

## ATTACHMENT 3F1

**Case Caption (separate case caption for brief)**

### **GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION AND RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to section 2423.40(a) of the Authority's regulations, Counsel for the General Counsel respectfully submits the following exceptions to the Decision and recommended Order of Administrative Law Judge (ALJ)

Johnson [add date of ALJD and ALJ no.]

#### **Examples of exceptions:**

#### **I. Unilateral change -- discontinuing a career ladder -- violation of section 7116(a)(1) and (5)**

##### **Exceptions to factual conclusions:**

To the ALJ's factual conclusion that from the inception of the program to rivetize some of its civilian work force, promotions to the WG-3801-12 position were competitive personnel actions under the Air Force's computerized system even though employees may have had no knowledge that their consideration for promotion was competitive. ALJD at 8, lines 17-20.

To the ALJ's factual conclusion that Respondent's 1993 memorandum concerning the operation of the rivetized workforce program indicated that the WG-12 positions were to be filled competitively, and the various promotion actions taken thereunder specified that the employees' selections for promotion to the WG-12 positions were pursuant to "cert." lists and other competitive procedures. ALJD at 9, lines 1-5.

##### **Exceptions to legal conclusions:**

To the ALJ's legal conclusion that respondent did not violate section 7116(a)(1) and (5) by discontinuing a career ladder under which all mechanics successfully completing the rivetized workforce training program were entitled to automatic and noncompetitive promotions to the WG-12 grade level. ALJD at 8, lines 12-16.

To the ALJ's legal conclusion that the Respondent did not unilaterally discontinue a career ladder policy in violation of the Statute. ALJD at 9, lines 6-8.

#### **II. Failure to comply with section 7114(a)(2)(B) in denying requests for representation - violation of section 7116(a)(1) and (8)**

##### **Exceptions to factual conclusions:**

To the ALJ's factual conclusion that Counsel for the General Counsel has never suggested that [the employee's] putative request for an attorney, or for "somebody" with whom to talk, constituted a valid request for Union representation. ALJD at 10, lines 2-6.

To the ALJ's factual conclusion finding a reasonable basis for doubt as to whether OIA understood or should have understood that the proof that [the employee] made a valid request for Union Representation would come in the form of testimony. ALJD at 9, lines 13-17.

##### **Exceptions to legal conclusions:**

To the ALJ's legal conclusion that testimony about requesting an attorney or "somebody" may not form the basis of a finding that [the employee] requested Union representation and the recommendation to dismiss the allegation that OIA denied such a request. ALJD at 10, lines 5-10.

To the ALJ's legal conclusion that a notice posted at the facility where the unfair labor practice occurred will suffice. ALJD at 14, lines 2-4.

### **III. Application for Attorney Fees under EAJA**

#### **Exceptions to factual conclusions:**

To the ALJ's factual conclusion that the General Counsel, notwithstanding his effort to obscure his purpose, was seeking to enforce the prior order of the Authority by asserting that discipline pursuant to section 7116(c) was unlawful because Respondent had not complied with the prior order. ALJD at 5, lines 2-6.

#### **Exceptions to legal conclusions:**

To the ALJ's legal conclusion that having failed at all levels, General Counsel's position was not substantially justified within the meaning of the EAJA. ALJD at 6, lines 1-5.

To the ALJ's legal conclusion that the General Counsel's theory that discipline under section 7116(c) is subject to compliance with a prior Authority Order has no reasonable basis in law. ALJD at 6, lines 9-12.

To the ALJ's legal conclusion that the Union should not have been forced into the expense of defending against General Counsel's action which was not substantially justified nor were special circumstances shown that would make an award unjust. ALJD at 8, lines 8-10.

### **IV. Nontraditional remedies based on egregious violations**

#### **Exceptions to factual conclusions:**

To the ALJ's factual conclusion that the unlawful conduct, while disparaging of Union officials and bargaining rights, appears to be more the product of anger, and of the zealous protection of perceived management prerogatives, than of a calculated effort to "break" the Union. ALJD at 30, lines 12-15.

To the ALJ's factual conclusion that the conduct was simply not in the same league with the kind of egregious "union busting" that is generally deemed in the private sector to warrant nontraditional remedies. ALJD at 30 lines 8-11.

To the ALJ's factual conclusion that nothing in the Warden's conduct suggests that he is likely to defy an Authority order. ALJD at 31, lines 3-7.

To the ALJ's factual conclusion that recommending the kinds of remedies that the General Counsel has requested would guarantee exceptions to the decision. ALJD at 33, lines 3-6.

#### **Exceptions to legal conclusions:**

To the ALJ's legal conclusion that the violations found were not so flagrant or pervasive as to render inadequate the more typical Authority remedies, including affirmative measures specifically tailored to recreating the conditions and relationships with which the unfair labor practice interfered. ALJD at 30, lines 3-7.

To the ALJ's legal conclusion that the calling of a special meeting at which the notice is to be read to employees is not warranted. ALJD at 31, lines 2-6.

To the ALJ's legal conclusion that however Respondent's violations may compare with violations committed in other cases arising under the Statute, they do not place this situation within the very select category of cases that requires such a special provision. ALJD at 32, lines 1-5.

To the ALJ's legal conclusion that the requirement that the responsible management official read the notice is subject to the objection of unnecessary humiliation and even the substitution of a reading by an Authority agent would be excessive in these circumstances and therefore an unwarranted intrusion into the operation

of the facility, notwithstanding the Warden's use of a staff recall meeting to make some of the coercive statements in this case. ALJD at 32, lines 13-19.

**V. Information case -- Cross-exception for failure to make a legal conclusion:**

(1) To the ALJ's legal conclusion that: "I find it unnecessary to determine whether Respondent violated sections 7116(a)(1) and (5) of the Statute independently by such conduct, as alleged in the complaint. The duty to furnish information under section 7114(b)(4) is part of an agency's duty to negotiate in good faith, as my recommended order reflects. Even if Respondent committed the addition violations alleged, no remedy in addition to those recommended here would be appropriate." ALJD at 24, n.28.

(2) To the ALJ's failure to address the General Counsel's remedial request (transcript at p. 4 (opening statement), p. 99 (closing argument)), in light of the record evidence that the agency has repeatedly failed to respond to requests for information (transcript at pp. 32-34), that the respondent be ordered to respond to future requests within 10 days after receipt of a request for information that meets the requirements of section 7114(b)(4) of the Statute. ALJD at 18, discussing remedy.

**Exception to legal conclusion:**

To the ALJ's legal conclusion that the Union's stated reason for requesting the drug testing lists was too general and therefore failed to establish a 'particularized need' as required under section 7114(b)(4)(B)." ALJD at 20, lines 3-5.

**VI. Official Time**

**Exception to legal conclusion:**

To the ALJ's legal conclusion that the Respondent did not violate section 7116(a)(1) and (8) of the Statute when it failed to grant official time to two union officials to negotiate over changes of conditions of employment of unit employees during the pendency of a representation petition filed pursuant to a reorganization at the agency. ALJD at 90-91.

**VII. Section 7115 Dues Allotment**

**Exception to legal conclusion:**

To the ALJ's legal conclusion failing to order the Respondent to remit to the exclusive representative those regular and periodic dues which should have been, but were not, withheld from employees' pay pursuant to section 7115 of the Statute. ALJD at 87, lines 15-20.

**VIII. ALJ exceeds adjudicatory authority**

To the ALJ's factual conclusion that Authority policy requires an ALJ to go beyond the issues presented by the parties. ALJD at 11-12, n.3.

**IX. Exceptions to the ALJ's credibility determinations**

To the ALJ's factual conclusion that the Respondent gave proper notification to the union about a new policy and asked the union for proposals in response, stating: "I specifically credit the testimony of Respondent's Director of Labor Relations [name] who testified that he sent an E-Mail message to the Union regarding this proposed new policy and gave the union 2 weeks within which to respond." ALJD at 16, lines 1-4 [GC may argue that employee's testimony is contrary to other testimony and that respondent could not produce proof that e-mail message was sent, and that the parties' practice is to communicate in writing, not by e-mail, with regard to proposed policy changes].

To the ALJ's factual conclusion that the Respondent's managers did not speak to unit employee [name] about the excessive filing of grievances by the Union, stating: "I credit the Respondent's two managers whose testimony was entirely consistent and corroborative and ALJD at 19, lines 16-20 [GC may argue that testimony is not corroborative and conflicts with other record testimony].

**X. ALJ's failure to conform to minimal standards of judicial conduct**

To the ALJ's failure to conform to standards of judicial conduct by interrupting Counsel for the General Counsel six times, over counsel's objection, when Counsel was attempting to answer a question posed by the ALJ, and refusing to allow Counsel for the General Counsel to complete a sentence while repeating the same phrase, "that's a lot of hot air." Transcript at pages 48-52.