

INTRODUCTION

The Unfair Labor Practice Casehandling Manual (ULP Manual) provides information on preventing, resolving, and investigating unfair labor practice charges under the Federal Service Labor-Management Relations Statute (the Statute). The ULP Manual has been prepared by the Federal Labor Relations Authority, Office of the General Counsel (OGC), under section 7104(f) of the Statute. The Manual provides a resource tool for Regional Office employees when processing ULP charges under the Statute. The Manual also provides parties and individuals to a ULP charge with a sound understanding of the ULP investigatory process and regulatory requirements. This helps Regional Office employees to timely and effectively process ULP charges.

The Manual is fully hyperlinked to internal and external sources and covers each aspect of processing ULP--from filing to disposition. The Manual references relevant case law and provides for: (1) uniformity and best practices among the Regional Offices; (2) criteria and principles that govern discretion and judgment; and (3) Model and Sample Forms and Letters. The Manual is not intended to be a condensed version of all substantive law, nor is it intended to be a substitute for knowledge of the law. The Manual is not a ruling or directive, nor is it binding upon the FLRA General Counsel, FLRA Administrative Law Judges or the FLRA Members. Although the Regional Staff refers to the Manual when processing ULP cases, the Manual does not encompass all situations that may be encountered in processing ULP charges. Thus, responsible, professional judgment and experience are required in applying and using these guidelines.

A. PRE-CHARGE ASSISTANCE

OVERVIEW: Before a party files a charge, ROs are frequently contacted by unions, activities, or other persons to discuss various labor-management matters. The Agent is prepared to give guidance and information in accordance with the specific needs expressed.

OBJECTIVE: To provide the Agent with a list of matters that s/he is prepared to cover if pre-charge assistance is required: (1) general pre-filing technical assistance; (2) drafting the charge; (3) collecting and organizing supporting evidence; and (4) legal impediments precluding the filing of a charge.

1. GENERAL PRE-FILING ASSISTANCE:

- Upon request, an Agent may provide a person/s the following types of assistance:
- Explain generally the rights and obligations under the Statute;
- Explain ULP procedures under the Regulations;
- The FLRA's Internet Home Page Web address--www.flra.gov--and the types of information found there;
- Furnish appropriate forms and reasonable technical assistance regarding completion of forms, including drafting language describing the basis of a charge; and
- Public written materials.

NOTE: *The Agent clarifies, whether orally, in writing, or by e-mail, that s/he is providing technical assistance only; that s/he cannot advise a party on what course of action to pursue; and that should a charge be filed, the charge will be investigated and a decision will be made by the RD on the evidence adduced during the investigation.*

2. DRAFTING THE CHARGE:

The charge includes a clear and concise statement of the facts alleged to constitute an unfair labor practice, including the date and place of occurrence of the particular acts and the names and titles of Agency or Union representatives involved.

3. COLLECTING AND ORGANIZING SUPPORTING EVIDENCE:

The Agent explains to the person the types of information that are necessary to gather to support a charge:

- Witnesses - with a brief synopsis as to what each witness will testify to, and a telephone number for each witness; and
- Documents, e.g., collective bargaining agreement;

See [ATTACHMENT 1A1](#) for a Sample Letter describing what a person needs to do before filing a charge.

4. LEGAL IMPEDIMENTS PRECLUDING THE FILING OF A CHARGE:

a. *Contractual notification requirements:*

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

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

b. *Grievance bar:*

- i. Second sentence of § [7116\(d\)](#) governs whether ULP charge is barred by a previously-filed grievance: and
- ii. ULP charge is barred by an earlier-filed grievance if “the unfair labor practice charge arose from the same set of factual circumstances as the grievance and the theory advanced in support of the ULP charge and the grievance are substantially similar.” *Olam S.W. Air Defense Sector (TAC), Point Arena Air Force Station, Point Arena, Cal.*, [51 FLRA 797](#), 801-02 (1996) (citation omitted).

NOTE: *The charge form requires that the Charging Party state whether the matter raised in the charge has been raised previously in a grievance procedure. See § [2423.4\(a\)\(i\)](#).*

c. *Charge is untimely:*

Agent advises if action may be untimely under § [7118\(a\)\(4\)](#) of the Statute. See *United States Dep't of the Treasury, IRS, Wash., D.C.*, [61 FLRA 146](#), 150 (2005) where the Authority stated that the “six-month filing period for ULP charges starts at the time the alleged unfair labor practice . . . occurred.” Therefore, with respect to arbitration awards, the filing period cannot begin at least until there has been a failure to comply with an award.” *Id.*; *EEOC, Wash., D.C.*, [53 FLRA 487](#) (1997) ([EEOC](#)); *Air Force Flight Test Ctr., Edwards Air Force Base, Cal.*, [55 FLRA 116](#), 120 (1999) (charge was timely filed where although changes in program were made more than six months before the charge was filed, charge alleges incident upon which charge was based occurred in the month preceding the charge, *i.e.*, meeting that occurred in month preceding charge modified

conditions of employment from those set forth in memorandum which issued more than six months prior to the filing of the charge). See *also* Part 2, Chapter A concerning Filing a Charge.

NOTE: *If any of the legal impediments described above applies, the Agent informs the person. But, the Agent advises person that s/he has the right to file a charge and a determination will be made by the RD.*

5. E-MAIL AND PRE-CHARGE ASSISTANCE:

Agents may reply by e-mail to inquiries received by e-mail. All Agents check their e-mail for messages with the same frequency that they check their telephone messages.

6. CONFIRMATION AND DOCUMENTATION OF TECHNICAL ASSISTANCE:

a. *Confirmation:*

Under no circumstances is it permissible for an Agent to allow a technical assistance call to be taped. An Agent who is advised that a conversation is actually being taped informs the caller that taping is against OGC policy and then terminates the conversation. If asked, the Agent may inform the caller that if the caller makes a specific inquiry in writing, the Region will respond in writing.

b. *Documentation:*

Calls approximating at least five minutes duration are documented on the Technical Assistance form. See [ATTACHMENT 1A2](#). Calls of shorter duration are not documented.

B. ALTERNATIVE DISPUTE RESOLUTION SERVICES

OVERVIEW: The provision of ADR services supports the FLRA's Agency-wide initiative to assist labor and management parties to evaluate the success of their current labor-management relationship and develop the type of labor-management relationship that best meets their interests. The OGC furthers its mission to provide leadership in promoting stable and productive labor-management relationships in the Federal sector by providing ADR programs both before and after a charge has been filed. See § [2423.1](#)(a) and (b). Section [2423.2](#) codifies the OGC's ADR services.

OBJECTIVE: To list the types of ADR services the OGC provides to parties and to describe how they promote stable and productive labor-management relationships in the Federal sector.

1. WHAT ADR SERVICES ARE PROVIDED:

Pursuant to § [2423.2](#)(b), the parties may request the following services:

- Facilitation - Assisting the parties in improving their labor-management relationship;
- Intervention - Using an interest-based technique, intervening when parties are experiencing or expect significant ULP disputes;
- Training - Training union and management representatives on their rights and responsibilities under the Statute, and how to avoid litigation over those rights; and
- Education - Working with the parties to recognize the benefits of, and establish processes for, avoiding disputes without the need for litigation.

2. BENEFITS OF ADR SERVICES:

- Ensure understanding of, and compliance with, the Statute;
- Assist the parties in developing the type of labor-management relationship that best suits them;
- Enable Federal agencies and their employees to deliver the highest quality services; and
- Enhance the quality of work life and the well-being of employees and managers.

3. ADR SERVICES PROVIDE LEADERSHIP AND PROMOTE STABLE AND PRODUCTIVE LABOR-MANAGEMENT RELATIONSHIPS:

- a. Description of ADR Programs:

- Training for union and management representatives on the rights and duties of employees, unions, and management under the Statute to ensure that the Statute's purposes are understood and supported and to assist the parties to improve their labor-management relationships within the requirements of the Statute;
- Assistance provided to union and management representatives which supports their efforts to improve and strengthen their working relationships.
- Services provided to union and management representatives who are experiencing or expect significant ULP activity due to relationship difficulties or external influences, and agree to use OGC ADR methods to try to resolve their conflicts and disputes.
- Training for union and management representatives on interest-based negotiation and problem-solving techniques for contract negotiations; and
- Training for union and management representatives to assist them in designing ADR approaches to meet their needs.

NOTE: [ATTACHMENT 1B1](#) contains a more exhaustive description of the above services.

b. Examples of situations when ADR assistance is appropriate:

- Newly certified unit - statutory training for union officers and agency managers;
- Numerous ULP charges are filed at one activity - intervention.

c. Examples of symptoms that indicate assistance is appropriate:

- Adversarial nature of negotiations; contract negotiations have been ongoing for too long a period of time; actual or potential ULP charges; and
- General interactions between union and management representatives are poor, e.g., parties do not talk to each other; no joint meetings are held; allegations are personalized; extraneous matters are raised; actual or potential ULP charges.

e. Criteria for providing ADR services:

The OGC concentrates its limited resources where they have the potential to achieve the greatest results. Based on this objective, RDs consider specific factors in determining whether ADR programs and services are undertaken. Not all of the following factors are relevant to each situation:

- **Commitment of the parties to improve their labor-management relationship:**

The OGC expends its limited resources only when both parties are committed to improve their relationship. Parties must be willing to be represented by officials who are committed to the process undertaken and empowered with the authority to commit their principals to specific actions intended to improve their relationship.

- **Availability of OGC employees to meet the parties' needs:**

A program is not undertaken unless there are employees available to assign to the specific program. RDs only assign those employees who are experienced in the type of ADR program undertaken and who are available at a time agreeable to both parties. In the event that the Region is unable to provide a requested program, the RD will advise OGC HQ and it will be determined if training resources may be secured elsewhere.

- **Balancing resource needs among OGC programs:**

The OGC continues to administer effectively its limited resources to achieve the maximum results in fulfilling its statutory mission. RDs thus take into consideration the pending ULP and representation caseload, the geographic location and timing of the program, the Agency's agreement to pay the travel and per diem of the RO employees involved and the size of the group which is involved in the ADR program.

- **Organizational level of the Agency and Union:**

- **Character of labor-management relationships:**

- **The OGC's commitment to, and the parties' need for, continued assistance:**

- **Nature and extent of prior assistance:**

- **Acceptability of OGC assistance by the Agency and Union:**

The weight of this factor varies depending upon the type of ADR program under consideration. For example, the degree of acceptability should be greater in a facilitation to improve a relationship, as compared to an intervention to resolve a pending ULP or representation dispute.

- **OGC involvement furthers dispute resolution:**

All ADR programs further the OGC's mission to provide leadership and promote stable and productive labor-management relationships in the Federal sector. The Regions do not undertake an ADR program which is not intended to further the mission.

f. **Additional criteria if request is for pre-charge ADR assistance pursuant to § [2423.1\(a\)](#):**

- Whether or not dispute involves a ULP;
- How close is it to the 6-month time limit for filing a charge;

- Parties are informed that the 6-month time period for filing charge is not tolled; and
- Magnitude of the violation.

Among other things, the Region considers whether there is potential for the situation to get worse in a short period of time.

4. HOW ADR SERVICES ARE INITIATED:

ADR services may be initiated by the OGC or by a request or agreement of the parties. Depending upon the type of ADR service requested, it may be appropriate to require that the parties jointly agree that the Region provide such services. In any event, the Region provides such services consistent with OGC criteria.

For example, parties may jointly request skills training or assistance in enhancing their labor-management relationship, or the OGC may suggest to the parties that they may benefit from such training or assistance. Irrespective of how these ADR services are initiated, the OGC creates innovative programs that are responsive to the varying needs of the parties.

5. DECIDING WHETHER TO PROVIDE AN ADR SERVICE:

Upon receipt of a joint request or a request from a Union or Agency for an ADR service, the Region explains the process for delivering an ADR program and obtains sufficient information from the parties to enable the RD to:

- Diagnose the needs of the parties;
- Apply the criteria listed above; and
- Determine which, if any, ADR program will be offered.

A. FILING A CHARGE

OVERVIEW: No investigatory action is taken unless and until a charge is filed by any activity, Agency, labor organization or other person which alleges a violation under § [7116](#) of the Statute seeking vindication of the rights accorded under the Statute.

OBJECTIVE: To provide guidance concerning the who, what, when, where and how, of filing a ULP charge.

1. WHO MAY FILE A CHARGE:

Section [2423.3](#) states:

“Any person may charge an activity, agency or labor organization with having engaged in, or engaging in, any unfair labor practice prohibited under [5 U.S.C. 7116](#).”

“Person” is defined as “an individual, labor organization, or agency.” [Section 2421.2](#) (incorporating the definition at § [7103\(a\)\(1\)](#) of the Statute).

2. WHERE TO FILE A CHARGE:

- a. Place of occurrence: [Section 2423.6\(a\)](#):
 - i. A charge is filed with the [RD for the region](#) in which the alleged ULP has occurred or is occurring. See [ATTACHMENT 2A1](#) for a geographic jurisdictional list for ROs.
 - ii. If the alleged ULP occurred or is occurring in more than one region, a charge may be filed with the RD in either region. *Id.*
- b. Filing in incorrect region:
 - i. Charge is date stamped and is deemed filed and is then sent by fax to the proper RO with jurisdiction over matter for docketing; and
 - ii. Parties are made aware that incorrect filing delays an investigation.

3. WHEN TO FILE A CHARGE:

- a. General requirement:

Under § [7118\(a\)\(4\)\(A\)](#) of the Statute, a charge normally may not be acted upon if the alleged ULP occurred more than six months before the filing of the charge.
- b. Exceptions:
 - i. Failure to perform a duty owed:

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

ii. Concealment:

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

iii. Equitable tolling:

Factors to weigh in determining whether the six-month period is equitably tolled:

- Lack of actual notice of the filing requirements;
- Lack of constructive knowledge of the filing requirements;
- Diligence in pursuing one's rights;
- Absence of prejudice to the Charged Party; and
- A Charging Party's reasonableness in remaining ignorant of the notice requirements.

See *EEOC, 53 FLRA at 498-99* (1997) (filing action in wrong forum does not justify invoking equitable tolling of statute of limitations).

4. WHAT TO FILE:

- a. Completion of the Charge Form: § [2423.4](#):
- i. Charges are filed on either a CA or CO standardized form (FLRA Forms 22 and 23) (Revised 1998) or on a form that is substantially similar;
 - ii. Charging Party provides a clear statement of the ULP allegation which includes the specific sections of the Statute allegedly violated;
 - iii. Certificate of service section on CO or CA form indicating method of service and name, title, location and date of service is completed;
 - iv. Number of copies: One copy of charge is filed; and

- v. The Charging Party should not reference or incorporate attached documents on the charge form. However, Charging Parties are encouraged to submit evidence at the same time the charge is filed.

NOTE: RO staff is available to give technical advice concerning completion of the Charge form. See Part 1, Chapter A concerning Pre-Charge Assistance.

5. HOW TO FILE A CHARGE:

Pursuant to § [2423.6\(c\)](#), the Charging Party files a charge by mail, delivery service, in person, or by fax with the appropriate RO. Filings by e-mail are not permitted. Filings are required to be made during normal business hours. The following additional rules apply to service by fax:

- Charges are transmitted to a RO fax machine that is dedicated to receiving incoming documents;
- A charge must not exceed a 10-page limitation if filing by fax (See § [2429.24\(e\)](#));
- Charging Party assumes the risk if fax machine malfunctions;
- Original signature of Charging Party is not required but a signature is required (can be a copy);
- Charging Party need not submit follow-up hard copy of charge; and
- RO fax machine will record time and date of receipt of the charge.

NOTE: Each Region's dedicated fax machine for incoming faxes reflects the correct time and date at all times.

6. CHARGES MAY BE TRANSFERRED AMONG THE REGIONS:

See Part 2, Chapter D and Part 5, Chapter D concerning Reviewing the Charge and Case Management and [ATTACHMENT 2A2](#) for a Sample Order Transferring Case.

B. DOCKETING THE CHARGE

OVERVIEW: Docketing a charge is the first official action a RO takes when a charge is received.

OBJECTIVE: To describe what actions take place at the time a RO docket a charge, which include entering the case into case tracking and sending the parties the opening letter.

1. DOCKETING CHARGES RECEIVED BY FAX OR MAIL:

- a. Upon receipt, a charge is reviewed and is not docketed if it is deficient in one or more of the following ways:
 - There is no signature;
 - The Charging Party or Charged Party is not identified;
 - Some basis for the charge is not stated; and
 - The Charge form is not substantially completed (the matters in each block are not addressed in some way).

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

NOTE: A charge filed on the wrong form is not deficient and is docketed as to what it should have been. For example, a charge filed on a CO form against an Agency is docketed as if it had been filed on a CA form.

- b. Assigning a case number:

Once it has been determined to docket the charge, the Region assigns a case number which consists of two letters indicating the Region (AT, BN, CH, DA, DE, SF, or WA) followed by a two-letter designation which indicates the type of case (CA or CO), followed by a six-digit number (the first two digits indicate the last two digits of the fiscal year in which the charge was filed and the other four digits indicate the sequential number of the case filed in the Region during the fiscal year).

EXAMPLE

“DE-CA-10-0030” is the case number given to the first charge against an Agency filed in FY 10 in the Denver Region.

- c. Docketing similar charges:
 - i. A grouping of charges filed on the same day or within days that raise identical issues received by a Region is counted as one case (i.e., are assigned the same case number, for case tracking purposes) **where the charges are filed by the same Charging Party**. Where multiple charges are filed by different Charging Parties, they should be docketed as separate cases.
 - ii. In the unlikely event that the dispositive actions may be different, the RD contacts OGC Headquarters to discuss the best way to capture the action; and
 - iii. Regions explain to parties that the assignment of a number in no way affects their rights.

2. CLARIFICATION OF CHARGE IS REQUIRED:

- a. Amended charge necessary before investigation begins:

A charge may not be deficient, but nevertheless may need to be clarified in order to begin the investigation, e.g., the underlying basis of the charge is not clear. In this circumstance, it is docketed and a letter is sent to the Charging Party’s representative requesting that the charge be clarified by filing an amended charge within 10 days of the date of the letter. The Charging Party is also advised that the charge may be dismissed if the amended charge is not received by the RO within the required 10 days. See Part 3, Chapter O, concerning Duty of a Charging Party, for additional discussion on dismissals for lack of cooperation.

The Region does not send a copy of the charge to the Charged Party, nor is an opening letter sent (see #5, below), until it receives the Charging Party’s clarification in an amended charge.

Once the charge has been sufficiently clarified, the charge and the amended charge are served on the Charged Party.

- b. Clarification during the course of the investigation:

If, during the investigation, it is necessary to clarify the scope of the charge, a confirming letter, affidavit, or amended charge may be used. Since the Charged Party was put on notice of the basis of the charge when it was filed, there is no need to copy the Charged Party.

3. DOCKETING CHARGES HANDED TO AN AGENT IN THE FIELD:

After determining that there are no deficiencies that would preclude docketing, the Agent contacts the Region for a number and affixes the number and date of filing on the charge.

4. ENTRY INTO ORACLE CASE TRACKING:

At the time a case number is assigned, the case is entered into the Oracle case tracking system. See OGC Administrative Manual for details concerning case tracking.

5. THE OPENING LETTER--FIRST WRITTEN CONTACT WITH THE PARTIES AFTER A CHARGE IS DOCKETED:

One standard opening letter ([ATTACHMENT 2B2](#)) is sent to the parties that includes:

- Acknowledgment of receipt of charge;
- Point of RO contact (name, phone and e-mail--might not be the assigned Agent);
- Case number;
- Designation of representative form;
- Copy of charge;
- Attachment that describes ULP process with reference to ADR processes (optional) (See [ATTACHMENT 2B3](#));
- Notification that a RO Agent will be contacting the parties soon and is prepared to discuss their legal position, relevant contract provisions, facts, documents and witnesses, as applicable; and
- If Charged Party representative does not understand the underlying basis of the charge, s/he should either contact the RO point of contact or assigned Agent.
- All opening letters issue as soon possible after a charge is filed, preferably within 5 days after a charge is filed, but in any event no later than 10 days after a charge is filed, absent unusual circumstances.

C. THE CASE FILE

OVERVIEW: The case file is created after a case is docketed and assigned to an Agent for investigation. It contains a compendium of all communication with the parties, relevant evidence and other information discovered, disclosed, or submitted during the investigation as well as information pertaining to post-investigation regional decision-making.

OBJECTIVE: To provide guidance concerning the contents of a case file, including the documents contained in the case file and the organization of the case file.

1. CREATION OF CASE FILE:

Contents of Case File:

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

2. TYPES OF DOCUMENTS OR MATERIALS IN THE CASE FILE:

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

a. *A case log:*

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

- Dates of all contacts;
- Names of each person contacted;

- Either a brief description of each case-processing or substantive matter discussed or a reference to a separate file memorandum; and
- Notations regarding any case processing decisions made by the RO during the processing and reviewing of the case. For example, determinations concerning the appropriateness of injunctive relief and decisions concerning the type and scope of the investigation pursuant to the Part 3 chapters concerning the Quality Standards and Scope of ULP Investigations.
- Evidence or background information bearing on the merits of the case does **not** appear in the case log but is documented elsewhere in the file.

b. *Affidavits or confirming letters:*

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

c. *Final Investigation Report:*

The case file must contain a written pre-decisional report and recommendation by the investigating Agent, unless specifically waived by the RD, usually on technical grounds.

d. *Rationale for Decision:*

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

e. *Notes to the file explaining case processing decisions:*

The Agent ensures that there are notes to the file to explain the reasons a case has been processed in a certain manner. Examples of such notations are: whether an agent solicited withdrawal prior to a RD determination on the merits and the results of that solicitation; whether injunctive relief was considered; how the file was reviewed to ensure that the quality standards were met; and whether the scope of the investigation was limited.

f. *Memos to the file:*

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

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

g. *Legal research:*

Legal research performed in the case that is not readily available, such as legislative history, is placed in the case file.

h. *Reference to applicable documents in other case files:*

Occasionally, evidence that is relied upon in considering the disposition of a case is filed in a companion case. The case log must contain a notation to this effect that references the Case No. of the file where the evidence may be found. Where the evidence is not voluminous, e.g., affidavits, copies should be made and placed in each case file.

Note: *In addition to the minimum requirements listed above, the ROs may develop and include in their case files any other internal documents which they consider material to the disposition of the case and consistent with the Chapter on Quality Standards for Investigations in [Part 3](#).*

3. ORGANIZATION OF THE CASE FILE:

a. *Benefits of uniform case file organization:*

- Easy retrieval, identification and use of all file documents;
- Facilitates review, both in the RO and at OGC Headquarters, of cases appealed; and
- Facilitates process of transferring cases between ROs.

b. *Contents of each side of case file:*

- **SIDE 1: OFFICIAL DOCUMENTS/CORRESPONDENCE**
 - Charge/Statement of Service
 - Amended Charge/Statement of Service
 - Designation of Representative
 - Opening Letter to Parties

- Party/Designated Representative Information Sheet
- Withdrawal Request Approval Form
- Dismissal letter/revocation of dismissal letter
- Complaint and Notice of Hearing, Memorandum In Support of Issuance of Complaint
- Request for Settlement Judge
- Respondent's Answer
- Settlement Agreement, Notice To Employee/Members, Related Correspondence
- Formal Papers
- Prehearing disclosure filings, documents and Orders; Order and notice of time for prehearing conference call
- Subpoena requests, Subpoenas
- ALJ/FLRA decision of the case
- Compliance correspondence/documents
- Joint letters to Charging and Charged Parties
- Appeal, appeal Order

Note: *ROs differentiate between documents supplied with the charge as supporting evidence and documents attached and incorporated by reference in the body of the charge. If a document is specifically referenced in the charge and therefore may be a part of the formal papers prepared for litigation, it remains with the charge in the file and, if desired, copied for placement in the Charging Party Evidence section (side 5) of the case file. All other documents are placed in the Charging Party Evidence section of the case file.*

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

• **SIDE 2: INTER/INTRA-REGIONAL/OGC DOCUMENTS**

- Case log
- Initial Charged Party contact form
- Intra-office memoranda/memos to the file
- Inter-office routing/assignment forms
- FIR, agenda minute, managerial memoranda in reply
- Oracle data entry form
- RO quality checklists, forms
- Research
- Advice request, advice memo
- Comment on appeal
- Draft complaints

- **SIDE 3: CHARGED PARTY EVIDENCE, INFORMATION, AND CORRESPONDENCE**
 - Charged Party Statement of Position in response to charge
 - All documentary evidence supplied by the Charged Party and Charged Party witnesses
 - Agent correspondence to/from Charged Party/Charged Party witnesses/representative

- **SIDE 4: CHARGED PARTY WITNESS STATEMENTS**
 - Affidavits, confirming letters, interview notes of Charged Party witnesses
 - Completed Questionnaires supplied by Charged Party witnesses
 - Affidavits from individuals whose testimony supports the Charged Party

- 2. **SIDE 5: CHARGING PARTY EVIDENCE, INFORMATION, AND CORRESPONDENCE**
 - Agent correspondence to/from Charging Party/Charging Party witnesses/representative
 - Relevant portions of collective bargaining agreement, if applicable
 - Memoranda of Agreement/Understanding, if applicable
 - All documentary evidence supplied by the Charging Party and Charging Party witnesses

- **SIDE 6: CHARGING PARTY WITNESS STATEMENTS**
 - Affidavits, confirming letters, interview notes of Charging Party witnesses
 - Completed Questionnaires supplied by Charging Party witnesses
 - Affidavits from individuals whose testimony supports the Charging Party

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

D. REVIEWING THE CHARGE

OVERVIEW: Soon after a charge is docketed and either before or after it is assigned to an Agent, it is reviewed to determine whether the Charging Party addressed certain matters.

OBJECTIVE: To provide guidance concerning what types of general matters are reviewed after a charge is docketed.

1. GENERAL MATTERS THAT ARE REVIEWED IN EVERY CASE AFTER A CHARGE IS DOCKETED:

- Jurisdiction;
- Sufficiency of the charge;
- Whether an ADR program is a possibility (See Part 1, Chapter B which describes ADR programs);
- Whether there are related cases--representation, negotiability, FSIP, DOL, MSPB, or other ULPs (See Part 2, Chapters I, J, K, L for a discussion of related case filings). If there are related charges in another Region, fax a copy and/or e-mail a notice of such to the appropriate region. Fax charge to all Regions if it is nationwide in nature. The Regions jointly coordinate (transfer cases, as necessary) where there are related charges or charges that are nationwide in nature. In coordinating the cases, the Regions need to ensure that the legal analysis applied in each Region is consistent (See [ATTACHMENT 2D1](#) for a Sample e-mail notice). See Part 4, Chapter C concerning matters submitted to the OGC for Advice;
- Whether the case involves novel issues to be submitted for advice;
- Whether the case fits injunction criteria (See Part 2, Chapter E describing such criteria);
- Whether proper charged party/ies are indicated;
- Whether the contract contains notification requirement (See Part 1, Chapter A for a discussion of contractual notification requirements);
- Certificate of service box is completed. Failure to sign does not affect the filing of the charge if, in fact, service was made. The RD serves a copy on all parties but is not responsible for such service. The Charging Party is still required to provide service; and
- Whether the stated allegation/s need clarification and, if so, whether clarification is accomplished by confirming letter or by amended charge with notice to

charged party. See Part 2, Chapter H on Amending the Charge for a discussion on how this is accomplished.

2. TRANSFER OF CASE TO ANOTHER REGION:

A transfer may take place if any of the following circumstances applies:

- There is another case/s that is/are related;
- Regional resources require consideration of transfer; or
- Parity concept (See Part 5, Chapter D for a discussion of parity) needs to be applied.

See also Part 2, Chapter A on Filing a Charge.

3. CONSIDERATION OF ADR PROGRAM:

When initially reviewing the charge, the Agent considers whether these factors, among others, are present in determining whether to recommend to the RD at this stage of the investigation that ADR services be offered:

- The charge/s does not involve differing legal interpretations of the Statute;
- The charge/s, in essence, involves disputes between a particular Union representative and a particular Agency official that do not directly involve institutional rights;
- The charge/s involves ongoing disputes over section [7131\(d\)](#) official time and/or other contract benefits;
- The parties seldom meet and communicate in writing or by e-mail;
- The charge/s evidences a basic lack of understanding of the parties' respective rights and obligations under the Statute; and
- The charge/s involves a basic disagreement over a matter, such as the level of bargaining in a nationwide unit, which impacts the labor-management relationship on a consistent basis.

E. INJUNCTIONS

OVERVIEW: Section [7123\(d\)](#) of the Statute, and § [2423.10\(b\)](#) and (c) provide for the GC, with Authority approval, to seek appropriate temporary relief from an appropriate United States Federal District Court when specific conditions have been met.

OBJECTIVE: To provide guidance concerning the identification and processing of cases where appropriate temporary relief is warranted. The Chapter provides an overview of the statutory criteria as well as criteria and principles for ROs to apply in implementing the statutory criteria. The Chapter provides the ROs with a consistent approach in investigating and making recommendations in ULP cases where interim temporary relief is necessary to effectuate the purposes and policies of the Statute.

1. **RO REVIEWS ALL CHARGES TO DETERMINE WHETHER TO SEEK TEMPORARY RELIEF:**

The Regions review all ULP charges to determine whether the purposes of the Statute will be frustrated if the status quo is not maintained while the ULP complaint is being processed. In those extraordinary circumstances where the status quo must be maintained, the GC requests Authority permission to seek appropriate temporary relief. The Regions fully inform all parties of the various steps involved in processing injunction cases and the parties are afforded the opportunity to resolve the dispute in accordance with [Part 4, Chapter G](#) concerning Settlements.

2. **SECTION [7123\(d\)](#) OF THE STATUTE:**

Section [7123\(d\)](#) of the Statute sets forth the criteria for a district court of the United States to grant appropriate temporary relief (including restraining orders) in ULP cases. A court must conclude that granting such relief is "just and proper" before temporary relief can be granted. In addition, a court cannot grant any temporary relief "if it would interfere with the ability of the Agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed."

3. **CASE LAW:**

Cases where the GC successfully has petitioned district courts for temporary relief:

- A strike by a labor organization (*United States v. PATCO, Inc.*, 524 F. Supp. 160 (D.D.C. 1981));
- A unilateral reorganization resulting in the involuntary transfer and relocation of bargaining unit employees from one state to another (*Smith v. FAA*, Civil Action No. C83-1538 C (D. Wash. Nov. 23, 1983));
- The refusal to recognize and enter into collective bargaining negotiations with a newly certified exclusive representative (*Reuben v. FDIC*, 760 F. Supp. 934 (D.D.C. 1991); and

- The unilateral elimination of on-base housing by a military activity where other suitable housing for civilian employees was not available (*Petrucci v. United States S. Command, Dep't of Defense, Republic of Panama and United States Army S., Republic of Panama*, Civil Action No. 94-3786 (E.D. La. Nov. 29, 1994) (unpub.).)

4. FACTORS THAT DETERMINE WHETHER § [7123\(d\)](#) INJUNCTIVE CRITERIA ARE MET:

- **SERIOUSNESS OF THE VIOLATION**

Is the violation serious?

Not all violations of the Statute are as serious as others. For example, a failure to accord recognition to a union after a valid representation election is more serious than a failure to afford the union an opportunity to be represented at a routine formal discussion. Moreover, there are degrees of harm within the same category of ULPs. For example, a decision to move the office of one employee to a different floor at the same facility is quite different from a decision to close an entire facility and transfer 100 employees to another state. The RDs consider the seriousness of the violation in deciding whether to recommend that appropriate temporary relief be sought.

- **LEGAL PRECEDENT**

Is the law clear regarding the violation alleged?

Courts consider the likelihood of success on the merits in deciding whether to grant injunctive relief. Accordingly, the RDs take into account whether a case involves a violation supported by well-established precedent or if it poses a novel legal theory.

- **DISRUPTION TO THE ESSENTIAL FUNCTIONS OF THE AGENCY RESPONDENT**

Would the granting of an injunction interfere with the ability of an Agency to fulfill an essential function?

The Statute prohibits a court from granting injunctive relief if an injunction would prevent an Agency from carrying out its essential functions. The RDs, therefore, consider whether temporary relief would interfere with those essential functions.

- **TIMELINESS OF THE DISPUTE**

Is the request timely in relationship to the underlying events?

Courts often are concerned with the current status of a case before the Authority and may be reluctant to grant injunctive relief if the facts establish that the matter has not been processed expeditiously. Therefore, consideration is given to the timeliness of a determination to recommend temporary relief in relationship to when the violation took place as well as the time it has taken to investigate and process the case.

- **THE REMEDY**

Will the failure to maintain the status quo frustrate the remedial purposes of the Statute?

Absent appropriate temporary relief, certain violations cannot be remedied effectively after they have been implemented. For example, implementation of a major reorganization that results in the relocation of employees, forced resignations and retirements, or other types of dislocations ordinarily cannot be remedied effectively after implementation. Unless appropriate temporary relief is granted, it is difficult, if not impossible, to restore the status quo through the ULP process because of the passage of time. In other instances where whole and status quo remedies are available. The RDs consider whether the failure to maintain the status quo frustrates the remedial purposes of the Statute in deciding whether to recommend that appropriate temporary relief be sought.

- **HARM TO THE STATUTORY RIGHT TO ORGANIZE AND BE REPRESENTED**

Does the violation undermine the fundamental right to organize and/or engage in collective bargaining?

Certain violations of the Statute undermine the bargaining relationship. For example, a refusal to recognize and deal with the employees' exclusive representative after certification denies employees the benefits of representation until the matter is ultimately resolved. Similarly, targeting union officials for a reduction-in-force renders a union unable to carry out its statutory duties as the exclusive representative, undermines the status of the exclusive representative and chills bargaining unit employees in exercising their protected statutory rights. The RDs consider whether the violation undermines the fundamental right to organize and/or engage in collective bargaining when deciding whether to recommend that appropriate temporary relief be sought.

5. IMPLEMENTATION:

The following process is followed by the Regions to determine if a charge is a candidate for § [7123\(d\)](#) relief:

a. *Review all charges:*

Each Region initially reviews all ULP charges and evidence which supports the charge to consider whether the issues and the supporting evidence are of the type which indicate that the GC should consider requesting Authority permission to seek appropriate temporary relief.

In addition, a Charging Party may also request when filing a ULP charge, or during the processing of a charge, that the GC consider requesting Authority permission to seek appropriate temporary relief. See § [2423.10\(b\)](#). If requesting such relief, the Charging Party specifically must make its request in the body of the charge or in writing during the course of the investigation. All charges are reviewed by the Regions for the potential for

seeking appropriate temporary relief in the same manner and under the same standards and time frames whether or not a Charging Party specifically requests appropriate temporary relief.

b. *Initial inquiry:*

In those cases where the charges and supporting evidence are of the type which indicate that the GC should consider requesting Authority permission to seek appropriate temporary relief, the Regions conduct an initial inquiry. All charges are reviewed by the Regions and receive similar treatment whether or not a Charging Party requests such relief. A Charging Party's request for appropriate temporary relief does not require the Region to conduct an initial inquiry into whether the charge warrants expedited treatment. Initial inquiries are made when the charge and supporting evidence are of the type which indicates that the GC should consider requesting Authority permission to seek appropriate temporary relief. There is no appeal to the GC or the Authority from an RD's determination not to conduct an initial inquiry.

The Regions document the file on those cases where the Region determines to conduct an initial inquiry. The purpose of the initial inquiry is to determine whether an expedited investigation is warranted to determine the merits of the charge and whether the Region recommends to the GC that temporary relief is appropriate under the standards in [§ 7123\(d\)](#) of the Statute. The purpose and scope of the initial inquiry is clearly discussed by the Region with the Charging Party. The Regions decide whether to expedite an investigation by examining the evidence obtained during the initial inquiry to determine whether there appears to be probable cause that a ULP has occurred, or is continuing to occur, and by applying the six criteria set forth in #4, above, to determine whether it appears that appropriate temporary relief should be sought. All discussions with the parties concerning the initial inquiry are documented in the file.

In deciding whether to expedite investigation of a charge, the Regions require probative evidence to support the allegations of the ULP, as well as the reasons why the Charging Party contends that appropriate temporary relief is just and proper. The Regions have discretion to determine the extent of the initial inquiry and the evidence and other documentation required for the Region to determine whether an expedited investigation is warranted.

6. EXPEDITED INVESTIGATION:

a. *Notification of regional determination on expedited investigation:*

If the Region determines that the initial inquiry does not support an expedited investigation, the file is documented and the case is processed in the same manner as other cases that did not involve the potential for appropriate temporary relief. If a Charging Party had specifically requested appropriate temporary relief and the Region decides not to expedite the investigation, the Region: (a) notifies the Charging Party that the investigation will not be expedited; (b) explains the basis of that decision and that there is no appeal of this determination; (c) informs the Charging Party that the charge will be fully investigated as soon as practicable; and (d) documents the file. There is no appeal to the GC or the Authority of the Region's decision not to expedite an investigation. If the Charged Party was involved in the initial inquiry, the Region also

notifies the Charged Party that there will be no expedited investigation and documents the file.

If the Region decides that an expedited investigation is warranted, the Region initially notifies the parties that they are to be prepared for an expedited investigation and the potential for § [7123\(d\)](#) relief, and documents the file.

b. *The parties' responsibilities in an expedited investigation:*

A Charging Party's responsibilities

The Charging Party must be prepared to commence the investigation immediately as soon as the Region advises the Charging Party that it is undertaking an expedited investigation because of the potential for temporary relief. The Charging Party must be prepared to provide the Region with all requested documents and to insure, to the best of the Charging Party's ability, that witnesses are identified by name, telephone number, and work hours and are available for an expeditious investigation. Similarly, the Charging Party must be prepared to present its documented and testimonial evidence to the Region to support the merits of the charge. Use of the fax machine and e-mail may help expedite the investigation.

If an investigation is expedited, the Charging Party must be prepared to present all relevant evidence pertaining to the merits of the charge. The Charging Party also must be prepared to address the six criteria discussed in this Policy (see section 4 above) which the Region evaluates to determine whether appropriate temporary relief should be pursued.

In all cases, during the expedited investigation, a Charging Party must be prepared to present evidence:

- Supporting all elements of the alleged ULP;
- Supporting a determination that immediacy in stopping the alleged unlawful event is imperative since a final order of the Authority would be rendered meaningless or ineffectual by the passage of time that is normally required for the processing of a case through the administrative procedure;
- Establishing why a subsequent remedy as a result of the prosecution of the ULP case would not satisfactorily remedy the violation;
- Establishing how the alleged violative act might undermine the purposes and policies of the Statute, e.g., the effect of the violation on an exclusive representative or Agency institutional right or the effect of the violation on individual employee rights.
- Establishing the impact, if any, on unit employees of the alleged violative act/s, e.g., loss of benefits, relocation, termination and/or reduction-in-force, and the number of employees affected;

- Concerning whether the essential functions of an Agency Charged Party would be interfered with by the granting of temporary relief.

A Charged Party's responsibilities

Similarly, a Charged Party must be prepared to cooperate in the expedited investigation and present its evidence and argument pertaining to the merits of the charge and the appropriateness of temporary relief. An expedited investigation is not delayed due to a Charged Party's delay in presenting evidence and argument.

c. Agent conducts expedited investigation:

Once the decision has been made to expedite the investigation of a charge, the Agent conducts, where possible, an on-site investigation of the charge. If a telephonic investigation is undertaken, affidavits are returned by fax. The investigation is completed within the shortest time period possible.

Affidavits are obtained as part of an investigation. The affidavit is appropriate for submission to a Federal district court; it is typed and addresses the proof elements of the violation and the criteria in § [7123](#) of the Statute. Specifically, the affidavit addresses the elements of the alleged ULP(s) to show "probable cause" that a violation has occurred or is occurring and to establish the nature of the harm to the remedial purposes of the Statute. See [Part 3, Chapter H](#) on Affidavits.

The RD determines whether to recommend to the GC that temporary relief be sought based on the six criteria in this Policy.

7. RD DETERMINATION ON THE MERITS OF THE CHARGE AND THE APPROPRIATENESS OF TEMPORARY RELIEF:

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

- If the determination is made that the charge has no merit, the decision is explained to the Charging Party, withdrawal of the charge is solicited, and absent withdrawal, a dismissal letter is issued to both parties.
- If a determination is made that the charge has merit but that temporary relief is not appropriate, the Region informs the parties of the basis of the decision and continues processing the charge.
- If a determination is made that the charge has merit and that the seeking of appropriate temporary relief is being recommended to the GC, the parties are informed: (a) of the basis of the decision on the merits; (b) that the case will be submitted to the GC; and (c) of the process that will be followed.

There is no appeal to the GC or the Authority from the RD's determination whether or not to recommend the seeking of temporary relief. The parties are encouraged to settle the

case. The Region emphasizes that it is preferable to resolve all aspects of the case, both the injunction action and the underlying merits of the charge.

8. PROCESSING OF REQUEST FOR TEMPORARY RELIEF – OGC:

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

The Region orally submits its recommendation to the OGC HQ and also forwards a Memorandum and draft complaint to OGC HQ. The Region also forwards documentation concerning the case that will be submitted to the Authority if the GC decides to seek Authority permission to seek § [7123\(d\)](#) relief.

i. Oral recommendation:

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

ii. Memorandum and draft complaint:

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

The first section of the legal memorandum analyzes the § [7123\(d\)](#) elements, concludes that there is probable cause that a ULP is being/has been committed, and discusses as applicable:

- The Statute;
- Authority precedent;
- Judicial decisions reviewing Authority actions or determinations;
- Law of other administrative agencies, e.g., NLRB, MSPB, OSC;
- Judicial decisions reviewing other agency actions or determinations;
- Facts and legal theories that would support a violation; and
- Arguments responding to anticipated arguments that respondent will make in opposition to the claim that there is probable cause to believe that a ULP is being committed.

The second section of the memorandum concludes that temporary relief would not interfere with the Agency's ability to carry out its essential functions and discusses:

- The Agency functions that will be affected by the temporary relief sought; and

- Arguments responding to anticipated arguments that respondent will make in opposition to the claim that the temporary relief will not interfere with the Agency's ability to carry out its essential functions.

The third section of the memorandum concludes that temporary relief is just and proper and analyzes and discusses:

- Traditional equitable criteria:
 - The likelihood of success on the merits;
 - The irreparable harm if relief is not granted;
 - The extent that the balance of hardships favors the respective parties; and
 - Whether and how the public interest will be advanced by granting preliminary relief.
 - Other applicable criteria establishing that temporary relief is just and proper;
 - The FLRA's and NLRB's experience (in cases arising under [29 U.S.C. § 160\(i\)](#)) in seeking temporary relief in analogous cases, particularly cases arising in the jurisdiction of the U.S. Circuit Court where this case arose; and
 - Anticipated arguments that respondent will make in opposition to the claim that temporary relief is just and proper.
- iii. Documentation concerning the case to be submitted to the Authority
- Charge/s filed by the Charging Party;
 - Complaint/s issued including any attachments; and
 - Any written submissions of the respondent in response to the charge, complaint, or attempt by the GC to seek temporary relief.
- b. *If the GC decides that temporary relief should not be sought:*
- i. The GC advises the Region to contact the parties and inform them of the basis for this decision.
 - ii. The GC's decision not to seek approval from the Authority for such temporary relief is final and may not be appealed to the Authority. [See § 2423.10\(b\)](#) .
- c. *If the GC decides to forward the Region's request to the Authority:*

- i. The OGC instructs the Region to issue complaint and to seek the earliest possible hearing date on the ULP complaint. The parties are notified that the Region is issuing a complaint and that the GC is requesting Authority permission to seek immediate relief.
- ii. Settlement is discussed thoroughly with each party since seeking injunctive relief is often a catalyst for resolution of disputes. Any settlement sought comports with the GC's Settlement Policy and serves the interests of the parties and the purposes and policies of the Statute. The RO strives to settle the underlying ULP case in its entirety to avoid the need for seeking temporary relief and litigating the case.

9. THE AUTHORITY'S ACTION ON THE GC'S REQUEST:

a. *Authority denial of request:*

If the Authority denies the GC's request, the RO orally notifies the parties of the denial of the request, that this decision cannot be appealed, and that the case will be tried, absent settlement, as soon as practical.

b. *Authority approval of request:*

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

10. SEEKING TEMPORARY RELIEF IN DISTRICT COURT:

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

The Region files the appropriate papers in person in the Federal district court having jurisdiction over the matter as soon as possible after the Authority's authorization. See Section [2423.10\(c\)](#).

11. LITIGATION OF THE ULP COMPLAINT AFTER APPROPRIATE TEMPORARY RELIEF HAS BEEN OBTAINED:

Whenever appropriate temporary relief has been obtained, the Region continues to try to settle the ULP complaint and the injunction action. If subsequent to obtaining appropriate temporary relief an ALJ recommends that the complaint be dismissed, in whole or in part, the Region informs the Federal district court which granted the temporary relief of the possible change in circumstances arising out of the decision of the ALJ.

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

OVERVIEW: After the case is assigned to an Agent, s/he reviews the file and contacts the parties' representatives by letter or by telephone. This occurs after the RO has sent the opening letter to the parties. This pre-investigatory process is the first opportunity that the Agent has to begin to build a relationship of trust with the parties and to lay the foundation for the Agent's control and conduct of a timely investigation.

OBJECTIVE: To provide a list of matters that an Agent considers addressing in the first written or oral communication with the parties.

1. AFTER RECEIPT OF A CASE FILE, THE AGENT DRAFTS A LETTER OR TELEPHONES THE PARTIES' REPRESENTATIVES:

Normally, as soon as possible after the receipt of a case file, the Agent contacts the Charging and Charged Party representatives identified by the Charging Party on the charge form, except where a party has put the Region on notice that another individual is to be contacted as the representative. In this situation, the Agent contacts the person previously designated who is not the individual identified on the charge form. The Agent discusses, as necessary, the following matters:

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

NOTE: *Agents may inquire if a party has an e-mail address and if so, whether the Agent may communicate at times with the party by e-mail. All e-mail communications with parties are sent certified and the record contains evidence of certification of delivery.*

Discussion of ULP process, e.g., clarify the OGC's and the party's expectations for the investigation, and scheduling of investigation, as necessary;

- A request that certain documents be sent to the Region, e.g., collective bargaining agreement;
- A request that certain documents and other information be made available when on-site for the investigation;
- A request that the Charging Party prepare a witness list with a short description of what information each witness will provide;
- Clarify the issues to assure that the charge represents the intent of the Charging Party. This can be accomplished by confirming letter or by the filing of an amended charge (See [Part 2, Chapter H](#) on amending the charge (be careful about timeliness issue as it relates to amended charges in particular)), in an

affidavit, or, as appropriate, in a conference call with both parties followed up by a confirming letter;

- Ascertain whether there are any statutory bars to the charge;
- Express expectation of cooperation by informing:

Charging Party of its obligation to provide evidence and to participate fully in the investigation; and

Charged Party of the expectation of cooperation and encouraging cooperation during the investigation, e.g., affidavits of Charged Party witnesses, Statement of Position;

- Optional reference in the letter to “Elements of the Violation” ([ATTACHMENT 2G1](#)) to educate the parties on the burdens of proof to establish and rebut prima facie cases; and
- Optional reference to the ADR FAQs ([ATTACHMENT 1B1](#)).

See [ATTACHMENT 3A1](#) for practical pointers on dealing with the parties, case processing techniques, and general guidance on how to use the computer to organize case files

NOTE: *To meet the quality element concerning the timely processing of charges, initial mailing needs to be accomplished expeditiously. See [Part 3, Chapter C](#) on Quality Standards for Investigations.*

NOTE: *The Agent uses his/her professional judgment concerning whether the initial telephone contact should be confirmed by a letter. At a minimum, the Agent documents the conversation in the case file log.*

2. **CONSIDERATION OF ADR PROGRAM:**

At any stage of the investigation, including the early stage when the parties are contacted by telephone or by letter for the first time, the Agent considers whether the case may be an appropriate candidate for the ADR Program (Part 1, Chapter B). If appropriate, upon review of case file and after discussion with RD/RA/mentor, as is necessary, the Agent may discuss option of using as an ADR Program. If both parties so request, the RD applies the specified criteria and, if appropriate, assists the parties in improving their relationship.

G. AMENDING THE CHARGE

OVERVIEW: After a charge is filed, the Charging Party may determine on its own that it is necessary to amend the charge or, upon review, the Agent may determine that it is necessary to clarify or correct the original charge. A charge may be amended at any time before issuance of a complaint but care is taken to do so in a timely manner. See § [2423.9](#).

OBJECTIVE: To provide guidance concerning the process of amending a charge and a list of issues and considerations that may arise when a charge is amended.

1. EXAMPLES OF SITUATIONS REQUIRING THAT A CHARGE BE AMENDED:

a. *To add an additional allegation:*

For example, during an investigation where the Charging Party alleges a violation of § [7116\(a\)\(1\)](#), (5) and (8) of the Statute based on the Agency's failure to provide information, it is disclosed that a supervisor stated something to the effect that the Union representative would not get the information requested because the Union representative spends too much time making requests for information and too little time doing the work that he was hired to do. In this case, the Agent has the Charging Party amend the charge to include an independent violation of § [7116\(a\)\(1\)](#) of the Statute, based on the interference with the person's right to engage in protected activity.

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

See *U.S. Penitentiary, Florence, Colo.*, [53 FLRA 1393](#), 1402 (1998).

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

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

See, e.g., *U.S. Dep't of the Interior, Bureau of Reclamation, Wash., D.C.*, [46 FLRA 9](#), 29 (1992), *enforcement denied on other grounds sub nom. United States Dep't of Interior, Bureau of Reclamation v. FLRA*, 23 F.3d 518 (D.C. Cir. 1994) (citing *Department of the Interior, Water and Power Resources Serv., Grand Coulee Project, Grand Coulee, Wash.*, 9 FLRA No. 46, 9 FLRA 385, 388 (1982) (level of management where exclusive recognition lies is not found to have violated § [7116\(a\)\(1\)](#) and (5) where it has no choice but to ministerially follow the dictates of the Department); and

Headquarters, NASA, Wash., D.C., [50 FLRA 601](#), 620-22 (1995) (finding of violation against Headquarters where it is responsible for actions which affect one of its subcomponents), *enforced sub nom. FLRA v. NASA, Wash., D.C.*, 120 F.3d 1208 (11th Cir. 1997), *aff'd sub nom. NASA v. FLRA*, [527 U.S. 229](#) (1999).

2. TIME CONSIDERATIONS UNDER § [7118\(a\)\(4\)\(A\)](#) OF THE STATUTE:

Do not obtain an amended charge alleging violative conduct occurring more than six months prior to the date of the amended charge. If the amended charge does not also include conduct encompassed by the original charge, a complaint based on allegations in the amended charge may be found untimely. Amended charges that are closely related to events or matters complained of in the charge and are based on events occurring within the six-month period preceding the charge are not barred by § [7118\(a\)\(4\)\(A\)](#) of the Statute. *United States Dep't of Veterans Affairs, Wash., D.C., Veterans Admin. Med. Ctr., Amarillo, Tex.*, [42 FLRA 333](#), 340 (1991), *rev'd on other grounds sub nom. U.S. Department of Veterans Affairs, Washington, D.C. v. FLRA*, 1 F.3d 19 (D.C. Cir. 1993); and [NRC](#), 44 FLRA at 379-80 (1992) (participation in the operation of a union (original charge) and an attempt to oust the union (amended charge) are two separate and distinct activities and therefore amended charge allegations were not encompassed within timely filed original charge).

3. WHAT IS REQUIRED TO AMEND A CHARGE:

a. *Amended FLRA Form 22 or 23:*

An amended FLRA Form 22 or FLRA Form 23 with a designation on the face of the form "FIRST AMENDED" or "SECOND AMENDED" before the word "charge." The amended charge contains the charge as amended in its entirety, including amendments. See [ATTACHMENT 2H1](#) for a Sample Letter and Amended Charge Form to be signed and returned.

b. *Mechanisms to withdraw specific allegations:*

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

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

4. SERVICE REQUIREMENTS:

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

5. RO EMPLOYEES ARE AVAILABLE AT ALL TIMES TO ASSIST THE CHARGING PARTY IN AMENDING A CHARGE:

See Part 1, Chapter A concerning Pre-Charge Assistance.

6. CHARGED PARTY OPPORTUNITY TO RESPOND TO AMENDED CHARGE:

The Region gives a Charged Party the opportunity to respond to an amended charge if the amendment is something other than a technical amendment, e.g., removing theories and not changing or adding a collateral theory. During the time in which the Charged Party is given an opportunity to respond, the Region takes no action on the amended charge. The Charged Party's representative is asked to submit any evidence, argument, or statement of position, that has not already been provided, within 5 days of the receipt of the amended charge. The amendment may be sent by fax to the Charged Party.

H. PROCESSING CHARGES RELATED TO FSIP REQUESTS FOR ASSISTANCE

OVERVIEW: Occasionally, where a Union and an Agency have reached an impasse in negotiations, a Union files a ULP charge and a request for assistance from FSIP under [Part 2471](#) of the Regulations.

OBJECTIVE: To provide guidance to ROs on how to proceed when a Union has filed both a ULP charge and a request for assistance from FSIP.

WHEN THE UNDERLYING ALLEGATIONS OF A ULP CHARGE CONCERN A NEGOTIATION IMPASSE:

- The RO checks Charge Form 22 to determine if the Union has also filed a request for FSIP's assistance (See § 2423.4(a)(6)(ii));
- If so, the RO contacts the OGC Headquarters with case-identifying information;
- The RO does **not** defer investigation of the ULP charge or any attempts at resolving the ULP charge;
- The RO processes the ULP charge up to an RD decision;
- The RD takes dispositive action If the charge is **non-meritorious**; and
- The RD **does not** take dispositive action if the charge is **meritorious**--the RD notifies OGC Headquarters.

I. PROCESSING CHARGES RELATED TO PENDING NEGOTIABILITY APPEALS

OVERVIEW: Occasionally, a Union files a ULP charge when the underlying allegation is also the subject of a negotiability petition that the Union has filed with the Authority.

OBJECTIVE: To describe the processing of a ULP charge when there is a pending negotiability appeal concerning the same underlying negotiability dispute.

1. CHECK THE CHARGE FORM 22:

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

2. NOTIFY OGC HEADQUARTERS:

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

J. PROCESSING CHARGES RELATED TO A PENDING REPRESENTATION PETITION

OVERVIEW: Occasionally, a Charging Party files a charge that is related to a representation petition that has already been filed. Absent the filing of a request to proceed, an election is not held when a ULP charge is filed by a party to a representation case and is based on conduct which would have a tendency to interfere with the free choice of the employees in the election. See RCHM, Chapter 60 concerning concurrent representation and ULP cases, for additional discussion.

OBJECTIVE: To provide guidance concerning the processing of a ULP charge that relates to a pending representation petition or that contains a representation issue in it.

1. **PRIORITY GIVEN TO ULP CHARGES THAT “BLOCK” REPRESENTATION PETITIONS:**

Because the speedy resolution of representation questions is of the utmost importance, a ULP charge that blocks a representation election petition is given the highest priority by the ROs in the investigatory phase of the case.

2. **NON-MERIT DETERMINATION OF THE ULP CHARGE “UNBLOCKS” A REPRESENTATION CASE:**

Disposition of a charge does not serve to “unblock” the representation proceeding until either: (1) the appeal period expires and no appeal is filed, or (2) if an appeal is filed, and the GC denies the appeal. If the GC remands the case to the RD, the representation case continues to be blocked.

3. **DEFER PROCESSING ULP CHARGE UNTIL RESOLUTION OF PENDING REPRESENTATION CASE:**

Where a ULP charge (that is not “blocking” an election) is so related to an unresolved representation matter that the processing of the representation case will resolve significant issues, the RD makes a determination to defer processing of the ULP charge.

For example, a pending ULP charge with a threshold issue of **unit eligibility** may be deferred pending a petition that seeks clarification of the unit status of the employee/s who are the subject of the ULP charge. By informing the parties of deferral of the charge, the Region retains jurisdiction while resolving the question concerning the unit employee/s’ bargaining unit status. See [ATTACHMENT 2J1](#) for a Sample Letter Deferring ULP Charge.

4. **RO RECEIPT OF ULP CHARGE THAT RAISES REPRESENTATION ISSUE:**

- RO encourages and solicits representation petitions whenever it receives ULP charges that raise a representation matter; and
- If a representation petition is then filed, the RO defers processing the ULP case (if it is not “blocking” an election) during the pendency of the representation case.

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

NOTE: *In certain cases, it may be necessary to obtain additional evidence if there are other issues besides whether an employee is in the unit.*

K. PROCESSING CHARGES RELATED TO A PENDING MSPB, SPECIAL COUNSEL OR DOL CASE

OVERVIEW: Occasionally, a Charging Party files a charge that is related to a pending MSPB, Special Counsel or DOL case.

OBJECTIVE: To provide guidance concerning how a ULP that relates to a pending MSPB, Special Counsel or DOL case is processed.

1. EXPEDITIOUS IDENTIFICATION AND DISPOSITION OF ULP CHARGES THAT RELATE TO CASES BEFORE ANOTHER ADJUDICATORY FORUM:

a. Charging Party identifies pending related charge:

A Charging Party may indicate that the issue raised in the charge is also pending in another forum (e.g., by checking the appropriate box of the charge form). See § 2423.4(a)(6)(ii). In this situation, the Agent, in the initial contact with the Charging Party, ascertains the specific details underlying the charge and the matter that is pending in the other administrative forum, including the case identifying number, if any. This may also become apparent after the investigation has begun, e.g., the Charged Party's Statement of Position mentions that the matter is pending in another forum.

b. RD's options:

i. FLRA clearly lacks jurisdiction:

Absent withdrawal, the RD dismisses a charge if it is determined that it concerns an issue over which some other forum has jurisdiction. For example, ULP charges concerning internal Union matters and which raise issues with respect to noncompliance with § [7120](#) of the Statute are dismissed for lack of jurisdiction. They are appropriately resolved through the procedures established by the DOL pursuant to § [7120](#). See AFGE, Local 2419, [53 FLRA 835](#), 841-42 (1997). See Part 3, Chapter D concerning the Scope of Investigations for additional discussion.

ii. FLRA has jurisdiction:

If ULP charge is related to, but clearly distinguishable from, an issue which would be within the DOL's jurisdiction under § [7120](#), the Region proceeds to process the charge.

iii. May defer charge:

If the charge concerns an issue that the Region believes may necessitate deferral of the charge pending resolution of a related issue in another forum, the RD submits to OGC HQ for advice.

iv. Undecided whether FLRA has jurisdiction:

If the Region is undecided about whether the FLRA has jurisdiction, the RD submits to OGC HQ for advice.

2. LIAISON WITH MSPB, SPECIAL COUNSEL AND DOL:

Each Region establishes a liaison or contact person with the MSPB, Special Counsel and DOL within the RO's jurisdiction to:

- Communicate that the FLRA has a case related to one pending at the other Agency;
- Request that any documents that are related to the case and are releaseable to the public be sent to the RO; and
- Provide update to the other Agency when the RD has taken final dispositive action.

3. REQUEST FOR INFORMATION FROM CASE FILE:

All requests for information from open case files are referred to OGC HQ before releasing information.

A. PREPARATION FOR INVESTIGATION

OBJECTIVE: Before beginning an investigation, each Agent's preparation is consistent with OGC policies.

OVERVIEW: To provide guidance to the Agent on matters s/he considers in the initial stages of preparing to investigate a ULP.

1. THE AGENT COMPLIES WITH OGC POLICIES IN DEVELOPING INVESTIGATIVE PLAN:

Before beginning an investigation an agent develops an investigative strategy or plan that is consistent with all OGC policies. Whether the plan is written is left to the discretion of the RD.

2. THE INVESTIGATIVE PLAN:

- Identify the issues of the charge;
- Review the information and documents received to date to develop areas of inquiry;
- Research relevant case law;
- Identify witnesses and ensure that they will cover all allegations and the requested remedy, including the means the agency customarily uses to communicate with bargaining unit employees or members, as appropriate, and whether those means include electronic communications; See [OGC Memorandum 11-01 on Electronic Notice Dissemination](#).
- Be aware of the need to ask for official time for a witness and any unique work or shift/scheduling situation;
- Depending on situation, the Agent may contact witnesses directly or have the Charging Party contact and advise witnesses of the date, time, location, and purpose of the investigation;
- Identify and arrange for documents to be made available or have documents sent to Agent;
- Explore potential for on-site settlement with parties (See Part 4, Chapter F, concerning Settlements);
- Determine if any related cases have been filed in the Region or in any other Region or before any other administrative body; and

- Consider providing ADR programs. See Part 1, Chapter B concerning ADR Services.

NOTE: See [ATTACHMENT 3A1](#) for practical pointers on case processing including preparing for an investigation.

B. QUALITY STANDARDS FOR INVESTIGATIONS

OVERVIEW: This Chapter discusses the OGC's Quality Standards for Investigations which are applicable to all RO employees.

OBJECTIVE: To list and explain the standards which guide the field Agent in conducting a quality investigation and to enlighten the parties as to these standards.

1. OBJECTIVES OF QUALITY STANDARDS:

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

2. QUALITY STANDARDS APPLICABLE TO EVERY INVESTIGATION:

- Regardless of the investigative methodology, every investigation meets the quality standards;
- The investigation obtains the best possible evidence;
- All evidence is relevant and assists the RD in reaching a proper disposition of the case;
- The case file contains all relevant evidence and information discovered or submitted during the investigation;
- All participants in the investigation are treated fairly and equitably and the GC's investigative methods are explained to the participants; and
- Charges are processed as expeditiously as possible.

3. EXPLANATION OF THE STANDARDS:

- **REGARDLESS OF THE INVESTIGATIVE METHODOLOGY, EVERY INVESTIGATION MEETS THE QUALITY STANDARDS**

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

- **THE INVESTIGATION OBTAINS THE BEST POSSIBLE EVIDENCE**

In investigating ULP charges, the Regions may obtain a variety of types of evidence: (a) sworn testimonial evidence; (b) documentary evidence; (c) physical evidence; (d) sworn questionnaires and (e) letters confirming conversations. Evidence obtained from Charged Parties meets the same standards as evidence obtained from Charging Parties.

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

The Regions explain to the parties why various types of evidence and information are appropriate to the investigation and the differences between that information which is, and that which is not, evidence.

- **ALL EVIDENCE IS RELEVANT AND ASSISTS THE RD IN REACHING A PROPER DISPOSITION OF THE CASE**

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

- **THE CASE FILE CONTAINS ALL RELEVANT EVIDENCE AND OTHER INFORMATION DISCOVERED OR SUBMITTED DURING THE INVESTIGATION**

The case file contains all relevant documentary and testimonial evidence discovered and submitted during the investigation and other non-evidentiary information. See Part 3, Chapter E concerning Evidence, in General, for a discussion of what is, and is not, evidence.

- **ALL PARTICIPANTS IN THE INVESTIGATION ARE TREATED FAIRLY AND EQUITABLY AND THE INVESTIGATIVE PROCESS IS EXPLAINED TO THE PARTICIPANTS**

The object of a ULP investigation includes not only the formal disposition of a charge, but also the goal of assisting the parties in resolving their differences through cooperation rather than litigation. It is critical that the parties have faith in the investigative process, that they perceive the investigating agent as neutral and impartial, and that they accept the investigation as fairly identifying their interests and their views of the case. Thus, the manner in which the investigation is conducted is as important as the evidence it obtains.

To achieve this standard, all investigating Agents:

- Clarify, whenever appropriate, the purposes and procedures of the investigation;
 - Answer any questions about how the Region has decided to conduct the investigation;
 - Avoid giving an impression of coercing a participant toward a particular result;
 - Give no indication of favoring one party's position over that of another; and
 - Conform to appropriate ethical standards of behavior at all times. See Part 5, Chapter B, which discusses Ethics issues.
- **CHARGES ARE PROCESSED AS EXPEDITIOUSLY AS POSSIBLE**

ULP charges are processed as expeditiously as possible, taking into consideration the resources available to the RO and the number of pending cases.

4. IMPLEMENTATION OF QUALITY STANDARDS:

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

- Ensure that investigations and decision-making are conducted in a timely and efficient manner;
- Enable all RO employees to understand the importance of maintaining a high level of quality in investigations and to understand the standards for quality in the OGC;
- Identify any assistance and training which OGC employees may require to meet quality standards;
- Assess the quality of the investigation in every ULP case;
- Ensure that applicable quality standards have been met before taking any dispositive action; and
- Explain to the Region's customers the intent of these policies and how they will be applied to their cases;
- Obtain continuing feedback from the participants on the quality of ULP investigations;
- Identify any practices which might reasonably lead those participants to question whether they have been treated fairly and equitably; and

- Correct any deficiencies which may exist.

NOTE: *To implement the overall goal of conducting a quality investigation, RDs meet periodically with employees to develop, implement, and modify, as required, an action plan which addresses the above.*

C. SCOPE OF INVESTIGATIONS

OVERVIEW: After a charge is docketed and assigned to an Agent, the process of investigating the alleged ULP/s begins. This Chapter sets forth a policy and uniform criteria that RDs apply in determining the type and extent of an investigation of a charge.

OBJECTIVE: To provide principles and applicable criteria that govern the scope of an Agent's investigation of a ULP charge.

1. SCOPE OF ULP INVESTIGATIONS:

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

2. CRITERIA FOR DETERMINING THE SCOPE OF INVESTIGATIONS:

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

- Whether there is jurisdiction over the charge; or
- Whether the facts support a determination that a violation of the Statute has occurred or is occurring; or
- Whether the case law supports the theory of violation alleged in the charge; or
- Whether all elements of the statutory violation are established; or
- Whether, even assuming the charge has merit, circumstances exist such that prosecution of the charge would not promote the purposes and policies underlying the Statute. See Part 4, Chapter D #3.c., concerning Regional Director Merit Determinations.

3. RDS MAY CONCLUDE AN INVESTIGATION:

a. *When:*

If, during the investigation, the RD determines that any of the first four criteria (section 2, above) have not been met or that circumstances exist such that prosecution of the charge would not promote the purposes and policies underlying the Statute, the RD may decide to conclude the investigation.

b. *The Agent does the following once the RD has decided to conclude an investigation:*

- Explains to the Charging Party the basis for the RD's decision to conclude the investigation;
- Solicits withdrawal of the charge; and
- Absent withdrawal, explains to the Charging Party that the RD will dismiss the charge.

NOTE: See Part 4, Chapter A concerning an Agent's Involvement in Withdrawal Requests Prior to an RD determination for discussion of limited circumstances when an Agent may solicit withdrawal of a charge **before** an RD determination of the merits of a charge.

4. EXPLANATION OF CRITERIA:

- **WHETHER THERE IS JURISDICTION OVER THE CHARGE**

Is it clear that there is no jurisdiction over the charge?

In limited situations, after an initial discussion of the dispute contained in the charge, it is clear that the Authority has no jurisdiction over the dispute.

Examples of no jurisdiction over the charge

- **Untimely filing**-- the exceptions in § [7118\(a\)\(4\)\(B\)](#) of the Statute are inapplicable, and the violation is not of a continuing nature. See *EEOC*, [53 FLRA at 493-96](#) (1997) (viewing use of a continuing violation theory with disfavor).
- **7116(d) bar**-- the charge may clearly be barred by a previously filed grievance under § [7116\(d\)](#) of the Statute and there is no question that the parties and the issues in the previously filed grievance are identical under Authority precedent.
- **ULP is not stated on the face of the charge**
- **Charge filed with the wrong third party**

In these particular circumstances, the Agent fully explains the basis for the RD's decision not to issue complaint. No withdrawal is solicited and the charge is not dismissed under this criterion (no jurisdiction) without first providing the Charging Party an opportunity, as appropriate, to discuss the background of the charge and the basic facts and theory of violation supporting the charge.

- **WHETHER THE FACTS SUPPORT A DETERMINATION THAT A VIOLATION OF THE STATUTE HAS OCCURRED OR IS OCCURRING**

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

ULP charges are investigated to the extent that sufficient information has been revealed which permits the RD to render a determination on the merits of the charge. Not all charges, however, are required to be investigated to the same extent in order to obtain that information necessary to render a merit determination. All investigations, regardless of the scope of the investigation, are conducted in accordance with the quality standards set forth in Part 3, Chapter B.

- **WHETHER THE CASE LAW SUPPORTS THE THEORY OF VIOLATION ALLEGED IN THE CHARGE**

Is the case law clear that the charge has no merit?

Sometimes, after an Agent has an initial discussion with the Charging Party concerning the theory of violation contained in the charge, it is clear that there would be no ULP finding even if all allegations in the charge, and all allegations made by the Charging Party while discussing the charge, are true. In these circumstances, the Agent provides a copy of the controlling Authority case law to the Charging Party. No withdrawal is solicited and the charge is not dismissed under this criterion without providing the Charging Party an opportunity, as appropriate, to discuss the background of the charge and the basic facts and theory of violation supporting the charge.

- **WHETHER ALL ELEMENTS OF THE STATUTORY VIOLATION ARE ESTABLISHED**

Is it clear that an element of the statutory violation is missing?

After the initiation of the investigation it becomes uncontested that an element of the statutory violation is missing. In most of these instances, it is the Charging Party which readily admits, when giving the details of the occurrences underlying the charge, that evidence required to support an element of proof of the alleged violation is missing.

Examples where elements of statutory violation are not established:

- **Weingarten examination element is missing**-- a Charging Party witness may state that no request was made for a union representative at an investigatory examination. See § [7114](#)(a)(2)(B) of the Statute.
- **Formal discussion element is missing**-- it may become undisputed that the exclusive representative received actual, timely notice of a formal discussion. See § [7114](#)(a)(2)(A) of the Statute.

In these types of situations, absent unusual circumstances, the RD concludes that the investigation has been completed to the extent that the RD can render a well-informed and supportable decision on the merits of the charge. No withdrawal is solicited and the charge is not dismissed under this criterion without providing the Charging Party an opportunity, as appropriate, to discuss the background of the charge and the basic facts and theory of violation supporting the charge.

NOTE: *Even in situations where it appears clear, consistent with the above criteria, that a charge has no merit, the Agent always gives a Charging Party an opportunity, as appropriate, to discuss the background of the charge and the basic facts and theory of violation supporting the charge. No withdrawal is solicited, and no dismissal letter is issued, until the Charging Party has been given this opportunity. See § 2423.8(a), which requires that all parties involved in an investigation be given an opportunity to present their evidence and views to the RD. The Agent documents in the case file that s/he has provided this opportunity.*

- **WHETHER, EVEN ASSUMING THE CHARGE HAS MERIT, THERE ARE CIRCUMSTANCES SUCH THAT PROSECUTION OF THE CHARGE WOULD NOT PROMOTE THE PURPOSES AND POLICIES UNDERLYING THE STATUTE**

Even though a charge has merit should it be dismissed because prosecution would not further the purposes and policies underlying the Statute?

In rare situations, it becomes clear that even if all the allegations in the charge and the allegations made by the Charging Party when discussing the case are true, it may not further the interests underlying the Statute to prosecute the charge. See [Part 4, Chapter D](#) concerning Regional Director Merit Determinations for a discussion of the factors applied in determining whether to issue a merit dismissal. In such situations, the charge may be dismissed, absent withdrawal, after full consideration of the circumstances, i.e., harm to bargaining relationship; harm to employees; pattern of conduct; remedy; and changed circumstances, as applicable.

If the RD determines, based on the application of the factors above, that the charge should be dismissed, absent withdrawal, the Agent explains the basis for the dismissal to the Charging Party. If the RD determines that the factors are either inapplicable or outweighed by the importance of prosecuting the charge, the Region completes the investigation consistent with the scope of investigations criteria in this chapter and the Quality Standards for Investigations set forth in Part 3, Chapter B.

D. ARRANGING ON-SITE INVESTIGATIONS

OVERVIEW: After developing an investigatory plan, as applicable, the Agent next considers making plans to do an on-site investigation of the alleged ULP/s.

OBJECTIVE: To provide guidance concerning when it is appropriate to conduct an on-site investigation and the administrative matters that an Agent considers such as notifying the Agency of plan to go on-site, arranging for official time for witnesses and what to do if Agency management declines to make a witness available.

1. THE RD EXERCISES DISCRETION IN DETERMINING WHETHER TO CONDUCT AN ON-SITE INVESTIGATION:

2. NOTIFICATION TO AGENCY OF PLAN TO GO ON-SITE:

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

3. OFFICIAL TIME FOR WITNESSES:

a. *Official time under Section [7131\(c\)](#) of the Statute:*

Contact the designated Agency representative by telephone or by letter and make a request. The request covers the following matters:

- List of persons needed for the interview;
- Advise that other witnesses may be identified once on-site;
- Arrange for the location of interviews;
- Telephone affidavits (See Part 3, Chapter I);
- Advise that another on-site interview may be necessary; and
- Ask that supervisors be informed to arrange for release; and
- Witness representatives are not entitled to section [7131\(c\)](#) time.

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

See [ATTACHMENT 3D1](#) for a Sample Letter requesting Official Time.

NOTE: *When planning the investigation, in order to conduct an efficient and effective interview, it is the Agent's responsibility to carefully arrange interviews with special consideration given to employees' work schedules. In only the rarest of instances should an Agent be faced with the end of a shift and an employee who does not wish to be detained beyond the end of the shift. RO supervisors are available to discuss how to deal with any special circumstances.*

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

- If requested, verify the use of official time at the time it is used;
- If requested after official time is used, decline to provide a statement or otherwise verify official time and cite regulation, §§ 2411.11 and 2423.8(c) stating that the Agent cannot become a witness in any proceedings that Agency may take against employee unless the GC approves.

4. MANAGEMENT DECLINES TO MAKE A WITNESS AVAILABLE:

- If the reasons are legitimate, e.g., work exigencies, make other arrangements;
- If no other purpose is apparent other than to delay/impede the investigation, first make the request in writing. If that is declined, the RD/RA makes a request to higher-level management.
- If Agent arrives on-site and a management official overruled the decision to make the employee/s available or the person is on annual leave, the Agent:
- Tries to work around the situation if the reason the employee does not show for the interview appears to be legitimate; or
- Talks to a management official on-site about making the employee available; and
- Gathers as much evidence as is possible.

NOTE: The Agent telephones the RD/RA/DRD for guidance, if necessary. The Agency's interference with the investigation may be grounds for a new charge.

E. EVIDENCE, IN GENERAL

OVERVIEW: The material facts that are used by an RD to decide the case are substantiated in accordance with the Quality Standards for Investigation (Part 3, Chapter C). It is the Agent's responsibility to investigate the ULP charge and to obtain the best evidence upon which the RD may base a decision.

OBJECTIVE: To provide an overview of the types of evidence that may be relied upon in deciding a ULP charge and the assessment of the relevance and weight of that evidence.

1. EVIDENCE v. INFORMATION:

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

For example:

- Witness statements;
- Records;
- Documents;
- Signed confirming letters; and
- Objects.

- b. *Information is knowledge that is obtained from an investigation that helps to understand and process the ULP, but that by itself, cannot provide a basis upon which an RD decides a case.*

For example:

- Oral statements to an Agent; and
- Charged Party's Statement of Position. An Agent may receive an e-mail concerning a Statement of Position. A Statement of Position may be used at trial to cross-examine a witness but the agent should seek guidance from the RD before using a Statement of Position.

NOTE: *For example--in a § [7116\(a\)\(1\)](#) and (5) unilateral change case, where an Agent receives information from the Charged Party that alleges that the Agency gave oral notification of the change to the Union well before the change took place, the Agent may "test" that information with the Charging Party, i.e., the Agent develops a line of questioning specifically concerning the alleged oral notification of the change. The Charging Party's response to*

these questions, captured in an affidavit, constitutes evidence that the RD may use in deciding the case.

Another example--in a Section [7116\(b\)\(1\)](#) and (8) duty of fair representation case, where an Agent receives information from the Charged Party that states that the Agency had informed the Charging Party that s/he was obligated to provide information to the Union in order for the Union to be able to determine the merits of the grievance, the Agent may "test" that information with the individual Charging Party. The Charging Party's response to these questions, captured in an affidavit, constitutes evidence that the RD may use in deciding the case.

2. DETERMINING THE BEST METHOD OF OBTAINING EVIDENCE:

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

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

Gathering evidence during an investigation is important and is taken seriously. Parties should not construe the use of e-mail as a signal that the OGC does not consider their charge to be important. Thus, for example, e-mail communication is not a substitute for taking an affidavit addressing the elements of a violation. However, in certain circumstances e-mail communication is appropriate, for example, when there is an inability to reach a witness by telephone and the agent needs basic information. Another example is where an affidavit has already been taken and the agent forgot to ask a question.

3. CHOOSING BETWEEN DOCUMENTARY AND SWORN TESTIMONIAL EVIDENCE:

a. Preference for documentary evidence:

Documentary evidence is evidence which has been reduced to writing prior to the investigation for purposes unrelated to the investigation itself, thus enhancing its credibility.

This type of evidence, when available, is almost always preferable to testimonial evidence on the same point because testimonial evidence is directly related to the investigation itself, thereby diminishing its credibility.

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

Documentation in a case file that is not clear on its face should be clarified or it has limited probative value.

b. *Situations where documentary evidence is critical:*

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

For example:

- contract interpretation - no case which turns on a question of contract interpretation is decided without the relevant portions of the contract at hand; and
- [7116\(d\)](#) grievance bar - no decision on a contested [§ 7116\(d\)](#) grievance bar is made without a copy of the grievance.
- Customary means used by agency to communicate with bargaining unit employees or members – obtain examples, e.g., emails, intranet or internet postings, as appropriate, to support an order requiring electronic posting of remedial notice. See [OGC Memorandum 11-01 on Electronic Notice Dissemination](#).

c. *Situations where testimonial evidence suffices:*

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

4. **ASSESSING RELEVANCE AND WEIGHT OF EVIDENCE:**

a. *Relevance:*

- i. The Agent's responsibility is to ensure that all evidence assembled in the case file, whether documentary or testimonial, is relevant.
- ii. The test for determining relevance is whether it can reasonably be expected to assist the RD in reaching a proper disposition of the case.
- iii. Examples:
 - Otherwise significant hearsay statements may be accepted during the investigation even though their use would be limited at trial.
 - An Agent has no obligation to accept evidence which clearly makes no independent contribution to an understanding of the case or its resolution-
-including:
 - Obviously irrelevant material; and

- Material which merely duplicates evidence already obtained.

NOTE: *Although the Agent, not the parties, is responsible for deciding during the investigation whether proffered evidence is relevant, any doubts are resolved by accepting the documents.*

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

b. Weight:

i. The Agent's responsibility is:

- To develop all factual evidence that would assist the RD in assessing the weight of the evidence:

The Agent inquires into the source of all evidence when that source is not otherwise apparent:

- In the case of documentary evidence, the Agent establishes the purpose for which the document was originally prepared and the circumstances of its preparation.
- In the case of testimonial evidence, the Agent establishes the competence of the witness and the witness's interests, if any, in the case.
- To maintain neutrality while taking evidence and the integrity of the decision-making process.
- Not to present opinions to the Charging Party without supervisory approval. See the discussion below and Part 4, Chapter A concerning an Agent's Involvement in Withdrawal Requests Prior to a RD Determination (in particular page 4A-3 which discusses solicitation of a withdrawal prior to an RD decision on the merits based on an agent's evaluation of the weight of the evidence).

NOTE: *Absent supervisory approval, the views of the Agent on the applicable law, weight of the evidence and the application of the law to the evidence is presented during the Region's deliberative process, not to the Charging Party prior to a Regional decision in the case. Presenting personal opinions prior to the Region's decision, which may not ultimately be adopted by the Region, will incorrectly cause Charging Parties to perceive that their charge was*

neither fully investigated nor fairly decided. In most cases, the Agent is the Charging Party's sole contact with the Region. It is, therefore, imperative that all Agents recognize the critical role they fill in representing the Region to the parties. Thus, an Agent is extremely cautious when assisting the parties in resolving their dispute prior to an RD decision on the merits. S/he maintains his/her neutrality and conveys to the parties that, absent resolution of the dispute, the RD will render a decision on the merits of the charge.

- ii. The RD ultimately determines the weight of the evidence. However, an Agent may be authorized to solicit withdrawal prior to an RD merits decision:
 - After receiving supervisory approval, the Agent may have a frank discussion with the Charging Party about the Agent's view of the evidence obtained thus far in an investigation; or
 - Without supervisory approval, on a case-by-case basis according to the RD's exercise of discretion, the Agent discusses with the Charging Party his/her view of the weight of the evidence.

5. BALANCE BETWEEN THE AMOUNT OF NECESSARY EVIDENCE AND THE AMOUNT OF EVIDENCE THAT THE CHARGING PARTY INSISTS ON SUBMITTING:

The RD exercises discretion in determining the amount of evidence required to complete an investigation by applying the scope of investigations criteria set forth at Part 3, Chapter C. If a party insists on submitting additional evidence beyond that required by the Agent, the Agent explains why the evidence is not required, but that documentary evidence or additional statements submitted by a date certain will be accepted and considered. See § [2423.8\(a\)](#), which states that "all parties involved are afforded an opportunity to present their evidence and views to the Regional Director."

If the Charging Party insists that more affidavits should be obtained from other witnesses not deemed necessary by the Agent, the Agent explains why those statements are not necessary and confirms, in that person's affidavit, a confirming letter, or a memorandum to the file, the substance of the witness's testimony according to the Charging Party. The Agent also informs the Charging Party that if the Charging Party still wants to submit additional information, signed and sworn statements and documentary evidence will be received by the Region up to a date certain.

F. AFFIDAVITS TAKEN IN PERSON

OVERVIEW: An affidavit is the preferred means of recording any witness's testimony during an investigation of charges involving the facts that are in dispute.

OBJECTIVE: To provide guidance concerning the mechanics of taking an affidavit, the characteristics of a quality affidavit, and the right to representation at interviews.

1. GENERAL RULES PERTAINING TO ALL AFFIDAVITS:

a. *Preparing the witness:*

Prior to taking an affidavit in person, the investigating Agent interviews the witness at the witness' work site, at the RO, or at any other mutually convenient location. The Agent prepares the witness's affidavit during the interview or shortly thereafter.

b. *Length and content of any affidavit:*

The nature of the case governs the length and content of any affidavit. Before preparing any affidavit (and, whenever possible, before opening the interview), the Agent anticipates whether the proof to be secured will be predominantly testimonial or documentary.

Examples:

i. *Predominantly testimonial: Formal discussion:*

Charges alleging formal discussions or coercive statements normally turn on what witnesses heard other people say, and the Agent can expect in such cases to ask for short, focused statements from a number of individuals.

ii. *Predominantly documentary: Refusal to bargain or to provide information:*

In charges alleging a refusal to bargain or to provide information, the evidence has often already been reduced to writing. Very little testimony may be necessary in such cases and the investigation may be better served by sworn questionnaires. If testimony is not required, the affidavit does not merely refer to existing documentary evidence but instead concentrates on such things as whether and how the Union orally explained its request to the Agency or described its need for the information requested.

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

In this instance, care is taken to ensure that each witness is testifying about the same thing and has similar competence to do so. It is not unusual for each witness to a formal discussion or a coercive statement to remember a slightly different version of what was

said, and the cumulative weight of this testimony may prove more persuasive than any single statement alone. If witnesses contradict each other, however, the Agent is careful to establish whether they were in the same location at the same time and in a position to hear the same thing being said. Any factors which might contribute to their different recollections (bias, for example) are explored.

d. *Witness reviewing the affidavit:*

Whenever possible, the Agent gives the affidavit to the witness for review, correction and signature while the witness and the Agent are still at the same location. If this is done, the affidavit may be handwritten. Or, if the Agent prefers, the affidavit may be typed on a laptop computer. In unusual cases, depending on time and resources, it may be necessary to prepare the affidavit at the RO or elsewhere and mail it to the witness for signature.

2. BASIC STEPS TAKING AN ON-SITE AFFIDAVIT: THE AGENT DOES THE FOLLOWING:

- Introduces him/herself and describes his/her role and the ULP process;
- Explains why s/he is there;
- Gives a general statement of the case and issues;
- Explains the confidentiality attached to the interview and use of affidavits (identity of the individual who submits a statement and/or information will not be disclosed unless it becomes necessary to produce the statement if the witness testifies at trial but the **substance or content** of the statement may be disclosed as part of the investigatory process);
- Explains that the affiant will have a chance to read the affidavit, to make changes, and to discuss if certain representations are inaccurate;
- Explains that issues concerning significant changes to the affidavit will be discussed;
- Explains the role of a representative, if one is present, i.e., the Agent reminds the witness that it is his/her testimony that is sought, not the representative's testimony;
- Explains the necessity of affirming the truth of the matters asserted (last page of affidavit) after the affiant agrees to the contents of the affidavit; and
- As applicable, assures the witness of protection under the Statute for providing testimony and assisting in the investigation.

See [ATTACHMENT 3F1](#) for a Sample Form for an Affidavit.

3. CHARGING PARTY WITNESS AFFIDAVITS—THEORY OF THE CASE AND ESSENTIAL FACTUAL ELEMENTS:

Each case file contains documentation that establishes a clear explanation of the theory of allegations that underlies the charge and the essential factual elements in the case in sufficient detail and accuracy to permit the RD to make a determination. The agent, therefore, investigates the allegations stated in the charge. If a moving affidavit contains a new allegation in the charge, the Agent explains to the Charging Party that the charge needs to be amended to incorporate the new allegation. An affidavit may also be used for the Charging Party to withdraw an allegation.

The Agent will also make inquiries, as appropriate, into the means customarily used by the agency to communicate with bargaining unit employees or members. In complaint cases where the evidence reflects that a respondent typically communicates information to employees by means of e-mail, posting on an intranet or the internet, or by any other electronic means, the General Counsel will seek a remedy to include dissemination of a remedial notice by those means. See [OGC Memorandum 11-01 on Electronic Notice Dissemination](#).

In certain situations where the GC will seek a nontraditional remedy, the case file contains documentation concerning why it is necessary to order a nontraditional remedy. This critical information is often provided by a single person in the form of an affidavit. However, in some instances the person who has knowledge of the facts is not the same person who can explain the theory underlying the allegation/s. Thus, it is necessary to obtain more than one affidavit to cover the theory of the allegation and the essential facts. Whether prepared after an in-person or a telephone interview, such affidavits:

- Set out all the essential factual elements in the case;
- Are obtained from individuals with first-hand knowledge of the events giving rise to the charge--in many cases, the person who signed the charge; and
- Contain a clear explanation of the allegations in the charge if the particular affiant signed the charge.

NOTE: *There is no requirement that the person filing the charge be the individual with the essential facts, as long as that person can refer the Region to such a witness to obtain an affidavit. If the affidavit is taken from a witness other than the individual who signed the charge, the allegations of the charge are explained or clarified in either an affidavit from, or a confirming letter to, the individual who signed the charge. In this case, the Agent ensures that the individual who provides the affidavit or confirming letter has the authority to bind the Charging Party and that the affidavit or confirming letter contains a statement to this effect.*

4. ADDITIONAL AFFIDAVITS:

Additional affidavits may be necessary to: (1) corroborate the testimony in the affidavit that sets out the essential elements in the case and/or contains a clear explanation of the allegations in the charge, or (2) describe significant facts not known to the other

witnesses. Each affidavit ideally complements the remainder of evidence in the case file without duplication or digression. Other affidavits, which serve neither of the latter purposes nor contribute to the investigation, are discouraged. For example, an affidavit which merely states that the affiant agrees with the statement of another affiant instead of independently stating the affiant's testimony is not useful. See Part 3, Chapter E concerning relevant evidence.

5. CHARACTERISTICS OF A QUALITY AFFIDAVIT:

A quality affidavit contains:

- **A full identification of the witness and of the witness's competence for testifying--qualify the witness:**

For example, for a union witness, this includes such things as the witness's union affiliation, union offices held, position at work and, when relevant, brief employment history. It also is clear from the affidavit how the witness came to know the facts s/he is describing. ("I attended the meeting of June 14 and I heard the director say that unions were a waste of time" or "I did not attend the meeting, but my supervisor told me the next day what the director said.")

- **A restatement or clarification of the allegations with respect to the Charging Party's lead witness' statement;**
- **An unambiguous chronological account of all the factual elements of the alleged violation about which the witness has direct knowledge:**

This requires that before opening the interview the Agent has a clear understanding of the elements of the violation. In a bargaining case, for example, the Agent must establish, among other things, whether the witness can testify about notice. In a formal discussion case, the witness is asked about the elements of formality.

- **An equally clear identification of those elements about which the witness does not have knowledge;**

If the bargaining case alleges a change in practice, and the witness is a union officer who might be expected to know about notice, but does not, the affidavit reflects that the witness does not know if the union was notified in advance of the change. If the witness has no idea whether attendance at the discussion was mandatory, the affidavit reflects that the witness did not know if employees were required to attend the meeting.

- **This confirms that the Agent has asked the essential question addressing an element of a violation.**
- **A full explanation of any legal or conclusionary assertions which the witness may offer;**

The Agent ordinarily resists any attempt by a witness to insert summary or judgmental comments into an affidavit, and does not allow such comments to stand alone. For example, the Agent does not permit a witness to testify that a supervisor made derogatory remarks about the Union, without being required to recount just what those remarks were.

- **No paraphrasing or rephrasing of what is in a document;**

The document speaks for itself. But, the affidavit may discuss the circumstances, intent, state of mind, clarify what is in the document, and discuss something that is not in the document itself.

- **Information about contracts, grievances and other related matters;**
- **Post-charge information to bring the situation up to date for settlement and remedy purposes;**
- **No quotation marks--state what the witness says;**

State what the witness said rather than trying to quote the witness's recollection of what someone else said. This protects the credibility of the witness should the witness testify at trial.

Only in rare instances is it appropriate to use quotations in an affidavit, e.g., an (a)(1) statement where the statement is significant and exact.

- **No blank spaces (draw a line through the unused portion of any page) to protect the integrity of the document; and**
- **No statement that the Agent provided a copy of affidavit to affiant.**

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

6. DOCUMENTS REFERRED TO IN THE AFFIDAVIT:

- Do not attach documents referred to in an affidavit to the affidavit;

- Make sure that documents referred to in an affidavit are in the case file; and
- Specifically reference and incorporate previous affidavits only if necessary.

7. AFFIDAVITS COVERING MULTIPLE CHARGES:

a. *Charges not related:*

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

b. *Charges are related:*

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

NOTE: *After the background information, start a new page when taking evidence pertaining to a specific charge. Start another new page when you begin taking evidence pertaining to a different charge. This will facilitate the sanitization process that will be required in the event that complaint issues with respect to only one of the charges and the affiant testifies at trial, and it becomes necessary to turn over that witness's affidavit to respondent's counsel. See LM Part 2, Chapter T concerning Jencks Act and the Production of Witness's Statement at Hearing (p. 162).*

8. REPRESENTATION OF THE CHARGING PARTY, CHARGED PARTY, AND NEUTRAL WITNESSES:

a. *In general:*

It is preferable, based on sound investigative practices, to interview all prospective witnesses alone.

b. *Interview of an agent of a party:*

- i. Contact the designated representative before contacting a witness who is an agent of a party.

NOTE: *A representative who also has personal knowledge of the events which underlie the charge **may not** be a witness because of the inherent credibility issues presented.*

- ii. If a witness is an agent of a party, i.e., a Union steward, the **party** has the right to be present, if requested. The agent has no right to a personal representative because the right to a representative is exercised by the **Union** supplying the representative. The right is waived if no request is made.

Exception: If an agent of a party requests that no party representative be present, there is no need to contact the party representative if the agent of the party understands the process.

NOTE: *If a supervisor comes forward on his/her own and asks to be a witness, the Agent makes sure that the supervisor understands that s/he is not protected under the Statute and that the affidavit contains a statement that the supervisor declined representation.*

Exception: If a representative is also a witness s/he cannot be a representative for any other witness.

iii. The notice of a right of parties to be present is explained in a statement describing the ULP process that is sent with the opening letter (See Part 2, Chapter B, concerning the opening letter).

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

Witnesses are approached consistent with their status at the time of the interview.

Examples:

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

contact the charged Agency or Union representative before interviewing the witness.

NOTE: *In any situation that arises where the status of a witness vis-à-vis the Agency or the Union has changed from the time of the event to the time of the interview and the Agency or the Union is potentially represented by an attorney, OGC HQ must be contacted for advice (before contacting the witness) to ensure that the Agent complies with any ethical rules that may be applicable. These rules may vary from jurisdiction to jurisdiction and the goal is to avoid any claim that the Agent breached an ethics rule by failing to contact the attorney representative of the agency or the Union before interviewing the witness.*

G. TELEPHONIC AFFIDAVITS

OVERVIEW: Under certain circumstances, the Agent takes a witness's affidavit over the telephone instead of in person.

OBJECTIVE: To provide guidance on the criteria for taking a telephone affidavit and the mechanics of taking an affidavit over the telephone. See Part 3, Chapter D for discussion of requesting official time for taking and reviewing a telephonic affidavit.

1. CRITERIA FOR TAKING A TELEPHONIC AFFIDAVIT:

Whenever practical, prudent, and consistent with the Scope of Investigations Policy, Regions conduct on-site investigations of ULP charges and obtain affidavits in person. However, RDs have discretion to authorize utilizing telephonic affidavits, under the following criteria:

- **No jurisdiction; untimely-filed charge; charge is barred**

The charge on its face, the supporting evidence submitted with the charge, and the conversation with the Charging Party, confirm that there is no jurisdiction over the dispute; the charge is clearly untimely; or that the charge is clearly barred by an earlier-filed grievance; or

- **Notwithstanding the merits, prosecution of the charge may not promote the purposes and policies underlying the Statute**

The charge on its face, the supporting evidence submitted with the charge, and the conversation with the Charging Party reveal that further processing of the charge may not promote the purposes and policies underlying the Statute; or

- **Remote witnesses**

The witnesses are in a remote location (a remote location with several cases, however, is given consideration for an on-site investigation); or

- **Costs**

The costs involved in an on-site investigation, the parties' relationship, the issues involved, the nature of the case and expected testimony, and the number of charges involved indicates that an on-site investigation would not enhance the parties' relationship or be a prudent use of OGC resources.

NOTE: Section [7116\(a\)\(2\)](#) discrimination allegations and difficult credibility disputes normally would not be appropriate for telephonic affidavits.

2. HOW TO TAKE A TELEPHONIC AFFIDAVIT:

The Agent generally applies the same rules as when on-site and also considers the following:

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

See [ATTACHMENT 3G1](#) for a Sample Telephonic Affidavit.

- Fax is an acceptable means of delivery, both for the parties to send documents to the RO and for the Agent to send documents to the parties.

NOTE: *Dispositive action normally is not taken in a case before all the witness affidavits have been signed and returned. Any instance in which a witness fails or refuses to return an affidavit is noted in the case file. If a witness/s fails to provide an affidavit/s that sets forth the essential factual elements in the case and a clear explanation of the allegations in the charge, the case is dismissed for lack of cooperation. See [Part 4, Chapter G](#), concerning dismissal letters.*

As in every other aspect of the investigation, the Region takes all reasonable steps to ensure that all parties or witnesses have been fairly and equitably treated and that the Region's investigative methods and rationale for decision making have been explained.

3. USE OF UNSIGNED/UNRETURNED TELEPHONIC AFFIDAVITS:

Unsigned/unreturned telephonic affidavits are **not** evidence--they are information. See Part 3, Chapter E which discusses the difference between evidence and information.

An RD may use unsigned affidavits in deciding the case, or the case may be dismissed for lack of cooperation if no other evidence has been submitted. However, a Charging Party witness' unsigned affidavit may not be used to prosecute a case.

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

OVERVIEW: Use of a questionnaire, which is defined as a sworn interrogatory, is a rarely used method of gathering evidence during an investigation.

OBJECTIVE: To provide guidance concerning the circumstances when it is appropriate to use a questionnaire during an investigation and the mechanics of doing so.

1. WHEN TO USE A SWORN QUESTIONNAIRE:

RDs have discretion to use this alternative case processing technique of gathering evidence when there are no material issues of fact in dispute in the case. The Regions have discretion to develop their own questionnaires in situations where they deem this technique useful. In any event, a questionnaire is not sent until after the Agent has made a telephonic contact with the party **and should not be used as a substitute for personal contact with a party's witness.**

These types of cases normally are based upon evidence which is impersonal, and predominantly documentary, involving undisputed facts which set forth the material information required to make a decision.

a. *An example of appropriate use of a questionnaire:*

- To request certain data for use in determining backpay;
- Bargaining and information cases which consist primarily of correspondence.

b. *An example of when the use of an affidavit would be appropriate, i.e., use of an questionnaire would usually be inappropriate:*

- Cases which potentially turn on a witness's credibility--what a witness has seen or heard, e.g., (a)(1) statement cases, Weingarten cases.

NOTE: *Parties, on their own volition, may submit interrogatories or position papers when filing or responding to a charge.*

2. CHARACTERISTICS OF A QUALITY QUESTIONNAIRE:

- It is prepared after an exploratory interview with the witness or, if the witness is known to be competent and cooperative, no interview is required;
- It typically consists of questions appropriate to the type of violation alleged;
- When sent from the RO, it is administratively handled in the same manner as telephone affidavits are processed--typewritten and accompanied by a cover letter to either the Charging or Charged Party explaining:

- The purpose and importance of the questionnaire;
- The manner in which the questionnaire is to be completed, including the date by which it must be returned;
- The options for processing the charge after the questionnaire is received by the Region; and
- Because the questionnaire, in select cases, is the equivalent of an affidavit that establishes the essential elements in the case and contains a clear explanation of the allegations in the charge, the Charging Party's failure to timely return the sworn and signed questionnaire constitutes a failure to cooperate in the investigation and will result in dismissal of the charge.

See [ATTACHMENT 3H1](#) for a Sample Cover Letter for a Questionnaire.

- Contains the same oath as contained in a sworn affidavit and there is no need that it be notarized;
- Functions as a checklist for the elements of proof associated with each allegation in a charge;
- In some circumstances, it may need to be supplemented by collateral affidavits or other statements;
- It is as self-contained as possible and is drafted to include all the elements of proof of the statutory violation and proposed remedy, and any other matters which the Region deems relevant in those type of violations; and
- Is drafted with a high degree of clarity and precision because it constitutes a series of questions prepared from the point of view of the Agent rather than that of the witness. It may be an informal supplement to the investigation or may be a substitute for a sworn affidavit.

3. REGIONS SHARE QUESTIONNAIRES VIA E-MAIL:

See [ATTACHMENT 3H2](#) for an example of a Questionnaire.

I. INVESTIGATORY SUBPOENAS

OVERVIEW: The investigatory subpoena is a rarely used investigatory technique to obtain evidence from the Charged Party or a Third Party. The GC has authority under § [7132\(a\)](#) of the Statute to issue an investigatory subpoena and to enforce an investigatory subpoena in an appropriate United States district court under § [7132\(b\)](#). Section [2423.8\(c\)](#) of the Regulations addresses the issuance and enforcement of investigatory subpoenas.

OBJECTIVE: To provide guidance concerning: (a) the criteria for requesting that the GC issue an investigatory subpoena; (b) the process for requesting and obtaining an investigatory subpoena; (c) service of investigatory subpoena; (d) revocation of an investigatory subpoena and (e) enforcement of investigatory subpoena.

1. WHEN DOES AN RD CONSIDER REQUESTING THAT THE GC ISSUE AN INVESTIGATORY SUBPOENA:

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

2. CRITERIA RD'S APPLY IN DETERMINING WHETHER TO REQUEST THAT THE GC ISSUE AN INVESTIGATORY SUBPOENA:

- Whether the evidence submitted by the Charging Party and any neutral witnesses establishes a potential violation (if the Region has sufficient evidence for the RD to decide the merits of the charge, it is not necessary to require the Charged Party to produce additional evidence);
- Whether the evidence sought is relevant and material and is neither privileged, unduly repetitious nor unreasonably cumulative;
- Whether the evidence is necessary to decide a factual issue which must be resolved to determine whether or not a violation of the Statute has occurred, and that evidence is not otherwise available;

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

- Whether the evidence sought is not within the control of the Charging Party;

- Whether the evidence can be produced without an undue burden and is specific, narrowly tailored, and reasonable;
- Whether the Charged Party is likely to comply with the subpoena, and failing that, the prospect for successful enforcement of the subpoena in court.

3. **PROCESS FOR REQUESTING AND OBTAINING GC'S ISSUANCE OF INVESTIGATORY SUBPOENA:**

- The Agent seeks voluntary cooperation (do not discuss matter of investigatory subpoena with the Charged Party's representative) and documents contacts with a confirming letter or in a memo to the file;
- If cooperation is not given, then, based on the above criteria, the Agent requests that the RD request the GC to issue an investigatory subpoena;
- RD decides whether to request the GC to issue the investigatory subpoena based on the above criteria. Such request is made by memorandum (no discussion with the Charged Party's representative about investigatory subpoena occurs); and

NOTE: The memorandum states the allegation, the evidence obtained thus far and how the criteria listed above are applied.

- GC decides to issue the subpoena or denies the request.

4. **BEFORE THE SUBPOENA ISSUES, THE CHARGED PARTY HAS A LAST CHANCE TO COOPERATE WITH THE INVESTIGATION:**

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

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

See [ATTACHMENT 311](#) for a Sample Investigatory Subpoena.

5. **SERVICE OF SUBPOENA:**

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

- Delivering it to the witness in person;

- Registered or certified mail; or
- Delivering the subpoena to a responsible individual (named in the document certifying the delivery) at the residence or place of business (as appropriate) of the person for whom the subpoena was intended.

6. REVOCATION OF SUBPOENA:

a. Procedural requirements:

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

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

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

7. ENFORCEMENT PROCEEDINGS:

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

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

J. INTERVIEWS WHEN NO AFFIDAVITS ARE TAKEN

OVERVIEW: During the course of the investigation, the Agent sometimes interviews a witness when no affidavit is taken. Instead, the Agent will record a note to the file or draft a confirming letter.

OBJECTIVE: To provide guidance on the use of confirming letters and notes to the file.

1. A MEMORANDUM TO THE FILE IS NOT EVIDENCE:

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

2. CONFIRMING LETTERS OF CHARGING PARTY WITNESS:

a. *When a confirming letter is used:*

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

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

Examples of appropriate use of a confirming letter:

- Charging Party informs the Agent telephonically that the events giving rise to the charge arose outside the timeliness provisions of the Statute (§ [7118\(a\)\(4\)\(A\)](#)) and the conversation reveals that none of the exceptions apply (§ [7118\(a\)\(4\)\(B\)](#)); and
- A party telephonically informs an Agent that it is challenging an action clearly outside the jurisdiction of the Statute.

b. *Contents of a confirming letter:*

Confirming letters clearly state the factual information received from the party or witness, explain that the information will be considered by the RD in deciding the merits of the case, and give the party or witness a reasonable period of time to advise the Agent of any inaccuracies or changes in the information. They also contain a statement that if the

letter is not returned by the required date the facts will be assumed to be correct and the letter will be submitted to the RD as evidence to be considered in deciding the case.

Confirming letters do not include the Agent's assessment of the case. The Agent does not discuss his/her assessment of the case with either party unless, under the criteria stated in Part 4, Chapter A concerning Solicitation of Withdrawals, the Agent is permitted to solicit a withdrawal prior to an RD's decision on the merits.

Confirming letters are not used to revise a charge that requires more than a minor clarification. Rather, an amended charge is required. See Part 2, Chapter B concerning Docketing the Charge and, in particular, when an Amended Charge is necessary.

NOTE: *There is no requirement that a Charging Party witness sign a confirming letter. If it is determined that it is necessary for the Charging Party witness to affirm certain facts, an affidavit or supplemental affidavit remains the preferred means of recording witness testimony involving facts that are in dispute. However, Regions have discretion to require a Charging Party witness to sign and return a confirming letter.*

See [ATTACHMENT 3J1](#) for a Sample Confirming Letter for Charging Party Witness that is used to support a Dismissal of the Charge; and [ATTACHMENT 3J2](#) for a Sample Confirming Letter for Charging Party Witness that supports the Charging Party.

3. INTERVIEWS WITH CHARGED PARTY REPRESENTATIVES AND OTHER AGENTS WHEN NO AFFIDAVITS ARE TAKEN:

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

An oral presentation of a legal position is not evidence. It may be used for background and information purposes only and does not bind a Charged Party to any legal position. See Part 3, Chapter E for a discussion of evidence v. information.

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

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

c. *Charged Party confirming letters:*

- i. Only use if the representative or agent agrees to such use, understands the process, and can partake in the process, e.g., do not use if the representative indicates that s/he is not permitted by the Agency or Union to confirm or not confirm;
- ii. If the party is represented, make sure the representative gets a copy; and
- iii. A signature is necessary to use as evidence to support dismissal or complaint.

Rationale for obtaining a signature on Charged Party confirming letters and not for Charging Party confirming letters. Unlike Charging Party confirming letters, which need not be signed in order to be used in determining the merits of a charge, a confirming letter of a Charged Party witness may not be used in determining the merits of a charge unless it is signed. For purposes of using a confirming letter to support the dismissal of a charge, it is quite different to rely on something stated, but not sworn to, by a Charging Party witness to dismiss a charge, than to rely on something stated, but not sworn to, by a Charged Party witness to dismiss a charge. Thus, it is required that Charged Party confirming letters be signed. For the purposes of using a confirming letter to support issuance of complaint, very seldom, if ever, would a complaint issue absent a signed/sworn Charging Party statement. Moreover, for the purposes of providing further support for the issuance of a complaint, it is acceptable to rely on an unsigned Charging Party's confirming letter and corroborating evidence already obtained, because that witness can be pre-tried and called as a GC witness at trial to obtain direct testimony. On the other hand, do not rely on an unsigned Charged Party witness confirming letter to support issuance of a complaint because of the uncertainty of that person's testimony at trial.

Thus, the above policy was adopted to require Charged Party confirming letters to be signed, as well as requiring the Agent to ensure that the Charged Party witness agrees to the use of a confirming letter, understands the process, and indicates the authority to confirm or not to confirm by their party.

See [ATTACHMENT 3J3](#) for a Sample Confirming Letter of a Charged Party Witness.

4. INTERVIEWS WITH NON-PARTY WITNESSES GIVING FACTS WHEN NOT AFFIDAVITS ARE TAKEN:

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

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

b. *Confirming letters:*

- i. Are used for corroborating evidence;
- ii. Are used to obtain additional facts after on-site investigation; and
- iii. Need not be signed.

See [ATTACHMENT 3J4](#) for a Sample Confirming Letter of a Non-party witness.

K. IMPROPERLY OBTAINED OR PURLOINED INFORMATION/EVIDENCE

OVERVIEW: During the course of an investigation, a witness or party's representative may provide, or seek to provide, evidence that may have been improperly obtained or purloined by that party. Such evidence could include documents obtained by a party or individual under "questionable circumstances," or other evidence, such as a tape recording or videotape, that may have been surreptitiously recorded without the consent of one or both of the parties. The OGC has an interest in obtaining the best evidence upon which to base an RD decision as well as to maintain the highest ethical standards.

OBJECTIVE: To provide guidance concerning the Agent's decision whether to accept and use evidence that may have been improperly obtained or purloined by a party.

1. AN AGENT OF THE FLRA NEVER ENGAGES IN COMPLICITY IN IMPROPERLY OBTAINING EVIDENCE

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

2. UPON LEARNING ABOUT IMPROPERLY OBTAINED EVIDENCE, THE AGENT NOTIFIES THE RD

3. THE RD EXERCISES DISCRETION TO DETERMINE WHETHER TO ACCEPT AND USE SUCH EVIDENCE

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

4. THE AUTHORITY HAS NOT ADDRESSED THE ISSUE OF USING IMPROPERLY OBTAINED OR PURLOINED EVIDENCE IN A ULP PROCEEDING:

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

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

OVERVIEW: The Agent gathers evidence and information during the course of an investigation. At times, s/he uses that evidence to develop other evidence so that the case file contains the best evidence needed for the RD to make a merit determination.

OBJECTIVE: To provide guidance concerning under what circumstances various types of evidence may be disclosed to the other party and how evidence that is not disclosed may be used to obtain additional evidence.

1. DISCLOSURE OF A PARTY'S DOCUMENTARY OR PHYSICAL EVIDENCE:

- a. *Distinction between public and non-public evidence:*
 - i. Rule of confidentiality applies to non-public evidence. See Section [2423.8\(c\)](#). Non-public evidence is evidence that is within an Agency's or Union's internal control and is not distributed externally, e.g., minutes of a Union or Agency-management meeting; intra-management or intra-union memorandum; or an employee's performance appraisal.
 - ii. If the evidence is public information it can be discussed with, shown and provided to, the other party if it is necessary to obtain the complete facts.
- b. *The document may be shared if, on its face, it shows that the other party has already obtained it.*
- c. *If the document is internal, i.e., non-public:*
 - i. Ask the party who provided it for permission to furnish a copy to the other party.
 - ii. If permission is granted, it can be discussed with, shown to, and provided to the other party.
 - iii. If such permission is declined, and the document purports to establish a fact, then the Agent informs the other party that s/he has a document establishing a certain fact that is disclosed and discussed, but does not identify, show, or furnish the document to that party.

2. DISCLOSURE OF AFFIDAVITS, SWORN QUESTIONNAIRES, AND CONFIRMING LETTERS:

- a. *The rule of confidentiality applies to affidavits, sworn questionnaires and confirming letters and the affidavit form refers to the confidentiality rule. See § [2423.8\(c\)](#).*

See Part 3, Chapter F concerning Affidavits Taken in Person, which discusses this rule.

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

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

M. DUTY OF THE CHARGING PARTY

OVERVIEW: Section [2423.8\(b\)](#) codifies the duty of a Charging Party to cooperate: “In connection with the investigation of charges, all persons are expected to cooperate fully with the Regional Director.”

OBJECTIVE: To provide guidance concerning what actions are taken when a Charging Party is uncooperative during the course of an investigation.

1. PURSUANT TO § [2423.8\(b\)\(1\)](#), COOPERATION INCLUDES:

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

2. DISMISSALS FOR LACK OF COOPERATION AND DISMISSALS ON THE MERITS FOR PARTIAL COOPERATION:

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

If, after the Region docket the charge, it is determined that the charge needs to be clarified before the investigation can be started, the Agent assigned to the case contacts the Charging Party representative by telephone to advise of the need for clarification by an amended charge. A confirming letter of the conversation is sent advising that if the clarification is not provided by a date certain (within 10 days of date of letter), the charge will be dismissed, absent withdrawal. If an attempt at contacting by telephone was unsuccessful, Charging Party is either sent a letter or an e-mail message (record contains copy of message and certification of receipt) stating the need to clarify within a date certain or the charge will be dismissed, absent withdrawal. See Part 2, Chapter B, concerning Docketing the Charge, and in particular, clarification and the need for an amended charge.

See [ATTACHMENT 3M1](#) for a Sample Letter to Charging Party – Warning of Dismissal for Lack of Cooperation in failing to provide clarification of charge.

b. Lack of cooperation at the outset of an investigation--no evidence submitted:

The Agent advises the Charging Party's representative, at least once by telephone, and in a confirming letter, that the Region is considering dismissing the charge for noncooperation, and provides the Charging Party with a reasonable period of time to respond. If still unable to contact the representative by telephone, the Agent sends a letter setting forth the Region's particular concerns. Charge is not dismissed until a reasonable effort to contact the Charging Party's representative by telephone has been made and s/he has been given a reasonable time to receive the letter. If the Charging Party fails to submit the evidence requested despite the opportunity to do so, the charge is dismissed for lack of cooperation. The case file contains documentation of the unsuccessful attempts to contact the Charging Party.

See [ATTACHMENT 3M2](#) for a Sample Letter to Charging Party – Warning of Dismissal for Lack of Cooperation during the Investigation.

See [ATTACHMENT 3M3](#) for a Sample Letter to Charging Party – Dismissal for Lack of Cooperation during the Investigation. This dismissal letter is sent **after** the Region sent the ATTACHMENT 3M2 letter Warning of Dismissal for Lack of Cooperation.

c. *Dismissal on the merits--additional evidence not submitted during investigation:*

This situation arises where the Charging Party has submitted some evidence that is either insufficient or incomplete and the Agent has requested that additional evidence be submitted. If the Charging Party has been given a fair opportunity to submit the evidence but did not do so, the Region dismisses the charge on the merits with a notation to that effect in the case file. Examples include:

- Repeatedly not returning phone calls;
- Not keeping appointments;
- Not returning telephone affidavits;
- Not submitting documents; and
- Not providing knowledgeable witnesses.

d. *When the Region is contacted after an established deadline but before a dismissal letter issues for failure to cooperate or before a dismissal letter issues on the merits:*

The Agent advises Charging Party's representative that a dismissal letter is being prepared but that its issuance will be delayed if the evidence is submitted within a specific time (as deemed appropriate by RA/DRD/RD). The Agent also tells the representative that any evidence received will be presented to the RD for a

determination regarding whether to reopen the case for further investigation or go forward with the dismissal.

- e. *Evidence received after the established deadline but before dismissal letter issues for failure to cooperate or before dismissal issues on the merits:*

Similarly, evidence that is actually received after the deadline imposed but before issuance of the dismissal letter will be considered by the RD for a determination whether to reopen the case for further investigation or to go forward with the dismissal.

- f. *When a witness refuses to continue an investigative interview due to end of shift:*
See Part 3, Chapter E concerning Arranging On-Site Investigations and issues relating to official time for witnesses.

- g. *When a party continuously files a substantial block of charges at one time that have routinely been dismissed or withdrawn after a non-merit determination:*

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

- h. *Circumstances arise during the investigation where conduct inhibits investigation and Agent's response:*

- i. If a scheduled witness does not show up for an interview, the Agent gives the witness a date certain to provide the information and/or to take a telephone affidavit. This is confirmed in a letter to the Charging Party with an admonition concerning the lack of cooperation and consequences should there be non-compliance by a date certain, i.e., dismissal.
- ii. If a representative does not make certain documents available when the Agent is on-site, as had been pre-arranged, the Agent gives the Charging Party a date certain to produce the documents and confirms this in a letter with an admonition concerning lack of cooperation and consequences should there be non-compliance by a date certain, i.e., dismissal.

NOTE: *The lack of cooperation discussed here does not include abusive behavior on the part of representatives or witnesses. That subject is covered in Part 3, Chapter S concerning Dealing with Parties that Display Abusive Behavior During an Investigation.*

N. DUTY OF THE CHARGED PARTY

OVERVIEW: An investigation is conducted effectively and obtains the best evidence upon which an RD may rely if the Charged Party, as well as the Charging Party, cooperates during an investigation. Such cooperation is contemplated under § [2423.8\(b\)](#), which does not distinguish between the level of cooperation given by the two parties.

OBJECTIVE: To provide guidance concerning the Charged Party's duty to cooperate during the course of an investigation.

1. CHARGED PARTY COOPERATION IS SOUGHT THROUGHOUT THE ENTIRE PROCESSING OF THE CHARGE:

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

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

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

2. USE OF THE INVESTIGATORY SUBPOENA:

Where a Charged Party fails or refuses to cooperate and the RD has deemed such cooperation appropriate, the GC may, in appropriate cases, exercise authority pursuant to § [7132](#) of the Statute to issue an investigatory subpoena. See Part 3 Chapter I for a discussion of investigatory subpoenas including criteria for determining when to request issuance of an investigatory subpoena.

O. RESOLVING DISPUTES DURING INVESTIGATIONS AND PRIOR TO A MERIT DETERMINATION

OVERVIEW: RO Agents encourage the informal resolution of the allegations in the ULP charge throughout the investigation prior to a determination on the merits of the charge. See § [2423.1\(b\)](#). Agents assist the parties, using an interest-based problem-solving approach, in resolving the dispute which gave rise to the filing of the charge.

OBJECTIVE: To provide the Agent with the principles and general techniques which facilitate the informal resolution of ULP charges.

1. GUIDELINES WHEN ASSISTING THE PARTIES IN RESOLVING THEIR DISPUTE:

- Agents employ an interest-based problem-solving approach, that utilizes skills, techniques, and strategies, when assisting the parties in resolving the dispute which gave rise to the filing of the ULP charge;
- This dispute resolution technique is employed as part of the investigation of the charge;

NOTE: Attempts to resolve the dispute informally do not delay the investigation or the RD's decision on the merits of the charge. Rather, as part of initially exploring the allegations and facts of the case, the Agent utilizes his/her experience, knowledge of the parties, and acceptance as a neutral, to uncover the parties' respective interests in the matter in dispute and suggest options which resolve the dispute and result in the withdrawal of the charge.

- The Agent explains the benefits of resolution and clarifies the relationship between the attempt to resolve the dispute prior to an RD determination on the merits of the charge and the taking of positions and evidence;
- Discussions occur on site or telephonically, if possible, with both parties together. If not possible, the Agent communicates separately with the parties but continues to employ an interest-based approach;
- Agents propose solutions and prepare draft resolutions, but the parties must adopt any resolution as their own, share a common understanding of both parties' commitments under the resolution and understand the process to resolve any allegations of non-compliance with that resolution; and
- If the parties are unable to resolve their dispute during initial conversations, the Agent begins taking evidence and, as appropriate during the investigation, continues to attempt resolution of the dispute.

2. CRITERIA AND PRINCIPLES GOVERNING THE RESOLUTION OF ULP CHARGES:

An Agent applies these criteria and principles when assisting the parties in resolving the dispute which gave rise to the filing of the ULP charge prior to an RD determination on the merits of the charge:

- Attempt to resolve only those charges that lend themselves to a party resolution. For example, charges which fall within the scope of investigations criteria, listed at Part 3, Chapter C, concerning Scope of Investigations, may not be appropriate;
- Utilize interest-based problem-solving principles (issues, interests, options, criteria and solutions);
- Avoid “shuttle diplomacy”, i.e., acting as a messenger between the parties’ offers and counteroffers;
- Explore both parties’ interests, not just what the charged party is willing “to give up” to “get rid of” the charge;
- Attempt to discuss the resolution with both parties together, but the same techniques can be utilized with separate discussions;
- Time is of the essence. If there is no resolution and withdrawal of the charge, the taking of evidence immediately commences if on-site or as soon as practicable if discussions were telephonic;
- No evidence (testimonial or documentary) is initially taken on the merits of the charge, although facts may be discussed to place the issue and the parties’ interests in context;
- No discussion of the merits of the charge;
- The applicable law may be discussed, as appropriate, especially when exploring the parties’ respective best alternatives to a negotiated agreement (BATNAs);
- Both parties understand how the investigation proceeds before beginning; that is, attempts to resolve the dispute and then the taking of evidence; and
- The criterion utilized in reaching agreement is whether the resolution is legal and consistent with the purposes and policies of the Statute, just as when unsolicited withdrawals are submitted based on a party agreement.

3. APPLICATION OF INTEREST-BASED PROBLEM-SOLVING PROCESS TO RESOLUTION OF ULP CHARGES:

- Agent describes the process:

- No evidence (affidavits or documentary) is initially taken on the merits of the charge--although facts may be discussed to place the issue and the parties' interests in context;
 - No discussion of the merits of the charge--although the applicable law may be discussed;
 - If no mutual resolution of the dispute and Charging Party withdrawal of the charge, the investigation proceeds with the taking of evidence, but resolution still may occur anytime thereafter;
 - Party resolution has the same force and effect as any other party agreement resulting in the withdrawal of the charge;
 - The parties own any agreement and must agree and understand both parties' commitments;
 - Initial time limits on discussions are established; and
 - Clarification of the necessity to empower the parties' representatives to agree to resolution.
- The Agent clarifies and identifies the dispute that caused the filing of the charge and tests that identification with the parties respectively.
 - The Agent understands the parties' respective interests and tests that understanding with the parties respectively.
 - The Agent explains the approach to developing a resolution. The Agent and parties present options, which are explored and modified, and no party commits until final agreement is reached.
 - The Agent controls and implements the process, exploring the parties' alternatives, as appropriate.
 - The Agent assists the parties in memorializing their agreement and the charge is withdrawn.

P. ENSURING EMPLOYEE SAFETY DURING AN INVESTIGATION

OVERVIEW: It is essential to ensure the safety of Agents and other people who are involved in an investigation. The Agent must know what to do should a situation arise that may compromise personal safety, whether at the RO or in the field.

OBJECTIVE: To provide guidance concerning safety during an investigation and the procedure to follow when a safety concern arises during the course of an investigation.

1. DEFINITIONS OF POTENTIALLY THREATENING SITUATIONS* / :

a. *Workplace violence:*

An aggressive action intended to cause, or capable of causing, death or serious bodily injury to oneself or others, or damage to property. Workplace violence includes abuse of authority, intimidating or harassing behavior, threats, and hostile and abusive language.

b. *Assault:*

To attack someone physically or verbally, causing bodily or emotional injury, pain and/or distress. This might involve the use of a weapon, and includes actions such as hitting, punching, pushing, poking, or kicking.

c. *Intimidating or harassing behavior:*

Threats or other conduct which creates a hostile environment, impairs Agency operations, or frightens, alarms or inhibits others. Psychological intimidation or harassment includes making statements which may be false, malicious, disparaging, derogatory, rude, disrespectful, abusive, obnoxious, insubordinate, or which have the intent to hurt others' reputation. Physical intimidation or harassment may include holding, impeding or blocking movement, following, stalking, touching or any other inappropriate physical contact or advances.

d. *Stalking:*

Malicious approach or pursuit of another person with intent to create fear of serious bodily injury or death.

e. *Threat:*

Any oral or written expression or gesture that conveys an intent to cause physical harm to people or property. Statements such as, "I'll get him" or "if you don't see it my way you'll end up just like those people at the Post Office" are examples of threatening expressions.

* Health and Human Services Department, Guidelines for Understanding and Responding to Violence in the Workplace 3-5 (1996)

NOTE: *The above definitions are not all inclusive. Employees should report incidents of workplace violence even if they might not fall within a particular definition. There is no standardized profile of a potentially threatening person or situation and an individual's "gut feeling" may be the best judge of a situation. Put simply, an employee knows a threat or intimidation or other disruptive behavior when s/he experiences it. Always err on the side of caution. All reports of incidents will be taken seriously.*

2. ROLES AND RESPONSIBILITIES OF ALL EMPLOYEES:

- To report promptly any acts of violence, threats, and similar disruptive behavior according to the procedure detailed below;
- To interact responsibly with those persons who are involved in the investigation, including all witnesses, the public, and other employees;
- To cooperate fully in any internal or external investigations/assessments of allegations of workplace violence; and
- If a manager, to take whatever action is appropriate under the circumstances to ensure the safety of all employees; to report all incidents to the FLRA's OIG; and to implement any corrective measures identified by the OIG or other management authority with the responsibility and authority to make such recommendation.

3. STEPS TO FOLLOW WHEN CONFRONTED BY THREATENING BEHAVIOR POSING AN IMMINENT DANGER:

- Situations are so varied that it is difficult to draw up a set of procedures that work in all situations. The following list of steps is intended as a guide:
- Remain as calm as possible;
- Secure your own safety--never stand directly in front of or make sudden movements with a violent or hostile person and, if possible, remove yourself from the room;
- Immediately dial 911 to summon the local authorities;
- Continue to remain calm, speaking slowly, softly and clearly;
- Ask the person to sit down; see if s/he is able to follow directions; and
- Be careful not to provoke the person by being critical or judgmental and not appearing to be empathetic.

4. REPORTING POTENTIALLY THREATENING INCIDENT:

- As soon as possible after a potentially threatening incident occurs, the Agent calls regional management and reports the incident;
- The appropriate regional manager notifies the IG at 202-482-6570 immediately and then notifies the OGC;
- Within the next business day, the Agent prepares a written report of the incident for regional management explaining the facts;
- The incident is documented in the case file; and
- The IG takes action, as appropriate.

5. CONTENTS OF THE AGENT'S REPORT:

A report of a threatening incident contains the following information:

- Name of the person making threats and his/her relationship to the FLRA;
- Name of the potential victim;
- Name of any witnesses;
- Where/when (date) the incident occurred;
- The specific language of the threat or harassing behavior; and
- If known, any precursor events to the incident.

6. RD CONSIDERS CHANGES IN THE RELATIONSHIP WITH A PARTY IN LIGHT OF AN INCIDENT:

After the threatening incident has occurred, the RD exercises discretion in considering whether it is necessary to change the way in which the RO relates with the party in light of the circumstances concerning the incident. Before doing so, the RD consults with OGC HQ. For example, a policy determination may be made concerning whether future contact with a party will be by telephone or require the party to come to the RO.

NOTE: *At any time during the course of an investigation, it is appropriate for the Agent to terminate an investigatory activity s/he is engaged in if the Agent perceives that his/her safety is an issue.*

7. STEPS TO REPORT NON-THREATENING INCIDENTS:

See Part 3, Chapter S concerning Dealing with Parties that Display Abusive Behavior During an Investigation. These instances do not involve behavior which could reasonably be construed to be a threat. Examples are: (a) making false statements; (b) disrupting an interview; (c) continued use of profanity after the individual has been requested to cease its use; (d) making harassing statements; and (e) other inappropriate

disrespectful behavior. The Agent reports the incident to regional management as soon as possible.

Q. DEALING WITH PARTIES WHO DISPLAY ABUSIVE BEHAVIOR DURING AN INVESTIGATION

OVERVIEW: It is the policy of the OGC to treat its customers in a professional manner with respect and courtesy, and to expect that OGC employees will be treated similarly by its customers. Abusive behavior, including the use of profanity or other offensive language, will not be tolerated. A party's representative or witness's behavior during an investigation that interferes with the investigation, but does not threaten employee safety or constitute a lack of cooperation within the meaning of § 2423.8(b) (see Part 3, Chapter O concerning Duty of the Charging Party), may constitute such abusive behavior. This type of behavior, which may occur telephonically or on-site, is unacceptable and will not be tolerated. It is important to note that to determine whether a particular action constitutes abusive behavior requires an exercise of judgment. For example, an Agent must differentiate between an individual who is simply frustrated with his/her circumstances and an individual whose behavior is, in fact, abusive.

OBJECTIVE: To provide guidance and the procedure to follow when a representative or witness is abusive during the course of an investigation.

1. DEFINITION OF ABUSIVE BEHAVIOR:

Abusive behavior is conduct which does not threaten the safety of an Agent, but which interferes with the ability of an Agent to perform his/her duties. Examples of abusive behavior are:

- Disrupting an interview;
- Continued use of profanity after the Agent has requested that its use cease;
- Making harassing, malicious, rude, derogatory, insubordinate or disparaging statements;
- Insisting on discussing disputes with, or disagreements about the actions of, or allegations against, the OGC, the Region, the FLRA, or a particular OGC employee, or other extraneous matters, after the Agent has requested the individual to restrict any comments to the investigation; and
- Other inappropriate or disrespectful behavior that interferes with the Agent's ability to conduct the investigation.

NOTE: *Employees are encouraged to report incidents that involve abusive behavior that might not fall within these particular definitions. There is no standardized profile of behavior that interferes with an investigation and subjects an Agent to abuse. If an Agent is unsure whether the conduct s/he has been subjected to is abusive behavior by a representative or a witness, the Agent reports the situation to the Region. In addition, see Part 3, Chapter R concerning*

Ensuring Employee Safety During an Investigation for a discussion of how to handle threatening situations.

2. ROLES AND RESPONSIBILITIES OF ALL EMPLOYEES:

- To report promptly, under the below procedure, when an employee believes that s/he is being subjected to abusive behavior;
- To interact responsibly with those persons who are involved in the investigation, including all witnesses, the public, and other employees;
- To inform those persons who are involved in the investigation, including all witnesses, the public, and other employees, when the Agent perceives that their behavior is unacceptable and request that the behavior cease; and
- If a manager, to take whatever action is appropriate under the circumstances to ensure that investigations are not interfered with and that Agents are not abused.

3. STEPS TO FOLLOW IF EXPERIENCING ABUSIVE BEHAVIOR:

a. *General situations:*

Situations are so varied that it is difficult to draw up a set of procedures that work in all situations. The following list of steps is intended as a guide:

- Do not respond in kind to the individual;
- In general, inform the individual in a professional and calm manner that: (a) the displayed behavior is unacceptable and (b) the Agent will terminate the conversation if the behavior continues.

b. *Conduct during a telephone conversation:*

If the conduct occurs during a telephone conversation, and after the above general protocol is followed, the conduct continues, inform the individual that the Agent will not continue the call while the behavior continues and that the Agent will call back to continue the conversation at a later date. The Agent then makes a note to the file and discusses the matter with RO management.

c. *Conduct in the RO or during an on-site visit in the RO city:*

If the conduct occurs in the RO or during an on-site visit in the RO city, and after the above general protocol is followed, the conduct continues, inform the individual that the Agent is taking a break to allow the individual to modify the behavior. Prior to terminating the investigation, the Agent contacts regional management to obtain guidance on whether the interview should be continued or whether other action is necessary. The Agent then makes a note to the file and follows the guidance received.

d. *Conduct occurs during an on-site visit outside of the RO city:*

If the conduct occurs during an on-site visit outside of the RO city, and after the above general protocol is followed the conduct continues, inform the individual that the Agent is taking a break to allow the individual to modify the behavior. Unless previously discussed with regional management, the Agent calls regional management to obtain guidance on whether the interview should be continued if the behavior continues after the break. The Agent then makes a note to the file and follows the guidance received.

4. THE RD CONSIDERS CHANGES IN THE RELATIONSHIP WITH A PARTY IN LIGHT OF AN INCIDENT:

A situation may arise when, despite following the above protocol, a particular representative of a party continues a pattern of abusive behavior during investigations, which, although neither threatening nor uncooperative, interferes with the investigation. Prior to changing the manner in which the Region will deal with the party (for example, limiting future contact with the party to telephone or meetings at the RO), the RD consults with OGC HQ.

A. AGENT'S INVOLVEMENT IN WITHDRAWAL REQUESTS PRIOR TO A REGIONAL DIRECTOR MERIT DETERMINATION

OVERVIEW: An Agent may solicit the withdrawal of a charge before an RD determination on the merits in limited circumstances.

OBJECTIVE: To provide criteria to guide an Agent in determining whether s/he may solicit withdrawal in a given case before an RD merit determination.

1. STANDARDS UNDER WHICH RO AGENTS CAN SOLICIT WITHDRAWAL OF A CHARGE BEFORE A MERIT DETERMINATION:

a. *The Standards:*

An Agent may solicit withdrawal of a charge prior to an RD decision on the merits and without supervisory approval only in the following limited circumstances:

- It is manifestly clear under the case law that the charge has no merit.
- It is manifestly clear that even if all the allegations in the charge, and all the allegations made by the Charging Party while discussing the charge, are true, there would be no ULP and the RD would dismiss the charge, absent withdrawal.
- It is manifestly clear that there is no jurisdiction over the charge.

For example, (1) the charge was filed untimely, the exceptions in § [7118](#)(a)(4)(B) of the Statute are inapplicable, and the violation is not alleged to be of a continuing nature; (2) the charge is barred by § [7116](#)(d) of the Statute and there is no question that the issues are identical under Authority precedent; (3) the charge on its face and the discussion with the Charging Party reveal that an ULP has not been stated; or (4) the Charged Party has filed with the wrong third party.

- It is manifestly clear that an element of the statutory violation is missing.

For example, it is undisputed that no request was made for a Union representative at an investigatory examination or the exclusive representative received actual, timely notice of a formal discussion.

NOTE: *Agents may always, at any time, contact their supervisor telephonically, or in person, to discuss whether withdrawal should be solicited prior to an RD decision. Similarly, a supervisor may always instruct an Agent in a particular case not to solicit withdrawal for any reason absent supervisory approval. All discussions with a supervisor and with the Charging Party concerning solicitation of a withdrawal prior to an RD decision are documented in the file, even if a withdrawal request is not received.*

b. *The Agent's explanation accompanying the solicitation:*

It is critical to the integrity of the investigative and decision-making process that the parties have faith in the process. The following disclosures are intended to ensure that the Charging Party is aware of the right to receive an RD decision on a charge and that the RD has not prejudged the charge. This disclosure is required regardless of the criteria relied upon by the Agent when soliciting withdrawal prior to an RD decision on the merits.

If an Agent solicits the withdrawal of a charge prior to an RD decision on the merits under these criteria, the Agent informs the Charging Party that:

- The basis for the Agent's withdrawal solicitation reflects only the Agent's view of the evidence collected thus far;
- Only the RD makes decisions on the merits of a charge, the RD has not yet made any decision on the charge, and the RD may evaluate the issues and evidence differently than the Agent;
- The Charging Party has a right to such further investigation of the charge (if not withdrawn) to be decided by the Region, if the RD does not dismiss the charge at this stage of the investigation consistent with the Quality Standards for Investigations set forth in [Part 3, Chapter B](#), and the Scope of Investigations criteria set forth at [Part 3, Chapter C](#);
- The RD has not prejudged the charge; and
- The Charging Party may consider seeking a party resolution of the dispute prior to completion of the investigation and an RD decision on the merits.

NOTE: *Withdrawal of a charge prior to an RD decision on the merits never occurs without providing the Charging Party an opportunity, as appropriate, to discuss the background of the charge and the basic facts and theory supporting the charge. Thus, no withdrawal is solicited until there has been this initial opportunity provided to the Charging Party.*

2. SOLICITATION OF A WITHDRAWAL PRIOR TO AN RD DECISION ON THE MERITS BASED ON AN AGENT'S EVALUATION OF THE WEIGHT OF THE EVIDENCE:

The solicitation of a withdrawal of a charge based on the weight of the evidence differs from a solicitation based on the three standards discussed above in #1. Unlike the three standards above, which are based on a clear legal analysis, an evaluation of the weight of the evidence requires a deliberative, decision-making approach.

RDs retain the discretion to authorize individual Agents to discuss the Agent's view of the weight of the evidence and solicit a withdrawal of the charge based on that assessment without supervisory approval on a case-by-case basis. In this instance, an Agent may have a frank discussion of his/her view of the evidence and solicit a withdrawal of a charge prior to an RD's merit decision based on the Agent's assessment of the weight of the evidence obtained thus far in an investigation.

NOTE: *Supervisory approval normally is required prior to solicitation of a withdrawal based on the Agent's view of the evidence to maintain the integrity of the decision-making process. The best reasoned decisions supported by rational argument are obtained through the Agenda process whereby different ideas are discussed and different perspectives of the evidence are presented and debated before the decision-maker, the RD. The Agenda process also provides a valuable opportunity to train employees and educate all agenda participants on an on-going basis. For these reasons, Agents only solicit withdrawal based on the Agent's view of the evidence prior to an RD merits decision after supervisory approval or based on prior pre-investigation supervisory authorization.*

3. HOW THE AGENT PROCEEDS IF A WITHDRAWAL REQUEST IS, OR IS NOT, SUBMITTED:

a. *The Charging Party submits withdrawal request:*

The Agent informs the RD and notes in the file the standard relied upon and the rationale for the Agent's solicitation to enable the RD to determine whether to approve the withdrawal. The RD issues a letter to both parties confirming that a charge has been withdrawn based on the Charging Party's request. Confirmation of withdrawal of the charge may not be made by e-mail.

b. *The Charging Party does not submit withdrawal request:*

In addition to documenting the file, the Agent ceases taking additional evidence and informs RO management so that the RD, under the Quality Standards for Investigations ([Part 3, Chapter B](#)) and the Scope of Investigations ([Part 3, Chapter C](#)), can determine whether the investigation is complete and an RD decision on the merits is rendered at this stage of processing of the charge. The Agent ensures that the investigative file contains the information upon which the Agent based the solicitation.

NOTE: *No additional evidence is taken because the Agent has concluded, in essence, that: (a) under the scope of investigation criteria, the investigation has been completed; (b) there is no merit to the charge, and (c) the case is presented to the RD for decision on the merits. Thus, it would not be possible then to complete an investigation without the Charging Party also perceiving that any additional investigation is either unfair or not impartial.*

4. WHEN THE RD DISAGREES WITH AN AGENT'S DECISION TO SOLICIT A WITHDRAWAL:

Should an RD disagree with an Agent's decision to solicit withdrawal and determine that more evidence is needed, the RD has discretion to determine whether the case will be reassigned to another Agent for the remainder of the investigation.

B. REGIONAL DIRECTOR APPROVAL OF REQUEST TO WITHDRAW CHARGE PRIOR TO A REGIONAL DIRECTOR MERIT DETERMINATION

OVERVIEW: A charging party may submit a request to withdraw an unfair labor practice charge or any portion of the charge at any time. However, the Regional Director has discretion whether to approve the withdrawal request. Upon receipt of a withdrawal request before a merit determination, the Agent should promptly prepare and submit to the Regional Director a recommendation regarding approval of the withdrawal.

OBJECTIVE: To provide guidance concerning the process of withdrawal requests and the process by which a withdrawal request may be rescinded.

1. A WITHDRAWAL REQUEST PRIOR TO A NON-MERIT DETERMINATION:

- The Agent notes in the case file whether the withdrawal request was solicited or unsolicited. (See Part A for standards governing Agent's solicitation of a withdrawal prior to a Regional Director's merit determination.)
- The Agent should attempt to ascertain the reasons for withdrawal, which -- if provided--should be included in the Agent's recommendation to the Regional Director.

See [ATTACHMENT 4B1](#) for a Sample Letter Approving a Withdrawal Request.

See [ATTACHMENT 4B2](#) for a Sample Letter Approving a Partial Withdrawal.

2. WITHDRAWAL REQUEST WHEN RESOLUTION IS A PSIWOC:

- a. *Regions record a resolution as a PSIWOC (Party Settlement Involving Withdrawal of Charge):*
 - i. When a resolution is a PSIWOC:
 - If the Region obtains some evidence or has some indication (oral or written) as to the terms of the resolution, and determines that the resolution settles the ULP dispute and is consistent with the purposes and policies of the Statute resulting in the withdrawal of the charge, it is recorded as a PSIWOC.
 - If the Agent receives a cryptic oral or written message indicating just that the parties have resolved the matter it is recorded as a PSIWOC, but the Agent should attempt to ascertain the details of the resolution and – if provided -- include that information in the Agent's recommendation regarding approval of the withdrawal.

- ii. Case file documentation of PSIWOC:
 - The Agent's notes on his/her involvement in obtaining the resolution; and
 - Includes a copy of the resolution or describes the terms of the resolution.
- iii. Case recorded as an ADR activity:

If the Agent was involved in any way in helping to obtain a PSIWOC it is recorded as an ADR activity and entered into the case management system. Even if the involvement is only a phone call to the parties to facilitate resolution of the charge, it is recorded as an ADR activity.

b. *Enforcement of PSIWOC:*

Because the agreement involves the withdrawal of a charge, the RO does not monitor for compliance. A PSIWOC has the same effect as an enforceable contract, i.e., a party who fails to comply with the terms of a settlement agreement may be found to have repudiated that agreement in violation of § [7116\(a\)\(1\)](#) and (5) of the Statute. See *Dep't of Defense Dependents Sch.*, [50 FLRA 424](#) (1995); *Great Lakes Program Serv. Ctr., SSA, Dep't of Health and Human Serv., Chicago, Ill.*, [9 FLRA 499](#), 500 (1982) (respondent violated (a)(1) and (5) by repudiating a MOU negotiated in settlement of a ULP charge). See LM, Part 1, Chapter H concerning Post-complaint/Pre-hearing settlements for additional discussion of post-complaint PSIWOCs.

3. **RESCINDING A WITHDRAWAL REQUEST:**

In the interest of finality, fairness and uniformity, the following applies:

a. *When approval of request has not yet been mailed:*

The Region approves the request to rescind the withdrawal request. This usually occurs within a brief period (usually within a few hours) of the same day when the request was made because the Charging Party has reconsidered.

b. *When the letter approving request has been mailed before the request to rescind the withdrawal was received:*

A party has to show cause why approval of the request to rescind the withdrawal request should be granted. Only for extraordinary reasons will request be granted. For example:

- An OGC administrative error occurred which is linked to the party's lack of understanding evidencing no intent to withdraw; or

- The Charging Party's representative lacked authority to withdraw the charge.

See [ATTACHMENT 4B3](#) for a Model Dismissal Letter which includes a Footnote Approving a Request to Rescind a Request to Withdraw a Charge.

C. CONSULTATION, ADVICE AND CLEARANCE

OVERVIEW: Regions contact the OGC HQ to: (a) discuss novel legal issues, either generally or case-specific; (b) questions relating to this Manual or (c) seek legal Advice pertaining to a certain case.

OBJECTIVE: To provide guidance concerning the circumstances when it is appropriate for a Region to request Consultation, Advice or Clearance from the OGC and the method for doing so.

1. CONSULTATION:

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

2. ADVICE:

a. *When advice is requested:*

An RD requests advice by memorandum or telephone concerning a novel issue in a case, as the circumstances require. These include:

- Novel legal questions or factual situations;
- Issues involving OGC policy;
- Issues that may arise in different Regions with the same Unions (e.g., interpretation of a contract clause in a nationwide contract);
- An alleged violation of § [7116\(b\)\(7\)](#) of the Statute;
- A request for injunctive relief pursuant to § [7123\(d\)](#) of the Statute where the RD has determined that issuance of a complaint is warranted;
- The enforcement of a subpoena issued by the ALJ; and
- Issues specifically referenced in GC memoranda, Guidances, Policies, other advice memoranda, strategies, and any other documents which state that certain issues are submitted for advice.

b. *Contents of memorandum requesting advice:*

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

- The allegation;

- The issue;
- The relevant facts;
- The applicable law;
- A thorough analysis of the law as applied to the facts in the case;
- The pros and cons as to the outcomes of the case;
- The recommendation as to the disposition; and
- The proposed remedy, if applicable.

NOTE: *Advice is rendered based on the facts as found by the RD in the memorandum requesting advice.*

3. CLEARANCE:

The RD obtains approval or clearance before taking any action based on the following:

- Alleged noncompliance with an Authority decision;
- A challenge to the Authority's jurisdiction;
- Contemplated approval of an unsolicited withdrawal request after injunctive relief has been obtained;
- Approval of a remedy different from that authorized in an advice memo from OGC; and
- Issues specifically referenced in GC memoranda, Guidances, Policies, other advice memoranda, strategies, and any other documents which state that certain issues are submitted for clearance.

D. REGIONAL DIRECTOR MERIT DETERMINATIONS

OVERVIEW: Once an investigation has been completed and in the absence of a settlement or withdrawal of the charge, the case is ready to present to the RD for a merit determination.

OBJECTIVE: To provide guidance on matters relating to an RD's merit determination which include: (a) knowing when a case is ready for decision; (b) descriptions of different ways in which a case is presented to an RD for decision; (c) how to address credibility issues; and (d) documenting the decision in the case file.

1. WHEN A CASE IS READY FOR PRESENTATION TO THE RD FOR DECISION:

In accordance with the Chapter entitled Scope of Investigations, [Part 3, Chapter C](#), ULP charges are investigated to the extent that sufficient information has been revealed which permits the RD to render a determination on the merits of the charge.

NOTE: *For example, a case is considered ready for presentation to the RD if the investigation reveals that an element of a violation has not been established. In a discrimination case, where the Charging Party alleges a violation of § [7116\(a\)\(1\), \(2\)](#), if the investigation discloses that the unit employee against whom the alleged discriminatory action was taken was not involved in protected activity, the case has been investigated consistent with the scope of investigations requirement and is ready to present to the RD.*

2. PRESENTATION OF THE CASE TO THE RD:

a. Documenting the decision in the case file:

Except in cases where the disposition (usually on technical grounds) is unmistakable, a written pre-decisional report and recommendation by the investigating Agent/team and/or a written post-decisional report is completed. Either report, whether it precedes or follows the Region's decision, addresses every allegation of the charge by: (a) defining the nature of the claimed violation; (b) describing and assessing the relevant evidence; (c) identifying the applicable legal principles; and, (d) recommending an appropriate disposition--including, if a complaint is to be issued, recommendations on remedy and settlement prospects. The report also notes any defects of timeliness, jurisdiction or service of the charge, as well as any difficulties in obtaining cooperation from the parties.

NOTE: *Whatever technique is used to present the case to the RD, it must contain the Agent's recommendation. Whenever an RD decides not to issue a complaint on any portion of a charge and his/her reasons for doing so differ from those of the Agent, the case file contains a statement supporting the RD's rationale, unless the reasons for the RD's decision are fully stated in the dismissal letter (see Part 4, Chapter G concerning Dismissal Letters). Similarly, whenever an RD decides to issue a complaint on any portion of a charge for reasons different from those in the Agent's recommendation, the case file contains an explanation of that decision.*

b. *Methods of presentation of the case to the RD:*

Every case file must contain a Final Investigative Report (FIR) or other written documentation prepared by the Agent **before** the case is forwarded to the RD for decision that contains the Agent's identification of the issues, legal analysis and recommendation.

Whenever an RD decides a case differently from the Agent's recommendation, whether different from the Agent's recommendation or different from the Agent's rationale supporting an adopted recommendation, the case file contains a signed notation (usually on the FIR or Agenda Minute) that explains the RD's rationale for not adopting the recommendation and/or rationale. Whenever the RD agrees with the recommendation and supporting rationale and does not wish to comment further, the RD states "I agree" or words to that effect, and signs the FIR or routing slip.

- **FINAL INVESTIGATIVE REPORT**

The purpose of an FIR is to give the RD a clear, concise, and comprehensive summary of the case. RDs have discretion to determine how detailed a Final Investigative Report need be in each case. In cases where the RD has determined that the FIR may be abbreviated, at a minimum, before the case is submitted to the RD for consideration, the case file must contain written documentation that reflects the Agent's identification of the issue(s), legal analysis (application of the relevant law to the material facts) and a recommendation concerning the disposition of each of the allegations raised in the charge, with the remedy, when appropriate. In most cases, the Agent will complete an FIR that addresses the matters described below.

Unless otherwise determined by the RD, each FIR discusses the following information: (a) the parties; (b) the date the charge was filed; (c) the method of investigation; (d) the allegations; (e) material facts; (f) applicable law; (g) legal analysis (application of law to facts); and (h) recommendations, including remedy when appropriate. In addition, as applicable, the FIR addresses: (a) relevant contract provisions; (b) related cases; (c) experience with ADR programs; (d) results of settlements efforts, if any; (e) reasons for any delays in the investigation; and (f) proposed remedy if meritorious, including documentation in the case file supporting a nontraditional remedy; and (g) triable issues (if meritorious).

See [ATTACHMENT 4D1](#) for a Sample FIR.

- **AGENDA**

The goal of an Agenda conference is the same as that of an FIR described above. As in cases where an FIR is prepared, agents are expected to make recommendations to the RD at the Agenda on both the merits of the case and remedy, if appropriate. An Agenda may be held in cases where an FIR has also been completed or, as appropriate, in cases where it is not necessary to complete an FIR. The Agenda is used when regional

staff come together to discuss case/s. Attendance at the Agenda may vary according to the particular case and practices of the region. Staff present at an Agenda may be the RD, RA/DRD, team leaders, other agents who have similar cases, trial attorney (if known) and new employees. Because all staff is encouraged to contribute to the discussion, unlike an FIR, an Agenda gives the RD the added benefit of oral staff input before s/he makes a merit determination. New employees benefit by attending Agenda conferences because it can be used as an effective training tool.

The results of an agenda conference are documented in an Agenda Minute. See [ATTACHMENT 4D2](#) for the format for a Sample Agenda Minute.

- **OTHER DECISION-MAKING ALTERNATIVES**

The RD may exercise his/her discretion to utilize other decision-making alternatives such as: (a) team presentation to RD; and (b) delegation to the RA/DRD to make the decision on certain cases based on certain criteria.

- c. *Merit determinations:*

It is especially important in cases where the pre-decisional report (FIR, Agenda Minute) recommends issuance of a complaint, to make sure the discussion of the witnesses, their testimony and the documentary evidence, is complete and accurate, and proves the violation and remedy. Also, the Agent indicates those documents that should be considered for subpoena. This helps both to ensure that the complaint is complete and accurate and to prepare for eventual litigation of the case.

3. WEIGHING THE EVIDENCE IN THE INVESTIGATIVE AND DECISION-MAKING PROCESS:

The purpose of an investigation of a ULP charge is to ascertain, analyze and apply relevant facts in order to determine whether a violation of the Statute has occurred.

- a. *How to weigh the evidence and reconcile conflicting evidence--factors considered:*

All relevant evidence is evaluated in light of the totality of the evidence adduced during the investigation to determine if it is more probable than not that the event underlying the ULP occurred as the Charging Party has alleged. In this regard, consideration is given to:

- The existence of corroborating evidence;

Is there other testimonial or documentary evidence supporting the Charging Party's allegations?
- The witness's opportunity and capacity to observe the event;
- Whether other witnesses had the opportunity and capacity to observe the event;
- Consistency of the witness's statement;

- Contradiction by, or consistency with, other evidence;
- Inherent improbability;
- How likely is it that the event occurred in the manner described by the testimony?

See *24th Combat Support Group, Howard Air Force Base, Republic of Panama*, [55 FLRA 273](#) (1999) (citing *U.S. Dep't of Commerce, Nat'l Oceanic and Atmospheric Admin., Nat'l Ocean Service, Coast and Geodetic Survey, Aeronautical Charting Div., Wash., D.C., 54 FLRA 987*, 1006-07 and n.11 (1998) (citing *Hillen v. Dep't of the Army, 35 MSPR 453*, 458 (1987)).

b. *The RD does not issue complaint when there is insufficient credible evidence:*

An RD need not issue a complaint when the Charging Party witness presents a story which, although not contradicted by another witness, tends to be incredible when evaluated in light of the factors above. The consideration in deciding whether to issue a complaint is whether the evidence, taken as a whole, establishes that a violation has occurred. A witness's credibility is one of many factors that is considered.

In dismissing a case because of insufficient credible evidence, the record contains sufficient documentation supporting the decision which explains the reason for the dismissal.

c. *The RD does not issue complaint when it would not effectuate the purposes and policies of the Statute:*

In determining whether it would effectuate the purposes and policies of the Statute to issue complaint the RD considers the facts and circumstances of each case in light of the factors to be considered below. Deciding to dismiss a charge notwithstanding its merit is invoked sparingly by RDs.

- **HARM TO THE BARGAINING RELATIONSHIP**

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

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

- **HARM TO EMPLOYEES**

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

The magnitude of the harm to a particular employee or employees generally caused by a violation may also vary substantially depending upon the particular circumstances.

- **PATTERN OF CONDUCT**

Has the same or similar conduct occurred in the past?

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

- **CHANGED CIRCUMSTANCES**

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

The facts existing at the time a charge is filed can change by the time an investigation is completed or before a trial is held. For instance, the violation may have been cured, i.e., the Charged Party may have rescinded the violative conduct and there either is no identifiable harm caused by the violation or the Charged Party has voluntarily mitigated any adverse impact caused by the violation. In this situation, the RD will also consider whether the repudiation of an unfair labor practice was timely, unambiguous, specific to the conduct alleged, free of any other illegal conduct, and informed employees that similar conduct will not occur in the future.

- **THE REMEDY**

Is there an appropriate remedy for the violation?

Circumstances may be present which preclude an effective remedy. The lack of the need for an affirmative remedy is another factor that is considered in exercising prosecutorial discretion. Before a case is dismissed because there is no effective remedy, the RD gives consideration to whether some novel or exceptional remedy might be available.

4. PRE-COMPLAINT UNILATERAL SETTLEMENT AGREEMENTS WHERE THE RD HAS MADE A MERIT DETERMINATION:

a. *Regulatory authority:*

Section [2423.12\(b\)](#) authorizes RDs, upon a belief that the policies of the Statute would be effectuated and when the Charging Party refuses to enter into an informal settlement offered by the Charged Party, to enter into the agreement and decline to issue the complaint. See Part 4, Chapter F for a listing of the criteria an RD applies in approving a settlement agreement. The Charging Party has the right to appeal.

b. *Notification upon approval:*

i. Notification to the Charged Party:

When the RD approves an informal unilateral settlement agreement, the Charged Party is notified by letter along with a copy of the approved agreement and a notice, if applicable, and instructions that the performance of the terms of the agreement will be deferred until the Charged Party has been advised that the Charging Party has not filed an appeal or that the GC has sustained the action of the RD. See [ATTACHMENT 4D3](#) for a Sample Letter to Charged Party and [4D4](#) for a Sample Letter to Charged Party after GC denied appeal and Respondent should begin compliance.

ii. Notification to the Charging Party:

The Charging Party is also notified by letter of the approval of the agreement. See [ATTACHMENT 4D5](#) for a Sample Letter. In the letter, the Charging Party is given the reasons why its objections to the settlement agreement were not considered sufficient to bar the approval of the unilateral settlement by the RD. The Charging Party is also apprised of its appeal rights to the GC and is sent a copy of the approved agreement.

5. PRE-COMPLAINT BILATERAL SETTLEMENT AGREEMENTS WHERE RD HAS MADE A MERIT DETERMINATION:

a. Regulatory authority:

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

b. Notification upon approval:

i. Notification to the Charged Party:

When the RD approves a bilateral settlement agreement, the Charged Party is notified by letter along with a copy of the approved agreement and instructions to take immediately the action(s) detailed in the agreement. If the agreement provides for the posting of a notice, the notice is also sent to the Charged Party for signing, dating, duplicating and posting. See [ATTACHMENT 4D6](#) for a Sample Letter.

ii. Notification to the Charging Party:

The Charging Party and other interested parties are also sent copies of such notification.

See Part 4, Chapter F for a more in-depth discussion of settlements.

E. SOLICITING WITHDRAWAL AFTER A REGIONAL DIRECTOR NON-MERIT DETERMINATION

OVERVIEW: After an RD makes a non-merit determination and before the charge is dismissed, the Agent contacts the Charging Party and explains the basis for the non-merit determination and solicits the Charging Party's withdrawal of the ULP charge. See § [2423.11\(a\)](#).

OBJECTIVE: To provide guidance concerning what the Agent explains to a Charging Party when s/he solicits the Charging Party's withdrawal of the charge after an RD has made a non-merit determination and the matters the Agent discusses with the Charged Party.

1. THE AGENT SOLICITS WITHDRAWAL OF CHARGE:

After an RD determines that an investigation is complete and a ULP complaint is not warranted on one or more of the allegations alleged, the Agent solicits a withdrawal of the non-meritorious allegations of the charge or an amended charge by telephonically contacting and informing the Charging Party's representative of the following:

- The RD's decision that the charge, or certain allegations contained in the charge, does not warrant issuance of a complaint;
- The basis in fact and law for the decision;
- The Charging Party's option to withdraw the charge, or to withdraw the non-meritorious allegations or file an amended charge, within a reasonable time (normally no less than two and no more than three days except if an extension for doing so is granted (see #4 below)) or have the RD issue a public dismissal letter to both parties, with an appeal right to the OGC;
- The Region does not delay issuance of the dismissal letter to afford the Charging Party an opportunity to seek a resolution from the Charged Party on the charge;
- The Region does not become involved in facilitating any specific adjustments of the charge after a RD non-merit decision (although the Region is available, upon joint request, to assist the parties in improving their relationship);

NOTE: *Once an RD makes a merit determination any effort to settle a case must cease. In a rare case, an RD may exercise discretion to postpone a merit determination for a suitable period of time pending completion of ADR efforts.*

An RD has discretion to determine whether the Charged Party will be informed of the decision to dismiss if the Charged Party makes an inquiry as to the status of the case after the Charging Party has been informed of the decision to dismiss but during the time it is deciding whether to withdraw the charge.

See #6 below for how to respond to a Charged Party inquiry as to the status of a case.

2. THE PROTOCOL FOR THE AGENT'S EXPLANATION OF BASIS FOR THE NON-MERIT DECISION:

- a. *An Agent does the following in discussing and explaining the basis of the RD's decision:*
 - Engages in such discussion as is necessary to explain the basis of the RD's decision;
 - Acknowledges that the Charging Party's facts and legal arguments were considered fully, although they were insufficient to establish a basis for a complaint; and
- b. *An Agent does not do the following in discussing and explaining the basis of the RD's decision:*
 - Personalize the discussion by disclosing the particular positions; or
 - Offer his/her own personal opinion on the correctness of the Region's decision. Rather, the Agent's views on the applicable law, weight of the evidence and the application of the law to the evidence are presented at the Region's agenda, not to the Charging Party after the RD has made a decision.

NOTE: *Once the RD has rendered a decision on the merits, that decision becomes the decision of the Region and the Agent acts as the Region's representative in soliciting withdrawal. The Agent's ability to explain the rationale of the Region's decision to the Charging Party and the Agent's support of the Region's decision is critical to the credibility of the decision-making process. Presenting personal opinions inconsistent with the Region's decision incorrectly causes Charging Parties to perceive that their charge was either not fully investigated or not fairly decided. In most cases, the Agent is the Charging Party's sole contact with the Region. Therefore, it is imperative that all Agents recognize the critical role they fill in representing the Region to the parties.*

3. HOW THE CHARGING PARTY REQUESTS TO WITHDRAW CHARGE:

- a. *Charging parties may submit a withdrawal request in writing or telephonically. The RD issues a letter to both parties confirming that a charge has been withdrawn based on the Charging Party's request. Confirmation of the withdrawal of the charge may not be made by e-mail.*
- b. *Opportunity for a Charging Party to rescind a withdrawal request when the Regional Director reconsiders a previous partial merit decision:*

Sometimes, when a Charging Party is informed that the RD has determined that some allegations have merit and others do not, the Charging Party submits a withdrawal request of the non-merit allegations. In situations where the RD reconsiders that initial merit decision and determines that there is no merit to the remaining allegations, the

Charging Party is afforded an opportunity to rescind its withdrawal request and receive a dismissal letter for all of the non-merit allegations, both those initially withdrawn and those redetermined to have no merit.

4. EXTENSION OF TIME TO SUBMIT WITHDRAWAL REQUEST:

- a. *Factors considered when determining whether to grant an extension of time to submit withdrawal:*

The Regions have discretion to extend the time to submit a withdrawal request dependent upon such factors as:

- The Region's past dealings with the party, e.g., whether in the past the Charging Party has requested extensions to withdraw and the results of those extensions;
- The type of issue involved in the charge, e.g., whether the Charging Party needs to explore what other third-party avenues are still available; and
- The reason for the extension, e.g., whether the Charging Party is required to contact an individual employee, a particular Union official or a particular management official.

NOTE: *If additional time is granted for the submission of a withdrawal request under the above criteria, there is no need to inform the Charged Party of this extension since the extension would not have been granted to allow the Charging Party to obtain a pre-dismissal adjustment. If a Charged Party requests the status of the case during this period, the Agent informs the Charged Party that the RD has made a decision to dismiss, absent withdrawal. The extension has no impact on the disclosure process.*

- b. *The Region denies the Charging Party's request for additional time to seek adjustment from Charged Party:*

The Region denies a Charging Party's request for an extension of time to submit a withdrawal request and defers the issuance of a dismissal letter to allow the Charging Party an opportunity to seek some sort of adjustment from the Charged Party on the charge. After an RD has determined that a complaint is not warranted, RO employees have no involvement in party settlements of disputes raised in charges.

- c. *The Agent informs the Charged Party of Charging Party's intent to seek an adjustment of charge:*

If a Charging Party informs an Agent that the party intends to seek an adjustment from the Charged Party on the charge after the Agent has communicated the Region's non-merit determination, the Agent informs the Charging Party that the Agent will expeditiously inform the Charged Party that there has been a non-merit determination. Then, the Agent contacts the Charged Party.

5. THE AGENT IS UNABLE TO CONTACT THE CHARGING PARTY:

If the Agent is unable to contact the Charging Party's representative by telephone after the RD decision, a message is left indicating that the Charging Party should contact the

Agent as soon as possible to discuss the charge. If the Charging Party does not respond expeditiously, the Agent will leave another message stating that the charge will be dismissed by a date certain if it is not withdrawn. If that telephonic communication proves unsuccessful, the Agent may send an e-mail to the representative to notify the Charging Party of the RD's decision not to issue complaint and to contact the Agent by a date certain to discuss and/or to withdraw the case and that if not withdrawn by a date certain the RD will issue a dismissal letter.

6. RO DISCLOSURE TO THE CHARGED PARTY AFTER AN RD NON-MERIT DECISION:

- a. *The Region denies the Charged Party's "blanket" request for notification of RD's decision:*

The Regions do not grant "blanket" requests requiring the Region, in all charges involving a particular Charged Party, to notify automatically the Charged Party whenever an RD decision has been made to dismiss, absent withdrawal, but before a withdrawal has been approved or a dismissal letter issued. These requests are considered on an individual case basis.

- b. *Communication with the Charged Party after the Charging Party has been informed of RD's non-merit determination:*

- i. Before the Charging Party has withdrawn the charge:

If a Charged Party requests the status of a charge after the RD decides that a complaint is not warranted, and if the Region has already informed the Charging Party of that decision and the Charging Party has not yet withdrawn the charge, the RD has discretion to determine whether the Charged Party is informed of the decision to dismiss, absent withdrawal. If the Charged Party is informed and further requests the basis for the decision, the RD has discretion in choosing from various options for the manner in which it responds. Among these options are:

- A full discussion of the legal issues involved;
- A simple statement that the evidence was insufficient to support the allegation; and
- A discussion that, although there is not an actionable ULP, the parties have a relationship problem which should be addressed in some other manner.

- ii. After the Charging Party has withdrawn the charge:

If a Charged Party requests the reasons for the withdrawal of a charge after a charge has been withdrawn, the Agent advises the Charged Party that the case is now closed and that the Charged Party should contact the Charging Party to obtain any information concerning the Charging Party's motivation for withdrawing the charge.

NOTE: *This process enables the Charged Party to have the same knowledge as to the status of the case as the Charging Party while the case is open. The failure to disclose information upon request could cause the Region to be viewed as assisting the Charging Party in obtaining a settlement of a charge which has been determined by the RD to be dismissed, absent a withdrawal. After the charge is withdrawn, however, the case is considered closed and the Charged Party has the same knowledge of the status of the case as the Charging Party when the Charged Party receives a copy of the approved or confirmed withdrawal request.*

7. THE AGENT DOCUMENTS ALL PARTY CONTACTS IN THE CASE FILE:

All RO contacts and attempted contacts with either party are documented in the file. If, during the discussion soliciting withdrawal, the Charging Party asserts that there is additional evidence which has not been provided to the Region, the Agent:

- Asks the Charging Party to explain: (a) why the evidence was not presented during the investigation and (b) the nature of the evidence, and documents the answer in the file; and
- Informs the RD of this assertion.

The RD, when reviewing the file, then has discretion to determine whether to issue the dismissal letter or reopen the investigation.

F. SETTLEMENTS

OVERVIEW: The OGC seeks to resolve ULP disputes after a ULP charge is filed but before an RD has made a determination that the charge has merit.

OBJECTIVE: To provide guidance concerning: (a) the goals of seeking settlements in ULP cases; (b) the manner in which settlements are reached; (c) the criteria RDs apply in determining whether to approve settlement agreements; and (d) issues concerning approval of formal settlement agreements.

1. THE GOAL OF ALL SETTLEMENTS:

To enhance the relationship between the parties; resolve the issues that caused the parties to seek FLRA assistance; and further the purposes and policies of the Statute. See § [2423.12](#).

2. THE SPECIFIC GOAL OF SETTLEMENTS:

- To resolve the specific issue brought before the OGC to the satisfaction of the parties;
- To bring the parties together and to enhance their relationship by resolving underlying disputes while improving the parties' relationship and their communication;
- To involve the parties in developing a remedy which satisfies their legitimate needs and promotes the purposes and policies of the Statute;
- To ensure that the OGC expends its resources on meaningful issues and that the Regions are abiding by uniform policies;
- To provide flexibility for the parties, with OGC assistance, to craft solutions responsive to their particular interests in each case;
- Where applicable, to explore creative remedies which meet the needs of the parties and which further the purposes and policies of the Statute even if not substantially similar to the traditional remedies ordered by the Authority after litigation;

Examples of creative remedies are: (a) mandatory training for supervisors or union officials; (b) specifying the names of supervisors or union officials in notices who committed the acts constituting the violations; (c) communications from managers to supervisors or from union presidents to stewards regarding their obligations under the Statute; (d) ordering parties to bargain an agreement on specific issues; (e) requiring a Charged Party to pay travel and per diem for bargaining sessions; and (f) establishing a process for obtaining information and/or the use of time tables for bargaining; and

- Where applicable, to approve settlement agreements which allow for limited postings, no postings, a posting of something other than an FLRA Notice To All Employees (such as a memorandum of understanding, letter, announcements in facility newspapers or newsletters, verbal announcements to individuals or groups of employees, e-mail, etc.), or whatever creative remedy the parties agree upon.

For a discussion of unilateral and bilateral settlement agreements see Part 4, Chapter D concerning RD merit determinations.

3. **CRITERIA FOR AN RD'S APPROVAL OF A UNILATERAL SETTLEMENT AGREEMENT:**

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

- Does the agreement remedy the specific allegations of the complaint?
- Does the agreement remedy the specific harm to the individual and/or the institution caused by the violation?
- Has the Charged Party committed the same or similar violation repeatedly?
- Does the agreement enhance the relationship of the parties?
- Has the Charging Party raised valid objections to the settlement?
- What purpose does the settlement serve?
- What are the benefits of litigation?
- How does the settlement communicate to employees their rights under the Statute and communicate to affected employees the terms of the settlement?
- What is the cost (time, resources and travel) involved in litigating the case in relation to the nature of the violation?
- Does a non-admissions clause undermine the effectiveness of the remedy under all the circumstances of the case?

NOTE: *The importance of any of the above factors varies according to the particular circumstances of each case. The factors are not all inclusive and other special circumstances may be considered. Even though one factor may indicate that a unilateral settlement agreement should not be approved, other criteria may outweigh that consideration and indicate that the settlement, in the totality of the circumstances, effectuates the purposes and policies of the Statute. Similarly, even though a unilateral settlement agreement may provide for the traditional remedy which the Authority has ordered in similar circumstances, all the criteria are considered to determine whether a novel remedy beyond that normally granted is appropriate.*

5. FORMAL SETTLEMENT AGREEMENT:

a. *Approval is appropriate when:*

The Charged Party has demonstrated its unwillingness to abide by the Statute.

- i. Such conduct could be demonstrated by repeatedly violating the Statute in a certain area of law (such as bypass, formal discussion, etc.), even though it has signed settlement agreements, posted notices, received training and other creative solutions have been proposed and accepted.
- ii. In cases involving nationwide bargaining units or consolidated bargaining units, the other Regions are kept informed of the status of proposed formal settlements.

See [ATTACHMENT 4F1](#) for a Sample Stipulation and Formal Settlement Agreement and Request for Approval of Formal Settlement Agreement. See *SSA, Balt., Md.*, [57 FLRA 152](#) (2001) for an Authority decision approving the parties' stipulation and Formal Settlement Agreement.

b. *The parties' agreement to something other than a formal settlement agreement:*

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

6. ENFORCEMENT OF SETTLEMENT AGREEMENT:

A party who fails to comply with the terms of a settlement agreement may be found to have repudiated that agreement in violation of § [7116](#)(a)(1) and (5) of the Statute.

G. DISMISSAL LETTERS

OVERVIEW: If, after having been given an opportunity to withdraw the charge because the RD has determined that the charge lacks merit (see Part 4, Chapter E), and the Charging Party chooses not to withdraw the charge, the RD issues a dismissal letter. See § [2423.11](#)(b). The dismissal letter is a legal document that is written on behalf of the GC which explains the basis on which a charge is dismissed.

OBJECTIVE: To provide guidance concerning: (a) the bases upon which a ULP charge may be dismissed; (b) the characteristics of a quality dismissal letter; (c) the notification requirements when a charge is dismissed; (d) partial dismissals; and (e) dismissals based upon prosecutorial discretion.

1. BASES FOR DISMISSAL OF A CHARGE:

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

- Failure to comply with the filing requirements set forth in the Regulations;
- Charge is untimely filed (see [ATTACHMENT 3J1](#) for a Confirming Letter of Charging Party witness which confirms that charge was untimely filed);
- Lack of jurisdiction pursuant to § [7103](#)(a)(2), (3) or (4) of the Statute;
- Failure to allege a ULP under § [7116](#)(a) or (b);
- Lack of cooperation by the Charging Party;
- Lack of sufficient evidence to support the allegation;
- Processing is prohibited by § [7116](#)(d) of the Statute; and/or
- Prosecution would not effectuate the purposes and policies underlying the Statute.

2. CRITERIA OF A QUALITY DISMISSAL LETTER:

- Opening paragraph contains a clear statement of the allegations or issues as clarified during the investigation;
- A succinct statement of the facts;

NOTE: *Minimize inclusion of background facts. In a straightforward manner, include only those facts which must be considered to determine whether a violation has occurred. Only the substance of testimony may be provided; do not identify the person who provided it. Statements of Position may be attributed to a party. Do not attribute facts to a particular affiant. See [Part 3, Chapter H](#), concerning*

Affidavits Taken in Person which discusses the confidentiality requirement.

- Statement of applicable law with supporting case cite/s;

NOTE: *Ensure that the case cited is still good law. It is preferable that the case cited be precedent-setting, which may or may not be the most recent case. A citation to the most recent case, which also contains a citation to the precedent-setting case, is acceptable (include a parenthetical indicating that the Authority relied on, cited, applied, etc., the precedent-setting case). Also, the case law may need to be explained briefly in a parenthetical after the case cite.*

- Application of the case law to the facts of the case;

NOTE: *The legal analysis includes a discussion and explanation of why the application of the law to the facts in the case has resulted in a finding of no violation in this case. Each allegation contained in the charge must be addressed.*

- Conclusion;
- Appeal rights;
- No grammatical or typographical errors;
- Does not present opinions, using phrases such as, “in my view” or “I think”

See [ATTACHMENT 4G1](#) for a Dismissal Letter in Unilateral Change Case After Editing; [ATTACHMENT 4G2](#) for a Model Dismissal Letter After incorporating edits in Unilateral Change Case; [ATTACHMENT 4G3](#) for a Model Dismissal Letter in (a)(2) Case; and [ATTACHMENT 4G4](#) for a Model Dismissal Letter in a Case with Multiple Allegations

3. **PARTIAL DISMISSALS:**

Occasionally, the RD dismisses certain allegations in the charge but finds merit and issues complaint with respect to other allegations of the charge. The Charging Party is given an opportunity to amend the charge, or to submit a withdrawal, to delete those allegations that will not be included in the complaint. Absent such amendment or withdrawal, the RD dismisses such allegations. The letter delineates the RD’s decision as to which allegations are being dismissed and which are the basis upon which a complaint is issued. The letter also states that no further action will be taken on the meritorious allegations until either the appeal period has expired or, if applicable, until after the GC rules on the appeal.

See [ATTACHMENT 4G5](#) for a Model Partial Dismissal Letter.

4. REVOCATION OF DISMISSAL:

After an RD has issued a dismissal letter and during the period when an appeal may be filed or while an appeal is under consideration (see Part 5, Chapter C concerning the Appeals Process), the RD may decide to revoke the dismissal due to:

- The submission of a withdrawal request; or
- The Charging Party establishes that there is new evidence that did not exist at the time of the investigation or that the Charging Party could not have reasonably known about the existence of such evidence.

If the RD determines that valid grounds exist to revoke a dismissal letter, the parties are notified of such revocation and are given a date certain within which to submit additional arguments concerning the grounds upon which the dismissal was revoked. The Agent ensures that the case file contains the revocation letter. Only after the parties have been given this opportunity to submit additional arguments does the RD reissue the dismissal letter.

See [ATTACHMENT 4G6](#) for a Sample Letter Notifying the Parties of a Revocation of a Dismissal Letter (revocation of dismissal letter is not always based on what is stated in the Charging Party's appeal).

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

6. SERVICE OF DISMISSAL LETTER AND REVOCATION OF DISMISSAL LETTER:

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

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.

PART 1 ATTACHMENTS

[ATTACHMENT 1A1](#)

Sample Letter Describing Potential Charging Party's Pre-filing Activities

[ATTACHMENT 1A2](#)

OGC Technical Assistance Workload Form

[ATTACHMENT 1B1](#)

Alternative Dispute Resolution

ATTACHMENT 1A1

SAMPLE LETTER DESCRIBING POTENTIAL CHARGING PARTY'S PRE-FILING ACTIVITIES

(date)

Potential Charging Party
(name and address)

Dear Mr./Ms. (name):

I am writing because you asked about filing an unfair labor practice charge. Before you file a charge, we suggest you communicate with the other party and try to reach a solution that meets both of your needs. We have found that when parties resolve matters themselves, they have a better chance of improving their relationship. But if the parties agree that you would like the FLRA's assistance, you should jointly request our help. Please see the enclosure which describes the alternative dispute resolution services we provide. We assist parties as much as we can, consistent with staff availability.

If you decide to file an unfair labor practice charge, you must complete FLRA Form 22, Charge Against an Agency, which I have enclosed. Please send the form to my office. Before you complete the form, you should take time to organize your thoughts and collect supporting documents and other evidence. You should ask yourself the following questions:

- Which of the subsections under section 7116 of the Federal Service Labor-Management Relations Statute (Statute) has the other party violated?
- How do I support this allegation?
- What witnesses will support my allegation and what will they say?
- Do the provisions of the collective bargaining agreement have any impact upon the allegations?
- What are my interests in this case and what remedy am I seeking?

After you have organized your information, you should complete the Charge Form. Make sure to sign and date the form and provide the information asked for in each part of the form. You must serve the other party with a copy of the charge, and give my office a written statement that you have completed the service. To support your allegations that an unfair labor practice has been committed, enclose with your charge any documentary evidence and names/telephone numbers of witnesses. If you choose to file a charge by fax, do not fax more than five (5) pages, as stated in our regulations. Our regulations do **not** permit you to send supporting evidence and documents to us by fax. See 5 C.F.R. § 2423.5.

Please answer the "who, what, when, where, and how" questions when describing the alleged violation(s) in section 6 of the form.

- Who, for the Charged Party, violated the Statute (list title)?
- What happened to cause the alleged violation(s)?
- When did the alleged violation(s) happen (dates)?

Please answer these questions, but keep your description of the violations brief.

Shortly after the Region docket the charge, the case will be assigned to an FLRA Field Agent for investigation. The Agent will contact you to talk to you about the process. If you have any questions about the unfair labor practice process, feel free to contact my office for assistance.

Very truly yours,

Regional Director

Enclosure

ATTACHMENT 1A2

Date _____

____-TA-____-

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

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

ATTACHMENT 1B1

ALTERNATIVE DISPUTE RESOLUTION

The Office of the General Counsel (OGC) Alternative Dispute Resolution (ADR) Services Program supports the FLRA's Agency-wide Collaboration and ADR (CADR) initiative. We provide dispute resolution services to resolve parties' labor-management disputes and to assist parties in developing the type of labor-management relationship that is best suited to their own needs. The OGC will work with the parties to customize a program that assists them. The OGC furthers its mission to provide leadership in promoting stable and productive labor-management relationships in the Federal sector by providing ADR programs both before and after an unfair labor practice charge or a representation petition has been filed. The OGC's ADR program is codified in the Regulations. See section 2423.1(a) and (b), 2423.2 and 2423.7 (for ULP disputes) and section 2422.13(a) and (b) (for representation matters).

FAQs

- *Does the OGC provide ADR services before a charge is filed?*
- *Specifically, what types of services does the OGC provide?*
- *Is the Regional Office available to help parties with representation issues that arise before a petition has been filed?*
- *Generally, what are the benefits of the ADR services that the OGC provides?*
- *What types of ADR programs not directly related to a pending ULP case might you consider requesting that the OGC provide?*
- *Specifically, what are some examples of ADR services that the OGC has provided?*
- *Does the OGC provide ADR services that are not directly related to a pending ULP case to requesters in all cases?*
- *Can a union force an agency, or an agency force a union, to participate in a dispute resolution program offered by the OGC?*
- *How do you initiate a request for an ADR service that is unrelated to a pending ULP charge?*
- *What is the cost of providing an ADR service?*
- *Whom should you contact about requesting the delivery of an ADR service?*

ANSWERS

Does the OGC provide ADR services before a charge is filed?

Yes. Upon a joint request of the parties, Regional Office Agents assist parties in resolving unfair labor practice (ULP) disputes prior to the filing of a ULP charge. See section 2423.1(a) of the Regulations. It is the General Counsel's policy to encourage all parties to meet and attempt to resolve ULP disputes before a charge is filed. To that end, if requested or agreed to by both parties, a representative of the Regional Office may be available, in appropriate circumstances, to assist the parties in identifying the underlying issues and their interests and in resolving their dispute.

Specifically, what types of services does the OGC provide?

Under section 2423(b), the parties may request that an OGC Agent provide any of the following services:

- **Facilitation** – Assisting the parties in improving their labor management relationship
- **Intervention** – Using an interest-based technique, intervening when parties are experiencing or expect significant ULP disputes
- **Training** – Training union and management representatives on their rights and responsibilities under the Statute, and how to avoid litigation over those rights

- Education – Working with the parties to recognize the benefits of, and establish processes for, avoiding disputes and resolving disputes by consensual rather than adversarial means

The above services may be requested at any time, i.e., they do not have to be related to a charge. In addition, after the initiation of an investigation, a Region may suggest to parties, as appropriate, that they may benefit from the ADR services.

Is the Regional Office available to help parties with representation issues that arise before a petition has been filed?

Yes. Just like in the ULP arena, upon the joint request of the parties, Regions are available to assist in resolving and narrowing representation issues prior to the filing of a representation petition, see section 2422.13(a) of the Regulations, and after a petition has been filed, see section 2422.13(b).

Generally, what are the benefits of the ADR services that the OGC provides?

- Ensure understanding of, and compliance with, the Statute
- Assist the parties in developing the type of labor-management relationship that best suits them
- Enable Federal agencies and their employees to deliver the highest quality services
- Enhance the quality of work life and the well-being of employees and managers

What types of ADR programs not directly related to a pending ULP case might you consider requesting that the OGC provide?

Upon joint request of the parties, the OGC is available to assist the parties to evaluate the success of their current labor-management relationship and develop the type of labor-management relationship that best meets their interests. The OGC will work with the parties to customize a program that meets their needs. This could include statutory training as well as presentation of information about the types of labor-management relationships options and their characteristics, facilitating a discussion of the parties' respective interests, and, if both parties agree, assisting the parties in developing options and selecting a course of action to achieve their interests.

Specifically, what are some examples of ADR services that the OGC has provided?

- Provided advanced statutory training to union and agency representatives at both the national and local levels. The training gave the participants an opportunity to discuss the law and strategies to interpret and apply the law in a manner that fosters productive labor-management relationships.
- Facilitated the resolution of multiple ULP and representation issues arising from the announced closing of a facility. The parties agreed to develop options for the placement of employees. The ULP charges were withdrawn and the parties' relationship improved.
- Helped parties affected by government-wide reorganizations by facilitating agreements that minimized the need for litigation concerning the reorganization.
- Provided training and facilitation services to assist parties in addressing disputes involving representation issues, such as successorship and accretion created by reorganizations, resulting in a narrowing of the issues and an agreement on the number of petitions to be filed to resolve the representation matters.
- Conducted pre-representation petition filing meeting to explore the effects of a scheduled reorganization affecting several existing bargaining units and assisted the parties in agreeing on the manner in which representational rights would be effectuated during the processing of the representation petitions.

Does the OGC provide ADR services that are not directly related to a pending ULP case to requesters in all cases?

No. The OGC concentrates its limited resources where they have the potential to achieve the greatest results. Based on this objective, Regional Directors consider specific factors in determining whether ADR programs and services are undertaken. Not all of the following factors are relevant to each situation:

- Commitment of the parties to improve their labor-management relationship
- Availability of OGC employees to meet the parties' needs
- Balancing of resource needs among OGC programs

- Organizational level of the Agency and Union
- Character of labor-management relationships
- The OGC's commitment to, and the parties' need for, continued assistance
- Nature and extent of prior assistance
- Acceptability of OGC assistance by the Agency and Union
- OGC involvement furthers dispute resolution

See ULPCHM, Part 1, Chapter B for a more in-depth discussion of each of the criteria listed above.

Can a union force an agency, or an agency force a union, to participate in a dispute resolution program offered by the OGC?

No. These services are only offered upon the parties' joint request. However, as part of processing a ULP charge, the OGC may suggest to the parties, as appropriate, that they may benefit from these ADR services.

How do you initiate a request for an ADR service that is unrelated to a pending ULP charge?

· ADR services may be initiated by the OGC or by a request or agreement of the parties. Depending upon the type of ADR service requested, it may be appropriate to require that the parties jointly agree that the Region provide such services. In any event, the Region provides such services consistent with OGC criteria.

· For example, parties may jointly request skills training or assistance in enhancing their labor-management relationship, or the OGC may suggest to the parties that they may benefit from such training or assistance. Irrespective of how these ADR services are initiated, the OGC creates innovative programs that are responsive to the varying needs of the parties.

What is the cost of providing an ADR service?

Costs may include reimbursement for travel expenses and expenses for training materials.

Whom should you contact about requesting the delivery of an ADR service?

As assigned by each Regional Director, Regional Dispute Resolution Specialists (RDRSs), along with the Regional Office Agents, deliver OGC ADR services within their respective Regions. The RDRS coordinates the day-to-day delivery of such services within their Regional Office and provides coaching and mentoring to Regional Office Agents on the OGC ADR Program. Visit the [OGC's ADR page](#) on the web site for the address and telephone number of each of the Regions and the e-mail address and telephone number for each RDRS.

PART 2 ATTACHMENTS

<u>ATTACHMENT 2A1</u>	FLRA, OGC Regional Offices
<u>ATTACHMENT 2A2</u>	Sample Order Transferring Case
<u>ATTACHMENT 2B1</u>	Sample Letter Returning Deficient Charge to Charging Party
<u>ATTACHMENT 2B2</u>	Model Uniform Opening Letter
<u>ATTACHMENT 2B3</u>	Description of the Unfair Labor Practice Investigation Procedure
<u>ATTACHMENT 2D1</u>	Sample E-mail Notice to all Regions of Charge that may have Nationwide Implications
<u>ATTACHMENT 2G1</u>	Elements of Common Violations
<u>ATTACHMENT 2H1</u>	Sample Letter Re: Amendment of Charge
<u>ATTACHMENT 2J1</u>	Sample Letter Deferring ULP Charge During Pendency of Representation Proceeding

ATTACHMENT 2A1

FEDERAL LABOR RELATIONS AUTHORITY OFFICE OF THE GENERAL COUNSEL REGIONAL OFFICES

FLRA Regional Offices, located in the following areas, serve over 2.1 million Federal employees worldwide:

ATLANTA REGIONAL OFFICE

225 Peachtree Street, Suite 1950
Atlanta, GA 30303-1203
(404) 331-5300
Fax: (404) 331-5280

Jurisdiction

Alabama, Florida, Georgia, Mississippi,
South Carolina, U.S. Virgin Islands

CHICAGO REGIONAL OFFICE

55 West Monroe Street, Suite 1150
Chicago, IL 60603-9729
(312) 886-3465
Fax: (312) 886-5977

Jurisdiction

Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota
North Dakota, Ohio, Tennessee, Wisconsin

DENVER REGIONAL OFFICE

1391 Speer Boulevard, Suite 300
Denver, CO 80204-3581
(303) 844-5224
Fax: (303) 844-2774

Jurisdiction

Arizona, Colorado, Kansas, Missouri, Montana,
Nebraska, South Dakota, Utah, Wyoming

WASHINGTON REGIONAL OFFICE

1400 K Street, NW, 2nd Floor
Washington, DC 20424-0001
(202) 357-6029
Fax: (202) 482-6724

Jurisdiction

Delaware, District of Columbia, Maryland,
North Carolina, Virginia, West Virginia, All land
and water areas east of the continents of North and South
America to long. 90 degrees East, except the
Virgin Islands, Panama, Puerto Rico and coastal islands

BOSTON REGIONAL OFFICE

Thomas P. O'Neill, Jr. Federal Building
10 Causeway Street, Suite 472
Boston, MA 02222
(617) 424-5730
Fax: (617) 424-5743

Jurisdiction

Connecticut, Maine, Massachusetts,
New Hampshire, New Jersey, New
York, Pennsylvania, Rhode Island,
Vermont, and Puerto Rico

DALLAS REGIONAL OFFICE

525 South Griffin Street, Suite 926,
LB 107
Dallas, TX 75202-1906
(214) 767-4996
Fax: (214) 767-0156

Jurisdiction

Arkansas, Louisiana, New Mexico, Oklahoma
Texas, and Panama (limited jurisdiction)

SAN FRANCISCO REGIONAL OFFICE

901 Market Street, Suite 220
San Francisco, CA 94103-1791
(415) 356-5000
Fax: (415) 356-5017

Jurisdiction

Alaska, California, Hawaii, Idaho,
Nevada, Oregon, Washington, and
all land and water areas west of the
continents of North and South
America (except coastal areas) to
long. 90 degrees E

ATTACHMENT 2A2

SAMPLE ORDER TRANSFERRING CASE

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
() REGION

(Agency Name)
Charged Party

and Case No. ()

(Charging Party's Name)
Charging Party

ORDER TRANSFERRING CASE

This case is transferred for further proceedings from the _____ Regional Office to the _____
Regional Office. The case is being transferred to serve the purposes of the Federal Service Labor-Management Relations
Statute and to avoid unnecessary costs or delay, as explained in 5 C.F.R. § 2429.2. If either party needs to contact someone
about this case, please contact the _____ Regional Director. Direct all future communications about the case to:

_____(Name)
Regional Director, ()Region
(Address)
(Tel. #)

_____(Name)
Regional Director, ()Region
(Address)

DATED: (date)

ATTACHMENT 2B1

SAMPLE LETTER RETURNING DEFICIENT CHARGE TO CHARGING PARTY

(DATE)

(Charging Party)
(address)

Dear Mr./Ms. (Name)

I am returning the unfair labor practice charge (enclosed) that you sent to my office, which is dated (date). You must complete every box on the form before we can docket and file the charge. See 5 C.F.R. § 2423.4.

In your case, I have determined that your charge is deficient because you have (insert case specific deficiency, e.g., failed to identify the Charged Party; failed to sign the charge form in the appropriate box). Specifically, you must (insert appropriate action to cure deficiency, e.g., clearly identify the Charged Party in the appropriate space of the Charge Form (Form 22 enclosed); sign the charge form at the bottom in box #8) and send the charge to my office where it will be docketed and filed. Please keep in mind that you must file the charge within six months of the event that you allege is an unfair labor practice. Section 7118(a)(4) of the Federal Service Labor-Management Relations Statute contains this time limitation.

If you have any questions about this letter or any other part of the ULP procedure, or if you would like help, feel free to call my office at the above telephone number.

Very truly yours,

Regional Director

enclosures

ATTACHMENT 2B2

MODEL UNIFORM OPENING LETTER

ON LETTERHEAD

Date

Charging Party Representative's Name and Address

Charged Party Representative's Name and Address

Re: Charged Party
City, State
Case No. XX-CX-XXXXX

Dear (Names of Charging and Charged Party Representatives):

I have enclosed a copy of the unfair labor practice charge which the Charging Party filed with my Office. I have assigned the case number shown above to this charge. It is important that you cooperate fully during the investigation of the charge so my office can timely complete the investigation and make a decision. The Agent who has been (will be) assigned to investigate the charge will contact you as soon as possible. If you have any questions, please contact the Agent using the phone number or e-mail address at the end of this letter.

For the Charging Party:

If you are the party who filed the charge and have not already done so, please submit the following so my office **receives** it by **(insert 10 days from date of letter)**:

1. A list of witnesses – names, positions, day and evening telephone numbers, and a summary of their expected testimony about their personal knowledge of the charge.
2. Copies of all relevant documents, with an Index if the submission is lengthy.

Section 2423.4(e) of the FLRA's Regulations requires you to provide this evidence/information. If you did not submit any evidence or information when you filed the charge, and do not provide this information by **(insert 10 days from date of letter)**, I may dismiss the charge for lack of cooperation. You are responsible for confirming that my office has received all supporting evidence and information. You also must respond to the Agent's attempts to communicate with you during the investigation.

For the Charged Party:

If you are the party against whom this charge is filed, please review the allegations in the charge and submit a written position to my office. You are expected to cooperate fully in the investigation, and the Agent may ask you for documents or a list of witnesses.

For Both Parties:

To assist you in understanding how we process an unfair labor practice charge, I have enclosed an information sheet describing what happens during and after an investigation.

If someone other than you will be representing your party in this case, please complete the enclosed "Notice of Designation of Representative."

The General Counsel encourages parties to informally resolve unfair labor practice charges, and the assigned Agent is available to assist the parties in resolving this matter. I have enclosed a question and answer sheet that gives information about the General Counsel's dispute resolution services.

Sincerely,

Regional Director

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

Enclosed: Description of Unfair Labor Practice Investigation Procedure
Alternative Dispute Resolution Services Q&As
Notice of Designation of Representative

ATTACHMENT 2B3

DESCRIPTION OF THE UNFAIR LABOR PRACTICE INVESTIGATION PROCEDURE

What happens after the Regional Office receives a charge?

After the Regional Office receives a charge, the Region docket the charge and gives it a case number. The Region then sends an opening letter to both parties with a copy of the charge, a notice of designation of representative form, and an information sheet on alternative dispute resolution services. The Region informs both parties that they are obligated to cooperate fully in the investigation and are encouraged to resolve their dispute informally.

Can the Regional Office transfer the charge to a different Regional Office?

Yes. Sometimes it is necessary to transfer a charge to avoid unnecessary costs or delay and to serve the purposes of the Statute. The charge is processed in the same manner no matter which Region processes it.

When will I first speak with the Agent?

Soon after the charge is filed, the assigned Agent contacts both parties and: (1) clarifies the allegation(s) in the charge; (2) describes each party's obligation to cooperate in the investigation; (3) reviews each party's evidence; (4) explains how the case will be investigated; and (4) determines which, if any, employees need official time to cooperate in the investigation.

Will the Agent help the parties resolve the dispute that led to the charge?

Yes. The General Counsel encourages parties to resolve informally unfair labor practice allegations after a charge is filed, but before the Regional Director has issued a complaint. As part of the investigation, the Agent will help the parties in informally resolving their dispute. The Charging Party may withdraw the charge at any stage of the investigation if the dispute has been resolved. There is more information on this topic in the ADR Services questions and answers.

How will the Region investigate the charge?

The Regions use a variety of investigative techniques to get the best possible, relevant evidence. The investigation may involve: (1) an on-site visit where the Agent takes signed and affirmed affidavits and gathers documents; (2) telephone affidavits; (3) questionnaires the parties sign and affirm; and (4) letters or emails confirming information discussed over the phone. The RD relies on this evidence to decide whether the ULP charge has merit. The Agent always notifies an agency before visiting the workplace.

When are employees entitled to official time?

If the Region determines it needs to speak with an employee as part of the investigation, the agency must grant the employee official time under section 7131(c) of the Statute. Employees are also entitled to reasonable official time when completing questionnaires or reviewing affidavits. The Agent arranges this time with the agency. The Regional Office does not arrange official time for employees who may need to gather information during the investigation. If an employee needs official time for that purpose, the employee should request official time from the agency. Whether or not the agency will grant official time depends on the parties' contract and past practices.

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

Cooperation includes, as determined by the Regional Director: (1) making union officials, employees and agency supervisors and managers available to give sworn/affirmed testimony; (2) producing documents related to the matter under investigation; (3) providing position statements; (4) and generally responding to all communications from the Agent.

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

If a Charging Party fails to cooperate, the Regional Director may dismiss the charge for lack of cooperation. If a Charged Party fails to cooperate, an investigative subpoena could be issued.

When is an investigation complete?

An investigation is complete when each party has been given a reasonable opportunity to provide relevant evidence and there are enough facts for the Regional Director to make a decision about the charge.

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

If the Regional Director determines that the charge does not have merit and should be dismissed, the Charging Party is given a chance to withdraw the charge before the Regional Director issues a dismissal letter. If the Charging Party does not promptly withdraw the charge, the Regional Director issues a dismissal letter and serves it on the parties. The dismissal letter describes the allegation(s), the facts learned during the investigation, the law, and the reason the Regional Director dismissed the charge.

Can the Charging Party appeal the Regional Director's decision to dismiss a charge?

Yes. The Charging Party can appeal the dismissal to the Office of the General Counsel in Washington, D.C. The General Counsel may: (1) deny the appeal and close the case; (2) send the case back to the Region to do more investigation; or (3) send the case back to the Region where the Regional Director will issue a complaint or settle it. The Charging Party cannot appeal the General Counsel's decision to deny an appeal and close a case.

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

If the Regional Director determines there is enough evidence to issue a complaint, the Region, as the public prosecutor, tries to settle the charge before issuing a complaint. If the charge is not settled, the Regional Director issues a complaint and notice of hearing, and the case is set for trial before a FLRA Administrative Law Judge. The complaint sets forth the allegations and is served on all parties to the charge.

ATTACHMENT 2D1

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

To: All RDs, RAs/DRD, Lit. Specialists

From: RD/RA/DRD

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

Date:

The Union is alleging that the Agency violated the Statute when its internal audit people conducted interviews with bargaining unit employees in the State of New Jersey without affording the union an opportunity to be represented and/or without honoring the request of the employees for union representation. These meetings were held in connection with recent criticism lodged against the IRS to determine if employees were being pressured to engage in inappropriate behavior or had knowledge of such behavior.

Follow-up interviews were held with these employees for the purpose of comparing their answers at each interview. We have completed our investigation and are likely to issue complaint alleging formal discussion and Weingarten violations. The Agency's position is that its audit employees were only taking a survey of opinions within the bounds of the law.

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

ATTACHMENT 2G1

ELEMENTS OF COMMON VIOLATIONS

Violations of section 7116(a)(1) and (8) of the Statute:

FORMAL DISCUSSION - Section 7114(a)(2)(A) of the Statute

An exclusive representative has the right to be present at:

- Discussion that was—
- Formal (was meeting scheduled in advance; whether employees were required to attend; whether management officials above employees' first line supervisor attended; whether the meeting was held outside the regular work area; whether the meeting had an agenda, the duration of the meeting; whether minutes were taken of the meeting)—
- Between 1 or more Agency representatives and 1 or more unit employees or their representatives—
- Concerning any grievance or any personnel policy or practice or other general condition of employment.

See, e.g., F.E. Warren Air Force Base, Cheyenne, Wy., 52 FLRA 149, 155 (1996).

WEINGARTEN VIOLATION - Section 7114(a)(2)(B) of the Statute

An exclusive representative has the right to be present at:

- Examination of a unit employee in connection with investigation;
- By a representative of the Agency;
- Employee reasonably believes that examination may result in disciplinary action against employee; and
- Employee requests representation

See, e.g., Headquarters, NASA, Wash., D.C., 50 FLRA 601, 606-22 (1995) (finding of violation against Headquarters where it is responsible for actions which affect one of its subcomponents), enforced sub nom. FLRA v. NASA, Wash., D.C., 120 F.3d 1208 (11th Cir. 1997), affirmed sub nom. NASA v. FLRA, 119 S. Ct. 1979 (1999).

Violation of section 7116(a)(1), (5) and (8) of the Statute:

DATA INFORMATION - Section 7114(b)(4)

To the extent not prohibited by law (e.g., the Privacy Act), an exclusive representative has the right to receive data from the agency, upon request, which is:

- Normally maintained;
- Reasonably available;
- Necessary

union's particularized need weighed, if applicable, against agency's countervailing interest; and

- Information requested **must not** be guidance, advice, counsel, or training for management officials relating to collective bargaining.

See, e.g., DHHS, SSA, NY Region, NY, NY, 52 FLRA 1133, 1139-50 (1996).

Violation of section 7116(a)(1) and (2):

- Unit employee against whom the alleged discriminatory action was taken was involved in protected activity; and
- Such activity was a motivating factor in the Agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment

and

after GC meets burden, Respondent does not show, as an affirmative defense, that:

- There was a legitimate justification for its action; and
- The same action would have been taken even in the absence of protected activity.

See, e.g., United States Air Force Acad., Colo. Springs, Colo., 52 FLRA 874, 878-79 (1997) (citing Letterkenny Army Depot, 35 FLRA 113 (1990)).

Violation of section 7116(a)(1) and (5):

UNILATERAL CHANGE IN CONDITIONS OF EMPLOYMENT:

- Without regard to the contract, the Agency gave no notice and opportunity to bargain over a change in condition of employment,

and

- Change had more than de minimis impact on unit employees' conditions of employment--consideration of: nature and extent of the effect (e.g., temporary or permanent, major or minor) or reasonably foreseeable effect of the change

if established, consider whether Respondent has established "covered by" affirmative defense

See, e.g., GSA, Region 9, San Francisco, Cal., 52 FLRA 1107, 1111 (1997); Air Force Materiel Command, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga., 53 FLRA 1092, 1093 (1998) (rejection of "covered by" affirmative defense).

REPUDIATION OF THE PARTIES' AGREEMENT:

- Nature and scope of the alleged breach of agreement (i.e., was the breach clear and patent); and
- Nature of the agreement provision allegedly breached (i.e., did the provision go to the heart of the parties' agreement).

See, e.g., Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Ill., 51 FLRA No. 72, 51 FLRA 858, 861-62 (1996) (citing Department of Defense, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga., 40 FLRA No. 106, 40 FLRA 1211 (1991)).

Violation of section 7116(a)(1):

The standard for determining a violation:

Whether, under the circumstances, the Agency's statement or conduct would tend to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive influence from the statement.

See, e.g., U.S. Dep't of Agric., U.S. Forest Serv., Frenchburg Job Corps, Mariba, Ky., 49 FLRA 1020, 1034 (1994).

INVESTIGATING AN ALLEGED MID-TERM CHANGE:

SAMPLE QUESTIONS

To the charging party and witnesses:

Grievances:

Has a grievance been filed which is any way related to this dispute? In writing?

The change:

What was the alleged change? When did it occur? When did you first learn of the change? Do you have a practice and/or contractual procedure which requires notice and/or a settlement effort before a charge is filed? Why the delay in filing the charge after learning of the change?

Implementation:

Was the change implemented or announced by a written document, for example, by memorandum? Do you have a copy? When and how did you or the union receive or become aware of this writing? Who else might have a copy if you don't? Can you point up the change as it appears in this writing? Was the announcement or implementation oral? Who was present? How were you informed if you weren't present? What was said?

Collective bargaining agreement(s):

Please provide a copy of the applicable collective bargaining agreement(s)? Is the change here at issue related to anything in the collective bargaining agreement(s)? How is the Union usually informed of such matters? Are you claiming that the collective bargaining agreement was violated or repudiated? How?

Negotiations/discussions at other levels:

Have Union and Agency management representatives above the local (or below the national) level discussed and/or negotiated concerning this issue? What is the relationship between those discussions and/or negotiations and this dispute?

Impact:

How are employees affected by the change? Will they be doing different work or be expected to do more? Will they perform higher or lower graded work or work for which they are unsuited? Will they have different starting or quitting times, be away from their usual colleagues, or work in unusual, variable, or out of the way locations? Under differing supervision? Is there an impact outside of their work hours?

Contacts between the parties:

Have you raised an issue about the change with Agency management, in writing or orally? Any documents exchanged? If there were oral contacts, when did they occur, who was present and what was said? Did you ask for information? Did you request bargaining? Were you asked to provide proposals? What were the proposals? What was management's reaction? Are any further exchanges in writing or meetings planned? Do you need and desire settlement assistance?

Resolution desired: What settlement do you seek?

To the Charged Party

The Union is claiming that _____.

Change:

Has there been a change? A change which affects employees' conditions of employment? A change which doesn't affect conditions of employment?

Implementation:

If there was any change, how and when was the change implemented? In writing? Can you provide a copy? Orally? Who made the announcement, to whom? Can I speak to that person? Under what circumstances? Is there a unusual practice for notification? Was this practice followed? Any reason for a different practice on this occasion? Did the Union respond? Was a response requested?

Impact:

Any affect on what work is performed, or when, where, how, or by whom it is performed? Any change in employee supervision or the manner in which employees will be appraised? Any change in employees' physical working conditions? A change in employees' contact with other employees or other persons?

Settlement discussions:

Have management and union representatives discussed this issue? When? Who was present? Are the discussions continuing? Has management requested or received Union proposals? A management response?

Contact with management officials and supervisors: May we speak to the management officials and/or supervisors who were directly involved in the action which is being complained of. What would induce you to allow us to have such discussions?

Scope of bargaining issues and procedures:

Have you claimed that the subject is outside of your duty to bargain under the Statute? In writing? Were there any other exchanges in writing between the parties connected with this dispute?

INVESTIGATING AN "EXAMINATION" OR "WEINGARTEN" SITUATION:

SAMPLE QUESTIONS

Meeting:

When did the meeting occur? Who initiated the meeting? Who was present? Was the employee and/or Union informed in advance? How? Was anything said before or during the meeting about the presence of a Union representative? Who said what on that subject? Was it done in writing?

Subject: What was discussed? Was that known in advance? Was the employee questioned? About the employee's work, conduct or behavior? About others' work, conduct or behavior?

Implications: Was anything said about discipline for anyone? For this employee or any other employee? Was the employee told that he or she had to answer the questions or that they must answer honestly? Was anything said about immunity from discipline for anyone? Are employees disciplined for the matters discussed at the meeting? How severe is the penalty, if any? Has discipline been proposed or imposed on anyone in connection with the matters discussed at the meeting?

Representation: Did the employee say or write anything before or during this meeting about his or her need or desire for Union assistance or Union representation? Concerning any assistance or representation? Did management's representatives respond? Any back and forth on this subject? Was the meeting delayed for this purpose? For how long? When and how was the union informed of the need for representation, if any? Do the parties have a common practice for these situations? How did it work here? Anything special or unusual about this

situation?

Further investigation:

Who else has direct knowledge of this situation? May we speak to them directly? Does any written record exist for what happened before, during, or as a result of this meeting?

Investigating an Allegation of “Discrimination”: SAMPLE QUESTIONS

Charging Party

Management’s Action:

What management action is being complained of? When, how, where, and by whom was the action implemented or announced? Who was affected? How? What explanation was given, if any? Do you know of any records that exist or may exist which would show whether the action was or was not justified?

Protected Activity (to Union representatives and employee witnesses):

Have any employees affected by the action been acting as Union representatives or been represented by the Union? Have they been promoting Union activity or trying to induce employees to engage in such activities? What were those activities? When did they take place? Does a written record of such activities exist? Were meetings involved? What was the subject of the meetings? Who was present? To your knowledge, what management officials were involved? How were they involved? Were the management officials involved in the action complained of affected by these employee activities? Directly? Indirectly?

Is there any reason why the management officials taking the action might be sensitive to the employee’s protected activity, because of what they’ve done, how they did it, or behaved? Have these people, management officials and employees, had difficulties with each other?

Management’s action and animus:

Did these management officials complain of the affected employees’ protected activities, to you or anyone else, orally or in writing? What comments? By whom? When?

Other explanations for the actions:

Have these management actions or like actions been taken concerning the affected employees at other times? When? What explanations, if any, were given? Are there any explanations for the actions other than the explanation in your charge? Do you know of, or can you think of, any other explanation?

Charged Party

Management’s action: The Union is referring to _____ and is alleging that this action was taken in retaliation for employees’ protected activity. Can you furnish the written record(s) used to justify the action, if any, and any written record of the action itself? Can I speak with and take information from the management officials directly involved?

What action was taken? When? Who was affected? What explanation has been given or is being given for the action? Has this action or similar actions been taken for these employees at other times? When? Any written records? Who would explain the basis for the action?

Employees’ protected activities:

What management officials were involved in the employees’ protected activities, by being affected by the employees’ protected activities or while acting as representatives for management? What other experiences have these management

officials had in dealing with these employees, other employees, or Union representatives on these or related matters? Any other contacts of this type at all? Does any written record exist concerning these matters? Any witnesses?

Animus:

Were any oral or written comments made to the affected employees or others regarding their protected activities? Is there any reason why the management officials taking the action might be sensitive to the employee's protected activity because of what the employees did, how they did it, or the way they behaved? Have these people, management officials and employees, had difficulties with each other?

INVESTIGATING AN "INFORMATION" ALLEGATION: SAMPLE QUESTIONS

Information request:

What information or data was requested? Was the request made orally or in writing? When was the request made? Who made the request? To whom was the request made? Was this request made the way requests are usually made? Anything unusual about the request here?

Why is the Union making this request? What is the representation issue? How would this information, if furnished, help the Union with the representation issue? How does the Union expect to use this information? Was this explained to management, orally or in writing, when the request was made? In conjunction with or separate from the information request?

If the information concerns individual employees and the identity of the employees could be determined from the information supplied, by name, social security number, or other means, did the Union ask that the information be supplied with this data? Without such data? If the Union asked for the information with the personal identifier data included, did the Union explain why it needed the information in that form? As compared to getting the information without such data?

Management response:

Did management respond to the request, orally or in writing? Did management ask for a clarification of what was being asked for? Did it ask for an explanation or clarification on why the Union needed this information or why the Union needed the information in the form in which it was requested? With or without personal identifiers?

Did management inquire into how the Union planned to use the information? Did management object to furnishing the information for any reason; for example, any of the reasons it could refer to under section 7114(b)(4)? What reasons? What rationale has management given or will it give to support this response?

If the information does contain personal identifiers data, is this information maintained in a system of records in accordance with the Privacy Act? What system of records? What are the "routine uses?" Is the Union a routine user?

Union response to management: Has the Union responded in any way to management's response to the request? Orally or in writing? Can the Union adjust or narrow its request so that it meets management's concerns or objections and still satisfy the Union's informational need? Has the Union made such an effort? Has it been communicated to management?

Discussions and negotiations:

Have one or both parties attempted to work out any disagreement(s) they may have about the request? Can management suggest a method for adjusting the request or its response to satisfy its concerns or objections and the Union's informational needs?

INVESTIGATING AN INDEPENDENT STATEMENT CASE OR (A)(1) VIOLATION: SAMPLE QUESTIONS

Independent (a)(1) violations:

An independent (a)(1) violation arises when a statement is made by a management official or supervisor orally or in writing which expressly or impliedly interferes with, restrains, or coerces any employee in the exercise by the employee of any right under the Statute. Statements which are not seen or heard and statements made by persons who lack influence over employees do not interfere with, restrain, or coerce employees.

Written statement:

What is the written statement? Do you have a copy? Who wrote the statement? What is their position? Did someone else originate the statement or require or influence its writing? What is their position? How did you come to have a copy? Who else may have a copy? How was the statement distributed, if at all? Was it intended to be made available to a select group? Was it posted on a bulletin board? Who knows of the statement's existence and its contents? How did they come to know?

Was the statement in response to an action or statement by others? What action(s) or statement(s)? Has anything occurred regarding the statement's contents since it was made?

Oral statement:

What was said? When? Who was present? Is it possible that someone not present heard the statement? Someone near the area or who may have been passing by? How do you know of the statement if you were not present? How did others, if any, come to learn of what was said? Who made the statement? Was there anything in their statement, their behavior, or the context to suggest that they were speaking for themselves or others? Was the statement made in reaction to what others said or did? What may have been said or done? Has anything occurred regarding the statement's contents since it was made?

Purpose or effect:

What is there in the context, when the statement was made, to explain its meaning? A history? What is the best interpretation of this statement that you could give, in favor of the writer or speaker? If the purpose or effect complained of is not readily apparent from the writing or what was said, how do you account for or explain that purpose or effect?

What is the problem with this statement? From your point of view? From others' point of view?

Remedy:

What would remedy your complaint about this statement? How would you implement the remedy? Will this remedy improve or harm the parties' relationship in any way?

ATTACHMENT 2H1

SAMPLE LETTER RE: AMENDMENT OF CHARGE

(Date)

Charging Party Rep.
(Name and address)

Re: Case Name and Case Number

Dear Mr./Ms. (Name):

As we spoke about on the phone on (date), I have enclosed the (First) Amended Charge in this case. In addition to the original allegations, you intend to (state added allegations or correction of errors). Please sign and date the amended charge and return it as soon as possible. You must serve a copy of the amended charge on the Charged Party. If you have any questions, please contact me at (telephone #).

Sincerely,

Field Agent
Region ()

ATTACHMENT 2J1

SAMPLE LETTER DEFERRING ULP CHARGE DURING PENDENCY OF REPRESENTATION PETITION

(Date)

Charging Party Rep.
(Name and Address)

Charged Party Rep.
(Name and Address)

Re: Case Name and Case Number

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

My office docketed this unfair labor practice (ULP) charge on (date). The issue in the ULP is related to an issue in a pending representation petition, (case name and case number). I am going to delay processing the ULP charge until the representation case is complete, because the outcome in the representation case will affect the ULP. Delaying the ULP charge will serve the purposes and policies of the Federal Service Labor-Management Relations Statute by avoiding a duplication of efforts.

When my office has finished processing the representation case, it will (continue to) process the ULP charge.

Sincerely,

Regional Director, Region ()

PART 3 ATTACHMENTS

<u>ATTACHMENT 3A1</u>	Practical Pointers to Process Promptly a ULP charge
<u>ATTACHMENT 3D1</u>	Sample Letter Requesting Official Time
<u>ATTACHMENT 3F1</u>	Affidavit Taken in Person
<u>ATTACHMENT 3G1</u>	Sample Cover Letter and Affidavit of Charging Party Taken Telephonically
<u>ATTACHMENT 3H1</u>	Sample Questionnaire: Information Case
<u>ATTACHMENT 3H2</u>	Sample Questionnaire: Information Case
<u>ATTACHMENT 3I1</u>	Subpoena Duces Tecum
<u>ATTACHMENT 3J1</u>	Sample Confirming Letter for Charging Party Witness
<u>ATTACHMENT 3J2</u>	Sample Confirming Letter for Charging Party Witness
<u>ATTACHMENT 3J3</u>	Sample Confirming Letter for Charged Party Witness
<u>ATTACHMENT 3J4</u>	Sample Confirming Letter for Non-party Witness
<u>ATTACHMENT 3M1</u>	Sample Letter to Charging Party – Warning of Dismissal for Lack of Cooperation in failing to provide clarification of charge
<u>ATTACHMENT 3M2</u>	Sample Letter to Charging Party – Warning of Dismissal for Lack of Cooperation during the Investigation
<u>ATTACHMENT 3M3</u>	Sample Letter RE: Dismissal for Charging Party’s Failure to Cooperate

ATTACHMENT 3A1

PRACTICAL POINTERS TO PROCESS PROMPTLY

A ULP CHARGE

—

OFFICE ORGANIZATION

&

CASE PROCESSING TIPS

GENERAL OFFICE ORGANIZATION TIPS

A. Organization of the day/week in Office

1. Keep a daily list--“To Do,” “To Call,” “To Write”
2. The first thing in the morning, read decisions for one hour or work on a thorny research issue or write a difficult dismissal letter.
3. Keep some kind of calendar on the desk or wall--it is good to be able to take it along in briefcase.
4. Keep a one page list of all current cases, date of filing and status.
5. Make use of sticky notes attached to files as reminder of status/next step in investigation.
6. Maintain current phone numbers and fax numbers of parties in a take-along phone book.
7. Make sure your voice mail message is current.

B. Computer and Word Processing Tools

1. Macros:
 - Legal analysis & case cites by issue
 - Affidavits
 - Other forms: fax sheets, service sheets, memo, MOAs
 - Address macros — use the last name for the command
 - Forms: letters, complaints, fax, affidavit, affidavit fax, withdraw form, file memo form, dismissals, etc.
2. Computer file/folder organization
3. E-mail to parties

4. Quick correct — great for such things as “FLRA”, “7116 (a) (1) (2)”, etc.
5. “Sidekick” entries (calendar) and file case cover entries:
 - “Events” section of the calendar — keep an entry for each case, with a short note of what you are waiting for or intend to do next. As the case progresses keep moving and changing the entry for each case. At the same time, on the cover of the actual file jot the Sidekick entry date so that you will be able to find it if a party surprises you and sends you what you want earlier than you have anticipated.
 - “To Do” section of the calendar — here you store cases that are on long-term hold (deferred for example), and completed cases that are in the hands of the Regional Director for decision (this list simply rolls over each day until you click it off).
 - Contacts — Keep a card for each contact. You can add the person’s phone number to the “title” of his/her card, which allows you to see the phone number on the index list of cards without having to open up the specific card.
6. Folders — See example that follows.
7. File names — Place all communications and documents for each case in an “investigation” folder (h:\agent name\investigations) using the case number followed by a description — when it comes time to write up a report all documents for the same case are together (See example below).

COMPUTER FOLDER/FILE ORGANIZATION

c:\My files

AFFIDAVIT

ABCD\

Davis.222

Toms.222

Squirt.222

POLICY

Advice\

Appeals\

OGC\

Admin\

DGA\

Hode.222
Jones.222
Tips.222

CAA\

Fore.222
Libra.222
Walls.222

Forms\

Opening.page
Lined.page
Closing.page

Union\

Brown.222
Jones.222
Smith.222

Witnesss\

Brown.222
Jones.222
Smith.222

VAMC\

Brown.222
Jones.222
Smith.222

MEMO

MOU\

Forms\

Confirming.ltr
FAX
Info.ltr
Inquiry.ltr
Itinerary
Memo.wd
Affidavit.ltr

Misc\

Service.reps

PROCESS

Dismiss\
FIR\

Forms\

Macros\
Organize\
Settle\

REPRESENTATION

ABCD\
CERTS\

DGA\

Election\
Forms\
HOG\

VaSpring\

TRAINING

IBB.ng\

Main.agenda\

Main.ibt\

Main.partner\
Main.statute\
Misc\

Pdi\

CASE PROCESSING TIPS

A. Contacts with the parties

1. To encourage parties to be cooperative and responsive, you need to build trust, confidence and respect. Remember--trust is built up over time, but it may be lost in an instant.
2. Assess both representatives' personalities and skills and adjust your communication methods accordingly. Learn the theories and facts before expressing any views about the case.
3. Call early from the date of assignment. After one week if there is no response/contact, then send a letter. From the beginning, if you suspect the party may not be fully cooperative and/or responsive, set specific reasonable response dates for documents or answers to questions and confirm these time deadlines in writing. Consider putting the case aside for a few weeks, but make sure that the parties are actually doing something for you during those early weeks. At least the next call is not the first, "cold" call and you have some idea as to what you are facing.
4. Explain the process and keep parties posted on the status of the investigation.
5. Explain what evidence is needed to support/refute an allegation based on the case law. When advising parties of an RD decision, refer back to this discussion in reviewing what evidence did or did not come to light in the investigation.
6. Use confirming letters early in the case to help confirm key facts.
7. Keep the parties posted on the potential date for investigation or contact.
8. Use fax and e-mail. Encourage the parties to use e-mail because it allows you to put the evidence and positions into your computer investigation files.
9. Follow through on what you tell the parties you are going to do (call them or send them something).
10. Return phone calls. Check for messages when you are out of the office and try to return the calls. As stated above, make sure that your voice-mail message is current at all times.
11. If you do not know, or are unsure of an answer to a question, do not hesitate to tell the party that you have to check out the answer before you respond.
12. Do not require the parties to provide information that you do not know if you will need, i.e., do not waste their time.

13. Check with others in your office as to how they have dealt with the parties in the past.
14. Be as straightforward with the parties as you possibly can. The relationship you establish with the current case may affect how easily you will be able to deal with them on other future cases.

B. Organization at the on-site investigation

1. Set a schedule & clear official time for witnesses prior to arrival.
2. The investigation should be conducted in a private room with a phone--not the Union office or an office in or near the Personnel Office or Director's Office.
3. Union space is fine as long as it is reserved for the use of the investigation.
4. Keep a running list of documents and witnesses needed.
5. Make sure to have the phone number and schedule of the Union rep/Agency rep to contact if necessary.

C. How to conclude a case upon completion of investigation

1. Prepare a FIR ASAP after the investigation is finished (while it is still fresh in your mind). Schedule the time for the necessary research and write-up.
2. Consider whether Agenda is necessary.
3. After RD makes decision, get the decision to the parties, by phone, fax, etc.
4. Schedule a time to do the final actions-dismissals, complaints.

ATTACHMENT 3D1

SAMPLE LETTER REQUESTING OFFICIAL TIME

(Date)

Charged Party Rep.
(Name and Address)

Re: Case Name and Case Number

Dear Mr./Ms. (Name):

When we talked last week, I told you I would be coming to your facility on _____ to investigate this ULP charge. Under section 7131(c) of the Federal Service Labor-Management Relations Statute, please contact the supervisors and make sure that these employees are released on official time for an interview at the following times:

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

Also, since the Union does not have an office, please let me know if you have a private space where I can conduct the interviews. Each interview will last for approximately two hours, and I will contact you if I need to interview any additional witness(es). After you've talked to the supervisors, please call or e-mail me to confirm that the employees will be released.

Thank you for your cooperation.

Sincerely,

Field Agent

ATTACHMENT 3F1

AFFIDAVIT TAKEN IN PERSON

UNITED STATES OF AMERICA

BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY

() REGION

AFFIDAVIT

State of _____

Case Name _____

Case Number _____

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

Home Address: _____

Home Telephone Number: _____

Work Telephone Number: _____

Work Position: _____

Work Location: _____

Years worked with Employer: _____

ATTACHMENT 3G1

SAMPLE COVER LETTER AND AFFIDAVIT OF CHARGING PARTY TAKEN TELEPHONICALLY

(Date)

(Name and Address)

Re: (Case Name and Number)

Dear Mr./Ms. (Name):

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

Thank you very much for your cooperation in this matter.

Sincerely,

Field Agent

Enclosure

UNITED STATES OF AMERICA

BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY

() REGION

AFFIDAVIT

State of _____

Case Name _____

Case Number _____

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

Home Address: _____

Home Telephone Number: _____

Work Telephone Number: _____

Work Position: _____

Work Location: _____

Years worked with Employer: _____

Union Position: _____

Page 1 of _____

Affiant's Initials _____

ATTACHMENT 3H1

SAMPLE COVER LETTER FOR QUESTIONNAIRE

(Date)

Charging Party Rep.
(Name and Address)

Re: Case Name and Case No.

Dear Mr./Ms. (Name):

I am sending you a questionnaire which you must complete as part of the investigation in the captioned unfair labor case. Please complete this questionnaire promptly so that I will be able to complete the investigation expeditiously.

We often ask Charging Parties to complete this questionnaire in light of many Authority decisions that have significantly impacted the manner in which unfair labor practice charges alleging a refusal to furnish information under section 7114(b)(4) of the Federal Service Labor-Management Relations Statute should be investigated and decided.

If the Regional Director determines that your charge lacks merit after applying the law to the facts of the case as described in your answers to the questions in the questionnaire, you will be given an opportunity to withdraw the charge and to resubmit the information request to the Agency. If you resubmit your request, make sure that you follow the guidelines set forth in the Authority's decisions. Enclosed is the Guidance Memorandum that the General Counsel has issued on Investigating, Deciding, and Resolving Information Disputes. This Memorandum discusses the Authority's decisions in this area and describes ways in which the parties can narrow and resolve their dispute in lieu of time-consuming and costly litigation. We also provide sample forms both for unions when submitting information requests and for agencies when responding to those requests.

Do the best that you can in answering the questions and signing the affirmation at the bottom of page three. Feel free to contact me at the telephone number below if you have any questions about the questionnaire or any other matter related to the investigation. In deciding the merits of the case, the Regional Director will rely upon your answers and any other documents that you present.

I ask that you submit the answers to this questionnaire by **(date)**. The failure to comply with this request would impact greatly the Region's effort to obtain the evidence necessary for the Regional Director to decide the case. Thus, should you fail to return the completed questionnaire by the required date, the

Regional Director may decide the case without your answers, or the case may be dismissed for lack of cooperation if no other evidence has been submitted.

Sincerely,

Field Agent
(telephone number)

Enclosures

ATTACHMENT 3H2

SAMPLE QUESTIONNAIRE: INFORMATION CASE

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

Case Name and Number:

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

My full name is

My Union position/title is

My mailing address is

My phone number is (____)-_____

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

2. What is the name of the requesting union?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11. Have the parties attempted to resolve this dispute themselves?

___ Yes ___ No. If yes, please describe as specifically as you can what efforts have been undertaken, by whom, when, and the results.

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

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

ATTACHMENT 311

SUBPOENA DUCES TECUM

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

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

Request having been made by (Margo Thomas, Regional Director), whose address is (1391 Speer Blvd., Suite 300, Denver, CO 80204-3581) concerning disclosure of a document in

Case Name: Bureau of Water Treatment

Case No.: DE-CA-10-0700

YOU ARE HEREBY REQUIRED AND DIRECTED TO PRODUCE THE FOLLOWING DOCUMENT at the (Denver Regional Office, 124 Speer Blvd., Suite 100, Denver, CO 80204) by (5:00 p.m. on August 28, 1998). Any method of delivery of the document is permitted provided that the Regional Office receives the document by (5:00 p.m. on August 28, 1998):

(Overtime Rosters for the Blue Unit for the period beginning July 1, 1997 through June 30, 1998).



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

(Signature)
General Counsel

NOTE:

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

ATTACHMENT 3J1

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

(date)

Name of Witness
(Address)

Re: Case Name and Case Number

Dear Mr./Ms. (Name):

This letter confirms our conversation today about the allegations raised by the Union in this unfair labor practice charge. I called you specifically to ask you about management's decision to remove a phone from the machine shop area without first providing the Union with notice and an opportunity to bargain.

You told me that management implemented this change on (date - more than six months prior to the filing of the charge), and that you talked to a unit employee about it the day after management implemented the change.

If these facts are either incorrect or incomplete in any way, please call or e-mail me before (date). If I do not hear from you by that date, I will assume that the facts are correct. Also, this letter will be placed in my file, and is evidence that the Regional Director will consider in deciding this case.

I appreciate your cooperation in the investigation of this case.

Sincerely,

Field Agent

ATTACHMENT 3J2

SAMPLE CONFIRMING LETTER FOR CHARGING PARTY WITNESS

(date)

Name of Witness
(Address)

Re: Case Name and Case Number

Dear Mr./Ms. (Name):

This letter confirms our conversation today about this unfair labor practice charge. During our discussion, you told me that after I took your affidavit last week, the Agency notified you in writing that you would be suspended for 10 days, starting on (date). The notice is dated _____.

If these facts are either incorrect or incomplete in any way, please call or e-mail me before (date). If I do not hear from you by that date, I will assume that the facts are correct. Also, this letter will be placed in my file, and is evidence that the Regional Director will consider in deciding this case.

I appreciate your continued cooperation in the investigation of this case.

Sincerely,

Field Agent

ATTACHMENT 3J3

SAMPLE CONFIRMING LETTER FOR CHARGED PARTY WITNESS

(date)

Name of Witness
(Address)

Re: Case Name and Number

Dear Mr./Ms. (Name):

This letter confirms our telephone conversation today concerning the investigation of the unfair labor practice charge in the captioned case. Specifically, we discussed the Union's allegation that (name) was denied a Union representative at a meeting to discuss delinquent charges on her government credit card account.

As we discussed, the meeting at issue was held on (date) and was attended by (names). You stated to (name) that the purpose of the meeting was primarily to counsel (name) regarding a report of a delinquency in (her/his) Government American Express card account. You stated that you began the meeting by first asking (name) whether she had the card with her. She said that she did not and then left the room briefly to retrieve it. After (name) returned with the card and gave it to you, you wrote the card number down on a piece of paper.

When (name) returned she handed you the card and you then showed it to (name) who compared the account number with the number on the delinquency report. You recalled that (name) kept stating that she paid her bills, or words to that effect. You asked her about her use of the card and she responded that she did not remember for what purpose the card was used because it had been many months since she used the card. You then informed her of potential disciplinary action that could result if it were determined that the card was misused.

Finally, you stated that before you began to ask (name) questions that she requested representation. You stated that you denied the request because you did not believe the meeting to be investigation. Rather, you believed that it was a counseling session, and that under these circumstances (name) was not entitled to representation.

If any of the above-described facts are in error or are incomplete in any way, please contact me by telephone at (number) or in writing on or before (date). If the facts as described are accurate and complete, please sign in the space below in which you acknowledge that the facts as presented are accurate and complete. In addition, this letter will be submitted to the Regional Director as evidence that s/he will consider in deciding this case.

I appreciate your cooperation in the investigation of this case.

Sincerely,

Field Agent

I, _____, acknowledge that the facts contained in this letter are accurate and complete.

cc: Charged Party Rep.
(Name & Address)

ATTACHMENT 3J4

SAMPLE CONFIRMING LETTER FOR NON-PARTY WITNESS

(date)

Name of Witness
(Address)

Re: Case Name and Number

Dear Mr./Ms. (Name):

This letter confirms our telephone conversation today concerning the investigation of the unfair labor practice charge in the captioned case. You stated that you were not present during a conversation between (name) and (his/her) supervisor (name). During the morning of (date) you attended an off-site training program.

If the above fact is inaccurate or incomplete please contact me by telephone or in writing on or before (date). If I do not hear from you by that date, I will assume that the facts as described are correct. In addition, this letter will be submitted to the Regional Director as evidence that s/he will consider in deciding the case.

I appreciate your cooperation in the investigation of this case.

Sincerely,

Field Agent

ATTACHMENT 3M1

SAMPLE LETTER RE: CHARGING PARTY FAILURE TO PROVIDE CLARIFICATION OF CHARGE WARNING OF POSSIBLE DISMISSAL

(date)

Charging Party
(Name and Address)

Re: Case Name and Case Number
Request for Amended Charge

Dear Mr./Ms. (Name):

In preparing to investigate the captioned case which the Region docketed on (date), I have determined that it is necessary that the Charge be amended. I tried to contact you by telephone yesterday and today but I was unsuccessful.

The allegation and the theory of the violation are unclear as stated on the charge. The Region cannot begin to investigate the charge until you have filed an amended charge to clarify the allegation and theory of the violation. Once you have sufficiently clarified the allegations and theory of the violation in an amended charge, I will contact the parties to begin the investigation.

Please submit the amended charged which contains the clarification of the charge to the Regional Director at the above address by (date). Failure to submit the amended charge by (date) may result in dismissal of the charge for lack of cooperation. You are reminded to serve the Charged Party with the amended charge as required by section 2423.6(d) of the FLRA's regulations. If you have any questions concerning this matter, feel free to contact me at (telephone number).

Sincerely,

Field Agent

ATTACHMENT 3M2

SAMPLE LETTER

RE: CHARGING PARTY FAILURE TO COOPERATE DURING INVESTIGATION WARNING OF POSSIBLE DISMISSAL

SAMPLE LETTER

RE: CHARGING PARTY FAILURE TO COOPERATE DURING INVESTIGATION--WARNING OF POTENTIAL DISMISSAL

(date)

Charging Party
(Name and Address)

Re: Case Name and Case Number

Dear Mr./Ms. (Name):

This letter concerns the investigation of the captioned case which this office docketed on (date). The charge concerned an allegation that the Agency refused to provide the Charging Party with information under section 7114(b)(4) of the Federal Service Labor-Management Relations Statute and therefore violated section 7116(a)(1), (5), and (8) of the Statute.

On (date) I spoke with you by telephone about this case. During this conversation, you agreed to provide certain documentation in support of the charge. On (date), having not yet received the documentation, I telephoned you and left a voice mail message to that effect but you did not respond to my message. Again, two weeks later, on (date), I attempted on numerous occasions to leave messages but your voice-mail box was full. Today I left a voice mail message asking that you contact me as soon as possible regarding the investigation of this charge.

Our regulations state that “[a]ll persons are expected to cooperate fully with the Regional Director in the investigation of charges” which includes “[p]roducing “documentary evidence pertinent to the matters under investigation.” See 5 C.F.R. § 2423.8(b). In light of this requirement, I request that you either provide the documentation required by (date) or contact me by telephone before that date. In the event that the Union is no longer interested in pursuing this charge, please let me know so that I can arrange to have the Regional Director approve your request to withdraw the charge.

Should you fail to send me the required documentation or contact me on or before (date), I will recommend that the Regional Director dismiss the charge for failure to cooperate during the investigation.

Sincerely,

Field Agent

ATTACHMENT 3M3

SAMPLE LETTER

Re: Dismissal for Charging Party's Failure to Cooperate

(date)

Charging Party

(Name and Address)

Re: Case Name and Case Number

Dear Mr./Ms. (Name):

Although the Region has attempted to investigate your charge alleging violations under Section 7116(a)(1) of the Federal Service Labor-Management Relations Statute, we have been unable to do so because of your failure and refusal to cooperate in the investigation.¹ Accordingly, I have concluded that further proceedings are not warranted and I am dismissing your charge.

(insert appeal language here).

Sincerely,

XXXXXXXXXX

(Regional Director)

cc: Charged Party Rep.

¹ On (insert date) the Region sent you a letter warning that dismissal of the charge would occur should you continue to refuse to cooperate in the investigation. This letter detailed the instances in which the regional agent attempted to contact you to investigate the case.

PART 5 ATTACHMENTS

[ATTACHMENT 5C1](#)

Questions and Answers about Unfair Labor Practice appeals to the Office of the General Counsel (OGC)

[ATTACHMENT 5C2](#)

Appeals Review Form

[ATTACHMENT 5C3](#)

Appeals Case Log

[ATTACHMENT 5C4](#)

Model Letter Denying Appeal

[ATTACHMENT 5C5](#)

Modified Form Appeal Denial Letter

[ATTACHMENT 5C6](#)

Modified Letter Granting Appeal

[ATTACHMENT 5E1](#)

Sample Letter to Respondent Re: Compliance

[ATTACHMENT 5E2](#)

Sample Letter Closing the Case

ATTACHMENT 5C1

QUESTIONS AND ANSWERS ABOUT UNFAIR LABOR PRACTICE APPEALS TO THE OFFICE OF THE GENERAL COUNSEL (OGC) FEDERAL LABOR RELATIONS AUTHORITY

Q #1: What are the grounds for granting an appeal and what must your appeal establish to be granted?

The grounds for granting an appeal are set forth in Section 2423.11(e) of the Rules and Regulations. An appeal may be granted if it establishes at least one of the following grounds:

- 1. The Regional Director's decision did not consider material facts that would have resulted in issuance of a complaint.**
- 2. The Regional Director's decision is based on a finding of a material fact that is clearly erroneous.**
- 3. The Regional Director's decision is based on an incorrect statement or application of the applicable rule of law.**
- 4. There is no Authority precedent on the legal issue in the case.**
- 5. The manner in which the Region conducted the investigation has resulted in prejudicial error.**

Your appeal must address the reasons why you believe one or more of the above five grounds have been satisfied. Appeals that do not establish at least one of these grounds are denied.

Q #2: What happens after the appeal is filed?

You will receive a written letter acknowledging that your appeal has been received. The appeal review includes a review of your appeal and the evidence in the file obtained during the investigation.

You will receive a written decision letter signed by the Assistant General Counsel for Appeals on behalf of the General Counsel which: 1) grants your appeal and orders further investigation of specific factual issues or issuance of a complaint over a specific violation; or 2) denies your appeal because none of the grounds for granting an appeal have been established.

Q #3: Does the appeal letter address each and every argument made in the appeal?

When an appeal is denied, the appeal decision is to affirm and adopt the Regional Director's determination of the material facts, the applicable law and rationale and reasoning for the finding that the evidence does not establish an unfair labor practice. Therefore, if the factual and legal issues have been correctly and sufficiently addressed by the Regional Director, the appeal determination letter does not restate this discussion. Rather, the appeal letter incorporates by reference the full discussion of the facts and the law as set forth in the Regional Director's

dismissal letter. However, the appeal denial letter will address any issues which may need additional clarification. Similarly, if the appeal establishes that one of the grounds for review has been met, the appeal Order does not discuss each and every argument presented in the appeal. In those cases, the appeal letter granting an appeal sets aside the Regional Director's decision with a statement of the ground for granting the appeal and the future case processing action to be taken by the Regional Director.

Q #4: How long does the appeal review process take?

The OGC's goal is to issue a decision on the appeal within 60 days or less of the date on which the appeal is received.

Q #5: Once an appeal decision issues, are there appeal rights?

No. The decision on the appeal is final. Section 2423.11 of the Rules and Regulations sets forth the appeals process. Paragraph (g) of this section provides that a Charging Party may file a motion for reconsideration of the final decision if it can establish with particularity extraordinary circumstances which are supported by citations to Authority case law. The motion must be filed within 10 days after the date on which the General Counsel's decision is postmarked. The General Counsel's decision on a motion for reconsideration is final.

Q #6: Should evidence be included with the appeal?

No. All of the evidence that was given to the Region during the investigation is in the investigative file and will be reviewed. This evidence may be referred to in the appeal.

Q #7: May new evidence be submitted that was not given to the Region?

No. An appeals review is not *de novo*. No new evidence will be considered unless it can be established in the appeal that the evidence either did not exist during the investigation or the existence of the evidence could not have been reasonably known about.

Q #8: Can the merits of the appeal be discussed with anyone from the OGC while the appeal is pending?

No. The appeal process is not an investigative process. The decision will be based on the appeal and the investigative file. Parties are notified as soon as a decision is reached. If the appeal is granted, the case will be returned to the Regional Office and the parties will be contacted by the Region for further processing of the case.

Q #9: To whom can the parties speak if there are any questions about how the charge was processed and decided?

Parties may always contact the Regional Offices if they have questions about the processing of a charge, do not understand the basis for the dismissal of a charge, or to seek further assistance.

If you have further questions about the appeals process, please contact any Regional Office, the Office of the General Counsel, or visit the FLRA website at www.flra.gov.

ATTACHMENT 5C2

APPEALS REVIEW FORM

(revised 5/2010)

Case No(s): _____ Dismissing Region: _____ Working Region: _____

- **Perform the legal review by applying the grounds for granting an appeal which are set forth in the Rules and Regulations at section 2423.11(e), and in the Office of the General Counsel's Revised Appeal Policy.**
- **Perform a Quality Review based on the Office of the General Counsel's Quality Standard, Scope of Investigations criteria in ULP Case Handling Manual, and the Quality of the FIR and dismissal letter.**

Complete the following:

1. Did the Regional Director's decision and the investigation consider all of the material facts, issues raised, jurisdiction/timeliness of the charge?
_____ Yes _____ No Comments:

2. Is the Regional Director's decision based on a finding of a material fact that is clearly erroneous?
___ Yes ___ No Comments:

3. Is the Regional Director's decision based on a correct statement of the applicable rule of law with pertinent citations to cases that present similar issues and facts as support.
___ Yes ___ No Comments:

4. Does the case present legal issues for which there is no Authority precedent?
___ Yes ___ No Comments:

5. Does the case file reflect how the case was investigated and processed and that there was no prejudicial error?

Yes No Comments:

6. Does the case file reflect that under the particular circumstances of the case, the investigation obtained the best possible evidence? Yes No Comments:
7. Does the case file reflect that evidence was obtained on all of the elements of the alleged violation(s), as appropriate, and that all of the allegations were investigated and decided and alternative outcomes were thoroughly considered? Yes No Comments:
8. Does the case file reflect that the parties were treated fairly and equitably?
 Yes No Comments:
9. Was the charge processed as expeditiously as possible from the time the investigation began to issuance of the decision without any periods of unexplained inactivity?
 Yes No Comments:
10. Do the FIR and dismissal letter and other case file documents substantially meet the quality standards (clear, comprehensive, correct, and concise)? Yes No Comments:

This form was approved by:

Regional Director

Date

ATTACHMENT 5C3

APPEALS CASE LOG (revised 1/2010)

This form is maintained in the Appeal Case File and is to be completed by both OGC HQ and the Working Region. Fill in the applicable dates or other information as appropriate.

TO BE COMPLETED BY OGC HQ:

Case No. _____
Dismissed by the _____ Region
Processed by _____ Region
Consolidated on appeal with Case No(s): _____
Date dismissed: _____
Date appeal filed: _____
Date appeal rec'd by OGC: _____
Date appeal decision due: _____
Date investigative file sent by Dismissing Region to OGC HQ: _____
Dismissing Region comments on appeal: Yes ___ No _____
Date investigative file received by OGC: _____
Date files sent by OGC HQ to Working Region: _____

TO BE COMPLETED BY WORKING REGION:

Date files received by Working Region: _____
Date appeal assigned: _____
Date appeal ready for recommended decision by RD: _____
Date Working Region's recommended decision sent by E-mail: _____
Working Region recommendation: Deny appeal: _____
Deny appeal with e-mail to RD (explain on appeal review form): _____
Grant appeal: _____
Further investigation: _____
Further analysis: _____
Reversal/Issuance of complaint: _____
E-mail attached: _____ e-mail sent to Dir. of Appeals: _____
Date files and recommendations sent by Working Region to OGC HQ: _____

TO BE COMPLETED BY OGC HQ:

Dismissal letter rescinded by Dismissing Region RD/Appeal case closed: _____
Date files received by OGC HQ: _____
Date appeal issued by OGC HQ: _____
Final OGC HQ decision: Deny appeal : _____
Grant appeal: _____
Further investigation: _____
Further Analysis: _____
Reversal/Issuance of complaint: _____
E-mail to RD drafted: Yes ___ No ___

Date Motion for Reconsideration filed: _____
Date of decision on Motion for Reconsideration: _____
Reconsideration decision: Granted: _____ Denied: _____

ATTACHMENT 5C4

MODEL LETTER DENYING APPEAL

Charging Party Rep.
(Name and Address)

Re: Charged Party
City, State
Case No. XX-XX-XX-XXXX

Dear ():

This Office has carefully considered your appeal of the dismissal of the unfair labor practice charge in this case by the () Regional Director.

The Regulations at 5 C.F.R. § 2423.11(e) provide the following grounds upon which the General Counsel may grant an appeal of a Regional Director's decision to dismiss an unfair labor practice charge: (1) the decision did not consider a material fact that would have resulted in issuance of complaint; (2) the decision is based on a finding of a material fact that is clearly erroneous; (3) the decision is based on an incorrect statement or application of the applicable rule of law; (4) there is no Authority precedent on the legal issue in the case; or (5) the manner in which the Region conducted the investigation has resulted in prejudicial error. *Id.* and 5 C.F.R. § 2423.11(f).

On appeal, you alleged, among other things, that the Regional Director's decision is based on a finding of a material fact that is clearly erroneous. In this regard, you maintained that the Regional Director erred in finding insufficient evidence of a violation of 5 U.S.C. § 7116(a)(1) and (5). Specifically, you submitted that the Regional Director erroneously found that the unilateral implementation of the centralized call system had no more than a *de minimis* impact on bargaining unit employees. You also maintained that the Regional Director erroneously found that employees had been previously required to log onto Aspect. In addition, you contended that the Regional Director failed to consider a material fact that would have resulted in issuance of complaint. You alleged error in the Regional Director's failure to distinguish between implementation of the CCCFS Project for GS-592 and GS-962 employees. Finally, you stated that the Regional Director erred in failing to consider a continuing violation theory with regard to the allegation that the IRS engaged in piecemeal negotiations.

The appeal has established no ground for reversing the Regional Director's decision or remanding the case for further investigation in accordance with 5 C.F.R. § 2423.11(e). The dismissal letter issued by the Regional Director constitutes the written statement of the reasons for not issuing a complaint as required by 5 U.S.C. § 7118(a)(1). The Regional Director's reasons for not issuing a complaint are hereby affirmed. Your appeal is denied and the case is closed.

For the General Counsel.

ATTACHMENT 5C5

MODIFIED FORM APPEAL DENIAL LETTER

Charging Party Rep.
(Name and Address)

Re: Charged Party
City, State
Case No. XX-XX-XX-XXXX

Dear ():

This Office has carefully considered your appeal of the dismissal of the unfair labor practice charge in this case by the () Regional Director.

The Regulations at 5 C.F.R. § 2423.11(e) provide the following grounds upon which the General Counsel may grant an appeal of a Regional Director's decision to dismiss an unfair labor practice charge: (1) the decision did not consider a material fact that would have resulted in issuance of complaint; (2) the decision is based on a finding of a material fact that is clearly erroneous; (3) the decision is based on an incorrect statement or application of the applicable rule of law; (4) there is no Authority precedent on the legal issue in the case; or (5) the manner in which the Region conducted the investigation has resulted in prejudicial error. *Id.* and 5 C.F.R. § 2423.11(f).

On appeal, you appear to contend that the Regional Director's decision is based on a material finding of fact that is clearly erroneous. In this regard, you submit that the Regional Director erred in finding the evidence insufficient to establish a violation under 5 U.S.C. § 7116(a)(1). Specifically, you maintain that the Regional Director erred in finding that there was no violation based on the Agency's failure to abide by Article 45 of the parties' agreement concerning official time.

The appeal has established no ground for reversing the Regional Director's decision or remanding the case for further investigation in accordance with 5 C.F.R. § 2423.11(e). It is well settled that disputes over the administration and application of contract rights such as matters concerning official time are resolved under the negotiated grievance-arbitration procedure, not the unfair labor practice procedure. *See, e.g., Marine Corps Logistics Base, Barstow, Cal.*, 33 FLRA 626, 641-42 (1988). The dismissal letter issued by the Regional Director constitutes the written statement of the reasons for not issuing a complaint as required by 5 U.S.C. § 7118(a)(1). The Regional Director's reasons for not issuing a complaint are hereby affirmed. Your appeal is denied and the case is closed.

For the General Counsel.

ATTACHMENT 5C6

MODIFIED LETTER GRANTING APPEAL

This Office has carefully considered your appeal of the dismissal of the unfair labor practice charge in this case by the () Regional Director.

The Regulations at 5 C.F.R. § 2423.11(e) (2008) provide the following grounds upon which the General Counsel may grant an appeal of a Regional Director's decision to dismiss an unfair labor practice charge: (1) the decision did not consider a material fact that would have resulted in issuance of complaint; (2) the decision is based on a finding of a material fact that is clearly erroneous; (3) the decision is based on an incorrect statement or application of the applicable rule of law; (4) there is no Authority precedent on the legal issue in the case; or (5) the manner in which the Region conducted the investigation has resulted in prejudicial error. *Id.* and 5 C.F.R. § 2423.11(f) (2008).

Your appeal has been granted because it has established, in accordance with section 2423.11(e) of the General Counsel's regulations, 5 C.F.R. § 2423.11(e), that the Regional Director's decision is based on an incorrect statement or application of the applicable rule of law. In this regard, the Regional Director incorrectly applied the legal standard to determine whether the Charged Party violated section 7116(a)(1) and (5) of the Statute by refusing to recognize a designated representative of the Charging Party. On remand, the Region will correctly apply the legal standard set forth in *IRS, Wash. D.C.*, 47 FLRA 1091, 1103 (1993).

Accordingly, the case is remanded to the Region for further analysis consistent with this decision.

For the General Counsel.

ATTACHMENT 5E1

SAMPLE LETTER TO RESPONDENT RE: COMPLIANCE

(Date)

Respondent's Representative
(Name and Address)

Re: (Case Name, Case #, FLRA No.)

Dear Mr./Ms. (Name):

Enclosed is a copy of the Decision and Order of the Federal Labor Relations Authority in the captioned case.

The Decision and Order requires, in part, the posting of notices on forms to be furnished by the Authority. Enclosed is one completed copy of the notice containing the language required by the Decision and Order. Please add the date, signature and title of the (appropriate signing official).

The Decision and Order requires that the notices be posted at (all locations specified in the Authority's Decision and Order). If you do not have suitable reproduction facilities to reproduce the quantity of notice forms required to satisfy the posting requirement, the (insert Region) Regional Director will provide you with additional blank forms upon request.

Please notify the (insert Region) Regional Director, within 30 days of the date of the Decision and Order, of the steps taken to comply with the requirements of the Decision and Order, and send a copy to the person(s) or parties on the service

sheet enclosed with this letter. Include a signed and dated copy of the notice with your submission.

Upon the expiration of the 60-day posting period, please certify, by letter to the (insert Region) Regional Director, with a copy to all persons or parties listed on the service sheet, that the Respondent has completed the requisite posting and any other remaining remedial action(s) required by the Decision and Order.

If you require any assistance or have any questions concerning compliance in this matter, please contact (name, address, and telephone number of the appropriate Regional Director).

For the Authority.

Sincerely,

Regional Director, (Region)

Enclosures (3)

Decision and Order
Notice (completed copy)
Service Sheet

ATTACHMENT 5E2

SAMPLE LETTER CLOSING THE CASE

(Date)

Charged Party Rep.
(Name and Address)

Dear Mr./Ms. (Name):

I have reviewed all aspects of compliance in this case. I have determined that the Respondent has met its obligations with regard to the terms and provisions of the Federal Labor Relations Authority's Decision and Order, FLRA No. (), dated ().

Accordingly, this matter is closed and will remain closed conditioned upon continued compliance with the Decision and Order.

In the event that subsequent violations of the Federal Service Labor-Management Relations Statute occur, this matter may be reopened.

Sincerely,

Regional Director

cc: Charging Party Rep.
(Name and Address)