

PART 5 ATTACHMENTS

[ATTACHMENT 5C1](#)

Questions and Answers about Unfair Labor Practice appeals to the Office of the General Counsel (OGC)

[ATTACHMENT 5C2](#)

Appeals Review Form

[ATTACHMENT 5C3](#)

Appeals Case Log

[ATTACHMENT 5C4](#)

Model Letter Denying Appeal

[ATTACHMENT 5C5](#)

Modified Form Appeal Denial Letter

[ATTACHMENT 5C6](#)

Modified Letter Granting Appeal

[ATTACHMENT 5E1](#)

Sample Letter to Respondent Re: Compliance

[ATTACHMENT 5E2](#)

Sample Letter Closing the Case

ATTACHMENT 5C1

QUESTIONS AND ANSWERS ABOUT UNFAIR LABOR PRACTICE APPEALS TO THE OFFICE OF THE GENERAL COUNSEL (OGC) FEDERAL LABOR RELATIONS AUTHORITY

Q #1: What are the grounds for granting an appeal and what must your appeal establish to be granted?

The grounds for granting an appeal are set forth in Section 2423.11(e) of the Rules and Regulations. An appeal may be granted if it establishes at least one of the following grounds:

- 1. The Regional Director's decision did not consider material facts that would have resulted in issuance of a complaint.**
- 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.**
- 5. The manner in which the Region conducted the investigation has resulted in prejudicial error.**

Your appeal must address the reasons why you believe one or more of the above five grounds have been satisfied. Appeals that do not establish at least one of these grounds are denied.

Q #2: What happens after the appeal is filed?

You will receive a written letter acknowledging that your appeal has been received. The appeal review includes a review of your appeal and the evidence in the file obtained during the investigation.

You will receive a written decision letter signed by the Assistant General Counsel for Appeals on behalf of the General Counsel which: 1) grants your appeal and orders further investigation of specific factual issues or issuance of a complaint over a specific violation; or 2) denies your appeal because none of the grounds for granting an appeal have been established.

Q #3: Does the appeal letter address each and every argument made in the appeal?

When an appeal is denied, the appeal decision is to affirm and adopt the Regional Director's determination of the material facts, the applicable law and rationale and reasoning for the finding that the evidence does not establish an unfair labor practice. Therefore, if the factual and legal issues have been correctly and sufficiently addressed by the Regional Director, the appeal determination letter does not restate this discussion. Rather, the appeal letter incorporates by reference the full discussion of the facts and the law as set forth in the Regional Director's

dismissal letter. However, the appeal denial letter will address any issues which may need additional clarification. Similarly, if the appeal establishes that one of the grounds for review has been met, the appeal Order does not discuss each and every argument presented in the appeal. In those cases, the appeal letter granting an appeal sets aside the Regional Director's decision with a statement of the ground for granting the appeal and the future case processing action to be taken by the Regional Director.

Q #4: How long does the appeal review process take?

The OGC's goal is to issue a decision on the appeal within 60 days or less of the date on which the appeal is received.

Q #5: Once an appeal decision issues, are there appeal rights?

No. The decision on the appeal is final. Section 2423.11 of the Rules and Regulations sets forth the appeals process. Paragraph (g) of this section provides that a Charging Party may file a motion for reconsideration of the final decision if it can establish with particularity extraordinary circumstances which are supported by citations to Authority case law. The motion must be filed within 10 days after the date on which the General Counsel's decision is postmarked. The General Counsel's decision on a motion for reconsideration is final.

Q #6: Should evidence be included with the appeal?

No. All of the evidence that was given to the Region during the investigation is in the investigative file and will be reviewed. This evidence may be referred to in the appeal.

Q #7: May new evidence be submitted that was not given to the Region?

No. An appeals review is not *de novo*. No new evidence will be considered unless it can be established in the appeal that the evidence either did not exist during the investigation or the existence of the evidence could not have been reasonably known about.

Q #8: Can the merits of the appeal be discussed with anyone from the OGC while the appeal is pending?

No. The appeal process is not an investigative process. The decision will be based on the appeal and the investigative file. Parties are notified as soon as a decision is reached. If the appeal is granted, the case will be returned to the Regional Office and the parties will be contacted by the Region for further processing of the case.

Q #9: To whom can the parties speak if there are any questions about how the charge was processed and decided?

Parties may always contact the Regional Offices if they have questions about the processing of a charge, do not understand the basis for the dismissal of a charge, or to seek further assistance.

If you have further questions about the appeals process, please contact any Regional Office, the Office of the General Counsel, or visit the FLRA website at www.flra.gov.

ATTACHMENT 5C2

APPEALS REVIEW FORM

(revised 5/2010)

Case No(s): _____ Dismissing Region: _____ Working Region: _____

- **Perform the legal review by applying the grounds for granting an appeal which are set forth in the Rules and Regulations at section 2423.11(e), and in the Office of the General Counsel's Revised Appeal Policy.**
- **Perform a Quality Review based on the Office of the General Counsel's Quality Standard, Scope of Investigations criteria in ULP Case Handling Manual, and the Quality of the FIR and dismissal letter.**

Complete the following:

1. Did the Regional Director's decision and the investigation consider all of the material facts, issues raised, jurisdiction/timeliness of the charge?
_____ Yes _____ No Comments:

2. Is the Regional Director's decision based on a finding of a material fact that is clearly erroneous?
___ Yes ___ No Comments:

3. Is the Regional Director's decision based on a correct statement of the applicable rule of law with pertinent citations to cases that present similar issues and facts as support.
___ Yes ___ No Comments:

4. Does the case present legal issues for which there is no Authority precedent?
___ Yes ___ No Comments:

5. Does the case file reflect how the case was investigated and processed and that there was no prejudicial error?

Yes No Comments:

6. Does the case file reflect that under the particular circumstances of the case, the investigation obtained the best possible evidence? Yes No Comments:
7. Does the case file reflect that evidence was obtained on all of the elements of the alleged violation(s), as appropriate, and that all of the allegations were investigated and decided and alternative outcomes were thoroughly considered? Yes No Comments:
8. Does the case file reflect that the parties were treated fairly and equitably?
 Yes No Comments:
9. Was the charge processed as expeditiously as possible from the time the investigation began to issuance of the decision without any periods of unexplained inactivity?
 Yes No Comments:
10. Do the FIR and dismissal letter and other case file documents substantially meet the quality standards (clear, comprehensive, correct, and concise)? Yes No Comments:

This form was approved by:

Regional Director

Date

ATTACHMENT 5C3

APPEALS CASE LOG (revised 1/2010)

This form is maintained in the Appeal Case File and is to be completed by both OGC HQ and the Working Region. Fill in the applicable dates or other information as appropriate.

TO BE COMPLETED BY OGC HQ:

Case No. _____
Dismissed by the _____ Region
Processed by _____ Region
Consolidated on appeal with Case No(s): _____
Date dismissed: _____
Date appeal filed: _____
Date appeal rec'd by OGC: _____
Date appeal decision due: _____
Date investigative file sent by Dismissing Region to OGC HQ: _____
Dismissing Region comments on appeal: Yes ___ No _____
Date investigative file received by OGC: _____
Date files sent by OGC HQ to Working Region: _____

TO BE COMPLETED BY WORKING REGION:

Date files received by Working Region: _____
Date appeal assigned: _____
Date appeal ready for recommended decision by RD: _____
Date Working Region's recommended decision sent by E-mail: _____
Working Region recommendation: Deny appeal: _____
Deny appeal with e-mail to RD (explain on appeal review form): _____
Grant appeal: _____
Further investigation: _____
Further analysis: _____
Reversal/Issuance of complaint: _____
E-mail attached: _____ e-mail sent to Dir. of Appeals: _____
Date files and recommendations sent by Working Region to OGC HQ: _____

TO BE COMPLETED BY OGC HQ:

Dismissal letter rescinded by Dismissing Region RD/Appeal case closed: _____
Date files received by OGC HQ: _____
Date appeal issued by OGC HQ: _____
Final OGC HQ decision: Deny appeal : _____
Grant appeal: _____
Further investigation: _____
Further Analysis: _____
Reversal/Issuance of complaint: _____
E-mail to RD drafted: Yes ___ No ___

Date Motion for Reconsideration filed: _____
Date of decision on Motion for Reconsideration: _____
Reconsideration decision: Granted: _____ Denied: _____

ATTACHMENT 5C4

MODEL LETTER DENYING APPEAL

Charging Party Rep.
(Name and Address)

Re: Charged Party
City, State
Case No. XX-XX-XX-XXXX

Dear ():

This Office has carefully considered your appeal of the dismissal of the unfair labor practice charge in this case by the () Regional Director.

The Regulations at 5 C.F.R. § 2423.11(e) provide the following grounds upon which the General Counsel may grant an appeal of a Regional Director's decision to dismiss an unfair labor practice charge: (1) the decision did not consider a material fact that would have resulted in issuance of complaint; (2) the decision is based on a finding of a material fact that is clearly erroneous; (3) the 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. *Id.* and 5 C.F.R. § 2423.11(f).

On appeal, you alleged, among other things, that the Regional Director's decision is based on a finding of a material fact that is clearly erroneous. In this regard, you maintained that the Regional Director erred in finding insufficient evidence of a violation of 5 U.S.C. § 7116(a)(1) and (5). Specifically, you submitted that the Regional Director erroneously found that the unilateral implementation of the centralized call system had no more than a *de minimis* impact on bargaining unit employees. You also maintained that the Regional Director erroneously found that employees had been previously required to log onto Aspect. In addition, you contended that the Regional Director failed to consider a material fact that would have resulted in issuance of complaint. You alleged error in the Regional Director's failure to distinguish between implementation of the CCCFS Project for GS-592 and GS-962 employees. Finally, you stated that the Regional Director erred in failing to consider a continuing violation theory with regard to the allegation that the IRS engaged in piecemeal negotiations.

The appeal has established no ground for reversing the Regional Director's decision or remanding the case for further investigation in accordance with 5 C.F.R. § 2423.11(e). The dismissal letter issued by the Regional Director constitutes the written statement of the reasons for not issuing a complaint as required by 5 U.S.C. § 7118(a)(1). The Regional Director's reasons for not issuing a complaint are hereby affirmed. Your appeal is denied and the case is closed.

For the General Counsel.

ATTACHMENT 5C5

MODIFIED FORM APPEAL DENIAL LETTER

Charging Party Rep.
(Name and Address)

Re: Charged Party
City, State
Case No. XX-XX-XX-XXXX

Dear ():

This Office has carefully considered your appeal of the dismissal of the unfair labor practice charge in this case by the () Regional Director.

The Regulations at 5 C.F.R. § 2423.11(e) provide the following grounds upon which the General Counsel may grant an appeal of a Regional Director's decision to dismiss an unfair labor practice charge: (1) the decision did not consider a material fact that would have resulted in issuance of complaint; (2) the decision is based on a finding of a material fact that is clearly erroneous; (3) the 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. *Id.* and 5 C.F.R. § 2423.11(f).

On appeal, you appear to contend that the Regional Director's decision is based on a material finding of fact that is clearly erroneous. In this regard, you submit that the Regional Director erred in finding the evidence insufficient to establish a violation under 5 U.S.C. § 7116(a)(1). Specifically, you maintain that the Regional Director erred in finding that there was no violation based on the Agency's failure to abide by Article 45 of the parties' agreement concerning official time.

The appeal has established no ground for reversing the Regional Director's decision or remanding the case for further investigation in accordance with 5 C.F.R. § 2423.11(e). It is well settled that disputes over the administration and application of contract rights such as matters concerning official time are resolved under the negotiated grievance-arbitration procedure, not the unfair labor practice procedure. *See, e.g., Marine Corps Logistics Base, Barstow, Cal.*, 33 FLRA 626, 641-42 (1988). The dismissal letter issued by the Regional Director constitutes the written statement of the reasons for not issuing a complaint as required by 5 U.S.C. § 7118(a)(1). The Regional Director's reasons for not issuing a complaint are hereby affirmed. Your appeal is denied and the case is closed.

For the General Counsel.

ATTACHMENT 5C6

MODIFIED LETTER GRANTING APPEAL

This Office has carefully considered your appeal of the dismissal of the unfair labor practice charge in this case by the () Regional Director.

The Regulations at 5 C.F.R. § 2423.11(e) (2008) provide the following grounds upon which the General Counsel may grant an appeal of a Regional Director's decision to dismiss an unfair labor practice charge: (1) the decision did not consider a material fact that would have resulted in issuance of complaint; (2) the decision is based on a finding of a material fact that is clearly erroneous; (3) the 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. *Id.* and 5 C.F.R. § 2423.11(f) (2008).

Your appeal has been granted because it has established, in accordance with section 2423.11(e) of the General Counsel's regulations, 5 C.F.R. § 2423.11(e), that the Regional Director's decision is based on an incorrect statement or application of the applicable rule of law. In this regard, the Regional Director incorrectly applied the legal standard to determine whether the Charged Party violated section 7116(a)(1) and (5) of the Statute by refusing to recognize a designated representative of the Charging Party. On remand, the Region will correctly apply the legal standard set forth in *IRS, Wash. D.C.*, 47 FLRA 1091, 1103 (1993).

Accordingly, the case is remanded to the Region for further analysis consistent with this decision.

For the General Counsel.

ATTACHMENT 5E1

SAMPLE LETTER TO RESPONDENT RE: COMPLIANCE

(Date)

Respondent's Representative
(Name and Address)

Re: (Case Name, Case #, FLRA No.)

Dear Mr./Ms. (Name):

Enclosed is a copy of the Decision and Order of the Federal Labor Relations Authority in the captioned case.

The Decision and Order requires, in part, the posting of notices on forms to be furnished by the Authority. Enclosed is one completed copy of the notice containing the language required by the Decision and Order. Please add the date, signature and title of the (appropriate signing official).

The Decision and Order requires that the notices be posted at (all locations specified in the Authority's Decision and Order). If you do not have suitable reproduction facilities to reproduce the quantity of notice forms required to satisfy the posting requirement, the (insert Region) Regional Director will provide you with additional blank forms upon request.

Please notify the (insert Region) Regional Director, within 30 days of the date of the Decision and Order, of the steps taken to comply with the requirements of the Decision and Order, and send a copy to the person(s) or parties on the service

sheet enclosed with this letter. Include a signed and dated copy of the notice with your submission.

Upon the expiration of the 60-day posting period, please certify, by letter to the (insert Region) Regional Director, with a copy to all persons or parties listed on the service sheet, that the Respondent has completed the requisite posting and any other remaining remedial action(s) required by the Decision and Order.

If you require any assistance or have any questions concerning compliance in this matter, please contact (name, address, and telephone number of the appropriate Regional Director).

For the Authority.

Sincerely,

Regional Director, (Region)

Enclosures (3)

Decision and Order
Notice (completed copy)
Service Sheet

ATTACHMENT 5E2

SAMPLE LETTER CLOSING THE CASE

(Date)

Charged Party Rep.
(Name and Address)

Dear Mr./Ms. (Name):

I have reviewed all aspects of compliance in this case. I have determined that the Respondent has met its obligations with regard to the terms and provisions of the Federal Labor Relations Authority's Decision and Order, FLRA No. (), dated ().

Accordingly, this matter is closed and will remain closed conditioned upon continued compliance with the Decision and Order.

In the event that subsequent violations of the Federal Service Labor-Management Relations Statute occur, this matter may be reopened.

Sincerely,

Regional Director

cc: Charging Party Rep.
(Name and Address)