

H. POST-COMPLAINT/PRE-HEARING SETTLEMENTS

OVERVIEW:

At any time in the proceedings it is **OGC Policy** “to seek settlements that enhance the parties’ relationship; resolve the issues that have brought the parties to seek FLRA assistance; and further the purposes of the . . . Statute.” OGC Settlement Policy (May 25, 1994) ([ATTACHMENT 1H](#)). OGC Policy recognizes the need for greater flexibility and creativity in assisting the parties to not only resolve cases but improve their overall relationship. To accomplish this goal, a settlement agreement may depart from the traditional view that its content should mirror the remedy anticipated at hearing. In light of this policy, after reviewing and analyzing the case file, the Trial Attorney first considers exploring settlement possibilities with the parties.

OBJECTIVE:

To provide an overview of the different types of settlements, the Trial Attorney’s role in that process and in the OALJ Settlement Judge Program.

1. TYPES OF SETTLEMENTS:

a. *Party Settlements Involving Withdrawal of Charge (PSIWOC): Post-Complaint:*

Occur at any stage of proceedings--policy considerations and applicable criteria for settling cases after issuance of complaint are identical to those prior to dispositive action:

i. *Regulatory authority:*

Pursuant to § [2423.11](#)(a)(1), an RD is authorized to approve such a withdrawal instead of issuing a complaint. This includes PSIWOCs.

ii. *Form:*

- (1) Almost any form is permitted because the parties themselves have negotiated the terms and built the foundation for their future relationship voluntarily without the need for monitoring from the RO. These settlements may have been reached privately (without involving the RO) or with the assistance of the Trial Attorney as facilitator/mediator.
- (2) No matter how simple the agreement may seem, a written memorialization is almost always preferable.

- (3) RD will approve a withdrawal request based on a private party settlement unless it is “repugnant to the purposes and policies of the Statute.” OGC Settlement Policy at 2.
- (4) The Trial Attorney reminds the parties that the agreement, which involves the withdrawal of the charge, will not be monitored by the RO for compliance but rather will have the same affect as an enforceable contract.

iii. *Procedure upon reaching settlement--Trial Attorney:*

- (1) Obtains a withdrawal request from the Charging Party. Often--but not required--the party settlement agreement itself contains explicit language where the Charging Party agrees to request withdrawal;
- (2) Transmits a memorandum to the RD briefly setting forth the allegations of the complaint and the terms of resolution. The Trial Attorney recommends approval; and
- (3) After RD approval and the scheduled trial docket is cleared:
 - Notifies OALJ;
 - Cancels court reporter;
 - Cancels reserved hearing space;
 - Notifies witnesses, whether or not under subpoena, that there is no hearing; and
 - Prepares an Order Withdrawing Complaint and Notice of Hearing for RD’s signature.

b. *Informal Settlements:*

i. *Bilateral Settlements*

(1) *Regulatory authority:*

Section [2423.12\(a\)](#) provides for bilateral (or “all party” if multiple charging parties or Respondents) settlements, defining them as settlements to be approved by the RD, and monitored by the RD to ensure compliance.

(2) *Form:*

- (a) RD will approve any form unless content is “repugnant to the Statute (for example, a settlement agreement in a [7116\(a\)\(2\)](#) discrimination case which provides no relief to the individual discriminatee).” OGC Settlement Policy at 3 (need for creativity in fostering the parties’ overall relationship flexibility to allow for a broad range of solutions).

(b) Although still permissible, GC settlement agreement forms and FLRA form Notices ([ATTACHMENT 1H](#), incorporating FLRA forms 54, 55, 57, 58 and 64), are no longer required. The Trial Attorney is free to encourage the parties to explore creative solutions while at the same time informing the Charging Party of the benefit of having the RD approve the Settlement Agreement and monitoring compliance with the Agreement.

(3) *Procedure upon reaching settlement--Trial Attorney:*

(a) *If a traditional format is used:*

Drafts the settlement and proposed notice for submission to both parties simultaneously but only after considering the interests and input of both parties. The Notice explicitly addresses the allegations in the charge and is consistent with FLRA orders in similar cases. An Order Withdrawing Complaint and Notice of Hearing need not be prepared because the form contains applicable language.

(b) *If a creative approach is used:*

Submits the signed agreement to the RD for approval. After approval, prepares and sends a letter to the Charged Party concerning its obligations under the agreement which gives the Charged Party a specified amount of time to report to the RD the steps taken to comply with the agreement. Depending upon regional practice, another regional staff person may complete this task.

As with a party settlement, the Trial Attorney must inform the OALJ, cancel the court reporter, cancel the hearing space and inform the witnesses that the hearing has been canceled.

(c) In either case, complete tasks listed under 1.a.iii.(c) above.

ii. *Unilateral settlements*

(a) *Regulatory authority:*

Section [2423.12](#)(b) authorizes RDs, upon a belief that the policies of the Statute would be effectuated and when the Charging Party refuses to enter into an informal settlement offered by the Respondent, to enter into the agreement and decline to proceed with the complaint. The Charging Party has the right to appeal.

(b) *Form:*

(1) Identical to a bilateral agreement discussed in preceding section 3.b.i.(b)--FLRA forms may, but need not, be used.

(2) Consider and apply basic unilateral settlement criteria set forth in OGC Settlement Policy at 4-5 before forwarding it

to RD for approval (because the Charging Party is not a party--settlement: (1) has not helped the parties' relationship; (2) has not completely resolved the specific charge; and (3) may be appealed).

(c) *Procedure upon reaching unilateral settlement--Trial Attorney:*

- (1) Submits the agreement to the RD for signature;
- (2) Completes tasks listed under 1.a.iii.(c) above;
- (3) Ensures that the OALJ is apprised that the settlement is unilateral and subject to appeal, so that the OALJ knows that disposition of the case is not final;
- (4) Prepares a transmittal letter to the Charged Party announcing approval of the agreement, but noting that the case is subject to appeal and compliance need not commence until further instructions are issued; and
- (5) Prepares a dismissal letter addressed to the Charging Party, setting forth its objections to the agreement and the reasons the RD is nevertheless approving the agreement. The dismissal letter sets forth the Charging Party's appeal rights.

c. *Formal Settlements:*

i. *Regulatory authority:*

- (1) Section [2423.25](#)(a)(2) provides for post-complaint/pre-hearing formal settlements.
- (2) **OGC Settlement Policy provides for seeking formal settlements “in cases in which the Charged Party has shown a deliberate and contumacious unwillingness to abide by the requirements of the Statute.”** Settlement Policy at 1. In practice, formal settlements are not commonly used.

ii. *Form and Content:*

A formal settlement consists of a record to be submitted to the FLRA including the complaint and a stipulation, where the parties agree to the facts of the case and where the Respondent admits to violating the Statute, and the following:

- Identification of the parties;
- Information relating to the filing, service and receipt of the charge and any amended charge, and to the issuance, service and receipt of the complaint and any amended complaint. Copies of all such documents are attached as exhibits and incorporated by reference;

- A statement that the parties are subject to the jurisdiction of the Statute;
- A statement waiving a formal hearing, ALJ decision, and any other proceedings to which parties might be entitled under the Statute or the Regulations;
- Descriptions of all bargaining units involved;
- A listing of the documents and pleadings which constitute the entire record;
- An admission by Respondent to the statutory violation(s);
- An express consent to entry of an FLRA Order without notice, including the exact provisions of such order;
- An express consent to the entry by an appropriate U.S. Court of Appeals of a decree enforcing the FLRA Order without further notice (see § [2423.25\(a\)\(2\)](#));
- A statement that the formal settlement agreement contains the entire agreement of the parties;
- A statement that the settlement is subject to the approval of the FLRA; and
- A provision for the entry of the signature and title of the authorized representative of each party and the date of the signature.

iii. *Procedure:*

After the RD approves the formal settlement, the RD transmits an original and three copies of the agreement and the exhibits directly to the FLRA for approval.

2. TRIAL ATTORNEY'S ROLE IN SETTLEMENTS:

- a. *Tasks Trial Attorney performs in initiating conference calls without ALJ settlement judge:*
- i. Contacts both parties to attempt to schedule a conference call.
 - ii. During these initial phone calls, obtains input as to each party's interests. The Trial Attorney speaks to each party as simultaneously as practicable so that both parties are actively providing input.
 - iii. If the conference call is arranged, may act as a mediator/facilitator because Trial Attorney represents the public interest, not the interest of the Charging Party.
 - iv. Suggests ground rules to govern conference calls. For example, no information that is shared will be used

outside the context of the discussion. Therefore, admissions made during settlement discussion cannot be used adversely to the party making these statements.

b. *ALJ Settlement Judge Program:*

OALJ's assistance under the Settlement Judge Program, is a recourse if Trial Attorney's settlement efforts are unsuccessful. See § [2423.25](#)(d). Any party, including the GC, may seek assistance. The Program is designed to supplement, not to supplant, traditional settlement efforts. Unless one of the other parties has requested assistance, the Trial Attorney first tries to get the parties to settle the case without OALJ involvement.

i. *Criteria--When is assistance requested?*

(1) *Easy issues, get parties talking*

If the issues appear easy to resolve, there is no reason to initiate the settlement judge process. Sometimes, however, involvement of the Settlement Judge will spur the parties to talk with each other sooner.

(2) *Reluctant Respondent*

The Settlement Judge Program addresses the concern of Respondents who may be reluctant to engage in meaningful discussions for fear of "giving away its case" by promising complete confidentiality and inadmissibility of any discussions, unless the parties otherwise agree. If the case goes to trial, it will be assigned to a different Judge who will not discuss the case with the Settlement Judge.

(3) *Difficult parties and issues and/or relationship problems*

The best time to use the Settlement Judge Program is when the Trial Attorney encounters particularly difficult

parties and issues and/or who are experiencing problems with their overall relationship.

(4) *Any other party requests Settlement Judge*

In this situation, the Trial Attorney always participates. However, the Trial Attorney does not participate in “unilateral” discussions, i.e., the Charging Party must agree to participate.

ii. *Procedure--How to utilize the Settlement Judge Program:*

- Trial Attorney prepares, submits, and serves parties with a written request for assistance to the Chief ALJ as soon as possible after issuance of complaint. The request is usually made well in advance of the anticipated date of the pre-hearing disclosure which, unless otherwise agreed to by the parties or ordered by the ALJ, is 14 days in advance of the hearing. See § 2423.23;
- The request includes telephone and fax numbers of all party representatives so that the Settlement Judge can contact them to schedule a conference call;
- The conference call is scheduled at least two to three weeks prior to hearing; and
- During the telephone conference call, the Trial Attorney is a facilitator; however, s/he is always aware that the GC is a party to the litigation.

iii. *Inadmissibility of settlement discussion information at hearing:*

As discussed above, § 2423.25(d)(4) provides that “[n]o evidence regarding statements, conduct, offers of settlement, and concessions of the parties made in proceedings before the settlement official shall be admissible in any proceeding before the [ALJ] or Authority, except by stipulation of the parties.”

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