OFFICE OF THE GENERAL COUNSEL

UNFAIR LABOR PRACTICE CASE HANDLING MANUAL

Revised February 2008

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
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OFFICE OF THE GENERAL COUNSEL

TO: All OGC Employees

FROM: Colleen Duffy Kiko
General Counsel

SUBJECT: Unfair Labor Practice Case Handling Manual

I am very pleased to announce the completion of the revisions to the Unfair Labor Practice (ULP) Case Handling Manual (Manual). The roll out of the Manual comes after two years of reviewing current practices in processing ULPs, and nearly a year of closely examining and comparing the old Manual to the current policies of the Office of the General Counsel (OGC). There are two overarching principals in the revisions to the Manual - neutrality and professionalism.

During all stages of a ULP investigation, the OGC staff must maintain a neutral role in both fact and appearance. The Manual was revised in several areas to encourage and allow staff to step away from the fray of parties' disputes and look impartially at the facts and allegations. This facilitates staff to make well-reasoned recommendations as to whether there has been a violation of the Federal Service Labor-Management Relations Statute (Statute). Maintaining neutrality during the course of an investigation is critical to the integrity of OGC investigations, which results in the parties receiving fair and unbiased consideration of their dispute.

I take great pride in the professionalism of the OGC. The OGC is a neutral third-party that is responsible for the enforcement of the Statute, but is not a party to the dispute. The parties must be held accountable for fulfilling their responsibility of providing the OGC with the information and cooperation needed to effectively and efficiently process and investigate ULP charges. The better the parties are at fulfilling their responsibilities, the better we are at fulfilling ours.

Many thanks to the members of the ULP Manual Task Force (Co-Chairs Jim Petrucci and Richard Zorn, and Members Gerald Cole, Phil Roberts and Sarah Whittle Spooner) for their hard work and dedication in revising the Manual. I thank you as well for your support of this effort. I have always deemed the work of the OGC employees to be of the highest standard and embody neutrality and professionalism, and the Manual revisions are intended to further support these qualities. I hope you find the revisions to be needed enhancements that will assist you in your role of processing ULP charges.

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PART 1

A. PRE-CHARGE TECHNICAL ASSISTANCE

1. Technical Assistance:

Upon request, an Agent may provide the following types of assistance:

- Explain generally the rights and obligations under the Statute;
- Explain ULP procedures under the Regulations;
- Refer to the FLRA's Internet Home Page Web address--**www.flra.gov**–and the types of information found there;
- Furnish appropriate forms; and
- Furnish public written materials.

Note: The Agent clarifies that s/he is providing technical assistance only; that s/he cannot advise a party on what course of action to pursue. The Agent may inform a party about the Region's Statutory Training Program if more information about the Statute is desired. The Agent may also inform a party that should a charge be filed, the charge will be investigated and a decision will be made by the RD on the evidence adduced during the investigation.

2. Collecting and Organizing Supporting Evidence:

a. The Agent may explain the types of information that are necessary to support a charge:

i. Witnesses - with a brief synopsis as to what each witness will testify to, and a telephone number for each witness;

ii. Collective bargaining agreement; and

iii. Documents.

b. The agent may not provide help in drafting a charge.

3. Legal Impediments to Filing a Charge:

The Agent may explain the following legal impediments to a charge:

a. Contractual notification requirements:

An agreement between a union and an activity, which contains a requirement for pre-charge filing, notification, or settlement efforts, is enforceable. *Headquarters, Fort Sam Houston, Dep't of the Army and AFGE, Local 2154*, 8 FLRA 394, 395 (1982). If the Region finds that the Charging Party has not followed a required procedure, the charge is dismissed.

Note: Contractual notification requirements are not binding on persons who file charges as individuals.

b. Grievance bar:

i. Second sentence of section 7116(d) governs whether ULP charge is barred by a previously-filed grievance; and

ii. ULP charge is barred by an earlier-filed grievance if "the unfair labor practice charge arose from the same set of factual circumstances as the grievance and the theory advanced in support of the ULP charge and the grievance are substantially similar." *Olam Sw. Air Defense Sector (TAC), Point Arena Air Force Station, Point Arena, Cal.*, 51 FLRA 797, 801-02 (1996) (citation omitted).

Note: The charge form requires that the Charging Party state whether the matter raised in the charge has been raised previously in a grievance procedure. See section 2423.4(a)(i).

c. Charge is untimely:

Agent may explain the time limitations under section 7118(a)(4) of the Statute.

Note: The Agent advises, however, that any final determination as to the proper filing of a charge will be made by the RD.

4. E-mail and Pre-Charge Assistance:

Agents may reply by e-mail to inquiries received by e-mail. All Agents check their e-mail for messages with the same frequency that they check their telephone messages. The Agent copies the RD on all technical assistance e-mail responses.

5. Documentation of Technical Assistance:

Technical assistance, whether via telephone, letter, or e-mail, is documented on the Technical Assistance form (See Attachment 1A1). Requests taking at least five

minutes duration are documented on the Technical Assistance form. Calls of shorter duration are not documented. Under no circumstances is it permissible for an Agent to allow a technical assistance call to be taped by a caller. An Agent who is advised that a conversation is actually being taped informs the caller that taping is against OGC policy and then terminates the conversation.

PART 2

A. REVIEWING A CHARGE FOR LEGAL SUFFICIENCY

1. Who May File a Charge?

Section 2423.3 states:

"Any person may charge an activity, agency or labor organization with having engaged in, or engaging in, any unfair labor practice prohibited under 5 U.S.C. 7116."

"Person" is defined as "an individual, labor organization, or agency." Section 2421.2 (incorporating the definition at section 7103(a)(1) of the Statute).

2. Is the Charge Filed in the Appropriate RO?

a. Place of occurrence: Section 2423.6(a):

i. The appropriate location for the filing of a charge can be found on the FLRA website. Generally, it is filed with the RO in which the alleged ULP has occurred or is occurring; and

ii. If the alleged ULP occurred or is occurring in more than one region, a charge may be filed with the RD in either region. *Id.*

b. Filing in incorrect RO:

Charge is date stamped and is deemed filed and is then sent by fax to the proper RO with jurisdiction over matter for docketing.

3. Is the Charge Timely Filed?

a. General requirement:

Under section 7118(a)(4)(A) of the Statute, a charge normally may not be acted upon if the alleged ULP occurred more than six months before the filing of the charge.

b. Exceptions:

i. Failure to perform a duty owed:

An RD may issue complaint on a charge that would otherwise have been found untimely if it is found that the Charging Party was prevented from filing the charge in a timely manner due to failure of an Agency or Union to perform a duty owed to the charging party. *See* section 7118(a)(4)(B)(i); *cf. U.S. NRC, Wash., D.C.*, 44 FLRA 370, 381 (1992) (*NRC*) (because agency had no duty to inform union of employee's detail to a supervisory position, charge, which was filed

more than six months after detailee's attendance at union executive board meeting, is untimely).

ii. Concealment:

An RD may issue complaint on a charge that would otherwise have been found untimely if it is found that the Charging Party was prevented from filing the charge in a timely manner due to the Agency's concealment which prevented the discovery of the alleged ULP during the six-month period. *See* section 7118(a)(4)(B)(i); *cf. NRC*, 44 FLRA at 381 (record evidence fails to show that detail was concealed from union).

4. Is the Charge Properly Filed?

Completion of the charge form: Section 2423.4:

- Charges are filed on either a CA or CO standardized form (FLRA Forms 22 and 23) (Revised 1998) or on a form that is substantially similar;
- Charging Party provides a clear statement of the ULP allegation which includes the specific sections of the Statute allegedly violated;
- Certificate of service section on CA or CO form indicating method of service and name, title, location and date of service is completed; and
- Number of copies: One copy of charge is filed.

5. How is a Charge Filed?

- Pursuant to section 2423.6(c), the Charging Party files a charge by mail, delivery service, in person, or by fax with the appropriate RD. Filings by e-mail are **not** permitted. Filings are required to be made during normal business hours. **The following additional rules apply to service by fax:**
- Charges are transmitted to a RO fax machine that is dedicated to receiving incoming documents; and
- A charge must not exceed a 10 page limitation.

Note: If Charging Party exceeds the two-page limitation, the RO accepts the charge if it is the first time that the Charging Party has exceeded the two-page limitation. In this instance, the RO calls the Charging Party on the telephone and informs the Charging Party of the two-page regulatory requirement and informs the Charging Party that the RO will not accept charges that exceed the two-page limitation in the future.

- Charging Party assumes the risk if fax machine malfunctions;
- Original signature of Charging Party is not required but a signature is required (can be a copy);
- Charging Party need not submit follow-up hard copy of charge; and
- RO fax machine will record time and date of receipt of the charge.

Note: Each RO's dedicated fax machine for incoming faxes must reflect the correct time and date at all times.

B. DOCKETING THE CHARGE

1. Docketing Charges Received by Fax or Mail:

*a. Upon receipt, a charge is reviewed and is **not** docketed if it is deficient in one or more of the following ways:*

i. There is no signature;

ii. The Charging Party or Charged Party is not identified;

iii. Some basis for the charge is not stated; and

iv. The Charge form is not substantially completed (the matters in each block are not addressed in some way).

If the charge is deficient but it can be determined who filed the charge, it is returned to that person with a notation as to why it has been returned. The Party is also informed that it may be sent to the RO again once the deficiency has been corrected but that it is not considered filed until the deficiency is corrected. Also, a reference is made to timeliness matters. (See Attachment 2B1 for a Sample Letter).

Note: A charge filed on the wrong form may not be deficient and may be docketed. For example, a charge filed on a CO form against an Agency is docketed as if it had been filed on a CA form.

b. Assigning a case number:

Once it has been determined to docket the charge, the RO assigns a case number which consists of two letters indicating the RO followed by a two-letter designation which indicates the type of case (CA or CO), followed by a two-digit number indicating the fiscal year in which the charge was filed and a four-digit number indicating the sequential number of the case filed in the RO during the fiscal year.

EXAMPLE

"WA-CA-07-0001" is the case number given to the first charge against an Agency filed in FY 2007 in the Washington RO.

c. Docketing similar charges:

A grouping of charges filed on the same day or within days that raise identical issues received by a RO is counted as one case (i.e., are assigned the same case number, for case tracking purposes) **where the charges are filed by the same Charging Party.**

Where multiple charges are filed by different Charging Parties, they should be docketed as separate cases;

2. Docketing Charges Handed to an Agent in the Field:

Should a party attempt to "file" a charge by handing it to the Agent while in the field, the Agent must advise the party to file it with the RO.

3. Entry into Oracle Case Tracking:

At the time a case number is assigned, the case is entered into the Oracle case tracking system.

4. The Opening Letter–First Written Contact with the Parties After a Charge is Docketed:

One standard Notification of Filing of Unfair Labor Practice Charge (See Attachment 2B2) is sent to the parties that includes:

- Acknowledgment of receipt of charge;
- Point of RO contact (name, phone and e-mail--might not be the Agent who ultimately is assigned the case);
- Case number;
- Designation of representative form;
- Copy of charge;
- Description of the neutral role of the FLRA;
- Notification that a RO Agent will be contacting the parties soon and is prepared to discuss their legal position, relevant contract provisions, facts, documents and witnesses, as applicable; and
- If Charged Party representative does not understand the underlying basis of the charge, s/he should either contact the RO point of contact or assigned Agent.

C. THE CASE FILE

1. Creation of Case File:

Contents of case file:

Before a case is assigned to an Agent for investigation, a six-sided case file folder is created and maintained for each charge filed and docketed. The case file contains all relevant evidence and information, correspondence, intra-office and OGC memoranda, and other documents discovered, submitted and developed from any source during the processing of the case to disposition in accordance with the Chapters in Part 3 concerning Quality Standards for Investigations and the Scope of Investigations.

2. Types of Documents or Materials in the Case File:

The minimum requirements for a case file are that it contains all relevant evidence and information discovered or submitted during the course of the investigation. These documents include:

a. A case log:

A case log is an essential part of the case file and must be completed for each case. It is a legible handwritten or computer-generated form and reflects the logical manner in which the case was processed, which includes the occurrence of each case processing or substantive discussion between anyone in the RO and any of the parties, their representatives or their witnesses about the merits of the case or the manner in which the case is being processed (whether they are by phone, in person, or by e-mail). For example:

i. Dates of all contacts;

ii. Names of each person contacted;

iii. Either a brief description of each case-processing or substantive matter discussed or a reference to a separate file memorandum;

iv. Notations regarding any case processing decisions made by the RO during the processing and reviewing of the case. For example, determinations concerning the appropriateness of injunctive relief and decisions concerning the type and scope of the investigation pursuant to the Part 3 Chapters concerning the Quality Standards and Scope of ULP Investigations; and

v. Evidence or background information bearing on the merits of the case does **not** appear in the case log but is documented elsewhere in the file.

b. Affidavits or confirming letters:

In cases which do not proceed solely on documentary evidence, the Agent secures signed affidavits or confirming letters, as appropriate, from all witnesses necessary to verify allegations and allow for decision by the Regional Director.

c. Final investigation report:

The case file must contain a final investigative report and recommendation by the investigating Agent, unless specifically waived by the RD, usually on technical grounds.

d. Rationale for decision:

Where the RD agrees with the recommendation in the FIR, this will be indicated on the FIR by the RD's initials and date. To the extent that the RD bases the decision in the case on a rationale other than that recommended by the Agent in the FIR, the basis for the decision will be explained in the file.

e. Notes to the file explaining case processing decisions:

The Agent ensures that there are notes to the file to explain the reasons a case has been processed in a certain manner. For example, whether injunctive relief was considered; how the file was reviewed to ensure that the quality standards were met; and whether the scope of the investigation was limited.

f. Memos to the file:

Memos to the file to reflect conversations which resulted in background information, but not evidence to be relied upon in deciding the merits of the charge, are also contained in the case file.

Note: Agents may communicate with the parties via e-mail concerning procedural case processing matters, e.g., requesting a party to contact the Agent due to unsuccessful attempts to contact the party telephonically; requesting documents; confirming site visits. ***Any e-mails must be professional and accurate as if written by letter and copies of each e-mail must be kept in the case file where appropriate.***

g. Legal research:

Any legal research performed in the case is put in the case file.

Note: In addition to the minimum requirements listed above, the ROs may develop and include in their case files any other internal documents which they consider

material to the disposition of the case and consistent with the Chapter on Quality Standards for Investigations in Part 3.

3. Organization of the Case File:

a. Benefits of uniform case file organization:

i Easy retrieval, identification and use of all file documents;

ii. Facilitates review, both in the RO and at OGC Headquarters, of cases appealed; and

iii. Facilitates process of transferring cases between ROs.

b. Contents of each side of case file:

i. **Side 1:** Official Documents/Correspondence

Charge/Statement of Service
Amended Charge/Statement of Service
Designation of Representative
Opening Letter to Parties
Party/Designated Representative Information Sheet
Withdrawal Request Approval Form
Dismissal Letter/Revocation of Dismissal Letter
Complaint and Notice of Hearing
Memorandum in Support of Issuance of Complaint
Request for Settlement Judge
Respondent's Answer
Settlement Agreement, Notice to Employee/Members,
Related Correspondence
Formal Papers
Prehearing Disclosure Filings, Documents and Orders
Order and Notice of Time for Prehearing Conference Call
Subpoena Requests, Subpoenas
ALJ/FLRA Decision of the Case
Compliance Correspondence/Documents
Joint letters to Charging and Charged Parties
Appeal, Appeal Order

Note: ROs differentiate between documents supplied with the charge as supporting evidence and documents attached and incorporated by reference in the body of the charge. If a document is specifically referenced in the charge and therefore may be a part of the formal papers prepared for litigation, it remains with the charge in the file and, if desired, copied for placement in the Charging Party

Evidence (side 5) section of the case file. All other documents are placed in the Charging Party Evidence section of the case file.

If an Agent takes materials out of the case file at any time, copy the material, and return the original to the formal case file. The formal case file is always complete and contains the required documents.

ii. **Side 2:** Inter/Intra-Regional/OGC Documents

Case Log
Initial Charged Party Contact Form
Intra-office Memoranda/Memos to the File
Inter-office Routing/Assignment Forms
FIR, Agenda Minute, Managerial Memoranda in Reply
Oracle Data Entry Form
RO Quality Checklists, Forms
Research
Advice Request, Advice Memo
Comment on Appeal
Draft Complaints

iii. **Side 3:** Charged Party Evidence, Information, and Correspondence

Charged Party Statement of Position in Response to Charge
All Documentary Evidence Supplied by the Charged Party and Charged Party Witnesses
Agent Correspondence to/from Charged Party/Charged Party Witnesses/Representative

iv. **Side 4:** Charged Party Witness Statements

Affidavits, Confirming Letters, Interview Notes of Charged Party Witnesses
Completed Questionnaires Supplied by Charged Party Witnesses
Affidavits From Individuals Whose Testimony Supports the Charged Party

v. **Side 5:** Charging Party Evidence, Information, and Correspondence

Agent Correspondence to/from Charging Party/Charging Party Witnesses/Representative
Relevant Portions of Collective Bargaining Agreement, If Applicable
Memoranda of Agreement/Understanding, If Applicable
All Documentary Evidence Supplied by the Charging Party and Charging Party Witnesses

vi. **SIDE 6:** Charging Party Witness Statements

Affidavits, Confirming Letters, Interview Notes of Charging Party Witnesses
Completed Questionnaires Supplied by Charging Party witnesses
Affidavits from Individuals Whose Testimony Supports the Charging Party

Note: The contents of each side of the file should be in chronological order (most recent document on top).

D. REVIEWING THE CHARGE

General Matters that are Reviewed in Every Case after a Charge is Docketed:

- Jurisdiction;
- Sufficiency of the charge;
- Whether there are related cases--representation, negotiability, FSIP, DOL, MSPB, or other ULPs. If there are related charges in another RO, the RD faxes a copy and/or e-mails a notice of such to the appropriate RO. Fax charge to OGC if it is nationwide in nature. The OGC will determine or lead any coordination effort (transfer cases, as necessary) where there are related charges or charges that are nationwide in nature. In coordinating the cases, the ROs need to ensure that the legal analysis applied in each RO is consistent (See Attachment 2D1 for a Sample E-mail Notice);
- Whether the case involves novel issues and, if so, the OGC will be notified;
- Whether proper charged party/ies are indicated;
- Whether the contract contains a notification requirement;
- Certificate of service box is completed; and
- Whether the stated allegation/s need clarification and, if so, whether clarification is accomplished by confirming letter or by amended charge with notice to charged party.

Note: RD's will notify OGC HQ when matters involve more than one region or matters are of nationwide significance.

E. INJUNCTIONS

1. Section 7123(d) of the Statute:

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) (TRO) in ULP 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."

2. Case Law:

Injunctive relief is an extraordinary action and is rarely used. The GC has successfully petitioned district courts for temporary relief in the following four cases:

- A strike by a labor organization (*United States v. PATCO, Inc.*, 524 F. Supp. 160 (D.D.C. 1981);
- A unilateral reorganization resulting in the involuntary transfer and relocation of bargaining unit employees from one state to another (*Smith v. FAA.*, Civil Action No. C83-1538 C (D. Wash. Nov. 23, 1983);
- The refusal to recognize and enter into collective bargaining negotiations with a newly certified exclusive representative (*Reuben v. FDIC*, 760 F. Supp. 934 (D.D.C. 1991); and
- 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 S. Command, Dep't of Defense, Republic of Panama and U.S. Army S., Republic of Panama*, Civil Action No. 94-3786 (E.D. La. Nov. 29, 1994) (unpublished).

3. Factors that Determine Whether Section 7123(d) Injunctive Criteria are Met:

- **Seriousness of the Violation**

Is the violation serious enough to warrant injunctive relief?

- **Legal Precedent**

Is the law clear regarding the violation alleged and is there a likelihood of success on the merits?

- **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?

- **Timeliness of the Dispute**

Is the request timely in relationship to the underlying events?

- **Irreparable Harm**

Will the failure to maintain the status quo frustrate the remedial purposes of the Statute and cause irreparable harm?

4. Implementation:

The following process is followed by the ROs when a request for relief under section 7123(d) has been raised:

- A Charging Party may request, when filing a ULP charge or during the processing of a charge, that the GC consider requesting Authority permission to seek appropriate temporary relief. *See* section 2423.10(b). If requesting such relief, the Charging Party specifically must make its request in the body of the charge or in writing during the course of the investigation; and

- Where the Charging Party requests injunctive relief, the RO reviews the charge and supporting evidence to determine if appropriate temporary relief would be warranted and to determine whether an expedited investigation is warranted. Such consideration is documented in the case file. The ROs 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 a ULP has occurred, or is continuing to occur, and by applying the criteria set forth in number 3, above, to determine whether it appears that appropriate temporary relief should be sought. All discussions with the parties concerning the initial inquiry are documented in the file.

5. Expedited Investigation:

a. *If the RD determines that the initial inquiry does not support an expedited investigation, the file is documented and the case is processed in the same manner as any other case.*

The RO:

i. Notifies the parties that the investigation we will not be going forward on a TRO request;

ii. Explains the basis of that decision and that there is no appeal of this determination;

iii. Informs the parties that the charge will be fully investigated as soon as possible; and

iv. Documents the file.

b. *If the RD decides that an expedited investigation is warranted, the RO initially notifies the parties that they are to be prepared for an expedited investigation, the potential for section 7123(d) relief and documents the file.*

i. Upon notification of an expedited investigation, the Charging Party must be prepared to provide the RO with all requested documents and to ensure that witnesses are identified by name, telephone number, and work hours and are available for an expeditious investigation. The expedited investigation will cease if the Charging Party does not provide evidence when requested. Use of the fax machine and e-mail may help expedite the investigation;

ii. 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 criteria discussed in this Policy which the RO evaluates to determine whether appropriate temporary relief should be pursued; and

iii. Similarly, a Charged Party must 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 is not delayed due to a Charged Party's delay in presenting evidence and argument.

c. *Once the decision has been made to expedite, the Agent conducts an investigation of the charge. The investigation is completed within the shortest time period possible.*

i. Affidavits are obtained as part of the investigation. The affidavit must be typed as it will be used for submission to a Federal district court. Specifically, the affidavit must address the elements of the alleged ULP(s) to show "probable cause" that a violation has occurred or is occurring and

to establish irreparable harm that frustrates the remedial purposes of the Statute; and

ii. The RD determines whether to recommend to the GC that temporary relief be sought based on the criteria above.

6. RD Determination on the Merits of the Charge and the Appropriateness of Temporary Relief:

Once the investigation has been completed, the RD makes a determination on the merits of the ULP and on whether to recommend to the GC that temporary relief should be sought.

- If the determination is made that the charge has no merit, the decision is explained to the parties, and a dismissal letter is issued to both parties.

- If a determination is made that the charge has merit but that temporary relief is not appropriate, the RO informs the parties that temporary relief will not be sought and continues processing the charge.

- If a determination is made that the charge has merit and that the seeking of appropriate temporary relief is appropriate, the case is referred to the GC as discussed below. The parties are not advised that the RD has recommended injunctive relief to the GC.

There is no appeal to the GC or the Authority from the RD's determination not to recommend the seeking of temporary relief.

7. Processing of a Request for Temporary Relief - OGC:

a. Submission of a Request for Appropriate Temporary Relief to the OGC:

i. Initial recommendation:

If the RD decides that a request for a TRO is warranted, immediately after such decision is made, the GC is notified by e-mail, telephone or fax.

ii. Memorandum and draft complaint:

The RD transmits a memorandum in support of the requested temporary relief to the GC by e-mail or fax. The following outline is used for each memorandum:

The first section of the legal memorandum provides an alternatives analysis on the likelihood of success on the merits of the case. The second section provides an alternatives analysis on irreparable harm. An alternatives analysis responds to

anticipated arguments that a respondent would make in opposition to the claim regarding the merits and/or irreparable harm (that a ULP is being committed and that temporary relief is just and proper and will not interfere with a respondent's ability to carry out its essential functions).
In addressing the merits, as applicable, discuss:

- The Statute;
- Authority precedent;
- Judicial decisions reviewing Authority actions or determinations;
- Law of other administrative agencies, e.g., NLRB, MSPB, OSC;
- Judicial decisions reviewing other agency actions or determinations; and
- Facts and legal theories that would support a violation.

In addressing irreparable harm, as applicable, address traditional equitable criteria:

- The likelihood of success on the merits;
- The irreparable harm if relief is not granted;
- The extent that the balance of hardships favors the respective parties (includes a discussion of how temporary relief would not interfere with the Charged Party's ability to carry out its essential functions); and
- Whether and how the public interest will be advanced by granting temporary relief.

b. If the GC decides that temporary relief should not be sought:

i. The GC advises the RD to contact the parties and inform them of the decision.

ii. The GC's decision not to seek approval from the Authority for such temporary relief is final and may not be appealed to the Authority. *See* section 2423.10(b).

c. If the GC decides to seek approval for a TRO from the Authority:

i. The GC instructs the RD to issue complaint and to seek the earliest possible hearing date on the ULP complaint. The parties are notified that the RO is issuing a complaint and that the GC is requesting Authority permission to seek immediate relief.

ii. Settlement is discussed thoroughly with each party since seeking injunctive relief is often a catalyst for resolution of disputes. Any settlement sought comports with the OGC's Settlement Policy and serves the interests of the parties and the purposes and policies of the Statute. The RO strives to settle the underlying ULP case in its entirety to avoid the need for seeking temporary relief and litigating the case.

8. The Authority's Action on the GC's Request:

a. Authority denial of request:

If the Authority denies the GC's request, the Agent orally notifies 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.

b. Authority approval of request:

If the Authority approves the GC's request, the GC notifies the RD processing the case. Further, the GC informs the national level of the Charged Party of the intent to seek temporary relief and urges officials at that level to assist in settling the case.

9. Seeking Temporary Relief in District Court:

The RO telephonically informs the parties of its intent to file for injunctive relief. This notice is confirmed in writing to the parties. Settlement is vigorously pursued while the preparation of the pleadings continues.

The RO files the appropriate papers in person in the Federal district court as soon as possible after the Authority's authorization. *See* section 2423.10(c).

10. Litigation of the ULP Complaint after Appropriate Temporary Relief Has Been Obtained:

After the Region has obtained appropriate temporary relief, the RO prosecutes the case. If subsequent to obtaining appropriate temporary relief an ALJ recommends that the complaint be dismissed, in whole or in part, the RO informs the Federal district court which granted the temporary relief of the possible change in circumstances arising out of the decision of the ALJ.

F. PRE-INVESTIGATION: INITIAL WRITTEN OR ORAL CONTACT WITH THE PARTIES

After Receipt of a Case File, the Agent Drafts a Letter or Telephones the Parties' Representatives:

As soon as possible after the receipt of the charge, the Agent contacts the Charging and Charged Party representatives. The Agent discusses, as necessary, the following matters:

- Introduction of Agent including the Agent's e-mail, telephone number and office fax number;

Note: Agents should inquire if a party has an e-mail address and if so, whether the Agent may communicate with the party by e-mail.

- Discussion of ULP process, e.g., clarification of the OGC's and the party's expectations for the investigation, and scheduling of investigation, and explanation of the OGC's role as a neutral, as necessary;

- A request that evidence supporting or defending against the charge be sent to the RO, including, e.g., collective bargaining agreement, as appropriate;

- A request that certain documents and other information be made available when on-site for the investigation;

- A request that the Charging Party prepare a witness list with a short description as to what information the particular witness will testify;

- Send questionnaire, as appropriate to case, to be filled out, signed, and returned by a date certain;

- Clarify the issues to ensure that the charge represents the intent of the Charging Party. This can be accomplished by confirming letter or by the filing of an amended charge, in an affidavit, or, as appropriate, in a conference call with both parties followed up by a confirming letter;

- Ascertain whether there are any statutory bars to the charge;

- Express expectation of cooperation by informing: (a) Charging Party of its obligation to provide evidence and to participate fully in the investigation; and (b) Charged Party of the expectation of cooperation and encouraging cooperation during the investigation, such as, affidavits of Charged Party witnesses and Statement of Position.

- It may be appropriate to outline options, including withdrawal of a charge, if on the face of the charge or during the opening telephone call it is clear that there is a serious problem with the charge, e.g., an obvious jurisdictional problem or the matter concerns an obvious grievance. In addition, the Charging Party may withdraw the charge on its own volition at any time in the proceedings.

Note: Once any type of evidence is submitted in response to an agent's initiative, e.g., moving affidavit, confirming letter, the investigation has begun and it is no longer appropriate to discuss the option of withdrawal of the charge.

G. AMENDING THE CHARGE

1. Examples of Situations Requiring that a Charge be Amended:

a. To add an additional allegation:

For example, the charge alleges a bypass but claims only a violation of section (a)(1). In this case, the Agent has the Charging Party amend the charge to claim an (a)(1) and (5).

b. To correct a typographical error in the dates the alleged violation occurred:

See U.S. Penitentiary, Florence, Colo., 53 FLRA 1393, 1402 (1998).

c. To ensure that the proper parties are charged: interference above the level of exclusive recognition:

An Agency's higher-level management is charged when it has directed or required management at a subordinate level of exclusive recognition to act in a manner that is inconsistent with the subordinate level's bargaining obligations under section 7116(a)(1) and (5) of the Statute.

See, e.g., U.S. Dep't of the Interior, Bureau of Reclamation, Wash., D.C., 46 FLRA 9, 29 (1992), *enforcement denied on other grounds sub nom. U.S. Dep't of Interior, Bureau of Reclamation v. FLRA*, 23 F.3d 518 (D.C. Cir. 1994) (citing *Dep't of the Interior, Water and Power Res. Serv., Grand Coulee Project, Grand Coulee, Wash.*, 9 FLRA 385, 388 (1982) (level of management where exclusive recognition lies is not found to have violated section 7116(a)(1) and (5) where it has no choice but to ministerially follow the dictates of the Department); and *Headquarters, NASA, Wash., D.C.*, 50 FLRA 601, 620-22 (1995) (finding of violation against Headquarters where it is responsible for actions which affect one of its subcomponents), *enforced sub nom. FLRA v. NASA, Wash., D.C.*, 120 F.3d 1208 (11th Cir. 1997), *aff'd sub nom. NASA v. FLRA*, 527 U.S. 229 (1999).

2. Time Considerations under section 7118(a)(4)(A) of the Statute:

Do not obtain an amended charge alleging violative conduct occurring more than six months prior to the date of the amended charge. If the amended charge does not also include conduct encompassed by the original charge, a complaint based on allegations in the amended charge may be found untimely. Amended charges that are closely related to events or matters complained of in the charge and are based on events occurring within the six-month period preceding the charge are not barred by section 7118(a)(4)(A) of the Statute. *U.S. Dep't of Veterans Affairs, Wash., D.C., Veterans Admin. Med. Ctr., Amarillo, Tex.*, 42 FLRA 333, 340 (1991), *rev'd on other grounds sub nom. U.S. Dep't*

of Veterans Affairs, Wash., D.C. v. FLRA, 1 F.3d 19 (D.C. Cir. 1993); and *NRC*, 44 FLRA at 379-80 (1992) (participation in the operation of a union (original charge) and an attempt to oust the union (amended charge) are two separate and distinct activities and therefore amended charge allegations were not encompassed within timely filed original charge).

3. What is Required to Amend a Charge:

a. Amended FLRA Form 22 or 23:

An amended FLRA Form 22 or FLRA Form 23 with a designation on the face of the form "FIRST AMENDED" or "SECOND AMENDED" before the word "charge." The amended charge contains the charge as amended in its entirety, including amendments.

b. Mechanisms to withdraw specific allegations:

A Charging Party who wishes to withdraw allegations in the charge may do so by:

- Filing an amended charge; or
- By a written statement; or
- The Agent may prepare a confirming letter of a telephone conversation with the Charging Party during which the Charging Party expressed the desire to withdraw certain allegations.

4. Service Requirements:

The service requirements discussed in Part 2, Chapter A4 regarding original charges also apply to amended charges. No matter which method described above is used to amend a charge, the Charging Party is required to serve the Charged Party with the amended charge and also if a Charging Party withdraws allegations in the charge.

5. Charged Party Opportunity to Respond to Amended Charge:

The RO provides the Charged Party the opportunity to respond to an amended charge. During the time in which the Charged Party is given an opportunity to respond, the RO takes no action on the amended charge. The Charged Party's representative is asked to submit any evidence, argument, or statement of position that has not already been provided, within 5 days of the receipt of the amended charge. The amendment may be sent by fax to the Charged Party. The communication with the Charged Party is documented in the case file.

H. PROCESSING CHARGES RELATED TO FSIP REQUESTS FOR ASSISTANCE

When the Underlying Allegations of a ULP Charge Concern a Negotiation Impasse:

- The RO checks Charge Form 22, Box No. 7, to determine if the Union has also filed a request for FSIP's assistance. *See* section 2423.4(a)(6)(ii);
- If so, the RO contacts the OGC HQ with case-identifying information;
- The RO does **not** defer investigation of the ULP charge;
- The RO processes the ULP charge up to an RD decision;
- The RD takes dispositive action if the charge is **non-meritorious**; and
- The RD **does not** take dispositive action if the charge is **meritorious** and complaint is authorized --the RD notifies OGC HQ.
- FSIP notifies OGC HQ once action has been taken and OGC HQ then notifies the Region.

I. PROCESSING CHARGES RELATED TO PENDING NEGOTIABILITY APPEALS

1. Check the Charge Form 22:

When a Union files a ULP charge which involves a negotiability issue, the RO checks to determine whether the Union has also filed a negotiability petition for review of the same negotiability issue with the Authority. *See* section 2423.4(a)(6)(iii). Check the Charge Form to determine whether the Union has checked "yes" in box 7 indicating that the matter has been raised before the Authority.

2. Notify OGC Headquarters:

Notify and discuss how the negotiability case impacts on the issues raised by the allegations underlying the ULP charge.

3. Notify Office of Case Production:

OGC HQ will notify the Office of Case Production of the pending ULP charge that raises a negotiability issue.

J. PROCESSING CHARGES RELATED TO A PENDING REPRESENTATION PETITION

1. Priority Given to ULP Charges that "Block" Representation Petitions:

Because the speedy resolution of representation questions is of the utmost importance, a ULP charge that blocks a representation election petition is given the highest priority by the ROs in the investigatory phase of the case. These cases generally raise questions concerning conduct which has a tendency to interfere with the free choice of the employees in an election.

2. Non-Merit Determination of the ULP Charge "Unblocks" a Representation Case:

A representation becomes unblocked when: (1) the appeal period expires and no appeal is filed, or (2) if an appeal is filed, and the GC denies the appeal. If the GC remands the case to the RD, the representation case continues to be blocked.

3. Defer Processing ULP Charge Until Resolution of Pending Representation Case:

Where a ULP charge (that is not "blocking" an election) is so related to an unresolved representation matter that the processing of the representation case will resolve significant issues, the RD makes a determination to defer processing of the ULP charge. For example, a pending ULP charge with a threshold issue of **unit eligibility** may be deferred pending a petition that seeks clarification of the unit status of the employee/s who are the subject of the ULP charge. By informing the parties of deferral of the charge, the RO retains jurisdiction while resolving the question concerning the unit employee(s') bargaining unit status. (See Attachment 2J1 for a Sample Letter Deferring ULP Charge)

4. RO Receipt of ULP Charge that Raises Representation Issue:

- Whenever the RO receives ULP charges that raise a representation matter the RO points out that the Charging Party should consider filing a representation petition (for example, questions concerning unit eligibility – an employee is denied dues checkoff because the charged party states that s/he is excluded from the unit); and

- If a representation petition is then filed, the RO defers processing of the ULP case (if it is not "blocking" an election) during the pendency of the representation case.

- Once the representation issue is resolved, the RD processes the merits of the ULP charge.

PART 3

A. PREPARATION FOR INVESTIGATION

1. Before the Actual Investigation:

- Section 2423.4(e) of the Regulations provides that, when filing a charge, "the Charging Party shall submit to the Regional Director any supporting evidence and documents, including, but not limited to, correspondence and memoranda, records, applicable collective bargaining agreement clauses, memoranda of understanding, minutes of meetings, applicable regulations, statements of position and other documentary evidence. The Charging Party also shall identify potential witnesses and shall provide a brief synopsis of their expected testimony."

- This burden to furnish supporting evidence is also set forth in the region's Opening Letter in each case, which provides a due date for receipt of that information if not already submitted with the charge. While a Charging Party will not always have access to all relevant documentary evidence or witnesses when filing the charge, it is expected that a good faith effort will be made to comply with the Regulations.

- Where a Charging Party fails to provide supporting documentation either when the charge is filed or by the due date in the opening letter, the investigation shall not be initiated. Rather, the Agent will send a letter to the Charging Party advising that: there has been a failure to comply with the Regulations relating to supporting evidence; the evidence must be received prior to close of business by a date certain (e.g., 10 days from the date of this letter); if the evidence is not received by the due date, a recommendation will be made to the Regional Director that the charge be dismissed for non-submission of evidence; and no further extensions will be granted.

2. Steps to Prepare For an Investigation:

- Identify the issues of the charge;

- Review the information and documents received to date to develop areas of inquiry;

- Research relevant case law;

- Identify witnesses and ensure that they will cover all allegations, as appropriate;

- Depending on situation, the Agent may contact witnesses directly or have the Charging Party or Charged Party contact and advise witnesses of the date, time, location, and purpose of the investigation;

- Identify and arrange for relevant documents to be made available on site or have the documents sent to Agent;

3. Factors Considered In Determining Whether the Investigative Plan is Written:

The RD has discretion to determine whether to require a written investigative plan. The RD's discretion may be guided by the following:

- Experience level of Agent;
- Number of issues in the charge;
- Complexity of issues in the charge;
- Number of witnesses; and
- Prior experiences with the party.

(See Attachment 3A1 for Practical Pointers on Case Processing Including Preparing for an Investigation)

B. QUALITY STANDARDS FOR INVESTIGATIONS

1. Objectives of Quality Standards:

Every participant in the investigation of a ULP charge has a right to expect that the investigation undertaken will meet certain basic standards of quality, even though the investigatory method and the scope of all investigations need not be the same for each particular charge.

2. Quality Standards Applicable to Every Investigation:

- The investigation obtains the best possible evidence;
- All evidence is relevant and assists the RD in reaching a proper disposition of the case;
- The case file contains all of the evidence and information discovered or submitted during the investigation;
- All participants in the investigation are treated professionally and fairly, and;
- Charges are processed as expeditiously as possible.

3. Explanation of the Standards:

a. *Regardless of the investigative methodology, every investigation seeks the best possible evidence*

i. RDs have discretion to use a variety of techniques to obtain evidence during an investigation of ULP charges: (a) the taking of affidavits in person; (b) the collection of documentary evidence; (c) the taking of a sworn affidavit through the use of a telephone interview; (d) the use of sworn interrogatories transmitted to and from the Region by mail; and (d) the use of letters from the RO confirming information obtained orally from a party.

ii. Evidence obtained from Charged Parties meets the same standards as evidence obtained from Charging Parties.

iii. Regions also obtain other non-evidentiary types of information: (a) unsworn written testimonial information; (b) unsworn oral information, and (c) position statements and legal arguments.

b. Determining whether evidence is relevant

The test for determining relevancy is whether it will assist the RD in reaching disposition in the case. Significant hearsay statements may be accepted during the investigation even though their use may be limited at trial. There is no obligation to accept evidence which clearly makes no independent contribution to an understanding of the case or its resolution or which is duplicative.

c. The case file contains all relevant evidence and other information discovered or submitted during the investigation

The case file must contain all relevant documentary and testimonial evidence discovered and submitted during the investigation and other non-evidentiary information in order to ensure the evidence is carefully considered and to ensure that, on appeal of a dismissal, the case file will contain all evidence upon which the RD relied to dismiss the case.

d. All participants in the investigation are treated fairly and equitably and the investigative process is explained to the participants

i. The object of a ULP investigation is the formal disposition of a charge. It is critical that the parties have faith in the investigative process, that they perceive the investigating agent as neutral and impartial, and that they accept the investigation as fairly identifying their interests and their views of the case. Thus, the manner in which the investigation is conducted is as important as the evidence it obtains.

ii. To achieve this standard, all investigating Agents:

Clarify, whenever appropriate, the purposes of the investigation;

Give no indication of favoring one party's position over that of another; and

Conform to appropriate ethical standards of behavior at all times.

e. Charges are processed as expeditiously as possible

ULP charges are processed as expeditiously as possible, taking into consideration the resources available to the RO and the number of pending cases. All significant time gaps must be documented and explained on the case log.

4. Implementation of Quality Standards:

All RDs ensure that each ULP investigation conforms as closely as possible to the quality standards. Each Region develops and implements procedures to:

- Ensure that investigations and decision-making are conducted in a thorough yet timely and efficient manner;
- Enable all RO employees to understand the importance of maintaining a high level of quality in every investigation and to understand the standards for quality in the OGC;
- Identify any assistance and training which OGC employees may require to meet quality standards;
- Assess and document in the case file the quality of the investigation in every ULP case;
- Identify any practices which might reasonably lead those participants to question whether they have been treated professionally, fairly and equitably; and
- Correct any deficiencies that may exist.

C. SCOPE OF INVESTIGATIONS

1. Scope of ULP Investigations:

RDs, under the direction and supervision of the GC, conduct such investigations of ULP charges as deemed appropriate under the totality of the circumstances surrounding the charge. All ULPs are investigated to the extent that the RD has sufficient information to render a determination on the merits of the charge. *See* section 2423.8(a). Not all charges, however, are required to be investigated in the same manner and to the same extent.

2. Criteria for Determining the Scope of Investigations:

To process expeditiously and decide ULP charges fairly and consistently, RDs address the following criteria to determine the scope of an investigation:

- Whether there is jurisdiction over the charge; or
- Whether a violation of the Statute has occurred or is occurring; or
- Whether the case law supports the theory of violation alleged in the charge; or
- Whether all elements of the statutory violation are established

3. Whether there is Jurisdiction Over the Charge:

Is it clear that there is jurisdiction over the charge?

- Is it timely filed? – under section 7118(a)(4)(A), a charge must be filed within 6 months of when the alleged unfair labor practice occurred, or if not, one of the exceptions in section 7118(a)(4)(B) of the Statute is applicable (failure of agency to perform a duty owed or concealment which prevented the discovery of the alleged unfair labor practice during the 6-month period.

- Is there a 7116(d) bar? – the charge may be barred by a previously filed grievance under section 7116(d) of the Statute but only if the parties, the issues, and the **legal theories** in the previously filed grievance are identical under Authority precedent. *See Olam S.W. Air Defense Sector (TAC) Point Arena Air Force Station Point Arena, Cal.*, 51 FLRA 797, 801-02 (1996).

- Is a ULP stated on the face of the charge? If not, no jurisdiction.

- Is the charge against the right parties?

4. Whether a Violation of the Statute has Occurred or is Occurring

Are there sufficient facts for the RD to render a determination on the merits of the charge?

ULP charges are sufficiently investigated to permit the RD to render a determination as to whether a violation of the Statute has occurred or is occurring. Not all charges, however, are required to be investigated to the same extent in order to obtain that information necessary to render a merit determination. All investigations, regardless of the scope of the investigation, are conducted in accordance with the quality standards set forth in Part 3.

5. Whether the Case Law Supports the Theory of Violation Alleged in the Charge

Is the case law clear?

Sometimes, after an Agent has an initial discussion with the Charging Party concerning the theory of violation, it is clear under governing case law that there would be no ULP finding even if all allegations in the charge, and all allegations made by the Charging Party while discussing the charge, are true.

6. Whether all Elements of the Statutory Violation are Established

Are all elements of the statutory violation met?

If, after the initiation of the investigation it becomes uncontested that an element of the statutory violation is missing, the investigation could be ceased.

Examples where elements of statutory violation are not established:

- *Weingarten* examination element is missing-- a Charging Party witness may state that no request was made for a union representative at an investigatory examination. *See* section 7114(a)(2)(B) of the Statute.

- Formal discussion element is missing-- it may become undisputed that the exclusive representative received actual, timely notice of a formal discussion. *See* section 7114(a)(2)(A) of the Statute.

7. Regional Directors May Conclude an Investigation:

If, after reviewing a FIR, the RD determines that the evidence and information obtained during the investigation is sufficient to resolve the charge, the RD may conclude the investigation.

D. EVIDENCE, IN GENERAL

1. Evidence v. Information:

a. *Evidence is any type of proof, or probative matter that, if presented at trial, could be the basis for finding facts at issue.*

For Example:

i. Witness statements;

ii. Records;

iii. Documents.

iv. Signed confirming letters; and

v. Objects.

b. *Evidence is any type of proof, or probative matter that, if presented at trial, could be the basis for finding facts at issue.*

For Example:

i. Oral statements to an Agent; and

ii. Charged party's statement of position.

2. Determining the Best Method of Obtaining Evidence:

The following investigative techniques are not mutually exclusive and may be combined during the investigation dependent upon the particular case situation:

- The taking of sworn affidavits and collection of documentary evidence in person;
- The taking of a sworn affidavit through use of a telephone interview;
- The use of sworn interrogatories transmitted to and from the Region by mail; and
- The use of letters from the RO confirming information obtained orally from a party.

3. Choosing Between Documentary and Sworn Testimonial Evidence:

a. Preference for documentary evidence:

Documentary evidence is evidence that has been reduced to writing prior to the investigation for purposes unrelated to the investigation itself, thus enhancing its credibility. The document should be an original or a clean copy.

This type of evidence, when available, is almost always preferable to testimonial evidence on the same point because credibility factors into the weighing of testimonial evidence whereas documentary evidence is evaluated on its own.

The Agent always determines whether relevant documentary evidence exists and emphasizes its importance to the parties who have access to that evidence.

b. Situations where documentary evidence is critical:

In some cases, documentary evidence may be so critical that no decision on the merits can be made without it, regardless of testimony.

For example:

i. contract interpretation - no case of contract interpretation can be decided without the relevant portions of the contract at hand; and

ii. 7116(d) grievance bar - no decision on a contested section 7116(d) grievance bar is made without a copy of the grievance.

c. Situations where testimonial evidence suffices:

Only when it is clear that the parties are unable to produce documents which are known to exist does the Agent attempt to reproduce that evidence through testimony.

4. Assessing Relevance and Weight of Evidence:

a. Relevance:

i. The test for determining relevance is whether it can reasonably be expected to assist the RD in reaching a proper disposition of the case.

ii. Examples:

Hearsay statements may be relevant during the investigation even though their use would be limited at trial.

An Agent has no obligation to accept evidence which clearly makes no independent contribution to an understanding of the case or its resolution-including:

Obviously irrelevant material; and
Material which merely duplicates evidence already obtained.

Note: The Agent, not the parties, is responsible for deciding during the investigation whether proffered evidence is relevant.

The taking of evidence is always as balanced as possible, and includes not only material which tends to support the allegations in the charge but any available and relevant material which tends to refute the allegations as well. Thus, as a neutral investigator, an Agent explores all potential evidence, whether supportive of the charge or exculpatory. The purpose of the investigation is to obtain all relevant facts to enable a decision on the merits of the charge, not to prove the charge.

b. Weight:

i. The Agent's responsibility is:

- To develop all factual evidence that would assist the RD in assessing the weight of the evidence;
- To inquire into the source of all evidence when that source is not otherwise apparent;
- In the case of documentary evidence, to establish the purpose for which the document was originally prepared and the circumstances of its preparation;
- In the case of testimonial evidence, to establish the competency of the witness and the witness' conflicting interests, if any, in the case;
- To maintain neutrality while taking evidence to protect the integrity of the decision-making process; and
- **Not** to present opinions to the Charging Party without supervisory approval.

ii. The RD ultimately determines the weight of the evidence.

Note: The views of the Agent on the applicable law, weight of the evidence and the application of the law to the evidence is presented at the Region's agenda, not to the Charging Party prior to a decision in the case. Presenting personal opinions prior to the Region's decision, which may not ultimately be adopted by the Region, will incorrectly cause Charging Parties to perceive that their charge was neither fully investigated nor fairly decided. The Agent maintains his/her neutrality and conveys to the parties that, absent resolution of the dispute by the parties, the RD will render a decision on the merits of the charge.

E. ARRANGING ON-SITE INVESTIGATIONS

1. When to do an On-Site Investigation:

The RD exercises discretion in determining whether to conduct an on-site investigation

2. Notification to Agency of Plan to go On-Site:

Under all circumstances, when an Agent plans to go on-site for an investigation, s/he gives timely notification to the Agency's representative. This rule applies whether or not official time for an employee witness has been requested, e.g., the Agent is merely going to the Union office on the Agency's premises.

3. Official Time for Witnesses:

a. Official time under section 7131(c) of the Statute:

Contact the designated Agency representative by telephone or by letter to provide the following information and make the following requests:

- List of persons needed for any interviews and the approximate time required;
- Advise that other witnesses may be identified once on-site;
- Request that arrangements be made for the location of interviews;
- List of persons who need to be scheduled for telephone affidavits and review of affidavits and the approximate time required;
- Persons who are requested to complete a questionnaire or an interrogatory and the approximate time required;
- Advise that another on-site interview may be necessary; and
- Ask that supervisors be informed to arrange for release.

Note: Official time is only requested if it is section 7131(c) time. It is not requested if it falls under section 7131(d) (contract time, for example, the representative is entitled to 100% official time under the contract). In the latter instance, it is the responsibility of the witness to arrange for official time in accordance with the agreement with the Agency.

(See Attachment 3E1 for a Sample Letter Requesting Official Time)

b. Agent's responsibilities with respect to official time granted a witness:

- If requested, verify the use of official time at the time it is used.

4. Management Declines to Make a Witness Available:

- If the reasons are legitimate, e.g., work exigencies, make other arrangements;

- If no other purpose is apparent other than to delay/impede the investigation, first make the request in writing. If that is declined, the RD makes a request to higher-level management;

- If Agent arrives on-site and a management official overruled the decision to make the employee/s available, the Agent:

  - Tries to work around the situation if the reason the employee does not show for the interview appears to be legitimate; or

  - Talks to a management official on-site about making the employee available; and

  Gathers as much evidence as is possible.

Note: The Agent telephones the RD for guidance, if necessary.

F. AFFIDAVITS TAKEN IN PERSON

1. General Rules Pertaining to All Affidavits:

a. *Preparing the witness:*

The Agent prepares the witness's affidavit during the interview or shortly thereafter.

b. *Where testimony of two or more witnesses conflicts:*

In this instance, care is taken to ensure that each witness is testifying about the same thing and has similar competence to do so. It is not unusual for each witness to a formal discussion or a coercive statement to remember a slightly different version of what was said, and the cumulative weight of this testimony may prove more persuasive than any single statement alone. If witnesses contradict each other, however, the Agent is careful to establish whether they were in the same location at the same time and in a position to hear the same thing being said. Any factors which might contribute to their different recollections (bias, for example) are explored.

c. *Witness reviewing the affidavit:*

Whenever possible, the Agent gives the affidavit to the witness for review, correction and signature while the witness and the Agent are still at the same location. If this is done, the affidavit may be handwritten.

d. *Confidentiality:*

The identity of the individual who submits a statement and/or information will not be disclosed unless it becomes necessary to produce the statement if the witness testifies at trial but the **substance or content** of the statement may be disclosed as part of the investigatory process.

2. Basic Steps of Taking an On-Site Affidavit: the Agent does the following:

- Introduces him/herself and describes his/her role as a neutral investigator;
- Explains the confidentiality attached to the interview and use of affidavits;
- Explains that the affiant will have a chance to read the affidavit, to make changes by initialing and crossing-out, and to discuss if certain representations are inaccurate;
- Explains that issues concerning significant changes to the affidavit will be discussed;

- Explains the role of a representative, if one is present, i.e., the Agent reminds the witness that it is his/her testimony that is sought, not the representative's testimony; and

- Explains the necessity of affirming the truth of the matters asserted (last page of affidavit) after the affiant agrees to the contents of the affidavit.

(See Attachment 3F1 for a Sample Form for an Affidavit)

3. Charging Party Witness Affidavit/s--Theory of the Case and Essential Factual Elements:

Each case file must contain documentation that establishes a clear explanation of the theory of allegations that underlies the charge and the essential factual elements in the case in sufficient detail and accuracy to permit the RD to make a determination. This critical information is often provided by a single person in the form of an affidavit. However, in some instances the person who has knowledge of the facts is not the same person who can explain the theory underlying the allegation/s. Thus, it is necessary to obtain more than one affidavit to cover the theory of the allegation and the essential facts. Whether prepared after an in-person or a telephone interview, such affidavits:

- Set out all the essential factual elements in the case;

- Are obtained from individuals with first-hand knowledge of the events giving rise to the charge--in many cases, the person who signed the charge; and

- Contain a clear explanation of the allegations in the charge if the particular affiant signed the charge.

Note: There is no requirement that the person filing the charge be the individual with the essential facts, as long as that person can refer the Region to such a witness to obtain an affidavit or a confirming letter that explains the allegations of the charge.

4. Additional Affidavits:

Additional affidavits may be necessary to: (1) corroborate the testimony in the affidavit that sets out the essential elements in the case and/or contains a clear explanation of the allegations in the charge, or (2) describe significant facts not known to the other witnesses. Each affidavit ideally complements the remainder of evidence in the case file without duplication or digression. Other affidavits, which serve neither of the latter purposes nor contribute to the investigation, are discouraged. For example, an affidavit which merely states that the affiant agrees with the statement of another affiant instead of independently stating the affiant's testimony is not useful. The Agent, not the parties, is

responsible for managing the investigation, which includes determining what evidence is relevant.

5. Characteristics of a Quality Affidavit:

A quality affidavit contains:

- A full identification of the witness and of the witness's competence for testifying--qualify the witness;
- A restatement or clarification of the allegations;
- An unambiguous chronological account of all the factual elements of the alleged violation about which the witness has direct knowledge. This requires that before opening the interview the Agent has a clear understanding of the elements of the violation and the applicable case law;
- An equally clear identification of those elements about which the witness does not have knowledge. The content of the affidavit should make clear that the Agent has asked the essential questions that address the element/s of the alleged violation. For example, if the witness does not know whether an essential element occurred, the affidavit should state that the witness has no knowledge;
- A full factual explanation of any legal or conclusionary assertions which the witness may offer. The Agent ordinarily resists any attempt by a witness to insert summary or judgmental comments into an affidavit, and does not allow such comments to stand alone. For example, the Agent does not permit a witness to testify that a supervisor made derogatory remarks about the Union, without being required to recount just what those remarks were;
- No paraphrasing or rephrasing of what is in a document. The document speaks for itself. But, the affidavit may discuss the circumstances, intent, state of mind, clarify what is in the document, and discuss something that is not in the document itself;
- Information about contracts, grievances and other related matters;
- Post-charge information to bring the situation up to date for prosecutorial discretion, settlement and remedy purposes;
- No quotation marks--state what the witness says. State what the witness said rather than trying to quote the witness's recollection of what someone else said. This protects the credibility of the witness should the witness testify at trial. Only in rare instances is it appropriate to use quotations in an affidavit, e.g., an (a)(1) statement where the statement is significant and exact; and

- No blank spaces (draw a line through the unused portion of any page) to protect the integrity of the document.

Note: The Agent inserts anything else that seems appropriate to the situation (such as statements reflecting that the witness has nothing more to add about what the witness heard at the meeting or the witness does not remember any other discussions with the Union about the status of the grievance). At the same time, the Agent remembers that the taking of an investigative affidavit is not an exercise in trial preparation. Thus, the determination as to whether information is relevant is not whether the information would be admissible at trial, but whether it can reasonably be expected to assist the RD, in conjunction with other evidence, in reaching a proper conclusion of the case--whether to issue a complaint and notice of hearing. Although hearsay statements may not be admissible, they may nonetheless contain useful information which could lead to direct evidence or corroborate other evidence.

6. Documents Referred to in the Affidavit:

- Do not attach documents referred to in an affidavit to the affidavit; rather, make sure that documents referred to in an affidavit are in the case file; and

- Specifically reference and incorporate previous affidavits only if necessary.

7. Affidavits Covering Multiple Charges:

a. *Charges not related:*

If affidavits covering multiple charges are not related, the Agent takes background information separately and then takes evidence separately for each charge, i.e., separate affidavits are prepared for the witness.

b. *Charges are related:*

If the charges are related, before the Agent takes evidence on each of the charges, s/he may first take background information that is applicable to all of the charges, and then take statements for each charge separately but in one affidavit.

Note: After the background information, start a new page when taking evidence pertaining to a specific charge. Start another new page when you begin taking evidence pertaining to a different charge. This will facilitate the sanitization process that will be required in the event that complaint issues with respect to only one of the charges and the affiant testifies at trial, and it becomes necessary to turn over that witness's affidavit to respondent's counsel.

8. Representation of the Charging Party, Charged Party, and Neutral Witnesses:

A party has a right to be represented during an interview of a witness who can bind the party. Contact the designated representative before contacting a witness who is an agent of a party.

Witnesses whose status has changed from the time of the events to the time of the interview:

- If the witness was a Union agent at time of events but is a temporary or permanent supervisor at the time of the interview, then treat the witness as a Union agent;
- If the witness was an employee at time of events but is a temporary or permanent supervisor at the time of the interview, then treat the witness as an employee;
- If the witness was a supervisor at time of the event but in the unit at the time of the interview, then treat the witness as an agent of Agency;
- If the witness was a Union agent at time of the event but is in the unit at the time of the interview, then treat as an agent of Union;
- If the witness was an agent of the Agency or Union representative at the time of event, but is in a different Agency at the time of the interview, then there is no need to contact the charged Agency or Union representative before interviewing the witness;
- If the witness was a temporary or permanent supervisor at time of event, but is in a different Activity at the same Agency at the time of the interview, then contact the Agency representative before interviewing the witness; or
- If the witness was an agent of the Agency or Union at the time of the event, but is retired at the time of the interview, then there is no need to contact the charged Agency or Union representative before interviewing the witness.

G. TELEPHONIC AFFIDAVITS

1. Regional Directors have Discretion to Authorize Use of Telephonic Affidavits

2. How to Take a Telephonic Affidavit:

In addition to generally following the rules that pertain to an on-site affidavit, the Agent follows these additional rules:

- Inquires as to who is in the room and/or can hear;
- Does not affirm over the phone; rather the affidavit form has the affirmation on it (the form need not be notarized);
- The Agent's signature is not on the affidavit;
- The affidavit is prepared after a telephone interview and is either mailed, faxed or e-mailed to the witness, covered by a letter or a message setting a date for its return. The affiant is advised to make any changes in pen on a hard copy of the affidavit (or a print-out in the case of e-mail). The affiant is requested to sign and return the copy to the RO. The letter or message states that if the affidavit is not returned by the requested date, a decision will be made without it or the charge will be dismissed for non-submission of evidence if no additional evidence has been submitted;
- If the affidavit is prepared in the RO, it is typewritten; and
- Fax is an acceptable means of delivery, both for the parties to send documents to the RO and for the Agent to send documents to the parties.

Note: Dispositive action normally is not taken in a case before all the witness affidavits have been signed and returned. Any instance in which a witness fails or refuses to return an affidavit is noted in the case file. If a witness/s fails to provide an affidavit/s that sets forth the essential factual elements in the case and a clear explanation of the allegations in the charge, the case is dismissed for lack of evidence submitted.

(See Attachment 3G1 for a Sample Telephonic Affidavit)

3. Use of Unsigned/Unreturned Telephonic Affidavits:

Unsigned/unreturned telephonic affidavits are **not** evidence--they are information.

H. SWORN QUESTIONNAIRES TRANSMITTED TO AND FROM THE REGION BY MAIL

1. When to Use a Sworn Questionnaire:

It is up to the RD's discretion when to use a sworn questionnaire. Generally, its use may be considered in cases that are impersonal and predominantly documentary, e.g., information cases. It is prepared after an exploratory interview with the witness or, if the witness is known to be competent and cooperative, no interview is required. It typically consists of questions appropriate to the type of violation alleged.

2. Characteristics of a Quality Questionnaire:

a. *When sent from the RO, it is administratively handled in the same manner as telephone affidavits are processed--typewritten and accompanied by a cover letter to either the Charging or Charged Party explaining*:

i. The purpose and importance of the questionnaire;

ii. The manner in which the questionnaire is to be completed, including the date by which it must be returned; and

iii. Because the questionnaire, in select cases, is the equivalent of an affidavit that establishes the essential elements in the case and contains a clear explanation of the allegations in the charge, the Charging Party's failure to timely return the sworn and signed questionnaire will result in dismissal of the charge.

(See Attachment 3H1 for a Sample Cover Letter for a Questionnaire)

b. Drafting a questionnaire;

i. It contains the same oath as contained in a sworn affidavit and there is no need that it be notarized;

ii. In some circumstances, it may need to be supplemented by collateral affidavits or other statements;

iii. It is as self-contained as possible and is drafted to include all the elements of proof of the statutory violation and proposed remedy, and any other matters which the Region deems relevant in those type of violations; and

iv. It is drafted with a high degree of clarity and precision because it constitutes a series of questions prepared from the point of view of the Agent rather than that of the witness. It may be an informal supplement to the investigation or may be a substitute for a sworn affidavit.

(See Attachment 3H2 for an Example of a Questionnaire)

I. INVESTIGATORY SUBPOENAS

1. When Does an RD Consider Requesting that the GC Issue an Investigatory Subpoena:

An RD considers requesting the issuance of an investigatory subpoena when a Charged Party fails or refuses to cooperate during an investigation and the criteria listed below are satisfied. It may also be requested when a Third Party has critical evidence it is not willing to provide.

2. Criteria RDs Address in Determining Whether to Request that the GC Issue an Investigatory Subpoena:

- Whether the evidence submitted by the Charging Party and any neutral witnesses establishes a potential violation (if the Region has sufficient evidence for the RD to decide the merits of the charge, it is not necessary to require the Charged Party to produce additional evidence);

- Whether the evidence sought is relevant and material and is neither privileged, unduly repetitious, nor unreasonably cumulative;

- Whether the evidence is **necessary** to decide a factual issue which must be resolved to determine whether or not a violation of the Statute has occurred, and that evidence is not otherwise available;

Note: Cases which turn on the credibility of a witness, e.g., section 7116(a)(1), (2) and (b)(1) are normally not proper candidates for consideration of the issuance of an investigatory subpoena to take a witness's statement, but it may be necessary to subpoena a crucial document(s) deemed material to the case under section 7116(a)(1) and (2).

- Whether the evidence sought is within the control of the Charging Party;

- Whether the evidence can be produced without an undue burden and is specific, narrowly tailored, and reasonable;

- Whether the Charged Party is likely to comply with the subpoena, and failing that, the prospect for successful enforcement of the subpoena in court.

3. Process for Requesting and Obtaining GC's Issuance of Investigatory Subpoena:

- The Agent seeks voluntary cooperation from the Charged Party (do **not** discuss the tool of an investigatory subpoena with the Charged Party's representative) and documents the contact with a confirming letter or in a memo to the file;

- If cooperation is not given, then, if the analysis of the above criteria warrants, the Agent recommends that the RD requests an investigatory subpoena from the GC;

- RD decides whether to request the investigatory subpoena based on the above criteria. Such request is made by memorandum (no discussion with the Charged Party's representative about investigatory subpoena occurs); and

Note: The memorandum states the allegation, the evidence obtained thus far and addresses each of the criteria listed above.

- GC either issues the subpoena or denies the request.

4. Before the Subpoena Issues, the Charged Party has a Last Chance to Cooperate with the Investigation:

After the GC grants the RD's request to issue an investigatory subpoena, the Agent expeditiously contacts the Charged Party's representative and gives the Charged Party a last chance to cooperate with the investigation. The Agent informs the Charged Party's representative that, absent voluntary compliance, a subpoena will issue, and, absent compliance with the subpoena, enforcement will be sought in an appropriate United States district court.

Note: The Agent documents this contact with the Charged Party's representative in the case file.

(See Attachment 3I1 for a Sample Investigatory Subpoena)

5. Service of Subpoena:

Any individual who is at least 18 years old and who is not a party to the proceeding may serve a subpoena and certify that s/he did so by:

- Delivering it to the witness in person;

- Sending it by registered or certified mail; or

- 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.

6. Revocation of Subpoena:

a. Procedural requirements:

Any person who does not intend to comply with a subpoena has five days from the date of service of the subpoena to petition in writing to revoke the subpoena. Such a person is required to serve the GC with a copy of the petition to revoke.

b. Standards governing the GC's ruling on a petition to revoke:

The GC revokes the subpoena if it is determined that: (a) witness or evidence which is required to be produced is not material and relevant to the matters under investigation or in question in the proceedings; (b) if the subpoena does not describe with sufficient particularity the evidence sought; or (c) if for any other reason sufficient in law the subpoena is invalid; or if appropriate, the GC denies the petition in writing.

7. Enforcement Proceedings:

Upon the failure of any person to comply with a subpoena, the RD contacts the GC immediately for a determination as to whether to institute proceedings in a United States district court for the enforcement of the subpoena.

If it is determined to institute enforcement proceedings, the GC will coordinate such action with the RD.

J. INTERVIEWS WHEN NO AFFIDAVITS ARE TAKEN

1. A Memorandum to the File is not Evidence:

If an Agent obtains substantive information orally that is to be relied upon by an RD in making a decision, the information is contained in either a sworn affidavit, documentary evidence, sworn questionnaire or a confirming letter. Other information, which does not constitute material facts and which is not relied upon by the RD in making merit determinations, may be noted in a memorandum to the file to be used for background purposes.

2. Confirming Letters of Charging Party Witness:

a. When a confirming letter is used:

A confirming letter, properly obtained, may be used by the Region in determining the merits of the case.

Not every conversation with a party or a witness results in evidence suitable for trial, but often these conversations do result in information which can be useful in the investigation. In order to rely on information received orally, the Agent confirms any relevant substantive information received about the case in a letter to the party or witness who provided it. A confirming letter may be used to clarify allegations of a charge or for corroborating evidence.

Examples of appropriate use of a confirming letter:

- Charging Party informs the Agent that the events giving rise to the charge arose outside the timeliness provisions of the Statute (section 7118(a)(4)(A)) and the conversation reveals that none of the exceptions apply (section 7118(a)(4)(B)); or

- A party telephonically informs an Agent that it is challenging an action clearly outside the jurisdiction of the Statute.

b. Contents of a confirming letter:

Confirming letters clearly state the factual information received from the party or witness, explain that the information will be considered by the RD in deciding the case, give the party or witness a reasonable period of time to advise the Agent of any inaccuracies or changes in the information, and advise that the information may be relied upon by the RD in deciding the case on the merits in the event that there is no response.

Confirming letters do **not** include the Agent's assessment of the case.

Confirming letters are **not** used to revise a charge that requires more than a minor clarification. Rather, an amended charge is required.

Note: There is no requirement that a Charging Party witness sign a confirming letter but the witness is advised that unless disputed within a certain time frame, the RD may rely upon it in determining the merits. If it is determined that it is necessary for the Charging Party witness to affirm certain facts, an affidavit or supplemental affidavit remains the preferred means of recording witness testimony involving facts that are in dispute. However, Regions have discretion to require a Charging Party witness to sign and return a confirming letter.

(See Attachment 3J1 for a Sample Confirming Letter for Charging Party Witness that is used to Support a Dismissal of the Charge)

3. Interviews with Charged Party Representatives and other Agents When no Affidavits are Taken:

*a. Charged party's **legal position** is presented orally in interview with representative:*

An oral presentation of a legal position is not evidence. It may be used for background and information purposes only and does not bind a Charged Party to any legal position.

*b. Use of **facts** presented orally in the interview with Charged Party representatives and other agents:*

An oral presentation of the facts is not evidence and it may be used for background and information purposes only.

c. Charged party confirming letters:

i. Only use if the representative or agent agrees to such use and can partake in the process, e.g., do not use if the representative indicates that s/he is not permitted by the Agency or Union to confirm or not confirm;

ii. If the party is represented, make sure the representative gets a copy; and

iii. A signature is necessary to use as evidence to support dismissal or complaint.

Rationale for obtaining a signature on Charged Party confirming letters and not for Charging Party confirming letters. Unlike Charging Party confirming letters, which need not be signed in order to be used in determining the merits of a charge, a confirming letter of a Charged Party witness may not be used in determining the merits of a charge unless it is signed. With respect to using a confirming letter to support dismissal of a charge, a statement that has not been

sworn to by the Charged Party witness provides no basis for concluding that such a statement could be established at trial. In other words, an assertion alone – without a basis for concluding that it can be substantiated by supporting evidence or sworn testimony – provides an insufficient basis upon which to conclude that a charge is without merit. For purposes of using a confirming letter to support the dismissal of a charge, it is not the same to rely on something stated, but not sworn to, by a Charging Party witness to dismiss a charge, than to rely on something stated, but not sworn to, by a Charged Party witness to dismiss a charge. Thus, it is required that Charged Party confirming letters be signed. Conversely, for the purposes of using a confirming letter to support issuance of complaint, very seldom, if ever, would a complaint issue absent a signed/sworn Charging Party statement.

(See Attachment 3J2 for a Sample Confirming Letter of a Charged Party Witness)

4. Interviews with Non-party Witnesses Giving Facts when No Affidavits are Taken:

a. Use of facts presented orally in an interview with non-party witnesses:

As stated above, oral presentations of facts are not evidence and may be used solely for background and information purposes.

b. Confirming letters:

i. Are used for corroborating evidence;

ii. Are used to obtain additional facts after on-site investigation; and

iii. Need not be signed;

(See Attachment 3J3 for a Sample Confirming Letter of a Non-Party Witness)

K. IMPROPERLY OBTAINED INFORMATION/EVIDENCE

1. An Agent of the FLRA never Engages in Complicity in Improperly Obtaining Evidence

Improperly obtained evidence could be evidence that was stolen or purloined.

2. Upon Learing About Improperly Obtained Evidence, the Agent Notifies the RD

3. The RD Exercises Discretion to Determine Whether to Accept and Use Such Evidence

Note: In deciding whether to accept the improperly obtained or purloined evidence, the Region may review the evidence.

4. The Authority Has Not Addressed the Issue of Using Improperly Obtained or Purloined Evidence in an ULP Proceeding:

Although the Authority has not ruled on this matter, the National Labor Relations Board has ruled that the evidence is allowed as long as the Board agent was not involved in improper activity. *See Air Line Pilots Ass'n*, 97 NLRB 929 (1951) and *Gen. Eng'g*, 123 NLRB 586 (1959) (Board held that it would allow the introduction of allegedly illegally-obtained evidence as long as government agents were not involved in the taking of the documents); *Cory Coffee Servs., Div. of Cory Food Servs., Inc.*, 242 NLRB 601 (1979); *NLRB v. S. Bay Daily Breeze*, 415 F.2d 360, 365 (9th Cir.1969) (in upholding Board's decision, court stated that "where the Board merely accepts and makes use of evidence illegally obtained by private individuals, exclusion of such evidence is not required by the Act").

L. DISCLOSURE OF EVIDENCE--DISCUSSING THE CONTENTS AND FURNISHING COPIES

1. Disclosure of a Party's Documentary or Physical Evidence:

a. Distinction between public and non-public evidence:

i. The rule of confidentiality applies to non-public evidence, *See* section 2423.8(d). Non-public evidence is evidence that is within an Agency's or Union's internal control and is not distributed externally, e.g., minutes of a Union or Agency-management meeting; intra-management or intra-union memorandum; or an employee's performance appraisal; and

ii. If the evidence is public information it can be discussed with, shown and provided to the other party if it is necessary to obtain the complete facts.

b. The document may be shared if, on its face, it shows that the other party has already obtained it.

c. If the document is internal, i.e., non-public:

i. Ask the party who provided it for permission to furnish a copy to the other party;

ii. If permission is granted, it can be discussed with, shown to, and provided to the other party; and

iii. If such permission is declined, and the document purports to establish a fact, then the Agent informs the other party that s/he has a document establishing a certain fact that is disclosed and discussed, but does not identify, show, or furnish the document to that party.

2. Disclosure of Affidavits, Sworn Questionnaires, and Confirming Letters:

a. The rule of confidentiality applies to affidavits, sworn questionnaires and confirming letters and the affidavit form refers to the confidentiality rule. See section 2423.8(c).

b. How to obtain a party's response to facts represented in an affidavit, confirming letter or sworn questionnaire:

The Agent uses the facts to frame questions but is careful not to disclose its origin, or show, or furnish copies, of the evidence.

M. DUTY OF THE CHARGING PARTY

1. Pursuant to section 2423.8(b)(1), Cooperation Includes:

- Making Union officials, employees and Agency supervisors and managers (if the Charging Party is an Agency) available to give sworn/affirmed testimony regarding matters under investigation;
- Producing documentary evidence pertinent to the matters under investigation; and
- Providing statements of position on the matters under investigation.

2. Dismissals for Non-Submission of Evidence or Insufficient Evidence:

a. When the Charging Party does not respond to the Agent's request that charge be clarified by amended charge:

If, after the Region dockets the charge, it is determined that the charge needs to be clarified before the investigation can be started, the Agent assigned to the case contacts the Charging Party representative to advise of the need for clarification by an amended charge. A confirming letter of the conversation is sent advising that if the clarification is not provided by a date certain (within 10 days of date of letter), the charge will be dismissed.

b. No evidence or insufficient evidence is submitted at the outset or during an investigation:

The Agent advises the Charging Party's representative and confirms in a letter, that the Region is considering dismissing the charge for either a lack of evidence or insufficient evidence, and provides the Charging Party with a notice that evidence must be received by the regional office within 10 days of the date of such notice for evidence to be considered. If the Charging Party fails to submit the evidence requested despite the opportunity to do so, the charge is dismissed for lack of evidence or insufficient evidence. The case file contains documentation of the attempts to contact the Charging Party.

c. When the Region is contacted or receives evidence after an established deadline, but before a dismissal letter issues:

It is within the RD's discretion to accept evidence at this time. However, it is the rare occasion when evidence will be accepted. To be accepted the facts must establish that there was a good faith effort to comply with established deadlines. That the RD has not yet issued a dismissal letter is irrelevant.

d. *When a party continuously files a substantial block of charges at one time that are substantially similar to charges that have previously been dismissed or withdrawn after a non-merit determination:*

Despite regional efforts to train/educate the Charging Party concerning the Statute, RDs should require these Charging Parties to submit their supporting evidence or respond in writing to questions concerning the charges, **before** determining the scope and method of the investigation. If there is no timely response, the charges are processed like other situations where the Charging Party fails to submit evidence in an investigation.

e. *Circumstances arise during the investigation where conduct inhibits investigation:*

i. If a scheduled witness does not show up for an interview, the Agent gives the witness a date certain to provide the information and/or to take a telephone affidavit. This is confirmed in a letter to the Charging Party with an admonition that a dismissal will be the consequence of non-compliance; and

ii. If a representative does not make certain documents available when the Agent is on-site, as had been pre-arranged, the Agent gives the Charging Party a date certain to produce the documents. This is confirmed in a letter to the Charging Party with an admonition that a dismissal will be the consequence of non-compliance.

N. DUTY OF THE CHARGED PARTY

1. Charged Party Cooperation is Sought Throughout the Entire Processing of the Charge:

A Charged Party's cooperation is specifically sought concerning the following matters:

- In the opening letter and the first telephone contact with the Charged Party's representative where the benefits of cooperation are explained;
- In arranging for section 7131(c) official time;
- In seeking a position statement and documents, even if the Charged Party will not allow witnesses to be interviewed, or has no witnesses. *See* section 2423.8(b)(3);
- In seeking evidence after the Charging Party has established a *prima facie* case; and
- In seeking background information even if no evidence through witnesses and/or documents is provided. For example, this information may be in the form of:
  - Unsworn position statements; or
  - Personal telephone interviews which do not lead to affidavits or confirming letters.

Note: Evidence obtained from Charged Parties meet the same standards as evidence obtained from Charging Parties. The Agent does not close an investigation without determining beyond the opening letter whether the Charged Party will provide evidence meeting these standards.

2. Use of the Investigatory Subpoena:

Where a Charged Party fails or refuses to cooperate and the RD has deemed such cooperation appropriate, the GC may, in appropriate cases, exercise authority pursuant to section 7132 of the Statute to issue an investigatory subpoena. See Chapter I in Part 3, concerning Investigatory subpoenas.

PART 4

A. RD APPROVAL OF REQUEST TO WITHDRAW CHARGE PRIOR TO A RD MERIT DETERMINATION

1. A Withdrawal Request Prior to a Non-Merit Determination:

Once a charge is filed it is incumbent upon all OGC Agents to maintain a neutral and professional posture, which should be reflected in all communications with the parties. Agents will keep parties informed about the role of the OGC in the investigatory process and, while never disclosing matters which would compromise the confidentiality of the investigative process, will normally discuss with both parties the evidence relating to the case.

Prior to the RD's merit determination in the case, the Agent will **not** expressly solicit withdrawal of the charge, **nor** suggest or imply that the charge or any allegation of the charge should be withdrawn. This is contrasted with communication to the parties **before** an investigation commences when it may be appropriate to outline options, including withdrawal of a charge, if on the face of the charge or during the opening phone call it is clear that there is a serious problem with the charge, e.g., an obvious jurisdictional problem or the matter concerns an obvious grievance.

If the Charging party unilaterally requests to withdraw a charge, the Agent notes such request in the case file and processes it through normal channels to the RD for Approval. (See Attachment 4A1 for a Sample Order Approving a Withdrawal Request). When a charge is withdrawn, the Agent will inform the Charged Party of this fact.

2. Partial Withdrawal:

Occasionally, the Charging Party will request that certain allegations contained within the charge be withdrawn. Upon receipt of a request to withdraw these allegations in the charge, the Agent notes such in the case file and processes the request through normal channels to the RD for Approval. When these allegations are withdrawn, the Agent will inform the Charged Party of this fact.

(See Attachment 4A2 for a Sample Notice Approving a Partial Withdrawal)

3. Rescinding a Withdrawal Request:

The RD has discretion whether to approve a request to rescind a withdrawal request.

B. POST INVESTIGATION PRESENTATION

1. When a Case is Ready for Presentation to the RD for Decision:

In accordance with the Chapter entitled Scope of Investigations, ULP charges are investigated to permit the RD to render a determination on the merits of the charge.

2. Final Investigative Report:

a. Purpose:

The purpose of a Final Investigative Report (FIR) is two-fold: to provide a comprehensive analysis of the allegations, providing the RD with alternative outcomes (case law and analysis supporting more than one possible outcome) to render a legally supportable decision; and (2) a learning and developmental tool that requires agents to use their writing, research and analytical skill to enhance their knowledge of the law. The detail of the FIR and extent of the analysis will depend in large part on the complexity of the issues presented.

An FIR is prepared by the investigating agent in **every** case. An FIR is intended to be a clear, concise, and comprehensive summary of the case, and includes a thorough presentation of all applicable case law on both sides of the issue with a detailed application of the case law to the facts incorporating various options for discussion, and finally the Agent's recommended disposition.

(See Attachment 4B1 for a Sample FIR).

b. Elements of an FIR:

i. Introduction includes the following information:

The parties and the RO case number
The Charging Party
Date charge filed
Allegations set forth in the charge
Allegations as clarified during investigation
Date upon which events forming basis of charge occurred
Does FLRA OGC have the jurisdiction to act on this charge?
- Timeliness of charge
- Proper parties
- Proper forum

Related cases within RO, if any

ii. The facts:

Present a **succinct** factual summary that includes **only** those facts relevant to the applicable legal standards on both sides of the issue. Do not lift testimony from an affidavit, except on rare occasions where it is imperative to the analysis/conclusion.

iii. The parties' arguments:

Set forth the position of both parties. The Agent should not comment on the positions in this section of the FIR. Rather, incorporate the arguments and dispose of them in the analysis section.

iv. Statement of applicable law with supporting case citations:

Restate the issue. Cite boilerplate standards where it is clear that the standard remains good law. Cite illustrative cases expanding on the boilerplate law **on both sides** of the issue (pro and con) making sure to cite recent and factually similar cases, if applicable. Do not forecast the recommendation.

v. Legal analysis:

Perform a detailed analysis–apply the law to the facts and state the reasoning clearly. Address each allegation in the charge. Address all alternatives (case law compared to facts where opposite conclusion could be reached) for resolving each allegation, even those with which the Agent may disagree.

vi. Recommendation:

Set forth a recommendation as to each allegation in the charge (this is where the Agent tries to persuade the RD). Set forth any expected difficulties at trial (if meritorious)–e.g., establishment of facts; reluctant witness, conflicts of interest, contrary case law. State whether issue is novel. If recommending complaint, recommend an appropriate remedy and consider whether prosecutorial discretion is appropriate.

c. Abbreviated FIR:

Under the following circumstances, the RD has discretion to permit an abbreviated FIR:

i. the charge is untimely filed with no evidence of concealment or breach of duty owed;

ii. the dispute does not fall within the jurisdiction of the Statute;

iii. an earlier grievance was filed on the same matter **and** is barred under 7116(d);

iv. a key element of the alleged violation is missing (e.g., a formal discussion where there were no supervisors present, or an investigatory interview where union representation was not requested, or discrimination where the alleged basis was not activity protected under the Statute); or

v. witnesses offered by the Charging Party in support of the charge did not provide evidence or gave evidence that did not support the allegations.

An abbreviated FIR is brief but must contain the following: (1) the allegation; (2) the facts; (3) the law; (4) application of the law to the facts; and (5) a recommendation.

3. Agenda:

The goal of an Agenda conference is to supplement the FIR. Whether to hold an Agenda is within the RD's discretion. An Agenda may be to discuss interesting, novel, and/or complex cases. Attendance at the Agenda may vary according to the particular case and practices of the region. Staff present at an Agenda may be the RD, RA/DRD, other agents who have similar cases, trial attorney (if known) and new employees. Because all staff are encouraged to contribute to the discussion, unlike an FIR, an Agenda gives the added benefit of oral staff input before the RD makes a merit determination. New employees benefit by attending Agenda conferences because it can be used as an effective training tool.

C. RD MERIT DETERMINATION

1. Disposition After Consideration of Post Investigation Presentation

a. No merit:

If the RD determines that the charge does not have merit, both parties are notified in the dismissal letter.

b. Merit:

If the RD determines that the charge has merit, the case is submitted to the GC. The submission includes the FIR with an accompanying memorandum recommending the issuance of a complaint.

Upon GC authorization to issue complaint, the RD should use alternative dispute resolution methods to seek resolution of the matter prior to issuance of complaint. This may include issuance of a unilateral or bilateral settlement agreement.

2. Pre-Complaint Bilateral Settlement Agreements Where RD has Made a Merit Determination:

a. Regulatory authority:

Section 2423.12(a) provides for bilateral (or "all party" if there are multiple Charging Parties or Charged Parties) settlements, defining them as settlements agreed to by all parties, to be approved by the RD, and monitored by the RD to ensure compliance.

b. Notification upon approval:

i. Notification to the charged party:

When the RD approves a bilateral settlement agreement, the Charged Party is notified by letter along with a copy of the approved agreement and instructions to take immediately the action(s) detailed in the agreement. If the agreement provides for the posting of a notice, the notice is also sent to the Charged Party for signing, dating, duplicating and posting. (See Attachment 4C1 for a Sample Notice).

ii. Notification to the charging party:

The Charging Party is also sent copies of such notification.

3. Pre-complaint Unilateral Settlement Agreements:

a. Regulatory authority:

Section 2423.11(b) authorizes RDs, upon a belief that the policies of the Statute would be effectuated by a settlement between the parties, and when the Charging Party refuses to enter into an informal settlement, to enter into the agreement and decline to issue the complaint. The Charging Party has the right to appeal.

b. Notification upon approval:

Notification to the parties:

- When the RD approves this type of settlement (an informal unilateral settlement agreement), the parties are notified by letter along with a copy of the approved agreement and a notice, if applicable, and instructions that the performance of the terms of the agreement will be deferred until the Charging Party's opportunity for appeal has expired. (See Attachment 4C2 for a Notice of Approved Unilateral Settlement Agreement, with Appeal Rights. See also Attachment 4C3 for a Sample Order to Charged Party after Appeal Disposition (where appeal is denied)). Respondent is advised to begin compliance.

D. CONSULTATION, CLEARANCE AND ADVICE

1. Consultation:

RDs are encouraged to call the GC to discuss novel issues or questions relating to this Manual. The discussions allow for the mutual exchange of ideas that may serve as a precipitating factor in developing a national policy on a certain issue; and may provide a basis for clarifying or revising the ULPCHM.

2. Clearance:

The RD obtains authorization from the GC before taking any action based on the following:

- Proposed issuance of complaint. The content of the submission includes the RD's supporting memorandum; draft complaint; FIR; any notes or other memoranda, as necessary; suggested remedy
- Alleged noncompliance with an Authority decision;
- A challenge to the Authority's jurisdiction;
- Contemplated approval of an unsolicited withdrawal request after injunctive relief has been obtained; and
- Approval of a remedy different from that set forth in original FIR or authorized in an advice memo from OGC.

3. Advice:

a. When advice is requested:

An RD requests advice by memorandum concerning a novel issue in a case, as the circumstances require. An advice request may be incorporated in a request for clearance. Circumstances that are appropriate candidates for advice include:

i. Novel legal questions or factual situations;

ii. Issues involving OGC policy;

iii. Issues that may arise in different Regions with the same Unions (e.g., interpretation of a contract clause in a nationwide contract);

iv. An alleged violation of section 7116(b)(7) of the Statute;

v. A request for injunctive relief pursuant to section 7123(d) of the Statute where the RD has determined that issuance of a complaint is warranted;

vi. The enforcement of a subpoena issued by the ALJ; and

vii. Issues specifically referenced in GC memoranda, Guidances, Policies, other advice memoranda, strategies, and any other documents that state that certain issues are submitted for advice.

b. Contents of memorandum requesting advice:

A request for advice is processed by memorandum, and a copy is sent by e-mail to the OGC, which sets forth the following:

i. The allegation;

ii. The issue;

iii. The relevant facts;

iv. The applicable law on both sides;

v. A thorough analysis of the law as applied to the facts in the case;

vi. The pros and cons as to the possible outcomes of the case;

vii. The recommendation as to the disposition; and

viii. The proposed remedy, if applicable.

Note: Advice is rendered based on the facts presented by the RD in the memorandum requesting advice.

E. NOTIFICATION TO PARTIES OF A RD NON-MERIT DETERMINATION

1. Process for Notifying both Parties of the RD's Non-merit Determination:

- After an RD determines that an investigation is complete and issuance of a ULP complaint is not warranted, the Agent contacts both parties to inform them of the RD's decision that the charge does not warrant issuance of a complaint and that the RD intends to dismiss the charge. In doing so, the Agent communicates the same message to both parties in a neutral and professional manner. The Agent should never offer his/her own personal opinion about the case or expressly solicit, suggest or imply that the charge should be withdrawn;

- The Agent states that the RD found that the evidence was insufficient to support the allegations. The parties are informed that the charge will be dismissed within a reasonable amount of time (not to exceed 48 hours) unless a withdrawal request is submitted before the dismissal letter issues. Upon request by either party, the Agent will briefly explain the basis for the decision to dismiss; and

- Methods of Notification and Case File Documentation -

  - *E-mail Contact* -- If contact is by e-mail, the same e-mail should be sent to the parties simultaneously with a copy of the e-mail placed in the case file; or

  - *Telephone Contact* -- If the contact is by telephone, the parties should be called sequentially with appropriate documentation placed in the case log of the date and time of call. In the event that attempted contact with either of the parties proves unsuccessful, a brief voice mail message will be left.

Note: A Region does not delay issuance of the dismissal letter to afford the Charging Party an opportunity to withdraw the charge or seek a resolution from the Charged Party or for any other reason.

2. How the Charging Party Requests to Withdraw Charge or an Allegation:

The Charging Party may submit a withdrawal request in writing, by e-mail, fax, or telephonically. The RD then issues a letter or notice to both parties confirming that a charge has been withdrawn based on the Charging Party's request. Confirmation of the withdrawal of the charge may **not** be made by e-mail.

F. PROSECUTORIAL DISCRETION

1. The Goal of Exercising Prosecutorial Discretion:

The proper exercise of prosecutorial discretion is essential to the establishment of a sound Federal sector labor-management relations program. Concentrating on more important cases allows the OGC to prosecute vigorously the underlying violations in those cases. In this way, the effectiveness of the Statute is enhanced, and OGC resources are used more effectively.

2. Prosecutorial Discretion Criteria:

All the facts and circumstances present in a particular case are examined under the following criteria before an RD decides to invoke his/her prosecutorial discretion authority. The importance of the various factors varies depending upon the particular circumstances of each case. These factors are not all inclusive and other special circumstances may be considered. Even though one criterion may indicate that prosecutorial discretion should be invoked in a particular case, other criteria may outweigh that consideration and indicate that prosecution of the violation, in the totality of the circumstances, would effectuate the purposes and policies of the Statute.

a. Nature of the violation:

What is the seriousness of the violation?

Not all violations of the Statute are as serious as others. Similarly, there are degrees of seriousness within the same category of ULPs. Still other violations are more technical in nature. The magnitude/seriousness of the violation is taken into consideration when determining whether to exercise prosecutorial discretion.

b. Harm to the bargaining relationship:

What is the degree and nature of the harm to the Union/Agency as an institution?

The degree and nature of the harm to the Union/Agency as an institution can vary widely depending upon the particular circumstances. A violation of the Statute may interfere with the Union as an institution so that it cannot function effectively as an exclusive representative or interfere with an Agency to such a degree where the mission cannot be accomplished. Other violations may have no or little impact on the Union or the Agency as an institution. This factor is examined to determine if prosecution is warranted.

c. Harm to employees:

What is the degree of harm to employees resulting from the violation?

The magnitude of the harm to a particular employee or employees generally caused by a violation may also vary substantially depending upon the particular circumstances. The harm to employees caused by a violation is another factor examined prior to invoking prosecutorial discretion.

d. Pattern of conduct:

Has the same or similar conduct occurred in the past?

Repeated violations of the same or similar conduct normally are not viewed the same as isolated unlawful conduct. Distinctions also may be warranted based on the level of the individual charged with committing the violation. The past history of the Charged Party is another factor considered when determining whether litigation would further the purposes and policies of the Statute.

e. Cure:

Has the violation been cured by the Charged Party?

Litigation of a meritorious charge may not be warranted where the Charged Party rescinds the violative conduct and there either is no identifiable harm caused by the violation or the Charged Party has voluntarily mitigated any adverse impact caused by the violation. Whether a violation has been effectively cured is another factor examined prior to exercising prosecutorial discretion.

f. The remedy:

Is there an appropriate remedy for the violation?

Circumstances may be present which preclude an effective remedy. The lack of the need for an affirmative remedy is another factor that is considered in exercising prosecutorial discretion.

g. Changed circumstances:

Have circumstances changed since the violation occurred which would render litigation inappropriate or render the dispute moot?

The facts existing at the time a charge is filed can change by the time an investigation is completed or before a trial is held. The RDs examine whether such changed circumstances make the case a likely candidate for the exercise of prosecutorial discretion.

h. Precedent:

Does the case present a novel issue which could affect the interpretation and application of the Statute?

If a novel issue is present, the case may not be a candidate for prosecutorial discretion. If, however, the case law is well settled, the application of prosecutorial discretion might be appropriate, on balance, in conjunction with other factors.

G. SETTLEMENTS

1. The General Goal of All Settlements:

To resolve a meritorious charge and to effectuate the purposes and policies of the Statute to the satisfaction of the parties. *See* section 2423.12.

2. The Specific Goals of Settlements:

- Resolve the specific violation of the Statute to the satisfaction of the parties;
- Involve the parties in developing their own remedy, which encourages parties to invest in their own relationship and promotes the purposes and policies of the Statute;
- Provide flexibility for the parties, with OGC assistance, to craft solutions responsive to their particular interests in each case;
- Provide for formal settlements, to be approved by the Authority and enforced in court, when other avenues of settlement have been exhausted and a party continues to be a recidivistic violator of the Statute.

3. Types of Settlements:

There are 3 types of settlements: (1) Bilateral; (2) Unilateral; and (3) Formal that are described below.

a. Bilateral settlement agreement:

A bilateral settlement agreement is an agreement between the parties after the RD has made a determination that the charge has merit. RDs approve bilateral settlement agreements acceptable to the parties, absent unusual circumstances, that allow for a broad range of solutions and are in keeping with and effectuate the purposes and policies of the Statute.

b. Unilateral settlement agreement:

After the RD has made a merit determination, the RD may approve a unilateral settlement agreement that is agreed to by the Charged Party which appropriately remedies the violation in the charge. The Charging Party does not sign on as a party to the agreement and is provided a right to appeal the RD's approval of such.

RDs apply the following criteria prior to approving or disapproving a unilateral settlement agreement:

i. Does the agreement remedy the specific violations of the Statute?

ii. Does it effectuate the purposes and policies of the Statute?

iii. Does the agreement remedy the specific harm to the individual and/or the institution caused by the violation?

iv. Has the Charged Party committed the same or similar violation repeatedly?

v. Has the Charging Party raised valid objections to the settlement?

vi. What is the likelihood of success on the merits?

vii. Does the settlement adequately communicate to affected employees their rights under the Statute and communicate to affected employees the terms of the settlement?

viii. Is it cost effective considering time, resources and travel necessary to prepare for and participate in trial?

ix. Does a non-admissions clause undermine the effectiveness of the remedy under all the circumstances of the case?

Note: The importance of any of the above factors varies according to the particular circumstances of each case. The factors are not all inclusive and other special circumstances may be considered. Even though one factor may indicate that a unilateral settlement agreement should not be approved, other criteria may outweigh that consideration and indicate that the settlement, in the totality of the circumstances, effectuates the purposes and policies of the Statute.

c. *Formal settlement agreement*:

i. Approval is appropriate when:

The Charged Party has demonstrated its unwillingness to abide by the Statute. Such conduct could be demonstrated by repeatedly violating the Statute as to certain allegations (such as bypass, formal discussion, etc.), even though it has signed settlement agreements, posted notices.

Note: In cases involving nationwide bargaining units or consolidated bargaining units, the other Regions are kept informed of the status of proposed formal settlements.

(See Attachment 4G1 for a Sample Stipulation and Formal Settlement Agreement and Request for Approval of Formal Settlement Agreement). See *SSA, Baltimore, MD*, 57 FLRA 152 (2001) for an Authority decision approving the parties' stipulation and Formal Settlement Agreement.

ii. The parties may agree to something other than a formal settlement agreement:

Although a Region may have determined that a formal settlement is the appropriate course of action, the parties may want to agree to something other than a formal settlement agreement. Normally, an RD does not approve a bilateral settlement agreement at this stage of the proceeding. The RD may approve a Charging Party's withdrawal request, however, based on the parties' private agreement and after considering the above criteria.

4. Compliance with any Settlement Agreement:

Settlement agreements must state that the Region is responsible for monitoring compliance and that non-compliance will result in revocation of the settlement agreement and issuance of the complaint.

5. Enforcement of all Settlement Agreements:

A party who fails to comply with the terms of a **party settlement** may be found to have repudiated that agreement in violation of section 7116(a) (1) and (5) of the Statute when a charge is filed alleging this new violation. Where, however, a party is alleging a failure to comply with the terms of an **FLRA informal settlement agreement**, it is processed as an allegation of non-compliance under Part 5, Chapter C.

H. DISMISSAL LETTERS

1. Bases for Dismissal of a Charge:

An RD may dismiss a charge for, but not be limited to, any of the following reasons:

- Failure to comply with the filing requirements set forth in the Regulations;
- Charge being untimely filed under section 7118(a)(4)(B); or lack of jurisdiction pursuant to section 7103(a)(2), (3) or (4) of the Statute;
- Failure to allege a ULP under section 7116(a) or (b);
- Lack of sufficient evidence to support the allegation;
- Processing is prohibited by section 7116(d) of the Statute; and/or
- Prosecutorial discretion.

2. Criteria of a Quality Dismissal Letter:

A quality dismissal letter contains the following information and format:

a. Introduction:

"The unfair labor practice charge(s) in this (these) case(s) was (were) filed with the ____ Regional Office on (date). After investigation, consideration of the evidence, and application of the law to the facts, issuance of a complaint is not warranted."

Do not use pronouns, e.g., do not state "unfair labor practice charge that **you** filed," even if the allegations concern the Charging Party personally.

b. The allegations:

In a paragraph list the section(s) of the Statute that was (were) allegedly violated and link it (them) to the action that formed the basis for the allegation(s).

"The charge alleges [or the charge, as clarified during the investigation,] a violation of section 7116(a) (1) of the Statute when . . . ."

c. The facts:

The facts should be professional and succinct. Minimize inclusion of background facts. In a straightforward manner, include only those facts to allow the reader to understand the decision. Break up the presentation of the facts into more than one paragraph, if necessary. This is **not** a chronological recitation of each event that occurred. Do not just

lift the testimony from the affidavit. Provide only the substance of testimony; do not identify the person who provided it or quote extensively from it unless necessary. Arguments or Statements of Position may be attributed to a party, but not a person.

d. Jurisdiction:

Address the GC's jurisdiction over the charge by stating the following (or words to the same effect), if jurisdiction is not an issue: "This Agency has jurisdiction over the matters raised in this timely-filed charge. If jurisdiction is an issue, provide a full legal analysis on the point.

e. Statement of applicable law with supporting case citations:

Ensure that the legal support for the decision is current and up-to-date. Do not use stock, on-hand boilerplate unless it is still good law and no more recent decision modified, or overturned it. Try to find cases on point with similar fact patterns in addition to the lead case on point. Use proper Blue Book citation form. Use proper signals and parentheticals to explain the relevance of cited cases.

f. Legal analysis:

Include an analysis – not just conclusions (e.g., apply the law to the facts and state clearly the reasoning behind the dismissal). Address each allegation, as appropriate, contained in the charge. Only when there is probative and/or strong arguments in opposition to the grounds upon which the RD will dismiss a charge, may the RD consider dismissing the charge on an alternative basis, e.g., the facts do not support that a change occurred, but even if a change were found, the facts support a finding that the change is *de minimis*. As this is a legal document that is based on applying the law to the facts, do not include any **opinions** such as "in my view" or "I think," etc. Where there are multiple allegations, it is preferred that analysis for each allegation is presented before moving on to the next allegation.

g. RD's conclusion:

In a paragraph, clearly summarize or make a succinct statement of the decision. Do not make the reader hunt for it by re-reading the previous paragraphs.

h. Appeal rights:

See Attachment 4H1 for a Model Dismissal Letter which contains Language for the Appeal Rights of the Charging Party.

3. Partial Dismissals:

Occasionally, the RD dismisses certain allegations in the charge but finds merit and issues complaint (after obtaining the necessary clearance from OGC HQ) with respect to

other allegations of the charge. The parties are apprised of the region's decision in the dismissal letter. The letter delineates the RD's decision as to which allegations are being dismissed and which form the bases upon which a complaint is issued. The letter also states that no further action will be taken on the meritorious allegations until either the appeal period has expired or, if applicable, until after the GC rules on the appeal.

(See Attachment 4H2 for a Model Partial Dismissal Letter).

4. Dismissals Based on Prosecutorial Discretion:

As appropriate after applying certain criteria, an RD exercises discretion to dismiss meritorious ULPs when litigation does not effectuate the purposes and policies of the Statute. In this instance, the dismissal letter contains a discussion and application of the criteria to the facts of the case.

(See Attachment 4H3 for a Model Dismissal Letter based on Prosecutorial Discretion)

5. Revocation of Dismissal:

An RD exercises discretion in determining whether valid grounds exist to revoke a dismissal letter. The Agent ensures that the case file contains the revocation letter. Grounds that may be cause to revoke a dismissal letter are: (1) when a charging party establishes that there is new evidence that did not exist at the time of the investigation or that a charging party could not have reasonably known about during the investigation; and (2) an argument is raised on appeal that was presented during the investigation but was not considered.

(See Attachment 4H3 for a Sample Letter Notifying the Parties of a Revocation of a Dismissal Letter) (revocation of dismissal letter is not always based on what is stated in the Charging Party's appeal).

*Note: After a dismissal letter has issued, a Region does **not** do any further investigation before determining whether to revoke the dismissal. That decision is based upon the case file that existed at the time the charge was initially dismissed. Once the decision is made to revoke the dismissal and to reconsider the merits of the case, it is then appropriate to notify the parties concerning the specific issues about which any additional investigation will be conducted. If the Region requests the parties to submit evidence by mail or fax, provide a date certain for doing so.*

6. Service of Dismissal Letter and Revocation of Dismissal Letter:

Service is accomplished by regular mail; service by e-mail is **not** permitted.

PART 5

A. ETHICS

1. Two of the Core Concepts from the Principles of Ethical Conduct for Government Officers and Employees, E.O. 12674, as Amended by E.O. 12731:

- Employees shall not use public office for private gain; and
- Employees shall act impartially and not give preferential treatment to any private organization or individual.

In addition, employees must strive to avoid any action that would create the appearance that they are violating the law or ethical standards.

2. All Participants in an Investigation are Treated Fairly and Equitably:

- The Charged and Charging Parties are provided an opportunity to provide evidence and fully participate in the investigation;
- The taking of evidence is always as balanced as possible and includes not only material which tends to support the allegations in the charge but any available and relevant material which tends to refute the allegations as well;
- OGC employees provide notice to Charged Party Agency representatives prior to obtaining evidence from the Charged Party's supervisory and managerial officials; and
- During the investigation, OGC employees remain completely neutral and avoid any appearance of favoring a party.

3. Application of Selected Provisions of the Standards of Ethical Conduct During ULP Investigations:

a. Gifts from outside sources:

i. Generally, employees may not accept gifts that are given because of their official position or that come from sources that have pending cases with the OGC or are regulated by the FLRA.

ii. **Exception:** Items such as modest refreshments, plaques and other items of little intrinsic value, rewards and prizes open to the general public are considered an exception to the general rule and may be accepted without any limitations:

EXAMPLE

Employees may accept a gift of appreciation such as a plaque, pen set, or paperweight, tote bag or other item whose value is less than $20.00, which is provided to all speakers for a presentation or speech.

EXAMPLE

An Agent investigating a ULP is offered two tickets to the Buffalo Bisons, a popular Triple A league baseball team, by the local Union President, a season ticket holder, who filed the pending charge. Although the value of this gift is less than $20.00, it should **not** be accepted because acceptance creates an appearance of impropriety.

EXAMPLE

An Agent conducts an investigatory interview that continues beyond the scheduled duty hours. The witness offers to buy the Agent dinner. A gift of this nature should **not** be accepted because it creates an appearance of impropriety.

Note: ***Meals with a party:*** *During an investigation, an Agent does not meet a party for a non-working meal. Working meals should be avoided, but if deemed necessary, the Agent should hold the working meal off-site, if possible. When engaged in a working meal, make sure that it is clear to anyone observing that you are working.*

Note: ***Rides provided by a party:*** *Generally, Agents avoid accepting offers to ride with a party, but in special circumstances it is permissible.*

See also 5 C.F.R. Part 2635, Subpart B, and criminal statutes 18 U.S.C. § 201(c)(1) (prohibition against solicitation or receipt of illegal gratuities), 18 U.S.C. § 201(b)(2) (prohibition against solicitation or receipt of bribes), and related statutory authorities, 5 C.F.R. § 2635.902.

b. Misuse of position:

Employees must not use their public office for their own or another's private gain, or allow the improper use of nonpublic information to further their own private interest or the private interest of a friend, associate or relative.

c. Confidential sources/release of witness affidavits:

Confidential sources and witness affidavits are protected from disclosure consistent with OGC policies and the regulatory requirements set forth at § 2423.8(c) and 5 U.S.C. § 552(b)(7)(D). Agents ensure that information contained in case files is protected and secure at all times during the course of an investigation and is not disclosed except as required under the FOIA.

d. Subpoenas issued to OGC employees:

Section 2411.11--Compliance with subpoenas states that no OGC employee:

> shall produce or present any files, documents, reports, memoranda, or records of the Authority, the Panel or the General Counsel, or testify in behalf of any party to any cause pending in any arbitration or in any court or before the Authority or the Panel, or any other board, commission, or administrative agency of the United States, territory, or the District of Columbia with respect to any information, facts, or other matter to their knowledge in their official capacity or with respect to the contents of any files, documents, reports, memoranda, or records of the Authority, the Panel or the General Counsel, whether in answer to a subpoena, subpoena *duces tecum*, or otherwise without the written consent of the General Counsel.

B. APPEALS PROCESS

1. Notification of Appeal Rights:

a. At the end of the dismissal letter:

A Charging Party is apprised of its appeal rights at the end of every dismissal letter.

b. Explanation of appeals process as an enclosure with dismissal letter:

A document explaining the standards for appeal and how they may be established is issued as an attachment to every dismissal letter. (See Attachment 5B1 for a Copy of the Appeals Explanation Document). This document also answers several frequently-asked questions about the appeals process.

2. Where Appeals are Filed:

All appeals are filed with the GC and a copy is served on the Dismissing RD. If the appeal is timely filed, the OGC acknowledges receipt to both parties and the Dismissing RD, and requests the case file from the Region.

If the appeal is untimely, the case file is not requested and the GC issues an Order denying an appeal as untimely filed.

3. The Appeals Case File:

If an appeal is timely filed, an appeals case file, containing the following documents, is created:

- The appeal;
- The letter acknowledging receipt of the appeal;
- The dismissal letter;
- A blank Appeals Review form (See Attachment 5B2);
- An Appeals Case Log (See Attachment 5B3);
- Any requests and rulings on extensions of time;
- Any Dismissing Region comments on appeal; and
- An Oracle Data Entry Form.

4. Timeline for Processing Appeals:

The following are time targets to meet the strategic goal of processing all appeals cases within 60 days after an appeal is filed:

- From date of receipt in OGC HQ to request for case file from region – 2 workdays;
- Time to locate file, review and prepare regional comment on appeal – 2 workdays;
- Time to send the case file to OGC HQ via 2-day FedEx – 2 workdays;
- Upon receipt of case file in OGC HQ, time to assign case for review – 2 workdays;
- Time to send the case file to working region via 2-day FedEx – 2 workdays;
- Upon receipt of case file by working region, time to complete review – 14 workdays;
- Time to send case file and recommendation to OGC HQ via 2-day FedEx – 2 workdays; and
- Case file returned to original region – 5 workdays from date of issuance of decision.

Note: Appeals may be assigned to OGC HQ to review as the working region.

5. The Dismissing Region's Responsibilities:

a. Dismissing region's comments on appeal:

Generally, RDs should provide a comment, unless deemed unnecessary, i.e., all contentions on appeal were raised and considered before issuance of dismissal letter. Such comments contribute information which is not contained in the case file and which add to the Working Region's understanding of the Dismissing Region's rationale for its dismissal and the method and scope of the Dismissing Region's investigation.

b. The process for withdrawing the dismissal letter:

RDs may withdraw the dismissal letter upon review of the appeal if it is determined that further investigation or issuance of a complaint is warranted. Withdrawals of dismissals, however, should be accomplished as soon as the appeal has been filed, with immediate telephonic notification to the GC and entry of the action into the Oracle case tracking

database (Oracle). The Dismissing Region should issue a letter to all parties, with a copy to the GC, withdrawing the dismissal. Upon receipt of the Dismissing Region's letter rescinding the dismissal letter, OGC HQ will close the appeal and issue a letter notifying the parties of the closing of the appeal.

6. The Assignment of an Appeals Case for Review:

a. The assistant GC assigns an appeals case to a RO:

Each appeals case is assigned by the Assistant GC for Appeals to an RO or HQ for review. The assignment of appeals cases is a confidential, discretionary decision. The final decision on disposition of the appeals case is made by the GC. An appeals case is never assigned to the Region that investigated the ULP that is on appeal. The appeals file and the complete investigative file is transmitted to the Working Region for review.

b. The assignment of appeals review in the region:

The assignment of appeals cases in the region is up to the RD's exercise of discretion.

7. Conducting an Appeals Review:

*a. Review is **not de novo:***

An appeals review is not a *de novo* review of the case. A party may not submit new evidence on appeal. Rather, an appeals review is conducted to determine whether the law and the factual evidence contained in the RO case file support the RD's decision to dismiss the case. The reviewer does not substitute his/her judgment for the judgment of the Dismissing RD.

b. Consider each appeal standard in each case:

In every case, the Working Region considers all five grounds for granting an appeal (number 8, below) in its review.

c. The protocol for review of an appeals case is:

i. First, conduct a legal review of the issues presented to determine if the decision is supported by the law and whether the material facts upon which the decision is based are supported by the evidence obtained or supplied during the investigation which is contained in the case file;

ii. Second, after completion of the legal review, a quality review of the case file is conducted to determine whether the case processing was completed in accordance with OGC policies, e.g., Chapters on the Quality Standards

for Investigations and Scope of Investigations set forth at Part 3 of the ULPCHM;

iii. The Appeals Review Form (See Attachment 5B2), which contains questions to facilitate the legal and factual review, and the Appeals Case Log (See Attachment 5B3), are completed and approved by the Working Region RD in each case. All recommended appeals decisions are the recommendations of the Working RD. The recommended decision is transmitted to the HQ for review. All final decisions are the decisions of the GC;

iv. When necessary, a telephone Agenda is conducted to discuss the Working Region's recommended decision; and

v. To ensure the integrity of the process, no discussion takes place about an appeals case between the Dismissing and Working Regions. Confidentiality is maintained at all times.

8. Grounds for Granting an Appeal of an RD's Decision Set Forth at Section 2423.11(e):

An appeal may be granted if one of the following grounds for appeal is established:

a. The RD's decision did not consider material facts that would have resulted in issuance of a complaint:

b. The RD's decision is based on a finding of a material fact that is clearly erroneous:

c. The RD's decision is based on an incorrect statement or application of the applicable rule of law:

d. There is no Authority precedent on the legal issue in the case:

e. The manner in which the Region conducted the investigation has resulted in prejudicial error.

9. Disposition of the Appeal:

*a. When grounds **are** established:*

If grounds for the appeal are established, the case is remanded to the Dismissing Region for: (1) further investigation; (2) further analysis; or (3) issuance of a complaint and notice of hearing.

*b. When grounds **are not** established:*

If one of the standards for appeal is not established, the appeal is denied and the case is closed. All parties are notified of the appeal decision.

*c. When grounds **are** established as to one allegation but **not** another allegation:*

The appeal in a case involving multiple allegations may be sustained in part and denied in part, as warranted.

10. Draft Appeal Determination Order:

a. A recommended decision to deny the appeal:

i. Standard order:

A standard Order is used in those cases where it is determined that the grounds for granting an appeal have not been met. (See Attachment 5B4 for a Model Order Denying the Appeal).

ii. Modified order:

In selected cases, where it would be instructive to the Charging Party, the Order will be modified to add no more than a few sentences, if necessary, to address specifically an issue raised in the appeal that is not clearly or sufficiently addressed in the dismissal letter or to educate the Charging Party. (See Attachment 5B5 for a Sample Modified Order Denying the Appeal).

iii. Quality e-mail to RD:

Although the legal decision to dismiss may be correct and supported by the record, an e-mail may be sent to the RD in those cases where the appeals review has disclosed a substantive error or quality issue that was disclosed during the appeals review process.

b. A recommended decision to grant the appeal and remand to the RO for further investigation and analysis:

If one of the appeals standards has been established, the Working Region prepares an e-mail and/or provides analysis on the Appeals Review Form stating the basis for recommending a remand. (See Attachment 5B6 for a Sample Order Granting an Appeal). Upon receipt by the dismissing region of the case file, the RO should make the case high priority.

11. The Completion of an Appeals Review:

a. Forward case file to OGC:

Upon completion of an appeals review, the Working RD submits the appeal recommendation, case file and appeals case file to the OGC HQ via two-day mail. The Working Region does not prepare a draft of the Order. However, if the recommendation is a modified Order, an Order granting the appeal and remanding the case, or a quality e-mail, the recommendation is sent via e-mail and with a printed copy of the recommendation secured in the case file. No documents from the case file may be maintained by the Working RO.

b. Appeal determination:

The final appeal determination is made by GC. When necessary for a full understanding of the Working Region's recommendation and a full understanding of the issues presented in the case, further clarification may be obtained from the Working Region.

c. Advice memorandum:

If the grant or denial of the appeal raises any policy or novel issue, an Advice Memorandum may be appropriate for issuance OGC-wide.

d. Service of an appeal determination:

The parties are served with the appeal determination Order by certified mail, return receipt requested. Service by e-mail is **not** permitted.

12. Quality Standards for Appeals Case Processing:

a. The quality standards applicable to the working region are:

i. Process appeals in accordance with established schedule;

ii. Make timely and accurate Oracle case tracking entries;

iii. Properly complete the Appeals Case Log;

iv. Properly complete the Appeals Review form;

v. Recommend disposition of appeals in accordance with the Grounds for Granting an Appeal, Quality Standards, Scope of Investigation criteria, Authority precedent and any current OGC advice and guidance; and

vi. Maintain confidentiality in the assignment of appeals work to the Region.

b. The quality standards applicable to OGC are:

i. Process appeals in accordance with established schedule;

ii. Make timely and accurate Oracle case tracking entries;

iii. Properly complete the Appeals Case Log; and

iv. Rule on appeals in accordance with the Grounds for Granting an Appeal, Quality Standards, Scope of Investigation criteria, Authority precedent and any current OGC advice and guidance.

C. COMPLIANCE WITH AUTHORITY ULP ORDERS

1. Effectuating Compliance with Authority ULP Orders

The Regional Office responsibilities are:

- RDs are responsible for all routine actions to effect compliance with Authority remedial orders in ULP cases. The RD is responsible for monitoring compliance with an Authority Decision and Order, which include;
- Determining the steps necessary to effectuate compliance;
- Investigating alleged failures to comply;
- Making appropriate recommendations for further formal action, where the respondent allegedly fails to comply; and
- Participating, where appropriate, in the institution and maintenance of any formal action required.

2. Initial Contact with Respondent:

The Region's initial contact with the respondent regarding compliance is made following the RD's receipt of an Authority Decision and Order. Immediately upon receipt of the Decision and Order, the Region is responsible for issuing a letter instructing the respondent of the steps to be taken to achieve compliance and for transmitting a copy of the remedial notice to be posted. (See Attachment 5C1 for a Sample Notice). The Region is required to send only one completed notice form containing the language required by the Authority's Decision and Order. No blank forms are sent unless the respondent specifically requests, and the RD approves.

Note: The RD cannot change the Authority's Order in any way. If it is necessary due to a typographical error, a Motion for Reconsideration must be made to the Authority for any substantive changes. See, e.g., SSA Office of Hearings & Appeals, Boston Reg'l Office, Boston, Mass., 60 FLRA 105 (2004).

3. Suspension of Compliance Efforts:

Compliance efforts are **not** suspended while a Motion for Reconsideration of the Authority Decision and Order is pending, unless the Authority orders a stay.

4. Postings:

a. Posting locations:

The locations where a Notice is to be posted are usually specified in the Order. Absent such specification, however, the respondent is directed to post the Notice in all places where the affected employees and/or members are located.

b. Special notice procedures:

Based on the circumstances of the case, an Authority Order may require the respondent to mail copies of the Notice directly to its employees or members, or it may require the publication of the Notice in a newsletter. In such cases, the respondent must certify or submit proof that the requested action has been taken.

5. Investigation of Allegations of Noncompliance:

Where an allegation of noncompliance with an Authority Order is brought to the Region's attention, the basis of the allegation is ascertained and supporting evidence is obtained by an appropriate investigation.

6. Closing a Case or Referring a Case to the Authority:

a. No allegations of noncompliance:

The RD is also responsible for issuing the letter closing the case after compliance has been effected. A case is closed and a letter is issued within 10 days after the date on which compliance was to have been effectuated if there has been no allegation of noncompliance.

Copies of such Closing Letters are served on all of the parties and an entry in Oracle is made. (See Attachment 5C2 for a Sample Order Closing a Case). The Authority's Director of Case Intake and Publication do not need to be served.

*b. An allegation of noncompliance and an RD determination that compliance **has been** effected:*

After an investigation of an allegation of noncompliance has been completed, in those instances where the RD has determined that compliance in fact has been achieved, the RD issues a letter to the parties setting forth the allegation of noncompliance, the facts adduced by the investigation, the conclusion that the Authority Order, in fact, has been satisfied, and a statement that the case is, therefore, closed. No appeal rights are to be set forth in this letter. Copies of such closing letters do not have to be served on the Authority's Director of Case Intake and Publication.

*c. An allegation of noncompliance and an RD determination that compliance has **not** been effected:*

After an investigation of an allegation of noncompliance has been completed, in those instances where the RD has determined that there has **not** been compliance with an Authority Order, or that the issue of compliance involves an interpretation of the Authority Order, and the Region has not been able to achieve voluntary compliance, the matter should be referred to the GC through a report on compliance.

The RD Report on Compliance, summarizing the investigatory findings and conclusions, includes, but is not necessarily limited to, the following:

i The substance of the Authority's Order;

ii. The allegation of noncompliance and its initiator;

iii. The findings of the compliance investigation, noting factual disputes, if any;

iv. The existence of any dispute as to what affirmative actions are required under the Authority's Order to constitute compliance; and

v. The RD's conclusions and recommendations concerning the above matters.

The Region sends the compliance case file along with the Report on Compliance to the GC. The GC decides whether to refer the compliance matter to the Authority. If the GC refers the matter to the Authority for enforcement, the Region will receive the GC's referral memorandum to the Authority. The Region then notifies the parties in writing that the matter has been referred to the Authority for appropriate action. The GC's memorandum to the Authority is not served on the parties. If the GC does not refer the matter to the Authority, the RD is instructed to close the case on compliance.

7. Regional Action After the Referral of an Allegation of Noncompliance to the Authority:

a. Effectuation of alleged voluntary compliance after referral of enforcement recommendation:

After the referral of an enforcement recommendation, the RD, GC or the Authority may receive communications from the respondent alleging that compliance with the Authority's Order **has been effectuated** subsequent to the initial RD determination of

noncompliance which renders enforcement proceedings unnecessary. The following procedures apply when such **written** communications are received. The party contacting the RD, OGC or Authority is advised that no action will be taken until a **written** confirmation is received:

i. Receipt by the Authority:

The Authority communicates with the GC concerning compliance matters that are raised to the Authority in the first instance. In turn, OGC Headquarters communicates with the RD to conduct a follow-up compliance investigation.

ii. Receipt by the RD:

The RD notifies the GC promptly of such communication and commences a follow-up compliance investigation. The GC promptly notifies the Authority.

iii. Receipt by the GC:

The GC promptly notifies the Authority that the matter is being referred to the RD for further investigation. The GC will communicate with the RD as appropriate concerning the need for a follow-up investigation and report. Should the investigation reveal compliance, the RD will notify the GC who will in turn notify the Authority to stop enforcement proceedings.

b. A communication of a party's willingness to comply after referral of an enforcement recommendation:

After the GC has referred a recommendation for enforcement to the Authority, if a party communicates a willingness to take specific actions in an attempt to comply with the Authority's Order, and:

i. The receipt by the RD concludes that the offer, if effectuated, **would** constitute compliance:

If the RD concludes that the party's offer to take specific actions, if effectuated, would constitute compliance with the Authority's Order, the RD promptly notifies the GC. The GC then notifies the Authority that the RD has received such communication and will conduct a follow-up investigation to ascertain whether compliance has been effectuated.

ii. The RD concludes that the offer, even if effectuated, **would not** constitute full compliance:

The RD promptly notifies the OGC in writing of the offer and the reasons for the Region's finding that such actions do not constitute compliance and then the GC notifies the Authority.

8. Enforcement Proceedings:

a. Petition for review of an Authority Order:

Compliance efforts continue even though a Cross Petition for Review of an Authority Order has been filed with a U.S. Court of Appeals, unless a stay has been ordered by the court. Should compliance be achieved prior to a court decree, the procedure set forth in number 7, above, is followed.

b. Compliance actions after enforcement decree:

Where a court decree fully or partially enforces an Authority Order, the Region continues compliance efforts with respect to the portion of the Order that has been enforced. Even if the respondent seeks rehearing by the court or a **writ of certiorari**, compliance efforts should continue, unless a stay has been ordered by the court or Supreme Court. Where a court decree fails to enforce an Order in whole or in part, the RD will be notified by the GC of any required further action.

c. Contempt proceedings:

Upon respondent's failure or unwillingness to comply with a court decree enforcing an Authority Order, the RD submits an internal report of investigation on noncompliance with a court decree to the GC, which sets forth the efforts undertaken to achieve compliance and which includes a recommendation with respect to the institution of contempt proceedings.

9. Respondent Files a Petition for Review or States an Intent Not to Comply:

a. The noncomplying party files a petition for review with the appropriate court of appeals (no enforcement action is pending):

i. When a noncomplying party, who the Authority has ordered to take certain affirmative action or to cease and desist from engaging in certain conduct, files a petition for review of the Authority's Order, an RD takes no action with respect to the case once a party has filed such a petition.

ii. RDs take the following actions when they are informed that a petition for review has been filed by a party:

iii. Telephonically advise the GC that such petition has been filed;

iv. Follow up in writing or e-mail which will be forwarded to the Authority; and

v. Note the case on the Region's Monthly Report.

The RD does not need to submit a report on compliance or compliance case file to the GC. The GC will forward to the Region a copy of the Authority's cross-application for enforcement when filed by the Authority.

b. The party informs the RD that it will not comply but has not filed a petition for review within the 60-day time period under section 7123(a) of the Statute:

Where a party that is ordered to take a certain affirmative action or to cease and desist from engaging in certain conduct informs the RD that it does not intend to comply with an Authority Order and intends to seek review of the Authority Order **but has not yet filed a petition** with the court, the Region advises the GC and follows up in writing. No report on compliance or the compliance case file need be submitted to the GC. If the Authority files an application for enforcement, a copy is sent to the Region. Should the party file a petition for review within the 60-day period prior to the Authority's filing of an application for enforcement, the GC sends the Region a copy of the Authority's cross-application for enforcement.

D. COMPLIANCE WITH INFORMAL SETTLEMENT AGREEMENTS (See OGC Settlement Policy, issued October 2, 2006)

a. RDs responsibilities are:

RDs are responsible for all routine actions to effect compliance with bilateral and unilateral settlement agreements (See Part 4G, Settlements). The RD is responsible for determining the steps to be taken by the Charged Party to comply, which include:

i. Analyzing the steps necessary to effectuate compliance;

ii. Investigating alleged failures to comply;

iii. Making appropriate recommendations for further formal action, where the respondent allegedly fails to comply; and

iv. Participating, where appropriate, in the institution and maintenance of any formal action required.

b. RD's routine course of action:

i. Send letter to Respondent opening compliance, enclosing a Notice for posting (if required by the settlement), explaining who must sign the Notice, where it is to be posted and describing any other affirmative action required by the agreement.

The letter further states that Respondent must, within 5 days of receipt, send a statement to the RD of when the Notice was posted and describing what steps have been taken to comply with any required affirmative action. After 60 days, Respondent must again advise the RD whether compliance was completed and, if certain aspects remain undone, what will be done to complete compliance.

Note: The 5 and 60 day requirements are found in the settlement agreement language.

ii. Where there have been no allegations of non-compliance, at or about the 45th day, a letter to the Charging Party is sent advising that any allegations of non-compliance must be submitted in the form of affidavits or documentary evidence by a date certain or it is the RD's intention to close the case on compliance.

iii. At the 60-day point, if Respondent has not submitted the 60-day statement of compliance required by the opening letter and the settlement agreement, the RD sends a letter to Respondent requesting immediate submission of evidence of compliance so that the matter may be closed.

iv. If Respondent submits a statement of compliance and the Charging Party has not filed allegations of non-compliance with supporting evidence, the RD issues a letter closing the case on compliance.

c. *Allegation of noncompliance with informal settlement agreement:*

i. Upon an allegation of noncompliance the RO conducts a compliance investigation.

ii. If the RD determines that there has been compliance, s/he closes the case (or the prior closing of the case on compliance is affirmed). The RD issues a decision letter to the parties advising of the determination on compliance and that the case is being closed. The RD's determination of compliance or noncompliance with the previously-approved settlement agreement is not subject to appeal.

iii. If the RD verifies noncompliance, the RO attempts to accomplish compliance with the Respondent's representative and may extend the period of compliance and Notice posting, as necessary (e.g., a notice was covered by other papers for 2 weeks so the posting period is extended by 2 weeks). If attempts at compliance prove unsuccessful, the RD submits a request to the GC to revoke its approval of the settlement agreement and to issue (or reissue) the complaint. If approved by the GC, the revocation of the informal settlement agreement is set forth in the complaint. The Region is prepared to establish, by a preponderance of the evidence at the hearing that the settlement agreement was not complied with in addition to the underlying ULP which gave rise to the settlement agreement.

d. *Processing ULP charges alleging noncompliance with an informal settlement agreement:*

i. Scope of investigation of ULP charge:

The investigation of a ULP charge alleging noncompliance with an informal settlement agreement approved by an RD is limited to the issue of whether the charge, in fact, alleges noncompliance or if the charge alleges a new, independent ULP. The failure to comply with an informal settlement agreement is not a ULP. *See AFGE, Local 987*, 53 FLRA 364, 369 (1997).

ii. Dismissal of the charge:

Upon finding that the charge, in fact, alleges solely noncompliance, the Region dismisses the charge on the basis that "it fails to state an unfair labor practice." so that the Region can investigate the noncompliance

allegation and issue or reissue the complaint. The Charging Party is informed of its right to appeal the dismissal to the OGC. The sole issue on appeal is whether the charge alleges a new ULP or noncompliance. The merits of any noncompliance issue will **not** be reviewed on appeal.

iii. An investigation of alleged noncompliance:

Upon denial of an appeal or if the Charging Party does not appeal the dismissal, the RO conducts the compliance investigation.

- *Allegation of noncompliance not substantiated:*

  Follow Part C II, Number 3, Bullet 2, herein.

- *Allegation of noncompliance substantiated:*

  Follow Part C II, Number 3, Bullet 3, herein.

E. PROCESSING ALLEGED NONCOMPLIANCE WITH AUTHORITY DECISIONS AND ORDERS ON NEGOTIABILITY ISSUES

1. Regional Director's Authority:

Requirement that noncompliance allegations be investigated:

- Allegations of noncompliance with Authority Decisions and Orders on Negotiability Issues are investigated in the same manner as are investigations of allegations of noncompliance with Authority Decisions and Orders in ULP cases. (See Part 5C, herein).

Report the results of investigation to the OGC and Authority:

- After the investigation is completed, the RD transmits an internal report of the investigation on the allegations of noncompliance, including recommendations to the GC, which refers the matter to the Authority; and

- Unlike ULP cases, RDs have **no** authority to close negotiability cases on compliance even if the investigation reveals that compliance has been effected.

Report any change with respect to voluntary compliance after submission of report:

- The RD reports to the GC any change with respect to voluntary compliance after submission of the report on investigation of noncompliance.

Process the charge the same way as allegations of noncompliance in ULP cases:

- If an allegation of noncompliance is raised in a ULP charge, the charge is processed in the same manner as charges which raise allegations of noncompliance with Authority Decisions and Orders and previously approved settlement agreements in ULP cases.

The investigation:

- The investigation is limited to the issue whether the charge alleges only noncompliance with the negotiability Order or if the charge also alleges independent conduct constituting a ULP. If the former, the Region dismisses the charge, and then investigates the ULP. The dismissal is not subject to the appeal procedures and is transmitted to the Authority through the GC, as discussed above. If the charge also alleges independent conduct constituting a ULP, the RO investigates the ULP.

F. BACKPAY

Government-wide Regulations Set Forth at 5 C.F.R. §§ 550.801-.808 (2007) Govern Backpay Matters

1. Backpay Period:

- The investigation is limited to the issue whether the charge alleges only Unless otherwise specifically set forth in the Authority Order, the backpay period is usually computed from the date of the ULP which gave rise to the backpay remedy to the date the respondent rescinds the action which gave rise to the ULP finding. 5 C.F.R. § 550.805(a)(2)

- For example, in discharge cases, the backpay period runs from the date the employee was discharged to when the respondent makes a proper and bona fide offer of reinstatement. In a unilateral change case, the backpay period runs from the date of the change to the date the respondent ceases to implement the change in conditions of employment and returns to the preexisting practice.

2. Interest on Backpay:

- Pursuant to 5 U.S.C. § 5596, "interest must be paid" on backpay awards. *See, e.g., U.S. Dep't of the Navy, Naval Training Ctr., Orlando, Fla. and Int'l Union of Operating Eng'rs, Local* 673, 53 FLRA 103, 109 (1997) (citation omitted); *U. S. Dep't of Defense, Dep't of Defense Dependents Schools and Fed. Educ. Ass'n*, 54 FLRA 773 (1998). Interest is computed at the rate or rates in effect under section 6621(a)(1) of title 26 of the United States Code. 5 C.F.R . § 550.806(d) (2007); *see also U.S. Dep't of the Interior, Bureau of Indian Affairs, Wapato Irrigation Project and NFFE*, Local 341, 55 FLRA 157 (1999) (quoting 5 U.S.C. § 5596(b)(2)(B)(ii)). Interest begins to accrue on the date on which the employee would have received the pay, allowances, and differentials if the unfair labor practice had not occurred. 5 C.F.R. § 550.806(a)(1) (2007).

3. Preparation of Backpay Computation:

- In computing backpay, the Region obtains, examines, and analyzes data relevant to the amount of pay, allowances, and differentials the employee would have earned had the ULP not occurred. Such pay includes all premium pay the employee would have earned and any changes in pay and allowances such as a periodic step increase or shift differential. In addition to changes made by wage surveys, laws, or other changes of general application which would have affected the employee's pay, the Region also considers allowances and differentials had the ULP not occurred.

Note: It may be necessary to examine records of other employees similarly situated and the records of the employee or employees who actually performed work during the pendency of the ULP in order to reconstruct what the employee's pay history would have been absent the ULP, e.g., overtime patterns, shift changes, work details, etc. Much of this data should have been obtained during the investigation of the underlying ULP charge.

4. Backpay Computation:

a. In general:

i. Time that is **included** in backpay computations:

When an Authority Order requires the payment of backpay, the employee/s affected are deemed to have performed service for the respondent during the period covered by the ULP. For the period covered by the ULP, the backpay computation computes the pay, allowances, and differentials the employee/s would have received if the unjustified or unwarranted personnel action (ULP) had not occurred. 5 C.F.R. § 550.805(a)(2) (2007). No employee is granted more pay, allowances, and differentials than what the employee would have been entitled to receive if the ULP had not occurred. 5 C.F.R. § 550.805(b) (2007).

ii. Some time periods are **excluded** in backpay computations:

In computing backpay, any period during which an employee was not ready, willing and able to perform the employee's duties because of an incapacitating illness or injury or any period during which the employee was unavailable for the performance of duties for reasons other than those related to, or caused by, the ULP, is **not** included in the period to be calculated. 5 C.F.R. § 550.805(c)(1) (2007).

Exception: The respondent must grant, upon request of an employee entitled to backpay, any sick or annual leave available to the employee for such period of incapacitation if the employee can establish that the period of incapacitation was a result of illness or injury. 5 C.F.R. § 550.805(d) (2007).

b. Leave:

An employee who is restored to duty after a separation is re-credited with sick and annual leave that the employee would have accrued during the period of separation without forfeiture of leave in excess of the employee's annual leave ceiling. Any leave in excess of the maximum leave accumulation authorized by law is credited to a separate leave account for use by the employee in accordance with appropriate OPM regulations and guidance. 5 C.F.R. § 550.805(g) (2007).

c. Set-off of outside earnings from backpay:

Any amounts earned by an employee from other employment during the period covered by the backpay award are deducted from the backpay award. Only employment which the employee undertook to take the place of employment from which s/he had been separated by the ULP is deemed to be such other employment. 5 C.F.R. § 550.805(e)(1) (2007). In other words, do not count earnings from additional "moonlight" work that the employee may have engaged in before the separation from Federal employment. *Id.*

Earnings from such other employment during the period of the improper action may **not** be set-off against Federal backpay on a pay period basis. Rather, **total** private sector earnings toward the entire backpay period must be set-off against **total** Federal backpay. Where income was generated from part-time teaching, lecturing and writing activities prior to the ULP, only the added increment from such activities during the period covered by the backpay remedy is deducted from backpay. The determination as to the amount of the added increment may be based upon a comparison of the amount of such work prior to and after separation.

d. Set-off of erroneous payments received from the Government:

Any erroneous payments received from the Government as a result of the ULP are deducted from the backpay award. The lump-sum leave payment that an erroneously-separated employee received upon removal is set off against the backpay award, and the leave which that payment represents, shall be re-credited to that employee's leave account. There is no authority to permit an employee to elect an option of retaining the lump-sum payment and canceling the annual leave. 5 C.F.R. § 550.805(e)(2) (2007)

e. Set-off of severance pay:

Severance pay, paid to an employee who is covered by a backpay remedy at the time of the employee's removal, is a proper item for deduction from backpay awarded upon restoration to duty. Severance pay is conditioned upon actual separation from the service. Since a restored employee is considered, for all purposes, to have performed duty during the period of separation, the employee may not simultaneously receive severance pay and backpay. 5 C.F.R. § 550.805(e)(2)(iii) (2007).

f. Unemployment compensation:

Where an employee receives unemployment compensation during the period of separation, such unemployment compensation is **not** a proper item for deduction from backpay upon reinstatement **unless**: (1) the applicable state law requires the employer, and not the employee, to reimburse the state for overpayments; (2) the appropriate state Agency has determined that an overpayment has occurred; and (3) the appropriate state Agency has so notified the employing Agency. 71 Comp. Gen. 114, 117 n.1 (1991) (citing 65 Comp. Gen. 865 (1986)).

g. Where outside interim earnings exceed the backpay award:

An employee whose interim earnings exceed the backpay calculation may retain the interim earnings but is not entitled to any backpay. 5 C.F.R. § 550.805(b) (2007).

5. Formal Backpay Proceedings:

After the expiration of the time limit to appeal an Authority Order which directs payment of backpay, or after the entry of a court decree enforcing such an Order, if it appears to the RD that a controversy exists between the respondent and the Authority that cannot be resolved without a formal proceeding, the RD requests that the GC approve the issuance of a Notice of Hearing setting forth the issues to be resolved. Thereafter, the ULP hearing procedures are followed with an ALJ ultimately determining the amount of backpay. *See* section 2423.42.

ATTACHMENTS

ATTACHMENT 1A1

Date_____

___-TA-___-_____

OFFICE OF THE GENERAL COUNSEL
TECHNICAL ASSISTANCE WORKLOAD FORM
(5 C.F.R. § 2323.1(a))

CUSTOMER INFO	Party Name (if provided): _____ Type of Contact: ☐ telephonic ☐ walk-in ☐ letter Customer Type: ☐ unit employee ☐ union representative ☐ supervisor/manager ☐ agency representative ☐ other _____
INQUIRY	Total Time spent: ☐ 15 minutes ☐ 1/2 hour ☐ 1 hour ☼ ☐ 2 hours ☐ 1/2 day
	Rights: ☐ FSLMRS (the Statute) ☐ other appeal rights (e.g., EEO, MSPB, OSC, DOL, NLRB)
	Subject Matter: ☐ ULP ☐ REP ☐ ADR Services ☐ NEG ☐ FSIP ☐ ARB ☐ other_____
ACTION	☐ further discussion ☐ letter/fax ☐ e-mail
	MATERIALS SENT: ☐ the Statute ☐ regs ☐ guidance ☐ CA form ☐ CO form ☐ petition ☐ decision(s) ☐ training material ☐ OGC Manuals (portion of) ☐ web site referral ☐ other_____
	REFERRAL TO: ☐ Authority/Docketing ☐ Authority/CADR ☐ OGC ADR Services ☐ EEOC ☐ MSPB ☐ OSC ☐ DOL ☐ NLRB ☐ other_____
SUBMITTED BY	Name_____

ATTACHMENT 2B1

SAMPLE LETTER RETURNING DEFICIENT CHARGE TO CHARGING PARTY

(DATE)

(Charging Party)
(address)

Dear Mr./Ms. (Name)

I am returning the unfair labor practice charge (enclosed) that was sent to this Office. As set forth at 5 C.F.R. § 2423.11, a Charging Party is required to fully complete the form before a Regional Office dockets the charge. In this case, I have determined that the charge is deficient because (insert case specific deficiency, e.g., the Charged Party has not been identified; the charge has not been signed in the appropriate box). Specifically, (insert appropriate action to cure deficiency, e.g., a Charged Party must be clearly identified in the appropriate space of the Charge Form (Form 22 enclosed); the charge form must be signed at the bottom of Form 22 in box #8) and send the charge to this Regional Office where it will be docketed and filed. In completing these actions please be reminded of the time requirements for filing a ULP charge--absent certain exceptions--a charge must be filed within six months of the event which is alleged to be a ULP. Section 7118(a)(4) of the Federal Service Labor-Management Relations Statute contains this time limitation.

If there are any questions concerning this letter, feel free to call this office at the above telephone number.

Very truly yours,

Regional Director (Region)

enclosures

ATTACHMENT 2B2

MODEL OPENING NOTICE

addresses

NOTIFICATION OF FILING OF UNFAIR LABOR PRACTICE CHARGE

Charged Party and Charging Party
Agency, Local facility (if needed)
City, State
Case No. XX-CX-XXXXX

Dear (Charging and Charged Party Representative):

Enclosed is a copy of the unfair labor practice charge, which has been filed with this Office and assigned the case number shown above. The OGC has a neutral fact-finding role in the investigation of ULP charges. To complete the investigation expeditiously, and to make a determination as to the merits of the charge, all parties are required to cooperate fully during the ensuing investigation of the charge. *See* C.F.R. § 2423.8(b). The Agent who has been assigned to investigate the charge will contact the parties shortly.

The Party Who Filed the Charge (Charging Party)

If you have not done so already, please promptly submit the following so that it is **received** by the Agent at the address listed below by **(insert date)**:

1. A list of witnesses – names, positions, day and evening telephone numbers, e-mail addresses, and a summary of their expected testimony about their personal knowledge of the charge

2. Copies of all relevant documents, with an Index if submission is voluminous.

This evidence/information is required under 5 C.F.R. § 2423.4(e). If the evidence/information requested was not submitted when the charge was filed and is not sent to the Regional Office pursuant to this letter so that it is **received by (insert date)**, the charge may be dismissed for lack of evidence. The Charging Party is responsible for confirming that all supporting evidence/information has been received by the date noted above.

The Party Against Whom the Charge is Filed (Charged Party)

Please review the allegations in the charge and submit a written position and/or other evidence/information such as a list of witnesses to this Office, which could assist us in the investigation of this charge.

Any questions may be directed to the Agent or Regional Point of Contact indicated below.

Sincerely,

Regional Director, (Region)

Assigned Agent or Regional Point of Contact: (Name, phone number, e-mail address)

Enclosures:

Description of Unfair Labor Practice Investigation Procedure
Notice of Designation of Representative

DESCRIPTION OF THE UNFAIR LABOR PRACTICE INVESTIGATION PROCEDURE

What happens after a charge is received by a Regional Office?

After a charge is received, it is docketed and given a case number. A Notice of Filing of Unfair Labor Practice is then sent to both parties with a copy of the charge, and a notice of designation of representative form. Both parties are informed of their obligations to cooperate fully in the investigation and are encouraged to resolve informally the dispute that gave rise to the charge.

Can the charge be transferred to a different Regional Office?

Yes. Occasionally, when necessary to avoid unnecessary costs or delay and to effectuate the purposes of the Statute, a charge may be transferred to a different Regional Office. The charge is processed in the same manner regardless of the Region processing the charge.

When will I first speak with the Agent?

Soon after the charge is filed, the assigned Agent contacts both parties and: (1) clarifies the allegation(s) in the charge, as necessary; (2) describes each party's obligation to cooperate in the investigation; (3) reviews each party's testimonial and documentary evidence; and (4) clarifies and determines whether official time is needed for any employees.

Will the Agent assist the parties in resolving the dispute that gave rise to the charge?

No. The General Counsel encourages the informal resolution by the parties of unfair labor practice allegations subsequent to the filing of a charge and prior to the issuance of a complaint by a Regional Director.

How will the charge be investigated?

The Regions use a variety of investigative techniques to obtain the best possible, relevant evidence. The investigation may involve: (1) an on-site visit and the taking of signed and affirmed affidavits and the gathering of documents; (2) the taking of affidavits over the telephone; (3) parties filling out signed and affirmed questionnaires; and (4) letters confirming information discussed telephonically. The RD relies upon this evidence in deciding whether or not the ULP charge has merit. Agencies are always notified before an Agent visits the workplace.

When are employees entitled to official time?

Employees deemed necessary by the Region to give evidence during the investigation are granted official time under section 7131(c) of the Statute. Employees requested to complete a questionnaire and to review a telephone affidavit also are entitled to reasonable official time. The Agent obtains clearance for use of such time with the agency. Official time to gather information during the course of the investigation depends upon the parties' contract and past practices and does not involve Regional Office authorization.

How do the parties cooperate with the Region during an investigation?

Cooperation includes, as determined 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; and (3) providing statements of position in the matters under investigation.

What happens if a party does not cooperate in the investigation?

A Charging Party's failure to cooperate could result in a dismissal of the charge for insufficient evidence. A Charged Party's failure to cooperate, as requested, could result in the issuance and enforcement of an investigative subpoena.

When is an investigation completed?

An investigation is completed when each party has been given a reasonable opportunity to provide relevant evidence and there are sufficient facts for the Regional Director to render a decision on the merits of the charge.

What happens if the Regional Director determines that the charge does not have merit?

If the Regional Director determines that the charge does not have merit and therefore should be dismissed, both parties are notified. The parties are also informed that the charge will be dismissed within a reasonable amount of time unless a withdrawal request is submitted before the dismissal letter issues.

Can that dismissal decision be appealed?

Yes. A dismissal is appealable to the Office of the General Counsel in Washington, D.C. The General Counsel may dismiss the appeal and close the case or remand the case for further investigation or issuance of a complaint. The General Counsel's decision to deny an appeal and close a case is not subject to review.

What happens if the Regional Director determines that the charge has merit?

If the Regional Director determines that the evidence supports issuance of a complaint, the Region, as the public prosecutor, attempts to settle the charge prior to issuance of a complaint and notice of hearing which schedules the matter for trial before a FLRA Administrative Law Judge. The complaint sets forth the allegations to be prosecuted and is served on all parties to the charge. Settlement efforts may continue after the issuance of complaint up until the trial begins.

ATTACHMENT 2D1

SAMPLE E-MAIL NOTICE TO ALL REGIONS OF CHARGE THAT MAY HAVE NATIONWIDE IMPLICATIONS

To: All RDs

From: RD

Subject: Agency, Case No. , docketed (date)

Date:

The Charging Party is alleging that the Charged Party violated the Statute when its internal audit people conducted interviews with bargaining unit employees in the State of New Jersey without affording the Charging Party an opportunity to be represented and/or without honoring the request of the employees for union representation. These meetings were held in connection with recent criticism lodged against the Charged Party to determine if employees were being pressured to engage in inappropriate behavior or had knowledge of such behavior. Follow-up interviews were held with these employees for the purpose of comparing their answers at each interview. We have completed our investigation and are likely to issue complaint alleging formal discussion and Weingarten violations. The Charged Party's position is that its audit employees were only taking a survey of opinions within the bounds of the law.

The Charged Party's conduct may not be limited to the State of New Jersey. If any similar cases arise in your regions, we need to coordinate our litigation efforts. Please notify me by e-mail (copy to the Deputy General Counsel) whether or not you have any pending related cases. By FAX, I am sending you the charge in this case.

ATTACHMENT 2J1

SAMPLE LETTER DEFERRING ULP CHARGE DURING PENDENCY OF REPRESENTATION PETITION

(Date)

Charging Party Rep.
(Name and Address)

Charged Party Rep.
(Name and Address)

Re: Case Name and Case Number

Dear Mr./Ms. (Name) & Mr./Ms. (Name):

This Office docketed the captioned unfair labor practice (ULP) charge on (date). Also pending at this time is a representation petition, (case name and case number) which has an issue that is related to the issue underlying the ULP charge. Because the processing of the representation case will resolve a significant issue that will impact on the processing of the ULP charge, it best effectuates the purposes and policies of the Federal Service Labor-Management Relations Statute to defer processing the ULP charge until the representation proceedings are completed. In this way, both matters will not be processed simultaneously thus avoiding a duplication of efforts.

Upon completion of the processing of the related representation case, the Regional Office will (continue to) process the ULP charge.

Sincerely,

Regional Director, (Region)

ATTACHMENT 3A1

PRACTICAL POINTERS TO PROCESS PROMPTLY

A ULP CHARGE

OFFICE ORGANIZATION

&

CASE PROCESSING TIPS

GENERAL OFFICE ORGANIZATION TIPS

A. Organization of the day/week in Office

1. Keep a daily list--" To Do," "To Call," "To Write"

2. The first thing in the morning, read decisions for one hour or work on a thorny research issue or write a difficult dismissal letter.

3. Keep some kind of calendar on the desk or wall--it is good to be able to take it along in briefcase.

4. Keep a one page list of all current cases, date of filing and status.

5. Make use of sticky notes attached to files as reminder of status/next step in investigation.

6. Maintain current phone numbers and fax numbers of parties in a take-along phone book.

7. Make sure your voice mail message is current.

B. Computer and Word Processing Tools

1. Macros:

   - Legal analysis & case cites by issue
   - Affidavits
   - Other forms: fax sheets, service sheets, memo, MOA's
   - Address macros — use the last name for the command
   - Forms: letters, complaints, fax, affidavit, affidavit fax, withdraw form, file memo form, dismissals, etc.

2. Computer file/folder organization

3. E-mail to parties

4. Quick correct — great for such things as "FLRA", "7116 (a) (1) (2)", etc.

5. "Sidekick" entries (calendar) and file case cover entries:

   - "Events" section of the calendar — keep an entry for each case, with a short note of what you are waiting for or intend to do next. As the case progresses keep moving and changing the entry for each case. At the

same time, on the cover of the actual file jot the Sidekick entry date so that you will be able to find it if a party surprises you and sends you what you want earlier than you have anticipated.

- "To Do" section of the calendar — here you store cases that are on long-term hold (deferred for example), and completed cases that are in the hands of the Regional Director for decision (this list simply rolls over each day until you click it off).

- Contacts — Keep a card for each contact. You can add the person's phone number to the "title" of his/her card, which allows you to see the phone number on the index list of cards without having to open up the specific card.

6. Folders — See example that follows

7. File names — Place all communications and documents for each case in an "investigation" folder (h:\agent name\investigations) using the case number followed by a description — when it comes time to write up a report all documents for the same case are together (See example below).

COMPUTER FOLDER/FILE ORGANIZATION

c:\My files

AFFIDAVIT
- ABCD\
  - Davis.222
  - Toms.222
  - Squirt.222
- DGA\
  - Hode.222
  - Jones.222
  - Tips.222
- CAA\
  - Fore.222
  - Libra.222
  - Walls.222
- Forms\
  - Opening.page
  - Lined.page
  - Closing.page
- Union\
  - Brown.222
  - Jones.222
  - Smith.222

POLICY
- Admin\
- Advice\
- Appeals\
- OGC\

PROCESS
- Dismiss\
- FIR\
- Forms\
- Macros\
- Organize\
- Settle\

REPRESENTATION
- ABCD\
- CERTS\
- DGA\
- Election\
- Forms\
- HOG\

Witnesss\
Brown.222
Jones.222
Smith.222

VAMC\
Brown.222
Jones.222
Smith.222

MEMO
MOU\
Forms\
Confirming.ltr
FAX
Info.ltr
Inquiry.ltr
Itinerary
Memo.wd
Affidavit.ltr
Misc\
Service.reps

VaSpring\

TRAINING
IBB.ng\
Main.agenda\
Main.ibb\
Main.partner\
Main.statute\
Misc\
Pdi\

CASE PROCESSING TIPS

A. Contacts with the parties

1. To encourage parties to be cooperative and responsive, the Agent needs to build trust, confidence and respect. The Agent must present an image of a neutral, professional, prosecutor. Remember--trust is built up over time, but it may be lost in an instant.

2. Learn the theories and facts of the case as best as possible before communicating with the parties.

3. Call early from the date of assignment. From the beginning, set specific reasonable response dates for documents or answers to questions and confirm these time deadlines in writing.

4. Use fax and e-mail. Encourage the parties to use e-mail because it allows you to put the evidence and positions into your computer investigation files.

5. Follow through on what you tell the parties you are going to do (call them or send them something).

6. Return phone calls. Check for messages when you are out of the office and try to return the calls. As stated above, make sure that your voice-mail message is current at all times.

7. If you do not know, or are unsure of an answer to a question, do not hesitate to tell the party that you have to check out the answer before you respond.

8. Do not require the parties to provide information that you do not know if you will need, i.e., do not waste their time.

9. Check with others in your office as to how they have dealt with the parties in the past.

10. Be as straightforward and equal-handed with the parties as you possibly can. The relationship you establish with the current case may affect how easily you will be able to deal with them on other future cases.

B. Organization at the on-site investigation

1. Set a schedule & clear official time for witnesses prior to arrival.

2. The investigation should be conducted in a private room with a phone--not the Union office or an office in or near the Personnel Office or Director's Office.

3. Union space is fine as long as it is reserved for the use of the investigation.

4. Keep a running list of documents and witnesses needed.

5. Make sure to have the phone number and schedule of the Union rep/Agency rep to contact if necessary.

C. How to conclude a case upon completion of investigation

1. Prepare an FIR ASAP after the investigation is finished (while it is still fresh in your mind). Schedule the time for the necessary research and write-up.

2. Keep track of the FIR and request an Agenda (if necessary) or the case.

3. Get the decision to the parties, by phone, fax, etc.

4. Schedule a time to do the final actions-dismissals, complaints.

ATTACHMENT 3E1

SAMPLE LETTER REQUESTING OFFICIAL TIME

(Date)

Charged Party Rep.
(Name and Address)

Re: Case Name and Case Number

Dear Mr./Ms. (Name):

As we discussed last week when I spoke with you by telephone regarding the captioned unfair labor practice charge, I will be coming to your facility next week to conduct an investigation. This investigation will take place on (date) at (time). Pursuant to 5 section 7131(c) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7131(c), I am requesting that the Agency make the following unit employees available on official time for an interview at the following times:

(Name)	8:00 A.M.
(Name)	10:00 A.M.
(Name)	12:00 P.M.

I anticipate that each interview will last for approximately two hours. Once I am on-site, it may be necessary to arrange for the interview of an additional witness(es). I will notify you should that occur. Please call or contact me at (telephone # and e-mail address) to confirm that the individuals will be released and to let me know of the location that will be made available for the purpose of the interviews. Should another on-site investigation be necessary after next week, I will contact you to make the necessary arrangements.

Thank you for your cooperation.

Sincerely,

Field Agent

ATTACHMENT 3F1

AFFIDAVIT TAKEN IN PERSON

UNITED STATES OF AMERICA

BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY

( ) REGION

AFFIDAVIT

State of

Case Name

Case Number

I, (name), make the following voluntary statement in cooperation with an official investigation being conducted pursuant to the Federal Service Labor-Management Relations Statute. I have been assured by an Agent of the Federal Labor Relations Authority that this statement will be considered confidential by the United States Government and will not be disclosed as long as the case remains open, unless I testify at a formal hearing and it then becomes necessary to produce the statement at the hearing. Upon the closing of the case, the statement may be subject to disclosure in accordance with the Freedom of Information Act, as amended.

Home Address:_____

Home Telephone Number:_____

Work Telephone Number:_____

Work Position:_____

Work Location:_____

Years worked with Employer:_____

 Affiant's Initials _____

Union Position:_____

Affiant's Initials _____

I have read, and have had an opportunity to correct, this affidavit consisting of (number) pages, including the signature page, and affirm that the facts asserted are true and correct to the best of my knowledge and belief.

(Signature) (Date)

Subscribed and affirmed before me
on this date (date).

Field Agent

ATTACHMENT 3G1

SAMPLE COVER LETTER AND AFFIDAVIT OF CHARGING PARTY WITNESS TAKEN TELEPHONICALLY

(Date)

(Name and Address)

Re: (Case Name and Number)

Dear Mr./Ms. (Name):

Enclosed is an affidavit that I have prepared based on our telephone conversation on (date) concerning the captioned case. Please review the affidavit and make any necessary **minor** corrections, changes or additions. Draw a line through words as needed or insert additional words as needed. Initial each change and initial in the space provided at the bottom of each page. Please call me if there is a **major** correction, change, or addition that you would like to make to the affidavit. As we agreed upon, please return the original signed affidavit by (date). Should you fail to return the signed affidavit by the required date, the Regional Director may decide the case without your affidavit, or the case may be dismissed if no other evidence has been submitted.

Thank you very much for your cooperation in this matter.

Sincerely,

Field Agent

Enclosure

UNITED STATES OF AMERICA

BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY

( ) REGION

AFFIDAVIT

State of

Case Name

Case Number

I, (name), make the following voluntary statement in cooperation with an official investigation being conducted pursuant to the Federal Service Labor-Management Relations Statute. I have been assured by an Agent of the Federal Labor Relations Authority that this statement will be considered confidential by the United States Government and will not be disclosed as long as the case remains open, unless I testify at a formal hearing and it then becomes necessary to produce the statement at the hearing. Upon the closing of the case, the statement may be subject to disclosure in accordance with the Freedom of Information Act, as amended.

Home Address:_____

Home Telephone Number:_____

Work Telephone Number:_____

Work Position:_____

Work Location:_____

Years worked with Employer:_____

Union Position:_____

Affiant's Initials _____

I have read, and have had an opportunity to correct, this affidavit consisting of (number) pages, including the signature page, and affirm that the facts asserted are true and correct to the best of my knowledge and belief.

_____ _____

(Signature) (Date)

Affiant's Initials _____

ATTACHMENT 3H1

COVER LETTER FOR QUESTIONNAIRE

(Date)

Charging Party Rep.
(Name and Address)

Re: Case Name and Case No.

Dear Mr./Ms. (Name):

Under 5 C.F.R. § 2423.8, as part of our investigation concerning the allegation/s in the above charge, certain evidence and information are required before rendering a decision on the merits. The enclosed questionnaire is an important step in this process and must be completed as soon as possible so we can expeditiously process the charge. The completed questionnaire must be returned to me at the above address by (insert **date** 10 days from date of letter) or by fax (insert fax #).

If you need help in completing the questionnaire, contact this Office for assistance. The Agent assigned to the case may also contact the Charging Party if additional evidence is needed. In deciding the merits of the case, the Regional Director will rely upon your answers to the questionnaire and any other documents presented.

A failure to comply with this request constitutes a failure to provide the Region with the evidence that is necessary to continue to process the case. In this regard, if the completed questionnaire is not returned by the required date, the Regional Director may decide the case without the answers and the case may be dismissed for lack of evidence.

Sincerely,

Regional Director
(insert region) Region

Enclosure

ATTACHMENT 3H2

SAMPLE QUESTIONNAIRE: INFORMATION CASE

If your answer to any question does not fit in the space provided, you may attach additional sheets. Please indicate which sheet corresponds to which question.

Case Name and Number: _____

I, _____, in cooperation with an official investigation being conducted by the Federal Labor Relations Authority pursuant to the Federal Service Labor-Management Relations Statute, supply the following information voluntarily.

My full name is _____

My Union position/title is _____

My mailing address is _____

My phone number is (__)-_____

1. On what date(s) did you make the information request?

2. What is the name of the requesting union?

3. If not you, what is the name, position, mailing address and phone number of the union representative who submitted the request?

4. What is the name, position, mailing address, e-mail address, and phone number of the agency representative to whom the request was made?

5(a). How was the request made? _____ in writing; _____ orally; or
_____ both in writing and orally?

5(b). If in writing, please attach a copy of the request.

5(c). If orally, either instead of a written request or in addition to a written request: state to whom you spoke; the date of the conversation(s); and, as closely as you can, exactly HOW YOU DESCRIBED the information that you were requesting.

6(a). Did you specifically request that the agency either include or delete personal identifiers (such as names, social security numbers or other matters identifying individual employees)? Yes _____ No._____

6(b). Was this done: ___ in writing; ___ orally; or ___ both in writing and orally?

7(a). Did you explain why the union needed the requested information?
___ in writing; ___ orally; or ___ both in writing and orally?

7(b). If in writing, please attach a copy of the request.

7(c). If orally, either instead of a written request or in addition to a written request: state to whom you spoke; the date of the conversation(s); and, as closely as you can, exactly WHAT YOU SAID to explain why the union needed the information you were requesting.

8(a). Do you know if the requested information is contained within a system of records under the Privacy Act? ___ Yes ___ No. If you do know, please identify that system of records.

Only answer the next two questions, 8(b) and 8(c), if your answer to number 8 is Yes.

8(b). If you know that the requested information is within a system of records under the Privacy Act, why doesn't the Privacy Act bar disclosure of the requested information, including any personal identifiers?

8(c). Did you state this to the agency representative? ___ Yes ___ No. If yes, describe as best you can exactly WHAT YOU SAID, to whom and when.

9(a). Did the agency respond to your request? ___ in writing; ___ orally; ____ both in writing and orally; or ____ not at all?

9(b). If in writing, attach a copy of the written response.

9(c). If orally, either instead of a written response or in addition to a written request; state to whom you spoke; the date of the conversation(s); and, as closely as you can, exactly what the agency representative SAID TO YOU.

9(d). If the Agency requested that the Union clarify the request, either in writing or orally, was any clarification provided? If so, what was provided?

10(a). Does the Union still need copies of the information as requested? ___ Yes ___ No.

10(b). If yes, please explain how the Union intends to use the information?

11. Have the parties attempted to resolve this dispute themselves?
___ Yes ___ No. If yes, please describe as specifically as you can what efforts have been undertaken, by whom, when, and the results.

12. Discuss any other matters not listed above which relate to the union's information request and any agency response.

I have read the information above consisting of (number) pages, including any attachments, and affirm to the best of my knowledge and the belief that it is true.

_____ _____

(Date) (Name)

ATTACHMENT 3I1

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF THE GENERAL COUNSEL

TO: John Jackson
Labor Relations Specialist
Bureau of Water Treatment
Division of Water Resources
Department of the Interior
999 Pond Rd.
Denver, CO 80209

Request having been made by (Margo Thomas, Regional Director), whose address is (1244 Speer Blvd., Suite 100, Denver, CO 80204) concerning disclosure of a document in

Case Name: Bureau of Water Treatment

Case No.: DE-CA-07-0700

YOU ARE HEREBY REQUIRED AND DIRECTED TO PRODUCE THE FOLLOWING DOCUMENT at the (Denver Regional Office, 124 Speer Blvd., Suite 100, Denver, CO 80204) by (5:00 p.m. on August 28, 2007). Any method of delivery of the document is permitted provided that the Regional Office receives the document by (5:00 p.m. on August 28, 2007):

(Overtime Rosters for the Blue Unit for the period beginning July 1, 2007 through June 30, 2007).

In testimony whereof, the seal of the FEDERAL LABOR RELATIONS AUTHORITY is affixed hereto and the undersigned has hereunto set his hand and authorized the issuance hereof.

_____
(Signature)
General Counsel

NOTE:

5 C.F.R. § 2423.8(c)(4) provides a mechanism for enforcement of a subpoena should a person fail to comply with a subpoena.

ATTACHMENT 3J1

SAMPLE CONFIRMING LETTER FOR CHARGING PARTY WITNESS (§ 7118(a)(4) - UNTIMELY FILED CHARGE)

(date)

Name of Witness
(Address)

Re: Case Name and Case Number

Dear Mr./Ms. (Name):

This letter confirms our telephone conversation today concerning the investigation of the unfair labor practice charge in the captioned case which was filed with this Office on (date). Specifically, we discussed the Union's allegation that the Agency violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute when management unilaterally removed a phone from the machine shop area without first providing the Union with notice and an opportunity to bargain.

You stated that management implemented this change on (date - more than six months prior to the filing of the charge) and that you discussed this matter with a unit employee the day after management implemented the change.

If the facts as described above are in error or are incomplete in any way, please contact me by telephone at (number) or in writing on or before (date). If I do not hear from you by that date, I will assume that the facts as described are correct. In addition, this letter will be submitted to the Regional Director as evidence to be considered in deciding this case.

I appreciate your cooperation in the investigation of this case.

Sincerely,

Field Agent

ATTACHMENT 3J2

SAMPLE CONFIRMING LETTER FOR CHARGED PARTY WITNESS

(date)

Name of Witness
(Address)

Re: Case Name and Number

Dear Mr./Ms. (Name):

This letter confirms our telephone conversation today concerning the investigation of the unfair labor practice charge in the captioned case. Specifically, we discussed the Union's allegation that (name) was denied a Union representative at a meeting to discuss delinquent charges on her government credit card account.

As we discussed, the meeting at issue was held on (date) and was attended by (names). You stated to (name) that the purpose of the meeting was primarily to counsel (name) regarding a report of a delinquency in (her/his) Government American Express card account. You stated that you began the meeting by first asking (name) whether she had the card with her. She said that she did not and then left the room briefly to retrieve it. After (name) returned with the card and gave it to you, you wrote the card number down on a piece of paper.

When (name) returned she handed you the card and you then showed it to (name) who compared the account number with the number on the delinquency report. You recalled that (name) kept stating that she paid her bills, or words to that effect. You asked her about her use of the card and she responded that she did not remember for what purpose the card was used because it had been many months since she used the card. You then informed her of potential disciplinary action that could result if it were determined that the card was misused.

If the facts as described above are in error or are incomplete in any way, please contact me by telephone at (number) or in writing on or before (date). If I do not hear from you by that date, I will assume that the facts as described are correct.

I appreciate your cooperation in the investigation of this case.

Sincerely,

Field Agent

I, _____, acknowledge that the facts contained in this letter are accurate and complete.

cc: Charged Party Rep.
(Name & Address)

ATTACHMENT 3J3

SAMPLE CONFIRMING LETTER FOR NON-PARTY WITNESS

(date)

Name of Witness
(Address)

Re: Case Name and Number

Dear Mr./Ms. (Name):

This letter confirms our telephone conversation today concerning the investigation of the unfair labor practice charge in the captioned case. You stated that you were not present during a conversation between (name) and (his/her) supervisor (name). During the morning of (date) you attended an off-site training program.

If the above fact is inaccurate or incomplete please contact me by telephone or in writing on or before (date). If I do not hear from you by that date, I will assume that the facts as described are correct. In addition, this letter will be submitted to the Regional Director as evidence to be considered in deciding the case.

I appreciate your cooperation in the investigation of this case.

Sincerely,

Field Agent

ATTACHMENT 4A1

UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF THE GENERAL COUNSEL

DEPARTMENT OF THE ARMY
WHITE SANDS MISSILE RANGE
LAS CRUCES, NEW MEXICO
Charged Party

and **Case No.**

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 2049
Charging Party

ORDER APPROVING WITHDRAWAL OF CHARGE

The Charging Party has requested to withdraw the unfair labor practice charge in the captioned case. This request has been duly considered.

ORDER: The request to withdraw is approved and the case is CLOSED.

Date Issued: _____

_____
(Name)
Regional Director

ATTACHMENT 4A2

UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF THE GENERAL COUNSEL

DEPARTMENT OF THE ARMY
WHITE SANDS MISSILE RANGE
LAS CRUCES, NEW MEXICO
Charged Party

and **Case No.**

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 2049
Charging Party

NOTICE APPROVING WITHDRAWAL OF ALLEGATION

The Charging Party has requested to withdraw the [STATUTORY SECTIONS] allegation in the captioned case. This request has been approved. The remaining allegation [STATUTORY SECTIONS] underlying the unfair labor practice charge will continue to be processed.

Sincerely,

Regional Director, (Region)

ATTACHMENT 4B1

SAMPLE FIR

To: Regional Director
From: Attorney
Date: insert

FINAL INVESTIGATIVE REPORT

Case No.	insert
Charging Party:	insert
Charged Party:	insert
Filed:	August 1, 2007
Allegations:	7116(a)(1), (5) and (8) – unilateral change
Date underlying event occurred:	February 12, 2007
Timeliness:	Yes
Jurisdiction:	Yes
Related Cases:	No

FACTS

In February 2007, two IIOs were informed that they were going to be processing orphan petitions while a district adjudication officer (DAO) was out on maternity leave. Throughout February, they were provided with many hours of training from the DAO. Some training sessions were held in a conference room with the IIOs' supervisor present. The DAO initially reviewed and approved petitions, but after she left in March, the employees processed and approved the petitions on their own. Since that time the employees spend 100% of their time processing orphan petitions, including administrative duties related to the petitions.

According to the IIO position description, IIOs provide highly technical counsel to the public about immigration and nationality law and regulations. Principle duties include: screening applications and petitions for completeness, appropriate fees, and proper supporting documents; determining prima facie eligibility for application accepted by the organizations; exploring all avenues of assistance available to the client; and observing and questioning clients for the purpose of determining if individuals are attempting to submit applications under fraudulent situations and reasons. The IIO position description was recently amended to add the duty of "adjudicating applications and petitions from the general body of case work filed at the various offices which have been determined to be routine, less complex than those referred to Adjudications Officers or readily approvable." This duty is supposed to account for 35% of their duty time.

The testimony of the IIOs revealed that the normal duties of the IIOs involve working the counter and answering general questions about applications. IIOs also assist DAOs in processing applications and sometimes adjudicating simple petitions.
Previous petitions processed by the two IIOs include replacement of naturalization or citizenship certificates and replacement of green cards.

There are two types of orphan petitions: the I-600A, Application for Advance Processing of Orphan Petition; and the I-600, Petition to Classify Orphan as an Immediate Relative. In order to adjudicate an I-600, the IIOs have to review a home study performed by a licensed social worker to determine the fitness of the applicant to be a parent. In order to adjudicate an I-600A, the IIOs not only have to determine whether a child meets the definition of an orphan under U.S. law, but also determine whether the adoption was completed in a proper manner according to the laws of the foreign country where the adoption occurred. They are even more complicated than the I-600As, and unlike most immigration applications, they require examination of the laws of multiple foreign countries. Thus, according to the IIOs, adjudicating orphan petitions is much more complex than anything they had done previously. Even according to the USCIS web site, "adjudicating applications to adopt foreign-born children involves some of the most complex decision-making within immigration services."

PARTIES' ARGUMENTS

The Charged Party asserts that the new duties are consistent with the IIO position description and do not constitute a change that is more than *de minimis.*

The Charging Party asserts that the new duties are completely new duties that take up 100% of the employees' work time. The Charging Party pointed out that the employees needed training before assuming the new duties.

LAW

Prior to implementing a change in conditions of employment of bargaining unit employees, an agency is required to provide the exclusive representative with notice and an opportunity to bargain over those aspects of the change that are within the duty to bargain. *See United States Army Corps of Eng'rs, Memphis Dist., Memphis, Tenn.*, 53 FLRA 79, 81 (1997). Failure to provide notice and bargain is a violation of section 7116(a)(1) and (5) of the Statute. However, an agency is only required to bargain over changes that have more than a *de minimis* impact on the working conditions of bargaining unit employees. *S SA, Office of Hearings and Appeals, Charleston, S.C.*, 59 FLRA 646 (2004) (*SSA*). In applying the *de minimis* standard, the Authority looks to the nature and extent of either the effect or the reasonably foreseeable effect of the change on bargaining unit employees' conditions of employment. *See, e.g., United States Dep't of the Treasury, IRS,* 56 FLRA 906, 913 (2000).

LEGAL ANALYSIS

In this case, the change, at least by May or June when the duties became permanent, was arguably more than *de minimis*. The change involved completely new duties that take up 100% of the employees' work time. Extensive training was necessary to prepare the employees for the duties. The duties are far more complex than any duties the employees previously performed. Under the circumstances, the effect of the change on the IIOs conditions of employment is more than *de minimis* and thus the Activity violated sections 7116(a)(1) and (5) of the Statute by failing to provide the Union with notice and an opportunity to bargain. *U.S. Dep't. of HHS, S SA, Baltimore, Md.*, 41 FLRA 1309 (1991)(reorganization of Title 2 claims representatives found to be more than *de minimis*).

Alternatively, it could be argued that the change is *de minimis*. In this regard, IIOs are already responsible for processing various kinds of immigration petitions and for having general knowledge related to all petitions. Thus, adjudicating orphan petitions is encompassed within their position description and a natural extension of their duties. However, the IIO amended position description only expands their duties to simple petitions and the orphan petitions, even according to the USCIS web site, are very complicated. It is also notable that the duties were taken over from an adjudication officer, thus indicating that the duties are within the DAO responsibilities and not typical IIO duties. Finally, this case is distinguishable from another recent case where the Authority found the change to be *de minimis*. *See United States Dep't of Homeland Sec., Border and Transp. Sec. Directorate, U.S. Customs and Border Prot., Border Patrol, Tucson Sector, Tucson, Ariz.*, 60 FLRA 169, 175 (2004) (*Tucson Sector*). In *Tucson Sector*, the Authority found, even assuming a change, that the change was *de minimis*, citing the fact that the employees were not assigned *new duties*, nor were they required to perform any duties not previously required of them. The Authority also noted that the processes and procedures remained the same. In this case, the duties are new and the employees have never been required to adjudicate this type of petition or any similar types of petitions.

RECOMMENDATION

It is recommended that complaint issue absent settlement. Remedy is retroactive bargaining and an appropriate notice signed by the San Francisco District Director and posted throughout the San Francisco District. The 7116(a)(8) allegation needs to be withdrawn.

ATTACHMENT 4C1

UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF THE GENERAL COUNSEL

DEPARTMENT OF THE ARMY
WHITE SANDS MISSILE RANGE
LAS CRUCES, NEW MEXICO
Charged Party

and **Case No.**

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 2049
Charging Party

NOTICE OF APPROVED BILATERAL SETTLEMENT AGREEMENT

A copy of the approved Settlement Agreement in the captioned case is enclosed. By executing this agreement, the Charged Party has, among other things, agreed to (insert action(s)).

The terms of the Settlement Agreement require that the Charged Party have the Notice signed and dated by [signatory], in the place designated for signature at the bottom of the Notice. The Charged Party is further required to post promptly the Notice in accordance with the terms of the Agreement, which requires that the Notice be posted in conspicuous places, **including all bulletin boards and other places where notices to employees are customarily posted** for a period of at least (60) days from the date of posting. The Notice should be reproduced by the Charged Party in sufficient numbers to comply with the posting requirement.

Note that the Settlement Agreement also requires that both parties notify the Regional Director, in writing, as to what steps the Charged Party has taken to comply with the Settlement Agreement. Accordingly, the Charged Party must notify the Regional Director within five (5) days of the commencement of posting, of the specific steps taken to comply with the Settlement Agreement, including a listing of the dates and locations of the posting of the Notice. At the time of such notification, a signed and dated copy of the Notice should also be provided to the Regional Director.

Upon the expiration of the sixty (60) day posting period, the Charged Party must submit its second written notification of compliance to the Regional Director specifically confirming all actions taken to comply with

the Settlement Agreement and setting forth a detailed explanation for any action(s) required that has not, as of the date of the notification, been taken.

Sincerely,

Regional Director (Region)

ATTACHMENT 4C2

UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF THE GENERAL COUNSEL

DEPARTMENT OF THE ARMY
WHITE SANDS MISSILE RANGE
LAS CRUCES, NEW MEXICO
Charged Party

and **Case No.**

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 2049
Charging Party

NOTICE OF APPROVED UNILATERAL SETTLEMENT AGREEMENT

A copy of the approved Settlement Agreement in the captioned case is enclosed. By executing this agreement, the Charged Party has, among other things, agreed to (insert action(s)). The Charging Party objected to the Settlement Agreement on the grounds that (insert reason(s)).

Pursuant to the General Counsel's policy regarding the settlement of unfair labor practice cases, Regional Directors have authority to approve settlement agreements unilaterally. In exercising this authority, Regional Director consider criteria including, but not limited to:

1. Does the agreement remedy the specific allegations of the complaint?

2. Does the agreement remedy the specific harm caused by the violations to the individual and/or the institution?

3. Has the Charging Party raised valid objections to the agreement?

4. Does the agreement effectively communicate to employees their rights under the Statute and the terms of the agreement?

5. What is the cost (time, resources, and travel) involved in litigating the case in relation to the nature of the violation?

Applying the above criteria to the facts of this case, it has been concluded that the approval of the Settlement Agreement effectuates the purposes of the policies of the Statute. (Insert rationale explaining why).

The Charged Party will not implement the terms of this Settlement Agreement until after either the time for filing an appeal of the approval of this Settlement Agreement has expired, or the General Counsel has denied such appeal. At that time, the Regional Director will instruct the Charged Party to implement the terms of the Settlement Agreement.

The Charging Party may file an appeal from the Regional Director's decision in this case. Include the Case Number in the appeal and address it to:

Federal Labor Relations Authority
Office of the General Counsel
1400 K Street NW, Second Floor
Attn: Appeals
Washington, DC 20424-0001

An appeal may be filed by mail or hand delivery by (**date**). A mailed appeal must be postmarked or a hand-delivered appeal must be delivered by that date. Please send a copy of the appeal to the Regional Director.

If more time is needed to prepare an appeal, the Charging Party may ask for an extension of time. The Charging Party should mail or hand deliver a request for an extension of time to the Office of the General Counsel at the address listed above. Because requests for an extension of time must be **received** at least five (5) days before the date the appeal is due, any request for an extension of time in this case must be **received** at the above address no later than (**date**).

Sincerely,

Regional Director, (Region)

ATTACHMENT 4C3

Sample Order to Charged Party after Appeal Disposition

UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF THE GENERAL COUNSEL

DEPARTMENT OF THE ARMY
WHITE SANDS MISSILE RANGE
LAS CRUCES, NEW MEXICO
Charged Party

and **Case No.**

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 2049
Charging Party

COMPLIANCE ORDER

The Settlement Agreement in the captioned case was approved on (date). On (date) the General Counsel denied the Charging Party's appeal of the Order Approving the Unilateral Settlement Agreement.

A copy of the Agreement and six (6) copies of the Notice to All Employees are enclosed. As specified in the Agreement, copies of the Notice should be posted in conspicuous places, including all bulletin boards and other places where notices to employees represented by the (union) are customarily posted, for a period of at least sixty (60) consecutive days from the date of the posting. The Charged Party is responsible for making a sufficient number of copies to fulfill that obligation. The Charged Party also must take steps to ensure that the Notice is not altered, defaced, or covered by other material.

The Charged Party shall notify the Regional Director in writing within five (5) days of after receipt of this letter of the steps taken to comply with the requirements of the Agreement. Upon the expiration of the 60-day posting period, written certification shall be provided to the Regional Director that the requisite posting of the Notice has been completed. Finally, the Charged Party shall serve the Charging Party with copies of the notification and certification.

ORDER: The Charged Party shall BEGIN COMPLIANCE with the terms of the Settlement Agreement.

Date Issued: _____

_____
(Name)
Regional Director

ATTACHMENT 4G1

UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF THE GENERAL COUNSEL

Name
Respondent

and Case No. ( )

Name

Charging Party

STIPULATION AND FORMAL SETTLEMENT AGREEMENT

Pursuant to 5 C.F.R. § 2423.25 of the Authority's Regulations, this Stipulation is entered into between the Agency (Name) (Respondent); the Charging Party (Name); and the General Counsel of the Federal Labor Relations Authority (General Counsel) as a formal settlement of unfair labor practice Case No. ( ). The parties hereby stipulate and agree as follows:

Procedural Background

1. The Charging Party filed a charge in Case No. ( ) with the Regional Director of the Federal Labor Relations Authority, (insert name) Region (Regional Director) on (insert date). The Respondent acknowledges receipt of the charge. The Charging Party filed a first amended charge with the Regional Director on (date). The Respondent acknowledges receipt of the first amended charge.

2. Pursuant to 5 U.S.C. § 7104(f)(2)(B) and based on this charge, the Regional Director issued a complaint and notice of hearing on (date). The Respondent and the Charging Party were timely served copies of this complaint.

3. On (date), the Regional Director approved a Settlement Agreement in this case in which the Respondent agreed that it would post a notice to all employees; provide the Charging Party with copies of all correspondence received from bargaining unit employees in response to its solicitation of comments on (date), (date), (date), and (date); and hold a video teleconference (IVT) meeting similar to the meeting held on (date), providing the Charging Party with prior notice and an opportunity to attend and participate in the meeting.

4. On (date), the Regional Director rescinded the bilateral settlement because the Respondent had failed to hold a video teleconference (IVT) meeting similar to the meeting held on (date), providing the Charging Party with prior notice and an opportunity to attend and participate in the meeting.

5. On (date), the Regional Director reissued the complaint and notice of hearing in this case. The Respondent and the Charging Party were timely served copies of this complaint.

6. On (date), the Respondent filed an answer to the reissued complaint.

Jurisdiction

7. The Respondent (name) is an agency under 5 U.S.C. § 7103(a)(3).

8. The Charging Party (name) is a labor organization under 5 U.S.C. § 7103(a) (4) and is the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent.9.

9. (Name) (if applicable, e.g., Council) is an agent of Charging Party (name) for the purpose of representing employees in the Respondent's Office (name of Office) within the unit described in paragraph 8.

10. The parties are subject to the jurisdiction of the Statute.

Facts Supporting Violations

11. During the time period covered by this complaint, each person listed below occupied the position opposite his or her name:

(name)	Deputy Commissioner, Agency (name)
(name)	Associate Commissioner, Agency (name)
(name)	Regional Chief Judge, (name of Region)
(name)	Regional Chief Judge, (name of Office)

12. During the time period covered by this complaint, the persons named in paragraph 11 were supervisors and/or management officials under 5 U.S.C. § 7103(a)(10) and (11) at the Respondent.

13. During the time period covered by this complaint, Employee (name) occupied the position of Administrative Law Judge, (Office).

14. During the time period covered by this complaint, the person named in paragraph 13 was an agent of the Respondent.

15. During the time period covered by this complaint, the persons named in paragraphs 11 and 13 were acting on behalf of the Respondent.

16. On (date), the Respondent, by (name), (name), (name), (name) and (name), held a meeting via interactive video teleconference (IVT) with employees in the bargaining unit described in paragraph 8.

17. The Respondent discussed the Hearing Process Improvement (HPI) Plan at the meeting described in paragraph 16.

18. The meeting described in paragraph 16 was formal in nature.

19. The meeting described in paragraph 16 was held without affording the Charging Party notice and an opportunity to be represented.

20. The Respondent, by employee (name), solicited suggestions and comments from employees in the bargaining unit described in paragraph 8 at the meeting described in paragraph 16.

21. The Respondent was bargaining with the Charging Party over HPI during (date) and during the months that followed.

22. On or about (date), the Respondent solicited comments about HPI from employees in the bargaining unit described in paragraph 8.

23. On or about (date), the Respondent solicited comments about HPI from employees in the bargaining unit described in paragraph 8.

24. On or about (date), the Respondent solicited comments about HPI from employees in the bargaining unit described in paragraph 8.

Legal Conclusions

25. By the conduct described in paragraphs 16 through 19, the Respondent failed to comply with 5 U.S.C. § 7114(a)(2)(A).

26. By the conduct described in paragraphs 16 through 19, and paragraph 25, the Respondent committed an unfair labor practice in violation of 5 U.S.C. § 7116(a)(1) and (8).

27. By the conduct described in paragraphs 20, 22, 23, and 24, the Respondent committed unfair labor practices in violation of 5 U.S.C. § 7116(a)(1) and (5).

28. The parties hereby waive their right to a formal hearing, a decision by an Administrative Law Judge, and any other proceedings to which they might be entitled under the Statute or the Regulations.

29. Based on this Stipulation and record, the parties hereby consent to the entry without further notice of an FLRA Order providing as follows:

The Respondent shall:

(1) Cease and desist from

(a) Conducting formal discussions with bargaining unit employees without affording the Charging Party (name) the exclusive representative of the employees, prior notice and an opportunity to be represented at the formal discussion, including formal discussions held by interactive video teleconference (IVT).

(b) Failing and refusing to bargain in good faith with the Charging Party by bypassing the Charging Party and dealing directly with bargaining unit employees concerning proposed changes in their conditions of employment, including the hearing process improvement (HPI) initiative.

(c) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of rights assured to them by the Federal Service Labor-Management Relations Statute.

(2) Take the following affirmative actions in order to effectuate the policies of the Statute:

(a) Hold a video teleconference (IVT) session about HPI on (date), from 1:00 pm to 2:30 pm (Eastern), including all bargaining unit employees in Office (name), and allow the Charging Party an opportunity to be represented and to participate to the extent required by the Statute. Should the Respondent be unable to broadcast on (date), due to circumstances beyond its control such as system failure or act of God, it will hold the IVT session no later than (date).

(b) Post at all facilities where bargaining unit employees are located copies of the Notice to All Employees, attached hereto as Appendix A, on forms to be furnished by the Regional Director. On receipt of such forms, they shall be signed the Associate Commissioner for (Office) and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to 5 C.F.R. § 2423.41, notify the Washington Regional Director, in writing, after 5 days and again after 60 days from the date of this Order, as to what steps have been taken to comply.

30. A U.S. Court of Appeals for any appropriate circuit may, upon application by the Authority, enter its decree enforcing the Order of the Authority consistent with paragraph 29. The Respondent waives all defenses to entry of the decree enforcing compliance with the Order of the Authority, and its right to receive notice of the filing of an application for the entry of such decree, provided that the decree is consistent with paragraph 29 herein. After the entry of the decree, the Respondent shall be required to comply with the affirmative provisions of the Authority's Order to the extent that it has not already done so.

31. This Stipulation, together with the attached appendix, shall constitute the entire record of this matter and the entire agreement of the parties, there being no other agreement of any kind which varies, alters, or adds to this Stipulation.

32. This Stipulation, together with the other documents constituting the record, shall be filed with the Authority in accordance with 5 C.F.R. § 2423.25(c) of the Authority's Regulations, and is subject to the approval of the Authority. This Stipulation shall be of no force and effect until the Authority has granted such approval. Upon approval of the Stipulation by the Authority, the Respondent shall immediately comply with the provisions of the Authority Order, consistent with paragraph 29 hereof.

Respondent (name)
By _____
(name), Associate Commissioner
Office (name)

_____
Date

Charging Party (name)
By_____
(name), President

_____
Date

Federal Labor Relations Authority
(insert Region)
By_____
(name), Counsel for the General Counsel

_____
Date

APPROVED:

_____
(name), Regional Director
FLRA, (insert Region)

_____
Date

UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF THE GENERAL COUNSEL

Name
Respondent

and Case No. ( )

Name

Charging Party

REQUEST FOR APPROVAL OF FORMAL SETTLEMENT

Pursuant to section 5 C.F.R. § 2423.25(a)(2) of the Authority's Regulations, all parties to this matter entered into a Formal Settlement, which I have approved. Pursuant to 5 C.F.R. § 2423.25(c) of the Regulations, the Formal Settlement is hereby forwarded to the Authority for approval.

By the Formal Settlement Agreement, the Respondent has acknowledged that unfair labor practices were committed when it held an (date), meeting with bargaining unit employees of the Office (name) without providing the Union (name) with prior notice and an opportunity to be represented, and when it solicited input directly from bargaining unit employees at this meeting. The Respondent has further acknowledged that unfair labor practices were committed on (date); (date); and (date), when it again solicited input from bargaining unit employees.

The Formal Settlement provides a complete remedy for the unfair labor practices, including an agreement that the Respondent will hold another meeting with employees on (date) with the

Charging Party present, and post a Notice To All Employees. Accordingly, approval of the Formal Settlement should be found to effectuate the purposes and policies of the Statute.

ATTACHMENT 4H1

Model Dismissal Letter

(Date)

(Name), President
ORD NATCA
812 N. Green Street
McHenry, IL 60050

Re: FAA, Des Plaines, IL
Case No.

Dear (Name):

The unfair labor practice charge in this case was filed with the Region on March 21, 2007. After investigation, consideration of all the evidence, and application of the law to the facts, it was determined that issuance of a complaint on the charge is not warranted.

The charge alleges that the FAA, Des Plaines, IL (the Charged Party) violated section 7116(a)(1), (2), (5), and (8) of the Statute by failing to provide to the Charging Party certain information. The FLRA has jurisdiction over the matters raised in the charges.

The investigation revealed that on September 30, 2006, the Charging Party requested information from the Charged Party Flight Surgeon pertaining to the suspension of a medical clearance for a bargaining unit employee. On November 8, 2006, the Charging Party narrowed its request to include accounts of conversations held between the Flight Surgeon's office and management at the facility where the employee worked. On December 21, the Flight Surgeon's office sent to the employee a consent form for the release of the requested information. Although the employee recalls submitting this signed consent form sometime prior to the charge in this case, he did not keep any fax confirmation and there was no follow-up between the parties or the employee prior to the filing of the instant charge. The Charged Party denies receiving this consent form.

Under section 7114(b)(4) of the Statute, an agency must furnish to the exclusive representative, upon request, data that is, among other things, "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining." To demonstrate that information is "necessary," a union must establish a particularized need for the information by demonstrating that the information requested is not merely relevant or useful but is required in order for the union to adequately represent the bargaining unit. *IRS, Kansas City*, 50 FLRA 661, 669-70; *AFGE, Local 2343 v. FLRA*, 144 F.3d 85, 89 (D.C. Cir. 1998) (*AFGE,*

Local 2343); *United States Dep't of Justice, Bureau of Prisons, Allenwood Fed. Prison Camp, Montgomery, Pa. v. FLRA*, 988 F.2d 1267, 1270-71 (D.C. Cir. 1993).

An agency is only required to provide information "to the extent not prohibited by law." Therefore, there is no unfair labor practice where an agency refuses to furnish information where doing so would violate the Privacy Act. *U.S. Dep't of Transportation, Federal Aviation Admin., New England Region, Bradley Air Traffic Control Tower, Windsor Locks, Conn.*, 51 FLRA 1054 (1996).

In this case, the Charged Party's Flight Surgeon office required a consent form from the employee prior to its release of information concerning the suspension of his medical certification. Such was a reasonable request based upon the private nature of the information sought. Given that the evidence does not demonstrate that a signed consent form was submitted by the employee prior to the filing of the charge, the Charged Party was not obligated to provide the requested information at the time the instant charge was filed. Accordingly, the Charged Party did not violate section 7116(a)(1), (5) and (8) of the Statute by failing to provide information concerning the suspension of the employee's medical certification.

Concerning the remaining allegation, there is no evidence that the Charged Party violated section 7116(a)(2) of the Statute.

For these reasons, the charge is dismissed.

An appeal may be filed by fail or hand delivery with the Office of the General Counsel at the following address:

Federal Labor Relations Authority
Office of the General Counsel
Attn: Appeals
1400 K Street NW, Second Floor
Washington DC 20424-0001

Whichever method is chosen, please note that **the last day for filing an appeal in this case is (date).** This means that an appeal that is mailed must be postmarked, or an appeal must be hand delivered, **no later than (date). Please send a copy of the appeal to the Regional Director.**

If more time is needed to prepare an appeal, a motion to request an extension of time may be filed. Mail or hand deliver the request for an extension of time to the Office of the General Counsel at the address listed above. Because a request for an extension of time must be **received** at least five days before the date the appeal is due, any request for an extension of time in this case must be **received** at the above address **no later than (date).**

The procedures, time limits, and grounds for filing an appeal are set forth in the Authority's Regulations at section 2423.11(c) through (e) (Volume 5 of the Code of Regulations). Unfair Labor Practice Proceedings, 73 Fed. Reg. 8995, 8999-9000 (Feb. 19, 2008) (to be codified at 5 C.F.R. § 2423.11). These regulations may be found in any Authority Regional office, public law library, some large general purpose libraries, Federal Personnel Offices, and the Authority's Home Page internet site - **www.FLRA.gov**. A document that summarizes commonly asked questions and answers regarding the Office of the General Counsel's unfair labor practice appeals process has also been enclosed.

Sincerely,

Regional Director, (Region)

ATTACHMENT 4H2

Model Partial Dismissal Letter

Date

Charging Party Name
Address

Re: Case Name
Case No.

Dear Ms. (Name):

The unfair labor practice charge in this case was filed with the (Name) Regional Office on (date). After investigation, consideration of the evidence, and application of the law to the facts, issuance of a complaint is warranted on certain allegations and not warranted on other allegations.[1]

The charge, as clarified during the investigation, alleges that the Department of Health and Human Services, Public Health Service, Albuquerque, New Mexico (Charged Party), violated Sections 7116(a)(1), (5) and (8) of the Federal Service Labor-Management Relations Statute (Statute) when it failed to respond to a Charging Party information request, and when it failed to provide three requested types of information related to the employment of a unit employee. This Agency has jurisdiction over the matters raised in this charge.

As concerns the one remaining part of the data request covered in this decision letter, the investigation revealed that on (date), the Charging Party requested a copy of any and all vouchers paid by the Indian Health Service for tuition and books for a coding class taken by unit employee, (Name), in (date). The data request provided information as to why the Union needed other portions of the data (concerning the decision to re-hire and to detail this employee), but did not provide any information to the Charged Party as to why the Charging Party needed the vouchers for (name) training class in (date). The data request also did not provide any support to show why it was necessary to fulfill the Charging Party's representational interests.

Under 5 U.S.C. § 7114(b)(4), an agency must, upon request, furnish to a union data that is: (1) normally maintained by the agency; (2) reasonably available; (3) necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining;

---

[1] Absent settlement, a complaint will issue on allegations that the Activity failed to respond to a data request of March 3, 2006, and failed or refused to furnish certain specified data to LIUNA Local 1376 (Union). This dismissal letter pertains only to one remaining part of the data request as set forth herein.

and (4) not guidance, advice, counsel or training. See *Dep't. of Transp., FAA, Fort Worth, Tex.*, 57 FLRA 604 (2001); and *Health Care Fin. Admin.*, 56 FLRA 503, 506 (2000). To demonstrate that information is "necessary" a union must establish a particularized need for the information by articulating, with specificity, why it needs the requested information, including the uses to which the union will put the information and the connection between those uses and the union's representational responsibilities under the Statute. A union must establish the requested information is required in order for the union to adequately represent its members. *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Forrest City, Ark.*, 57 FLRA 808 (2002); *IRS, Wash., D.C. and IRS, Kansas City Serv. Ctr., Kansas City, Mo.*, 50 FLRA 661 (1995).

In this case, the Charging Party's request does not establish a particularized need for the information relating to the coding class. As stated above, the data request did not provide any basis to establish that the information was necessary to the Union's representational interests. Under all of the facts and circumstances, therefore, the Charged Party's failure to provide that information does not violate the Statute. Thus, absent settlement, the Region will issue a complaint on the Charged Party's failure to respond to the request, and failure to provide the first and second items requested in the (date) information request.

An appeal may be filed by fail or hand delivery with the Office of the General Counsel at the following address:

Federal Labor Relations Authority
Office of the General Counsel
Attn: Appeals
1400 K Street NW, Second Floor
Washington DC 20424-0001

Whichever method is chosen, please note that **the last day for filing an appeal in this case is (date).** This means that an appeal that is mailed must be postmarked, or an appeal must be hand delivered, **no later than (date). Please send a copy of the appeal to the Regional Director.**

If more time is needed to prepare an appeal, a motion to request an extension of time may be filed. Mail or hand deliver the request for an extension of time to the Office of the General Counsel at the address listed above. Because a request for an extension of time must be **received** at least five days before the date the appeal is due, any request for an extension of time in this case must be **received** at the above address **no later than (date).**

The procedures, time limits, and grounds for filing an appeal are set forth in the Authority's Regulations at section 2423.11(c) through (e) (Volume 5 of the Code of Regulations). Unfair Labor Practice Proceedings, 73 Fed. Reg. 8995, 8999-9000 (Feb. 19, 2008) (to be codified at 5 C.F.R. § 2423.11). These regulations may be found in any Authority Regional office, public law library, some large general purpose libraries, Federal Personnel Offices, and the Authority's Home Page internet site - **www.FLRA.gov**. A document that summarizes commonly asked questions and answers regarding the Office of the General Counsel's unfair labor practice appeals process has also been enclosed.

Very truly yours,

Name
Regional Director, (Region)

ATTACHMENT 4H3

Model Dismissal Letter Based on Prosecutorial Discretion

Date

Name
President
AFGE Local 3344
7180 Highland Drive
Pittsburgh, PA 15206

Re: Department of Veterans Affairs,
VA Pittsburgh Health Care System,
Pittsburgh, Pennsylvania
Case No.

Dear (Name):

The unfair labor practice charge in this case was filed with the Region on (insert date). After investigation, consideration of all the evidence, and application of the law to the facts, it was determined that issuance of a complaint on the charge is not warranted.

The charge alleges that the Department of Veterans Affairs, VA Pittsburgh Health Care System, Pittsburgh, Pennsylvania (the Activity) violated sections 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by recouping dues payments from the dues remittances of the American Federation of Government Employees (AFGE), Local 3344 (Local 3344 or the Union). The FLRA has jurisdiction over the matter raised in this charge.

The investigation revealed that there are two different AFGE locals covering different facilities within the VA Pittsburgh Healthcare System. Local 2028 represents employees at University Drive and the Heinz Division, and Local 3344 represents employees at Highland Drive. Employees often transfer between facilities, and the two locals do not always know when that occurs.

Every two weeks, the Activity sends the union a copy of union dues deductions ($13.50 per pay period per employee). Chief Steward of Local 3344, Mark Sutton (Sutton), noticed on the (date) remittance form that instead of crediting the union with $13.50 under one particular employee, the Activity had deducted $175.50 from the overall payment. Sutton notified Jim Baker (Baker), Vice President of Business Service Line, who oversees payroll. Baker stated that the agency had recouped the money because the employee was represented by Local 2028. The agency ultimately determined an error had been made. On (date), after the charge in this case was filed, the employee was advised that it was an error to previously credit the funds and the Union was reimbursed the $175.50.

Section 7115(a) of the Statute states that "[i]f an agency has received from an employee in an appropriate unit a written assignment which authorizes the agency to deduct from the pay of the employee amounts for the payment of regular and periodic dues . . . the agency shall honor the assignment and make appropriate allotment pursuant to the assignment." In *Lowry Air Force Base, Denver, Colo.*, 31 FLRA 793, 795-97 (1988), the Authority held that an agency violates sections 7116(a)(1) and (8) of the Statute "in reducing a current remittance to an exclusive representative of union dues in order to recoup a previous erroneous payment" since such conduct is inconsistent with section 7115(a) of the Statute. Accordingly, the facts establish that the Activity violated section 7116(a)(1) and (8) of the Statute when it recouped $175.50 from Local 3344's dues remittances to correct a prior error. Nevertheless, in accordance with the General Counsel's policy on prosecutorial discretion, it has been determined that further proceedings in this matter are not warranted.

Under the General Counsel's policy, Regional Directors may exercise their prosecutorial discretion to dismiss unfair labor practice charges when litigation would not effectuate the purposes and policies of the Statute. In exercising this discretion, Regional Directors consider the following criteria: (1) the nature or seriousness of the violation; (2) the degree of harm to the bargaining relationship; (3) the degree of harm to employees; (4) whether the same or similar harm has occurred in the past; (5) whether the violation has been cured by the charged party; (6) whether there is an appropriate remedy for the violation; (7) whether circumstances have changed since the violation occurred which render litigation inappropriate or render the dispute moot; (8) whether the case presents a novel issue which could affect the interpretation and application of the Statute. These criteria are not applied mechanically or in a vacuum. Rather, they are considered with all the facts and circumstances presented in a case.

Applied to the facts presented, the evidence reveals that the Agency recognized that its decision to recoup money from the dues remittances to Local 3344 was improper, and that it repaid the money that was recouped to Local 3344. Therefore, prosecution of this case would not result in any affirmative relief. Moreover, given that the Activity has recognized that it acted improperly, there is no reason to believe that it will improperly recoup union dues in the future and any harm that has resulted has been cured. Accordingly, further proceedings in this matter would not effectuate the purposes and policies of the Statute.

An appeal may be filed by fail or hand delivery with the Office of the General Counsel at the following address:

Federal Labor Relations Authority
Office of the General Counsel
Attn: Appeals
1400 K Street NW, Second Floor
Washington DC 20424-0001

Whichever method is chosen, please note that **the last day for filing an appeal in this case is (date).** This means that an appeal that is mailed must be postmarked, or an appeal must be hand delivered, **no later than (date). Please send a copy of the appeal to the Regional Director.** If

more time is needed to prepare an appeal, a motion to request an extension of time may be filed. Mail or hand deliver the request for an extension of time to the Office of the General Counsel at the address listed above. Because a request for an extension of time must be **received** at least five days before the date the appeal is due, any request for an extension of time in this case must be **received** at the above address **no later than (date).**

The procedures, time limits, and grounds for filing an appeal are set forth in the Authority's Regulations at section 2423.11(c) through (e) (Volume 5 of the Code of Regulations). Unfair Labor Practice Proceedings, 73 Fed. Reg. 8995, 8999-9000 (Feb. 19, 2008) (to be codified at 5 C.F.R. § 2423.11). These regulations may be found in any Authority Regional office, public law library, some large general purpose libraries, Federal Personnel Offices, and the Authority's Home Page internet site - **www.FLRA.gov**. A document that summarizes commonly asked questions and answers regarding the Office of the General Counsel's unfair labor practice appeals process has also been enclosed.

Sincerely,

Name
Regional Director (Region)

Enclosure: Appeals, Questions and Answers

ATTACHMENT 5B1

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.**

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

A letter acknowledging receipt of the appeal is sent to the Charging Party with a copy to the Charged Party. The appeals review includes a review of the appeal and the evidence in the file obtained during the investigation. Upon completion of the appeals review, the parties will receive a written Order signed by the General Counsel which either: 1) grants the appeal and orders further investigation of specific factual issues or issuance of a complaint over a specific violation; or 2) denies the 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 Order incorporates by reference the full discussion of the facts and the law as set forth in the Regional Director's dismissal letter. 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 Order 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 an Order on the appeal within 60 days or less of the date on which the appeal is received.

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

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 the 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 not given to the Region be submitted?

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. The OGC will notify the parties 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 #12: 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 or the OGC if they have questions about the processing of a charge, do not understand the basis for the dismissal of a charge, or seek further assistance.

ATTACHMENT 5B2

APPEALS REVIEW FORM
(revised 10/2006)

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 and that the agent reflected the neutral role of the FLRA?
___ 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 5B3

APPEALS CASE LOG (revised 2/2007)

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 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 5B4

Model Order Denying Appeal

UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF THE GENERAL COUNSEL

U.S. DEPARTMENT OF VETERANS AFFAIRS
VA HEALTH ADMINISTRATION CENTER
DENVER, COLORADO
Charged Party

and **Case No.**

SHARON LEON
Charging Party

Order Denying Appeal

The Rules and Regulations (Regulations) of the Federal Labor Relations Authority (FLRA) provide that a "Charging Party may obtain review of the Regional Director's decision not to issue a complaint by filing an appeal with the General Counsel within 25 days after service of the Regional Director's decision." 5 C.F.R. § 2423.11(c) (2008).

The decision of the Regional Director not to issue a complaint was issued on December 20, 2007, and was served on the parties by mail. Accordingly, an appeal must be filed by January 22, 2008. (An additional five days is added to the time period if the decision is served by mail. *See* 5 C.F.R. § 2429.22). The appeal was filed on December 26, 2007; therefore, it is timely filed and is properly before the General Counsel for consideration.

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).

The Charging Party's appeal is construed as having 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, the Charging Party contended that she did not want to file a grievance and therefore

did not seek to be represented by the union. The Charging Party further submitted that the Charged Party failed to respond to her lawyer's letter.

This appeal has been carefully considered. The appeal has failed to establish any ground for either reversing the Regional Director's decision or remanding the case for further investigation in accordance with 5 C.F.R. § 2423.11(e) (2008). 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).

ORDERED: For the foregoing reasons, the appeal is hereby DENIED.*

Date Issued: _____

_____
(Name)
General Counsel

* Federal courts lack jurisdiction to review a decision by the General Counsel of the FLRA denying an appeal of a decision not to issue a ULP complaint. *See, e.g., Patent Office Prof'l Ass'n v. FLRA*, 128 F.3d 751, 752 (D.C. Cir. 1998).

ATTACHMENT 5B5

Sample Modified Order Denying the Appeal

UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF THE GENERAL COUNSEL

DEPARTMENT OF DEFENSE
U.S. AIR FORCE
325th MISSION SUPPORT GROUP SQUADRON
TYNDALL AIR FORCE BASE, FLORIDA

Charged Party

and **Case No.**

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3240

Charging Party

Order Denying Appeal

The Rules and Regulations (Regulations) of the Federal Labor Relations Authority (FLRA) provide that a "Charging Party may obtain review of the Regional Director's decision not to issue a complaint by filing an appeal with the General Counsel within 25 days after service of the Regional Director's decision." 5 C.F.R. § 2423.11(c) (2008).

The decision of the Regional Director not to issue a complaint was issued on October 30, 2007, and was served on the parties by mail. Accordingly, an appeal must be filed by December 3, 2007. (An additional five days is added to the time period if the decision is served by mail. *See* 5 C.F.R. § 2429.22). A request for an extension of time to file an appeal was granted until December 17, 2007. The appeal was filed on December 17, 2007; therefore, it is timely filed and is properly before the General Counsel for consideration.

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).

On appeal, the Charging Party alleged, among other things, that Federal agencies were directed under Executive Order 12871 to negotiate over permissive subjects of bargaining such as assigning new supervisors to unit employees. The Charging Party contended that the Regional Director's decision did not consider the directives contained in this Executive Order when deciding not to issue a complaint.

This appeal has been carefully considered. For the reasons stated below, the appeal is denied.

Specifically, the Regional Director's decision is in accordance with law. In this regard, the directives contained in Executive Order 12781 (1993) were revoked by Executive Order 13203 (2001). The appeal has failed to establish any ground for either reversing the Regional Director's decision or remanding the case for further investigation in accordance with 5 C.F.R. § 2423.11(e) (2008). 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).

ORDERED: For the foregoing reasons, the appeal is hereby DENIED.*

Date Issued: _____

_____
(Name)
General Counsel

* Federal courts lack jurisdiction to review a decision by the General Counsel of the FLRA denying an appeal of a decision not to issue a ULP complaint. *See, e.g., Patent Office Prof'l Ass'n v. FLRA*, 128 F.3d 751, 752 (D.C. Cir. 1998).

ATTACHMENT 5B6

Sample Order Granting an Appeal

UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF THE GENERAL COUNSEL

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
MOBILE DISTRICT
MOBILE, ALABAMA

Charged Party

and **Case No.**

INTERNATIONAL FEDERATION OF
PROFESSIONAL & TECHNICAL ENGINEERS,
LOCAL 561

Charging Party

Order Granting Appeal

The Rules and Regulations (Regulations) of the Federal Labor Relations Authority (FLRA) provide that a "Charging Party may obtain review of the Regional Director's decision not to issue a complaint by filing an appeal with the General Counsel within 25 days after service of the Regional Director's decision." 5 C.F.R. § 2423.11(c) (2008).

The decision of the Regional Director not to issue complaint was issued on (**date**), and was served on the parties by mail. Accordingly, an appeal must be filed by (**date**). (An additional five days is added to the time period if the decision is served by mail. *See* 5 C.F.R. § 2429.22). The appeal was filed on (**date**); therefore, it is timely filed and is properly before the General Counsel for consideration.

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).

On appeal, the Charging Party has 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, the Charging Party contended that the Regional Director erred in determining that the sole issue in the grievance concerned contracting out under OMB Circular A-76 (A-76).

This appeal has been carefully considered. For the reasons stated below, the appeal is granted.

Specifically, a review of the case file establishes that it cannot be determined with certainty that the sole issue presented in the grievance concerned contracting out under A-76. Therefore, the Charged Party violated 5 U.S.C. § 7116(a)(1) and (8) by refusing to process the underlying grievance to arbitration. *See, e.g., U.S. Dep't of Veterans Affairs, VA Med. Ctr., Phoenix, Ariz.*, 60 FLRA 405, 406-07 (2004).

ORDERED: For the foregoing reasons, the appeal is hereby GRANTED, and the case is REMANDED to the Regional Director for issuance of complaint, absent settlement.

Date Issued: _____

_____
Colleen Duffy Kiko
General Counsel

ATTACHMENT 5C1

UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF THE GENERAL COUNSEL

DEPARTMENT OF THE ARMY
WHITE SANDS MISSILE RANGE
LAS CRUCES, NEW MEXICO
Respondent

and **Case No.**

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 2049
Charging Party

NOTICE OF COMPLIANCE

A Decision and Order By the Federal Labor Relations Authority in the captioned case issued on (date). (enclosed)

The Decision and Order requires, in part, the posting of notices on forms to be furnished by the Authority. Enclosed are six copies of the notice containing the language required by the Decision and Order. Please have the notice signed and dated by (insert person from Authority's Order). The Decision and Order requires that the notices be posted and maintained for 60 consecutive days in conspicuous places, including all places where notices to unit employees are customarily posted.

Please notify the (insert Region) Regional Director in writing, by (insert date), as to what steps the Respondent has taken to comply with the Authority's Decision and Order. In addition to the compliance statement, please include a signed and dated copy of the Notice.

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 on the attached certificate of service sheet, that the Respondent has completed the requisite posting and the other remaining remedial actions required by the Decision and Order.

If additional assistance or further information is required concerning compliance in this matter, please contact the undersigned at (insert tel. #).

Sincerely,

Regional Director, (Region)

ATTACHMENT 5C2

UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF THE GENERAL COUNSEL

DEPARTMENT OF THE ARMY
WHITE SANDS MISSILE RANGE
LAS CRUCES, NEW MEXICO
Respondent [OR Charged Party]

and **Case No.**

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 2049
Charging Party

ORDER CLOSING CASE ON COMPLIANCE

All aspects of compliance in this case have been reviewed. It has been determined that the Respondent [OR Charged Party] has met its obligations with regard to the terms and provisions of the Federal Labor Relations Authority's Decision and Order, FLRA No. ( ), dated ( ). [OR insert "settlement agreement" after "provisions of the"]

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

ORDER: This case is hereby CLOSED.

Date Issued: _____

_____
(Name)
Regional Director, (Region)