

## **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:** After a Charging Party has submitted a withdrawal request before a merit determination has been made, the Agent forwards the case file to the RD for review and approval of the withdrawal request.

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

### **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.

**NOTE:** *If the parties do not provide some evidence of the terms of a resolution, it is recorded as a withdrawal, not as a PSIWOC.*

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.

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. PARTIAL WITHDRAWAL:**

Occasionally, the Charging Party will request that certain allegations contained within the charge be withdrawn. The Agent notes in the case file whether the withdrawal request was solicited or unsolicited.

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

**4. 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) ask 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 [2423.11\(b\)](#) 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 filed 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:** *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 Model Dismissal Letter which contains language for the Appeal Rights of the Charging Party.

### 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 4G2](#) 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 4G3](#) 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.