54TH FEDERAL LABOR RELATIONS COURSE

The Administrative and Civil Law Department
The Judge Advocate General's School
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54TH FEDERAL LABOR RELATIONS COURSE DESKBOOK

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54TH FEDERAL LABOR RELATIONS COURSE

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I. INTRODUCTION.

II. REFERENCES.

A. Statutes.

1. Title 5, United States Code, Chapters 11, 12, 21, 23, 33, 51, 55, 75, and 77 (Civil Service Reform Act of 1978).

2. Title 29, United States Code, §§ 791 and 794a (Rehabilitation Act of 1973).

3. Title 29, United States Code, §§ 633a (Age Discrimination in Employment Act).

4. Title 42, United States Code, §§ 2000e to 2000e-17 (Civil Rights Act of 1964, as amended).

5. Title 42, United States Code, §§§ 1981, 1988, and 2000e-2 (Civil Rights Act of 1991).

B. Government-Wide Regulations and Guidance.

1. Office of Personnel Management (OPM). Title 5, Code of Federal Regulations, Chapter I.

2. Merit Systems Protection Board (MSPB). Title 5, Code of Federal Regulations, Chapter II.

3. Office of Special Counsel (OSC). Title 5, Code of Federal Regulations, Chapter VIII.

4. Equal Employment Opportunity Commission (EEOC). Title 29, Code of Federal Regulations, Part 1614.

C. Military Department Regulations.

1. Department of Defense. DOD Directive 1400.25-M, DOD Civilian Personnel Manual System (DODCPMS).

2. Department of the Army. Army Regulation 690-xxx series.

3. Department of the Navy. Office of Civilian Personnel Management Instruction (OCPMINST) 12xxx.x series.

4. Department of the Air Force. Air Force Instruction 36-xxx series.

5. Marine Corps. Marine Corps Orders (MCO) 12xxx.x series.

D. Secondary Sources.

1. Administrative and Civil Law Deskbook, The Law of Federal Employment, JA 210 (September 2000).

2. U.S. Merit Systems Protection Board Reporter (M.S.P.R.), West Publishing Co., St. Paul, MN. The last five year MSPB decisions are also available at the MSPB website, http://www.mspb.gov/mspbsrch.html.

3. Representing the Agency Before the U.S. Merit Systems Protection Board: A Handbook on MSPB Practice and Procedure Harold J. Ashner, Dewey Publications Inc., P.O. Box 663, Arlington, VA 22216 Tel.: (703) 524-1355.

4. A Guide to Merit Systems Protection Board Law & Practice, Peter B. Broida, Dewey Publications Inc., P.O. Box 663, Arlington, VA 22216; Tel.: (703) 524-1355. Updated annually.

5. A Guide to Federal Sector Equal Employment Law & Practice, Ernest C. Hadley, Dewey Publications Inc., P.O. Box 663, Arlington, VA 22216; Tel.: (703) 524-1355. Updated annually.

6. Internet Cites: OPM, WWW.OPM.GOV; MSPB, WWW.MSPB.GOV; EEOC, WWW.EEOC.GOV; DoD Civilian. Personnel Management System, WWW.CP,S.OSD.MIL; DoD Directives/Instructions, WEB7.WHS.OSD.MIL; Army Civilian Personnel Office, CPOL.ARMY.MIL.

III. DEVELOPMENT AND STRUCTURE OF THE FEDERAL CIVIL SERVICE SYSTEM.

A. Evolution From Spoils System.

1. Pendleton Act, 22 Stat. 403 (1883).

2. Lloyd-LaFollette Act, 37 Stat. 555 (1912).

3. Veterans' Preference Act, 58 Stat. 387 (1944).

4. Civil Service Reform Act of 1978, Pub. L. No. 95-454 (1978).

5. Civil Service Due Process Amendments of 1990, Pub. L. No. 101-376 (1990).

B. Key Players in the Civil Service System (Government-Wide).

1. The President and Congress. U.S. Const. art. II, § 2, cl. 2: The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein provided for and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

2. Office of Personnel Management (OPM). 5 U.S.C. §§ 1101-1105.

a. Source: A successor agency to the Civil Service Commission created under the authority of the Civil Service Reform Act of 1978.

b. Function: The principal function of the OPM is to set policy and provide guidance to other federal agencies in matters regarding federal employees.

3. Merit Systems Protection Board (MSPB). 5 U.S.C. §§ 1201-1206.

a. Source: Three-member bipartisan board created under the authority of the Civil Service Reform Act of 1978.

b. Functions:

(1) Hear and adjudicate cases within its jurisdiction.

(2) Conduct special studies.

(3) Review OPM rules and regulations to determine validity.

4. Office of Special Counsel (OSC). 5 U.S.C. §§ 1211-1219.

a. Sources: The Civil Service Reform Act of 1978; Whistleblower Protection Act of 1989; and Office of Special Counsel Reauthorization Act of 1995.

b. Function: OSC receives employee complaints on such issues as "whistleblowing" and prohibited personnel practices.

(1) Seeks corrective action.

(2) Prosecutes (administratively) offending agency official.

5. Equal Employment Opportunity Commission (EEOC). Presidential Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19,807 (1978).

6. Federal Labor Relations Authority (FLRA). 5 U.S.C. §§ 7104-7105.

C. Agency Players in the Civil Service System.

1. Department of Defense Civilian Personnel Management Service (CPMS).

2. Installation Level Players.

a. The Army Labor Counselor.

b. The Civilian Personnel Office (CPO).

(1) Traditional structure.

(2) CPO regionalization.

(a) DOD worldwide regionalization.

(b) CPOC.

(c) CPAC.

c. Equal Employment Opportunity Officer.

IV. CLASSIFICATIONS OF FEDERAL EMPLOYEES.

A. Becoming a Civil Service Employee--Statutory Requirements. 5 U.S.C. § 2105(a).

1. Appointment. *See* Bevans v. Office of Personnel Management, 900 F.2d 1558 (Fed. Cir. 1990); Horner v. Acosta, 803 F.2d 687 (Fed. Cir. 1986); Watts v. OPM, 814 F.2d 1576 (Fed. Cir. 1987); Costner v. United States, 665 F.2d 1016 (Ct. Cl. 1981); Baker v. United States, 614 F.2d 263 (Ct. Cl. 1980). Horstman v. OPM, 1998 WL 719143 (Fed. Cir.); Mopsick v. OPM, 1996 WL 232661 (Fed. Cir.)

2. Performing federal function. McCarley v. MSPB, 757 F.2d 278 (Fed. Cir. 1985); Briggs v. Nat'l Council on Disability, 60 M.S.P.R. 331 (1994).

3. Supervision. McCarley.

B. Employees--Classified by Type of Appointment.

1. Competitive service. 5 U.S.C. § 2102.

2. Excepted service. 5 U.S.C. § 2103.

a. Statutory definition: "[T]hose civil service positions which are not in the competitive service or the Senior Executive Service."

b. Excepted Service Schedules.

(1) Schedule A: Not practicable to examine, such as lawyers, chaplains, DOD dependent school teachers, and all jobs in federal security agencies.

(2) Schedule B: Not practicable to hold competitive examination, but jobs are subject to OPM's basic qualification standards for the job and grade level. Includes trainees in cooperative education programs.

(3) Schedule C: Confidential or policy-determining character in close relationship with agency heads.

3. Senior Executive Service (SES). 5 U.S.C. §§ 2101a and 3132(a)(2).

C. Employees--Classified by Tenure Status.

1. Requirement for probationary period. 5 U.S.C. §§ 3321; 5 C.F.R. §§ 315.801-315.806.

a. Purpose--an extension of the hiring process; to determine the employee's fitness and qualifications for continued employment. 5 C.F.R. § 315.03.

b. Length.

c. Competitive service--one year. 5 C.F.R. § 315.801.

d. Excepted service.

(a) Preference eligible excepted service employees must serve a one-year probationary equivalent time period.

(b) Nonpreference eligible excepted service employees must serve two years of "current continuous service . . . under other than a temporary appointment . . ." Forest v. Merit Systems Protection Bd., 47 F.3d 409 (Fed. Cir. 1995).

e. Significance of probationary status. 5 C.F.R. § 315.804 (requiring only notice of effective date and stated reason for termination of probationer); Toyens v. Dep't of Justice, 58 M.S.P.R. 634 (1993); Stanley v. Dep't of Justice, 58 M.S.P.R. 354 (1993); Pierce v. GPO, 70 F.3d 106 (1996).

f. Requirement of new probationary period upon change in positions if new appointment or initial probationary period not satisfied. 5 C.F.R. § 315.801(b); Park v. DHHS 78 M.S.P.R. 527 (1998);Todd v. MSPB, 50 F.3d 21 (Fed. Cir. 1995) (Table); Grigsby v. Dep't of Commerce, 729 F.2d 772 (Fed. Cir. 1984); Francis v. Dep't of Navy, 53 M.S.P.R. 545 (1992).

g. Temporary or intermittent appointments do not count toward satisfaction of probationary period. Forest v. MSPB, 47 F.3d 409 (Fed. Cir. 1995); Rosete v. OPM, 48 F.3d 514 (Fed. Cir. 1995).

2. Probationary period for new supervisors--one year. 5 U.S.C. § 3321; 5 C.F.R. §§ 315.901-315.908; AR 690-300, ch. 315, subch. 9. DeCleene v. Education, 71 M.S.P.R. 651 (1996).

3. Probationary employees' limited MSPB appeal rights: When separated, a competitive service probationary employee has limited appeal rights to the MSPB. 5 C.F.R. § 315.804-06. The extent of appeal rights depends on whether the removal is based on pre-appointment or post-appointment reasons. The employee has the right to a jurisdictional hearing to determine whether his termination was based upon partisan political reasons or marital status or that his termination was based upon pre-appointment reasons and was procedurally incorrect. Park v. DHHS 78 M.S.P.R. 527 (1998)

   a. Termination of Probationers for preappointment conditions. 5 C.F.R. § 315.805.

      (1) Probationers removed for preappointment reasons (example: failure to pass a physical required for the position) are entitled to MSPB review to ensure that they received the proper procedural rights,{notice, an opportunity to respond in writing, and a final written decision} but they are not entitled to have the MSPB review the correctness of the agency decision. Gaxiola v. Dep't. Of Air Force, 6 M.S.P.R. 515 (1981); Munson v. Dep't. of Justice, 55 M.S.P.R. 246 (1992); Keller V. Dept of Navy, 69 M.S.P.R. 183 (1996).

      (2) In determining the appeal rights of a probationary employee, a claim that the removal was based on either a learning disability or sexual harassment by a supervisor does not constitute a pre-appointment reason entitling the employee limited due process under 5 CFR § 315.805. Presumably, the employee could file an EEO complaint. Pierce v. GPO, 70 F.3d 106 (1996).

   b. Termination of Probationers for post-appointment misconduct or performance. 5 C.F.R. § 315.806 (b). Probationers removed for post-appointment reasons are entitled to MSPB review only upon valid allegations of discrimination based on (1) marital status or (2) partisan political reasons. Rhone v. Dept Treasury, 66 M.S.P.R. 257 (1995).

4. Tenure upon appointment: Career-conditional. 5 C.F.R. § 315.301.

a. Acquisition of career status.

b. Significance of career status--noncompetitive promotion and placement.. 5 C.F.R. § 212.301.

5. Competitive service v. Excepted service--Preference eligible v. Nonpreference eligible: What Significance?

a. Much due process:

(1) Nonprobationary competitive service employees.

(2) Nonprobationary preference eligible excepted service employees.

(3) Most nonprobationary nonpreference eligible excepted service employees with more than two years of current continuous service.

b. Little due process:

(1) Probationary competitive service and probationary, preference eligible excepted service employees.

(2) Nonpreference eligible excepted service employees with less than two years of current continuous service.

(3) Temporary or term appointees; some excepted service employees not subject to Due Process Amendments of 1990. Todd v. MSPB, 55 F.3d 1574 (Fed. Cir. 1995) (employees of DODDS schools do not receive appeal rights); Monser v. Dep't of Army, 67 M.S.P.R. 477 (1995) (CIPMS employees do not receive appeal rights).

D. Employees--Classified by Eligibility for Veterans' Preference. 5 U.S.C. § 2108.

1. Definition of "veteran." Individual who:

a. Served on active duty in the armed forces

(1) During a war, or

(2) In a campaign or expedition for which a campaign badge has been authorized, (Service on active duty in the armed forces "during, or at the time of, a campaign or expedition for which a campaign badge has been authorized" is not sufficient. Rather, the individual must have served in the campaign or expedition for which a campaign badge was authorized. Perez v. MSPB, 85 F.3d 591 (Fed. Cir. 1996) Rivas v. Postal Serv. 72 M.S.P.R. 383 (1996). , or

(3) During the period from April 28, 1952, through July 1, 1955, or

(4) For a period of more than 180 consecutive days after January 31, 1955, and before October 15, 1976, and

b. Has been discharged under honorable conditions.

c. The Fiscal Year 1998 Defense Authorization Act authorizes servicemembers who participated in Operation Joint Endeavor or Operation Joint Guard in the Republic of Bosnia and Herzegovina and in such other areas in the region as the Secretary of Defense considers appropriate, and were awarded the Armed Forces Expeditionary Medal (AFEM) to claim a 5 point veteran's preference.

2. Types of preference eligibility.

a. Veterans.

b. Disabled veterans.

c. Certain unmarried widows/widowers.

d. Wives and mothers of disabled veterans.

3. Effects of preference eligibility.

a. Appointment.

b. Reduction-in-force (RIF) actions. 5 U.S.C. § 3502.

c. Actions for unacceptable performance and misconduct. 5 U.S.C. §§ 4303(e), 7511(a)(1)(B), and 7513(d).

4. Constitutionality of preference. Frederick v. United States, 507 F.2d 1264 (Ct. Cl. 1974). *See also* Massachusetts v. Feeney, 442 U.S. 256 (1979).

E. Classification of Positions by Method of Payment. 5 U.S.C. Chapters 51-59.

1. General schedule employees. 5 U.S.C. Chapters 51 and 53. GS-1-GS-15.

2. Prevailing rate employees (wage board). 5 U.S.C. §§ 5341-5349. WG-1-WG-15, WL-1-WL-15.

3. Senior Executive Service (SES) employees. 5 U.S.C. §§ 5381-5385. ES-1-ES-6.

4. Executive Schedule. Levels I-V.

5. Nonappropriated fund employees (AR 215-3): Those employees who are <u>not</u> paid from funds appropriated by Congress.

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Outline of Instruction

I. INTRODUCTION.

II. EQUAL EMPLOYMENT OPPORTUNITY -- STATUTORY FRAMEWORK.

A. Title VII, Civil Rights Act of 1964, *as amended*, 42 U.S.C. §§ 2000e-2000e-17, prohibits:

1. Basis: Discrimination on basis of race, color, religion, sex, or national origin in connection with any personnel action; retaliation or reprisal for having engaged in protected activity.

2. Persons covered: Applicants for employment, employees, and former employees.

3. Issues: Fail or refuse to hire, discharge, or otherwise discriminate in compensation, terms, conditions, or privileges of employment; limit, segregate, or classify in a way to adversely affect person.

B. Age Discrimination in Employment Act, 29 U.S.C.§ 633a, prohibits:

1. Basis: Discrimination on basis of age 40 and over; retaliation or reprisal for having engaged in protected activity.

2. Persons covered: Applicants for employment, employees, and former employees.

3. Issues: Fail or refuse to hire, discharge, or otherwise discriminate in compensation, terms, conditions, or privileges of employment; limit, segregate, or classify in a way to adversely affect; or reduce wages.

C. Rehabilitation Act of 1973, *as amended*, 29 U.S.C. §§ 790-794, and *modified by* the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213:

1. Basis: Discrimination on the basis of handicapping condition (disability); failure to reasonably accommodate qualified handicapped.

2. Persons covered: Applicants for employment, employees, and former employees.

3. Issue: Test applicant to screen out handicapped; fail or refuse to hire, discharge, or otherwise discriminate in compensation, terms, conditions, or privileges of employment; limit, segregate, or classify in a way to adversely affect; or reduce wages, or be denied "reasonable accommodation" if accommodation does not impose undue hardship on agency.

4. Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213, provides protections to private-sector employees similar to those provided federal employees in the Rehabilitation Act and modifies and codifies portions of the Rehabilitation Act. The ADA modifies the term "qualified handicapped individual" to "a qualified individual with a disability." These terms are used interchangeably in this outline.

D. The Equal Pay Act (29 U.S.C. § 206(d)) requires equal pay for equal work.

E. The Civil Rights Act of 1991, Pub. L. No. 102-166 (codified at scattered sections of 42 U.S.C.), provides for the recovery of compensatory damages of up to $300,000 from the federal government. Punitive damages are not recoverable from the federal government

III. EQUAL EMPLOYMENT OPPORTUNITY AGENCIES.

A. Equal Employment Opportunity Commission (EEOC).

B. Merit Systems Protection Board (MSPB). 5 U.S.C. § 7702. The Civil Service Reform Act of 1978 (5 U.S.C. § 7702) provides for the processing of "mixed cases:" a personnel action that is (1) otherwise appealable and (2) allegedly motivated by prohibited discrimination.

IV. EEO SUBSTANTIVE ANALYSIS.

A. Theories of Discrimination and Methods of Proof.

1. Disparate Treatment.

2. Definition. International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977): "The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin."

3. Proof of discriminatory motive essential. Palmer v. Shultz, 815 F.2d 84 (D.C. Cir. 1987), remanded 905 F.2d 84 (1990); Equal Employment Opportunity Comm'n v. General Telephone Co. of Northwest, Inc., 885 F.2d 575 (9th Cir. 1989).

4. The shifting burdens.

a. Plaintiff's *prima facie* case. McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); U.S. Postal Service v. Aikens, 460 U.S. 711 (1983); St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993); Harding v. Gray, 9 F.3d 150 (D.C. Cir. 1993).

(1) Member of protected class.

(2) Qualified for job.

(3) Rejected/discharged.

(4) Employer filled job with someone else or still seeking similarly qualified applicants. Washington v. Garrett, 10 F.3d 1421 (9th Cir. 1994).

(5) Additional "background circumstances" required to establish an inference of discrimination in "reverse" discrimination cases. Harding v. Gray, 9 F.3d 150 (D.C. Cir. 1993).

b. Defendant's burden of production. Articulate legitimate nondiscriminatory reason. Furnco Construction Co. v. Waters, 438 U.S. 567 (1978); *Burdine*.

c. Plaintiff's rebuttal. St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993); *McDonnell-Douglas*; *Furnco*; *Burdine*.

(1) Employer's explanation unworthy of belief (pretext); and

(2) Discriminatory reason for action more likely.

d. Ultimate burden of proof remains with plaintiff. St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993); U.S. Postal Serv. v. Aikens, 460 U.S. 711 (1983); Comer v. Brown, 13 F.3d 404 (10th Cir. 1994) (table); Cosgrove v. Sears, Roebuck, & Co., 9 F.3d 1033 (2d Cir. 1993); LeBlanc v. Great American Ins. Co., 6 F.3d 836 (1st Cir. 1993); Odom v. Frank, 3 F.3d 850 (5th Cir. 1993); Rennie v. Dalton, 3 F.3d 1100 (7th Cir. 1993), cert. denied, 114 S. Ct. 1054 (1994).

e. A finding of liability under the Equal Pay Act does not support a finding of discrimination under Title VII absent a specific finding of intentional discrimination. Meeks v. Computer Assocs. Int'l, 15 F.3d 1013 (11th Cir. 1994).

B. "Mixed Motive" Discrimination Cases.

1. Law before the CRA 1991. A plaintiff proves prohibited discrimination was a contributing factor in the decision and the defendant proves by a preponderance of evidence that it would have taken the same employment action absent the prohibited discrimination. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

2. Current Law. Section 107 of the Civil Rights Act of 1991 modifies the "but for" test in *Price Waterhouse*. An employee who demonstrates that discrimination was "a motivating factor for any employment practice" has proven an unlawful employment practice. 42 U.S.C. § 2000e-2(m). Fuller v. Phipps, 67 F.3D 1137 (4th Cir. 1995).

a. The employer can avoid full liability only by demonstrating by clear and convincing evidence it would have taken the same action in the absence of discrimination. 42 U.S.C. § 2000e-5(g)(2)(B). Tanca v. Nordberg, 98 F.3d 680 (1st Cir. 1996), *cert. denied.*, 117 S.Ct. 1253 (1997).

b. The employee is still entitled to declaratory and injunctive relief recovery of attorney's fees and costs. Russell v. Microdyne Corp., 65 F.3d 1229, 1237 (4th Cir.1995).

C. Disparate impact. The Civil Rights Act of 1991 § 105, overruled portions of the Supreme Court's decision in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), and established statutory burdens of proof in disparate impact cases. 42 U.S.C. § 2000e-2.

1. Definition (Int'l Brotherhood of Teamsters): "[E]mployment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."

2. Although traditionally applied to invalidate tests or fixed qualification standards, may be applied to cases where subjective criteria are used to make employment decisions. Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988).

3. No proof of discriminatory motive is required. Typically attacks systemic or mechanical discrimination.

4. Plaintiff's prima facie case. 42 U.S.C. § 2000e-2(k)(1)(A).

a. Member of protected class.

b. Rejected/discharged/segregated/etc. by facially neutral employment practice.

c. Demonstrate (meet burden of production and persuasion--generally with statistical evidence) that each employment practice being challenged adversely affects protected class in disproportionate numbers (or that practices cannot be separated for analysis).

5. Defendant's rebuttal.

a. Under Section 105 of the CRA 1991, the **burden of proof** shifts to the employer to demonstrate that the employment practice is job related for the position in question and consistent with business necessity. 42 U.S.C.§ 2000e-2(k)(1)(A)(i).

b. The employer can also rebut the underlying statistics (e.g., wrong labor market, incomplete data, inadequate techniques) or show that other factors account for the discrepancy. 42 U.S.C. § 2000e-2(k)(1)(B)(2). *See also* Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989)(reversing disparate impact finding for improper use of statistics); Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988); Equal Employment Opportunity Comm'n v. Chicago Miniature Lamp Works, 947 F.2d 292 (7th Cir. 1991); Valentino v. U.S. Postal Serv., 674 F.2d 56 (D.C. Cir. 1982); Maddox v. Claytor, 764 F.2d 1539 (11th Cir. 1985).

6. Plaintiff's reply. Even if defendant satisfies its burden of proof, a plaintiff can prevail by proving that an alternative business practice, which the employer refused to adopt, would have satisfied the employer's business needs without causing such an adverse impact.

D. Retaliation and Reprisal.

1. Elements. Atkinson v. Bd. of Regents, 4 F.3d 984 (4th Cir. 1993); Malarky v. Texaco, Inc., 983 F.2d 1204 (2d Cir. 1993); Miller v. Williams, 590 F.2d 317 (9th Cir. 1979).

a. Individual engaged in protected activity. 42 U.S.C. § 2000e-3.

(1) Opposition clause.

(2) Participation clause.

b. Adverse employment action taken against the employee.

c. Causal connection between protected activity and adverse action.

(1) An inference that a causal connection exists can arise where the individual shows that employer was aware of the protected activity and the adverse action follows the protected activity closely in time. *Atkinson*.

(2) Protected activity by one employee can protect another from retaliation. Equal Employment Opportunity Comm'n v. Ohio Edison Co., 7 F.3d 541 (6th Cir. 1993).

2. Employer defenses.

a. Legitimate, non-retaliatory reasons for adverse action. Atkinson v. Bd. of Regents, 4 F.3d 984 (4th Cir. 1993); Butler v. Dep't of Agric. 826 F.2d 409 (5th Cir. 1987).

b. Decision to take adverse action made before protected activity. Newton v. Leggett, 7 F.3d 1042 (8th Cir. 1993).

c. Lack of knowledge of prior protected activity. Jackson v. Brown, 5 F.3d 546 (10th Cir. 1993); Malarky v. Texaco, Inc., 983 F.2d 1204 (2d Cir. 1993); Acosta v. Univ. of the District of Columbia, 528 F. Supp. 1215 (D.D.C. 1981).

d. Prolonged period of time between protected activity and adverse action negates presumption of causal connection. Johnson v. Dep't of Health & Human Servs., 30 F.3d 45 (6th Cir. 1994); Clark v. Chrysler Corp., 673 F.2d 921 (7th Cir. 1982).

E. Handicap (Disability) Discrimination--reasonable accommodation. 29 C.F.R. § 1614.203.

1. Three theories to support claim of handicap (disability) discrimination:

a. Disparate treatment (treating disabled employees less favorably than non-disabled employees);

b. Disparate impact; and

c. Failure to reasonably accommodate in hiring, placement, or advancement opportunities.

2. The plaintiff's burden in disability discrimination cases parallels Title VII disparate treatment analysis:

a. Proof by direct evidence; or

b. Proof by circumstantial evidence establishing a *prima facie* case of disability discrimination--

(1) The employee suffers from a disability;

(2) is qualified for the job;

(3) was subject to an adverse employment action; and

(4) was replaced by a non-disabled person or was treated less favorably than non-disabled employees. *See* Daigle v. Liberty Life Ins. Co., 70 F.3d. 394 (5th Cir., 1995).

c. The burden of production then shifts to the employer to articulate a valid, nondiscriminatory reason for its actions.

3. Plaintiff's *prima facie* case in accommodation cases: Demonstrate that plaintiff is "qualified handicapped person" ("qualified individual with a disability"). Owens v. U.S. Postal Serv., 37 F.3d 1326 (8th Cir. 1994); Sargent v. Dep't of Air Force, 55 M.S.P.R. 387 (1993).

a. Disabled person--has a record of having, or <u>is regarded as having</u> a physical or mental impairment that substantially limits one or more major life activity. 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2; Cook v. State of Rhode Island, 10 F.3d 17 (1st Cir. 1993); Ruiz v. U.S. Postal Svc., 59 M.S.P.R. 76 (1993).

b. Qualified handicapped (individual)--Can perform essential functions of position, with/without reasonable accommodation. Carr v. Reno, 23 F.3d 525 (D.C. Cir. 1994).

c. Performance will not endanger health or safety of employee or others. School Board of Nassau County v. Arline, 480 U.S. 273 (1987); Lassiter v. Dep't of Justice, 60 M.S.P.R. 138 (1993).

4. Defenses.

a. Plaintiff not "qualified handicapped person" ("qualified individual with disability"). Bradley v. Univ. of Texas Cancer Center, 3 F.3d 922 (5th Cir. 1993); Jasany v. U.S. Postal Serv., 755 F.2d 1244 (6th Cir. 1985); Vernon v. Veterans Admin., 54 M.S.P.R. 486 (1992); Cohen v. Dep't of Army, 46 M.S.P.R. 369 (1990).

(1) Agency is not obligated to assign employee to permanent light duty. Bauman v. Dep't of Navy, 55 M.S.P.R. 209 (1992).

(2) Reassignment as reasonable accommodation. Agencies must offer to reassign a qualified disabled employee to a funded vacant position located in the same commuting area and serviced by the same appointing authority, unless the agency can demonstrate that the reassignment would impose an undue hardship or disruption on the agency. 29 C.F.R. § 1614.203(g). Fedro v. Reno, 21 F.3d 1391 (7th Cir. 1994)(holding that an agency need not establish a new position to accommodate a handicapped employee); Ignacio v. U.S. Postal Serv., 30 M.S.P.R. 471 (Spec. Pan. 1986); Savage v. Dep't of Navy, 36 M.S.P.R. 148 (1988).

(3) For purposes of reassignment, "agency" is military department, not Dep't of Defense. Brown v. Dep't of Navy, 53 M.S.P.R. 537 (1992).

b. The accommodation would impose an undue hardship on agency's operation. Vande Zande v. State of Wisconsin Dep't of Admin., 44 F.3d 538 (7th Cir. 1995) (finding that the financial condition of an employer is only one consideration in determining whether accommodation otherwise reasonable would impose undue hardship); Treadwell v. Alexander, 707 F.2d 473 (11th Cir. 1983); Bolstein v. Dep't of Labor, 55 M.S.P.R. 459 (1992); Cohen v. Dep't of Army, 46 M.S.P.R. 369 (1990); Widger v. VA, 37 M.S.P.R. 368 (1988).

c. Agency "good faith" attempts to accommodate will preclude recovery of compensatory damages. 42 U.S.C. § 1981a(a)(3); Hocker v. Dep't of Transp., 63 M.S.P.R. 497 (1994).

d. When an employee fails to cooperate, such as failing to submit sufficient medical evidence which would have allowed the agency to determine what accommodation, if any, was appropriate, the agency may proceed with ongoing removal actions. [In this case it was for AWOL.] The Commission noted that the process of identifying a reasonable accommodation is an interactive one, i.e., one in which petitioner and agency work together to identify petitioner's specific physical limitations, identify potential accommodations, and assess how effective each would be. In this case the agency attempted to engage in a dialogue; however, the record reflects that petitioner would not participate. In such a case, the Commission concludes that the agency cannot be held liable for failing to accommodate. Medlock v. Dep't of Air Force, EEOC Petition No. 03970126 (1998).

5. Alcoholism and drug dependence as handicapping conditions; accommodating the alcoholic or drug addict. Lazenby v. Dep't of Air Force, 66 M.S.P.R. 514 (1995); Anderson v. Dep't of Transportation, 59 M.S.P.R. 585 (1993); 42 U.S.C. § 2000e-2(k)(3); 29 C.F.R. § 1614.203(h).

a. In the recent past, alcoholism was viewed as a disability. Reasonable accommodation of an alcoholic required: (1) counseling; (2) a "firm choice" between treatment and discipline (last chance agreement); (3) outpatient treatment; (4) inpatient treatment; and (5) discharge. If the employee does not complete rehabilitation, chooses not to participate, or falls off the wagon, he can be removed. However, no discipline allowed before a firm choice given. Crewe v. OPM, 834 F.2d. 140 (8th Cir. 1987); Rogers v. Lehman, 869 F.2d. 253 (4th Cir. 1989).

b. The current EEOC position is that federal employers are no longer required to provide the reasonable accommodation of a firm choice because the Rehabilitation Act Amendments of 1992 changed the applicable standard. The EEOC noted that Section 104(c)(4) of the ADA (29 U.S.C. § 12114 (c)(4)) permits a covered employer to hold an employee who is an alcoholic to the same qualification standards for employment, or job performance and behavior, as other employees. Johnson v. Babbitt, EEOC Appeal No. 03940100 (March 28, 1996).

c. In a separate case, the MSPB held that the EEOC's decision in Johnson v. Babbitt had a reasonable basis and adopted the EEOC rule for the appellant and future cases. The MSPB went on to state: "In so doing we overrule Harris, 57 M.S.P.R. 124; Banks v. Department of the Navy, 57 M.S.P.R. 141 (1993); and Carlton, 44 M.S.P.R. 477, as well as all other Board decisions that may be interpreted to require imposition of the firm choice rule following the effective date of the Rehabilitation Act Amendments of 1992, October 29, 1992." Kimble v. Navy, 70 M.S.P.R. 617 (1996).

d. Employee involved in on-duty accident while driving under the influence of alcohol (DUI) in a government van which damaged government property, resulted in physical injury to him, and endangered others was NOT a qualified person with a disability under the Rehabilitation Act, and, thus, the employee did not have any right to reasonable accommodation by agency for his alcoholism. Coates v. Dep't. Navy, 74 M.S.P.R. 362 (1997).

e. While agencies are no longer obligated by the ADA and the Rehabilitation Act to provide accommodations formerly required for alcoholics, they may voluntarily do so because the wording of the law is that they "may" hold such employees to the same standards to which they hold others. Moreover, where employee shows that he has a right to such accommodation under agency's own rules and that right has been denied, he has proven affirmative defense of harmful procedural error rather than disability discrimination. Army Regulation 600-85, paras 5-4 and 5-5, require postponing adverse action for 90 days for employees enrolled in ADAPCP at the time it initiates adverse action and to forebear from taking an adverse action upon achievement of a successful result. Humphrey v. Dep't. of Army, 76 M.S.P.R. 519, (1997).

f. **NOTE:** Under the ADA, any person "who currently and knowingly uses or possesses a controlled substance" is excluded from the protections of the ADA.

F. Sexual Harassment. "Neither men nor women should have to run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living." Henson v. Dundee, 682 F.2d 897 (11th Cir. 1982).

1. Definition. 29 C.F.R. § 1604.11(a). Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when:

a. Submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

b. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

c. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

2. Army Regulation 600-20: Any soldier or civilian employee:

a. In a supervisory or command position who uses or condones implicit or explicit sexual behavior to control, influence, or affect the career, pay, or job of another soldier or civilian employee is engaging in sexual harassment.

b. Who makes deliberate or repeated unwelcome verbal comments, gestures, or physical contact of a sexual nature is engaging in sexual harassment.

c. Under AR 600-20, sexual harassment is not limited to the workplace, but can occur at almost any place, and violates acceptable standards of integrity and impartiality required of all Army personnel. It interferes with mission accomplishment and unit cohesion. "Such behavior by soldiers or Army civilians will not be tolerated."

3. Title 10 U.S.C. Section 1561. (111 Stat. 1629 (1997)) The National Defense Authorization Act for Fiscal Year 1998 added section 1561 to Title 10 of the United States Code.

a. The section includes a definition of sexual harassment similar (but not identical) to the definition in DoD Dir. 1350.2 and AR 600-20. This new statutory definition is broader than the Title VII definition of sexual harassment.

b. Condonation by persons in supervisory positions **and** deliberate or repeated unwelcome gestures or comments of a sexual nature in the workplace by any member of the armed forces or any DoD civilian employee, are both sufficient to constitute sexual harassment.

4. Types of Sexual Harassment.

a. "Quid Pro Quo" Sexual Harassment: Generally refers to a request for sexual favors in return for a job benefit, or in connection with the threat of the loss of a job, grade, or an unfavorable performance rating if the employee fails to grant the requested favors.

(1) No requirement for resistance to the harassment. Voluntariness not a defense. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986); Chamberlin v. 101 Realty, Inc., 915 F.2d 777, 783 (1st Cir. 1990).

(2) Plaintiff need not prove economic loss. Karibian v. Columbia Univ., 14 F.3d 773 (2d Cir. 1994).

b. "Hostile Environment" Sexual Harassment:

(1) Elements. Spicer v. Commonwealth of Virginia Department of Corrections, 66 F.3D 705 (4th Cir. 1995); Brown v. Hot, Sexy and Safer Productions, Inc., 68 F.3D 525 (1st Cir. 1995), *citing* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64-65 (1986).

(a) Complainant was subject to unwelcome conduct or harassment;

(b) That the harassment was based upon sex;

(c) That the harassment was sufficiently severe or pervasive so as to alter the conditions of the workplace and create an abusive environment; and

(d) The harassment is imputable on some factual basis to the employer.

(2) Does not require the loss of job benefits or opportunities.

(3) Psychological and emotional work environment as a condition of employment. A violation can be shown **either** by evidence that the misconduct interfered with an employee's work **or** by evidence that the misconduct caused serious psychological damage. "Reasonable person" and "reasonable victim" test. Harris v. Forklift Systems, Inc., 114 S. Ct. 367, (1993); Objective/subjective elements. Baskerville v. Culligan Int'l Co., 50 F.3d 428 (7th Cir. 1995).

(4) Must be "Pervasive . . . severe and persistent". Single act versus pattern of conduct. The requirement for repeated exposure will vary inversely with the severity of the offensiveness of the incidents.

(5) The harassment does not necessarily have to be directed at the complainant. Evidence of sexual harassment directed at employees other than the plaintiff is relevant to show a hostile environment.

(6) The harassing official need not be of the opposite sex as the complainant. Sexual harassment, both quid pro quo and hostile environment, of a male employee by a male supervisor is actionable under Title VII. Oncale v. Sundowner Offshore Services, 523 U.S. ____, 118 S.Ct. 998, (1998).

5. Types of acts encompassed.

a. Visual (leering and ogling);

b. Verbal (derogatory remarks, innuendoes, and jokes);

c. Physical (pinching, fondling, and rape).

6. Agency liability.

a. An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. The employer may raise an affirmative defense that he acted reasonably to prevent and correct any sexually harassing behavior and that the plaintiff failed to take advantage of any preventive or corrective measures provided by the employer. Burlington Industries v. Ellerth 524 U.S. 742; 118 S. Ct. 2257 (1998).

b. With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action. A successful plaintiff must demonstrate that the employer had actual or constructive knowledge of the existence of the sexually hostile work environment and took no prompt and adequate remedial action. Spicer v. Commonwealth of Virginia Department of Corrections, 66 F.3d 705 (4th Cir. 1995) (reversing an award for sexual harassment and attorney's fees because the employer acted immediately and effectively to eliminate the offensive, yet isolated, behavior); see also Baskerville v. Culligan Int'l Co., 50 F.3d 428 (7th Cir. 1995) and Carr v. General Motors Corp., 32 F.3d 1007 (7th Cir. 1994) (holding there are two issues in hostile environment analysis of employer liability: whether the employee was subjected to a hostile working environment; <u>and</u>, whether the employer's response or lack of response to the situation was negligent.); Bouton v. BMW of North America, Inc., 29 F.3d 103 (1994); Carmon v. Lubrizol Corp., 17 F.3d 791 (5th Cir. 1994). *Contra*, Karibian v. Columbia Univ., 14 F.3d 773 (2d Cir. 1994).

7. Disciplinary actions. Civilian employees may be subject to administrative discipline for engaging in sexual harassment under agency regulations prohibiting sexual harassment. King v. Hillen, 21 F.3d 1572 (Fed. Cir. 1994); Hillen v. Dep't of Army, 66 M.S.P.R. 68 (1994); Holland v. Dep't of Air Force, 31 F.3d 1118 (Fed. Cir. 1994); Kirk v. Dep't of Navy, 58 M.S.P.R. 663 (1993).

a. No requirement for victims to file EEO complaints. A victim may or may not seek redress, but the agency's right to discipline employees who harass or discriminate is not dependent on employee's action.

b. Supervisors can be held to higher standard than coworkers. Pierce v. Commonwealth Life Insurance Co., 40 F.3d 796 (6th Cir. 1994).

c. Charge as misconduct: violation of AR 600-20. Agency need only show an adverse effect on the efficiency of the service. Standard misconduct action under 5 U.S.C. chapter 75. In Kirk v. Dept. of Navy, 58 M.S.P.R. 663, (1993) the MSPB made it clear that an agency which charges a harasser with violating its policy need only address that policy and need not prove a Title VII violation or 29 CFR violation.

d. Removal is appropriate penalty based on single incident of sexual harassment involving physical contact. Evidence showed the employee a postal supervisor sexually harassed another postal supervisor, including proof that employee left voice mail message for other supervisor stating, “Girl, the sound of your voice makes my thing throb and my toes quiver,” he attempted to hug and kiss her after she repeatedly warned him not to, and then he ignored those warnings and hit her on the buttocks. Payne v. USPS, 74 M.S.P.R. 419 (1997).

V. PROCESSING EEO COMPLAINTS.

A. Administrative Complaint Procedures--Nonmixed Cases.

1. Complaint process.

a. Informal stage: Employee contacts EEO Counselor.

(1) Timing--within 45 days of matter of which complained. 29 C.F.R. § 1614.105(a); Zografov v. VA Medical Center, 779 F.2d 967 (4th Cir. 1985); Boyd v. U.S. Postal Serv., 752 F.2d 410 (9th Cir. 1985).

(a) Commencement of 45-day period.

(i) Personnel action--effective date of action.

(ii) Event not constituting a personnel action--date individual knew or reasonably should have known of discriminatory event.

(b) Tolling of 45-day period. 29 C.F.R. § 1614.105(a)(2). The agency or the Commission shall extend the 45-day time limit when

(i) The individual shows that he or she was not notified of the time limits and was not otherwise aware of them;

(ii) That he or she did not know and reasonably should not have known that the discriminatory matter or personnel action occurred;

(iii) That despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission;

(c) Posting requirements. 29 C.F.R. § 1614.102(b)(7).

(d) Waiver of time limit. Oaxaca v. Roscoe, 641 F.2d 386 (5th Cir. 1981).

b. Counselor actions. 29 C.F.R. § 1614.105(b)(1).

(1) Initial interview. At the initial counseling session, counselors must advise individuals in writing of their rights and responsibilities, including

(a) The right to request a hearing after an investigation by the agency;

(b) Election rights pursuant to §§ 1614.301 and 1614.302;

(c) The right to file a notice of intent to sue pursuant to §1614.201 (a) and

(d) A lawsuit under the ADEA instead of an administrative complaint of age discrimination under this part.

(e) The duty to mitigate damages, administrative and court time frames, and that only the matter(s) raised in precomplaint counseling (or issues like or related to issues raised in pre-complaint counseling) may be alleged in a subsequent complaint filed with the agency.

(f) Counselors must also advise individuals of their duty to keep the agency and Commission informed of their current address and to serve copies of appeal papers on the agency.

(g) Gather facts from complainant.

(h) Identify primary agency witness (PAW), if any.

(2) Counselors shall advise aggrieved persons that, they may choose between participation in an alternative dispute resolution (ADR) program and the counseling activities provided.

(a) Where the aggrieved person chooses to participate in ADR, the pre-complaint processing period shall be 90 days.

(b) Counselor inquiry, including interview with PAW.

(c) Final interview. § 1614.105(d). If the complainant chooses not to take part in ADR, he shall be given final notice of his right to file a formal discrimination complaint. The notice shall inform the complainant of the right to file a discrimination complaint within 15 days of receipt of the notice, of the appropriate official with whom to file a complaint and of the complainant's duty to assure that the agency is informed immediately if the complainant retains counsel or a representative.

(i) Time--within 30 days of contact. This period may be extended for up to an additional 60 days if both the employee and the agency agree. In addition, the 30-day period would be automatically extended to 90 days if the complainant participates in ADR.

(3) Final report. Counselor must submit a written report within 15 days to the agency office that has been designated to accept complaints and the aggrieved person concerning the issues discussed and actions taken during counseling. 29 C.F.R. § 1614.105(c).

(a) Identity of complainant. 29 C.F.R. § 1614.105(g). The counselor shall not reveal the identity of an aggrieved person who consulted the counselor, except when authorized to do so by the aggrieved person, or until the agency has received a discrimination complaint from that person involving that same matter.

c. Formal stage.

(1) Written complaint to EEO Officer. 29 C.F.R. § 1614.106(b). A complaint must contain a signed statement from the person claiming to be aggrieved or that person's attorney. This statement must be sufficiently precise to identify the aggrieved individual and the agency and to describe generally the action(s) or practice(s) that form the basis of the complaint.

(a) Timing. Within 15 days of final interview with EEO counselor.

(b) Amendment. 29 C.F.R. § 1614.106(d). A complainant may amend a complaint at any time prior to the conclusion of the investigation to include issues or claims like or related to those raised in the complaint.

(c) Dismissal of complaint. 29 C.F.R. § 1614.107.

(i) Untimely--at either formal or informal stage. 29 C.F.R. § 1614.107(b).

(ii) Not within purview of 29 C.F.R. § 1614.103.

(iii) Identical complaint.

(iv) Not against the proper agency.

(v) That is the basis of a pending civil action in a United States District Court.

(vi) That is moot or alleges that a proposal to take a personnel action, or other preliminary step to taking a personnel action, is discriminatory.

(vii) That alleges dissatisfaction with the processing of a previously filed complaint; or

(viii) Where the agency, strictly applying the criteria set forth in Commission decisions, finds that the complaint is part of a clear pattern of misuse of the EEO process for a purpose other than the prevention and elimination of employment discrimination.

(ix) Appeal of rejection. 29 C.F.R. § 1614.107(b). Where the agency believes that some but not all of the claims in a complaint should be dismissed, the agency shall notify the complainant in writing of its determination, the rationale for that determination and that those claims will not be investigated. The agency shall place a copy of the notice in the investigative file. A determination under this paragraph is reviewable by an administrative judge if a hearing is requested on the remainder of the complaint, but is not appealable until final action is taken on the remainder of the complaint.

(d) After acceptance, the agency may cancel the complaint if employee:

(i) Files suit in federal court.

(ii) Fails to prosecute.

(2) Investigation. Series of interviews or a fact-finding conference resulting in a report of investigation (ROI). AR 690-600, para. 2-9. Agencies must complete the investigation within 180 days of the filing of the complaint (with a possible extension of up to 90 days if the employee and agency agree in writing). 29 C.F.R. §§ 1614.106(d) and 1614.108(e). Agencies may use an exchange of letters or memoranda, interrogatories, investigations, fact-finding conferences, or any other fact-finding methods to develop a record. Agencies are encouraged to incorporate alternative dispute resolution (ADR) techniques. 29 C.F.R. § 1614.108(b).

(a) Complainant decides on course of action -- within 30 days of receipt of the investigative file. 29 C.F.R. § 1614.108(f).

(i) Request a final agency decision from the agency head based on the record.

(ii) Request a hearing and final decision from EEOC administrative judge.

d. EEOC hearing. 29 C.F.R. § 1614.109.

(1) Prehearing issues.

(a) Request for hearing.

(b) Dismissals. 29 C.F.R. § 1614.109(b). Administrative judges may dismiss complaints pursuant to 1614.107, on their own initiative, after notice to the parties, or upon an agency's motion to dismiss a complaint.

(c) Offers of Resolution. 29 C.F.R. § 1614.109(c). Any time after the filing of the written complaint but not later than the date an administrative judge is appointed to conduct a hearing, the agency may make an offer of resolution to a complainant who is represented by an attorney. Any time after the parties have received notice that an administrative judge has been appointed to conduct a hearing, but not later than 30 days prior to the hearing, the agency may make an offer of resolution to the complainant, whether represented by an attorney or not. The agency's offer, to be effective, must include attorney's fees and costs and must specify any non-monetary relief.

(d) Discovery. The parties may engage in discovery before the hearing. 29 C.F.R. § 1614.109(d).

(e) Hearing procedures.

(i) Evidence. 29 C.F.R. § 1614.109(e). Rules of evidence shall not be applied strictly, but AJ may exclude irrelevant or repetitious evidence and any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing.

(ii) Decisions by administrative judges. 29 C.F.R. § 1614.109(i). Unless the administrative judge makes a written determination that good cause exists for extending the time for issuing a decision, an administrative judge shall issue a decision on the complaint, and shall order appropriate remedies and relief where discrimination is found, within 180 days of receipt by the administrative judge of the complaint file from the agency.

(f) Final action by agencies. 29 C.F.R. § 1614.110 (a). The agency shall take final action on the complaint by issuing a final order within 40 days of receipt of the hearing file and the administrative judge's decision. The final order shall notify the complainant whether or not the agency will fully implement the decision of the administrative judge and shall contain notice of the complainant's right to appeal to the Equal Employment Opportunity Commission, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for appeals and lawsuits. If the final order does not fully implement the decision of the administrative judge, then the agency shall simultaneously file an appeal.

(2) Appeal to EEOC. 29 C.F.R. § 1614.401. An appeal of the agency's final action or dismissal of a complaint must be filed with the EEOC's Office of Federal Operations (OFO) within 30 days of receipt of the final action or dismissal. Agency appeals must be filed within 40 days of receipt of the hearing file and decision.

e. Remedial actions. 29 C.F.R. § 1614.501

(1) Nondiscriminatory placement.

(2) Back pay.

(3) Compensatory damages up to $300,000.

(4) Fees and costs.

(5) Other.

f. Miscellaneous issues in the administrative complaint process. 29 C.F.R. § 1614.605.

(1) Representation.

(2) Official time. Reasonable time to prepare and attend; does <u>not</u> allow official time for witnesses to <u>prepare</u>.

B. Administrative Complaint Procedures--Mixed Cases.

1. Initiating the process--Three possible options.

a. Negotiated grievance procedure. 29 C.F.R. § 1614.301(a). When a person is covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance procedure, a person wishing to file a complaint or a grievance on a matter of alleged employment discrimination must elect to raise the matter under either part 1614 or the negotiated grievance procedure, but not both.

b. EEOC mixed case complaint. 29 C.F.R. § 1614.302(a)(1). (EEO complaint process minus hearing before EEOC AJ and appeal to EEOC). A mixed case complaint is a complaint of employment discrimination filed with a Federal agency based on race, color, religion, sex, national origin, age or handicap related to or stemming from an action that can be appealed to the Merit Systems Protection Board (MSPB). The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address. 29 C.F.R. § 1614.302(a)(1)

c. MSPB mixed case appeal. 29 C.F.R. § 1614.302(a)(2). A mixed case appeal is an appeal filed with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, handicap or age.

2. Electing the option. An aggrieved person may initially file a mixed case complaint with an agency pursuant to this part or an appeal on the same matter with the MSPB pursuant to 5 C.F.R. 1201.151, but not both. An agency shall inform every employee who is the subject of an action that is appealable to the MSPB and who has either orally or in writing raised the issue of discrimination during the processing of the action of the right to file either a mixed case complaint with the agency or to file a mixed case appeal with the MSPB.

a. Complaint process. When a complainant elects to file a mixed case complaint, rather than with the MSPB, the procedures set forth above for nonmixed case processing shall govern the processing of the mixed case complaint with the following exceptions:

(1) At the time the agency advises a complainant of the acceptance of a mixed case complaint, it shall also advise the complainant that:

(a) If a final decision is not issued within 120 days of the date of filing of the mixed case complaint, the complainant may appeal the matter to the MSPB at any time thereafter as specified at 5 C.F.R. § 1201.154(b)(2) or may file a civil action as specified at § 1614.310(g), but not both; and

(b) If the complainant is dissatisfied with the agency's final decision on the mixed case complaint, the complainant may appeal the matter to the MSPB (not EEOC) within 30 days of receipt of the agency's final decision;

(2) Upon completion of the investigation, the notice provided the complainant in accordance with § 1614.108(f) will advise the complainant that a final decision will be issued within 45 days without a hearing; and

(3) At the time that the agency issues its final decision on a mixed case complaint, the agency shall advise the complainant of the right to appeal the matter to the MSPB (not EEOC) within 30 days of receipt and of the right to file a civil action as provided at § 1614.310(a).

b. Other differences in procedures for mixed cases and nonmixed cases.

(1) Hearing in EEO complaint process.

(2) Appeal to EEOC upon completion of MSPB process.

(3) Special Panel if MSPB and EEOC decisions clash.

C. Administrative Complaint Procedures--Class Complaints.

1. Requirement to exhaust administrative class procedures as a prerequisite to maintaining judicial class action.

2. Significant difference in procedures for class complaints.

a. Class agent.

b. Heightened pleading requirement in formal complaint.

c. Preliminary role of administrative judge in determining propriety of class processing.

d. Additional requirements for acceptance of class complaint.

e. Notice to class members and opting out.

f. Individual relief upon finding of class-wide discrimination.

VI. REMEDIES IN EEO ACTIONS.

A. Monetary. 42 U.S.C § 2000e-5(g).

1. Traditional relief:

a. Back Pay. Reduced by interim earnings; employee must be ready, willing, and able to work to be entitled to back pay. Miller v. Marsh, 766 F.2d 490 (11th Cir. 1985).

b. Promotion. A "but for" test applied.

c. Reinstatement.

d. Front Pay. Shore v. Federal Express Corp., 42 F.3d 373 (6th Cir. 1994).

2. Additional relief under the Civil Rights Act of 1991.

a. Compensatory/punitive damages. Limited to $300,000 above other relief (cap does not include backpay, frontpay, attorney fees, or lost benefits).

b. Jury trials. In any case where the plaintiff seeks compensatory damages.

c. Prejudgment interest.

d. Expert fees.

B. Attorney Fees. 42 U.S.C. § 2000e-5(k). Success on any significant issue in litigation that achieves some benefit to the plaintiff.

C. Injunctive Relief.

D. EEO Recovery Limited by After-Acquired Evidence of Misconduct. McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (1995).

VII. CONCLUSION.

CHAPTER B

54TH FEDERAL LABOR RELATIONS COURSE

Introduction to Federal Labor-Management Relations

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Major Holly O'Grady Cook
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Outline of Instruction

I. REFERENCES.

A. Title VII, Civil Service Reform Act of 1978 (5 U.S.C. §§ 7101-7135).

The Congress finds that(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them:
(A) safeguards the public interest,
(B) contributes to the effective conduct of public business, and
(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment ....
Therefore, labor organizations and collective bargaining in the civil service are in the public interest. (5 U.S.C. § 7101).

B. Exec. Order No. 12,871, 58 Fed. Reg. 52,201 (1993).

The involvement of Federal Government employees and their union representatives is essential to achieving the National Performance Review's Government reform objectives. Only by changing the nature of Federal labor-management relations so that managers, employees, and employees' elected union representatives serve as partners will it be possible to design and implement comprehensive changes necessary to reform Government. Labor-management partnerships will champion change in Federal Government agencies to transform them into organizations capable of delivering the highest quality services to the American people.

C. Regulations of Program Authorities, 5 C.F.R. §§ 2420-2472.

D. DoD Directive 1400.25-M, Subchapter 711, Labor-Management Relations (attached).

E. Government Reporting Services (published by U.S. Gov't Printing Office).

1. Reports of the Federal Labor Relations Authority.

2. Releases of the Federal Service Impasses Panel.

F. *The Army Lawyer*, Labor and Employment Law Notes.

G. Law of Federal Labor-Management Relations, JA 211 (September 2000).

H. Peter B. Broida, Guide to Federal Labor Relations Authority Law and Practice (13th ed. 2000).

II. INTRODUCTION.

A. Historical Development.

1. Executive Order 10,988 (1962).

2. Executive Order 11,491 (1969).

3. Civil Service Reform Act of 1978.

4. Executive Order 12,871 (1993).

B. Role of Organized Labor in the Federal Sector (As of 1 January 1997).

1. Exclusive Recognition by Agencies.

Federal Employees Represented Government Wide:	1,098,072
Decrease From 1993:	164,787
Percentage Of All Federal Employees:	59%
Percentage Represented in 1993	59%

2. Percentage of Employees Organized, by Agency.

AGENCY	PERCENTAGE REPRESENTED
Air Force	74%
Army	59%
Navy	57%

3. Exclusive Recognition by Major Unions.

UNION	EMPLOYEES REPRESENTED
AFGE	596,206
NTEU	136,577
NFFE	123,660
NAGE	54,712
MTC	25,256
IAM	20,633

AFGE - AMERICAN FEDERATION OF GOV'T EMPLOYEES
NFFE - NATIONAL FEDERATION OF FED. EMPLOYEES
NTEU - NATIONAL TREASURY EMPLOYEES UNION
MTC - METAL TRADE COUNCIL
NAGE - NATIONAL ASSOCIATION OF GOV'T EMPLOYEES
IAM - INTERNATIONAL ASSOC. OF MACHINISTS

C. Installation Level Players.

1. Commander.

2. The Civilian Personnel Office (CPO).

3. Responsibilities of the Labor Counselor.

a. Aids in making policies and procedures for the administration of labor-management relations.

b. Participates in contacts with the exclusive representative.

c. Represents management (command) in third-party proceedings.

d. Renders legal advice to the management team when it is negotiating a collective bargaining agreement (CBA).

e. Renders legal advice on the interpretation and application of the CBA.

III. BASIC TERMINOLOGY.

A. Agencies of the Federal Sector. This includes any Executive branch agency, the Library of Congress, and the Government Printing Office. It excludes most agencies with law enforcement and national security missions.

1. Agencies which are specifically excluded include:

a. The General Accounting Office;

b. The Federal Bureau of Investigation;

c. The Central Intelligence Agency;

d. The National Security Agency;

e. The Tennessee Valley Authority;

f. The Federal Labor Relations Authority; and

g. The Federal Service Impasses Panel.

2. President's Authority:

a. The President may issue an order excluding any agency or subdivision of any agency from the coverage of the Statute if the President determines that:

(1) The agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work, and

(2) The provisions of the Statute cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations. 5 U.S.C. § 7103(b).

b. The President may issue an order suspending any provision of the Statute with respect to any agency, installation, or activity located outside the 50 States and the District of Columbia if the President determines that the suspension is necessary in the interest of national security. 5 U.S.C. § 7103(b)(2).

(1) NFFE and H.Q. U.S. Army, Korea, 4 FLRA 68 (1980); DOD, DA and 8th Army, Korea v. FLRA and NFFE, 685 F.2d 641 (D.C. Cir. 1982).

(2) Executive Order 12,391, Nov. 4, 1982. Partial Suspension of Federal Service Labor-Management Relations Overseas.

B. Employee. 5 U.S.C. §§ 7103(a)(2) and (3).

1. Person employed in an agency, or person whose employment has terminated because of a ULP.

2. Statutory exclusions.

a. Alien or noncitizen of the U.S. who occupies a position outside the U.S;

b. Member of the uniform services;

c. Supervisor or a management official;

d. An officer or employee in the Foreign Service of the United States employed in the Department of State, the International Communication Agency, the United States International Development Cooperation Agency, the Department of Agriculture, or the Department of Commerce; or

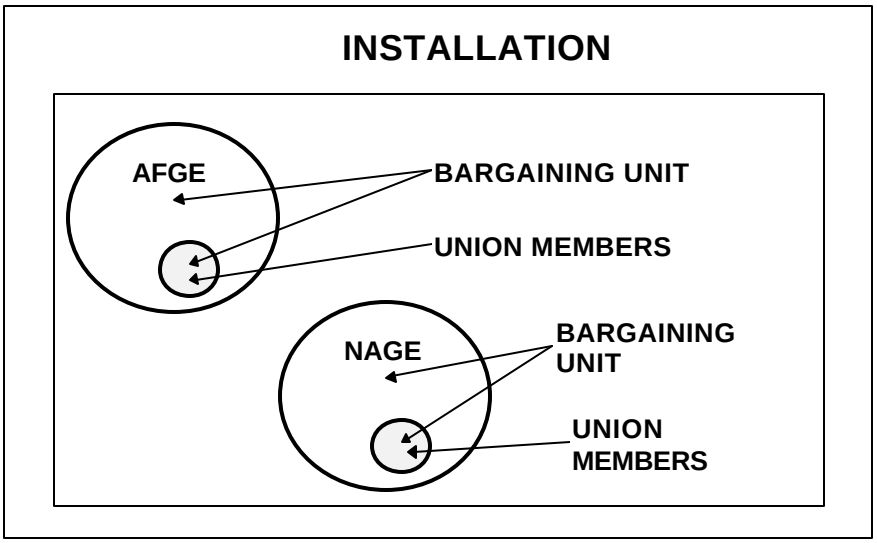
e. Any person who participates in a strike in violation of § 7311.

C. Bargaining Unit. Group of employees with similar interests. In determining appropriate bargaining units, the FLRA considers three factors:

1. The unit must ensure a clear and identifiable *community of interest* among the employees in the unit.

2. The unit must promote *effective dealings* with the agency involved.

3. The unit must promote *efficiency of operations* of the agency involved.



D. Exclusive Representative. Any labor organization which is certified under the Statute as the sole representative of employees in an appropriate unit, or that was recognized as such immediately before the effective date of the Statute and continues to be so recognized. 5 U.S.C. § 7103(a)(16).

1. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

2. An exclusive representative must adopt and subscribe to standards of conduct that assure it will maintain democratic principles and a system of financial responsibility. 5 U.S.C. § 7120.

a. The Assistant Secretary of Labor for Labor Management Relations is responsible for the standards of conduct for labor organizations.

b. Criteria. 5 U.S.C. § 7103(a)(4). A labor organization cannot:

(1) Deny membership because of race, color, creed, national origin, sex, age, civil service status, political affiliation, marital status, or handicapping condition;

(2) Advocate the overthrow of the United States government;

(3) Be sponsored by the agency; or

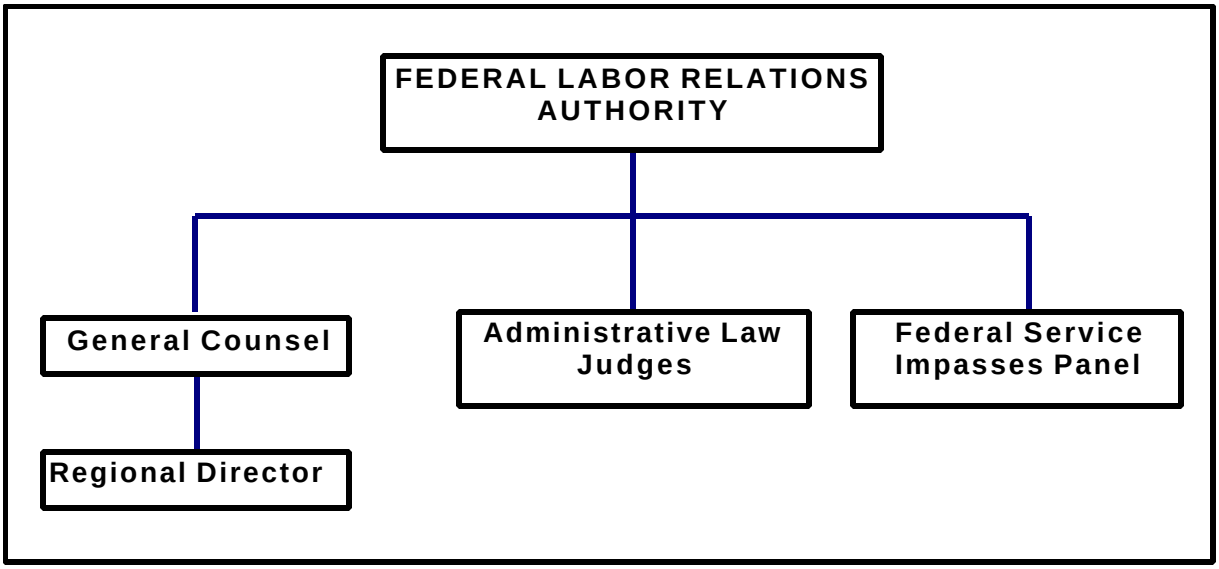
(4) Participate in a strike.

E. Collective Bargaining Agreement. The contract. An agreement negotiated by management and the exclusive representative.

F. Unfair Labor Practice. A violation of the labor statute by an individual, agency, or union.

G. Grievance. A violation of the collective bargaining agreement by an individual, agency, or union.

IV. PROGRAM ADMINISTRATION.



A. Federal Labor Relations Authority. 5 U.S.C. § 7104.

1. Overall program administration.

2. Makes negotiability determinations.

3. Renders final decisions in unfair labor practices (ULPs).

4. Reviews arbitration awards.

B. General Counsel. 5 U.S.C. § 7104(f).

1. Prosecutes unfair labor practices.

2. Supervises the Regional Directors.

C. Regional Directors.

1. Seven locations.

a. Boston. (Includes Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Jersey, New York, Eastern Pennsylvania, Rhode Island, and Vermont.)

b. Washington, D.C. (Includes the District of Columbia, Maryland, and Virginia.)

c. Atlanta. (Includes Alabama, Florida, Georgia, Mississippi, North Carolina, Puerto Rico, South Carolina, Tennessee, and the Virgin Islands.)

d. Chicago. (Includes Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Eastern Missouri, Ohio, Western Pennsylvania, West Virginia, and Europe.)

e. Dallas. (Includes Arkansas, Louisiana, Oklahoma, Texas, and Panama.)

f. Denver. (Includes Alaska, Arizona, Colorado, Idaho, Kansas, Western Missouri, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, Utah, and Wyoming.)

g. San Francisco. (Includes California, Hawaii, Oregon, Washington, and Asia.)

2. Determine appropriate bargaining units.

3. Investigate ULPs.

4. Supervise elections.

D. Administrative Law Judges. 5 U.S.C. § 7105(e)(2); 5 C.F.R. § 2421.9. Hear ULP complaints.

V. IMPASSE RESOLUTION.

A. Only applies to negotiable issues.

B. Negotiations (5 U.S.C. § 7114(a)(4)). The "agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purpose of arriving at a collective bargaining agreement."

C. Federal Mediation and Conciliation Service (5 U.S.C. § 7119). Provides mediation services during impasse.

D. Federal Service Impasses Panel (5 U.S.C. § 7119; 5 C.F.R. § 2470). Authority to impose terms during impasse.

VI. CONCLUSION.

DEPARTMENT OF THE ARMY

OFFICE OF THE ASSISTANT SECRETARY
MANPOWER AND RESERVE AFFAIRS
200 STOVALL STREET
ALEXANDRIA, VIRGINIA 22332-0300

October 7, 1996

MEMORANDUM FOR LABOR RELATIONS SPECIALISTS AT MACOMS,
OPERATING CIVILIAN PERSONNEL OFFICES,
CIVILIAN PERSONNEL ADVISORY CENTERS,
INDEPENDENT REPORTING ACTIVITIES AND
CIVILIAN PERSONNEL OPERATIONS CENTERS

SUBJECT: Cancellation of Army's Labor Relations
Regulation--Labor Relations Bulletin #395

The attached bulletin discusses the cancellation of Army Regulation 690-700, Chapter 711, Labor-Management Relations. Also addressed are the requirements contained in the DoD Civilian Personnel Manual (CPM) 1400.25-M, Subchapter 711, Labor-Management Relations.

Please share this bulletin with your civilian personnel officer, your labor attorney and all other interested management officials.

///////signed///////
Elizabeth B. Throckmorton
Chief, Policy and Program
Development Division

Attachment

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Labor Relations Bulletin

No. 395 October 7, 1996

Cancellation of Army's Labor Relations Regulation

With the publication of the Department of Defense's Civilian Personnel Manual (CPM), 1400.25-M, Subchapter 711, Labor-Management Relations, together with our desire to reduce regulatory restrictions, this office has canceled Army Regulation (AR) 690-700, Chapter 711, Labor-Management Relations.

Following is a list of previous Army requirements contained in AR 690-700.711 that have been eliminated with the cancellation of the AR. (Only those sections with no corresponding DoD requirement are identified.) Also included is general guidance to be considered before locally terminating these practices.

* **Activities will record and maintain data on the use of official time**. (Para 3-1c.) While this is no longer a requirement, activities should give careful consideration to maintaining this practice. While the use of official time may not be a current problem at your installation, this situation can change overnight. For example, a change in union leadership where the new union official's job assignment requires greater time on the job. There may also be a decrease in unit strength, grievances and complaints. Under these or other conditions, management may seek to curtail the amount of official time. Without a benchmark level of usage, though, negotiating a reduction of official time may be impossible.

*** Chief negotiator of management's team must have authority to commit command to binding agreement**. (Para 3-3b(2).) While no longer a regulatory requirement, it remains a Statutory one--see 5 USC § 7114(b)(2).

*** Activities must consult with MACOMs before filing petition to decertify exclusive representatives.** (Para 4-1.) While no longer an HQDA imposed requirement, it's still a good idea and your MACOM may continue to want to be kept informed.

*** Negotiation Impasses**. (Para 4-3c and d.) The AR required installations to provide their MACOMS copies of all referrals to the Panel and to consult with them prior to referring negotiation impasses to arbitration. MACOMs will have to decide whether this information is still needed from their installations. Notwithstanding the above, this office continues to discourage voluntary use of arbitration to resolve impasses because of the limited avenues of appeal. Should management want to challenge a decision of an interest arbitrator, the avenue of appeal is dictated by the method used in seeking the arbitration.

If the Panel assigns an arbitrator to hear an impasse in response to a joint management-union request, the only avenue of appeal is to file an exception to the arbitrator's award. If the use of an arbitrator is directed by the Panel, a negotiability appeal would be filed to challenge the arbitrator's award. Negotiability appeals ultimately provide for judicial review while arbitration exceptions do not.

NOTE: It is still DoD policy that Army activities notify HQDA when going to the Panel on permissive topics.

*** ULPs**. (Para 4-5a(3)&(5).) Installations were required to notify their MACOM upon receipt of a ULP complaint. Further, MACOMs needed to be consulted with prior to an activity filing a ULP charge against a union. This is no longer an HQDA regulatory requirement; however, your MACOM may want to continue this practice.

* **Planning for possible job actions**. (Appendix B.) This provision required a job action contingency plan be maintained. That is no longer a regulatory requirement. However, we believe it is still good program management to keep an up to date job action contingency plan ready and available. Installations should already have a plan; it wouldn't be too much of a burden to keep it up to date. If there ever is a job action by the employees and/or their unions, the command will look towards the labor relations office for guidance and strategy. It would be terribly difficult to develop a plan at that time. Activities may also want to keep a copy of Appendix B in their files since it contains guidance on preventing job actions and for dealing with them should they occur.

Activities should keep in mind that while the above requirements are no longer regulated by Army, MACOMs may still want to maintain their past practices.

DoD Regulatory Requirements

Other matters no longer regulated by Headquarters, Department of the Army but covered by the DoD regulation are:

* **An overall labor relations policy**. The DoD policy is:

> . . . to establish labor management relationships focused on supporting and enhancing the Department's national security mission and creating and maintaining a high performance workplace which delivers the highest quality products and services to the American public at the lowest possible cost. Such relationships should be committed to pursuing solutions that promote increased quality and productivity, customer service, mission accomplishment, efficiency, quality of work life, employee empowerment, organizational performance, and military readiness. DoD activities should seek to use consensual means of resolving disputes that may arise in a labor-management relationship.

* **Agreement review**. Activities will:

- Provide CPMS (which is the parent organization of the Field Advisory Service) one copy of agreements once negotiations are completed, but prior to execution.

- Forward one copy of executed agreement to CPMS indicating date agreement executed, name and address of union representative, and name and phone number of agency POC.

- Upon publication, send CPMS two copies of agreement with completed OPM Form 913B. Activities will also provide copy of agreement to HQDA. (CPMS will provide OPM copies.)

- Provide HQDA and CPMS copies of OPM Form 913-B concerning changes in agreement expiration dates. (CPMS will provide OPM copies.)

* **Exclusions from coverage**. Requests to exclude organizational entities from coverage under the Statute or to suspend any of its provisions should be sent by activities through command channels to the Deputy Assistant Secretary of Defense (Civilian Personnel Policy).

* **Representation cases**.

- Proposed units which encompass employees in two or more DoD components or employees in different personnel systems are generally not appropriate. If a union petitions for such a unit, a copy of the petition, and a copy of the subsequent Regional Director's decision, will be sent by activities to HQDA and CPMS. Any agency application for review of such a decision will be coordinated with HQDA and CPMS.

- Copies of FLRA Regional Director decisions and orders on new or revised units, as well as information on new, revised or terminated units (using OPM Form 913-B), will be sent by activities to CPMS and HQDA.

* **Unfair labor practices**. Activities will:

- Provide HQDA and CPMS copies of all exceptions filed to ALJ decisions, along with the decisions and any subsequently filed documents.

- Notify HQDA and CPMS when employees engage in strikes, work stoppages, slowdowns or picketing which interfere with an agency's operations.

* **Negotiability issues**.

- After receiving a written request for a negotiability determination, activities will coordinate with HQDA and CPMS prior to issuing a written response.

- Activities will provide a written declaration of nonnegotiability to the union within 10 days of receipt of its request.

- HQDA or CPMS will prepare the agency's response to a negotiability appeal.

******SEE NEW NEGOTIABILITY PROCEDURES***
EFFECTIVE 1 APRIL 1999 (5 C.F.R. PART 2424)

(ATTACHED AT PAGE B-41)

* **Review of arbitration awards (except those involving performance-based or adverse actions)**. Activities will:

- Immediately contact HQDA and CPMS if they believe an exception should be filed to an arbitrator's award.

- Forward a copy of the award, the grievance file, the address of the arbitrator, and the name and address of the union representative in the proceeding to HQDA and CPMS where there appears to be a basis for an exception. The exception will be filed by HQDA or CPMS.

- Furnish HQDA and CPMS a copy of the exception, the award and the activity's position on the exception within 5 calendar days of receipt of a union-filed exception. HQDA or CPMS will file the opposition.

*** General statements of policy**. Activities seeking a general statement of policy from the FLRA will elevate the request through command channels to OSD.

*** Arbitration awards relating to matters described in 5 USC 7121(f) (performance-based and adverse actions.)**

- Management representatives in these cases should instruct the arbitrator at the hearing to prepare an administrative record and maintain it for at least 45 days from the date of the award.

- Activities must immediately notify Headquarters, Department of the Army, Office of The Judge Advocate General, Labor and Employment Law Division (hereinafter referred to as DAJA-LE), if they want to seek review of the arbitrator's award.

- Activities will submit requests for judicial review though command legal channels to the Director of OPM. A copy of the request will be sent to CPMS.

*** Judicial review**. Activities will:

- Send requests for judicial review of Authority decisions or requests to intervene in judicial proceedings through legal channels to the Office of the Deputy General Counsel, Personnel and Health Policy (ODGC (P&HP)), DoD. Immediately notify DAJA-LE of the request.

- Notify the DAJA-LE and ODGC (P&HP), through legal channels, upon learning that a union has initiated court action in a matter arising out of its relationship with the activity.

*** Reports**. Activities will provide two copies of arbitration awards to OPM.

Attachments.

Attached is a copy of the DoD Civilian Personnel Manual 1400.25-M, Subchapter 711, Labor-Management Relations. Also attached are checklists we developed from the DoD regulation for the various labor relations actions addressed therein. If they're helpful, that's great. If not, throw them out.

SUBCHAPTER 711

LABOR-MANAGEMENT RELATIONS

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E. COVERAGE 711-2

F. PROCEDURES 711-3

SUBCHAPTER 711

LABOR-MANAGEMENT RELATIONS

References: (a) DoD Directive 1400.25, “DoD Civilian Personnel Management System”, xxx xx, xxx
(b) Chapter 71 of title 5, United States Code, “Labor-Management Relations”
(c) Executive Order 12871, "Labor-Management Partnerships," October 1, 1993
(d) Public Law 96-70, "The Panama Canal Act of 1979," September 27, 1979
(e) Executive Order 12171, "Exclusions From the Federal Labor-Management Relations Program," as amended, November 19, 1979
(f) DoD Instruction 1400.10, "Employment of Foreign Nationals in Foreign Areas,” December 5, 1980
(g) Executive Order 12391, "Partial Suspension of Federal Service Labor-Management Relations,” November 4, 1982
(h) Volume 8, "Civilian Pay Policy and Procedures," DoD 7000.14-R, "Department of Defense Financial Management Regulation," June 1994
(i) 5, Code of Federal Regulations, Chapter XIV, “Regulations of the Federal Labor Relations Authority (FLRA), General Counsel of the Federal Labor Relations Authority, and Federal Service Impasses Panel (FSIP)”
(j) Chapter 73 of title 5, United States Code, “Suitability, Security, and Conduct”
(k) Section 1918 of title 18, United States Code
(l) 29, Code of Federal Regulations, Parts 1404 and 1425, “Regulations of the Federal Mediation and Conciliation Service (FMCS)”
(m) Chapter 77 of title 5, United States Code, “Appeals”
(n) 29, Code of Federal Regulations, Parts 457-459, “Regulations of the Assistant Secretary of Labor for the American Workplace”

A. PURPOSE

This subchapter implements policies under references (a) through (n), prescribes procedures, delegates authority, and assigns responsibility for the Federal labor-management relations program within the Department of Defense (DoD).

B. POLICY

It is DoD policy under (reference (a)) to establish labor management relationships focused on supporting and enhancing the Department’s national security mission and creating and maintaining a high performance workplace which delivers the highest quality products and services to the American public at the lowest possible cost. Such relationships should be committed to pursuing solutions that promote increased quality and productivity, customer service, mission accomplishment, efficiency, quality of work life, employee empowerment, organizational performance, and military readiness.

DoD activities should seek to use consensual means of resolving disputes that may arise in a labor-management relationship.

C. RESPONSIBILITIES

1. The Deputy Assistant Secretary of Defense (Civilian Personnel Policy) (DASD)(CPP) shall issue labor relations policies and procedures, coordinate labor-management relations programs and activities throughout the Department, and provide guidance on labor-management relations issues. The DASD(CPP) shall be the Department's primary point of contact with the Federal Labor Relations Authority (FLRA) and shall authorize the submission of documents to the Authority as provided for in this subchapter (see paragraphs F.6.c., d. and f., below).

2. The Heads of the DoD Components shall ensure the labor-management relations program is implemented in their organizations.

D. DEFINITIONS

The terms defined in Section 7103 of reference (b) have the same definitions when used in this Subchapter.

1. **Employee.** The definition of employee in Section 7103(a)(2) of reference (b) includes civilian employees paid from nonappropriated fund instrumentalities (NAFIs), including off-duty military personnel with respect to employment with a DoD NAFI, when such employment is civilian in nature and separate from any military assignment. Military personnel are not "employees" for purposes of this Subchapter with respect to any matter related to their military status or assignment. Contractor personnel also are not covered by the definition of employee. Pursuant to Section 1271(a) of Pub. L. 96-70 (reference (d)), the definition of employee includes non-U.S. citizen employees of the DoD in the Panama Canal area.

2. **Primary National Subdivisions.** DoD primary national subdivisions are the Office of the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, the Military Departments, the Defense Agencies (except the National Security Agency and those that the President has excluded from coverage by E.O. 12171 (reference (e))), the National Guard Bureau, the Army and Air Force Exchange Service, and the Department of Defense Education Activity.

E. COVERAGE

The Federal labor-management relations program and this Subchapter apply to all the DoD Components, including nonappropriated fund instrumentalities under their jurisdiction, except for the following:

1. The National Security Agency (see 5 U.S.C. 7103(a)(3)(D) (reference (b));

2. Those DoD functional or organizational entities the President has excluded from coverage under E.O. 12171 (reference (e)); and,

3. Non-U.S. citizen personnel employed at DoD activities except for those in the Republic of Panama. Relationships with unions representing such non-U.S. citizens shall be consistent with pertinent intergovernmental agreements, local practices, customs, and DoD Instruction 1400.10 (reference (f)).

Provisions of reference (b) shall not apply to any DoD entities located outside the 50 States and the District of Columbia where the President has suspended them under E.O. 12391 (reference (g)). This Subchapter shall be applied consistent with such suspensions.

F. PROCEDURES

1. **Dues Withholding.** DoD activities shall withhold union dues by allotment consistent with the requirements of Section 7115 of reference (b) and DoD 7000.14-R, Vol. 8 (reference (h)).

2. **Right of Representation.** As required by Section 7114(a)(3) of reference (b), DoD activities shall inform bargaining unit employees annually of their right to union representation under Section 7114(a)(2)(B) of reference (b).

3. **Agreement Review**

a. The Defense Civilian Personnel Management Service (CPMS) shall review and approve or disapprove agreements pursuant to Section 7114(c) of reference (b).

b. DoD activities should provide CPMS with one copy of agreements, or supplements to agreements, once negotiations are completed in order to facilitate the review and provide CPMS an opportunity to address issues prior to execution of the agreement.

c. Activities shall forward one copy of executed agreements, or supplements to agreements, to CPMS immediately upon execution. The transmittal letter shall indicate the specific date the agreement was executed, the name and address of the labor organization's designated representative, and the name and phone number of an activity point of contact.

d. Immediately upon publication, DoD activities shall provide CPMS with two copies of published agreements, or supplements to agreements, together with Office of Personnel Management (OPM) Form 913-B. CPMS will provide one copy to OPM (see paragraph F.10., below, regarding this reporting requirement). Activities shall also provide a copy to their appropriate Component headquarters.

e. Local agreements subject to a national or other controlling agreement at a higher organizational level shall be approved under the procedures of the controlling agreement. Where no such procedures exist, a local agreement shall be reviewed under the procedures in this subsection.

f. DoD activities shall provide CPMS and their appropriate Component headquarters with OPM Forms 913-B concerning changes in agreement expiration dates. CPMS will forward this information to OPM (see paragraph F.10., below, regarding this reporting requirement).

4. **Exclusions from Coverage of the Federal Labor-Management Relations Program.**

a. The President may issue an order under 5 U.S.C. 7103(b)(1) (reference (b)) excluding DoD functional or organizational entities from coverage under the Federal labor-management relations program if the President determines:

a. They have as a primary function intelligence, counterintelligence, investigative, or national security work; and

b. The provisions of the program cannot be applied to them in a manner consistent with national security requirements and considerations.

b. DoD activities shall forward requests for such exclusions, with fully developed supporting rationale, through channels to the DASD(CPP) for appropriate action. Requests shall include information on the numbers, types and grades of civilian employees involved and on whether they are represented by a union.

5. **Suspension of Provisions of the Federal Labor-Management Relations Program**

a. Under Section 7103(b)(2) of reference (b), the President may issue an order suspending any provision of the Federal labor-management relations program with respect to DoD functional or organization entities outside the 50 States and the District of Columbia if the President determines the suspension is necessary in the interest of national security. Under this authority, the President issued E.O. 12391 (reference (g)) which prohibits dealings on labor relations matters that would substantially impair DoD's implementation of any treaty or agreement and allied minutes or understandings between the United States and host nations.

b. DoD activities shall direct requests to effect a suspension under reference (g) through channels to the Secretary of Defense through the Under Secretary of Defense (Personnel and Readiness) (USD(P&R)). The appropriate Under Secretary of Defense or Assistant Secretary of Defense shall endorse requests for suspensions in the Office of the Secretary of Defense. Component Heads shall sign requests from their organizations. Each request shall fully document the collective bargaining issue or dispute involved, identify the bargaining unit, and demonstrate how the labor relations matter would substantially impair implementation of a specific treaty or international agreement. The Secretary of Defense, after consultation with the Secretary of State, or designee, shall make the final decision on the suspension.

6. **Processing Cases under the 5 CFR Chapter XIV Regulations of the Federal Labor Relations Authority (FLRA), the FLRA General Counsel and the Federal Service Impasses Panel (FSIP) (reference (i))**

a. **Representation Cases**

(1) DoD activities shall follow the procedures in the regulations of the FLRA governing representation proceedings (Part 2422 of reference (i)).

(2) Proposed units that would encompass employees in two or more DoD Components or employees under different personnel systems generally are not appropriate. Where a union files a representation petition involving the creation of such a bargaining unit, the DoD activity involved shall immediately provide CPMS and the appropriate Component headquarters with a copy of the petition. The DoD activity shall also provide those offices with the subsequent Regional Director's decision on the petition immediately upon receipt. The DoD activity shall coordinate with CPMS through their appropriate Component headquarters any application for review of a FLRA Regional Director's decision involving such a petition.

(3) DoD activities shall provide copies of FLRA Regional Director Decisions and Orders on new or revised units to CPMS and the appropriate Component headquarters.

(4) DoD activities shall provide CPMS with two copies of information on new, revised, or terminated units. Activities shall also provide a copy to the appropriate Component headquarters. OPM Form 913B shall be used to submit this data (see paragraph F.10., below, regarding this reporting requirement). CPMS will provide a copy to OPM.

b. **Unfair Labor Practice Proceedings**

(1) DoD activities shall follow the procedures in the regulations of the FLRA governing unfair labor practice proceedings (Part 2423 of reference (i)). Where exceptions to an Administrative Law Judge (ALJ) decision are filed with the FLRA, the DoD activity will provide CPMS and the appropriate Component headquarters with a copy of the decision, the exceptions to the decision, and any subsequently filed documents. Documents shall be forwarded to those offices at the time they are filed with the FLRA or when they are received by the DoD activity.

(2) 5 U.S.C. 7311 (reference (j)) and 18 U.S.C. 1918 (reference (k)) prohibit Federal employees from striking against the Government of the United States. Employees can be disciplined for engaging in such action. 5 U.S.C. 7116(b)(7) (reference (b)) proscribes strikes, work stoppages, slowdowns, and picketing that interferes with an agency's operations by unions representing DoD employees. Informational picketing, which does not disrupt agency operations or prevent public access to a facility, is not prohibited. CPMS and the appropriate Component headquarters shall be immediately notified when prohibited acts take place.

c. **Review of Negotiability Issues**

(1) DoD activities shall follow the procedures in the regulations of the FLRA governing the review of negotiability issues (5 CFR 2424 (reference (i)). Under these procedures, unions are required to request in writing an allegation that a proposal is outside the duty to bargain, and the agency is required to respond in writing within 10 days from receipt of the union's request. Before making such a response, a DoD activity will consult with CPMS and its appropriate Component headquarters. If a union subsequently files a negotiability appeal with the FLRA, the appeal must be filed within 15 days after the date the allegation is served on the union, meet the other requirements in the FLRA's regulations, and be served on the Director, Workforce Relations, Office of the Deputy Assistant Secretary of Defense (Civilian Personnel Policy), 4000 Defense Pentagon, Room 3D269, Washington, D.C., 20301-4000. The Director shall immediately provide a copy to CPMS and the affected DoD Component if they have not been served with a copy.

(2) CPMS shall develop an agency statement of position or shall coordinate on the agency statement of position when a DoD Component elects to prepare it. DoD Components shall immediately advise CPMS of their decision regarding preparation of the agency's statement of position.

d. **Review of Arbitration Awards (except those involving performance-based or adverse actions)**

(1) DoD activities shall follow the procedures in the regulations of the FLRA governing the review of arbitration awards (Part 2425 of reference (i)).

(2) DoD activities shall contact CPMS and their appropriate Component headquarters when they believe an exception to an arbitration award should be filed with the FLRA. Where there appears to be a basis for filing an exception, an activity shall forward the award, the grievance file, the address of the arbitrator, and the name and address of the union representative in the proceeding to CPMS and the appropriate Component headquarters within 5 calendar days of receipt of the award. The activity shall forward the postmarked envelope in which the award was mailed (if delivered by mail) to CPMS. If the award is served by personal delivery, the date of receipt shall be stamped on the document. Where CPMS determines that an exception shall be filed, it shall develop and file the exception or shall coordinate on the exception when a DoD Component elects to develop it. The DoD Components shall immediately advise CPMS of their decision regarding preparation of the agency's exception to the award.

(3) DoD activities shall forward a union-filed request for an exception to an arbitration award, together with the award and their position on the exception, to CPMS and their appropriate Component headquarters within 5 calendar days from receipt of the exception. When CPMS determines that an opposition shall be filed, it shall prepare the opposition or shall coordinate on the opposition when a DoD Component elects to prepare it. DoD Components shall immediately advise CPMS of their decision regarding preparation of the agency's opposition to the exception to the award.

e. **National Consultation Rights**

(1) The DoD and DoD primary national subdivisions shall follow the procedures in the regulations of the FLRA governing the granting and termination of national consultation rights (5 CFR 2426 (reference (i)).

(2) Upon written request by a union, the DoD or a DoD primary national subdivision shall grant national consultation rights to the union when it meets the criteria in the regulations of the FLRA. The DoD or a DoD primary national subdivision shall terminate national consultation rights where a union no longer qualifies for such rights. The organization taking the action shall first serve the union with a notice of intent to terminate national consultation rights, together with a statement of reasons, not less than 30 days before the intended termination date.

(3) DoD primary national subdivisions shall provide CPMS with a copy of any letter granting or denying a union's request for national consultation rights or notifying a union of its intent to terminate national consultation rights.

f. **General Statements of Policy or Guidance.** DoD activities shall forward any recommendation that DoD seek a general statement of policy or guidance from FLRA as provided for by the FLRA's regulations (Part 2427 of reference (i)) through channels to the DASD(CPP) for appropriate action. DoD activities shall immediately notify the DASD(CPP) of any referrals to FLRA for review and decision or general rulings under Section 2429.4 of reference (i).

g. **Negotiation Impasses.** DoD activities shall follow the procedures in the regulations of the FSIP (Part 2470 of reference (i)) and the FMCS (29 CFR 1404 and 1425 (reference (l)) governing resolving negotiation impasses.

7. **Arbitration Awards Relating to Matters Described in 5 U.S.C. 7121(f) (reference (b))**

a. Under 5 U.S.C. 7121(f) (reference (b)), exceptions to arbitration awards involving certain adverse actions or unacceptable performance actions may not be filed with the FLRA. However, such awards are subject to judicial review in the same manner and on the same basis as if those matters had been decided by the Merit Systems Protection Board (MSPB).

b. The grounds and procedures for judicial review of a decision of the Board are set forth in 5 U.S.C. 7703 (reference (m)). Under that section, only the Director of the Office of Personnel Management (OPM) may seek judicial review of such matters. Where the Director did not intervene in the matter before the arbitrator, the Director must first petition the arbitrator for reconsideration of the award. To facilitate the Director’s involvement, individuals representing DoD activities in an arbitration proceeding should instruct the arbitrator at the hearing to prepare an administrative record. The record should be maintained for at least 45 days from the date of the award.

c. DoD activities shall expeditiously submit requests for judicial review through channels to the Director of OPM for appropriate action. CPMS shall be provided a copy of any requests.

8. **Standards of Conduct.** The regulations of the Assistant Secretary of Labor for the American Workplace (29 CFR 457-459 (reference n)) implement 5 U.S.C. 7120 (reference (b)) which relates to the standards of conduct for labor organizations under reference (b). Parties involved in such proceedings are responsible for following those regulations.

9. **Judicial Review**

a. Many final orders of the FLRA may be appealed to an appropriate United States Court of Appeals pursuant to 5 U.S.C. 7123 (reference (b)). To ensure consistency of interpretation and full consideration of the policy and program implications of such appeals, DoD activities shall forward requests for judicial review of decisions of the Authority, or requests to intervene in judicial proceedings, through channels to the Office of the Deputy General Counsel, Personnel and Health Policy (ODGC)(P&HP), DoD, for review and approval in coordination with CPP.

b. A DoD activity shall promptly notify the ODGC (P&HP) through channels upon learning that a union has initiated court action in a matter arising out of its relationship with the activity.

10. **Reports.** OPM requires that agencies provide two copies of arbitration awards and certain information concerning changes in exclusive bargaining units and collective bargaining agreements to: Office of Personnel Management; Chief, Labor-Management Relations Division, 1900 E Street, N.W., Washington, D.C. 20415-0001. OPM Form 913-B, which is used to report the information on units and agreements, is available from that Office. The assigned number for these reporting requirements is Interagency Report Control Number 1060-OPM-BI. DoD activities shall forward two copies of arbitration awards to that address. CPMS will provide the other information required by OPM (see paragraphs F.3.d. and f. and F.6.a.(4), above).

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Agreement Review Checklist

** Notify CPMS (specifically, Field Advisory Services) when negotiations commence. (OPTIONAL)

** Forward to CPMS management and union proposals for review/discussion. (OPTIONAL)

** Provide CPMS one copy of agreement, or supplement to agreement, once negotiations are completed, but prior to execution.

** Forward one copy of executed agreement or supplement to agreement to CPMS immediately upon execution. Transmittal letter must include:

(1) specific date agreement was executed;

(2) name and address of union's designated representative

(3) name and phone number of activity point of contact

** If agreement is subject to national or other higher level controlling agreement, it is approved under the procedure of the controlling agreement.

** Provide HQDA one copy of approved agreement.

** Provide CPMS two copies of approved agreement and OPM Form 913-B. CPMS will provide copy to OPM.

Representation Cases
Checklist

** If proposed unit encompasses employees in two or more DoD components or employees under different personnel systems, provide HQDA and CPMS (specifically, FAS) copy of petition.

** Provide HQDA and CPMS copy of Regional Director's (RD's) decision on the above petition immediately upon receipt.

** Coordinate with CPMS, through HQDA, application for review of RD's decision involving the above described petition.

** Provide HQDA and CPMS copies of RD's Decisions and Orders for all new or revised units.

** Provide HQDA one copy, and CPMS two copies, of all changes to bargaining units as certified on OPM Form 913-B. CPMS will provide copy of the form to OPM.

Unfair Labor Practice and Job Action Checklist

For ULPs

** Where a local exception is filed to an ALJ decision, provide HQDA and CPMS (specifically, FAS) a copy of the ALJ decision, the exception and any subsequently filed documents. Provide documentation upon receipt or when filing with the Authority.

For Work Stoppages

** Immediately notify HQDA and CPMS when employees engage in a strike, work stoppage, slowdown or picketing that interferes with agency operations.

Negotiability Disputes Checklist

** Under Authority procedures, union must request allegation of nonnegotiability in writing.

** Upon receipt of union request, consult with HQDA and CPMS (specifically, FAS) to determine agency position.

** Respond, in writing, within 10 days of receipt of union request. (Written responses are only provided to written union requests.)

** Agency response to negotiability appeal is prepared by either HQDA or CPMS.

******SEE NEW NEGOTIABILITY PROCEDURES EFFECTIVE 1 APRIL 1999 (5 C.F.R. PART 2424)***

(Attached at page B-41)

Exceptions to Arbitration Awards Checklist

Agency Exception

** Immediately contact HQDA and CPMS if it is believed an exception should be filed.

** If HQDA/CPMS supports the activity's position, forward to HQDA and CPMS, within 5 days of receipt of the award:

(1) a copy of the award;
(2) the grievance file;
(3) the arbitrator's address; and
(4) the name and address of the union representative in the proceeding.

** If the date of the award differs from the postmarked envelope within which it was mailed, forward the envelope to CPMS.

** If the award is served by personal delivery, the date of receipt should be stamped on the document.

** HQDA or CPMS is responsible for filing the exception.

Union Exception

** Within 5 days of receipt of the union exception, send HQDA and CPMS a copy of:

(1) the union filed exception;
(2) the award; and
(3) the agency's position on the exception

** HQDA or CPMS is responsible for filing the opposition.

Arbitration Awards Relating to 5 USC § 7121(f) (Adverse and Performance-Based Actions)

** Agency representative in these types of arbitrations should instruct the arbitrator at the hearing to prepare an administrative record. The record should be maintained for 45 days from the date of the award.

** Immediately contact DAJA-LE if your activity wants to seek review of the arbitrator's award.

** Request for judicial review of these awards should be expeditiously submitted through legal channels to OPM.

** A copy of the request shall be sent to CPMS (specifically, FAS.)

Judicial Review of Authority Decisions Checklist

** Requests for judicial review, or requests to intervene in judicial proceedings, will be submitted through legal channels to the Office of the Deputy General Counsel, Personnel and Health Policy (ODGC(P&HP)), DoD. Immediately notify DAJA-LE of the request.

** Immediately notify the ODGC(P&HP) and DAJA-LE, through legal channels, upon learning that a union has initiated court action arising out of its relationship with the activity.

Reports Checklist

Arbitration Awards

** Provide two copies of arbitration awards to:

Office of Personnel Management
Chief, Labor-Management Relations Division
1900 E Street, N.W.
Washington, D.C. 20415-0001.

Representation Changes

** Send duplicate copies of completed OPM Form 913-B to CPMS indicating changes in exclusive bargaining units and collective bargaining agreements. CPMS will furnish copies to OPM.

5 C.F.R. Part 2424

PART 2424--NEGOTIABILITY PROCEEDINGS

Effective April 1, 1999

Subpart A--Applicability of This Part and Definitions

Sec.

2424.1 Applicability of this part.

2424.2 Definitions.

2424.3-2424.9 [Reserved] [*66414]

Subpart B--Alternative Dispute Resolution; Requesting and Providing Allegations Concerning the Duty to Bargain

2424.10 Collaboration and Alternative Dispute Resolution Program.

2424.11 Requesting and providing allegations concerning the duty to bargain.

2424.12-2424.19 [Reserved]

Subpart C--Filing and Responding to a Petition for Review; Conferences

2424.20 Who may file a petition for review.

2424.21 Time limits for filing a petition for review.

2424.22 Exclusive representative's petition for review; purpose; content; severance; service.

2424.23 Post-petition conferences; conduct and record.

2424.24 Agency's statement of position; purpose; time limits; content; severance; service.

2424.25 Response of the exclusive representative; purpose; time limits; content; severance; service.

2424.26 Agency's reply; purpose; time limits; content; service.

2424.27 Additional submissions to the Authority.

2424.28-2424.29 [Reserved]

Subpart D--Processing a Petition for Review

2424.30 Procedure through which the petition for review will be resolved.

2424.31 Resolution of disputed issues of material fact; hearings.

2424.32 Parties' responsibilities; failure to raise, support, and/or respond to arguments; failure to participate in conferences and/or respond to Authority orders.

2424.33-2424.39 [Reserved]

Subpart E--Decision and Order

2424.40 Authority decision and order.

2424.41 Compliance.

2424.42-2424.49 [Reserved]

Subpart F--Criteria for Determining Compelling Need for Agency Rules and Regulations

2424.50 Illustrative Criteria.

2424.51-2424.59 [Reserved]

Authority: 5 U.S.C. 7134.

Subpart A--Applicability of This Part and Definitions

§ 2424.1 -- Applicability of this part.

This part is applicable to all petitions for review filed after April 1, 1999.

§ 2424.2 -- Definitions.

In this part, the following definitions apply:

(a) *Bargaining obligation dispute* means a disagreement between an exclusive representative and an agency concerning whether, in the specific circumstances involved in a particular case, the parties are obligated to bargain over a proposal that otherwise may be negotiable. Examples of bargaining obligation disputes include disagreements between an exclusive representative and an agency concerning agency claims that:

(1) A proposal concerns a matter that is covered by a collective bargaining agreement; and

(2) Bargaining is not required over a change in bargaining unit employees' conditions of employment because the effect of the change is *de minimis*.

(b) *Collaboration and Alternative Dispute Resolution Program* refers to the Federal Labor Relations Authority's program that assists parties in reaching agreements to resolve disputes.

(c) *Negotiability dispute* means a disagreement between an exclusive representative and an agency concerning the legality of a proposal or provision. A negotiability dispute exists when an exclusive representative disagrees with an agency contention that (without regard to any bargaining obligation dispute) a proposal is outside the duty to bargain, including disagreement with an agency contention that a proposal is bargainable only at its election. A negotiability dispute also exists when an exclusive representative disagrees with an agency head's disapproval of a provision as contrary to law. A negotiability dispute may exist where there is no bargaining obligation dispute. Examples of negotiability disputes include disagreements between an exclusive representative and an agency concerning whether a proposal or provision:

(1) Affects a management right under 5 U.S.C. 7106(a);

(2) Constitutes a procedure or appropriate arrangement, within the meaning of 5 U.S.C. 7106(b)(2) and (3), respectively; and

(3) Is consistent with a Government-wide regulation.

(d) *Petition for review* means an appeal filed with the Authority by an exclusive representative requesting resolution of a negotiability dispute. An appeal that concerns only a bargaining obligation dispute may not be resolved under this part.

(e) *Proposal* means any matter offered for bargaining that the parties have not agreed to yet. If a petition for review concerns more than one proposal, then the term includes each proposal concerned.

(f) *Provision* means any matter that has been disapproved by the agency head on review pursuant to 5 U.S.C. 7114(c). If a petition for review concerns more than one provision, then the term includes each provision concerned.

(g) *Service* means the delivery of copies of documents filed with the Authority to the other party's principal bargaining representative and, in the case of an exclusive representative, also to the head of the agency. Compliance with part 2429 of this subchapter is required.

(h) *Severance* means the division of a proposal or provision into separate parts having independent meaning, for the purpose of determining whether any of the separate parts is within the duty to bargain or is contrary to law. In effect, severance results in the creation of separate proposals or provisions. Severance applies when some parts of the proposal or provision are determined to be outside the duty to bargain or contrary to law.

(i) *Written allegation concerning the duty to bargain means* an agency allegation that the duty to bargain in good faith does not extend to a proposal.

§ 2424.3 -2424.9 -- [Reserved]

Subpart B--Alternative Dispute Resolution; Requesting and Providing Allegations Concerning the Duty To Bargain

§ 2424.10 -- Collaboration and Alternative Dispute Resolution Program.

Where an exclusive representative and an agency are unable to resolve disputes that arise under this part, they may request assistance from the Collaboration and Alternative Dispute Resolution Program (CADR). Upon request, and as agreed upon by the parties, CADR representatives will attempt to assist the parties to resolve these disputes. Parties seeking information or assistance under this part may call or write the CADR Office at (202) 482-6503, 607 14th Street, NW., Washington, D.C. 20424-001. A brief summary of CADR activities is available on the Internet at www.flra.gov.

§ 2424.11 -- Requesting and providing written allegations concerning the duty to bargain.

(a) *General.* An exclusive representative may file a petition for review after receiving a written allegation concerning the duty to bargain from the agency. An exclusive representative also may file a petition for review if it requests that the agency provide it with a written allegation concerning the duty to bargain and the agency does not respond to the request within ten (10) days.

(b) *Agency allegation in response to request.* The agency's allegation in response to the exclusive representative's request must be in writing and must be served in accord with § 2424.2(g).

(c) *Unrequested agency allegation.* If an agency provides an exclusive [*66415] representative with an unrequested written allegation concerning the duty to bargain, then the exclusive representative may either file a petition for review under this part, or continue to bargain and subsequently request in writing a written allegation concerning the duty to bargain, if necessary.

§§ 2424.12-2424.19 -- [Reserved]

Subpart C--Filing and Responding to a Petition for Review; Conferences

§ 2424.20 -- Who may file a petition for review.

A petition for review may be filed by an exclusive representative that is a party to the negotiations.

§ 2424.21 -- Time limits for filing a petition for review.

(a) A petition for review must be filed within fifteen (15) days after the date of service of either:

(1) An agency's written allegation that the exclusive representative's proposal is not within the duty to bargain, or

(2) An agency head's disapproval of a provision.

(b) If the agency has not served a written allegation on the exclusive representative within ten (10) days

after the agency's principal bargaining representative has received a written request for such allegation, as provided in § 2424.11(a), then the petition may be filed at any time.

§ 2424.22 -- Exclusive representative's petition for review; purpose; content; severance; service.

(a) *Purpose*. The purpose of a petition for review is to initiate a **negotiability proceeding** and provide the agency with notice that the exclusive representative requests a decision from the Authority that a proposal or provision is within the duty to bargain or not contrary to law, respectively. As more fully explained in paragraph (b) of this section, the exclusive representative is required in the petition for review to, among other things, inform the Authority of the exact wording and meaning of the proposal or provision as well as how it is intended to operate, explain technical or unusual terms, and provide copies of materials that support the exclusive representative's position.

(b) *Content*. A petition for review must be filed on a form provided by the Authority for that purpose, or in a substantially similar format. It must be dated and include the following:

(1) The exact wording and explanation of the meaning of the proposal or provision, including an explanation of special terms or phrases, technical language, or other words that are not in common usage, as well as how the proposal or provision is intended to work;

(2) Specific citation to any law, rule, regulation, section of a collective bargaining agreement, or other authority relied on by the exclusive representative in its argument or referenced in the proposal or provision, and a copy of any such material that is not easily available to the Authority;

(3) A statement as to whether the proposal or provision is also involved in an unfair labor practice charge under part 2423 of this subchapter, a grievance pursuant to the parties' negotiated grievance procedure, or an impasse procedure under part 2470 of this subchapter, and whether any other petition for review has been filed concerning a proposal or provision arising from the same bargaining or the same agency head review;

(4) Any request for a hearing before the Authority and the reasons supporting such request; and

(5) A table of contents and a table of legal authorities cited, if the petition exceeds 25 double-spaced pages in length.

(c) *Severance.* The exclusive representative may, but is not required to, include in the petition for review a statement as to whether it requests severance of a proposal or provision. If severance is requested in the petition for review, then the exclusive representative must support its request with an explanation of how each severed portion of the proposal or provision may stand alone, and how such severed portion would operate. The explanation and argument in support of the severed portion(s) must meet the same requirements for information set forth in paragraph (b) of this section.

(d) *Service*. The petition for review, including all attachments, must be served in accord with § 2424.2(g).

§ 2424.23 -- Post-petition conferences; conduct and record.

(a) *Timing of post-petition conference.* On receipt of a petition for review involving a proposal or a provision, a representative of the FLRA will, where appropriate, schedule a post-petition conference to be conducted by telephone or in person. All reasonable efforts will be made to schedule and conduct the conference within ten (10) days after receipt of the petition for review.

(b) *Conduct of conference.* The post-petition conference will be conducted with representatives of the exclusive representative and the agency, who must be prepared and authorized to discuss, clarify and resolve matters including the following:

(1) The meaning of the proposal or provision in dispute;

(2) Any disputed factual issue(s);

(3) Negotiability dispute objections and bargaining obligation claims regarding the proposal or provision;

(4) Whether the proposal or provision is also involved in an unfair labor practice charge under part 2423 of this subchapter, in a grievance under the parties' negotiated grievance procedure, or an impasse procedure under part 2470 of this subchapter; and

(5) Whether an extension of the time limits for filing the agency's statement of position and any subsequent filings is requested. The FLRA representative may, on determining that it will effectuate the purposes of the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 *et seq.*, and this part, extend such time limits.

(c) *Record of the conference.* At the post-petition conference, or after it has been completed, the representative of the FLRA will prepare and serve on the parties a written statement that includes whether the parties agree on the meaning of the disputed proposal or provision, the resolution of any disputed factual issues, and any other appropriate matters.

§ 2424.24 -- Agency's statement of position; purpose; time limits; content; severance; service.

(a) *Purpose.* The purpose of an agency statement of position is to inform the Authority and the exclusive representative why a proposal or provision is not within the duty to bargain or contrary to law, respectively. As more fully explained in paragraph (c) of this section, the agency is required in the statement of position to, among other things, set forth its understanding of the proposal or provision, state any disagreement with the facts, arguments, or meaning of the proposal or provision set forth in the exclusive representative's petition for review, and supply all arguments and authorities in support of its position.

(b) *Time limit for filing.* Unless the time limit for filing has been extended pursuant to § 2424.23 or part 2429 of this subchapter, the agency must file its statement of position within thirty (30) days after the date the head of the agency receives a copy of the petition for review.

(c) *Content.* The agency's statement of position must be on a form provided by the Authority for that

purpose, or in a substantially similar format. It must be dated and must:

(1) Withdraw either: [*66416]

(i) The allegation that the duty to bargain in good faith does not extend to the exclusive representative's proposal, or

(ii) The disapproval of the provision under 5 U.S.C. 7114(c); or

(2) Set forth in full the agency's position on any matters relevant to the petition that it wishes the Authority to consider in reaching its decision, including a statement of the arguments and authorities supporting any bargaining obligation or negotiability claims, any disagreement with claims made by the exclusive representative in the petition for review, specific citation to any law, rule, regulation, section of a collective bargaining agreement, or other authority relied on by the agency, and a copy of any such material that is not easily available to the Authority. The statement of position must also include the following:

(i) If different from the exclusive representative's position, an explanation of the meaning the agency attributes to the proposal or provision and the reasons for disagreeing with the exclusive representative's explanation of meaning;

(ii) If different from the exclusive representative's position, an explanation of how the proposal or provision would work, and the reasons for disagreeing with the exclusive representative's explanation;

(3) A statement as to whether the proposal or provision is also involved in an unfair labor practice charge under part 2423 of this subchapter, a grievance pursuant to the parties' negotiated grievance procedure, or an impasse procedure under part 2470 of this subchapter, and whether any other petition for review has been filed concerning a proposal or provision arising from the same bargaining or the same agency head review;

(4) Any request for a hearing before the Authority and the reasons supporting such request; and

(5) A table of contents and a table of legal authorities cited, if the statement of position exceeds 25 double-spaced pages in length.

(d) *Severance.* If the exclusive representative has requested severance in the petition for review, and if the agency opposes the exclusive representative's request for severance, then the agency must explain with specificity why severance is not appropriate.

(e) *Service.* A copy of the agency's statement of position, including all attachments, must be served in accord with § 2424.2(g).

§ 2424.25 -- Response of the exclusive representative; purpose; time limits; content; severance; service.

(a) *Purpose.* The purpose of the exclusive representative's response is to inform the Authority and the

agency why, despite the agency's arguments in its statement of position, the proposal or provision is within the duty to bargain or not contrary to law, respectively, and whether the union disagrees with any facts or arguments in the agency's statement of position. As more fully explained in paragraph (c) of this section, the exclusive representative is required in its response to, among other things, state why the proposal or provision does not conflict with any law, or why it falls within an exception to management rights, including permissive subjects under 5 U.S.C. 7106(b)(1), and procedures and appropriate arrangements under section 7106(b) (2) and (3). Another purpose of the response is to permit the exclusive representative to request the Authority to sever portions of the proposal or provision and to explain why and how it can be done.

(b) *Time limit for filing.* Unless the time limit for filing has been extended pursuant to § 2424.23 or part 2429 of this subchapter, within fifteen (15) days after the date the exclusive representative receives a copy of an agency's statement of position, the exclusive representative must file a response.

(c) *Content*. The response must be on a form provided by the Authority for that purpose, or in a substantially similar format. With the exception of a request for severance pursuant to paragraph (d) of this section, the exclusive representative's response is specifically limited to the matters raised in the agency's statement of position. The response must be dated and must include the following:

(1) Any disagreement with the agency's bargaining obligation or negotiability claims. The exclusive representative must state the arguments and authorities supporting its opposition to any agency argument, and must include specific citation to any law, rule, regulation, section of a collective bargaining agreement, or other authority relied on by the exclusive representative, and provide a copy of any such material that is not easily available to the Authority. The exclusive representative is not required to repeat arguments made in the petition for review. If not included in the petition for review, the exclusive representative must state the arguments and authorities supporting any assertion that the proposal or provision does not affect a management right under 5 U.S.C. 7106(a), and any assertion that an exception to management rights applies, including:

(i) Whether and why the proposal or provision concerns a matter negotiable at the election of the agency under 5 U.S.C. 7106(b)(1);

(ii) Whether and why the proposal or provision constitutes a negotiable procedure as set forth in 5 U.S.C. 7106(b)(2);

(iii) Whether and why the proposal or provision constitutes an appropriate arrangement as set forth in 5 U.S.C. 7106(b)(3); and

(iv) Whether and why the proposal or provision enforces an "applicable law," within the meaning of 5 U.S.C. 7106(a)(2).

(2) Any allegation that agency rules or regulations relied on in the agency's statement of position violate applicable law, rule, regulation or appropriate authority outside the agency; that the rules or regulations were not issued by the agency or by any primary national subdivision of the agency, or otherwise are not applicable to bar negotiations under 5 U.S.C. 7117(a)(3); or that no compelling need exists for the rules or regulations to bar negotiations.

(3) A table of contents and a table of legal authorities cited if the response to an agency statement of position exceeds 25 double-spaced pages in length.

(d) *Severance.* If not requested in the petition for review, or if the exclusive representative wishes to modify the request in the petition for review, the exclusive representative may request severance in its response. The exclusive representative must support its request with an explanation of how the severed portion(s) of the proposal or provision may stand alone, and how such severed portion(s) would operate. The exclusive representative also must respond to any agency arguments regarding severance made in the agency's statement of position. The explanation and argument in support of the severed portion(s) must meet the same requirements for specific information set forth in paragraph (c) of this section.

(e) *Service.* A copy of the response of the exclusive representative, including all attachments, must be served in accord with § 2424.2(g).

§ 2424.26 -- Agency's reply; purpose; time limits; content; service.

(a) *Purpose.* The purpose of the agency's reply is to inform the Authority and the exclusive representative whether and why it disagrees with any facts or arguments made for the first time in the exclusive representative's response. As more fully explained in [*66417] paragraph (c) of this section, the Agency is required in the reply to, among other things, provide the reasons why the proposal or provision does not fit within any exceptions to management rights that were asserted by the exclusive representative in its response, and to explain why severance of the proposal or provision is not appropriate.

(b) *Time limit for filing.* Unless the time limit for filing has been extended pursuant to § 2424.23 or part 2429 of this subchapter, within fifteen (15) days after the date the agency receives a copy of the exclusive representative's response to the agency's statement of position, the agency may file a reply.

(c) *Content.* The reply must be on a form provided by the Authority for that purpose, or in a substantially similar format. The agency's reply is specifically limited to the matters raised for the first time in the exclusive representative's response. The agency's reply must state the arguments and authorities supporting its reply, cite with specificity any law, rule, regulation, section of a collective bargaining agreement, or other authority relied on, and provide a copy of any material that is not easily available to the Authority. The agency is not required to repeat arguments made in its statement of position. The agency's reply must be dated and must include the following:

(1) Any disagreement with the exclusive representative's assertion that an exception to management rights applies, including:

(i) Whether and why the proposal or provision concerns a matter included in section 7106(b)(1) of the Federal Service Labor-Management Relations Statute;

(ii) Whether and why the proposal or provision does not constitute a negotiable procedure as set forth in section 7106(b)(2) of the Federal Service Labor-Management Relations Statute;

(iii) Whether and why the proposal or provision does not constitute an appropriate arrangement as set forth in section 7106(b)(3) of the Federal Service Labor-Management Relations Statute;

(iv) Whether and why the proposal or provision does not enforce an "applicable law," within the meaning of section 7106(a)(2) of the Federal Service Labor-Management Relations Statute;

(2) Any arguments in reply to an exclusive representative's allegation in its response that agency rules or regulations relied on in the agency's statement of position violate applicable law, rule, regulation or appropriate authority outside the agency; that the rules or regulations were not issued by the agency or by any primary national subdivision of the agency, or otherwise are not applicable to bar negotiations under 5 U.S.C. 7117(a)(3); or that no compelling need exists for the rules or regulations to bar negotiations; and

(3) A table of contents and a table of legal authorities cited, if the agency's reply to an exclusive representative's response exceeds 25 double-spaced pages in length.

(d) *Severance.* If the exclusive representative requests severance for the first time in its response, or if the request for severance in an exclusive representative's response differs from the request in its petition for review, and if the agency opposes the exclusive representative's request for severance, then the agency must explain with specificity why severance is not appropriate.

(e) *Service.* A copy of the agency's reply, including all attachments, must be served in accord with § 2424.2(g).

§ 2424.27 -- Additional submissions to the Authority.

The Authority will not consider any submission filed by any party other than those authorized under this part, provided however that the Authority may, in its discretion, grant permission to file an additional submission based on a written request showing extraordinary circumstances by any party. The additional submission must be filed either with the written request or no later than five (5) days after receipt of the Authority's order granting the request. Any opposition to the additional submission must be filed within fifteen (15) days after the date of the receipt of the additional submission. All documents filed under this section must be served in accord with § 2424.2(g).

§ 2424.28-2424.29 -- [Reserved]

Subpart D--Processing a Petition for Review

§ 2424.30 -- Procedure through which the petition for review will be resolved.

(a) *Exclusive representative has filed related unfair labor practice charge or grievance alleging an unfair labor practice.* Except for proposals or provisions that are the subject of an agency's compelling need claim under 5 U.S.C. 7117(a)(2), where an exclusive representative files an unfair labor practice charge pursuant to part 2423 of this subchapter or a grievance alleging an unfair labor practice under the parties' negotiated grievance procedure, and the charge or grievance concerns issues

directly related to the petition for review filed pursuant to this part, the Authority will dismiss the petition for review. The dismissal will be without prejudice to the right of the exclusive representative to refile the petition for review after the unfair labor practice charge or grievance has been resolved administratively, including resolution pursuant to an arbitration award that has become final and binding. No later than thirty (30) days after the date on which the unfair labor practice charge or grievance is resolved administratively, the exclusive representative may refile the petition for review, and the Authority will determine whether resolution of the petition is still required.

(b) *Exclusive representative has not filed related unfair labor practice charge or grievance alleging an unfair labor practice.* Where an exclusive representative files only a petition for review under this part, the petition will be processed as follows:

(1) *No bargaining obligation dispute exists.* Where there is no bargaining obligation dispute, the Authority will resolve the petition for review under the procedures of this part.

(2) *A bargaining obligation dispute exists.* Where a bargaining obligation dispute exists in addition to the negotiability dispute, the Authority will inform the exclusive representative of any opportunity to file an unfair labor practice charge pursuant to part 2423 of this subchapter or a grievance under the parties' negotiated grievance procedure and, where the exclusive representative pursues either of these courses, proceed in accord with paragraph (a) of this section. If the exclusive representative does not file an unfair labor practice charge or grievance, the Authority will proceed to resolve all disputes necessary for disposition of the petition unless, in its discretion, the Authority determines that resolving all disputes is not appropriate because, for example, resolution of the bargaining obligation dispute under this part would unduly delay resolution of the negotiability dispute, or the procedures in another, available administrative forum are better suited to resolve the bargaining obligation dispute.

§ 2424.31 -- Resolution of disputed issues of material fact; hearings.

When necessary to resolve disputed issues of material fact in a negotiability or bargaining obligation dispute, or when it would otherwise aid in decision making, the Authority, or its designated representative, may, as appropriate:

(a) Direct the parties to provide specific documentary evidence;

(b) Direct the parties to provide answers to specific factual questions; [*66418]

(c) Refer the matter to a hearing pursuant to 5 U.S.C. 7117(b)(3) and/or (c)(5); or

(d) Take any other appropriate action.

§ 2424.32 -- Parties' responsibilities; failure to raise, support, and/or respond to arguments; failure to participate in conferences and/or respond to Authority orders.

(a) *Responsibilities of the exclusive representative.* The exclusive representative has the burden of raising and supporting arguments that the proposal or provision is within the duty to bargain, within the duty to bargain at the agency's election, or not contrary to law, respectively, and, where applicable, why

severance is appropriate.

(b) *Responsibilities of the agency.* The agency has the burden of raising and supporting arguments that the proposal or provision is outside the duty to bargain or contrary to law, respectively, and, where applicable, why severance is not appropriate.

(c) *Failure to raise, support, and respond to arguments.* (1) Failure to raise and support an argument will, where appropriate, be deemed a waiver of such argument. Absent good cause:

(i) Arguments that could have been but were not raised by an exclusive representative in the petition for review, or made in its response to the agency's statement of position, may not be made in this or any other proceeding; and

(ii) Arguments that could have been but were not raised by an agency in the statement of position, or made in its reply to the exclusive representative's response, may not be raised in this or any other proceeding.

(2) Failure to respond to an argument or assertion raised by the other party will, where appropriate, be deemed a concession to such argument or assertion.

(d) *Failure to participate in conferences; failure to respond to Authority orders.* Where a party fails to participate in a post-petition conference pursuant to § 2424.23, a direction or proceeding under § 2424.31, or otherwise fails to provide timely or responsive information pursuant to an Authority order, including an Authority procedural order directing the correction of technical deficiencies in filing, the Authority may, in addition to those actions set forth in paragraph (c) of this section, take any other action that, in the Authority's discretion, is deemed appropriate, including dismissal of the petition for review, with or without prejudice to the exclusive representative's refiling of the petition for review, and granting the petition for review and directing bargaining and/or rescission of an agency head disapproval under 5 U.S.C. 7114(c), with or without conditions.

§ 2424.33--2424.39 -- [Reserved]

Subpart E--Decision and Order

§ 2424.40 -- Authority decision and order.

(a) *Issuance.* Subject to the requirements of this part, the Authority will expedite proceedings under this part to the extent practicable and will issue to the exclusive representative and to the agency a written decision, explaining the specific reasons for the decision, at the earliest practicable date. The decision will include an order, as provided in paragraphs (b) and (c) of this section, but, with the exception of an order to bargain, such order will not include remedies that could be obtained in an unfair labor practice proceeding under 5 U.S.C. 7118(a)(7).

(b) *Cases involving proposals.* If the Authority finds that the duty to bargain extends to the proposal, or any severable part of the proposal, then the Authority will order the agency to bargain on request concerning the proposal. If the Authority finds that the duty to bargain does not extend to the proposal,

then the Authority will dismiss the petition for review. If the Authority finds that the proposal is bargainable only at the election of the agency, then the Authority will so state. If the Authority resolves a negotiability dispute by finding that a proposal is within the duty to bargain, but there are unresolved bargaining obligation dispute claims, then the Authority will order the agency to bargain on request in the event its bargaining obligation claims are resolved in a manner that requires bargaining.

(c) *Cases involving provisions*. If the Authority finds that a provision, or any severable part thereof, is not contrary to law, rule or regulation, or is bargainable at the election of the agency, the Authority will direct the agency to rescind its disapproval of such provision in whole or in part as appropriate. If the Authority finds that a provision is contrary to law, rule, or regulation, the Authority will dismiss the petition for review as to that provision.

§ 2424.41 -- Compliance.

The exclusive representative may report to the appropriate Regional Director an agency's failure to comply with an order, issued in accordance with § 2424.40, that the agency must upon request (or as otherwise agreed to by the parties) bargain concerning the proposal or that the agency must rescind its disapproval of a provision. The exclusive representative must report such failure within a reasonable period of time following expiration of the 60-day period under 5 U.S.C. 7123(a), which begins on the date of issuance of the Authority order. If, on referral from the Regional Director, the Authority finds such a failure to comply with its order, the Authority will take whatever action it deems necessary to secure compliance with its order, including enforcement under 5 U.S.C. 7123(b).

§§ 2424.42--2424.49 -- [Reserved]

Subpart F--Criteria for Determining Compelling Need for Agency Rules and Regulations

§ 2424.50 -- Illustrative criteria.

A compelling need exists for an agency rule or regulation concerning any condition of employment when the agency demonstrates that the rule or regulation meets one or more of the following illustrative criteria:

(a) The rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of functions of the agency or primary national subdivision in a manner that is consistent with the requirements of an effective and efficient government.

(b) The rule or regulation is necessary to ensure the maintenance of basic merit principles.

(c) The rule or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature.

§§ 2424.51--2424.59 -- [Reserved]

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CHAPTER C

54TH FEDERAL LABOR RELATIONS COURSE

Employee Performance

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Outline of Instruction

I. INTRODUCTION.

II. ACTIONS FOR UNACCEPTABLE PERFORMANCE. 5 U.S.C. § 4303; 5 C.F.R. PART 432; AR 690-400, CH. 432.

A. Employees Covered. 5 U.S.C. § 4301; 5 C.F.R. § 432.102. Nonprobationary competitive service and nonprobationary equivalent excepted service employees.

B. Performance Appraisal System. 5 U.S.C.§ 4302; 5 C.F.R. Part 430; AR 690-400, Ch. 4302. Total Army Performance Evaluation System (TAPES).

C. Types of Actions.

1. Counseling.

2. Reassignment.

3. Reduction in Grade.

4. Removal.

D. Proof Requirements in Chapter 43 Unacceptable Performance Cases.

1. Proof requirements generally. Martin v. Federal Aviation Admin., 795 F.2d 995 (Fed. Cir. 1986), Stenmark v. Department of Transportation, 59 M.S.P.R. 462 (1993). In every reduction in grade or removal for unacceptable performance under Chapter 43, the agency must:

a. Prove that OPM has approved the agency's Performance Appraisal System.

b. Prove (by substantial evidence) that before any proposed reduction in grade or removal:

(1) the employee was informed, in writing, of the applicable critical elements and standards of performance;

(2) the employee was informed of the specific performance deficiencies;

(3) the employee was given a reasonable amount of time to demonstrate acceptable performance;

(4) the employee's performance in a critical element continued to be unacceptable despite management assistance; and

(5) the agency followed proper procedures.

2. Demonstrating OPM approval of agency's Performance Appraisal System. Scillion v. Dep't of Health and Human Services, 45 M.S.P.R. 521 (1990); Griffin v. Dep't of Army, 23 M.S.P.R. 657 (1984); McKenzie v. Dep't of Interior, 16 M.S.P.R. 397 (1983).

a. Statement in the regulation. Chennault v. Dep't of Army, 796 F.2d 465 (Fed. Cir. 1986); Pfennel v. Dep't of Agriculture, 32 M.S.P.R. 429 (1987); Brown v. Dep't of Army, 28 M.S.P.R. 648 (1985); Shorter v. Dep't of Air Force, 28 M.S.P.R. 622 (1985).

b. Agency affidavit. Wapinski v. Dep't of Army, 28 M.S.P.R. 616 (1985).

c. OPM letter. Alexander v. Dep't of Commerce, 30 M.S.P.R. 243 (1986); Renshaw v. Dep't of Army, 28 M.S.P.R. 638 (1985).

d. For the Army, the most recent approval letter is dated 22 May 1993 and is located at Appendix C, AR 690-400, Chapter 4302.

e. Stipulation.

3. Proving all required actions taken before proposing performance action.

a. Written notice to employee of critical elements and performance standards. Introduce signed and dated copy of performance plan.

(1) Substantive right to be advised at beginning of appraisal period. 5 C.F.R. § 430.204(b)(1)(ii); Weirauch v. Dep't of Army, 782 F.2d 1560 (Fed. Cir. 1986); Cross v. Dep't of Air Force, 25 M.S.P.R. 353 (1984).

(2) What standards required? 5 C.F.R.§ 430.206(b)(8)(i)--minimum of two rating levels (e.g., fully successful, unacceptable) with standards written at the "fully successful" level. 5 C.F.R.§ 430.206(b)(8)(i)(B).

(3) Agency must demonstrate that performance standards are valid (i.e., reasonable, realistic, attainable, and clearly stated in writing). Dancy v. Dep't of Navy, 55 M.S.P.R. 331 (1992) (finding standard must be sufficiently precise and specific as to invoke general consensus as to its meaning and content); Chagaris v. GSA, 49 M.S.P.R. 249 (1991); Johnson v. Dep't of Army, 44 M.S.P.R. 464 (1990).

(4) Employee participation in preparing performance requirements. 5 C.F.R. § 430.204(c); Smith v. Dep't of Agriculture, 64 M.S.P.R. 46 (1994); Beverly v. Defense Logistics Agency, 27 M.S.P.R. 600 (1985).

(5) Common defective standards.

(a) Absolute standards.

(i) Absolute standards generally constitute an abuse of discretion. Hurd v. Dep't of Interior, 53 M.S.P.R. 107 (1992). Callaway v. Dep't of Army, 23 M.S.P.R. 592 (1984);

(ii) Absolute standard permissible if failure to perform in a single instance could result in risk of death or serious injury, loss of large amounts of money, or a breach of security. Callaway v. Dep't. of Army, 23 M.S.P.R. 592 (1984), James v. Veterans Admin., 27 M.S.P.R. 124 (1985).

(iii) Standards requiring "near perfection." Walker v. Dep't of Treasury, 28 M.S.P.R. 227 (1985). *But see* Hober v. Dep't of Army, 64 M.S.P.R. 129 (1994).

(b) Backward standards. Writing minimally acceptable standards in terms that describe unacceptable performance is improper. Eibel v. Dep't of Navy, 857 F.2d 1439 (Fed. Cir. 1988); Dancy v. Department of Navy 55 M.S.P.R. 331 (1992); Burnett v. Dep't of Health and Human Services, 51 M.S.P.R. 615 (1991).

(c) Vague standards. Standards containing measurement devices like "sometimes" are so vague as to render the standards invalid. Smith v. Dep't of Energy, 49 M.S.P.R. 110 (1991). *Contra* Satlin v. Dep't of Veterans Affairs, 60 M.S.P.R. 218 (1993), Rupp v. Dep't of Health and Human Services, 51 M.S.P.R. 456 , *aff'd* 991 F. 2d 810, *cert denied* 114 S.Ct. 559.

b. Notice to employee of performance deficiencies.

(1) Written notice not required but recommended. DAJA-LC Msg 122051Z Feb. 86, Subject: Labor Counselor News Item No. 4. At minimum, use SF 7B, Employee Record Card, or equivalent.

(2) Notice must advise employee of performance level required to be acceptable. Smallwood v. Dep't of Navy, 52 M.S.P.R. 678 (1992); Burroughs v. Dep't of Health and Human Services, 49 M.S.P.R. 644 (1991).

(3) Notice that performance is "marginal" is insufficient. Colgan v. Dep't of Navy, 28 M.S.P.R. 116 (1985).

c. Reasonable time allowed employee to correct performance deficiencies--Performance Improvement Period (PIP).

(1) PIP must be meaningful opportunity to improve. Thomson v. Farm Credit Ass'n, 51 M.S.P.R. 569 (1991); Zang v. Defense Investigative Service, 26 M.S.P.R. 155 (1985); Sandland v. GSA, 23 M.S.P.R. 583 (1984).

(2) Impact of employee improvement during this period. Benton v. Dep't of Labor, 25 M.S.P.R. 430 (1984); Zoltowski v. Dep't of Army, 26 M.S.P.R. 525 (1985).

(3) 5 C.F.R. § 432.105--employee must maintain acceptable performance for one year from beginning of PIP or no new PIP is required. Sullivan v. Dep't of Navy, 44 M.S.P.R. 646 (1990); Cohen v. GSA, 53 M.S.P.R. 492 (1992); Cockrell v. Dep't of Air Force, 58 M.S.P.R. 211 (1993).

(4) An agency need not prove that an employee performed unacceptably prior to the opportunity to improve period. Wilson v. Dep’t of Navy, 24 M.S.P.R. 583 (1984).

d. Proving that employee's performance is unacceptable despite management assistance and reasonable time to improve.

(1) Need only prove unacceptable performance during improvement opportunity period. Griggs v. Dep't of Defense, 53 M.S.P.R. 597 (1992); Clifford v. Department of Agriculture, 50 M.S.P.R. 232; Wilson v. Dep't of Navy, 24 M.S.P.R. 583 (1984).

(2) In rating an employee's performance during the PIP, the agency may use proportional standards to assess performance of annual numerical standards. Brown v. Dep't of Veterans Affairs and OPM, 44 M.S.P.R. 635 (1990).

(3) Evidence to prove unacceptable performance. Bowling v. Dep't of Army, 47 M.S.P.R. 379 (1991); Johnson v. VA, 32 M.S.P.R. 443 (1987); Player v. VA, 32 M.S.P.R. 448 (1987).

(a) Employee Efficiency Rating.

(b) Examples of employee's work product.

(c) SF 7-B with annotations for all assistance to employee.

(d) Supervisor's explanation.

4. Required procedures. 5 U.S.C. § 4303. Harmless error rule applies. 5 U.S.C. § 7701(c)(2)(A); 5 C.F.R. § 1201.56(c)(3). Dazey v. Dep't of Air Force, 54 M.S.P.R. 658 (1992); Stephen v. Dep't of Air Force, 47 M.S.P.R. 672 (1991). *But see* Stenmark v. Dep't of Transp., 59 M.S.P.R. 462 (1993); Nafus v. Dep't of Army, 57 M.S.P.R. 386 (1993); Cross v. Dep't of Air Force, 25 M.S.P.R. 353 (1984), regarding what is a "procedural" matter.

a. 30 days' advance written notice.

(1) Specific instances of unacceptable performance.

(2) Critical elements involved.

b. Representation.

c. Oral and written replies.

d. Written decision.

e. Concurrence of supervisor in a position higher than proposing official.

f. Within 30 days after expiration of advance notice period.

5. Standard of Proof--Substantial evidence. 5 U.S.C. § 7701(c)(1)(A).

6. MSPB (and arbitrators if employee proceeds under negotiated grievance procedures) cannot mitigate agency action under Chapter 43. Horner v. Bell, 825 F.2d 382 (Fed. Cir. 1987); Lisiecki v. MSPB, 769 F.2d 1558 (Fed. Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986); Davis v. Dep't of Health and Human Services, 58 M.S.P.R. 538 (1993); Cook v. Equal Employment Opportunity Comm'n, 50 M.S.P.R. 660 (1991). *Contra*, Sokolove v. Dep't of Treasury, 776 F.2d 1063 (Fed. Cir. 1985), and case on remand at 30 M.S.P.R. 180 (1986) (finding MSPB can mitigate agency penalty in a performance case under Chapter 75).

7. Alternative to Chapter 43 performance problem: Use Chapter 75. Shorey v. Department of the Army 77 M.S.P.R. 239, (1998); Lovshin v. Dep't of Navy, 767 F.2d 826 (Fed. Cir. 1985), *cert. denied*, 475 U.S. 1111 (1986); Fairall v. VA, 844 F.2d 775 (Fed. Cir. 1987); Cowins v. Veterans Affairs, 64 M.S.P.R. 551 (1994); McGillivray v. Federal Emergency Management Agency, 58 M.S.P.R. 398 (1993); Cook v. Equal Employment Opportunity Comm'n, 50 M.S.P.R. 660 (1991); Ortiz v. USMC, 37 M.S.P.R. 359 (1988).

III. OTHER PERFORMANCE BASED ACTION--WITHIN-GRADE ("STEP") INCREASES (WIGI). 5 U.S.C. § 5335(A); 5 C.F.R. §§ 531.401-531.413.

A. Conditions for Granting. 5 C.F.R. § 531.404.

1. Time requirements between increases. 5 C.F.R. § 531.405.

a. 52 calendar weeks for steps 2 to 4.

b. 104 calendar weeks for steps 5 to 7.

c. 156 calendar weeks for steps 8 to 10.

2. No other equivalent increase during the waiting period.

3. Employee performance at an acceptable level of competence (ALOC)--most recent performance rating of record at least "fully successful."

B. Withholding Step Increases.

1. Negative determination. Shaishaa v. Dep't of Army, 58 M.S.P.R. 450 (1993).

2. Reconsideration. Priselac v. Department of Navy, 77 M.S.P.R. 332, (1998); Mozqueda v. Dep't of Defense, 54 M.S.P.R. 152 (1992).

3. Appeal and grievance rights. 5 U.S.C. § 5335(a).

a. MSPB. Dockery v. Federal Deposit Insurance Corp., 64 M.S.P.R. 458 (1994); Jones v. Dep't of Air Force, 29 M.S.P.R. 241 (1985).

b. Negotiated grievance procedure (NGP). Espenschied v. MSPB, 804 F.2d 1233 (Fed. Cir. 1986); NTEU v. Cornelius, 617 F. Supp. 365 (D.D.C. 1985). Employee in bargaining unit <u>must</u> use NGP, unless denials of step increases are not covered by grievance and arbitration provisions.

4. MSPB (and arbitrator) review.

a. Agency must have an OPM approved Performance Appraisal System. Renshaw v. Dep't of Army, 28 M.S.P.R. 638 (1985); Callan v. Dep't of Navy, 26 M.S.P.R. 6 (1984).

b. Agency not required to offer employee opportunity to demonstrate acceptable performance before denying within-grade increase. Bowden v. Department of Army, 59 M.S.P.R. 662, (1993); Wilson v. Dep't of Agriculture, 28 M.S.P.R. 472 (1985); Lance v. Dep't of Energy, 28 M.S.P.R. 467 (1985).

c. Agency not required to base decision to deny within-grade increase on employee's performance during entire waiting period. 5 C.F.R. § 531.409(b). Hudson v. Dep't of Army, 49 M.S.P.R. 202 (1991); Bowden v. Dep't of Army, 59 M.S.P.R. 622 (1993).

d. Agency failure to provide employee access to documents forming basis for negative acceptable level of competence determination is harmful procedural error. Fagan v. Dep't of Navy, 25 M.S.P.R. 87 (1984).

e. Standard of review: substantial evidence. Harvey v. Department of Navy, 65 M.S.P.R. 120 (1994); Grant v. Department of Air Force, 61 M.S.P.R. 370 (1994); Romane v. DCAA, 760 F.2d 1286 (Fed. Cir. 1985); Parker v. Defense Logistics Agency, 1 M.S.P.R. 489 (1980).

IV. CONCLUSION.

CHAPTER D

54TH FEDERAL LABOR RELATIONS COURSE

Employee Misconduct

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Outline of Instruction

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II. DISCIPLINARY ACTIONS FOR MISCONDUCT. 5 U.S.C. §§ 7501-7514; 5 C.F.R. PART 752; AR 690-700, CH. 751.

A. Types of actions.

1. Informal Actions.

a. Oral admonitions.

b. Use of Standard Form 7B, Employee Record Card.

c. Written warnings.

2. Formal actions.

a. Letters of reprimand.

b. "Minor" (nonappealable) disciplinary actions. 5 U.S.C. § 7502; 5 C.F.R. §§ 752.201-203. Suspensions for 14 days or less.

c. "True" (appealable) adverse actions. 5 U.S.C. § 7512; 5 C.F.R. §§ 752.301-406.

(1) Suspension for more than 14 days.

(2) Removal.

(3) Reduction in grade or pay.

(4) Furloughs. Furloughs for 30 days or less are adverse actions, but are used for nondisciplinary reasons. Furloughs for more than 30 days are governed by reduction in force (RIF) procedures.

B. Predecisional procedural requirements for taking misconduct actions.

1. Oral admonitions and written warnings. AR 690-700, Ch. 751, para. 1-3a.

a. Applicability. Procedural requirements apply to all employees regardless of status.

b. Procedures.

2. Letters of reprimand.

a. Applicability. Procedural requirements apply to all employees regardless of status.

b. Procedures.

(1) Supervisor actions before imposing reprimand.

(2) No right to counsel.

(3) Supervisor decision.

(4) Preparation of formal written reprimands.

(5) Filing determination.

3. Suspension: Placing an employee, for disciplinary reasons, in a temporary, non-duty, non-pay status.

a. Suspensions of 14 days or less are non-appealable to the Merit Systems Protection Board (MSPB) and covered by: 5 U.S.C. §§ 7501-7504 and 5 C.F.R. § 752.101-203.

b. Applicability. Predecisional procedural protections apply only to nonprobationary competitive service employees. (Excepted service employees, even those who are preference eligibles or have two or more years current, continuous service, may be summarily suspended for 14 days or less. *See* Bredehorst v. United States, 677 F.2d 87 (Ct. Cl. 1982).

c. Substantive standard. "For such cause as will promote the efficiency of the service"--nexus.

d. Procedures. 5 C.F.R. § 752.203

(1) Advance written notice stating specific reasons for action.

(2) Right to review material relied on by management to support the action.

(3) Reasonable time to submit written and oral reply.

(4) Right to representation.

(5) Final written decision that considers response.

e. Length of suspension--calendar days. 5 C.F.R. §§ 752.201(d)(1) and 752.402.

f. Consecutive suspensions. There is no Board jurisdiction if an employee is suspended for two consecutive 14-day periods if the suspensions arise out of separate events and circumstances. They cannot be combined to constitute a single suspension for determining jurisdiction. Jennings v. MSPB, 59 F.3d 159 (1995).

4. "True" adverse actions: removals and suspensions for more than 14 days. 5 U.S.C. §§ 7511-7514. For “true” adverse actions there must be at least 30-days advance written notice. 5 U.S.C. § 7513 (b) (1). The proposal letter must include all charges, all specifications, penalty factors, and allow for the employee to make an informed reply. Brown v. U.S. Postal Service, 47 M.S.P.R. 50 (1991).

a. Applicability. Predecisional procedural protections apply only to nonprobationary competitive service employees and nonprobationary-equivalent excepted service employees.

b. Substantive standard. "For such cause as will promote the efficiency of the service"-- nexus.

c. Predecisional procedures. 5 C.F.R. § 752.404.

(1) 30 days’ advance written notice.

(2) Right to review material relied on by management to support the action.

(3) At least 7 days to submit written and oral reply.

(4) Optional agency hearing.

(5) Right to representation.

(6) Final written decision that considers response.

d. Advance written notice and opportunity to respond are fundamental procedural due process rights. Howarth v. USPS 77 M.S.P.R. 1 (1997).

III. SELECTED ISSUES REGARDING PREDECISIONAL PROCEDURAL RIGHTS.

A. Duty status during the advance notice/reply period. OPM regulations concerning duty status during the advance notice period at 5 C.F.R. § 752.404(b)(3).

1. General rule--duty status.

2. If the employee's presence at the work site is a threat to the employee or others or to government property or otherwise jeopardizes legitimate Government interests, agency may consider other options:

a. Assign employee other duties for which employee does not pose a threat;

b. Place employee on annual leave (with employee's consent);

c. Place employee on sick leave (if there is medical documentation of physical or mental incapacitation);

d. Place employee on leave without pay (LWOP) or AWOL status, if the employee is absent for reasons not originating with the agency;

e. Invoke the shorter notice period, if the "crime exception" is applicable (see below); or

f. Place employee on paid nonduty status for the whole notice period.

B. Shortening the advance notice/reply period in "true" adverse actions--the "crime exception." 5 U.S.C. § 7513(b)(1); 5 C.F.R. § 752.404(d)(1).

1. Basis: Reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed. Knuckles v. Bolger, 654 F. 2d 25 (8th Cir. 1981).

a. Examples of reasonable cause include:

(1) An indictment;

(2) An employee arrested and held for further legal action by a magistrate;

(3) An arrest or investigation accompanied by such circumstances showing reasonable cause;

(4) A criminal information;

(5) Certain egregious acts such as murder or national security offenses. Gonzales v. Dep't. of Treasury, 37 M.S.P.R. 589 (1988).

b. Result: Employee has 7 days to reply to notice.

c. Duty status: If necessary, employee may be placed in a nonduty status for time necessary to effect action.

d. May be used in combination with an indefinite suspension pending disposition of criminal charges. Engdahl v. Dep't. of Navy, 900 F. 2d 1572 (Fed. Cir. 1990). Indefinite suspension must have a condition subsequent upon which the suspension will end. Jones v. Dept. of the Army, 68 M.S.P.R. 398 (1995).

C. Indefinite suspension pending disposition of criminal charges:

1. Elements: The employee is entitled to the same procedural and substantive proof requirements as in any suspension for more than 14 days, i.e., (a) reasonable cause to believe employee has committed a crime for which imprisonment could be imposed; (b) suspension has an ascertainable end; (c) nexus; and (d) reasonable penalty. 5 U.S.C. § 7513(b)(1).

a. Indictment is sufficient. Pararas-Carayannis v. Dep't of Commerce, 9 F.3d 955 (Fed. Cir. 1993); Dalton v. Dep't of Justice, 66 M.S.P.R. 429 (1995); Crespo v. U.S. Postal Serv., 53 M.S.P.R. 125 (1992).

b. Investigation or arrest alone is insufficient. Reid v. U.S. Postal Serv., 54 M.S.P.R. 648 (1992). *But see* Dunnington v. Dep't of Justice, 45 M.S.P.R. 305 (1990), *aff'd*, 956 F.2d 1151 (Fed. Cir. 1992) (arrest pursuant to warrant issued by magistrate based on determination of probable cause is sufficient).

c. Invocation of fifth amendment right against self-incrimination when confronted with evidence of crime. Bell v. Dep't of Treasury, 54 M.S.P.R. 619 (1992).

d. Combination of circumstances. Ellis v. Dep't of Veterans Affairs, 60 M.S.P.R. 681 (1994); Honeycutt v. Dep't of Labor, 22 M.S.P.R. 491 (1984); Backus v. Office of Personnel Management, 22 M.S.P.R. 457 (1984).

2. Nature of action.

a. Temporary--to allow examination of alleged criminal misconduct. Brown v. Dep't of Justice, 715 F.2d 662 (D.C. Cir. 1983); Martin v. Dep't of Treasury, 12 M.S.P.R. 12 (1982).

b. Suspension must state a valid condition subsequent that will terminate the suspension (completion of criminal trial or completion of agency investigation). Newbold v. Dep't of Treasury, 58 M.S.P.R. 532 (1993); Johnson v. U.S. Postal Serv., 37 M.S.P.R. 388 (1988).

NOTE: If condition subsequent is completion of agency investigation, suspension is not appropriate if investigation of misconduct is completed before suspension is imposed. Giacobbi v. U.S. Postal Serv., 30 M.S.P.R. 39 (1986); Littlejohn v. U.S. Postal Serv., 25 M.S.P.R. 478 (1984).

3. Action when criminal charges resolved (or agency investigation is terminated). Agency must take prompt action to:

a. Reinstate the employee. Newbold v. Dep't of Treasury, 58 M.S.P.R. 532 (1993); or

b. Initiate action to remove the employee.

(1) Agency may proceed with removal action based on underlying misconduct even if employee is acquitted. United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984); Finfer v. Caplin, 344 F.2d 38 (2d Cir. 1965).

(2) The agency may rely on record of conviction to prove misconduct in removal action. Beasley v. Dep't of Defense, 52 M.S.P.R. 272 (1992); Otherson v. Dep't of Justice, 711 F.2d 267 (D.C. Cir. 1983).

(3) If the conviction is overturned, the Board will reverse a removal based solely on the conviction. Payne v. U.S. Postal Serv., 69 M.S.P.R. 503 (1996); Underwood v. U.S. Postal Serv., 18 M.S.P.R. 708 (1984).

4. Effect of reinstatement on the indefinite suspension--back pay issue. Richardson v. U.S. Customs Serv., 47 F.3d 415 (Fed. Cir. 1995) (holding that agency has discretion to award or not award back pay upon reinstatement from indefinite suspension); Jones v. Dep't of Navy, 51 M.S.P.R. 607 (1991), *aff'd*, 978 F.2d 1223 (Fed. Cir. 1992).

5. Conditions required for extending indefinite suspension through notice period of a subsequent removal action. Martin v. Dep't of the Treasury, 12 M.S.P.R. 12 (1982); Hernandez v. Dep't of Justice, 35 M.S.P.R. 669 (1987).

a. Resolution of criminal charges;

b. Notice to employee when indefinite suspension is proposed, that it may continue pending resolution of any further adverse action deemed appropriate; and

6. Action by the agency to initiate further action "within a reasonable period of time after resolution of the criminal charges."

D. Duty to investigate. The agency is under a duty "to make reasonable inquires into the exonerating facts which appellant [brings] to its attention before effecting his removal." Jones v. Department of Defense, 42 M.S.P.R. 35 (1989).

E. Proper role of proposing and deciding officials.

1. No per se prohibition on proposing and deciding official being same person. Franco v. Health and Human Servs., 32 M.S.P.R. 653 (1987), *aff'd*, 852 F.2d 1292 (Fed. Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989).

a. In a performance action under Chapter 43, the proposing and deciding official can be the same person, but a higher level official must approve the decision. 5 U.S.C. § 4303(b)(1)(D)(ii). DeSarno v. Dep't of Commerce, 761 F.2d 657 (Fed. Cir. 1985).

2. Limitations on who can be deciding official. Monroe v. Dep't of Treasury, 770 F.2d 1044 (Fed. Cir. 1985); Svejda v. Dep't of Interior, 7 M.S.P.R. 108 (1981); Williamson v. Health and Human Servs., 3 M.S.P.R. 18 (1980).

F. Ex parte communications between deciding official and other agency officials not error per se. Sullivan v. Dep't of Navy, 720 F.2d 1266 (Fed. Cir. 1983); Gonzales v. DLA, 772 F.2d 887 (Fed. Cir. 1985); Welcker v. United States, 752 F.2d 1577 (Fed. Cir. 1985); Carr v. Dep't of Defense, 61 M.S.P.R. 176 (1994).

G. Emergency furloughs: A furlough due to unforeseen circumstances, e.g., sudden breakdown in equipment may be taken without an advance notice period. 5 C.F.R. § 752.404 (d) (2).

IV. PROOF REQUIREMENTS IN MISCONDUCT ACTIONS.

A. Proof requirements generally. In every formal disciplinary action for misconduct, the agency must prove that:

1. The employee committed the misconduct (by a preponderance of evidence);

2. There is a nexus or connection between the misconduct and the efficiency of the service (by a preponderance of evidence);

3. The severity of the penalty is appropriate (reviewed for abuse of discretion); and

4. It followed proper procedures.

B. Proving the employee's act of misconduct.

1. When charging employee misconduct only charge what you can prove. "It is not permissible for the MSPB to split a single charge of an agency into several independent charges and then sustain one of the newly-formulated charges, which represents only a portion of the original charge. If the agency fails to prove one of the elements of its charge, then the entire charge must fail." LaChance v. MSPB, 147 F.3d 1367 (Fed. Cir. 1998); King v. Nazelrod, 43 F.3d 663 (1994);Burroughs v. Dep't of Army, 918 F.2d 170 (Fed. Cir. 1990);.

2. Independent evidence of act of misconduct.

a. An agency must prove all elements of offense charged by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B)). Jacobs v. Dep't of Justice, 35 F.3d 1543 (Fed. Cir. 1994); Perez v. Dep't of Justice, 65 M.S.P.R. 287 (1994); Nazelrod v. Dep't of Justice, 50 M.S.P.R. 456 (1991).

b. A charge citing violation of a specific criminal statute must be proven by the elements of that law. Heath v. Railroad Retirement Bd., 64 M.S.P.R. 638 (1994).

c. In proving insubordination, an agency must prove intent - a willful and intentional refusal to obey a direct order of a superior officer that the officer is entitled to give and have obeyed. With a charge of failure to follow supervisory instructions, the agency need only prove that the instructions were given and that the employee failed to follow them, without regard to whether the failure was intentional or unintentional. Hamilton v. USPS, 71 M.S.P.R. 547 (1996) (The Board modified its prior case law in holding insubordination and failure to follow supervisory instructions are separate charges with different standards of proof.)

d. An agency may charge an employee with both a substantive offense and with false statements (denials) concerning that offense. LaChance v. Erickson, 522 U.S. 262, 118 S.Ct. 753, 1998 WL 17107, 139 L.Ed.2d 695 (1998).

3. Evidence of conviction--collateral estoppel. Graybill v. U.S. Postal Serv., 782 F.2d 1567 (Fed. Cir. 1986); Chisolm v. DLA, 656 F.2d 42 (3d Cir. 1981); Fisher v. Dep't of Defense, 64 M.S.P.R. 509 (1994); Owens v. U.S. Postal Serv., 57 M.S.P.R. 63 (1993). *See also* Loveland v. Dep't of Air Force, 34 M.S.P.R. 484 (1987) (conviction pursuant to Alford plea).

4. Evidence of indictment, arrest, or deferred prosecution insufficient to prove underlying misconduct, but it may justify an *indefinite suspension.*. O'Connor v. Dep't of Veterans Affairs, 59 M.S.P.R. 653 (1993); Roby v. Dep't of Justice, 59 M.S.P.R. 426 (1993); Crespo v. U.S. Postal Serv., 53 M.S.P.R. 125 (1992).

C. Proving the nexus between the misconduct and the efficiency of the service.

1. Presenting evidence of nexus. Royster v. Dep't of Justice, 58 M.S.P.R. 495 (1993); Kruger v. Dep't of Justice, 32 M.S.P.R. 71 (1987).

a. Presumption of nexus arising in certain "egregious circumstances" based on the nature and gravity of the misconduct. Hayes v. Dep't of Navy, 727 F.2d 1535 (Fed. Cir. 1984); Graham v. U.S. Postal Serv., 49 M.S.P.R. 364 (1991); Merritt v. Dep't of Justice, 6 M.S.P.R. 585 (1981).

(1) Application of presumption. Johnson v. HHS, 22 M.S.P.R. 521 (1984); Williams v. GSA, 22 M.S.P.R. 476 (1984); Hayes v. Dep't of Navy, 727 F.2d 1535 (Fed. Cir. 1984).

(2) Employee rebuttal of presumption. Abrams v. Dep't of Navy, 714 F.2d 1219 (3d Cir. 1983*)*; *Johnson*; *Williams.*

b. The misconduct adversely affects the employee's or co-workers' job performance or the agency's trust and confidence in the employee's job performance.

(1) On-duty misconduct. Serious on-duty misconduct raises presumption of nexus. McClaskey v. Dep't of Energy, 720 F.2d 583 (9th Cir. 1983); Coleman v. U.S. Postal Serv., 57 M.S.P.R. 537 (1993) (drinking on job and AWOL presumptively affect efficiency of service).

(2) Even minor on-the-job misconduct satisfies nexus requirement. Sternberg v. Dep't of Defense, 52 M.S.P.R. 547 (1992).

(3) Off-duty misconduct off agency premises.

(a) Morale problems in office caused by employee's conduct (other employees are uncomfortable working with/around this employee). Beasley v. Dep't of Defense, 52 M.S.P.R. 272 (1992); Sherman v. Alexander, 684 F.2d 464 (7th Cir. 1982), *cert. denied*, 459 U.S. 1116 (1983).

(b) Impairment of office operation (other employees have to pick up workload for problem employee). *Sherman*.

(c) Coworkers' apprehension about employee. Walsh v. U.S. Postal Serv., 53 M.S.P.R. 478 (1992); Backus v. OPM, 22 M.S.P.R. 457 (1984).

(d) Supervisor's lack of confidence in employee. *Beasley*; Jaworski v. Dep't of Army, 22 M.S.P.R. 499 (1984); Honeycutt v. Dep't of Labor, 22 M.S.P.R. 491 (1984).

c. The misconduct interfered with or adversely affected the agency's mission.

(1) Off-duty misconduct on agency premises. Incident on agency premises and involving use of agency personnel to deal with employee's conduct. Ingram v. Dep't of Air Force, 53 M.S.P.R. 101, *aff'd*, 980 F.2d 742 (1992); Franks v. Dep't of Air Force, 22 M.S.P.R. 502 (1984); Venson v. Dep't of Air Force, 10 M.S.P.R. 375 (1982).

(2) Misconduct interferes with or adversely affects agency's mission.

(a) Notoriety/adverse publicity surrounding the incident is likely to provoke public indignation and reflect adversely on the agency (newspaper articles/T.V. news identifying employee as agency employee). *Sherman*.

(b) Misconduct antithetical to agency's mission. Royster v. Dep't of Justice, 58 M.S.P.R. 495 (1993); Scofield v. Dep't of Treasury, 53 M.S.P.R. 179 (1992); Thompson v. Dep't of Justice, 51 M.S.P.R. 43 (1991).

(c) Employee's absence during incarceration. Young v. Hampton, 568 F.2d 1253 (5th Cir. 1977); Abrams v. Dep't of Navy, 22 M.S.P.R. 480 (1984).

D. Demonstrating appropriateness of penalty choice.

1. General MSPB Rule. Douglas v. Veterans Administration, 5 M.S.P.R. 280 (1981). Relevant considerations for proposing and deciding officials include:

a. Nature and seriousness of offense;

b. Employee's job level and type of employment (supervisor, public contact, prominence);

c. Employee's past disciplinary record;

d. Employee's past work record (length of service, job performance, dependability);

e. Effect of offense on employee's ability to perform job and effect upon supervisor's confidence in employee;

f. Consistency with penalties to other employees for similar offenses;

g. Consistency with agency's table of penalties;

h. Notoriety of the offense or its impact on the agency's reputation;

i. Clarity of notice to employee that conduct not acceptable;

j. Potential for employee's rehabilitation;

k. Mitigating circumstances (unusual job stress, personal problems, provocation);

l. Adequacy of alternative sanctions to deter misconduct by this employee and others.

2. Agency need not demonstrate that it considered each *Douglas* factor; it need consider only those *Douglas* factors relevant to its decision. Nagel v. Health and Human Servs., 707 F.2d 1384 (Fed. Cir. 1983); Chauvin v. Dep't of Navy, 59 M.S.P.R. 675 (1993), *rev'd on other grounds*, 35 F.3d 1543 (Fed. Cir. 1994); Ingram v. Dep't of Air Force, 53 M.S.P.R. 101, *aff'd*,980 F.2d 744 (1992).

a. Agency must present evidence demonstrating its consideration of the relevant *Douglas* factors even if employee does not contest the propriety of the penalty choice. Parsons v. Dep't of Air Force, 707 F.2d 1406 (D.C. Cir. 1983).

b. Where an agency policy provides for removal of an employee found to be stealing government property for petty amounts, and even for the first offense, the deciding official must still demonstrate that she considered the relevant *Douglas* factors prior to deciding that removal is the appropriate penalty for the misconduct. Banez v. Defense, 69 MSPR 642, (1996).

3. Consistency with table of penalties. A table of penalties listing specific offenses and penalties for first, second and further offenses is one factor to consider in determining the appropriateness of a penalty. Davis v. Dep’t. of Army, 56 M.S.P.R. 583 (1993); Padilla v. Dep't of Justice, 64 M.S.P.R. 416 (1994).

a. Offense not listed on table. McLeod v. Dep't of Army, 714 F.2d 918 (9th Cir. 1983).

b. Flexibility of table. Weston v. HUD, 724 F.2d 943 (Fed. Cir. 1983).

4. Deference to agency in penalty selection--abuse of discretion standard. Uske v. U.S. Postal Serv., 60 M.S.P.R. 544 (1994), *aff'd*, 56 F.3d 1375 (Fed. Cir. 1995); Betz v. General Servs. Admin., 55 M.S.P.R. 424 (1992); Schulmeister v. Dep't of Navy, 46 M.S.P.R. 13 (1990), *aff'd*, 928 F.2d 411 (Fed. Cir. 1991).

5. When is agency's penalty choice an abuse of discretion? Miguel v. Dep't of Army, 727 F.2d 1081 (Fed. Cir. 1984).

a. *De Minimis* misconduct. On remand from the Federal Circuit, the Board mitigated the removal of a WG-8 Cook at West Point for theft of government property (left over food) to a 14-day suspension. Skates v. Dep't of Army, 69 M.S.P.R. 366 (1996).

b. Choice of maximum penalty not necessarily abuse of discretion. Stump v. Dep't of Transp., 761 F.2d 680 (Fed. Cir. 1985). Board will review agency imposed penalty only to determine if agency considered all relevant factors and exercised management discretion within tolerable limits of reasonableness. Board gives due deference to agency's discretion, recognizing that Board's function is not to displace management's responsibility for maintaining employee discipline and efficiency but to ensure that managerial judgment has been properly exercised. Lewin v. Dept. of Justice, 74 MSPR 294 (1997).

6. Not all agency charges sustained. When reviewing a case in which some, but not all, of the charges have been sustained, the Board may not independendently determine penalties. When the Board sustains fewer than all of the agency's charges, the Board may mitigate to the maximum reasonable penalty so long as the agency has not indicated either in its final decision or during proceedings before the Board that it desires that a lesser penalty be imposed on fewer charges. LaChance v. Devall, __F.3d__, 1999 WL 342227 (Fed Cir. 1999).

a. The Board will consider any statements made by deciding officials concerning what penalties they would have imposed for the sustained charges. White v. U.S. Postal Serv., 71 M.S.P.R. 521 (1996); Wilson v. Dept of Veterans Affairs, 74 M.S.P.R. 65 (1997).

7. Use of previous disciplinary actions to enhance punishment in current action.

a. General rule. The agency may use past discipline to enhance the punishment in the current misconduct provided the employee was given adequate due process in the previous action and the prior misconduct is adequately detailed to permit an informed reply. Leaton v. Department of Interior, 65 M.S.P.R. 331 (1994).

b. Adequate detail of prior misconduct. The record must contain documentary evidence showing that the appellant was informed of the prior actions in writing, that the actions were a matter of record, and that the appellant was permitted to dispute the charges before an authority different from the authority that took the actions against him. Schoeffler v. Department of Agriculture, 47 M.S.P.R. 80 (1991), Thomas v. Dep't of Defense, 66 M.S.P.R. 546 (1995), *aff'd*, 64 F.3d 677 (Fed. Cir. 1995) (Table); Maddux v. Dep't of Air Force, 68 M.S.P.R. 644 (1995) (finding an agency can rely on nondisciplinary counseling to enhance punishment, but only if it places employee on notice of their use); Lovenduski v. Dep't of Army, 64 M.S.P.R. 612 (1994).

c. Past discipline time barred. An agency may not rely on disciplinary actions that have expired by their terms or because of an agency regulation. Gardner v. U.S. Postal Serv., 44 M.S.P.R. 565 (1990); Amell v. GSA, 7 M.S.P.R. 531 (1981). *Accord* Spearman v. U.S. Postal Serv., 44 M.S.P.R. 135 (1990) (finding time barred discipline could not be used to support more severe penalty, but could be used to rebut argument of past good performance).

d. Dissimilarity in offenses may be relevant to weight accorded prior discipline in determining an appropriate penalty. Skates v. Dep’t of Army, 69 M.S.P.R. 366 (1996); Jackson v. Veterans Admin., 768 F.2d 1325 (Fed. Cir. 1985). Lewis v. Dep't of Air Force, 51 M.S.P.R. 475 (1991).

e. A canceled action may still be used as proof that the employee was warned of misconduct. Rush v. U.S. Air Force, 69 M.S.P.R. 416 (1996).

f. Nondisciplinary sanctions. An agency may consider nondisciplinary counselings as a basis for an enhanced penalty. Thomas v. Department of Defense, 66 M.S.P.R. 546 (1995),;Lovenduski v. Dep't of Army, 64 M.S.P.R. 612 (1994).

E. Agency followed proper procedures; action "in accordance with law." Harmful error rule. 5 U.S.C. § 7701(c)(2)(A); 5 C.F.R. § 1201.56(c)(3). Umshler v. Dep't of Interior, 55 M.S.P.R. 593 (1992); Hamilton v. U.S. Postal Serv., 58 M.S.P.R. 586 (1993).

V. SPECIAL DISCIPLINARY SITUATIONS.

A. Adverse action based on revocation of security clearance. Dep't of Navy v. Egan, 484 U.S. 518 (1988); Drumheller v. Dep't of Army, 49 F.3d 1566 (Fed. Cir. 1995) (finding courts have no authority to review the merits of an agency security clearance decision); Brockmann v. Dep't of Air Force, 27 F.3d 544 (Fed. Cir. 1994) (the MSPB and courts may have jurisdiction over security clearance determinations that involve colorable constitutional claims); Jones v. Dep't of Navy, 978 F.2d 1223 (Fed. Cir. 1992); Hill v. Dep't of Air Force, 844 F.2d 1407 (10th Cir. 1988); Alston v. Dep't of Navy, 58 M.S.P.R. 158 (1993). MSPB may review only the procedural steps of removal in security clearance cases; neither the MSPB nor the courts can review the merits of an executive agency's denial or revocation of a security clearance of a civilian employee.

1. MSPB review is limited to determining that--

a. Agency has established requirement of security clearance for position in question;

b. Employee has lost or been denied a security clearance; and

c. Agency has provided minimal due process protections to employee: notice of denial or revocation, statement of reasons upon which negative determination was based, and opportunity to respond.

2. An employee who loses security clearance has no substantive right to consideration for alternative employment in nonsensitive positions, unless such right is provided by agency regulation. Griffin v. Defense Mapping Agency, 864 F.2d 1579 (Fed. Cir. 1989); Lyles v. Dep't of Army, 864 F.2d 1581 (Fed. Cir. 1989).

3. Employee cannot challenge agency's requirement of security clearance for position in question. Skees v. Dep't of Navy, 864 F.2d 1576 (Fed. Cir. 1989). (Procedure for denial/revocation of security clearance is set forth in DOD Directive 5200.2-R, reprinted in AR 380-67).

4. The EEOC has held that, while Egan may preclude it from reviewing the substance of security clearance decisions and the validity of a security clearance requirement, it is <u>not</u> precluded from determining whether the grant, denial, or revocation of security clearances is conducted in a nondiscriminatory manner. Schroeder v. Dep't of Defense, EEOC No. 05930248 (April 14, 1994); Lyons v. Dep't of Navy, EEOC No. 05890839 (March 22, 1990). Contrast the EEOC's position with decisions from the MSPB and federal courts holding that *Egan* precludes review of the merits of the denial or revocation of a security clearance, even when the employee alleges that the denial or revocation was based on discrimination. Brazil v. Dep't of Navy, 66 F.3d 193 (9th Cir. 1995); Guillot v. Garrett, 970 F.2d 1320 (4th Cir. 1992); Pangarova v. Dep't of Army, 42 M.S.P.R. 319 (1990). *See also* Jamil v. Sec'y of Defense, 910 F.2d 1203 (4th Cir. 1990) (noting conflict).

5. *Egan* defense does not apply by analogy to loss of certifications other than security clearances. *See, e.g.*, Jacobs v. Dep't of Army, 62 M.S.P.R. 688 (1994) (finding *Egan* inapplicable to revocation of chemical munitions access); McGillivray v. Fed. Emergency Management Agency, 58 M.S.P.R. 398 (1993) (revocation of procurement authority); Siegert v. Dep't of Army, 38 M.S.P.R. 684 (1988) (revocation of clinical privileges).

B. Involuntary resignation/retirement. An employee is entitled to a jurisdictional hearing to establish whether his disability retirement was involuntary. Atkins v. Department of Commerce, 81 M.S.P.R. 246 (1999)

C. No right to lie. An agency may take adverse action against an employee because the employee made false statements in response to an underlying charge of misconduct. LaChance v. Erickson, 118 S.Ct. 753, 139 L.Ed.2d 695 (1998).

D. Threats of violence. In deciding whether an employee threatened his supervisors or his co-workers, consider the following evidentiary factors: a) The listener's reactions; b) the listener's apprehension of harm; c) the speaker's intent; d) any conditional nature of the statements; and e) the attendant circumstances. Metz v. Dep't of Treasury, 780 F.2d 1001 (Fed.Cir. 1986). Removal is often within the bound of reasonableness. McCarty v. Dep't of Navy, 72 M.S.P.R. 201 (1996); *but see* Powell v. Dep't of Justice, 73 M.S.P.R. 29 (1997).

VI. CONCLUSION.

CHAPTER E
54TH FEDERAL LABOR RELATIONS COURSE

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Outline of Instruction

I. INTRODUCTION.

II. BARGAINING UNIT DETERMINATION. 5 U.S.C. § 7112. A bargaining unit is a group of employees with similar interests.

A. Statutory criteria. 5 U.S.C. § 7112(a). The Authority examines the totality of the circumstances in each case in making appropriate unit determinations under § 7112(a)(1) of the Statute. Naval Fleet and Industrial Supply Center, Norfolk and AFGE Local 53, 52 FLRA 950 (1997); DOJ, Office of the Chief Immigration Judge, Chicago, and AFGE, 48 FLRA 620 (1993).

B. In determining appropriate bargaining units, the FLRA considers three factors:

1. The unit must ensure a clear and identifiable *community of interest* among the employees in the unit.

a. The Authority has not specified individual factors or the number of factors required to determine that employees share a community of interest. Health and Human Services, Region II, and NTEU, 43 FLRA 1245 (1992).

b. Among the factors considered are: the work performed; skills, training and education of the employees; geographic proximity of work sites; relationship of the work; common supervisors; organizational relationships; common applicability of personnel practices and working conditions; and bargaining histories. Redstone Arsenal and AFGE, 14 FLRA 150 (1984); DOJ, Office of the Chief Immigration Judge, Chicago, 48 FLRA 620 (1993).

2. The unit must promote *effective dealings* with the agency involved.

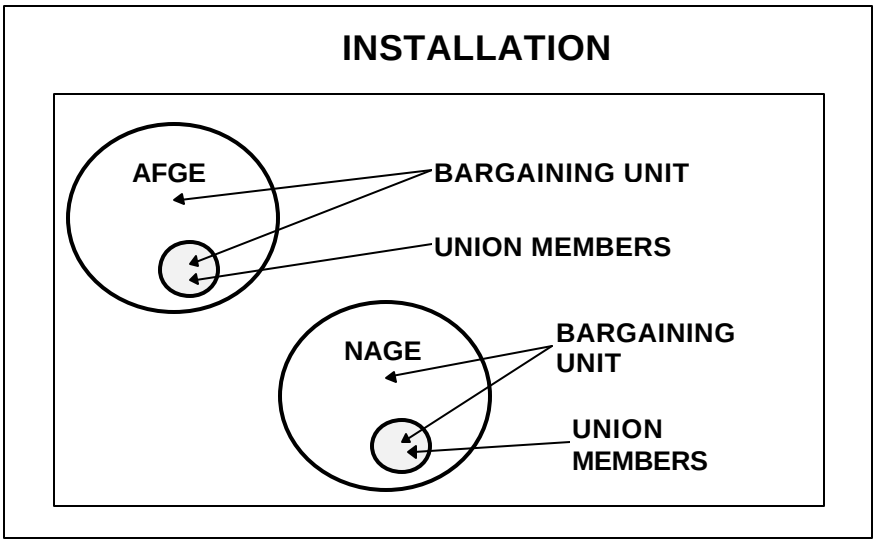
a. Will there be authority at the level of organization to make decisions for the group?

b. Factors to consider include: the level at which negotiations will take place, at what point grievances will be processed, whether substantial authority exists at the level of the unit sought, and bargaining history. U.S. DoD, National Guard Bureau and Association of Civilian Technicians, 55 FLRA No. 115 (1999) (concluding that a proposed consolidation of existing bargaining units in 39 states and representing about 53% of eligible National Guard technicians nationwide was not appropriate); DOJ, Office of the Chief Immigration Judge, Chicago, 48 FLRA at 637; DLA, Defense Plant Representative Office-Thiokol, and NFFE, 41 FLRA 316, 328-329 (1991).

3. The unit must promote *efficiency of the operations* of the agency involved.

a. Is the unit size and make-up appropriate to allow for necessary interactions without duplication of effort and excessive disruption of the mission?

b. Factors to consider include: relationship of the bargaining unit to the agency's organizational and operational structure; the degree to which there is interchange outside the unit sought; the extent of differences with other groups of employees outside the unit sought; whether negotiations would cover problems common to employees in the unit; and bargaining history. *See* Naval Fleet and Industrial Supply Center, Norfolk and AFGE Local 53, 52 FLRA 950 (1997).



C. Mandatory Exclusions. A unit cannot include any of the following categories of employees:

1. Any management officials or supervisors, unless they have been historically included in the unit.

a. Supervisors. 5 U.S.C. §§ 7103(a)(10) and 7112(b)(1); Interpretation and Guidance, 4 FLRA 754 (1980) (agency determination, for merit pay, that employee is manager or supervisor has no impact on inclusion in unit).

(1) Can they hire, fire, assign work, promote, suspend, or recommend any of the above in more than just a clerical capacity?

(2) Must supervise "employees" as defined in 5 U.S.C. § 7103.

b. Management officials. 5 U.S.C. §§ 7103(a)(11) and 7112(b)(1); Internal Revenue Service, 9 FLRA 175 (1982) (public affairs specialist implements rather than shapes policy); New York N.G., 9 FLRA 16 (1982) (agency attorneys are not management officials because they implement policy rather than formulate policy).

(1) Do they formulate, determine, or influence agency policy?

(2) Dep't of Agriculture, Food and Nutrition Service, 34 FLRA 143 (1989) (computer specialist not management official since would only advise manager in event of problem); EPA, Research Triangle Park, 12 FLRA 358 (1983) (ADP security specialist was management official because he developed security policy and had authority to shut down the facility in event of security breach).

2. Any confidential employee. 5 U.S.C. §§ 7103(a)(13) and 7112(b)(2); Bureau of Mines, 9 FLRA 14 (1982) (secretaries to research directors are confidential employees where directors effectuated policy in labor management relations); GSA National Archives and Records Service, 8 FLRA 333 (1982) (member of management negotiating team).

3. Any employee engaged in personnel work in other than a purely clerical capacity. 5 U.S.C. § 7112(b)(3).

4. Any employee engaged in administering the provisions of the Statute. 5 U.S.C. § 7112(b)(4).

5. Professional employees in the same unit as other employees only if a majority of the professional employees vote for inclusion in the unit. 5 U.S.C. §§ 7103(a)(15) and 7112(b)(5).

   a. A professional employee means an employee engaged in the performance of work:

      (1) Requiring the knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or hospital;

      (2) Requiring the consistent exercise of discretion and judgment in its performance;

      (3) Which is predominantly intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work);

      (4) Which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time; or

   b. An employee who has completed the courses of a specialized intellectual instruction and study prescribed above, and is performing related work under an appropriate direction or guidance to qualify the employee as a professional employee.

6. Any employee engaged in intelligence, counterintelligence, investigative, or security work that directly affects national security. 5 U.S.C. § 7112(b)(6).

7. Any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity. 5 U.S.C. § 7112(b)(7). The test is are the employees involved in the design, analysis, or monitoring of security systems and procedures?

8. Temporary employees. Generally no community of interest. Federal Aviation Technical Center, 44 FLRA 1238 (1992) (temporary detail of supervisor to unclassified position, for over a year, during investigation did not justify including him in union); *but see* Lower Rio Grande Valley District Office and AFGE Local 3904, 16 FLRA 180 (1984) (temps with "reasonable expectancy of continued employment" may be in bargaining unit).

III. EXCLUSIVE RECOGNITION.

A. An Exclusive Representative is any labor organization which is certified under the statute as the sole representative of employees in an appropriate unit, or that was recognized as such immediately before the effective date of the statute and continues to be so recognized. 5 U.S.C. § 7103(a)(16).

1. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

2. An exclusive representative must adopt and subscribe to standards of conduct that assure it will maintain democratic principles and a system of financial responsibility. 5 U.S.C. § 7120.

IV. THE UNION ORGANIZING CAMPAIGN.

A. Elections. 5 U.S.C. § 7111(a).

1. Timeliness Requirements.

a. Election Bar. 5 U.S.C. § 7111(b), 5 C.F.R. § 2422.12(a).

(1) The Rule: An election is not permitted within 12 months of a previous election in which the union failed to obtain the requisite number of votes.

(2) For the rule to apply, the bargaining unit must be the same unit or a subdivision thereof.

b. Certification Bar. 5 U.S.C. § 7111(f)(4), 5 C.F.R. § 2422.12(b). An election is not permitted within 12 months of certification of a labor organization as the exclusive representative for the bargaining unit.

c. Contract/Agreement Bar. 5 U.S.C. § 7111(f)(3), 5 C.F.R. § 2422.12(d) & (e).

(1) The Rule: A labor organization which desires to displace an incumbent exclusive representative may file a petition:

(a) Upon termination of the CBA if CBA is in existence for 3 years or less, or

(b) If the CBA is in existence for greater than 3 years, at the 3 year point.

(c) If filed not more than 105 days and not less than 60 days before the expiration date of the collective bargaining agreement.

(2) Purpose of the Contract/Agreement Bar.

(3) If there is no termination date or it is indefinite, there is no Agreement Bar.

(4) Agreement signed the same day as a petition is filed will act as a bar unless the Agency received notice that the petition was filed before the agreement was signed. III Corps & Fort Hood and NFFE, 51 FLRA 934 (1996).

d. Bar During Agency Head Review. 5 C.F.R. § 2422.12(c). Bars petitions during any period of agency head review under 5 U.S.C. § 7114. Bar expires after:

(1) Thirty days, or

(2) Agency head takes action on the Collective Bargaining Agreement.

2. Regional Director Conducts or Supervises the Election. 5 C.F.R. § 2422.23.

a. Showing of Interest.

(1) Definition and Purpose. 5 U.S.C. § 7111(b)(1)(A) and 5 C.F.R. § 2421.16.

(2) Evidence of showing of interest.

(a) Authorization cards or affidavits.

(b) Dues allotment forms or records.

(3) Minimum interest requirements. 5 C.F.R. §§ 2422.9 & 2422.10.

(a) Thirty percent for original representation petition.

(b) Intervening unions - 10 percent within 10 days of posting notice of an upcoming election.

(c) Incumbent - automatically included.

(4) Equivalent Status. Equivalent status achieved when Regional Director determines that showing of interest is adequate and notifies parties. DoD and Education Association of Panama, 44 FLRA 419 (1992).

(a) It is an ULP to assist labor organization lacking equivalent status. 5 U.S.C. § 7116(a)(3); Gallup Indian Medical Center, Gallup, New Mexico, 44 FLRA 217 (1992)

(b) Unions with equivalent status are entitled to "customary and routine" services and facilities. U.S. Army Air Defense Center, Fort Bliss, Texas, 29 FLRA 362 (1987).

b. Notice of election is posted. 5 C.F.R. § 2422.23(b).

(1) Parties are encouraged to enter into an agreement in preparation for the election. 5 C.F.R. § 2422.16.

(2) Regional Director has the discretion to establish the method of election where the parties are not able to reach agreement on those procedures on their own. AAFES and NAGE, 55 FLRA 1239 (2000) (upholding Regional Director's authority to order a mail ballot election even though one party disagrees).

c. Observers are appointed. 5 C.F.R. § 2422.23(h).

d. Challenged Ballots Are Impounded. 5 C.F.R. § 2422.24.

3. Labor organization needs the vote of a majority of eligible employees who vote to win. 5 U.S.C. § 7111(a).

4. Run-Off and Inconclusive Elections.

a. Run-off: Three or more on the ballot and none gets a majority of the valid votes cast but can eliminate one or more parties. 5 C.F.R. § 2422.28.

b. Inconclusive: Three or more on the ballot, none gets a majority of the valid votes cast and all are tied or all are tied except one who has a greater number (but not majority) of votes. 5 C.F.R. § 2422.29.

5. Objections to Election. 5 C.F.R. § 2422.26.

a. Grounds.

b. Regional Director's Preliminary Investigation.

c. Hearing if there is a relevant issue of fact. 5 C.F.R. § 2422.27.

d. Regional Director issues a decision. 5 C.F.R. § 2422.27(c). This decision may be appealed to the Authority. 5 C.F.R. § 2422.31.

6. Certification. 5 C.F.R. § 2422.32.

B. Nonemployee Access on the Installation.

1. No "right" to access.

a. Babcock v. Wilcox, 351 U.S. 105 (1956). The case involved an attempt by union organizers to distribute literature in the private parking lot of a plant. The Court held that an employer may deny access to property by nonemployee union organizers, provided (1) the union is reasonably able to communicate with the employees by other means, and (2) the employer's denial does not discriminate against the union by permitting other unions with equal status to solicit or distribute literature.

b. First Amendment Issue. National Treasury Employees Union v. King, 798 F.Supp. 780 (D.D.C. 1992) (the NTEU successfully raised a constitutional challenge to the limitation of outside union solicitation in public areas under the control of a federal agency, when that agency has treated the location as a public forum).

c. NTEU v. FLRA, 55 FLRA No. 158 (1999) (explaining that if an employer maintains a "no-solicitation" policy, it may ban non-employee union solicitation while at the same time permitting a small number of beneficent organizations on its premises).

2. Inaccessible Employees. Barksdale Air Force Base and NFFE, 45 FLRA 659 (1992) (ULP to allow nonemployee representative unless union can show that despite diligent effort, it has been unable to reach the agency's employees through reasonable, alternative means of communication).

- Reasonable means include: mailings, TV and radio ads, billboards, information booths at shopping centers or commuter stations, and/or employee organizer(s).

C. Employees' Right to Solicit Union Membership on the Installation.

1. Generally, cannot prohibit solicitation on the installation in non-work areas during non-work time.

a. Department of Commerce and Hanlon, 26 FLRA 311 (1987) (ULP to prohibit employee union solicitation in work area during non-work times, absent evidence of disruption);

b. GSA and Hanlon, 26 FLRA 719 (1987) (ULP to prohibit showing of union recruiting movie during non-work times in non-work areas of federal building, including lobby);

c. GSA and Hanlon, 29 FLRA 684 (1987) (ULP to limit times Hanlon could use lobby and content of union materials).

2. May restrict solicitation on the installation. GSA, 9 FLRA 213 (1982) (not ULP to prohibit desk-to-desk distribution of union leaflets in work area).

3. May restrict wearing of union paraphernalia while on duty. DOJ v. FLRA, 955 F.2d 998 (5th Cir. 1992) (Border Patrol officers proposed to wear union pins with uniform); AFGE and Idaho Army and Air National Guard, 32 FLRA 539 (1988) (military technicians proposed special patches).

4. Treat exclusive representative equal to private organizations operating on the activity. IRS and NTEU, 42 FLRA 1034 (1991) (union request to hold bake sale).

D. Management Neutrality. 5 U.S.C. §§ 7116 (a)(1) through (a)(3) and 7102.

1. Management may not aid, nor hinder, the union organization effort. Air Force Plant Rep. Office, 5 FLRA 492 (1981) (commander's published comments "implying that unions were unnecessary, undesirable, and difficult to remove" considered improper); DA, Fort Sill, Oklahoma, 29 FLRA 1110 (1987) (photograph of union officials with Army and White House representatives during contested election improper); and Bureau of Indian Affairs and NFFE, 56 FLRA 169 (2000) (finding that an agency did not unfairly assist a union with equivalent status when it gave that union access to facility bulletin boards that the incumbent used even without a contractual agreement to that effect).

2. Management may act and speak in some instances. 5 U.S.C. § 7116(e).

a. Publicize election and encourage employees to vote.

b. Correct the record.

c. Inform employees about Government policy concerning labor-management relations.

V. SUCCESSORSHIP AND ACCRETION.

A. FLRA's framework for determining how accretion and successorship apply when an agency reorganizes. AFGE and Navy Fleet and Industrial Supply Center, 52 FLRA 950 (1997).

1. The first step is to determine if the employees are in a new appropriate bargaining unit.

2. If the employees are in a new appropriate bargaining unit, apply the successorship analysis.

3. If the employees are not in a new appropriate bargaining unit, apply the accretion analysis.

B. Successorship following reorganization. Naval Facilities Engineering Service Center, Port Hueneme, California and National Association of Government Employees, 50 FLRA 363 (1995). The gaining entity is a successor, and the union retains its status as the exclusive representative of the employees who are transferred, when:

1. An entire recognized unit, or portion thereof, is transferred.

2. The transferred employees are:

   a. in an appropriate bargaining unit after the transfer, and

   b. constitute a majority of such employees in such unit.

3. The gaining entity has substantially the same organizational mission as the losing entity.

4. The employees are performing substantially the same duties.

5. No election is necessary to determine representation.

C. Accretion applies when the transferred employees:

1. Are not in an appropriate bargaining unit.

2. Are functionally and administratively integrated into existing units.

3. Are appropriate to add to the bargaining unit.

D. Restructuring existing units.

1. Chain of command reorganization. Navy Base Norfolk, Virginia and NAGE, Local R4-1, 56 FLRA No. 47 (2000).

   a. A change in an agency's chain of command does not, by itself, render an existing unit inappropriate. Rather, the FLRA will evaluate how such a change has affected each of the three criteria for appropriate units, as applied to the existing unit and any proposed, new units.

   b. If an agency reorganizes and there are competing claims of successorship, the FLRA will first evaluate the proposed bargaining units that will most fully preserve the status quo in terms of bargaining unit structure and the relationship of employees to their chosen exclusive representative. If it finds the existing unit continues to be appropriate, the FLRA will not address any petitions that attempt to establish different unit structures.

2. Merger of existing units into a new unit. A representation election may not be necessary when two groups of employees, represented by different labor organizations, are assigned to a newly created organization if one of the unions represents a sufficiently predominant number of employees and the two missions of the former units blend into one mission that is substantially the same for the new unit. U.S. Army Aviation Missile Command, Redstone Arsenal and AFGE, 56 FLRA 126 (2000) (finding that an election was not necessary between NFFE and AFGE bargaining unit employees that merged into a new organization when AFGE represented more than 70 percent of the newly combined unit employees).

3. An agreement between unions that would change the structure of existing bargaining units by removing employees from a unit represented by one union to a unit represented by the other is not valid because it interferes with the fundamental right of employees to determine their exclusive representation, and thwarted the Authority's representation process. NAGE/SEIU, Local 5000, and SEIU and Dep't of Veterans Affairs, Washington, D.C., 52 FLRA 1068 (1997).

VI. REPRESENTATION PROCEEDING PETITIONS.

A. FLRA Form 21 is used to petition the FLRA for action in a representation proceeding. *See* sample form attached at page E-29.

B. A petition may be filed for the following purposes:

1. Elections or Eligibility for Dues Allotment. (5 C.F.R. § 2422.1(a)). This petition is used:

   a. To hold an election to determine if employees want a union to represent them.

   b. To determine eligibility for dues allotment in an unrepresented unit.

   c. To hold an election to determine if employees no longer wish to be represented by the exclusive representative.

2. Clarification or Amendment (5 C.F.R. § 2422.1(b)). This petition is used to clarify or amend:

   a. A recognition or certification then in effect.

   b. Any other matter relating to representation.

3. Consolidation (5 C.F.R. § 2422.1(c)). This petition is used to consolidate two or more bargaining units, with or without an election.

VII. CONCLUSION.

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February 3, 1997

MEMORANDUM

TO: Regional Directors

FROM: Joe Swerdzewski, General Counsel

SUBJECT: Quality in Processing Representation Petitions

This policy was developed after considering the recommendations of the Regional Directors and their staffs and the Union of Authority Employees, and will be made available to our customers. This policy complements the Office of the General Counsel Policy on Quality in Unfair Labor Practice Investigations and furthers the intent of the new representation regulations, which were effective March 15, 1996. This quality policy applies to all Regional Office processing of representation petitions, and will be incorporated into the Representation Case Handling Manual.

POLICY

This policy sets forth the standards of quality which the processing of each representation petition will meet, regardless of the purpose of the petition. All Regional Directors will ensure that the processing of each representation petition conforms as closely as possible to the standards discussed in this policy. Each Region is responsible for developing and implementing procedures to:

- ensure that the processing of representation petitions is conducted in a timely and efficient manner;
- enable all Regional Office employees to understand the importance of maintaining a high level of quality in processing representation petitions and to understand the standards for quality in the Office of the General Counsel;
- identify any assistance (such as additional training) which Office of the General Counsel employees may require to meet these quality standards;
- assess the quality of the processing of a petition in every representation case;
- ensure that applicable quality standards have been met before taking any dispositive action; and
- provide that high levels of quality continue to be maintained in the processing of all representation petitions.

Under this policy, the Regions will develop and implement procedures to ensure that these quality standards have been met in each representation case prior to a Regional Director decision on the petition. This policy will be evaluated to determine its effectiveness on a recurring basis, by reviewing the

quality of Regional Office representation petition processing and by considering the views of our customers.

OBJECTIVES

Every participant in the processing of a representation petition has a right to expect that the case processing procedures will meet certain basic standards of quality. Even though the petitions may have different purposes, seek different results and be processed differently, every participant has the right to expect that those standards of quality will be the same, regardless of which Regional Office processes the case. This policy is intended to establish the standards for the processing of representation petitions which will be followed throughout all Regional Offices.

BACKGROUND

Pursuant to the Federal Service Labor-Management Relations Statute and the Authority and General Counsel implementing regulations, the Regional Directors are charged with processing representation petitions; including making determinations on appropriate units, conducting investigations and hearings, directing and conducting elections, certifying election results and making other determinations on issues raised in representation petitions. Regional Directors also are charged with assisting the parties in discussing their interests and narrowing and resolving the issues both prior, and subsequent, to the filing of a petition.

The employees of the Authority's Regional Offices are highly regarded for their experience, ability and integrity. The Office of the General Counsel has always relied upon the competence and dedication of these employees to maintain the high quality of the processing of representation petitions. This policy establishes uniform standards, available to the public, for achieving that quality.

QUALITY STANDARDS

These are the essential quality standards which the processing of every representation petition should meet:

1. The purpose of the petition is properly identified and the Region assists the petitioner to ensure that the petition is filed consistent with the Statute and the Regulations.
2. The Region identifies all issues including those defined by what the petitioner seeks and those defined by the facts and circumstances giving rise to the petition.
3. The investigation obtains the best possible relevant evidence.
4. The case file contains all relevant evidence and information obtained during the investigation that provides a basis for the Regional Director's decision.
5. All parties are treated fairly and equitably and the representation case handling process is explained to the parties.
6. Representation elections are conducted in a fair and impartial manner, so that each eligible voter has an opportunity to cast a secret, uncoerced ballot.

7. Hearings are conducted in a fair and impartial manner and create a complete factual record upon which the Regional Director can make a well-reasoned and supportable decision.
8. Representation petitions are processed as expeditiously as possible.

1. THE PURPOSE OF THE PETITION IS PROPERLY IDENTIFIED AND THE REGION ASSISTS THE PETITIONER TO ENSURE THAT THE PETITION IS FILED CONSISTENT WITH THE STATUTE AND THE REGULATIONS.

The Region takes a proactive role in assisting parties in filing representation petitions. The purpose of the petition is discussed with the petitioner and identified prior to beginning the investigation. When appropriate, the Region also is available to meet with a petitioner prior to filing a petition to provide technical assistance. All interested parties also are encouraged to meet with the Region prior to filing a petition to narrow and resolve issues.

2. THE REGION IDENTIFIES ALL ISSUES INCLUDING THOSE DEFINED BY WHAT THE PETITIONER SEEKS AND THOSE DEFINED BY THE FACTS AND CIRCUMSTANCES GIVING RISE TO THE PETITION.

Issues are not only defined by the results that the petitioner seeks, but also by the facts and circumstances that caused the petition to be filed. The Region assists the parties in exploring the totality of the facts to better understand the range of issues raised by the situation.

3. THE INVESTIGATION OBTAINS THE BEST POSSIBLE RELEVANT EVIDENCE.

The Region notifies any labor organization and agency it identifies that may be affected by issues raised in the petition and provides an opportunity for that labor organization and agency to participate in the process. All evidence, whether documentary or testimonial, is relevant. The Region obtains evidentiary information relevant to the issues raised by the petition in a manner that expedites the processing of the case. Such evidence is in the form of affidavits, documentation, position statements and legal arguments. The Region obtains this evidence through either an investigation or a fact-finding hearing. The Region informs the parties of the investigative process and its appropriateness.

4. THE CASE FILE CONTAINS ALL RELEVANT EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION THAT PROVIDES A BASIS FOR THE REGIONAL DIRECTOR'S DECISION.

The case file contains all relevant documentary and testimonial evidence discovered and submitted during the investigation. The file also reflects the Region's decisional process.

5. ALL PARTIES ARE TREATED FAIRLY AND EQUITABLY AND THE REPRESENTATION CASE HANDLING PROCESS IS EXPLAINED TO THE PARTIES.

The representation process is the cornerstone for establishing the collective bargaining relationship between agencies and labor organizations. The representation proceeding is a nonadversarial process. It is critical that the parties view the Regional Office as neutral and impartial and have confidence that any decision will be consistent with the requirements of the Statute. The manner in which the case is processed is as important as the evidence it obtains.

To achieve this standard, all Regional Office employees:

- conduct meetings to define, narrow and resolve issues;
- clarify, whenever appropriate, the purposes and procedures of the investigation or hearing;
- provide fair, appropriate and impartial technical assistance to all parties, as necessary;
- encourage and assist the parties in entering into resolutions that resolve the issues raised by the parties and are consistent with the Statute; and
- conform to appropriate ethical standards of behavior at all times.

6. REPRESENTATION ELECTIONS ARE CONDUCTED IN A FAIR AND IMPARTIAL MANNER, SO THAT EACH ELIGIBLE VOTER HAS AN OPPORTUNITY TO CAST A SECRET, UNCOERCED BALLOT.

All representation elections, whether conducted on-site or by mail, are conducted in a fair and neutral basis. The sanctity of the ballot is protected at all times and the Region takes steps in preparing for and conducting an election that ensure that each eligible voter is afforded an opportunity to cast a secret, uncoerced ballot. The election process is clearly explained to the parties.

7. HEARINGS ARE CONDUCTED IN A FAIR AND IMPARTIAL MANNER AND CREATE A COMPLETE FACTUAL RECORD UPON WHICH THE REGIONAL DIRECTOR CAN MAKE A WELL REASONED AND SUPPORTABLE DECISION.

Representation hearings are fairly and expeditiously conducted, and all Hearing Officer rulings are impartial. As a nonadversarial process, the Hearing Officer ensures that all evidence relevant to the issues raised by the petition is contained in the official record of the hearing.

8. REPRESENTATION PETITIONS ARE PROCESSED AS EXPEDITIOUSLY AS POSSIBLE.

Representation cases are processed as expeditiously as possible, taking into consideration the resources available to the Regional Office and the number of pending cases.

--end--

Office of the General Counsel
Federal Labor Relations Authority

Representation Petition Case Processing Time Goals

The following are the Regional Office time targets and goals for the processing of representation petitions. These time targets and goals are benchmarks for the Regions to strive for in processing representation petitions. In order to reach these targets, it is imperative that parties filing petitions should be prepared to present to the Regions at the time they file the petition all the information which is necessary for the Region to process the petition. Similarly, parties participating in the processing of a representation petition should be prepared to present necessary information expeditiously after they have been notified that the petition has been filed.

Petitions which do not comply with the filing requirements in section 2422.3 of the Regulations and which prevent the opening of the case are deficient and must be cured by an amended petition. The time targets and goals set forth below will be tolled until the amended petition curing the deficiency has been filed.

The following are the time targets for the processing of representation petitions:

> For those petitions which are decided by a Regional Director Decision and Order without the need for a hearing, the Decision and Order should be issued within 90 days after the petition is filed.
>
> For those petitions which are decided by a Regional Director Decision and Order when a hearing has been held, the Decision and Order should be issued within 150 days after the petition is filed.
>
> For those petitions which result in an election pursuant to an election agreement or a directed election, the tally of ballots for an on-site election, and the mailing of ballots in a mail ballot election, should occur within 90 days after the petition is filed.
>
> For those petitions where there are elections and objections and/or determinative challenged ballots are filed, the objections and/or determinative challenged ballots should be withdrawn or decided in a Regional Director Decision and Order, with or without a hearing, within 60 days after the objections and/or determinative challenged ballots are filed.

The goal is for the Regions to process eighty-five percent (85%) of the representation petitions within the above time targets for each type of action.

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December 18, 1996

MEMORANDUM

TO: Regional Directors

FROM: Joe Swerdzewski, General Counsel

SUBJECT: Guidance on Proper Descriptions of Bargaining Units and Identification of Parties to the Collective Bargaining Relationships in Certifications

This memorandum provides guidance to the Regional Directors on identifying and correcting inaccurate descriptions of bargaining units and parties to a collective bargaining relationship in certifications. The memorandum is divided into three parts. Part I explains why it is important that certifications accurately describe unit inclusions and exclusions and reflect the proper and current names of the parties to the exclusive bargaining relationship. Part II describes situations which may cause a certification to become improper. Part III suggests ways that the Regional Offices can assist agencies and unions in filing appropriate representation petitions to resolve questions related to proper certifications.

PART I. Significance of Certifications of Representative

The certification of representative is the formal document issued by a Regional Director that certifies that a labor organization has been selected as the exclusive representative by a majority of the employees in an appropriate unit who cast valid ballots in a secret ballot election. Once a labor organization is certified, the Federal Service Labor Management Relations Statute (Statute) requires an agency to recognize a labor organization for the purposes of collective bargaining about matters affecting the bargaining unit employees' conditions of employment. The certified union also is required to represent all employees in the bargaining unit without discrimination and without regard to membership in the union.

The bargaining unit sets the stage for the entire collective bargaining process. Maintaining accurate and current certifications is the only way in which the parties to an exclusive bargaining relationship can ensure that the bargaining unit continues to be appropriate and accurately reflects the parties to the bargaining relationship. The Statute includes provisions to clarify or amend any certification relating to the representation of employees in a bargaining unit. Implementing regulations are set forth in Part 2422 of the Authority's Regulations.

Certifications that do not accurately reflect the bargaining unit or the parties to the collective bargaining relationship have the potential of creating a myriad of problems that could result in unfair labor practice charges. For example, an agency may refuse to check-off dues and negotiate with a union based on a dispute over which employees the union represents. Often, these types of disputes may be avoided if the parties file a representation petition to resolve issues concerning their unit descriptions and the identity of the agency and the union.

PART II. Certifications That Do Not Properly Reflect the Recognized Unit or the Parties to the Collective Bargaining Relationship

A certification that does not properly reflect the unit description and the parties to the collective bargaining relationship impairs the parties' ability to carry on the collective bargaining process. This occurs when changes in the description of the unit or in the union's or agency's identity are not reflected in the certification. These are some common situations where a certification can be inaccurate:

1. Changes are made in the status of individual employees in the bargaining unit due to some personnel action.

> For example, employees designated as supervisors are reclassified as non-supervisory team leaders.

2. Employees who were specifically identified in the unit description are transferred out of the bargaining unit.

> For example, a specific type of employee or employees of a particular entity who are specifically identified in the unit description are removed from the unit by transfer or disestablishment of the employing entity.

3. Employees are acquired by another agency.

> For example, agency A acquires employees who formerly worked at agency B or at another subdivision of agency A in a separate bargaining unit.

4. The name of an employing agency changes.

5. The employing agency ceases to exist.

6. The name of the union representing the employees changes.

> For example, the union changes affiliation or merges with another union.

7. The union representing the employees ceases to exist.

8. Due to a reorganization, realignment or some other change in the organization of the agency, there is a question to whether the existing units are appropriate under the Statute.

PART III. Assisting the Parties In Resolving Issues Concerning Proper Certifications

The Regions can assist the parties in identifying those units where the certifications do not properly reflect the unit description or the identity of the union or agency by the following actions.

1. When petitions are filed, review the petition and the existing certification to determine if: a) the current composition of employees in the unit is properly designated; b) the agency/activity and the union are properly identified; and c) the exclusions conform to the Statute.

2. When petitions are filed, determine whether the petition raises issues related to the accuracy and continued appropriateness of the unit.

3. Educate the parties about the importance of maintaining accurate unit descriptions and the representation process for accomplishing that goal. This can be accomplished: during town meetings; while delivering facilitation, intervention, training and education programs; and while processing unfair labor practice and representation cases.

4. Offer to provide technical assistance and/or prefiling assistance to the parties pursuant to section 2422.13(a) of the Regulations.

5. Distribute the attached checklist to enable unions and agencies to determine if there is a need to file a representation petition to ensure that their unit description properly identifies the unit and the parties to the collective bargaining relationship.

Regional Directors should continue to contact the Office of the General Counsel if any questions arise concerning the appropriateness of resolving issues related to updating a unit description during the processing of a petition.

Attachment (Certification Checklist)

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OFFICE OF THE GENERAL COUNSEL
FEDERAL LABOR RELATIONS AUTHORITY
CERTIFICATION CHECKLIST

Only the Federal Labor Relations Authority may certify a labor organization to act as the exclusive representative of an appropriate unit of employees for the purposes of collective bargaining or thereafter, clarify or amend matters relating to the representation of employees. This checklist will assist unions and agencies in determining if their current certification properly identifies the bargaining unit and the union and agency to the collective bargaining relationship. We encourage unions and agencies to review this checklist together. If any of the following questions are answered "Yes", you should contact an FLRA Regional Office for assistance.

1. Have any encumbered positions in the existing bargaining unit changed since the certification so that they are now supervisory, management official, or confidential?

2. Have any employees who are specifically identified in the unit description been transferred out of the bargaining unit?

3. Has the agency acquired any grouping of employees from another agency?

4. Has the name of the employing agency changed?

5. Has the employing agency gone out of existence?

6. Has the name of the union representing the employees changed?

7. Has the union which represented the employees gone out of existence?

8. Are there any questions as to whether the existing unit is appropriate under the Federal Service Labor Management Relations Statute due to a reorganization, realignment or some other change in the organization of the agency?

Before you contact a Regional Office, try to collect the following information by reviewing your certification and/or your unit description in your collective bargaining agreement:

1. Date that the union was first certified.

2. Authority case number when the first certification issued.

3. The unit description in the first certification.

4. The identity of the parties to the first certification.

5. Any subsequent changes to the description of the first certification concerning the description of the unit and the identity of the parties.

6. The current name of the union and the agency.

7. Any changes to the composition of the unit.

CHAPTER F

54TH FEDERAL LABOR RELATIONS COURSE

Merit Systems Protection Board (MSPB)

Practice and Procedures

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United States Marine Corps
Labor Counsel, Eastern Area Counsel Office

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Outline of Instruction

I. INTRODUCTION.

II. REFERENCES.

A. Primary.

1. 5 United States Code §§ 7701-7703.

2. 5 C.F.R. Part 772 (Interim Relief).

3. 5 C.F.R. Part 1201 (Practices and Procedures).

4. 5 C.F.R. Part 1209 (Practices and Procedures for Appeals and Stay Requests of Personnel Actions Allegedly Based on Whistleblowing).

B. Secondary.

1. Representing the Agency Before the U.S. Merit Systems Protection Board. A Handbook on MSPB Practice and Procedure - Prepared by OPM (May 1984).

2. A Guide to Merit Systems Protection Board Law and Practice. Peter Broida, Dewey Publications, Inc., P.O. Box 663, Arlington, Virginia 22216 (703-524-1355) Updated Annually.

3. U.S. Merit Systems Protection Board Reporter (M.S.P.R.), West Publishing Company. The official reporter for MSPB decisions.

III. JURISDICTION.

A. General. 5 U.S.C. § 1204(a).

B. Original Jurisdiction. 5 C.F.R. § 1201.2.

1. Actions brought by the Special Counsel.

2. Certain actions against Senior Executive Service employees.

3. Actions against administrative law judges.

C. Appellate Jurisdiction. 5 U.S. C. §§ 7701 - 7703; 5 C.F.R. § 1201.3.

1. Statutory.

a. Removal or reduction in grade for unacceptable performance. 5U.S.C. § 4303(e).

b. Removal, reduction in grade or pay, suspension for more than 14 days, or furlough for 30 days or less for cause that will promote the efficiency of the service. 5 U.S.C. § 7512.

c. Mixed cases. 5 U.S.C. § 7702.

d. Individual right of action (IRA) appeals. 5 U.S.C. § 1221(a). A personnel action that the appellant alleges was threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities.

2. Regulatory.

a. Termination of competitive service probationer. 5 C.F.R. § 315.806. A very limited right of appeal. MSPB has jurisdiction only if the probationer makes a non-frivolous allegation that removal was based on:

(1) Discrimination because of marital status. Edem v. Dep't of Commerce, 64 M.S.P.R. 501 (1994); Bedynek-Stumm v. Dep't of Agric., 57 M.S.P.R. 176 (1993); Gribben v. Dep't of Justice, 55 M.S.P.R. 257 (1992).

Or

(2) Partisan political affiliation. Munson v. Dep't of Justice, 55 M.S.P.R. 246 (1992); James v. Dep't of Army, 55 M.S.P.R. 124 (1992).

b. Assignment of probationary managers and supervisors to nonmanagerial or nonsupervisory positions. 5 C.F.R. § 315.908(b). This is also a very limited appeal right. MSPB has jurisdiction only if the probationary supervisor demonstrates the reason for returning the employee to nonsupervisory status was discrimination based on marital status or partisan political affiliation. Hardy v. Merit Systems Protection Bd., 13 F.2d 1571 (1994).

c. Reductions in force. 5 C.F.R. § 351.901.

d. Denials of reconsideration of withholding within-grade ("step") increases. 5 C.F.R. § 531.410.

e. Denial of restoration rights (military duty and recovery from compensable injury). 5 C.F.R. § 353.401.

D. Agency Challenges to Jurisdiction.

1. Action challenged is not an appealable action.

a. Placing employee in AWOL status. Perez v. Merit Sys. Protection Bd., 931 F.2d 853 (Fed. Cir. 1991); Rose v. Heath & Human Serv., 721 F.2d 355 (Fed. Cir. 1983); Green v. U.S. Postal Serv., 57M.S.P.R. 23 (1993).

b. Voluntary resignation or retirement. Cruz v. Dep't of Navy, 934 F.2d1240 (Fed. Cir. 1991) (presumption of voluntariness in retirement or resignation); Schultz v. Dep't of Navy, 810 F.2d 1133 (Fed. Cir.1987); Burgess v. Merit Sys. Protection Bd., 758 F.2d 641 (Fed. Cir. 1985); Caveney v. Office of Admin., 57 M.S.P.R. 667 (1993). But see 5 U.S.C. §§ 1221(j) and 7701(j); 5 C.F.R. § 1201.3(d); Mays v. Dep't of Trans., 27 F.3d 1577 (Fed. Cir. 1994). Disability retirement issues, See Nordhoff v. Dep't of Navy, 64 MSPR 478 (1994) ; and, Nordhoff v. Dep't of Navy, 78 MSPR 88 (1998); Handy v. Dep't of Army, 82 M.S.P.R. 683 (1999).

c. Classification. Pavlopoulos v. Office of Personnel Management, 58 M.S.P.R. 620 (1993); Atwell v. Dep't of Army, 2 M.S.P.R. 484 (1980), affd, 670 F.2d 272 (D.C. Cir. 1981).

d. Failure to promote. Williams v. Dep't of Army, 651 F.2d 243 (4th Cir. 1981); Kochanoff v. Dep't of Treasury, 54 M.S.P.R. 517 (1992).

e. Reassignments without loss of grade or pay. Wilson v. Merit Sys. Protection Bd., 807 F.2d 1577 (Fed. Cir. 1986); Maddox v. Merit Sys. Protection Bd., 759 F.2d 9 (Fed. Cir. 1985); Von Kelsch v. Dep't of Labor, 51 M.S.P.R. 378 (1991); Else v. Deptt of Justice, 3 M.S.P.R. 397 (1980). But see Robinson v. U.S. Postal Serv., 63 M.S.P.R. 307 (1994) (finding Postal Service reassignments subject to reduction in force procedures).

f. Valid settlement agreement. Smitherman v. Defense LogisticsAgency, 56 M.S.P.R. 626 (1993).

g. Whistleblower exception. Kochanoff v. Dep't of Treasury, 54 M.S.P.R. 517 (1992).

(1) Unless the action challenged is otherwise appealable to the MSPB, the employee must first seek corrective action from the Special Counsel and exhaust those proceedings before bringing an individual right of action. Ferry v. Hayden, 954 F.2d 658 (llth Cir. 1992); Knollenberg v. Merit Sys. Protection Bd., 953 F.2d 623 (Fed. Cir. 1992); Lozada v. Equal Employment Opportunity Comm'n, 45 M.S.P.R. 310 (1990).

(2) The Board has, in limited circumstances, jurisdiction over all personnel actions allegedly based on appellant's whistleblowing under an individual right of action (IRA).

(a) Personnel actions are defined in 5 U.S.C. § 2302(a)(2) and include: appointment, promotion, adverse action under Chapter 75, other disciplinary or corrective action, detail, transfer, reassignment, performance evaluation, a decision to order psychiatric testing or examination, or any other significant change in duties, responsibilities, or working conditions.

(b) Canceling an erroneous vacancy announcement is not a personnel action that would support an individual right of action appeal. Slake v. Dep't of Treasury, 53 M.S.P.R. 207 (1992).

(c) Is reduction in force one of the personnel actions defined in 5 U.S.C. § 2302(a)(2))? Carter v. Dep’t of Army, 62 M.S.P.R. 393 (1994), reversing 56 M.S.P.R. 321 (1993).

h. The Board has held that a jurisdictional determination (i.e., was the resignation or retirement voluntary) is not required when the Board, by assuming *arguendo* it has jurisdiction, finds that the appeal can be properly dismissed on timeliness or other grounds. Gaydon v. U.S. Postal Serv., 62 M.S.P.R. 198 (1994); Popham v. U.S. Postal Serv. 50 M.S.P.R. 193 (1991).

2. Employee challenging action does not have appeal rights.

a. Probationary or term employee.

(1) Limited appeal rights. Edmond v. Dep't of Air Force, 57 M.S.P.R. 361 (1993); Gribben v. Dep't of Justice, 55 M.S.P.R. 257 (1992).

(2) Demonstrating limited basis for appeal. McChesney v. Dep't of Justice, 55 M.S.P.R. 512 (1992); Gribben v. Deptt of Justice, 55 M.S.P.R. 257 (1992).

(3) Is employee a probationer? Question concerning appointment Toyens v. Dep't of Justice, 58 M.S.P.R. 634 (1993); Stanley v. Dep't of Justice, 58 M.S.P.R. 354 (1993).

b. Excepted service employee. Only preference eligible with more than one year of service and (after August 17, 1990) most nonpreference eligible with two or more years of current continuous service (nonprobationary equivalent) have appeal rights. Pennington v. Dep't of Veterans Affairs, 57 M.S.P.R. 8 (1993).

c. Nonappropriated fund employee. Perez v. AAFES, 680 F.2d 779 (D.C. Cir. 1982).

d. National Guard technician. In 1991, the Board held that National Guard technicians are "employees" who have MSPB appeal rights only for matters outside the sole authority of the state adjutant general. Ockerhausen v. New Jersey Dep't of Military and Veterans Affairs, 52 M.S.P.R. 484 (1992) (MSPB has jurisdiction over whistleblower complaints not involving reserved right); Kostan v. Arizona Nat'l Guard, 50 M.S.P.R. 182 (1991) (MSPB has jurisdiction over restoration appeal).

3. Appeal precluded by exercise of grievance/arbitration rights under negotiated grievance procedure.

a. Appealable action involving discrimination under 5 U.S.C. § 2302(b)(1) (mixed cases)--employee elects forum, but MSPB may review grievance/arbitration decision. Capriles v. Panarna Canal Comm'n, 65 M.S.P.R. 221 (1994); Means v. Dep't of Labor, 63 M.S.P.R. 180 (1994); Leary v. Dep't of Navy, 60 M.S.P.R. 529 (1994).

b. Adverse actions under 5 U.S.C. § 7512 and performance cases under 5 U.S.C. § 4304 (nonmixed cases). Employee elects forum; election is binding. 5 C.F.R. § 1201.3(c). Morales v. Merit Sys. Protection Bd., 823 F.2d 536 (Fed. Cir. 1987); Billops v. Dept of Air Force, 725 F.2d 1160 (8th Cir. 1984); Nelson v. Dep't of Treasury, 58 M.S.P.R. 464 (1993);

c. Other actions grievable under negotiated grievance procedure - no MSPB jurisdiction. Sirkin v. Dep't of Labor, 16 M.S.P.R. 432 (1983) (RIF); Lovshin v. Dep't of Navy, 16 M.S.P.R. 14 (1983) (denial of step increase).

4. Appeal precluded by election of EEOC complaint process. 5 C.F.R. § 1201.151--161. Ferdon v. U.S. Postal Serv., 60 M.S.P.R. 325 (1994).

IV. PROCESSING AN APPELLATE CASE. 5 U.S.C. § 7701; 5 C.F.R. PART 1201.

A. Agency Decision Notice. 5 C.F.R. § 1201.21.

1. Contains notice of time limits, effect of missing time limits, and address for appeal. Walls v. Merit Systems Protection Bd., 29 F.3d 1578 (Fed. Cir. 1994).

2. A copy (or access to copy) of MSPB regulations.

3. Appeal form (NEW MSPB form/Internet).

4. Notice of grievance rights (if any).

B. Employee Appeal. 5 C.F.R. § 1201.22. The following rules of filing apply to **all** submissions to the Board (appellant or agency).

1. Methods of filing. Personal delivery, FAX, or mail. 5 C.F.R. § 1201.22(d).

2. Date of filing. 5 C.F.R. § 1201.4(1). Late is late.

a. Personal delivery -- date of receipt by MSPB. Cohen v. Dep't of Commerce. 56 M.S.P.R. 578 (1993).

b. FAX -- date of receipt of FAX (as recorded on transmission by receiving FAX machine). Jude v. Dep't of Treasury, 52 M.S.P.R. 5 (1991).

c. Mail -- postmark (or presumption of 5 business days before receipt if no legible postmark). Jordan v. Dep't of Treasury, 64 M.S.P.R. 242 (1994). But see Zicht v. Health and Human Servs., 56 M.S.P.R. 9 (1992); Raphel v. Dep't of Army, 50 M.S.P.R. 614 (1991).

d. Delivery by private express companies. The MSPB previously found that filing by delivery company was a personal delivery rather than mail. Amended rules now treat these deliveries as similar to mail: filing is completed when the pleading is given to the delivery company. (See 5 C.F.R. ∍ 1201.4(1). *See also* McDavid v. Dep't of Labor, 64 M.S.P.R. 304 (1994); Ally v. Dep't of Navy, 58 M.S.P.R. 680 (1993).

3. Time for filing -- 30 days.

a. Waiver of time requirement for good cause. 5 C.F.R. § 1201.22(c). Walls v. Merit Systems Protection Bd., 29 F.3d 1578 (Fed. Cir. 1994); Anderson v. Dep't of Justice, 999 F.2d 532 (Fed. Cir. 1993); Crawford v. Dep't of State, 60 M.S.P.R. (1994).

(1) Employee has the burden of demonstrating good cause.

(2) Employee must show due diligence or ordinary prudence under the circumstances of the case.

(3) The only relevant factor is whether there is a "reasonable excuse"--any doubts should be resolved in favor of the appellant. Calfee v. OPM, 64 M.S.P.R. 309 (1994); Sanford v. Dep't of Defense, 61 M.S.P.R. 207 (1994).

b. Discretion to grant evidentiary hearing on timeliness issue. See Bagge v. Dep't of Navy, 38 M.S.P.R. 326 (1988).

C. Acknowledgment Order.

1. Standard form

2. Show Cause Orders: Jurisdictional issues. Martinez v. MSPB, 126 F.3d 1480 (Fed. Cir. 1997).

D. Agency Response.

1. Time -- 20 days. 5 C.F.R. § 1201.22(b).

2. Consequences of late filing. Johnson v. Dist. of Columbia Bd. of Education, 7 M.S.P.R. 652 (1981).

3. Content. 5 C.F.R. § 1201.25.

a. Identity of parties.

b. Narrative response stating reasons for action.

c. Adverse action file.

d. Designation of agency representative.

e. Other documents or responses requested by the Board.

NOTE: Documents submitted with the response become part of the record and need not be reintroduced into evidence during the hearing. Boltin v. Dep't of Justice, (Fed. Cir. 1986).

E. Motion Practice. 5 C.F.R. § 1201.55.

1. Form.

2. Coordination with opposing party required before filing procedural motions, including extensions of time and postponing hearing.

3. Commonly asserted motions.

a. Motion to dismiss for lack of jurisdiction.

b. Motion for extension of time. 5 C.F.R. § 1201.55(c).

c. Motion to postpone hearing. 5 C.F.R. § 1201.51(c).

d. MSPB does not have summary adjudication authority. See Currier v. U.S. Postal Service, 79 M.S.P.R. 177(1998). But see Browder v. Dep't of Navy, 81 M.S.P.R. 71 (1999) (AJ can dismiss based on jurisdiction if mixed appeal appellant does not fall within protection of Rehab Act as matter of law).

4. Time for opposition to written motions -- 10 days from service of motion.

F. Discovery. 5 C.F.R. §§ 1201.71 - .75.

1. Purposes.

2. Scope.

a. Nonprivileged.

b. Relevant ("appears reasonably calculated to lead to the discovery of admissible evidence").

3. Methods.

a. Any method provided for in Federal Rules of Civil Procedure.

(1) Written interrogatories.

(2) Requests for production of documents.

(3) Requests for admission.

(4) Depositions. Beware of time frames involved.

b. Federal Rules of Civil Procedure are "instructive."

4. Procedures.

a. Discovery from a party. 5 C.F.R. § 1201.73.

(1) Initial request -- within 25 days of acknowledgment order.

(2) Response or objection are due -- within 20 days of service of request.

(3) Follow up request are due -- within 10 days of service of prior response.

b. Discovery from a nonparty.

(1) Voluntary discovery when possible.

(2) Motion and order for discovery from nonparty.

(3) Response or objection -- within 20 days of service of request (voluntary) or 20 days from order for discovery.

(4) Follow up request -- within 10 days of service of prior response.

c. Motion to compel discovery.

(1) Filed within 10 days of date of service or objections (or 10 days after time limit for response expires).

(2) Content of motion to compel.

(a) Original request.

(b) Response and objections (or affidavit or declaration under 28 U.S.C. § 1746 that no response has been received).

(c) Statement showing that information sought is relevant and material.

(3) Opposition to motion to compel - 10 days from date of service of motion.

d. Motion for protective order. 5 C.F.R. § 1201.55(d).

NOTE: Agency counsel will frequently want to request the administrative judge to delay any discovery going to the merits of the case until after a jurisdictional issue has been resolved. See Kostan v. Arizona Nat'l Guard, 45 M.S.P.R. 173 (1990).

e. Sanctions for noncompliance with order compelling discovery. 5 C.F.R. §§ 1201.43 and 1201.74(c).

(1) Adverse inference.

(2) Exclude evidence and testimony.

(3) Permit use of secondary evidence.

(4) Rule against noncompliant party on issue.

G. Prehearing Submissions and Prehearing Conference(s).

1. Prehearing submissions. Binding on parties.

a. Statement of facts and issues, including affirmative defenses.

b. Stipulations.

c. Witness list with summary of expected testimony.

d. Exhibits.

2. Prehearing conference(s).

a. Purposes.

(1) Facilitate discovery.

(2) Focus issues for resolution.

(3) Obtain stipulations.

(4) Rule on witnesses and exhibits.

(5) Discuss settlement.

b. Record of conferences.

H. Hearing.

1. Right to a hearing

a. Employee has statutory right. 5 U.S.C. § 7701(a).

(1) Timely request.

(2) Waiver.

(3) Can be Video Teleconference (preferred).

b. Agency has no right. Walker v. Veterans Admin., 4 M.S.P.R. 78 (1980): Thompson v. U.S. Coast Guard, 11 M.S.P.R. 461 (1982).

2. Scheduling the hearing -- not earlier than 15 days after notice. 5 C.F.R. § 1201.51.

3. Location. 5 C.F.R. § 1201.51(d).

a. Approved locations. 5 C.F.R. Part 1201, Appendix III.

b. Motion to change location.

(1) Good cause -- a different location will be more advantageous to all parties and the Board.

(2) Standard of review -- prejudice: location affected substantive rights of parties. Pope v. Dep't of Transportation, 12 M.S.P.R. 93 (1982).

4. Order of hearing and burdens of proof. 5 C.F.R. §§ 1201.56-.57.

a. Jurisdiction and timeliness of appeal.

(1) Employee has burden and presents case first.

(2) Preponderance of the evidence.

b. Performance-based and misconduct actions.

(1) Agency has burden.

(2) Performance-based action: substantial evidence.

(3) Misconduct-based action: preponderance of evidence.

c. Affirmative defenses -- employee has the burden of proof by preponderance of evidence.

d. Special Counsel actions. Eidmann v. Merit Sys. Protection Bd., 976 F.2d 1400 (Fed. Cir. 1992).

(1) Corrective action on behalf of employee. 5 U.S.C. § 1214.

(2) Disciplinary action against supervisor. 5 U.S.C. § 1215.

I. Record.

1. Content. 5 C.F.R. § 1201.54.

a. Pleadings.

b. Orders and decisions.

c. Exhibits.

d. Verbatim record of testimony (tape recording or transcript). 29 C.F.R. § 1201.53.

2. Closing the record. 5 C.F.R. § 1201.58.

J. Initial Decision by Administrative Judge. 5 C.F.R. § 1201.111.

1. Content.

a. Findings of fact and conclusions of law with reasons therefor. Hillen v. Dep't of Army, 35 M.S.P.R. 453 (1987).

b. Order making final disposition.

c. If employee prevails, statement regarding interim relief.

d. Date decision will become final (35 days after initial decision unless timely petition for review filed).

e. Review and appeal rights.

2. Interim relief. 5 U.S.C. § 7701(b)(2); 5 C.F.R. § 1201.111(c).

a. Agency options.

(1) Grant ordered relief.

(2) Place employee in paid, nonduty status if agency determines that employee's presence at worksite would be unduly disruptive. DeLaughter v. U.S. Postal Serv., 3 F.3d 1522 (Fed. Cir. 1993); Scofield v. Dep't of Treasury, 53 M.S.P.R. 179 (1992) (MSPB has no authority to review determination that reinstatement would be unduly disruptive).

(3) Detail or assign the employee to a position other than the former position, or return him to the former position with restricted duties. The employee must receive the same pay and benefits as in the former position. The agency decision is NOT subject to review for bad faith. King v. Jerome, 42 F.3d 1371 (Fed. Cir. 1994), rev'ing. Jerome v. Small Business Admin., 56 M.S.P.R. 181 (1993).

(4) The agency may reinstate employee under interim relief order by temporary appointment pending outcome of PFR. Avant v. Dep't of Navy, 60 M.S.P.R. 467 (1994).

b. Failure to produce evidence of compliance with (1) or (2) above before the date the petition for review is due will result in dismissal of agency's petition for review. 5 C.F.R. § 1201.115(b)(4). Shaishaa v. Dep't of Army, 60 M.S.P.R. 359 (1994); White v. U.S. Postal Serv. 60 M.S.P.R. 314 (1994); Reid v. U.S. Postal Serv., 61 M.S.P.R. 84 (1994); Harrell v. Dep't of Army, 60 M.S.P.R. 164 (1993).

c. An employee may challenge the agency's compliance with an interim relief order by moving to dismiss the agency's petition for review. DeLaughter v. U.S. Postal Serv., 3 F.3d 1522 (Fed. Cir. 1993); Ginocchi v. Dep't of Treasury, 53 M.S.P.R. 62 (1992).

d. KEY!! Do NOT cancel the underlying action if the AJ orders interim relief. The appeal then becomes moot! Cain v. Defense Commissary Agency, 60 M.S.P.R. 629 (1994); Trotter v. Dep’t of Defense, 54 M.S.P.R. 563, 564 (1992).

3. Initial decisions lack precedential value. 5 C.F.R. § 1201.113.

K. Petition for review (PFR). 5 C.F.R. §§ 1201.114-.117.

1. Time limits.

a. PFR -- 35 days after initial decision issued. Hall v. Dep't of Army, 59 M.S.P.R. 161 (1993).

b. Cross-petition for review -- 25 days after service of PFR.

c. Response to PFR or cross-petition -- 25 days after service of PFR or cross-petition.

2. Grounds for granting petition. 5 C.F.R. § 1201.115(c). Dunning v. NASA, 718 F.2d 1170 (D.C. Cir. 1983).

a. New and material evidence.

b. Erroneous interpretation of law or regulation.

3. Proof of interim relief.

L. MSPB Review of Initial Decision. 5 C.F.R. § 1201.116.

1. Nature.

a. Written briefs.

b. Oral argument.

2. Action.

M. Intervention Before the Board. 5 C.F.R. §§ 1201.34 and 1201.114(g).

1. Intervention of right.

a. Director, OPM.

b. Special Counsel.

2. Permissive intervenors -- anyone who will be directly affected by the outcome of the proceeding.

3. Amicus curiae -- discretion of Board.

N. OPM Petition for Reconsideration. 5 U.S.C. § 7703(d); 5 C.F.R. § 1201.118.

1. Grounds.

a. Board erred in interpreting civil service law, rule, or regulation affecting personnel management.

b. Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.

NOTE: The MSPB may not question the authority of OPM to seek reconsideration; OPM may seek reconsideration whenever factual issues are in dispute. King v. Lynch, 21 F.3d 193 (Fed. Cir. 1994), reversing Newman v. Lynch, 897 F.2d 1144 (Fed. Cir. 1990).

2. Time -- 35 days after date of service of Board's order on the employing agency (generally not OPM).

O. Judicial Review.

1. Review is by the U.S. Court of Appeals for the Federal Circuit (CAFC). 5 U.S.C. § 7703; 5 C.F.R. § 1201.119.

2. The jurisdiction of the CAFC is concurrent with the jurisdiction of the Board. Del Marcelle v. Dep't of Treasury, 59 M.S.P.R. 251 (1993).

V. PROCESSING A MIXED CASE. 5 U.S.C. § 7702; 5 C.F.R. PART 1201, SUBPART E.

A. Election of Remedies.

B. Time for Filing Appeal -- 30 days. 5 C.F.R. § 1201.154(a).

C. Time for Processing Appeal -- 120 days. 5 C.F.R. § 1201.156.

D. Review of MSPB Decision by EEOC. 5 C.F.R. § 1201.161.

E. MSPB Action on EEOC Decision. 5 C.F.R. § 1201.162.

1. Reaffirm original action.

2. Concur and adopt in whole EEOC decision.

F. Referral to Special Panel. 5 C.F.R. § 1201.171.

1. Certification to Special Panel upon reaffirmance of original action.

2. Membership of Special Panel.

a. Chairman of Special Panel (appointed by President with advice and consent of Senate).

b. Member appointed by MSPB Chairman.

c. Member appointed by EEOC Chairman.

G. Judicial Review. 5 C.F.R. § 1201.175.

1. Appropriate United States District Court.

2. Bifurcated review. Morales v. Merit Sys. Protection Bd., 932 F.2d 800 (9th Cir. 1991); Rana v. United States, 812 F.2d 887 (4th Cir. 1987).

a. De novo review of discrimination issues.

b. Record review of nondiscrimination issues.

VI. SETTLEMENT. 5 C.F.R. § 1201.41(C).

A. Policy. Martin v. U.S. Postal Serv., 34 M.S.P.R. 326 (1987).

B. Role of the Administrative Judge.

1. Initiation of settlement discussion.

2. Waiver of prohibitions against ex parte communications. 5 C.F.R. § 1201.47(c).

C. Including Settlement Agreement in Record.

1. Requires initial determination of jurisdiction over the appeal.

2. Either party may file agreement.

3. Administrative judge must approve agreement.

4. Effect.

a. Dismissal of appeal with prejudice.

b. MSPB retains jurisdiction to ensure compliance with agreement.

D. Content of Agreement.

1. Waiver of statutory rights. Rogers v. U.S. Postal Serv., 59 M.S.P.R. 647 (1993).

2. Attorney fees.

3. OWBPA: CAUTION needed in mixed cases alleging age discrimination.

E. Setting Aside a Settlement Agreement.

1. Agreement must have been received into record. Gorelick v. OPM, 45 M.S.P.R. 81 (1990).

2. Grounds. Dos Santos v. Veterans Admin., 56 M.S.P.R. 399 (1993).

a. Coercion.

b. Lack of authority of representative.

c. Fraud.

d. Mutual mistake.

VII. RELIEF.

A. MSPB Authority. 5 U.S.C. § 1204(a)(2).

1. Affirm or overturn agency decision. See Burroughs v. Dep't of Army, 918 F.2d 170 (Fed. Cir. 1990); Weaver v. Dep't of Agric., 55 M.S.P.R. 569 (1992).

2. Mitigation of penalty in Chapter 75 cases. Kirk v. Defense Logistics Agency, 59 M.S.P.R. 523 (1993). Not all agency charges sustained. Board will now apply reasonable penalty standard to make penalty selection and direct agency to implement penalty selected by the Board. White v. U.S. Postal Serv., 71 M.S.P.R. 521 (1996).

B. Traditional Remedies -- Status Quo Ante.

C. Stay of Personnel Action.

D. Interim Relief. 5 C.F.R. Part 772.

E. Attorney Fees. 5 U.S.C. § 7701(g)(1), 5 C.F.R. § 1201.37.

1. Entitlement criteria under 5 U.S.C. § 7701(g). Van Fossen v. Merit Sys. Protection Bd., 788 F.2d 748 (Fed. Cir. 1986); Sterner v. Dep't of Army, 711 F.2d 1563 (Fed. Cir. 1983); Roth v. U.S. Postal Serv., 54 M.S.P.R. 298 (1992).

   a. Prevailing party. Irwin v. Small Business Admin., 45 F.3d 417 (Fed. Cir., 1995); Ray v. Health and Human Serv. 64 M.S.P.R. 100 (1994).

      (1) Obtained an enforceable judgment or enforceable relief by settlement:

      (2) Relief is significantly due to initiation of MSPB proceeding.

      (3) Attorney fees were incurred, and amount of fees is reasonable.

   b. Fees warranted in the interests of justice. Rose v. Dep't of Navy, 36 M.S.P.R. 352 (1988); Gollis v. Dep't of Navy, 54 M.S.P.R. 38 (1992); OR

   c. Charges clearly without merit. Hutchcraft v. Dep't of Transportation, 55 M.S.P.R. 138 (1992).

2. Entitlement criteria under 42 U.S.C. § 2000e-5(k).

   a. Prevailing party.

   b. Decision is based on finding of discrimination.

   c. No interest of justice standard.

3. Entitlement criteria under 5 U.S.C. § 1221(g).

   a. Prevailing party.

b. Decision based on a finding of a prohibited personnel practice.

c. No interest of justice standard.

4. Entitlement criteria under 5 U.S.C. § 1204(m).

a. Prevailing party in disciplinary action brought by OSC.

b. Fees warranted in the interests of justice or charges clearly without merit.

5. Reasonable fees.

a. General rule -- lodestar (customary rate or prevailing market rate x number of hours reasonably expended). Heath v. Dep't of Transportation, 66 M.S.P.R. 101 (1995); Blum v. Stenson, 465 U.S. 886 (1984); Montreuil v. Dep't of Air Force, 55 M.S.P.R. 685 (1992).

b. Fees for union attorneys. Goodrich v. Dep't of Navy, 733 F.2d 1578 (Fed. Cir. 1984), cert. denied, 469 U.S. 1189 (1985); Kean v. Dep't of Army, 41 M.S.P.R. 618 (1989); Powell v. Dep't of Treasury, 19 M.S.P.R. 174 (1984); (cost = salary + overhead). But cf. AFGE, Local 3882 v. FLRA, 944 F.2d 922 (D.C. Cir. 1991) (market rate for union attorney in FLRA proceeding); Kean v. Stone, 968 F.2d 119 (3d Cir. 1993)(market rate where discrimination found).

c. No enhancement for contingent fee arrangements. City of Burlington v. Dague, 112 S. Ct. 2638 (1992); Pecotte v. Dep't of Air Force. 55 M.S.P.R. 165 (1992).

d. Travel expenses are recoverable as part of an attorney fees award. Wilson v. U.S. Postal Serv., 58 M.S.P.R. 653 (1993).

6. Fee petition.

a. Time for filing.

(1) 20 days after initial decision becomes final; or

(2) 25 days after issuance of final decision if PFR filed'

b. Content.

(1) Statement of why entitled to fees.

(2) Contemporaneous time records.

(3) Terms of fee agreement (if any).

(4) Evidence of customary or market rate.

c. Opposition to petition.

(1) Time -- set by judge.

(2) Inflated petition. **See Keener v. Dep't of Army, 136 F.R.D. 140 (M.D. Tenn. 1991) affirmed 956 F.2d 269, (6th Cir. 1992).

d. PFR on decision on fee petition—35 days.

VIII. COMPLIANCE AND ENFORCEMENT.

A. Statutory Authority. 5 U.S.C. §§ 1204(a)(2) and 1204(d)(2).

B. Petition for Enforcement. 5 C.F.R. §§ 1201.181-.183.

IX. NEW DEVELOPMENTS

A. Charging: Otero v. Postal Service, MSPB Docket No. AT-0752-95-0922-I-1 (February 6, 1997)

1. Balance efficient charging against notice requirement. See, Mason v. Dep't of Navy, 70 M.S.P.R. 584 (1996).

B. Penalty: Devall v. Navy, 178 F.3d 1246 (Fed. Cir. 1999), reversing, White v. U.S. Postal Service, 71 M.S.P.R. 521 (1996).

C. How to change the past? Proposals control the process.

X. CONCLUSION.

Individual EEO Complaint Procedures

Major Brad Bell

Central Labor Law Office

Authority

- Statutes
  - Title VII
  - Rehabilitation Act
  - ADEA
  - Equal Pay Act
- Regulations
  - 29 C.F.R. 1614
  - MD - 110
  - AFI 36-1201

EEO Complaint Summary

Incident

Initial Contact w/ EEO Counselor

Counseling or ADR

Formal Complaint

45 Days

30 - 90 Days

15 Days

EEO Complaint Summary

Formal Complaint

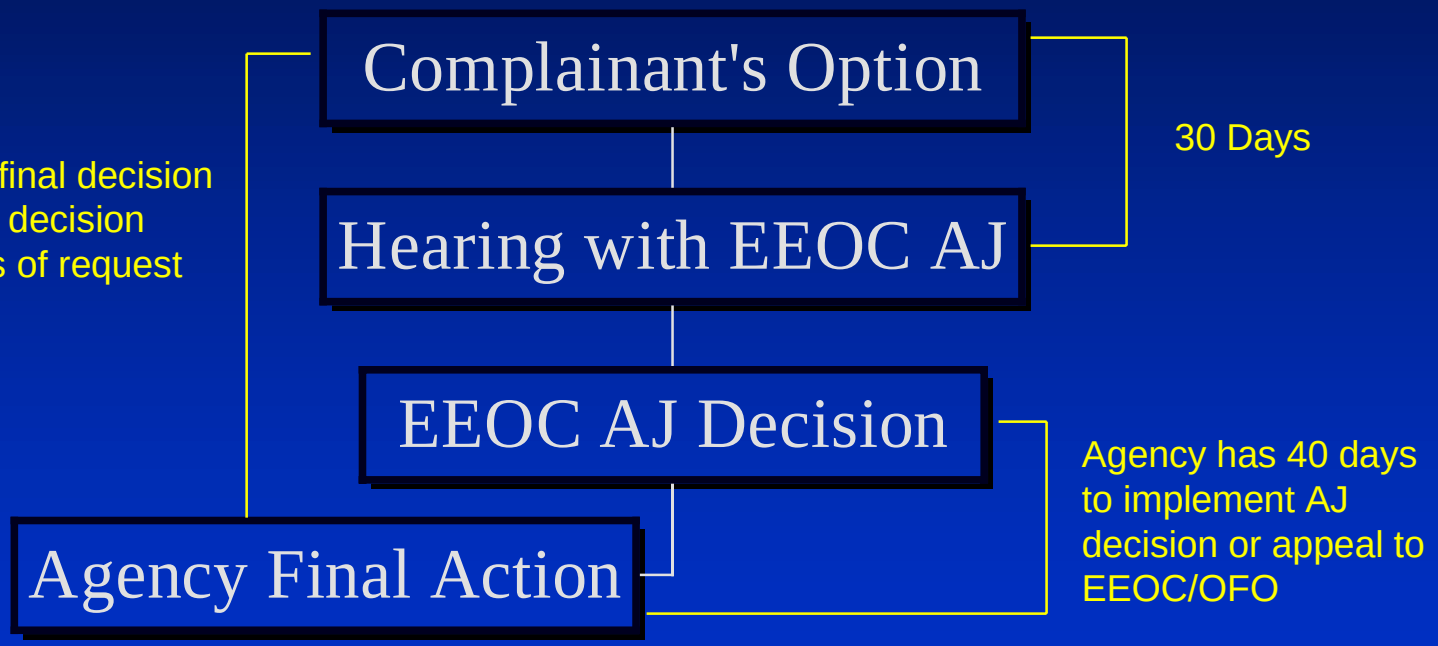
Accept

Investigation

Report to Complainant

180 Days

EEO Complaint Summary



EEO Complaint Summary

Agency Final Action

Appeal to EEOC/OFO

Request to Reopen & Reconsider

Complainant 30 Days

Party may request w/in 30 days of receipt of decision of EEOC/OFO

Rationale For Changing 1614

- Create More Efficient Process
- Improve EEOC's Effectiveness in Enforcement
- Establish a Fairer System
- Overcome Delays
- Avoid Fragmentation of Cases

Fragmentation

- Cause:
  - Improperly distinguishing between factual allegations in support of a legal claim and the legal claim itself, resulting in the breaking up of some claims that involve a number of different allegations.
- Susceptible Claims:
  - Harassment
  - Continuing Violation

Fragmentation

- Unnecessarily Multiplies Complaints
- Burdens EEO process
- Renders non-meritorious otherwise valid and cognizable claims

Identifying Claims

- Two components of a claim:
  - Policy or practice being challenged; and
  - Basis (race, color, religion, sex, national origin, age, disability or retaliation)

- Need to distinguish claim from evidence supporting claim

Agency ADR Program

- Agencies Must Establish ADR Program
  - Pre-complaint Process
  - Formal Complaint Process
- Agency Does Not Have to Offer ADR for Each Claim
- Cannot Exclude Entire Bases
- If Offered, Claimant Chooses Between ADR and Counseling

Agency ADR Program

- Neutral
- Voluntary
- Confidential
- Enforceable

ADR & Counseling

- Information on rights, responsibilities & timeframes must be provided in writing
- If ADR available, EEO counselor advises aggrieved individual of:
  - right to elect participation in ADR; or
  - traditional counseling
- If ADR offered and selected, no traditional counseling

ADR & Counseling

- 90 Days For ADR
- Counselors Either:
  - Issue report indicating complaint resolved during ADR; or
  - Issue Notice of Final Interview and prepare Counselor's Report

Counselor's Report

- Counselor's Report Should Contain:
  - Summary of initial counseling session;
  - Issues and bases of claims; and
  - Reporting that ADR was elected and unsuccessful
- Do not disclose:
  - contents of settlement discussion
  - Identity of complainant unless given permission or unless complainant files formal complaint

Amending Complaints

- Agency must allow complainant to amend a complaint at any time before the investigation is finished to include claims that are like or related to the original complaint
- AJ has discretion to add issues or claims like or related to the original complaint.
- No counseling required

Consolidating Complaints

- Two or more complaints filed by same complainant must be consolidated by agency after appropriate notification

- Complaints from two or more complainants with substantially similar claims may be consolidated

Amending and Consolidating Complaints

- Investigation shall be completed within the earlier of:
  - 180 days after the filing of the last complaint, or
  - 360 days after the filing of the original complaint.
- A hearing request may be made 180 days from the date of the initial complaint

Partial Dismissal

- Partial dismissal may not be appealed until final action taken
- The agency shall notify complainant of its reasons for dismissal and document complaint file
- Dismissed portion not investigated

Partial Dismissal

- Final decision from agency shall address all claims in complaint, including reasons for partial dismissal

- AJ will evaluate agency reasons

Hearing Request

- Complainant must send written request directly to appropriate EEOC office
- Complainant must notify agency of request
- Agency must forward complaint file to EEOC within 15 days of request
- If request mistakenly sent to agency, it must forward request and complaint file to appropriate EEOC office

Responsibilities of AJ

- AJ assumes full responsibility for complaint
- AJ presides over any supplementation of complaint file
- No more remands to agencies

Summary Judgment

- Decision Without Hearing
  - Material facts not in genuine dispute
  - Mere recitation of factual dispute is insufficient
  - Non-moving party must explain how the facts in dispute are material
  - Request at least 15 days before hearing

Dismissing Complaint

- Lack of Jurisdiction
- Abuse of Process
- Not Employee
- Failure to State Claim
- Not Aggrieved
- Proposed Action
- Identical
- Suit Filed
- Complaint About Process
- Moot
- Not Counseled
- Untimely Informal
- Untimely Formal
- Failure to Prosecute
- Absent Complainant

Dismissing Complaint

- Agency Dismissal of Entire Complaint
  - Prior to Request for a Hearing
- Agency Dismissal of Part of Complaint
  - Prior to OCI Investigation
  - AJ Reviews Dismissal at Hearing
  - Can Not Appeal Until Agency Final Action
- AJ's Dismissal of Complaint at Hearing
  - AJ Initiative or Agency Motion

Dismissing Complaint
No Jurisdiction

- AF Has No Jurisdiction over Action
  - Complainant v. Other Agencies

Dismissing Complaint Lacks Standing

- Not an Applicant, Employee, Former Employee
  - Third Party Organizations
  - Definition of Employee
  - 11 Spirides Factors

Dismissing Complaint Failure To State Claim

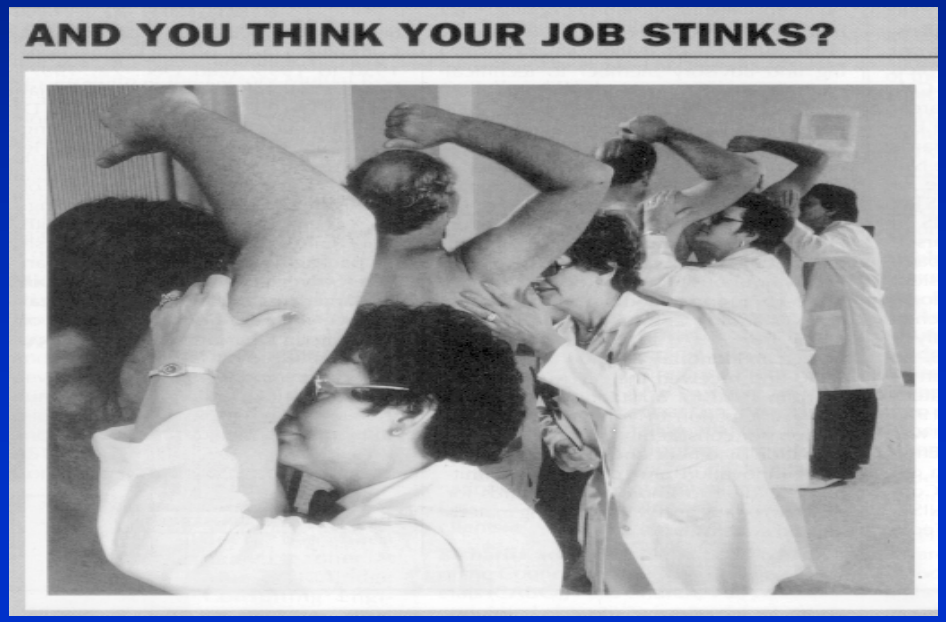
- Standard
  - In determining whether a complaint states a claim, the proper inquiry is whether the conduct as alleged would constitute an unlawful employment practice under the EEO statutes

Dismissing Complaint Failure To State Claim

- Harassment
  - Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment - an environment that a reasonable person would find hostile or abusive - is beyond Title VII's purview. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22 (1993)
  - Isolated comments, petty slights, and trivial annoyances are not actionable

Dismissing Complaint
Failure To State Claim

- Generalized Allegations
  - “My job stinks,” “My boss is mean,” or “I don’t like the people I work with,” are insufficient



Dismissing Complaint
Failure To State Claim

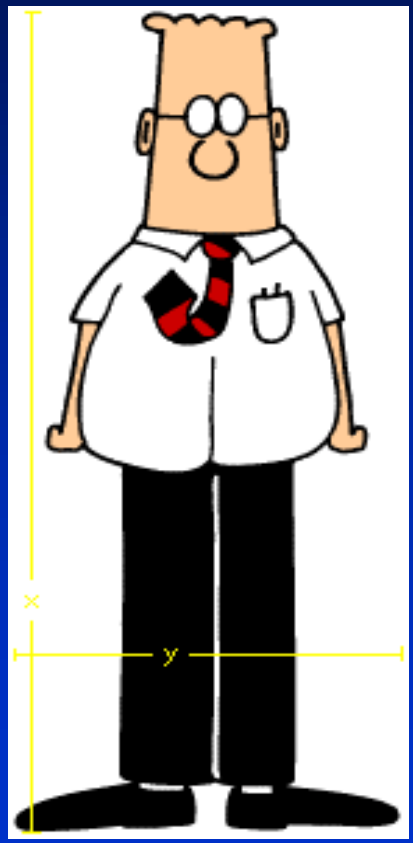
- Age < 40
  - Individuals under the age of 40 have no claim under the ADEA

Dismissing Complaint Failure To State Claim

- Employment
  - The complaint must involve employment matters

Dismissing Complaint Failure To State Claim

- Not Aggrieved
  - Does not suffer a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy
    - " I cried because I did not have an office with a door until I met a man who had no cubicle." Dilbert



Dismissing Complaint Failure To State Claim

- Counseling by supervisor
  - No notes or record
- Settlements
  - Complaining over terms of another employee's EEO settlement

Dismissing Complaint

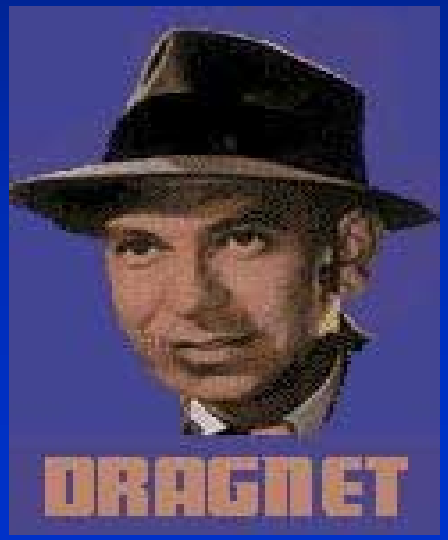
- Union Activities
  - Discrimination against bargaining unit member for participation in union activities is issue for the FLRA, not the EEOC

Dismissing Complaint

- Reprisal
- Marital Status
- FOIA, PA, FECA
- Family Medical Leave Act

Dismissing Complaint Preliminary Steps

- Proposed Disciplinary Action
- Performance Improvement Plan
- Subject to OSI Investigation



Dismissing Complaint Identical To Prior Action

- EEO Complaint, MSPB Appeal, NGP
- Identical Subject Matter & Time
- No Need to Have Alleged Discrimination

Dismissing Complaint Mootness

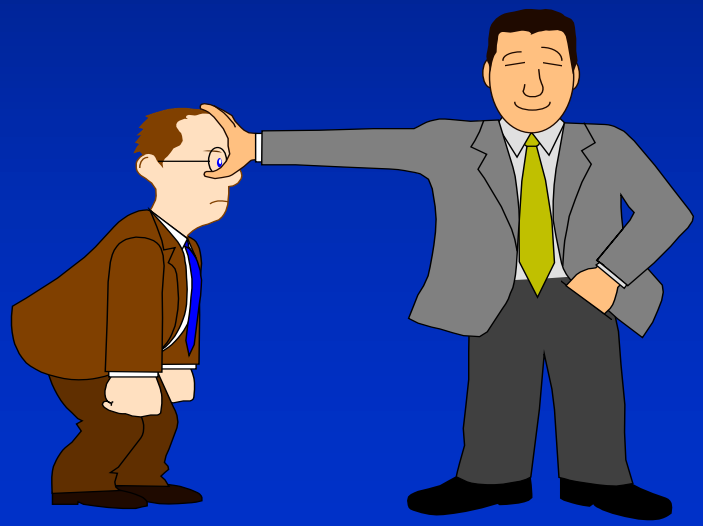
- Elements
  - Violation Won’t Recur
  - Eradication of Effects of Violation
- Typical Case
  - Complainant Leaves Agency
  - No Economic Relief
- More Difficult w/ Comps

Dismissing Complaint
Abuse Of Process

- Abuse of Complaint Process
  - Clear pattern of misuse of the EEO process for a purpose other than the prevention and elimination of employment discrimination
  - Rare
  - Numerous filings alone is not enough
  - Must also show frivolous, identical, lack of specificity, issues previously resolved

Dismissing Complaint
Spin Off Complaints

- Complaint About the Process
  - Agency must dismiss a complaint that alleges dissatisfaction with the processing of a previously filed complaint



Dismissing Complaint Untimely

Dismissing Complaint Untimely Informal

- 45 Days to Contact Counselor
  - With Intent to Initiate Counseling
- When Time Limits Begin
  - Date of Personnel Action
  - Discrimination Apparent or Should Have Been Apparent
    - Objective Test

Dismissing Complaint
Waiver Of Time Limits

- Complainant Not Notified of Limits
  - Constructive Knowledge
- Circumstances Beyond Complainant's Control
- Agency Misconduct
- Continuing Violation Theory
  - One Timely Allegation
  - Related Nexus or Theme

Dismissing Complaint Untimely Formal

- 15 Days After Notice of Final Interview
- Exceptions
  - Not Notified of Time Limits
  - Circumstances Beyond Control
  - Other Circumstances

Dismissing Complaint
Failure To Prosecute

- Complainant Fails to Provide Information Within 15 Days of Receipt of Request
  - Must warn of cancellation
  - Insufficient available information to adjudicate claim
  - Requires “contumacious conduct”

Offers Of Full Relief

- An agency's certified offer of full relief is no longer a basis for dismissal under the new rules

Offers Of Resolution

- When Represented by Attorney
  - Any time from the filing of a formal complaint until 30 days before a hearing
- Not Represented
  - After notice that an AJ has been appointed to conduct a hearing, until 30 days before a hearing

Offers Of Resolution

- Content of Offer
  - Written
  - Failure to Accept Notice
    - Loss of atty's fees and costs incurred after 30-day acceptance period if final award is less than offer
  - Include Attorney's Fees, Costs, Non monetary and Monetary Relief
- Time Limit to Accept
  - 30 Days from receipt of offer

AJ Decisions

- AJ will issue decision after motion for summary judgment or after a hearing on the merits of the case

- Agency has 40 days to issue final order, which will either:
  - Implement AJ decision; or
  - Not implement AJ decision and appeal to EEOC

AJ Decisions

- Agency may not write new decision
- AJ decision becomes agency final action if agency does not issue final order within 40 days

Remedies And Relief

Remedies And Relief

- Where Discrimination Found
  - Agency must provide “make whole” relief including back pay and compensatory damages
  - Presumption of award of attorney’s fees

Attorney's Fees

- AJ orders and calculates
- Attorney must submit statement of fees and costs
- Agency may respond to fee statement.
- The AJ (or agency, or EEOC, if applicable) will determine award

Pre-Complaint Attorney's Fees

- Fees still not available pre-complaint, with two exceptions:
  - Agency may pay pre-complaint fees in settlements, and
  - Agency must pay pre-complaint fees where AJ finds for complainant, agency appeals, and EEOC upholds AJ decision

Interim Relief

- Interim relief is required when:
  - AJ finds discrimination;
  - Restores complainant to position; and
  - Agency appeals

- Agency must conditionally place complainant in position during appeal

Interim Relief: Exception

- Agency may decide not to restore complainant to position if unduly disruptive

- Agency must provide prospective pay and benefits

Standard of Review

- Factual findings of AJ after hearing will be subject to substantial evidence standard of review

- All other decisions subject to de novo review

Substantial Evidence

- EEOC will defer to AJ's factual findings unless there is a good reason not to

- No new evidence considered unless not reasonably available at the hearing

Reconsideration

- Commission has greater discretion to grant or deny reconsideration. The requesting party must show:
  - Clearly erroneous interpretation of material fact or law; or
  - Substantial impact on the policies practices, or operations of the agency

The End

CHAPTER G

54TH FEDERAL LABOR RELATIONS COURSE

Individual EEO Procedures

I. REFERENCES.

A. Primary.

1. 42 U.S.C. §§ 2000e-2000e-17. Title VII, Civil Rights Act.

2. 29 U.S.C. § 633a. Age Discrimination in Employment Act.

3. 29 U.S.C. §§ 790-794. Rehabilitation Act of 1973, as amended.

4. 29 C.F.R. Part 1614.

5. AFI 36-1201 (1994).

B. Secondary.

1. A Guide to Federal Sector Equal Employment Law and Practice; Ernest C. Hadley. Updated annually.

2. EEO Management Directive 110 (1999).

II. ADMINISTRATIVE COMPLAINT PROCESS AND PROCEDURES—NONMIXED CASES.

A. Informal Stage: Employee Contacts EEO Counselor.

1. Timing—Aggrieved persons who believe they have been discriminate against on the basis of racer, color, religion, sex, national origin, age, or disability or who believes s/he has been subjected to sexual harassment or retaliated against for participating in the complaint process must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory - the "informal complaint" 29 C.F.R. § 1614.105(a), AFI 36-1201, Section B, Paragraph 2.

   a. Commencement of 45-day period.

      (1) Personnel action—effective date of action.

      (2) Event not constituting a personnel action—date individual knew or reasonably should have known of discriminatory event.

   b. Tolling of 45-day period. 29 C.F.R. § 1614.105(a)(2). Initial contact beyond 45 days will be permitted if the employee was not notified of and was otherwise not aware of the 45-day limit, or did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, or was prevented by circumstances beyond his control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

   c. Posting requirements. 29 C.F.R. § 1614.102(b)(5). Make written materials available to all employees and applicants informing them of the variety of equal employment opportunity programs and administrative and judicial remedial procedures available to them and post such written materials throughout the workplace

   d. Waiver of time limit. Oaxaca v. Roscoe, 641 F.2d 386 (5th Cir. 1981).

2. Counselor actions. 29 C.F.R. § 1614.105.

   a. Initial interview. To be deemed as initiating contact the aggrieved person must state a basis. Place all allegations of discrimination in the pre-complaint process, regardless of timeliness, merit, or other considerations. AFI 36-1201, Section 2, Paragraph B.

(1) Advise complainant. Counselors must advise individuals in writing of their rights and responsibilities including the right to request a hearing or an immediate final decision after an investigation by the agency in accordance with § 1614.108(f).

(2) Counselors shall advise aggrieved persons that, where the agency agrees to offer ADR in the particular case, they may choose between participation in the alternative dispute resolution program and the counseling activities. § 1614.105(b)(2).

(3) Gather facts from complainant.

(4) Identify responsible management official (RMO), if any.

b. Counselor inquiry, including interview with RMO. Counselor reviews applicable records and interviews the responsible management officials or co-workers to find out the reasons for the action taken.

c. Final interview.

(1) Time—within 30 days of contact. This period may be extended for up to an additional 60 days if both the employee and the agency agree. If the aggrieved person chooses to participate in an ADR procedure, the pre-complaint processing period shall be 90 days. 29 C.F.R. § 1614.105(d)-(f).

(2) Counselor should discuss what occurred during the EEO counseling process in terms of attempts at resolution. EEO MD-110, Section VI, Paragraph D.

(3) Notice of right to file formal complaint. Advise the complainant in the final interview letter to file any formal complaint with the Chief EEO Counselor or local Commander within 15 calendar days of receipt of the final interview notice. AFI 36-1201, Section B, Paragraph 2.

(4) A postmark dated within the requisite 15 days will be evidence of timely filing. EEO MD-110, Section VI, Paragraph D.

(5) Counselor must **not** indicate whether s/he believes the discrimination complaint has merit. EEO MD-110, Section VI, Paragraph D. The Counselor shall not attempt in any way to restrain the aggrieved person from filing a complaint. 29 C.F.R. § 1614.105(g).

d. Final report. Submit a narrative report to the Chief EEO Counselor within 5 calendar days of the date the formal complaint is filed. AFI 36-1201, Section B, Paragraph 2.

e. Identity of complainant. The Counselor shall not reveal the identity of an aggrieved person who consulted the Counselor, except when authorized to do so by the aggrieved person, or until the agency has received a discrimination complaint from that person involving that same matter.

B. Formal stage.

1. Written complaint to EEO Officer. 29 C.F.R. § 1614.106(b). Complainant may amend at any time prior to conclusion of investigation (like or related only) 29 C.F.R. §1614.106(d). May amend on motion to judge after request for hearing. Id.

a. Timing—within 15 days of final interview notice with EEO Counselor.

b. Dismissals of complaint. Prior to a request for a hearing in a case, the agency can dismiss an entire complaint for the following reasons: 29 C.F.R. § 1614.107(a).

(1) Failure to state a claim under 29 C.F.R. § 1614.103. "The Commission finds that the agency properly dismissed appellant's complaint for failure to state a claim. The commission has held that a remark or comment, unaccompanied by concrete action, is not a direct and personal deprivation sufficient to render an individual aggrieved. Appellant's complaint does not assert either a concrete harm affecting a term, condition, or privilege of employment or a pattern of conduct showing harassment." *Welsh v. Dep't. of Navy*, EEOC Appeal No. 01965331 (1998). 29 C.F.R. § 1614.107(a)(1)

(2) Identical complaint. 29 C.F.R. § 1614.107(a)(1)

(3) Not against the proper agency. 29 C.F.R. § 1614.107(a)(1)

(4) Untimely—at either formal or informal stage 29 C.F.R. § 1614.107(a)(2)

(5) Pending civil action in a United States District Court in which the complainant is a party provided that at least 180 days have passed since the filing of the administrative complaint. 29 C.F.R. § 1614.107(a)(3)

(6) Raised in negotiated grievance procedure that permits allegations of discrimination or in an appeal to the MSPB. 29 C.F.R. § 1614.107(a)(4)

(7) Issue is moot, or issue is a proposal to take a personnel action or other preliminary step to taking a personnel action. 29 C.F.R. § 1614.107(a)(5)

(8) Complainant cannot be located. 29 C.F.R. § 1614.107(a)(6)

(9) Failure to prosecute. 29 C.F.R. § 1614.107(a)(7)

(10) Spin-off complaints. ". . .dissatisfaction of processing of a previously filed complaint." 29 C.F.R. §1614.107(a)(8).

(11) Abuse of Process. 29 C.F.R. §1614.107(a)(9).

c. Administrative Judges (AJ) may dismiss complaints for the foregoing reasons on their own initiative, after notice to the parties, or upon an agency's motion to dismiss a complaint. 29 C.F.R. §1614.109(b).

d. Agency may **no longer** dismiss for failure to accept an offer of full relief.

e. Appeal of dismissal. A complaint dismissed in whole by the agency may be appealed, within 30 days of receipt, to the EEOC's Office of Federal Operations (EEOC/OFO) 29 C.F.R. § 1614.402(a).

f. Partial Dismissals. There is no longer an interlocutory appeal right to the OFO on partial dismissals. When an agency dismisses some but not all of the claims in a complaint, it must notify the complainant in writing and must explain the rational for the decision and shall notify the complainant that those claims will not be investigated. This determination is reviewable by the AJ if a hearing is requested on the remainder of the complaint. The AJ may determine to supplement the file through testimony or other means if he determines the dismissed issues were dismissed in error. Issue is not appealable until final action is taken on the remainder of the complaint. 29 C.F.R. §1614.107(b).

g. Investigation. Office of Complaint Investigations (OCI) investigator collects the exhibits gathered by the agency representative and the complainant, interviews the witnesses, drafts the affidavits for the witnesses to sign, and writes a report.

h. Timing of Investigation. Agencies must complete the investigation within 180 days of the filing of the complaint, or where a complaint was amended, within the earlier of 180 days after the last amendment to the complaint or 360 days after the filing of the original complaint (with a possible extension of up to 90 days if the employee and agency agree in writing). 29 C.F.R. §§ 1614.108(f) and 1614.108(e).

i. Complainant decides on course of action—within 30 days of receipt of the investigative file.

(1) Request a final decision from the agency head based on the record.

(2) Request a hearing and decision from an EEOC administrative judge.

2. EEOC Hearing. 29 C.F.R. § 1614.109.

a. Prehearing Issues.

(1) Request for Hearing. 29 C.F.R. 1614.108(g) Complainants make requests for a hearing directly to the EEOC office indicated in the agency's acknowledgment letter. The Complainant must send a copy of the request for a hearing to the agency EEO office.

(2) Offer of Resolution. 29 C.F.R. 1614.109(c).

(a) Timing of Offer if Represented by an Attorney. Any time after the filing of the written complaint but not later than the date an AJ is appointed to conduct a hearing.

(b) Timing of Offer Whether Represented by an Attorney or Not. Any time after the parties have received notice that an AJ has been appointed to conduct a hearing, but not later than 30 days prior to the hearing.

(c) Content.

(i) Written

(ii) Notice of Consequences. If the complaining party does not accept the offer and ultimately obtains no more relief than what was offered, no attorney's fees or costs will be payable for work done after the offer was not accepted.

(iii) Timing for Acceptance. 30 days from receipt of the offer of resolution.

(3) Prehearing order. 29 C.F.R. § 1614.109(g)(1),(2). The parties may limit the issues for hearing by filing a statement at least 15 days before the hearing showing that there is no genuine dispute as to some or all material facts.

(4) Summary disposition. 29 C.F.R. § 1614.109(g)(3).

(5) Discovery. 29 C.F.R. § 1614.109(d). The parties may engage in discovery before the hearing. AJ may limit the quantity and timing of discovery. Evidence may be developed through interrogatories, depositions, and requests for admissions, stipulations or production of documents.

(a) Grounds for Objection. A party may object to requests for discovery that is irrelevant, overburdensome, repetitious, or privileged.

b. Hearing procedures.

(1) Evidence. 29 C.F.R. § 1614.109(e). The AJ shall receive into evidence information or documents relevant to the complaint. Rules of evidence shall not be applied strictly, but the AJ shall exclude irrelevant or repetitious evidence.

(2) Witnesses. 29 C.F.R. § 1614.109(e). Agencies shall provide for the attendance at a hearing of all **employees** approved as witnesses by an AJ.

(3) Alternatives to testimony. Written statement under penalty of perjury. 29 C.F.R. § 1614.109(f)(2).

(4) Don't forget the basics! Agency held liable when it failed to put into evidence that it had a strong, widely disseminated, policy against discrimination **and** that it had an effective complaint procedure in place. *Parker v. Dep't. of Army*, EEOC Appeal No. 01943227 (1997).

c. Record of hearing. 29 C.F.R. § 1614.109(h). The hearing shall be recorded and the agency shall arrange and pay for verbatim transcripts.

d. Decision. 29 C.F.R. § 1614.109(i). Within 180 days of receipt of the complaint file from the agency, the AJ will issue a decision on the complaint, and will order appropriate remedies and relief where discrimination is found.

C. Final Agency Action After Hearing. 29 C.F.R. § 1614.109(i). When an AJ has issued a decision, the agency shall take final action on the complaint by issuing a final order within 40 days of receipt of the hearing file and the AJ's decision.

1. Content of Final Order. 29 C.F.R. § 1614.110(a). The final order will indicate whether or not the agency will implement the AJ's decision. The final order shall also contain notice of the right to appeal to the EEOC, notice of the right to file a civil action in federal district court, and the applicable time limits for appeals and lawsuits.

2. Agency Appeal of AJ Decision. 29 C.F.R. § 1614.403(d). If the agency is not going to fully implement the AJ's decision, then it must simultaneously file an appeal to the EEOC/OFO. The agency's appeal brief in support of the appeal needs to be submitted to EEOC/OFO within 20 days of filing the notice of appeal.

D. Final Agency Action When There is no Hearing. 29 C.F.R. § 1614.110(b). The agency will take a final action by issuing a final decision when it dismisses an entire complaint under 29 C.F.R. § 1614. 07, receives a request for an immediate final decision or does not receive a reply to the notice issued under 29 C.F.R. § 1614. 108(f).

1. Content of Final Decision. The final decision will consist of findings by the agency on the merits of each issue in the complaint, or, as appropriate, the rationale for dismissing any claims in the complaint and when discrimination is found, appropriate remedies and relief. The final decision shall also contain notice of the right to appeal to the EEOC, notice of the right to file a civil action in federal district court, and the applicable time limits for appeals and lawsuits.

2. Timing of Final Decision/No Hearing.

   a. Within 60 days of receiving notification that a complainant has requested an immediate decision from the agency.

   b. Within 60 days of the end of the 30-day period for the complainant to request a hearing or an immediate final decision where the complainant has not requested either a hearing or a decision.

3. Complainant's Appeal of Final Agency Action. 29 C.F.R. § 1614.402(a). If a complainant is going to appeal, s/he must do so within 30 days of receipt of a dismissal, final action or decision.

   a. Appeal to the EEOC/OFO. 29 C.F.R. § 1614.403(a)-(f). The complainant may file a brief or statement in support of the appeal within 30 days of filing the appeal and the agency must submit the complaint file to the EEOC/OFO within 30 days of an appeal.

   b Briefs in Opposition. Any statement or brief in opposition to an appeal must be submitted to the Commission and served on the opposing party within 30 days of receipt of the statement or brief supporting the appeal, or, if no statement or brief supporting the appeal is filed, within 60 days of receipt of the appeal.

   c. Format. The EEOC/OFO will accept statements or briefs in opposition to an appeal by facsimile provided they are no more than 10 pages long.

E. Request for Reconsideration. 29 C.F.R. § 1614.405. A decision issued by the EEOC/OFO is final unless the Commission reconsiders the case.

1. Timing of Request for Reconsideration. A party may request reconsideration within 30 days of receipt of a decision of the Commission.

2. Grounds for Reconsideration.

   a. The appellate decision involved a clearly erroneous interpretation of material fact or law; or

   b. The decision will have a substantial impact on the policies, practices or operations of the agency.

F. Remedial Actions.

1. Nondiscriminatory placement.

2. Back pay. Reduced by interim earnings; employee must be ready, willing, and able to work to be entitled to back pay. *Miller v. Marsh*, 766 F.2d 490 (11th Cir. 1985). Back pay liability under title VII or the Rehabilitation Act is limited to two years prior to the date the discrimination complaint was filed.

3. Front Pay. *Shore v. Federal Express Corp*., 42 F.3d 373 (6th Cir. 1994).

4. Expunge from the agency's records any adverse materials relating to the discriminatory employment practice.

5. Full opportunity to participate in the employee benefit denied (e.g., training, preferential work assignments, overtime scheduling).

6. Fees and costs. Attorney's fees or costs shall apply to allegations of discrimination prohibited by title VII and the Rehabilitation Act. Attorney's fees are payable for work performed during pre complaint process where the Commission affirms an administrative judge's finding that an agency has not implemented.

   a. Finding of discrimination raises a presumption of entitlement to an award of attorney's fees.

b. Attorney's fees or costs shall be paid by the agency.

c. Attorney's fees allowable only for the services of members of the Bar, and law clerks, paralegals or law students under the supervision of members of the Bar.

d. No award is allowable for the services of any employee of the Federal Government.

7. Additional relief under the Civil Rights Act of 1991.

a. Compensatory Damages. Limited to $300,000 above other relief (cap does not include back pay, front pay, attorney fees, or lost benefits). Assessed by EEOC. *West v. Gibson*,119 S.Ct. 1906 (1999).

b. Jury trials. In any case where the plaintiff seeks compensatory damages.

c. Prejudgment interest.

d. Expert fees.

8. Injunctive Relief

9. EEO Recovery Limited by After-Acquired Evidence of Misconduct. *McKennon v. Nashville Banner Publishing Co*., 115 S. Ct. 879 (1995).

G. Miscellaneous Issues in the Administrative Complaint Process. 29 C.F.R. § 1614.605.

1. Representation.

2. Official time. Reasonable time to prepare and attend—normally considered in <u>hours</u>, not days or weeks; does <u>not</u> allow official time for witnesses to <u>prepare</u>, but allows for official time when their presence is authorized or required by Commission or agency officials in connection with a complaint.

H. Requirement for Exhaustion of Administrative Remedies Before Seeking Judicial Review. *Brown v. GSA*, 425 U.S. 820 (1976).

1. Employee must get a final administrative decision or wait 180 days after filing administrative complaint before going to court.

2. Age discrimination complainant may bypass administrative process and go directly to federal court after giving EEOC 30-day notice of intent to sue within 180 days of alleged discriminatory act. *Stevens v. Dep't of Treasury*, 111 S. Ct. 1562 (1991).

3. Equitable tolling applies to time limits for filing Title VII and other discrimination actions. *Irwin v. Veterans Admin*., 111 S. Ct. 453 (1990).

I. Appeal to U.S. District Court. 29 C.F.R. § 1614.407.

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CHAPTER H

54TH FEDERAL LABOR RELATIONS COURSE

Negotiability in the Federal Sector, the Duty to Bargain, and Impasse Resolution

Outline of Instruction

I. Introduction

A. Negotiability versus Duty to Bargain

1. Duty to Bargain = when one has to engage in the collective bargaining process with a union

2. Negotiability = a proposal which, if one has a duty to bargain, would have to be bargained over (negotiability issues normally arise only if one first has a duty to bargain)

3. A clearly negotiable proposal need not be bargained if one has no duty to bargain (e.g., the same topic is already "covered by" one's labor contract)

4. Declaring a union proposal non-negotiable also amounts to a no "duty to bargain" assertion

5. These two concepts are related but different

   a. Failing to understand one's duty to bargain (such as by unilaterally taking some action where the union should have been provided advance notice and an opportunity to bargain thereover) can give rise to an unfair labor practice that is different (and has different defenses) from an unfair labor practice for refusing to bargain over proposals actually submitted for bargaining by a union

B. "Conditions of Employment" versus "Working Conditions"

1. "Conditions of Employment" (COE) are the "rules" by which day-to-day "working conditions" are affected

   a. Adverse action procedures would be COE, but an employee's non-duty, non-pay status while suspended thereby would be "working conditions"

2. Two related but different concepts

II. Statutory Framework of Bargaining/Negotiability

A. 5 U.S.C. § 7102(2) - Employee right to engage in collective bargaining through union representatives

B. 5 U.S.C. §§ 7114(a)(1) & (4) - Union right to bargain on behalf of bargaining unit members, mutual agency and union obligation to negotiate in good faith

C. 5 U.S.C. §§ 7114(b) & (c) - Amplification of what "negotiate in good faith" means, and agency head approval of collective bargaining agreements (and agreements negotiated below the "level of recognition")

D. 5 U.S.C. §§ 7117(a)(1) & (2) - Bargaining obligation limited by Federal law and government-wide rules & regulations, and agency regulations for which a "compelling need" exists

E. 5 U.S.C. §§ 7117(b) & (c) - "Compelling need" and negotiability appeal procedures

F. 5 U.S.C. §§ 7103(a)(12) & (14) - Define "collective bargaining" and "conditions of employment" (COE)

III. Negotiability Considerations

A. Union proposals must be limited to COE, which are "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions"

1. There is a growing body of case law that acknowledges that laws and regulations, etc., to fall within the ambit of COE, must have been issued for the purpose of regulating COE. Customs Service v. FLRA, 43 F.3d 682 (D.C. Cir. 1994), where a grievance over the interpretation of a statute regulating international shipping procedures was ultimately found to not be a grievance regarding a law "affecting conditions of employment." See Also, Customs Service and NTEU, 50 FLRA 656 (1995). But See BOP and AFGE, 51 FLRA 1126, 1133-35 (1996), where the FLRA refused to apply Customs Service to an agency regulation (28 CFR 541).

2. Express statutory exceptions to the definition:

a. Hatch Act activities

b. Classification of positions

c. Specifically provided for by federal statute

(1) Pay for most employees

(2) Vacations, health benefits

(3) Flexible and compressed work schedules

3. FLRA test for COE: Antilles, 22 FLRA 235 (1986)

a. Does matter pertain to bargaining unit employees

b. Is there a direct connection between the matter and the work situation or employment relationship of the bargaining unit employees

4. A matter can become a COE when it "vitally affects" working conditions of bargaining unit employees even though the subject affects employee outside the unit. It cannot, however, regulate the conditions of employment of employees in other bargaining units or supervisory personnel, U.S. Dept of Navy, 952 F.2d 1434 (D.C. Cir. (1992), and AFGE and OPM, 51 FLRA 491 (1995).

5. Examples of COE/non-COE

a. Employee of the Month Award program was a COE. DVA Medical Center, St. Louis, 50 FLRA 378 (1995).

b. Proposals which define the competitive area for RIF purposes as including both unit and non-unit employees are negotiable as the proposal (1) "vitally affects" working conditions of unit employees and (2) it is consistent with applicable laws and regulations. AFGE, Local 32 and OPM, 33 FLRA 335 (1988).

c. Annual employee picnic is a COE. AFGE, Local 2761 v. FLRA, 866 F.2d 1443 (D.C. Cir. 1989).

d. Day care facilities are a COE. AFGE and AFLC, Wright-Patterson AFB, 2 FLRA 604 (1980); NAGE and U.S. Dept of Veterans Affairs, 43 FLRA 414 (1991).

e. Travel and educational benefits for unit employees upon their retirement from federal civil service are not a COE. Overseas Education Ass'n and DoDDS, 27 FLRA 492 (1987), aff'd 858 F.2d 769 (D.C. Cir. 1988).

f. Filling supervisory positions is not a COE. National Council of Field Labor Locals, AFGE, AFL-CIO v. Dept. of Labor, 3 FLRA 290 (1980).

6. A matter which is not a COE does not become one solely on the basis that it has been shown to be a past practice of the parties to bargain over the issue. VA and NAGE, SEIU, 35 FLRA 188, 197 (1990).

B. Union proposals that are inconsistent with any Federal law or Government-wide rule or regulation are nonnegotiable. 5 U.S.C. § 7117(a)(1)

1. Government-wide regulations are regulations and official declarations of policy that apply to the Federal civilian workforce as a whole and are binding on the Federal agencies and officials to which they apply. Defense Contract Audit Agency, Central Region and AFGE, 47 FLRA 512, 521 (1993)

2. This doesn't apply to 5 U.S.C. 7101 et seq.

3. The rule or regulation need not apply to all Federal employees to be considered "Government- wide"

4. One must still look at what discretion, if any, the law, rule, or regulation provides the agency. The duty to bargain may still be present to the extent the agency is provided leeway in implementing the law, rule, or regulation, unless it is clear that the agency's exercise of that discretion is to be "sole and exclusive." IAMAW, 50 FLRA 677 (1995).

C. Proposals are nonnegotiable to the extent they address matters which are the subject of agency (DOD) or primary national subdivision (AF) regulations for which a "compelling need" exists: 5 U.S.C. § 7117 (a)(2) (See NTEU and FDIC, 14 FLRA 179 (1984)

1. Compelling need rarely found

2. Regulation must be "essential" as opposed to being helpful or desirable to accomplishing the agency's mission

3. Regulation is necessary to insure maintenance of basic merit principles

4. Regulation implements a mandate to the agency under law or other outside authority, the implementation of which is essentially non-discretionary in nature

5. Resolution of compelling need issues is subject to separate proceedings set forth at § 7117(b), which appear to preclude the use of ULP procedures to resolve these issues (the General Counsel cannot be a party to compelling need proceedings). But, the FLRA will let the matter be resolved in ULP proceedings where the agency has not affirmatively raised the compelling need argument beforehand.

D. A proposal will also be nonnegotiable to the extent it conflicts with a § 7106(b)(1) "permissive" topic over which the agency does not wish to negotiate

1. However, negotiating to agreement on a "permissive" topic moots this negotiability defense

2. Refer to further discussion of § 7106(b)(1) and Executive Order 12871 infra

E. Union proposals conflicting with an agency's "reserved" rights at § 7106(a) are

nonnegotiable. However, the key is the extent to which the proposal conflicts and the manner in which it conflicts (see discussion infra).

IV. Management's Reserved Rights [5 U.S.C. § 7106(a)]

A. Management cannot bargain substantively as to rights given to it by statute. Management rights are:

1. To determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

2. In accordance with applicable laws,

   a. To hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay or take other disciplinary action against such employees;

   b. To assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations should be conducted;

   c. With respect to filling positions, to make selections for appointments from:

      (1) Among properly ranked and certified candidates for promotion; or

      (2) Any other appropriate source

   d. To take actions necessary to carry out the agency mission during emergencies

B. Contractual provisions which substantively intrude upon management's rights are void ab initio

C. However, introductory language to § 7106(a) and §§ 7106(b)(2) & (3) reflect agency obligation to negotiate over "impact and implementation" (I & I) of the exercise of agency's reserved § 7106(a) rights

1. "Procedures which management officials of the agency will observe in exercising any authority under this section" -- the "implementation" part of I & I

2. "Appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials" -- the "impact" part of I & I

V. Tests used to determine whether an issue is bargainable

A. Confusing area; many seemingly conflicting decisions

B. "Acting at all" see AFGE, AFL-CIO, Local 1099 v. AAFES, Dix-McGuire Exchange, Fort Dix, NJ, 2 FLRA 153 (1979).

1. This standard is used when proposal is purely procedural in nature and does not contain decision-making criteria.

2. FLRA application of this standard is frequently criticized by the courts of appeal and its decisions frequently reversed.

   a. "We doubt, however, whether the court will be able to live indefinitely with a test that conceals rather than explains the FLRA's policy judgments which ultimately determine whether substantive management rights have realistically been impaired." NFFE, Local 615 v. FLRA, 801 F.2d 477, 483 (D.C. Cir. 1986).

   b. "Whatever merit the standard may have when it is applied properly the FLRA's use of it seems at times to be mechanical, displacing any reasoned consideration of the proposal before it, and yielding results that are not only patently inconsistent. . . but also, as in this case, utterly irrational." U.S. Customs Service v. FLRA, 854 F.2d 1414, 1420 (D.C. Cir. 1988).

C. "Direct interference" AFGE and AFLC, Wright-Patterson AFB, 2 FLRA 604, 612-614 (1980). Modified by "excessive interference" test.

D. "Appropriate arrangements for adversely affected employees" AFGE, AFL-CIO, Local 2782 v. FLRA, 702 F.2d 1183 (D.C. Cir. 1983).

1. Proposal is bargainable unless it "excessively interferes" with a management reserved right

2. Factors to determine whether there is "excessive interference". NAGE, Local R14-87 and Kansas City National Guard, 21 FLRA 24, 31-33 (1987).

   a. Nature and extent of impact upon the adversely affected employees

   b. Extent to which the circumstances of adverse effects are within the employee's control

   c. Impact on management's ability to deliberate and act with respect to its statutory rights

   d. Is the negative impact on management's rights disproportionate to the benefits to the employees from the proposal?

   e. Effect the proposal will have on the effective and efficient exercise of government operations

3. Finally, even though a proposal may be nonnegotiable under one test, if it is negotiable under another standard, it will have to be bargained over. See, e.g., NFFE, Local 29 and Army Engineer District, Kansas City, 45 FLRA 603, 611 (proposal found nonnegotiable as direct interference with right to assign work still ruled negotiable as an "appropriate arrangement").

VI. FLRA Case law interpreting 5 U.S.C. § 7106(a) proposals

A. Mission of the agency is defined as those particular objectives that the agency was established to accomplish. AFGE and AFLC, 2 FLRA 604 (1980)(What topics would be taught not negotiable). NLRB Local 21 and NLRB, 36 FLRA 82 (1990)(Hours when open to the public not negotiable).

B. Agency budget

1. FLRA has narrowly restricted this management right

2. Proposals infringe upon an agency's right to determine its budget when the proposal prescribed a specific program or amount to be included in the agency's budget or a substantial showing is made that a significant increase in costs will occur which will not be offset by improved employee productivity or morale. AFGE and AFLC, 2 FLRA 604, 607-609 (1980); SSEU Local 200-B and U.S. Dept of Veterans Affairs, 44 FLRA 821 (1992).

a. Supreme Court has questioned whether intangible benefits such as morale must be considered. However, the court did not indicate that the remainder of the standard was flawed. Fort Stewart v. FLRA, 110 S.Ct. 2043 (1990). In a later decision, the Authority indicated that it will heed the admonition of the Court in Fort Stewart and we will not consider 'nonmonetary intangible' benefits such as the positive effects on employee morale." NTEU and U.S. Nuclear Regulatory Commission, 47 FLRA 980 (1993).

b. Proposal that agency increase the percentage of the health insurance premiums it paid for NAF employees from 46% to 75% was negotiable. AFGE and Eglin AFB, 24 FLRA 377 (1986).

3. Proposal which would have the effect of requiring an agency to reallocate funds from one program to another directly interferes with an agency's right to determine its budget. Charleston Naval Shipyard v. FLRA, 885 F.2d 185 (4th Cir. 1989).

C. Agency organization

1. Includes the administrative and functional structure of the agency. AFGE, INS Council and INS, 8 FLRA 347 (1982).

2. Proposals which affect the division, organizational components, or ratio of civilian to military are nonnegotiable. AFGE, Local 3742 and Army, 98 Training Division, 11 FLRA 189 (1983); Congressional Research Employees Ass'n and Library of Congress, 3 FLRA 736 (1980)(Union proposal to create four sections in division not negotiable).

D. Internal security practices

1. FLRA has broadly interpreted this management right

2. Those policies and actions which are part of an agency's plan to secure or safeguard its physical property against internal and external risks, to prevent improper or unauthorized disclosure of information, or to prevent disruption of the agency's activities. NFFE, Local 1363 and HQ U.S. Army Garrison, Yongsan, Korea, 4 FLRA 139 (1980); AFGE, Local 32 and OPM, 14 FLRA 6 (1984); and NAGE and Army Defense Artillery Center, 45 FLRA 949, 960 (1992).

   a.. Proposals which would limit the amount of pecuniary liability of employees for damage they cause is nonnegotiable. NTEU, Local 29 and Army Corps of Engineers, 21 FLRA 233 (1986).

   b. Proposal limiting circumstances upon which employees could be searched is nonnegotiable. NTEU and Treasury, Bureau of Engraving and Printing, 18 FLRA 405 (1985).

   c. Proposal requiring that a gate that management closed due to flightline security concerns be reopened was not negotiable. AFGE and Warner-Robins AFB, 24 FLRA 940 (1986).

   d. Proposal requiring an agency to make an effort to locate the driver of an illegally parked automobile before towing it is nonnegotiable. AFGE, Local 1141 and Army, Fort Benjamin Harrison, 32 FLRA 990 (1988).

   e. The use of polygraphs is an internal security matter. GSA, 18 FLRA 789, 797-98 (1985); and Sierra Army Depot, 30 FLRA 1236, 1239-40 (1988). But, see AFGE and BOP, 51 FLRA 1112, 1124 (1996) (this decision conflicts with FLRA precedent in more than one respect).

3. Internal security includes measures to safeguard the agency's personnel. Defense Logistics Council of AFGE and DLA, 20 FLRA 166 (1985).

4. FLRA does not examine the agency's plan to determine if it is an effective method of achieving internal security. NFFE, Local 29 and Army, Kansas City District, Army Corps of Engineers, 21 FLRA 233 (1986).

5. Union proposals to establish internal security policies and procedures are non-negotiable. These interfere with an agency's right to determine its internal security practices. NFFE Local 1482 and DOD, 44 FLRA 637 (1992).

6. Determining investigative techniques management to include those aimed at obtaining truthful and reliable information from interviewees relates to internal security. Army Defense Artillery Center, supra; GSA, supra, 18 FLRA at 798; and AFGE and BOP, supra.

E. Management's Right to Hire

1. Proposal that an agency not leave vacancies unfilled "excessively" interferes with the right to hire. DLA Council of AFGE Locals and DLA, 24 FLRA 367 (1986)

2. Requiring that a number of positions in a branch be filled using the agency's upward mobility program interferes with the right to hire. AFGE, Local 32 and OPM, 8 FLRA 460 (1981).

F. Management's Right to Assign Work

1. The right to assign work allows management to determine what work will be done and when it will be done, NTEU v. FLRA, 691 F.2d 553, 563 (D.C. Cir. 1982).

2. Proposal that work assignments not be in violation of prohibited personnel practice nor any relevant law, rule, or regulation was negotiable. NFFE, Local 1497 and Lowry AFB, 9 FLRA 151 (1982).

3. Proposal that management assign lower level duties on the basis of inverse seniority was nonnegotiable. Laborers' Int'l Union Local 1267 and DLA, Defense Depot Tracy, 14 FLRA 686 (1984).

4. Proposal is negotiable which requires management to assign employees to positions, shifts, and locations based upon seniority if the proposal is limited to those employees whom management previously determined were qualified. AFGE, Local 1336 v. FLRA, 829 F.2d 683 (8th Cir. 1987); Local Lodge 830, Int'l Ass'n of Machinist and Aerospace Workers and U.S. Naval Ordnance Station, Louisville, KY, 20 FLRA 848 (1984), aff'd 818 F.2d 545 (6th Cir. 1987).

5. Proposal that management minimize the effects of a RIF by reassigning employees to vacancies for which they qualify, and if management decides to fill the positions, is negotiable as an "appropriate arrangement." AFGE, Local 1931 and Naval Weapons Station, Concord, CA, 32 FLRA 1023, 1033 (1988); Int'l Brotherhood of Electrical Workers, Local 2080 and U.S. Army Engineer District Nashville, 32 FLRA 347 (1988).

6. Proposal which tries to limit work that can be assigned to union officials was nonnegotiable. NTEU and Dept. of the Treasury, 31 FLRA 181 (1988).

7. Proposal which limits workload violates the right to assign work. IRS, 16 FLRA 141(1984).

8. Proposals requiring that work be assigned in a manner consistent with restrictions imposed by the agency's medical authorities constitute negotiable procedures. Proposals restricting the assignment of work on grounds independent of and/or conflict with those of the agency's own medical authorities violate management's right to assign work. AFGE, Local 1625 and Navy, Naval Air Station, Oceana, VA, 30 FLRA 1105 (1988).

9. Union proposals may not limit management's right to use particular information in evaluating employee performance. Management's right to assign work includes the right to determine the quantity, quality and timeliness of an employee's work. Such proposals are non-negotiable, AFGE Local 3295 and U.S. Dept of Treasury, 44 FLRA 63 (1992).

10. Union proposal could not prescribe the number and duration of faculty and other meetings that employees could be required to attend in a duty day, Ft. Bragg Association of Teachers v. Army, 44 FLRA 852 (1992).

11. An integral aspect of the right to assign work is the right to determine the qualifications and skills necessary to perform the work of a position, including individual characteristics such as judgement and reliability. U.S. Air Force, Warner-Robins, ALC, Robins AFB, GA, 35 FLRA 265, 269 (1990).

12. Restricting an agency's right to deny leave requests directly interferes with the right to assign work. (42 FLRA 1112, 1126), and can also interfere when viewed as an appropriate arrangement (44 FLRA 1405, 1529), all of which is discussed in AFGE Council 240 and USMC, 50 FLRA 637, 639-40 (1995).

G. Management's Right to Direct Employees

1. The right to direct employees encompasses management's ability to supervise and guide employees in the performance of their jobs by determining the quantity, quality, and timeliness of work production and establishing priorities for its accomplishment. NTEU and Dept. of the Treasury, Bureau of the Public Dept, 3 FLRA 769, 775 (1980), aff'd 691 F.2d 553 (D.C. Cir. 1982).

2. Management's identification of critical elements and establishment of performance standards fall within its right to direct employees. Id.

a. Proposal which requires an agency to comply with laws or regulations when developing performance standards and critical elements does not directly interfere with management's right to direct. NTEU, Chapter 213, 228 and DOE, 32 FLRA 578 (1988).

b. Limitations on management's establishment of performance standards which exceed requirements imposed by law or regulation are nonnegotiable. AFGE, Local 3748 v. FLRA, 797 F.2d 612 (8th Cir. 1986); AFGE, Local 1858 and U.S. Army Missile Command, Army Test, Measurement, and Diagnostic Equipment Support Group, Army Information Systems

Command-Redstone Arsenal Commissary, 28 FLRA 714 (1987).

H. Management's Right to Lay Off Employees

1. Proposal assuring employment security for certain employees is nonnegotiable. AFGE, Council 236 and GSA, 9 FLRA 825 (1982).

2. Proposal that part-time employees be laid off before full-time employees is nonnegotiable. Federal Union of Scientists and Engineers and Dept. of the Navy, Naval Underwater Systems Center, 22 FLRA 731 (1986).

I. Management's Right to Discipline Employees

1. Proposal requiring management to stay execution of suspensions/removals until final determination made was negotiable as it did not prevent management from acting at all, merely determined when management could act. AFGE, Local 1099 and AAFES, Fort Dix-McGuire Exchange, Fort Dix, NJ, 2 FLRA 153 (1979), enforced sub nom., DOD v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981).

2. Proposal preventing agency from disciplining an employee as long as the employee is an active participant in a recognized drug/alcoholism program interferes with the right to discipline. NTEU and IRS, 6 FLRA 522 (1981).

3. Proposal seeking to establish a contractual statute of limitations is nonnegotiable because it prevents management from acting at all. NFFE, Local 615 v. FLRA, 801 F.2d 477 (D.C. Cir. 1986).

4. Proposal that requires management to use a table of penalties is nonnegotiable. NY State Nurses Assoc. and VA, 30 FLRA 706, 733-734 (1988).

5. Proposal to allow employees to remain silent during any discussion with management if the employee believes disciplinary action may be taken against them is nonnegotiable. Tidewater Virginia Federal Employees Metal Trades Council and Navy Public Works Center, Norfolk, VA, 15 FLRA 343 (1984); AFGE, Local 1812 & U.S. Information Agency, 16 FLRA 308 (1984).

6. Restricting management's discretion in choosing penalty to impose in disciplinary actions interferes with the right to discipline. Naval Concord Station, 32 FLRA 1023 (1988); NYSNA and V.A. Medical Center, 30 FLRA 706 (1987).

7. Proposal that employees be allowed to request union representation when being presented with a Performance Improvement Period letter does not conflict with statute or government-wide regulation, and therefore, is negotiable. AFGE and Farmers Home Administration, Finance Office, 34 FLRA 919 (1990).

8. Proposal that only "like offenses" be considered for penalty enhancement purposes is non-negotiable because it directly interferes with management's right to discipline.

AFGE and Ft. Bragg, 34 FLRA 903 (1990).

J. Management's Right to Contract Out

1. Can't use negotiated grievance procedure to challenge contracting out determinations. Treasury v. FLRA, 996 F.2d 1246 (D.C. Cir. 1993). This was adopted by the FLRA at AFGE Local 1345 and Fort Carson, 48 FLRA 168, 206 (1993).

2. Union proposal to prevent agency from implementing contracting out decision until exhaustion of grievance/arbitration procedures was nonnegotiable as it was a direct interference with the agency's right to contract out. AFGE Local 2077 and Michigan Air National Guard, 43 FLRA 344, 364-66 (1991).

3. However, procedural bargaining issues (I & I) must still be addressed.

VII. Permissive Bargaining -- 5 U.S.C. § 7106(b)(1)

A. 5 U.S.C. § 7106(b)(1) addresses the following matters:

1. Numbers types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty

2. Technology, methods, and means of performing work

a. "Performing work" means those matters which directly and integrally relate to accomplishing the agency's mission. AFGE and AFLC, Wright-Patterson AFB, 2 FLRA 604, 618 (1980).

b. "Means" is any instrumentality, including an agent, tool, device, measure or policy used by the agency to accomplish or further the performance of its work. HHS v. FLRA, 885 F.2d 911 (D.C. Cir. 1989); Warner Robins ALC and AFGE, Local 987, 35 FLRA 68 (1990).

c. "Methods" is defined as the way in which an agency performs its work. NTEU and IRS, Los Angeles District, 32 FLRA 182 (1988). How and when management monitors telephone conversations between employees and taxpayers is a method of performing work about which management need not bargain. IRS, 6 FLRA 522 (1981).

d. "Technology" refers to the technical method that will be used in accomplishing or furthering the performance of the agency's work. Library of Congress, 7 FLRA 578 (1982), aff'd, 699 F.2d 1280 (D.C. Cir. 1983).

e. "Types" refers to work or job-related staffing differences (sounds like "series" of employees), including necessary qualifications such as training and experience (probationary employees, trainees, journeyman/supervisors, or full or part-time employees). See, NAGE, Local R1-109 & DVA Medical

Center, Newington, 38 FLRA 211, 216-20 (1990), and the cases cited therein.

B. Effect of Executive Order 12871 (3 Oct 93)

1. Language

SEC. 2. IMPLEMENTATION OF LABOR-MANAGEMENT PARTNERSHIPS THROUGHOUT THE EXECUTIVE BRANCH. The head of each agency subject to the provisions of chapter 71 of title 5 United States Code shall: . . .

(d) Negotiate over the subjects set forth in 5 U.S.C. 7106(b)(1), and instruct subordinate officials to do the same; . . .

SEC. 3. NO ADMINISTRATIVE OR JUDICIAL REVIEW. This order is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right to administrative or judicial review, or any other right, substantive or procedural, enforceable by any party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

2. ALJ Interpretations. The E.O. does not create a duty to bargain over permissive topics. Hanscom Air Force Base, Case No. BN-CA-41011 (July 31, 1996); Marine Corps Logistical Base, Case No. SF-CA-41251 (April 10, 1996).

3. FLRA Decisions: Executive Order 12,871 is not an election to bargain. Department of Commerce Patent and Trademark Office and Patent Office Professional Association, 53 FLRA 858 (1998) (partial decision and procedural order); NAGE v. FLRA, 1999 U.S. App. LEXIS 14172 (June 25, 1999) (holding that section 2(d) of Executive Order 12871 did not effect an election by the agency to negotiate on matters covered by 5 U.S.C. §7106(b)(1)).

4. Court Decisions: Executive Order 12,871 is not an election to bargain. National Ass'n of Gov't Employees v. FLRA, 179 F.3d 946 (D.C. Cir. 1999) (E.O. 12871 providing that agency heads "shall" negotiate over such management rights issues did not constitute election by agencies obligating them to bargain); American Fed'n of Gov't Employees, Council 147 v. FLRA No. 98-70912, 204 F.3d 1272 (9th Cir. 2000).

C. Management may begin to negotiate the proposal, then declare it non-negotiable. National Park Service, 24 FLRA 56 (1986)(union proposal requiring help or mechanical aides for lifting heavy objects a permissive topic).

D. Once agreement is reached, proposal under § 7106(b)(1) may not be declared non-negotiable. National Park Service, 24 FLRA 56 (1986)(agreement could not be declared non-negotiable at agency head review).

E. Negotiability of Proposals Raising Issues Under § 7106(a) and § 7106(b)(1). NAGE and DVA Medical Center, Lexington, Kentucky, 51 FLRA 386 (1995)(finding that § 7106(b)(1) is an exception to the management rights under § 7106(a).

1. The Authority first determines if the proposal concerns matters under § 7106(b)(1). If it does, the complaint will be dismissed 5 C.F.R. § 2424.10(b) (noting that the duty to bargain is at the election of the Agency).

2. If the proposal does not concern matters under § 7106(b)(1), the Authority will then analyze the proposal under § 7106(a).

3. If the proposal concerns matters that are governed by both § 7106(a) and § 7106(b)(1), and the proposal's provisions or requirements are inseparable, the Authority will determine which of the proposal's requirements is dominant. Negotiability is determined based on the dominant requirement. AFGE, Local 1336 and SSA, Mid-America Program Service Center, 52 FLRA 794 (1996) (the dominant requirement is that which the other requirements addressed by the proposal depend for their viability).

4. Once agreement is reached on a proposal that is both a prohibited topic of negotiation under § 7106(a) and a permissive topic under § 7106(b), the rules governing permissive topics will control and the proposal may not be declared non-negotiable. Assoc. of Civilian Technicians, Montana Air Chapter No. 27 v. FLRA, 22 F.3d 1150 (D.C. Cir. 1994) (negotiations over requirement civilian technicians wear uniforms).

VIII. Duty to Bargain

A. Introductory Thoughts

1. Common Sense Point #1: you have a duty to bargain over the proposal unless you can show otherwise

2. Common Sense Point #2: alleging non-negotiability as a duty to bargain defense only works if the union has already submitted bargaining proposals, and won't help you if you failed to provide the union with advance notice and an opportunity to bargain over the matter at issue (most likely an I & I bargaining situation) before making the change

3. Common Sense Point #3: "waiver" of a union's right to bargain is very difficult to prove, so try to find something else to rely on as well

B. Common descriptions of bargaining obligations

1. Substantive bargaining - where one is bargaining the substance of the matter at issue rather than just the I & I of the matter. An example would be the substance of the decision of whether or not to have a day care for children of bargaining unit members.

2. I & I bargaining - where one is bargaining impact or implementation issues related to an agency's exercise of its reserved 5 U.S.C. § 7106(a) rights. An example would be where an installation exercises its internal security rights to install controlled access fences around certain buildings, and the union wants to bargain a "grace period" covering showing up to work late due to the increased time needed to get through the controlled access ingress/egress points.

3. Permissive bargaining - bargaining over an agency's 5 U.S.C. § 7106(b)(1) rights or over matters outside of the required scope of bargaining, such as a union waiver of its statutory right to engage in I & I bargaining. See, e.g., FAA and PASS, 14 FLRA 644, 647-48 (1984), and the cases cited therein. Matters concerning positions and employees outside the bargaining units (i.e. management and supervisory positions) are also considered permissive topics of negotiation. AFGE, Local 1815 v. Army, Aviation Center, 53 FLRA 624 (1997).

4. Prohibited bargaining - bargaining proposals that violate 5 U.S.C. § 7101 et seq. or other applicable law, rule, or regulation. Such proposals, even if agreed to, and even if not disapproved by agency head review pursuant to 5 U.S.C. § 7114(c), are void and unenforceable. See, NTEU, Chapter 52 and IRS, Austin District, 23 FLRA 720, 722 (1986) and the cases cited therein; and AFGE v. FLRA, 778 F.2d 850 (D.C. Cir. 1985).

C. Duty to bargain contexts

1. **Labor contract bargaining**. "Labor contracts" are collective bargaining agreements covering a variety of COE (discipline, grievance/arbitration procedures, loans/details, appraisals, etc.) and having a fixed duration. This carries the broadest duty to bargain of all collective bargaining contexts. Possible duty to bargain defenses/ limitations include the following:

   a. Union bargaining demand conflicts with negotiated ground rules governing how negotiation over the actual proposals will take place

      (1) Possible limitation on submitting additional proposals after a certain date

   b. Proposal submitted to wrong level of agency for bargaining

      (1) Where bargaining also takes place below the "level of recognition" in the agency and union primarily responsible for dealing with each other, the parties may designate certain issues to bargained at only one certain organizational level, although express agreement needed to negotiate at other than the level of recognition

c. Union proposal is nonnegotiable because it does not pertain to bargaining unit COE or is in conflict with applicable law, rule or regulation

2. **I & I bargaining**. The narrowest duty to bargain context. Union limited to bargaining only when agency exercises one of its reserved rights, and proposals are limited to the "impact and implementation" of the exercise of that right. In addition to the duty to bargain defenses/limitations noted above, which can also be applicable to I & I bargaining, the following additional matters may also be applicable:

   a. If agency change to COE is de minimis, no duty to bargain is created. SSA and AFGE, 24 FLRA 403 (1986).

   b. No duty to bargain if union demands to bargain substance rather than I & I of matter. National Bureau of Standards, Boulder Laboratories, and AFGE, Local 2186, 5 FLRA 823 (1981).

   c. No duty to bargain if union demand/proposals not submitted by time standard in contract. If no time limit set in contract, demand/proposals submitted at "eleventh hour" raise no duty to bargain. Customs Service and NTEU, 16 FLRA 654 (1984).

   d. No duty to bargain if the union I & I proposals do not relate to the I & I of the management action in question. FLRA v. Department of Justice, 994 F.2d 868 (D.C. Cir. 1993).

   e. The matter at issue is already "covered by" or "contained in" a collective bargaining agreement between the parties. Marine Corps, Albany v. FLRA, 962 F.2d 48 (D.C. Cir. 1992); SSA, 47 FLRA 1004 (1993).

   f. The union has "waived" its right to demand to bargain pursuant to a "zipper clause" (very rare, almost nonexistent). Missouri National Guard, 31 FLRA 1244 (1988).

   g. Where collective bargaining agreement incorporates agency regulations, union has "waived" right to bargain over the substance of those regulations when they are changed (I & I bargaining obligation would still remain, however). AFLC and AFGE Council 214, 22 FLRA 502 (1986).

3. **Terminating "illegal" past practices**. Where an agency discovers that an employment practice on its part is "illegal" (violative of statute, or case law interpreting statute), the decision to terminate that illegal past practice is not bargainable, but any "I & I" would be, to include providing the union with advance notice and an opportunity to bargain thereover. Portsmouth Naval Shipyard, 49 FLRA 1522, 1527-28 (1994) and the cases cited therein. However, the agency need not fulfill its I & I bargaining obligation first before terminating the unlawful past practice. Hill AFB, 17 FLRA 399, 403 (1983), citing to U.S. Geological Survey, 9 FLRA 543, 546 at note 9 (1982).

4. **Mid-term negotiations**. An agency or union demand to bargain that is not in the context of labor contract negotiations, and is not based upon an agency's proposed exercise of its § 7106(a) rights (which in its own right would give rise to I & I bargaining, discussed, supra). The issue could also arise where a union alleges that an agency has made an improper change to COE that is unrelated to the agency's exercise of its § 7106(a) rights (such as where the agency decides to terminate its agency-run child care facility). These bargaining situations occur during the term of a labor contract, hence the name "mid-term." In addition to the duty to bargain defenses/limitations noted in paragraph 1, supra, the following matters might also be relevant:

   a. No duty to bargain if any contract provisions governing this are not complied with

   b. Waiver of this right to bargain pursuant to a "zipper clause," as discussed, supra

   c. Waiver if the union had been given an earlier opportunity to bargain thereover and failed to do so, as discussed, supra

   d. The matter sought to be negotiated is already "covered by the contract," as discussed, supra

   e. NFFE, Local 1309 v. Dept. of the Interior, 119 S. Ct. 1003 (1999). U.S. Supreme Court case on whether or not 5 U.S.C. § 7114(a)(4) requirement to bargain in good faith extended to union-initiated proposals during the term of the contract.

      (1) Prior to this case, there was a split of opinion in the 4th and D.C. circuits. [No union right to initiate mid-term bargaining. SA v. FLRA, 956 F.2d 1280 (4th Cir. 1992). The FLRA and D.C. Circuit disagreed: IRS, 29 FLRA 162 (1987), on remand from 810 F.2d 295 (1987).]

      (2) The Supreme Court held that the FLRA has the legal power to determine whether the parties must engage in mid-term bargaining or bargaining about mid-term bargaining.

   f. FLRA Final Resolution: Unions have a statutory right to initiate midterm bargaining. Department of the Interior and National Fed'n of Fed. Employees, Local 1309, 56 FLRA 45 (2000) (concluding that an agency must bargain over a proposal that obligates it to bargain over midterm issues not covered by the CBA).

IX. Forums in Which Negotiability Issues Raised

A. Negotiability appeals: 5 U.S.C. § 7117, 5 CFR Part 2424

1. Agency may not submit negotiability appeal if a union declares a proposal nonnegotiable: 5 U.S.C. § 7117(c)(1), 5 CFR 2424.2

2. Union may pursue negotiability appeal when agency formally asserts that the duty to bargain does not extend to the matter in issue

   a. Union must file petition within 15 days

   b. Agency must file position with Federal Labor Relations Authority within 30 days withdrawing the assertion or setting forth in full its position

   c. Where a union receives an unsolicited allegation of non-negotiability, its options are to: file within the 15 day limit; or, ignore the allegation and make a written request for a written allegation of non-negotiability from the agency, and then timely file a petition based on the solicited allegation of non-negotiability. NFFE, Local 422 and BIA, Colorado River Agency, 50 FLRA 541, 543 (1995).

      (1) Where a union misses the time limit and attempts to "revive" itself by soliciting a new allegation of non-negotiability, the FLRA will not entertain the subsequent petition if the underlying proposal has not changed since the first allegation of non-negotiability (it will consider the second negotiability petition as being untimely filed as well). Id.

3. Negotiability appeals are decided solely on written submissions of the parties (no hearings). Parties bear burden of developing the record.

4. While a union is required to provide "[a]n explicit statement of the meaning" of its proposals (5 CFR 2424.4(a)(2)), be aware of possible attempts to ascribe a more "negotiable" meaning to a proposal that is inconsistent with the proposal itself, and challenge the erroneous "spin" that is being put on the language in dispute. Laurel Bay, 51 FLRA 733 (1996); and AFGE and BOP, 51 FLRA 1112 (1996).

5. FLRA is required to expedite negotiability appeals

B. Unfair labor practice charges: 5 U.S.C. § 7116(a)(5), 5 CFR Part 2423. When a COE has already been changed and it is alleged that required bargaining did not take place, the allegation can be raised as a ULP.

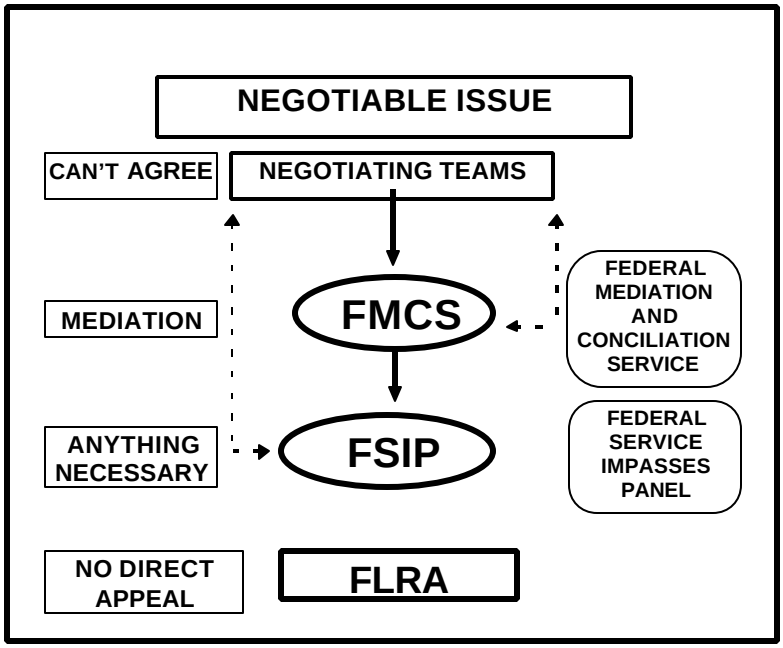
X. Impasse Resolution

A. Definition of Impasse. That point in the negotiation of conditions of employment at which the parties are unable to reach agreement, notwithstanding their efforts to do so by direct negotiations and by the use of mediation or other voluntary arrangements for settlement. 5

C.F.R. § 2470.2e.

1. Contrast to Non-Negotiability Assertion.

B. Procedures. 5 U.S.C. § 7119; 5 C.F.R. § 2471.



Impasse Resolution Process

1. Federal Mediation and Conciliation Service (FMCS). 29 C.F.R. § 1425.

   a. Notification to Federal Mediation and Conciliation Service (FMCS).

      (1) Prior to Contract Expiration.

      (2) Upon Impasse.

   b. Functions of the FMCS.

      (1) Mediation. Suggested Solutions.

      (2) Referral to FSIP.

2. Request Assistance of Federal Service Impasses Panel.

   a. FSIP Authority. The Panel or shall consider the impasse and shall . . . take whatever action is necessary and not inconsistent with this chapter to resolve the impasse. 5 U.S.C. § 7119(b)(5).

b. Issues considered.

(1) Impasse issues, not negotiability issues.

(a) FSIP may use variety of methods to resolve impasse, but may not resolve underlying obligation to bargain. NTEU, 11 FLRA 626 (1983)(interpretation and guidance opinion provided by the Authority on the issue).

(b) The panel can resolve an impasse relating to a proposal concerning a duty to bargain if it applies existing Authority case law. Carswell AF Base and AFGE, 31 FLRA 620 (1988)(during Panel approved interest arbitration the arbitrator addressed duty to bargain issues and the union took exception).

c. The FSIP obtains the facts, usually through a fact-finding hearing.

d. FSIP's Courses of Action. 5 U.S.C. § 7119(b)(5)(B)(iii); 5 C.F.R. § 2471.11: Resumption of Negotiations; Resumption of Negotiations with Mediation Assistance; Make Recommendations; Make a Decision and Order; Authorize Outside Arbitration; Authorize Mediation-Arbitration.; Final-Offer Selection; Order interest arbitration.

3. No Direct Appeal of FSIP Decision to FLRA. Council on Prison Locals v. Brewer, 735 F.2d 1497 (D.C. Cir. 1984)(in union petition for review of allegedly illegal FSIP decision review was found to be precluded absent extraordinary circumstances); New York National Guard, 2 FLRA 185 (1979)(when agency sought review of FSIP order allowing civilian technicians to wear civilian clothes the Authority held there was no authority for direct appeal).

4. Agency Head Review of Impasse Decisions.

a. Impasses resolved under § 7119(b)(1) are subject to agency head review under § 7114(c).

b. Agency Review Pursuant to § 7114(c) of Interest Arbitrator's Award. Patent and Professional Association and Department of Commerce, 41 FLRA 795 (1991)(18 provisions awarded by FSIP ordered interest arbitrator were disapproved by agency head).

c. Impasses resolved under § 7119(b)(2) are not subject to agency head review under § 7114(c) but are reviewable under § 7122

XI. Conclusion

CHAPTER I

54TH FEDERAL LABOR RELATIONS COURSE

Unfair Labor Practices

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APPENDICES 43

Outline of Instruction

I. INTRODUCTION.

II. REFERENCES.

A. Statutory definition, 5 U.S.C. § 7116. An act or non-act by an employer or union which contravenes a statutory proscription.

B. Unfair Labor Practice (ULP) Regulations. 5 C.F.R. §§ 2423 and 2329.

1. October 1997 Amendments.

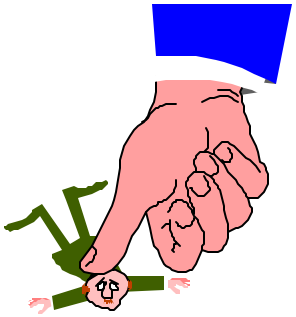
2. January 1999 Amendments.

C. Unfair Labor Practice Case Handling Manual, October 1999. Available as of 7 January 2000 on the FLRA website, *www.flra.gov*. *See* Appendix A.

D. FLRA Office of General Counsel Litigation Manual, November 1998. FLRA website, *www.flra.gov/gc/lm_f-for.html*. Excerpt at Appendix B.

The Chief of Staff is quite concerned. To increase NAF income, he ordered an increase of 5 cents in the cost of sodas in the vending machines on post. The union president stormed into his office demanding negotiations on the price increase. The Chief of Staff refused. The Chief of Staff then received a copy of an ULP Charge Against the Agency. The original had been signed by the union president and sent to the Regional Director of the Federal Labor Relations Authority. The Chief of Staff calls his trusted labor counselor and asks what happens now?

III. MANAGEMENT VIOLATIONS. 5 U.S.C. § 7116(A).



You are stationed in Korea. The union president has filed a number of unfair labor practice complaints and is not well liked by the command. When his tour is up, the command refuses to extend his tour even though this has been generally allowed. They say that it is for his own career enhancement even though he will need to return to a lower graded job in the United States. Is this a problem?

A. Interference With Basic Employee Rights. 5 U.S.C. § 7116(a)(1).

1. Employee rights -- The right to freely and without fear of penalty or reprisal form, join, and assist a labor organization or to refrain from such. 5 U.S.C. § 7102.

2. Examples. Hill Air Force Base, 25 FLRA 342 (1987) (union steward's misrepresentation of pay grade in correspondence with headquarters was not protected activity); Eighth U.S. Army and NFFE, 11 FLRA 434 (1983) (denial of union president's request for extension of overseas tour found to be a ULP); Internal Revenue Service and Brookhaven Service Center, 9 FLRA 930 (1982) (consolidated cases where attorneys spoke with witnesses in preparation for MSPB and arbitration cases); Fort Bragg Schools, 3 FLRA 363 (1980) (principal's statements at union organizing meeting constituted a ULP).

B. Discrimination to Encourage or Discourage Union Membership. 5 U.S.C. § 7116(a)(2).

1. Alameda Naval Air Station and Aerospace Workers Lodge 739, 38 FLRA 567 (1990) (employee disciplined shortly after filing ULP).

2. Warner Robbins Air Force Base and AFGE, Local 987, 52 FLRA 602 (1996) (agency did not commit a ULP by denying a temporary promotion to the union president who was on 100% official time).

C. Improper Assistance to Labor Organizations. 5 U.S.C. § 7116(a)(3).

1. The "Neutrality Doctrine." DA, Fort Sill, 29 FLRA 1110 (1987) (commander's statement in bulletin was a ULP).

2. Barksdale Air Force Base and NFFE, 45 FLRA 659 (1992) (ULP to allow nonemployee union representative access without a showing that union has been unable to reach the agency's employees through reasonable, alternative means of communication).

D. Retaliation Against an Employee Because of His Filing a Complaint or Giving Information. 5 U.S.C. § 7116(a)(4).

1. Consumer Product Safety Commission, 4 FLRA 803 (1980) (employee transferred after serving as union witness in several ULP hearings).

2. Alameda Naval Air Station and Aerospace Workers Lodge 739, 38 FLRA 567 (1990) (employee disciplined shortly after filing ULP).

E. Refusal to Negotiate in Good Faith. 5 U.S.C. § 7116(a)(5).

1. The meaning of "good faith." 5 U.S.C. § 7114(b).

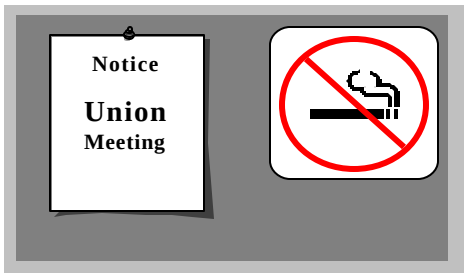
a. Sincere resolve to reach an agreement.

b. Be represented by duly authorized negotiators.

c. Meet at reasonable times and places.

d. Furnish data when appropriate.

e. If agreement is reached, sign and implement the agreement.



The union has represented installation employees since 1980. During that time the Commander has allowed the union to use the bulletin board. There is no provision for such use in the CBA. On 15 November 2000, the union posted a memorandum stating that management was unfair in not permitting employees to attend, during the duty day, the annual bowling tournament at the post bowling alley. The Commander confronted the union president stating that this memorandum was disloyal and that he was considering not permitting the union to use the bulletin board. The Commander then came to find you. He asks whether such action will violate any of those "crazy labor laws." How do you respond and why?

2. Unilateral Changes - Past Practices.

a. Unilateral changes to conditions of employment. GSA and AFGE, Local 2431, 55 FLRA No. 84 (1999) (agency reduced amount of performance awards after ten years of using the same standard); US Customs Service and NTEU, 29 FLRA 891 (1987) (management renovated customs stations without negotiating); Dept. of Treasury, IRS and NTEU, 15 FLRA 1014 (1984) (management assigned employees to specialized work groups without negotiating).

b. Definition.

(1) Condition of employment. Letterkenny Army Depot and NFFE, 34 FLRA 606 (1990) (management changed practice of allowing union representative to go with employee to meetings with selecting officials to find out why they were not selected).

(2) Past usage. Clear and consistent, long-standing, and known about and accepted by both parties. SSA, 9 FLRA 229 (1981) (ULP when agency refused to bargain over new office policies that eliminated extra time at lunch, breaks and office parties).

(3) Actual impact. Scott AFB and NAGE, 35 FLRA 844 (1990) (management refused to bargain over issuance of RIF notices).

(4) *De minimis* impact. DHHS, SSA, Chicago, 19 FLRA 827 (1985) (sending claims officers to social service offices was *de minimis*); VAMC, Prescott and AFGE, 46 FLRA 471 (1992) (changing schedule of two housekeeping aids found to be more than *de minimis*).

(5) Waiver of union right.

(a) Matters covered by the CBA.

(b) Failure to request negotiations. Bureau of Engraving and Printing and IAM, 44 FLRA 575 (1992) (management unsuccessfully refused to bargain when they rearranged car pool parking because union had not bargained on the issue in the past).

c. Examples. AFGE v. FLRA, 866 F.2d 1443 (D.C. Cir. 1989) (combined appeal of two cases. In Puerto Rico, the agency tried to terminate PX privileges after over 20 years and in St. Louis, a picnic on duty time was a past practice).

d. Preventing past practices. IRS, 3 FLRA 655 (1980) (management prevented union use of office machines from becoming a past practice).

e. Changing past practices.

(1) Agency must give union notice of proposed change and the opportunity to bargain. Dep't of Treasury and National Treasury Employees Union, 55 FLRA No. 16 (1998) (agency committed an ULP when it changed from audio taping employee interviews as stated in the CBA to video taping those interviews without giving the union notice and the opportunity to bargain); Patents and Trademark Office, 39 FLRA 1477 (1991) (cannot change a past practice without notice and opportunity to bargain even if it conflicts with contract).

(a) If the union requests negotiation, the agency must meet and negotiate in good faith.

(b) If the union does not respond to the agency's notice within a reasonable time, the agency may implement the change. Castle AFB and NAGE, 18 FLRA 642 (1985) (union may waive its right if it never requests bargaining).

(c) An agency can stop a past practice immediately if it conflicts with a statute. An agency that delays changing a past practice until months later will still not be found to commit an ULP. *See* Department of Navy and AFGE, 34 FLRA 635 (1990) (no ULP where agency was improperly purchasing reflective vests for motorcycle riders, even though it did not change past practice until several months after FLRA opinion on this issue).

(2) If the parties negotiate in good faith about the proposed change, but cannot agree, the agency may initiate impasse procedures or give the union a notice of implementation.

(a) In response to a notice of implementation, a union may initiate impasse procedures. If it does, the agency must maintain the status quo.

(b) If the union does not respond within a reasonable time, the agency may implement the change.

F. Bypassing the Union.

1. Surveying BU employees. *See* Surveys, Questionnaires, and Bypassing the Union, Labor Relations Bulletin, No. 411, July 20, 1999.

a. An agency may question employees directly provided it does not do so in a way that amounts to attempting to negotiate directly with its employees concerning matters that are properly bargainable with its employees exclusive representative. IRS and NTEU, 19 FLRA 354 (1985) (finding no ULP when the agency gave copies of proposed employee questionnaires to its union before seeking input from the employees).

b. An agency may not use surveys or questionnaires to deal directly with unit employees on conditions of employment. Beale Air Force Base and AFGE, Local 2025, 43 FLRA 1173 (1992) (finding a ULP when agency issued a memo to unit employees asking them to propose an outside location for smokers that would provide necessary shelter during inclement weather).

2. Other examples of Bypassing the Union. *See* McGuire AFB and AFGE, 28 FLRA 1112 (1987) (agency improperly met with employee after being notified of union representation); IRS, 17 FLRA 107 (1985) (Management Employee Relations chief met with husband of grievant and negotiated settlement).

G. Furnishing Data.

1. Statutory Requirement. "[F]urnish to the exclusive representative involved, or its authorized representative, upon request and, *to the extent not prohibited by law*, data which is normally maintained by the agency in the regular course of business; which is *reasonably available* and *necessary* for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining . . ." 5 U.S.C. § 7114(b)(4).

2. Failure to provide the information in a timely manner is an unfair labor practice. HQDA, 90th Regional Support Command and AFGE, Local 1017, 1999 FLRA LEXIS 200, FLRA ALJ Decision # 144 (1999) (finding the agency committed an ULP when it did not give the union documents when it asked for them and instead told the union it could have official time to make copies itself).

3. It is a ULP to refuse to provide documentation when the union has shown a particularized need for the information and no countervailing interests outweigh that need. AFGE Local 2343 v. FLRA, 144 F.3d 85 (D.C. Cir. 1998) (rejecting union's claim that particularized need is automatically established when requested documents discuss a specific incident); DOJ, INS v. FLRA, 144 F.3d 90 (D.C. Cir. 1998) (agency committed ULP when it failed to give union a copy of an investigatory file for which union showed it had a particularized need).

H. Refusal to Cooperate at Impasse. 5 U.S.C. § 7116(a)(6).

1. Dep't of Air Force v. FLRA, 775 F.2d 727 (6th Cir. 1985) (agency failed to make timely appeal of FSIP interest arbitration decision).

2. Dep't of Energy and AFGE, 51 FLRA 124 (1995) (agency disapproval of provision included in agreement by order of FSIP was an unfair labor practice where Authority found the provision was negotiable).

I. Enforcement of Rules in Conflict with CBA. 5 U.S.C. § 7116(a)(7).

- Customs and NTEU, 9 FLRA 983 (1982) (proposal that the contract will control over Government-wide and agency-wide regulations that go into effect after the effective date of the contract is negotiable).

J. Otherwise Fail or Refuse to Comply with Provisions of Chapter VII. 5 U.S.C. § 7116(a)(8).

1. Formal Discussions.

An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices, or other general condition of employment.. . . . 5 U.S.C. § 7114(a)(2)(A).

a. The union is entitled to advance notice and an opportunity to be represented at any formal discussion between management and one or more bargaining unit employees concerning (1) grievances or (2) personnel policies and practices affecting the general working conditions of unit employees.

b. A formal discussion is:

(1) A discussion. VA, Washington, D.C. and VA Medical Center, Brockton, Mass., 37 FLRA 747 (1990) (two meetings were found to be formal discussions even though there was no discussion or dialogue).

(2) Formal.

(a) FLRA will look at totality of circumstances to determine if meeting was formal. Marine Corps Logistics Base, Barstow, CA. and AFGE, 45 FLRA 1332 (1992) (impromptu meeting in work area to seek volunteers for overtime not a formal discussion); SSA, San Francisco and AFGE, 10 FLRA 115 (1982) (no ULP where supervisor met with individual employees to get their opinions concerning assignment of work).

(b) Indicia of a formal discussion:

(i) Whether the person who held the discussion was merely a first level supervisor or higher in the management hierarchy;

(ii) Whether any other management representatives attended;

(iii) Where the meeting took place;

(iv) How long the meeting lasted;

(v) If scheduled, how was the meeting scheduled;

(vi) Whether there was a formal agenda for the meeting;

(vii) Were notes kept of the meeting;

(viii) Whether attendance was mandatory or optional; and

(ix) How the meeting was conducted.

(c) On January 26, 1999, the General Counsel issued detailed guidance to Regional Directors on how to apply the requirements of the FSLMRS to processing EEO complaints and bargaining over EEO issues. The guidance addresses when the union has a right to be represented at meetings where EEO complaints are a topic of discussion. *http://www.access.gpo.gov/flra/gc/gc_eeo1.html*. *See* Marine Corps Logistics Base, Barstow, CA, 52 FLRA 1039 (1997) (EEO settlement discussions are formal discussions).

(d) In response to the FLRA General Counsel's guidance, the EEOC stated in the preamble of its new discrimination rules that "any activity conducted in connection with an agency ADR program during the EEO process would *not* be a formal discussion within the meaning of the Civil Service Reform Act." 64 Fed. Reg. 37644 (12 July 1999). *See also* Luke Air Force Base, Arizona v. FLRA, 1999 U.S. App. LEXIS 34569 (9th Cir. 1999) (reversing an FLRA decision and finding that EEO settlement discussions are not formal discussions requiring notice to the union).

(3) Between management and one or more bargaining unit employees,

(4) Concerning:

(a) Grievances, or

(i) Both phone and office interviews of union witnesses in an arbitration case were found to be formal discussions. Sacramento Air Logistics Center, 35 FLRA 594 (1990).

(ii) A meeting between agency counsel, employee and employee's counsel to negotiate settlement of an MSPB complaint was found to be a formal discussion. GSA & AFGE, 48 FLRA 1348 (1994).

(iii) An MSPB deposition was found to be a formal discussion. The union has a right to be present, but the agency may limit their participation. INS & AFGE, 47 FLRA 170 (1993).

(iv) Interviewing a BU member in preparation for an arbitration or a ULP hearing is a formal discussion. Dep't of Veterans Affairs v. FLRA, 3 F.3d 1386 (10th Cir. 1993) (arbitration); F.E. Warren AFB, 31 FLRA 541 (1988) (ULP hearing).

(v) Interviews of unit employees by the agency's EEO Director were formal discussions. NLRB & NLRBPA, 46 FLRA 107 (1992).

(b) Personnel policies and practices affecting the general working conditions of unit employees.

- General rules applicable to agency personnel, not discrete actions taken with respect to individual employees. GSA and Bobbie J. Brunning, 50

FLRA 401 (1995) (case involving meetings with witnesses in MSPB case involving supervisor).

c. A meeting can turn into a formal discussion, even if it does not begin as one. Defense Logistics Agency, Defense Depot Tracy, Tracy, California, 37 FLRA 952 (1990) (meeting with employees on how to fill out forms became formal when questions were asked); New Cumberland Army Depot, New Cumberland, Pennsylvania, 38 FLRA 671 (1990) (safety meeting became formal discussion when employees asked questions on alternative work schedule plan).

d. Exceptions:

(1) "On the spot" job counseling and counseling sessions are not formal discussions. SSA, San Francisco and AFGE, 9 FLRA 48 (1982) (supervisor met with employees at their desk, employees later went by supervisor's office to ask questions).

(2) Pre-disciplinary oral reply. Critical factors:

(a) The meeting arose under section 5 U.S.C. § 7513(b);

(b) The employee did not request union representative;

(c) The meeting did not involve a matter covered by § 7114(a)(2)(A); and

(d) The meeting did not involve an application of the parties' contract grievance procedure. DOJ v. AFGE, 29 FLRA 584 (1987) (union filed ULP charge over meeting with employee and employees attorney for oral reply to proposed suspension).

e. A formal discussion triggers agency's duty to notify the union and give a union representative an opportunity to attend.

(1) Mere presence of union officials is insufficient; advance notice must be given. Department of Treasury, 29 FLRA 610 (1987) (union steward was present and participated in monthly meeting); McClellan Air Force Base, 29 FLRA 594 (1987) (JAG, on phone with union when witness arrived, notified union but did not invite union to the discussion).

(2) Union representative has the right to speak and comment. Nuclear Regulatory Commission, 21 FLRA 765 (1986) (ULP when management interrupted union representative whenever he spoke).

2. Investigatory Examination of Employees. 5 U.S.C. § 7114(a)(2)(B). NLRB v. Weingarten, 420 U.S. 251 (1975) (NLRB case where employee being interrogated about a theft asked for a union representative and the representative was denied).

An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at any examination of an employee in the unit by a representative of the agency in connection with an investigation if (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and (ii) the employee requests representation. 5 U.S.C. § 7114(a)(2)(B).

a. The rule. Management must permit a bargaining unit employee to notify the union and allow a union representative an opportunity to attend interviews with employees when: (*must meet all 4 requirements*).

(1) There is an examination of a bargaining unit employee in connection with an investigation.

(a) Construing "Examination." AFGE, Local 1941 v. FLRA, 837 F.2d 495 (D.C. Cir. 1988) (credentials committee meeting for doctor was an examination).

(b) Includes written memos. U.S. Border Patrol, Del Rio, Texas, 46 FLRA 363 (1992) (agents required to provide written statements about escape of suspect).

(2) By an agency representative.

(a) Inspector Generals are agency representatives when conducting an employee examination covered by §7114(a). NASA v. FLRA, 119 S. Ct. 1979 (1999) (finding that while Congress intended that OIGs would enjoy a great deal of autonomy, the OIG investigative office still performs on behalf of the particular agency in which it is stationed and therefore acts as an agency representative when it conducts examinations covered by §7114(a)).

(b) The FSLMRS does not entitle employees to have union representatives present during questioning by IG agents on matters within the bona fide functions of the IG Act and outside the scope of collective bargaining.

(3) Employee reasonably believes disciplinary action may result. IRS v. FLRA, 671 F.2d 560 (D.C. Cir. 1982) (whether there are reasonable grounds to believe that discipline may result from the interview is an objective standard); DOJ, Bureau of Prisons, 27 FLRA 874 (1987).

(4) Employee requests union representative.

b. Union representative may choose not to attend. INS and AFGE Local 1917, 46 FLRA 1210 (1993) (agency proceeded when union representative refused to attend after the agency made repeated efforts).

c. When employee asks for a union representative, management has three alternatives:

(1) Allow representative to attend,

(2) End the interview, or

(3) Give employee the option of either answering the questions without a union representative or having no interview at all. Bureau of Prisons, Leavenworth, 46 FLRA 820 (1992) (Office of Inspector General investigator gave employee being interrogated the choice of remaining silent or proceeding without a union representative).

d. Employees must be reminded of their rights under this section annually. 5 U.S.C. § 7114(a)(4). Sears v. Dept. of Navy, 680 F.2d 863 (1st Cir. 1982) (the Navy did not need to give additional notice where they provided annual notice).

e. Effective representation. FAA and NAATS, 35 FLRA 645 (1990) (union unsuccessfully requested volumes of information to represent employee at interrogation); Bureau of Prisons, Office of Internal Affairs and AFGE, AFL-CIO Local 171, 52 FLRA 421 (1996) (no right for employee and union rep. to consult outside interview room).

f. Not a "right to remain silent." Navy Public Works Center v. FLRA, 678 F.2d 97 (9th Cir. 1982) (proposal to give right to remain silent was violation of management rights to discipline and assign work); Metal Trades Council and Navy Public Works, Norfolk, 15 FLRA 343 (1984) (proposal to give right to remain silent was violation of management rights to discipline and assign work).

g. Remedy for violation, 5 U.S.C. § 7114(a)(2)(B). DOJ, Bureau of Prisons, 35 FLRA 431 (1990), reversed on other grounds, DOJ v. FLRA, 939 F.2d 1170 (5th Cir. 1991) (agency told to repeat interview, afford the employee full rights, and reconsider disciplinary action taken).

h. Union Representative - Employee privilege. NTEU and Customs, 38 FLRA 1300 (1991) (it was a ULP for an investigator to order a union representative to divulge what member had said to him while he was acting in his representative capacity).

3. Fact-Gathering Sessions and Brookhaven Warnings.[1]

a. A "fact-gathering" session is an interview between an agency representative and a bargaining unit employee to ascertain necessary facts in preparation for third party proceedings. Sacramento Air Logistics Center and AFGE, 29 FLRA 594 (1987) (management met with union witness in an arbitration case).

b. Brookhaven Warnings. Internal Revenue Service and Brookhaven Service Center, 9 FLRA 930 (1982) (consolidated cases where attorneys spoke with witnesses in preparation for MSPB and arbitration cases).

(1) Management must:

(a) inform the employee who is to be questioned of the purpose of the questioning,

(b) assure the employee that no reprisal will take place if he or she refuses, and

(c) obtain the employee's participation on a voluntary basis;

(2) The questioning must occur in a context which is not coercive in nature; and

(3) The questioning must not exceed the scope of the legitimate purpose of the inquiry.

[1] This is actually a violation of § 7116(a)(1), Interfering, Restraining, or Coercing an Employee in the Exercise of the Employee's Rights Under the Statute, but it fits better with a discussion of formal discussions.

c. Fact-gathering sessions may also be formal discussions that require notice and an opportunity to be present. GSA, Region 2, New York and AFGE Local 2431, 54 FLRA No. 86 (1998) (a meeting to discuss possible testimony of a third party witness in preparation for a pending arbitration hearing was also a formal discussion requiring notice to the union and an opportunity to attend).

d. Brookhaven Warnings must be given even if the discussion is formal and the union has been given advance notice and an opportunity to be present. Veterans Administration and AFGE, 41 FLRA 1370 (1991) (employees were required to go to supervisor's office to speak with attorney on the phone).

IV. MANAGEMENT'S DEFENSES TO UNFAIR LABOR PRACTICES.

A. *De Minimis* Changes. HHS and AFGE, 24 FLRA 403 (1986) (change of employees title without change in duties was *de minimis).*

B. Dual Motive ULP Cases. Agency must show that it would have taken the same action in the absence of protected activity and that the action was legitimate. Warner Robins Air Force Base and AFGE Local 987, 52 FLRA 602 (1996) (denial of temporary promotion for union president not a ULP); FEMA and AFGE, Local 4060, 52 FLRA 486 (1996) (Agency failed to establish that its failure to act on union president's request for a personnel action was legitimate).

C. Wrong Appeal Route.

1. Issues which can be raised under a statutory appeals procedure may not be raised as a ULP. 5 U.S.C. § 7116(d).

2. Except for matters covered by a statutory appeals procedure, (5 U.S.C. §§ 4303, 7512 or 2302(b)(1)), other problems involving conditions of employment that are covered by the CBA may be raised by grievance/arbitration or ULP, but not both. 5 U.S.C. § 7116(d).

a. Parties must chose between ULP or grievance arbitration procedures.

b. If a party choose to file a grievance already, that party may not change its mind and the agency defense is that the ULP procedures are no longer available.

3. If a issue is one that requires contract interpretation, the FLRA will interpret the contract using the standards and principles applied by arbitrators to determine the express terms of the agreement and the intent of the parties. HHS and AFGE, 47 FLRA 1167 (1993); IRS, 47 FLRA 1091 (1993) (union alleged violations of union rights and agency responded that the parties had agreed in the contract that it was permissible).

D. Defenses - Duty to Bargain.

1. No change to conditions of employment (or subject matter is not a condition of employment (e.g., political activity, classification of position, etc.)).

2. Covered by statute or government-wide regulation.

3. Management right.

4. Permissive topic.

5. Matter is covered by the contract.

E. Defenses - Duty to Furnish Requested Information.

1. Prohibited by law (e.g., Privacy Act, Rehabilitation Act, etc.).

2. Not normally maintained.

3. Not reasonably available.

4. Subject not within scope of bargaining.

5. No particularized need.

F. Defenses - Formal Discussions.

1. Not a formal discussion.

2. Does not satisfy the indicia of formality (e.g., shop meeting over productivity or work assignment).

3. Not a discussion over terms & conditions of employment nor a grievance.

4. Not a representative of the agency.

G. Defenses - Weingarten Rights.

1. Not an examination.

2. Not an agency representative.

3. Reasonable person would not believe that discipline could result.

4. Employee did not ask for representation.

V. UNION VIOLATIONS. 5 U.S.C. § 7116(B).

A. Interference With Basic Employee Rights. 5 U.S.C. § 7116(b)(1).

1. All BU members receive lawyer's assistance. National Treasury Employees Union, 1 FLRA 909 (1979) (NTEU policy of providing attorneys only for dues paying members in work related situations was ULP). *See* AFGE v. FLRA, 812 F.2d 1326 (10th Cir. 1987) (requirement to provide attorney does not apply to statutory appeals); NTEU v. FLRA, 800 F.2d 1165 (D.C. Cir. 1986) (did not need to provide attorneys in MSPB appeals); Department of Defense Dependent Schools, 28 FLRA 908 (1987) (union not required to provide attorney for unrelated class action lawsuit).

2. Union is not obligated to represent a non-member where employee controls procedure. AFGE Local 1857 and Eloise F. Holkahl, 46 FLRA 904 (1992) (employee allowed representative of her choice and since she did not pay dues the union declined).

3. Duty of fair representation. *See also* FLRA General Counsel Memorandum to Regional Directors, subject: The Duty of Fair Representation, January 27, 1997, FLRA website, *www.flra.gov/gc/dfr_mem.html*.

   a. A union may attempt to use employee complaints to try to leverage union membership, but it may not coerce bargaining unit employees into joining by refusing to listen to their votes on union policies unless they join. National Air Traffic Controllers Association and FAA, 55 FLRA No. 103 (1999) (finding that the union violated the duty of fair representation when its president wrote a letter to non-union members telling them that the union's seniority policy is directly determined by union members alone).

   b. Union delay in assisting grievant was breach of duty of fair representation under circumstances. IAM, 24 FLRA 352 (1986) (union misled employee into thinking they would file grievance). [Note: Federal employees do not have a private right of action against their unions for breach of the duty of fair representation. Karahalios v. NFFE, 489 U.S. 527 (1989)].

B. Cause Agency to Discriminate Against an Employee. 5 U.S.C. § 7116(b)(2).

- Union attempting to induce discipline of nonmembers for exercising rights protected by § 7102. OEA v. DODDS, 11 FLRA 377 (1983) (union tried to get employee disciplined for writing letter critical of union president).

C. Coerce a Union Member as Punishment, Reprisal, or for the Purpose of Impeding the Member's Work Performance. 5 U.S.C. § 7116(b)(3).

- Union steward removed from office after reporting patient abuse by another employee. VA Medical Center, Salisbury, 19 FLRA No. 66 (1985), reversed, AFGE v. FLRA, 806 F.2d 1105 (D.C. Cir. 1986); on remand, FLRA reversed its initial decision, *see* AFGE v. VA Medical Center, Salisbury, 29 FLRA 178 (1987) (no violation). (Good history of § 7116(b)(3)).

D. Discriminate in Union Membership Based Upon Race, Color, Creed, National Origin, Sex, Age, Civil Service Status, Political Affiliation, Marital Status, or Handicapping Condition. 5 U.S.C. § 7116(b)(4).

- AFGE and Moore, 22 FLRA 966 (1986) (wife of union officer alleged marital status discrimination saying she was expelled from union for her husband's actions).

E. Refusal to Negotiate in Good Faith. 5 U.S.C. § 7116(b)(5).

- AFGE and SSA, 20 FLRA 749 (1985) (union signed settlement on grievance then immediately refiled on the same matter).

F. Refusal to Cooperate at Impasse. 5 U.S.C. § 7116(b)(6).

G. Call or Participate in a Strike or Work Slowdown, or Condone Such Activity. 5 U.S.C. §§ 7116(b)(7)(A)-(B).

- Union must take affirmative action to halt the work stoppage. PATCO, 7 FLRA 34 (1981); Air Transport Assoc. of America v. PATCO, 667 F.2d 316 (2d Cir. 1981) (air traffic controller cases); United States v. PATCO, 653 F.2d 1134 (7th Cir. 1981); PATCO v. FLRA, 685 F.2d 547 (D.C. Cir. 1982); Social Security, Baltimore, 4 FLRA 126 (1980) (when employees walked off job for 3-6 minutes to protest conditions it constituted a work slowdown).

H. Picketing by Federal Employees. 5 U.S.C. § 7116(b)(7)(A).

1. Generally. SSA, New York, 22 FLRA 63 (1986) (may picket if it does not interfere with agency mission).

2. DA Policy. DA Msg, Clarification of DA Policy on Informational Picketing, 24 Feb. 1979. *But see* Fort Ben Harrison and AFGE, 40 FLRA 558 (1991) (commander admitted that there was not interference with mission when employees picketed in park on installation).

I. Otherwise Fail or Refuse to Comply with Provisions of Chapter 5 U.S.C. § 7116(b)(8).

VI. REMEDIES. *See* Appendix C, May 2000, FLRA General Counsel Guidance on Seeking Remedies for ULPs.

A. Cease and desist order. Department of Treasury and NTEU, 37 FLRA 603 (1990); Sacramento ALC and AFGE, 35 FLRA 1230 (1990).

B. Status quo ante (SQA). FDIC and NTEU, 41 FLRA 224 (1991); Federal Correctional Institute, 8 FLRA 604 (1982).

C. Retroactive Bargaining Order. U.S. Food and Drug Administration, Northeast and Mid-Atlantic Regions and AFGE Council No. 242, 53 FLRA 1269 (1998) (Authority rejected a request for retroactive bargaining order, but stated that if the respondent "knew or should have known that its actions constituted a ULP, a RBO may be appropriate."); FAA Northwest Region, Renton, Washington, 51 FLRA 35 (1995).

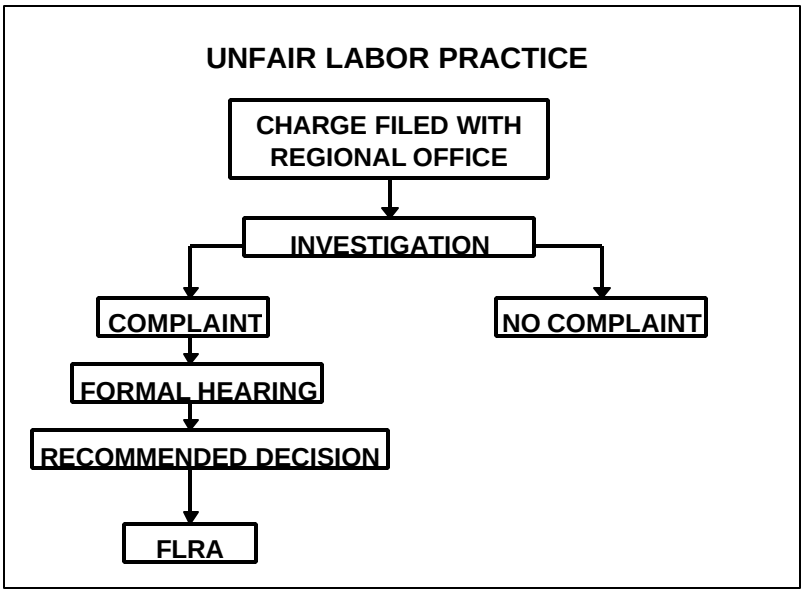
D. Reinstate employee with backpay.

1. Need statutory authority to order backpay.

2. Backpay is limited to six years.

E. Order any remedial action necessary to carry out the purposes and policies of the statute.

VII. PROCEDURES.



Unfair Labor Practice Procedure

A. Resolving ULPs. 5 C.F.R. §§ 2423.1 and 2423.2 (1999 amendments).

1. Before filing the charge.

   a. Parties are encouraged to meet and, in good faith, attempt to resolve ULP disputes.

   b. Attempts to resolve disputes informally do not toll statute of limitations for filing a charge.

2. After filing the charge.

   a. Parties are encouraged to informally resolve ULP allegations before a determination on the merits by the Regional Director (RD).

   b. Collaboration and Alternative Dispute Resolution Program (CADR) services are available.

B. The Charge.

1. Who may file a charge. 5 C.F.R. § 2423.3.

   a. Any individual;

   b. Any labor organization; or

   c. Any agency.

2. Charges may be filed against: *See* Appendix D for sample forms.

   a. An activity;

   b. An agency; or

   c. A labor organization.

3. Contents of the charge. 5 C.F.R. §§ 2423.4 & 2423.6.

   a. Specific information about the charging party and the charged party.

   b. Clear and concise statement of the facts alleged to constitute an ULP UP 5 U.S.C. § 7116.

   c. Supporting documents and evidence.

   d. Charging party must serve the charge on the other parties and include a statement of service in the charge filed with the RD.

4. Time limit. 5 U.S.C. § 7118(a)(4). Generally must be filed within 6 months of the wrong unless:

a. there was a failure of the charged agency to perform a duty owed to the person, or

b. there was any concealment that prevented discovery of the alleged ULP during the 6-month period.

c. If one of the exceptions occurs, the General Counsel (GC) may issue a complaint based on a charge filed in the 6 months after discovery.

5. Investigation by Regional Director (RD). 5 C.F.R. § 2423.8 (1999 amendments).

a. All parties are required to cooperate fully with RD.

b. If a person declines to cooperate with the investigation, the RD may recommend to the GC to issue a subpoena under 5 U.S.C. § 7132.

c. An agency is not required to disclose intramanagement guidance, advice, counsel, or training within an agency.

d. During its investigation, the GC will protect the identity of persons who submit statements and information.

(1) This confidentiality policy helps ensure that the GC obtains all relevant information.

(2) Witness names and a summary of their expected testimony and proposed evidence will be released after issuance of a complaint and in preparation for a hearing.

C. RD actions. 5 C.F.R. § 2423.10.

1. Approve a request to withdraw a charge.

2. Issue a complaint. 5 C.F.R. § 2423.20.

a. Decision to issue a complaint is not subject to review.

b. Answer. Respondent has 20 days from date of service of the complaint to file an answer with the Office of the Administrative Law Judge (ALJ). 5 C.F.R. § 2423.20(b).

c. Amendments. The RD may amend the complaint anytime before the answer is filed. After Respondent answers, any request to amend a complaint must be filed with the Office of the ALJ. 5 C.F.R. § 2423.20(c).

3. Refuse to issue a complaint. 5 C.F.R. § 2423.11.

a. If the RD refuses to issue a complaint and the charging party does not withdraw the charge, the RD may dismiss the charge.

b. A charging party may appeal a dismissal decision from the RD to the GC within 25 days after service of the RD dismissal letter. 5 C.F.R. § 2423.11(c). Charging party is not required to serve a copy of the appeal on the other parties. *See* FLRA Qs & As on ULP Appeals to the General Counsel, January 1999 version, at *www.flra.gov/gc/qa_ulp1.html.*

4. Approve a settlement agreement. 5 C.F.R. § 2423.12.

a. The settlement may be between the charged and charging parties or between the Regional Director and the charged party.

b. The Regional Director must approve settlement agreements.

c. Where there is a settlement between the Regional Director and the charged party, the charging party may appeal to the General Counsel.

D. Settlement Judge Program. 5 C.F.R. 2423.25(d).

1. Voluntary.

2. Not the ALJ who will hear the case.

3. All matters are confidential and cannot be used at an ULP hearing.

4. Prepare your position.

a. Theory or theories.

b. Facts.

c. Have your witnesses present.

E. Prehearing conference. 5 C.F.R. § 2423.24(d).

1. The ALJ hearing the case will conduct at least one conference no less than 7 days before the hearing.

2. Typically, the conference is telephonic.

3. Notice for the prehearing conference usually directs that prehearing witness list and an index of exhibits be provided before the meeting.

F. Hearing is Conducted by Administrative Law Judge (ALJ). 5 C.F.R. §§ 2423.30 - 2423.34.

1. All pleadings, motions, conferences, and hearings are administered by the ALJ. 5 C.F.R. § 2423.20(d).

a. This includes prehearing documents. 5 C.F.R. § 2423.24.

b. ALJ has authority to sanction any party that fails to comply with orders.

2. Rules of evidence are not strictly followed. 5 C.F.R. § 2423.31(b).

3. Burden of Proof. 5 C.F.R. § 2423.32.

   a. GC has the burden of proving the allegations of the complaint.

   b. Respondent has the burden of proving any affirmative defenses it raises.

   c. Standard is preponderance of the evidence.

4. Post-hearing briefs may be filed. 5 C.F.R. § 2423.33. Must be filed within 30 days of the close of the hearing.

5. ALJ Decision and exceptions. 5 C.F.R. § 2423.34.

   a. ALJ issues recommended decision containing findings of fact and conclusions of law.

   b. ALJ transfers case to the Authority for decision and order.

   c. Either party may file exceptions to the recommendation. 5 C.F.R. § 2423.40(a).

      (1) Exceptions to the recommendation must be filed within 25 days of service of the recommendation.

         (a) If exceptions are filed, the Authority will review the case of the merits and issue a decision affirming or reversing, in whole or in part, the ALJ's recommended decision.

         (b) Exceptions cannot raise a matter not raised before the ALJ. 5 C.F.R. § 2429.5.

      (2) If no exceptions are filed, the ALJ's recommendations shall become the Authority's final decision.

   d. Judicial review. 5 U.S.C. § 7123.

(1) Appeal must be filed within 60 days of the FLRA's decision to the appropriate U.S. Circuit Court of Appeals.

(2) Appeal may not raise issues not raised before the FLRA.

VIII. CONCLUSION.

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APPENDIX A

Copy of FLRA webpage advertising new ULP Case Handling Manual.

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APPENDIX B

Excerpt from FLRA GC Litigation Manual with chart showing ULP regulatory time limits.

App B, page 2.

App B, page 3.

App B, page 4.

App B, page 5.

App B, page 6.

App B, page 7.

App B, page 8.

APPENDIX C

May 8, 2000

MEMORANDUM
TO: Regional Directors
FROM: Joe Swerdzewski, General Counsel
SUBJECT: Guidance on Seeking Remedies for Unfair Labor Practices Under the Federal Service Labor-Management Relations Statute

This memorandum discusses the Office of the General Counsel policy on seeking remedies for unfair labor practices under the Federal Service Labor-Management Relations Statute (Statute). This memorandum provides guidance on the types of remedies and the elements of proof that are necessary to obtain those remedies. When determining, on behalf of the General Counsel, to issue an unfair labor practice complaint under the Statute, Regional Directors are required to make decisions on the remedy that will be sought in litigation. Regional Directors are guided by the decisions of the Members of the Federal Labor Relations Authority in determining the appropriate legal remedy for unfair labor practices. Obtaining these remedies from the Authority in litigation requires not only a finding that an unfair labor practice violation has occurred, but also a determination that the remedy sought is lawful and appropriate to the violation in the particular circumstances of the case. Thus, it is imperative that the Regions, and the parties, are aware of not only the variety of possible remedies, but also the type of evidence that is necessary to establish the appropriateness of these remedies.

This memorandum serves as guidance to the Regional Directors in investigating, settling and litigating unfair labor practice charges. It is also intended to assist parties in providing evidence and arguments concerning the appropriate remedy to an unfair labor practice charge. By understanding the types of remedies available and the evidence necessary to establish the appropriateness of those remedies, the Regions and the parties will be better suited to resolve unfair labor practice complaints and, if litigation is necessary, make cogent arguments based on relevant evidence as to the appropriateness of those remedies. The remedies set forth in this Guidance are illustrative of the remedies which may be sought by the Regions. The Regions will continue to pursue new and better remedies and continue to expand potential remedies available for violations of the Statute.

I am making this Guidance Memorandum available to the public to assist union officials and agency representatives to resolve unfair labor practice issues in an expeditious fashion consistent with the requirements of the Statute. This Guidance is a continuation of my Office's commitment to provide the participants in the Federal Service Labor-Management Relations Program with my views on significant topics. This Guidance reflects my views as the General Counsel of the Federal Labor Relations Authority and does not constitute an interpretation by the three-member Authority.
This Guidance is divided into five parts. Part I -- "Remedial Authority under the Statute " -- sets forth the remedial provisions of the Statute and discusses the purposes of remedies; Part II -- "OGC Remedy

Policy" -- sets forth the General Counsel's policy on seeking remedies in the litigation of unfair labor practice complaints and emphasizes the importance of developing evidence of the appropriate remedy throughout the processing of an unfair labor practice charge and the litigation of an unfair labor practice complaint; Part III --"Traditional and Nontraditional Remedies" -- explores the Authority's standards for ordering "nontraditional" remedies; Part IV -- "Postings and Notices" -- explores issues concerning where remedial notices are posted and distributed, and which official signs such notices; and Part V - - "Monetary Awards" -- discusses the requirements that need to be met before money may be awarded.

Many of the remedies discussed in this Guidance have been well established by Authority precedent, but those decisions also leave open the possibility for further innovative remedies, as long as the Statute is effectuated, the evidence establishes the need for such a remedy, and the remedy is not otherwise inconsistent with the Statute or other external law. Accordingly, to assist the parties in recognizing and supporting appropriate remedies, attached to this Guidance are: (1) the different types of remedies, both traditional and nontraditional, to specific unfair labor practices with descriptions of the types of evidence that are necessary to establish the appropriateness of those remedies; and (2) a decisional protocol to assist the Regional Director in determining what remedy to seek when litigating an unfair labor practice complaint.

The remedies discussed in this Guidance are sought, as appropriate, after an unfair labor practice complaint issues and the case is litigated before an Administrative Law Judge (ALJ) and the Authority. The Office of the General Counsel's Settlement Policy, on the other hand, concerns the settlement of unfair labor practice disputes without the need for litigation. The Settlement Policy sets forth the goals of settlements, the manner in which settlements are reached, and the criteria that Regional Directors apply in determining whether to approve settlement agreements. Those criteria are applied on a case-by-case basis and involve additional factors beyond the appropriate traditional or nontraditional remedy that would have been sought in litigation. Thus, settlements often contain provisions that are different from the remedies that may be sought in actual litigation.

EXECUTIVE SUMMARY

FLRA GENERAL COUNSEL JOSEPH SWERDZEWSKI'S MEMORANDUM TO REGIONAL DIRECTORS ON GUIDANCE IN SEEKING REMEDIES FOR UNFAIR LABOR PRACTICES UNDER THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

This Executive Summary of the General Counsel of the Federal Labor Relations Authority's Guidance Memorandum to Regional Directors discusses the Office of the General Counsel policy on seeking remedies for unfair labor practices under the Federal Service Labor- Management Relations Statute (Statute). This memorandum provides guidance on the types of remedies and the elements of proof that are necessary to obtain those remedies. When determining, on behalf of the General Counsel, to issue an unfair labor practice complaint under the Statute, Regional Directors are required to make decisions on the remedy that will be sought in litigation. Regional Directors are guided by the decisions of the Members of the Federal Labor Relations Authority in determining the appropriate legal remedy for unfair labor practices. Obtaining these remedies from the Authority in litigation requires not only a finding that an unfair labor practice violation has occurred, but also a determination that the remedy sought is lawful and appropriate to the violation in the particular circumstances of the case. Thus, it is imperative that the Regions, and the parties, are aware of not only the variety of possible remedies, but also the type of evidence that is necessary to establish the appropriateness of these remedies.

This memorandum serves as guidance to the Regional Directors in investigating, settling and litigating unfair labor practice charges. It is also intended to assist parties in providing evidence and arguments concerning the appropriate remedy to an unfair labor practice charge. By understanding the types of remedies available and the evidence necessary to establish the appropriateness of those remedies, the Regions and the parties will be better suited to resolve unfair labor practice complaints and, if litigation is necessary, to make cogent arguments based on relevant evidence as to the appropriateness of those remedies.

I am making this Guidance Memorandum available to the public to assist union officials and agency representatives to resolve unfair labor practice issues in an expeditious fashion consistent with the requirements of the Statute. This Guidance is a continuation of my Office's commitment to provide the participants in the Federal Service Labor-Management Relations Program with my views on significant topics. This Guidance reflects my views as the General Counsel of the Federal Labor Relations Authority and does not constitute an interpretation by the three-member Authority.

Many of the remedies discussed in this Guidance have been well established by Authority precedent, but those decisions also leave open the possibility for further innovative remedies, as long as the Statute is effectuated, the evidence establishes the need for such a remedy, and the remedy is not otherwise inconsistent with the Statute or other external law. Accordingly, to assist the parties in recognizing and supporting appropriate remedies, attached to this Guidance are: (1) the different types of remedies, both traditional and nontraditional, to specific unfair labor practices and describes the types of evidence that

are necessary to establish the appropriateness of those remedies; and (2) a decisional protocol to assist the Regional Director in determining what remedy to seek when litigating an unfair labor practice complaint. This Guidance sets forth established traditional remedies and possible nontraditional remedies for various violations. It is not a limitation on developing new and better remedies not referenced in the Guidance.

The remedies discussed in this Guidance are sought, as appropriate, after an unfair labor practice complaint issues and the case is litigated before an Administrative Law Judge (ALJ) and the Authority. The Office of the General Counsel's Settlement Policy, on the other hand, concerns the settlement of unfair labor practice disputes without the need for litigation. The Settlement Policy sets forth the goals of settlements, the manner in which settlements are reached, and the criteria that Regional Directors apply in determining whether to approve settlement agreements. Those criteria are applied on a case-by-case basis and involve additional factors beyond the appropriate traditional or nontraditional remedy that would have been sought in litigation. Thus, settlements often contain provisions that are different from the remedies that may be sought in actual litigation.

PART I

REMEDIAL AUTHORITY UNDER THE STATUTE

Q. #1: What is the statutory authority for the Federal Labor Relations Authority to order agencies and unions to take remedial action for committing unfair labor practice violations?

Sections 7105 (g)(3) and 7118 (a)(7) of the Statute contain the Authority's remedial power. In sum, the Authority is empowered to: (1) issue cease and desist orders; (2) require parties to negotiate a contract and to give it retroactive effect; (3) order reinstatement of an employee with backpay; and (4) order any remedial action necessary to carry out the purposes and policies of the Statute.

Q. #2: What are the limitations on the Authority's remedial powers?

The Authority and the courts have concluded that Congress intended to provide the Authority with broad remedial power. The Statute's broad grant of remedial power to the Authority is tempered only by reference to the purpose of the Statute, which embodies the balance of interests between and among employees, unions, and agencies, and consistency with external law.

Q. #3: Does the Statute's management rights clause limit the Authority's remedial power?

No. Section 7106 of the Statute (the management rights clause) does not diminish the Authority's remedial powers. This clause limits only the scope of collective bargaining under the Statute. For example, the Authority will specifically name in its order the title of the appropriate agency or union official to sign a remedial notice.

Q. #4: What is the purpose of a remedy for an unfair labor practice violation?

The essential purpose of an Authority remedial order is "to restore, so far as possible, the status quo that would have obtained but for the wrongful act and to deter future misconduct." In other words, the purpose of a remedy is to recreate the conditions and relationships that would have been had there been no unfair labor practice. The deterrence of future violative conduct also is an essential purpose of a remedy. Remedies, however, must not be punitive, and the Authority may not direct a respondent to perform an illegal act.

Q. #5: What are the Authority's remedy principles?

All remedies ordered by the Authority, therefore, must meet these standards, referred to as the remedy principles:

a. be consistent with external law;

b. be reasonably necessary to effectively recreate the conditions and relationships with which the unfair labor practice interfered;

c. effectuate the policies of the Statute, including the deterrence of future violative conduct; and

d. are not punitive.

PART II

OFFICE OF THE GENERAL COUNSEL REMEDY POLICY

Q. #1: What is the OGC Remedy Policy?

The OGC seeks traditional and nontraditional remedies that:

- Recreate the conditions and relationships that would have been had there been no unfair labor practice;
- Restore, so far as possible, the status quo that would have been obtained but for the wrongful act;
- Deter future violations;
- Are appropriate under the particular circumstances of the violation and are supported by the evidence;
- Utilize the full extent of the Authority's remedial power;
- Avoid being punitive;
- Are consistent with external controlling law;
- Are responsive to the legitimate interests of the parties; and
- Effectuate and promote the purposes and policies of the Statute.

Q. #2: How is the issue of appropriate remedy considered throughout the processing of the ULP charge and ULP complaint?

Regional Offices consider and evaluate potential appropriate remedies throughout the investigation of an unfair labor practice charge and the litigation of an unfair labor practice complaint. During the investigation of a charge, the Agent obtains relevant evidence, testimonial and documentary, concerning the legitimate interests of the Charging Party in seeking a particular remedy. Throughout the decisional and trial preparation processes, the appropriate remedy is analyzed in the same manner that the elements of the violation are analyzed. The sought remedy is disclosed as part of the pre-hearing disclosure requirement. Documentary evidence pertaining to the appropriate remedy is presented at the hearing, argued, supported in post-hearing briefs, and considered as a basis for the filing of exceptions.

PART III

TRADITIONAL AND NONTRADITIONAL REMEDIES

Q. #1: What is a traditional remedy?

The Authority has distinguished in its decisions between traditional remedies and nontraditional remedies. For example, a cease-and-desist order accompanied by the posting of a notice to employees is a traditional remedy provided in virtually all cases where a violation is found. The Authority also has identified other remedies that require some form of affirmative action by a respondent as established, or traditional, remedies, such as a retroactive bargaining order, the grant of backpay, and the release of improperly withheld information. Aside from these general references, however, the Authority to date has not clearly identified the factors which differentiate a traditional remedy from a nontraditional remedy.

Q. #2: Are all traditional remedies granted as a matter of course?

No. Some traditional remedies, such as status quo ante as a remedy for a failure to bargain over the procedures and appropriate arrangements concerning the exercise of a management right and the grant of backpay, have given rise to criteria of their own. Thus, even though considered traditional by the Authority, evidence must still be presented and legal conclusions made to support these traditional remedies

Q. #3: What is a nontraditional remedy?

The Authority has referred to remedies not routinely granted as a matter of course as nontraditional remedies. Nontraditional remedies must satisfy the same broad objectives that are required of all remedies ordered by the Authority, i.e., they must meet the remedy principles. Thus, assuming that there exist no legal or public policy objections to a proposed, nontraditional remedy, the questions are whether the remedy is reasonably necessary and would be effective to "recreate the conditions and relationships" with which the unfair labor practice interfered, as well as to effectuate the policies of the Statute, including the deterrence of future violative conduct."

Q. #4: What is the basic distinction between traditional and nontraditional remedies?

If a remedy is deemed traditional, the Authority, in essence, presumes that these traditional remedies meet the remedy principles. The burden is on the respondent to establish otherwise. Of course, if the

traditional remedy has criteria of its own, the burden remains on the General Counsel to satisfy those independent criteria in order to trigger the applicability of the traditional remedy.

On the other hand, the Authority requires an independent factual basis to sustain a nontraditional remedy. This burden lies with the General Counsel. As such, a nontraditional remedy requires a separate factual determination that the specific nontraditional remedy is reasonably necessary and would be effective to recreate the conditions and relationships which would have existed but for the unfair labor practice, as well as to effectuate the policies of the Statute, including the deterrence of future violative conduct.

Q. #5: What must be established to obtain a nontraditional remedy?

To obtain a nontraditional remedy, the General Counsel must establish both that the traditional remedy is not adequate, and that the evidence dictates that a nontraditional remedy is necessary. These questions are essentially factual, requiring specific evidence to establish their existence.

Q. #6: How is this evidence obtained?

The Regions investigate and litigate these remedies in the same manner that the Regions investigate and litigate the essential elements of a violation. As with other factual questions, the General Counsel bears the burden of persuasion, the ALJ is responsible for initially determining whether the remedy is warranted, and the Authority is responsible for ordering such nontraditional remedies.

Q. #7: What is the key to obtaining a nontraditional remedy?

It is essential that when any remedy other than the routinely ordered, traditional remedy is requested, the record contains evidence establishing why it is necessary to order a nontraditional remedy, rather than the routine traditional remedy. Not only must the General Counsel establish that the traditional remedy is not adequate to redress the wrong incurred by the unfair labor practice, but the General Counsel must also establish through evidence that the particular nontraditional remedy sought is appropriate under the remedy principles. Record evidence, not mere policy and equity arguments, is essential to establish the appropriateness of a nontraditional remedy.

PART IV

POSTING, DISTRIBUTING, AND SIGNING REMEDIAL NOTICES AND THE CONTENTS OF THOSE NOTICES

Q. #1: Why are Authority notices posted as part of the remedy for an unfair labor practice violation?

The posting of a notice provides evidence to bargaining unit employees that the rights guaranteed under the Statute will be vigorously enforced. In many instances, the posting of a notice is the only visible indication to unit employees that a respondent recognizes and intends to fulfill its obligations under the Statute. In addition to ordering certain conduct to cease and desist and any affirmative action to be taken, the notices contain an introductory statement that the Authority has found a violation of the Statute and has ordered the respondent to post and abide by the notice.

Q. #2: What is the scope of a posting and the signatory on the posting?

The scope of the posting refers to the identification of the particular locations where a remedial notice to employees will be posted. The signatory indicates the particular management or union official who is ordered to sign the notice. Whenever the scope of the posting is expanded beyond the particular location of the violation, the signatory on the posted notice should be an official with responsibility for the entire posting area. Conversely, whenever the signatory of a posting is an official with responsibility for an area beyond the particular location of the violation, the scope of the posting should encompass that expanded area. In short, the scope of the posting and level of the signatory should be consistent.

Q. #3: Where should a remedial notice be posted?

The standard for the scope of a remedial posting is whether the violative conduct affects employees beyond a particular location. Where a respondent's conduct impacts unit employees beyond the particular location where the violation occurred, it is appropriate to require that notices be posted in additional areas. The General Counsel has the burden to present evidence to establish a scope of posting beyond the location of the violation. When litigating a case, the Regions request the greatest appropriate scope of the posting.

Q. #4: Who should sign a remedial notice?

Sometimes, signing the notice is the only way that employees know that the lead manager or union official is even aware that a violation of law has occurred. The Authority has long held that the remedial purposes of a notice are best served by requiring the head of the activity responsible for the violation to sign the notice. The highest official of the activity responsible for the violation, however, is not always the head of the activity/ agency or union. As with the scope of the posting, the burden is on the General Counsel to present evidence to establish the appropriate level of the signatory. When litigating a case, the Regions request the highest appropriate official to sign the notice.

Q. #5: Has the Authority ever ordered the nontraditional remedy of distributing the notice to unit employees, supervisors and managers?

Yes. Sometimes, it may be necessary to ensure that the notice is distributed in a different or additional manner to impress upon the respondent the seriousness of the violation(s) and to ensure that employees know that their rights under the Statute will be protected. When warranted by the extraordinary circumstances surrounding the violations, such as repeated egregious violations, the Authority has ordered that the signed remedial notice be distributed to each supervisor, manager and employee. Regions also may consider distribution of a notice by electronic mail when appropriate to ensure that the notice is available to all employees affected by the violation.

Q. #6: Has the Authority ever ordered the nontraditional remedy of reading the notice to unit employees, supervisors and managers?

Yes. In view of the seriousness of the violations, the Authority on two occasions has ordered that a meeting be held where the agency head, or an Authority agent in the presence of the agency head, reads the notice aloud. In U.S. Penitentiary, Leavenworth, Kansas, 55 FLRA No. 127, 55 FLRA 704, 720 (1999), the chief management official had been personally involved to a significant extent in a pattern of unfair labor practice violations over the course of a seven-month period, many of them egregious, such as making threatening, anti-union statements at a mandatory meeting of all employees and making repeated statements threatening to take action against union officials. The Authority found it was reasonably necessary to require those statements to be retracted, via a reading aloud of the notice, at another meeting of all employees.

Q. #7: Has the Authority ever ordered the nontraditional remedy of naming specific managers or union officials that engaged in violative conduct in the notice?

No. The General Counsel, to date, has been unsuccessful in convincing the Authority that it is necessary to name specific offending managers, supervisors or union officials in a posting to recreate the conditions that existed before the violation and to deter future violations. In Leavenworth, for example, the Authority noted that there are no private sector cases where a request for a remedy has been granted. The Authority added that in view of the other ordered remedies, naming particular individuals in the notice is not reasonably necessary to recreate the conditions and relationships with which the unfair labor practice interfered, or to effectuate the policies of the Statute.

Q. #8: Has the Authority ever ordered the nontraditional remedy of referring to prior violations in the notice?

Yes. On one occasion, the Authority granted this remedy, noting that the language serves to put both the employees and the respondent on notice of the serious nature of the respondent's unlawful conduct.

Q. #9: What type of evidence supports these nontraditional scope of posting, signatories and notice distribution remedies?

To determine the appropriate scope and signatories of a posting and whether any of the above nontraditional posting remedies are appropriate, evidence should include:

- the extent to which unit employees at locations other than the site of the violation know of the violative conduct;
- whether the violation involved high ranking union and/or agency officials;
- how the violation affected employees at different locations within the unit;
- the seriousness, type and number of violations; and
- the manner in which information about policies, personnel matters, job announcements and other important information is routinely disseminated to employees and managers.

PART V

MONETARY RELIEF

Q. #1: What are the rules for ordering an agency to pay money to employees as part of an unfair labor practice remedy?

The legal doctrine of sovereign immunity requires the party requesting a monetary remedy to establish that there is statutory authority for the expenditure of such funds. Thus, an order by the Authority that an agency remedy an unfair labor practice by providing monetary reimbursement for losses incurred due to an unfair labor practice must be supported by statutory authority to impose such a remedy.

Q. #2: What is the most common statutory authority to allow an agency to pay money to employees as part of an unfair labor practice remedy?

One specific statutory authority unambiguously authorizing money damages is the Back Pay Act. An employee found to have been affected by an improper or unwarranted personnel action resulting in the withdrawal or reduction of pay, allowances or differentials may be made whole under the authority of the Back Pay Act. The Back Pay Act also specifically provides for the payment of interest. The Authority has held that the management rights section of the Statute, particularly the right to determine its budget, does not provide any impediment to a make whole remedy based on the Back Pay Act.

Q. #3: What are some examples of Backpay awards to remedy unfair labor practices?

The Back Pay Act applies to a variety of unfair labor practices as long as the withdrawal or reduction of pay, allowances or differentials was as a result of the unfair labor practice. For example, a violation of section 7116(a)(2) of the Statute by suspending an employee for engaging in protected activity results in a backpay remedy. Similarly, a unilateral change unfair labor practice that denied an employee an award could result in a money remedy under the Back Pay Act.

Q. #4: Does the General Counsel take a position on whether a charging party's attorney fees should accompany a backpay remedy for an unfair labor practice violation?

The Back Pay Act provides an entitlement to reasonable attorney fees. In keeping with the Regions' role as a neutral third party representing the public interest, the General Counsel does not take a position as to whether attorney fees are warranted and the amount of such fees, if any.

Q. #5: Does the Statute itself constitute authority for the expenditure of such funds under the doctrine of sovereign immunity?

No. The Authority has held that the remedial provisions of the Statute do not meet the strict test for waiver of liability for money damages under the doctrine of sovereign immunity. Thus, the Statute does not waive sovereign immunity to an award of money damages not related to an unlawful reduction in pay, allowances, or differentials covered by the Back Pay Act. When backpay is not involved, any monetary damages must be unambiguously grounded in some other law.

Q. #6: Is there a difference between the payment of money to employees and a remedy that incurs costs to a respondent?

Yes. The Authority will uphold specific remedies that are equitable in nature. Just because a remedy requires an agency to expend money does not automatically translate into a remedy requiring money damages. A monetary award can be either legal or equitable in nature. For example, to remedy a unilateral change that raised parking fees, the Authority could not order that employees be reimbursed for the extra money they spent on parking due the unilateral fee increase. However, the Authority has ordered an agency to reduce the parking fee in the amount unlawfully raised until the employees' losses have been recouped.

A DECISIONAL ANALYSIS FOR REGIONAL DIRECTORS WHEN DECIDING ON APPROPRIATE REMEDIES FOR UNFAIR LABOR PRACTICES

The General Counsel bears the burden of establishing the appropriate remedy based on the evidence provided by the Charging Party. The following protocol sets forth a decisional process to assist the Regional Directors in determining what remedy to seek when litigating an unfair labor practice complaint.

1. Identify the traditional remedy for the type of violation at issue.

2. What were the conditions and relationships in existence with which the unfair labor practice interfered?

3. Will the traditional remedy:

   a. effectively recreate those conditions and relationships; and

   b. effectuate the policies of the Statute, including the deterrence of future violative conduct?

4. If not, what evidence supports the conclusion that the traditional remedy is not sufficient?

5. If not, what nontraditional remedy would satisfy the remedy principles?

6. What specific evidence supports the nontraditional remedy?

7. Is the nontraditional remedy inconsistent with any external law?

8. If the payment of money by an agency is the remedy that is requested, what is the statutory authority for the payment of that money?

APPENDIX D

Copies of FLRA forms:	Charge Against An Agency
	Charge Against a Labor Organization

CHAPTER J

54TH FEDERAL LABOR RELATIONS COURSE

Emergency-Essential Civilians in Contingency Operations

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Outline of Instruction

I. REFERENCES.

A. DODD 1404.10, Emergency-Essential (E-E) DOD U.S. Citizen Civilian Employees, April 10, 1992.

B. DODD 1400.31, DOD Civilian Work Force Contingency and Emergency Planning and Execution, April 28, 1995.

C. DODD 1400.32, DOD Civilian Work Force Contingency and Emergency Planning Guidelines and Procedures, April 28, 1995.

D. AR 690-11, Mobilization Planning and Management, 14 September 1990.

E. DA Pam 690-47, DA Civilian Employee Deployment Guide, 1 November 1995.

F. DA Pam 715-16, Contractor Deployment Guide, 27 February 1998.

II. INTRODUCTION.

"It is DOD policy that the DOD civilian workforce shall be prepared to respond rapidly, efficiently, and effectively to meet mission requirements for all contingencies and emergencies." DoDI 1400.32, para 4 (April 24, 1995)

III. DESIGNATING EMERGENCY ESSENTIAL POSITIONS.

A. Identify E-E Positions.

1. Include civilian positions overseas or in the United States that would be transferred overseas in a crisis situation.

a. The specific crisis situation duties and responsibilities and physical requirements of each E-E position must be identified and documented to ensure that E-E employees know what is expected of them.

b. Documentation can be:

(1) Annotation of E-E duties in existing peacetime position descriptions;

(2) Brief statements of crisis situation duties attached to position descriptions if materially different than peacetime duties;

(3) Separate E-E position descriptions.

c. Record E-E Position Designation. A statement shall be included in the position description of each E-E identified position.

(1) Example: "This position is emergency-essential (E-E). In the event of a crisis situation, the incumbent, or designated alternate, must continue to perform the E-E duties until relieved by proper authority. The incumbent or the designated alternate, may be required to take part in readiness exercises. This position cannot be vacated during a national emergency or mobilization without seriously impairing the capability of the organization to function effectively; therefore, the position is designated "key," which requires the incumbent, or designated alternate, to be screened from military recall status."

2. Ensure that civilian positions are designated "E-E" only when civilians are required for direct support to combat operations, or to combat systems support functions that must be continued and that could not otherwise be immediately met by using deployed military possessing the skills in the number and in the functions expected to be needed to meet combat operations or systems support requirements in a crisis situation.

3. Ensure that employees are identified to perform the duties of E-E positions, including the identification of alternates to cover vacant E-E positions or those in which the incumbents are unable to perform the duties or have not signed the E-E position agreement.

4. Issue E-E employees, or employees occupying positions determined to be E-E, the DD Form 489, "Geneva Convention Identity Card for Civilians Who Accompany the Armed Forces," or DD Form 1934, "Geneva Convention Identity Card for Medical and Religious Personnel Who Serve In or Accompany the Armed Forces," as appropriate.

5. Advise applicants for E-E positions that individuals selected to fill these positions are required to sign written agreements (DD Form 2365), "DoD Civilian Employee Overseas Emergency-Essential Position Agreement."

   a. The agreements document that incumbents of E-E positions accept certain conditions of employment arising out of crisis situations wherein they shall be sent on temporary duty, shall relocate to duty stations in overseas areas, or continue to work in overseas areas after the evacuation of other U.S. citizen employees who are not in E-E positions.

   b. All individuals selected for E-E positions must be exempted from recall to the military Reserves or recall to active duty for retired military.

6. Encourage incumbents of positions that become E-E to sign DD Form 2365 as soon as reasonably practicable and consistent with the needs of the military mission.

   a. Those employees who decline to sign the agreement should be detailed or reassigned to non-E-E positions. If that is not possible, no further tour extension should be approved.

7. Attempt to fill E-E positions with employees who volunteer to occupy such positions and sign the E-E agreement or direct the involuntary assignment of civilian employees to E-E positions as may be necessary to meet the exigencies of the circumstances and when unforeseen contingencies prevent prior identification of those positions as being "E-E."

8. If an employee declines to sign the agreement, but possesses special skills and expertise, which in management's view renders it necessary to send that employee on the assignment without signing the agreement, the employee may be directed on involuntary temporary duty to the location where the employee's skills are required. All civilian employees deploying to combat operations/crisis situations are considered EE regardless of volunteer status or the signing of the EE position agreement. The employee will be in an EE status for the duration of the assignment.

IV. DEPLOYMENT PREPARATIONS.

A. E-E employees shall be provided protective equipment, work related training, law of war training, and training in the Uniform Code of Military Justice, commensurate with the anticipated threat and theater policy.

1. Protective Equipment Training Requirements -- Civilian employees should be issued, and trained in the use of the same protective gear as is issued to military personnel in theater, to include lens inserts, if required.

2. Training for civilian employees on their responsibilities; e.g. standards of conduct, as well as coping skills if they become Prisoners of War.

3. Civilian employees shall receive the same immunizations as given to military personnel in theater.

4. Civilian employees shall be provided appropriate cultural awareness training for the theater if such training is being provided to military personnel.

5. Civilian employees shall be issued passports, visas, and country clearances.

6. Civilian employees shall be issued any required security clearances expeditiously.

7. Civilian employees will fill out DD Form 93,"Record of Emergency Data." Components will establish procedures to store and access civilian DD 93s that are the same as or parallel to those for military personnel.

   a. Components will set up procedures for civilian casualty notification and assistance that parallel those for military personnel.

8. Provisions shall be made for medical care of civilian employees in a theater of operations.

   a. They shall be HIV-tested before deployment, if the country of deployment requires it.

      (1) DA policy (DA DCSPER/ OTJAG decision) is that in those isolated situations when a requirement exists for mandatory HIV screening, and the test is positive, a civilian can be deployed in support of a contingency operation as long as the host country is notified and the individual is able to perform assigned duties.

   b. All DOD-sponsored non-military personnel PCS or TDY outside the United States and its Territories shall have panarex or DNA samples taken for identification purposes.

      (1) Dental x-rays may be substituted when the ability to take panarex or DNA samples is not available.

   c. Civilians may also be issued" dog tags" for identification purposes.

(1) Components shall establish procedures to store and access such identification data that are the same as or parallel to those for military personnel.

d. Civilians shall receive medical and dental examinations and, if warranted, psychological evaluations to ensure fitness for duty in the theater of operations to support the military mission.

(1) During a contingency or emergency, civilian employees returning to the United States and its Territories from a theater of operations shall receive cost-free military physical examinations within 30 days if the medical community decides it is warranted, or required for military personnel.

e. Civilians shall carry with them a minimum of a 90-day supply of any medication they require.

f. Civilians with dependents who are in or deploying to a theater of operations are encouraged to make Family Care Plans.

(1) As a condition of employment, single parents or families where both parents are emergency-essential civilians, are required to prepare a family care plan. This plan will be equivalent to that required of the military located in the same geographical area (AR 690-11).

g. Civilians killed in a theater of operations shall be processed by Graves Registration personnel with procedures parallel to those for the military personnel.

(1) An escort officer for the remains of civilians killed is authorized; and a flag shall be purchased for the casket at Government expense.

h. Legal assistance relating to matters of deployment is available to Army civilians, notified of deployment, as well as their families. Legal assistance will be available for the period of deployment and is limited to matters related to deployment as determined by the on-site supervising attorney.

(1) Civilians deploying to or in a theater of operations shall be furnished the opportunity and assistance with making wills and any necessary powers of attorney.

B. Weapons Certification and Training.

1. Under certain conditions Army civilians may be issued sidearms for their personal self defense, subject to military regulations regarding training in proper use and safe handling of firearms. Acceptance of a sidearm is voluntary by the emergency-essential civilian.

a. Authority to carry sidearms is contingent upon the approval and guidance of the supported Combatant/ MACOM Commander. The Army Component Commander must make the decision early in the operation as to whether or not civilians may be armed.

b. Only government issued sidearms/ammunition are authorized. Familiarization training will be conducted IAW FM 23-35.

C. Clothing and Equipment Issue.

1. Organization Clothing and Individual Equipment (OCIE) will be issued to emergency-essential personnel and other civilians who may be deployed in support of military operations.

a. Kevlar Helmets, load bearing equipment, and chemical defensive equipment will be worn in a tactical environment in accordance with supported unit procedures.

b. Maintenance and accountability of EE clothing and equipment is the responsibility of the employee to whom the items were issued.

c. Items of personal clothing and personal care are the responsibility of the individual. Civilian employees should bring work clothing required by their particular job.

V. COMMAND AND CONTROL DURING DEPLOYMENTS.

A. During a crisis situation or deployment, civilian employees are under the direct command and control of the on-site supervisory chain. Therefore, the on-site supervisory chain will perform the normal supervisory functions; for example, those related to performance evaluations, task assignments and instructions, and initiating and effecting recognition and disciplinary actions.

B. The on-site commander may impose special rules, policies, directives, and orders based on mission necessity, safety, and unit cohesion. These restrictions need only be considered reasonable in the circumstance of the deployment to be enforceable.

VI. PAY AND ALLOWANCES DURING DEPLOYMENTS.

A. Civilian employees receive the same pay and allowances to which they were entitled prior to deploying, and to which they would become entitled thereafter (i.e., within grade increases).

1. There is no tax exclusion for civilian employees similar to the combat tax exclusion for military members.

B. Tour of Duty. The Administrative workweek constitutes the regularly scheduled hours for which a deployed employee must receive basic and premium pay. Under some conditions, hours worked beyond the administrative workweek may be considered to be irregular and occasional, and compensatory time may be authorized in lieu of overtime/premium pay.

1. The authority for establishing and changing the tours of duty for civilian employees is delegated to the in-theater commander or his representative. The duration of the duty is dependent upon the particular operation and will be established by the in-theater commander.

C. Overtime. GS employees whose basic rates of pay do not exceed that of a GS-10 step 1, will be paid at a rate of one and one-half times their basic hourly pay rate for each hour of work authorized and approved over the normal 8 hour day or 40 hour week. Employees whose rate exceeds that of a GS-10, Step 1, will be paid at the rate of one and one-half times the basic hourly rate of a GS-10, Step 1.

1. If overtime is not approved in advance, the employee's travel orders should have this statement in the remarks column: "Overtime authorized at TDY site as required by the Field Commander. Time and attendance reports should be sent to (name and address)." The field commander should then submit to the employee's home installation a DA Form 5172-R, or local authorization form (with a copy of the travel orders), documenting the actual premium hours worked by each employee for each day of the pay period as soon as possible after the premium hours are worked.

D. On Call Employees. During crisis situations, the nature of the work may make it necessary to have employees "on-call" because of emergencies or administrative requirements that might occur outside the established work hours.

1. On-site commanders may designate employees to be available for such a call during off-duty times. Designation of employees for this purpose will follow these guidelines:

a. There should be a definite possibility that the services of the designated employee might be required;

b. On-call duties required of the employees will be brought to the attention of all employees concerned;

c. If more than one employee could be used for on-call service, the designation should be made on a rotating basis;

2. The designation of employees to be "on-call" or in an "alert" posture will not, in itself, serve as a basis for additional compensation (i.e., overtime or compensatory time). If an employee is called in, the employee must be compensated for a minimum of two hours.

E. Leave Accumulation. Any annual leave in excess of the maximum permissible carry over is automatically forfeited at the end of the leave year. Annual leave forfeited during a combat or crisis situation, which has been determined by appropriate authority to constitute an exigency of the public business, may be temporarily restored. However, the employee must file for carry over. Normally, the employee has up to two years to use restored annual leave.

F. Foreign Post Differential. Employees assigned to work in foreign areas where the environmental conditions either differ substantially from CONUS conditions or warrant added compensation as a recruiting and retention incentive are eligible for Foreign Post Differential (FPD) after being stationed in the area in excess of 41 days.

1. FPD is exempt from the pay cap and is paid as a percentage of the basic pay rate not to exceed 25% of the basic pay.

a. The Department of State determines areas entitled to receive FPD and the FPD rate for the area. The Department of State also determines the length of time the rate is in effect. Different areas in the same country can have different rates.

G. Danger Pay. Civilian employees serving at or assigned to foreign areas designated for danger pay by the Secretary of State, because of civil insurrection, civil war, terrorism or wartime conditions which threaten physical harm or imminent danger to the health or well being of a majority of employees stationed or detailed to that area, will receive a danger pay allowance (DPA).

1. The allowance will be a percentage of the employee's basic compensation at the rates of 15, 20, or 25 percent as determined by the Secretary of State. This allowance is in addition to any foreign post differential prescribed for the area but in lieu of any special incentive differential authorized the post prior to its designation as a danger pay area.

a. The foreign post differential may be reduced by any part attributable to political violence. The combined danger pay and post differential must be at least 5 percent above the previous combined post differential and special incentive differential at the post, if any, in effect at the post prior to its designation as a danger pay area.

2. The DPA commences for employees already in the area on the date of the area's designation for danger. For employees later assigned or detailed to the area, DPA commences upon arrival in the area. For employees returning to the post after a temporary absence it commences on the date of return.

3. DPA will terminate with the close of business on the date the Secretary of State removes the danger pay designation for the area or on the day the employee leaves the post for any reason for an area not designated for the DPA.

a. The DPA paid to Federal civilian employees should not be confused with the Imminent Danger Pay (IDP) paid to the military. The IDP is triggered by different circumstances and is not controlled by the Secretary of State.

H. Life Insurance. Federal civilian employees are eligible for coverage under the Federal Employees Group Life Insurance (FEGLI) program. Death benefits (under basic and all forms of optional coverage) are payable regardless of cause of death.

1. The Office of Personnel Management (OPM) has confirmed that civilians who are deployed with the military to combat support roles during times of crises are not "in actual combat" and are entitled to accidental death and dismemberment benefits under FEGLI in the event of death. Similarly, civilians carrying sidearms for personal protection are not "in actual combat".

VII. CONTRACTOR EMPLOYEES.

A. "In all countries engaged in war, experience has sooner or later pointed out that contracts with private men of substance and understanding are necessary for the subsistence, covering, clothing, and moving of any Army. " Robert Morris, Superintendent of Finance, 1781.

B. Command and Control. The command and control of contractor employees is significantly different than that of DA civilians.

1. For contractor employees command and control is tied to the terms and conditions of the government contract. Contractor employees are not under the direct supervision of military personnel in the chain of command. The Contracting Officer is the designated liaison for implementing contractor performance requirements.

2. While the government does not directly command and control contractor employees, key performance requirements should be reflected in the contract. For example, theater commander directives, orders and essential standard operating procedures can be incorporated into the government contract. If those requirements should change, the contract can be modified by the contracting officer to satisfy the commander's new requirements.

a. Contractor employees will be expected to adhere to all guidance and obey all instructions and general orders issued by the Theater Commander. All instructions and guidance will be issued based upon the need to ensure mission accomplishment, personal safety, and unit cohesion. If the instructions and orders of the Theater Commander are violated, the Theater Commander may limit access to facilities and/or revoke any special status that a contractor employee has as an individual accompanying the force.

b. The contracting officer may also direct that the contractor remove from the theater of operations any contractor employee whose conduct endangers persons or property or whose continued employment is inconsistent with the interest of military security.

C. Legal Assistance. Contractor employees in the U.S. preparing to deploy abroad, or already deployed overseas, to perform work pursuant to any contract or subcontract with DA, generally will not be eligible to receive legal assistance from Army military or Army civilian lawyers.

1. Contractor employees should satisfy all legal requirements that they deem necessary, such as a last will and testament, guardianship arrangements for children and estate planning, with privately retained attorneys before deployment. Payment of legal fees is a private matter between the contractor employee and the lawyer retained. The Army has no involvement.

2. Exceptions:

a. If contractor employees are accompanying the Armed Forces of the United States outside the United States, they may receive certain legal assistance from Army lawyers when DA or DOD is contractually obligated to provide this assistance as part of their logistical support.

(1) The specific terms of the contract under which contractor employees are deploying must be reviewed to verify if DA is obligated to provide legal service.

3. Where DA is under contractual obligation to provide legal assistance, the following rules apply:

a. If the legal assistance is to be provided overseas, it must be in accordance with applicable international agreements or approved by the host nation government in some way.

b. Legal assistance, is limited to ministerial service (for example notarial services), legal counseling (to include the review and discussion of legal correspondence and documents), and legal document preparation (limited to powers of attorney and advanced medical directives) and help on retaining civilian lawyers.

c. NOTE: Contract employee status is irrelevant if the person is an authorized recipient of legal assistance services, e.g. Retiree or family member otherwise authorized legal assistance services.

D. Identification Cards. Contractor employees will receive the following three distinct forms of identification:

1. DD Form 1173 (Uniformed Services Identification and Privilege Card). This card is required for access to facilities and use of privileges afforded to military, government civilians and/or military dependents.

2. DD Form 489 (Geneva Conventions Identity Card for Persons who Accompany the Armed Forces). This card identifies one's status as a contractor employee accompanying the U.S. Armed Forces. This card must be carried at all times when in the theater of operations.

3. Personal identification tags. The identification tags will include the following information: full name, social security number, blood type and religious preference. These tags should be worn at all times when in the theater of operations.

4. In addition, other identification cards, badges, etc., may be issued depending upon the basis for the operation. For example, when U.S. forces participate in United Nations (U.N.) or multinational peace-keeping operations, contractor employees may be required to carry items of identification that verify their relationship to the U.N. or multinational force.

5. If their employer processes contractor employees for deployment, it is the responsibility of the employer to ensure its employees receive required identification prior to deployment.

E. Organizational Clothing and Equipment Issue. Items of personal clothing and personal care, to include both casual attire and work clothing required by the particular assignment, are the responsibility of the individual contractor employee and will not be issued at the deployment processing center. If required by the Theater Commander, the deployment processing center will issue Organizational Clothing and Individual Equipment (OCIE) to contractor personnel. The wearing of such equipment by contractor personnel, however, is voluntary, unless required in the contractual agreement.

F. Force Protection. The government will provide force protection for those contractor personnel accompanying forward deployed forces.

1. Weapons and Training. Individual Deployment Sites (IDS) or CONUS Replacement Centers (CRC) may issue sidearms to contractor employees for their personal self-defense. The issuance of such weapons must be authorized by the Theater Commander and must comply with military regulations regarding firearms training and safe handling. Weapons familiarization is provided to contractor employees as part of the IDS/CRC deployment processing.

a. The acceptance of self-defense weapons by a contractor employee is voluntary and should be in accordance with the gaining theater and the contractor's company policy regarding possession and/or use of weapons.

(1) Authorization for the use of privately owned weapons may be required through the U.S. Embassy channels vice military chain of command. Weapons safety and training may be also implemented by embassy Regional Security Officers (RSO's).

VIII. CONTRACTOR ISSUES DURING DEPLOYMENTS.

A. Vehicle and Equipment Operation. Deployed contractor employees may be required or asked to operate U.S. military, government owned or leased equipment such as generators and vehicles. Contractor personnel may also be required to obtain a local license for the country they are being deployed to, i.e. German driver's license.

1. While operating a military owned or leased vehicle, a contractor employee is subject to the local laws and regulations of the country, area, city, and/or camp in which he/she is deployed. Traffic accidents or violations usually will be handled in accordance with the local laws, the Status of Forces Agreement, and/or Theater Commander guidance.

2. If a contractor employee does not enjoy special status under the Status of Forces Agreement, then he/she may be subject to criminal and/or civil liabilities. Therefore, the employee or contractor may be held liable for damages resulting from negligent or unsafe operation of government, military vehicles and equipment.

B. Living under field conditions. Generally, a contractor employee's living conditions, privileges, and limitations will be equivalent to those of the units supported unless the contract with the Government specifically mandates or prohibits certain living conditions.

C. Medical and Dental care. Military and/or host nation emergency medical and dental care will be available to contractors should the need arise, at a level commensurate with that afforded government employees and military personnel.

1. Deployed contractor personnel generally do not receive routine medical and dental care at military medical treatment facilities unless this support is specifically included in the contract with the government. In the absence of such agreements, contractors should make provisions for their employees' medical and dental care.

D. MWR Support. Contractor employees working within the theater of operations may be eligible to use some or all MWR facilities and activities subject to the installation or Theater Commander's discretion and the terms of the contract.

1. U.S. citizen contractor employees may be eligible for use of Army and Air Force Exchange Service (AAFES) facilities for health and comfort items. Use of these facilities will be based on the installation or Theater Commander's discretion, the terms of the contract with the government, and the terms of the applicable Status of Forces Agreement.

E. Status of Forces Agreements (SOFAs). Contractor employee's status will depend upon the specific provisions of the SOFA, if any, that are applicable between the U.S. and the country of deployment at the time of deployment.

1. Contractor employees may or may not be subject to criminal and/or civil jurisdiction of the host country to which they are deploying.

2. The North Atlantic Treaty Organization (NATO) SOFA is generally accepted as the model for bilateral and multilateral SOFAs between the U.S. Government and host nations around the world. The NATO SOFA covers three general classes of sending state personnel:

a. Members of the "force," i.e., members of the armed forces of the sending state;

b. Members of the "civilian component, " i.e., civilian employees of the sending state;

c. "Dependents," i.e., the spouse or child of a member of the force or civilian component that is dependent upon them for support.

d. Under the generally accepted view of the NATO SOFA, contractor employees are not considered members of the civilian component. Accordingly, special technical arrangements or international agreements generally must be concluded to afford contractor employees the rights and privileges associated with SOFA status.

F. Discipline of Contractor Employees. Contractor personnel may have administrative privileges (i.e., suspension of exchange or MWR privileges, etc.) suspended for disciplinary infractions.

1. Such conduct as: making any sale, exchange, transfer, or other disposition of exchange merchandise or services to unauthorized persons, whether or not for a profit; using exchange merchandise or services in the conduct of any activity for the production of an income; theft of exchange merchandise or other assets by shoplifting; and intentional or repeated presentation of dishonored checks or other indebtedness.

2. The process for removal of contractor employees from the theater of operations is dependent upon the policies issued by the theater commander and the extent to which those policies are incorporated in the terms of the contract, and are exercised through the contracting officer.

G. Tours of Duty and "On-Call" Requirements. A contractor employee's Tour of Duty is established by the employer and the terms and conditions of the contract between the employer and the government.

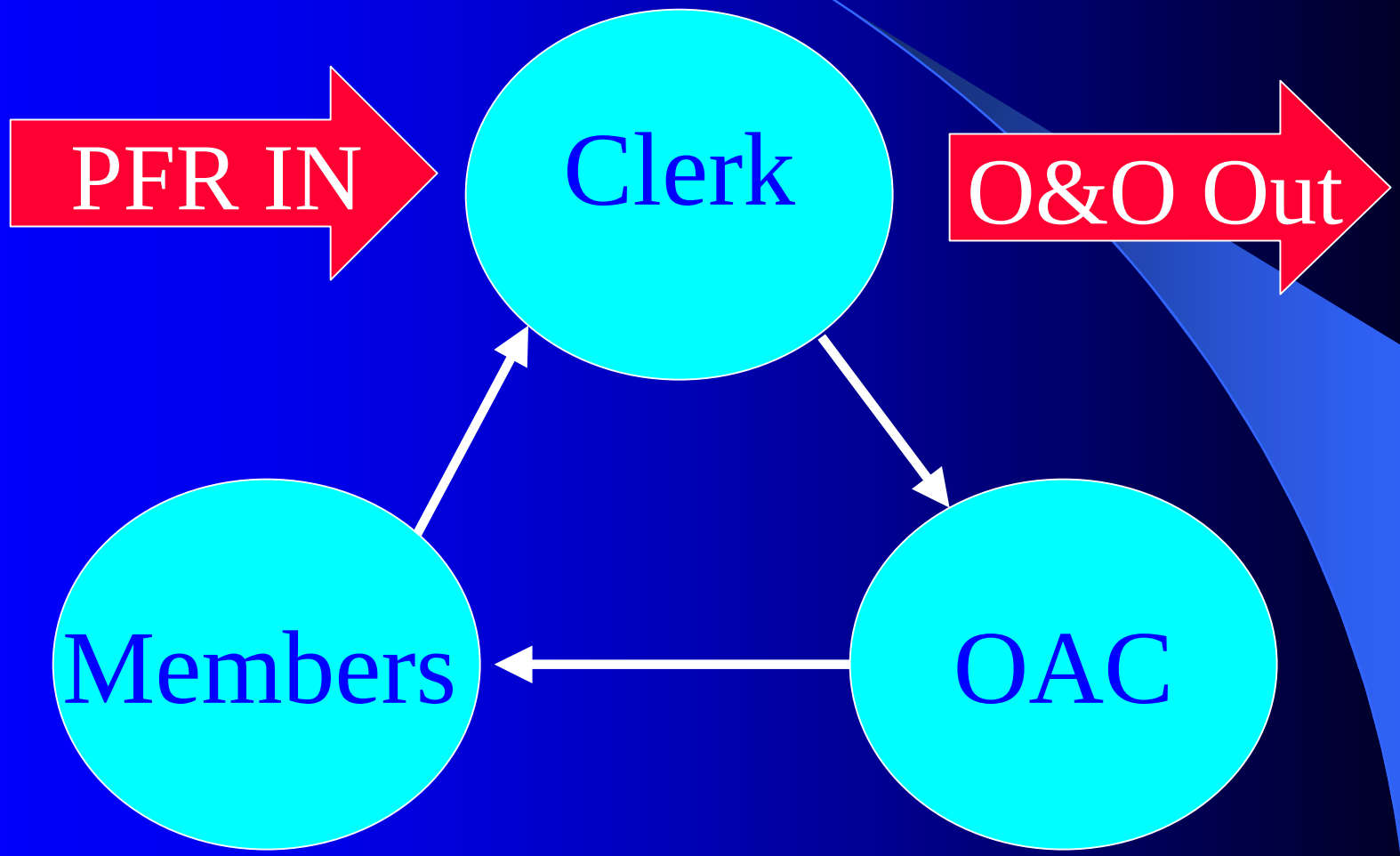
1. On-call requirements, if any, will be included as special terms and conditions of an employer's contract with the Government.

IX. CONCLUSION.

Merit Systems Protection Board
Petition for Review Process

How the Board adjudicates appeals from initial decisions issued by its Administrative Judges

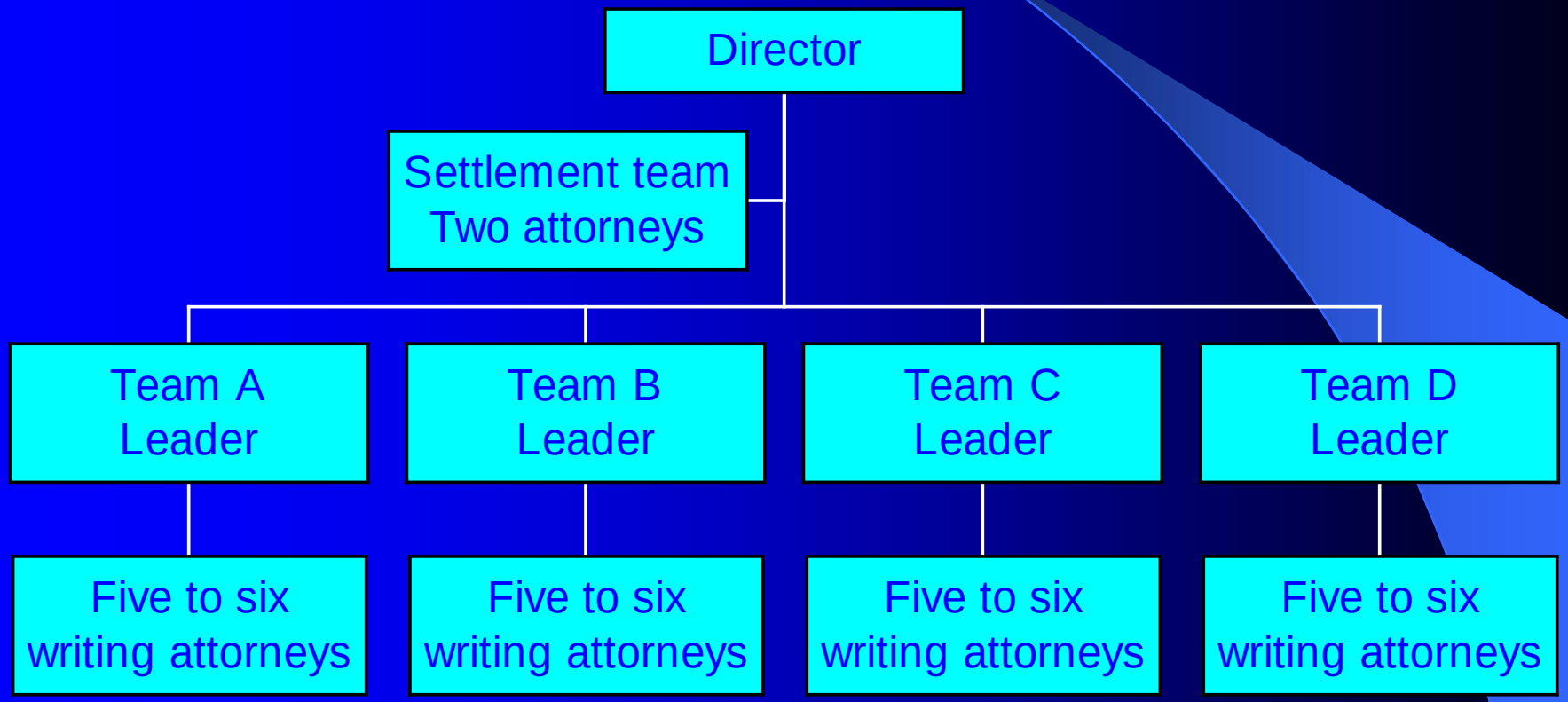
The Three PFR Offices



Office of the Clerk

- Entry into the Board
- Obtains regional file
- Notifies all parties
- Collects all filings
- Issues show-cause orders
- Prepares file for adjudication

Office of Appeals Counsel



Office of Appeals Counsel

- Initial legal review
- OAC team leader assigns the case
- Matches difficulty with “writing” attorney’s skills
- 4 teams of 5-7 attorneys

OAC “Writing” Attorney

- Reviews entire file
- Assesses all arguments
- Evaluates the initial decision for error
- Drafts a proposed Opinion and Order

OAC Team Leader

- Supervises the work of the writing attorney
- Must approve all proposed Opinions and Orders
- Directs further research, analysis, and edits final draft

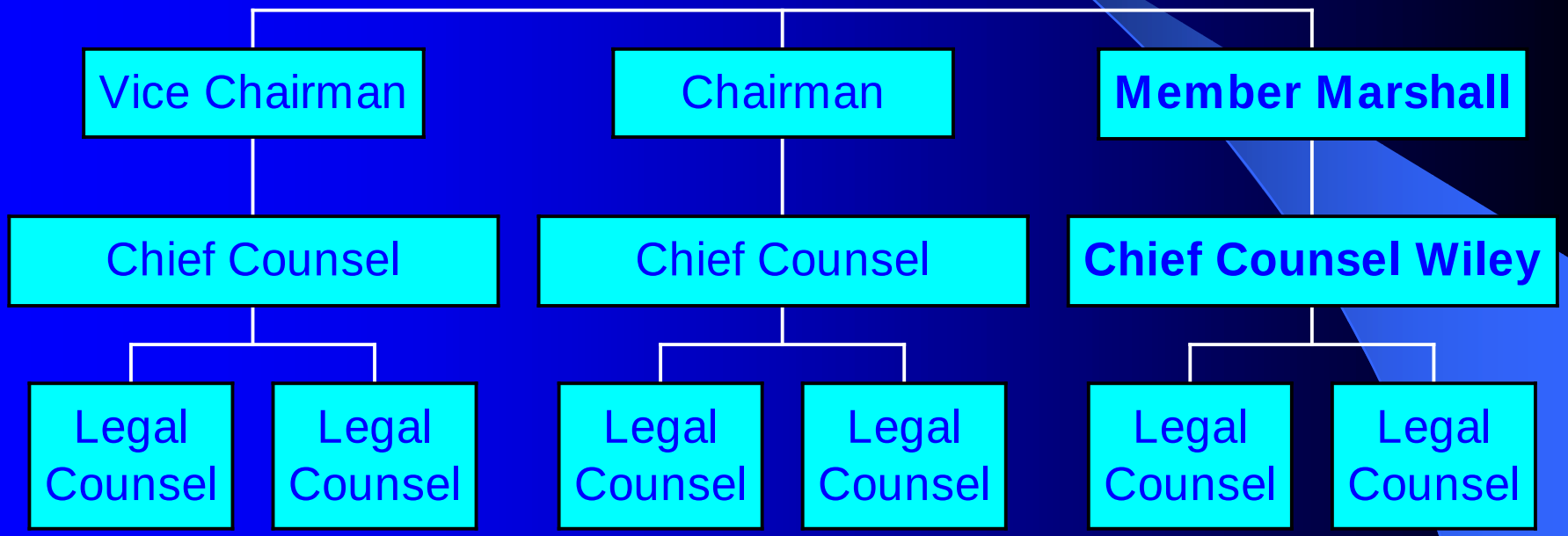
OAC Director

- Overall manager of the office
- Final authority on every draft Opinion and Order
- Represents OAC to the Board members

Settlement Team

- An alternative to the regular adjudication process
- Mediates the dispute attempting settlement
- Is successful in 1 out of 4 cases

Offices of the Members



A Board Member's Office

- Each of the 3 members has a personal staff
- A legal counsel serves at the pleasure of the member
- The legal counsels review cases and advise the member

Office of the Clerk

- Final reviewer of every decision
- Public contact point for the Board
- Ensures safety and integrity of the file

PFR Factoids

- 1600-2000 per year
- 140 days to resolve
- 8-10 attorneys review most every appeal
- Each step of the process has time standards and goals
- Each Board member independently reviews every case
- Some files weigh over 25 pounds
- Currently 750 PFR's pending; two years ago, over 1000

20 Hints for an Effective PFR

- Be on time.
- Handle interim relief.
- Avoid long “Background” sections.
- Aim for no more than 20 pages.
- Try for no more than three issues.
- Consider using the Board’s PFR form.
- Avoid legalisms, write plainly.

20 Hints for an Effective PFR

- Prove the statutory basis for your PFR.
- Master the Board's regulations.
- Know the law and the case law.
- AJ factual errors must be relevant.
- Cite specifically to the record and ID.
- Attach relevant regulations.

20 Hints for an Effective PFR

- Argue policy and fairness.
- Rely on preserved arguments.
- Never forget settlement.
- Do not call people bad names.
- Consider revisiting settled law.
- Know the three Board members.
- Be prepared for the worst.

PFR Final Exam

1. *You should file a petition for review for what reason(s)?*

A. If the administrative judge made an error of law.

B. If your boss says you will be fired if you don't.

C. If you can prove that the administrative judge was biased against you or your client.

D. If new and material evidence is available.

PFR Final Exam

2. What are your chances of having the Board reverse an initial decision on petition for review?

A. One in two.

B. One in five.

C. One in ten.

D. One in a hundred zillion.

PFR Final Exam

3. What should you attach to every PFR?

A. A certificate of service attesting to your service of a copy of the PFR to the other party.

B. A copy of the written transcript.

C. A cover letter telling the Board why you are filing a petition for review.

D. A credit card number along with the cardholder's signature.

PFR Final Exam

4. How should an agency provide “interim relief” to a successful appellant?

A. Restore the employee to his old position by canceling the prior termination.

B. Look up “interim relief” in a subject index and figure out what in the world it is you are supposed to do.

C. Submit proof of your compliance with the interim relief order to the Board within 30 days of filing your petition for review.

D. Put the employee in a pay status effective the date of the initial decision, and then find him a position other than his original position where he will be able to work until your PFR is ruled on.

PFR Final Exam

5. The other party has filed a PFR with the Board. You should definitely:

A. File a Cross-PFR.

B. File a Response-to-the-PFR.

C. Try to settle the case.

D. Seek other employment.

PFR Final Exam

6. The main reason that most PFR's are not successful is:

A. They are filed too late.

B. The arguments presented by the parties are stupid.

C. The attorneys at MSPB are stupid.

D. The AJ's decision is correct.

54th ANNUAL FEDERAL LABOR-RELATIONS COURSE

The Judge Advocate General's School

Charlottesville, Virginia

November 2000

Recent Decisions of the FLRA and the Courts

David M. Smith

Solicitor
FLRA

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I. Unfair Labor Practice Decisions

A. Necessity for Information

U.S. Dep't of Justice, INS, Northern Region, Twin Cities, Minn. v. FLRA, 144 F.3d 90 (D.C. Cir. 1998) (Affirming the Authority's determination that even though a union is not obligated to provide representation to a bargaining unit employee in responding to a proposed removal, if it does provide representation, the union is entitled, in representing the employee, to exercise its right to request information under the Statute.)

AFGE, AFL-CIO, Local 2343 v. FLRA, 144 F.3d 85 (D.C. Cir. 1998) (Affirming the Authority's determination that a union's mere statement that it needed certain information in order to prepare for arbitration did not satisfy the articulation and particularized need requirements of § 7114(b)(4)(B).)

Federal Bureau of Prisons, Washington, D.C. and Federal Bureau of Prisons, South Central Region, Dallas, Tex. and Federal Bureau of Prisons, Federal Transfer Ctr., Oklahoma City, Okla. and AFGE, Local 171, AFL-CIO, 55 FLRA 1250 (2000) (Concluding that a union, representing an employee who had been disciplined, established a particularized need for sanitized copies of disciplinary action taken against other employees throughout the agency for similar misconduct. Noting the fact that the union enjoyed nationwide recognition, the Authority rejected the agency's arguments that the union's right to information was limited to the activity taking the discipline and that, given the scope of the data sought, the information was not reasonably available.)

B. Inspectors General as Representatives of Agency

National Aeronautics and Space Admin., et al. v. FLRA, 119 S. Ct. 1979 (1999) (*NASA*) (Affirming the Authority's (50 FLRA 601 (1995)) and the Eleventh Circuit's (120 F.3d 1208 (11th Cir. 1997)) determinations that an Office of Inspector General investigator is a "representative of the agency" when examining a bargaining unit employee who reasonably fears that discipline might result from the examination. Thus, if an employee requests representation, the OIG examiner must either accommodate the request or discontinue the interview.)

FLRA v. Department of Justice, et al., 119 S. Ct. 2387 (1999) (Vacating and remanding the Second Circuit's decision (137 F.3d 683 (2d Cir. 1998)) that concluded, on rehearing, that the determination of whether an OIG agent is a representative of the agency depends on the context in which the interrogation

arises. The Second Circuit had held that an OIG agent is not a representative of the agency when questioning an employee for purposes within the authority of the IG Act, but that the agent is a representative of the agency when interrogating an employee about matters traditionally handled by agency supervisors as an aspect of their personnel responsibilities. Vacating this decision, the Supreme Court instructed the Circuit Court to reconsider the case in light of the Supreme Court's opinion in *NASA*.)

U.S. Department of Justice, Washington, D.C. & Office of the Inspector General and AFGE, Local 709; U.S. Department of Justice, Washington, D.C. & Office of the Inspector General and AFGE, 56 FLRA 556 (2000) (Finding in two cases that agency Inspectors General, who interviewed bargaining unit employees, were acting as representatives of the agency notwithstanding the fact that the investigative interviews were part of a criminal, rather than administrative, investigation.) (*Judicial review pending* in the D.C. Circuit.)

C. Midterm Bargaining

NFFE and FLRA v. U.S. Department of the Interior, et al., 119 S. Ct. 1003 (1999) (Finding the Statute ambiguous on the obligation of an agency to engage in union-initiated midterm bargaining, the Supreme Court rejected the absolute interpretations of the D.C. and 4th Circuits on this issue. The Court concluded that Congress delegated to the Authority the power to determine whether, when, and under what circumstances midterm bargaining is required. Accordingly, the Court remanded the case for the Authority to make the workplace empirical judgments concerning the merits and drawbacks of midterm bargaining, aware that the Statute permits but does not compel the Authority's previous conclusions on the subject.)

U.S. Department of the Interior, Washington, D.C. and U.S. Geological Survey, Reston, Va., 56 FLRA 45 (2000) (Concluding, on remand from the U.S. Supreme Court and the U.S. Court of Appeals for the Fourth Circuit, that proposals obligating an agency to engage in midterm bargaining over matters that are not contained in or covered by an existing agreement are within the duty to bargain because they restate an obligation under the Statute and because such proposals are not inconsistent with law, rule, or regulation.)

D. Discipline for Protected Activity

Federal Bureau of Prisons, Office of Internal Affairs, Washington, D.C. and Fed. Bureau of Prisons, Fed. Correctional Inst. Englewood, Littleton, Colo. and American Fed'n of Gov't Employees, Local 709, 53 FLRA 1500 (1998) (Clarifying that when alleged discrimination against an employee for engaging in protected activity concerns conduct occurring while an employee is acting in the capacity as a union representative, a necessary part of the respondent's defense under *Letterkenny Army Depot*, 35 FLRA 113 (1990), is that the conduct constituted "flagrant misconduct." Because conduct for which the union president was suspended -- leaving a counseling session -- occurred while the president was acting in capacity as union representative and did not constitute flagrant misconduct, the suspension violated the Statute.)

U.S. Department of Agriculture, Food Safety and Inspection Serv., Washington, D.C. and National Joint Council of Food Inspection Locals, AFGE, AFL-CIO, 55 FLRA 875 (1999) (The Authority adopted the Administrative Law Judge (ALJ) decision that a union official's profane characterization of his counterpart management official during a quarterly labor-management meeting did not amount to "flagrant misconduct" justifying suspension of the union official in light of the fact that the remark was not made in front of other employees on the job site, did not disrupt work, and because there was a culture of using profanity that the parties had established through their regular course of dealing.)

Air Force Flight Test Center, Edwards Air Force Base, Cal. and American Fed'n of Gov't Employees, Local 1406, AFL-CIO, 53 FLRA 1455 (1998) (Authority adopted Administrative Law Judge (ALJ) decision that suspension of union representative for speech/conduct occurring during meeting where representative was requesting official time violated Statute because speech/conduct did not constitute flagrant misconduct.)

American Fed'n of Gov't Employees, Local 2419 and James J. Powers, 53 FLRA 835 (1997) (Union did not commit an unfair labor practice when it expelled from union membership an employee who advocated to other bargaining unit members that he favored getting rid of the local. The Authority cautioned, however, that a union may not discipline an employee for filing unfair labor practice charges, take actions against an employee that affect the employee's status as an employee, or, absent a threat to its continued existence, discipline an employee for mere criticism of the union's management or policies.)

Puerto Rico Air National Guard, 156th Air Wing, Carolina, Puerto Rico and AFGE, Local 3936, AFL-CIO, 56 FLRA 174 (2000) (Concluding that the

Authority had jurisdiction to review and remedy some, but not all actions taken against civilian technicians when said actions were taken for the sole and express reason that the employees engaged in informational picketing. Specifically, the Authority determined that it could remedy the Guard's suspension of security clearances and placement of employees in a nonduty status. However, the Authority concluded that it lacked jurisdiction, in light of section 709(e) of the National Guard Technicians Act, to review the Guard's termination of a technician, notwithstanding the fact that the employee was removed because he engaged in protected activity.) (*Judicial review pending* in 1st Circuit.)

E. Remedies

Social Security Admin., Baltimore, Md. v. FLRA, 201 F.3d 465 (D.C. Cir. 2000) (Concluding that liquidated damages, awarded employees through arbitration under the Fair Labor Standards Act (FLSA), were not "pay, allowances, or differentials" within the meaning of the Backpay Act, the Court reversed the Authority's determination (55 FLRA 246 (1999)) that the employees were entitled to interest on the liquidated damages.)

National Treasury Employees Union and Fed. Deposit Ins. Corp., 53 FLRA 1469 (1998) (Reversing precedent, Authority concluded that arbitrators are bound by the statute of limitations set forth in Fair Labor Standards Act, 29 U.S.C. § 255(a) (FLSA), in remedying violations of the FLSA; Authority set aside award as inconsistent with law and remanded for determination of whether backpay should be awarded for 2 or 3 years.) (*Judicial review denied* for lack of jurisdiction, *FDIC v. FLRA*, No. 98-1221 (D.C. Cir. August 3, 1998).)

U.S. Penitentiary, Florence, Colo. and Am. Fed'n of Gov't Employees, Local 1301, 53 FLRA 1393 (1998) (Applying the framework established in *F.E. Warren Air Force Base, Cheyenne, Wyo. and Am. Fed'n of Gov't Employees, Local 2354*, 52 FLRA 149 (1996), for evaluating requests for "nontraditional remedies" (whether the record establishes that the remedy is reasonably necessary, would be effective in recreating conditions and relationships, would effectuate the policies of the Statute, and is not contrary to law or public policy), the Authority concluded that the basis had not been established to annotate the personnel file of the supervisor who violated the Statute. But, the Authority sustained the ALJ's determination that because this was the third similar violation committed by the respondent, a copy of the notice would be distributed to all supervisors.)

F. General Counsel's Decision Not to File ULP Complaint

Patent Office Prof'l Ass'n v. FLRA, 128 F.3d 751 (D.C. Cir. 1997) (Decision of the General Counsel not to file a complaint is not judicially reviewable.)

G. Enforceability of Executive Order 12,871

U.S. Dep't of Commerce, Patent and Trademark Office and Patent Office Prof'l Ass'n, 54 FLRA 360 (1998) (Concluding in this and a number of other cases that section 2(d) of Executive Order 12,871 constitutes a direction to agency personnel to negotiate over section 7106(b)(1) subjects rather than a statutory election to bargain enforceable in unfair labor practice proceedings.) (54 FLRA 360 and cases following it: 54 FLRA 429 & 457, *aff'd sub nom. National Ass'n of Gov't Employees, Inc., et al. v. FLRA*, 179 F.3d 946 (D.C. Cir. 1999); 54 FLRA 444, *aff'd sub. nom. American Fed'n of Gov't Employees, AFL-CIO, Council 147 v. FLRA*, 204 F.3d 1272 (9th Cir. 2000).)

H. Section 7116(d)

United States Small Bus. Admin. and Robert Wildberger, 51 FLRA 413 (1995), *aff'd in part and remanded in part sub nom., Wildberger v. FLRA*, 132 F.3d 784 (D.C. Cir. 1998) (The Court affirmed the Authority's determination that the Authority lacked jurisdiction, as a result of the second sentence of section 7116(d), to consider issues raised through unfair labor practice complaints that had been litigated before and considered by the MSPB. However, the Court remanded to the Authority a disparate treatment complaint that the MSPB had not addressed.)

I. Section 7114(a)(2)(B) -- Representation During Investigative Interviews

Federal Bureau of Prisons, Office Of Internal Affairs, Washington, D.C. and Fed. Bureau of Prisons, Fed. Correctional Inst. Englewood, Littleton, Colo. and AFGE, Local 709, AFL-CIO, 54 FLRA 1502 (1998) (Adopting private sector precedent that on a showing of "special circumstances," an agency is entitled to preclude a particular individual from serving as a designated representative during an investigative interview.)

U.S. Department of Justice, Fed. Bureau of Prisons, Office of Internal Affairs, Washington, D.C. and AFGE, Council of Prison Locals, 55 FLRA 388 (1999) (A bargaining unit employee, who had declined union representation in previous interviews, informed investigators during a subsequent interview that "I want somebody to talk to." Following private sector precedent, the Authority concluded that under the circumstances, this statement was sufficient to put the agency on notice that the employee desired representation. By not granting the request and proceeding with the interrogation the agency violated the employee's *Weingarten* right.)

J. Official Time

Office of the Adjutant General, N.H. Nat'l Guard, Concord, N.H. and Granite State Chapter, Ass'n of Civilian Technicians, 54 FLRA 301 (1998); *Nevada Air Nat'l Guard and Association of Civilian Technicians, Silver Barons Chapter,* 54 FLRA 316 (1998); *Georgia Dep't of Defense and Georgia State Chapter, Ass'n of Civilian Technicians*, 54 FLRA 654 (1998) (In three separate decisions, the Authority determined, in various contexts, that official time could not be granted to engage in lobbying activities involving pending or desired legislation because of an express prohibition on the use of appropriated funds involving pending legislation set out in section 8015 of the DOD Appropriations Act.) (54 FLRA 301, *aff'd sub nom. Granite State Chapter, Ass'n of Civilian Technicians v. FLRA*, 173 F.3d 25 (1st Cir. 1999); 54 FLRA 654, *aff'd sub nom. Georgia State Chapter Ass'n of Civilian Technicians v. FLRA*, 184 F.3d 889 (D. C. Cir. 1999); 54 FLRA 316, *aff'd sub nom. Nevada Air Nat'l Guard and Ass'n of Civilian Technicians, Silver Barons Chapter v. FLRA*, 200 F.3d 590 (9th Cir. 2000).)

Association of Civilian Technicians, Razorback Chapter 117 and U.S. Department of Defense, Nat'l Guard Bureau, Ark. Nat'l Guard, Camp Robinson, North Little Rock, Ark., 56 FLRA 427 (2000) (A provision authorizing official time to engage in lobbying activities for desired, rather than pending, legislation was not inconsistent with express prohibition on use of appropriated funds for lobbying activities in section 8012 (formerly section 8015) of the DOD Appropriations Act.)

K. Formal Discussions

Luke Air Force Base v. FLRA, 208 F.3d 221 (9th Cir. 1999) (Table) (Reversing Authority's determination (54 FLRA 716 (1998)) that an agency's meetings with a bargaining unit employee held for the purpose of mediating and investigating the employee's formal EEO complaints were formal discussions pursuant to section 7114(a)(2)(A). The Court, relying on an earlier decision (*IRS, Fresno Serv. Center v. FLRA*, 706 F.2d 1019 (9th Cir. 1983)), held that "grievances" within the meaning of section 7114(a)(2)(A) do not include complaints brought pursuant to EEOC procedures.) (*Petition for certiorari denied* October 2, 2000.)

L. Compliance With an Arbitration Award

U.S. Dep't of Transp., Fed. Aviation Admin., Renton, Wash. and National Air Traffic Controllers Ass'n, 55 FLRA 293 (1999) (An arbitrator ordered the agency to obtain employee parking spaces from the city of Denver. Despite being aware of difficulties in implementing the award prior to the passage of 30 days (after which the award would become final and binding), the agency neither filed exceptions with the Authority nor subsequently complied with the award. In response to the ULP filed to enforce the award, the agency argued, *inter alia*, that the award was deficient because it directed the agency to take actions within the purview of a third party. The Authority concluded that having failed to file exceptions to the award before it became final and binding, the agency could not, as a defense to the ULP, collaterally attack the validity of the award.) (*Judicial review pending* in the D.C. Circuit.)

II. Negotiability Determinations

A. Negotiability Regulations

The Authority's revised regulations covering negotiability proceedings, effective April 1, 1999. 5 C.F.R. Part 2424.

B. Revised Framework for Section 7106(b)(1) Analysis

American Fed'n of Gov't Employees, HUD Council of Locals 222, Local 2910 and U.S. Department of Housing and Urban Dev., 54 FLRA 171 (1998) (Noting that the analysis set out in *NAGE, Local R5-184 and U.S. Department of VAMC, Lexington, Ky.*, 51 FLRA 386 (1995) for analyzing whether a proposal is electively negotiable under section 7106(b)(1) is not appropriate when the union disputes the agency's assertion that a proposal is inconsistent with a section 7106(a) right or claims that the proposal is otherwise within the duty to bargain. Accordingly, the Authority clarified that in such cases it will first analyze the section 7106(a) right claim and then, if necessary, determine if the proposal is electively negotiable under section 7106(b)(1).)

C. Specificity of Agency's Argument

U.S. Department of Transp., FAA v. FLRA, 145 F.3d 1425 (D.C. Cir. 1998) (reviewing 53 FLRA 139 (1997)) (The Court rejected the Authority's determination that the union's proposals were negotiable because the agency failed to offer any specific arguments establishing that proposals were inconsistent with Government-wide regulation. The Court found that despite the lack of specificity, the agency's position was squarely presented to the Authority. As such, the Authority should have either addressed the agency's argument or requested additional briefing.)

D. National Guard Technicians

National Fed'n of Fed. Employees, Local 1669 and U.S. Department of Defense, Ark. Air Nat'l Guard, 188th Fighter Wing, Fort Smith, Ark., 55 FLRA 63 (1999) (Consistent with Authority precedent, uniform allowances for National Guard civilian technicians were held to be within the duty to bargain. The Authority disagreed with an agency's assertion that Authority precedent concerning the negotiability of uniform allowance proposals was no longer applicable as a result of amendments to the Technician Act, 32 U.S.C. § 709(b). The amendments provided that civilian technicians who receive a uniform allowance under 37 U.S.C. §§ 417 or 418 may not receive an allowance under

5 U.S.C. § 5901 or 10 U.S.C. § 1593. The Authority rejected the agency's claims that bargaining would be contrary to the amendments, that providing uniform allowances was a military aspect of civilian employment, and that the amendments dealt comprehensively with the subject of uniform allowances.)

Association of Civilian Technicians, Texas Lone Star Chapter 100 and U.S. Department of Defense, Nat'l Guard Bureau, State of Texas and Association of Civilian Technicians, ATC, Wisconsin 26 and U.S. Department of Defense, Nat'l Guard Bureau, Dep't of Military Affairs, State of Wisconsin, 55 FLRA 1226 (2000) (Proposals provided that a selecting official would have unfettered discretion to select an employee to a wage leader position, notwithstanding the fact that the selectee had a lower military grade than employees with whom the leader will work. The Authority found the proposals outside the duty to bargain as inconsistent with the military grade inversion policy which provides that a technician may not supervise any individual with a higher military rank than the military rank of the supervisor. Such proposals are outside the duty to bargain because they concern the military aspects of civilian employment.) (*Judicial review pending* in D.C. Circuit.)

Association of Civilian Technicians, Schenectady Chapter and U.S. Department of Defense, Nat'l Guard Bureau, N.Y. Air Nat'l Guard, Latham, N.Y., 55 FLRA 925 (1999) (Finding nonnegotiable a proposal that would prevent the Guard from directly soliciting any individual technician to volunteer to perform a military assignment in a particular pay status. The Authority concluded that the proposal concerned a military aspect of technician employment in that it attempts to influence the pay status of employees assigned to a military mission by prescribing the manner in which volunteers will be solicited. If the Guard wanted a particular technician to perform the mission, the proposal would limit the Guard's ability to communicate directly with that technician to solicit voluntary status.) (*Judicial review pending* in D.C. Circuit).

E. Compensatory Time

American Fed'n of Gov't Employees, Locals 3807 and 3824 and U.S. Department of Energy, Western Area Power Admin., Golden, Colo., 55 FLRA 1 (1998) (In response to agency regulation providing that, except in certain circumstances, compensatory time not taken within 26 pay periods would be forfeited, the union proposed to continue practice of paying overtime for compensatory time not used within 26 pay periods. The Authority found that the union's proposal did not conflict with 5 C.F.R. §550.114(d), because that regulation granted the agency discretion, *i.e.*, it did not require the agency to fix a time limit for the use of compensatory time. The Authority also found no compelling need for the agency regulation and that the union's proposal did not affect the agency's right to determine its budget under section 7106(a)(1) of the Statute. As for a separate union proposal providing that employees would be allowed to choose between compensatory time and overtime pay as compensation for overtime work, the Authority concluded that 5 C.F.R. § 550.114(c) gave the agency head discretion to provide for compensatory time rather than overtime payment for certain employees, and that the agency may exercise its discretion through negotiation to allow individual employees to elect overtime rather than compensatory time.)

F. Permissive Negotiations

National Fed'n of Fed. Employees, Local 2148 and U.S. Department of the Interior, Office of Surface Mining, Reclamation and Enforcement, Albuquerque, N.M., 53 FLRA 427 (1997) (Proposals seeking to add positions, and fill vacancies are negotiable at the election of an agency, pursuant to section 7106(b)(1).)

G. Competitive Areas

American Fed'n of Gov't Employees, Local 1815 and U.S. Department of the Army, U.S. Army Aviation Center and Fort Rucker, Fort Rucker, Ala., 53 FLRA 606 (1997) (Provision requiring an agency to bargain before changing any competitive areas is a permissive subject of bargaining.)

III. Arbitration Exceptions

A. Authority's Jurisdiction

American Fed'n of Gov't Employees, Local 2986 and U.S. Department of Defense, Nat'l Guard Bureau, The Adjutant General, State of Oregon, 51 FLRA 1549 (1996); *U.S. Department of Defense, Nat'l Guard Bureau, Idaho Nat'l Guard, Adjutant General, State of Idaho and American Fed'n of Gov't Employees, Local 3006*, 51 FLRA 1693 (1996) (Notwithstanding the limitations in section 7122(a) and section 7121(f) on matters that may be the subject of exceptions to an arbitration award, the Authority determined in these cases that it had jurisdiction to review and reverse two arbitrators' determinations. In one case, the arbitrator had determined that an employee was entitled to severance pay on being removed from his civilian technician position for failing to meet weight standards. In the other, the arbitrator had determined that an employee was entitled to severance pay on being removed from his civilian technician position because he was barred from reenlisting in the state Guard.) *Petitions for review dismissed, AFGE, Local 2986 v. FLRA*, 130 F.3d 450 (D.C. Cir. 1997) (The court rejected the union's argument that the Authority did not have jurisdiction to consider the agencies' exceptions in these cases. Finding it lacked jurisdiction to review the Authority's decisions on exceptions to the arbitrators' awards unless an unfair labor practice was involved, the Court dismissed the union's petition for review.)

Office and Prof'l Employees Int'l Union, Local 268 and U.S. Department of Energy, Oak Ridge, Tenn., 55 FLRA 775 (1999) (Under section 7122(a) of the Statute, the Authority lacks jurisdiction to resolve exceptions to awards relating to matters described in section 7121(f), which includes matters covered under 5 U.S.C. §§ 4303 and 7515. In the case before it, the arbitrator denied a grievance claiming that the agency did not have a valid reason for rejecting the grievant's request to withdraw his buyout agreement and application for early retirement. The Authority found that the Merit Systems Protection Board views claims such as those made by the union to the arbitrator be within its jurisdiction as a constructive removal under section 7512 when the agency does not have a valid reason for denying the withdrawal request. On this basis, the Authority determined that the award related to a matter described in section 7121(f) over which it had no jurisdiction.)

B. Awards Alleged to be Contrary to Management's Rights

U.S. Dep't of the Treasury, Bureau of Engraving and Printing, Washington, D.C. and National Treasury Employees Union, Chapter 201, 53 FLRA 146 (1997) (The Authority clarified that there is a 2-prong test for determining whether an award is deficient as contrary to management's rights under section 7106(a): under Prong I, the Authority examines whether the award provides a remedy for a violation of either applicable law or a contract provision that was negotiated pursuant to section 7106(b); under Prong II, the Authority determines whether the award reflects a reconstruction of what management would have done if it had not violated the applicable law or the 7106(b) provision.)

C. Agreement to Negotiate over Section 7106(b)(1) Subjects

General Servs. Admin. and AFGE, Council of GSA Locals, Council 236, 54 FLRA 1582 (1998) (The Authority set aside an arbitrator's award finding that the agency's refusal to bargain over the union's proposal violated the parties' Memorandum of Understanding (MOU) requiring the agency to negotiate over the subjects set forth in section 7106(b)(1). The arbitrator had determined that the subject of the proposal -- contracting out -- concerned the methods and means of performing work within the meaning of section 7106(b)(1), and consequently, the agency's refusal to bargain over the proposal violated the parties' agreement. The Authority rejected the arbitrator's determination that proposals concerning contracting out concern the "methods" or "means" of performing work. The Authority concluded that such proposals "do not relate to the *way* in which an agency *performs its work* or the *tools* or *devices* that may be used in accomplishing it." Rather, as "such proposals relate to an agency's decision-making process concerning *by whom* the work is best performed -- either in-house by agency employees or by employees outside of an organization[,]" the Authority concluded that the arbitrator's finding of an MOU violation was deficient, because the agency had not refused to bargain over a section 7106(b)(1) matter.)

Social Security Admin., Baltimore, Md. and American Fed'n of Gov't Employees, 55 FLRA 1063 (1999) (Where parties enter into an agreement to bargain over matters contained in section 7106(b)(1) of the Statute, the provision becomes enforceable though grievance arbitration. Challenges to an arbitrator's enforcement of such a provision are a matter of contract interpretation.)

D. Fair Labor Standards Act

National Treasury Employees Union and Fed. Deposit Ins. Corp., 53 FLRA 1469 (1998) (Reversing precedent, the Authority concluded that arbitrators are bound by the statute of limitations set forth in the Fair Labor Standards Act, 29 U.S.C. § 255(a) (FLSA), in remedying violations of the FLSA; The Authority set aside award as inconsistent with law and remanded for determination of whether backpay should be awarded for two or three years.) (*Judicial review denied* for lack of jurisdiction, *FDIC v. FLRA*, No. 98-1221, August 3, 1998.).

U.S. Department of the Navy, Naval Explosive Ordinance Disposal Technology Div., Indian Head, Md. and American Fed'n of Gov't Employees, Local 1923, 56 FLRA 280 (2000) (The Authority denied exceptions to an award challenging an arbitrator's determination that an agency improperly exempted employees from overtime coverage under the Fair Labor Standards Act. The arbitrator's reliance on the employees' position descriptions, as well as the agency's exemption determination regarding other persons with similar duties, did not establish that the arbitrator failed to consider the employees' actual or day-to-day duties, as required under FLSA implementing regulations. In addition, the agency offered no evidence that it took affirmative steps necessary to overcome the presumption in favor of liquidated damages, which the arbitrator had awarded.)

E. Interest on Backpay

U.S. Department of Defense Dependents Schools and Federal Educ. Ass'n, 54 FLRA 514 (1998) (In this case, the Authority held that an arbitrator may properly award attorney fees for the time spent litigating the entitlement to interest on backpay. In a prior award, the arbitrator, on concluding that the agency's actions amounted to an unjustified and unwarranted personnel action, awarded the affected employees interest on backpay that the agency had already reimbursed. In a subsequent award, the arbitrator awarded the union attorney fees incurred in litigating the prior award of interest. The Authority determined that interest is an inseparable part of any payment under the Back Pay Act and that there is no requirement that a backpay award be in the same proceeding as the proceeding that determines the entitlement to attorney fees.)

IV. Representation Decisions

A. Employees Who Administer a Labor Relations Statute

National Mediation Bd. and AFGE, 54 FLRA 1474 (1998) (Concluding that a union was precluded from representing a proposed unit that contained employees who administer a labor relations statute that covers members of unions affiliated with the petitioning union. The Authority found that because a union is affiliated with the AFL-CIO, and because other affiliates of the AFL-CIO represent employees covered by the Railway Labor Act (RLA), a union was precluded from representing employees who administer the RLA. In reaching this conclusion, the Authority construed, for the first time, the phrase "affiliated directly or indirectly," set out in section 7112(c)(2) as encompassing two affiliates of the AFL-CIO.)

National Mediation Bd. and American Fed'n of Gov't Employees, AFL-CIO, 56 FLRA 1, *reconsideration denied* 56 FLRA 320 (2000) (Section 7112(c) of the Statute sets forth the conditions under which an employee engaged in administering provisions of law relating to labor-management may not be represented by a labor organization. Defining the term "administering," the Authority determined that employees who are not responsible for managing, carrying-out, or otherwise executing a provision of law relating to labor-management relations may be included in an appropriate bargaining unit.)

B. Judicial Review of Authority Representation Decisions

American Fed'n of State, County, & Municipal Employees, Local 3719 v. FLRA, No. 97-01043 (D.D.C. January 20, 1998) (Granting the Authority's motion to dismiss for lack of subject matter jurisdiction, the district court agreed that it lacked jurisdiction, under either section 7123(a) or *Leedom v. Kyne*, to review an Authority decision excluding certain employees from a bargaining unit because the employees' work involved national security.)

C. Nationwide Bargaining Units

U.S. Department of Defense, Nat'l Guard Bureau and Association of Civilian Technicians, 55 FLRA 657 (1999) (Finding a consolidated national bargaining unit was not appropriate because such a unit would not recognize the role of state officials in the administration of the National Guard technician program. The separate authority exercised by each state over its military mission led the Authority to conclude that the lack of integration of mission and function across state lines outweighed any similarities in the duties performed by the technicians. Accordingly, nationwide consolidation would not promote

effective dealings or the efficiency of agency operations.) (*Judicial review pending* in D.C. District Court.)

U.S. Securities and Exchange Commission, Washington, D.C. and National Treasury Employees Union, 56 FLRA 312 (2000) (Finding appropriate a nationwide unit of agency employees, including attorneys, accountants, securities compliance examiners and support staff, but excluding employees in a regional office represented by a different union. Noting that Authority precedent does not establish a "preference" for any particular unit structure, the nationwide unit was nonetheless consistent with a long-established principle that the application of appropriate unit criteria properly results in broader, more comprehensive bargaining units.)

D. Change in Affiliation

New Mexico Army and Air Nat'l Guard and National Fed'n of Fed. Employees Indep., Local 1636, et al., 56 FLRA 145 (2000) (The Authority majority upheld the Regional Director's finding that a union seeking to change affiliation from one local union to another satisfied the "Montrose" procedural safeguards. However, Member Segal indicated a need to reexamine whether such safeguards are appropriately applied in adversarial takeover situations, such as occurred in this case. Chairman Wasserman also questioned the application of that doctrine in such situations and suggested the addition of a notice requirement to the parent organization of the local seeking a change in affiliation. Such notice would further the goal of having a fully informed electorate vote on proposed changes in affiliation.)

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Introduction to Alternative Dispute Resolution (ADR)
54th FEDERAL LABOR RELATIONS COURSE

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OUTLINE OF PRESENTATION

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2. Sec/Army Memorandum 25 July 1995
3. DoJ Order April 6, 1995
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E. EEOC
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VI. Interagency ADR Working Group

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B. Information
C. Advantages 0f ADR

AIR FORCE ADR PROGRAM:

A Status Update

Joseph M. McDade
Deputy Dispute Resolution Specialist

Air Force ADR Program

AFPD 51-12 -- WHAT DOES IT DO?

- **ESTABLISHES AIR FORCE POLICY "TO VOLUNTARILY USE ADR TO THE MAXIMUM EXTENT PRACTICABLE AND APPROPRIATE"**
- **MAKES THE PRINCIPAL DEPUTY GENERAL COUNSEL THE OPR FOR ADR**
- **REQUIRES VARIOUS "TWO LETTER" ORGANIZATIONS TO WORK WITH SAF/GC TO IMPLEMENT THE AIR FORCE ADR PROGRAM**

Air Force ADR Program

TASKINGS UNDER AFPD 51-12:

- **DEVELOP A FIVE YEAR PLAN FOR THE AIR FORCE ADR PROGRAM *AND* SUPPORT ITS IMPLEMENTATION**
- **APPOINT ADR ADVOCATES AT EACH MAJCOM, BASE & DRU**
- **PROVIDE APPROPRIATE ADR TRAINING**
- **SECURE RESOURCES NECESSARY TO IMPLEMENT THE AIR FORCE ADR POLICY AND PROGRAM**

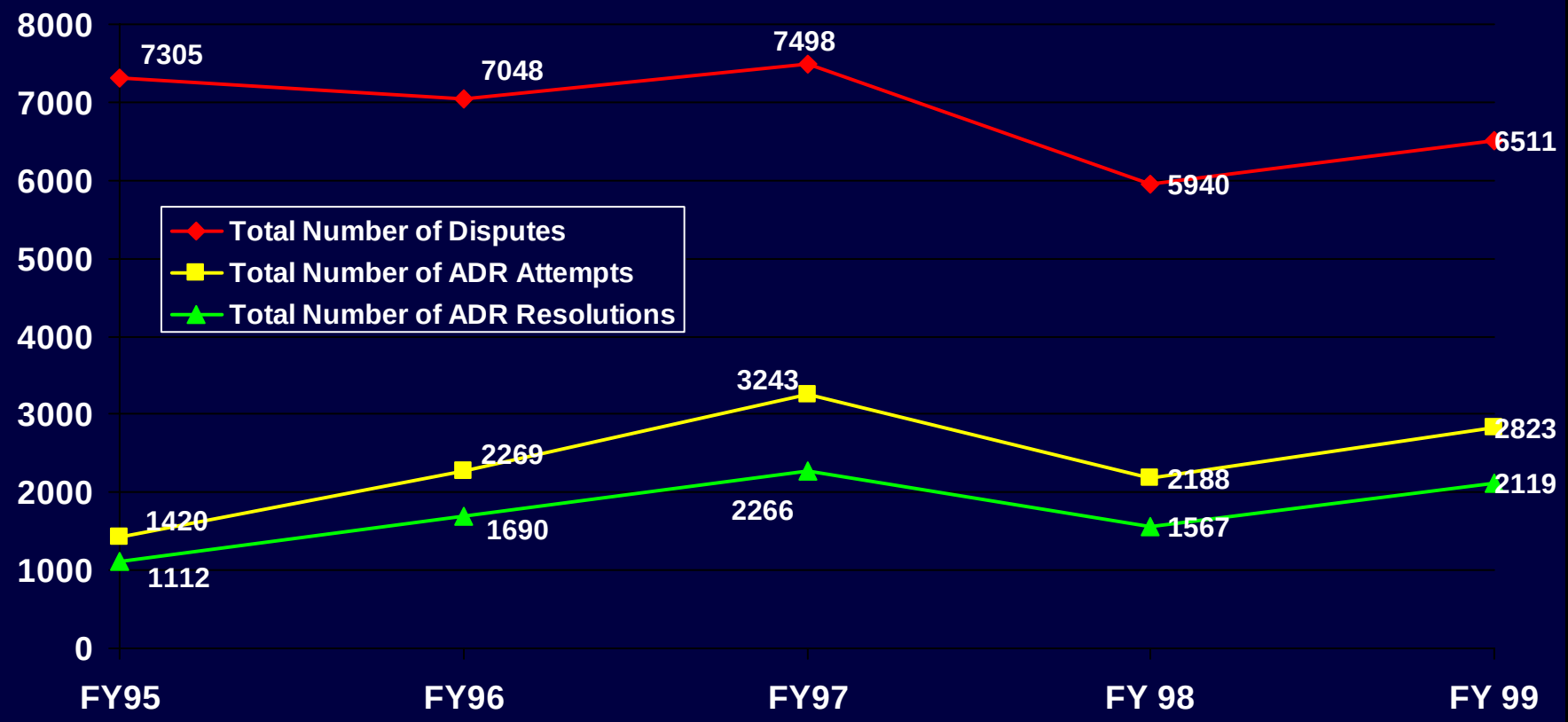
Air Force ADR Program

Workplace Disputes Plan

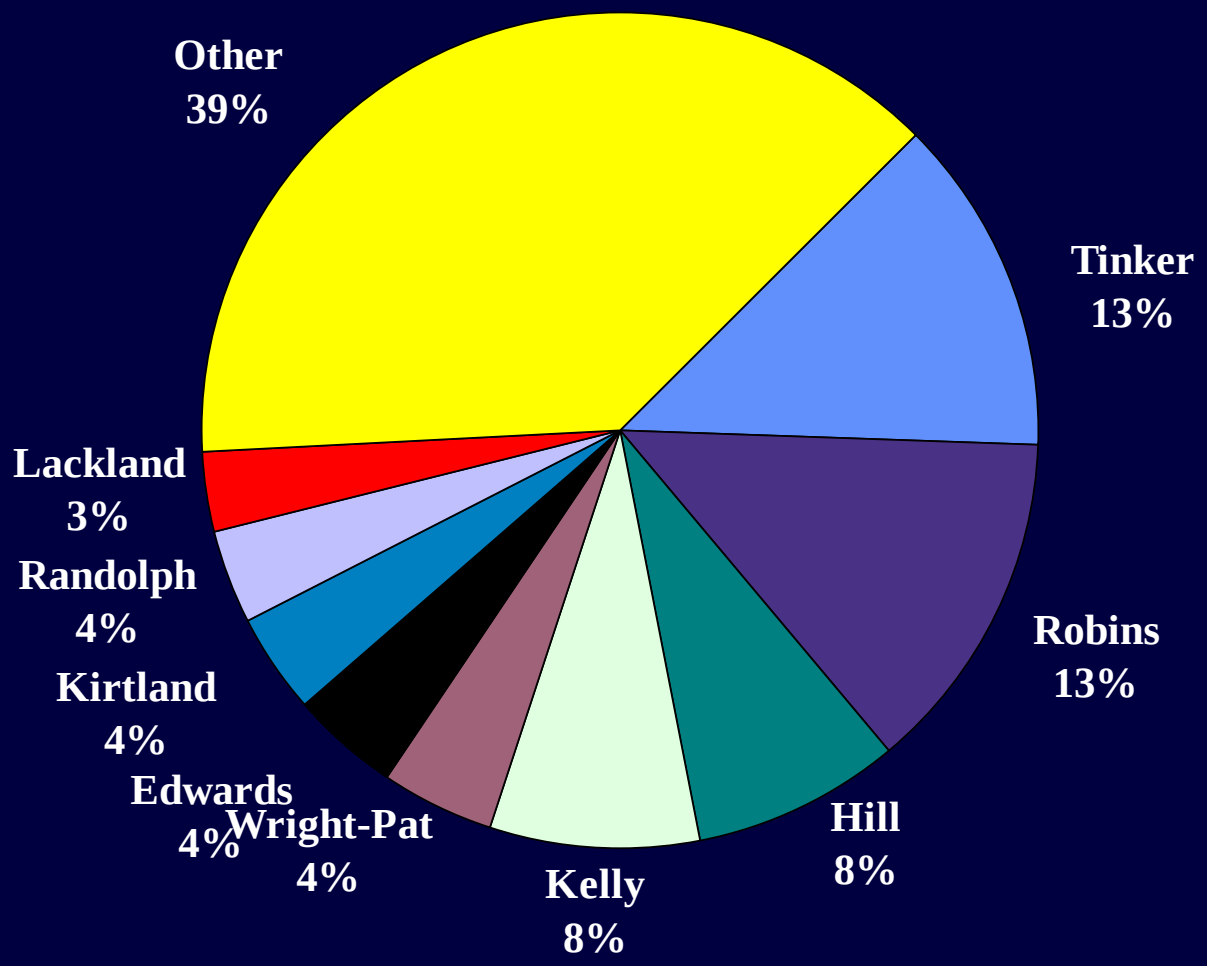
Contract Disputes Plan

Environmental Disputes Plan

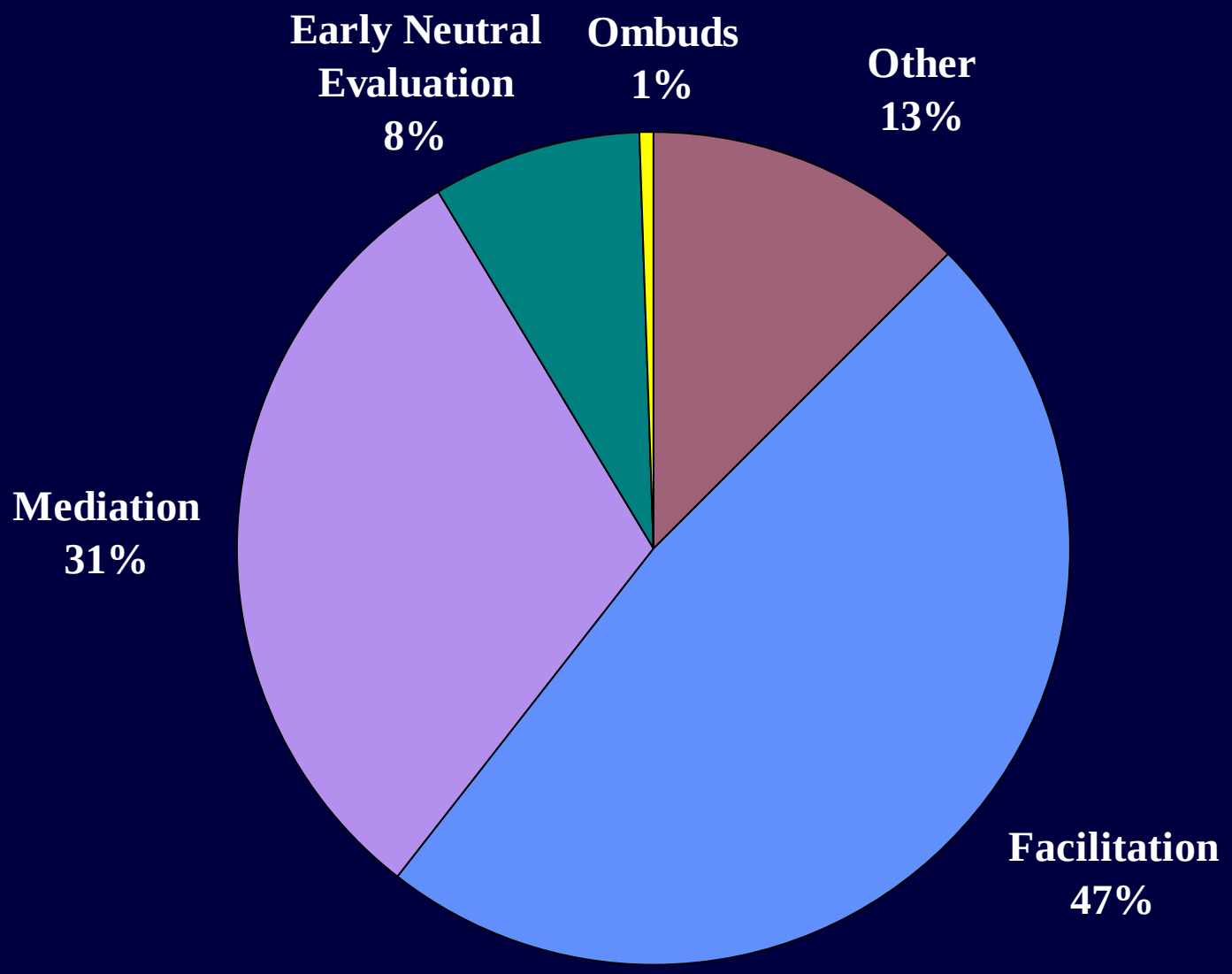
Air Force Civilian Workplace Disputes and ADR Activity Fiscal Years 1995-1999



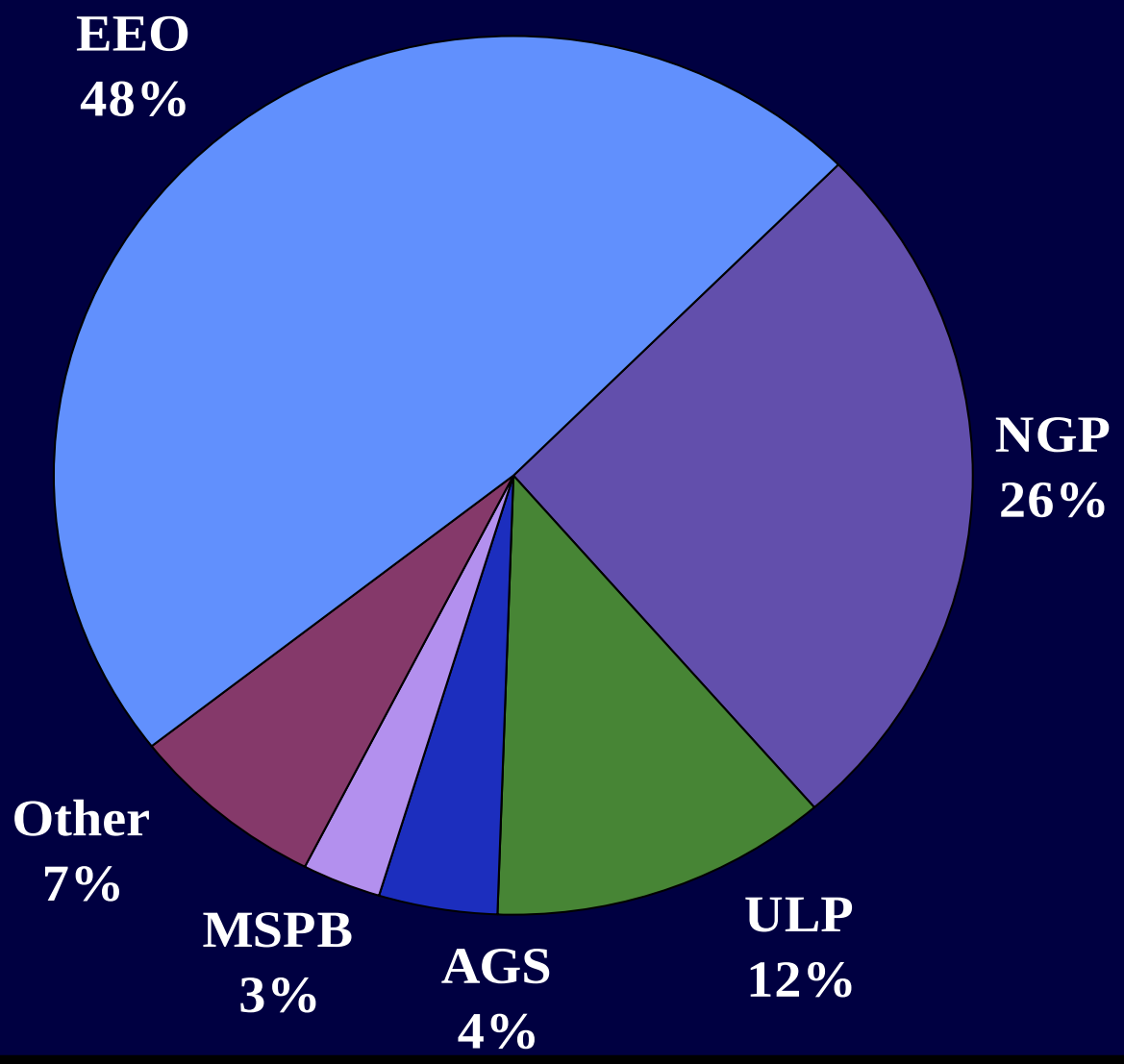
Percentage of Total Civilian Workplace Disputes by Base (FY 99)



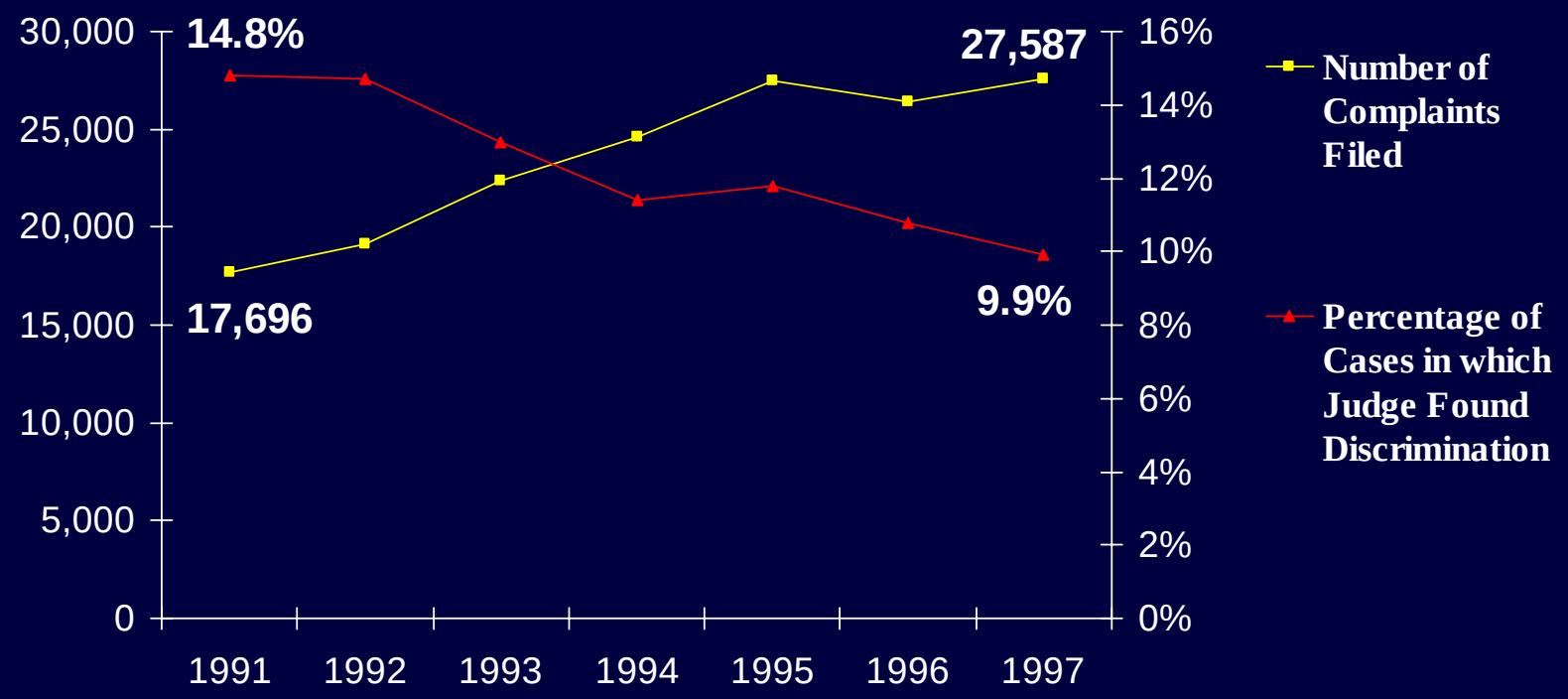
ADR Techniques Employed Fiscal Years 1997-1998



Civilian Workplace Disputes FY 1999



EEO Complaints Are Up 56 %
Findings of Discrimination Are Down 33 %

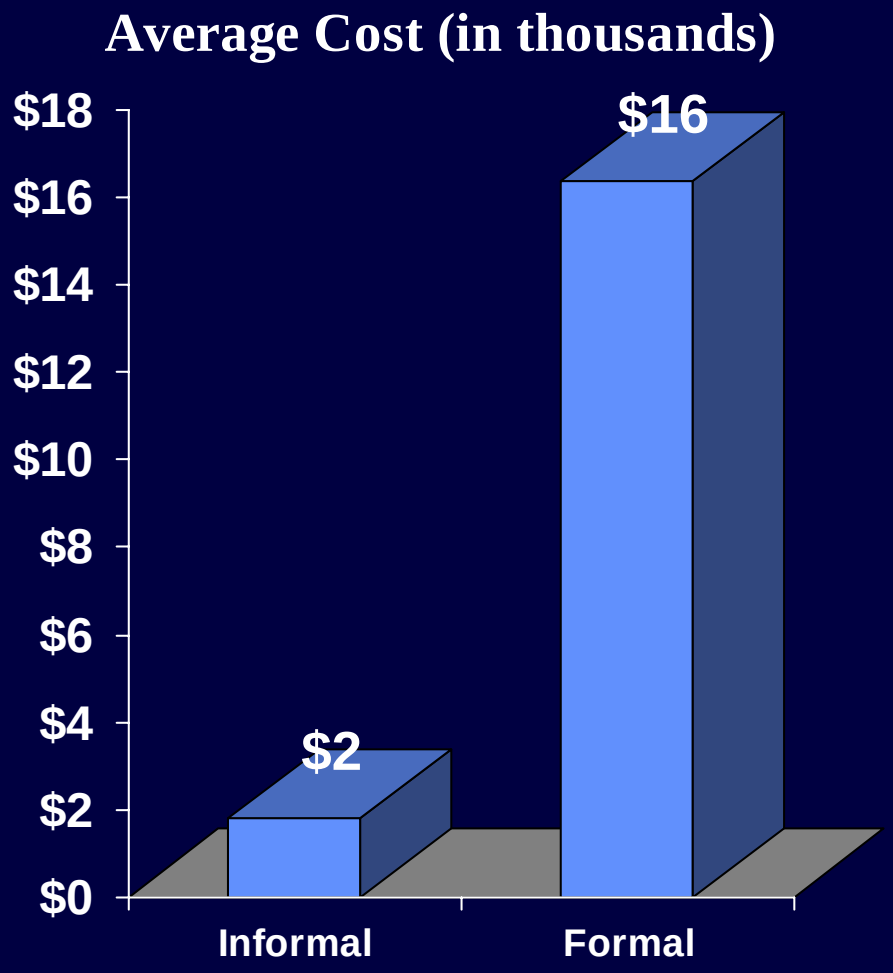


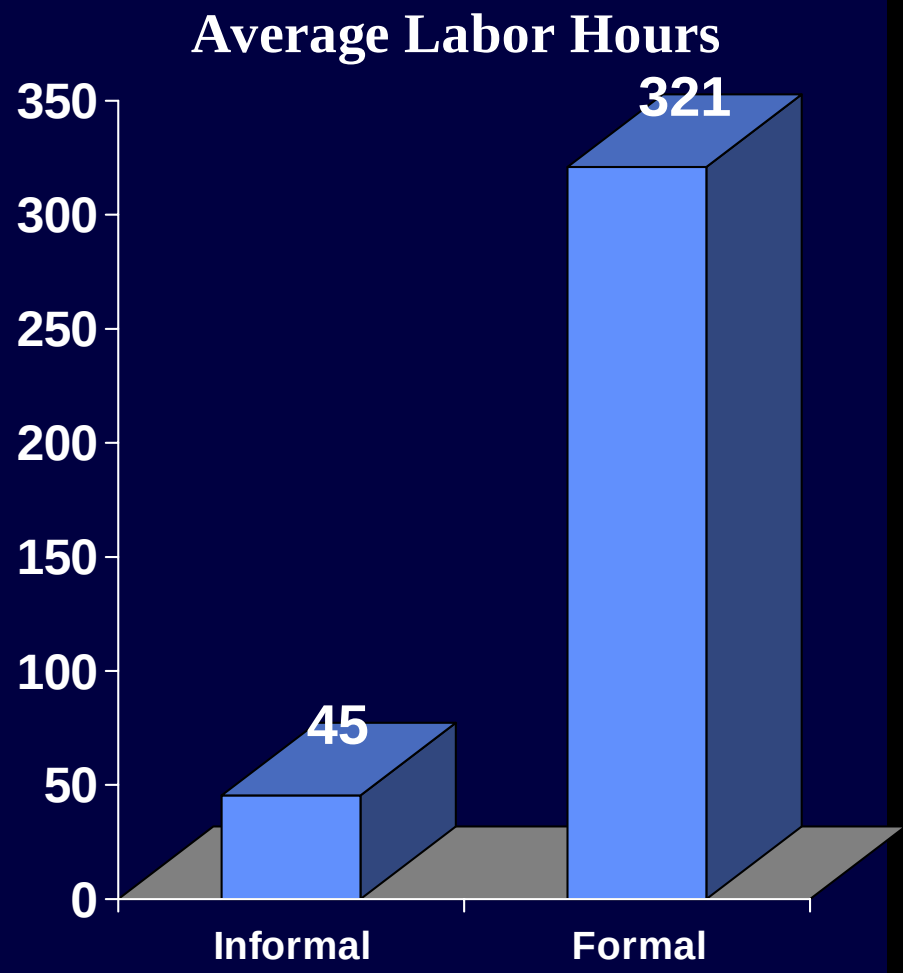
EEO Complaints Often Do Not Involve Discrimination

"[T]here may be a sizable number of disputes . . . which may not involve discrimination issues at all. They reflect, rather, basic communications problems in the workplace."

Source: ADR Study, U.S. Equal Employment Opportunity Commission, Office of Federal Operations, Oct. 1996

Time and Cost of Informal and Formal EEO Complaints

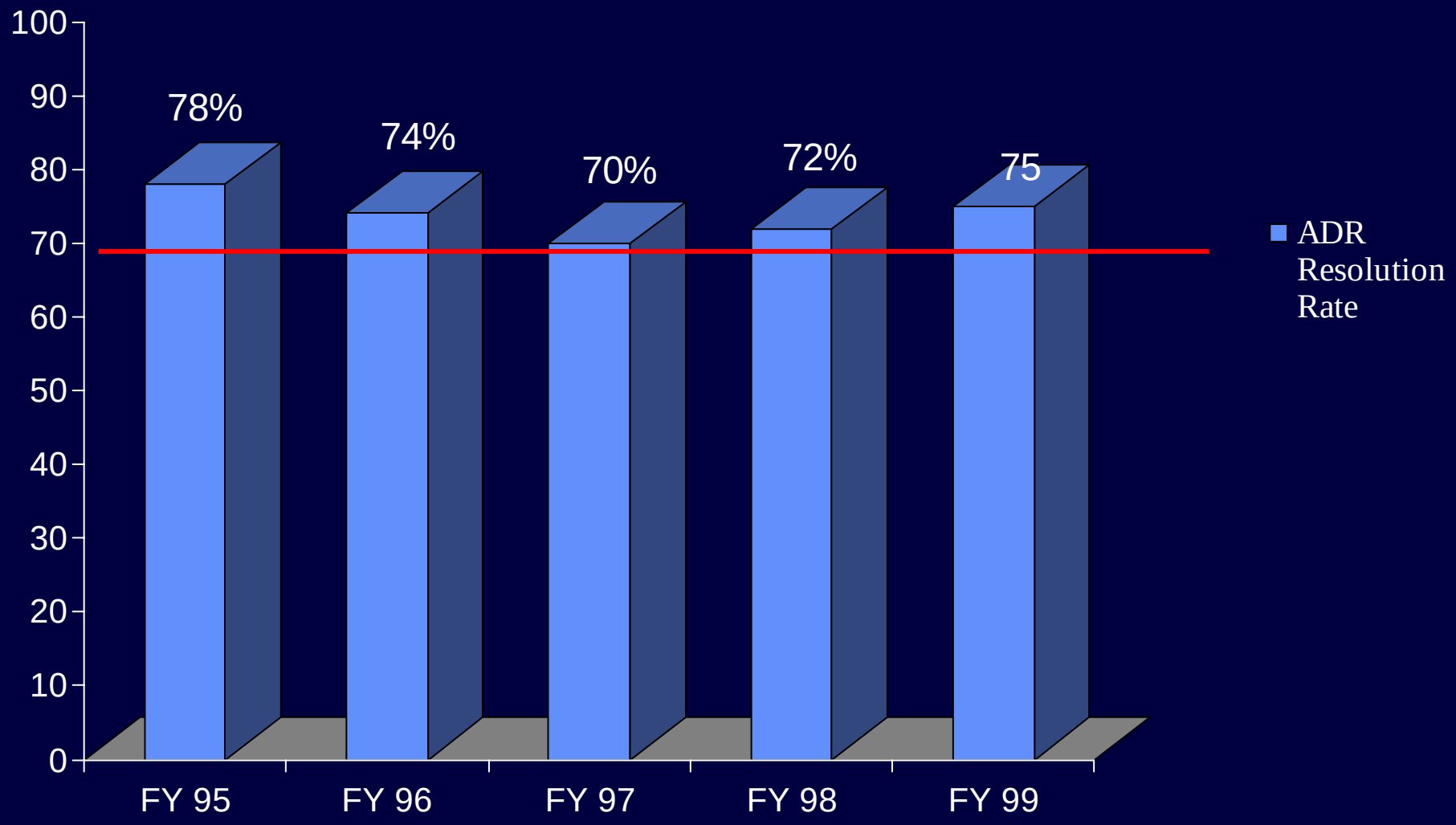




Note: Actual average cost of informal complaint is $1,795.
Actual average cost of formal complaint is $16,372.

Source: Air Force Audit Agency, Project 98051018

ADR Resolution Rates FY 95-98
Civilian Workplace Disputes



Air Force ADR Program

ACCESS TO ADR INFORMATION

- **ADR PROGRAM WEBSITE: http://www.adr.af.mil (See Air Force ADR Program EEO, Labor & What's New -- Mediation Best Practices Compendium)**

- **CLLO WEBSITE ON FLITE: http://aflsa.jag.af.mil/GROUPS/AIR_FORCE/LABOR_LAW**

- **JACR WEBSITE ON FLITE: http://aflsa.jag.af.mil/GROUPS/AIR_FORCE/JAC/JACR/index.htm**

Air Force ADR Program

WHAT TO EXPECT IN THE NEXT YEAR:

- **SIGNIFICANT INCREASE OF ADR USE IN EEO COMPLAINTS**
- **AIR FORCE FIVE YEAR ADR PLAN IMPLEMENTATION (AS PER AFPD 51-12)**
- **SIGNIFICANT ACTIVITY TO INCORPORATE ADR SYSTEMS INTO COLLECTIVE BARGAINING AGREEMENTS**

Air Force ADR Program

WHAT TO EXPECT IN THE NEXT YEAR:

- **INCREASED INTEREST BY FLRA REGARDING ADR PROGRAM IMPLEMENTATION & THE ROLE OF THE UNION**
- **CONTINUED LEGAL/ADVOCACY CHALLENGES**

CHAPTER N

TO: Federal ADR Council
FROM: Interagency ADR Working Group Steering Committee
DATE: September 12, 2000
SUBJECT: Draft Confidentiality Report

The Federal ADR Council requested the Interagency Working Group Steering Committee to explore the degree of confidentiality that can be promised in a federal ADR proceeding. The ADR Council further proposed that the Steering Committee provide the Council with a report on the reasonable expectations of confidentiality for parties in federal dispute resolution, as well as a statement expressing that expectation suitable for use by neutrals in such proceedings.

To accomplish these proposed tasks, the Steering Committee assembled a subcommittee to analyze the provisions of ADR Act and draft a report on its confidentiality provisions. The enclosed document is the product of that group's efforts. The "Report on the Reasonable Expectations of Confidentiality under the ADR Act" (Confidentiality Report) contains a short analysis of the confidentiality provisions of ADR Act, a question and answer section which provides guidance on numerous areas involving issues of confidentiality under the Act, and, finally, a Model Confidentiality Statement for use by neutrals.

As is reflected in the introduction to the Confidentiality Report, several issues emerged regarding implementation of the ADR Act that the Steering Committee was not able to address fully. We, therefore, recommend that the ADR Council request the Steering Committee to do the following:

- Publish the draft Confidentiality Report for public comment in the Federal Register;

- Cooperate with and consider the comments of individuals and organizations in determining appropriate modifications of the Confidentiality Report;

- Explore the need for and develop appropriate guidance for federal agencies, such as best practices for ensuring confidentiality in the administration of federal ADR programs, confidentiality implications of using external and internal neutrals, and considerations in identifying agency neutrals; and

- Enter into a dialogue with the President's Council on Integrity and Efficiency, the Executive Council on Integrity and Efficiency and other organizations that represent federal entities with authority to request information. The purpose to these dialogues is to obtain concurrence on the principles set forth in the draft Confidentiality Report; and

- Enter into a dialogue with federal entities with authority to request information on a government-wide basis. The purpose of these dialogues will be to develop best practices to maintain the integrity of federal dispute resolution processes and minimize conflict when requesting information from ADR programs.

We appreciate your attention to this matter and hope that the report furthers the goal of improving the quality of federal ADR practice.

REPORT ON THE REASONABLE EXPECTATIONS OF CONFIDENTIALITY UNDER THE ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1996

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V. Model Confidentiality Statement for Use by Neutrals

I. INTRODUCTION

The Administrative Dispute Resolution Act of 1996 ("ADR Act") contains provisions that affect the confidentiality of administrative ADR proceedings. Neutrals and participants in federal dispute resolution proceedings need to have an accurate understanding of these provisions. The Federal ADR Council directed the Interagency ADR Working Group Steering Committee to review the ADR Act confidentiality provisions and provide the Council with a report outlining reasonable expectations of confidentiality for parties in federal dispute resolution. This report, the product of that effort, describes the ADR Act confidentiality provisions principally located at 5 USC Section 574.

The report has four sections: (1) a reprint of the confidentiality provisions of the ADR Act; (2) a section-by-section analysis of the confidentiality provisions; (3) a set of questions and answers designed to expand upon the analysis and address issues likely to arise in practice; and (4) a model confidentiality statement suitable for use by neutrals in federal ADR proceedings.

During preparation of this report, several issues emerged regarding implementation of the ADR Act that are not fully addressed in this report. These issues are important to the practice of federal ADR and would benefit from further investigation and study. As federal sector experience with ADR evolves, some issues addressed in this report will be refined and new issues are likely to arise. It is also important to note that the ADR Act is not the only means of maintaining confidentiality and other laws, regulations, and agency policies may impact confidentiality. A complete analysis of all such authorities is beyond the scope of this report.

II. ADMINISTRATIVE DISPUTE RESOLUTION ACT

Definitions (5 U.S.C.571)

For the purposes of this subchapter, the term--

(1) "agency" has the same meaning as in section 551(1) of this title;

(2) "administrative program" includes a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rule making, adjudication, licensing, or investigation, as those terms are used in subchapter II of this chapter;

(3) "alternative means of dispute resolution" means any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, factfinding, minitrials, arbitration, and use of ombuds, or any combination thereof;

(4) "award" means any decision by an arbitrator resolving the issues in controversy;

(5) "dispute resolution communication" means any oral or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or nonparty participant; except that a written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication;

(6) "dispute resolution proceeding" means any process in which an alternative means of dispute resolution is used to resolve an issue in controversy in which a neutral is appointed and specified parties participate;

(7) "in confidence" means, with respect to information, that the information is provided--
- (A) with the expressed intent of the source that it not be disclosed; or
- (B) under circumstances that would create the reasonable expectation on behalf of the source that the information will not be disclosed;

(8) "issue in controversy" means an issue which is material to a decision concerning an administrative program of an agency, and with which there is disagreement--
- (A) between an agency and persons who would be substantially affected by the decision; or
- (B) between persons who would be substantially affected by the decision;

(9) "neutral" means an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy;

(10) "party" means--

(A) for a proceeding with named parties, the same as in section 551(3) of this title; and

(B) for a proceeding without named parties, a person who will be significantly affected by the decision in the proceeding and who participates in the proceeding;

(11) "person" has the same meaning as in section 551(2) of this title; and

(12) "roster" means a list of persons qualified to provide services as neutrals.

Confidentiality (5 U.S.C.574)

(a) Except as provided in subsections (d) and (e), a neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence to the neutral, unless–

(1) all parties to the dispute resolution proceeding and the neutral consent in writing, and, if the dispute resolution communication was provided by a nonparty participant, that participant also consents in writing;

(2) the dispute resolution communication has already been made public;

(3) the dispute resolution communication is required by statute to be made public, but a neutral should make such communication public only if no other person is reasonably available to disclose the communication; or

(4) a court determines that such testimony or disclosure is necessary to--

(A) prevent a manifest injustice;

(B) help establish a violation of law; or

(C) prevent harm to the public health or safety,

of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.

(b) A party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication, unless–

(1) the communication was prepared by the party seeking disclosure;

(2) all parties to the dispute resolution proceeding consent in writing;

(3) the dispute resolution communication has already been made public;

(4) the dispute resolution communication is required by statute to be made public;

(5) a court determines that such testimony or disclosure is necessary to--
(A) prevent a manifest injustice;
(B) help establish a violation of law; or
(C) prevent harm to the public health and safety,
of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential;

(6) the dispute resolution communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award; or

(7) except for dispute resolution communications generated by the neutral, the dispute resolution communication was provided to or was available to all parties to the dispute resolution proceeding.

(c) Any dispute resolution communication that is disclosed in violation of subsection (a) or (b), shall not be admissible in any proceeding relating to the issues in controversy with respect to which the communication was made.

(4) (1) The parties may agree to alternative confidential procedures for disclosures by a neutral. Upon such agreement the parties shall inform the neutral before the commencement of the dispute resolution proceeding of any modifications to the provisions of subsection (a) that will govern the confidentiality of the dispute resolution proceeding. If the parties do not so inform the neutral, subsection (a) shall apply.

(2) To qualify for the exemption established under subsection (j), an alternative confidential procedure under this subsection may not provide for less disclosure than the confidential procedures otherwise provided under this section.

(e) If a demand for disclosure, by way of discovery request or other legal process, is made upon a neutral regarding a dispute resolution communication, the neutral shall make reasonable efforts to notify the parties and any affected nonparty participants of the demand. Any party or affected nonparty participant who receives such notice and within 15 calendar days does not offer to defend a refusal of the neutral to disclose the requested information shall have waived any objection to such disclosure.

(f) Nothing in this section shall prevent the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of a dispute resolution proceeding.

(g) Subsections (a) and (b) shall have no effect on the information and data that are necessary to document an agreement reached or order issued pursuant to a dispute resolution proceeding.

(h) Subsections (a) and (b) shall not prevent the gathering of information for research or educational purposes, in cooperation with other agencies, governmental entities, or dispute resolution programs, so long as the parties and the specific issues in controversy are not identifiable.

(I) Subsections (a) and (b) shall not prevent use of a dispute resolution communication to resolve a dispute between the neutral in a dispute resolution proceeding and a party to or participant in such proceeding, so long as such dispute resolution communication is disclosed only to the extent necessary to resolve such dispute.

(j) A dispute resolution communication which is between a neutral and a party and which may not be disclosed under this section shall also be exempt from disclosure under section 552(b)(3).

III. SECTION-BY-SECTION ANALYSIS OF CONFIDENTIALITY PROVISIONS (5 U.S.C. 574)

Section 574(a)

In general, a neutral in a dispute resolution proceeding is prohibited from disclosing any dispute resolution communication or any communication provided to him or her in confidence. Unless the communication falls within one of the exceptions listed below, the neutral cannot voluntarily disclose a communication and cannot be forced to disclose a communication through a discovery request or by any other compulsory process.

The exceptions to this general rule are found in subsections 574(a)(1) - (4), 574(d) and 574(e).

Section 574(a)(1)

A neutral may disclose a communication if all parties <u>and</u> the neutral agree in writing to the disclosure. If a nonparty provided the communication, then the nonparty must also agree in writing to the disclosure.

Section 574(a)(2)

A neutral may disclose a communication if the communication has already been made public.

Section 574(a)(3)

A neutral may disclose a communication if there is a statute which requires it to be made public. However, the neutral should not disclose the communication unless there is no other person available to make the disclosure.

Section 574(a)(4)

A neutral may disclose a communication if a court finds that the neutral's testimony, or the disclosure, is necessary to:

A. prevent a manifest injustice;
B. help establish a violation of law; or
C. prevent harm to the public health and safety.

In order to require disclosure, a court must determine that the need for disclosure is of sufficient magnitude to outweigh the detrimental impact on the integrity of dispute resolution proceedings in general. The need for the information must be so great that it outweighs a loss of confidence among other potential parties that their dispute resolution communications will remain confidential in future proceedings.

Section 574(b)

Unless the communication falls within one of the exceptions listed below, the party cannot voluntarily disclose a communication and cannot be forced to disclose a communication through a discovery request or by any other compulsory process.

Section 574(b)(1)

The party who makes a statement or communication is free to disclose it.

Section 574(b)(2)

A party may disclose a communication if all the parties agree in writing to the disclosure.

Section 574(b)(3)

A party may disclose a communication if the communication has already been made public.

Section 574(b)(4)

A party may disclose a communication if there is a statute which requires it to be made public.

Section 574(b)(5)

A party may disclose a communication if a court finds that the party's testimony, or the disclosure, is necessary to:

A. prevent a manifest injustice;
B. help establish a violation of law; or
C. prevent harm to the public health and safety.

In order to require disclosure, a court must determine that the need for disclosure is of sufficient magnitude to outweigh the detrimental impact on the integrity of dispute resolution proceedings in general. The need for the information must be so great that it outweighs a loss of confidence among other potential parties that their dispute resolution communications will remain confidential in future proceedings.

Section 574(b)(6)

1) Parties may use dispute resolution communications to show that a settlement agreement was in fact reached or to show what the terms of this agreement mean.

2) Parties may also use communications in connection with later issues regarding enforcing the agreement.

3) Communications may only be revealed to the extent that they meet the above purposes.

Section 574(b)(7)

1) There is no confidentiality protection for parties' dispute resolution communications that were available to everyone in the proceeding. For example, in a joint mediation session with all parties present, statements made and documents provided by parties are not confidential.

2) Communications coming from the neutral are confidential. For example, early neutral evaluations or settlement proposals from the neutral are protected.

3) A party may not use this provision to gain protection for a communication by providing it to the neutral who then provides it to the other party.

Section 574(c)

No one may use any dispute resolution communication in a related proceeding, if that communication was disclosed in violation of Section 574 (a) and (b).

Section 574(d)(1)

1) Parties may agree to alternative confidentiality procedures to limit disclosure by a neutral.

2) Parties must inform the neutral of the alternative procedures before the dispute resolution proceeding begins.

3) If parties do not inform the neutral of the alternative procedures, the procedures outlined in Section 574(a) will apply.

Section 574(d)(2)

1) Dispute resolution communications covered by alternative confidentiality procedures may be protected from disclosure under FOIA.

2) To qualify for this protection, the alternative procedures must provide for as much, or more, disclosure than the procedures provided in Section 574.

3) Dispute resolution communications covered by alternative confidentiality procedures do not qualify for protection from disclosure under FOIA if they provide for less disclosure than those outlined in Section 574.

Section 574(e)

1) A neutral who receives a demand for disclosure, in the form of a discovery request or other legal process, must make reasonable efforts to notify the parties and any affected non-party participants of the demand.

2) Parties and non-party participants who receive a notice of a demand for disclosure from a neutral:

a. must respond within 15 days and offer to defend a refusal to disclose the information; or
b. if they do not respond within 15 days, will have waived their objections to disclosure of the information.

Section 574(f)

Evidence that is otherwise discoverable or admissible is not protected from disclosure under this Section merely because the evidence was presented during a dispute resolution proceeding.

Section 574(g)

The provisions of Section 574 (a) and (b) do not affect information and data that are necessary to document agreements or orders resulting from dispute resolution proceedings.

Section 574(h)

Information from and about dispute resolution proceedings may be used for educational and research purposes as long as the parties and specific issues in controversy are not identifiable.

Section 574(I)

1) Dispute resolution communications may be used to resolve disputes between the neutral in a dispute resolution proceeding and a party or non-party participant.

2) Dispute resolution communications may be disclosed only to the extent necessary to resolve a dispute between a neutral and party or non-party participant.

Section 574(j)

A dispute resolution communication between a neutral and a party that is protected from disclosure under this section is also protected from disclosure under FOIA (Section 552(b)).

IV. Questions & Answers on Confidentiality under the Administrative Dispute Resolution Act of 1996 (ADR Act)

GENERAL CONFIDENTIALITY RULES

1. What communications are confidential?

Subject to certain exceptions, the following two types of communications are potentially confidential under the ADR Act:

1. A dispute resolution communication.

   A dispute resolution communication is any oral or written statement made by a party or a neutral that occurs during a dispute resolution proceeding and any writing prepared specifically for the purposes of a dispute resolution proceeding. Written agreements to enter into a dispute

resolution proceeding and any written final agreement reached as a result of the proceeding are not dispute resolution communications. *Citation: 5 USC 571(5).*

2. A "communication provided in confidence to the neutral."

   A "communication provided in confidence to the neutral" is any oral statement or document provided to a neutral during a dispute resolution proceeding. The communication must be made: 1) with the express intent that it not be disclosed, or 2) provided under circumstances that would create a reasonable expectation that it not be disclosed. *Citation: 5 USC 571(7) and 574 (a).*

2. What confidentiality protection is provided for dispute resolution communications?

Generally, neutrals and parties may not voluntarily disclose or be compelled to disclose dispute resolution communications. The ADR Act contains specific exceptions to the general rule. *Citation: 5 USC 574(a), (b).*

3. What confidentiality protection applies to a "communication provided in confidence" by a party to a neutral?

A neutral may not disclose any communication provided in confidence. *Citation: 5 USC 574(a).*

4. What is a dispute resolution proceeding?

A dispute resolution proceeding is any process involving the services of a neutral that is used to resolve an issue in controversy arising from an agency's program, operations, or actions. A dispute resolution proceeding includes any stage of such a dispute resolution process. *Citation: 5 USC 571(6) and (8).* See also, Question 10.

5. Who is a neutral?

A neutral is anyone who functions specifically to aid the parties during a dispute resolution process. A neutral may be a private person or a federal government employee who is acceptable to the parties. There may be more than one neutral during the course of a dispute resolution process (e.g., an "intake" neutral, a "convener" neutral, as well as the neutral who facilitates a face-to-face proceeding). It is important that agencies clearly identify neutrals to avoid misunderstanding.

The ADR Act supports a broad reading of the term "neutral." An intake or convening neutral is included in this definition as "an individual who ... functions specifically to aid the parties in resolving the controversy" because such neutrals take the necessary first steps toward a potential resolution of a dispute.

In situations where an intake neutral is identified by an agency, a party's willingness to contact and/or work with the intake neutral to initiate an ADR process is an indication that the intake neutral is acceptable to the party. *Citation: 5 USC 571(9), 571(6), 571(3), 573(a).*

> **Example:** An employee contacts an agency ADR program and describes a dispute to an intake person. The conversation is confidential only if the intake person has been appropriately identified as a neutral by the agency to aid parties in resolving such disputes.

6. Who is a party?

A party is any person or entity who participates in a dispute resolution proceeding and is named in a legal proceeding or will be affected significantly by the outcome of the proceeding. The obligations of parties extend to their representatives and agents. *Citation: 5 USC 571(10).*

7. What constitutes disclosure?

Disclosure is not defined in the ADR Act. Disclosure occurs when a neutral, a party, or a non-party participant makes a communication available to some other person by any method.

8. May a party or neutral disclose dispute resolution communications in response to discovery or compulsory process?

In general, neither a neutral nor a party can be required to disclose dispute resolution communications through discovery or compulsory process. Compulsory processes include any administrative, judicial or regulatory process that compels action by an individual. (See also Question 15) *Citation: 5 USC 574(a) & 574(b).*

9. What confidentiality protection is provided for communications by a nonparty participant in a dispute resolution proceeding?

A nonparty participant in a dispute resolution proceeding is an individual other than a party, agent or representative of a party, or the neutral. This could be an individual who is asked by the neutral to present information for use of the neutral or parties. A nonparty participant has an independent right to protect his or her communications from disclosure by a neutral. A neutral needs to obtain the consent of all parties and the nonparty participant to disclose such a the communication. *Citation: 5 USC 574(a)(1).*

10. When in an ADR process do the confidentiality protections of ADR Act apply?

Confidentiality applies to communications when a person seeking ADR services contacts an appropriate neutral. A communication made by a party to a neutral is covered even if made prior to a face-to-face ADR proceeding. Confidentiality does not apply to communications made after a final written agreement is reached, or after resolution efforts aided by the neutral have otherwise ended. *Citation: 5 USC 571(6), 574(a) and (b).*

EXCEPTIONS TO CONFIDENTIALITY PROTECTION

11. What communications are not protected by the ADR Act?

1. A party's own communications made during a dispute resolution proceeding.

   A party may disclose any oral or written communication which the party makes or prepares for a dispute resolution proceeding. *Citation: 5 USC 574(b)(1).*

2. A dispute resolution communication that has "already been made public."

   The ADR Act's confidentiality protections do not apply to a communication that has already been made public. Examples of communications that have "already been made public" include:

   1. The communication has been discussed in a Congressional hearing;
   2. The communication has been posted on the Internet;
   3. The communications has been released to the media;
   4. The communication has been placed in a court filing or testified about in a court in a proceeding not under seal;
   5. The communication has been reported in the newspapers;
   6. The communication has been discussed in an open meeting;
   7. The communication has been released under FOIA.

   Citation: 5 USC 574(a)(2) & 574(b)(3).

3. Communications required by statute to be made public.

FOIA is an example of a federal statute which requires agency records to be made public under certain circumstances. NOTE: A protected dispute resolution communication which is between a neutral and a party is exempt from disclosure under FOIA. (See Question 23) *Citation: 5 USC 574(a)(3), 574(b)(4), & 574(j).*

4. When a court orders disclosure.

   A federal court may override the confidentiality protections of ADR Act in three limited situations. In order to override the confidentiality protections, a court must determine that testimony or disclosure of a communication is necessary to either (1) prevent a manifest injustice, (2) help establish a violation of law, or (3) prevent harm to the public health or safety. The court must also determine that the need for the information is of a sufficient magnitude in the particular case to
   outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential. There are no cases as of August 2000 that have interpreted these provisions. *Citation: 5 USC 574(a)(4) & (b)(5).*

5. In order to resolve a dispute over the existence or meaning of a settlement arrived at through a dispute resolution proceeding.

   The ADR Act creates an exception to the general rule of nondisclosure for the limited purpose of determining the existence or meaning of an agreement arrived at through a dispute resolution proceeding. Parties may also disclose communications as required to enforce an agreement arrived at through a dispute resolution proceeding. *Citation: 5 USC 574(b)(6).*

   Example: Parties may disclose dispute resolution communications as required to show that a settlement agreement was reached or to show what the terms of this agreement were.

6. Parties' communications in joint session, with all parties present.

   A neutral may not disclose communications made in joint session. However, there is no prohibition against a party disclosing communications available to everyone in the proceeding. *Citation: 5 USC 574(b)(7).*

7. Information sought for specific purposes.

   The ADR Act allows for the disclosure of information for educational and research purposes, in cooperation with agencies, governmental entities, or dispute resolution programs. It is essential that the parties and specific issues in controversy not be identifiable, however. *Citation: 5 USC 574(h)*

   Example: An individual who has served as a neutral in a number of agency ADR proceedings may share collected experiences when participating in a training program provided that the parties and specific issues are not identifiable.

Example: An ADR program administrator may collect statistics to monitor the results of the program.

8. Communications required to resolve disputes that arise between the neutral and a party.

   If there is a dispute between a neutral and a party regarding the conduct of a dispute resolution proceeding, both may disclose information to the extent necessary to resolve the dispute. *Citation: 5 U.S.C. 574(i)*

   Example: If a party refuses to pay the neutral for services, the neutral can disclose communications to the extent necessary to establish that payment is due.

12. Are a neutral's communications to parties in joint session or provided to all parties confidential?

Yes. ADR Act protects communications by a neutral.

Example: Early neutral evaluations or settlement proposals provided to the parties by a neutral are protected.

NOTE: A party, however, may not use this provision to gain protection for a communication by providing it to the neutral who then provides it to the other party. The statute says that the communication must be "generated" by the neutral, not just passed along by the neutral. *Citation: 5 USC 574 (b)(7).* (See H. Rept. 104-841,142 Cong. Rec. H11108-11 (September 25, 1996).

13. Can confidentiality attach to communications that are provided to or available to fewer than all of the parties?

Yes. The ADR Act does not prohibit disclosure of dispute resolution communications that are "provided to or ... available to all parties to the dispute resolution proceeding." Under a plain reading of the statute, communications are not protected when provided to, or available to, all parties; thus, they remain protected if they are provided to, or are available to, some (but not all) of the parties in a dispute.

The legislative history states, "A dispute resolution communication originating from a party to a party or parties is not protected from disclosure by the ADR Act." H.R. Rep. No. 104-841, 142 Cong. Rec. H11, 110 (Sept. 25, 1996). The plain language of the statute is not inconsistent with this piece of legislative history, in that it can be interpreted to mean both parties in a two-party ("party to the other

party") or all parties in a multi-party dispute ("party to all other parties"). *Citation: 5 U.S.C. 574(b)(7).*

14. Does ADR Act provide confidentiality protection for all evidence used in the course of a dispute resolution proceeding?

No. All evidence that is otherwise discoverable is not protected merely because it was presented at a dispute resolution proceeding. *Citation: 5 USC 574(f).*

15. Does the ADR Act protect against the disclosure of dispute resolution communications in response to requests by federal entities for such information?

Section 574 of the ADR Act prohibits a neutral or a party from disclosing, voluntarily or in response to discovery or compulsory process, any protected communication. The ADR Act further states that neutrals and parties shall not "be required" to disclose such communications. However, a number of federal entities have statutory authority to request disclosure of documents from federal agencies and employees. Examples of such statutes include, but are not limited to, The Inspector General Act (5 USC App.); The Whistleblower Protection Act (5 USC Section 1212(b)(2)); and the Federal Service Labor-Management Relations Act (5 USC Section 7114(4)).

None of the exceptions to the ADR Act's confidentiality provisions directly applies to requests for disclosure of information from federal entities. For example, these statutes do not require information to be made public under ADR Act Section 574 (a)(3) & (b)(4). In addition, the judicial override procedure outlined in Section 574 (a)(4) & (b)(5) is not always available to federal entities with authority to access information. Some federal entities may lack jurisdiction to seek a court order to compel disclosure. Other federal entities may have such jurisdiction, but may seek disclosure under other statutory authority.

In summary, a tension between these statutory authorities exists. The issues of statutory interpretation of these differing authorities have not yet been considered in an appropriate forum. We do not anticipate that there will be many occasions when such requests will be directed to neutrals or participants. However, it is important for agencies, neutrals and participants to be aware of the potential for requests.

In order to prevent unnecessary disputes over requests for information pursuant to an access statute and to mitigate damage to ADR programs, we recommend:

- Agency ADR programs should enter into a dialogue with potential requesting entities so that each may be educated about their respective missions.

- Procedures should be established for access to information that recognize the importance of confidentiality in dispute resolution processes and protect the integrity of the agency's ADR program.

- ADR programs should identify classes of information that are not confidential.

- Requesting entities should use non-confidential information as a basis for information requests.

- Requesting entities should seek confidential information only after other potential sources have been exhausted.

- Requesting entities should seek information from a neutral only as a last resort.

- The ADR program and requesting entities should agree to procedures to resolve specific disagreements that arise with regard to the disclosure of information.

- If a federal employee party or neutral receives a request for disclosure, he or she should contact the agency's ADR program as soon as possible to discuss appropriate courses of action. Neutrals must also notify parties of any such request (See Question 19).

ALTERNATIVE PROCEDURES TO ESTABLISH CONFIDENTIALITY PROTECTION

16. May parties agree to confidentiality procedures which are different from those contained in ADR Act?

Yes. Parties may agree to more, or less, confidentiality protection for disclosure by the neutral or themselves than is provided for in the Act.

Subsection 574(d)(1) provides that the parties can agree to alternative confidential procedures for disclosures <u>by a neutral</u>. While there is no parallel provision for parties, the exclusive wording of this subsection should not be construed as indicating Congressional intent to limit alternative procedures by parties. Parties have a general right to sign confidentiality agreements, and there is no reason this should change in a mediation context.

If the parties agree to alternative confidentiality procedures regarding disclosure by a neutral, they must so inform the neutral before the dispute resolution proceeding begins or the confidentiality procedures in the ADR Act will apply. An agreement providing for alternative confidentiality procedures is binding on anyone who signs the agreement. (See Questions 23 and 24 for potential FOIA implications.)

Example: Parties to an ADR proceeding can agree to authorize the neutral to use his or her judgment about whether to voluntarily disclose a protected communication, as long as the neutral is informed of this agreement before the ADR proceeding commences.

Example: Parties to an ADR proceeding can agree that they, and the neutral, will keep everything they say to each other in joint session confidential.

ISSUES REGARDING THE DISCLOSURE OF PROTECTED COMMUNICATIONS

17. What restrictions are put on the use of confidential communications disclosed in violation of the ADR Act?

If the neutral or any participant discloses a confidential communication in violation of Sections 574(a) or (b), that communication may not be used in any proceeding that is related to the subject of the dispute resolution proceeding in which the protected communication was made. A dispute resolution communication that was improperly disclosed may not be protected from use in an unrelated proceeding. *Citation: 5 U.S.C. 574(c).*

18. What is the penalty for disclosing confidential communications in violation of the statute?

The ADR Act does not specify any civil or criminal penalty for the disclosure of a protected communication in violation of the Act. However, such disclosure may violate other laws, regulations or agreements of the parties.

19. What must a neutral do when he or she receives a "demand for disclosure" of confidential communications?

A demand for disclosure is a formal request for confidential information. The demand must be made by a discovery request or some other legal process. Upon receiving a demand for disclosure of a confidential communication, a neutral must make a reasonable effort to notify the parties and any affected non-party participants of the demand. Notice must be provided even if the neutral believes that there is no basis for refusing to disclose the communication.

Notice should be delivered to the last address provided by a party. Parties have fifteen days, from the date they receive the notice, in which to offer to defend the neutral against disclosure. Therefore, notice should be sent by a process that provides certification of delivery. For example, delivery could be by registered mail, by any carrier that provides

tracking and certification of delivery, or by courier. Use of telephone or email communications as notice could be problematic. Since the parties must respond within 15 days or waive their right to object to disclosure, there must be a written record of when the notice was sent and when it was received. *Citation: 5 USC 574(e)*.

> **EXAMPLE:** A colleague asks a neutral what happened in a mediation. The neutral must simply refuse to discuss the matter. The neutral does not need to notify the parties of the request.
>
> **EXAMPLE:** A neutral receives a formal discovery request for information on what happened in a mediation. The neutral must notify the parties of this demand for disclosure using the procedures described above.

20. What can/must parties do when they receive notice of a demand for disclosure from the neutral?

If a party has no objection to the disclosure of confidential communications, it need not respond to the notice. On the other hand, if a party believes that the sought-after communications should not be disclosed, it should notify the neutral and make arrangements to defend the neutral. Where the party is a federal agency, it should develop departmental procedures for processing the notice.

21. What responsibilities do agencies have for ensuring that the notification requirement is met?

In some federal ADR programs, the neutral may be a federal employee performing collateral duty. Imposing an obligation upon these neutrals to keep records of parties to dispute resolution proceedings may be unduly onerous and ineffective. Agencies should develop administrative procedures to assure that the notification functions are fulfilled.

22. May a neutral refuse to disclose communications even when the parties have failed to agree to defend the neutral?

Yes. The ADR Act permits, but does not compel, a neutral to disclose if the parties have waived objections to disclosure under Section 574(e). While the statute is clear that a neutral "shall not" disclose where a party objects, the statute does not say that a neutral must disclose if a party does not object.

The effectiveness and integrity of mediation and other ADR processes is largely dependent on the credibility and trustworthiness of neutrals. In order to safeguard the integrity of ADR programs and to eliminate the potential for eroding confidence in future ADR proceedings, neutrals should be allowed to rely on established codes of ethics and confidentiality standards to support a decision not to disclose. *Citation: 5 USC 574(a) & (e).*

ISSUES RELATED TO THE FREEDOM OF INFORMATION ACT (FOIA)

23. What dispute resolution communications are protected from disclosure under FOIA?

Dispute resolution communications between a neutral and a party that are covered by the confidentiality protections of the ADR Act are specifically exempted from disclosure under the Freedom of Information Act. This includes communications that are generated by a neutral and provided to all parties, such as an Early Neutral Evaluation. In addition, other FOIA exemptions may apply.

Since only federal records are subject to FOIA, dispute resolution communications that are not federal records are not subject to the disclosure requirements of FOIA. Therefore, this subsection would not apply to oral dispute resolution communications. *Citation: 5 USC 574(j).*

24. If parties agree to alternative confidentiality procedures, are dispute resolution communications subject to FOIA?

Parties may agree to confidentiality procedures that differ from those provided for in the ADR Act. Parties should be aware, however, that the FOIA exemption may not apply to all the communications protected under their agreement.

If the agreement provides for the same or more disclosure than provided by the Act, dispute resolution communications are exempt from disclosure under FOIA. If the agreement provides for less disclosure, communications are not exempt from disclosure under FOIA. The ADR Act, in effect, establishes a ceiling on the extent to which confidential communications will be exempt. Parties cannot contract for more FOIA protection than the ADR Act provides.

V. MODEL CONFIDENTIALITY STATEMENT FOR USE BY NEUTRALS

The confidentiality provisions of the Administrative Dispute Resolution Act (ADR Act) apply to this process. Generally, if you tell me something during this process, I will keep it confidential. The same is true for written documents you prepare for this process and give to me. [Similarly, you are generally required to keep information confidential that you receive during conversations with other parties or me and from writings prepared for this process.]*

Be advised, there are limits on our ability to keep information confidential. If you say something or provide documents to all the other parties it is not confidential. Under rare circumstances, a judge can order disclosure of confidential information. Even though not required by the ADR Act, information about a violation of criminal law, or an act of fraud, waste, or abuse, or an imminent threat of serious harm may have to be disclosed to appropriate authorities by a participant, but not necessarily by me.

You can agree to more confidentiality if you want to. For example, you can agree to keep confidential things you share with all the parties. If you want to do any of that, it will require the agreement of all parties and should be memorialized in writing. You should be aware that if you agree to more confidentiality, written documents may still be available to others, for example, through the Freedom of Information Act. Confidentiality provisions other than those in the ADR Act may also apply to this process.

* - Include for multi-party disputes.

CHAPTER O

54TH FEDERAL LABOR RELATIONS COURSE

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Outline of Instruction

COMPETITIVE SOURCING[1]

In the process of governing, the Government should not compete with its citizens. The competitive enterprise system, characterized by individual freedom and initiative, is the primary source of national economic growth. In recognition of this principle, it has been and continues to be the general policy of the Government to rely on commercial sources to supply the products and services the Government needs.[2]

I. INTRODUCTION. Objectives: Following this block of instruction, students will understand:

A. The policies and procedures applicable to competitive sourcing.

B. The policies and procedures applicable to the inventorying of federal positions.

C. The policies and procedures applicable to military housing and utility privatization.

II. COMPETITIVE SOURCING: BACKGROUND.

A. Origins.

1. 1955: The Bureau of Budget issued a bulletin establishing the federal policy to obtain goods and services from the private sector.

2. 1966: The Office of Management and Budget (OMB) issued OMB Cir. A-76, which restated this policy but justified using outsourcing for cost-savings. OMB revised the Circular again in 1967, 1979, 1983, and 1999.

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[1] "Competitive sourcing" is the latest term for "outsourcing" and "contracting out."

[2] FEDERAL OFFICE OF MANAGEMENT AND BUDGET CIRCULAR [OMB] A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES, ¶ 4.a (Aug. 4, 1983) [hereinafter OMB CIR. A-76].

3. 1996: The OMB issued a Revised Supplemental Handbook containing new guidance for OMB Cir. A-76. The OMB updated the Revised Supplemental Handbook in June 1999.

B. Past Legislative Roadblocks.

1. National Defense Authorization Act for FY 1988-89 allowed installation commanders to decide whether to study commercial activities for outsourcing. Codified at 10 U.S.C. § 2468(a), this law expired on 30 September 1995. Most commanders opted not to pursue outsourcing for the following reasons:

a. Disruptions to the workforce.

b. Cost of conducting the outsourcing studies.

c. Loss of control over workforce.

2. Other Roadblocks.

a. Department of Defense Appropriations Act for FY 1991 and subsequent DOD appropriations acts prohibited funding OMB Cir. A-76 studies.

b. National Defense Authorization Acts for FY 1993 and FY 1994 prohibited DOD from entering into contracts stemming from cost studies done under OMB Cir. A-76.

C. New Direction for OMB Cir. A-76.

1. 1993: National Performance Review: Reinvent government.

2. 1996: Defense Science Board Task Force on Outsourcing and Privatization: DOD could save 20-40 percent by outsourcing support activities.

3. 1997: Quadrennial Defense Review (QDR): Maintain combat readiness means cutting support functions.

4. 1997: Defense Reform Initiative (DRI): Expanded upon the QDR to propose more streamlining and outsourcing.

III. COMPETITIVE SOURCING GENERALLY.

A. Defined. Competitive Sourcing is the analysis and if appropriate, the transfer of a function previously performed "in-house" by government employees to an private entity, or vice-versa.

B. Policy. See OMB Cir. A-76, para 5. It is the policy of the U.S. Government to:

1. Rely on the commercial sector to provide commercial products and services.

2. Retain inherently governmental functions in-house.

3. Achieve economy and enhance productivity through the use of cost comparisons.

C. Authority and Tools. OMB Cir. A-76; OMB Cir. A-76 Revised Supplemental Handbook (Mar. 1996; Revised 1999).

1. OMB Cir. A-76 embraces the idea of using the commercial sector to provide certain supplies and services for the government if more economical. OMB Cir. A-76, para. 4.a.

a. In its simplest terms, OMB Cir. A-76 is a process for agencies to use to determine if it is cheaper for either the government or the private sector to provide supplies or services.

b. In this process, both the government private sector offerors prepare proposals and submit estimates for the product or service.

2. The Revised Supplemental Handbook to OMB Cir. A-76 attempts to do the following:

   a. Balance the interests of the parties involved,

   b. Provide a level playing field between public and private sector offerors,

   c. Seek the most cost effective means of obtaining commercial products and support services that are needed on a recurring basis, and

   d. Provide new administrative flexibility in the government's make or buy decision process.

3. Scope. The policies and procedures of OMB Cir. A-76 and the Revised Supplemental Handbook apply to all federal executive agencies unless otherwise excluded by law. However, OMB Cir. A-76 and the Revised Supplemental Handbook <u>do not</u>:

   a. Provide authority to enter into contracts.

   b. Authorize contracts that create an employer-employee relationship between the government and the contractor employees.

   c. Justify conversion to contract solely to avoid personnel ceilings or salary limitations.

D. Key Definitions. The heart and soul of competitive sourcing rests on whether an activity is commercial or inherently governmental.

1. Commercial Activity. A commercial activity is one which is operated by a federal agency and which provides a product or service that is or could be obtained from a private sector source. OMB Cir. A-76, para. 6.a; Revised Supplemental Handbook, Appendix 1. Some examples include the following: automatic data processing; audiovisual products and services; food services; maintenance services; transportation services. OMB Cir. A-76, Attachment A; Revised Supplemental Handbook, Appendix 2.[3]

2. Inherently Governmental Function. An inherently governmental function is one so intimately related to the public interest as to mandate performance by government employees. OMB Cir. A-76, para. 6.e; Revised Supplemental Handbook, Appendix 1; OFPP Policy Letter 92-1, Inherently Governmental Functions, 57 Fed. Reg. 45,101. Inherently governmental functions fall into two broad categories:

a. The act of governing via the discretionary exercise of government authority. Examples include criminal investigations, prosecutorial and judicial functions, managing and directing the armed forces, and combat, combat support, and combat service support roles.[4]

b. Monetary transactions and entitlements. Examples include tax collection and revenue disbursements, control of treasury accounts and money supply, and administering public trusts.

E. Exemptions. OMB Cir. A-76, para 7.c. The following activities are exempt from OMB Cir. A-76 and the Revised Supplemental Handbook:

1. Inherently governmental functions.

[3] The OMB list is not exhaustive. The OMB cautions agencies to use its suggested list of commercial activities only as a guide.

[4] For a complete list of inherently governmental functions, *see* OMB Cir. A-76, para. 6.e(1). *See also* OFPP Policy Letter 92-1, *Inherently Governmental Functions*, Appendix A. For example, other inherently governmental functions include conducting foreign policy, determining agency policy, approving contract documents, determining contract costs, awarding contracts, and budget decision. OFPP Policy Letter 92-1 also contains a list of services and actions not considered inherently governmental. *Id*. at Appendix B.

2. DOD in times of declared war or military mobilization.

3. The conduct of research and development.

F. Exceptions. OMB Cir. A-76 and the Revised Supplemental Handbook permit exceptions to the general policy of relying on the private sector. These exceptions include the following:

1. No Satisfactory Commercial Source Available. OMB Cir. A-76, para. 8.a; Revised Supplemental Handbook, Part I, Chapter 1, para. C.5; FAR 7.303; AR 5-20, para. 2-3, 4-29b; AFI 38-203, para. 1.1.

2. National Defense. National defense interests may justify performing the activity in-house. OMB Cir. A-76, para. 8.b; Revised Supplemental Handbook, Part I, Chapter 1, para. C.1. This exception includes selected military training in military skills, deployable activities, and rotation base.

3. Patient Care. Patient care performed at a government-operated hospital can be retained in-house, if an agency determines that in-house performance would be in the best interest of direct patient care. OMB Cir. A-76, para. 8.c; Revised Supplemental Handbook, Part I, Chapter 1, para. C.2.

4. Cost Comparison. When a cost comparison demonstrates that in-house performance would be cheaper than contractor performance, the government may retain an activity in-house. OMB Cir. A-76, para. 8.d; Revised Supplemental Handbook, Part I, Chapter 1, para. C.8.

5. Core Capabilities. The agency must maintain a minimum core capability of specialized employees to ensure that it can fulfill its mission responsibilities and emergency requirements. Revised Supplemental Handbook, Part I, Chapter 1, para. C.3.

G. DOD Commercial Activities Program: The implementation of OMB Cir. A-76.

1. Authority and Tools: OMB Cir. A-76; Revised Supplemental Handbook; DODD 4100.15; AR 5-20; AFPD 38-6; AFI 38-203, para 1.1.

2. Policy. DODD 4100.15, para D. When implementing a commercial activities program, DOD components must consider the following policy guidance:

a. Ensure DOD mission accomplishment.

b. Achieve economy and quality through competition.

c. Retain governmental functions in-house.

d. Rely on the commercial sector, except when required for national defense, no satisfactory source is available, or when in the best interests of patient care.

e. Delegate decision authority and responsibility to lower organizational levels to give commanders freedom to "intelligently use their resources" while preserving essential wartime capability.

f. Provide placement assistance for displaced federal employees.

IV. THE A-76 STUDY PROCESS.

A. Generally. The A-76 study process sets forth whether—and if so, how—to perform a cost comparison study for a commercial activity. The A-76 study process falls into the following broad areas:

1. Conducting the inventory and review (figuring out what we have).

2. Identifying the players (the team).

3. Preparing the plans.

4. Seeking offers.

5. Choosing a winner.

6. Understanding the post-award review options.

7. Final Decision and implementation.

B. Conducting the Inventory and Review.

1. The Inventory Requirement. 10 U.S.C. § 2468(b); DOD Instr. 4100.33, para. 9. An inventory is a listing of all in-house and contracted commercial activities on an installation. Each agency evaluates all its activities and functions to determine which are inherently government functions and which are commercial activities.

2. The Review Requirement. DOD Instr. 4100.33, para. 9.

a. The agency must review its existing in-house commercial activities to determine whether it should convert them from in-house to contract status. This involves a two-step approach:

(1) The agency must first determine whether the activity must remain in-house for reasons other than lower cost, such as no commercial source available, patient care, etc.

(2) If the agency determines that a commercial activity does not fit one of the categories above, then it may face the requirement of a cost comparison study.

b. Direct Conversions. Activities with 10 or fewer full time equivalent employees may be converted without cost comparison, if the contracting officer determines that fair and reasonable prices cannot otherwise be obtained. Revised Supplemental Handbook, Part I, Chapter 1, para. C.6. The annual Defense Appropriations Act generally prohibits conversions involving more than 10 DOD civilian employees. See Section 8014 of the FY 2000 Defense Appropriations Act, Pub. L. No. 106-76, 113 Stat. 1212, 1234.

c. Streamlined Cost Comparisons. Activities with 65 or fewer full time equivalent employees may use the simplified cost comparison procedures, if it will serve the equity and fairness purposes of OMB Cir. A-76. Revised Supplemental Handbook, Part II, Chapter 5. See RTS Travel Serv., B-283055, Sept. 23, 1999, 99-2 CPD ¶ 55 (holding that there is no requirement for a management plan or MEO as part of streamlined cost comparisons).

C. Identifying the Players.

1. Congress. The installation must notify DOD, through channels, of its intent to conduct a cost comparison if 50 or more persons perform the function proposed for OMB Cir. A-76 study. DOD in turn, must notify Congress. 10 U.S.C. § 2461(a).

2. Cost Comparison Study Team. A group of functional experts in the agency who prepare several plans (discussed in paragraph H.4, infra) and develop the agency's cost estimate, known as the Most Efficient Organization (MEO).

3. Unions. At least monthly, the installation must keep affected DOD employees notified of developments. 10 U.S.C. § 2467(b).

D. Preparing the Plans.

1. Performance Work Statement (PWS). The PWS serves as the heart of the possible future solicitation. DOD Instr. 4100.33, para. 15(d)(2). The PWS defines the agency's needs, the performance standards and measures, and the timeframe for performance. The PWS is a budget driven document. DOD Instr. 4100.33, para. 17B; Revised Supplemental Handbook, Part I, Chapter 1, para. I.

2. Quality Assurance Surveillance Plan (QASP). The QASP outlines how federal employees will inspect either the in-house or the contractor performance. Revised Supplemental Handbook, Part I, Chapter 3, para. D.

3. Management Plan. The management plan defines the overall structure for the MEO. This organizational structure serves as the government's proposed work force for cost comparison purposes. Revised Supplemental Handbook, Part I, Chapter 3, para. E; DOD Instr. 4100.33, para. 15(d)(3).

4. Most Efficient Organization (MEO). The MEO describes the way the government will perform the commercial activity and at what cost.

E. Seeking Offers.

1. Procurement Method. The Revised Supplemental Handbook permits all competitive methods under the FAR. Revised Supplement Handbook, Part I, Chapter 3, para. H.1.

a. Sealed bidding.

b. Two-Step.

c. Negotiated procurements.

2. Issue the solicitation. The agency issues the solicitation to seek offers from the private sector.

3. Negotiated Procurement. Special rules apply if the agency chooses negotiated procurements. Revised Supplemental Handbook, Part I, Chapter 3, para. H.3.

a. Source Selection Authority (SSA). The Source Selection Authority reviews contract offers and identifies the offer that represents the "best value" to the government. See NWT, Inc; PharmChem Laboratories, Inc., B-280988; B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158. The contracting officer then submits to the Source Selection Authority the government's in-house offer (not the cost estimate) to ensure that it meets the same level of performance and performance quality as the private offer. Revised Supplemental Handbook, Part I, Chapter 3, paras. H.3.c-d.

b. Independent Review. Once the government makes any and all the changes necessary to meet the performance standards set by the SSA, the government submits a revised cost estimate to the Independent Review Officer. This review assures that the government's in-house cost estimate is based upon the same scope of work and performance levels as the best value contract offer. Revised Supplemental Handbook, Part I, Chapter 3, para. H.3.e.

F. Choosing the Winner.

1. The private offeror "wins" the OMB Cir. A-76 study if it beats the in-house or MEO estimate by a minimum cost differential of the lesser of

a. 10 percent of personnel costs, or

b. $10 million over the performance period. The minimum differential ensures that the government will not convert for marginal cost savings. Revised Supplemental Handbook, Part I, Chapter 4, para. A.1.

2. Otherwise, the MEO "wins" and the installation keeps the commercial activity in-house.

G. Post-Award Review.

1. The Agency Appeal Process. FAR 7.307; DOD Instr. 4100.33, para. 18; Revised Supplemental Handbook, Part I, Chapter 3, para. K.

a. OMB Cir. A-76 requires agencies to develop an internal appeal process to challenge cost comparison decisions.

(1) The agency must receive appeal within 20 calendar days of announcement of tentative decision. Revised Supplemental Handbook, Part I, Chapter 3, para. K.1.b. But see Apex Int'l Management Servs., Inc., B-228885.2, Jan. 6, 1988, 88-1 CPD ¶ 9 (finding low bidder not bound by agency time limits when rebutting challenge to its standing to receive award); FAR 52.207-2 (providing for a public review period of 15-30 working days, depending upon the complexity of the matter);

(2) The appeal must be based on noncompliance with the requirements and procedures of OMB Circular A-76 or specific line items on Cost Comparison Form; and

(3) The appeal must demonstrate that information has been wrongly withheld or the result of appeal would change cost comparison decision. Revised Supplemental Handbook, Part I, Chapter 3, para. K.1.

b. Only "interested parties" may submit agency appeals. This encompasses directly affected parties: federal employees and their representative organizations; bidders; and offerors. Revised Supplemental Handbook, Part I, Chapter 3, para. K.2.

c. Decision on Appeal. The agency should provide for a decision within 30 days after the Appeal Authority received the appeal. Revised Supplemental Handbook, Part I, Chapter 3, para. K.8.

2. Protests to the General Accounting Office (GAO). The GAO's normal bid protest procedures apply to competitive sourcing protests.

a. Standing.

(1) Only an "interested party" as defined by the Competition in Contracting Act (CICA) may file a protest with the GAO: "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." 31 U.S.C. § 3551 (2). See American Overseas Marine Corp.; Sea Mobility, Inc., B-227965.2, B-227965.4, Aug. 20, 1987, 87-2 CPD ¶ 190 (holding protester not in line for award, so protest dismissed).

(2) Unlike the agency appeal process, "interested party" does not encompass affected employees or their labor unions. See Part V.B.2., infra.

b. Timing.

(1) The protester must exhaust the agency appeal process. See Omni Corp., B-2281082, Dec. 22, 1998, 98-2 CPD ¶ 159 (dismissing as premature a protest filed with the GAO when protester challenged cost study before post-award debriefing at the end of the agency appeal process); Professional Servs. Unified, Inc., B-257360.2, July 21, 1994, 94-2 CPD ¶ 39 (dismissing cost comparison protest as premature).

(2) The protester must file the protest within 10 working days of agency decision. See Base Services, Inc., B-235422, Aug. 30, 1989, 89-2 CPD ¶ 192 (finding a protest filed during the 15-day review period mandated by FAR 7-307 was timely); Northrop Worldwide Aircraft Servs., Inc., B-212257.2, Dec. 7, 1983, 83-2 CPD ¶ 655 (finding appeal filed 10 working days after agency decision); Space Age Eng'g, Inc., B-230148, February 19, 1988, 88-1 CPD ¶ 173 (finding irrelevant if the protester requests reconsideration by agency). Note: New bid protest rules have reduced the time for filing a protest to 10 calendar days.

c. Standard of Review. When reviewing cost comparison decisions, the GAO applies the following standard of review:

(1) To determine "whether the comparison was conducted reasonably";

(2) To determine if the agency complied with applicable procedures; and

(3) If the agency failed to follow procedures, to determine if the failure could have materially affected the outcome of the cost comparison.

d. Trends. From the GAO cases decided since late 1998, several trends have emerged in A-76 study process protests.

(1) The A-76 process is a contracting process and the GAO will treat it as such. See, e.g., NWT, Inc., PharmChem Laboratories, Inc., B-282988, B-280988.2, Dec 17, 1998, 98-2 CPD ¶ 158 (holding that agencies could apply best value to cost comparison studies); Omni Corp., B-281082, Dec. 22, 1998, 98-2 CPD ¶ 159 (applying agency debriefing requirement to cost comparison studies).

(2) As a contracting process, the cost study procedures must be fair. See, e.g., Rice Servs, Ltd., B-284997, June 29, 2000, 2000 U.S. Comp. Gen. LEXIS 106 (finding that the Navy failed to evaluate fairly the contractor and government proposals); DZS/Baker LLC, Morrison Knudsen Corp., B-281224, et seq., Jan. 12, 1999, 99-1 CPD ¶ 19 (analyzing conflicts of interest in cost comparison studies).

(3) Within reason, the GAO will accord agencies discretion in their cost studies. See RTS Travel Serv., B-283055, Sept. 23, 1999, 99-2 CPD ¶ 55 (holding agency did not err in adding contract administration costs to the contractor's proposal); Gemini Industries, Inc., B-281323, Jan. 25, 1999, 99-1 CPD ¶ 22 (holding agency acted properly when it evaluated proposals against the estimate of proposed staffing); Symvionics, Inc., B-281199.2, Mar. 4, 1999, 99-1 CPD ¶ 48 (finding the agency conducted a fair cost comparison despite not sealing the management plan and MEO; Bay Tankers, Inc., B-230794, July 7, 1988, 88-2 CPD ¶ 18 (holding that the GAO will not look at MEO staffing pattern absent fraud or bad faith).

(4) The General Accounting Office will not review the agency's decision not to issue a solicitation for cost comparison purposes. Inter-Con Security Sys., Inc., B-257360.3, Nov. 15, 1994, 94-2 CPD ¶ 187.

3. Court Challenges.

a. Jurisdiction. The Tucker Act, as amended by the Administrative Dispute Resolution Act of 1996 (ADRA), Pub. L. No. 104-320 (codified at 28 U.S.C. § 1491(b)(1)), provide the U.S. Court of Federal Claims (COFC) and the district courts of the United States with concurrent jurisdiction to hear pre-award and post-award bid protests. Specifically, each court independent of the other has jurisdiction to hear protests that object to a solicitation, proposed award, or alleged violation of statute. 28 U.S.C. § 1491(b)(1).

b. Standing.

(1) Only an "interested party" under the ADRA has standing to challenge procurement decisions, though the term is not limited to just those parties covered by CICA. See e.g., Phoenix Air Group, Inc. v. United States, 46 Fed. Cl. 90 (2000); Winstar Communications, Inc. v. United States, 41 Fed. Cl. 748 (1998); CCL, Inc. v. United States, 39 Fed. Cl. 780 (1997).

(2) Historically, employees and labor unions have had little success in federal court challenging the decision to outsource commercial activities. See Part V.B.3., infra.

H. Final Decision and Implementation.

1. Once the appeal period has expired, then the Decision Summary is sent to the agency for approval by the Secretary of Defense and notice to Congress. 10 U.S.C. § 2461(a).

2. The approval is either for award to the contractor or retention in house.

3. If the MEO wins the cost study, then it will be implemented upon the commander's approval.

4. Contractor Implementation.

a. Reviews. Contracted commercial activities will be continually monitored to ensure that performance is satisfactory and cost effective.

b. If contractor defaults during the first year:

(1) Award to the next offeror in line at an adjusted price for the remainder of the contract term.

(2) If the MEO is the next low, implement the MEO if feasible.

(3) If contract cannot be performed by the next offeror or MEO (as above), issue a new solicitation without a cost comparison study, reprocure from an original contractor offering a reasonable price, or initiate a transfer cost comparison to bring the activity back in house. Revised Supplemental Handbook, Part I, Chapter 3, para. L.7.

(4) If the contractor defaults after the first year, seek interim contract support and solicit a new contractor, reprocure from a contractor offering a reasonable price, or initiate a transfer cost comparison to bring the activity back in house.

5. MEO Implementation: Post-MEO Performance Reviews.

a. When services are performed in-house following a cost comparison, a post-MEO performance review will be conducted at the end of the first full year of performance. If the MEO has not been implemented and deficiencies are not corrected, re-award to the next offeror if feasible, or initiate a new cost competition study. Revised Supplemental Handbook, Part I, Chapter 3, para. L.1.

b. The organization, position structure, and staffing of the implemented MEO will not normally be altered within the first year. If changes in functions or workloads occur, the performance work statement (PWS) should be modified and such modification should be fully documented.

c. Reviews will be conducted on at least 20 percent of the in-house functions after a full year of performance. Revised Supplemental Handbook, Part I, Chapter 3, para. L.3.

V. CIVILIAN PERSONNEL ISSUES.

A. Civilian Personnel Management.

1. The servicing Civilian Personnel Office must coordinate with management officials, employees, and union officials to minimize personnel turbulence and adverse effects on employees. AR 5-20, para. 3-1; AFCAPI, para. 8.4.4.

2. Commanders must ensure that the Civilian Personnel Office is brought into the planning, review, and conduct of cost comparison studies from the beginning. AR 5-20, para. 3-1; AFCAPI, para. 8.4.1.

3. As noted earlier, the installation must notify DOD, through channels, of its intent to conduct a cost comparison if 50 or more persons (civilians) perform the function proposed for OMB Cir. A-76 study. DOD, in turn, must notify Congress. 10 U.S.C. § 2461(a).

4. At least monthly during the conduct of a cost competition or direct conversion study, commanders shall consult with civilian employees who will be affected by the study and consider their views on the development and preparation of the performance work statement and the management study. 10 U.S.C. § 2467.

   a. At the earliest possible stages, affected parties will have the opportunity to participate in the development of documents and proposals, including the performance standards, performance work statement, management plans and the development of in-house cost estimates. Revised Supplemental Handbook, Part I, Chapter 1, para. G.

   b. Upon issuance, a solicitation used in a cost comparison will be made available to directly affected employees and their representatives for comment. They will be given sufficient time to review the document and submit comments before final receipt of offers from the private sector. Revised Supplemental Handbook, Part I, Chapter 1, para. G.

5. Reduction-in-Force Planning. The Civilian Personnel Office must provide sufficient lead-time to issue Reduction-in-Force (RIF) notices to ensure a timely transition for the cost comparison decision. Every reasonable effort will be made to place or retrain displaced civilian employees. If no vacancies exist or are projected, coordinate with state employment offices for retraining opportunities under the Job Training Partnership Act. Commanders should make every effort to help separated employees find continuing employment elsewhere, especially through the right of first refusal. See generally AR 5-20, para. 3-4; AFCAPI, para. 8.4.4.1.1.

B. Federal Employee/Union Remedies.

1. Agency Appeals. Federal employees and their representative organizations are interested parties for purposes of agency appeals of cost comparison commercial activity studies. Revised Supplemental Handbook, Part I, Chapter 3, para. K.2.

2. GAO Protests. Federal employees, as well as labor unions representing potentially displaced federal workers, do not have standing to challenge a procurement to contract out services that were previously performed by government employees, because they are not "actual or prospective bidders." American Fed'n of Gov't Employees, B-282904.2, 2000 U.S. Comp. Gen. LEXIS ¶ 83 (June 7, 2000); American Fed'n of Gov't Employees, B-223323, 86-1 CPD ¶ 572; American Fed'n of Gov't Employees, B-219590, B-219590.3, 86-1 CPD ¶ 436.

3. Court Challenges. Federal employees and labor unions have had limited success challenging an agency decision to outsource positions.

   a. AFGE, AFL-CIO, AFGE, AFL-CIO, Local 1482 v. United States, 46 Fed. Cl. 586 (2000)(holding that federal employees and their unions lacked standing as they were not within the zone of interests protected by the statutes that they alleged were violated).

   b. AFGE v. United States, 104 F. Supp. 2d 58 (D.C. Dist. Ct 2000) (holding that federal employees and their unions did have standing to challenge a direct conversion to preferentially-treated Native American firms pursuant to Section 8014 of the FY 2000 Defense Appropriations Act).

   c. AFGE, Local 2119 v. Cohen, 171 F.3d 460 (7th Cir. 1999) (holding that displaced federal employees and their unions did not have standing under 10 U.S.C. § 2462 to challenges the Army's decision to award two contracts to private contractors, but had standing here under the Arsenal Act (10 U.S.C. § 2542)).

d. AFGE v. Clinton, 180 F.3d 727 (6th Cir. 1999) (holding that governmental employees and their labor union lacked standing to protest agency's decision to directly convert positions to contractor performance, as their injury was not concrete and particularized).

e. National Air Traffic Controllers Ass'n v. Pena, 78 F.3d 585 (6th Cir. 1996)(not recommended for full-text publication)(holding that employees had standing to challenge the agency's determination that their positions were not inherently governmental functions).

f. Diebold v. United States, 947 F.2d 787 (6th Cir. 1991) (holding that the government's decision to privatize an activity was subject to review under the Administrative Procedure Act (APA), but remanding the case to determine whether displaced federal employees and their union had standing to maintain the action).

g. NFFE v. Cheney, 883 F.2d 1038 (D.C. Cir. 1989) (holding that displaced federal workers and their unions do not have standing to challenge the A-76 cost comparison process).

4. Grievances. OMB Cir. A-76 is a government-wide regulation and the agency is not required to bargain over appropriate arrangements. Department of Treasury, IRS v. Federal Labor Relations Authority, 996 F.2d 1246, 1252 (D.C. Cir. 1993). See also Department of Treasury, IRS v. Federal Labor Relations Authority, 110 S.Ct. 1623 (1990); AFGE Local 1345 and Department of the Army, Fort Carson, 48 FLRA 168 (holding that proposal requiring an additional cost study to consider cost savings achievable by alternate methods such as furloughs and attrition was not negotiable).

C. Right of First Refusal: Generally. FAR 52.207-3.

1. The clause reads as follows:

The Contractor shall give the Government employees who have been or will be adversely affected or separated as a result of award of this contract the right of first refusal for employment openings under the contract in positions for which they are qualified, if that employment is consistent with post-Government employment conflict of interest standards. Within 10 days after contract award, the Contracting Officer will provide to the Contractor a list of all Government employees who have been or will be adversely affected or separated as a result of award of this contract.

2. The right of first refusal extends only to permanent employees. It does not extend to temporary employees. A union has associational standing to challenge the granting of this right. See National Maritime Union of America v. Commander, Military Sealift Command, 824 F.2d 1228 (1986). The contractor shall report to the Contracting Officer the names of individuals identified in the list who are hired within 90 days after contract performance begins. This report shall be forwarded within 120 days after contract performance begins.

D. Right of First Refusal: Relationship with Conflict of Interest Laws.

1. In most instances, federal employees will participate in preparing the PWS and the MEO. Certain conflict of interest statutes may impact when and if they may exercise their right of first refusal.

2. Procurement Integrity Act, 41 U.S.C. § 423; FAR 3.104.

a. Disclosing or Obtaining Procurement Information (41 U.S.C. §§ 423(a)-(b)). These provisions apply to all federal employees, regardless of their role during an OMB Cir. A-76 study.

b. Reporting Employment Contacts (41 U.S.C. § 423(c)).

(1) FAR 3.104-3 generally excludes from the scope of "personally and substantially" the following employee duties during an OMB Cir. A-76 study:

(a) Management studies;

(b) Preparation of in-house cost-estimates;

(c) Preparation of the MEO; or

(d) Furnishing data or technical support others use to develop performance standards, statements of work, or specifications.

(2) MEO role. Probably not required to report employment contacts.

(3) PWS role. Consider employee's role: technical only?

c. Post-Employment Restrictions (41 U.S.C. § 423 (d)). Bans certain employees for one year from accepting compensation.

(1) Applies to contracts exceeding $10 million, and

(a) Employees in any of these positions:

(i) Procuring contracting officer;

(ii) Administrative Contracting Officer;

(iii) Source Selection Authority;

(iv) Source Selection Evaluation Board member;

(v) Chief of Financial or Technical team;

(vi) Program Manager; or

(vii) Deputy Program Manager.

(b) Employees making these decisions:

(i) Award contract or subcontract exceeding $10 million;

(ii) Award modification of contract or subcontract exceeding $10 million;

(iii) Award task or delivery order exceeding $10 million;

(iv) Establish overhead rates on contract exceeding $10 million;

(v) Approve contract payments exceeding $10 million; or

(vi) Pay or settle a contract claim exceeding $10 million.

(2) No exception to one-year ban for offers of employment pursuant to right of first refusal. Thus, employee performing any of the listed duties or making the listed decisions on cost comparison resulting in a contract exceeding $10 million is barred for one year after performing such duties from accepting compensation/ employment opportunities from contract via the right of first refusal.

3. Financial Conflicts of Interest, 18 U.S.C. § 208. Prohibits officers and civilian employees from participating personally and substantially in a "particular matter" affecting the officer or employee's personal or imputed financial interests.[5]

[5] In January 1999, the GAO sustained a cost comparison study protest because 14 of the 16 agency evaluators held positions subject to being contracted out. The GAO found an organizational conflict of interest under FAR subpart

a. Cost comparisons conducted under OMB Cir. A-76 are "particular matters" under 18 U.S.C. § 208.

b. Whether 18 U.S.C. § 208 applies to officers and civilian employees preparing a PWS or MEO depends on whether the participation will have a "direct and predictable" effect on their financial interests. This determination is very fact specific.

4. Representational Ban, 18 U.S.C. § 207. Prohibits individuals who personally and substantially participated in, or were responsible for, a particular matter involving specific parties while employed by the government from switching sides and representing any party back to the government on the same matter. The restrictions in 18 U.S.C. § 207 do not prohibit employment; they only prohibit communications and appearances with the "intent to influence."

a. The ban may be lifetime, for two years, or for one year, depending on the employee's involvement in the matter.

b. Whether 18 U.S.C. § 207 applies to employees preparing a PWS or MEO depends on whether the cost comparison has progressed to the point where it involves "specific parties."

c. Even if 18 U.S.C. § 207 does apply to these employees, it would not operate as a bar to the right of first refusal. The statute only prohibits representational activity; it does not bar behind-the-scenes advice.

VI. FEDERAL ACTIVITIES INVENTORY REFORM ACT (FAIR ACT) OF 1998," Pub. L. No. 105-270, 112 Stat. 2382 (1998) (codified at 31 U.S.C. § 501 (note)).

A. Generally. The FAIR Act addresses certain parts of the competitive sourcing process.

1. Key features:

9.5. DZS/Baker LLC; Morrison Knudsen Corp., B-281224, Jan. 12, 1999, 99-1 CPD ¶ 19. OMB has now issued guidance stating that it is a "better business practice" to limit participation on source selection teams of those personnel whose jobs are involved in a cost comparison. Accordingly, "individuals who hold position in an A-76 study should not be members of the Source Selection Team, unless an exception is authorized by the head of the contracting activity."

a. Codifies the definition of "inherently governmental function." The "new" statutory definition mirrors the definition of inherently governmental function already found in OFPP Policy Letter 92-1, Inherently Governmental Function, para. 5.

b. Requires each executive agency to submit to OMB an annual list (by 30 June) of non-inherently governmental (commercial) activities) performed by federal (civilian) employees. After mutual consultation, both OMB and the agency will make the list public. The agency will also forward the list to Congress.

c. Provides "interested parties" the chance to challenge the list within 30 days after its publication. The "interested party" list includes a broad range of potential challengers:

(1) A private sector source that is:

(a) an actual or prospective bidder for any contract (or other form of agreement) to perform the activity, and

(b) has a direct economic interest in performing the activity that would be adversely affected by a decision not to procure the activity from the private sector;

(2) A representative of any business or professional group that includes those private sector sources in its membership;

(3) An officer or employee of an organization within an executive agency that is an actual or prospective offeror to perform the activity; and

(4) The head of any labor organization referred to in 5 U.S.C. § 7103(a)(4) that includes within its membership those officers or employees.

d. Requires agencies to use a competitive process to select a private sector source, except as provided by law, regulation, or circular.

e. Requires agencies to conduct "realistic and fair" cost comparisons when deciding whether to contract with a private sector source.

B. OMB Guidance on the FAIR Legislation.

1. Congress directed the OMB to issue guidance to implement the FAIR. On 1 March 1999, the OMB issued draft guidance for public comment. The draft guidance is at 64 Fed. Reg. 10031 (March 1, 1999). After receiving public comments, the OMB issued its final guidance on 24 June 1999. 64 Fed. Reg. 33927 (June 24, 1999).

2. To implement the FAIR, the OMB changed both OMB Cir. A-76 and its Revised Supplemental Handbook. The key provisions of the OMB guidance are as follows:

a. *Revised Supplemental Handbook, Part I, Chapter 1, para. A:* The OMB Guidance added a reference to the FAIR Act in the first sentence. As revised, Part I of the Revised Supplemental Handbook states that it contains the "principles and procedures" for implementing the FAIR Act. A similar revision is found in OMB Cir. A-76, para. 1.

b. *Revised Supplemental Handbook, Part I, Chapter 1, para. B:* The OMB Guidance added a reference to the FAIR Act's definition of inherently governmental function. As revised, the Revised Supplemental Handbook states that its definition of inherently governmental function conforms with the one in the FAIR Act. A similar revision is found in OMB Cir. A-76, para. 6.e.

c. *Revised Supplemental Handbook, Part II, Chapter 1, para. A.1:* The OMB guidance added a reference to the FAIR Act in the first sentence. As revised, the Revised Supplemental Handbook states that it contains the "generic and streamlined cost comparison guidance" to comply with the FAIR Act.

d. *Revised Supplemental Handbook, Appendix 2:* The OMB guidance changed the name from the OMB Circular No. A-76 Inventory" to the "Commercial Activities Inventory." The OMB guidance further revised Appendix 2 as follows:

(1) *Paragraph A*: The OMB Guidance added the FAIR Act's inventory requirement and 30 June due date. It also added two additional data elements to the agency's description of a commercial activity: the year the activity first appeared on the inventory under FAIR, and the agency point of contact responsible for the activity. A similar revision is found in OMB Cir. A-76, para. 10.

(2) *Paragraph G (new):* The OMB guidance added the FAIR Act's requirements to review and publish the inventories and the process "interested parties" can use to challenge the inventory. A similar revision is found in OMB Cir. A-76, paras. 6.h, 10.

(3) *Paragraph H (new):* The OMB guidance added the FAIR Act's requirements for agencies to review their inventories and use a competitive process, with a cost comparison procedure, when considering contracting with the private sector for the performance of an activity on the inventory.

C. The FAIR Lists.

1. Under the OMB guidance, agencies are required to list the "noninherently governmental activities," using "reason" and "function" codes.

a. The reason codes would show whether or not the agency believed that the commercial activity would be subject to a cost study, and would include those commercial activities that cannot be competed because of a legislative or other exemption.

b. The function code characterizes the type of activity that the agency performs.

2. The OMB has released the names of the agencies that have published their lists. See 64 Fed. Reg. 52,809 (1999) (providing notice of the first 52 agencies that have published their lists); 64 Fed. Reg. 58,641 (1999) (providing notice that NASA and the Department of Energy have published their lists); 64 Fed. Reg. 73,595 (1999) (providing notice that DOD published its list).

3. Several interested parties have challenged FAIR Act inventories from certain agencies, such as NASA, the Environmental Protection Agency, and the Department of Commerce.

D. Reactions to the FAIR Act Lists.

1. General Accounting Office. The GAO has released several reports assessing how agencies have implemented the FAIR Act.[6] The reports have noted the following issues and deficiencies:

   a. The decisions agencies made about whether or not activities were eligible for competition and the reasons for those decisions.

   b. The processes agencies used to develop their FAIR Act inventories.

   c. The usefulness (or uselessness) of the FAIR Act inventories.

   d. The need for additional information in future FAIR Act inventories.

2. Congressional Testimony. Several individuals testified before the House Committee on Government Reform on 28 October 1999 about the FAIR Act implementation. These comments may be summarized as follows:

   a. The OMB guidance is inadequate and did not carry out the intent of Congress when it passed the FAIR Act.

   b. The completed lists are difficult to access and the OMB should make them centrally available.

[6] GENERAL ACCOUNTING OFFICE, COMPETITIVE CONTRACTING: AGENCIES UPHELD FEW CHALLENGES AND APPEALS UNDER THE FAIR ACT, REPORT NO. GAO/GGD/NSIAD-00-244 (Sept. 2000); GENERAL ACCOUNTING OFFICE, DOD COMPETITIVE SOURCING: MORE CONSISTENCY NEEDED IN IDENTIFYING COMMERCIAL ACTIVITIES, REPORT NO. GAO /NSIAD-00-198 (Aug. 2000); GENERAL ACCOUNTING OFFICE, COMPETITIVE CONTRACTING: THE UNDERSTANDABIL-ITY OF FAIR ACT INVENTORIES WAS LIMITED, REPORT NO. GAO/GGD-00-68 (Apr. 2000); GENERAL ACCOUNTING OFFICE, COMPETITIVE CONTRACTING: PRELIMINARY ISSUES REGARDING FAIR ACT IMPLEMENTATION, REPORT NO. GAO/T-GGD-00-34 (Oct. 28, 1999).

c. Congress should impose a moratorium on outsourcing until a complete picture of the true size of the federal contracting workforce is available.

VII. DOD COMPETITIVE SOURCING REPORTS/STUDIES.

A. Actual Cost Savings. Early on in the recent competitive sourcing fray, the General Accounting Office reviewed the DOD's cost savings efforts with mixed results.[7] The General Accounting Office noted that DOD faced several challenges in conducting cost studies with the goal of saving significant dollars. Some of the challenges the General Accounting Office spotted included the following:

1. Costs savings of 20-40 percent overstated for several reasons:

a. DOD derived the projected savings from limited database information; and

b. DOD has the potential to save money with large omnibus contracts, but these tools have their own constraints.

2. Historical impediments to competitive sourcing, such as:

a. Lack of resources to conduct OMB Cir. A-76 studies as a result of downsizing and civilian personnel cuts.

b. Time limits for studies are short. The Revised Supplemental Handbook contains limits for cost comparison studies: 18 months for single activities, 36 months for multiple activities. DOD is also constrained by statutory time limits. See Department of Defense Appropriations Act, 1999, Pub. L. No. 105-262, § 8026, 112 Stat. 2279, 2302 (1998).

[7] *See* GENERAL ACCOUNTING OFFICE, DOD COMPETITIVE SOURCING: SOME PROGRESS, BUT CONTINUING CHALLENGES REMAIN IN MEETING PROGRAM GOALS, REPORT NO. GAO/NSIAD-00-106 (Aug. 2000); GENERAL ACCOUNTING OFFICE, OUTSOURCING DOD LOGISTICS: SAVINGS ACHIEVABLE BUT DEFENSE SCIENCE BOARD PROJECTIONS ARE OVERSTATED, Report No. GAO/NSIAD-98-48 (Dec. 8, 1997); GENERAL ACCOUNTING OFFICE, BASE OPERATIONS: CHALLENGES CONFRONTING DOD AS IT RENEWS EMPHASIS ON OUTSOURCING, Report No. GAO/NSIAD-97-86 (Mar. 11, 1997).

c. Legislative constraints on competitive sourcing, such as congressional notification of cost studies and annual reports to Congress. In addition, 10 U.S.C. § 2465 precludes outsourcing of firefighters and security guards, except under limited circumstances.

B. DOD's Report Card. The General Accounting Office evaluated DOD's competitive sourcing efforts and assigned DOD a "report card" of sorts.[8] The General Accounting Office reviewed completed competitions between October 1995 and March 1998; reviewed the completion time, savings produced; and identified problems in implementing the results. Some of the key results the General Accounting Office focused on are as follows:

1. Completed cost studies totaled 53, involving 5757 positions (3226 military and 2531 civilian). Of the 53 competitions, 43 involved single functions (such as grounds maintenance) and 10 involved multiple functions (such as base operating support contracts). Of the completed cost studies, 85 percent belonged to the Air Force. The private sector won 60 percent of the completed cost studies.

2. DOD performed the cost studies generally within the established time frames. The average completion time was 18 months for single functions and 30 months for multiple functions.

3. DOD's projected cost savings of $528 million is subject to change over time.

4. DOD has experienced few problems implementing the results of the cost studies. To date, however, many of the completed studies have been in effect for an average of 15 months or less. Thus, the General Accounting Office noted that it could not offer a meaningful assessment of performance.

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[8] GENERAL ACCOUNTING OFFICE, DOD COMPETITIVE SOURCING: RESULTS OF RECENT COMPETITIONS, Report No. GAO/NSIAD-99-44 (Feb. 23, 1999). For a companion GAO report, see GENERAL ACCOUNTING OFFICE, DOD COMPETITIVE SOURCING: QUESTIONS ABOUT GOALS, PACE, AND RISKS OF KEY REFORM INITIATIVE, Report No. GAO/NSIAD-99-46 (Feb. 22, 1999). The GAO has issued other recent reports. See GENERAL ACCOUNTING OFFICE, DOD COMPETITIVE SOURCING: LESSONS LEARNED SYSTEM COULD ENHANCE A-76 STUDY PROCESS, GAO/NSIAD 99-152 (July 21, 1999); GENERAL ACCOUNTING OFFICE, A-76 NOT APPLICABLE TO AIR FORCE 38TH ENGINEERING INSTALLATION WING PLAN, Report No. GAO/NSIAD-99-73 (Feb. 26, 1999); GENERAL ACCOUNTING OFFICE, PUBLIC-PRIVATE PARTNERSHIPS: KEY ELEMENTS OF FEDERAL BUILDING AND FACILITY PARTNERSHIPS, Report No. GAO/GGD-99-23 (Feb. 3, 1999); GENERAL ACCOUNTING OFFICE, GOVERNMENT MANAGEMENT: OBSERVATIONS ON OMB'S MANAGEMENT LEADERSHIP EFFORTS, Report No. GAO/T-GGD/AIMD-99-65 (Feb. 4, 1999)

C. Lessons Learned.

1. In 1999, the GAO also evaluated the DOD's competitive sourcing process for lessons learned.[9]

2. The report offered the following observations:

a. The DOD has improved its competitive sourcing studies, but needs to devote more time to identify and disseminate best practices DOD-wide.

b. The DOD has improved the quality of the performance-based work statements for the cost studies, but has limited efforts to develop standard.

VIII. HOUSING PRIVATIZATION.

A. Generally. Privatization involves the process of changing a federal government entity or enterprise to private or other non-federal control and ownership. Unlike competitive sourcing, privatization involves a transfer of ownership, control and responsibility, and not just a transfer of performance.

B. Authority. 10 U.S.C. §§ 2871-85 provides temporary authority for military housing privatization. This legislation expires in 2001 (although the draft FY 2001 National Defense Authorization Act plans to extend such authority for an additional five years).

1. This authority applies to family housing units on or near military installations within the United States and military unaccompanied housing units on or near installations within the United States.

2. Secretary may use any authority or combination of authorities to provide for acquisition or construction by private persons. Authorities include:

a. Direct loans and loan guarantees to private entities.

[9] GENERAL ACCOUNTING OFFICE, DOD COMPETITIVE SOURCING: LESSONS LEARNED SYSTEM COULD ENHANCE A-76 STUDY PROCESS, REPORT NO. GAO/NSIAD 99-152 (July 21, 1999).

b. Build/lease authority.

c. Equity and creditor investments in private entities undertaking projects for the acquisition or construction of housing units (up to a specified percentage of capital cost). Such investments require a collateral agreement to ensure that a suitable preference will be given to military members.

d. Rental guarantees.

e. Differential lease payments.

f. Conveyance or lease of existing properties and facilities to private entities.

3. Establishment of Department of Defense housing funds.

a. The Department of Defense Family Housing Improvement Fund.

b. The Department of Defense Military Unaccompanied Housing Improvement Fund.

C. Goals and Projects.

1. Goals. The DOD goals for the housing privatization process are twofold:

a. The stated goal is to eliminate all inadequate family housing by 2010.

b. The unstated goal is to get the services out of business of family housing ownership.

2. Current Army Housing Privatization Projects.

a. Ft. Carson awarded a 50-year contract on September 30, 1999, for the privatization of 1,823 existing family housing units, and the construction of 840 new units.

b. Ft. Hood awarded a 50-year contract on June 28, 2000, for the privatization of 5,482 existing family housing units, plus the construction of 1149 new units.

c. Ft. Lewis awarded a 50-year contract on August 30, 2000, for the privatization of 3,589 existing family housing units, plus the construction of 759 new units.

d. Ft. Meade (2,862 existing units, plus 308 new units): currently accepted proposals from contractors.

e. The Army is proposing 16 additional family housing privatization projects from FY02 to FY05.

D. Implementation.

1. The service conveys ownership of existing housing units, and leases the land upon which they reside for up to 50 years.

2. The consideration received for the sale is the contractual agreement to renovate, manage, and maintain existing family housing units, as well as construct, manage, and maintain new units.

3. The contractual agreement may include provisions regarding:

a. The amount of rent the contractor may charge military occupants (rent control).

b. The manner in which soldiers will make payment (allotment).

c. Rental deposits.

d. Loan guarantees to the contractor in the event of a base closure of realignment.

e. Whether soldiers are required to live there.

f. The circumstances under which the contractor may lease units to nonmilitary occupants.

E. Issues and Concerns.[10]

1. Loss of control over family housing.

2. The affect of long-term agreements.

a. Future of installation as a potential candidate for housing privatization.

(1) DOD must determine if base a candidate for closure.

(2) If not, then DOD must predict its future mission, military population, future housing availability and prices in the local community, and housing needs.

b. Potential for poor performance or nonperformance by contractors.

(1) Concerns about whether contractors will perform repairs, maintenance, and improvements in accordance with agreements. Despite safeguards in agreements, enforcing the agreements might be difficult, time-consuming, and costly.

(2) Potential for a decline in the value of property towards the end of the lease might equal decline in service and thus quality of life for military member.

[10] *See* GENERAL ACCOUNTING OFFICE, MILITARY HOUSING: CONTINUED CONCERNS IN IMPLEMENTING THE PRIVATIZATION INITIATIVE, Report No. GAO/NSIAD-00-71 (March 30, 2000); GENERAL ACCOUNTING OFFICE, MILITARY HOUSING: PRIVATIZATION OFF TO A SLOW START AND CONTINUED MANAGEMENT ATTENTION NEEDED, Report No. GAO/NSIAD-98-178 (July 17, 1998).

3. Affect on federal employees.

a. The privatization of housing will result in the elimination of those government employee positions which support family housing.

b. Even other garrison directorates/activities that support family housing will result in the elimination of jobs/positions (e.g., DECAM).

4. Prospects of civilians living on base.

a. Civilians allowed to rent units not rented by military families.

b. This prospect raises some issues, such as security concerns and law enforcement roles.

IX. UTILITIES PRIVATIZATION.

A. Authority. 10 U.S.C. 2688 (originally enacted as part of the FY 1998 National Defense Authorization Act) permits the service secretaries to convey all or part of a utility system to a municipal, private, regional, district, or cooperative utility company. This permanent legislation supplements several specific land conveyances involving utilities authorized in previous National Defense Authorization Acts.

B. Implementation.

1. The DOD goal is to privatize all utility systems (water, wastewater, electric, and natural gas) by 30 September 2003, except those needed for unique security reasons or when privatization is uneconomical. Defense Reform Initiative Directive (DRID) #49—Privatizing Utility Systems. While DRID #49 does not specifically direct the privatization of steam, hot and chilled water, and telecommunications at this time, it does not prohibit such privatization. The overall objective is to get DOD "out of the business" of owning, managing, and operating utility systems by privatizing them.

2. In FY99, the Army privatized (or exempted) 37 systems. Current plans are to privatize 100 systems in FY00, 100 systems in FY01, and 83 systems in FY02.

3. Requests for exemption from utility systems privatization must be approved by the Secretary of the Army. Exemption request, which must be forwarded through the appropriate MACOM to OACSIM, must include:

   a. Letter from installation commander to MACOM request exemption from privatization;

   b. Endorsement by MACOM to OACSIM;

   c. Written synopsis of process conducted to solicit for award, including analysis, alternatives, feasibility, and results;

   d. Completed economic analysis; and

   e. Separate letters from the contracting officer and legal counsel concurring with the analysis, review, and decision to request exemption. U.S. Dep't of Army, Privatization of Army Utility Systems—Update 1 Brochure (March 2000).

4. Installations shall use competitive procedures to sell (privatize) utility systems and to contract for receipt of utility services. 10 U.S.C. §2688(b). DOD may enter into 50-year contracts for utility service when conveyance of the utility system is included. 10 U.S.C. §2688(c)(3).

5. Any consideration received for the conveyance of the utility system may be accepted as a lump sum payment, or a reduction in charges for future utility services. If the consideration is taken as a lump sum, then payment shall be credited at the election of the Secretary concerned for utility services, energy savings projects, or utility system improvements. If the consideration is taken as a credit against future utility services, then the time period for reduction in charges for services shall not be longer than the base contract period. 10 U.S.C. §2688(c).

6. Installations may, with Secretary approval, transfer land with a utility system privatization. 10 U.S.C. § 2688(i)(2); U.S. Dep't of Army, Privatization of Army Utility Systems—Update 1 Brochure (March 2000). In some instances (environmental reasons) installations may want to transfer the land under wastewater treatment plants.

7. Installations must submit notice to Congress of any utility system privatization. The notice must include an analysis demonstrating that the long-term economic benefit of the utility privatization exceeds the long-term economic cost, and that the conveyance will reduce the long-term costs to the Department concerned for utility services provided by the subject utility system. The installation must also wait 21 days after providing such congressional notice. 10 U.S.C. §2688(e).

C. Current Legal Issues.

1. The Affect of State Law and Regulation. State utility law and regulation, the application of which would result in sole-source contracting with the company holding the local utility franchise at each installation, do not apply to federal utility privatization. Virginia Electric and Power Company; Baltimore Gas & Electric, B-285209, B-285209.2 (Aug. 2, 2000) 2000 U.S. Comp. Gen. LEXIS 125 (holding that 10 U.S.C. § 2688 does not contain an express and unequivocal waiver of federal sovereign immunity). The DOD General Counsel has issued an opinion that reached the same conclusion. Dep't. of Def. General Counsel, The Role of State Laws and Regulations in Utility Privatization (Feb. 24, 2000).

2. Bundling. An agency may employ restrictive provisions or conditions (such as bundling) only to the extent necessary to satisfy the agency's needs. Bundled utility contracts, which not only achieve significant cost savings, but also ensure the actual privatization of all utility systems, are proper. Virginia Electric and Power Company; Baltimore Gas & Electric, B-285209, B-285209.2 (Aug. 2, 2000) 2000 U.S. Comp. Gen. LEXIS 125.

3. Reversionary Clauses. The contractual agreement must protect the government's interests in the event of a default termination. The use of reversionary clauses, which revoke the conveyance of the utility system, are but one option. Presently, the Army General Counsel's Office does not favor the use of reversionary clauses as the means to accomplish this end.

4. Affect of A-76. Privatization of Army-owned utility systems does not involve OMB A-76 (no cost comparison required).

5. Right of First Refusal. Presently, private sector companies already operate many Army installation utility plants. As the OMB Circular A-76 rules do not apply to utility privatization actions, there is no automatic "right of first refusal" for affected government employees. However, the privatization negotiations may include the placement of current personnel.

6. Model Solicitation for Utilities System Privatization. The Defense Energy Support Center (DESC) is presently working on a model solicitation that installations may use for utility system privatization efforts.

X. CONCLUSION.

A. Service contracting plays a major role in installation contracting, especially in the wake of the competitive sourcing push. Moreover, competitive sourcing and privatization projects are prevalent within DOD.

B. As attorneys, you may find yourself advising commanders and functional experts on the competitive sourcing and privatization process. Thus, you should familiarize yourself with several substantive areas, such as labor, standards of conduct, and contracting.

APPENDIX A

COMPETITIVE SOURCING AND PRIVATIZATION REFERENCES

1. 10 U.S.C. §§ 2460-2469.
2. Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382.
3. Federal Office of Management and Budget Circular A-76 (4 Aug. 1983; Revised 1999), Performance of Commercial Activities.
4. Federal Office of Management and Budget Circular A-76 Revised Supplemental Handbook, Performance of Commercial Activities (March 1996; Revised 1999).
5. General Servs. Admin., et.al., Federal Acquisition Reg. Subpt. 7.3 (June 1997).
6. General Servs. Admin., et.al., Federal Acquisition Reg. Subpt. 9.5 (June 1997).
7. General Servs. Admin., et.al., Federal Acquisition Reg., Pt. 37 (June 1997).
8. U.S. Dep't of Defense, Dir. 4100.15, Commercial Activities Program (10 Mar. 1989).
9. U.S. Dep't of Defense, Instr. 4100.33, Commercial Activities Program Procedures (9 Sept. 1985).
10. U.S. Dep't of Army, Reg. 5-20, Commercial Activities Program (1 Oct 1997).
11. U.S. Dep't of Army, Pam. 5-20, Commercial Activities Study Guide (July 1998).
12. Office of Federal Procurement Policy Letter 93-1, Management Oversight of Service Contracts, 59 Fed. Reg. 26,818 (1994).
13. Office of Federal Procurement Policy Letter 92-1, Inherently Governmental Functions, 57 Fed. Reg. 45,101 (1992).
14. Office of Federal Procurement Policy Letter 91-2, Policy Letter on Service Contracting, 56 Fed. Reg. 15,110 (1991).
15. U.S. Dep't of Defense Reform Initiative Directive #49-Privatizing Utility Systems (23 Dec. 1998).
16. Memorandum, Acting General Counsel, U.S. Dep't of Defense Office of the General Counsel to the General Counsels of the Military Departments, subject: The Role of State Laws and Regulations in Utility Privatization (24 Feb 2000).
17. U.S. Dep't of Army, Privatization of Army Utility Systems Brochure (May 1999).
18. U.S. Dep't of Army, Privatization of Army Utility Systems—Update 1 Brochure (March 2000).
19. U.S. Dep't of Air Force Pol. Dir. 38-2, Manpower (Mar. 1995).
20. U.S. Dep't of Air Force Pol. Dir. 38-6, Outsourcing and Privatization (Sep. 1997).
21. U.S. Dep't of Air Force Instr. 38-203, Commercial Activities Program (Apr. 1994).
22. U.S. Dep't of the Air Force, Commercial Activities Program Instruction (AFCAPI) (July 1998)
23. U.S. Dep't of Navy, Secretary of the Navy Instr. 4860.44F, Commercial Activities (Sep. 1989).

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APPENDIX B

COMPETITIVE SOURCING WEB SITES

http://www.defenselink.mil (General topics of interest in DOD)

http://www.hqda.army.mil/acsim (Army competitive sourcing)

http://www.afcqmi.randolph.af.mil (Air Force competitive sourcing)

http://www.fac131.navfac.navy.mil/csso (Navy competitive sourcing)

http://www.arnet.gov (Acquisition reform network)

http://www.acq.osd.mil/iai/hrso (DOD housing privatization home page)

http://gao.gov (GAO reports and decisions)

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CHAPTER P

54TH FEDERAL LABOR RELATIONS COURSE

Handling Sexual Harassment Complaints

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Outline of Instruction

I. INTRODUCTION.

II. DEFINING SEXUAL HARASSMENT.

A. DoD Definition. DoD Dir 1350.2, (Aug. 18, 1995).

1. Sexual harassment is a form of sex discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when:

a. Submission to such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career; or

b. Submission to, or rejection of, such conduct by a person is used as a basis for career or employment decisions affecting that person; or

c. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive environment.

d. Such conduct, to be actionable as "abusive work environment" harassment, need not result in concrete psychological harm to the victim, but rather need only be so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the work environment as hostile or offensive.

e. "Workplace" is an expansive term for military members and may include conduct on or off duty, 24 hours a day.

2. Any person in a supervisory or command position who:

a. Uses or condones any form of sexual behavior to control, influence, or affect the career, pay or job of another soldier or civilian employee is engaging in sexual harassment.

3. Any military member or civilian employee who:

a. Makes deliberate or repeated unwelcome verbal comments, gestures, or physical contact of a sexual nature is engaging in sexual harassment.

(AR 600-20, para 7-4, July 15, 1999, adopts this definition with minor differences.)

B. Title VII Definition:

1. Employee must allege that they suffered a "tangible employment action" as the result of discrimination. Tangible employment action can be shown by either of the following events:

a. A significant change in employment status. An employee may show that they experienced a change in a term or condition of employment akin to a demotion or a reassignment entailing significantly different job responsibilities;

b. Employee may also show that they were the victim of a severe and pervasive hostile work environment. In determining when an employee has established a hostile work environment in violation of Title VII, an employee must establish that the environment was "both objectively and subjectively offensive," one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.

2. Title VII is implemented in the federal government through the Code of Federal Regulations(CFR). 29 CFR 1604.11 contains the following definition of sexual harassment:

a. Unwelcome **sexual** advances, requests for **sexual** favors, and other verbal or physical conduct of a **sexual** nature constitute **sexual** harassment when:

(1) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

(2) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

(3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

C. 10 USC § 1561 Definition:

1. Conduct (constituting a form of sex discrimination) that:

a. Involves unwelcome sexual advances, requests for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature when:

(1) Submission to such conduct is made either explicitly or implicitly a term or condition of a person's job, pay or career;

(2) Submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person; or

(3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment; and

(4) Is so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the work environment as hostile or offensive.

2. Any use or condonation by any person in a supervisory or command position, of any form of sexual behavior to control, influence, or affect the career, pay, or job of a member of the armed forces or a civilian employee of the Department of Defense.

3. Any deliberate or repeated unwelcome verbal comment or gesture of a sexual nature in the workplace by any member of the armed forces or civilian employee of the Department of Defense.

D. Types of Sexual Harassment.

1. "Quid Pro Quo." A request for sexual favors in return for a job benefit, or in connection with the threat of the loss of a job, grade, or an unfavorable performance rating if the employee fails to grant the requested favors.

a. Voluntariness in the sense of lack of resistance is not a defense to a charge of sexual harassment. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). It may be relevant in determining whether the complainant found the particular sexual advances unwelcome.

2. "Hostile Environment." Deliberate or repeated verbal comments, gestures, or physical contact which creates an unpleasant workplace is sexual harassment.

a. Does not require the loss of job benefits or opportunities. Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

b. No requirement for resistance to the harassment. Voluntariness not a defense. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986); Chamberlin v. 101 Realty, Inc., 915 F.2d 777, 783 (1st Cir. 1990). It must be unwelcome.

c. Psychological and emotional work environment as a condition of employment. A violation can be shown **either** by evidence that the misconduct interfered with an employee's work **or** that the environment could "reasonably be perceived and is perceived as hostile or abusive." Harris v. Forklift Systems, Inc., 114 S.Ct. 367 (1993).

d. "Reasonable person" and "reasonable victim" test. Objective/subjective elements. Harris v. Forklift Systems Inc., 114 S.Ct. 367 (1993); Rabidue v Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986). The sexual harassment must detrimentally affect a reasonable person of the same sex as the victim. Ellison v. Brady, 924 F.2d 872 (8th Cir. 1988).

e. Must be "Pervasive . . . severe and persistent." Single act versus pattern of conduct. The requirement for repeated exposure will vary inversely with the severity of the offensiveness of the incidents.

f. Need not necessarily be directed at complainant. Evidence of harassment directed at employees other than the plaintiff is relevant to show a hostile work environment. Hall v. Gus Construction Co., Inc., 842 F.2d 1010 (8th Cir. 1988); Broderick v. Ruder, 685 F. Supp. 1269 (D.D.C. 1988).

g. The harassing official need not be of the opposite sex as the complainant. EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989), Oncale v. Sundowner Offshore Services, 118 S. Ct. 998 (1998).

3. New analysis of sexual harassment? The Supreme Court recently had the opportunity to decide two high-profile sexual harassment cases. Farragher v. City of Boca Raton, 118 S.Ct. 2275 (1998); and Burlington Industries v. Ellerth, 118 S. Ct. 2257 (1998). In *Ellerth*, the Supreme Court discussed whether the "quid pro quo" and "hostile environment" terms had outlived their usefulness. "The terms quid pro quo and hostile work environment are helpful, perhaps, in making rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility."

E. Vicarious Responsibility. A supervisor or commander who condones acts of sexual harassment by subordinates engages in sexual harassment. This can include failure to take immediate and appropriate corrective action when the supervisor or commander knew or should have known of the misconduct creating a hostile work environment.

III. EO COMPLAINT PROCESS.

A. AR 600-20.

1. Applies to soldiers, DA civilian employees, and family members (but civilian employees will generally use more specific means).

2. Background. Procedures are designed to solve perceived systemic problems:

a. Lack of faith in the system.

b. Low substantiation rate.

c. No feedback to complainant.

d. Perception--nothing ever happens to the offender.

e. Lack of timeliness in resolution.

f. Documentation/reporting of complaints lacking.

g. Dissatisfaction with chain of command influence on the complaint process.

3. Basic tenets of the complaint system (design criteria for the current complaint system).

a. Resolve complaints at the lowest level possible.

b. Resolution of complaints is a command responsibility.

c. Alternative agencies serve as "safety valves" for deficiencies in the chain of command; access to these agencies will not be restricted.

d. Soldiers should be able to make complaints without fear of retribution or reprisal.

4. Informal Complaint. AR 600-20, para E-1(a).

a. Any complaint that the soldier, employee, or family member does not wish to file in writing.

b. Not subject to time suspense or reporting.

c. Attempted resolution at the lowest possible level.

5. Formal Complaint. AR 600-20, para E-1(b).

a. Filed by submitting a sworn statement on DA Form 7279-R.

(1) Basis of complaint.

(2) Dates, parties, witnesses.

(3) Requested remedy.

b. Timely submission required (w/in 60 calendar days of the incident). Processed through chain of command or alternative agency.

(1) Reporting complaint to chain of command "strongly encouraged."

(2) “Alternative agencies” when complainant perceives chain of command as the problem:

(a) Higher echelons of chain of command.

(b) EO advisor.

(c) Inspector General. Investigation governed by AR 20-1, not AR 600-20. DA Form 7279-R not used. Confidentiality policy.

(d) Chaplain.

(e) Provost Marshal, Criminal Investigation Command.

(f) Medical agencies.

(g) Staff Judge Advocate.

(h) Housing referral office.

c. No promises of confidentiality (except with Inspector General, and possibly JAs in their legal assistance capacity).

d. Actions by "alternative agencies."

(1) Talk with the complainant; gather as much information as possible; tell complainant what role (if any) that agency will have in resolving the complaint.

(2) Annotate DA Form 7279-R.

(3) If resolution is beyond agency's charter, refer complainant to appropriate agency or commander, with complainant's consent.

(4) Most "alternative agencies" do not have an independent investigatory charter. Exception: Inspector General.

e. Investigation. Commander conducts preliminary inquiry to determine if sufficient evidence exists to warrant a full investigation.

(1) Referral to battalion or higher level commander for appointment of investigating officer under AR 15-6.

(2) Fourteen days (3 weekend drill periods) to complete the investigation. Possible extension of 30 days (2 weekend drill periods).

f. Feedback. Written feedback within 14 days (3 weekend drill periods) after acknowledgment of complaint.

(1) Summary of investigative results.

(2) Remedial actions taken.

(3) Copy provided to complainant.

g. Appeal by complainant in writing to the next higher commander, up to GCMCA.

(1) Within 7 days following notification of results of investigation and acknowledgment of actions taken by the command to resolve the complaint.

(2) Options outside the EO system.

h. Follow up. Thirty to forty-five days after final decision, EOA conducts an assessment on all complaints, substantiated and unsubstantiated, to determine effectiveness of any corrective action taken and to detect reprisal. Recorded on DA Form 7279-1-R.

i. File maintained for two years.

j. Complaints against promotable colonels, active or retired GOs, IGs, members of the SES or Executive Schedule employees forwarded to Investigations Division, US Army Inspector General Agency, ATTN: SAIG-IN, Pentagon, Washington DC 20310-1700 "by rapid but confidential means within 5 calendar days of receipt." AR 600-20, para E-2(d).

IV. STAFFING.

A. AR 600-20, para 6-4.

1. Equal Opportunity Advisor.

a. Role. Understanding and articulating EO policy; recognizing and assessing indicators of discrimination; recommending remedies; collecting, organizing, and interpreting demographic data; EO training; complaint processing. EOAs may conduct inquiries in accordance with the commander's guidance.

b. Brigade-level or equivalent and higher commands. Primary, full-time duty. Has direct access to commander.

c. Density.

(1) Brigade-level and higher units; installations to 10,000 soldiers; base support battalions: SFC (E-7) or higher.

(2) Installations over 10,000 soldiers, and area support groups: MSG (E-8) and SFC.

(3) MACOM: LTC, SGM, & MSG/SFC.

2. Equal Opportunity Representative.

a. Role. Assists commanders at the battalion level and below in carrying out the EO program in their units. *May not* conduct investigations.

b. Assigned to battalion and company size organizations. Not a full time duty. Commanders must appoint members of the chain of command in the rank of SSG through first lieutenant.

V. EEO COMPLAINT PROCESS.

A. Administrative Complaint Procedures--Nonmixed Cases.

1. Complaint process.

a. Informal stage: Employee contacts EEO Counselor.

(1) Timing--within 45 days of matter of which complained. 29 C.F.R. § 1614.105(a); Zografov v. VA Medical Center, 779 F.2d 967 (4th Cir. 1985); Boyd v. U.S. Postal Serv., 752 F.2d 410 (9th Cir. 1985).

(a) Commencement of 45-day period.

(i) Personnel action--effective date of action.

(ii) Event not constituting a personnel action--date individual knew or reasonably should have known of discriminatory event.

(b) Tolling of 45-day period. 29 C.F.R. § 1614.105(a)(2). The agency or the Commission shall extend the 45-day time limit when

(i) The individual shows that he or she was not notified of the time limits and was not otherwise aware of them;

(ii) That he or she did not know and reasonably should not have known that the discriminatory matter or personnel action occurred;

(iii) That despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission;

(c) Posting requirements. 29 C.F.R. § 1614.102(b)(7).

(d) Waiver of time limit. Oaxaca v. Roscoe, 641 F.2d 386 (5th Cir. 1981).

b. Counselor actions. 29 C.F.R. § 1614.105(b)(1).

(1) Initial interview. At the initial counseling session, counselors must advise individuals in writing of their rights and responsibilities, including

(a) The right to request a hearing after an investigation by the agency;

(b) Election rights pursuant to §§ 1614.301 and 1614.302;

(c) The right to file a notice of intent to sue pursuant to §1614.201 (a) and

(d) A lawsuit under the ADEA instead of an administrative complaint of age discrimination under this part.

(e) The duty to mitigate damages, administrative and court time frames, and that only the matter(s) raised in precomplaint counseling (or issues like or related to issues raised in pre-complaint counseling) may be alleged in a subsequent complaint filed with the agency.

(f) Counselors must also advise individuals of their duty to keep the agency and Commission informed of their current address and to serve copies of appeal papers on the agency.

(g) Gather facts from complainant.

(h) Identify primary agency witness (PAW), if any.

(2) Counselors shall advise aggrieved persons that, they may choose between participation in an alternative dispute resolution (ADR) program and the counseling activities provided.

(a) Where the aggrieved person chooses to participate in ADR, the pre-complaint processing period shall be 90 days.

(b) Counselor inquiry, including interview with PAW.

(c) Final interview. §1614.105(d). If the complainant chooses not to take part in ADR, he shall be given final notice of his right to file a formal discrimination complaint. The notice shall inform the complainant of the right to file a discrimination complaint within 15 days of receipt of the notice, of the appropriate official with whom to file a complaint and of the complainant's duty to assure that the agency is informed immediately if the complainant retains counsel or a representative.

(i) Time--within 30 days of contact. This period may be extended for up to an additional 60 days if both the employee and the agency agree. In addition, the 30-day period would be automatically extended to 90 days if the complainant participates in ADR.

(3) Final report. Counselor must submit a written report within 15 days to the agency office that has been designated to accept complaints and the aggrieved person concerning the issues discussed and actions taken during counseling. 29 C.F.R. § 1614.105(c).

(a) Identity of complainant. 29 C.F.R. § 1614.105(g). The counselor shall not reveal the identity of an aggrieved person who consulted the counselor, except when authorized to do so by the aggrieved person, or until the agency has received a discrimination complaint from that person involving that same matter.

c. Formal stage.

(1) Written complaint to EEO Officer. 29 C.F.R. § 1614.106(b). A complaint must contain a signed statement from the person claiming to be aggrieved or that person's attorney. This statement must be sufficiently precise to identify the aggrieved individual and the agency and to describe generally the action(s) or practice(s) that form the basis of the complaint.

(a) Timing. Within 15 days of final interview with EEO counselor.

(b) Amendment. 29 C.F.R. § 1614.106(d). A complainant may amend a complaint at any time prior to the conclusion of the investigation to include issues or claims like or related to those raised in the complaint.

(c) Dismissal of complaint. 29 C.F.R. § 1614.107.

(i) Untimely--at either formal or informal stage. 29 C.F.R. § 1614.107(b).

(ii) Not within purview of 29 C.F.R. § 1614.103.

(iii) Identical complaint.

(iv) Not against the proper agency.

(v) That is the basis of a pending civil action in a United States District Court.

(vi) That is moot or alleges that a proposal to take a personnel action, or other preliminary step to taking a personnel action, is discriminatory.

(vii) That alleges dissatisfaction with the processing of a previously filed complaint; or

(viii) Where the agency, strictly applying the criteria set forth in Commission decisions, finds that the complaint is part of a clear pattern of misuse of the EEO process for a purpose other than the prevention and elimination of employment discrimination.

(ix) Appeal of rejection. 29 C.F.R. §1614.107(b). Where the agency believes that some but not all of the claims in a complaint should be dismissed, the agency shall notify the complainant in writing of its determination, the rationale for that determination and that those claims will not be investigated. The agency shall place a copy of the notice in the investigative file. A determination under this paragraph is reviewable by an administrative judge if a hearing is requested on the remainder of the complaint, but is not appealable until final action is taken on the remainder of the complaint.

(d) After acceptance, the agency may cancel the complaint if employee:

(i) Files suit in federal court.

(ii) Fails to prosecute.

(2) Investigation. Series of interviews or a fact-finding conference resulting in a report of investigation (ROI). AR 690-600, para. 2-9. Agencies must complete the investigation within 180 days of the filing of the complaint (with a possible extension of up to 90 days if the employee and agency agree in writing). 29 C.F.R. §§ 1614.106(d) and 1614.108(e). Agencies may use an exchange of letters or memoranda, interrogatories, investigations, fact-finding conferences, or any other fact-finding methods to develop a record. Agencies are encouraged to incorporate alternative dispute resolution (ADR) techniques. 29 C.F.R. § 1614.108(b).

(a) Complainant decides on course of action -- within 30 days of receipt of the investigative file. 29 C.F.R. § 1614.108(f).

(i) Request a final agency decision from the agency head based on the record.

(ii) Request a hearing and final decision from EEOC administrative judge.

d. EEOC hearing. 29 C.F.R. § 1614.109.

(1) Prehearing issues.

(a) Request for hearing.

(b) Dismissals. 29 C.F.R. § 1614.109(b). Administrative judges may dismiss complaints pursuant to 1614.107, on their own initiative, after notice to the parties, or upon an agency's motion to dismiss a complaint.

(c) Offers of Resolution. 29 C.F.R. § 1614.109(c). Any time after the filing of the written complaint but not later than the date an administrative judge is appointed to conduct a hearing, the agency may make an offer of resolution to a complainant who is represented by an attorney. Any time after the parties have received notice that an administrative judge has been appointed to conduct a hearing, but not later than 30 days prior to the hearing, the agency may make an offer of resolution to the complainant, whether represented by an attorney or not. The agency's offer, to be effective, must include attorney's fees and costs and must specify any non-monetary relief.

(d) Discovery. The parties may engage in discovery before the hearing. 29 C.F.R. § 1614.109(d).

(e) Hearing procedures.

(i) Evidence. 29 C.F.R. § 1614.109(e). Rules of evidence shall not be applied strictly, but AJ may exclude irrelevant or repetitious evidence and any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing.

(ii) Decisions by administrative judges. 29 C.F.R. § 1614.109(i). Unless the administrative judge makes a written determination that good cause exists for extending the time for issuing a decision, an administrative judge shall issue a decision on the complaint, and shall order appropriate remedies and relief where discrimination is found, within 180 days of receipt by the administrative judge of the complaint file from the agency.

(f) Final action by agencies. 29 C.F.R. § 1614.110 (a). The agency shall take final action on the complaint by issuing a final order within 40 days of receipt of the hearing file and the administrative judge's decision. The final order shall notify the complainant whether or not the agency will fully implement the decision of the administrative judge and shall contain notice of the complainant's right to appeal to the Equal Employment Opportunity Commission, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for appeals and

lawsuits. If the final order does not fully implement the decision of the administrative judge, then the agency shall simultaneously file an appeal.

(2) Appeal to EEOC. 29 C.F.R. § 1614.401. An appeal of the agency's final action or dismissal of a complaint must be filed with the EEOC's Office of Federal Operations (OFO) within 30 days of receipt of the final action or dismissal. Agency appeals must be filed within 40 days of receipt of the hearing file and decision.

e. Remedial actions. 29 C.F.R. § 1614.501

(1) Nondiscriminatory placement.

(2) Back pay.

(3) Compensatory damages up to $300,000.

(4) Fees and costs.

(5) Other.

f. Miscellaneous issues in the administrative complaint process. 29 C.F.R. § 1614.605.

(1) Representation.

(2) Official time. Reasonable time to prepare and attend; does <u>not</u> allow official time for witnesses to <u>prepare</u>.

2. Administrative Complaint Procedures--Mixed Cases.

a. Initiating the process--Three possible options.

b. Negotiated grievance procedure. 29 C.F.R. § 1614.301(a). When a person is covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance procedure, a person wishing to file a complaint or a grievance on a matter of alleged employment discrimination must elect to raise the matter under either part 1614 or the negotiated grievance procedure, but not both.

c. EEOC mixed case complaint. 29 C.F.R. § 1614.302(a)(1). (EEO complaint process minus hearing before EEOC AJ and appeal to EEOC). A mixed case complaint is a complaint of employment discrimination filed with a Federal agency based on race, color, religion, sex, national origin, age or handicap related to or stemming from an action that can be appealed to the Merit Systems Protection Board (MSPB). The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address. 29 C.F.R. § 1614.302(a)(1)

d. MSPB mixed case appeal. 29 C.F.R. § 1614.302(a)(2). A mixed case appeal is an appeal filed with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, handicap or age.

3. Electing the option. An aggrieved person may initially file a mixed case complaint with an agency pursuant to this part or an appeal on the same matter with the MSPB pursuant to 5 CFR 1201.151, but not both. An agency shall inform every employee who is the subject of an action that is appealable to the MSPB and who has either orally or in writing raised the issue of discrimination during the processing of the action of the right to file either a mixed case complaint with the agency or to file a mixed case appeal with the MSPB.

a. Complaint process. When a complainant elects to file a mixed case complaint, rather than with the MSPB, the procedures set forth above for nonmixed case processing shall govern the processing of the mixed case complaint with the following exceptions:

(1) At the time the agency advises a complainant of the acceptance of a mixed case complaint, it shall also advise the complainant that:

(a) If a final decision is not issued within 120 days of the date of filing of the mixed case complaint, the complainant may appeal the matter to the MSPB at any time thereafter as specified at 5 CFR § 1201.154(b)(2) or may file a civil action as specified at § 1614.310(g), but not both; and

(b) If the complainant is dissatisfied with the agency's final decision on the mixed case complaint, the complainant may appeal the matter to the MSPB (not EEOC) within 30 days of receipt of the agency's final decision;

(2) Upon completion of the investigation, the notice provided the complainant in accordance with § 1614.108(f) will advise the complainant that a final decision will be issued within 45 days without a hearing; and

(3) At the time that the agency issues its final decision on a mixed case complaint, the agency shall advise the complainant of the right to appeal the matter to the MSPB (not EEOC) within 30 days of receipt and of the right to file a civil action as provided at э 1614.310(a).

b. Other differences in procedures for mixed cases and nonmixed cases.

(1) Hearing in EEO complaint process.

(2) Appeal to EEOC upon completion of MSPB process.

(3) Special Panel if MSPB and EEOC decisions clash.

B. Administrative Complaint Procedures--Class Complaints.

1. Requirement to exhaust administrative class procedures as a prerequisite to maintaining judicial class action.

2. Significant difference in procedures for class complaints.

a. Class agent.

b. Heightened pleading requirement in formal complaint.

c. Preliminary role of administrative judge in determining propriety of class processing.

d. Additional requirements for acceptance of class complaint.

e. Notice to class members and opting out.

f. Individual relief upon finding of class-wide discrimination.

VI. REMEDIES IN EEO ACTIONS.

A. Monetary. 42 U.S.C § 2000e-5(g).

1. Traditional relief:

a. Back Pay. Reduced by interim earnings; employee must be ready, willing, and able to work to be entitled to back pay. Miller v. Marsh, 766 F.2d 490 (11th Cir. 1985).

b. Promotion. A "but for" test applied.

c. Reinstatement.

d. Front Pay. Shore v. Federal Express Corp., 42 F.3d 373 (6th Cir. 1994).

2. Additional relief under the Civil Rights Act of 1991.

a. Compensatory/punitive damages. Limited to $300,000 above other relief (cap does not include backpay, frontpay, attorney fees, or lost benefits).

b. Jury trials. In any case where the plaintiff seeks compensatory damages.

c. Prejudgment interest.

d. Expert fees.

B. Attorney Fees. 42 U.S.C. § 2000e-5(k). Success on any significant issue in litigation that achieves some benefit to the plaintiff.

C. Injunctive Relief.

D. EEO Recovery Limited by After-Acquired Evidence of Misconduct. McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (1995).

VII. 10 USC § 1561 INVESTIGATION PROCESS.

A. Action on complaints alleging sexual harassment by military members:

1. The DoD policies and procedures governing investigating and reporting sexual harassment complaints shall be used. Therefore the provisions of AR 600-20, Appendix E (EO Complaint Process) detailed above will apply.

B. Action on complaints alleging sexual harassment by DoD civilians:

1. Establish a separate POC to handle 10 USC § 1561 complaints. That person should be separate from the EEO Officer to avoid any perceived conflict-of-interest issues.

2. The 1561 POC shall, within 48 hours after initial contact by an aggrieved person, submit in writing as detailed a description as possible of the allegation to the appropriate commanding officer or military officer-in-charge.

3. Within 72 hours of receipt of written notification from a 1561 POC, a commanding officer, or officer-in-charge shall

   a. Forward the complaint or a detailed description of the allegation to the next superior officer in the chain of command who is authorized to convene a general court-martial;

   b. Commence, or cause the commencement of, an investigation of the complaint; and

   c. Advise the complainant of the commencement of the investigation.

C. Duration of investigation.--To the extent practicable, a commanding officer shall ensure that the investigation of the complaint is completed not later than 14 days after the date on which the investigation is commenced.

D. Report on investigation.--To the extent practicable, a commanding officer receiving such a complaint shall--

1. Determine if the allegations have been substantiated within 3 days of receipt of the investigation report;

2. Submit a final report on the results of the investigation, including any action taken as a result of the investigation, to the next superior officer within 20 days after the date on which the investigation is commenced;

3. Notify the aggrieved person in writing within 6 days of receipt of the investigation findings of the investigation findings, the decision made on substantiation of the allegations and the decisions on corrective action taken or proposed; or

4. Submit a report on the progress made in completing the investigation to the next superior officer within 20 days of commencement of the investigation;

5. After the date on which the investigation is commenced and every 14 days thereafter until the investigation is completed and, upon completion of the investigation, then submit a final report on the results of the investigation, including any action taken as a result of the investigation, to that next superior officer.

VIII. SANCTIONS.

A. Military members.

1. Administrative action.

2. Action under the Uniform Code of Military Justice (UCMJ).

B. Civilian employees.

1. May be subjected to administrative discipline in accordance with the current Army Table of Penalties (AR 690-700, chap 751, Table 1-1).

2. No requirement for victims to file EEO complaints. A victim may seek redress or not, as he or she sees fit, but the right of the service to discipline employees who harass or discriminate is not affected in either event. Hostetter v. United States, 739 F.2d 983 (4th Cir. 1984).

IX. LIABILITY.

A. Agency Liability. An agency may be held liable for Title VII violations that result from discriminatory practices of "supervisory personnel" (military or civilian) responsible for civilian subordinates.

1. When supervisors contravene agency policy without the agency's knowledge and the employer promptly investigates and disciplines the offenders the agency may escape liability.

a. A successful plaintiff must demonstrate that the employer had actual or constructive knowledge of the existence of the sexually hostile work environment and took no prompt and adequate remedial action. Katz v. Dole, 709 F.2d 251 (4th Cir. 1983).

2. A published procedure for handling sexual harassment complaints, disseminated to the workforce, and suitable to the employment circumstances may be sufficient to show that the agency exercised reasonable care to prevent and correct promptly sexually harassing behavior. Faragher v. City of Boca Raton, 118 S.Ct 2275 (1998).

3. The Civil Rights Act of 1991 permits federal civilian employees who prove intentional discrimination to recover up to $300,000 in compensatory damages for future pecuniary losses, emotional pain and suffering, inconvenience, mental anguish, and loss of enjoyment of life.

B. Personal Liability.

1. Wood v. United States, 995 F.2d 1122 (1st Cir. 1993) (Army officer sued in individual capacity for common law torts arising from claims of sexual harassment was not acting within scope of employment and therefore was not entitled to immunity under Federal Employees Liability Reform and Tort Compensation Act). *Accord* McHugh v. University of Vermont, 758 F. Supp. 945 (D. Vt. 1991), *aff'd*, 966 F.2d 67 (2d Cir. 1992).

2. Turner v. United States, 595 F. Supp. 708 (W.D. La. 1984) (National Guard recruiter found to be acting outside the scope of his employment in conducting complete physical examinations of female applicants).

3. Mackey v. Milam, 154 F.3d 648 (6th Cir., 1998)(Certification by United States Attorney under Westfall Act that federal employee was acting within scope of his employment does not conclusively establish as correct the substitution of United States as defendant in place of the employee, but provides prima facie evidence that the employee was acting within scope of his employment. Under the Westfall Act, whether a federal employee was acting within the scope of his employment is a question of law made in accordance with the law of the state where the conduct occurred.)

C. Bar to recovery by members of the armed forces. Chappell v. Wallace, 462 U.S. 296 (1983).

1. *Feres* doctrine bars common-law tort suits by service members against superiors in personal capacity for violation of plaintiff's civil rights which arise incident to military service. *See generally* Feres v. United States, 340 U.S. 135 (1950).

2. *Bivens* claims for constitutional torts not generally actionable by service members, because courts consistently find that special factors (e.g., military discipline) counsel hesitation or that Congress intended another remedy (e.g., UCMJ) to be exclusive. *See generally* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), and Chappell v. Wallace, 462 U.S. 296 (1983).

X. CONCLUSION.

"Neither men nor women should have to run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living." Henson v. Dundee, 682 F.2d 897 (11th Cir. 1982).

CHAPTER Q

54TH FEDERAL LABOR RELATIONS COURSE

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)

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UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

I. REFERENCES.

A. Uniformed Services Employment and Reemployment Rights Act (USERRA), P.L. 103-353, 108 Stat. 3149, mostly codified at 38 U.S.C. §§ 4301-4333.

B. Practices and Procedures for Appeals Under The Uniformed Services Employment and Reemployment Rights Act and the Veterans Employment Opportunities Act, 5 CFR Part 1208 (2000)

C. Department of Defense Instruction 1205.12, Civilian Employment and Reemployment Rights of Applicants for, and Service Members and Former Service Members of the Armed Forces, 32 C.F.R. Part 104 (2000).

D. Army Regulation 27-3, The Army Legal Assistance Program, para 3-6e (10 Sep 95).

E. Restoration to Duty from Uniformed Service, 5 C.F.R. Part 353 (1999).

F. Note, *Employers Cannot Require Reservists to Use Vacation Time and Pay for Military Duty*, The Army Lawyer, December 1996, at 22.

G. Note, *Merit System Protection Board Addresses the Uniformed Services Employment and Reemployment Act*, The Army Lawyer, September 1997, at 47 [Appendix A].

H. Note, *Interpreting USERRA "Mixed Motive" Discrimination Cases*, The Army Lawyer, December 1997, at 30.

I. Note, *Merit Systems Protection Board Develops Regulations for USERRA Claims by Federal Employees*, The Army Lawyer, February 1998, at 33 [Appendix D].

J. Note, *Jury Trials for USERRA Cases*, The Army Lawyer, June 1998, at 15.

K. Note, *How Do You Get Your Job Back?* The Army Lawyer, August 1998, at 30.

L. Note, *The 1998 USERRA Amendments*, The Army Lawyer, August 1999, at 52.

II. OVERVIEW.

A. What are the prerequisites (i.e., requirements) for a returning service member to gain the protections of USERRA?

B. What are the protections granted by USERRA?

C. How are the USERRA protections enforced if an employer doesn't comply with the law?

III. PREREQUISITES FOR APPLICATION OF STATUTE. [38 U.S.C. § 4312].

A. Employee must have held a civilian job.

1. USERRA applies to virtually all employers: the federal government, state governments, all private employers. No exemption for small size, etc.

2. Overseas employees working for American controlled businesses or the federal government, including NAFIs such as AAFES, are now covered by the USERRA. See 38 USCA Sections 4303(3) and 4319 (1999), and 64 F.R. 31485 (11 Jun 99) (to be codified at 5 C.F.R. Section 353.103).

3. Even a temporary job may get USERRA protections, if there was a "reasonable expectation that employment will continue indefinitely or for a significant period." Burden is on employer to prove that the job was not permanent. Temporary Federal appointments are suspended during term of military service, and resume with reemployment. 5 CFR 353.103 (a)

4. Certain Federal employees may be excluded from active duty and maintained in the Standby Reserve, if they are designated "key employees" under DoD Directive 1200.7, Screening the Ready Reserve, (6 Apr 84), and AR 135-133, Ready Reserve Screening, *(*10 Jul 89). ***See Dew v. United States***, 1998 WL 159060 (S.D.N.Y. 1 Apr. 98) (FBI policy that no Special Agents may serve in the Ready Reserve because of a "blanket" key employee designation. Suit under USERRA dismissed for failure to exhaust administrative remedies), *affirm'd, on other grounds*, 192 F.3d. 366, 1999 U.S. App. LEXIS 23710 (2d Cir. 28 Sep. 99) (FBI agents are intelligence agency employees under 38 USC 4325, and thus are not able to sue in federal court, and have no right to judicial review of agency USERRA decisions). ***See also Thomsen v. Dep't of the Treasury***, 169 F.3d 1378 (Fed. Cir. 5 Mar. 99) (Reservists have no right to be a member of the Selected Reserve, and may be required to serve in the Standby Reserve if designated "key employees").

B. Employee must have given prior notice of military service to civilian employer.

1. Statute requires notice: it doesn't require that notice be written; written notice, however, will minimize proof problems. See Appendix B, USERRA Employer Notice Letters.

2. Notice may be given by the soldier or by a responsible officer from the soldier's unit.

3. Exceptions: "military necessity" precludes notice (e.g., fact of deployment is classified) or where giving notice would be otherwise "unreasonable." Clear from legislative history, and case law construing predecessor legislation, that this exception will be construed narrowly. Soldier should give notice as soon as possible.

C. Employee's period of military service cannot exceed five years [Appendix B].

1. Five year limit on military service is cumulative.

2. The five-year clock restarts when employee changes civilian employers.

3. Some types of service (e.g., periodic/special Reserve/NG training, service in war or national emergency, service beyond five years in first term of service) do not count toward the five year calculation.

4. Five year period does not start fresh on 12 December 1994 (effective date of USERRA) - it reaches back to include all periods of military service during employment with given employer, unless such service was exempted from old VRR law's four year service calculations.

D. **Employee's service must have been under "honorable conditions" - that is, no punitive discharge, no OTH discharge, and no DFR.** For service of 31 (or more) days, employer can demand proof of honorable conditions. Proof can consist of a DD Form 214, letter from commander, endorsed copy of military orders, or a certificate of school completion.

E. Employee must report back or apply for reemployment in a timely manner.

1. If service up to 30 days, must report at next shift following safe travel time plus 8 hours (for rest).

2. If service 31 days to 180 days, must report or reapply within 14 days.

3. If service 181 days (or more), must report or reapply within 90 days.

4. Extensions are available if employee can show that it was impossible or unreasonable, through no fault of the employee, to report or reapply.

5. Reapplication need only indicate that you formerly worked there, are returning from military service, and request reemployment pursuant to USERRA. The request need not be in writing. Written request for reemployment, however, will avoid proof problems. ***See Mc Guire v. United Parcel Service, Inc.***, 1997 WL 543059 (N.D. Ill. 1997) (unpub.), *aff'd*., 152 F.3d. 673 (7th Cir. 1998).

6. A soldier who fails to comply with USERRA's timeliness requirements doesn't lose all USERRA protections. The employer, however, is entitled to treat (and discipline) that employee's late reporting just like any other unauthorized absence.

IV. PROTECTIONS AFFORDED BY THE STATUTE. [38 U.S.C. §§ 4311-18.]

IF THE EMPLOYEE MEETS THE FIVE REEMPLOYMENT PREREQUISITES DISCUSSED ABOVE, THE EMPLOYEE IS ENTITLED TO **SEVEN** BASIC ENTITLEMENTS**: PROMPT REINSTATEMENT; STATUS; ACCRUED SENIORITY; HEALTH INSURANCE COVERAGE; TRAINING, RETRAINING, OR OTHER ACCOMMODATIONS; AND SPECIAL PROTECTION FROM DISCHARGE (EXCEPT FOR CAUSE)**. NOTE THAT THESE REQUIREMENTS APPLY TO ALL EMPLOYERS: BOTH PUBLIC (FEDERAL, STATE, & LOCAL) AND PRIVATE. UNLIKE MANY OTHER FEDERAL LAWS, THERE IS NO "SMALL COMPANY" EXCEPTION.

A. **Prompt Reinstatement.** If the employee was gone 30 (or fewer) days, the employee must be reinstated immediately; if gone 31 (or more) days, the reinstatement should take place within a matter of days.

B. **Status.** The employee may object to the proffered reemployment position if it does not have the same status as previous employment. Examples:

1. "Assistant Manager" is not the same as "Manager," even if both given the same pay.

2. One location or position may be less desirable than another (geographically, by earnings potential, or by opportunity for promotion).

3. A change in shift work (from day to night, for example) can be challenged.

4. Civilian flight instructor assigned non-flight duties upon his return from Reserve active duty, upon RIF action which abolished his position, made nonfrivolous complaint that he was not assigned to a position of "like status and pay". See *Groom v. Dep't of Army*, 82 M.S.P.R 221 (1999); *Rogers v. Dep't of Army*, 82 M.S.P.R. 670 (1999); *Heidel v. U.S. Postal Service*, 69 M.S.P.R. 511, 516 (1996); and 5 C.F.R. Section 353.209(a).

C. **Seniority.** If the employer has any system of seniority, the employee returns to the "escalator" as if he or she had never left the employer's service.

1. If the service was for 90 days (or less), the employee is entitled to the same job (plus seniority). If the service was for 91 days (or more), the employee is entitled to same "or like" job (status and pay), at employer's option, plus seniority [See Appendix C].

2. Seniority applies to pension plans as well (including TSP for Federal employees). The seniority principle protects the employee for purposes of both vesting and amount of pension.

   a. If employer has a plan that does not involve employee contribution, employer must give employee pension credit as if employee never left.

   b. If pension depends on a variable that is hard to estimate because of the employee's absence (e.g., amount of accrual pension depends on % of commissions earned by employee), employer may use what employee did in the 12 months before service to determine pension benefits. Employer may not, in any case, use military earnings as basis to figure civilian pension accrual.

c. If the employer has a plan that involves employee contributions, employee must make up the contributions after returning to work. The employee has a period of three times the period of absence for military service, not to exceed five years, to make up the contributions. No interest may be charged by employer. Federal employees are entitled to a period of four times the period of absence to make up contributions, per 5 C.F.R Part1620, as amended by interim rule published 60 F.R. 19990 (21 Apr. 95), and final rule published 62 F.R. 18234 (14 Apr. 97). See also 64 F.R. 31052 (9 Jun 99) (new TSP loan policy for employees returning from military duty) (to be codified at 5 C.F.R. Part 1620, Subparts E and H)[See Appendix I--Federal Employee Reemployment Benefits.]

D. Health Insurance.

1. Immediately upon return to the civilian job, the employee (and his/her family) must be reinstated in the employer's health plan. The employer may not impose any waiting period or preexisting condition exclusions, except for service-connected injuries as determined by the Department of Veterans Affairs.

2. USERRA provides for continued employer health coverage, at the option of the employee, during the military service. [Federal employees should refer to 5 C.F.R. Part 890 (1999); see also 64 F.R. 1485 (11 Jun 99).]

   a. Employers must, if requested, continue employee and family on health insurance up to first 30 days of service. Note: CHAMPUS does not cover dependents on tours of less than 31 days. Cost to employee cannot exceed normal employee contribution to health coverage.

   b. Employees may request coverage beyond 31 days. Employer must provide this coverage up to 180 days or end of service (plus reapplication period), whichever occurs first. However, employers may charge employees a premium not to exceed 102% of total cost (employee + employer) of the entire premium.

E. **Training, Retraining, and Other Accommodations.** An employee who returns to the job after a long period of absence may find his/her skills rusty or face some new organization or technology. An employer must take "reasonable efforts" to requalify the employee for his/her job.

1. "Reasonable efforts" are those that do not cause "undue hardship" for the employer. A claim of "undue hardship" requires an analysis of the difficulty and expense in light of the overall financial resources of employer (and several other factors). The USERRA language is similar to that employed in the Americans with Disabilities Act.

2. If the employer cannot accommodate the employee, employer must find a position which is the "nearest approximation" in terms of seniority, status, and pay.

F. **Special Protection Against Discharge.** Depending on the length of service, there are certain periods of post-service employment where, if the employee is discharged, the employer will have a heavy burden of proof to show discharge for cause. This provision is a hedge against bad faith or pro forma reinstatement.

1. For service 181 days (or more), the subsequent protection lasts a year.

2. For service of 31 days to 180 days, the subsequent protection lasts for 180 days.

3. There is no special protection for service 30 (or less) days. However, the statute's general prohibition against discrimination or reprisal applies.

4. Employers cannot discriminate in hiring, employment, reemployment, retention in employment, promotion, or **any other benefit of employment** because of military service.

a. Not only are current Active and Reserve Component military members covered by this provision, but so are former members--veterans. **See** ***Petersen v. Dep't of Interior***, 71 M.S.P.R. 227 (1996). Neither widows nor spouses of prior service members are covered by the USERRA anti-discrimination provision. *Lourens v. MSPB*, 193F 3d. 1369, 1999 U.S. App. LEXIS 25515 (Fed. Cir. 13 Oct. 1999).

b. There is no exhaustion of administrative remedies requirement to receive relief under USERRA before the MSPB. *Roche v. MSPB*, 1998 U.S. App. LEXIS 1775 (Fed. Cir. 1998) (unpub.). However, if a federal employee chooses to seek DOL assistance by filing a complaint with the Secretary of Labor UP 38 USC Section 4322, the employee must wait until the completion of that process before requesting relief from the Board. See *Milner v. Dep't of Justice*, 77 M.S.P.R. 37, 46-47 (1997) and 38 USC Section 4324(b).

c. Employers cannot require someone to use vacation time/pay for military duty [§ 4316(d)]. **See** Veterans' Benefit Improvement Act of 1996, Pub. L. No. 104-275, § 311, 110 Stat. 3322 (9 Oct. 96), and ***Graham v. Hall-McMillen Company, Inc.***, 925 F. Supp. 437 (N.D. Miss. 1996) (Reservist may not be fired for complaining about employer requiring him to use vacation pay/days for military duty.)

d. An agency cannot treat employees who are absent because of military leave like those employees who are non-military leave of absence when the result is to deny Reserve employees any legally required benefits, including promotions or lateral assignments the employee would prefer and had seniority over other employees, e.g., a change from night to day shift. *Allen v. U.S. Postal Service*, 142 F.3d. 1444 (Fed Cir. 1998).

e. Employers may not take adverse action against anyone (not just the military employee) because that person takes action to enforce rights under USERRA or testifies or assists in a USERRA action or investigation.

f. Employees may use a USERRA claim as an affirmative defense against an agency in challenging an adverse action before the MSPB UP 5 USC Section 7701(c)(2)(C). *Yates v. MSPB*, 145 F.3d. 1480, 1484 (Fed. Cir. 1998) and *Morgan v. U.S. Postal Service*, 82 M.S.P.R. 1 (1999). The theory is that any agency adverse action that fails to address an employee's military status under USERRA is "an agency decision not in accordance with the law". See also *Bodus v. Dep't of Air Force*, 82 M.S.P.R. 508 (1999), and *Metzenbaum v. Dep't of Justice*, 82 M.S.P.R. 700 (1999) (Where there is an independent appealable action for MSPB jurisdiction and a USERRA claim, the USERRA claim is an affirmative defense to the action).

g. Such a defense may be implied by the factual record, without the claimant having to expressly mention USERRA in his/her complaint to the MSPB. *Yates*, supra; *Roberson v. U.S. Postal Service*, 77 M.S.P.R. 569 (1998); *Jasper v. U.S. Postal Service*, 73 M.S.P.R 367 (1998); *Matir v. Dep't of Navy*, 81 M.S.P.R. 421 (1999); and *Morgan v. U.S. Postal Service*, 82 M.S.P.R. 1 (1999). All a claimant must allege to make an implied prima facie case of discrimination under USERRA is:

(1) Allegation that he performed duty in a uniformed service of the United States.

(2) That he was denied a benefit of employment

(3) That the benefit was denied upon the basis of his duty performance in the uniformed services.

h. USERRA makes it easier to prevail in allegations of unlawful discrimination - if plaintiff can show that such discrimination was a motivating factor (not necessarily the sole motivating factor), the burden of proof is then on the employer to show that the action would have been taken even without the protected activity. **See *Robinson v. Morris Moore Chevrolet,*** 974 F. Supp. 571 (E.D. Tex. 1997); ***Gummo v. Village of Depew,*** 75 F.3d 98 (2d Cir. 1996); ***Novak v. Mackintosh,*** 919 F. Supp. 870 (D.S.D. 1996); ***Graham v. Hall-McMillen Company***, 925 F. Supp. 437, 443 (N.D. Miss. 1996); ***Petersen v. Dep't of Interior***, 71 M.S.P.R. 227 (1996); and ***Hanson v. Town of Irondequoit***, 896 F. Supp. 110 (W.D. N.Y. 1995). Such cases are proven by direct evidence of discrimination (*Jasper v. U.S. Postal Service*, 73 M.S.P.R. 367, 370-371 (1998)) or by indirect circumstantial evidence of discrimination (***Duncan v. U.S. Postal Service***, 73 M.S.P.R. 86, 93-94 (1997)). The administrative judge must so inform a claimant of the two methods of proof, and provide him time to develop the record. *Jasper*, supra at 371; and *Matir v. Dep't of Navy*, 81 M.S.P.R. 421 (1999).

i. An employee's intervening act of misconduct can overcome an inference of military status discrimination inferred by the close proximity between military duty and an adverse employer personnel action. ***Chance v. Dallas County Hospital District***, 1998 WL 177963 (N.D. Tex. 6 Apr. 98) (unpub.), *aff'd*, 176 F.3d 294 (5th Cir. 1999).

j. Military veteran/Reserve employees may raise "hostile work environment" discrimination claim based upon the individual's military status. **See *Petersen v. Dep't of Interior,*** 71 M.S.P.R 227 (1996).

G. **Other Non-Seniority Benefits.** If the employer offers other benefits, not based on seniority, to employees who are on furlough or nonmilitary leave, the employer must make them available to the employee on military service during the service. For federal employees, see 64 F.R. 31485, 31487 (11 June 1999), to be codified at 5 C.F.R. Section 353.106c.

1. Examples: ESOP, disability coverage, low cost life insurance, Christmas bonus, holiday pay, etc. [Appendix H for Federal Thrift Savings Plan].

2. If the employer has more than one leave/furlough policy, the military employee gets the benefit of the most generous. However, if policies vary by length of absence, the military employee may only take advantage of policies geared to similar periods of absence (e.g., 6 months, 1 year, etc.) of absence.

3. The employee may waive the right to these benefits if the employee states, in writing, that he/she does not intend to return to the job. Note, however, that such a written waiver cannot deprive the employee of his other reemployment rights should he "change his mind" and seek reemployment.

V. ASSISTANCE AND ENFORCEMENT. [GENERALLY, 38 U.S.C. §§ 4322-24].

A. The National Committee for Employer Support of Guard and Reserve (1-800-336-4590). DoD agency. Provides information on USERRA to employees and employers, and seeks to resolve disputes on an informal basis. National and state ombudsman program first step to resolve employer-employee USERRA disputes. Website: http://www.ncesgr.osd.mil

B. **The Veterans' Employment and Training Service (VETS) (1-202-219-9110).** Department of Labor agency. Primary responsibility to formally investigate claims of USERRA violations. Website: http://www.dol.gov/dol/vets/. The Office of Special Counsel has responsibility to represent federal employees before the MSPB on USERRA violations, if they do not elect private counsel or desire to represent themselves. Website: http://www.access.gpo.gov/osc/.

1. If the VETS investigation establishes a violation probably occurred, VETS will refer the case to the Office of Special Counsel (OSC - employer a federal executive agency) [Appendix F] or Department of Justice (DOJ) for other employers. See also 64 F.R. 31485 (11 Jun 99) (to be codified at 5 C.F.R. Section 353.210) (DOL-VETS will assist federal employees with USERRA complaints, and when asked, refer such cases to the OSC for MSPB representation).

2. National Guard technicians do not have the right to appeal reemployment rights claim decisions made by their State Adjutant General to the MSPB, but may file complaints directly with the federal court. See 38 USCA 4323 (1999) and 64 F.R. 31485, 31487 (11 June 99) (to be codified at 5 C.F.R. Section 353.211). As the result of recent Eleventh Amendment cases and amendment of 38 USC 4323 [Appendix J], National Guard technicians may only sue their states under USERRA through the DOL-VETS and the U.S. Department of Justice. **Cf.** *Larkins v. Dep't of Mental Health*, 1999 U.S. Dist. LEXIS 9137 (M.D. Ala. 1999).

3. The OSC or AG may provide counsel for representation free of charge. If they do not, the individual may hire private counsel. Action against the employer may then be taken in Federal Court or the MSPB (for federal employers). MSPB regulation providing for USERRA case attorney fee awards is at 62 F.R. 17046 (9 Apr. 97) (to be codified at 5 C.F.R. § 1202.202(a)(7)) and 63 F.R. 41177 (3 Aug. 98).

4. The MSPB has recognized that it has appellate jurisdiction over probationary, and non-probationary federal employees for USERRA claims. **See also** ***Petersen v. Dept of Interior***, 71 M.S.P.R. 227 (1996); ***Duncan v. U.S. Postal Service***, 73 M.S.P.R. 86 (1997); ***Botello v. Dep't of Justice***, 76 M.S.P.R.117 (1997); ***Jasper v. U.S. Postal Service***, 73 M.S.P.R. 367 (1997) [probationary employee]; ***Wright v. Dep't of Veteran's Affairs***, 73 M.S.P.R. 453 (1997) [probationary employee]; ***Roberson v. U.S. Postal Service***, 77 M.S.P.R. 569 (1998)[probationary employee]; and *Yates v. MSPB*, 145 F.3d 1480 (Fed. Cir. 1998) [probationary employee]. For purposes of USERRA complaints, a federal employee does not need to meet the one year of current continuous service as a preference eligible employee under 5 USC Section 7511(a)(1)(B), to have jurisdiction before the MSPB. *Yates*, supra; and *Matir v. Dep't of Navy*, 81 M.S.P.R. 421 (1999).

5. There are no time limits for individuals to file USERRA discrimination claims before the MSPB, notwithstanding prior MSPB policies. 5 CFR 1208.12 (2000), Watkins v. USPS, 85 MSPR 141 (2000).

6. The 1998 Amendments to USERRA [Appendix J] provided at 38 USC Section 4324(c) that the MSPB may now hear complaints "without regard as to whether the complaint accrued before, on, or after October 13, 1994"[Day before USERRA enacted]. The MSPB has interpreted this provision not to create any retroactive application of USERRA to pre-USERRA cases, but rather to allow the MSPB to hear and the OSC to represent federal employees in VRRA (predecessor statute) cases that accrued before or on October 13, 1994. The MSPB opined that Congress was attempting to ensure that the OSC would represent federal employees on VRRA cases before the MSPB. *Williams v. Dep't of Army*, 83 M.S.P.R. 109 (1999) and *Venters v. U.S. Postal Service*, __M.S.P.R. __, 1999 MSPB LEXIS 1304 (21 Sep. 1999).

7. VETS has informally retained its policy, dating from the preceding statutory scheme, of not assisting veterans who are represented by counsel. Legal assistance attorneys should beware of holding themselves out to employers or to VETS as the veteran's "counsel." **See also** AR 27-3, The Army Legal Assistance Program, para 3-6e(2), concerning limits on Army legal assistance in USERRA cases.

8. The USERRA adds several new "teeth" to the enforcement of reemployment rights.

   a. Gives the DOL (VETS) subpoena power to aid in the conduct of its investigations.

   b. Employees who prevail on their claims may be entitled to reinstatement, lost pay (plus prejudgement interest), attorney's fees, and litigation costs. **See** 62 F.R. 17046 (9 Apr. 97), to be codified at 5 C.F.R. § 1201.202(a)(7), and ***Graham v. Hall-McMillen Company***, 925 F. Supp. 437, 446-447 (N..D. Miss. 1996).

   c. Employees who can demonstrate that reinstatement is not a viable remedy may seek “front pay” damage remedies. **See *Graham v. Hall-McMillen Company***, 925 F. Supp. 437, 443-446 (N.D. Miss. 1996).

VI. CONCLUSION.

- **DOL Non-Technical Guide to the USERRA - Appendix C.**
- **NCESGR Handouts on USERRA - Appendix E.**

APPENDIX A

EXCEPTIONS TO 5 YEAR MILITARY SERVICE LIMIT IN TITLE 38, U.S. CODE SECTION 4312(c) [USERRA]

NOTES:

1. Effective with enactment of the Reserve Officer Personnel Management Act (ROPMA) on October 6, 1994, several section numbers from Title 10 U.S. Code that are referenced as exceptions to the five year limit have been changed. The new Title 10 section numbers are noted in italics and underlined.

2. The term "Reservist" means member of the National Guard or Reserve. Sections that apply only to the National Guard or the Coast Guard are identified as such.

3. State call-ups of National Guard members are not protected under USERRA.

4. The symbol "§" means "section."

Title 38, U.S. Code § 4312(c) "...does not exceed five years, except that any such period of service shall not include..."

Obligated Service -- 4312(c)(1)

Applies to obligations incurred beyond 5 years, usually by individuals with special skills, such as aviators.

Unable to Obtain Release -- 4312(c)(2)

Self explanatory. Needs to be documented on a case-by-case basis.

Training Requirements -- 4312(c)(3)

10 U.S.C. §270(a) *(10147)*----------regularly scheduled inactive duty training (drills) and annual training.

10 U.S. C. §270(B) & (c) *(10148)*----------ordered to active duty up to 45 days because of unsatisfactory participation.

EXCEPTIONS TO 5 YEAR MILITARY SERVICE LIMIT IN TITLE 38, U.S. CODE SECTION 4312(c) [USERRA], continued...

32 U.S.C§502(a)----------NATIONAL GUARD regularly scheduled inactive duty training and annual training.

32 U.S.C.§503----------NATIONAL GUARD active duty for encampments, maneuvers, or other exercises for field or coastal defense.

Specific Active Duty Provisions -- 4312(c)(4)(A)

10 U.S.C.§672(a) *(12301(a))*----------involuntary active duty in wartime.

10 U.S.C.§672(g) *(12301(g))*----------retention on active duty while in a captive status.

10 U.S.C.§673 *(12302)*----------involuntary active duty for national emergency up to 24 months.

10 U.S.C.§673b *(12304)*----------involuntary active duty for operational mission up to 270 days.

10 U.S.C.§673c *(12305)*----------involuntary retention of critical persons on active duty during a period of crisis or other specific condition.

10 U.S.C.§688----------involuntary active duty by retirees.

14 U.S.C.§331----------COAST GUARD involuntary active duty by retired officer.

14 U.S.C.§332----------COAST GUARD voluntary active duty by retired officer.

14 U.S.C.§359----------COAST GUARD involuntary active duty by retired enlisted member.

14 U.S.C.§360----------COAST GUARD voluntary active duty by retired enlisted member.

14 U.S.C.§367----------COAST GUARD involuntary retention of enlisted member.

EXCEPTIONS TO 5 YEAR MILITARY SERVICE LIMIT IN TITLE 38, U.S. CODE SECTION 4312(c) [USERRA], continued...

14 U.S.C.§712----------COAST GUARD involuntary active duty of Reserve members to augment regular Coast Guard in time of natural/man-made disaster.

War or Declared National Emergency -- 4312(c)(4)(B)

Provides that active duty (other than for training) in time of war or national emergency is exempt form the 5 year limit, ***whether voluntary or involuntary activation***.

Certain Operational Missions --4312(c)(4)(C)

Provides that active duty (other than training) ***in support of an operational mission*** for which Reservists have been activated under Title 10, U.S. Code Section 673b *(12304)* is exempt from the 5 year limit, whether voluntary or involuntary activation. NOTE: In such a situation, involuntary call-ups would be under §673b *(12304)*. Volunteers may be ordered to active duty under a different authority.

Critical Missions or Requirements -- 4312(c)(4)(D)

Provides that active duty in support of certain critical missions and requirements is exempt from the 5 year limit, ***whether call-up is voluntary or involuntary***. This would apply in situations such as Grenada or Panama in the 1980s, when provisions for involuntary activation of the Reserves were not exercised.

Specific National Guard Provisions -- 4312(c)(4)(E)

10 U.S.C. Chapter 15----------NATIONAL GUARD call into Federal service to suppress insurrection, domestic violence, etc.

10 U.S.C.§§3500/8500 *(12406)*------ARMY/AIR NATIONAL GUARD call into Federal service in case of invasion, rebellion, or inability to execute Federal law with active forces

APPENDIX B

REEMPLOYMENT POSITIONS UNDER USERRA

IF PERIOD OF SERVICE WAS FOR LESS THAN 91 DAYS

1. Escalator Position

   if not qualified for this position after reasonable effort then

2. Position Held at Beginning of Service

   if can't become qualified for position 1 or 2 with reasonable effort then

3. Any position of Lesser Status and Pay Qualified to Perform (with full seniority)

IF PERIOD OF SERVICE IS MORE THAN 90 DAYS

1. Escalator Position or

2. Position of Like Seniority, Status and Pay

   if not qualified for either position 1 or 2 after reasonable effort then

3. Position Held at Beginning of Service or a Position of Like Seniority, Status, and Pay

   if not qualified for any of the above after reasonable effort then

4. Any position of Lesser Status and Pay Qualified to Perform (with full seniority)

PERSONS WITH SERVICE RELATED DISABILITY

1. Escalator Position (with reasonable accommodation)

   if not qualified for this position after effort to accommodate disability then

2. Any Other Position Equivalent in Seniority, Status, and Pay Qualified to Perform with Reasonable Effort

   if no such position exists or if not employed as above then

3. Nearest Approximation to Equivalent Position (consistent with person's circumstances with full seniority)

APPENDIX C

A Non-Technical Resource Guide to the Uniformed Services Employment and Reemployment Rights Act (USERRA)

The U.S. Department of Labor
Veterans Employment and Training Service

April 1999

Introduction

The Department of Labor's Veterans' Employment and Training Service provides this guide to enhance the public's access to information about the application of the Uniformed Services Employment and Reemployment Rights Act (USERRA) in various circumstances. Aspects of the law may change over time. Every effort will be made to keep the information provided up-to-date.

USERRA applies to virtually all employers, including the Federal Government. While the information presented herein applies primarily to private employers, there are parallel provisions in the statute that apply to Federal employers. Specific questions should be addressed to the State director of the Veterans' Employment and Training Service listed in the government section of the telephone directory under U.S. Department of Labor.

Information about USERRA is also available on the Internet. An interactive syatem, "The USERRA Advisor," answers many of the most-often asked questions about the law. It can be found in the "E-Laws" section of the Department of Labor's home page. The Internet address is *http://www.dol.gov*.

Disclaimer

This user's guide is intended to be a non-technical resource for informational purposes only. Its contents are not legally binding nor should it be considered as a substitute for the language of the actual statute or the official USERRA Handbook.

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Employment and Reemployment Rights

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), enacted October 13, 1994 (Title 38 U.S. Code, Chapter 43, Sections 4301-4333, Public Law 103-353), significantly strengthens and expands the employment and reemployment rights of all uniformed service members.

Who's eligible for reemployment?

"Service in the uniformed services" and "uniformed services" defined -- (38 U.S.C. Section 4303 (13 & 16)

Reemployment rights extend to persons who have been absent from a position of employment because of "service in the uniformed services." "Service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service, including:

- Active duty
- Active duty for training
- Initial active duty for training
- Inactive duty training
- Full-time National Guard duty.
- Absence from work for an examination to determine a person's fitness for any of the above types of duty.

The "uniformed services" consist of the following:

- Army, Navy, Marine Corps, Air Force, or Coast Guard.
- Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve, or Coast Guard Reserve.
- Army National Guard or Air National Guard.
- Commissioned Corps of the Public Health Service.
- Any other category of persons designated by the President in time of war or emergency.

"Brief Nonrecurrent" positions (Section 4312(d)(1)(C))

The new law provides an exemption for preservice positions that are "brief or nonrecurrent and that cannot reasonably be expected to continue indefinitely or for a significant period."

Advance Notice (Section 4312(a)(1))

The law requires all employees to provide their employers with advance notice of military service.

Notice may be either written or oral. It may be provided by the employee or by an appropriate officer of the branch of the military in which the employee will be serving. However, no notice is required if:

- military necessity prevents the giving of notice; or
- the giving of notice is otherwise impossible or unreasonable.

"Military necessity" for purposes of the notice exemption is to be defined in regulations of the Secretary of Defense. These regulations will be immune from court review.

Duration of Service (Section 4312(c))

The cumulative length service that causes a person's absences from a position may not exceed five years.

Most types of service will be cumulatively counted in the computation of the five-year period.

Exceptions. Eight categories of service are exempt from the five-year limitation. These include:

(1) **Service required beyond five years to complete an initial period of obligated service (Section 4312 (c)(1)).** Some military specialties, such as the Navy's nuclear power program, require initial active service obligations beyond five years.

(2) **Service from which a person, through no fault of the person, is unable to obtain a release within the five year limit (Section 4312(c)(2)).** For example, the five-year limit will not be applied to members of the Navy or Marine Corps whose obligated service dates expire while they are at sea.
Nor will it be applied when service members are involuntarily retained on active duty beyond the expiration of their obligated service date. This was the experience of some persons who served in Operations Desert Shield and Storm.

(3) **Required training for reservists and National Guard members (Section 4312(c)(3)).** The two-week annual training sessions and monthly weekend drills mandated by statute for reservists and National Guard members are exempt from the five-year limitation. Also excluded are additional training requirements certified in writing by the Secretary of the service concerned to be necessary for individual professional development.

(4) **Service under an involuntary order to, or to be retained on, active duty during domestic emergency or national security related situations (Section 4312(c)(4)(A)).**

(5) **Service under an order to, or to remain on, active duty (other than for training) because of a war or national emergency declared by the President or Congress (Section 4312(c)(4)(B)).** This category includes service not only by persons involuntarily ordered to active duty, but also service by volunteers who receive orders to active duty.

(6) **Active duty (other than for training) by volunteers supporting "operational missions" for which Selected Reservists have been ordered to active duty without their consent (Section 4312(c)(4)(c)).** Such operational missions involve circumstances other than war or national emergency for which, under presidential authorization, members of the Selected Reserve may be involuntarily ordered to active duty under Title 10, U.S.C. Section 12304. The recent U.S. military involvement in support of restoration of democracy in Haiti ("Uphold Democracy") was such an operational mission as is the current (as of 1998) operation in Bosnia ("Joint Endeavor").

This sixth exemption for the five-year limitation covers persons who are called to active duty after volunteering to support operational missions. Persons involuntarily ordered to active duty for operational missions would be covered by the fourth exemption, above.

(7) **Service by volunteers who are ordered to active duty in support of a "critical mission or requirement" in times other than war or national emergency and when no involuntary call up is in effect (Section 4312 (c)(4)(D)).** The Secretaries of the various military branches each have authority to designate a military operation as a critical mission or requirement.

(8) **Federal service by members of the National Guard called into action by the President to suppress an insurrection, repel an invasion, or to execute the laws of the United States (Section 4312(c)(4)(E)).**

<u>Disqualifying service</u> (Section 4304)

When would service be disqualifying? The statute lists four circumstances:

(1) Separation from the service with a dishonorable or bad conduct discharge.

(2) Separation from the service under other than honorable conditions. Regulations for each military branch specify when separation from the service would be considered "other than honorable."

(3) Dismissal of a commissioned officer in certain situations involving a court martial or by order of the President in time of war **(Section 1161(a) of Title 10).**

(4) Dropping a individual from the rolls when the individual has been absent without authority for more than three months or who is imprisoned by a civilian court. **(Section 1161(b) of Title 10)**

Reporting back to work (Section 4312(e))

Time limits for returning to work now depend, with the exception of fitness-for-service examinations, on the duration of a person's military service.

Service of 1 to 30 days. The person must report to his or her employer by the beginning of the first regularly scheduled work day that would fall eight hours after the end of the calendar day. For example, an employer cannot require a service member who returns home at 10:00 p.m. to report to work at 12:30 a.m. that night. But the employer can require the employee to report for the 6:00 a.m. shift the next morning.
If, due to no fault of the employee, timely reporting back to work would be impossible or unreasonable, the employee must report back to work as soon as possible.

Fitness Exam. The time limit for reporting back to work for a person who is absent from work in order to take a fitness-for-service examination is the same as the one above for persons who are absent for 1 to 30 days. This period will apply regardless of the length of the person's absence.

Service of 31 to 180 days. An application for reemployment must be submitted no later than 14 days after completion of a person's service. If submission of a timely application is impossible or unreasonable through no fault of the person, the application must be submitted as soon as possible. If the 14th day falls on a day when the offices are not open, or there is otherwise no one available to accept the application, the time extends to the next business day.

Service of 181 or more days. An application for reemployment must be submitted no later than 90 days after completion of a person's military service. If the 90th day falls on a day when the offices are not open, or there is otherwise no one available to accept the application, the time extends to the next business day.

Disability incurred or aggravated. The reporting or application deadlines are extended for up to two years for persons who are hospitalized or convalescing because of a disability incurred or aggravated during the period of military service.

The two-year period will be extended by the minimum time required to accommodate a circumstance beyond an individual's control that would make reporting within the two-year period impossible or unreasonable.

Unexcused delay. Are a person's reemployment rights automatically forfeited if the person fails to report to work or to apply for reemployment within the required time limits? No. But the person will then be subject to the employer's rules governing unexcused absences.

Documentation upon return (Section 4312(f))

An employer has the right to request that a person who is absent for a period of service of 31 days or more provide documentation showing that:

- the person's application for reemployment is timely;
- the person has not exceeded the five-year service limitation; and
- the person's separation from service was other than disqualifying under **Section 4304.**

Unavailable documentation. **Section: 4312(f)(3)(A)**. If a person does not provide satisfactory documentation because it's not readily available or doesn't exist, the employer still must promptly reemploy the person. However, if, after reemploying the person, documentation becomes available that shows one or more of the reemployment requirements were not met, the employer may terminate the person. The termination would be effective as of that moment. It would not operate retroactively.

Pension contributions. Section 4312(f)(3)(B). Pursuant to **Section 4318**, if a person has been absent for military service for 91 or more days, an employer may delay making retroactive pension contributions until the person submits satisfactory documentation. However, contributions will still have to be made for persons who are absent for 90 or fewer days.

<u>How to place eligible persons in a job</u>

Length of service -- Section 4313(a)

Except with respect to persons who have a disability incurred in or aggravated by military service, the position into which a person is reinstated is based on the length of a person's military service.

1 to 90 days. Section 4313(a)(1)(A) & (B). A person whose military service lasted 1 to 90 days must be "promptly reemployed" in the following order of priority:

(1) **(Section 4313(a)(1)(A))** in the job the person would have held had the person remained continuously employed, so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer to qualify the person; or, **(B)** in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, only if the person is not qualified to perform the duties of the position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

(2) if the employee cannot become qualified for either position described above (other than for a disability incurred in or aggravated by the military service) even after reasonable employer efforts, the person is to be reemployed in a position that is the nearest approximation to the positions described above (in that order) which the person is able to perform, with full seniority. **(Section 4313(a)(4))**

With respect to the first two positions, employers do not have the option of offering other jobs of equivalent seniority, status, and pay.

91 or more days. **Section 4313(a)(2)**. The law requires employers to promptly reemploy persons returning from military service of 91 or more days in the following order of priority:

(1) **Section 4313(a)(2)(A)**. In the job the person would have held had the person remained continuously employed, or a position of like seniority status and pay, so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer to qualify the person; or, **(B)** in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status, and pay the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of the position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

(2) **Section 4313(a)(4)**. If the employee cannot become qualified for the position either in (A) or (B) above: in any other position of lesser status and pay, but that most nearly approximates the above positions (in that order) that the employee is qualified to perform with full seniority.

"Escalator" position. The reemployment position with the highest priority in the reemployment schemes reflects the "escalator" principle that has been a key concept in federal veterans' reemployment legislation. The escalator principle requires that each returning service member actually step back onto the seniority escalator at the point the person would have occupied if the person had remained continuously employed.

The position may not necessarily be the same job the person previously held. For instance, if the person would have been promoted with reasonable certainty had the person not been absent, the person would be entitled to that promotion upon reinstatement. On the other hand, the position could be at a lower level than the one previously held, it could be a different job, or it could conceivably be in layoff status.

Qualification efforts. Employers must make reasonable efforts to qualify returning service members who are not qualified for reemployment positions that they otherwise would be entitled to hold for reasons other than a disability incurred or aggravated by military service.

Employers must provide refresher training, and any training necessary to update a returning employee's skills in situation where the employee is no longer qualified due to technological advances. Training will not be required if it is an undue hardship for the employer, as discussed below.

If reasonable efforts fail to qualify a person for the first and second reemployment positions in the above schemes, the person must be placed in a position of equivalent or nearest approximation and pay that the person is qualified to perform (the third reemployment position in the above schemes).

"Prompt" reemployment. Section 4313(a). The law specifies that returning service members be "promptly reemployed." What is prompt will depend on the circumstances of each individual case.

Reinstatement after weekend National Guard duty will generally be the next regularly scheduled working day. On the other hand, reinstatement following five years on active duty might require giving notice to an incumbent employee who has occupied the service member's position and who might possibly have to vacate that position.

<u>Disabilities incurred or aggravated while in Military Service</u> Section 4313(a)(3).

The following three-part reemployment scheme is required for persons with disabilities incurred or aggravated while in Military Service:

(1) The employer must make reasonable efforts to accommodate a person's disability so that the person can perform the position that person would have held if the person had remained continuously employed.

(2) If, despite reasonable accommodation efforts, the person is not qualified for the position in **(1)** due to his or her disability, the person must be employed in a position of equivalent seniority, status, and pay, so long as the employee is qualified to perform the duties of the position or could become qualified to perform them with reasonable efforts by the employer.

(3) If the person does not become qualified for the position in either (1) or (2), the person must be employed in a position that, consistent with the circumstances of that person's case, most nearly approximates the position in (2) in terms of seniority, status, and pay.

The law covers all employers, regardless of size.

<u>Conflicting reemployment claims</u> Section 4313(b)(1) & (2)(A).

If two or more persons are entitled to reemployment in the same position, the following reemployment scheme applies:

- The person who first left the position has the superior right to it.
- The person without the superior right is entitled to employment with full seniority in any other position that provides similar status and pay in the order of priority under the reemployment scheme otherwise applicable to such person.

<u>Changed circumstances</u> Section 4312(d)(1)(A)).

Reemployment of a person is excused if an employer's circumstances have changed so much that reemployment of the person would be impossible or unreasonable. A reduction-in-force that would have included the person would be an example.

Undue hardship Section 4312(d)(1)(B).

Employers are excused from making efforts to qualify returning service members or from accommodating individuals with service-connected disabilities when doing so would be of such difficulty or expense as to cause "undue hardship."

Rights of reemployed persons

Seniority rights Section 4316(a)

Reemployed service members are entitled to the seniority and all rights and benefits based on seniority that they would have attained with reasonable certainty had they remained continuously employed.

A right or benefit is seniority-based if it is determined by or accrues with length of service. On the other hand, a right or benefit is not seniority-based if it is compensation for work performed or is subject to a significant contingency.

Rights not based on seniority Section 4316(b).

Departing service members must be treated as if they are on a leave of absence. Consequently, while they are away they must be entitled to participate in any rights and benefits not based on seniority that are available to employees on nonmilitary leaves of absence, whether paid or unpaid. If there is a variation among different types of nonmilitary leaves of absence, the most favorable treatment must be accorded the service member.

The returning employees shall be entitled not only to nonseniority rights and benefits available at the time they left for military service, but also those that became effective during their service.

Forfeiture of rights. Section 4316(b)(2)(A)(ii). If, prior to leaving for military service, an employee knowingly provides clear written notice of an intent not to return to work after military service, the employee waives entitlement to leave-of-absence rights and benefits not based on seniority.

At the time of providing the notice, the employee must be aware of the specific rights and benefits to be lost. If the employee lacks that awareness, or is otherwise coerced, the waiver will be ineffective.

Notices of intent not to return can waive only leave-of-absence rights and benefits. They cannot surrender other rights and benefits that a person would be entitled to under the law, particularly reemployment rights.

Funding of benefits. **Section 4316(b)(4)**. Service members may be required to pay the employee cost, if any, of any funded benefit to the extent that other employees on leave of absence would be required to pay.

Pension/retirement plans

Pension plans, **Section 4318,** which are tied to seniority, are given separate, detailed treatment under the law. The law provides that:

- **Section 4318(a)(2)(A)**. A reemployed person must be treated as not having incurred a break in service with the employer maintaining a pension plan;

- **Section 4318(a)(2)(B)**. Military service must be considered service with an employer for vesting and benefit accrual purposes;

- **Section 4318(b)(1)**. The employer is liable for funding any resulting obligation; and

- **Section 4318(b)(2)**. The reemployed person is entitled to any accrued benefits from employee contributions only to the extent that the person repays the employee contributions.

Covered plan. Section 4318. A "pension plan" that must comply with the requirements of the reemployment law would be any plan that provides retirement income to employees until the termination of employment or later. Defined benefits plans, defined contribution plans, and profit sharing plans that are retirement plans are covered.

Multi-employer plans. Section 4318(b)(1). In a multi-employer defined contribution pension plan, the sponsor maintaining the plan may allocate among the participating employers the liability of the plan for pension benefits accrued by persons who are absent for military service. If no cost-sharing arrangement is provided, the full liability to make the retroactive contributions to the plan will be allocated to the last employer employing the person before the period of military service or, if that employer is no longer functional, to the overall plan.

Within 30 days after a person is reemployed, an employer who participates in a multi-employer plan must provide written notice to the plan administrator of the person's reemployment. **(4318(c))**

Employee contribution repayment period. Section 4318(b)(2). Repayment of employee contributions can be made over three times the period of military service but no longer than five years.

Calculation of contributions. Section 4318(b)(3)(A). For purposes of determining an employer's liability or an employee's contributions under a pension benefit plan, the employee's compensation during the period of his or her military service will be based on the rate of pay the employee would have received from the employer but for the absence during the period of service.

Section 4318(b)(3)(B). If the employee's compensation was not based on a fixed rate, the determination of such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).

Vacation pay Section 4316(d).

Service members must, at their request, be permitted to use any vacation that had accrued before the beginning of their military service instead of unpaid leave. However, it continues to be the law that service members cannot be forced to use vacation time for military service.

Health benefits Section 4317

The law provides for health benefit continuation for persons who are absent from work to serve in the military, even when their employers are not covered by COBRA. (Employers with fewer than 20 employees are exempt for COBRA.) **Section 4317(a)(1).**

If a person's health plan coverage would terminate because of an absence due to military service, the person may elect to continue the health plan coverage for up to 18 months after the absence begins or for the period of service (plus the time allowed to apply for reemployment), whichever period is shorter. The person cannot be required to pay more than 102 percent of the full premium for the coverage. If the military service was for 30 or fewer days, the person cannot be required to pay more than the normal employee share of any premium.

Exclusions/waiting periods. Section 4317(b). A waiting period or exclusion cannot be imposed upon reinstatement if health coverage would have been provided to a person had the person not been absent for military service. However, an exception applies to disabilities determined by the Secretary of Veterans' Affairs (VA) to be service-connected.

Multi-employer. Section 4317(a)(3). Liability for employer contributions and benefits under multi-employer plans is to be allocated by the plan sponsor in such manner as the plan sponsor provides. If the sponsor makes no provision for allocation, liability is to be allocated to the last employer employing the person before the person's military service or, if that employer is no longer functional, to the plan.

Protection from discharge

Persons returning from active duty for training were not explicitly protected under the old law. Under USERRA, a reemployed employee may not be discharged without cause as follows:

- **Section 4316(c)(1)**. For one year after the date of reemployment if the person's period of military service was for more than six months (181 days or more).

- **Section 4316(c)(2).** For six months after the date of reemployment if the person's period of military service was for 31 to 180 days.

Persons who serve for 30 or fewer days are not be protected from discharge without cause. However, they are protected from discrimination because of military service or obligation.

Protection from discrimination and retaliation

Discrimination -- Section 4311.

Section 4311(a). Employment discrimination because of past, current, or future military obligations is prohibited. The ban is broad, extending to most areas of employment, including:

- hiring;
- promotion;
- reemployment;
- termination; and
- benefits

Persons protected. Section 4311(a). The law protects from discrimination past members, current members, and persons who apply to be a member of any of the branches of the uniformed services.

Previously, only Reservists and National Guard members were protected from discrimination. Under USERRA, persons with past, current, or future obligations in all branches of the military are also protected.

Standard/burden of proof. Section 4311(c). If an individual's past, present, or future connection with the service is a motivating factor in an employer's adverse employment action against that individual, the employer has committed a violation, unless the employer can prove that it would have taken the same action regardless of the individual's connection with the service. The burden of proof is on the employer once a *prima facie* case is established.

The enacted law clarifies that liability is possible when service connection is just one of an employer's reasons for the action. To avoid liability, the employer must prove that a reason other than service connection would have been sufficient to justify its action.

Both the standard and burden of proof now set out in the law apply to all cases, regardless of the date of the cause of action, including discrimination cases arising under the predecessor ("VRR") law.

Reprisals

Employers are prohibited from retaliating against anyone:

- who files a complaint under the law;
- who testifies, assists or otherwise participates in an investigation or proceeding under the law; or

- who exercises any right provided under the law.
- whether or not the person has performed military service **(section 4311(b))**.

How the law is enforced

Department of Labor

Regulations. Section 4331(a). The Secretary of Labor is empowered to issue regulations implementing the statue. Previously, the Secretary lacked such authority. However, certain publications issued by the U.S. Department of Labor had been accorded "a measure of weight" by the courts.

Veterans' Employment and Training Service. Reemployment assistance will continue to be provided by the Veterans' Employment and Training Service (VETS) of the Department of Labor. **Section 4321.** VETS investigates complaints and attempts to resolve them. Filing of complaints with VETS is optional. **Section 4322.**

Access to documents. Section 4326(a). The law gives VETS a right of access to examine and duplicate employer and employee documents that it considers relevant to an investigation. VETS also has the right of reasonable access to interview persons with information relevant to the investigation.

Subpoenas. Section 4326(b). The law authorizes VETS to subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation.

Government-assisted court actions

Section 4323(a)(1). Persons whose complaints are not successfully resolved by VETS may request that their complaints be submitted to the Attorney General for possible court action. If the Attorney General is satisfied that a complaint is meritorious, the Attorney General may file a court action on the complainant's behalf.

Private court actions Section 4323(a).

Individuals continue to have the option to privately file court actions. They may do so if they have chosen not to file a complaint with VETS, have chosen not to request that VETS refer their complaint to the Attorney General, or have been refused representation by the Attorney General.

Double damages. Section 4323(c)(1)(A)(iii). Award of back pay or lost benefits may be doubled in cases where violations of the law are found to be "willful." "Willful" is not defined in the law, but the law's legislative history indicates the same definition that the U.S. Supreme Court has adopted for cases under the Age Discrimination in Employment Act should be used. Under that definition, a violation is willful if the employer's conduct was knowingly or recklessly in disregard of the law.

Fees. Section 4323(c)(2)(B). The law, at the court's discretion, allows for awards of attorney fees, expert witness fees, and other litigation expenses to successful plaintiffs who retain private counsel. Also, the law bans charging of court fees or costs against anyone who brings suit (4323(c)(2)(A)).

Declaratory judgments. Section 4323(c)(4). Only persons claiming rights under the law may bring lawsuits. According to the law's legislative history, its purpose is to prevent employers, pension plans, or unions from filing actions for declaratory judgements to determine potential claims of employees.

Service Member Checklist

Service Member Obligations	Yes	No	Comments	Reference
1. Did the service member hold a job other than one that was brief, nonrecurring? (exception would be discrimination cases.)				Page 1
2. Did the service member notify the employer that he/she would be leaving the job for military training or service?				Page 2
3. Did the service member exceed the 5-year limitation limit on periods of service? (exclude exception identified in the law)				Page 2
4. Was the service member discharged under conditions other than disqualifying under section 4304?				Page 4
5. Did the service member make application or report back to the pre-service employer in a timely manner?				Page 4
6. When requested by the employer, did the service member provide readily available documentation showing eligibility for reemployment?				Page 5
7. Did the service member whose military leave exceeded 30 days elect to continue health insurance coverage? The employer is permitted to charge up to 102% of the entire premium in these cases.				Page 11

Employer Obligations

Employer Obligations:	Yes	No	Comments	Reference
1. Did the service member give advance notice of military service to the employer? (This notice can be written or verbal)				Page 2
2. Did the employer allow the service member a leave of absence? The employer cannot require that vacation or other personal leave be used.				Page 11
3. Upon timely application for reinstatement, did the employer timely reinstate the service member to his/her escalator position?				Page 6
4. Did the employer grant accrued seniority as if the returning service member had been continuously employed? This applies to the rights and benefits determined by seniority, including status, rate of pay, pension vesting, and credit for the period for pension benefit computations.				Page 9
5. Did the employer delay or attempt to defeat a reemployment rights obligation by demanding documentation that did not then exist or was not then readily available?				Page 5
6. Did the employer consider the timing, frequency, or duration of the service members training or service or the nature of such training or service as a basis for denying rights under this Statute?				Page 2
7. Did the employer provide training or retraining and other accommodations to persons with service-connected disabilities. If a disability could not be accommodated after reasonable efforts by the employer, did the employer reemploy the person in some other position he/she was qualified to perform which is the "nearest approximation" of the position to which the person was otherwise entitled, in terms of status and pay, and with full seniority?				Page 8
8. Did the employer make reasonable efforts to train or otherwise qualify a returning service member for a position within the organization/company? If the person could not be qualified in a similar position, did the employer place the person in any other position of lesser status and pay which he/she was qualified				Page 7

to perform with full seniority?				
9. Did the employer grant the reemployed person pension plan benefits that accrued during military service, regardless of whether the plan was a defined benefit or defined contribution plan?				Page 10
10. Did the employer offer COBRA-like health coverage upon request of a service member whose leave was more than 30 days? Upon the service member's election, did the employer continue coverage at the regular employee cost for service members whose leave was for less than 31 days?				Page 11
11. Did the employer discriminate in employment against or take adverse employment action against any person who assisted in the enforcement of a protection afforded any returning service member under this Statute.				Page 13
12. Did the employer in any way discriminate in employment, reemployment, retention in employment, promotion, or any benefit of employment on the basis of past or present membership, performance of service, application for service or obligation for military service.				Page 12
13. Did the employer satisfy the burden of proof where employment, reemployment or other entitlements are denied or when adverse action is taken when a service connection is the motivating factor in the denial or adverse action? Did the employer provide documentation that the action would have been taken in the absence of such membership?				Page 13

APPENDIX D

Office of the Special Counsel Considerations Regarding MSPB Representation

OFFICE OF THE SPECIAL COUNSEL & USERRA

1. What is the Office of Special Counsel?

The Office of Special Counsel is an independent federal executive agency that investigates and prosecutes cases involving:

a. Prohibited Personnel Practices (PPPs) under 5 U.S.C. Section 2302(b).

b. Federal employee violations of the Hatch Act, which regulates the partisan political activities of federal employees.

c. Agency violations of law, rule, or regulations; fraud, waste, and abuse of authority; gross mismanagement or a substantial and specific danger to public health and safety, disclosed by federal employee whistleblowers.

d. Agency denials of veteran and reservist employment or reemployment rights, discrimination based upon military status, and denial of any promotion, or other benefit of employment because of military status.

2. What obligations does USERRA give the Office of Special Counsel, with respect to federal employees who allege agency discrimination, failure to hire or reemploy because of their military or veteran status?

a. 38 U.S.C. Section 4324(a)(1):

A person who receives from the Secretary [of Labor] a notification pursuant to section 4322(e) may request that the Secretary refer the complaint for litigation before the Merit Systems Protection Board. The Secretary shall also refer the complaint to the Office of Special Counsel established by section 1211 of title 5.

b. 38 U.S.C. Section 4324(a)(2)(A):

If the Special Counsel is reasonably satisfied that the person on whose behalf a complaint is referred under paragraph (1) is entitled to the rights or benefits sought, the Special Counsel (upon request of the person submitting the complaint) may appear on behalf of, and act as attorney for, the person and initiate an action regarding such complaint before the Merit Systems Protection Board.

c. **38 U.S.C. Section 4324(a)(2)(B):**

If the Special Counsel declines to initiate an action and represent a person before the Merit Systems Protection Board under subparagraph (A), the Special Counsel shall notify such person of that decision.

3. What action does the Office of Special Counsel take upon referral?

a. Obtains the DOL-VETS investigative file and report/memorandum from the Office of the Solicitor, Department of Labor.

b. Reviews the entire investigative file in detail.

(1) Direct Evidence of Military Status Discrimination

(2) Circumstantial Evidence of Military Status Discrimination

A. Statements of Animus

B. Agency's Explanation

C. Disparate Treatment

D. Time Chronology

E. Conduct of the Veteran/Reserve Component Employee

c. Reviews the legal analysis from Secretary of Labor, Office of the Solicitor

d. Determines if further investigation is needed

e. Conducts their own legal analysis of the facts and law

4. What is the legal standard for a finding of military status discrimination?

a. The employee's affiliation (or former affiliation) with the active component Armed Forces or the Reserve Components of the Armed Forces (including the National Guard) played **a "substantial or motivating" part** in the agency's adverse action against the employee.

b. A "substantial or motivating factor" must be more than "some weight", but less than the "sole reason" for agency adverse action against an employee. Each case is examined on its unique facts. The employee must show by a preponderance of evidence (>50%) that military status was a "motivating" or "substantial" basis for adverse agency action. Petersen v. Department of the Interior, 71 M.S.P.R. 227 (1996); *Accord*, Gummo v. Village of Depew, New York, 75 F.3d 98, 106 (2d Cir. 1996)

c. Once an employee raises a USERRA claim of military status discrimination, the agency must prove that **it would have taken the same action against the employee even if the employee had no military affiliation**. The employee can then rebut the agency's claims by use of direct or circumstantial evidence, showing the agency's defense is really a **pretext for discriminatory conduct**. 38 U.S.C. Section 4311(b).

5. What would be considered "direct evidence" of military status discrimination?

a. Uncontradicted evidence that something was done or not done to an agency employee because of his or her status as a veteran or military member.

(1) Statements found in performance evaluations, letters of reprimand, e.g., that "X is not a 'team player' because of his or her numerous absences for Reserve duty and meetings."

(2) Stated reasons given to a veteran or reservist for a particular assignment or demotion. ("You are gone on military duty so much that we can't consider you for X position, as we can't count on you being here when we need you.")

b. Direct evidence is gathered from documents, witness statements, independent sources (internal inspector general investigations/audits), and agency policy and conduct/past practices.

6. What constitutes "circumstantial evidence" of military status discrimination?

a. The MSPB, in Duncan v. U.S. Postal Service, 73 M.S.P.R. 86 (1997), has determined that federal employees may **prove indirectly the agency's discriminatory intent** by providing relevant circumstantial evidence which a fact finder can infer discriminatory agency intent. The Board has directed that circumstantial evidence cases use the "burden-shifting analysis" provided under Title VII of the Civil Rights Act of 1964. The employee must establish a ***prima facie*** case that:

(1) he or she was a member of a protected group, the Armed Forces, Armed Forces Reserve Component, or a former member of the military (veteran), and the employer was aware of this status,

(2) he or she was similarly situated to an individual who was not a member of the protected group (e.g., someone on sabbatical or pregnancy leave), and

(3) he or she was treated more harshly or disparate than the individual who was not a member of the Armed Forces, Armed Forces Reserve Component or veteran.
Coleman v. Department of Air Force, 66 M.S.P.R. 498, 508 (1995), *aff'd*, 79 F.3d 1165 (Fed. Cir. 1996).

b. Once the employee has met the initial burden of proof, the burden "shifts" to the **agency to articulate a legitimate, nondiscriminatory reason for its action**. The agency meets this burden when it introduces evidence, which, on its face, would lead a fact finder to conclude that the agency had a nondiscriminatory basis for its action, regardless whether the agency proves the reason.

c. One the agency has raised a legitimate nondiscriminatory defense for its action, the employee must show that the agency's stated reason was really a **pretext for prohibited discrimination**. The employee must show both that the agency's stated reason was not the real reason for its action and that military status discrimination was a motivating factor for the adverse action.

d. Several types of information help the reservist or veteran prove his case:

(1) Statements of animus. Statements of animus are statements by supervisors and agency officials indicating a strong dislike of someone because of military or veteran status. In the Peterson case, the employee was a Vietnam veteran who was subjected to continuous abusive name calling by his supervisors and co-workers, such as "Psycho" and "Babykiller". Other common agency manager statements would be to disparage Reservists as "unreliable" or "disloyal", "non-team players", and "double dippers".

(2) Disparate Treatment. A good example is where a Reservist on active duty is denied an annual bonus, but a woman employee on pregnancy leave is given the annual bonus.

(3) Time Sequencing/Chronology. Where an agency immediately disciplines or fires an employee after he has asserted his USERRA rights or returned from military duty, despite agency protests of non-discriminatory purpose, a strong inference of discriminatory conduct may be found. *Accord*, Robinson v. Morris Moore Chevrolet, 974 F. Supp. 571 (E.D. Tex. 1997).

7. Does a Reserve or National Guard employee have an obligation to minimize the burden upon the agency by rescheduling military duty or training that conflicts with his agency job demands?

a. Practically speaking, the answer is generally yes. Whenever possible, Reserve and National Guard members should work with their commands to avoid unnecessary conflicts between their military duty and civilian work schedules. This is particularly true in shift work type jobs, such as firemen, policemen, prison guards, postal workers, and hospital workers. Employees should provide their agencies with as much advance notice as possible to avoid scheduling conflicts. Still, military employees do not always have a say as to when they must participate in military training or activations.

b. Agency management must understand that they cannot refuse to allow their military member employees to attend military duty or training for agency convenience. The military mission is paramount. *See* H. Rep. No. 103-65, 103d Cong., 1st Sess., at 30 (1993):

> [T]here is no obligation on the part of the service member to rearrange or postpone already scheduled military service nor is there any obligation to accede to an employer's desire that such service be planned for the employer's convenience.

c. There are no reported MSPB cases where the Board has endorsed adverse action against an employee for failing to minimize the frequency, timing or duration of their military training or duty. The statute, 38 U.S.C. ∋ 4312(h), makes clear that civilian employers, including the federal government, do not decide when, where, or how often employee Reservists do their military duty or training. As Congress observed in creating this section of the Act:

> This section makes clear the Committee's intent that no "reasonableness" test be applied to determine reemployment rights and that this section prohibits consideration of timing, frequency, or duration of service so long as it does not exceed the cumulative limits under section 4312(C) and the servicemember has complied with the requirements under sections 4312(a) and (e).

H. Rep. No. 103-65, 103d Cong., 1st Sess., at 30 (1993). *See also* OPM Regulation, 5 C.F.R. Section 353.203(c), which urges federal employees to make a good faith effort to resolve work conflicts with their military duty. The 5 C.F.R. Section 353.203(c) provision should not be used as a test to determine whether the service member's military duty was "reasonable" or "fair to the agency", or whether the OSC should represent a federal employee with a USERRA issue.

8. How do you contact the Office of Special Counsel?

The OSC has a website at http://www.access.gpo.gov/osc . You can also contact the OSC senior counsel for USERRA cases, at telephone (202) 653-6005. Merit Systems Protection Board regulations and cases may be found at the MSPB website, http://www.access.gpo.gov/mspb .

APPENDIX E

DoD National Committee for Employer Support of the Guard & Reserve (NCESGR) Materials for Service Members and Employers

USERRA Facts for Employers

Note: This material is for information only and should not be considered a legal authority. While this factsheet is directed to civilian employers of members of the National Guard and Reserve, it should be noted that Active component members, Public Health Service Commissioned Corps members, and certain others are also protected by the Uniformed Services Employment and Reemployment Rights Act (USERRA), if they meet the eligibility criteria. Contact the National Committee for Employer Support of the Guard and Reserve at (800) 336-4590 with specific questions regarding USERRA.

If you need more information concerning specific situations, please E-mail: NCESGR's WebMaster or call the National Committee at (800) 336-4590.

Note: Where applicable, a relevant section number of Title 38, United States Code, is provided in parentheses after the answer.

1. Is there a law governing a servicemember's right to reemployment rights after his or her completion of military training or service?

Yes. Since 1940, there has been such a law, known as the Veterans' Reemployment Rights (VRR). On October 13, 1994, President Clinton signed the Uniformed Services Employment and Reemployment Rights Act – a comprehensive revision of the VRR, USERRA became fully effective December 12, 1994, and is contained in Title 38, United States Code, at chapter 43. (Sections 4301 through 4333)

2. Who is eligible for reemployment rights under USERRA following military service?

The individual must meet five conditions, or "eligibility criteria." The individual:
a. must hold or have applied for a civilian job. (Note: Jobs employers can show to be held for a brief, nonrecurrent period with no reasonable expectation of continuing for a significant period do not qualify for protection.)
b. must have given written or verbal notice to the civilian employer prior to leaving the job for military training or service except when precluded by military necessity.

c. must not have exceeded the 5-year cumulative limit on periods of service.
d. must have been released from service under conditions other than dishonorable.
e. must report back to the civilian job in a timely manner or submit a timely application for reemployment. (generally, Section 4312)

3. Are there reemployment rights following voluntary military service? State callups?

USERRA applies to voluntary as well as involuntary military service, in peacetime as well as wartime. However, like the VRR law, USERRA does not apply to state callups of the National Guard for disaster relief, riots, etc. Any protection for such duty must be provided by the laws of the state or territory involved. (Section 4303)

4. When is prior notice to the civilian employer required? How is such notice to be given?

The person who is performing the service (or an official representative of the uniformed service) must give advance written or verbal notice to the employer. The notice requirement applies to all categories of training or service. Notice is not required if precluded by military necessity or, if the giving of such notice is otherwise impossible or unreasonable.

A determination of military necessity shall be made pursuant to regulations prescribed by the Department of Defense. It is reasonable to expect that situations where notice is not required will be rare. The law does not specify how much advance notice is required, but the Department of Defense advises members of the National Guard and Reserve that they should provide their employers as much advance notice as they can. (Section 4312)

5. Is an employer entitled to proof that military duty for which an employee was granted a leave of absence was actually performed?

Yes. USERRA provides that following periods of military service of 31 days or more, the returning employee must, upon the employer's request, provide documentation that establishes length and character of the service and the timeliness of the application for reemployment. Reemployment may not be delayed, however, if such documentation does not exist or is not readily available. In general, the following documents have been determined by the Secretary of Labor to satisfy proof of eligibility for reemployment: discharge papers,

leave and earnings statements, school completion certificate, endorsed orders, or a letter from a proper military authority.
While USERRA does not address documentation of shorter periods of military service, if doubt exists, an employer could contact the employee's military command with questions about a specific period of service. (Section 4312)

6. How is the 5-year limit computed?

Service in the uniformed services, except the types of service described below, counts toward the cumulative 5-year limit of military service a person can perform while retaining rights under USERRA. When a person starts a new job with a new employer, he or she receives a fresh 5-year entitlement. Duty performed prior to the effective date of USERRA is addressed in question #8.
USERRA's cumulative 5-year limit does not include certain kinds of military training or service. Exceptions to the 5-year limit can be grouped into three broad categories:

a. Unable (through no fault of the individual) to obtain release from service or service in excess of five years to fulfill an initial period of obligated service (generally imposed on Active component aviators or others who undergo extensive initial training in certain technical military specialties).
b. Required drills and annual training and other training duty certified by the military to be necessary for professional development or skill training/retraining.
c. Service performed during time of war or national emergency or for other critical missions/contingencies/military requirements. Involuntary service of this type is exempt from the 5-year limit. Voluntary service in support of the mission/contingency/military requirement is also exempt. (Section 4312)

7. Can an employee be required to use earned vacation while performing military service?

No. As under the VRR law, a person may not be forced to use earned vacation. Employees are entitled to earned vacation or leave in addition to time off to perform military service. A rare exception would be a case where there is a standard plant shutdown at a certain time of year and all employees must take their vacations during that period and an employee's period of military service happens to coincide with that period. (Section 4316)

8. Now that USERRA has been enacted, can a person serve an additional five years and still have reemployment rights?

Not necessarily. USERRA provides that military service performed prior to December 12, 1994, will count toward the USERRA 5-year limit if it counted against the limits contained in the old law. (transition rules—not codified)

9. How much time off is an employee entitled to prior to reporting for military service?

Although an exact amount of time is not specified in USERRA, an employee, at a minimum, needs to be given sufficient time to travel to the place where the military duty is to be performed.

10. After the completion of military service, what is the time frame within which a person has to report back to work or apply for reemployment?

For periods of service of up to 30 consecutive days, the person must report back to work for the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and safe transportation home, plus an 8-hour period for rest. If reporting back within this deadline is "impossible or unreasonable" through no fault of the employee, he or she must report back as soon as possible after the expiration of the 8-hour period.

After a period of service of 31-180 days, the person must submit a written or verbal application for reemployment with the employer not later than 14 days after the completion of the period of service. If submitting the application within 14 days is impossible or unreasonable through no fault of the employee, he or she must submit the application as soon as possible thereafter.

After a period of service of 181 days or more, the person must submit an application for reemployment not later than 90 days after completion of the period of service. These deadlines to report to work or apply for reemployment can be extended up to two years to accommodate a period during which a person was hospitalized for or convalescing from an injury or illness that occurred or was aggravated during a period of military service. (Section 4312)

In either case, the person does not automatically forfeit the right to reemployment, but will be "subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work." (Section 4312)

11. Does USERRA give a person the right to benefits from the civilian employer during a period of military training or service?

Yes. USERRA gives an employee the right to elect continued health insurance coverage, for himself or herself and his or her dependents, during periods of military service. For periods of up to 30 days of training or service, the employer can require the person to pay only the normal employee share, if any, of the cost of such coverage. For longer tours, the employer is permitted to charge the person up to 102 percent of the entire premium. If the employee elects coverage, the right to that coverage ends on the day after the deadline for him or her to apply for reemployment or 18 months after the absence from the civilian job began, whichever comes first.

USERRA gives an employee and previously covered dependents the right to immediate reinstatement of civilian health insurance coverage upon return to the civilian job. The health plan cannot impose a waiting period and cannot exclude the returning employee based on preexisting conditions (other than for those conditions determined by the Federal government to be service-connected). This right is not contingent on an election to continue coverage during the period of service. (Section 4317)

To the extent that an employer offers other non-seniority benefits (e.g., holiday pay or life insurance coverage) to employees on furlough or a leave of absence, the employer is required to provide those same benefits to an employee during a period of service in the uniformed services. If the employer's treatment of persons on leaves of absence varies according to the kind of leave (e.g., jury duty, educational, etc.), the comparison should be made with the employer's most generous form of leave. Of course, you must compare periods of comparable length. An employee may waive his or her rights to these other non-seniority benefits by knowingly stating, in writing, his or her intent not to return to work. However, such statement does not waive any other rights provided by USERRA. (Section 4316)

12. What is an employer required to provide to a returning servicemember upon reemployment?

There are four basic entitlements (if the eligibility criteria in answer #2 are met):

a. Prompt reinstatement (generally a matter of days, not weeks, but will depend

on the length of absence).
b. Accrued seniority, as if continuously employed. This applies to rights and benefits determined by seniority as well. This includes status, rate of pay, pension vesting, and credit for the period for pension benefit computations.
c. Training or retraining and other accommodations. This would be particularly applicable in case of a long period of absence or service-connected disability.
d. Special protection against discharge, except for cause. The period of this protection is 180 days following periods of service of 31-180 days. For periods of service of 181 days or more, it is one year. (generally, Section 4313)

13. Is the returning employee always entitled to have the same job back?

No. USERRA provides that, if the period of service was less than 91 days, the person is entitled to the job he or she would have attained absent the military service, provided the person is, or can become, qualified for that job. If unable to become qualified for a new job after reasonable efforts by the employer, the person is entitled to the job he or she left.

For periods of service of 91 days or more, the employer may reemploy the returning employee as above (i.e., position that would have been attained or position left), or in a position of "like seniority, status and pay" the duties which the person is qualified to perform. (Section 4313)

14. What if a person is not qualified for the reemployment position?

If a person has been gone from the civilian job for months or years, civilian job skills may have been dulled by a long period without use. A person must be (or become) qualified to do the job to have reemployment rights, but USERRA requires the employer to make "reasonable efforts" to qualify that person. "Reasonable efforts" means actions, including training, that don't cause undue hardship to the employer. If a person can't become qualified in the positions described in #13 after reasonable efforts by the employer, and if not disabled, the person must be employed in any other position of lesser status and pay, which he or she is qualified to perform, with full seniority. (Section 4313)

15. What if a returning servicemember is disabled?

USERRA also requires the employer to make "reasonable efforts" to accommodate persons with a disability incurred or aggravated during military service. If a person returns from military service and is suffering from a disability that

cannot be accommodated by reasonable employer efforts, the employer is to reemploy the person in some other position he or she is qualified to perform and which is the "nearest approximation" of the position to which the person is otherwise entitled, in terms of status and pay, with full seniority.

A disability need not be permanent to confer rights under USERRA. For example, if a person breaks a leg during annual training, the employer may have an obligation to make reasonable efforts to accommodate the broken leg, or to place the person in another position, until the leg has healed. (Section 4313)

16. How does the new law address discrimination by an employer or prospective employer?

Section 4311(a) of USERRA provides as follows:

> "A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in the uniformed services shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation."

Section 4311(c)(1) further provides:

> "An employer may not discriminate in employment against or take any adverse employment action against any person because such person has taken an action to enforce a protection afforded any person under this chapter, has testified or otherwise made a statement in or in connection with any proceeding under this chapter, has assisted or otherwise participated in an investigation under this chapter, or has exercised a right provided for in this chapter."

These two provisions provide a very broad protection against employer discrimination, much broader than the VRR law provided. The second provision prohibits, for the first time, reprisals against any person, without regard to military connection, who testifies or otherwise assists in an investigation or other proceeding under USERRA. (Section 4311)

17. Who has the burden of proof in discrimination cases?

The employer or prospective employer. USERRA provides that a denial of employment or an adverse action taken by an employer will be unlawful if a

service connection was a motivating factor (not necessarily the only factor) in the denial or adverse action "unless the employer can prove that the action would have been taken in the absence of such membership, application for membership or obligation." (Section 4311)

18. Where do I go for information or assistance?

Employers should contact the National Committee for Employer Support of the Guard and Reserve (NCESGR). You can contact a NCESGR ombudsman toll-free at (800) 336-4590. Ombudsmen are trained to provide information and informal mediation services concerning civilian job rights of National Guard and Reserve members. As mediators, they act as neutrals, with a goal of helping bring about solutions to conflicts that are legal and equitable to each of the parties involved.

Sometimes, employers are particularly inconvenienced by the timing of proposed military duty by an employee-Reservist. For example, a scheduled drill weekend by a "key" employee may disrupt a major project, special product promotion, annual inventory, etc.

In such cases, NCESGR suggests employers contact the military commander involved to seek relief from the impending hardship. Experience has shown that commanders are sensitive to employer concerns and can often assist, when military requirements permit, by rescheduling the proposed military duty or assigning someone else to perform it.

Ombudsman Services

National Guardsmen, Reservists, or their employers who experience problems resulting from employee participation in the National Guard or Reserve, may request assistance from one of NCESGR's ombudsmen.

Ombudsmen provide information about rights and responsibilities under the law and seek a solution through mediation that can provide quick problem resolution. This service (whether local or national) is informal; discussions are not entered into personnel records. The objective is to eliminate misunderstandings and resolve difficulties to the satisfaction of all.

Each of the 54 ESGR committees have trained ombudsmen who are ready to assist in resolving employer-reservist conflicts. Most state committee ombudsmen are local business leaders; they

understand both sides of the problem and can help mediate. State committee ombudsmen may be identified through unit commanders, state Adjutants General, or by calling the toll-free number below.

The first attempt to resolve a problem should be made at the employer-employee an atmosphere of mutual cooperation. If that fails, unit commanders should be consulted. Commanders have a vested interest in the problem and may be able to explain the situation or suggest compromises that will satisfy everyone's needs.If those efforts fail, e-mail us at the address below and we'll put you in touch with an ombudsman who is qualified to help and is sympathetic to the needs of both employers and employees. As with all communications, you should provide full details of the problem and an address and telephone number where you can be reached.

For more information about ESGR Ombudsman Services, NCESGR's WebMaster
National Committee for Employer
Support of the Guard and Reserve
1555 Wilson Blvd, Suite 200
Arlington, VA 22209-2405
Toll-Free: 800-336-4590

Please note: NCESGR's ombudsmen handle only employer-employee conflicts involving military service. Recruiting and inspector general complaints should be forwarded to the appropriate agencies. None of the sources listed above have authority to enforce the law. Cases that require legal advice or assistance are referred to the United States Department of Labor.

Employment and Reemployment Rights Questions and Answers for National Guard and Reserve Members

NOTE: This material is for information only and should not be considered a legal authority. While this factsheet is directed to members of the National Guard and Reserve, it should be noted that Active component members, Public Health Service Commissioned Corps members, and certain others are also protected by the Uniformed Services Employment and Reemployment Rights Act (USERRA), if they meet the eligibility criteria. Contact the National Committee for Employer Support of the Guard and Reserve at (800) 336-4590 with specific questions regarding USERRA.

1. Is there a law governing reemployment rights after military training or service?

Yes. Since 1940, there has been such a law, known as the Veterans' Reemployment Rights (VRR) law. On October 13, 1994, President Clinton signed the Uniformed Services Employment and Reemployment Rights Act, a comprehensive revision of the VRR law. USERRA became fully effective December 12, 1994, and is contained in Title 38, United States Code at chapter 43.

2. Am I eligible for reemployment rights under USERRA if I perform military service?

Yes, provided you meet five conditions, or "eligibility criteria":

a. You must hold a civilian job. (Note: Jobs that are held for a brief, nonrecurrent period with no reasonable expectation that the employment will continue indefinitely or for a significant period do not qualify for protection.)

b. You must give notice to your civilian employer that you will be leaving the job for military training or service.

c. You must not exceed the 5-year cumulative limit on periods of service.

d. You must be released from service under "honorable conditions."

e. You must report back to your civilian job in a timely manner or submit a timely application for reemployment.

3. Do I have reemployment rights following voluntary military service? State callups?

USERRA applies to voluntary as well as involuntary military service, in peacetime as well as wartime. However, like the VRR law, USERRA doesnot apply to state callups of the National Guard for disaster relief, riots, etc. Any protection for such duty must be provided by the laws of the state involved.

4. When is prior notice to my civilian employer required? How is such notice to be given?

It is necessary that the person who is performing the service (or an official representative of the uniformed service) give advance written or verbal notice to the employer. The notice requirement applies to all categories of training or service. Notice is not required if precluded by military necessity or, if the giving of such notice is otherwise impossible or unreasonable.

A determination of military necessity shall be made pursuant to regulations prescribed by the Department of Defense. It is reasonable to expect that situations where notice is not required will be rare. The law does not specify how much advance notice is required, but you should give your employer as much advance notice as possible.

5. How is the 5-year limit computed?

Service that you have performed, except the service described below, counts toward the cumulative 5-year limit of service you can perform while retaining rights under USERRA. When you start a new job with a new employer, you receive a fresh 5-year entitlement. Duty performed prior to the effective date of USERRA is addressed in question #8.

USERRA's cumulative 5-year limit does not include certain kinds of military training or service. Exceptions to the 5-year limit can be grouped into three broad categories:

> a. Unable (through no fault of yours) to obtain orders releasing you from service or service in excess of five years to fulfill an initial period of obligated service, generally imposed on Active component aviators or others who undergo extensive initial training in certain technical military specialties.

b. Required drills and annual training and other training duty certified by the military to be necessary for professional development or skill training/retraining.

c. Service performed during time of war or national emergency or for other critical missions, contingencies, or military requirements. Involuntary service of this type is exempt from the 5-year limit. Voluntary service in support of a mission, contingency, or military requirement is also exempt.

6. I am a Federal employee, and I receive 15 days of paid military leave each year. My agency's personnel office has informed me that I have no right to time off from work for military training or service beyond this 15 days. Is that right?

No. As a Federal employee, you have the right to 15 days of paid military leave each fiscal year, under Title 5 U.S. Code. When you have exhausted your right to paid leave under Title 5, you still have the right to use your accrued civilian leave or unpaid leave under USERRA, because USERRA applies to the Federal Government as well as all other civilian employers.

If you wish to continue your civilian pay uninterrupted and you have annual leave on the books, you can use that annual leave for your military training or service. USERRA gives you the explicit right to do this.

If your employer is a state or local government that grants paid military leave, the result would be the same. Most states and many local governments do grant employees paid military leave. When you have exhausted your paid leave, USERRA gives you the right to use of accrued vacation or unpaid leave of absence.

7. Can I be required to use my earned vacation while performing military service?

No. As under the VRR law, you may not be forced to use earned vacation. You are entitled to earned vacation or leave in addition to time off to perform military service. A rare exception would be a case where there is a standard plant shutdown at a certain time of year and all employees must take their vacations during that period and your period of military service happens to coincide with that period.

8. Now that USERRA has been enacted, can I serve an additional five years and still have reemployment rights?

Not necessarily. USERRA provides that military service performed prior to December 12, 1994, will count toward the USERRA 5-year limit if it counted against the limits in the old law.

9. After military service, how long do I have to report back to work or apply for reemployment?

For periods of service of up to 30 consecutive days, you must report back to work for the first full regularly scheduled work period on the day following the completion of the period of service and safe transportation home, plus an 8-hour period for rest. If reporting back within this deadline is "impossible or unreasonable" through no fault of your own, you must report back as soon as possible after the end of the 8-hour period.

After a period of service of 31-180 days, you must submit an application for reemployment, either written or verbal, with the employer not later than 14 days after the completion of the period of service. If submitting the application within 14 days is impossible or unreasonable through no fault of your own, you must submit the application as soon as possible thereafter.

After a period of service of 181 days or more, you must submit an application for reemployment not later than 90 days after completion of the period of service. These deadlines to report to work or apply for reemployment can be extended up to two years to accommodate a period during which you were hospitalized for or convalescing from a service-connected injury or illness.

10. What if I am late in reporting back to work or applying for reemployment without a valid excuse?

In either case, you do not automatically forfeit your right to reemployment, but you will be "subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work."

11. Does USERRA give me the right to benefits from my civilian employer during my military training or service?

Yes. USERRA gives you the right to elect continued health insurance coverage, for yourself and dependents, during periods of military service. For periods of up to 30 days of training or service, the employer can require you to pay only the employee share, if any, of the cost of such coverage.

For longer tours, the employer is permitted to charge you up to 102 percent of the entire premium. If you elect coverage, your right to that coverage ends on the day after the deadline for you to apply for reemployment or 18 months after your absence from your civilian job began, whichever comes first.

USERRA gives you and your previously covered dependents the right to immediate reinstatement of your civilian health insurance coverage upon return to your civilian job. There must be no waiting period and no exclusion of preexisting conditions (other than for those conditions determined to be service-connected). This right is not contingent on your having elected to continue that coverage during your period of service.

To the extent that your employer offers other non-seniority benefits (e.g., holiday pay or life insurance coverage) to employees on furlough or leave of absence, the employer is required to provide those same benefits to you, during your period of service in the uniformed services. If the employer's treatment of persons on leaves of absence varies according to the kind of leave (jury duty, educational, etc.), the comparison should be made with the employer's most generous form of leave. Of course, you must compare periods of comparable length.

12. To what am I entitled upon my application for reemployment?

You have four basic entitlements (if you meet the eligibility criteria in answer #2):

a. Prompt reinstatement (generally a matter of days, not weeks, but will depend on your length of absence).

b. Accrued seniority, as if you had been continuously employed. This applies to rights and benefits determined by seniority as well. This includes status, rate of pay, pension vesting, and credit for the period for pension benefit computations.

c. Training or retraining and other accommodations. This would be particularly

applicable in case of a long period of absence or service-connected disability.
d. Special protection against discharge, except for cause. The period of this protection is 180 days following periods of service of 31-180 days. For periods of service of 181 days or more, it is one year.

13. When I return from military duty will I get my old job back?

USERRA provides that, if your period of service was less than 91 days, you are entitled to the job you would have attained if you hadn't left, provided that you are still, or can become, qualified for that job. If unable to become qualified for a new job after reasonable efforts by the employer, you are entitled to the job you left.

For periods of service of 91 days or more, the employer may reemploy you as above (i.e., position you would have attained or position you left), or in a position of "like seniority, status and pay" the duties of which you are qualified to perform.

14. What if I'm not qualified for my reemployment position? What if I'm injured or disabled?

If you have been gone from your civilian job for months or years, your civilian job skills may have been dulled by a long period without use. You must be qualified to do the job in order to have reemployment rights, but USERRA requires the employer to make "reasonable efforts" to qualify you.

"Reasonable efforts" means actions, including training, that don't cause undue hardship to the employer. If you can't become qualified in the positions described in #13 after reasonable efforts by your employer and you are not disabled, you must be employed in any other position of lesser status and pay, the duties of which you are qualified to perform, with full seniority.

USERRA also requires the employer to make "reasonable efforts" to accommodate a service-connected disability. If upon your return from military service you are suffering from a service-connected disability that cannot be accommodated by reasonable employer efforts, the employer is to reemploy you in some other position that you are qualified to perform and which is the "nearest approximation" of the position to which you are otherwise entitled, in terms of seniority, status, and pay.
A disability need not be permanent in order to confer rights under USERRA. For

example, if you break your leg during your annual training, your employer may have an obligation to make reasonable efforts to accommodate your broken leg, or to place you in another position, until your leg has healed.

15. Does the new law protect me from discrimination by my employer or a prospective employer?

Yes. Section 4311(a) of USERRA provides the following:

"A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in the uniformed services shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation."

Section 4311(c)(1) further provides:

"An employer may not discriminate in employment against or take any adverse employment action against any person because such person has taken an action to enforce a protection afforded any person under this chapter, has testified or otherwise made a statement in or in connection with any proceeding under this chapter, has assisted or otherwise participated in an investigation under this chapter, or has exercised a right provided for in this chapter."

These two provisions provide a very broad protection against discrimination, much broader than the VRR law provided. The second provision prohibits, for the first time, reprisals against any person, without regard to military connection, who testifies or otherwise assists in an investigation or other proceeding under USERRA.

16. Who has the burden of proof in these cases?

The employer or prospective employer. USERRA provides that a denial of employment or an adverse action taken against you by an employer will be unlawful if your service connection was a motivating factor (not necessarily the only factor) in the denial or adverse action "unless the employer can prove that the action would have been taken in the absence of such membership, application for membership ... or obligation."

17. Where do I go for information or assistance?

National Guard and Reserve members with questions or concerns about their civilian job rights should first consult with their command.

For assistance, contact the National Committee for Employer Support of the Guard and Reserve (NCESGR). You can contact a NCESGR ombudsman toll-free at (800) 336-4590. Ombudsmen are trained to provide information and informal mediation services concerning civilian job rights of National Guard and Reserve members. If you believe your employer has violated your rights under USERRA and you wish to file a formal complaint, you should contact the Veterans' Employment and Training Service of the United States Department of Labor.

APPENDIX F

USERRA and Federal Thrift Savings Plans

Summary of Uniformed Services Employment And Reemployment Rights Act (USERRA) As It Pertains To Thrift Savings Plans (TSPs)

This reference guide and example are provided as clarification of **TSP Bulletin 95-13**. It is not intended to replace the bulletin. Please refer to TSP Bulletin 95-13 for more detailed information.

The Uniformed Services Employment and Reemployment Rights Act (USERRA), enacted on October 13, 1994, includes provisions to allow all eligible employees the opportunity to make up any Thrift Savings Plan (TSP) contributions that were not made to their TSP accounts because they separated (or were in a leave-without-pay status) to perform military service. TSP Bulletin 95-13 defines eligible employees as persons who separated (or entered in a leave-without-pay status) to perform military service and who were restored or reemployeed under Chapter 43 of Title 38, U.S.C. on or after August 2, 1990. Personnel offices may solicit self identification of employees in addition to automated methods to identify potentially eligible employees. When the employee has been identified, the personnel representative may make an appointment with him or her to explain the impact of USERRA. This is an opportunity to advise the employee of the amount of retroactive agency automatic 1% contributions. To assist the employee in making an informed decision, the personnelist may compute an estimate of retroactive employee contributions based on the employee's election.

Employees have until April 21, 1996 or one year from the date of reemployment, whichever is later, to submit a written request to the personnel office to make up the missed employee contributions, or their rights are forfeited. Agency Automatic 1% contributions should be forwarded to TSP by June 20, 1995. Belated submissions will continue to accrue lost earnings at the cost of the employing agency.

1. Employee Contributions: Eligible employees may choose to make retroactive contributions to their TSP accounts. Such contributions are made via payroll deductions from the employee's biweekly pay. The rate(s) of basic pay for the retroactive period must be furnished to employee's civilian payroll office. For the portion of the retroactive period when the employee did not receive a civilian salary, the rate of basic pay used to calculate TSP contributions, including the Agency Automatic 1%, is the basic pay to which the employee would have been entitled had he or she remained continuously employed. TSP Bulletin 95-13, Paragraph II.F., defines the retroactive period. Employees may change the amount of their contributions one time for each TSP Open Season during which they were eligible to participate, except that they were separated from civilian employment (or on LWOP) to perform military duty. An election to make a retroactive open season election is treated similarly to the error correction process. The fund allocations for all contributions must be identical to those indicated on the most current TSP-1.

2. Government Matching Contributions: Matching is available only to FERS employees if they choose to make retroactive contributions. If employees are currently contributing to TSP, government

matching contributions will be invested in accordance with current allocations. Lost earnings will be paid on the retroactive government matching contributions (see paragraph 4 below).

3. Agency Automatic 1%: The personnel office is responsible for determining the retroactive period and for submitting corresponding basic pay rates to payroll. The personnel representative should find this information in the OPF. Payroll will submit the appropriate amount to the National Finance Center (NFC) to be invested in accordance with the current TSP-1.

4. Lost Earnings: A lost earnings record will be submitted by the employee's civilian payroll office for each pay period covered by the retroactive period. The TSP will calculate lost earnings on all retroactive agency contributions using the G-Fund rate of return unless the employee submitted one or more interfund transfer requests during the period of separation. In this case, lost earnings will be calculated using the G-Fund rate of return until the first interfund transfer request was processed. Contributions subject to lost earnings will be moved to the investment funds indicated on interfund transfer requests and lost earnings will then be calculated based on those investment funds. The contribution is traced through any additional interfund transfers that were processed during the lost earnings calculation period.

5. Forfeitures: If a FERS employee separated to perform military service before he or she was vested and thus forfeited agency automatic contributions, he or she is entitled to have these funds restored. It is incumbent on the employee to notify the personnel office of the forfeiture. TSP-5-R has been issued by TSP to be used to request restoration. Please refer to TSP Bulletin 95-18 for procedures to request restoration of forfeited funds.

6. Withdrawals: If the employee received an automatic cash out or was required to withdraw his or her TSP funds prior to March 1995, he or she may elect to reinvest the full amount of the withdrawal back into TSP. In certain cases, if a taxable distribution was declared on a TSP loan and the employee returns the amount of the withdrawal to the TSP, the taxable distribution that was declared on the loan may be reversed. In such a case, regular loan payments are resumed.

EXAMPLE #1:

In July 1991 TSP Open Season Mike submits a TSP-1 to contribute 3% of basic pay, allocating 100% to C-Fund. On October 1, 1991 Mike enters LWOP status to perform military duty. Mike returns to his civilian job March 12, 1992. At this time he resumes contributions at the 3% rate with 100% in the C-Fund. He has made no change since. On June 1, 1995 he is contacted by his employing agency and notified of his right to make retroactive contributions under USERRA.

--Mike has the opportunity to make retroactive contributions which will be based on the TSP-1 on file, at the 3% rate, 100% in the C-Fund. Mike will be entitled to the Agency Automatic 1% and Agency matching. Lost earnings will be calculated at the G-Fund rate of return only on the Agency Automatic 1% and on the Agency Matching Contributions. Retroactive contributions will be invested according to his current contribution allocation which is still 100% C-Fund.

--A TSP Open Season occurred during Mike's LWOP. Thus, he may submit a TSP-1 to change the amount of the contribution. However, the contributions will be invested according to the allocations indicated on his current TSP-1. If, for example Mike wants to make retroactive contributions at 5% of Basic Pay (instead of 3%), this change would be effective the first full pay period in January

and would end with the pay period prior to the first full pay period in July 1992. Effective with the July 1992 open season, Mike's contributions would return to 3%. (Reason: Mike had an opportunity to make an open season election in July 1992 yet remained at the 3% contribution level.)

--The personnel office should provide the payroll office with the period during which agency automatic 1% contributions are due. In this case that period of time begins on October 1, 1991 and terminates at the end of the pay period prior to the pay period in which Mike returned to duty. The personnel office should also provide the payroll office with the period during which agency matching contributions must be calculated. In the above example, the periods are from October 1, 1991 through December 1991, at 3% and January 1992 through June 1992, at 5%. Applicable salary rates should be provided for each period individually.

EXAMPLE #2

Pat is a CSRS employee contributing 2% of basic pay to TSP with 100% invested in the G-Fund. Pat is placed on LWOP in February 1994 to perform military service. He returns to duty in June 1994. In June 1995 Pat's employing office notifies him of his rights under USERRA.

--Pat may reinstate the TSP-1 election that was in effect in February 1994. As no open season occurred during Pat's leave, he does not have the option to change the contribution amount. He is locked into the 2% contribution rate. Pat is not entitled to the Agency Automatic 1% or the Agency Matching because he is covered under CSRS.

EXAMPLE #3

Debbie was first employed on October 1, 1992. November 1, 1992 she enters LWOP to perform military service. She remains on LWOP until she returns to her civilian position on June 2, 1993. During the July 1993 open season she enrolls in TSP for the first time.

--Debbie may not make retroactive contributions under the USERRA provisions. This is because she was not eligible to participate in TSP until the July 1993 Open Season.

EXAMPLE #4

Colette is a FERS employee who, prior to her separation on February 15, 1992 to perform military service, participated in TSP (5% of Basic Pay with 50% in the G-Fund and 50% in the F-Fund). Colette is reemployed on July 1, 1995 under Chapter 43 of Title 38, U.S.C.

--Immediately upon reemployment, Colette's agency will give her the opportunity to submit a Form TSP-1 to make current contributions. The fund allocation she requests will be the prospective investment allocation as well as the investment allocation for retroactive contributions. Within 60 days of becoming reemployed Colette's agency should advise her of her opportunity to make retroactive contributions. If she chooses to make retroactive payments, she is locked into the 5% contribution amount until her open season opportunity in July 1992. She can change the amount of her contribution for each open season during which she was separated in order to perform military service.

--The agency determines the retroactive period and the basic pay amounts on which the agency automatic 1% will be computed and submits this information to the civilian payroll office.

APPENDIX G
OPM News Release (1995): Benefits For Federal Employee Reservists Outlined

NEWS RELEASE

FOR IMMEDIATE RELEASE
December 28, 1995

CONTACT: Sharon J. Wells
(202) 606-1800, fax: 606-2264

BENEFITS FOR FEDERAL EMPLOYEE RESERVISTS OUTLINED

Washington, D.C.--Office of Personnel Management Director Jim King yesterday issued a notice to heads of Executive departments and agencies providing a summary of the rights and benefits of those federal employees who, as military reservists, are being called to assist in the international efforts in former Yugoslavia. This mobilization is called “Operation Joint Endeavor."

"The Federal Government is by far the largest single employer of members of the Armed Forces Reserves, and we as Federal employees are proud of the dedication and commitment of these fellow workers in a time of international crisis," said Director King.

The package contained specifics on the rights and benefits of federal civilian employees who perform active military duty including information on:

- Employee Assistance Programs (EAP's);
- pay;
- military leave;
- annual and sick leave;
- lump-sum leave payments;
- health benefits;
- life insurance;
- retirement; and,
- return to civilian duty.

On the last point, an employee on military duty is guaranteed the right to return to the position he or she would have held but for the military duty.

"Our first obligation as an employer is to make sure that those friends and colleagues who perform active military duty are able to leave their employment temporarily with the knowledge that their affairs are in order and their rights protected," Jim King continued.

Agencies were urged to share the information with all affected employees as soon as possible.

Office of Personnel Management
Theodore Roosevelt Building
1900 E. Street, NW
Room 5F12

Washington, D.C. 20415-0001

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

OFFICE OF THE DIRECTOR
MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES
FROM: JAMES B. KING, DIRECTOR
SUBJECT: Operation Joint Endeavor

Pursuant to section 12304 of title 10, United States Code, and Executive Order l2982 of December 8, 1995, the Secretary of Defense has delegated to the Secretaries of the Military Departments the authority to order to active duty Selected Reserve units and individual members not assigned to units for a period of up to 270 days to assist in the international efforts in former Yugoslavia. This mobilization is called "Operation Joint Endeavor."
The Federal Government is by far the largest single employer of members o£ the Armed Forces Reserves, and we as Federal employees are proud of the dedication and commitment of these fellow workers in a time of international crisis. Our first obligation as an employer is to make sure that those friends and colleagues who perform active military duty are able to leave their employment temporarily with the knowledge that their affairs are in order and their rights protected. Federal law provides many important rights and benefits for Federal employees who perform active military duty. An overview of these rights and benefits, including changes made necessary by the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), is provided in attachment 1. I urge agencies to share this information with all affected employees as soon as possible.

USERRA generally requires an agency to place an employee entering the military on leave without pay unless the employee requests to be separated. Employees may also choose to be placed on military leave or paid leave, as appropriate. In any event, an employee entering on military duty is guaranteed the right to return to the position he or she would have held but for the military duty.
Finally attachment 2 reminds agencies of their authority and obligation to provide certain premium pay benefits to civilian employees who perform emergency work in support of Operation Joint Endeavor.

Attachments

Attachment 1

EMPLOYEE RIGHTS AND BENEFITS OF FEDERAL CIVILIAN EMPLOYEES WHO PERFORM ACTIVE MILITARY DUTY

Civilian Federal employees who are members of the Uniformed Services and who are called to active duty (or volunteer for active duty) are entitled to the following rights and benefits:

1. EMPLOYEE ASSISTANCE PROGRAMS(EAPs). Employee Assistance Programs can be very helpful to employees and their families in coping with the stress and disruption associated with a call to active military duty. EAP's provide short-term counseling and referral services to help with financial, emotional, and dependent care problems. These services are available to employees who have been called to active military duty (or who volunteer for such duty) and to employees who are family members of those who are performing active military duty. In addition, many EAP's offer services to family members of employees.

2. PAY. Employees performing active military duty will receive compensation from the Armed Forces in accordance with the terms and conditions of their military enlistment or commission. They will now receive any compensation from their civilian employing agency unless they elect to use military leave, annual leave, or sick leave as described in paragraphs 3 and 4 below. As usual, agencies should continue the payment of annual premium pay for administratively uncontrollable overtime (AUO) work, availability pay for criminal investigators, regularly scheduled standby duty, or Sunday premium pay (when Sunday is part of the employee's regularly scheduled non-overtime civilian tour of duty) on days of military leave, annual leave, or sick leave.

3. MILITARY LEAVE. Employees who perform active military duty may request the use of paid military leave, as specified in 5 U.S C. 6323(a). Under the law, an eligible full-time employee accrues 15 calendar days of military leave each fiscal year, and any unused military leave at the end of the fiscal year (up to 15 calendar days) is carried forward for use in addition to the 15 days credited at the beginning of the new fiscal year. Part-time career employees accrue military leave on a prorated basis. Full-time employees may have up to 30 calendar days of military leave for use during a fiscal year. However, an employee who has more than 15 calendar days of unused military leave must use the excess amount of leave before the end of the fiscal year in order to avoid forfeiture. Employees who elect to use military leave will receive full compensation from their civilian position for each workday charged to military leave, in addition to their military pay for the same period.

Employees who perform active military duty in support of Operation Joint Endeavor may not be granted an additional 22 days of military leave under 5 U.S.C. 6323 (b) because that type of military leave is for the purpose of providing military aid to assist domestic civilian authorities to enforce the law or protect life and property.

4. ANNUAL AND SICK LEAVE. Employees who perform active military duty may request the use of accrued and accumulated annual leave to their credit (under 5 U.S C. 6303 and 6304). and such

requests must be granted by the agency. Requests for sick leave (under 5 U.S.C. 6307) may be granted if appropriate under the normal requirements for such leave. In addition, requests for advanced annual or sick leave may be granted at the agency's discretion. Employees who use annual leave or sick leave will receive full compensation from their civilian position for all hours charged to annual or sick leave in addition to their military pay for the same period. Generally, employees do not earn annual or sick leave while in an extended nonpay status (e.g., LWOP for 2 weeks (80 hours) or more for most full-time employees)

5. LUMP-SUM PAYMENTS. Employees who enter into active military duty may choose (1) to have their annual leave remain to their credit until they return to their civilian position, or (2) receive a lump-sum payment for all accrued and accumulated annual leave. There is no requirement to separate from the civilian position in order to receive a lump-sum leave payment under 5 U.S.C. 5552.

6. HEALTH BENEFITS. Individuals performing active military duty under orders specifying a period of more than 30 days are provided medical and dental services, and their dependents are covered by care within an active military medical facility or the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS). If an employee covered by the Federal Employees Health Benefits Program (FEHBP) is separated or placed in an LWOP status to perform military service, his or her health benefits enrollment continues for up to 18 months, unless elects in writing to have the enrollment terminated. If the FEHBP enrollment continues, the employee is responsible for paying the usual enrollee share of the premium for the first 12 months of absence for military duty and 102 percent o£ the full premium (Government and enrollee shares) for the final 6 months of continued coverage. However, employees may incur a debt during the first 12 months of such absence, rather than paying concurrently.

Termination. If an employee elects in writing to have the FEHBP enrollment terminated or if the enrollment automatically terminates after 18 months of separation or LWOP related to military duty, the employee and the covered family members have a 31-day temporary extension of coverage to convert to a non-group policy. These employees are not eligible for temporary continuation of coverage (TCC) at the end of the 18-month period of continued FEHEP coverage.

7. LIFE INSURANCE. If an employee is separated or placed in an LWOP status for reasons related to military service, his or her Federal Employees' Group Life Insurance (both basic and all forms of optional coverage) continues for up to 12 months at no cost to the employee. If the life insurance coverage is terminated after 12 months of such absence, the employee has a 31-day temporary extension of coverage for conversion to a non-group policy.

8. RETIREMENT. An employee who is placed in an LWOP status while performing active military duty continues to be covered by the retirement law--i.e., the Civil Service Retirement System (CSRS) or the Federal Employees Retirement System (FERS) Death benefits will be paid as if he or she were still in the civilian position. If the employee becomes disabled for his or her civilian position during the LWOP and has the minimum amount of civilian service necessary for title to disability benefits (5 years for CSRS, 18 months for FERS), the employee will become entitled to disability benefits under the retirement law. Upon eventual retirement from civilian service, the period of military service is creditable under either CSRS or FERS, subject to the normal rules for crediting military service.

If an employee separates to enter active military duty, he or she generally will receive retirement credit for the period of separation when the employee exercises restoration rights to his or her civilian position. If the separated employee does not exercise the restoration right, but later re-enters Federal civilian service, the military service may be credited under the retirement system, subject to the normal rules governing credit for military service. However, if an employee covered by CSRS is separated to enter active military duty during a period of war or national emergency as declared by Congress or proclaimed by the President, the employee is deemed not to be separated from his or her civilian position for retirement purposes, unless the employee applies for and receives a refund of his or her retirement deductions.

Thrift Savings Plan. For purposes of the Thrift Savings Plan (TSP), no contributions can be made, either by the agency or the employee, for any time in an LWOP status or for a period of separation. However, if employees are subsequently reemployed in, or restored to, a position covered by FERS or CSRS pursuant to 38 U.S C. chapter 43, they may make up missed contributions. FERS employees are entitled to receive retroactive Agency Automatic (1 percent) Contributions and, if they make up their own contributions, retroactive Agency Matching Contributions.

Also, if FERS employees separate and their Agency Automatic (1 percent) Contributions and associated earnings are forfeited because they did not meet the TSP vesting requirement, the employees are entitled to have these funds restored to their accounts after they are reemployed. In addition, if employees separate and their accounts are disbursed as automatic cashouts, the employees may return to the TSP an amount equal to the full amount of the payment after they are reemployed.

For more information, see TSP Bulletins 95-13, Implementation of the Uniformed Services Employment and Reemployment Rights Act of l994, and 95-20, Interim Regulations and Fact Sheet on Thrift Savings Plan Benefits Resulting from the Uniformed Services Employment and Reemployment Rights Act of 1994.

9. RETURN TO CIVILIAN DUTY. An employee who enters active military duty (voluntarily or involuntarily) from any position, including a temporary position, has full job protection, provided he or she applies for reemployment within the following time limits:

(A) Employees who served less than 31 days must report back to work at the beginning of the next scheduled workday following their release from service and the expiration of 8 hours after a time for safe transportation back to the employee's residence.

(B) Employees who served more than 30 days, but less than 181 days, must apply for reemployment within 14 days of release by the military.

(C) Employees who served more than 180 days have 90 days to apply for reemployment. Employees who served less than 91 days must be restored to the position for which qualified that they would have attained had their employment not been interrupted. Employees who served more than 90 days have essentially the same rights, except that the agency has the option of placing the employee in a position for which qualified of like seniority, status, and pay.

Upon return or restoration, an employee generally is entitled to be treated as though he or she had never left for purposes of rights and benefits based upon length of service. This means that the employee must

be considered for career ladder promotions, and the time spent in the military will be credited for seniority, successive within-grade increases, probation, career tenure, annual leave accrual rate, and severance pay. An employee who was on a temporary appointment serves out the remaining time, if any, left on the appointment. (The military activation period does not extend the civilian appointment.) An employee performing active military duty is protected from reduction in force (RIF) and may not be discharged from employment for a period of 1 year following separation (6 months in the case of a Reservist called to active duty under 10 U.S.C. l2304 for more than 30 days but less than 181 days or ordered to an initial period of active duty for training of not less than 12 consecutive weeks), except for poor performance or conduct or for suitability reasons.

NOTE: Employees in the intelligence agencies have substantially the same rights. but are covered under agency regulations rather than the Office of Personnel Management's regulations and have different appeal rights.

10. APPEAL RIGHTS. An employee or former employee of an agency in the executive branch (including the U.S. Postal Service) who is entitled to restoration in connection with military duty may appeal an agency's failure to properly carry out the law directly to the Merit Systems Protection Board (MSPB), or the employee may first submit a complaint to the Department of Labor, which will attempt to resolve it. If resolution is not possible, the Department may present the case to the Office of the Special Counsel, which may represent the employee in an appeal to the MSBP. Appeals to the Board must be submitted within 30 calendar days after the effective date of the action being appealed.

11. DOCUMENTING PERSONNEL ACTIONS.

Leave without Pay. LWOP must be documented on an SF 50, Notification of Personnel Action, with nature of action 473/LWOP-US and legal authorities Q3K/5 CFR 353 and ZJU/Operation Joint Endeavor. (Note: ZJU is a new legal authority that has been established to enable OPM and agencies to identify reservists who are involved in the international effort under Operation Joint Endeavor.) These same two authorities must also be used on the 292/RTD action when the reservist returns to civilian employment.

Health Benefits and Life Insurance. For those reservists with health benefits coverage while absent for reasons related to military duty, enter in block 45 of the SF 5 0 remark B66:

"Health benefits coverage will continue for 18 months unless you elect to cancel coverage You are liable for the employee share of the premiums for the first 365 days and for 102% of the full subscription charge after 365 days. Payment for coverage after 365 days must be made on a current basis; payment for the first 365 days may be made while you are absent or when you return."

For those reservists with Federal Employees' Group Life Insurance (FEGLI) coverage, enter in block 45 of the SF 50 remark B39:

"FEGLI coverage continues for up to 12 months in a nonpay status."

Separations. If the reservist requests separation rather than LWOP, the separation must be documented with nature of action 353/Separation-US and legal authorities Q3K/5 CFR 353 and ZJU/Operation Joint Endeavor. Follow the instructions in Chapter 9 or 11 (as appropriate) of *The Guide to*

Processing Personnel Actions, to document the reservist's restoration upon completion of his or her military service.

12. CONTACTS. For further information on employment rights and benefits of civilian Federal employees who perform active military duty, agencies should contact the following offices:

--For information on pay, military leave, and annual and sick leave, contact OPM's Compensation Administration Division, (202) 606-2858.

--For information on health benefits, life insurance, and retirement, contact the Insurance Officer or Retirement Counselor of your agency. Retirement Counselors may contact OPM's Agency Advisory Services Division, (202) 606-0788. Insurance Officers may contact the Office of Insurance Programs, Insurance Policy and Information Division, (202) 606-0191.

--For information on the Thrift Savings Plan, agency headquarters personnel offices may contact the Federal Retirement Thrift Investment Board, (202) 523-7507 Field installations should contact their headquarters TSP Coordinator for guidance.

--For information on return to civilian duty and appeal rights, contact OPM's Staffing Reinvention Office, (202) 606-0830.

--For information on documenting actions related to entering active military duty, contact OPM's Personnel Records and Systems Division. (202) 606-4415.

--For information on labor-management relations issues, contact OPM's Labor-Management Relations Division, (202) 606-2930.

Attachment 2

PREMIUM PAY FOR FEDERAL CIVILIAN EMPLOYEES WHO PERFORM EMERGENCY WORK IN SUPPORT OF OPERATION JOINT ENDEAVOR

The purpose of this attachment is to provide information about premium pay for civilian employees who perform emergency work in connection with "Operation Joint Endeavor."

Agencies are reminded of their authority under the law (5 U.S.C. 5547(b)) and OPM regulations (5 CFR 550.106) to make exceptions to the bi-weekly maximum earnings limitation. (Please note that overtime pay under the Fair Labor Standards Act of 1938, as amended, does not count toward this limitation) When the head of an agency or his or her designee determines that an emergency posing a direct threat to life or property exists, an employee who is performing work in connection With the emergency must be paid premium pay under the annual limitation of GS-15, step 10, rather than the GS-15, step 10, biweekly limitation. However, law enforcement officers (LEO's) are covered by the higher biweekly limitation in 5 U.S.C. 5547(c) and are not covered by the authority to apply the annual limitation during emergencies.

OPM encourages agencies to exercise their authority in the case of employees (other than LEO's) who perform emergency work in connection with Operation Joint Endeavor. Agency heads are required to make a determination as soon as practicable and to make entitlement to premium pay under the annual limitation effective as of the first day of the pay period in which the emergency began. Questions may be referred to OPM' s Compensation Administration Division on (202) 606-2858.

CHAPTER R

54TH FEDERAL LABOR RELATIONS COURSE

Negotiated Grievance Procedures and Grievance Arbitration

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Outline of Instruction

I. INTRODUCTION.

A. Grievance: "In labor law a complaint filed by an employee, or by his or her union representative, regarding working conditions and for resolution of which there is procedural machinery provided in the union contract." Black's Law Dictionary 702 (6th ed. 1990).

B. Arbitration: A process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard. Black's Law Dictionary 105 (6th ed. 1990).

II. NEGOTIATED GRIEVANCE PROCEDURES UNDER THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE.

A. Grievance Arbitration. A procedure or proceeding resulting from the voluntary contractual agreement of labor and management pursuant to which the parties submit unresolved disputes to an impartial third party for decision whose decision they normally have agreed in advance to accept as final and binding.

B. Public Sector Arbitration vs. Private Sector Arbitration.

C. Statutory Requirements for Grievance Procedures. 5 U.S.C. §§ 7121(a)-(b).

1. § 7121(a). Each collective bargaining agreement must have a grievance process.

2. § 7121(b). Each grievance process must:

a. Be fair, simple, and expeditious.

b. Allow grievances by exclusive representative.

c. Allow grievances by employee on own behalf.

d. Provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration that may be invoked by either the exclusive representative or the agency.

D. Scope and coverage.

1. Basic function: Grievance in the federal sector is expanded to include enforcing compliance with law and regulation as well as enforcing compliance with the collective bargaining agreement.

2. 5 U.S.C. § 7103(a)(9). Defines grievance as any complaint:

a. by any employee concerning any matter relating to the employment of the employee.

b. by any union concerning any matter relating to the employment of any employee.

c. by any employee, union, or agency concerning--

(1) the effect, interpretation, or a claim of breach of a collective bargaining agreement, or

(2) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.

3. 5 U.S.C. §§ 7121(c)(1)-(5). Excludes grievances concerning five general matters from coverage by a negotiated grievance procedure:

a. Prohibited political activities;

b. Retirement, life insurance, or health insurance;

c. A suspension or removal for national security reasons;

d. Examination, certification, or appointment; and

e. The classification of any position which does not result in the reduction-in-grade or pay of an employee.

(1) When the substance of a grievance concerns the grade level of the duties assigned to, and performed by the grievant, the grievance concerns the classification of a position within the meaning of § 7121(c)(5).

(2) Where the substance of a grievance concerns whether the grievant is entitled to a temporary promotion by reason of having performed the established duties of a higher-graded position, the grievance does not concern the classification of a position within the meaning of § 7121(c)(5). SSA Office of Hearings and Appeals and AFGE Local 3627, 55 FLRA No. 131 (1999) (denting an agency's exceptions because the grievance concerned a claim that the grievants had performed work of a higher-graded position and was therefore arbitrable); AFGE Local 1617 and Kelly Air Force Base, 55 FLRA No. 55 (1999) (setting aside an arbitrator's award and finding that a grievance concerning a grievant's entitlement to a temporary promotion based on the performance of higher level work was arbitrable).

III. PUBLIC SECTOR ARBITRATION.

A. Procedures

1. Only the exclusive representative or the agency may invoke binding arbitration. 5 U.S.C. § 7121(b)(1)(C)(iii).

2. Cost.

3. Selection of the arbitrator.

4. Hearing.

IV. REVIEW OF ARBITRATION AWARDS BY THE FLRA UNDER 5 U.S.C. § 7122(A).

> *Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in § 7121(f) of this title). If upon review the Authority finds that the award is deficient (1) because it is contrary to any law, rule, or regulation; or (2) on other grounds similar to those applied by Federal courts in private sector labor-management relations; the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.*

A. Either party.

1. A party is any person who participated as a party in a matter where the award of an arbitrator was issued.

   a. Generally, only the union and the agency are entitled to file exceptions because they are the only parties to arbitration.

   b. An agency's failure to attend the hearing does not preclude it from filing exceptions with the Authority. However, the Authority will not consider evidence that was not before the arbitrator. Dept of Navy Mare Island and Federal Employees Metal Trades Council, 53 FLRA 390 (1997) (considering exceptions despite agency's failure to attend arbitration hearing); Golden Gate Nat'l Recreation Area and Laborers' Int'l Union of North America, Local 1276, 55 FLRA 193 (1999); Internal Revenue Service, 56 FLRA 393 (2000).

2. Employee is not a party and may not take exception. Oklahoma Air Logistics Center and AFGE, 49 FLRA 1068 (1994*), request for reconsideration denied,* 50 FLRA 5 (1994).

3. The Authority will not consider issues that could have been, but were not, presented to the arbitrator. 5 C.F.R. § 2429.5. *See* Panama Area Maritime Metal Trades Council and Panama Canal Commission, 55 FLRA No. 193 (1999) (dismissing union's exceptions to arbitrator's award because they related to the agency's last best offer which was not raised at the arbitration); SSA Office of Hearings and Appeals and AFGE Local 3627, 55 FLRA No. 131) (1999) (refusing to consider a procedural argument raised by the agency because there was no evidence that the argument was raised before the arbitrator).

B. "Other than an award relating to a matter described in § 7121(f) of this title."

1. 5 U.S.C. § 7121(f) provides for review of § 4303 (unacceptable performance) and § 7512 (misconduct) matters, and similar matters, which arise under other personnel systems.

2. These matters can involve an arbitration award because the employee has an option of filing an appeal with MSPB, or other agency, or of filing a grievance.

3. Review of awards relating to § 7121(f) matters.

a. The arbitrator makes the decision rather than the MSPB or EEOC. In deciding the case, the arbitrator must apply the same statutory standards as applied by the MSPB (or other appropriate agency). Things such as: the evidentiary standards and harmful error rule of § 7701(c) and the prohibitions of § 7701(c)(2) that an agency decision may not be sustained if based on a prohibited personnel practice or if not in accordance with law will apply. Cornelius v. Nutt, 472 U.S. 648 (1985) (harmful-error rule in arbitration).

b. Appeal is to the U.S. Court of Appeals for the Federal Circuit in an MSPB type case, or Federal Circuit Court of Appeals in an EEO type case.

(1) Notwithstanding the rule that these decisions are not subject to review by the FLRA, the Authority has in the past reviewed such actions and reversed the arbitrator's decision granting back pay. AFGE, Local 2986 and U.S. DoD, National Guard Bureau, Oregon, 51 FLRA 1549 (1996); U.S. DoD, National Guard Bureau, Idaho and AFGE, Local 3006, 51 FLRA 1693 (1996).

(2) The District of Columbia Court of Appeals held the Authority's decisions were not reviewable, finding no violation of a clear statutory mandate. AFGE v. FLRA, 130 F.3d 450 (D.C. Cir. 1997). *But see* FAA v. Nat'l Assoc. of Air Traffic Specialists, 54 FLRA 235 (1998) (concluding Authority lacks jurisdiction to hear such actions).

c. On the agency side, only the Director of OPM may obtain review. The Director must establish that the award misinterpreted civil service law or regulation and will have a substantial impact on civil service law and regulation. 5 U.S.C. § 7703(d); Devine v. Nutt, 718 F.2d 1048 (Fed. Cir. 1983), *rev'd as to other matters sub nom.* Cornelius v. Nutt, 472 U.S. 648 (1985); Devine v. Sutermeister, 724 F.2d 1558 (Fed. Cir. 1983); King v. Wilson, 56 F.3d 80, 1995 U.S. App. LEXIS 19491 (Fed. Cir. 1995).

C. Time limits.

1. 30-day Filing Period.

a. Jurisdictional and cannot be waived or extended. 5 C.F.R. § 2429.23(d); Dept of Transportation Federal Aviation Administration and Nat'l Air Traffic Controllers Assn, 55 FLRA 293 (1999) (*Judicial review pending D.C. Circuit*) (if agency fails to take exception to an arbitrator's award in a timely manner, it will be prohibited from collaterally attacking the award by raising a defense during a subsequent ULP hearing); Dept of Interior, BIA Billings Area Office and NFFE LOCAL 478, 38 FLRA 256 (1990), *motion for reconsid. denied,* 39 FLRA 238 (1991).

b. Computation.

(1) The 30-day period begins on the day the award is served. 5 C.F.R. § 2425.1(b).

(2) Your exception must be filed within 30 days unless the 30th day is a Saturday, Sunday, or Federal holiday or unless the award was served on you by mail.

(a) If the 30th day is a Saturday, Sunday, or Federal holiday, your exception must be filed by the next day that is not a Saturday, Sunday, or Federal holiday. 5 C.F.R. § 2429.21(a).

(b) If the award was served on you by mail, 5 days are added to the filing period after the 30-day period is first computed taking into account weekends and holidays. The additional 5-day period is also extended if the 5th day falls on a weekend or holiday. 5 C.F.R. § 2429.22.

(3) Mailbox Rule. 5 C.F.R. § 2429.21(b).

(a) The date of the postmark is the day of filing.

(b) In the absence of a postmark, the date of filing is determined to be the date of receipt minus 5 days.

(c) IRS & Nat'l Treasury Employees Union, 44 FLRA 538 (1992) (Authority will not consider proof that a letter had been filed more than 5 days earlier).

(4) Filing by personal delivery is accomplished the day that the Authority receives the documents.

D. Scope of Review.

1. Although Congress specifically provided for review of arbitration awards in § 7122(a), at the same time, Congress expressly made clear that the scope of that review is very limited.

2. The Authority will presume that the award should be accorded the binding status required by the Statute.

3. Only when it is established that the award is deficient as one of the specific grounds set forth in § 7122(a) will an award be found deficient.

E. Grounds for Review.

1. Contrary to any law, rule, or regulation. 5 U.S.C. § 7122(a)(1).

a. Awards contrary to law. *See, e.g.*, §§ 7106(a), 7116(d), 7121(d); NTEU and IRS, 40 FLRA 614 (1991); AFGE & HUD, 54 FLRA No. 109 (1998).

(1) The Statute.

(a) No arbitration award may improperly deny the authority of an agency to exercise any of its rights. 5 U.S.C. § 7106(a); SSA and AFGE, 55 FLRA No. 173 (1999) (denying agency exception because it elected to bargain permissive topics in the CBA and arbitrator simply enforced that election); Dept of Air Force Warner Robins Air Logistics Center and AFGE Local 987, 53 FLRA 1344 (1998) (denying agency exceptions where it had agreed to bargain over impact and implementation to mitigate adverse effects); Panama Canal Commission & Maritime Metal Trades Council, 52 FLRA 404 (1996); *see also* IRS v. FLRA, 110 S. Ct. 1623 (1990).

(b) When, in the discretion of the aggrieved party, an issue has been raised under the ULP procedures, the issue subsequently may not be raised as a grievance. 5 U.S.C. § 7116(d); EEOC and AFGE, 48 FLRA 822 (1993); *but see* Point Arena Air Force Station and NAGE Local R12-85, 51 FLRA 797 (1996) *and* EEOC and AFGE, 53 FLRA 465 (1997) (Same facts may support both ULP and grievance where different legal theories apply).

(c) When an employee affected by prohibited EEO discrimination has timely raised the matter under an applicable statutory procedure, the matter subsequently may not be raised as a grievance. 5 U.S.C. § 7121(d); INS, El Paso and AFGE, Local 1929, 40 FLRA 43 (1991); US Dep't of Air Force & AFGE, 43 FLRA 290 (1991).

(2) Back Pay Act, 5 U.S.C. § 5596.

(a) Necessary findings. U.S. Department of Navy and Int'l. Assoc. of Machinists, 45 FLRA 1324 (1992); VA Medical Center Kansas City and AFGE Local 2663, 51 FLRA 762 (1996); Alabama Ass'n of Civilian Technicians and Alabama Nat'l Guard, 54 FLRA 229 (1998); United States Small Business Administration, 55 FLRA 179 (1999).

(i) Agency personnel action was unjustified and unwarranted.

(ii) Such action directly resulted in the withdrawal or reduction of the pay, allowances, or differentials of the grievant.

(iii) But for such action, the grievant would not otherwise have suffered such withdrawal or reduction of pay, allowances, or differentials.

(b) Attorney fees: statutory requirements for award by an arbitrator. US Dep't of Defense & Federal Ed. Assoc., 54 FLRA No. 79 (1998).

(i) Unjustified personnel action resulting in loss of pay.

(ii) Fee award in conjunction with backpay award.

(iii) Reasonable and related to the personnel action.

(iv) In accordance with the standards of § 7701.

(a) Interest of justice.

(b) Fully articulated, reasoned decision.

(c) Backpay awards that include allowances or differentials are limited to 6 years. *See* 64 Fed. Reg. 72457 (28 December 1999) (applying 6 year statute of limitations to include settlements of grievances and arbitrations).

(d) US Dep't of Veterans Affairs & Nat'l Assoc. of Gov't Employees, 53 FLRA 1426 (1998) (Parties are not required to request, and arbitrator is not required to decide requests for, attorney fees before award of back pay becomes final).

(3) Environmental Differential Pay. AFGE Local 2004 and Defense Logistics Agency, 55 FLRA No. 2 (1998) (denying union's exceptions to arbitration award because arbitrator properly applied the asbestos standards used by OSHA as negotiated by parties).

b. Awards not subject to grievance and arbitration. 5 U.S.C. § 7121(c).

(1) Classification grievances. § 7121(c)(5). Where the substance of the grievance concerns the grade level of duties performed by the grievant and the grievant has not been reduced in grade or pay, the grievance is precluded. HUD and AFGE Local 3475, 53 FLRA 1611 (1998).

(2) Examination, certification, or appointment. § 7121(c)(4); U.S. Dept. of Defense and Overseas Ed. Assoc., 51 FLRA 210 (1995).

(3) Grade and pay retention matters. § 5366(b). When employees retain their grade and pay following certain reduction-in-force or reduction-in-grade actions, grievances are precluded over the action that was the basis for the grade and pay retention and over the termination of such benefits. U.S. Dept. of Vet. Affairs and AFGE Local 1915, 34 FLRA 580 (1990).

(4) Management rights and scope of the negotiated grievance procedure.

(a) Performance appraisal matters. Management rights are considered in connection with resolution of the grievance on the merits. Nat'l Federal of Fed. Employees & Bureau of the Census, 47 FLRA 812 (1993).

(b) Contracting out. The decision to contract out is a management right governed by OMB Circular A-76, a government-wide regulation. Grievances concerning the decision to contract out or claiming a failure to follow A-76 are barred. AFGE Local 1345 and Fort Carson, 48 FLRA 168, 205 (1993); IRS v. FLRA, 996 F.2d 1246, 1250 (D.C. Cir. 1993).

(5) Matters for exclusive resolution by the Authority.

(a) Duty to bargain. Negotiability disputes over the extent of the duty to bargain must be resolved by the Authority. Arbitrators may not resolve them. 5 U.S.C. § 7117; Indian Educators Federation & Bureau of Indian Affairs, 53 FLRA 696 (1997).

(b) Bargaining-unit status. An arbitrator is precluded from addressing the merits of a grievance whenever a grievability question has been raised regarding the bargaining-unit status of the grievant. Gen. Services Administration Region IX and AFGE, 44 FLRA 901 (1992).

(6) Separation of probationary employees. Grievances are prohibited. Department of Justice, Immigration and Naturalization Service v. FLRA, 709 F.2d 724 (D.C. Cir. 1983); Nellis Air Force Base and AFGE Local 1199, 46 FLRA 1323 (1993); NEA Overseas Ed. Assoc. and U.S. Dept. of Defense, 53 FLRA 941 (1997).

(7) Discipline of a National Guard civilian technician under § 709(e) of the Civilian Technicians Act of 1968. Grievances are prohibited. US Dep't of Defense & AFGE Local 3006, 51 FLRA 1693 (1996).

(8) Discipline of a professional employee of the Department of Medicine & Surgery of the Department of Veterans Affairs. Grievances are prohibited. NFFE and Veterans Admin., 31 FLRA 360, 364 (1988), *remanded*, Veterans Admin. v. FLRA, No. 88-1314 (D.C. Cir. 9/27/88), *dec. on remand*, 33 FLRA 349 (1988).

(9) Adverse actions against nonpreference-eligible, excepted service employees. The Authority held that grievances were permitted; the courts disagreed. HHS v. FLRA, 858 F.2d 1278 (7th Cir. 1988), *reversing* NTEU and HHS, Region V, 25 FLRA 1110 (1987). Legislation now permits grievances. Civil Service Due Process Amendments, Pub. L. No. 101-376, 104 Stat. 461 (1990).

(10) Assessment of pecuniary liability. The Authority holds that nothing prevents an arbitrator from reviewing the assessment. AFGE Council 214 and AFLC, Wright-Patterson AFB, 21 FLRA 244 (1986).

(11) Denials of within-grade increases. The grievance procedure is the exclusive procedure for employees in bargaining units. NTEU v. Cornelius, 617 F. Supp. 365 (D.D.C. 1985).

(12) An arbitrator may not review merits of an agency's security-clearance determination. Department of the Navy v. Egan, 108 S. Ct. 818 (1988); AFGE and Dept. of Education, 42 FLRA 527, 533 (1991); Stehney v. Perry, 101 F.3d 925 (3d Cir. 1996).

c. Contrary to Law, the Privacy Act. Federal Correctional Facility, El Reno, Oklahoma and AFGE Local 171, 51 FLRA 584 (1995).

2. Awards contrary to regulation. Dept. of Army and AFGE, 37 FLRA 186 (1990); DODDS and OEA, 48 FLRA 979 (1993); AFGE Local 1164 and SSA Region I, 54 FLRA No. 85 (1998).

a. Only an arbitration award that conflicts with a regulation that governs the matter in dispute will be found deficient.

b. Government-wide regulations govern a matter in dispute unless they conflict with preexisting CBA provisions. If there is a conflict, the CBA will control until expiration of the agreement.

c. Agency regulations govern a matter in dispute only when the matter is not covered by a collective bargaining agreement.

3. On other grounds similar to those applied by Federal courts in private sector labor-management relations. 5 U.S.C. § 7122(a)(2).

a. Arbitrator failed to conduct a fair hearing. US Dept. of Defense & AFGE Local 3407, 44 FLRA 103 (1992); US Dept. of Defense & Overseas Fed. of Teachers, 36 FLRA 861 (1990); Tidewater Virginia Federal Employees Metal Trades Council & US Dept. of Navy, 53 FLRA 1149 (1998).

b. The arbitrator was biased or partial; the arbitrator was guilty of misconduct which prejudiced the rights of a party; or the award was obtained by fraud or undue means. AFLC Hill AFB and AFGE Local 1592, 34 FLRA 986 (1990).

c. Award is incomplete, ambiguous, or contradictory so as to make implementation of the award impossible. Delaware National Guard and Association of Civilian Technicians, 5 FLRA 50 (1981); Antilles Consolidated Ed. Assoc and USDD, 38 FLRA 341 (1990).

d. Arbitrator exceeded authority.

(1) The FLRA will find an award deficient when the arbitrator rendered the award in disregard of a plain and specific limitation on the arbitrator's authority. U.S. Dept. of Navy and AFGE Local 22, 51 FLRA 305 (1995).

(2) The Authority will find an award deficient when the arbitrator determines an issue not included in the subject matter submitted. Dept of Navy Puget Sound Naval Shipyard and AFGE Local 48, 53 FLRA 1445 (1998) (setting aside an award where the arbitrator rephrased the relevant issue, found grievant not entitled to a temporary position and yet awarded grievant with a temporary promotion and backpay); VA and AFGE, 24 FLRA 447 (1986); Bremerton Metal Trades Council and Puget Sound Naval Shipyard, 47 FLRA 406 (1993); USDHHS and Nat'l Treasury Employees Union, 54 FLRA 90 (1998).

(3) Arbitrators exceed their authority by extending an award to cover employees outside the bargaining unit or by ordering an agency to take an action beyond its authority. Bureau of Indian Affairs and NFEE, 25 FLRA 902 (1987). Oklahoma City Army Logistics Ctr. and AFGE Local 916, 46 FLRA 862 (1992).

(4) Arbitrators may also exceed their authority by extending an award to cover employees who did not file grievances. SSA and AFGE Local 3509, 53 FLRA 43 (1997).

e. Award is based on a nonfact. U.S. Dept. of Defense and AFGE Local 916, 53 FLRA 460 (1997); U.S. Dept. of Army and AFGE Local 2022, 46 FLRA 1304 (1993).

(1) The central fact underlying the award is clearly erroneous, but for which, a different result would have been reached.

(2) To find an award deficient, it should be shown that the alleged nonfact was:

(a) Central to the result of the award,

(b) That it was clearly erroneous, and

(c) That but for the arbitrator's misapprehension, the arbitrator would have reached a different result.

(d) Also, it should be shown that the arbitrator not only erred in the view of the facts, but that the sole articulated basis for the award was clearly in error and it should be shown that the evidence discloses a clear mistake of fact, but for which, in accordance with the expressed rationale of the arbitrator, a different result would have been reached. Redstone Arsenal & AFGE, 18 FLRA 374, 375 (1985).

f. Award is contrary to public policy. Long Beach Naval Shipyard and FEMTC, 48 FLRA 612 (1993); Dep't of Veterans Affairs & AFGE Local 1963, 48 FLRA 1067 (1993).

g. Award does not draw its essence from CBA. Antilles Consolidated Ed. Assoc. and U.S. Dept. of Defense, 50 FLRA 132 (1995).

(1) Cannot in any rational way be derived from agreement;

(2) is so unfounded in reason and fact, and so unconnected with the wording and purpose of the agreement, as to manifest an infidelity to the obligation of the arbitrator;

(3) evidence a manifest disregard for the agreement; or

(4) does not represent a plausible interpretation of the agreement.

F. Reconsideration. 5 C.F.R. § 2429.17. A party seeking reconsideration after the Authority has issued a final decision or order has the heavy burden of establishing extraordinary circumstances exist to justify this unusual action. NTEU Chapter 208 and U.S. Nuclear Regulatory Commission, 55 FLRA No. 116 (1999) (denying union's motion because it failed to establish extraordinary circumstances); Scott Air Force Base, 50 FLRA 80, 86-87 (1995) (identifying the limited number of situations in which extraordinary circumstances have been found to exist).

G. Remedies.

The Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations. 5 U.S.C. § 7122

H. Compliance. Compliance is required with final award and failure to comply is an unfair labor practice with no collateral attack on award permissible.

1. Award as to which no exceptions or no timely exceptions are filed. Wright Patterson AFB and AFGE, 15 FLRA 151 (1984), *aff'd*, Dep't of the Air Force v. FLRA, 775 F.2d 727 (6th Cir. 1985); FAA and NATCA, 54 FLRA 480 (1998).

2. Award as to which the Authority has denied exceptions. U.S. Marshals Service and AFGE, 13 FLRA 351 (1983), *enforced*, Marshals Service v. FLRA, 778 F.2d 1432 (9th Cir. 1985); Bureau of Prisons and AFGE, 20 FLRA 39 (1985), *enforced*, Bureau of Prisons v. FLRA, 792 F.2d 25 (2d Cir. 1986); FAA and NATCA, 54 FLRA 480 (1998).

3. Award as to which timely exceptions have been filed and are pending. U.S. Army Armament Reserve and Nat'l Federation of Fed. Employees Local 1437, 52 FLRA 527 (1996).

V. APPEAL OF GRIEVANCES UNDER § 7121(d).

A. Mixed Cases. The election of an employee to select the grievance process in no way prejudices the employee's right to ask the MSPB to review the final decision pursuant to § 7702 (Mixed Case Procedure) of the statute.

B. EEOC Matters. The election of an employee to select the grievance process in no way prejudices the employee's right to ask the EEOC to review the final decision in any matter involving a complaint of discrimination of the type prohibited by any law administered by the EEOC.

VI. JUDICIAL REVIEW OF FLRA ARBITRATION DECISIONS.

A. 5 U.S.C. § 7123(a). Arbitration decisions are generally not subject to judicial review.

1. In contrast to most other decisions of the Authority, the Authority's arbitration decisions are generally not subject to judicial review. U.S. Dept. of Treasury and FLRA, 43 F.3d 682 (D.C. Cir. 1994).

B. Arbitral Awards that Involve ULPs.

1. Under 5 U.S.C. § 7123(a), a circuit court can review a final decision of the FLRA involving an arbitrator's award only if an unfair labor practice is involved. NTEU v. FLRA, 112 F.3d 402 (9th Cir. 1997).

2. Although the precise meaning of § 7123(a) is still uncertain, the courts have generally construed the provision narrowly. U.S. Dept. of Interior v. FLRA, 26 F.3d 179 (D.C. Cir. 1994); Begay v. Dept. of Interior, 145 F.3d 1313 (Fed. Cir. 1998).

3. The D.C. Circuit has recently brought this narrow construction into question. U.S. Customs Service v. 6.6 FLRA, 43 F.3d 682 (1994). The Customs Service appealed an FLRA decision upholding a decision by an arbitrator concerning the application of a statute concerning the boarding of ships. The court held that they may review the decision of the Authority concerning an arbitration decision for the limited purpose of determining whether the Authority exceeded its jurisdiction, even in the absence of a ULP. *But see* discussion in NTEU v. FLRA, 112 F.3d 402, 405-06 (1997) (refusing to follow D.C. Circuit's opinion regarding the scope of judicial review).

C. Review of Arbitration Awards Under 5 U.S.C. § 7121(f).

1. In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure [MSPB performance or discipline cases] ... judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board.

a. Court of Appeals for the Federal Circuit.

b. Applicable case law. Cornelius v. Nutt, 472 U.S. 648 (1985).

c. 5 U.S.C. § 7703(d). Director of OPM may obtain review.

d. Grounds for Review. Same as for appealing final decision of MSPB.

VII. CONCLUSION.

CHAPTER S

54TH FEDERAL LABOR RELATIONS COURSE

Arbitration and Environmental Differential Pay

Major Douglas Cox
Department of the Air Force
Employment Litigation Division

CHAPTER T

54TH FEDERAL LABOR RELATIONS COURSE

Defense Civilian Personnel Management Service

Field Advisory Services

Mr. Ralph (Ben) James, Jr.
Chief, Labor Relations Branch
Field Advisory Services

CHAPTER U

54TH FEDERAL LABOR RELATIONS COURSE

Office of Special Counsel and

Whistleblower Actions

Ms. Shirine E. Moazed
Prosecution Division, General Law and Litigation Section
Office of Special Counsel

CIVILIAN PERSONNEL LITIGATION

Civilian Personnel Branch
Litigation Division

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CIVILIAN PERSONNEL LITIGATION[1]

Civilian Personnel Branch
Litigation Division

I. INTRODUCTION AND OVERVIEW.

II. COMPLAINTS OF PROHIBITED DISCRIMINATION.

A. Statutory References.

1. Title VII, Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16 (outlaws discrimination based on race, color, religion, national origin, and sex).

2. Age Discrimination in Employment Act, 29 U.S.C. § 633a (protects those over 40 from discrimination based upon age).

3. Rehabilitation Act of 1973, 29 U.S.C. §§ 791, 794a (protects "qualified handicapped persons" from discrimination).

4. Equal Pay Act of 1966 (as amended by FLSA amendments of 1974), 29 U.S.C. §§ 206 et seq. (prohibits gender-based wage discrimination for equal work).

5. The Civil Rights Act of 1991.

B. Filed in United States District Court.

1. **Mandatory exhaustion of administrative remedies.** Brown v. General Services Administration, 425 U.S. 820 (1976). Failure to exhaust may subject suit to dismissal.

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[1] **(Revised: November 2000)**

a. Agency EEO complaint procedures (29 C.F.R. § 1614):

1) **Jurisdictional prerequisite to suit.** Kizas v. Webster, 707 F.2d 525 (D.C. Cir. 1983); Stewart v. INS, 762 F.2d 193 (2nd Cir. 1985); Johnson v. Orr, 747 F.2d 1352 (10th Cir. 1984); Grier v. Secretary of Army, 799 F.2d 721 (11th Cir. 1986). McAdams v. Attorney General, 64 F.3d 1137 (8th Cir. 1995) (Abandonment of discrimination claims at MSPB results in failure to exhaust administrative remedies for subsequent Title VII action).

2) **Specific information** must be provided. Woodward v. Lehman, 717 F.2d 909 (4th Cir. 1983) (identify specific incident of discrimination); Johnson v. Bergland, 614 F.2d 415 (5th Cir. 1980); Edwards v. Dept. of the Army, 708 F.2d 1344 (8th Cir. 1983).

3) **Cooperation.** Munoz v. Aldridge, 894 F.2d 1489 (5th Cir. 1990) (exhaustion requires good faith participation in administrative process); Johnson v. Bergland, 614 F.2d 415 (5th Cir. 1980) (notwithstanding passage of 180 days, cooperation is required in order to exhaust); Jordan v. United States, 522 F.2d 1128 (8th Cir. 1975) (refusal to cooperate administratively deprives court of jurisdiction); Rivera v. U. S. Postal Service, 830 F.2d 1037 (9th Cir. 1987) (impatience with agency does not justify immediate resort to the courts); Wade v. Secretary of the Army, 796 F.2d 1369 (11th Cir. 1986) (good faith effort to cooperate required).

4) **Offers of full relief.** Wrenn v. Dept. of Veterans Affairs, 918 F.2d 1073, 1077 (2d Cir.1990); Francis v. Sec. of Commerce, 58 F.3d 191(5th Cir. 1995); Frye v. Aspin, 997 F.2d 426 (8th Cir. 1993) (failure to accept an offer of full relief is tantamount to a failure to

exhaust available administrative remedies); but see Greenlaw v. Garret, 59 F.3d 994 (9th Cir. 1995) (requiring pro se litigant to make legal assessment on offer of full relief under pain of exclusion from court violates principles of Title VII).

b. Collective bargaining agreement grievance procedures (5 U.S.C. § 7121);

c. Appeal to the MSPB (when discrimination is part of the complaint) (5 U.S.C. § 7702);

d. Except under ADEA, where a plaintiff can bypass administrative procedures by filing a notice of intent to sue with the EEOC, wait 30 days, and then file a civil action (29 U.S.C. § 633a(d)) (See II.G., *infra*).

2. EEO Time limits.

a. **Administrative**. Complainants must, in a timely manner, bring to the attention of an EEO counselor the matter causing them to believe they have been the subject of discrimination (45 days under 29 C.F.R. § 1614.105(a)(1)).

1) This is **not** a jurisdictional requirement but instead a statute of limitation, subject to equitable tolling. Saltz v. Lehman, 672 F.2d 207 (D.C. Cir. 1982); Jensen v. Frank, 912 F.2d 517 (1st Cir. 1990); Zografov v. V. A. Medical Center, 779 F.2d 967 (4th Cir. 1985); Henderson v. United States Veterans Administration, 790 F.2d 436 (5th Cir. 1986); Boddy v. Dean, 821 F.2d 346 (6th Cir. 1987); Rennie v. Garrett, 896 F.2d 1057 (7th Cir. 1990); Boyd v. United States Postal Service, 752 F.2d 410 (9th Cir. 1985).

2) Time period within which to contact counselor begins to run from the date the complainant knows or reasonably should

know of the discriminatory event or personnel action--**not** from the date complainant apprehends that an adverse employment decision was motivated by a discriminatory purpose. Jensen v. Frank, 912 F.2d 517 (1st Cir. 1990); Pacheco v. Rice, 966 F.2d 904 (5th Cir. 1992). But see, Sturniolo v. Sheaffer, 15 F.3d 1023 (11th Cir. 1994) where the court held that time period was tolled until date when an ADEA plaintiff learned he was replaced by a younger individual

3) Agency carelessness in counseling can extend employee's rights indefinitely. Weick v. O'Keefe, 26 F.3d 467 (4th Cir. 1994) (civilian employee who timely contacted EEO counselor was not required to file formal administrative complaint within any definite time period where counselor failed to give her notice of termination of counseling; court held that filing of administrative complaint three years after nonselection action was timely).

4) Acceptance of and investigation into an untimely complaint by a federal agency does **not** waive the complainant's failure to comply with the prescribed time periods, **unless** the agency or EEOC has made a finding of discrimination, Saltz v. Lehman, 672 F.2d 207 (D.C. Cir. 1982); Oaxaco v. Roscoe, 641 F.2d 386 (5th Cir. 1981); Boyd v. U.S. Postal Service, 752 F.2d 410 (9th Cir. 1985), or has specifically found the administrative complaint to be timely. Henderson v. Veterans Administration, 790 F.2d 436 (5th Cir. 1986); Girard v. Rubin, 62 F.3d 1244 (9th Cir. 1995) (EEOC OFO's remand of agency untimeliness decision constitutes waiver of statute of limitations). Briones v. Runyon, 101 F.3d 287 (2nd Cir. 1996). An EEOC director's implied finding that an

employee may not have had notice of the 45-day deadline was sufficient to bar the agency from arguing untimeliness in court. Humm v. Crowell, No. 97-5988 unpubl, (6th Cir. 11/30/98).

b. **Judicial**. Once administrative procedures have been exhausted, plaintiff may file a civil action in the district court against the federal government. Under prior law, plaintiff had 30 days from receipt of the final administrative decision to file suit. Section 102 of the 1991 Act increased this time period to 90 days. (29 C.F.R. § 1614.408(a)).

1) The circuits were split on whether the time within which to file suit challenging an **EEO** or **Agency decision** (42 U.S.C. § 2000e-16(c)) was jurisdictional or a statute of limitations which could be equitably tolled in appropriate circumstances. The U.S. Supreme Court resolved the dispute, holding equitable tolling could be applied in cases against the government. Irwin v. Veteran's Administration, 111 S. Ct. 453 (1990). **Reasons** for invocation of **equitable tolling** include:

a) Filing a timely, but **defective pleading**.

b) **Inadequate notice**.

c) **Motion for appointment of counsel** is pending.

d) When plaintiff has been **misled** or lulled into inaction by the **defendant's misconduct**. But no tolling allowed where plaintiff's own attorney offered erroneous advice concerning time within which to file. Polsby v. Chase, 970 F.2d 1360 (4th Cir. 1992).

e) When plaintiff has been **misled** by the court. Washington v. Ball, 890 F.2d 413 (11th Cir. 1989).

2) For years, the circuits were also split as to whether a timely **request** to the EEOC **to reconsider** an administrative decision revokes the finality of the right to sue letter and hence extends the filing deadline.

a) **Extends deadline**. Nordell v. Heckler, 749 F.2d 47 (D.C. Cir. 1984); Donaldson v. Tennessee Valley Authority, 759 F.2d 535 (6th Cir. 1985).

b) **Does not extend deadline**. Birch v. Lehman, 677 F.2d 1006 (4th Cir. 1982); Mahroom v. Defense Language Institute, 732 F.2d 1439 (9th Cir. 1984).

c) **Revision** of finality definition to include requests to reconsider has **mooted** this debate. (29 C.F.R. § 1614.405(b)(1)).

3) The **time** within which to file suit challenging an adverse **MSPB** mixed-case decision (5 U.S.C. § 7703(b)(2)) is most often construed to be **jurisdictional**. King v. Dole, 782 F.2d 274 (D.C. Cir. 1986); Dean v. V. A. Regional Office, 943 F.2d 667 (6th Cir. 1991); Lofton v. Heckler, 781 F.2d 1390 (9th Cir. 1986). But see Johnson v. Burnley, 887 F.2d 471 (4th Cir. 1989) (non-jurisdictional, but decision vacated pending en banc review); James v. U.S. Postal Service, 835 F.2d 1265 (8th Cir. 1988) and Lee v. U.S. Postal Service, 774 F.2d 1067 (11th Cir. 1985) (where both courts would not rule on whether filing a timely suit was

jurisdictional, but affirmed the lower court's dismissal nonetheless).

4) There is a split in the circuits over whether an employee whose mixed case appeal is rejected by the MSPB as untimely needs to seek review of the decision before the Federal Circuit, or may proceed to a District Court for a determination on whether waiver, equitable tolling or estoppel should be applied to the filing of a timely charge of discrimination. See, Downey v. Runyon, 160 F.3d 139 (2d Cir. 1998); cf. Ballentine v. MSPB, 738 F.2d 1244 (Fed. Cir. 1984); Powell v. DoD, 158 F.3d 597 (D.C. Cir. 1998); Sloan v. West, 140 F.3d 1255 (9th Cir. 1998); and Wall v. United States, 871 F.2d 1540 (10th Cir. 1989).

3. **Proper Defendant**. Under 42 U.S.C. § 2000e-16(c) the only proper defendant is "the head of the department, agency, or unit as appropriate." Davis v. Califano, 613 F.2d 957 (D.C. Cir. 1979); Soto v. Postal Service, 905 F.2d 537 (1st Cir. 1990); Owens v. United States, 822 F.2d 408 (3d Cir. 1987); Newbold v. U. S. Postal Service, 614 F.2d 46 (5th Cir. 1980); Hancock v. Egger, 848 F.2d 87 (6th Cir. 1988); McGuinness v. U.S. Postal Service, 744 F.2d 1318 (7th Cir. 1984); Morgan v. U.S. Postal Service, 798 F.2d 1162 (8th Cir. 1986); White v. GSA, 652 F.2d 913 (9th Cir. 1981); Canino v. EEOC, 707 F.2d 468 (11th Cir. 1983).

4. **Exclusivity.** Title VII is the exclusive judicial remedy available for a federal employee complaining of job related discrimination. Brown v. General Services Administration, 425 U.S. 820 (1976). As a result, Title VII **preempts** other theories to include the following:

a. **Civil Rights Statutes.**

1) **42 U.S.C. § 1981.** Brown v. GSA, 425 U.S. 820 (1976); Gissen v. Tackman, 537 F.2d

784 (3d Cir. 1976); Newbold v. United States Postal Service, 614 F.2d 46 (5th Cir. 1980); White v. General Services Administration, 652 F.2d 913 (9th Cir. 1981); Trotter v. Todd, 719 F.2d 346 (10th Cir. 1983); Canino v. EEOC, 707 F.2d 468 (11th Cir. 1982).

2) **42 U.S.C. § 1983.** Gissen v. Tackman, 537 F.2d 784 (3d Cir. 1976); Rowe v. Sullivan, 967 F.2d 186 (5th Cir. 1992); White v. General Services Administration, 652 F.2d 913 (9th Cir. 1981).

3) **42 U.S.C. § 1985.** Gissen v. Tackman, 537 F.2d 784 (3d Cir. 1976); Great American Federal Savings & Loan Assoc. v. Novotney, 442 U.S. 366, 378 (1979); Rowe v. Sullivan, 967 F.2d 186 (5th Cir. 1992); White v. General Services Administration, 652 F.2d 913 (9th Cir. 1981).

4) **42 U.S.C. § 1986.** Gissen v. Tackman, 537 F.2d 784 (3d Cir. 1976); White v. General Services Administration, 652 F.2d 913 (9th Cir. 1981).

b. **Constitutional Tort Claims** (Bivens Claims). Ethnic Employees of Library of Congress v. Boorstin, 751 F.2d 1405 (D.C. Cir. 1985); Porter v. Adams, 639 F.2d 273 (5th Cir. 1981); Clemente v. United States, 766 F.2d 1358 (9th Cir. 1985); Otto v. Heckler, 781 F.2d 754 (9th Cir. 1986); Ray v. Nimmo, 704 F.2d 1480 (11th Cir. 1983). But Title VII only precludes constitutional claims for actions proscribed by Title VII. Nolan v. Cleland, 606 F.2d 806 (9th Cir. 1982) White v. General Services Administration, 652 F.2d 913 (9th Cir. 1981).

c. **Common Law Tort Claims.** Hampton v. IRS, 913 F.2d 180 (5th Cir. 1990); Bell v. United States, 366 U.S. 393 (1961) (common-law rules governing private contracts have no place in

federal employment); Riplinger v. United States, 695 F.2d 1163, 1164 (9th Cir. 1983)(federal employees serve by appointment only not by contract).

C. **Scope of Review**.

1. *De novo* review of Title VII claims. Chandler v. Roudebush, 425 U.S. 840 (1976). **Record review** of nondiscrimination aspects of a "mixed case" appeal. Hayes v. United States Government Printing Office, 684 F.2d 137 (D.C. Cir. 1982); Rana v. United States, 812 F.2d 887 (4th Cir. 1987); Maulding v. Sullivan, 961 F.2d 694 (8th Cir. 1992); Romain v. Shear, 799 F.2d 1416 (9th Cir. 1986). An employee may seek review of parts of a favorable EEOC decision without risking a review of the remainder of that decision. Haskins v. Army, 808 F.2d 1192, 1199-1200 (6th Cir. 1987); Morris v. Rice, 985 F.2d 143, 145 (4th Cir. 1993).

2. Court may grant relief **only** for those matters **raised** in the **administrative complaint** and plaintiff must file a complaint over each discrete incident. Ray v. Freeman, 626 F.2d 439 (5th Cir. 1980); Gardner v. Morris, 752 F.2d 1271 (8th Cir. 1985); Ong v. Cleland, 642 F.2d 316 (9th Cir. 1981); Harbison v. Goldschmidt, 693 F.2d 115 (10th Cir. 1982). But see Section III. B., *infra*, for cases dealing with exhaustion where reprisal claims are involved.

3. However, when subsequent acts **grow from**, or are **like or reasonably related** to, a matter raised in the original complaint, need not file additional administrative complaints. Waiters v. Parsons, 729 F.2d 233 (3d Cir. 1984); Anderson v. Block, 807 F.2d 145 (8th Cir. 1986); Turner v. Orr, 804 F.2d 1223 (11th Cir. 1986).

4. With respect to acts occurring more than the allowable number of days (45 under current regulations) **prior** to initiating administrative procedures, the plaintiff can only obtain relief if he can establish a **continuing violation** (i.e.

a series of related acts occurring both within and prior to the limitations period). Roberts v. Gadsa Memorial Hospital, 835 F.2d 793 (11th Cir. 1988); Valentino v. U.S. Postal Service, 674 F.2d 56 (D.C. Cir. 1982); Green v. Los Angeles, 883 F.2d 1472 (9th Cir 1989). The complaining party must demonstrate that some discriminatory act transpired within the limitation period. Mack v. Great Atlantic & Pacific Tea Co., 871 F.2d 179 (1st Cir. 1989). Are the acts connected, recurring, and permanent? Berry v. Board of Supervisors of LSU, 715 F.2d 971 (5th Cir. 1983). Time limit for bringing a complaint runs from the time the employee knew or should have known of the discriminatory employment practice. Lorance v. AT&T Technologies, 490 U.S. 900 (1989). Plaintiff may allege continuing violation in court even if he did not specifically raise it administratively, so long as the theory is evident and discernible from the EEOC charge. Haithcock v. Frank, 958 F.2d 671 (6th Cir. 1992).

5. If the untimely allegations are time-barred, plaintiff cannot obtain relief; however, these can be relevant background evidence for timely claims. United Air Lines v. Evans, 431 U.S. 553 (1977). Although a defendant is not liable for pre-Title VII discrimination, liability may be imposed to the extent that the discrimination was continued after application of the statute to the government. Bazemore v. Friday, 478 U.S. 385 (1986).

6. Cannot obtain relief for **moot claims**. DeFunis v. Odegaard, 416 U.S. 312 (1974). Discrimination claims of an employee who has been removed, without possibility of being reinstated, are moot if injunction is only available relief. DuVall v. Postmaster General, 774 F.2d 510 (D.C. Cir. 1985); Hampton v. IRS, 913 F.2d 180 (5th Cir. 1990).

D. **Standard of Review**.

1. Preponderance of the evidence standard; plaintiff bears the burden of proof.

2. Two theories of discrimination: disparate treatment and disparate impact.

E. **Disparate Treatment**.

1. Definition. Intentionally treating some employees less favorably because of race, color, national origin, religion, or sex. International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

   a. Defendant's motive is crucial;

   b. Typical proof is circumstantial evidence.

2. Method of proof.

   a. Plaintiff's prima facie case [in a termination context] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) [creates prima facie test in context of termination action; other circumstances require an "adverse personnel action"].

      1) member of protected class;

      2) qualified for the job;

      3) rejected or terminated;

      4) employer continued to search for another to fill the job.

   b. Prima facie case creates an **inference of discrimination**. Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). The first three prongs of the test merely set the stage for the fourth, where proof pointing toward illegal discrimination is required. Holmes v. Bevilacqua, 794 F.2d 142 (4th Cir. 1986). But see Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

c. Defendant's rebuttal.

1) Defendant must articulate a legitimate, nondiscriminatory reason for the action taken. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

2) Evidence of legitimate nondiscriminatory reason satisfies employer's burden of going forward created by prima facie case. Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978).

3) After-acquired evidence of wrongdoing is not a shield to a possible finding of liability, but rather goes to the question of remedies. McKennon v. The Nashville Banner Publishing Co., 115 S. Ct. 879 (1995).

d. Plaintiff then must prove that defendant's proffered reasons are a mere pretext **for** discrimination. Texas Dept of Community Affairs v. Burdine, 450 U.S. 248 (1981); St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993). Prima facie case and sufficient evidence of pretext may permit trier of fact to find unlawful discrimination, without additional independent evidence of discrimination, though such showing will not always be adequate to sustain jury's finding of liability. Reeves v. Sanderson Plumbing, 120 S. Ct. 2097 (2000).

e. Note that plaintiff always retains the burden of proof by a preponderance of the evidence. The prima facie case is merely a way of analyzing the evidence. United States Postal Service v. Aikens, 460 U.S. 711 (1983). The trier of fact's rejection of an employer's asserted reasons for its actions does not entitle a plaintiff to judgment as a matter of law. St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993); Hazen Paper Co. v. Biggins, 113 S. Ct. 1701 (1993) (a disparate treatment claim under the ADEA cannot succeed

unless the employee's protected status actually played a role in the decision making process); Ontiveros v. Asarco, Inc., 83 F.3d 732 (5th Cir. 1996) (Circuit overturned trial court's denial of a JNOV noting "[t]here may barely be enough evidence to sustain a finding of pretext...[h]owever, there is insufficient evidence to support a reasonable inference of discrimination."); see also, Mungin v. Katten, Muchin & Zavis, 116 F.3d 1549, (DC Cir. 1997) (reversal of a denial for JNOV in 2.5 million verdict).

f. Note that prima facie case is subject to refinement in any given circumstance. Harding v. Gray, 9 F.3d 150 (D.C. Cir 1993) (white employee not selected for a promotion can demonstrate sufficient circumstances to support suspicion by having qualifications superior to the successful minority applicant).

3. **Mixed Motive Cases.** These involve employment decisions motivated in part by an unlawful discriminatory reason.

a. Under Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), an employer could avoid liability in a mixed motive case by proving that it would have made the same decision absent discrimination.

b. Section 107 of 1991 Act reversed Price Waterhouse by allowing a plaintiff to prevail if discrimination was **a** motivating factor for an employment decision such that it contributed to the decision, even though other nondiscriminatory factors also motivated the decision.

c. Relief in such a case is limited to an injunction, attorney fees and costs; reinstatement, back pay, and promotions may not be awarded.

d. 1991 Act mixed motive provisions do not apply to retaliation claims. Tanca v. Nordberg, 98 F.3d 680 (1st Cir. 1996).

4. Direct Evidence. Direct evidence of discrimination obviates the need for the traditional McDonnell Douglas analysis. Trans World Airlines v. Thurston, 469 U.S. 111, 121 (1984). Talley v. Bravo Pitinon Restaurant Ltd., 61 F.3d 1241 (6th Cir. 1995) (repeated racially derogatory comments and racial slurs constituted direct evidence of discrimination); Sennello v. Reserve Life Ins. Co., 872 F.2d 393, 395 (11th Cir. 1989)(concluding that certain statements by a manager were direct evidence of discriminatory motivation in an employment decision).

F. **Disparate Impact.**

1. Definition. Facially neutral employment practices which affect a protected group more harshly than others. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

a. Employer's motive not relevant; requires no proof of discriminatory intent. Typically attacks systemic or mechanical discrimination.

b. Traditionally applied to invalidate tests or rigid qualifications. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Dothard v. Rawlinson, 433 U.S. 321 (1977).

c. Disparate impact analysis may also be applied to cases where **subjective** or discretionary criteria are used to make employment decisions. Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988).

2. Method of Proof.

a. Plaintiff's prima facie case. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

1) Identify neutral employment practice; and

2) Prove (preferably by statistical evidence) that the practice in question has disproportionately affected the protected class.

3) The proper statistical comparison is between the demographic makeup of the positions at issue in the workforce and the demographic makeup of the **qualified** population in the relevant labor market. Hazlewood School District v. United States, 433 U.S. 299 (1977). It is **not** a statistical comparison drawn from within the employer's own internal workforce. Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989).

b. Defendant's rebuttal.

1) Under Section 105 of the 1991 Act, the **burden of proof** shifts to the employer to demonstrate that the employment practice is job related for the position in question and consistent with business necessity.

2) Defendant can also rebut the statistics (*e.g.*, incomplete data, inadequate techniques) or show that other factors account for the discrepancy. Valentino v. U.S. Postal Service, 674 F.2d 56 (D.C. Cir. 1982); Maddox v. Claytor, 764 F.2d 1539 (11th Cir. 1985).

3) If a testing device or standard is challenged, defendant may well have to validate the reliability of the challenged instrument (using EEOC guidelines).

c. Plaintiff's reply. Even if defendant satisfies his burden of proof, Section 105 of the 1991 Act allows a plaintiff to prevail by proving that an alternative business practice, which the employer refused to

adopt, would have satisfied the employer's business needs without causing such an adverse impact.

3. Caveat on Statistics. While statistical evidence can be relevant in determining whether an employer's past practice is discriminatory, it is not equivalent to concluding that the absence of proportionality makes out discrimination. The Supreme Court has never held that non-proportionality constitutes discrimination and relying solely on statistical disparities as proof of discrimination under Title VII could result in the imposition of de facto quotas. Luteran Church v. FCC, 154 F.3d 487, (D.C. Cir. 1998).

G. **Age Discrimination**.

1. **Title VII Provisions.**

a. When a provision in ADEA can be traced to a complimentary provision in Title VII, the two statutes should be construed consistently. Oscar Meyer & Co. v. Evans, 441 U.S. 750 (1979).

b. ADEA has historically been construed consistently with Title VII, with some exceptions.

1) No right to **jury trial**. Lehman v. Nakshian, 453 U.S. 156 (1981). But see Section J.1.b., *infra*, where 1991 Act permits jury trial under Title VII if plaintiff seeks compensatory damages.

2) Head of agency is **proper defendant**. Honeycutt v. Long, 861 F.2d 1346 (5th Cir. 1988); Ellis v. United States Postal Service, 784 F.2d 835 (7th Cir. 1986); Romain v. Shear, 799 F.2d 1416 (9th Cir. 1986).

3) No recovery for **compensatory damages**. Smith v. Office of Personnel Management,

778 F.2d 258 (5th Cir. 1985). But see Section J.1.b., *infra*, where 1991 Act permits compensatory damages under Title VII.

4) ADEA is **exclusive remedy**. Purtill v. Harris, 658 F.2d 134 (3d Cir. 1981); Patterson v. Weinberger, 644 F.2d 521 (5th Cir. 1981).

5) **Title VII Methodology**. Johnson v. Lehman, 679 F.2d 918 (D.C. Cir. 1982); Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979); Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980); Duffy v. Wheelins Pittsburgh Steele Corp., 738 F.2d 1393 (3d Cir. 1984); Burns v. Texas City Refining, Inc., 890 F.2d 747 (5th Cir. 1989); Borden's Inc. v. EEOC, 724 F.2d 1390 (9th Cir. 1984); Carey v. U.S. Postal Service, 812 F.2d 621 (10th Cir. 1987); Anderson v. Savage Labs, Inc., 675 F.2d 1221 (11th Cir. 1982). However, disparate impact may not be actionable under the ADEA. Hazen Paper Co. v. Biggins, 113 S. Ct. 1701 (1993); EEOC v. Francis W. Parker School, 115 S. Ct. 2577 (1995) (denial of cert on 41 F.3d 1073); Ellis v. United Airlines, 73 F.3d 999, (10th Cir. 1996).

6) **Limitations period within which to sue**. Under ADEA, there was much controversy concerning the limitations period within which to sue. Lavery v. Marsh, 918 F.2d 1022 (1st Cir. 1990) (adopting Title VII's 30 day limitations period for federal ADEA actions despite lack of express provision in 29 U.S.C. § 633a). *See also* Long v. Frank, 22 F.3d 54 (2nd Cir. 1994); Jones v. Runyon, 32 F.3d 1454 (10th Cir. 1994); Edwards v. Shalala, 64 F.3d 601 (11th Cir. 1995). *But see* Bornhardt v. Brady, 869 F.2d 57 (2d Cir. 1989) (rejecting 30 day period without adopting an alternative, as court unable

to determine what Congress intended); Lubniewski v. Lehman, 891 F.2d 216 (9th Cir. 1989) (adopting 6 year limitations period). Section 115 of the 1991 Act amended ADEA to allow for 90 days to sue for cases processed administratively.

c. Inconsistent application has occurred with respect to **venue**. Rebar v. Marsh, 959 F.2d 216 (11th Cir. 1992) (applying the general venue statute to ADEA action rather than the Title VII venue provision).

2. **Exhaustion**. (Two methods).

a. **Bypass administrative procedures** and file suit in federal district court, after giving EEOC 30 days notice of intent to sue (29 U.S.C. § 633a(d)). Notice must be filed within 180 days of alleged discriminatory practice and notice to the employing agency is sufficient. Stevens v. Dept. of Treasury, 111 S. Ct. 1562 (1991). There is a split as to whether filing of this notice is an absolute precondition to suit or is a statute of limitations which may be equitably excused.

1) **Jurisdictional**. Limongelli v. Postmaster General, 707 F.2d 368 (9th Cir. 1983).

2) **Statute of Limitation**. Castro v. United States, 707 F.2d 399 (1st Cir. 1985); Ray v. Nimmo, 704 F.2d 1480 (11th Cir. 1983).

b. **File administrative complaint** with the agency (29 U.S.C. § 633a(b)) and follow Title VII procedures. There had been a split as to whether, absent a final administrative decision, a complainant may go to court 180 days after filing administrative complaint. 1992 regulatory changes would seem to have resolved this dispute and placed ADEA complainants in same position as Title VII complainants, and thus able to sue after 180 days absent a final decision. (29 C.F.R. §

1614.408(b)). Adler v. Secretary of Agriculture, 35 F.3d 263 (7th Cir. 1994). Prior to these regulatory revisions, the circuits were split as follows:

1) Must await final action. Bornholdt v. Brady, 869 F.2d 57 (2d Cir. 1989); Purtill v. Harris, 658 F.2d 134 (3d Cir. 1981); White v. Frank, 895 F.2d 243 (5th Cir. 1990); McGinty v. Department of Army, 900 F.2d 1114 (7th Cir. 1990); Rivera v. U.S. Postal Service, 830 F.2d 1037 (9th Cir. 1987).

2) May opt out of administrative procedures and file suit. Langford v. Army Corps of Engineers, 839 F.2d 1192 (6th Cir. 1988).

3. **Employer Defenses.** Liability under ADEA requires a finding that **disparate treatment** was motivated by the employer's consideration of age. Hazen Paper Co. v. Biggins, 113 S. Ct. 1701 (1993) (a decision to fire an employee in order to prevent his pension from vesting does not, without more, constitute age related discrimination in violation of ADEA). Same actor inference provides that animusis unlikely where the putative discriminator responsible for employee's termination also was responsible for hiring decision initially. Proud v. Stone, 945 F.2d 796 (4th Cir. 1991); Lowe v. J.B. Hunt Transport, Inc., 963 F.2d 173 (8th Cir. 1992); see also, Buhrmaster v. Overnite Transportation Co., 61 F.3d 461 (6th Cir. 1995) (same actor inference applies to sex discrimination as well as agediscrimination cases; lengthy passage of time between hiring and firing goes to strength of inference not its existence). Williams v. Vitro Services Corp., 144 F.3d 1438, 1443 (11th Cir. 1998)(permissible inference). Circuit courts have reached opposite conclusions on the issue of whether **disparate impact** claims are cognizable under the ADEA. The Supreme Court suggested that such claims were not viable, but deliberately did not address the issue in Hazen. 113 S. Ct. 1706-07. The First, Seventh, and Tenth Circuits

have held that disparate impact claims are not cognizable under the ADEA. Mullin v. Raytheon Co., 164 F.3d 696, 703 (1st Cir. 1999); EEOC v. Francis, 41 F.3d 1073, 1076-1078 (7th Cir. 1994); and Ellis v. United Airlines, Inc., 73 F.3d 999, 1007 (10th Cir. 1996). The Ninth Circuit reached the opposite conclusion. EEOC v. Local 350 Plumbers and Pipefitters, 998 F.2d 641, 648 n.2, (9th Cir. 1993).

4. **Caveat on Settlements.**

a. The Older Workers' Benefit Protection Act (29 U.S.C. § 626(f)) provides that an individual may not waive any right or claim under the ADEA unless the waiver is knowing and voluntary and meets the following statutory requirements:

1) that the waiver is part of an agreement that can be clearly understood by complainant;

2) that it specifically refers to rights or claims arising under the ADEA;

3) that the complainant does not waive rights or claims that arise after the waiver is executed;

4) that the complainant receives valuable consideration in exchange for the waiver, beyond those benefits to which the complainant is already entitled to;

5) that the complainant is advised in writing to consult an attorney before executing the agreement; and

6) that the complainant is given a reasonable period of time to consider the agreement.

b. Non-statutory circumstances may also be considered by a court in determining whether an employee's waiver of ADEA rights was

knowing and voluntary. Griffin v. Kraft General Foods, 62 F.3d 368 (11th Cir. 1995).

c. 24 hours to consider and accept terms of a release in private sector severance packages did not result in a knowing and voluntary waiver. Puentes v. United Parcel Service, 86 F.3d 196 (11th Cir 1996).

d. A former employee is NOT blocked by the common law "tender back" rule from pursuing an age bias claim when the settlement he signed did not comply with the OWBPA's "knowing and voluntary" standard. The employee will owe the consideration received in the settlement to the employer, however such restitution is not a condition precedent to suit. Oubre v. Entergy Operations, 118.S.Ct 838 (1998).

e. Final EEOC Regulations on ADEA rights waivers were published in the June 5, 1998, Federal Register. (63 Fed. Reg. 30624; 29 C.F.R. § 1625.22).

H. **Handicap/Disability Discrimination.**

1. Federal government is required to **act affirmatively** to reasonably accommodate qualified handicapped employees or applicants. Gardner v. Morris, 752 F.2d 1271 (8th Cir. 1985). Courts may take into account the reasonableness of the cost of any necessary workplace accommodation. Carter v. Bennett, 840 F.2d 63 (D.C. Cir. 1988). *See* generally, Prewitt v. United States Postal Service, 662 F.2d 292 (5th Cir. 1981) (good discussion of handicap discrimination).

2. Pursuant to applicable case law, reasonable accommodation does not require **reassignment**. Shea v. Tisch, 870 F.2d 786 (1st Cir. 1989); Carter v. Tisch, 822 F.2d 465 (4th Cir. 1987). However, revised EEOC regulations place this burden upon government agencies. (29 C.F.R. § 1614.204(g)).

3. Accommodation efforts cannot violate legitimate rights under a collective bargaining agreement. Shea v. Tisch, 870 F.2d 786 (1st Cir. 1989); Jasany v. United States Postal Service, 755 F.2d 1244 (6th Cir. 1985); Daubert v. United States Postal Service, 733 F.2d 1367 (10th Cir. 1984).

4. Employee must **exhaust administrative remedies**. (29 C.F.R. §§ 1614.103). *See also*, Ryan v. Federal Deposit Insurance Corp., 565 F.2d 762 (D.C. Cir. 1977); Counts v. United States Postal Service, 631 F.2d 46 (5th Cir. 1980); Smith v. United States Postal Service, 742 F.2d 257 (6th Cir. 1984); McGuiness v. United States Postal Service, 744 F.2d 1318 (7th Cir. 1984); Morgan v. United States Postal Service, 798 F.2d 1162 (8th Cir. 1986); Boyd v. United States Postal Service, 752 F.2d 410 (9th Cir. 1985). There is a potential dispute regarding the exclusivity of § 501 of the Rehabilitation Act (which requires exhaustion) versus § 504 (which does not require exhaustion) [Rivera v. Heyman, No. 97-9316 (2nd Cir. 8/26/98); Johnson v. United States Postal Service, 861 F.2d 475 (10th Cir. 1988); Boyd v. United States Postal Service, 752 F.2d 410, 413 (9th Cir. 1985); McGuinness v. United States Postal Service, 744 F.2d 1318, 1321 (7th Cir 1984); cf Morgan v. United States Postal Service, 798 F.2d 1162, 1164-65 (8th Cir. 1986).] There is no waiver of sovereign immunity for compensatory damages under § 504 (as opposed to § 501). Lane v. Pena, 116 S. Ct. 2092 (1996).

5. Rehabilitation Act is the **exclusive remedy** for claims of handicap discrimination. Smith v. United States Postal Service, 742 F.2d 257 (6th Cir. 1984); McGuiness v. United States Postal Service, 744 F.2d 1318 (7th Cir. 1984); Gardner v. Morris, 752 F.2d 1271 (8th Cir. 1985); Boyd v. United States Postal Service, 752 F.2d 410 (9th Cir. 1985).

6. Head of the agency concerned is the only appropriate defendant in an action under the Rehabilitation Act. McGuiness v. United States

Postal Service, 744 F.2d 1318 (7th Cir. 1984); Morgan v. United States Postal Service, 798 F.2d 1162 (8th Cir. 1986).

7. Under prior law, there was no right to a **jury trial** under the Rehabilitation Act. Smith v. Barton, 914 F.2d 1330 (9th Cir. 1990). Section 102 of the 1991 Act, however, allows for compensatory damages (and therefore a jury trial on demand) except where the employer demonstrates good faith efforts to make reasonable accommodation.

8. Title VII's venue provision (42 U.S.C. § 2000e-5(f) (3)) controls rather than the general venue statute (28 U.S.C. § 1391(e)). Bolar v. Frank, 938 F.2d 377 (2d Cir. 1991).

9. **Plaintiff's Burden of Proof**. Strathie v. Department of Transportation, 716 F.2d 227 (3d Cir. 1983); Daubert v. United States Postal Service, 733 F.2d 1367 (10th Cir. 1984).

   a. The employee or applicant is a **"disabled person" (a/k/a "handicapped person")** defined as an individual who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment; or is regarded as having such an impairment. (29 C.F.R. § 1614.203). The impairment must be a significant one before an individual will be deemed handicapped. Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986). *See also*, EEOC Compliance Manual Section 902: Definition of the Term "Disability" (March 15, 1995 document discusses major life activities under the "Americans with Disabilities Act" to include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, sitting, standing, lifting, thinking, concentrating, and interacting with other people).

   b. The employee or applicant is **"otherwise qualified"** for the position sought.

Southeastern Community College v. Davis, 442 U.S. 397 (1979) (able to meet all of a program's requirements in spite of handicap).

c. The employee or applicant was excluded from the position sought **solely** by reason of his or her handicap. Leckelt v. Bd. of Cmr's of Hosp. Dist. No. 1, 909 F.2d 820 (5th Cir. 1990); Norcross v. Sneed, 755 F.2d 113 (8th Cir. 1985) (plaintiff must show handicap was **sole** reason for the decision, while a Title VII plaintiff need only show that a protected classification was a factor influencing the decision). McNely v. Ocala Star-Banner Corp., 99 F.3d 1068 (11th Cir. 1996) (While Rehab Act tolerates actions based, in part, on discriminatory motives, ADA has same standard as Title VII).

d. The program or activity in question **receives federal financial assistance** (generally inapplicable in federal sector cases but see H.4. *supra*).

e. Affirmative obligation on federal agencies as model employer to reassign nonprobationary handicapped employee to a funded vacant position in same commuting area serviced by the same appointing authority. (29 C.F.R. 1614.203(g)).

10. **Employer's Defenses**.

a. Whether an agency has provided reasonable accommodation is a question of fact. Reynolds v. Brock, 815 F.2d 571 (9th Cir. 1987). The employer bears the burden of proving an inability to accommodate. Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985). Agency must show it would suffer "undue hardship" by allowing computer programmer to work at home. Langon v. Department of HHS, 959 F.2d 1053 (D.C. Cir. 1992). The Agency need only offer a reasonable accommodation, not necessarily one desired by an employee. Ansonia Board of

Education v. Philbrook, 479 U.S. 60 (1986); 29 C.F.R. 1605. The employee must participate in good faith in the interactive accommodation process. Beck v. University of Wisconsin, 75 F.3d 1130 (7th Cir. 1996).

b. Plaintiff is **not** a "qualified handicapped person." Jasany v. United States Postal Service, 755 F.2d 1244 (6th Cir. 1985) (physical ailment which only impairs an employee's ability to perform a particular job, but not his ability to work in general, is not a handicap within the meaning of the Rehabilitation Act); Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986); Ellison v. Software Spectrum, Inc., 85 F.3d 187 (5th Cir. 1996) (treatment for breast cancer may have reduced employee's work performance, as shown in her ratings, but does not substantially limit her ability to work). Sutton v. United Air Lines, 1999 WL 407488 (U.S. June 22, 1999) (persons who were denied jobs as commercial airline pilots because of near-sightedness, but whose vision is correctable with glasses, are not disabled within the meaning of the ADA because substantial limitation in a major life activity is determined after taking into account the effect of mitigative measures such as medication or assistive devices).

c. Plaintiff **not** "otherwise qualified" for the job at issue. Lucero v. Hart, 915 F.2d 1367 (9th Cir. 1990) (plaintiff could not meet minimum words per minute typing requirement); Jackson v. V.A., 22 F.3d 277 (11th Cir. 1994) (housekeeping aide whose degenerative rheumatoid arthritis caused him to miss six days on sporadic, unpredictable basis over two month probationary period could not perform daily tasks of position). Individuals who make sworn statements in disability applications that they are totally disabled may pursue claims that they are qualified to perform the essential functions of their positions. Cleveland v. Policy Management Systems, 119 S. Ct. 1597 (1999) (a finding of

full disability by SSA does not automatically bar a claimant's employment discrimination action under the ADA).

d. Accommodation would impose an **undue hardship** on employer's operation. Treadwell v. Alexander, 707 F.2d 473 (11th Cir. 1983) (doubling up with other employees not required); Hall v. United States Postal Service, 857 F.2d 1073 (6th Cir. 1988) (an accommodation which eliminates an essential function of the job is not reasonable); Bradley v. University of Texas MD Anderson Cancer Center, 3 F.3d 922 (5th Cir 1993) (hospital could not accommodate surgical technician infected with HIV); Carr v. Reno, 23 F.3d 525 (D.C. Cir. 1994) (an essential function of any government job is the ability to appear for work and to complete assigned tasks within a reasonable time--"Once the district court determined that Ms. Carr could not perform an essential function of any government job, we think there was no need for further fact finding."); Fedro v. Reno, 21 F.3d 1391 (7th Cir. 1994) (employer not required to create alternative employment opportunities for employees who are no longer able to perform the essential functions of their jobs); Hudson v. MCI, 87 F.3d 1167 (1996) [unpaid leave of an indefinite duration does not constitute a reasonable accommodation] see also Rogers v. Intl. Marine Terminals, 87 F.3d 755 (5th Cir. 1996).

e. Employee's action or misconduct, not the handicapping condition, is the cause of the employer's action. Marino v. U.S.P.S., 25 F.3d 1037 (1st Cir. 1994) (employee who suffered from anxiety neurosis should have gone to bathroom and screamed to release stress instead of assaulting supervisor); Doe by Lavery v. Reno, 44 F.3d 715 (9th Cir. 1995) (failure to cooperate with FBI's individualized inquiry about safety factors prevented agency from determining whether

doctor with AIDS was otherwise qualified; terminated for lack of candor, not disease).

f. Employee application for disability benefits does not bar the employee's claim as a matter of law; where the benefits application contains relevant information, it may be admitted into evidence. Whitbeck v. Vital Signs, Inc, No. 97-7206, (D.C. Cir. 11/20/98); Swanks v. WMATA, 116 F.3d 582 (D.C. Cir. 1997); see also Cleveland v. Policy Management Systems, 119 S. Ct. 1597 (1999).

11. **Selected Impairment Determinations.**

a. **Handicap.**

1) Contagious Disease. School Board of Nassau County v. Arline, 480 U.S. 273 (1987).

2) Epilepsy. Reynolds v. Brock, 815 F.2d 571 (9th Cir. 1987).

3) Alcoholism. Crewe v. U. S. Office of Personnel Management, 834 F.2d 140 (8th Cir. 1987). Reasonable accommodation of an alcoholic requires (1) counselling; (2) a "firm choice" between treatment and discipline; (3) outpatient treatment; (4) inpatient treatment; and (5) discharge. Rogers v. Lehman, 869 F.2d 253 (4th Cir. 1989); Fuller v. Frank, 916 F.2d 558 (9th Cir. 1990). But see, Butler v. Thronburg, 900 F.2d 871 (5th Cir. 1990) ("firm choice" not required by FBI regulations, so agency could disregard). NOTE: EEOC has held that the Rehabilitation Act Amendments of 1992 no longer require firm choice accommodation Johnson v. Babbitt, 03940100 March 28, 1996, (employers do not have to excuse the violation of uniformly-applied

conduct or job performance standards as a form of reasonable accommodation).

4) Blind. Smith v. Barton, 914 F.2d 1330 (9th Cir. 1990).

5) Emotional debilitation -- extreme stress reaction. Lucero v. Hart, 915 F.2d 1367 (9th Cir. 1990).

6) Spondylitis. Sisson v. Helms, 751 F.2d 991 (9th Cir. 1985).

7) Kidney disease. Gilbert v. Frank, 949 F. 2d 637 (2d Cir. 1991).

8) Morbid obesity. Cook v. Rhode Island, 10 F.3d 17 (1st Cir. 1993).

9) Asymptomatic HIV-Positive status, if it impairs a major life activity such as reproduction. Bragdon v. Abbott, 524 U.S. 624 (1998). [ADA decision.][possible future comparison for other conditions that are in remission or manifest no outward symptoms: e.g. multiple sclerosis, Alzheimer's, cancer,epilepsy, diabetes.]

b. **Not a Handicap.**

1) Strabismus. Jasany v. United States Postal Service, 755 F.2d 1244 (6th Cir. 1985).

2) Varicose Veins. Oesterling v. Walters, 760 F.2d 859 (8th Cir. 1985).

3) Bad Back. Daubert v. United States Postal Service, 733 F.2d 1367 (10th Cir. 1984).

4) Left-handed. de la Torres v. Bolger, 781 F.2d 1134 (5th Cir. 1986).

5) Acrophobia. Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986).

6) Inability to withstand criticism; Pesterfield v. TVA. 941 F.2d 437 (6th Cir. 1991).

7) Addiction to and distribution of heroin; Taub v. Frank. 957 F.2d 8 (1st Cir. 1992).

8) Sensitivity to chemicals. Maulding v. Sullivan, 961 F.2d 694 (8th Cir. 1992).

9) Angina, high blood pressure, and coronary artery disease where not shown to substantially limit major life activities such as walking, seeing, speaking, breathing, or learning. Aucutt v. Six Flags, 85 F.3d 1311 (8th Cir. 1996).

10) Hemophilia. Bridges v. Bossier, 92 F.3d 329 (5th Cir 1996). Firefighter applicant substantially limited in only a narrow range of jobs -- not a class of jobs. [Note that DoJ filed an amicus on the losing side.]

11) Infertility. Krauel v. Iowa Methodist Medical Center, 95 F.3d 674 (8th Cir. 1996). Infertility not protected under either ADA or Pregnancy Discrimination Act.

12) Degenerative joint disease. Kelley v. Drexel University, 94 F.3d 102 (3rd Cir.1996). Comparatively moderate restrictions on the ability to walk are not disabilities under the ADA.

13) Correctable near-sightedness. Sutton v. United Air Lines, 1999 WL 407488 (U.S. June 22, 1999)

I. **Sexual Harassment.**

1. **Definition.** (29 C.F.R. § 1604.11(a)). Unwelcome sexual advances, requests for sexual favors, and

other verbal or physical conduct of a sexual nature when:

a. submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

b. submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting that individual; or

c. such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

2. Plaintiff's Prima Facie Case. Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

a. The employee belongs to a protected group. (Employee can be either a man or a woman).

b. The employee was subjected to **unwelcome sexual harassment**. The employee may not entice or solicit such conduct; evidence of plaintiff's provocative speech or dress are relevant in determining whether she welcomed sexual advances from her supervisors. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). However, a plaintiff's use of sexual innuendo in a consensual setting does not waive her legal protections against unwelcome and unsolicited sexual harassment. Katz v. Dole, 709 F.2d 251 (4th Cir. 1983). Trial court must determine if plaintiff welcomed the particular conduct in question from the alleged harasser (not others). Swentek v. U.S. Air, 830 F.2d 552 (4th Cir. 1987). Protection is not withdrawn merely upon a showing that the victim of the harassment had in the past entered into a consensual sexual relationship with the perpetrator. Huebschen v. Dept. of Health & Human Services, 716 F.2d 1167 (7th Cir. 1983).

c. The harassment complained of was **based upon sex**. Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981) (plaintiff must prove that but for her sex, she would not have been the object of harassment). Same-sex sexual harassment may be actionable. Oncale v. Sundowners Offshore Services, 118 S. Ct. 998 (1998); Wrightson v. Pizza Hut, 99 F.3d 138 (4th Cir. 1996); Quick v. Donaldson Co., 90 F.3d 1372 (8th Cir. 1996). The harassment, however, **need not involve sexual activity or language**. EEOC Guidance on Sexual Harassment (1990); McKinney v. Dole, 765 F.2d 1129 (D.C. Cir., 1985); Hall v. Gus Construction, 842 F.2d 1010 (8th Cir., 1988) (women on road construction crew refused transportation for bathroom breaks).

d. The harassment complained of affected a **"term**, **condition**, **or privilege"** of employment. The harassment must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment. This determination is made based on the totality of the circumstances. (29 C.F.R. § 1604.11(b)). Mendoza v. Borden, Inc., 195 F.3d 1238 (11th Cir. 1999)(reviewing decisions throughout the federal circuits and delineating minimal baseline of severity or pervasiveness for harassing conduct to constitute discrimination under Title VII); Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2284 (1998)("conduct must be extreme to amount to a change in terms and conditions of employment"; Title VII is not a "general civility code"); Harris v. Forklift Systems, 114 S. Ct. 367 (1993) (although employee does not need to prove psychological injury, she had to show that the offending behavior was, under the totality of the circumstances, both subjectively and objectively abusive); King v. Hillen, 21 F.3d 1572 (Fed. Cir. 1994) (applying Harris, Federal Circuit noted that MSPB mechanical approach to determining a hostile environment must give way to a

totality of the circumstances approach); Paroline v. Unisys Corp., 879 F.2d 100 (4th Cir. 1989), as modified 900 F.2d 27 (4th Cir. 1990) (plaintiff, in a constructive discharge case, must establish the deliberateness of the employers' actions and intolerability of the working conditions); Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991) (establishing a reasonable **victim** standard rather than reasonable person).

e. **Respondeat Superior**. Employers are not absolutely liable for the actions of their supervisors in every circumstance of sexual harassment. Relevant in this regard are the existence of **actual knowledge** by the employer of the harassment and whether the victim had a reasonably available avenue for making complaints known. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). Employers are **vicariously liable for harassment of an employee by a supervisor that results in a tangible employment action; however, if the harassment has not lead to an employment action, then the employer can prove an affirmative defense** that: 1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and 2) the employee failed to take advantage of any preventative or corrective opportunity provided by the employer or to avoid harm otherwise. Burlington Industries v. Ellerth, 524 U.S. 742 (1998); Faragher v. Boca Raton, 524 U.S. 775 (1998).

3. Non quid pro quo harassment (Hostile Environment).

a. Creating an offensive or hostile working environment leading even to **noneconomic** injury can violate Title VII; *i.e.*, the conduct at issue need not be directly linked to the grant or denial of an economic quid pro quo. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

b. The harassment need not take the form of sexual advances or of other incidents with clearly sexual overtones. Any harassment or unequal treatment that would not occur but for the sex of the employee, if sufficiently patterned or pervasive, may violate Title VII. McKinney v. Dole, 765 F.2d 1129 (D.C. Cir. 1985).

c. A hostile environment exists when an employee can show (1) he or she was subjected to sexual advances, requests for sexual favors, or other verbal conduct of a sexual nature; (2) that this conduct was unwelcome; and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the employee's environment or create an abusive working environment. Jordan v. Clark, 847 F.2d 1368 (9th Cir. 1988). See also, Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986); Waltman v. International Paper Co., 875 F.2d 468, 477 (5th Cir. 1989); Swentek v. USAir, 830 F.2d 552, 557 (4th Cir. 1987).

d. **Same-sex sexual harassment**, like opposite-sex sexual harassment, need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. Oncale v. Sundowners Offshore Services, 118 S. Ct. 988 (1998).

e. Examples of unacceptable behavior that did not rise to the level of sexual harassment.

1) Single, non-supervisory employee's crude and vulgar comments toward plaintiff, coupled with sexually oriented posters, were insufficient to affect the totality of the circumstances. Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986).

2) Blatant sexual overtures allegedly made by supervisor -- placing hand on knee and forcibly kissing her at a nightclub after work, and a subsequent attempt to grab her a few weeks later -- were not so severe or pervasive as to create an objectively hostile work environment. Saxton v. American Telephone and Telegraph Co., 10 F.3d 526, (7th Cir. 1993).

3) Supervisor who was "overly friendly and charming" and caught by employee embracing another female assistant in his office. Ellert v. University of Texas at Dallas, 52 F.3d 543 (5th Cir. 1995).

4) Humorous column in monthly newsletter satirizing female police officers published ten times at irregular intervals over two years was not so egregious as to alter the conditions of employment. The law "cannot remedy every tasteless joke or groundless rumor that confronts women in the workplace." DeAngelis v. El Paso Municipal Police Officers Assoc., 51 F.3d 591 (5th Cir. 1995).

5) Bad conduct listed in 200 paragraph statement of facts including intentionally giving hotel clerks the impression he was sharing a room with employee, took employee to Hooters restaurant, insisting employee work in his hotel room, many sexually explicit comments and needless touchings. Penry v. Federal Home Loan, 155 F.3d 1257 (10th Cir. 1998) finding that the gender based incidents were too few and far between to be considered sufficiently severe or pervasive to alter the employment.

6) Sexually oriented joke is the kind of non-threatening "utterance" that cannot alone support a hostile environment

claim. Long v. Eastfield College, 88 F.3d 300, 309 (5h Cir. 1996).

7) Several incidents over a two-year period, including comment: "your elbows are same color as your nipples," comment that plaintiff had big thighs, touching plaintiff's arm, and attempts to look down plaintiff's dress were insufficient to support hostile environment claim. Shephard v. Comptroller of Public Accounts of Texas, 168 F.3d 871, 872-75 (5th Cir. 1999).

f. Equally abusive behavior by a supervisor toward both sexes does not necessarily obviate liability. Steiner v. Showboat Operating Co., 25 F.3d 1459 (9th Cir. 1994) (court found that while supervisor was abusive of all, his abuse of women was "gender-specific"); Kopp v. Samaritan Health System, 13 F.3d 264 (8th Cir. 1993) (court held that while there was a longstanding pattern of abuse towards both sexes, there were more incidents of abusive behavior towards women and incidents with women were more serious in nature); Hutchinson v. Amateur Electronic Supply, Inc., 42 F.3d 1037 7th Cir. 1994) (court rejected employer's claim that offending supervisor's "boorish behavior" was equally offensive to men and women).

g. While isolated allegedly biased incidents may not be actionable, such conduct by decisionmakers in an adverse employment action can be relevant evidence to support a discrimination claim if the incidents show a pattern of behavior indicative of a defendant's discriminatory state of mind. Lam v. University of Hawaii, 164 F.3d 1186 (9th Cir. 1998).

4. **Employer's Response (Affirmative Defense)**. Burlington Industries v. Ellerth, 524 U.S. 742

(1998); Faragher v. Boca Raton, 524 U.S. 775 (1998).

a. Employer's prompt and proper response to a sexual harassment claim obviates employer liability. Woods v. Graphic Comm., 925 F.2d 1195 (9th Cir.1991); Reed v. Delta Air Lines, Inc., 19 F.3d 19(6th Cir. 1994); Carmon v. Lubrizol Corp., 17 F.3d 791 (5th Cir. 1994) (Fifth Circuit imposed sanctions for frivolous appeal of district court's grant of summary judgment). This is true even when the alleged harasser is a supervisor. Saxton v. American Telephone and Telegraph Co., 10 F.3d 526(7th Cir. 1993); Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989); Kotcher v. Rosa & Sullivan Appliance Center, Inc., 957 F.2d 59, 63 (2d Cir. 1992); Cortes v. Maxus Exploration Co., 977 F.2d 195, 199 (5th Cir. 1992); Baskervill v. Culligan International Co., 50 F.3d 428 (7th Cir. 1995); Davis v. Tri-State Mack Distributors, Inc. 981 F.2d 340, 343 (8th Cir. 1992); Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (11th Cir. 1989); *But see,* Yates v. Avco Corp., 819 F.2d 630, 636 (6th Cir. 1987).

b. The employer's response should be reasonably calculated to preclude further harassment; whether the harassment actually stopped as a result is not the sole factor to be considered since the perpetrator might persist. Adler v. WalMart Stores, 144 F.3d 664 (10th Cir. 1998).

5. **Exclusivity of Title VII.**

a. Title VII is the exclusive federal remedy; however, agency officials engaging in sexual harassment exceed the outer perimeter of their official duties for immunity purposes and are thus subject to state tort claims premised on the harassment in question. Owens v. United States, 822 F.2d 408 (3d Cir. 1987); Arnold v. United States, 813 F.2d 1306 (9th Cir. 1987).

b. Employee could, however, pursue a **constitutional claim** for sexual harassment for an injury caused by a federal employee acting within the parameters of his authority. Otto v. Heckler, 781 F.2d 754 (9th Cir. 1986).

6. **Disciplinary Actions.**

a. An agency has the right to remove an employee whose conduct is unwelcome, sexual in nature, offensive and likely to have an adverse effect on the agency's functioning. Sexual harassment is a serious charge. Howard v. Air Force, 877 F.2d 952 (Fed. Cir. 1989).

b. However, the agency must consider the context in which an incident occurred or remarks were made and the evidence must demonstrate that the events or remarks interfered with an employee's work or psychological well being, Downs v. FAA, 775 F.2d 288 (Fed Cir. 1985). The penalty chosen may be reduced if deemed disproportionately severe. Jackson v. Veterans Admin., 768 F.2d 1325 (Fed. Cir. 1985) (supervisor's request for kisses insufficient basis upon which to support a removal). Holland v. Air Force, 31 F.3d 1118 (Fed. Cir. 1994) (supervisor improperly demoted for statements expressing opposition to having women work in a warehouse since such statements were insufficient to establish hostile working environment).

c. On the other hand, verbal warnings and counseling may be an insufficient agency response to sexual harassment. If harassment continues, the employer must impose more severe measures. Intlekofer v. Turnage, 973 F.2d 773 (9th Cir. 1992).

d. The fact that a victim of sexual harassment has the right to seek redress under Title VII (and whether the victim chooses to exercise that right) has no bearing upon the agency's

right to discipline employees who harass or discriminate. Hostetter v. United States, 739 F.2d 983 (4th Cir. 1984); Carosella v. U.S. Postal Service, 816 F.2d 638 (Fed. Cir. 1987).

e. An employee can be disciplined for making false sexual harassment claims during an agency internal investigation; however, false EEO charges would be protected under Title VII. Vasconcelos v. Meese, 907 F.2d 111 (9th Cir. 1990).

J. **Remedies available.** 42 U.S.C. § 2000e-5(g).

1. **Monetary.**

a. Traditional permissible relief.

1) **Back Pay**. Set off by interim earnings. Clark v. Marsh, 665 F.2d 1168 (D.C. Cir. 1981). Employee must use reasonable diligence in finding another job, but need not accept a demotion or go into another line of work. Ford Motor Co. v. EEOC, 458 U.S. 219 (1982). Plaintiff must be "ready, willing and available" to work. Miller v. Marsh, 766 F.2d 490 (11th Cir. 1985).

2) **Promotion**. Available so long as court finds that employee would have been promoted **but for** the discrimination. Day v. Mathews, 530 F.2d 1083 (D.C. Cir. 1976); Richerson v. Jones, 551 F.2d 918 (3d Cir. 1977); Harbison v. Goldschmidt, 693 F.2d 115 (10th Cir. 1982). If more than one person is denied the same job opening or promotion for concededly discriminatory reasons, the employer may prove that only one of the persons would have been promoted "but for" the discrimination because there was only **one** job opening. Milton v. Weinberger, 696 F.2d 94 (D.C. Cir. 1982); See also

Pollard v. Grinstead, 741 F.2d 73 (4th Cir. 1984).

3) **Reinstatement.** Garcia v. Lawn, 805 F.2d 1400 (9th Cir. 1986).

4) **Front Pay**. Pending opportunity for promotion. Thompson v. Sawyer, 678 F.2d 257 (D.C. Cir. 1982); Pecker v. Heckler, 801 F.2d 709 (4th Cir. 1986); Smith v. Office of Personnel Management, 778 F.2d 258 (5th Cir. 1985).

b. Additional relief made available under the 1991 Act.

1) **Compensatory/Punitive Damages**. Neither available under prior law. DeGrace v. Rumsfield, 614 F.2d 796 (1st Cir. 1980); Richerson v. Jones, 551 F.2d 918 (3d Cir. 1977); Smith v. Office of Personnel Management, 778 F.2d 258 (5th Cir. 1985); Boddy v. Dean, 821 F.2d 346 (6th Cir. 1987); Padway v. Palches, 665 F.2d 965 (9th Cir. 1982); Walker v. Ford Motor Co., 684 F.2d 1355 (11th Cir. 1982). Under Section 102 of the 1991 Act, compensatory damages, but not punitive damages, of up to $300,000 ("for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses") may be recovered from the federal government. Such damages are over and above other relief authorized such as backpay, attorney fees, etc. [Currently debate centers on whether or not the dollar cap applies on a per lawsuit basis or on a per allegation of discrimination basis. See, e.g., Hudson v. Reno, 130 F.3d 1193 (6th Cir. 1997); Hogan v. Bangor and Aroostook Railroad Co., 61 F.3d 1034 (1st Cir. 1995) (statutory cap for compensatory and punitive damages (42 U.S.C. §

1981a(b)(3)) is a limitation on the sum and not on each type of damage award).]

2) **Jury Trials.** Under Section 102 of the 1991 Act, where plaintiff seeks compensatory damages, either party may demand trial by jury and the court shall not inform the jury of the damage limitations. Jury trials and compensatory damages are not available in ADEA actions, nor in Rehabilitation Act cases where the employer can demonstrate good faith efforts in consultation with the employee to identify and make a reasonable accommodation. 42 U.S.C. 1981a.

3) **Prejudgment Interest**. Not available under prior law. Library of Congress v. Shaw, 478 U.S. 310 (1986); Blake v. Califano, 626 F.2d 891 (D.C. Cir. 1980); Fischer v. Adams, 572 F.2d 406 (1st Cir. 1978); Richerson v. Jones, 551 F.2d 918 (3d Cir. 1977); Cross v. U. S. Postal Service, 733 F.2d 1327 (8th Cir. 1984); Saunders v. Claytor, 629 F.2d 596 (9th Cir. 1980); De Weever v. United States, 618 F.2d 685 10th Cir. 1980); *But see* Nagy v. United States Postal Service, 773 F.2d 1190 (11th Cir. 1985); Edwards v. Lujan, 40 F.3d 1152 (10th Cir. 1994) and Brown v. Secretary of Army, 918 F.2d 214 (D.C. Cir. 1990) (holding the Back Pay Act's allowance of interest for "unwarranted personnel actions" waives sovereign immunity under Title VII for unlawful personnel actions resulting in withdrawal or reduction of pay, but not as to denials of promotion). Section 114 of the 1991 Act amended the Civil Rights Act to grant interest to compensate for delay in payment, as is currently available in cases involving nonpublic parties.

4) **Expert Witness Fees.** Not available under prior law. West Virginia University Hospitals v. Casey, 111 S. Ct. 1138 (1991). Section 113 of the 1991 Act grants courts the discretion to award expert fees.

2. **Injunctive.**

a. **Enforcement of final EEOC order** if agency refuses to comply (without necessity of *de novo* review). Pecker v. Heckler, 801 F.2d 709 (4th Cir. 1986); Haskins v. Department of Army, 808 F.2d 1192 (6th Cir. 1987) (noting that EEOC finding on liability does not necessarily resolve relief issue); Houseton v. Nimmo, 670 F.2d 1375 (9th Cir. 1982); Moore v. Devine, 780 F.2d 1559 (11th Cir. 1986).

b. Changes in promotion practices. McKenzie v. Sawyer, 684 F.2d 62 (D.C. Cir. 1982).

c. **Personnel File Reconstruction/Expungement**. Chastain v. Kelley, 510 F.2d 1232 (D.C. 1975); Smith v. Secretary of the Navy, 659 F.2d 1113 (D.C. Cir. 1981); Nolan v. Cleland, 686 F.2d 806 (9th Cir. 1982).

d. **Permanent Title VII Injunctions.** Pecker v. Heckler, 801 F.2d 709 (4th Cir. 1986).

3. After-acquired evidence. After-acquired evidence of misconduct that would have resulted in the removal of the employee can limit the remedies available to the employee. McKennon v. Nashville Banner Publishing, 115 S. Ct. 879 (1995) [private sector ADEA case]; Castle v. Rubin, 78 F.3d 654 (D.C. Cir. 1996) [public sector Title VII case applying McKennon].

K. **Attorney fees.** 42 U.S.C. § 2000e-5(k).

1. Prevailing Party.

a. **Standard.** Success on any significant issue in litigation which achieves some of the benefit sought in bringing the suit. Hensley v. Eckerhart, 461 U.S. 424 (1983).

b. **Interim Award.** Can obtain an interim fee award absent a final judgment if plaintiff has obtained at an interlocutory stage final disposition of some important aspect of the case. Hanrahan v. Hampton, 446 U.S. 754 (1980). Favorable interlocutory ruling, absent damages, injunction, settlement, *etc.* does not make one a "prevailing party." Hewitt v. Helms, 482 U.S. 755 (1987). Similarly, procedural and discovery victories are insufficient interlocutory successes upon which to recover fees. Grubbs v. Butz, 548 F.2d 973 (D.C. Cir. 1976); Hanrahan v. Hampton, 446 U.S. 754 (1980).

2. Computing the Amount of the Award.

a. **General Principles**. (Time and labor required, novelty of the case, skill required, customary fee, results obtained, undesirability of the case, etc.) Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974).

b. **Reasonable Rates.** Prevailing market rate in the relevant community, with burden on the plaintiff to prove rates are comparable. Blum v. Stenson, 465 U.S. 886 (1984). Must bill at historical rather than current rate to avoid prejudgment interest. Library of Congress v. Shaw, 478 U.S. 310 (1986).

c. **Customary Fee.** Circuits are split on whether a firm's customary rate is the reasonable rate under Title VII.

1) Presumption that a private attorney's normal billing rate is a reasonable rate for computing fee award. Laffey v. Northwest Airlines, Inc., 746 F.2d 4 (D.C. Cir. 1984).

2) Permits fee award in line with the market rate, even if that amount substantially exceeds the fee applicant's own customary rate. Maldonado v. Lehman, 811 F.2d 1341 (9th Cir. 1987).

d. **Lodestar**. The number of hours reasonably expended multiplied by a reasonable hourly rate. Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980); Hensley v. Eckerhart, 461 U.S. 424 (1983). Fee award need not be proportionate to amount of damages recovered. City of Riverside v. Rivera, 477 U.S. 561 (1986).

e. **Upward Adjustment of Lodestar.** Justified in that rare case where the fee applicant shows the quality of the services rendered was superior and the results obtained were outstanding. Blum v. Stenson, 465 U.S. 886 (1984); Pennsylvania v. Delaware Valley Citizens Council, 478 U.S. 546 (1986). See also, Pennsylvania v. Delaware Valley Citizens Council, 483 U.S. 711 (1987). Not justified to compensate for risk of nonpayment. City of Burlington v. Dague, 112 S. Ct. 2638 (1992).

f. **Nonprofit Legal Organizations** are similarly entitled to reasonable fees and risk enhancements. Blum v. Stenson, 465 U.S. 886 (1984).

g. **Contingent Fee** arrangement in civil rights suit is **not** an absolute ceiling upon the amount of fees recoverable. Blanchard v. Bergeron, 489 U.S. 87 (1989).

3. Who may be Compensated?

a. **Attorneys**. 42 U.S.C. § 2000e-5(k). Unless they are representing themselves. Kay v. Ehrler, 111 S. Ct. 1435 (1991).

b. **Paralegals**. Richardson v. Byrd, 709 F.2d 1016 (5th Cir. 1983); Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810 (8th Cir. 1983).

c. **Not pro se** Plaintiffs. Lovell v. Snow, 637 F.2d 170 (1st Cir. 1981); Owens-El v. Robinson, 694 F.2d 941 (3d Cir. 1982); Wright v. Crowell, 674 F.2d 521 (6th Cir. 1982); Smith v. DeBartoli, 769 F.2d 451 (7th Cir. 1985); Coleman v. Turner, 838 F.2d 1004 (8th Cir. 1988); Gonzales v. Kangas, 814 F.2d 1411 (9th Cir. 1987); Turner v. Tuttle, 711 F.2d 148 (10th Cir. 1983); Ray v. DoJ, 87 F.3d 1250, 1251 (11th Cir. 1996).

d. **Not federal employees** prosecuting claims against the United States. 18 U.S.C. § 205.

4. What Attorney Services are Compensable?

a. Compensable.

1) **Administrative Success**. Kulkarni v. Alexander, 662 F.2d 758 (D.C. Cir. 1978); Booker v. Brown, 619 F.2d 57 (10th Cir. 1980). **Except under ADEA**. Kennedy v. Whitehurst, 690 F.2d 951 (D.C. Cir. 1982).

2) **Travel Time**. Maceira v. Pagan, 698 F.2d 38 (1st Cir. 1983) (reduced rate).

3) **Monitoring Consent Decree**. Turner v. Orr, 785 F.2d 1498 (11th Cir. 1986).

4) **Preparing and Presenting Fee Claim**. Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980); Daley v. Hill, 709 F.2d 1071 (4th Cir. 1986); Cruz v. Hauck, 762 F.2d 1230 (5th Cir. 1985); Jones v. MacMillan Bloedel Containers, Inc., 685 F.2d 236 8th Cir. 1982).

5) **Successful Appeals**. Furtado v. Bishop, 635 F.2d 915 (1st Cir. 1980); Barnes v. Bosley, 764 F.2d 490 (8th Cir. 1985).

b. Not Compensable.

1) **Pre-administrative complaint**. Prior to filing a formal administrative complaint, the only compensable time is that spent in determining whether to represent a claimant. Mertz v. Marsh, 786 F.2d 1578 (11th Cir. 1986).

2) **Pursuit of Unsuccessful Claims**. Hensley v. Eckerhart, 461 U.S. 424 (1983) (where unsuccessful claims were based upon different facts and legal theories than the claims upon which plaintiff prevailed); King v. McCord, 707 F.2d 466 (11th Cir. 1983).

3) **Duplicative Efforts** (i.e. two or more lawyers used where only one needed). Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980).

4) **Excessive Time Expenditures** (beyond that reasonably necessary.) DiFilippo v. Morizio, 759 F.2d 231 (2nd Cir. 1985).

5) **Undocumented Time**. Hensley v. Eckerhart, 461 U.S. 424 (1983).

6) United States may **not** recover attorney fees as prevailing Title VII defendant (but could be awarded fees as a sanction for bad-faith litigation). Butler v. Agriculture Department, 826 F.2d 409 (5th Cir. 1987); Blue v. Marsh, 914 F.2d 525 (4th Cir. 1990). Conversely, a court can award a **private** prevailing defendant attorney fees upon a finding that a plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad

faith. Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

5. Other Fee Shifting Statutes -- Equal Access to Justice Act. While the ADEA does not provide for attorneys fees, fees for such representation might be available under EAJA. Nowd v. Rubin, 76 F.3d 25 (1st Cir. 1996). Boehms v. Crowell, No. 97-60030, (5th Cir. 4/15/98).

6. Effect of Rule 68 Offers of Judgment.

   a. When a civil rights plaintiff's final recovery is less than a valid offer of judgment, defendant is not liable for any of plaintiff's post-offer costs, including attorney fees. Marek v. Chesney, 473 U.S. 1 (1985).

   b. When a Rule 68 Offer applies, plaintiff must pay defendant's post-offer costs, but not defendant's post-offer attorney fees. Crossman v. Marcoccio, 806 F.2d 329 (1st Cir. 1986).

III. RETALIATION/REPRISAL.

A. **Definition**. 29 C.F.R. § 1614.101.

B. **Exhaustion of administrative procedures is required**. Ong v. Cleland, 642 F.2d 316 (9th Cir. 1981). Unless complainant has a complaint pending. Nealon v. Stone, 958 F.2d 584 (4th Cir. 1992); Gupta v. East Texas State University, 654 F.2d 411 (5th Cir. 1981); Rennie v. Garrett, 896 F.2d 1057 (7th Cir. 1990); Goza v. Bolger, 741 F.2d 1383 (11th Cir. 1984).

C. **Elements Plaintiff Must Prove**. McKinney v. Dole, 765 F.2d 1129 (D.C. Cir. 1985); McCollum v. Bolger, 794 F.2d 602 (11th Cir. 1986).

1. Participation in statutorily protected activity;

2. Adverse employment action taken against employee;

3. Causal connection exists between the adverse employment action and the protected activity. This causal connection can be established by showing the employer had knowledge of the protected activity and that the adverse personnel action took place shortly after the activity. Mitchell v. Baldridge, 759 F.2d 80 (D.C. Cir. 1985).

D. **Employer's Defenses**.

1. Articulate legitimate reasons for its actions; business judgment. Butler v. U.S. Department of Agriculture, 826 F.2d 409 (5th Cir. 1987); Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1420 (11th Cir. 1991) ("Federal courts do not sit as a super-personnel department that reexamines an entity's business decisions...Rather, the inquiry is limited to whether the employer gave an honest explanation of its behavior.")

2. Lack of knowledge of former protected activity. Talley v. United States Postal Service, 720 F.2d 505 (8th Cir. 1983).

3. Extended delay between protected activity and alleged retaliation. Johnson v. Sullivan, 945 F.2d 976 (7th Cir. 1991) (3 years).

4. There is a **split in the circuits** on whether or not the retaliation prohibition applies to actions which do not amount to "ultimate employment actions" such as hiring and firing. Dollis v. Rubin 77 F.3d 777 (5th Cir. 1995) [Title VII was intended to address ultimate employment decisions such as hiring, discharging or promoting and not every decision that might arguably have a tangential effect on those ultimate decisions]; see also Ledergerber v. Stangler, 122 F.3d 1141, 1144 (8th Cir. 1997). But see: Wyatt v. City of Boston, 35 F.3d 12 (1st Cir. 1994), Yartzoff v.Thomas, 809 F.2d 1371 (9th Cir. 1987), Berry v. Stevinson, 74 F.3d 980 (10th Cir. 1996). Note that a recent unpublished opinion, Williams v. West, No. 99-14939 at 5 (11th Cir. Jun. 19, 2000) provides different

outcome for private sector v. federal cases: cf Wideman v. WalMart, 141 F.3d 1453 (11th Cir. 1998) with Ferguson v. Veteran's Admin., 723 F.2d 871 (11th Cir. 1984).

E. **Former Employees.** Robinson v. Shell Oil Co., 117 S.Ct 843 (1996) (former employee may bring Title VII action against former employer for retaliation). Nelson v. Upsala College, 51 F.3d 383 (3rd Cir. 1995) (anti-retaliation provisions of Title VII protect former employees only to extent that employer's alleged retaliation impairs some employment relationship; former employee has no cause of action for being barred from campus).

F. **Associational Reprisal**. A husband who was fired after his wife alleged age bias has no retaliation claim under ADEA. Holt v. JTM Industries, 89 F.3d 1224 (5th Cir. 1996).

G. **Mixed Motive Issues.** 1991 Act mixed motive provisions do not apply to retaliation claims. Tanca v. Nordberg, 98 F.3d 680 (1st Cir. 1996).

IV. SUMMARY JUDGMENT STANDARD APPLIED.

A. *De Novo* Review v. Summary Judgment.

B. Rule 56(c), Federal Rules of Civil Procedure.

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

C. Past Judicial Interpretation.

1. Circuit courts viewed summary judgment as a "disfavored procedural shortcut," applicable to only a limited class of cases. Armstrong v. City of Dallas, 997 F.2d 62 (5th Cir. 1993).

2. Hesitancy based on fear that trial judges would use summary judgment as "catch penny contrivance to take unwary litigants into its toils and deprive them of a trial." Fontenot v. Upjohn Co., 780 F.2d 1190 (5th Cir. 1986).

D. The Supreme Court's Trilogy - Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

1. Circuit courts' earlier restrictive approach wrong because inconsistent with Rule 56.

2. If plaintiff presents no evidence to support an essential element of his case, that case is subject to summary judgment.

3. The "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed `to secure the just, speedy and inexpensive determination of every action.'" Celotex, 477 U.S. at 327.

4. Mere existence of scintilla of evidence in support of plaintiff's position insufficient. Anderson, 477 U.S. at 249.

5. Party opposing summary judgment must do more than show some metaphysical doubt as to material facts. Matsushita, 475 U.S. at 586.

E. Genuine Issue of Material Fact - Developing Essential, Undisputed Facts.

1. Administrative record. Lujan v. National Wildlife Federation, 110 S. Ct. 3177 (1990).

2. Plaintiff's prior admissions.

3. Additional discovery.

F. Evidence Construed and Factual Inferences Drawn in Favor of Non-moving Party. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). However, for factual

issues to be considered genuine for the purposes of summary judgment, they must have a real basis in the record. Hairston v. Gainesville Sun Pub. Co., 6 F.3d 836 (11th Cir. 1993). Plaintiff cannot rest upon conclusory allegations, improbable inferences, and unsupported speculation. LeBlanc v. Great American Ins. Co., 896 F.2d 5 (1st Cir. 1993).

G. Shifting Burdens of Proof. Circumstantial Evidence of Discrimination - McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

1. Plaintiff's Burden - Establish a *Prima Facie* Case.

a. Presenting proof giving rise to the inference that it is more likely than not that the adverse action complained of was based on illegal discriminatory criteria. Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978).

b. Not intended to be "rigid, mechanized, or ritualistic." MacDonald v. Eastern Wyo. Mental Health Ctr., 941 F.2d 1115 (10th Cir. 1991).

c. Established by proving (1) plaintiff is member of protected class; (2) plaintiff, while qualified, suffered some adverse employment action; and (3) another employee outside of protected class not treated in similar adverse manner under circumstances from which discrimination could be inferred. Luna v. City & County of Denver, 948 F.2d 1144 (10th Cir. 1991).

d. Burden is not onerous, but plaintiff must point out specific facts giving rise to an inference of discriminatory animus. Hoeppner v. Crotched Mountain Rehabilitation Ctr., 31 F.3d 9 (1st Cir. 1994).

e. If insufficient evidence for *prima facie* case, summary judgment routinely granted.

Torre v. Casio, Inc., 42 F.3d 825 (3rd Cir. 1994).

f. Application of Standard: If it can be shown that plaintiff is not in a protected group, was not qualified for the position or action in question, did not suffer any adverse impact from the contested action, or was not treated differently from other similarly situated employees, plaintiff fails to establish a *prima facie* case. Luna v. City & County of Denver, 948 F.2d 1144 (10th Cir. 1991). If plaintiff cannot show he was similarly situated, and therefore cannot present sufficient evidence to raise the required inference of discriminatory animus, he has not met a *prima facie* case and summary judgment is warranted. Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997) (plaintiff must show that he is similarly situated "in all relevant respects" to employees outside his classification that were treated more favorably than him.)

2. Defendant's Burden - Articulate Legitimate, Non-discriminatory Reason for Action Taken. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

   a. Defendant's burden of production is exceedingly light. Meeks v. Computer Associates Intern., 15 F.3d 1013 (11th Cir. 1994).

   b. Court will not look behind proffered reason to determine real intent or motivation behind reasons for action. Burdine, 450 U.S. 248 (1981).

3. Plaintiff's Burden - Showing Pretext.

   a. If plaintiff cannot show pretext, summary judgment granted. Clark v. Coats & Clark, Inc., 990 F.2d 1217 (10th Cir. 1992).

b. When burden of proof shifts back to plaintiff to prove pretext, plaintiff's obligation merges with ultimate burden of proving intentional discrimination. St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993). Plaintiff must present "significantly probative" evidence to prove defendant's articulated reason is pretext for intentional discrimination. Elrod v. Sears Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991).

c. Application of Standard: A plaintiff cannot defeat a motion for summary judgment simply by making out a bare *prima facie* case. Wallis v. J.R. Simplot Co., 26 F.3d 885 (9th Cir. 1994). Plaintiff must raise a genuine factual question as to whether defendant's reasons are pretextual. Lowe v. City of Monrovia, 775 F.2d 998 (9th Cir. 1985).

1) Plaintiff's mere conjecture that employer's explanation is pretext for intentional discrimination is an insufficient basis for denial of summary judgment. Palochko v. Manville Corp., 21 F.3d 981 (10th Cir. 1994).

2) If no facts related to the pretextuality of defendant's action remain in dispute, summary judgment is proper. Hooks v. Diamond Crystal Specialty Foods, Inc., 997 F.2d 793 (10th Cir. 1993).

3) Even where court finds pretext in defendant's articulation of its reasons, in order to defeat a motion for summary judgment plaintiff must adduce sufficient evidence to support finding that Defendant's stated reason was not only a pretext, it was a pretext for illegal discrimination. St. Mary's Honor Center v. Hicks, 113 S.Ct 2742 (1993); Reeves v. Sanderson Plumbing, 120 S. Ct. 2097 (2000).

H. Summary judgment motion examples at Appendix A.

1. Mixed case appeal to district court alleging national origin and age discrimination in a termination for refusing to accept a reassignment following the expiration of an employment rotation agreement in Europe.

    a. Untimely filed.

    b. Failed to name the head of the agency.

    c. Failed to raise alleged age discrimination before the MSPB.

    d. Even if court reaches the merits of the claims, summary judgment is appropriate.

2. Suit in district court alleging race discrimination in her "nonselection" for a temporary promotion and subsequent permanent hiring in the position in question.

    a. Failed to exhaust mandatory administrative remedies (untimely EEO counselor contact) with regard to the temporary promotion.

    b. Defend is entitled to summary judgment for all claims in action.

3. Suit in district court alleging plaintiff's nonselection for a GS-6 position was in retaliation for a prior EEO complaint. [Note that this sample includes a separate "statement of material facts not in genuine dispute" which is required in some jurisdictions.]

    a. Summary judgment is proper because plaintiff cannot establish a *prima facie* case of retaliation.

    b. Summary judgment is also appropriate because plaintiff's nonselection was motivated by legitimate, nondiscriminatory reasons which plaintiff cannot show are a pretext for retaliation.

V. JUDICIAL REVIEW OF DECISIONS OF THE MSPB.

A. Filed in either the United States Court of Appeals for Federal Circuit (CAFC) (5 U.S.C. § 7703) ("pure cases") or in a United States District Court (5 U.S.C. § 7702) ("mixed cases").

1. **Pure Cases.** CAFC has plenary jurisdiction to review decisions of the MSPB. Rosano v. Department of the Navy, 699 F.2d 1315 (Fed. Cir. 1983). If employee raises but later abandons discrimination claim, CAFC has exclusive jurisdiction over appeal from an adverse MSPB decision. Blake v. Department of Air Force, 794 F.2d 170 (5th Cir. 1986).

2. **Mixed Cases**. When petitioner has alleged discrimination before the MSPB in connection with an adverse personnel action and continues to allege discrimination in his judicial appeal, jurisdiction is vested in the district courts, not the CAFC. Williams v. Department of Army, 715 F.2d 1485 (Fed. Cir. 1983). (*See* (29 C.F.R. § 1614.302)).

   a. Every Court of Appeals considering the question has ruled that mixed cases involving elements of discrimination and nondiscrimination must be tried as a unit in the district court. Hayes v. U. S. Government Printing Office, 684 F.2d 137 (D.C. Cir. 1982); Chang v. Merit Systems Protection Board, 677 F.2d 882 (1st Cir. 1982); Wiggins v. U.S. Postal Service, 653 F.2d 219 (5th Cir. 1981); Christo v. Merit Systems Protection Board, 667 F.2d 882 (10th Cir. 1981); Doyal v. Marsh, 777 F.2d 1526 (11th Cir. 1985).

   b. Dismissal by district court of discrimination claim does not automatically deprive the court of jurisdiction to hear the **nondiscrimination** claim. Afifi v. Dept. of Interior, 924 F.2d 61 (4th Cir. 1991).

c. Jurisdiction to review MSPB's award of attorney **fees** in mixed cases is in the district court, rather than CAFC. Kean v. Stone, 926 F.2d 276 (3d Cir. 1991).

3. **Threshold Jurisdiction**. CAFC does not automatically transfer every appeal of a mixed case to the appropriate district court; instead CAFC conducts preliminary inquiry of petitioner's discrimination claim to determine where jurisdiction lies. Meehan v. United States Postal Service, 718 F.2d 1069 (Fed. Cir. 1983). If the discrimination claim in a mixed case is specious, inadequate, or not fairly at issue in the appeal, CAFC will not transfer. Hill v. Department of Air Force, 796 F.2d 1469 (Fed. Cir. 1986).

B. **Time limits**. Petition must be filed within thirty days of petitioner receiving notice of the MSPB decision. 5 U.S.C. § 7703(b)(1). This time limit is usually held to be jurisdictional. Devine v. White, 697 F.2d 421 (D.C. Cir. 1983); Monzo v. Department of Transportation, 735 F.2d 1335; Lewis v. IRS, 691 F.2d 858 (8th Cir. 1982); Boehm v. Foster, 670 F.2d 111 (9th Cir. 1982). (*See also*, Section II.B.2.b.3), *supra*). In a mixed case complaint the thirty days runs from actual receipt even if belated. Saddler v. Army, 68 F.3d 1357 (Fed. Cir. 1995)

C. **Scope of Review.**

1. MSPB files administrative record with the Court.

2. Review of administrative record; no de novo consideration of evidence. Doe v. Hampton, 566 F.2d 265 (D.C. Cir. 1977); Gellerman v. Nimmo, 704 F.2d 1004 (7th Cir. 1983).

3. Exhaustion of administrative remedies required; employee is precluded from raising issues before CAFC which were not raised before MSPB. Boley v. U.S. Postal Service, 917 F.2d 1099 (Fed. Cir 1990). May not resort to courts if MSPB dismisses appeal for failure to cooperate.

Tanious v. Internal Revenue Service, 915 F.2d 410 (9th Cir. 1990).

D. **Standard of Review.**

1. Statutory Standard (5 U.S.C. 7703(c)). Court to set aside any findings found to be:

   a. Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

   b. Obtained without procedures required by law, rule or regulation having been followed; or

   c. Unsupported by substantial evidence.

2. Court of Appeals for Federal Circuit is deferential to both the MSPB and the Agency.

   a. **MSPB**. Very narrow and limited review. Hayes v. Department of the Navy, 727 F.2d 1535 (Fed. Cir. 1984). Deference given to the determinations of the MSPB administrative judge. Hagemeyer v. Department of Treasury, 757 F.2d 1281 (Fed. Cir. 1985).

   b. **Agency**. Much deference accorded to the sound discretion of the agency. Weston v. U.S. Department of Housing and Urban Development, 724 F.2d 943 (Fed. Cir. 1983).

E. **Who can obtain review?**

1. The employee. 5 U.S.C. § 7703(a)(1).

2. The Director of the Office of Personnel Management, (5 U.S.C. § 7703(d)) if the Director concludes:

   a. The MSPB erred in interpreting a civil service law, rule, or regulation affecting personnel management; or

   b. The decision will have a "substantial impact" on a civil service law, rule, regulation, or

policy directive. Devine v. Nutt, 718 F.2d 1048 (Fed. Cir. 1983) (CAFC not bound by OPM Director's claim of "substantial impact"). However, MSPB has no authority to refuse to consider the merits of the Director's petition. Newman v. Lynch, 897 F.2d 763 (Fed. Cir. 1990). Similarly, OPM must seek and an arbitrator must reconsider an arbitration decision as a condition precedent to judicial review. Nemman v. Corrado, 897 F.2d 1579 (Fed. Cir. 1990).

c. The Director must either intervene before the MSPB or request reconsideration by the MSPB prior to filing a petition for review. Horner v. Burns, 783 F.2d 196 (Fed. Cir. 1986).

d. OPM director's authority to intervene extends to adverse arbitration decisions as well. 5 U.S.C. § 7121(f).

3. Individually affected federal agencies have no right to judicial review (absent action by OPM).

VI. JUDICIAL REVIEW OF DECISIONS OF THE MSBP (VETERNS EMPLOYMENT OPPORTUNITIES ACT OF 1998, P.L. 105-339)

The act amends 5 USC 2302(b) to make it an enumerated prohibited personnel practice to knowingly take or fail to take a personnel action if to do so violates a veteran's preference requirement. A veteran who alleges that an agency has violated his veterans preference rights can file a complaint with the Department of Labor within 60 days of the alleged violation. From DoL, or if the veteran is not alleging a violation of veterans' preference, the employee can appeal to the MSPB. If the MSPB does not finish within 120 days, the veteran has 60 days to go to U.S. District Court or can appeal after the MSPB decision.

Remedies: The MSPB and courts may order compliance with the veterans preference laws, back pay, liquidated damages if the violation is willful, and reasonable attorney fees, expert witness fees and costs.

VII. JUDICIAL REVIEW OF DECISIONS OF THE FLRA.

A. Filed in "appropriate" circuit court of appeals (having jurisdiction) or in the Court of Appeals for the D.C. Circuit. 5 U.S.C. § 7123(a).

B. **Time limits**. Petition for review must be filed within 60 days of the date of the FLRA order. 5 U.S.C. § 7123(a). American Federation of Gov't Employees v.Federal Labor Relations Authority, 802 F.2d 47 (2d Cir. 1986).

C. **Scope of Review.**

1. Review of administrative record; no de novo review. 5 U.S.C. § 7123(c).

2. The FLRA files the administrative record. 5 U.S.C. § 7123(c).

3. Cannot gain judicial review of issues not presented to the FLRA. EEOC v. Federal Labor Relations Authority, 476 U.S. 19 (1986).

4. Decision of FLRA General Counsel **not** to issue an Unfair Labor Practice Complaint is not a final order of the Authority subject to review. Martinez v. Smith, 768 F.2d 479 (1st Cir. 1985); Turgeon v. FLRA, 677 F.2d 937 (D.C. Cir. 1982).

5. Factual findings must be supported by substantial evidence. 5 U.S.C. § 7123(c).

D. **Standard of Review**.

1. Taken from the Administrative Procedure Act, 5 U.S.C. § 706, 5 U.S.C. § 7123(c). National Treasury Employees Union v. Federal Labor Relations Authority, 691 F.2d 553 (D.C. Cir. 1982).

2. Courts give considerable deference to FLRA's interpretations.

a. Bureau of Alcohol, Tobacco, and Firearms v. Federal Labor Relations Authority, 464 U.S.

89 (1983). *But see*, Federal Labor Relations Authority v. Aberdeen Proving Ground, 485 U.S. 409 (1988).

b. FLRA upheld unless the decision is "arbitrary, capricious, an abuse of discretion, or not in accordance with law." Library of Congress v. Federal Labor Relations Authority, 699 F.2d 1280 (D.C. Cir. 1983).

c. However, FLRA is only entitled to deference when it is interpreting its own statute--not another agency's. IRS, Fresno Service Center v. Federal Labor Relations Authority, 706 F.2d 1019 (9th Cir. 1982) (no deference to Authority's interpretation of EEOC regulations); California National Guard v. Federal Labor Relations Authority, 697 F.2d 874 (9th Cir. 1983) (no deference owed to FLRA's interpretation of Title 32).

E. **Who can obtain review**?

1. Any "person" aggrieved by the final order of the FLRA. 5 U.S.C. 7123(a).

2. "Person" includes individuals, labor organizations, and agencies. 5 U.S.C. 7103(a)(1).

3. FLRA may petition any appropriate Court of Appeals for enforcement of any order of the Authority. 5 U.S.C. § 7123(b).

VII. CONCLUSION.

APPENDIX A. Sample Motions for Summary Judgment

APPENDIX B. Sample Litigation Report Documents

Litigation Report Checklist

References: AR 27-40, Para. 3-9; Individual litigation attorneys

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1. Statement of Facts

Complete Statement of Facts.

- All facts pertaining to claims raised in the judicial complaint.
- All facts pertaining to potential defenses to claims in judicial complaint.
- Dates for all complaints and responsive actions.

All Facts Supported by Documents/Statements.

- All supporting documents and statements are attached and tabbed.
- Statement of facts references all supporting tabbed evidence.

2. Setoff or Counterclaim

Discuss any prior settlements or settlement offers.
Discuss any possible counterclaim, i.e. fraud.

3. Responses to Pleadings

Prepare a Draft Answer to the Judicial Complaint.

- Respond to each and every fact asserted.
- Deny what is false.
- Admit what is true.
- If neither, deny as presented and aver or explain our position.
  - Explains tangential facts not contained in litigation report.
  - Factual supplement to the litigation report.

4. Memorandum of Law

Prepare Brief Statement of the Legal Issues and Potential Defenses.

- Format not important.
- View it as a lawyer to lawyer memo highlighting the legal issues.
- Do not worry about legal citations.
- Do not let this requirement delay the litigation report.

5. Potential Witness Information

Complete List of Potential Witnesses

- Work address and phone number.
- Home address and phone number if available (for emergency use).
- Brief statement of witness relevance and to what they can attest.

6. Exhibits

Copy of all relevant documents attached and tabbed.
Index/List of tabs and exhibits included.

7. Distribution

Two Copies to the Litigation Attorney.
One Copy to the Assistant U.S. Attorney Assigned to the Case.
Computer Disk of Litigation Report included.

- Wordperfect format preferred.
- MS Word format acceptable.
- Include copy of any MSPB or EEOC briefs available.
- Label disk

CONFIDENTIAL ATTORNEY WORK PRODUCT CONFIDENTIAL

ABCDEF-31A 28 September 1999

MEMORANDUM FOR USALSA, ATTN: DAJA-LTC (MAJ Litigator), 901 N. Stuart St., Arlington, VA 22203-1837

SUBJECT: Harry Smith v. Louis Caldera, Secretary of the Army, No. C-98-666 (N.D. VA., filed August 17, 1998)

1. In accordance with your letter dated, 6 September 1998, please find enclosed a copy of the Litigation Report for the above styled case.

2. The Index (List of Exhibits) is found at Part VI of the Litigation Report.

3. Also enclosed is a DA 4 signed by the Acting EEO Manager, and a 3¼ disk in WordPerfect and ASCII formats.

4. If you have any questions concerning the above, feel free to call me at (555) 555-3086/3431, or DSN 555-3086/3431. My Fax number is (555) 555-2312 (DSN 555-2312), and my E- Mail address is cleverlawyer@.army.mil.

Brett Favre

Encls.
as

BRETT FAVRE
Attorney Advisor

SMITH v. CALDERA LITIGATION REPORT

PART I
STATEMENT OF FACTS

COURSE OF PROCEEDINGS

Complainant contacted the Fort Swampy EEO office on October 31, 1994, regarding his nonselection for a position. Complainant alleged only sex discrimination because he believed that one of the selectees, Ms. Mack, was selected because she was female. This counselor contact was timely as complainant only learned of his nonselection on September 23, 1994. Complainant did not allege race discrimination initially. After discussing the matter with the counselor, he amended his informal complaint to allege reprisal discrimination (dated November 21, 1994). A copy of the EEO Counselor Report is at TAB O at p. 33-38. The EEO counselor was not able to resolve the complaint and gave complainant his final interview on December 1, 1994. Plaintiff filed a formal complaint of discrimination on December 17, 1994. TAB O at p. 40-45. This report was accepted and investigated although it was a day late. December 16, 1994, was a Sunday, and EEO office practice is to accept a complaint on the following business day. Complainant was advised of this policy when he attended his final interview. (TAB O at p. 38).

A Department of Defense Office of Complaint Investigations (OCI) Fact Finding Conference was held on April 24, 1995. The OCI Fact Finding Transcript begins at TAB A, p. 36. The OCI Investigator issued a finding of no discrimination dated June 29, 1995 (TAB A, p. 1). The Complainant signed for the Investigative File on July 13, 1995 (TAB B).

Complainant timely appealed the OCI Investigator's finding of no discrimination to the Equal Employment Opportunity Commission (EEOC) on August 9, 1995 (TAB C). An EEOC hearing was held on April 23, 1996. (The EEOC Transcript is hereafter referred to as TAB D). The EEO Administrative Judge issued a Bench Decision finding No Discrimination on April 29, 1996 (TAB E). Department of Army issued a Final Army Decision concurring with the finding of no discrimination on June 19, 1996 (TAB F).

On July 18, 1996, the Complainant appealed the Final Army Decision to the EEOC's Office of Federal Operations (OFO). (See, TAB G). The OFO issued a Decision affirming the Agency's Final Decision on February 24, 1998 (TAB H).

Complainant filed this action : Harry Smith v. Louis Caldera, Secretary of the Army, No. C-98-666 in the United States District Court (N.D. VA) in Haines Point, VA on August 17, 1998 (TAB I). Complainant filed the action *Pro Se*.

FACTS

On or about August 2, 1994 the Complainant, Mr. Harry Smith, applied for the position of Aircraft Engine Overhaul Inspector, WG-8602-11 (TAB A, p. 137). The position was in Engine Service Center and Quality Control Branch, of the Engine Production Management Division, of the Directorate of Engine Production Directorate. There were ten candidates, including the Complainant, referred to the Selecting Official for two position openings. The Complainant was not selected for either position (See, TAB J).

Ms. Imogene Selector, Division Chief of the Engine Production Management Division, GS-1152-12 (second-level supervisor) made the two selections, in question. Normally, the supervisor of the T53 Engine Assembly Shop (in the Engine Service Center and Quality Control Branch) would have made the selections. However, the first-level supervisor was on a 120 day detail. Therefore, Ms. Selector, the second level supervisor made the selections (TAB A, pp. 68-69, OCI Transcript, ("Tr.") pp. 33-34 and, EEOC Transcript, hereafter, TAB D, p. 18). Also, because this was not Ms. Selector's area of expertise, she accepted the panel's decision on experience and concluded that all of the candidates were equally qualified (TAB A, p. 65, Tr., p. 30).

The positions were advertised initially by a Promotional Bulletin 28-94 issued on June 6, 1994 with a closing date of June 15, 1994 (TAB K). The Promotional Bulletin was amended three times. The Promotional Bulletin (PB) was amended for the first time on June 9, 1994 under the number 28-94A (TAB L). PB 28-94A deleted the Knowledge, Skill and Ability (hereafter, "KSA") requirement No. 7, that initially required the "Ability to Communicate in Writing." The PB was amended for the second time on July 15, 1994 (TAB D, p. 90) under the number 28-94B (TAB M). PB 28-94B deleted KSAs Nos. 6 and 8 which initially required the "Ability to Communicate Orally", and the "Ability to Demonstrate Interpersonal Skills." The PB was amended for the third time on July 21, 1994 (TAB D, p. 91) under the number 28-94C (TAB N). PB 28-94C reiterated that KSAs Nos. 6-8 had been deleted. It was issued on July 26, 1994 and closed on August 4, 1994.

The Selecting Official, Ms. Selector selected Ms. Brenda Hack (Black, Female) and Mr. Michael Smack (Caucasian, Male) for the two vacant positions (TAB J).

The issue accepted for investigation- "Was the complainant discriminated against based on his sex (Male) and reprisal for prior participation in discrimination complaint activity when on or about 21 September 1994, he was not selected for the Aircraft Engine Overhaul Inspector, GS-8602-11, position announced on Promotional Bulletin (PB) number 28-94" (TAB A, Report of Investigation, p. 1). Note that complainant never raised a claim of race discrimination during the administrative processing of his claims.

One of the Complainant's main contentions was that he should have been selected because he had more experience than the two selectees. He stated he had 22 years experience with engines (TAB A, p. 42, Tr., p. 7). He argued it was not rational to bring in selectees from completely different job series to inspect his work (TAB D, pp. 65-66). He added that he was better qualified than the selectee's because he did not have to be trained on the T-53 engine line (TAB A, p. 48, Tr. p.13).

Complainant alleged, he would have to train the two selectees if they inspected his work because they did not know the engine (See, TAB A, p. 48, Tr., p.13, and TAB D, p. 51). Lastly, in regard to experience, Complainant alleged everyone on the Selection Register was more qualified then the two selectees, because the selectees came from a different area (TAB D, p. 66).

The Selecting Official, Ms. Selector testified that there was no order of ranking of the candidates on the referral register, (TAB D, pp. 20, 23) and that the list was complied alphabetically, (TAB A, p. 60, Tr. p. 25). She explained that the issue of experience, to include whether prior engine experience was required, in her mind was determined by the ranking panel. Ms. Selector believed all the employee's had equal; experience (TAB A, pp. 61, 65, Tr. pp. 26, 30).

The Personnel and Classification Specialist, Ms. Bobbie Brooks, GS-201-11 testified that she advised Ms. Selector not to ask the candidates about their experience. That was because Personnel and the rating panel members would not have referred the candidates if they did not have the required experience (TAB A, pp. 86-87, Tr. pp.51-52).

The rating panel members were subject matter experts. Mr. Dorsey Levens was a member, he was a prior supervisor in the contested position's area (TAB A, p. 74, Tr. p. 39). Mr. Antonio Freeman also was a panel member. He was from the T-700 engine area. Mr. Mark Chmura was the third panel member. He was from the T-55 engine area. (TAB D, p. 88).

Neither Mr. Chmura, nor Mr. Freeman was in the directorate where the selections were being made (TAB D, pp. 98-99). Both Chmura and Freeman were division chiefs over areas where inspectors came in; and according to Ms. Brooks their comments had a lot of weight. (TAB D. p. 91). They referred 10 candidates as "Best Qualified" to the Selecting Official. There was no requirement to have prior aircraft engine mechanic experience to be referred as a successful candidate (TAB A, p. 81, Tr. p. 46)

Responding to the OCI Investigator's question, Complainant admitted he had not seen or heard anything that would lead him to believe that management made its decision based on the female selectee's gender. But, he added "we" knew she was going to be selected because the shop did not have a black women, or even a female inspector. (TAB A, p. 51, Tr., p. 16). Complainant added that the white male was selected because he was the supervisor's friend and they went out together. (TAB A, pp. 51-52, Tr., ROI, pp. 16-17).

Complainant's allegation concerning gender discrimination lost its viability when he admitted to the EEO Administrative Judge at the EEOC Hearing, I can't say that the Selecting Official doesn't like male mechanics, or that he won't select a male because he did select a man (TAB D, p. 76). The Selecting Official specifically denied that he preselected candidates (TAB A, p. 68, Tr. pp. 33). (TAB D. p. 32)

Complainant's allegation of reprisal stems from complaints he filed within the Directorate of Engine Production. One of them was filed against the Director, Mr. Reggie White, for Complainant's non-selection to a supervisory position (TAB A, pp. 46-47, Tr. pp. 11-12). The others were against supervisors in the directorate (TAB A, p. 100, Tr., p. 65). Complainant alleges since the Selecting Official informed the Director of his selections after the selections were made that gave the Director an opportunity to reprise against him by assuring he was not selected (TAB A, pp. 46-47, Tr. pp. 11-12).

At the EEOC Hearing the Complainant made the assumption that because the Selecting Official did not have experience in Complainant's area he must have consulted with the Director in making his selections. Complainant stated,

> With him [Selecting Official] being placed in the position he really knew nothing about nothing right, but I do know that Reggie [White] has a lot of influence on what's being done down there. He [Selecting Official] couldn't really make a decision on experience because he had no knowledge of my area, so he had to go to some other subject matter, which is Reggie [White]. Because Reggie was there before him (TAB D, p. 78).

The Selecting Official testified that at the time of the selection he was not aware that Mr. Smith had filed prior EEO complaints (TAB A, p. 66, Tr., p. 31). In fact prior to the selection he did not even know the Complainant (TAB D, p. 25), nor had the Complainant ever filed an EEO complaint against Mr. Musser (TAB D, pp. 33, 38, 42).

The Director, Mr. Reggie White testified that, even though he was aware of the Complainant's prior complaints against him, he did not influence the selections which were made freely by Ms. Selector (TAB A, p. 100, Tr., p. 65).

Complainant's other "evidence" of discrimination were the many amendments of the Promotional Bulletins. He averred the Selecting Official or management continued to manipulate the Promotional Bulletins until they received applications from the right candidates.

The Selecting Official testified that he was not involved in the decision to amend the promotional bulletin (TAB A, p. 59, Tr., p. 24). The Director, Mr. White testified that he did not make the decision

to amend the Promotional Bulletin. However, two panel members came to him asking whether he had any objection to their deleting the testing and ability to communicate requirements. He indicated he advised them since you have to work with those jobs, if you feel the requirements are not needed I have no objection to their deletion. (TAB A, pp. 96-97, Tr., pp. 61-62).

Complainant asked why would they change the Promotional Bulletin now when it had been the same for 10 years? (TAB A, p. 45, Tr., p. 10). He stated he put in his KSAs under the original bulletin under the seven elements (TAB D, p. 44). Thus, implying he was adversely affected by the amendments.

It is noted that his application for the position, CCAD Form 190h entitled, "Supplemental Application Form" is dated August 2, 1994 (TAB A, p. 137). That being the case his application would have only been timely under the Promotional Bulletin's third and last amendment 28-94C (TAB N).

TACTICAL CONSIDERATIONS

The Selecting Official, who is presently retired, could make a poor witness. While a very competent supervisor, she does not testify well. Additionally she made her selection based on the oral interviews, even though the KSAs, "Ability to Communicate Orally " and "Ability to Demonstrate Interpersonal Skills" were deleted from the amended Promotional Bulletin. These are still valid selection criteria, particularly for a person working with inspections, but Complainant may try to make an issue of the KSA changes. The Selecting Official kept no record of the questions she asked the candidates. Also, she cannot remember either the number, nor the subject matter of the questions asked. It appears, based upon her prior testimony that she made an uninformed selection.

The good news is that she made two selections-- one Black female; one Caucasian male. Therefore, selection based on sex is out since another male was selected. While Complainant also alleges race discrimination in his judicial complaint, he failed to raise that issue in the administrative hearings. Even if he had, it would be difficult to establish race discrimination when Ms. Selector did select a Black. Also, the Selecting Official did not know the Complainant prior to the interview; and the Selecting Official did not know of his prior EEO activity. Therefore, the reprisal issue cannot be sustained either. Nor has any other employee ever filed a discrimination complaint against Ms. Selector. There is no evidence of Title VII discrimination in the selections she made. (see EEOC Board Decision, pp. 7-8)

Complainant's failure to raise reprisal discrimination as a basis until well under investigation may be a failure to exhaust. See Tolbert. The EEO office also has a policy of accepting EEO complaints that are due on a weekend or holiday on the first business day following the filing deadline. I have repeatedly argued with the EEO office over this policy. "15 days means 15 days." However, they have

stuck to their position. If called to testify, the EEO officer would testify that he granted an exception to policy and found the complaint timely.

PART II

SETOFF OR COUNTERCLAIM

There is no setoff or counterclaim in this case. I proposed settling the case by giving the Complainant a within grade transfer to a different section which enhance his promotion opportunities. He refused the offer and demanded $100,000 to settle his claim, which we refused. We have many promotion opportunities at Camp Swampy and a monetary settlement would wreak havoc on the selection process.

PART III

RESPONSES TO PLEADINGS

Listed below are suggested responses to the to the numbered paragraphs of the Plaintiff's Original Complaint filed August 17, 1997.

I. JURISDICTION AND VENUE

1-4. These paragraphs contain Plaintiff's characterization of Jurisdiction, to which no answer is required. Defendant avers, however, that the exclusive jurisdictional basis for this action is Title VII of the Civil Rights Act, as amended, codified at 42 U.S.C. Section 200e-16.

III. PARTIES

5. Defendant admits the first and third sentences and denies the second and fourth sentences and avers that Plaintiff was not as qualified for the disputed positions as Ms. Hack and Mr. Smack.

6. Admit.

7. Defendant admits the first sentence and denies the second sentence and avers that the principal office of the Secretary of the Army is at the Pentagon, located in Arlington, Virginia.

8. This paragraph contains Plaintiff's characterization of the nature of his claims to which no answer is required. Defendant denies that Plaintiff suffered unlawful employment practices

III. ADMINISTRATIVE PROCEEDINGS

9. Admit

10. Admit, but aver that Plaintiff never alleged race discrimination in his administrative complaints and has failed to exhaust his administrative remedies with respect to such allegations.

IV. JURY DEMAND

11. This paragraph contains Plaintiff's request for a jury to which no answer is required.

V. FACTUAL BACKGROUND

12. Admit

13. Admit

14. Admit that the Plaintiff applied for the Aircraft Engine Overhaul Inspector position, but deny that he applied for the position on or about June 8, 1994 and aver that Plaintiff applied August 2, 1994.

15. Admit

16. Deny and aver that Ms. Hack and Mr. Smack were better qualified than Plaintiff.

17. Deny and aver that Plaintiff timely applied for the position because of the change in KSAs.

18. Defendant admits that Ms. Hack was selected though she was not currently an engine mechanic but avers that Ms. Hack was an accomplished engine mechanic at the time of the selection. Defendant admits that Plaintiff had more engine mechanic experience than Mr. Smack. However, Defendant avers that Mr. Smack had better evaluations and more education than Plaintiff. The Defendant denies that it did anything to effectuate the selection of Ms. Hack. Defendant avers that review of candidate's 201 files was not required to make a selection to this position. Defendant denies that review of Ms. Hack's 201 file would have indicated she was not qualified for the position and avers that a review of her file would indicate that she had better evaluations and more education than Plaintiff.

19. Admit only that Ms. Selector, the Selecting Official, based her selection on personal interviews with each candidate, and that she relied on the candidate's demeanor and oral communication skills as a deciding factor in making the selection. The rest of the paragraph is denied.

20. Admit.

21. Admit only that the Plaintiff had previously filed EEO Complaints, but Defendant avers that the Selecting Official was not involved in those prior EEO cases, nor did she have knowledge of those prior

EEO complaints at the time of his selections.

FIRST CAUSE OF ACTION

22. This paragraph contains Plaintiff's characterization of the nature of his claims to which no answer is required

23. This paragraph contains Plaintiff's characterization of the nature of his claims to which no answer is required. Defendant denies that Plaintiff suffered unlawful employment practices and avers that Plaintiff is entitled to no relief whatsoever

24. Admit.

25. Admit.

26. Deny and aver that Ms. Hack was more qualified than Plaintiff based upon evaluations and educational experience.

27. Admit only that one selectee was black and the other selectee was Caucasian the rest of the paragraph is denied.

SECOND CAUSE OF ACTION

28. This paragraph contains Plaintiff's characterization of the nature of his claims to which no answer is required

29. This paragraph contains Plaintiff's characterization of the nature of his claims to which no answer is required. Defendant denies that Plaintiff suffered unlawful employment practices and avers that Plaintiff is entitled to no relief whatsoever

30. Deny and aver that Plaintiff never alleged race discrimination claims in his administrative complaints.

31. Admit.

32. Deny.

33. Admit only that one selectee was black and the other selectee was not black the rest of the paragraph is denied.

THIRD CAUSE OF ACTION

34. This paragraph contains Plaintiff's characterization of the nature of his claims to which no answer is required

35. Deny and aver that the selecting official had no knowledge of prior protected activity.

36. Admit.

37. Deny.

38. Deny.

VIII. PRAYER FOR RELIEF

The remainder of Plaintiff's complaint contains his prayer for relief, to which no answer is required. Defendant denies, however, that punitive damages are permitted against a federal defendant. Insofar as an answer is required, the Defendant denies that Plaintiff is entitled to any relief whatsoever.

Any allegation set forth in Plaintiff's Complaint not expressly admitted is hereby denied.

ADDITIONAL AND AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The Complaint states claims for which the Court has no jurisdiction.

SECOND AFFIRMATIVE DEFENSE

The Complaint states claims for which relief cannot be granted.

THIRD AFFIRMATIVE DEFENSE

Plaintiff was not the victim of unlawful discrimination or reprisal.

FOURTH AFFIRMATIVE DEFENSE

The defendant had legitimate, nondiscriminatory reasons for taking the personnel actions which are included within this Complaint.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff has failed to timely exhaust administrative remedies.

SIXTH AFFIRMATIVE DEFENSE

Punitive damages are not permitted against a federal defendant.
WHEREFORE, Defendant respectfully prays that the Plaintiff take nothing by his action herein, and that the Defendant be awarded the costs of this action and such other relief as may be deemed necessary by the Court.

PART IV

MEMORANDUM OF LAW

Based upon discussions with Major Litigator, no memorandum of law is required. At TAB M are the agency arguments before the EEOC regarding Plaintiff's administrative complaint.

Plaintiff cannot establish sex discrimination because the selecting official did select a male. Nor can Plaintiff establish race discrimination because the selecting official did select a Black employee. A review of the applications of the two selectees and the Plaintiff indicates that the selectees each had more education, a wider variety of work experience, and had more technical education than Plaintiff.

Plaintiff also failed to raise race discrimination in his administrative complaints and thus failed to exhaust his administrative remedies. Plaintiff cannot show that the selecting official knew of his prior protected activity and cannot establish a prima facie case of reprisal discrimination.

PART V

LIST OF WITNESSES

1. Ms. Imogene Selector

HOME	WORK
2210 Dorchester Dr,	Retired
Haines Point, VA 55555	
(555) 555-1212	

Ms. Selector will testify as to her selection decision for Mr. Smack and Ms. Hack.

2. Mr. Reggie White

WORK:	HOME
Camp Swampy	725 Belmeade Dr.
Haines Point, VA 55555	Haines Point, VA 55555
(555)-666-6969	(555) 555-1212
Fax: (555) 666-7000	

Mr. White will testify that he did not have any involvement in the selection decision.

3. Ms. Bobbie Brooks

WORK:	HOME:
Southwest Civilian Personnel Operation Center	
ATTN: Staffing & Service Division, Branch 1	Not released.
301 Marshall Ave.	
Ft. Riley, KS 66442-5004	
(785) 239-5555	

Ms. Brooks will testify as to the selection process, the changes in the KSAs, and her advice to the selection official.

4. Mr. Antonio Freeman

WORK:	HOME
Camp Swampy	8013 Saint Laurent Dr.

Haines Point, VA 55555	Haines Point, VA 55555
(555)-666-6969	
Fax: (555) 666-7000	(555) 555-1212

Mr. Freeman will testify as to his participation in the rating panel and why Ms. Hack and Mr. Smack were both better qualified for the position than Plaintiff.

5. Mr. Mark Chmura

WORK:	HOME
Camp Swampy	4806 Prescott St.
Haines Point, VA 55555	Haines Point, VA 55555
(555)-666-6969	(555) 555-1212
Fax: (555) 666-7000	

Mr. Chmura will testify as to his participation in the rating panel and why Ms. Hack and Mr. Smack were both better qualified for the position than Plaintiff. Chmura is a great witness. Very articulate and comes across as compassionate.

6. Mr. Dorsey Levens

HOME	WORK
5218 Hitching Post Lane	Retired
Haines Point, VA 55555	
(555) 555-1212	

Mr. Levens will testify as to his participation in the rating panel and why Ms. Hack and Mr. Smack were both better qualified for the position than Plaintiff.

LIST OF EXHIBITS

TAB A Office of Complaint Investigations Investigative File, June 29, 1995

TAB B Complainant signed for the Investigative File on July 13, 1995

TAB C Complainant's Request For an EEOC Hearing, August 9, 1995

TAB D EEOC Hearing Transcript, April 23, 1996

TAB E EEOC Bench Decision, April 29, 1996

TAB F Department of The Army's Final Decision, June 19, 1996

TAB G Complainant's Appeal to Office of Federal Operations, July 18, 1996

TAB H EEOC's Office of Federal Operations Decision, February 24, 1998

TAB I Summons & Complaint, Northern District, Virginia filed August 17, 1998

TAB J DA Form 2600 Referral and Selection Register, September 21, 1994

TAB K Promotional Bulletin Number 28-94, June 6-15, 1994

TAB L Promotional Bulletin Number 28-94 A, June 6-15, 1994

TAB M Promotional Bulletin Number 28-94 B, June 6-15, 1994

TAB N Promotional Bulletin Number 28-94 C, July 26-August 4, 1994

TAB O Miscellaneous EEO Documents In Reverse Date Order

CHAPTER W

54TH FEDERAL LABOR RELATIONS COURSE

Seminar on Selected Labor and Civilian Personnel Problems

CHAPTER X

54TH FEDERAL LABOR RELATIONS COURSE

FACULTY

MAJOR BRADLEY L. BELL

Major Bradley L. Bell is a Labor and Employment Law attorney for the Central Labor Law Office, AFLSA/JACL. Major Bell was born and raised in Murray, Utah graduating from Murray High School. After attending Brigham Young University for a semester, Major Bell served a mission for his church in Buenos Aires, Argentina. After his mission, he attended the University of Utah where he graduated in 1988 with a Bachelor of Arts degree in Political Science. Major Bell then attended the University of Utah Law School graduating in 1991. After law school, he began his Air Force career as an assistant staff judge advocate 325th Fighter Wing, Tyndall AFB, Panama City, Florida. While there, he served as the Chief of Civil Law, Labor Law, Claims Officer and Chief of Military Justice. In December 1994, he was assigned to the 722nd Air Refueling Wing, March AFB, Moreno Valley, California. At March AFB, he worked primarily on issues related to the successful realignment of the base from an active duty wing to a reserve wing. In addition, he was also responsible for all Labor Law issues. In February 1996, Major Bell was assigned to the 1st Fighter Wing, Langley AFB, in Hampton, Virginia. At Langley AFB, Major Bell served as the Chief of Civil Law and again was responsible for Labor Law issues. After two years at Langley, Major Bell was selected to receive his LLM degree in Labor and Employment Law at Georgetown University where he graduated with distinction in 1999. Major Bell completed Squadron Officer School in residence in 1996. His decorations include the Air Force Commendation Medal, with two oak leaf clusters, and the Air Force Training Ribbon. Major Bell is married to the former Sharilyn Johnson of Murray, Utah. They have four children, Brittney (age 10), Matthew (age 7), Andrew (age 3), Abby (age 1).

MAJOR DAVID C. CALDWELL

Professor, Administrative and Civil Law Department. B.A., 1986, St. John's University, Collegeville, Minnesota; J.D., 1989, Hamline University School of Law; 121st Judge Advocate Officer Basic Course, 1990; Combined Arms and Services Staff School, 1997; LL.M., 46th Judge Advocate Officer Graduate Course, 1998. Legal Assistance Attorney, Trial Defense Counsel, Administrative Law Attorney, and Command Judge Advocate, 194th Armored Brigade (Separate), Fort Knox, Kentucky, 1990-93; Trial Counsel and Operational Law Attorney, 3d Armored Brigade, 4th Infantry Division (Mechanized), Fort Carson, Colorado, 1993-94; Chief, Contract Law and Budget, U.S. Army Claims Service, Fort Meade, Maryland, 1994-95; Litigation Attorney, Civilian Personnel Branch, U.S. Army Litigation Division, Washington, DC, 1995-97; Officer-in-Charge, Stuttgart Law Center, 21st Theatre Support Command, Stuttgart, Germany, 1998-00. Member of the Bar of Minnesota.

FRANK CARR

Chief Trial Attorney and Agency Dispute Resolution Specialist for the U.S. Army Corps of Engineers in Washington, DC. Mr. Carr received his B.A. and J.D. degrees from Duquesne University and an LL.M. from Georgetown University. He formerly held committee chair positions for the ABA Public Contract Law Section and is past president of the Boards of Contract Appeals Bar Association. A highly decorated military officer with the Legion of Merit and a Bronze Star Medal, he recently retired as Colonel, military judge, in the Army Reserve. Mr. Carr currently serves on committees for several dispute resolution groups, including the Department of Defense ADR Coordinating Committee, the U.S. Court of Federal Claims Advisory Council Ad Hoc Committee on ADR, and the Federal government's Interagency ADR Working Group. Mr. Carr is a frequent lecturer on federal government procurement and litigation topics, alternative dispute resolution techniques, and construction Partnering. He has lectured at Harvard University Law School, Glasgow University in Scotland, and the University of Technology Sydney, Australia. Mr. Carr has authored, co-authored, and contributed to numerous articles, pamphlets, and books on ADR and Partnering. Recently, the ABA Forum on the Construction Industry published his book titled *Partnering in Construction: A Practical Guide to Project Success*.

MAJOR LOUIS A. CHIARELLA

Professor, Contract and Fiscal Law Department, B.A., University of Notre Dame, 1985; J.D., State University of New York at Buffalo, 1988; M.A., Catholic University of America, 1996; Judge Advocate Officer Basic Course, 1988; LL.M., Military Law, The Judge Advocate General's School, 1997. Career Highlights: Chief, Criminal Law Division; Chief, Administrative and Civil Law Division, HQ, 7th ID and Fort Carson, Fort Carson, Colorado, 1997-1999. Trial Attorney, Contract Appeals Division, U.S. Army Litigation Center, Arlington, Virginia, 1992-1996. Special Assistant United States Attorney (Felony Prosecutor); Special Assistant United States Attorney (Magistrate Court Prosecutor); Legal Assistance Attorney, Fort Knox, Kentucky, 1998-1992. Member of the Bar of New York and Ohio; admitted to practice before the U.S. Supreme Court, the U.S. Court of Appeals for the Sixth Circuit, the U.S. District Court for the Western District of Kentucky, and the U.S District Court for the Western District of New York.

MAJOR HOLLY O. COOK

Professor, Administrative and Civil Law Department. B.A., St. Joseph's College, 1984; J.D., Union University Albany Law School, 1987; 119th Judge Advocate Officer Basic Course, 1989; Combined Arms and Services Staff School, 1993; LL.M., 44th Judge Advocate Officer Graduate Course, 1996; Command and General Staff College, 1999. Trial Counsel, United States Army Garrison, Fort Huachuca, Arizona, 1989-90; Command Judge Advocate, Eighth Army Special Troops, Korea, 1990; Administrative Law Attorney, Eighth United States Army, Korea, 1990-92; Chief, Criminal Law, Eighth United States Army, Korea, 1992-93; International Law Attorney-Adviser, Department of State, Washington, DC, 1993-95; Chief, Administrative and Civil Law Division, 21st Theater Army Area Command (TAACOM), Kaiserslautern, Germany; 1996-98; Officer-in-Charge (OIC), Kaiserslautern Law Center, 21st TAACOM, Kaiserslautern, Germany, 1997-98; Deputy Staff Judge Advocate, 1st Armored Division and 1st Cavalry Division at Task Force Eagle, Tuzla, Bosnia and Herzegovina, 1998-99. Member of the Bars of Maryland, United States District Court (District of Maryland), United States Army Court of Criminal Appeals, United States Court of Appeals for the Armed Forces, and the United States Supreme Court.

MAJOR DOUGLAS B. COX

Major Douglas Cox is a Trial Attorney assigned to the Air Force Federal Employment Litigation Branch in Arlington, Virginia. Major Cox graduated from Ohio University *summa cum laude* in 1986 with a Bachelor of Science degree in Journalism. Major Cox received his Juris Doctor degree from the University of Cincinnati College of Law in 1989, and a Master of Laws degree *with distinction* in Labor and Employment Law from Georgetown University in 1998. Major Cox is admitted to practice in the state of Ohio and in the United States Court of Appeals for the Armed Forces.

Major Cox served as a firefighter with the Ohio Air National Guard from May 1982 to May 1988, ending his enlistment as a staff sergeant. He was commissioned in the United States Air Force in November of 1989. After completing the Judge Advocate Staff Officer Course at Maxwell Air Force Base in April 1990, Major Cox was assigned as the Chief, Military Justice at Andersen Air Force Base, Guam. In March 1992, Major Cox became the Chief, Military Justice at Luke Air Force Base, Arizona. In June 1993, Major Cox was appointed as the Area Defense Counsel at Luke Air Force Base. He served in the position until May 1995, when he assumed his duties as a Circuit Defense Counsel in the Western Judicial Circuit at Travis Air Force Base, California. After completing his tour as a Circuit Defense Counsel in July 1997, Major Cox was selected to attend Georgetown University. After completing his LL.M. degree at Georgetown in July 1998, Major Cox was assigned to the Air Force Central Labor Law Office as Labor Counselor until August 1999, when he assumed his present duties. A recent article by Major Cox, *Changing the Traditional Grievance and Arbitration Model: Alternative Dispute Resolution Provisions in Air Force Collective Bargaining Agreements*, was published in the American Bar Association's The Labor Lawyer, Vol. 15, No. 1 at 69 (Summer 1999). Major Cox has completed Squadron Officer School and Air Command and Staff College. Major Cox's military awards and decorations include the Meritorious Service Medal, the Air Force Commendation Medal with one oak leaf cluster, and the Air Force Reserve Meritorious Service Medal with one oak leaf cluster. Major Cox and his wife Sherry have three children: Jake, Luke, and Elle.

MONTE B. CRANE

Mr. Monte Crane is a Labor Attorney assigned to the Central Labor Law Office, AFLSA/JACL, and has served in that capacity since 1990. Mr. Crane, a Department of the Air Force civilian, GS-14, graduated from the University of California at Riverside, California, in 1975 with a Bachelor of Arts degree in Philosophy. From there he was accepted and matriculated into the University of San Diego School of Law. Mr. Crane graduated in the upper one third of his class in 1978 and received his Juris Doctor degree.

After passing the California State Bar examination in 1978, Mr. Crane accepted employment in the private firm of Oster, Millard and Suchman in Santa Ana, California. Mr. Crane began his Air Force career in 1979 when he applied for and was accepted for the civilian attorney-advisor position at March Air Force Base. In 1986, Mr. Crane transferred to a civilian attorney-advisor position at Norton Air Force Base. After a one-year interruption, during which he worked for the firm of Merrill, Schultz and Wolds in San Diego, California, Mr. Crane resumed his public service career at Kelly Air Force Base in 1988, where he specialized in environmental and contract law. In 1990, he was promoted to his current position in Washington, D.C.

MAJOR DANIEL A. CULVER

Professor, Administrative and Civil Law Department. B.A., Gonzaga University, 1983; J.D., Gonzaga University School of Law, 1985; 110th Judge Advocate Officer Basic Course, 1986; Judge Advocate Officer Advanced Course, 1994; U.S. Army Command and General Staff College (Nonresident), 1998; LL.M., 48th Judge Advocate Officer Graduate Course, 2000. Legal Assistance Attorney, Trial Counsel, and Chief, Legal Assistance, Fort Bliss, Texas, 1986-89; Post Judge Advocate, Sierra Army Depot, Herlong, California, 1989-92; Chief Depot Counsel, Sierra Army Depot, Herlong, California, 1992-96; Judge Advocate, Nevada Army National Guard, Carson City, Nevada, 1992-96; Judge Advocate (AGR), 81st Regional Support Group, Fort Jackson, South Carolina, 1996-99. Member of the State Bars of Washington and Nevada.

MAJOR PETER L. DELORIER

Major Pete Delorier entered the Marine Corps after graduating from Georgia Tech. A Navy ROTC commissionee, he was first assigned to the Basic School and Infantry Officers' Course in Quantico, Virginia. Upon graduation, he was assigned to 3d Battalion, 1st Marines, Camp Pendleton, California, where he was a Platoon Commander, Weapons Platoon Commander, Rifle Company Executive Officer, and Battalion Maintenance Management Officer. After leaving Camp Pendleton, he was assigned as the Operations Officer, Marine Corps Recruiting Station, Hartford, Connecticut. Major Delorier was selected for the Funded Legal Education Program and attended Campbell University Law School in the metropolis of Buies Creek, North Carolina. After law school and completion of the Naval Justice School course in Newport, Rhode Island, Major Delorier was assigned to the Joint Law Center, Marine Corps Air Station, Cherry Point, North Carolina. After completion of that tour, Major Delorier was assigned to the 45th Graduate Class, The Judge Advocate General's School of the Army in Charlottesville, Virginia. Major Delorier is currently assigned as the Labor Counsel, Eastern Area Counsel Office, Camp Lejeune, North Carolina.

CAROLE SCHNEIDER HOUK

Ms. Houk is an Assistant to the General Counsel of the Navy and serves as the Deputy Dispute Resolution Specialist for the Department of the Navy. In that position, she is responsible for coordinating activities involving Alternative Dispute Resolution (ADR) policy and initiatives in the Navy, acts as chairperson for the ADR Working Group, serves as the Navy contact on ADR matters, and serves as the Navy member on the Department of Defense ADR Coordinating Committee. The Navy issued a comprehensive ADR policy in 1996 and focuses its ADR efforts in the areas of procurement/contracts, workplace disputes, environmental issues, and claims against the government, as well as the broader area of conflict management.

Ms. Houk received mediation skills training from the Justice Center of Atlanta, has completed several courses in principled negotiation and dispute resolution at The Program on Negotiation at Harvard Law School, and has received ombuds training from The Ombudsman Association. Ms. Houk is a member of the Society of Professionals in Dispute Resolution (SPIDR), and is a member of SPIDR's ADR in the Workplace Committee, which is currently drafting Guidelines for Employer-Sponsored Internal Dispute Resolution Systems. She is a member of the Executive Steering Committee of the Attorney General's Inter Agency Working Group on ADR. She is a frequent speaker and lecturer on ADR issues, and teaches effective negotiation skills and ADR advocacy to Navy attorneys.

Prior to her appointment to her current position in January 1997, Ms. Houk was a member of the Office of Counsel, Naval Sea Systems Command, where she practiced labor and civilian personnel law. In that position, Ms. Houk developed an innovative ADR practice applying the principles of interest-based negotiation to ongoing labor-management concerns. She successfully resolved a multi-million dollar, 20 year-old Fair Labor Standards Act overtime dispute involving thousands of shipyard workers using interest-based negotiations.

From 1979 to 1982, Ms. Houk was a Staff Attorney with the U.S. Department of Labor. Ms. Houk received her B.S. from Michigan State University, J.D. from Wayne State University, and L.L.M in Labor Law from Georgetown University Law Center. Ms. Houk is married to Russell R. Houk, M.D., Chief of the Department of Pathology at Alexandria Hospital. They have two children, Katie and David. Ms. Houk can be reached at houk.carole@hq.navy.mil.

RALPH MATTHEW (BEN) JAMES, JR.

Ben James is the Chief of the Labor Relations Branch, Field Advisory Services, Defense Civilian Personnel Management Service. In this capacity, he directs a staff of Labor and Employee Relations Specialists providing advice, assistance and guidance on labor-management relations and on employee relations to Department of Defense (DOD) Human Resources Offices worldwide. Among other responsibilities, Mr. James oversees the activities of the Defense Partnership Council.

Prior to his employment with DOD, Mr. James served in the Department of the Navy Secretariat with responsibilities at various times for these programs: labor relations, employee relations, staffing, classification, employee development, compensation, discrimination complaint processing, NAF personnel policy, and drug-free workplace. These responsibilities included development of policy and guidance on the program areas, representing the Department before third-parties and other agencies, and managing the delivery of these functions to a work force of as many as 350,000 civilians.

Mr. James began his career in the Federal service at the Naval Air Station, Patuxent River, Maryland, in 1972. A native of West Virginia, he is a graduate of Concord College and obtained a Master's Degree in Industrial Personnel Management from the George Washington University.

JOSEPH M. McDADE, JR.

Mr. McDade began his service in the Air Force General Counsel's Office in August, 1991. Upon completion of extensive ADR training at the Office of Personnel Management's Executive Development Center and the Harvard School of Law, among others, the General Counsel of the Air Force appointed him Deputy Dispute Resolution Specialist in May of 1993.

As the Deputy Dispute Resolution Specialist in the Air Force General Counsel's Office, Mr. McDade is responsible for assisting in the development of Air Force-wide ADR policy, plans and programs. He has written, lectured and taught extensively on the topic of ADR and testified before Congress regarding the achievements of the Air Force ADR Program. He played a key role in the publication of the Air Force's landmark ADR Policy Directive 51-12 (April 1, 1999) and was instrumental in helping the Air Force ADR Program win the Office of Personnel Management Award for Outstanding ADR Program for 1999 and the Center for Public Resources' Award for Outstanding Achievement in ADR for 1999.

Mr. McDade serves as the Air Force representative to the Department of Defense ADR Coordinating Committee and the Steering Committee of the Interagency ADR Working Group. He was the Co-Chairman of the American Bar Association Public Contract Law Section's ADR Committee from the fall of 1997 to the summer of 1999.

Mr. McDade graduated *cum laude*, from Georgetown University in 1985 with a Bachelor of Science in Foreign Service. He received his Juris Doctor from Georgetown Law Center in 1988. Mr. McDade became a member of the of Bar of the Commonwealth of Pennsylvania in 1988 and the District of Columbia in 1989. In November 1988, he joined the law firm of Patton, Boggs & Blow in Washington, D.C. where he specialized in procurement law and lobbying. Mr. McDade was born in 1962 in Scranton, Pennsylvania. He currently resides in Alexandria, Virginia, with his wife, Becky, and his daughter, Madeleine.

MICHAEL J. MEISEL

Mr. Meisel is the Chief of the Civilian Personnel Branch with the Army's Litigation Division, U.S. Army Legal Services Agency Litigation Center. He is the supervisory attorney responsible for ensuring that the Army's interests are represented in federal litigation brought by its civilian employees. Immediately prior to his current position, Mr. Meisel was the Chief of the Civilian Personnel Law Team with the Labor and Employment Law Office, Office of The Judge Advocate General. In that capacity, he advised the Army Staff on Army personnel policy and regulations. In addition, he provided representation for Headquarters, Department of the Army, in labor and employee relations' matters before third party adjudicators. Mr. Meisel has served on active duty with the United States Army Judge Advocate General's Corps and the First Infantry Division (Mech) at Fort Riley, Kansas. He has been a Special Assistant United States Attorney, senior trial counsel, and labor counselor. As an installation labor counselor, he represented management in a wide variety of labor relations' matters including arbitration and contract negotiations as well as adverse action appeals, discrimination complaints, and unfair labor practice allegations. Mr. Meisel is a member of the bar of the State of New York and a graduate of Albany Law School of Union University and Siena College.

SHIRINE E. MOAZED

Shirine E. Moazed has been with the Office of Special Counsel (OSC) since February 1997. Currently, Ms. Moazed is an attorney in the Prosecution Division of the General Law and Litigation Section. While in this position, Ms. Moazed has worked to enforce the Whistleblower Protection Act by analyzing investigative reports and making legal recommendations to the Special Counsel on whether to initiate corrective and/or disciplinary action before the Merit Systems Protection Board. Ms. Moazed is also responsible for litigating cases before the Merit Systems Protection Board. Prior to working in the Prosecution Division, Ms. Moazed worked as an attorney in OSC's Disclosure Unit where she analyzed disclosures of information on alleged government wrongdoing from whistleblowers to determine whether sufficient evidence existed to forward the complaint to the head of the appropriate federal agency for a report.

Before coming to OSC, Ms. Moazed worked at the U.S. Department of Commerce within the Bureau of Export Administration. There, Ms. Moazed enforced the antiboycott provisions of the Export Administration Act. Ms. Moazed conducted on-site audits of U.S. companies, analyzed export transactions with the Middle East to determine compliance with the regulations, and ascertained if a case merited prosecution.

Ms. Moazed received her undergraduate degree from the University of Maryland and her law degree from the American University in Washington D.C.

DAVID M. SMITH

Mr. Smith was appointed as the Solicitor of the Federal Labor Relations Authority in November 1992. As Solicitor, Mr. Smith is the chief legal and ethics advisor to the Authority and oversees a legal office of fourteen persons. Prior to assuming the Solicitor position, Mr. Smith served for six years as the Chief of Civilian Personnel Litigation for the Department of the Army. Before that, he was the Labor Counselor and Chief of Administrative Law and Legal Assistance at Fort Rucker, Alabama. Mr. Smith graduated with a Bachelor of Arts degree from the University of Alabama and received his Juris Doctor from the University of Alabama Law School. Upon graduation from law school, Mr. Smith served as a Captain in the Judge Advocate General's Corps for three years while stationed at Fort Hood, Texas. He is recognized to practice law before the United States Supreme Court and numerous federal district and appellate courts. The Solicitor's Office represents the Authority before United States District Courts, Courts of Appeal, and the Supreme Court.

WILLIAM B. WILEY

Mr. Wiley is the Chief Counsel to a Member of the U.S. Merit Systems Protection Board (MSPB). In his position, he provides advice to the Member on a wide range of legal issues that come before the Board in Federal employee appeals of such personnel actions as removals, demotions, suspensions, and claims of reprisal against whistleblowers. Mr. Wiley previously served as Chief Counsel to the Chairman of the MSPB from September 1993 until July 2000.

Prior to joining the Board, Mr. Wiley was an attorney in private practice, concentrating in Federal sector labor and employment law. He contracted exclusively with Federal agencies and unions to conduct training and provide professional assistance in his areas of expertise, including employee discipline and termination, performance management, grievance resolution, discrimination complaints, whistleblower reprisal, union negotiations, and cooperative labor relations. As an Associate Director of the Federal Personnel Management Institute, Inc., he was a contributing writer to the monthly newsletters, *Federal Labor and Employment Relations UPDATE* and *MSPB Alert*, summarizing recent case decisions involving Federal employee discrimination complaints and disciplinary action appeals. He also authored four books, *The Federal Employment Law Practitioner's Handbook*, *The Federal Managers Guide to Performance Management*, *The Federal Employee's Guide to Liability*, and *Sexual Harassment: Address It, Prevent It, Defeat It*. From 1988 to 1990, Mr. Wiley was Chief of Staff and Executive Assistant to the General Counsel of the Federal Labor Relations Authority. In that position, he oversaw all of the administrative and labor law matters that came before the office. In 1987, he served as Executive Assistant to the Member of the Merit Systems Protection Board, where he assisted in analyzing cases and writing decisions for the Board. From 1977 to 1986, he held various positions of significant responsibility in the labor and employee relations' field with the Department of the Navy.

Mr. Wiley is a graduate of Louisiana State University in Baton Rouge, Louisiana, and holds a Master of Science degree in Industrial and Organizational Psychology from San Francisco State University. He received his J.D. degree from the William Howard Taft School of Law and is admitted to the practice of law by both the California and Federal bars.

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