

Q. OPENING STATEMENTS

OVERVIEW:

Before the trial begins, the parties have the opportunity to make opening statements. The Trial Attorney always makes an opening statement.

OBJECTIVE:

To provide guidance concerning making an effective opening statement.

1. PURPOSE OF OPENING STATEMENT:

To acquaint ALJ and Respondent with nature of GC's case, GC's theory of violation and what GC's proof will be.

2. CHECKLIST FOR AN EFFECTIVE OPENING STATEMENT:

- Be concise, clear and direct;
- Explain key facts and issues;
- Discuss remedy being sought;
- Mention known defenses and how GC will deal with them (e.g., credibility, "covered by");
- Reveal problems that you know will come up;
- Do not overstate case; and
- Do not argue case--opening statement is a short narrative to give ALJ an overview of GC's case.

3. AS THE PUBLIC PROSECUTOR, TRIAL ATTORNEY ALWAYS MAKES OPENING STATEMENT.

 *Be ready to answer ALJ's questions regarding legal theory and cases that support or do not support GC's theory. Always respond to questions posed by the ALJ.*

EXAMPLE OF OPENING STATEMENT

Your Honor, the General Counsel is alleging that the Respondent violated § [7116](#)(a)(1) and (5) of the Statute by repudiating a negotiated grievance settlement agreement. The evidence will show:

On August 17, 1995, the Union filed a grievance under the negotiated grievance procedure for bargaining unit employee Bill Smith, contending that Mr. Smith, a GS-14 officer, was due a temporary promotion to a GS-15 for time Respondent detailed him to serve as Acting Associate Chief of Respondent's RO. This is a common grievance situation and the parties call grievances of this nature: higher-graded duty grievances.

On August 9, 1996, after investigating the grievance, after several discussions with the Union, and after receiving guidance from Respondent's National Office, John Sloan, the Chief, and Tom Jackson, the Associate Chief, of the Respondent's RO, signed a written settlement agreement with the Union in full resolution of Mr. Smith's grievance.

The negotiated settlement agreement provided that Mr. Smith would receive a retroactive temporary promotion to the GS-15 level for the period June 2, 1991 to July 25, 1992, the time when he served on detail as the Acting Associate Chief.

It took the Respondent one year to decide to settle Mr. Smith's grievance. We are not here to revisit that decision. We are not here to argue the merits of the Smith grievance.

In October 1996, Respondent notified the Union that it was rejecting the Smith settlement agreement. Since then, Respondent has failed and refused to comply with the terms of the settlement agreement. The Respondent claims as an

affirmative defense that the agreement is illegal and has alluded to the Back Pay Act. While the Authority has held that an agreement that is violative of law is unenforceable (GSA, 50 FLRA No. 28, 50 FLRA 136), there is nothing in the Smith settlement agreement that is contrary to law including the Back Pay Act. Parties have tried this type of defense before without success. The Authority has rejected an after the fact claim that a grievance settlement providing back pay for the performance of higher-graded duties is void as contrary to the Back Pay Act. (DLA New Cumberland PA, 50 FLRA No. 49, 50 FLRA 282). In that case, the third-step deciding official granted a grievance, claiming backpay for higher-graded duties. After that, higher-level management repudiated the resolution claiming it did not comply with the Back Pay Act as the resolution did not contain a finding that the grievants had suffered an “unjustified or unwarranted personnel action . . . [resulting] in the withdrawal or reduction of all or part of the pay” (quoting the Back Pay Act). On review, the Authority and ALJ rejected this defense finding that the grievance settlement was consistent with the Back Pay Act as the third-step official’s decision to grant the grievance and awarding backpay constituted the required “unjustified action resulting in loss of pay” finding for entitlement to backpay under the Back Pay Act. The same applies to the Smith settlement agreement. Respondent’s officials, by signing the Smith agreement, determined that Smith suffered an unjustified personnel action resulting in a loss of pay (i.e., while on detail he performed higher-graded duties without proper compensation). Accordingly, as in the DLA New Cumberland case, Respondent’s affirmative defense will fail.

Counsel for the General Counsel respectfully requests that your Honor find that the Respondent violated § [7116\(a\)\(1\)](#) and (5) of the Statute by repudiating the August 9 Smith settlement agreement and order Respondent to carry out and abide by the terms of the agreement. Specifically, General Counsel requests the award of backpay and interest to Mr. Smith for the period in which he was temporarily promoted, as set out in the settlement agreement. In addition, the General Counsel requests that Respondent be ordered to post an appropriate Notice to All Employees, signed by Robert King, Respondent’s Director, throughout Respondent’s ROs.

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