

A. CUSTOMER STANDARDS

OVERVIEW: *Setting Customer Service Standards*, E.O. 12862, September 11, 1993, provides that in order to carry out the principles of the National Performance Review, the Federal Government must be customer-driven.

OBJECTIVE: To provide OGC employees with an understanding of OGC's customer standards which implement the Executive Order.

1. THE FLRA CUSTOMER SERVICE STANDARDS:

- C We treat our customers with respect, understand their needs and merit their trust by our professional conduct;
- C Our customers can rely upon our National and Field Offices to interpret the Statute with clarity, consistency, and uniformity;
- C We provide innovative and effective education, training and intervention programs tailored to our customers' needs, enabling them to develop productive labor-management relationships and reduce the cost of conflict;
- C We consistently provide high quality service that timely resolves disputes in the Federal labor-management relations community; and
- C Our customers view us as fair-minded, professional leaders who provide services vital to the development of successful labor-management relationships.

2. THE OGC IMPLEMENTS THE FLRA CUSTOMER SERVICE STANDARDS IN THE FOLLOWING MANNER:

- C We use our expertise in labor law and problem solving to enforce the Statute fairly and impartially and to promote collective bargaining that serves the public interest;
- C We timely resolve disputes by establishing time-processing goals for ULPs, from the date of filing to initial disposition, and for issuance of decisions on appeals of RD decisions not to issue a complaint;
- C We establish OGC case processing policies and quality standards to ensure that customers are treated fairly, and to ensure that the Statute is interpreted with consistency and clarity across the OGC;
- C We give our customers respect by explaining our investigative processes and by explaining the rationale for our decisions;
- C We enable our customers to view us as fair-minded, impartial professionals by training OGC employees in the delivery of effective communications, quality investigations and legally sound decision-making;
- C We enable our customers to develop productive labor-management relationships and resolve disputes by providing innovative and effective education, training intervention programs tailored to our customers' needs;
- C We enable our customers to accomplish effectively the mission of their agencies by providing them with ADR procedures which create savings and enhances labor-management relationships; and
- C We survey our customers to determine the kind of services they want and their level of satisfaction with the OGC's existing services.

B. ETHICS

OVERVIEW: OGC employees, as employees of the Executive Branch of the Federal Government, adhere to the general principles of ethical conduct which are set forth in Executive Order 12674 (April 12, 1989), as modified by Executive Order 12731 (October 17, 1990), *Principles of Ethical Conduct for Government Officers and Employees*. This Chapter does not provide a complete statement of the Rules of Ethics. Questions concerning Rules of Ethics that arise during the investigation of a case are referred to the RD.

OGC employees also adhere to the U.S. Office of Government Ethics Regulations, [Standards of Ethical Conduct for Employees of the Executive Branch](#), 5 C.F.R. Part 2635.

OBJECTIVE: To provide guidance on fostering high ethical standards of conduct for employees and how to strengthen the confidence and understanding of OGC customers that the OGC's mission is accomplished with impartiality and integrity.

1. **TWO OF THE CORE CONCEPTS THAT FORM THE UNDERPINNINGS OF THE 14 GENERAL PRINCIPLES SET FORTH IN E.O. 12674, AS AMENDED BY E.O. 12731:**

- C Employees shall not use public office for private gain; and
- C 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 AND THE OGC'S INVESTIGATIVE METHODS WILL BE EXPLAINED TO THE PARTICIPANTS:**

- C The Charged and Charging Parties are provided an opportunity to provide evidence and fully participate in the investigation;
- C 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;
- C OGC employees provide notice to Charged Party Agency representatives when requested prior to obtaining evidence from the Charged Party's supervisory and managerial officials; and
- C 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.

 **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 give notice to the other party and 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.*

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

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. *Impartiality in Performing Official Duties:*

Employees must take appropriate steps to avoid any appearance of the loss of impartiality in the performance of official duties.

EXAMPLE

During the investigation of a ULP, the Agent can avoid the appearance of the loss of impartiality when soliciting a withdrawal prior to an RD decision on the merits by informing the Charging Party that: (a) the basis for the Agent's withdrawal solicitation reflects only the Agent's view of the evidence; (b) only the RD makes decisions on the merits and has not prejudged the case; and (c) the Charging Party has a right to such further investigation as deemed necessary by the Region to provide the RD with sufficient evidence to render a decision. (See [Part 3, Chapter D](#) concerning Scope of Investigations).

EXAMPLE

After completion of a ULP investigation, the RD renders a decision not to issue a complaint. When the Agent communicates the decision to dismiss the charge to the Charged Party, the Charging Party requests a delay in issuance of the dismissal letter to afford the Charging Party an opportunity to seek resolution. To avoid the appearance of a loss of impartiality, the Agent must advise the Charging Party that the dismissal letter will not be delayed and that the Charged Party will be informed that the RD has decided to dismiss the charge, absent withdrawal.

EXAMPLE

After the completion of a ULP investigation, the RD renders a decision not to issue a complaint. The Agent orally advises the Charging Party representative of the decision to dismiss the charge. The Agent may state that there were varying issues and opinions explored at the Agenda, but that the decision just communicated was the final decision of the RO. The Agent, however, must not personalize the discussion by disclosing the particular positions taken by the participants in the agenda or offering a personal opinion on the correctness of the RD's decision.

c. *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.

EXAMPLE

During settlement discussions of a ULP under investigation, the Agent assigned to the case assists in the development of a settlement agreement which includes the delivery of interest-based problem-solving training for Union and Agency management representatives. During the settlement discussions, the OGC Agent provides an informational brochure regarding a particular private consultant company that provides interest-based bargaining training and facilitation services. The private company is owned by the spouse of the OGC employee. Under the circumstances, such action would constitute a misuse of position for financial gain of the employee's spouse.

d. *Purloined documents and other "improperly" obtained evidence (see [Part 3, Chapter M](#) for a more exhaustive discussion of this topic):*

i. What are purloined documents and other "improperly" obtained evidence?

Purloined documents and other "improperly" obtained evidence are documents obtained by a party or individual under "questionable circumstances" and provided to the Region during the investigation or other evidence such as a tape recording or videotape that may have been surreptitiously recorded without the consent of one or both parties. An Agent never engages in complicity to obtain evidence improperly.

ii. Considerations concerning whether or not to accept and/or use purloined evidence:

In determining whether to accept knowingly the purloined or improperly obtained evidence, the Agent considers whether use of the evidence during the investigation will result in criminal or civil liability to the individual who provided the evidence and whether the use of the evidence will negatively and adversely impact the investigatory process so as to outweigh any potential value from its use. In addition, the Agent considers the materiality of the information the evidence represents and explores other investigatory techniques to document the material fact without use of improperly obtained or purloined evidence. (See [Part 3, Chapter M](#) for additional discussion of improperly obtained evidence).

e. *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\(c\)](#). (See [Part 3, Chapter G](#) concerning Documentary Evidence for additional discussion). 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.

f. *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.

4. ROLE OF OGC EMPLOYEES IN THE DELIVERY OF ALTERNATIVE CASE PROCESSING PROCEDURE:

a. *The information obtained is not evidence:*

The successful delivery of the Alternative Case Processing Procedure may involve the discussion of factual information that is pertinent to the underlying dispute. Factual information obtained during the ADR Procedure, however, does not constitute evidence for the purpose of aiding the RD in reaching a decision on the merits of the ULP. Such information will not become a part of the investigative record if the dispute is not resolved.

b. *The information obtained is **not** disclosed to the investigating Agent and is not used in deciding the ULP:*

The OGC employee facilitating the ADR procedure/s is prohibited from supplying any factual information obtained during the ADR procedures to anyone in the RO involved in investigating and deciding the ULP, and is prohibited from participating in any way in any discussion regarding the merits of the ULP.

See [Part 3, Chapter B](#) for a complete discussion of the Alternative Case Processing Procedure.

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[Part 3, Chapter B](#) concerning Alternative Case Processing Procedure; and

[Part 3, Chapter D](#) concerning Scope of Investigations;

[Part 3, Chapter G](#) concerning Documentary Evidence; and

[Part 3 Chapter M](#) concerning Improperly Obtained or Purloined Evidence.

RESERVED

C. APPEALS PROCESS

OVERVIEW: A Charging Party may obtain a review of an RD's decision not to issue a complaint by filing an appeal with the GC in accordance with § [2423.11\(c\)](#). The Region assigned the case for review is known as the Working Region. The Region that investigated and decided the case is known as the Dismissing Region.

OBJECTIVE: To provide guidance concerning the standards for granting an appeal and the manner in which appeals are processed and decided.

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. See [ATTACHMENT 4H1](#) for the notification of appeal rights language.

b. *A Public Announcement as an enclosure with dismissal letter:*

A Public Announcement explaining the standards for appeal and how they may be established is issued as an attachment to every dismissal letter. See [ATTACHMENT 5C1](#) for a copy of the Public Announcement. The Public Announcement also answers frequently-asked questions about the appeals process.

2. WHERE APPEALS ARE FILED:

All appeals are filed with the OGC HQ and a copy is served on the Dismissing RD. If the appeal is timely filed, the OGC HQ acknowledges receipt to both parties and the Dismissing RD.

If the appeal is untimely, the Dismissing Region is advised not to send the case file to the OGC HQ.

3. The APPEALS CASE FILE:

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

- C The appeal;
- C The letter acknowledging receipt of the appeal;
- C The dismissal letter;
- C A blank Appeals Review form ([ATTACHMENT 5C2](#));
- C An Appeals Case Log ([ATTACHMENT 5C3](#));
- C Any requests and rulings on extensions of time;
- C Any Dismissing Region comments on appeal; and
- C An Oracle Data Entry Form.

 A completed Appeals Review Form, Appeals Case Log, and any comments regarding the appeal, either by the Working or Dismissing Region, are not subject to disclosure under the Freedom of Information Act as they are exempted from disclosure under Exemption 5. See 5 U.S.C. § 552(b)(5). A case file analysis comes within the deliberative process privilege which has the purpose of “prevent[ing] injury to the quality of agency decisions.” *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 151 (1975).

4. THE DISMISSING REGION’S RESPONSIBILITIES:

a. *Transmittal of investigative file:*

Upon the receipt of a copy of the appeal, the Dismissing Region sends the case file within one day, by two-day mail. No transmittal document of any kind is necessary.

b. *Dismissing Region’s comments on appeal:*

There is no requirement that a Dismissing Region comment on an appeal and, as a matter of course, the Regions should not comment. The Regions are not barred, however, from submitting comments whenever the Region deems it appropriate, i.e., the 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.

c. *The process for withdrawing the dismissal letter:*

Dismissing Regions may withdraw the dismissal letter upon review of the appeal if the dismissing RD determines 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 OGC HQ and entry of the action into the Oracle Casetracking Database (Oracle). The Dismissing Region should issue a letter to all parties, with a copy to HQ, withdrawing the dismissal and stating that as a result of the withdrawal of the dismissal the case has been returned to the Region for further processing.

The letter rescinding the dismissal letter notifies the parties of the issue/s that form the basis for the rescission of the dismissal letter and the process by which the parties may address this issue. For example, as to the process, the letter should state that the parties will be contacted by the Region for further investigation, or that the parties should contact the Region within a specified period of time if they wish to present additional evidence or a statement of position on the stated issue/s.

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.

5. 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 and development of a draft decision. The final decision on disposition of the appeals case is made by the HQ. An appeals case is never assigned to the RO that investigated the ULP that is on appeal. Appeals cases are distributed equally among each Working RO. The HQ transmits the appeals file and the complete investigative file to the Working Region for review.

b. *Assignment of cases to OGC HQ:*

An Appeals case that involves any one of the following concerns is assigned to the HQ for review:

- C Timeliness of the appeal;
- C Dismissals issued pursuant to an Advice Memorandum from the OGC HQ;
- C Serious allegations that the investigation was not properly conducted;
- C Unilateral settlements;
- C Partial dismissals;
- C Major policy issues which may require an advice memorandum;
- C Motions for Reconsideration of a previously-issued appeal determination;
- C Complex factual or legal issues with voluminous files;
- C Congressional inquiries; or
- C Cases which, on their face, present no merit.

c. *The selection of RO employees to process appeals:*

To achieve fully the objectives of the Appeals policy, each Region seeks to distribute appeals cases to as many RO employees as possible. The distribution of cases among employees shall seek to meet the following interests:

- C A fair distribution of appeals among employees;
- C No limitation on the flexibility and potential of teams that may be developed in the Regions;
- C Timely and quality processing of appeals;
- C Utilization of RO expertise, experience, and perspective;
- C Exposure of RO Agents to the case processing techniques and work product of the other Regions;
- C Allowing employees an opportunity to perform a function and to develop skills that vary in some respects from their current functions and skills; and
- C Create a workload that is manageable and complements the processing of open cases.

C+P The following basic criteria are applied in the assignment of appeals cases, consistent with the way other case assignments are made in the Region:

- C Appeals may be assigned to any professional who has sufficient experience investigating and processing ULP cases, and familiarity with OGC policies;
- C Appeals will not normally be assigned to managers;
- C Working ROs need not assign appeals in an identical manner; and
- C RDs may maintain lists of appeal case assignments in order to ensure parity in assignments and to provide a record of each employee's workload.

6. CONDUCTING AN APPEALS REVIEW:

a. *Review is not de novo:*

An appeals review is not a **de novo** review of the case. 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 (#7, 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, Chapters C and D](#) and the ULPCHM and section #12 below concerning quality standards applicable to appeals case processing.
- iii. A party may not submit new evidence on appeal unless it is established that the evidence either did not exist during the investigation or that the Charging Party could not have reasonably known about the existence of the evidence.
- iv. The Appeals Review Form ([ATTACHMENT 5C2](#)), which contains questions to facilitate the legal and factual review, and the Appeals Case Log ([ATTACHMENT 5C3](#)), are completed and approved by the Working RD in each case. All recommended appeals decisions are the recommendations of the Working RD and not the OGC employee who conducted the review. The recommended decision is transmitted to the HQ for review and final decision. All final decisions are the decisions of the GC.

- v. When necessary, a telephone Agenda is conducted to discuss the Working Region's recommended decision.
- vi. To ensure the integrity of the process, no discussion takes place about an appeals case between the Dismissing and Working Regions.

7. GROUNDS FOR GRANTING AN APPEAL OF AN RD'S DECISION SET FORTH AT § [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:*

To establish this ground, the appeal:

- C States the material facts which were not addressed in the investigation;
- C States what evidence supports those facts, e.g., certain documents or testimony from a specific witness; and
- C Explains how those facts would result in the finding of a ULP.

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

To establish this ground, the appeal:

- C States the material fact which is clearly erroneous;
- C States what evidence establishes that the material fact is clearly erroneous; and
- C Explains how a different factual finding would result in the finding of an ULP.

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

To establish this ground, the appeal:

- C States what rule of law relied upon by the RD is incorrect;
- C States why that rule of law is incorrect;
- C States what the correct rule of law should be; and
- C Explains how the application of the correct rule of law would result in the finding of a ULP.

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

To establish this ground, the appeal:

- C States the legal issue for which there is no rule of law under Authority precedent; and
- C States the rule of law that should be presented to the Authority.

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

To establish this ground, the appeal:

- C Describes the improper manner in which the investigation was conducted;
- C Explains why this manner of investigation was improper; and
- C Explains how this manner of investigation resulted in prejudicial error.

8. 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.

9. PREPARING THE DRAFT APPEAL DETERMINATION LETTER:

- b. *A recommended decision to deny the appeal:*

- i. Standard form letter:

A standard form determination letter is used in those cases where it is determined that the grounds for granting an appeal have not been met. The use of the form letter indicates the adoption of the analysis and decision set forth in the dismissal letter. See [ATTACHMENT 5C4](#) for a Model Letter Denying the Appeal.

- ii. Modified form denial letter:

In selected cases, where it would be instructive to the Charging Party, the Working RD has the discretion to modify the form appeal letter 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. No other modifications may be made to the denial letter. Modified form denial letters sent to the OGC HQ for issuance will normally be adopted and issued without editing. See [ATTACHMENT 5C5](#) for a Sample Modified Letter Denying the Appeal and the following examples:

EXAMPLE

The case was dismissed pursuant to § 7116(d) of the Statute because of an earlier-filed grievance on the same issue that arose at the second step of the grievance processing. The appeal argued that the issues presented in the grievance and the ULP were different and, therefore, the dismissal was in error. The addition of the following language to the standard form letter is appropriate:

It is noted that, at the second step of the Union's grievance filed on July 21, 1997, the Union raised the issue of the failure to provide the grievant with due process by not attempting to resolve the matter through the agreed upon alternate dispute resolution agreement. This is the same issue raised by the ULP charge filed on August 27, 1997. Since the same issue was raised in the grievance which was filed before the charge, the Regional Director properly concluded that this charge was barred by § 7116(d) of the Statute. See Olam, 51 FLRA No. 69, 51 FLRA 797, 801-02 (1996).

EXAMPLE

In the appeal, the Charging Party maintains that the RD did not consider a material fact because the Agent did not interview all of the witnesses supplied by the Charging Party.

The addition of the following language to the standard form letter is appropriate:

"Contrary to the allegations you raise on appeal, the investigation was conducted consistent with the Office of the General Counsel's Quality and Scope of Investigations policies."

- 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 a draft decision letter. The Working Region also prepares a draft Case File Analysis, which is an internal management document that discusses the basis for the decision to remand the case and the investigatory process and/or legal analysis that the Dismissing Region follows upon receipt of the remand. See [ATTACHMENT 5C6](#) for a Sample Letter Granting an Appeal.

10. CASE FILE ANALYSIS:

- a. *Remand cases:*

A Case File Analysis ([ATTACHMENT 5C7](#)) is issued in every remand case. The Case File Analysis format addresses the following:

- C The Charge

A brief statement of the charge, including the parties and the issue/s presented as set forth in the dismissal letter.

- C The RD Rationale for Dismissal

Set forth the legal conclusion/s which forms the basis of the dismissal letter, without editing or restatement.

- C Appeal Determination

Set forth the recommended appeal determination, including the following:

- C The specific ground for granting an appeal that has been established if the case is being remanded;

- C The factual question or legal issue which could not be decided based on the investigation and the element of the ULP violation which concerned that factual determination;
- C The legal precedent which was not considered in the decision-making process;
- C The particular investigatory or procedural matter which raises issues of consistency with the Quality and Scope Policies with a specific reference to the applicable provision of the ULP Case Handling Manual; and/or
- C The specific action the Dismissing RD should take upon remand of the case.

 *All recommended Case File Analysis memoranda are prepared in a positive, instructional manner.*

 *A Case File Analysis is not subject to disclosure under the Freedom of Information Act as it is exempted from disclosure under Exemption 5. See 5 U.S.C. § 552(b)(5). A case file analysis comes within the deliberative process privilege which has the purpose of “prevent[ing] injury to the quality of agency decisions.” NLRB v. Sears Roebuck & Co., 421 U.S. 132, 151 (1975).*

- b. *Issuance of a case file analysis without remand:*

Although the legal decision to dismiss may be correct and supported by the record, a Case File Analysis may also be issued in those cases where it is determined that the processing of the case was not in accordance

with the Quality Standards for Investigations and Scope of Investigations criteria set forth at [Part 3, Chapters C and D](#). The draft Case File Analysis in this instance follows the same format as [ATTACHMENT 5C7](#) and includes a specific reference to the OGC requirement that was not met.

11. THE COMPLETION OF AN APPEALS REVIEW:

- a. *Forward case file to OGC HQ:*

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 form denial letter. However, if the recommendation is a modified denial letter, a grant of appeal remanding the case, or a case file analysis without remand, the recommendation (Draft appeal determination letter and draft case file analysis) are submitted to OGC HQ via e-mail with a printed copy of the draft documents 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 OGC HQ. When necessary for a full understanding of the Working Region’s recommendation and a full understanding of the issues presented in the case, a teleconference agenda with the Working Region (RD, RA and employee or team) and the GC and/or Deputy GC may be conducted.

- c. *Oral communication with the Dismissing and Working Regions:*

The Assistant GC for Appeals will discuss all appeal recommendations and determinations that involve a remand or issuance of a Case File Analysis without remand with the Working RD and the Dismissing RD prior to issuance of the appeal determination. No appeal decision involving a remand or Case File Analysis without remand will issue until both the Working and Dismissing

RDs have been notified. The Assistant GC also will inform Working RDs when a recommendation to issue a case file analysis or to remand a case has not been adopted.

d. *Advice memorandum:*

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

e. *Service of an appeal determination:*

The parties are served with the appeal determination letter by regular mail. Service by e-mail is **not** permitted. Copies of appeal determination letters that involve a Case File Analysis are distributed to each RO.

12. QUALITY STANDARDS FOR APPEALS CASE PROCESSING:

a. *The Quality Standards applicable to the Working Region are:*

- C Timely processing of appeals in accordance with time targets;
- C Timely and accurate Oracle casetracking entries;
- C Proper completion of the Appeals Case Log;
- C Proper completion of the Appeals Review form; and
- C Recommended disposition of appeals and case file analyses are developed in accordance with the Grounds for granting an appeal, Quality Standards, Scope of Investigation criteria, Authority precedent and previously issued OGC advice and guidance.

b. *The Quality Standards applicable to OGC HQ are:*

- C Timely processing of appeals in accordance with time targets;
- C Timely and accurate Oracle casetracking entries;
- C Proper completion of the Appeals Case Log;
- C Issuance of case file analyses in accordance with the Grounds for granting an appeal, Quality Standards, Scope of Investigation criteria, Authority precedent and previously issued OGC advice and guidance;
- C Denial and grant of appeals in accordance with the Grounds for granting an appeal, Quality Standards, Scope of Investigation criteria, Authority precedent and previously issued OGC advice and guidance; and
- C Communication with dismissing RD when appeals are granted and/or case file review analyses are issued; and with Working RDs when recommendations are not adopted and when case file analyses are issued.

Q [Part 3, Chapter C](#) concerning Quality Standards for Investigations; and
[Part 3, Chapter D](#) concerning Scope of Investigations.

RESERVED

D. PARITY

OVERVIEW: For a variety of reasons, the caseload in ROs may fluctuate over time. The OGC implements the concept of parity, whereby attempts are made to assist ROs with caseload imbalances.

OBJECTIVE: To provide a policy and procedure for the OGC and RDs to discuss, on a quarterly basis, regional caseload concerns and to make the necessary adjustments to certain regional caseloads, as needed.

1. THE GOALS OF PARITY:

- C To respond quickly to temporary fluctuations in a RO's caseload;
- C To provide timely and efficient case-processing services to the FLRA's customers; and
- C To maintain caseload and staffing balance among the ROs.

2. HOW PARITY IS IMPLEMENTED:

The OGC monitors RO caseload on a quarterly basis and reassigns cases among ROs to meet temporary caseload imbalances. At regularly-scheduled management meetings, OGC Headquarters staff and RDs discuss current case and staffing data. A consensus is reached on which RO/s are in the best position to assist another Region in processing its current caseload.

RESERVED

E. TRANSFERRING CASES BETWEEN REGIONS

OVERVIEW: Other than for parity reasons, cases may be transferred between ROs.

OBJECTIVE: To describe the situations that may result in the transferring of cases between ROs and the process for doing so.

1. THE GOALS OF TRANSFER POLICY:

- C To provide consistent case processing decisions to the FLRA's customers across RO jurisdictional boundaries.
- C To ensure that case issues are processed consistently among ROs when the same or substantially similar issues are presented nationally.
- C To assist another RO in the development of that RO's staff members.
- C To maximize the use of OGC resources by not duplicating effort in two or more ROs.

2. HOW A TRANSFER OF CASES BETWEEN ROs IS IMPLEMENTED:

- a. *How potential transfer cases are identified:*
 - C Other ROs are notified of related cases based upon either an RD or an OGC HQ determination.
 - C RDs contact each other to discuss possible transfer of cases that meet the above reasons for transfer; and
 - C The OGC may be contacted by any RD to assist in the discussion/facilitation of the possible transfer of cases between the Regions.

- b. *How to process the transfer of cases between Regions:*
- C Notify the parties;
- C Keep the same ULP number initially assigned;
- C Transfer the case as expeditiously as possible according to the circumstances of the case; and
- C The RDs coordinate this process.

See [ATTACHMENT 2A2](#) for a Sample Order Transferring Case to Another Region.

F. PERIODIC GEOGRAPHIC JURISDICTION REVIEW

OVERVIEW: The geographic jurisdictions of the seven Regions are reviewed periodically to ensure the work is apportioned evenly and that resources are used effectively to accomplish the mission of the OGC.

OBJECTIVE: To describe how geographic jurisdiction review decisions are made and the basis upon which such determinations are made.

1. GOALS OF GEOGRAPHIC JURISDICTION REVIEW:

- C To conduct a comprehensive, empirical analysis of RO caseloads on a periodic basis to correct systemic caseload imbalances which constitute long-term changes in case filings;
- C To provide timely and efficient customer service; and
- C To sustain current RO structure and staffing parity among ROs. See [Part 5, Chapter D](#) concerning the Parity.
- C To maximize the resources of the OGC.

2. HOW REVIEW IS IMPLEMENTED:

- C Review is undertaken by OGC Headquarters, with RD input, every two years;
- C Review is based on four complete years of fiscal data;
- C Current representational case data is considered; and
- C Travel by RO staff is considered in terms of cost and ability of RO staff to provide efficient service to the FLRA's customers.

3. CHANGES IN REGIONAL JURISDICTIONS:

Any changes that result after review of regional geographic jurisdiction are published in the Federal Register and are incorporated in the Code of Federal Regulations at Appendix A to 5 C.F.R. Chapter XIV.

Q [Part 5, Chapter D](#) concerning Parity.

G. COMPLIANCE WITH AUTHORITY ULP ORDERS

OVERVIEW: Regions are responsible for attempting to obtain prompt, complete and voluntary compliance with the terms of an Authority Order. Should compliance become an issue, the RD is in contact with the OGC HQ and efforts to obtain compliance and/or enforcement of the Authority's Order are coordinated with the Authority pursuant to § 2423.41(e).

OBJECTIVE: To provide guidance concerning the process of obtaining compliance with an Authority ULP Decision and Order, which includes regional responsibilities for monitoring compliance, what to do if noncompliance becomes an issue and a recommendation to the Authority to make application for enforcement in a U.S. Court of Appeals.

1. EFFECTUATING COMPLIANCE:

a. *RO responsibilities:*

ROs are responsible for all routine actions to effect compliance with Authority remedial orders in ULP cases. The RO is responsible for determining the steps to be taken by the Respondent to comply with an Authority Decision and Order, which include:

- C Analyzing the steps necessary to effectuate compliance;
- C Initiating, monitoring and reporting the status of compliance efforts;
- C Investigating alleged failures to comply;
- C Making appropriate recommendations for further formal action, where the respondent allegedly fails to comply; and
- C Participating, where appropriate, in the institution and maintenance of any formal action required.

b. *Initial contact with respondent:*

The Region's initial contact with the respondent regarding compliance is made following the RO'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 5G1](#) for a Sample Letter. 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.

 *The RD cannot change the Authority's Order in any way.*

c. *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 such a stay.

2. 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.

c. *Notice checks:*

Routine checks of posted Notices are made by RO personnel who are in the vicinity of an activity where a Notice has been posted. If it appears that the posting is inadequate or inappropriate, the matter is brought to the attention of the RD.

3. AFFIRMATIVE PROVISIONS OTHER THAN BACKPAY:

The RO is completely familiar with the remedial order and all of the facts of the case which affect the remedy. The RO takes the necessary steps to ensure that there is compliance with the affirmative provisions of the Order such as:

a. *Reinstatement Order:*

Ordinarily, a reinstatement Order provides for full reinstatement to the employee's former position without prejudice to seniority or any other rights, entitlements and privileges (such as pay rate, seniority, leave category, etc.) that the employee would have received had there been no ULP. If the employee would normally have been promoted or transferred during the period of separation from employment, the restored position should be that to which the employee would have been promoted or transferred had the ULP not occurred. Thus, the Region determines the employee's employment history. If an employee cannot be returned to his/her former position, e.g., the job has been abolished, the Order usually will require that an offer of reinstatement be made to a substantially equivalent position.

b. *Rescission Order:*

Where the respondent has been ordered to rescind a particular document or policy, the Region ensures that such rescission, in fact, has been properly effected.

c. *Order to negotiate or to undertake other affirmative action:*

If the respondent has been ordered to negotiate over a matter, to resume negotiating a collective bargaining agreement, to comply with an

arbitration award, or to take some other affirmative action, the Region ensures that such an Order has been satisfied.

4. INVESTIGATING 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.

5. CLOSING A CASE OR REFERRING A CASE TO THE AUTHORITY:

a. *No allegations of noncompliance:*

The RO is also responsible for issuing the letter closing the case after compliance has been effected. A case is closed and a letter is issued after the RO has determined that:

- C The Charged Party has complied with the posting requirements contained in the Authority's Order;
- C The Charged Party has complied with other affirmative action required by the Authority's Order; and
- C There are no allegations that the Charged Party has not complied with the Authority's Order.

Copies of such Closing Letters are served on all of the parties. See [ATTACHMENT 5G2](#) for a Sample Letter closing a case. The Authority's Director of Case Control is not to be served.

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

- i. The RD closes the case on compliance **without** further submission or referral to the OGC or the Authority:

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 complied with, 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 are not served on the Authority's Director of Case Control.

ii. This Letter and FIR are forwarded to OGC:

The internal FIR (or Agenda Minute) prepared in the RO is attached to the copy of the closing letter forwarded to the OGC. The internal FIR is not to be sent to the parties or to the Authority's Director of Case Control.

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

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 OGC through a report on compliance.

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

- C The substance of the Authority's Order;
- C The allegation of noncompliance and its initiator;
- C The findings of the compliance investigation, noting factual disputes, if any;
- C The existence of any dispute as to what affirmative actions are required under the Authority's Order to constitute compliance; and
- C The RD's conclusions and recommendations concerning the above matters.

The Region sends the compliance case file along with the Report on Compliance.

i. Referral to the Authority:

The OGC refers matters of alleged noncompliance to the Authority with an appropriate recommendation and serves a copy of such referral on the RO.

ii Notification to the parties of the referral of the noncompliance issue to the Authority:

When the Region subsequently receives the OGC memorandum to the Authority referring the matter of alleged noncompliance to the Authority, with an appropriate recommendation, the Region then notifies the parties in writing that the matter has been referred to the Authority for appropriate action. The OGC memorandum to the Authority is not served on the parties.

6. REGIONAL ACTION AFTER 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, OGC or the Authority may receive communications 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 Authority:

The Authority communicates with the OGC concerning compliance matters that are raised to the Authority in the first instance. In turn, OGC Headquarters communicates with the RD.

ii. Receipt by RO:

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

iii. Receipt by OGC:

The OGC promptly notifies the Authority that the matter is being referred to the RD for further investigation. The OGC will communicate with the RO as appropriate concerning the need for a follow-up investigation and report.

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

When a party communicates, in **writing**, a willingness to comply **in full** with a final order of the Authority after the OGC has referred the matter to the Authority with a recommendation for enforcement, each office (the OGC, RO and Authority), provides notification. Once the RO has notified the party to proceed with compliance and is advised in turn that compliance has been effectuated, the RO conducts a follow-up compliance investigation, as required, and prepares a report for the OGC.

c. *A communication of a party's willingness to take specific actions in an attempt to comply after referral of an enforcement recommendation:*

After the OGC has referred a recommendation for enforcement to the Authority, a party may communicate a willingness to take specific actions in an attempt to comply with the Authority's Order.

i. Receipt by the Authority:

The Authority communicates with the OGC concerning compliance matters that are raised to the Authority in the first instance. In turn, OGC Headquarters communicates with the RD. Once the RO has notified the party to proceed with compliance and is advised in turn that compliance has been effectuated, the RO conducts a follow-up compliance investigation, as required,

and prepares a report for the OGC. Where additional factual information is required before it can be determined that the offer to comply is not clearly inconsistent with the terms of the Authority's Order, the information request is forwarded to the OGC where it is then forwarded to the appropriate Region.

- ii. The receipt by the RO and 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 OGC. The OGC then notifies the Authority that the RO has received such communication and will conduct a follow-up investigation to ascertain whether compliance has been effectuated.

- iii. The receipt by the RO and 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.

7. ENFORCEMENT PROCEEDINGS:

- a. *Petition for review of an Authority Order:*

Compliance efforts continue even though a 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 #5, 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 OGC 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 OGC which sets forth the efforts undertaken to achieve compliance and which includes a recommendation with respect to the institution of contempt proceedings.

8. 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:*

- 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:
 - C Telephonically advise the OGC that such petition has been filed;
 - C Follow up in writing or e-mail which will be forwarded to the Authority; and
 - C Note the case on the Region's Overage Compliance Case Report.

The RD does not need to submit a report on compliance or compliance case file to the OGC HQ. The OGC HQ 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 RO that it will not comply but has not filed a petition for review within the 60-day time period under § 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 RO 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 OGC and follows up in writing. No report on compliance or the compliance case file need be submitted to the OGC. 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 OGC sends the Region a copy of the Authority's cross-application for enforcement.

H. PROCESSING ULP CHARGES ALLEGING NONCOMPLIANCE WITH AN INFORMAL SETTLEMENT AGREEMENT

OVERVIEW: After the RD has approved an informal settlement agreement, a Charging Party may file a ULP alleging noncompliance with an informal settlement agreement.

OBJECTIVE: To provide guidance concerning how to process a charge alleging noncompliance with an informal settlement agreement.

1. 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.

2. NO NEW INDEPENDENT ULP:

The failure to comply with an Authority remedial order is not a ULP. American Federation of Government Employees, Local 987, 53 FLRA No. 45, 53 FLRA 364, 369 (1997).

a. *Request Charging Party to Withdraw Charge:*

Upon finding that the charge, in fact, alleges noncompliance, the Region requests the Charging Party to withdraw the charge so that the Region can investigate the noncompliance allegation.

b. *Dismiss the Charge if Charging Party Refuses to Withdraw:*

If the Charging Party refuses to withdraw a charge alleging noncompliance, the RD dismisses the charge on the basis that it "fails to

state an unfair labor practice." 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.

3. AN INVESTIGATION OF ALLEGED NONCOMPLIANCE:

Upon withdrawal of the charge, or upon denial of an appeal, the RO conducts the compliance investigation.

4. ALLEGATION OF NONCOMPLIANCE NOT SUBSTANTIATED:

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's determination of compliance or noncompliance with the previously-approved settlement agreement is not subject to appeal.

5. ALLEGATION OF NONCOMPLIANCE SUBSTANTIATED:

In this instance, the RD revokes approval of the settlement agreement and complaint issues (or reissues). 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.

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

OVERVIEW: Regions do not become involved in negotiability disputes between an Agency and a Union unless and until the Authority issues a Decision and Order on negotiability issues and the Union files a ULP charge alleging noncompliance with the Decision and Order.

OBJECTIVE: To provide guidance how the Regions process a ULP charge alleging noncompliance with an Authority decision and order on negotiability issues, including the requirements for, and reporting of, an investigation.

1. AN RD'S AUTHORITY:

a. *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.

b. *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 OGC, which refers the matter to the Authority.

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

- c. *Report any change with respect to voluntary compliance after submission of report:*

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

2. PROCESSING ULP CHARGES ALLEGING NONCOMPLIANCE WITH AUTHORITY NEGOTIABILITY ORDERS:

- a. *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.

- b. *Request the Charging Party to withdraw charge:*

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 requests the Charging Party to withdraw the charge so that it can investigate the noncompliance allegation. Upon withdrawal of the charge, the RD's determination of compliance or noncompliance with the Authority's negotiability Order is not subject to the appeal procedures, but rather is transmitted internally to the Authority through the OGC as discussed above.

- c. *Dismiss the charge if the Charging Party refuses to withdraw:*

If the Charging Party refuses to withdraw a charge alleging only noncompliance with an Authority negotiability order, the RD dismisses the charge on the basis that it "fails to state an unfair labor practice." 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 only noncompliance, i.e., the merits of any noncompliance issue are **not**

reviewed on appeal. Upon denial of such an appeal, the Region investigates the noncompliance issue and make its compliance determination.

RESERVED

J. BACKPAY

OVERVIEW: Section [7118\(a\)\(7\)\(C\)](#) of the Statute empowers the Authority to award backpay to an employee as a remedy for a ULP. When the Authority determines that an employee is entitled to be made whole or receive backpay, the Region computes the amount of backpay owed pursuant to applicable OPM regulations (5 C.F.R. Part 550, subpart H §§ 550.801-550.807 implementing the Back Pay Act of 1966, 5 U.S.C. § 5596) and GAO rulings.

OBJECTIVE: To provide guidance concerning the computation of backpay and formal backpay proceedings pursuant to § 2423.42.

1. BACKPAY PERIOD:

Unless otherwise specifically set forth in the Authority Order, the backpay period is usually computed from the effective 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.

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. Department of the Navy, Naval Training Center, Orlando, Florida and International Union of Operating Engineers, Local 673, 53 FLRA No. 15, 53 FLRA 103, 109 (1997) (citation omitted); U. S. Department of Defense, Department of Defense Dependents Schools and Federal Education Association, 54 FLRA No. 79, 54 FLRA 773 (1998).

Interest is "computed at the rate or rates in effect under section 6621(a)(1) of the Internal Revenue Code of 1986." U.S. Department of the Interior, Bureau of Indian Affairs, Wapato Irrigation Project and National Federation of Federal Employees, Local 341, 55 FLRA No. 25, 55 FLRA 157 (1999) (quoting 5 U.S.C. § 5596(b)(2)(B)(ii))

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 change. 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.

 *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. 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.

ii. Some time periods are **excluded** from 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.

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.

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.

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.

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.

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.

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. *Period of active military service:*

An employee subject to a backpay remedy may not receive backpay for the period during the separation that the employee was on active military duty. While on active duty the employee could not accept an obligation to render concurrent civilian service and thus was unavailable for the performance of the civilian position.

h. *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.

i. *Past Union dues:*

Past Union dues which had been checked-off prior to separation are not paid out of a backpay award unless the employee specifically requests such deduction.

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 which cannot be resolved without a formal proceeding, the RD issues 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