

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.

THE FLRA CUSTOMER SERVICE STANDARDS:

- We treat our customers with respect, understand their needs and merit their trust by our professional conduct;
- Our customers can rely upon our National and Field Offices to interpret the Statute with clarity, consistency, and uniformity;
- 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;
- We consistently provide high quality service that timely resolves disputes in the Federal labor-management relations community; and
- Our customers view us as fair-minded, professional leaders who provide services vital to the development of successful labor-management relationships.

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 [E.O. 12674](#) (April 12, 1989), as modified by [E.O. 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 MODIFIED 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 AND THE OGC'S INVESTIGATIVE METHODS WILL BE EXPLAINED TO THE PARTICIPANTS:

- 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; 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 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.

NOTE: *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. *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](#)(d). (See Part 3, Chapter E concerning Evidence, in General, 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.

e. Subpoenas issued to OGC employees:

[5 C.F.R. § 2417.201](#) states:

No employee of the Authority, the General Counsel or the Panel may produce official records and information or provide any testimony relating to official information in response to a demand or request without the prior, written approval of the Chairman of the FLRA or the Chairman's designee.

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 4G1](#) for the notification of appeal rights language.

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 5C1](#) for a copy of this document. The document 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, and requests the case file from the Region.

If the appeal is untimely, the case file is not requested and the Charging Party is advised that the appeal has been 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 ([ATTACHMENT 5C2](#));

- An Appeals Case Log ([ATTACHMENT 5C3](#));
- Any requests and rulings on extensions of time;
- Any Dismissing Region comments on appeal; and
- Case Tracking 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 work days;
- Time to locate file, review and prepare regional comment on appeal – 2 work days;
- Time to send the case file to OGC HQ via 2-Day FEDEX – 2 work days;
- Upon receipt of case file in OGC HQ, time to assign case for review – 2 work days;
- Time to send the case file to working region via 2-day FEDEX – 2 work days;
- Upon receipt of case file by working region, time to complete review – 14 work days;
- Time to send case file and recommendation to OGC HQ via 2-Day FEDEX – 2 work days; 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. RDs should address any unusual contentions, e.g., that the investigation was prejudicial or biased (excluding the frequent contention that not all witnesses were interviewed). Such comments contribute information which is not contained in the case file and which adds 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. If the RD

is unavailable during the 2-day time period within which to provide a comment on appeal, the file will be sent to HQ on time and a comment can be sent when the RD becomes available.

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 OGC and entry of the action into the Casetracking Database. The Dismissing Region should issue a letter to all parties, with a copy to the OGC, 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 on behalf of 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 are 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. 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 (#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 Chapters B and C.
- iii. A party may not submit new evidence on appeal.
- iv. When necessary, a telephone Agenda is conducted to discuss the Working Region's recommended decision.
- 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. 2423.11(e): GROUNDS FOR GRANTING AN APPEAL OF AN RD's DECISION SET FORTH AT §

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 LETTER:

a. *A recommended decision to deny the appeal:*

i. Standard Denial Letter:

A standard Denial Letter is used in those cases where it is determined that the grounds for granting an appeal have not been met. The standard letter will reference the contentions raised on appeal. See [ATTACHMENT 5C4](#) for a Model Letter Denying the Appeal.

ii. Modified Denial Letter:

In selected cases, where it would be instructive to the Charging Party, the Letter 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 5C5](#) for a Sample Modified Letter 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. Where appropriate, the RD will be contacted before the e-mail is sent and given a chance to explain the error or quality issue.

b. *A recommended decision to grant the appeal and remand to the RO for further investigation and analysis or issuance of complaint:*

If one of the appeals standards has been established, the Working Region prepares a thorough e-mail and/or provides analysis on the Appeals Review Form stating the basis for recommending a remand. See [ATTACHMENT 5C6](#) for a Sample Letter Granting an Appeal.

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 appeal decision letter. However, if the recommendation is a modified letter, a letter 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 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, further clarification may be obtained from the Working Region.

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

The AGC for Appeals will discuss with the Dismissing RD all appeal determinations that involve a remand or quality e-mail before issuance of the appeal determination. The AGC for Appeals will provide feedback to the Working Region RD on all appeal recommendations that involve either a recommended remand or quality e-mail or where a remand was not recommended but the decision was to remand the case.

d. *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.

e. *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.

f. *Action upon remand:*

Upon receipt of the case file by the Dismissing Region, the RO should make the case a high priority. At the end of each month after the case has been remanded, the RD sends a status report to the AGC for Appeals.

D. CASE MANAGEMENT

OVERVIEW: For a variety of reasons, the caseload in ROs may fluctuate over time. The goal of case management is for the OGC to assist ROs in handling caseload imbalances which helps the OGC to process cases expeditiously and uniformly throughout the 7 regions.

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

1. THE GOALS OF CASE MANAGEMENT:

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

2. HOW CASE MANAGEMENT IS IMPLEMENTED:

The OGC monitors RO caseload and reassigns cases among ROs to meet temporary caseload imbalances. RDs may meet on their own and decide to transfer cases based on specific workload issues. In the latter instance a communication is sent to the Deputy GC listing the cases that will be transferred. In addition, at regularly-scheduled management meetings, OGC HQ staff and RDs discuss current case and staffing data. A consensus is reached on which ROs are in the best position to assist another Region in processing its current caseload.

3. HOW TO PROCESS THE TRANSFER OF CASES BETWEEN REGIONS:

- Notify the parties;
- Keep the same ULP number initially assigned;
- Transfer the case as expeditiously as possible according to the circumstances of the case; and
- The RDs coordinate this process.

E. 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 making 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:

- Analyzing the steps necessary to effectuate compliance;
- Initiating, monitoring and reporting the status of compliance efforts;
- 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.

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 5E1](#) 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.

NOTE: *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 or it may require electronic posting or circulation. 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, or it may require electronic posting or circulation. 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:

- The Charged Party has complied with the posting requirements contained in the Authority's Order;
- The Charged Party has complied with other affirmative action required by the Authority's Order; and
- 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 5E2](#) 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:

- The substance of the Authority's Order;
- The allegation of noncompliance and its initiator;
- The findings of the compliance investigation, noting factual disputes, if any;
- The existence of any dispute as to what affirmative actions are required under the Authority's Order to constitute compliance; and
- 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 with respect to the institution of enforcement proceedings 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:
 - Telephonically advise the OGC that such petition has been filed;
 - Follow up in writing or e-mail which will be forwarded to the Authority; and
 - 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.

F. COMPLIANCE WITH INFORMAL SETTLEMENT AGREEMENTS

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. RD's RESPONSIBILITIES ARE:

- a. *RDs are responsible for all routine actions to effect compliance with bilateral and unilateral settlement agreements. 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.

2. RD's ROUTINE COURSE OF ACTION:

- a. *Send a 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.*

- b. *Where there have been no allegations on 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.*
- c. *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.*

- d. *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.*

3. ALLEGATION OF NONCOMPLIANCE WITH INFORMAL SETTLEMENT AGREEMENT:

- a. *Upon an allegation of noncompliance the RD conducts a compliance investigation.*
- b. *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.*
- c. *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.*

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

- a. *Scope of investigation:*

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.

- b. *No new independent ULP:*

The failure to comply with an Authority remedial order is not a ULP. *AFGE, Local 987*, [53 FLRA 364](#), 369 (1997).

- i. *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.

- ii. *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.

c. *An investigation of alleged noncompliance:*

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

d. *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.

e. *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.

G. 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 be 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.

H. 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 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 Sch. 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 the Internal Revenue Code of 1986.” *U.S. Dep’t of the Interior, Bureau of Indian Affairs, Wapato Irrigation Project and NFFE, Local 341*, [55 FLRA 152](#) (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.

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 is 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.