

## ATTACHMENT 1E

September 4, 1996

### **MEMORANDUM**

**TO:** Regional Directors  
**FROM:** Joe Swerdzewski  
General Counsel  
**SUBJECT:** Injunction Policy

Section 7123(d) of the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101 et seq., provides for the General Counsel, with Authority approval, to seek appropriate temporary relief from an appropriate United States Federal District Court when specific conditions have been met. The General Counsel has issued a public memorandum reflecting the General Counsel's policy implementing this section of the Statute. This policy was developed after considering the recommendations of the Maximizing the Statute Work Group, which includes all Regional Attorneys, representatives of the employees and the Regional Directors. The Policy will be implemented in conjunction with the General Counsel's Scope of Investigations Policy, Intervention Policy, Quality of Unfair Labor Practice Investigations Policy, Settlement Policy, Prosecutorial Discretion Policy and Facilitation, Intervention, Training and Education Policy.

### **POLICY**

The Regions will review all unfair labor practice charges to determine whether the purposes of the Statute will be frustrated if the *status quo* is not maintained while the unfair labor practice complaint is being processed. In those extraordinary circumstances where the *status quo* must be maintained, the General Counsel will request Authority permission to seek appropriate temporary relief. The Regions should fully inform all parties of the various steps involved in processing injunction cases and the parties should be afforded the opportunity to resolve the dispute in accordance with the Office of the General Counsel settlement policy. This Policy will be evaluated to determine its effectiveness on a recurring basis, by reviewing the type of cases where the Regions have determined to conduct initial inquiries and expedited investigations and made recommendations for injunctive relief and by considering the views of our customers.

### **OBJECTIVE**

The objective of this policy is to maximize the effectiveness of the Statute by identifying and processing those unfair labor practice charges where appropriate temporary relief is warranted. This policy also provides for a consistent approach by the Regional Directors, who are subject to the General Counsel's supervision and direction, in investigating and making recommendations in unfair labor practice cases where interim temporary relief is necessary to effectuate the purposes and policies of the Statute.

This policy is issued in conjunction with the General Counsel's prosecutorial discretion and settlement policies. Pursuant to the prosecutorial discretion policy, the Office of the General Counsel applies established criteria to determine if discretion should be exercised to dismiss meritorious unfair labor practice charges when litigation would not effectuate the purposes and policies of the Statute. As part of that policy, the Office of the General Counsel will be able to concentrate its limited resources on vigorously prosecuting cases, including seeking temporary relief, where the parties, with the assistance of the Office of the General Counsel, are unable to resolve their dispute. Pursuant to the Office of the General Counsel settlement policy, the General Counsel seeks settlements that enhance the relationship between the parties; resolve the issues that have brought the parties to seek FLRA assistance; and further the purposes and policies of the Statute. Under this policy, the parties are involved in developing the remedy which best meets their interests, and settlement is pursued through all stages of the processing of the case.

This policy also complements the General Counsel's Scope of Investigations Policy, Intervention Policy, Quality of Unfair Labor Practice Investigations Policy and Facilitation, Intervention, Training and Education Policy. These

policies establish standards for the conduct of investigations and alternative processes to resolve work place disputes.

## BACKGROUND

Section 7123(d) of the Statute sets forth the criteria for a district court of the United States to grant appropriate temporary relief (including the right to grant temporary restraining orders) in unfair labor practice cases. A court must conclude that granting such relief is "just and proper" before temporary relief can be granted. In addition, a court cannot grant any temporary relief "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".

The following are examples of cases where the General Counsel successfully has petitioned district courts for temporary relief:

1. A strike by a labor organization (United States v. PATCO, Inc., 524 F. Supp. 160, 107 LRRM 3299 (D.C.D.C. 1981);
2. A unilateral reorganization resulting in the involuntary transfer and relocation of bargaining unit employees from one state to another (Smith v. Federal Aviation Administration, Civil Action No. C83-1538 C (W.D.WA D.C. Nov. 23, 1983);
3. The refusal to recognize and enter into collective bargaining negotiations with a newly certified exclusive representative (Reuben v. Federal Deposit Insurance Corporation, 760 F. Supp. 934, 137 LRRM 2066 (D.C.D.C. 1991).
4. The unilateral elimination of on-base housing by a military activity where other suitable housing for civilian employees was not available (Petrucci v. United States Southern Command, Department of Defense, Republic of Panama and United States Army South, Republic of Panama, Civil Action No. 94-3786 (E.D. LA D.C. Nov. 29, 1994 ); and,

## CRITERIA

In order for this policy on injunctive relief to be consistently and fairly applied, the Regional Directors and our customers must understand the section 7123(d) elements a court will examine in determining whether injunctive relief is appropriate. In addition, the parties must understand that a decision to seek injunctive relief is appropriate only under extraordinary circumstances and, in determining whether injunctive relief should be sought, one factor is seldom determinative. Instead, all the facts and circumstances present in a particular case must be examined before a decision is made to seek injunctive relief. The Office of the General Counsel will consider some or all of the following factors, *inter alia*, in determining whether a particular case meets the criteria set forth in section 7123(d) of the Statute for injunctive relief:

### 1. SERIOUSNESS OF THE VIOLATION

#### **Is the violation serious?**

Not all violations of the Statute are as serious as others. For example, a failure to accord recognition to a union after a valid representation election is more serious than a failure to afford the union an opportunity to be represented at a routine formal discussion. Moreover, there are degrees of harm within the same category of unfair labor practices. For example, a decision to move the office of one employee to a different floor at the same facility is quite different from a decision to close an entire facility and transfer 100 employees to another state. The Regional Directors should consider the seriousness of the violation in deciding whether to recommend that appropriate temporary relief be sought.

## **2.       LEGAL PRECEDENT**

### **Is the law clear regarding the violation alleged?**

Courts consider the likelihood of success on the merits in deciding whether to grant injunctive relief. Accordingly, the Regional Directors should take into account whether a case involves a violation supported by well-established precedent or if it poses a novel legal theory.

## **3.       DISRUPTION TO THE ESSENTIAL FUNCTIONS OF THE AGENCY RESPONDENT**

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

The Statute prohibits a court from granting injunctive relief if an injunction would prevent an agency from carrying out its essential functions. The Regional Directors, therefore, should consider whether temporary relief would interfere with an agency's ability to carry out essential functions.

## **4.       TIMELINESS OF THE DISPUTE**

### **Is the request timely in relationship to the underlying events?**

Courts often are concerned with the current status of a case before the Authority and may be reluctant to grant injunctive relief if the facts establish that the matter has not been processed expeditiously. Therefore, consideration should be

given to the timeliness of a determination to recommend temporary relief in relationship to when the violation took place as well as the time it has taken to investigate and process the case.

## **5.       THE REMEDY**

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

Absent appropriate temporary relief, certain violations cannot be remedied effectively after they have been implemented. For example, implementation of a major reorganization that results in the relocation of employees, forced resignations and retirements, or other types of dislocations cannot ordinarily be remedied effectively after implementation. Unless appropriate temporary relief is granted, it will be difficult, if not impossible, to restore the *status quo* through the unfair labor practice process because of the passage of time. In other instances make whole and *status quo* remedies are available. The Regional Directors should consider whether the failure to maintain the *status quo* frustrates the remedial purposes of the Statute in deciding whether to recommend that appropriate temporary relief be sought.

## **6.       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?**

Certain violations of the Statute undermine the bargaining relationship. For example, a refusal to recognize and deal with the employees' exclusive representative after certification would deny employees the benefits of unionization until the matter is ultimately resolved. Similarly, targeting union officials for a reduction-in-force would render a union unable to carry out its statutory duties as the exclusive representative, undermine the status of the exclusive representative and chill bargaining unit employees in exercising their protected statutory rights. The Regional Directors should consider whether the violation undermines the fundamental right to organize and/or engage in collective bargaining when deciding whether to recommend that appropriate temporary relief be sought.

*The following process should be followed by the Regions to determine if a charge is a candidate for section 7123(d) relief.*

## **REVIEW OF CHARGES**

Each Region should initially review all unfair labor practice charges and supporting evidence which accompanies the charge to consider whether the issues and the supporting evidence are of the type which indicate that the General Counsel should consider requesting Authority permission to seek appropriate temporary relief.

In addition, a Charging Party may also request when filing an unfair labor practice charge, or during the processing of a charge, that the General Counsel consider requesting Authority permission to seek appropriate temporary relief. If requesting such relief, the Charging Party should specifically make its request in the body of the charge or in writing during the course of the investigation. All charges should be reviewed by the Regions for the potential for seeking appropriate temporary relief in the same manner and under the same standards and time frames whether or not a Charging Party specifically requests appropriate temporary relief.

## **INITIAL INQUIRY**

In those cases where the charges and supporting evidence are of the type which indicate that the General Counsel should consider requesting Authority permission to seek appropriate temporary relief, the Regions should conduct an initial inquiry. A Charging Party's request for appropriate temporary relief does not require the Region to conduct an initial inquiry into whether the charge warrants expedited treatment. Rather, all charges should be reviewed by the Regions and receive similar treatment whether or not a Charging Party requests such relief. There is no appeal to the General Counsel or the Authority from a Regional Director's determination not to conduct an initial inquiry because the charge and supporting evidence is not the type which indicate that the General Counsel should consider requesting Authority permission to seek appropriate temporary relief.

The Regions should document the file on those cases where the Region determines to conduct an initial inquiry. The purpose of the initial inquiry is to determine whether an expedited investigation is warranted to determine the merits of the charge and whether the Region should recommend to the General Counsel that temporary relief is appropriate under the standards in section 7123(d) of the Statute. The purpose and scope of the initial inquiry should be clearly discussed by the Region with the Charging Party. The Regions should decide whether to expedite an investigation by examining the evidence obtained during the initial inquiry to determine whether there appears to be probable cause that an unfair labor practice has occurred, or is continuing to occur, and by applying the six criteria set forth in the policy memorandum to determine whether it appears that appropriate temporary relief should be sought. All discussions with the parties concerning the initial inquiry should be documented in the file.

In deciding whether to expedite investigation of a charge, the Regions should require probative evidence to support the allegations of the unfair labor practice on the merits, as well as the reasons why the Charging Party contends that appropriate temporary relief is just and proper. The Regions have discretion to determine the extent of its initial inquiry and the evidence and other documentation required for the Region to determine whether an expedited investigation is warranted.

## **NOTIFICATION OF REGIONAL DETERMINATION ON EXPEDITED INVESTIGATION**

If the Region determines that the initial inquiry does not support an expedited investigation, the file should be documented and the case should be processed in the same manner as other cases which did not involve the potential for appropriate temporary relief. If a Charging Party had specifically requested appropriate temporary relief and the Region decides not to expedite the investigation, the Region should notify the Charging Party that the investigation should not be expedited, explain the basis of that decision and that there is no appeal of this determination, inform the Charging Party that the charge will be fully investigated as soon as practicable and document the file. There is no appeal to the General Counsel or the Authority of the Region's decision whether or not to expedite an investigation. If the Charged Party was involved in the initial inquiry, the Region also should notify the Charged Party that there will be no expedited investigation and document the file.

If the Region decides that an expedited investigation is warranted, the Region initially will notify the parties that they should be prepared for an expedited investigation, the potential for section 7123(d) relief and document the file.

## **RESPONSIBILITIES OF CHARGING AND CHARGED PARTIES IN AN EXPEDITED INVESTIGATION**

If an investigation is expedited, the Charging Party must be prepared to present all relevant evidence pertaining to the merits of the charge. The Charging Party also must be prepared to address the six criteria discussed in this policy memorandum which the Region will evaluate to determine whether appropriate temporary relief should be pursued.

The Charging Party must be prepared to immediately commence the investigation as soon as the Region advises the Charging Party that it will be undertaking an expedited investigation because of the potential for temporary relief. The Charging Party should be prepared to provide the Region with all requested documents and to insure, to the best of the Charging Party's ability, that witnesses are identified by name, telephone number, and work hours and are available for an expeditious investigation. Similarly, the Charging Party should be prepared to present its documented and testamentary evidence to the Region to support the merits of the charge.

The following are examples of the type of evidence and information which the Charging Party should be prepared to present during the expedited investigation:

In all cases, the Charging Party must present evidence supporting all elements of the alleged unfair labor practice. The Charging Party also must present evidence to support a determination that immediacy in stopping the alleged unlawful event is imperative since a final order of the Authority would be rendered meaningless or ineffectual by the passage of time that is normally required for the processing of a case through the administrative procedure. The Charging Party should be prepared to present evidence why a subsequent remedy as a result of the prosecution of the unfair labor practice case would not satisfactorily remedy the violation. The Charging Party also should be prepared to present evidence on how the alleged violative act might undermine the purposes and policies of the Statute; such as the effect of the violation on an exclusive representative or agency institutional right or the effect of the violation on individual employee rights.

In charges filed against an agency, the union Charging Party should provide information such as: a description of the impact on unit employees of the alleged violative act(s) (for example, loss of benefits, relocation, termination and/or reduction-in-force); the number of employees involved; and/or the type and nature of discipline or administrative action that had been imposed. An individual Charging Party filing a charge against an agency should provide the same type of information, but must also provide evidence or information concerning whether the union, in its capacity as the exclusive representative, was involved prior to the agency's action that is the subject of the charge. Moreover, an individual or union Charging Party should be prepared with evidence to establish that the essential functions of an agency Charged Party would not be interfered with by the granting of temporary relief.

In charges filed against a labor organization, an agency Charging Party should provide information on how the alleged violative conduct affects the ability of the agency to perform its functions and mission. An individual charging party should provide information on the impact on the individual.

Similarly, a Charged Party should be prepared to cooperate in the expedited investigation and present its evidence and argument pertaining to the merits of the charge and the appropriateness of temporary relief. An expedited investigation should not be delayed due to a Charged Party's delay in presenting evidence and argument.

## **REGIONAL OFFICE EXPEDITED INVESTIGATION**

Once the decision has been made to expedite the investigation of a charge, the agent/attorney should conduct, where possible, an on-site investigation of the charge. If a telephonic investigation is undertaken, the Region may authorize the use of express mail for the return of any original affidavits, while requesting a fax of the affidavits so that the Region should not be delayed in processing the case. The investigation should be completed within the shortest time period possible.

Affidavits should be obtained as part of an investigation. The affidavit must be appropriate for submission to a federal district court: it should be typed and should address the proof elements of the violation and the criteria in section 7123 of the Statute. Specifically, the affidavit should address the elements of the alleged unfair labor practice(s) to show "probable cause" that a violation has occurred or is occurring and to establish the nature of the harm to the remedial purposes of the Statute.

The Regional Director will determine whether to recommend to the General Counsel that temporary relief should be sought based on the criteria in this policy.

## **REGIONAL DIRECTOR DETERMINATION ON THE MERITS OF THE CHARGE AND THE APPROPRIATENESS OF TEMPORARY RELIEF**

Once the investigation has been completed, the Regional Director will make a determination on the merits of the unfair labor practice and on whether to recommend to the General Counsel that temporary relief should be sought. If the determination is made that the charge has no merit, the decision should be explained to the Charging Party, withdrawal of the charge should be solicited, and absent withdrawal, a dismissal letter should be issued to both parties. If a determination is made that the charge has merit but that the Region has determined that temporary relief is not appropriate, the Region should inform the parties of the basis of the decision and continue processing the merit charge. If a determination is made that the charge has merit and that the seeking of appropriate temporary relief should be recommended to the General Counsel, the parties should be informed of the basis of the decision on the merits, that the case will be submitted to the General Counsel and the process that will be followed. There is no appeal to the General Counsel or the Authority from the Regional Director's determination whether or not to recommend the seeking of temporary relief. The parties also should be encouraged to settle the case. The Region should emphasize that it is preferable to resolve all aspects of the case, both the injunction action and the underlying merits of the charge.

### **SUBMISSION OF THE REQUEST FOR APPROPRIATE TEMPORARY RELIEF TO THE OFFICE OF THE GENERAL COUNSEL**

The Region will submit its recommendation to the General Counsel. If the General Counsel decides that temporary relief should not be sought, the Office of the General Counsel will advise the Region to contact the parties and inform them of the basis for this decision. The General Counsel's decision not to seek approval from the Authority for such temporary relief is final and may not be appealed to the Authority.

If the General Counsel decides to forward the Region's request to the Authority, the Office of the General Counsel will instruct the Region to issue complaint and to seek the earliest possible hearing date (usually 25 days from issuance of the complaint) on the unfair labor practice complaint. In certain extraordinary circumstances, the Region should request a hearing within five days after issuance of complaint consistent with section 2423.12(b) and 2423.13(a) of the Regulations.

The parties should be notified that the Region is issuing complaint and will seek permission to seek immediate relief. Settlement should be discussed thoroughly with each party since seeking injunctive relief is often a catalyst for resolution of disputes. Any settlement sought should comport with the General Counsel's Settlement Policy and should serve the interests of the parties and the purposes and policies of the Statute. The Regional Office should strive to settle the underlying unfair labor practice case in its entirety to avoid the need for seeking temporary relief and litigating the case.

### **THE AUTHORITY'S ACTION ON THE GENERAL COUNSEL'S REQUEST**

If the Authority denies the General Counsel's request, the Regional Office should verbally notify the parties of the denial of the request, that this decision cannot be appealed, and that the case will be tried, absent settlement, as soon as practical.

If the Authority approves the General Counsel's request, the General Counsel's staff will forward by E-mail or fax a copy of the Authority's authorization to seek injunctive relief. The Office of the General Counsel will fax or E-mail this information to the other Regional offices. Further, the Office of the General Counsel should inform the national level of the Respondent of the intent to seek temporary relief and urge officials at that level to assist in settling the case.

### **SEEKING TEMPORARY RELIEF IN DISTRICT COURT**

The Region should telephonically inform the parties of its intent to file for injunctive relief. This notice should be confirmed in writing to the counsel of record for the Respondent. Settlement should be vigorously pursued while the preparation of the pleadings continues.

The Region should file the appropriate papers in person in the district court having jurisdiction over the matter as soon as possible after the Authority's authorization.

**LITIGATION OF THE UNFAIR LABOR PRACTICE COMPLAINT AFTER APPROPRIATE TEMPORARY RELIEF HAS BEEN OBTAINED**

Whenever appropriate temporary relief has been obtained and thereafter an Administrative Law Judge hearing the complaint recommends that the complaint be dismissed, in whole or in part, the Region will inform the district court which granted the temporary relief of the possible change in circumstances arising out of the decision of the Administrative Law Judge.