed that "it remains the law of this circuit that a decision of the General Counsel of the FLRA not to file a complaint is not judicially reviewable given that the statute provides for review only of decisions of the Authority." *POPA*, 128 F.3d at 753.

Given the settled case law granting the General Counsels of the FLRA and NLRB essentially coextensive prosecutorial discretion, the Supreme Court has

resolved the question presented in this case. In *UFCW, Local 123*, the Supreme Court held that the NLRB "General Counsel's unreviewable discretion to file and withdraw a complaint . . . logically supports a reading that he or she must also have final authority to dismiss a complaint in favor of an informal settlement, at least before a hearing begins." *UFCW, Local 23*, 484 U.S. at 126. As the Court explained, the NLRA establishes a clear "prosecutorial versus adjudicatory line." *Id.* at 124. Until a hearing opens and adjudication begins, the General Counsel's decisions remain prosecutorial. *Id.* at 126. In that light, the Court "fail[ed] to see why the General Counsel should have the concededly unreviewable discretion to file a complaint, but not the same discretion to withdraw the complaint . . . ." *Id.*

UFCW, Local 23 is dispositive here, given that "the General Counsel of the Authority must be accorded the same discretion with respect to issuance of unfair labor practice complaints as the General Counsel of the NLRB." *Turgeon*, 677 F.2d at 940. Indeed, although Clark correctly notes that *Turgeon* did not address the exact issue presented here (Br. 25-27), his argument fails to address, much less mention, the subsequent Supreme Court decision in *UFCW, Local 23*. The omission of *UFCW, Local 23* from Clark's brief perhaps explains why it raises so many arguments that the Supreme Court conclusively rejected in the analogous NLRA context.

For instance, Clark argues (Br. 21-23) that unilaterally settling an unfair labor practice complaint cannot be characterized as a prosecutorial function of the General Counsel because it was not a power explicitly granted to the General Counsel by

Congress. Yet the Supreme Court, applying analogous provisions in the NLRA, rejected the fundamental premise of that argument in *UFCW, Local 23*. *See* 484 U.S. at 125-26 ("Respondent would have us hold that after a complaint is filed all dispositions can *only* be deemed adjudicatory. . . . We hold that it is a reasonable construction of the NLRA to find that until the hearing begins, settlement or dismissal determinations [by the NLRB General Counsel] are prosecutorial.") (emphasis in original).

Clark further argues (Br. 22-23) that the General Counsel's post-complaint settlement authority is judicially reviewable because it is exercised "on the Authority's behalf." However, the Supreme Court also considered, and squarely rejected, this argument in *UFCW, Local 23*. *See* 484 U.S. at 128 ("The plain language cited by respondent reflects that the General Counsel acts '*on behalf of*' the Board. Clearly this is not the same as an act '*of the Board*' itself.") (internal citations omitted and emphasis in original).[5]

[5] Curiously, in arguing that the General Counsel merely exercises the delegated power of the Authority in settling cases after complaint issuance, Clark relies (Br. 23-24) on the FLRA's *Decision on Request for General Statement of Policy or Guidance*, 23 FLRA 342 (1986). Clark is wrong to do so. As an initial matter, the Authority's decision in the case denied the request to issue a general statement of policy or guidance, and thus, the pronouncements in the case should not be taken as such. *Id.* at 342. Additionally, to the extent the Authority's comments are deemed to be persuasive, the Authority described the General Counsel as having full discretion to do exactly what she did here. *Id.* at 344. Citing the statutory grant of power to the General Counsel, the Authority recognized that "the determination by the General Counsel to cease prosecuting a complaint and enter into an informal settlement agreement is . . . fully within [her] authority." *Id.* Thus, Clark's cited case does nothing but *support* the view

Given that the prosecutorial role and function of the FLRA's General Counsel is identical (and modeled upon) the General Counsel of the NLRB, *UFCW, Local 23* compels dismissal of Clark's petition for lack of jurisdiction.

B. Clark's Additional Claims Do Not Provide the Court with Jurisdiction, Nor, in Any Event, Do They Have Merit

Clark recognizes (Br. 15) that this Court is without jurisdiction under 5 U.S.C. § 7123(a) if the General Counsel's final decision in this case is not a final order of the Authority. Clark's attempts to conflate the General Counsel's determination with a final order of the Authority, however, do not withstand scrutiny. Moreover, Clark's other scattershot attacks on the Authority's regulations, settlement powers, and the merits of the settlement decision here not only fail to provide this Court with jurisdiction, they are uniformly meritless. The Court should dismiss the petition for review.

1. The Court Does Not Have Jurisdiction Over the General Counsel's Decision on Appeal Merely Because It Is "Final"

While Clark correctly describes the General Counsel's determination on appeal as "final" (Br. 20-21), this does not translate to an order reviewable by the Court. *Turgeon*, 677 F.2d at 939. The FLRA's regulation, 5 C.F.R. § 2423.25(b), expressly grants the RD the power to enter into post-complaint settlements over the charging

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that the General Counsel has unreviewable discretion to enter into a unilateral settlement, and that doing so does not constitute a final order by the Authority that could provide the Court with jurisdiction.

party's objections and 5 C.F.R. § 2423.25(a)(1) explicitly states that informal settlements "are not subject to approval by or an order of the Authority." *Id.* The Authority's regulation making the General Counsel's decision not subject to Authority review, and therefore final, represents a reasonable reading of the Statute deserving of deference from the Court. *See UFCW, Local 123*, 484 U.S. at 123 (deferring to the NLRB's reading of similar statutory structure and implementing regulations). As noted above, because the informal settlement does not result in an Authority order, there is no review under the Statute. 5 U.S.C. § 7123(a).

2. Contrary to Clark's Assertion, Authority Regulations Permit Unilateral Settlements After Issuance of a Complaint

Clark next contends that the General Counsel erred in approving a post-complaint settlement because Authority regulations provide only for pre-complaint unilateral settlements. (Br. 27-31.) Even if that were true, Clark provides no authority stating that this Court has jurisdiction to review the claim.

Moreover, even on the merits, Clark is mistaken. In their correspondence with Clark, the RD and Office of the General Counsel cited 5 C.F.R. § 2423.12 as providing a right to enter into a unilateral settlement agreement. (JA 62, 88.) Clark correctly notes that 5 C.F.R. § 2423.12 governs pre-complaint unilateral settlements, not post-complaint settlements. As explained above, however, 5 C.F.R. § 2423.25 authorizes post-complaint settlements and refers back to Subpart A, which includes 5 C.F.R. § 2423.12, concerning how to obtain review of an RD's decision to enter into

an informal settlement agreement over the charging party's objections. Procedures for both pre- and post-complaint unilateral settlements are substantially similar: Both describe the RD's discretion to enter into unilateral settlement agreements and provide an opportunity for an appeal to the General Counsel. Thus, to the extent there was a citation error in the correspondence with Clark, it was harmless, and Clark has identified no prejudice.

3. The General Counsel Enjoys the Power Under the Statute To Withdraw a Complaint Upon Settling a Case, and There Are No Constitutional Problems With Exercising That Discretion

Again without explaining how it would vest jurisdiction on the Court, Clark next asserts that the Statute confers no power, not only on the General Counsel but on any component of the FLRA, to settle a case unilaterally, claiming that Congress could have explicitly granted settlement authority in the Statute, but chose not to do so. (Br. 31-34.) That is not a reasonable interpretation of the Statute. As the Supreme Court explained in *UFCW, Local 23*, Congress was "aware that settlements constitute the 'life-blood' of the administrative process, especially in labor relations." 484 U.S. at 127-28. Indeed, *UFCW, Local 23* holds that post-complaint settlements are an intrinsic part of prosecutorial discretion insulated from judicial review. If Clark's position were accepted, the General Counsel would have no authority to withdraw a complaint before hearing, even "if further investigation discloses that the case is too weak to prosecute" or if the General Counsel receives a settlement offer

too good to refuse. *Id.* at 126. That would lead to absurd results. And it would undermine the operations of "an effective and efficient Government," contrary to the Statute's command. 5 U.S.C. § 7101.

Clark also claims that the Court should construe the Statute to preclude unilateral settlements because other interpretations would "raise serious constitutional questions." (Br. 34.) But merely citing constitutional concerns does not provide this Court with jurisdiction; rather, federal employees' claims are subject to the Statute's procedures and "structure[,] even if their claim is based . . . on the Constitution." *Steadman v. Governor, U.S. Soldiers' and Airmen's Home,* 918 F.2d 963, 967 (D.C. Cir. 1990).

In any event, Clark's various constitutional claims (Br. 34-35) do not withstand scrutiny. He neither has a property interest in purely speculative wage claims nor in a "cause of action." To the contrary, the Statute effectuates public rights, not private ones, and vests no charging party with private causes of action. *Cf. Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 265 (1940). Furthermore, both the Regional Director and the General Counsel provided Clark with due process, explaining the reasons for accepting the settlement unilaterally and affording him an avenue to appeal that decision. *See* 5 C.F.R. § 2423.25(a)-(b); JA 62-65, 88-89. *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982) (explaining that due process requires only that the state give "the putative owner [of a property interest] an opportunity to present his claim of entitlement"). As the First Circuit observed in a

similar case in which a frustrated charging party attempted to challenge the NLRB General Counsel's prosecutorial discretion, "it is doubtful that appellant has an 'entitlement' to have an unfair labor practice complaint issue" under the Due Process Clause. *Saez v. Goslee*, 463 F.2d 214, 215 (1st Cir. 1972).

4. The Administrative Procedure Act Does Not Confer Jurisdiction To Review Clark's Petition on this Court

Finally, despite failing to establish jurisdiction under § 7123, Clark goes on to argue (Br. 20, 37-43) that the General Counsel's decision on the merits violated the Administrative Procedure Act. But the Supreme Court in *UFCW, Local 23* held that the APA did not provide jurisdiction to review an informal settlement, as here. 484 U.S. at 130 (holding that "review under the APA is unavailable of actions specified in 5 U.S.C. § 701(a), that is, where 'statutes [otherwise] preclude judicial review'").[6]

[6] Moreover, even if one were to review the settlement's merits, the RD properly exercised his prosecutorial discretion. He analyzed Clark's objections, including that the remedy was inadequate monetarily and failed to deter future violations. He explained to Clark that the RD's complaint alleged unlawful preferential treatment—only that he was treated unfairly in relation to dues-paying members. The best result Clark could have hoped for in litigation to make him equal with the dues-paying members, as the RD described in his May 23, 2013 letter, was exactly what the settlement provided: payment equal to the highest paid employees under the Union's original settlement with the Agency, or $ 1,970. The other employees, who had not filed timely complaints and thus were potentially barred from any relief at all, also received compensation and a notice describing the ULP and what the Union did to resolve the matter. (JA 63.) A prosecutor's determination to settle a case before hearing involves the exercise of prosecutorial discretion at its core. It involves a variety of considerations, including weighing the evidence and risks of litigation, considering prosecutorial resources, the public interest, and the benefits obtained by the settlement. The General Counsel's decision to settle the complaint over Clark's objections represents a proper exercise of prosecutorial discretion. Finally, to subject

Because the General Counsel's denial of Clark's appeal involves a prosecutorial decision, not a final order of the Authority, it is not subject to judicial review.

CONCLUSION

The petition for review should be dismissed for lack of jurisdiction.

Respectfully submitted,

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the General Counsel's decision to settle a complaint to judicial review would interfere with the efficient and effective administration of the Statute, burden the courts, and promote no useful purpose. *UFCW, Local 23*, 484 U.S. at 131-32.

Fed. R. App. Rule 32(a) Certification

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief is double-spaced (except for extended quotations, headings, and footnotes) and is proportionally spaced, using Garamond font, 14 point type. Based on a word count of my word processing system, this brief contains fewer than 14,000 words. It contains 4,972 words excluding exempt material.

/s/ Fred B. Jacob
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CERTIFICATE OF SERVICE

I certify that on this day, June 19, 2014, the foregoing Brief was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the address listed below:

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ADDENDUM

Relevant Statutes and Regulations

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Relevant Statutes and Regulations

§ 7104. Federal Labor Relations Authority

(a) The Federal Labor Relations Authority is composed of three members, not more than 2 of whom may be adherents of the same political party. No member shall engage in any other business or employment or hold another office or position in the Government of the United States except as otherwise provided by law.

(b) Members of the Authority shall be appointed by the President by and with the advice and consent of the Senate, and may be removed by the President only upon notice and hearing and only for inefficiency, neglect of duty, or malfeasance in office. The President shall designate one member to serve as Chairman of the Authority. The Chairman is the chief executive and administrative officer of the Authority.

(c) A member of the Authority shall be appointed for a term of 5 years. An individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced. The term of any member shall not expire before the earlier of--

(1) the date on which the member's successor takes office, or

(2) the last day of the Congress beginning after the date on which the member's term of office would (but for this paragraph) expire.

(d) A vacancy in the Authority shall not impair the right of the remaining members to exercise all of the powers of the Authority.

(e) The Authority shall make an annual report to the President for transmittal to the Congress which shall include information as to the cases it has heard and the decisions it has rendered.

(f) (1) The General Counsel of the Authority shall be appointed by the President, by and with the advice and consent of the Senate, for a term of 5 years. The General Counsel may be removed at any time by the President. The General Counsel shall hold no other office or position in the Government of the United States except as provided by law.

(2) The General Counsel may--

(A) investigate alleged unfair labor practices under this chapter [5 USCS §§ 7101 et seq.].

(B) file and prosecute complaints under this chapter [5 USCS §§ 7101 et seq.], and

(C) exercise such other powers of the Authority as the Authority may prescribe.

(3) The General Counsel shall have direct authority over, and responsibility for, all employees in the office of General Counsel, including employees of the General Counsel in the regional offices of the Authority.

§ 7114. Representation rights and duties

(a) (1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

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§ 7116. Unfair labor practices

(a) For the purpose of this chapter [5 USCS §§ 7101 et seq.], it shall be an unfair labor practice for an agency--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter [5 USCS §§ 7101 et seq.];

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter [5 USCS §§ 7101 et seq.];

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter [5 USCS §§ 7101 et seq.];

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter [5 USCS §§ 7101 et seq.];

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title [5 USCS § 2302]) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

(8) to otherwise fail or refuse to comply with any provision of this chapter [5 USCS §§ 7101 et seq.].

(b) For the purpose of this chapter [5 USCS §§ 7101 et seq.], it shall be an unfair labor practice for a labor organization--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter [5 USCS §§ 7101 et seq.];

(2) to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter [5 USCS §§ 7101 et seq.];

(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;
(4) to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;
(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter [5 USCS §§ 7101 et seq.];
(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter [5 USCS §§ 7101 et seq.];
(7) (A) to call, or participate in, a strike, work stoppage, or to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or (B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or
(8) to otherwise fail or refuse to comply with any provision of this chapter [5 USCS §§ 7101 et seq.].

§ 7118. Prevention of unfair labor practices

(a) (1) If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the charge a written statement of the reasons for not issuing a complaint.

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§ 7123. Judicial review; enforcement.

(a) Any person aggrieved by any final order of the Authority other than an order under--

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the

evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(d) The Authority may, upon issuance of a complaint as provided in section 7118 of this title charging that any person has engaged in or is engaging in an unfair labor practice, petition any United States district court within any district in which the unfair labor practice in question is alleged to have occurred or in which such person resides or transacts business for appropriate temporary relief (including a restraining order). Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant any temporary relief (including a temporary restraining order) it considers just and proper. A court shall not grant any temporary relief under this section if it would interfere with the ability of the agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed.

§ 2423.4 What must you state in the charge and what supporting evidence and documents should you submit?

(a) What to file. You, the Charging Party, may file a charge alleging a violation of 5 U.S.C. 7116 by providing the following information on a form designated by the General Counsel, or on a substantially similar form, or electronically through the use of the eFiling system on the FLRA's Web site at www.flra.gov, or by facsimile transmission:

(1) The Charging Party's name and mailing address, including street number, city, state, and zip code;

(2) The Charged Party's name and mailing address, including street number, city, state, and zip code;

(3) The Charging Party's point of contact's name, address, telephone number, facsimile number, if known, and email address, if known;

(4) The Charged Party's point of contact's name, address, telephone number, facsimile number, if known, and email address, if known;

(5) A clear and concise statement of the facts alleged to constitute an unfair labor practice, a statement of how those facts allegedly violate specific section(s) and paragraph(s) of the Statute, and the date and place of occurrence of the particular acts; and

(6) A statement whether the subject matter raised in the charge:

(i) Has been raised previously in a grievance procedure;

(ii) Has been referred to the Federal Service Impasses Panel, the Federal Mediation and Conciliation Service, the Equal Employment Opportunity Commission, the Merit Systems Protection Board, or the Office of Special Counsel for consideration or action;

(iii) Involves a negotiability issue that you raised in a petition pending before the Authority under part 2424 of this subchapter; or

(iv) Has been the subject of any other administrative or judicial proceeding.

(7) A statement describing the result or status of any proceeding identified in paragraph (a)(6) of this section.

(b) When and how to file. Under 5 U.S.C. 7118(a)(4), a charge alleging an unfair labor practice must be in writing and signed or filed electronically using the eFiling system on the FLRA's Web site at www.flra.gov. It is normally filed within six (6) months of its occurrence unless one of the two (2) circumstances described under paragraph (B) of 5 U.S.C. 7118(a)(4) applies.

(c) Declarations of truth and statement of service. A charge must also contain a declaration by the individual signing the charge, under the penalties of the Criminal Code (18 U.S.C. 1001), that its contents are true and correct to the best of that individual's knowledge and belief.

(d) Statement of service. You must also state that you served the charge on the Charged Party, and you must list the name, title and location of the individual served, and the method of service.

(e) Self-contained document. A charge must be a self-contained document describing the alleged unfair labor practice without a need to refer to supporting evidence and documents submitted under paragraph (f) of this section.

(f) Submitting supporting evidence and documents and identifying potential witnesses. When filing a charge, you must submit to the Regional Director any supporting evidence and documents, including, but not limited to, correspondence and memoranda, records, reports, applicable collective bargaining agreement clauses, memoranda of understanding, minutes of meetings, applicable regulations, statements of position, and other documentary evidence. You also must identify potential witnesses with contact information (telephone number, email address, and facsimile number) and provide a brief synopsis of their expected testimony.

§ 2423.6 What is the process for filing and serving copies of charges?

(a) Where to file. You must file the charge with the Regional Director for the region in which the alleged unfair labor practice has occurred or is occurring. A charge alleging that an unfair labor practice has occurred or is occurring in two or more regions may be filed with the Regional Director in any of those regions.

(b) Date of filing. When a Regional Director receives a charge, it is deemed filed. A charge filed during business hours by facsimile or electronic means is deemed received on the business day on which it is received (either by the Regional Office fax machine or by the eFiling system), until midnight local time in the Region where it is filed. But when a Region receives a charge after the close of the business day by any other method, it will be deemed received and docketed on the next business day. The business hours for each of the Regional Offices are set forth at http://www.FLRA.gov.

(c) Method of filing. You may file a charge with the Regional Director in person or by commercial delivery, first class mail, certified mail, facsimile, or electronically through use of the eFiling system on the FLRA's Web site at www.flra.gov. If filing by facsimile transmission or by electronic means, you are not required to file an original copy of the charge with the Region. You assume responsibility for the Regional Director's receipt of a charge. Supporting evidence and documents must be submitted to the Regional Director in person, by commercial delivery, first class mail, certified mail, facsimile transmission, or through the FLRA's eFiling system.

(d) Service of the charge. You must serve a copy of the charge (without supporting evidence and documents) on the Charged Party. Where facsimile equipment is available, you may serve the charge by facsimile transmission, as paragraph (c) of this section discusses. Alternatively, you may serve the charge by electronic mail ("email"), but only if the Charged Party has agreed to be served by email. The Region routinely serves a copy of the charge on the Charged Party, but you remain responsible for serving the charge, consistent with the requirements in this paragraph.

§ 2423.8 How are charges investigated?

(a) Investigation. The Regional Director, on behalf of the General Counsel, conducts an investigation of the charge as deemed necessary. During the course of the investigation, all parties involved are given an opportunity to present their evidence and views to the Regional Director.

(b) Cooperation. The purposes and policies of the Statute can best be achieved by the parties' full cooperation and their timely submission of all relevant information from all potential sources during the investigation. All persons must cooperate fully with the Regional Director in the investigation of charges. A failure to cooperate during the investigation of a charge may provide grounds to dismiss a charge for failure to produce evidence supporting the charge. Cooperation includes any of the following actions, when deemed appropriate by the Regional Director:

(1) Making union officials, employees, and agency supervisors and managers available to give sworn/affirmed testimony regarding matters under investigation;
(2) Producing documentary evidence pertinent to the matters under investigation;

(3) Providing statements of position on the matters under investigation; and

(4) Responding to an agent's communications during an investigation in a timely manner.

(c) Investigatory subpoenas. If a person fails to cooperate with the Regional Director in the investigation of a charge, the General Counsel, upon recommendation of a Regional Director, may decide in appropriate circumstances to issue a subpoena under 5 U.S.C. 7132 for the attendance and testimony of witnesses and the production of documentary or other evidence. However, no subpoena, which requires the disclosure of intramanagement guidance, advice, counsel, or training within an agency or between an agency and the Office of Personnel Management, will issue under this section.

(1) A subpoena can only be served by any individual who is at least 18 years old and who is not a party to the proceeding. The individual who served the subpoena must certify that he or she did so:

(i) By delivering it to the witness in person;

(ii) By registered or certified mail; or

(iii) By delivering the subpoena to a responsible individual (named in the document certifying the delivery) at the residence or place of business (as appropriate) of the person for whom the subpoena was intended. The subpoena must show on its face the name and address of the Regional Director and the General Counsel.

(2) Any person served with a subpoena who does not intend to comply must, within 5 days after the date of service of the subpoena upon such person, petition in writing to revoke the subpoena. A copy of any petition to revoke must be served on the General Counsel.

(3) The General Counsel must revoke the subpoena if the witness or evidence, the production of which is required, is not material and relevant to the matters under investigation or in question in the proceedings, or the subpoena does not describe with sufficient particularity the evidence the production of which is required, or if for any other reason sufficient in law the subpoena is invalid. The General Counsel must state the procedural or other grounds for the ruling on the petition to revoke. The petition to revoke becomes part of the official record if there is a hearing under subpart C of this part.

(4) Upon the failure of any person to comply with a subpoena issued by the General Counsel, the General Counsel must determine whether to institute proceedings in the appropriate district court for the enforcement of the subpoena. Enforcement must not be sought if to do so would be inconsistent with law, including the Statute.

(d) Confidentiality. It is the General Counsel's policy to protect the identity of individuals who submit statements and information during the investigation, and to protect against the disclosure of documents obtained during the investigation, to ensure the General Counsel's ability to obtain all relevant information. However, after a Regional Director issues a complaint and when necessary to prepare for a hearing, the Region may disclose the identification of witnesses, a synopsis of their expected testimony, and documents proposed to be offered into evidence at the hearing, as required by the prehearing disclosure requirements in § 2423.23.

§ 2423.10 What actions may the Regional Director take with regard to your charge?

(a) Regional Director action. The Regional Director, on behalf of the General Counsel, may take any of the following actions, as appropriate:

(1) Approve a request to withdraw a charge;

(2) Dismiss a charge;

(3) Approve a written settlement agreement under § 2423.12;

(4) Issue a complaint; or

(5) Withdraw a complaint.

(b) Request for appropriate temporary relief. Parties may request the General Counsel to seek appropriate temporary relief (including a restraining order) under 5 U.S.C. 7123(d). The General Counsel may initiate and prosecute injunctive proceedings under 5 U.S.C. 7123(d) only upon approval of the Authority. A determination by the General Counsel not to seek approval of the Authority to seek temporary relief is final and cannot be appealed to the Authority.

(c) General Counsel requests to the Authority. When a complaint issues and the Authority approves the General Counsel's request to seek appropriate temporary relief (including a restraining order) under 5 U.S.C. 7123(d), the General Counsel may make application for appropriate temporary relief (including a restraining order) in the district court of the United States within which the unfair labor practice is alleged to have occurred or in which the party sought to be enjoined resides or transacts business. The General Counsel may seek temporary relief if it is just and proper and the record establishes probable cause that an unfair labor practice is being committed. Temporary relief will not be sought if it would interfere with the ability of the agency to carry out its essential functions.

(d) Actions subsequent to obtaining appropriate temporary relief. The General Counsel must inform the district court that granted temporary relief under 5 U.S.C. 7123(d) whenever an Administrative Law Judge recommends dismissal of the complaint, in whole or in part.

§ 2423.11 What happens if a Regional Director decides not to issue complaint?

(a) Opportunity to withdraw a charge. If the Regional Director determines that the charge has not been timely filed, that the charge fails to state an unfair labor practice, or for other appropriate reasons, the Regional Director may request the Charging Party to withdraw the charge.

(b) Dismissal letter. If the Charging Party does not withdraw the charge within a reasonable period of time, the Regional Director will dismiss the charge and provide the parties with a written statement of the reasons for not issuing a complaint.

(c) Appeal of a dismissal letter. The Charging Party may obtain review of the Regional Director's decision to dismiss a charge by filing an appeal with the General Counsel, either in writing or by email to ogc.appeals@flra.gov, within 25 days after the Regional Director served the decision. A Charging Party must serve a copy of the appeal on the Regional Director. The General Counsel must serve notice on the Charged Party that the Charging Party has filed an appeal.

(d) Extension of time. The Charging Party may file a request, either in writing or by email to ogc.appeals@flra.gov, for an extension of time to file an appeal, which must be received by the General Counsel not later than five (5) days before the date the appeal is due. A Charging Party must serve a copy of the request for an extension of time on the Regional Director.

(e) Grounds for granting an appeal. The General Counsel may grant an appeal when the appeal establishes at least one of the following grounds:

(1) The Regional Director's decision did not consider material facts that would have resulted in issuance of a complaint;

(2) The Regional Director's decision is based on a finding of a material fact that is clearly erroneous;

(3) The Regional Director's decision is based on an incorrect statement or application of the applicable rule of law;

(4) There is no Authority precedent on the legal issue in the case; or

(5) The manner in which the Region conducted the investigation has resulted in prejudicial error.

(f) General Counsel action. The General Counsel may deny the appeal of the Regional Director's dismissal of the charge, or may grant the appeal and remand the case to the Regional Director to take further action. The General Counsel's decision on the appeal states the grounds listed in paragraph (e) of this section for denying or granting the appeal, and is served on all the parties. Absent a timely motion for reconsideration, the General Counsel's decision is final.

(g) Reconsideration. After the General Counsel issues a final decision, the Charging Party may move for reconsideration of the final decision if it can establish extraordinary circumstances in its moving papers. The motion must be filed within 10 days after the date on which the General Counsel's final decision is postmarked. A motion for reconsideration must state with particularity the extraordinary circumstances claimed and must be supported by appropriate citations. The decision of the General Counsel on a motion for reconsideration is final.

§ 2423.12 What types of settlements of unfair labor practice charges are possible after a Regional Director decides to issue a complaint but before issuance of a complaint?

(a) Bilateral informal settlement agreement. Before issuing a complaint, the Regional Director may give the Charging Party and the Charged Party a reasonable period of time to enter into an informal settlement agreement to be approved by the Regional Director. When a Charged Party complies with the terms of an informal settlement agreement approved by the Regional Director, no further action is taken in the case. If the Charged Party fails to perform its obligations under the approved informal settlement agreement, the Regional Director may institute further proceedings.

(b) Unilateral informal settlement agreement. If the Charging Party elects not to become a party to a bilateral settlement agreement, which the Regional Director concludes fulfills the policies of the Statute, the Regional Director may choose to approve a unilateral settlement between the Regional Director and the Charged Party. The Regional Director, on behalf of the General Counsel, must issue a letter stating the grounds for approving the settlement agreement and declining to issue a complaint. The Charging Party may obtain review of the Regional Director's action by filing an appeal with the General Counsel under § 2423.11(c) and (d). The General Counsel may grant an appeal when the Charging Party has shown that the Regional Director's approval of a unilateral settlement agreement does not fulfill the purposes and policies of the Statute. The General Counsel must take action on the appeal as set forth in § 2423.11(b) through (g).

§ 2423.25 Post complaint, prehearing settlements.

(a) Informal and formal settlements. Post complaint settlements may be either informal or formal.

(1) Informal settlement agreements provide for withdrawal of the complaint by the Regional Director and are not subject to approval by or an order of the Authority. If the Respondent fails to perform its obligations under the informal settlement agreement, the Regional Director may reinstitute formal proceedings consistent with this subpart.

(2) Formal settlement agreements are subject to approval by the Authority, and include the parties' agreement to waive their right to a hearing and acknowledgment that the Authority may issue an order requiring the Respondent to take action appropriate to the terms of the settlement. The formal settlement agreement shall also contain the Respondent's consent to the Authority's application for the entry of a decree by an appropriate federal court enforcing the Authority's order.

(b) Informal settlement procedure. If the Charging Party and the Respondent enter into an informal settlement agreement that is accepted by the Regional Director, the Regional Director shall withdraw the complaint and approve the informal settlement agreement. If the Charging Party fails or refuses to become a party to an informal settlement agreement offered by the Respondent, and the Regional Director concludes that the offered settlement will effectuate the policies of the Federal Service Labor-Management Relations Statute, the Regional Director shall enter into the agreement with the Respondent and shall withdraw the complaint. The Charging Party then may obtain a review of the Regional Director's action by filing an appeal with the General Counsel as provided in subpart A of this part

(c) Formal settlement procedure. If the Charging Party and the Respondent enter into a formal settlement agreement that is accepted by the Regional Director, the Regional Director shall withdraw the complaint upon approval of the formal settlement agreement by the Authority. If the Charging Party fails or refuses to become a party to a formal settlement agreement offered by the Respondent, and the Regional Director concludes that the offered settlement will effectuate the policies of the Federal Service Labor-Management Relations Statute, the agreement shall be between the Respondent and the Regional Director. The formal settlement agreement together with the Charging Party's objections, if any, shall be submitted to the Authority for approval. The

Authority may approve a formal settlement agreement upon a sufficient showing that it will effectuate the policies of the Federal Service Labor-Management Relations Statute.