# ATTACHMENT 1D

May 5, 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

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[*] Previous public guidance memoranda have been issued on the following subjects: "The Duty to Bargain Over Programs Establishing Employee Involvement and Statutory Obligations When Selecting Employees for Work Groups" (August 8, 1995), "Guidance on Investigating, Deciding and Resolving Information Disputes" (January 5, 1996), "Proper Descriptions of Bargaining Units and Identification of Parties to the Collective Bargaining Relationships in Certifications" (December 18, 1996), "The Duty of Fair Representation" (January 27, 1997), "The Impact of Collective Bargaining Agreements on the Duty to Bargain and the Exercise of Other Statutory Rights" (March 5, 1997), "Pre-Decisional Involvement: A Team-Based Approach Utilizing Interest-Based Problem Solving Principles" (July 15, 1997), "Guidance in Determining Whether Union Bargaining Proposals are Within the Scope of Bargaining Under the Federal Service Labor-Management Relations Statute" (September 10, 1998), "Guidance on Applying the Requirements of the Federal Service Labor-Management Relations Statute to Processing Equal Employment Opportunity Complaints and Bargaining over Equal Employment Opportunity Matters" (January 26, 1999), and "Guidance on Developing a Labor Relations Strategic Plan" (September 24, 1999). Copies of all of these guidance memoranda can be found at the FLRA's Web-site, www.flra.gov.

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.

# TABLE OF CONTENTS

## PART 1--REMEDIAL AUTHORITY UNDER THE STATUTE

### A. Statutory Remedial Authority

Section 7105 of the Statute sets forth the powers and duties of the Authority. Paragraph (g)(3) of section 7105 contains the Authority's basic remedial power:

> (g) In order to carry out its functions under this chapter, the Authority. . .
>
> (3) may require an agency or a labor organization to cease and desist from violations of this chapter and require it to take any remedial action it considers appropriate to carry out the policies of this chapter."

Section 7118 of the Statute deals with the prevention of unfair labor practices. Paragraph (a)(7) of that section sets forth specifically the scope of the Authority's unfair labor practice remedial authority:[1]

> Under this section, upon a determination that an agency or labor organization engaged in an unfair labor practice, the hearing official shall state such findings in writing and shall serve upon the agency or labor organization an order –
>
> (A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged;
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> (B) requiring the parties to renegotiate a collective bargaining agreement in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect;
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> (A) requiring reinstatement of an employee with backpay in accordance with § 5596 of this title; or
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> (B) including any combination of the actions described in subparagraphs (A) through (C) of this paragraph or such other action as will carry out the purpose of this chapter.
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> If any such order requires reinstatement of any employee with backpay, backpay may be required of the agency (as provided in § 5596 of this title) or of the labor organization, as the case may be, which is found to have engaged in the unfair labor practice involved.

Thus, the Authority is empowered to:

- issue cease and desist orders;
- require parties to negotiate a contract and to give it retroactive effect;
- order reinstatement of an employee with backpay; and
- order any remedial action necessary to carry out the purposes and policies of the Statute.

### B. The Authority Has Broad Remedial Power

[1] Section 5596 of the Back Pay Act is set forth in Appendix A, and the Office of Personnel Management implementing regulations are set forth in Appendix B.

The Authority and the courts have concluded that Congress intended to provide the Authority with broad remedial powers.[2] Section 7118(a)(7) speaks specifically to the scope of the Authority's remedial power in unfair labor practice cases. That section sets forth certain specific remedies and empowers the Authority to order "such other action as will carry out the purposes of this chapter." This broad grant of remedial power is tempered only by reference to the purpose of the Statute, which embodies the balance of interests between and among employees, unions, and agencies. No other limitations are expressed. The breadth of the Authority's remedial power in unfair labor practice cases has been recognized in a variety of contexts.[3] The United States Court of Appeals for the D.C. Circuit has found that Congress intended the Authority to have remedial authority in unfair labor practice cases similar to that granted the NLRB under the National Labor Relations Act.[4]

Further, the Authority also has found that section 7106 of the Statute (the management rights clause) does not diminish the Authority's remedial powers, but rather limits only the scope of collective bargaining under the Statute.[5] The Authority has an obligation to "repair and restore the effects of statutory violations . . . . The Statute provides the Authority the discretion to fashion remedies as long as such remedies are consistent with the purposes and polices of the Statute."[6]

Thus, based on the language of the Statute and Authority and court decisions, the Authority has been granted broad remedial power, tempered only by external law and the purposes and policies underlying the Statute.

## C. Purpose of Remedies

### 1. Recreate the Conditions Prior to the Unlawful Act

The essential purpose of an Authority's 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."[7] 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.[8] When fashioning a remedy to a particular violation, it is important to identify the conditions that would have existed had there been no unlawful act.

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[2] Federal Bureau of Prisons, Washington, D.C., 55 FLRA No. 202, 55 FLRA 1250, 1258 (2000) (FBP).

[3] See United States Department of Justice, Bureau of Prisons, Safford, Arizona, 35 FLRA No. 56, 35 FLRA 431, 444 (1990) (Safford) (citing Professional Air Traffic Controllers Organization v. FLRA, 685 F.2d 547 (D.C. Cir. 1982)); and National Treasury Employees Union v. FLRA, 910 F.2d 964, 967 (D.C. Cir. 1990) (en banc); see also F.E. Warren Air Force Base, Cheyenne, Wyoming, 52 FLRA No. 17, 52 FLRA 149, 160-62 (1996) (F.E. Warren) and Department of Veterans Affairs Medical Center, Phoenix, Arizona, 52 FLRA No. 18, 52 FLRA 182, 185-86 (1996) (DVA, Phoenix) (reaffirming the principles enunciated in Safford).

[4] American Federation of Government Employees v. FLRA, 785 F.2d 333, 336 (D.C. Cir. 1986).

[5] FBP, 55 FLRA at 1256-58.

[6] Id. at 1256.

[7] Id. at 1258 (citation omitted).

[8] Department of Defense Dependent Schools, 54 FLRA No. 37, 54 FLRA 259, 269 (1998).

### 2. Deterrence of Future Violative Conduct

The Authority also has clearly stated that the deterrence of future violative conduct is an essential purpose of a remedy.[9] A component of recreating the conditions and relationships that would have been had there been no unfair labor practice is promoting employee confidence in the rights and procedures established by the Statute.[10] Remedies, however, must not be punitive.[11] The Authority also may not direct a respondent to perform an illegal act.[12]

### 3. Remedy Principles[13]

All remedies, therefore, must:

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. OGC REMEDY POLICY

### A. Creative Remedies that Effectuate the Statute

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.

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[9] FBP, 55 FLRA at 1258.

[10] Safford, 35 FLRA at 448.

[11] F.E. Warren, 52 FLRA at 160.

[12] See, e.g., Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 49 FLRA No. 1389, 49 FLRA 1522, 1532 (1994) (Authority will not order status quo ante where prior practice was unlawful).

[13] These standards will be referred to as the "remedy principles" throughout this Guidance.

## B. Appropriate Remedies are Considered Throughout the Processing of the ULP Charge and ULP Complaint[14]

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.

### 1. Evidence is Obtained Pertaining to Remedy During the Investigation of the Unfair labor Practice Charge

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. The investigation reveals what remedial action is necessary to effectuate the OGC's remedial policy stated above in this Part.[15]

### 2. Cases that are Ready for Presentation to the Regional Director for Decision Contain a Recommendation for a Particular Remedy, When Applicable

When a case is presented to the Regional Director for a decision on the merits of the charge, any recommendation for issuance of complaint or alternatives resulting in issuance of complaint is accompanied by a recommendation for an appropriate remedy. Just as recommendations for dismissal or complaint are supported by record evidence, recommendations for an appropriate remedy are supported by record evidence. Regional Director decisions authorizing issuance of complaint, absent settlement, include the decision on the remedy to be sought in litigation.[16]

### 3. Notice of Remedy in Complaint

Notice of unique or novel remedies is given in the complaint.

### 4. Transmittal Memoranda

The transmittal memorandum that accompanies the issuance of the complaint sets forth the remedy to be sought in litigation, cites any novel precedent supporting the remedy, and notes any significant facts or issues pertaining to the appropriateness of the remedy and potential difficulties in obtaining that particular remedy.[17]

### 5. Preparation for Trial

The Trial Attorney includes the issue of the appropriate remedy in preparing for the hearing. The Trial Attorney reviews witness testimony and documentary evidence pertaining to the appropriate remedy in the same manner as evidence is reviewed pertaining to establishing the violation.[18]

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[14] Internal OGC documents, such as transmittal memoranda, are not subject to disclosure under the Freedom of Information Act. These documents are exempt from disclosure under Exemption 5. These documents come under the deliberative process privilege which has the purpose of "prevent[ing] injury to the quality of agency decisions." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975).

[15] See ULP Case Handling Manual, Part 3, concerning Investigations.

[16] See ULP Case Handling Manual, Part 4, Chapter D concerning Regional Director Merit Determinations.

[17] See Litigation Manual, Part 1, Chapter A concerning Issuance of the Complaint.

[18] See Litigation Manual, Part 2, Chapters I, J, K, L, M, N. O, P and Q concerning Preparation for Hearing.

### 6. Pre-Hearing Disclosure Requirement

Section 2423.23(c) requires the General Counsel to disclose a brief statement concerning the theory of the case, including the relief sought, at least 14 days before the hearing. If a nontraditional remedy is sought, all parties must be on notice so that no party may claim surprise.[19] Adherence to the pre-hearing disclosure requirements is especially important in this instance. This rule applies to the Charging Party as well because the Charging Party can always argue for a remedy that differs from that which the General Counsel is seeking. This knowledge may impact on the Charging Party's desire to argue for or against the remedy sought by the General Counsel and/or to argue for another remedy that it believes is more appropriate.[20]

### 7. The Hearing

The Trial Attorney presents witness testimony and documentary evidence pertaining to the appropriate remedy in the same manner as evidence is presented pertaining to establishing the violation. It is critical that testimonial and documentary evidence be submitted to establish the necessity for the requested remedy.[21]

If notice of the nontraditional remedy, for some reason, is not given as part of the pre-hearing disclosure, the Trial Attorney sends a letter to the parties as soon as the Region determines to seek that remedy. In addition, at hearing, in the opening statement, the Trial Attorney identifies the nontraditional remedy that will be sought. Since the remedy was not noticed as part of pre-hearing disclosure, this may precipitate an objection from respondent's counsel. However, even at this late date, such notice does give the respondent the opportunity to address and fully litigate the issues that may be required to rebut the General Counsel's remedy evidence and also provides the Charging Party with a chance to put on evidence in support of its own remedy.

Before the close of the hearing, if evidence has been introduced to support the remedy sought, but notification has not yet been made, state the remedy sought. As stated above, be prepared to respond to an objection. At least this allows the parties to brief the remedy issue and makes the filing of supplemental briefs unnecessary.

### 8. Post-Hearing Briefs

Post-hearing briefs have a separate section where the sought remedy is discussed. The brief discusses the relevant precedent and, citing record evidence, explains why the requested remedy is necessary and consistent with the purpose of a remedy.[22] The brief also contains a suggested order and notice.

### 9. Exceptions to ALJ Recommended Decisions and Orders

When a Trial Attorney files exceptions to an ALJ's failure to find a specific violation, those exceptions also specifically encompass the ALJ's accompanying failure to order the remedy requested. When an ALJ finds a specific violation but fails to order the complete remedy requested, the Region files exceptions when it determines that, under the totality of the circumstances (including the remedy received, the current situation and the interests of the Charging Party) the requested remedy still should be sought.[23]

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[19] "Nontraditional" remedies are discussed in Part III.

[20] See Litigation Manual, Part 1, Chapter N for a discussion of pre-hearing disclosure requirements concerning the General Counsel's theory of the case.

[21] See Part III for further discussion on the need to present evidence to support a nontraditional remedy. Also, Part VI identifies specific types of evidence to support particular nontraditional remedies.

[22] See Litigation Manual Part 3, Chapter B concerning briefs.

[23] See Litigation Manual Part 3, Chapter F concerning exceptions.

## PART III. TRADITIONAL AND Nontraditional REMEDIES

### A. Traditional Remedies

The Authority has distinguished in its decisions between traditional remedies and nontraditional remedies. In F.E. Warren, the Authority noted that it had "developed several 'traditional' remedies, including a cease-and-desist order accompanied by the posting of a notice to employees that meet the criteria of a remedy, and which are provided in virtually all cases where a violation is found."[24] The Authority also identified other remedies that require some form of affirmative action by the respondent as established, or traditional, remedies. For example, a retroactive bargaining order,[25] the grant of backpay,[26] and the release of improperly withheld information[27] were cited as traditional remedies. Some of these traditional remedies, such as status quo ante as a remedy for a failure to bargain violation, have given rise to criteria of their own.[28] 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, except that traditional remedies are routinely granted as a matter of course whereas as nontraditional remedies require independent justification.

Therefore, unless the Authority has established specific criteria for a remedy (such as status quo ante in appropriate arrangement and procedure change cases), the Authority does not require specific evidence to establish that traditional remedies are appropriate under the remedy principles. Thus, in essence, the Authority presumes, subject to evidence establishing otherwise, that these traditional remedies: (1) are not contrary to external law or the purposes of the Statute; (2) are reasonably necessary and effective to recreate the conditions and relationships with which the unfair labor practice interfered, and (3) deter future violative conduct.

### B. Nontraditional Remedies

The Authority has referred to remedies not routinely granted as a matter of course as nontraditional remedies. Nontraditional remedies, of course, must satisfy the same broad objectives that are required of all remedies ordered by the Authority. 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."[29]

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[24] F.E. Warren, 52 FLRA at 161.

[25] Id. (citing Department of Veterans Affairs Medical Center, Asheville, North Carolina, 51 FLRA No. 129, 51 FLRA 1572, 1580-81 (1996) (RBO was appropriate since it was not possible to restore the status quo)).

[26] Id. (citing U.S. Department of Labor, Washington, D.C. and U.S. Department of Labor, Employment Standards Administration, Boston, Massachusetts, 37 FLRA No. 2, 37 FLRA 25, 41 (1990) (reimbursement to employees for money expended on water coolers unilaterally removed as an example of a backpay case)). Regional Offices should not rely on this case because it is inconsistent with the Authority's earlier decision on the doctrine of sovereign immunity (discussed in Part V.) where the Authority specifically stated that it will no longer follow these cases that grant award money that does not come under the Back Pay Act or some other express and unambiguous grant of authority.

[27] Id. (citing Internal Revenue Service, Austin District Office, Austin, Texas, 51 FLRA No. 95, FLRA 1166, 1182 (1996)).

[28] Id. (citing Federal Correctional Institution, 8 FLRA No. 111, 8 FLRA 604 (1982) (setting criteria for status quo ante remedies where respondent failed to bargain over impact and implementation of a change); Federal Deposit Insurance Corporation, 41 FLRA No. 29, 41 FLRA 272, 279 (1991) (setting standard for status quo ante remedy where respondent failed to bargain over substance of a change)). Part VI A. and B. discuss the criteria for these bargaining remedies.

[29] U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Ocean Service, Coast and Geodedic Survey, Aeronautical Charting Division, Washington, D.C., 54 FLRA No. 92, 54 FLRA 987, 1020, 1023 (1998) (Dept. of Commerce) (nontraditional language in notice to reflect the findings of past violations, to further assure employees that despite this history of violations the agency recognizes their statutory rights and to

(continued...)

The basic difference between traditional and nontraditional remedies is that the Authority requires an independent factual basis to sustain a nontraditional remedy, whereas the traditional remedy is most always assumed to be appropriate, absent special circumstances. As such, although normally it is not necessary to establish a separate factual basis to support a traditional remedy other than the existence of the violation itself, 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. In sum, because the Authority routinely presumes that a traditional remedy is effective to remedy the violation, 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. As such, 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.

Thus, 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,[30] but the General Counsel must also establish through evidence that the particular nontraditional remedy sought is appropriate under the remedy principles. In those decisions where the Authority has denied the General Counsel's request for a nontraditional remedy, the basis for the denial usually has not been that the requested remedy was unlawful or outside the remedial powers of the Authority, but that the record did not establish the need for such a nontraditional remedy.[31] I emphasize that record evidence, not mere policy and equity arguments, is essential to establish the appropriateness of a nontraditional remedy. Thus, as noted above in Part II discussing the OGC Remedy Policy, it is critical that this testimonial and documentary evidence is developed throughout the processing of the charge and complaint.

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[29] (...continued)
"put both employees and the respondent on notice of the serious nature of the Respondent's unlawful conduct").

[30] Safford, 35 FLRA at 444 (fundamental consideration in formulating remedies is whether the traditional remedy will "adequately redress the wrong incurred by the unfair labor practice . . .").

[31] Dept. of Commerce, 54 FLRA at 1022 ("the General Counsel has not established a need for disciplining the supervisors); and U.S. Penitentiary, Leavenworth, Kansas, 55 FLRA No. 127, 55 FLRA 704, 720 (1999) (Leavenworth) (copies of an Authority's order or the posting of an order along side the notice was not supported by evidence demonstrating why such distribution is necessary).

## PART IV. POSTING, DISTRIBUTING, AND SIGNING REMEDIAL NOTICES AND THE CONTENTS OF THOSE NOTICES

The posting of a notice provides evidence to bargaining unit employees that the rights guaranteed under the Statute will be vigorously enforced.[32] The Authority also has acknowledged that, 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.[33]

Upon the request of the General Counsel, Authority notices now contain a statement that the Authority has found a violation of the Statute and has ordered the respondent to post and abide by the notice. The Authority's notices serve a critical role in effectuating the purposes of the Statute. Therefore, their contents must be clear and their import readily understandable. The Authority has found that these purposes are enhanced by explicitly stating in the Notice to employees that the Authority has found the respondent to have violated the Statute. Accordingly, such language is a part of all notices when unfair labor practices are found.[34]

Posting a remedial notice ordered by the Authority raises a series of related issues, such as: where should the notice be posted; what management or union official signs the notice on behalf of the respondent agency or union; and should the notice be distributed in a manner different or in addition to posting.

The first two issues, scope and signatories are related. Thus, 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.

### A. Scope of Posting of Remedial Notices

The scope of the posting refers to the identification of the particular locations where a remedial notice to employees will be posted. The issue usually concerns whether a notice will be posted only at the particular location where the unfair labor practice violation occurred or at other locations where bargaining unit employees also may be working. For example, when a violation occurs at one facility within a nationwide bargaining unit, the posting may occur at that location only or throughout the nationwide bargaining unit.

In determining the scope of a posting requirement, the Authority considers the purpose of a posting. 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.[35] The Authority, for example, has found this standard to be met when the unfair labor practice concerned the discipline of the union president for engaging in

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[32] U.S. Department of Justice, Office of the Inspector General, Washington, D.C., 47 FLRA No. 117, 47 FLRA 1254, 1263 (1993) (notice posted throughout nationwide bargaining unit).

[33] Department of Housing and Urban Development, San Francisco, California, 41 FLRA No. 45, 41 FLRA 480, 483 (1991) (notice posted at all locations where employees are represented by the union are located, rather than just a limited posting at the location where the violation occurred).

[34] United States Department of Justice, Immigration and Naturalization Service, 51 FLRA No. 75, 51 FLRA 914, 916, 918 (1996) (each notice is preceded with the statement: "The Federal Labor Relations Authority has found that the [agency or union] violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice").

[35] U. S. Department of Justice, Federal Bureau of Prisons, Office of Internal Affairs, Washington, D.C., 55 FLRA No. 64, 55 FLRA 388, 394-95 (1999) (nationwide notice is appropriate where there were multiple violations and investigators' work involves assignments throughout the locations of the bargaining unit); Department of Defense Dependents Schools, 54 FLRA No. 37, 54 FLRA 259, 271 (1998) (posting at all facilities where unit employees are employed and where employees had been involuntarily transferred, but not world-wide where all unit employees are located); and U.S. Department of Treasury, Customs Service, Region IV, Miami, Florida, 37 FLRA No. 44, 37 FLRA 603, 605 (1990) (notice posted region-wide, rather than only in the particular location where the violation occurred).

protected activity. In those circumstances, a unit-wide posting was found to be appropriate because the impact of the unfair labor practice, although it concerned only the discipline of one employee, concerned the union president who was acting on behalf of the entire unit.[36] On the other hand, when there is no indication that other employees outside a specific location were affected by the violation, the Authority has ordered a local posting.[37] When litigating a case, the Regions request the greatest appropriate scope of the posting. The signatories on a remedial notice, discussed next, often is influenced by the scope of the posting.

**B. Signatories on Remedial Notices**

The signatory indicates the particular management or union official who is ordered to sign the 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 issue often arises as to the level of the official who should sign the notice that is posted. For example, is it appropriate for the local manager or the local labor relations officer to sign a notice, or should the facility manager or head of the agency be the more appropriate signatory. Similarly, should a union steward be the signatory or should the local or nationwide unit president sign the notice.

The management rights provisions of the Statute do not diminish the Authority's remedial powers. Specifically, the management rights provisions do not preclude the Authority from naming a particular management official to sign a remedial notice.[38] Thus, the Authority will specifically name in its order the title of the appropriate agency or union official to sign a remedial notice.

The Authority has stated that by requiring the highest official to sign the notice, a respondent "signif[ies] that the respondent acknowledges its obligations under the Statute and intends to comply with those obligations."[39] Thus, 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."[40] "[T]he highest official of the activity responsible for the violation," however, is not always the head of the activity/agency or union.[41] However, when the respondent is the agency at the level of exclusive recognition of a nationwide unit and the violation has unit-wide impact, the Authority

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[36] National Park Service, 54 FLRA No. 91, 54 FLRA 940, 946-47 (1998) (posting extended beyond the division where the unfair labor practices occurred, i.e., to all locations where unit employees are employed because, although the unfair labor practice involved the discipline of only one employee, that employee was the president of the union which represents the entire unit).

[37] Air Force Materiel Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, 54 FLRA No. 134, 54 FLRA 1529, 1536-37 (1998) (posting limited to the employees in the directorate who were directly affected by the unilateral change).

[38] FBP, 55 FLRA at 1256 (because personnel at the Region and the Bureau separately refused to furnish the union with the information requested, and the unit is nationwide, the Director of the Federal Bureau of Prisons was ordered to sign the notice).

[39] Department of the Air Force, Air Force Logistics Command, Sacramento Air Logistics Center, McClellan Air Force Base, California, 35 FLRA No. 26, 35 FLRA 217, 220 (1990) (the Commanding Officer of the Center was ordered to sign the notice).

[40] U.S. Department of Veterans Affairs, Washington, D.C., 48 FLRA No. 109, 48 FLRA 991, 992, (quoting Department of Health and Human Services, Regional Personnel Office, Seattle, Washington, 48 FLRA No. 39, 48 FLRA 410, 411 (1993) (the agency's General Counsel, whose office was responsible for the violation, was ordered to sign the notice), affirmed on reconsideration, 48 FLRA No. 148, 48 FLRA 1400, 1402 (1994).

[41] U.S. Department of Transportation, Federal Aviation Administration, Standiford Air Traffic Control Tower, Louisville, Kentucky, 53 FLRA No. 42, 53 FLRA 312, 322 (1997) (where the violation was the failure to implement an agreement for a new facility at the tower, the appropriate official to sign the notice was the tower manager and not the FAA Administrator).

has ordered the head of the agency to sign the notice.[42] When litigating a case, the Regions request the highest appropriate official to sign the notice.

### C. The Nontraditional Remedy of Distributing the Notice to Employees, Supervisors and Managers by Hard Copy or Electronic Mail

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, the Authority has ordered that the signed remedial notice be distributed to each supervisor, manager and employee.[43] In the one case where such a remedy was ordered, the Authority noted that the distribution of the posting to all supervisory personnel and management officials sufficiently addressed the concern for deterrence of future violations. As such, the Authority declined the General Counsel's request for an additional nontraditional remedy, i.e., to annotate the official file of the particular supervisor who committed the violations.[44]

Another nontraditional manner in which to distribute a notice is to use electronic mail. In one National Labor Relations Board decision, an ALJ reasoned:

> The Charging Party seeks the mailing of a notice to each unit employee. The General Counsel seeks normal posting. We live in changing times. The Board's traditional notice posting as a means of communication with employees is increasingly less effective in an electronic age in which the physical posting of notices in common areas generally is not the sole or even the most common means of providing information to employees. It is evident from the record that the unit employees involved herein are scattered at numerous locations and that the Respondent communicated with its employees respecting this matter via electronically transmitted memoranda. . . . I find that the Respondent shall be required, in addition to the normal posting requirements, to send each unit employee a copy of the notice herein by the method generally used to communicate to employees regarding matters of importance. Thus, the Respondent will be required to either mail or transmit a copy . . . by the means of electronic transmission currently used . . . for example, by E-mail . . . .[45]

This is an untested area of the law; however, Regions 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.

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[42] Social Security Administration, Baltimore, Maryland, 55 FLRA No. 43, 55 FLRA 246, 251 (1999) (without discussion, the Authority ordered the SSA Administrator to sign a nationwide posting in a case involving unit-wide impact).

[43] U.S. Penitentiary, Florence, Colorado, 53 FLRA No. 124, 53 FLRA 1393, 1394 (1998) (distribution of a posting to all supervisors, managers and employees is a nontraditional remedy tailored to fit the circumstances of the case where there have been continuing similar violations and where unusually large number of employees witnessed egregious violations).

[44] See Part VI. for a discussion of other nontraditional remedies.

[45] Pacific Bell, 330 NLRB No. 31, 1999 WL 1100443 at *9 (1999) (note that the Board did not address the remedy in its decision, although one Member dissented as to the e-mail distribution).

### D. The Nontraditional Remedy of Reading the Notice to Unit Employees, Supervisors and Managers

In view of the seriousness of the violations, the Authority has ordered that a meeting be held where the agency head reads aloud the notice.[46] In Leavenworth, the chief management official, the warden, was 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 (unit and nonunit) and making repeated statements threatening to take action against union officials. Relying on private sector precedent, the Authority ordered the respondent either to have the warden personally read the notice to all employees thereby informing employees that the employer has been found to have committed statutory violations, or to have an Authority agent read the notice with the warden present. The Authority particularly highlighted that in view of the fact that the warden made egregious, anti-union statements at a mandatory meeting of all employees, it was reasonably necessary to require those statements to be retracted, via a reading aloud of the notice, at another meeting of all employees. The Authority reasoned that this remedy will reach the same group of employees that witnessed the offense, and is calculated to have a countervailing impact similar to the initial offense. Further, because the warden called this mandatory meeting and made these statements in his representational capacity as the warden of the penitentiary, the Authority found it reasonably necessary to require the warden to conduct the reading, or alternatively, to require the warden to be present when the reading is conducted by an Authority agent, in order to recreate the conditions and relationships with which the unfair labor practice interfered, as well as to effectuate the policies of the Statute.[47]

### E. The Nontraditional Remedy of Naming Specific Managers or Union Officials that Engaged in Violative Conduct in the Notice

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.[48] In Leavenworth, for example, the Authority, noting that there are no private sector cases where such a remedy has been granted, found that in view of the other ordered remedies, naming particular individuals in the notice is not reasonably necessary in order to recreate the conditions and relationships with which the unfair labor practice interfered, or to effectuate the policies of the Statute.[49] As noted above, the General Counsel has been successful in requiring that all future notices be prefaced with a clear and unambiguous statement that the Authority has found the particular agency or union to have violated the Statute.

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[46] Leavenworth, 55 FLRA at 719 (where the warden's actions in making repeated anti-union statements at a mandatory meeting were egregious and the warden was personally involved in many unfair labor practice violations in the case, the Authority found it reasonably necessary to require the warden's statements to be retracted by a reading aloud by the warden, or by an Authority agent in the warden's presence, of the notice at another meeting of all employees) and Puerto Rico Air National Guard, 156th Airlift Wing (AMC), Carolina, Puerto Rico, 56 FLRA No. 21 (2000), slip op. at 23, petition for review filed, American Federation of Government Employees, Local 3936, AFL-CIO v. FLRA, No. 00-1417 (1st Cir. Mar. 24, 2000) (where violations by the highest agency official were flagrant and blatant, the Authority ordered that within ten days of the posting of the notice, at a meeting of all civilian technicians in the unit, the Adjutant General will read the Notice and inform the employees that the Guard recognizes the Authority's jurisdiction over the Guard and that conduct in conflict with the Statute will not be tolerated).

[47] For examples of nontraditional distribution remedies ordered by the National Labor Relations Board, see Fieldcrest Cannon Inc., 318 NLRB 470 (1995), enforced in relevant part, 97 F.3d 65 (4th Cir. 1996) (notice published in company's internal newsletter, mailed to employees' homes, published in local newspaper and read to employees by vice-president, in addition to other access remedies); Three Sisters Sportswear Co., 312 NLRB 853 (1993); Montfort of Colorado, 298 NLRB 73 (1990), enforced in relevant part, 965 F.2d 1538 (10th Cir. 1992); United States Service Industries, 319 NLRB 231 91995), enforced, 107 F.3d 973 (D.C. Cir. 1997); and S.E. Nichols, 284 NLRB 556 (1987), enforced, 862 F.2d 952 (2nd Cir. 1988).

[48] Leavenworth, 55 FLRA at 720; and Department of Veterans Affairs Medical Center, Phoenix, Arizona, 52 FLRA No. 18, 52 FLRA 182, 185 n.5 186 (1996) (the mere fact that an offending supervisor holds a position of authority is insufficient to warrant the inclusion of the names of offending supervisors in the notice to employees).

[49] Leavenworth, 55 FLRA at 720.

### F. The Nontraditional Remedy of Referring to Prior Violations in the Notice

The seriousness of a violation may support reference to previous violations in the notice. The one time the Authority granted this remedy, it noted that the "language serves to put both the employees and the respondent on notice of the serious nature of the respondent's unlawful conduct." [50]

### G. Evidence to Support Posting Remedies

To determine the appropriate scope and signatories of a posting and whether any of the above nontraditional posting remedies are appropriate, evidence should be developed to establish:

- 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

### A. Doctrine of Sovereign Immunity

Applying the legal doctrine of sovereign immunity, the Authority requires the party requesting a monetary remedy to establish that there is statutory authority (other than that provided in the Statute) for the expenditure of such funds.[51] 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.

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[50] Dept. of Commerce, 54 FLRA at 1023 (1998) (the notice referred to prior violations by stating adding to the traditional statement that the Authority has found a violation, the phrase "and has done so in the past").

[51] Immigration and Naturalization Service, Los Angeles District, Los Angeles, California 52 FLRA No. 11, 52 FLRA 103, 104-06 (1996) (INS, Los Angeles) (adopting Department of the Army, U.S. Commissary, Ft. Benjamin Harrison, Indianapolis, Indiana v. FLRA, 56 F.3d 273 (D.C. Cir. 1995) (Department of the Army) (vacating in part Department of the Army, U.S. Army Soldier Support Center, Fort Benjamin Harrison, Office of the Director of Finance and Accounting, Indianapolis, Indiana, 48 FLRA No. 2, 48 FLRA 6 (1993)).

### 1. Back Pay Act

One specific statutory authority unambiguously authorizing money damages is the Back Pay Act.[52] 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.[53] The Back Pay Act specifically provides for the payment of interest.[54] 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.[55]

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.[56] Similarly, a unilateral change unfair labor practice could result in a money remedy under the Back Pay Act.[57]

### 2. Attorney Fees

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[52] 5 U.S.C. § 5596 (Appendix A) and Office of Personnel Management implementing regulations at 5 CFR §§ 550.801-.808 (Appendix B).

[53] Social Security Administration, Baltimore, Maryland, 55 FLRA No. 43, 55 FLRA 246, 250-51 (1999) (Back Pay Act, 5 U.S.C. § 5596(b)(1) and (2)(A), explicitly provides that ULP remedies shall be payable with interest which operates as an explicit waiver of sovereign immunity); Department of Defense Dependents Schools, 54 FLRA No. 37, 54 FLRA 259, 264-68 (1998) (repudiation of a settlement agreement by refusing to accord priority to the requests of certain employees to be transferred off the island of Lajes which also effectively denied opportunities to former employees to return to the island remedied by paying employees who were denied the opportunity to return to the island for any losses they incurred, including the 5% hardship pay that employees on the island receive); U.S. Department of Health and Human Services, 54 FLRA No. 106, 54 FLRA 1210, 1221-23 (1998) (transit subsidies constitute pay, allowances, or differentials).

[54] Social Security Administration, Baltimore, Maryland, 55 FLRA No. 43, 55 FLRA 246, 250 (1999) (the remedy for the failure to comply with an arbitrator's award requiring the payment of backpay includes the payment of interest on those monies from the date the award became final and binding).

[55] Federal Aviation Administration, 55 FLRA No. 203, 55 FLRA 1271, 1276-77 (2000) (FAA) (citing AFGE, SSA Council 220 v. FLRA, 840 F.2d 925, 930 (D.C. Cir. 1988) (improper repudiation of an agreement caused unit employees to suffer the loss of monetary awards they otherwise would have received but for the unfair labor practice).

[56] U.S. Department of Agriculture, Food Safety and Inspection Service, Washington, D.C., 55 FLRA No. 148, 55 FLRA 875, 875-76 (1999) (respondent ordered to reimburse the employee for the losses incurred as a result of a five-day suspension, including backpay with interest, and any other benefits lost due to the suspension).

[57] Air Force Flight Test Center, Edwards Air Force Base, California, 55 FLRA No . 21, 55 FLRA 116, 125 (1999) (retroactive promotions with backpay and interest); Indian Health Service, Crownpoint Comprehensive Health Care Facility, Crownpoint, New Mexico, 53 FLRA No. 92, 53 FLRA 1161, 1162 (1998) (a change in work schedules remedied by a make-whole remedy for any salary differential or any other compensation lost); and Air Force Materiel Command, Warner Robbins Air Logistics Center, Robbins Air Force Base, Georgia, 53 FLRA No. 88, 53 FLRA 1092, 1094 (1998) (section 7116(a)(1) and (5) unilateral implementation in work assignments remedied by paying lost overtime).

The Back Pay Act referred to above also provides an entitlement to "reasonable attorney fees . . . awarded in accordance with standards established under section 7701(g) of this title . . . ."[58] A union can request attorney fees before an ALJ at the hearing, in a post-hearing brief, or on motion to the ALJ after the ALJ has recommended a decision and order. In keeping with the Regions' role as a neutral third party representing the public interest, it is inappropriate for the OGC to take a position as to whether attorney fees are warranted and the amount of any such fees. Similarly, the Trial Attorney refrains from taking a position with respect to the attorney fees request and the amount of such fees, if any are requested.

### 3. External Statutory Authority

Relying on the D.C. Circuit decision in Department of the Army, 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.[59] The Authority adopted the court's reasoning, and disavowed earlier Authority precedent, to hold that 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. Thus, when backpay is not involved, any monetary damages must be unambiguously grounded in some other statute.

[58] 5 U.S.C. § 5596(b)(1)(A)(ii). These standards are: (1) attorney fees may be incurred by a union's staff attorney, an attorney retained by the union, or an attorney retained by the individual employee; (2) an employee is the prevailing party if the employee has obtained all or a significant part of the relief sought; (3) the interest of justice standard is met any of five criteria set forth in Allen v. United States Postal Service, 2 MSPR 420 (1980) and National Association of Government Employees, Local R5-188 and U.S. Department of the Air Force, Seymour Johnson Air Force Base, North Carolina, 54 FLRA No. 122, 54 FLRA 1401 (1998) is met; and (4) the amount of the award must be reasonable.

[59] INS, Los Angeles, 52 FLRA at 105 (no legal authority to order a make-whole remedy for employees who incurred a monetary loss as a result of a change in parking policy).

## B. Equitable Relief

The Authority will uphold specific remedies that are equitable in nature.[60] Just because a remedy requires an agency to expend money does not automatically translate into a remedy requiring money damages. In Department of the Army, the court discussed the difference between money damages and equitable relief. The court characterized "money damages" as a payment to a plaintiff of a sum of money for "something lost in consequence of the defendant's act," and as a substitute for a suffered loss in an action at law for damages.[61] On the other hand, the remedy in an equitable action "attempt[s] to give the plaintiff the very thing to which he was entitled."[62] The court recognized that a monetary award can be either legal or equitable in nature.[63]

Based on this holding, in those situations where the Regions in the past would have sought damages, but such damages are now not supportable, the Regions should seek other innovative remedies which make the employees whole, but which do not violate the doctrine of sovereign immunity. As noted above, the doctrine applies to the payment of monetary damages to employees, not every expenditure of funds by an agency. For example, should the facts present in INS, Los Angeles arise again, instead of requesting that the agency reimburse employees for parking fees they were required to incur as a result of the violation, the agency could be required to provide free or reduced parking for an equal period of time.[64] Similarly, where a respondent has unilaterally increased the cost of food items in its vending machines or canteen, instead of requiring reimbursement, the respondent could be required to lower prices in the amount unlawfully raised until the employees' losses have been recouped. This approach can be applied to most matters that involve a cost to employees. The Regions should set forth the basis for any money damages in the transmittal memorandum upon issuance of a complaint and should specify what remedies the Region will seek if monetary damages are not supportable.

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[60] FAA, 55 FLRA at 1276-77 (2000) (remedy of make-whole relief for lost appraisal-linked awards due to repudiation of MOU is equitable in nature--the relief is the very thing that was improperly withheld); U.S. Department of Veterans Affairs, 55 FLRA No. 195, 55 FLRA 1213, 1216 (2000) (Department of VA) (remedy requiring respondent to reduce parking rates for a period of time necessary to offset the difference between the unlawfully implemented rate and the former rate until such time as the employees have been fully reimbursed is equitable); U.S. Department of Transportation, Federal Aviation Administration, Northwest Mountain Region, Renton, Washington, 55 FLRA No. 46, 55 FLRA 293, 298-99 (1999) (FAA, Renton) (notwithstanding a respondent's contrary contention, relief ordered by an ALJ, to obtain parking spaces for unit employees, at no cost to the employees, in a different location than had been made available by respondent, is not a remedy for money damages in contravention of the doctrine of sovereign immunity and FAA has authority to obligate funds for interests in property and thus respondent has authority to expend money to comply with ALJ's order), petition for review filed sub nom. Department of Transportation, Federal Aviation Administration, Northwest Mountain Region, Renton, Washington v. FLRA, (D.C. Cir. Apr. 29, 1999).

[61] Department of the Army, 56 F.3d at 276.

[62] Department of the Army, (quoting Bowen v. Massachusetts, 487 U.S. 879, 895 (1988) (Bowen) and citing Maryland Department of Human Resources v. Department of Health and Human Services, 763 F.2d 1441, 1446 (D.C. Cir. 1985)).

[63] See also Bowen, 487 U.S. at 893 ("The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as money damages").

[64] See FAA, Renton, 55 FLRA at 298-300 (1999) (the Authority enforced an arbitrator's award that required the agency to acquire from the City and County of Denver 30 indoor parking spaces for use by bargaining unit employees at no cost to the employees, even if doing so necessitates acquiring more than 30 spaces or acquiring spaces in a different, but substantially equivalent location) and Department of VA, 55 FLRA at 1216 (2000) (the Authority ordered an "offset" remedy -- a decrease in parking rates for a period of time to offset the difference between the unlawfully implemented rate and the former rate, until such time as the affected employees have been made whole).

**ATTACHMENT 1--REMEDIES FOR SPECIFIC VIOLATIONS**

**AND EVIDENCE TO SUPPORT THOSE REMEDIES**

This attachment lists the most common types of unfair labor practice violations and identifies the different types of remedies, both traditional and nontraditional. The attachment then describes the types of evidence that are necessary to establish the appropriateness of those remedies. When involved with a particular unfair labor practice allegation, the Regions, charging parties and respondents may use this attachment to focus on the potential traditional and nontraditional remedies associated with that violation.

## A. Unilateral Changes - Procedures and Appropriate Arrangements - Status Quo Ante

### 1. Criteria

In addition to a traditional cease and desist order and a remedial posting, the Authority has developed criteria to determine whether a status quo ante remedy is appropriate to remedy a unilateral change in a condition of employment without affording the union an opportunity to bargain over appropriate arrangements and procedures.[1] The Authority has stated:

> [T]he appropriateness of a status quo ante remedy must be determined on a case-by-case basis, carefully balancing the nature and circumstances of the particular violation against the degree of disruption in government operations that would be caused by such a remedy. Accordingly, in determining whether a status quo ante remedy would be appropriate in any specific case involving a violation of the duty to bargain over impact and implementation, the Authority considers, among other things, (1) whether, and when, notice was given to the union by the agency concerning the action or change decided upon; (2) whether, and when, the union requested bargaining on the procedures to be observed by the agency in implementing such action or change and/or concerning appropriate arrangements for employees adversely affected by such action or change; (3) the willfulness of the agency's conduct in failing to discharge its bargaining obligations under the Statute; (4) the nature and extent of the impact experienced by adversely affected employees; and (5) whether, and to what degree, a status quo ante remedy would disrupt or impair the efficiency and effectiveness of the agency's operations.[2]

This passage is commonly referred to as the FCI criteria. The Authority relies upon the ALJ's finding of facts when applying the FCI criteria. Remember, a respondent is only required to adhere to its former practices until such time as the respondent fulfills its bargaining obligations under the Statute.[3]

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[1] Federal Correctional Institution, 8 FLRA No. 111, 8 FLRA 604, 606 (1982) (FCI).

[2] Id. (citation omitted).

[3] See, e.g., U.S. Department of Justice, Immigration and Naturalization Service, 55 FLRA No. 151, 55 FLRA 892, 906-08 (1999) (U.S. DOJ) (status quo ante ordered where agency violated § 7116(a)(1) and (5) by failing to bargain over the impact and implementation of its non-deadly force policy--Authority requires that a conclusion that a status quo ante remedy would be disruptive to the operations of an agency be "based on record evidence"); and Air Force Flight Test Center, Edwards Air Force Base, California, 55 FLRA No. 21, 55 FLRA 116, 124-25 (1999) (retroactive promotions and backpay granted where agency refused to bargain over procedures and appropriate arrangements for employees adversely affected by unilateral elimination of noncompetitive promotions).

**a. Notice**

The Authority distinguishes between a union's knowledge of a change and notice and a reasonable opportunity to request to bargain under the Statute.[4]

**b. Request**

Sometimes, a union will request to bargain even if it did not receive appropriate notice of a change. Of course, if a union is provided proper notice but fails to request to bargain, there would be no unfair labor practice violation.

**c. Willfulness**

The Authority has found that an intentional failure to notify a union of an impending change is willful, even though based on an erroneous conclusion that the agency was not obligated to bargain over the subject matter.[5] Also, since the obligation to bargain arises prior to implementation of changes, the timing of negotiations subsequent to the implementation of the changes does not temper the willful nature of a respondent's conduct.[6]

**d. Impact**

In order to establish the duty to bargain and the resulting unfair labor practice, it must first be established that the change had more than a de minimis impact on the working conditions of unit employees.[7] The Authority rarely, if ever, denies a status quo ante on the basis that the impact factor has not been met. Rather, the Authority examines the degree of impact when balancing the disruption to agency operations caused by a status quo ante remedy under the disruption criteria. Further, the Authority has held that the fact that management has the right to implement a change that adversely affects employees does not provide a basis for denying a status quo ante remedy.[8]

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[4] U.S. DOJ, 55 FLRA at 906 (Authority based status quo remedy -- recission of a non-deadly force policy, in part, on ALJ's finding that notwithstanding Charging Party's knowledge of non-deadly force policy, respondent did not invite Charging Party to bargain).

[5] See U.S. Department of Energy, Western Area Power Administration, Golden Colorado, 56 FLRA No. 2, 56 FLRA 9, 13, 14 (2000) (WAPA, Golden) (citing U.S. Department of the Army, Lexington-Blue Grass Army Dept, Lexington, Kentucky, 38 FLRA 647, 649 (1990) (Lexington-Blue Grass) (as a result, the Authority ordered rescission of directed reassignments, offer of reinstatement to previously occupied positions and make whole for any reduction of pay and/or benefits as a result of the reassignments).

[6] Federal Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas, 55 FLRA No. 147, 55 FLRA 848, 856 (2000) (FCI, Bastrop) (duty to bargain arises prior to implementation of a change).

[7] Department of Health and Human Services, Social Security Administration, 24 FLRA No. 42, 24 FLRA 403, 407-08 (1986) (sets the test for the duty to bargain over appropriate arrangements and procedures).

[8] U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 36 FLRA No. 71, 36 FLRA 655, 673 (1990) (even if decision to colocate teleclaims representatives constituted an exercise of a management right, that factor does not mean that respondent was privileged to implement the decision without bargaining).

### e. Disruption

When it is alleged that a status quo ante remedy would cause disruption to the efficiency and effectiveness of the agency's operations, the Authority bases its findings on specific evidence in the record concerning how, and to what degree, such disruption would occur.[9] Evidence supporting the legitimacy of the agency's change at issue does not necessarily support a finding that restoration of the former unilaterally changed practices will cause disruption to the efficiency and effectiveness of its operations. Further, just because a facility has "special security concerns" that are of "paramount importance" that are always present in those types of facilities does not necessarily require a finding that restoration of the former unilaterally changed practices will cause disruption to the efficiency and effectiveness of its operations.[10] The record must reveal a significant security risk outweighing the totality of the factors favoring a status quo ante remedy.[11] The existence of general security concerns does not preclude a status quo ante remedy where, on balance, the other FCI criteria support the remedy and the remedy will effectuate the purposes and policies of the Statute.[12] Thus, while the respondent's exercise of its internal security right is a factor to be considered in weighing whether a status quo ante remedy would have a disruptive effect upon management's operations, it is not dispositive.[13]

The Regions investigate the disruption criteria just as the other elements of the violation and the FCI criteria are investigated. However, unlike the elements of the violation and the other FCI criteria, the burden is on the respondent agency to establish that a status quo ante remedy would unduly disrupt its operations, not on the General Counsel to establish that a status quo ante remedy would not unduly disrupt operations.[14]

## 2. Evidence to Establish the FCI Criteria

Much of the evidence necessary to establish the unfair labor practice violation is also applicable to establishing the first four FCI criteria in determining whether or not a status quo ante remedy is appropriate. Thus, as to notice, evidence should be developed to address:

- what notice, if any, was provided to the union;
- the manner in which the notice was given;
- the timing of notice in relationship to the decision and implementation of the change; and

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[9] Army and Air Force Exchange Service, Waco Distribution Center, Waco, Texas, 53 FLRA No. 66, 53 FLRA 749, 763 (1997) and Lexington-Blue Grass, 38 FLRA at 649-50.

[10] FCI, Bastrop, 55 FLRA at 856.

[11] Compare id. with United States Department of the Air Force, Air Force Materiel Command, 54 FLRA No. 90, 54 FLRA 914, 922 (1998) (status quo ante remedy not warranted because there would be potential disruption to respondent's operations and an unfair impact on those employees who received the voluntary incentive separation pay).

[12] FCI, Bastrop, 55 FLRA at 856 (status quo ante remedy for unilaterally changing policles regarding inmate release procedures without bargaining over appropriate arrangements and procedures; and the Authority clarified that it never held that the presence of internal security concerns precludes status quo ante relief in all cases).

[13] See also WAPA, Golden, 56 FLRA at 13 (after discussing each FCI factor, the Authority ordered a status quo ante remedy where respondent reassigned two unit employees without providing the union with notice and an opportunity to bargain); and U.S. Army Corps of Engineers, Memphis District, Memphis, Tennessee, 53 FLRA No. 14, 53 FLRA 79, 84-85 (1997) (restore a cook position that was unilaterally eliminated).

[14] WAPA, Golden, 56 FLRA at 13 (agency could not accurately reflect the degree of disruption a status quo ante remedy would have on its operations).

- the extent of the bargaining opportunity, if any, provided to the union.

As to the request, evidence should be developed to address:

- whether the union requested to bargain;
- the manner in which the request was made;
- the timing of that request; and
- whether a request would have been futile.

As to willfulness, evidence should be developed to address:

- management's response, if any, to the request; and
- the extent of bargaining, if any, prior to the change.

As to impact, evidence should be developed to address:

- in addition to the impact needed to trigger the bargaining obligation in the first instance, the extent and nature of the impact in comparison to management's need to implement the change.

The final criterium, disruption, usually controls the status quo ante determination. The Region investigates this fifth criteria to the same extent the Region investigates and considers the elements of the violation and the other status quo ante criteria. However, the respondent bears the burden of proving that a status quo ante remedy would unduly disrupt or impair the effectiveness of the respondent's operations. If the respondent presents such evidence, the General Counsel must be prepared to establish that returning to the status quo ante would not be unduly disruptive or impair the effectiveness of the respondent's operations. For example, the General Counsel may gain admissions from the respondent's witnesses that while status quo ante is not their preference, they could still perform their mission and carry out essential services if the status quo were restored. Evidence should be developed to address:

- the time period that the pre-existing condition of employment was in effect;
- the effectiveness of that practice during that period of time;
- why, if the change was so imperative so that operations would be disruptive without the change, it took the time period at issue to actually implement the change; and
- why the operations would be so unduly disrupted if the agency were required to return to the pre-existing practice until it complied with the Statute.

## B. Unilateral Change - Status Quo Ante

### 1. Status Quo Ante is the Traditional Remedy

A status quo ante remedy usually is regarded as the most effective remedy for a unilateral change violation, whether the failed duty to bargain concerned the change itself or the procedures and appropriate arrangements relating to the change.[15] The purpose of a status quo ante remedy is to place parties, including employees, in the positions they would have been in had there been no unlawful conduct. Another critical purpose of the remedy is to deter the respondent and future parties from failing to satisfy their duty to bargain, and to reduce any incentive that may exist

[15] Money remedies under the Back Pay Act also are traditional remedies. See Part V.

to unilaterally implement changes in conditions of employment while refusing to fulfill the statutory bargaining obligation that accompanies that change.[16] Thus, where management changes a condition of employment without fulfilling its obligation to bargain over the substance of the decision to make the change, in addition to a traditional cease and desist order and a remedial posting, the Authority orders a status quo ante remedy in the absence of special circumstances.[17]

### 2. Nontraditional Remedies for Unilateral Change Violations

The imposition of time limits on bargaining to ensure expeditious bargaining is a nontraditional remedy. In one case, the Authority denied a General Counsel request for such a remedy noting that the reason for the request, to complete bargaining before a facility is open, no longer existed since at the time of the Authority decision, the facility had already opened, and that there was nothing in the record to indicate that the respondent was unwilling to bargain expeditiously.[18] The Authority also has noted the difficulty in imposing effective time limits on collective bargaining in the Federal sector.[19] A similar nontraditional remedy wold be to establish other ground rules for the bargaining.

The case law is unclear as to whether the Authority will order rescission of disciplinary actions taken against employees for failure to comply with work rules and conditions of employment unilaterally imposed contrary to the statutory duty to bargain. The Authority has stated that it will "remedy disciplinary action taken against employee conduct that, absent unilateral changes, would not have been proscribed conduct."[20] However, on reconsideration, the Authority clarified that it would not order discipline rescinded that otherwise would have been appropriate and lawful despite the improper unilateral change. Thus, discipline for failing to comply with a unilaterally-imposed dress

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[16] See FDIC v. FLRA, 977 F.2d 1493, 1498 (D.C. Cir. 1992) (the purpose of a status quo ante remedy is "to ensure that agencies will have incentive to bargain with their unions"); and NTEU v. FLRA, 910 F.2d at 969 ("[W]here an agency has taken unilateral action that disturbs the status quo and has illegally refused to give a union an opportunity to bargain over the decision (or its impact), a stronger case can be made for the proposition that the Authority, as does the NLRB, should restore the status quo ante in a remedial order . . . ").

[17] See, e.g., U.S. Department of Justice, Executive Office for Immigration Review, Board of Immigration Appeals, 55 FLRA No. 74, 55 FLRA 454, 457 (1999) (after reconsidering requests for flexiplace, respondent ordered to make adversely affected employees whole for any annual leave due to the failure to initially consider their requests); Navajo Area Indian Health Service, Winslow Service Unit, Winslow, Arizona, 55 FLRA No. 32, 55 FLRA 186, 189 (1999) (respondent ordered to rescind the changes to the Employee Health Program and to reinstate the services which were provided to non-beneficiary employees prior to the change); and Federal Deposit Insurance Corporation, 41 FLRA No. 29, 41 FLRA 272, 279 (1991) enforced, 977 F.2d 1493 (D.C. Cir. 1992) (setting standard for status quo ante remedy where respondent failed to bargain over substance of a change); compare Department of Veterans Affairs Medical Center, Asheville, North Carolina, 51 FLRA No. 51 FLRA 1572, 1580 n.13 (1996) (status quo ante remedy not ordered because special circumstances exist--it was not possible to recreate events that had already transpired--employee birthdays for which administrative leave was not granted had already occurred so it was not possible to provide time off for employees to commemorate past birthdays).

[18] Federal Aviation Administration, Northwest Mountain Region, 51 FLRA No. 4, 51 FLRA 35, 37-38 (1995).

[19] See U.S. Department of Transportation and Federal Aviation Administration, 48 FLRA No. 129, 48 FLRA 1211, 1215 (1993) (the Authority declined to issue an order that limits the length of a return to the status quo ante by imposing a time limit on the bargaining process).

[20] U. S. Department of Justice, U.S. Immigration and Naturalization Service, El Paso District Office, 34 FLRA No. 166, 34 FLRA 1035, 1049-50 (1990) (INS, El Paso), order denying in part, and granting in part, motion for reconsideration and modifying decision, 39 FLRA No. 123, 39 FLRA 1431, 1438-39 (1991) (respondent ordered to rescind admonishments for failure to comply with changes in requirements except for those disciplinary actions that would have been appropriate and lawful despite improper implementation of the changes).

code has not been rescinded,[21] while discipline for not following unilaterally imposed work rules has been rescinded.[22] Notwithstanding the uncertainty of whether the Authority will order a rescission of disciplinary actions for failing to comply with a unilaterally-imposed condition of employment, the Regions should continue to seek make-whole remedies when an employee is disciplined for merely asserting a statutory or contract right. However, since it is unclear when the Authority will order the recission of discipline resulting from a unilateral change, when questioned, Regions suggest that employees follow unilaterally-imposed changes in conditions of employment and seek redress through either the negotiated grievance procedure or the unfair labor practice procedure. **The Regions should submit for case handling advice proposed remedies in those situations where an employee has been disciplined for failing to comply with a work rule or condition of employment imposed contrary to the statutory duty to bargain.**

#### 3. Evidence to Establish the Appropriateness of Nontraditional Bargaining Remedies

A traditional bargaining order presumes that good faith bargaining will take place and that any problems can be handled as a compliance matter. Thus, when time limits or other procedures for bargaining are requested, the General Counsel must establish that the good faith presumption has been rebutted by the respondent's prior conduct. Evidence should be developed to address:

- whether negotiations in the past had been delayed by the respondent, e.g., responding late, not meeting regularly, seeking to postpone, avoiding a schedule for bargaining, claiming unavailability, not having authorized representatives; and/or being prepared; and
- whether time is of the essence with respect to bargaining over the specific subject matter.

When seeking an order rescinding disciplinary actions taken against employees for failure to comply with work rules and conditions of employment unilaterally imposed contrary to the statutory duty to bargain, evidence should be developed to address:

- whether the discipline would have been imposed absent the unilateral change.

### C. Unilateral Change--Retroactive Bargaining Order (RBO)

#### 1. RBO Is an Alternative Traditional Remedy for an Unlawful Unilateral Change

An RBO is appropriate where a respondent's unlawful conduct has deprived the exclusive representative of an opportunity to bargain in a timely manner over negotiable conditions of employment affecting bargaining unit employees.[23] In particular, an RBO affords the parties the ability to negotiate and implement the results of their agreement retroactively, "thereby approximating the situation that would have existed had the respondent fulfilled its

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[21] Veterans Administration, West Los Angeles Medical Center, Los Angeles, California, 23 FLRA No. 37, 23 FLRA 278, 280 (1987) (in the circumstances of the case, a refusal to negotiate in good faith does not excuse an employee's insubordination).

[22] INS, El Paso.

[23] Federal Aviation Administration, Northwest Mountain Region, Renton, Washington, 51 FLRA No. 4, 51 FLRA 35, 37 (1995) (FAA, Northwest Mountain Region) (citation omitted).

statutory obligations."[24] Furthermore, an RBO is used where it is clear that some employees have been harmed by an agency's unlawful conduct, but there is no way to ascertain their identity through compliance proceedings. [25]

Accordingly, whenever the Region determines not to seek a status quo ante remedy in any bargaining situation, whether the duty to bargain concerns the substance of the change or its appropriate arrangements and procedures, the Region should consider seeking an RBO. Similarly, when seeking a status quo ante remedy in an appropriate arrangements and procedures bargaining situation, the Region should also argue that should the Authority find that the FCI criteria have not been met in an arrangements/procedures case or there are other special circumstances rendering a status quo ante remedy in a change case inappropriate, and thus a status quo ante remedy is not appropriate, an RBO should be ordered.[26]

#### 2. When an RBO is Appropriate Rather Than a Status Quo Ante

To determine whether a retroactive bargaining order is appropriate in a unilateral change situation, evidence should be developed to address:

- whether some employees have been harmed by an agency's unlawful conduct, but there is no way to ascertain their identity through compliance proceedings;
- whether the FCI criteria have not been met in an arrangements/procedures case; and
- whether there are other special circumstances rendering a status quo ante remedy in a change case inappropriate.

## D. Bad Faith Bargaining

### 1. Traditional Remedies for Bad Faith Bargaining

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[24] Id.

[25] See, e.g., Federal Deposit Insurance Corporation, Washington, D.C., 48 FLRA No. 27, 48 FLRA 313, 330-31 (1993) (FDIC), petition for review denied sub nom. FDIC v. FLRA, No. 93-1694 (D.C. Cir. 1994) (Authority imposed RBO to remedy respondents' unilateral decision not to renew appointments of certain employees, requiring that "any employee be made whole who, based on any agreement reached by the parties, is determined to have suffered a loss of pay, benefits, allowances, or differentials because of the [r]espondents' unlawful conduct").

[26] Department of Veterans Affairs Medical Center, Asheville, North Carolina, 51 FLRA No. 129, 51 FLRA 1572, 1581 (1996) (RBO remedies failure to notify union of management's decision to no longer grant employees four hours of administrative leave on their birthday by allowing the parties to determine the best form of relief for the conduct found to be unlawful); and United States Department of the Air Force, Air Force Materiel Command, 54 FLRA No. 90, 54 FLRA 914, 922-24 (1998) (RBO remedies failure to notify union of receipt of authorization to offer voluntary separation incentive pay which deprived the union of an opportunity to bargain before employees were affected by allowing the parties to negotiate the best form of relief for those employees adversely affected by the unlawful refusal to bargain).

In addition to a traditional cease and desist order and a remedial posting, the traditional remedy for a bad faith bargaining violation is an affirmative order to bargain in good faith.[27]

### 2. Nontraditional Remedies for Bad Faith Bargaining

In one case, when an agency engaged in bad faith bargaining which precluded the completion of negotiations for a collective bargaining agreement before the expiration of the one-year period following the union's certification, the Authority applied private sector precedent and extended the union's certification for a one-year period beginning on the date that bargaining commenced.[28]

Another possible remedy in a bad faith bargaining case is an order imposing time limits on negotiations. Like all other nontraditional remedies, the appropriateness of time limits must be supported by evidence indicating that the respondent was unwilling to negotiate expeditiously.[29] The Regions should not, however, request the Authority to approve a bargaining order that requires a respondent to reach an agreement.[30] Ordering a respondent to participate in interest arbitration to resolve an impasse in negotiations, or requiring a respondent to bear the cost of past and/or future negotiations, are two other potential nontraditional remedies for bad faith bargaining.

### 3. Evidence to Establish the Necessity for Nontraditional Bad Faith Bargaining Remedies

To determine whether nontraditional remedies are appropriate in a bad faith bargaining situation, evidence should be developed to establish:

- the timing of the request to bargain and the response(s);
- the specific conduct of both parties in scheduling negotiations and at the bargaining table; and
- the effect of the violation on the efficacy of the union and the rights of employees, or on the efficiency of the agency, including the extra costs incurred due to the violation.

## E. Failure to Implement an Agreement and Repudiation of an Agreement

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[27] U.S. Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 36 FLRA No. 62, 36 FLRA 524, 534-35 (1990) (the Authority found that a bargaining order would not be moot, duplicative or unnecessary).

[28] U.S. Geological Survey, Caribbean District Office, San Juan, Puerto Rico, 53 FLRA No. 86, 53 FLRA 1006, 1015-22 (1997) (the Authority ordered its remedy consistent with the national labor policy which seeks to have disputes between employees and their employers involving conditions of employment settled amicably through collective bargaining).

[29] Federal Aviation Administration, Northwest Mountain Region, 51 FLRA at 37 (1995) (in denying the request for the imposition of time limits on bargaining the Authority noted that the expressed reason for the requested time limits on bargaining no longer existed; the record contained no evidence indicating that the respondent was unwilling to negotiate expeditiously; and the difficulty in imposing effective time limits on collective bargaining in the Federal sector).

[30] U.S. Department of Labor, Occupational Safety and Health Administration, Chicago, Illinois, 19 FLRA No. 60, 19 FLRA 454, 455 (1985) ("an order which would compel the parties to reach agreement is inconsistent with section 7103(a)(12) of the Statute . . .").

### 1. Traditional Remedy for Failure to Implement an Agreement and Repudiation of an Agreement

In addition to a traditional cease and desist order and a remedial posting, when a respondent has committed an unfair labor practice by failing to execute an agreement, the Authority typically affirmatively directs the respondent to implement the agreement.[31] Similarly, in a repudiation cases, the Authority orders the agreement to be reinstated.[32]

### 2. Nontraditional Remedy for Failure to Implement an Agreement and Repudiation of an Agreement

In addition to a traditional cease and desist order and a remedial posting, a potential nontraditional remedy would be to give retroactive effect to the agreement from the date of the violation, including making employees whole pursuant to the agreement's terms.

### 3. Evidence to Establish the Necessity for Nontraditional Failure to Implement an Agreement and Repudiation of an Agreement Remedies

To determine whether nontraditional remedies are appropriate in a failure to implement an agreement situation, evidence should be developed to establish:

- the effect of the violation on employees' conditions of employment;
- any requests to delay the unlawful action in order to give the other party time to alleviate/mitigate the effects of the violation; and
- whether a retroactive or make-whole remedy would unduly burden the respondent.

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[31] E.g., Veterans Administration Outpatient Clinic, Los Angeles, California, 22 FLRA No. 40, 22 FLRA 399, 400 (1986) (implement the agreement consonant with laws and regulations governing the matters that are the subject of the agreement); National Council of Social Security Administration Field Operations Locals--Council 220, American Federation of Govenre, 21 FLRA No. 43, 21 FLRA 319, 322 (1986) (sign the agreement upon request of the charging party); Long Beach Naval Shipyard, Long Beach, California and FEMTC, AFL-CIO, 7 FLRA No. 16, 7 FLRA 102, 103 (1981) (take action in conformity with agreement).

[32] Department of Transportation, Federal Aviation Administration, Fort Worth, Texas, 55 FLRA. No. 157, 55 FLRA 951, 957 (1999) (allow union representation on employee interview panels as required by the parties' agreement); and U.S. Department of Justice, Federal Bureau of Prisons, FCI Danbury, Danbury, Connecticut, 55 FLRA No. 37, 55 FLRA 201, 205 (1999) (reinstate the shift starting and stopping times as agreed to in a local supplemental agreement).

## F. Bypasses

### 1. Traditional Remedy for Bypasses

The traditional remedy for a bypass violation is a traditional cease and desist order and a remedial posting.[33]

### 2. Nontraditional Remedy for Bypasses

In one case, where the bypass of the union resulted in a last chance agreement between the employee and the agency, the Authority ordered, at the request of the union, that the agreement be voided and copies be purged from the agency's files.[34]

### 3. Evidence to Establish the Necessity for Nontraditional Bypass Remedies

To determine whether nontraditional remedies are appropriate in a bypass situation, evidence should be developed to establish:

- whether employees are uncertain about the agency's actions regarding the topic of the bypass and the union's position on that topic; and
- whether the union expeditiously took mitigating actions upon learning of the bypass, such as requesting to bargain on the change in conditions of employment or requesting to be involved in all grievance settlement meetings regarding the employee involved.

## G. Investigatory Examinations

### 1. Traditional Remedy for a Section 7114(a)(2)(B) Violation

In addition to a traditional cease and desist order and a remedial posting, where there has been a denial of representation rights under section 7114(a)(2)(B) and discipline has ensued, the Authority orders the agency, upon request of the union and the employee, to repeat the investigatory interview and to afford the employee full rights to union representation.[35] After repeating the investigatory interview, the agency is ordered to reconsider the disciplinary action taken against the employee.[36] If on reconsideration the agency concludes that the disciplinary action was unwarranted or that a mitigation of the penalty is warranted, the employee is made whole for any losses suffered to the extent consistent with the agency's decision on reconsideration.[37] The agency is required to notify the employee of the results of the reconsideration, including whatever make-whole actions are to be afforded the

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[33] U.S. Department of Justice, Immigration and Naturalization Service, New York Office of Asylum, Rosedale, New York, 55 FLRA No. 170, 55 FLRA 1032, 1039 (1999) (Rosedale, New York).

[34] Social Security Administration, 55 FLRA No. 160, 55 FLRA 978, 983 (1999) (agency committed a unilateral change and a bypass violation by negotiating a last chance agreement with an employee without notifying and bargaining with the union).

[35] U.S. Department of Justice, Federal Bureau of Prisons, Office of Internal Affairs, Washington, D.C., 55 FLRA No. 64, 55 FLRA 388, 395 (1999).

[36] Id.

[37] Id.

employee and, if relevant, afford the employee any grievance or appeal rights that may exist under the parties' negotiated agreement, law or regulation with respect to the agency's action in reconsidering the disciplinary action.[38]

### 2. When A Traditional Make-Whole Remedy for a Section 7114(a)(2)(B) Violation is Appropriate

Where a disciplinary action has been taken because the employee engaged in protected activity, a traditional make-whole remedy is appropriate.[39] For example, the imposition of discipline for requesting a representative at an investigatory interview would be remedied by a traditional make-whole order.

### 3. Evidence to Establish that a Make-Whole Remedy for a Section 7114(a)(2)(B) Violation is Appropriate

To determine whether a make-whole remedy is appropriate to remedy an investigatory examination violation, evidence should be developed to establish:

- whether the reason that the employee was disciplined was for asserting a right to representation, or for not attending the meeting without a representative, or for another reason; and
- whether other employees had received similar discipline for a similar reason.

## H. Formal Discussions

### 1. Traditional Remedy for a Formal Discussion Violation

In addition to a traditional cease and desist order and a remedial posting, the Authority affirmatively orders the agency to provide prior notice to the union and the opportunity to be represented at any formal discussions.[40]

### 2. Nontraditional Remedy for a Formal Discussion Violation

A nontraditional remedy for a formal discussion violation is to re-hold the meeting to enable the union to ask questions and make comments as if it had been given notice of the meeting and an opportunity to actively participate, as required by the Statute. A similar nontraditional remedy is to allow the union to convene a meeting among the unit employees who attended the formal discussion on duty time at the same location and for the same

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[38] Id. (citing Safford, 35 FLRA at 447-48 (1990)).

[39] Charleston Naval Shipyard, 32 FLRA No. 37, 32 FLRA 222, 233-34 (1988) (adopting the conclusions and analysis that were applied by the NLRB in Taracorp Industries, 273 NLRB 221, 221-23 (1984), the Authority indicated that in cases involving violations of section 7114(a)(2)(B), traditional make-whole remedies would not be ordered where the "only violation is the denial of an employee's request for representation at an investigatory interview").

[40] Rosedale, New York, 55 FLRA No. 170, 55 FLRA 1032 (1999) (formal discussion and bypass violations by attempting to resolve a grievance directly with an employee).

time period to allow the union to respond to the discussion at the meeting and answer employee questions about the subject matter.

### 3. Evidence to Establish that a Nontraditional Remedy for a Formal Discussion Violation is Appropriate

To determine whether a a nontraditional remedy for a formal discussion violation is appropriate, the evidence should be developed to establish:

- the extent to which the meeting left employees uncertain as to what position and action the union has taken about issues discussed;
- the extent it appeared to the employees that the union was in agreement with management, when in fact the union had positions which the employees should have heard; and
- whether the meeting concerned a sensitive or "hot button" issue that resulted in employees latter seeking advice or clarification from the union; and
- whether the employees are geographically dispersed, subject to different shifts, or otherwise difficult for the union to reach.

## I. Information

### 1. Traditional Remedy for a Failure to Furnish Requested Information under Section 7114(b)(4)

In addition to a traditional cease and desist order and a remedial posting, the Authority orders the offending agency to furnish the requested information, upon request.[41]

### 2. Nontraditional Remedy for an Information Violation

One nontraditional remedy is to request that the agency be ordered to waive any contractual time limits for filing a grievance over the matter that gave rise to the information request. See Health Care Financing Administration, OALJ No. 99-40 (Sept. 24, 1999) (exceptions pending). Cf. Department of the Army, Headquarters, XVIII Airborne Corps and Fort Bragg, North Carolina, 26 FLRA No. 52, 26 FLRA 407, 414 (1987) (denial of General Counsel's request for waiver of time limits for filing of grievance). Another nontraditional remedy is to request, in situations where an agency has failed to respond to repeated requests for information or has been repeatedly dilatory in responding to such requests, that the agency be ordered to respond to future requests within a certain time frame, i.e., a compulsory procedure to ensure that the agency makes timely responses to requests for information.[42] Other possible nontraditional remedies could be to require the agency to renegotiate, upon the union's request, any

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[41] Federal Aviation Administration, 55 FLRA No. 44, 55 FLRA 254, 261 (1999) (furnish upon request information necessary for union to determine seniority under the contact).

[42] U.S. Immigration and Naturalization Service, Border Patrol, Tucson, Arizona, ALJ Dec. Rpt. 129 (Aug. 29, 1997) (no exceptions filed) (agency ordered to reply in a timely and proper manner to requests for information made by the union by following a procedure to: (1) respond in writing within ten work days after the receipt of a data request by addressing the following issues; (2) whether the specific data requested exists; (3) whether or not it will be provided as requested; (4) whether clarification from union is required; (5) whether or not the release of the information is precluded by law, and, if so, a statement of the reason(s); (6) whether the agency has any countervailing interests in non-disclosure; and (7) offer to and/or initiate a meeting and/or a telephone conference if it would assist in resolving any issue arising from the request).

agreement reached with the union concerning the subject matter that was the subject of the information request and order any new agreement to be effective retroactively. This could apply to a grievance settlement or a memorandum of understanding resulting from collective bargaining. Recall that section 7118(a)(7)(B) of the Statute specifically provides that the Authority has the power to "require the parties to renegotiate a collective bargaining agreement in accordance with the order of the Authority and requir[e] that the agreement, as amended, be given retroactive effect." In my view, this remedy should be requested from the Authority when the evidence establishes that the union would have been in a better bargaining position had the Statute not been violated.

#### 3. Evidence to Establish that a Nontraditional Remedy for an Information Violation is Appropriate

To determine whether the nontraditional remedy to waive grievance time limits is appropriate, evidence should be developed to establish:

- that proceeding to arbitration is still appropriate and could still remedy the underlying grievance for which the information was requested.

To determine whether the nontraditional remedy to establish time frames for furnishing information is appropriate, evidence should be developed to establish:

- whether the agency has repeatedly failed to respond to information requests or exhibited dilatory tactics in responding to such requests; and
- whether the information is useful only if received within a certain time frame.

To determine whether the nontraditional remedy to renegotiate an agreement is appropriate, evidence should be developed to establish:

- whether the failure to have the information placed the union in a disadvantaged position during collective bargaining; or
- whether the failure to have the information placed the union in a disadvantaged position during settlement of a grievance.

### J. Section 7115 Dues Allotment

#### 1. Traditional Remedy for a Dues Withholding Violation

In addition to a traditional cease and desist order and a remedial posting, when an agency unlawfully fails to process dues assignments, the Authority orders the agency to remit to the exclusive representative those regular and periodic dues which should have been, but were not, withheld from employees' pay pursuant to section 7115 of the Statute, and to affirmatively honor such assignments in the future.[43] When a union violates section 7115 of the

[43] Morale, Welfare and Recreation Directorate, Marine Corps Air Station, Cherry Point, North Carolina, 48 FLRA No. 71, 48 FLRA 686, 691 (1993) (remedy ordered for discontinuing dues withholding and for withdrawing recognition from the union after a reorganization and during the pendency of a question concerning representation).

Statute, the Authority orders, in addition to a traditional cease and desist order and a remedial posting, an affirmative order to process a request, or to request that the agency initiate, reinstate or revoke dues withholding.[44]

### 2. Nontraditional Remedy for a Dues Withholding Violation

In addition to reimbursing the union for lost dues, employees may have lost benefits when their dues were not withheld. In such circumstances, there may be equitable remedies to make the employees whole.

Dues withholding violations may also be committed by unions that fail to remove employees from dues withholding as required by the Statute. In those cases, the union may be required to remit dues monies to the employee. Dues withholding violations may also be committed by unions that fail to place employees on dues withholding. In such circumstances, as with similar agency violations referred to above, there may be equitable remedies to make the employees whole.

### 3. Evidence to Establish that a Nontraditional Remedy for a Dues Withholding Violation is Appropriate

To determine whether a a nontraditional remedy for a dues withholding violation is appropriate, evidence should be developed to establish:

- whether any employee lost benefits as a result of the failure of the agency to place the employee on dues withholding or the failure of the union to submit an employee's name to the agency for dues withholding;
- whether any employee lost money as a result of the failure of the agency to terminate dues withholding or the failure of the union to submit an employee's name to the agency to terminate his/her dues withholding.

## K. Statutory Official Time

### 1. Traditional Remedy for a Statutory Official Time Violation

In addition to a traditional cease and desist order and a remedial posting, the traditional remedy for the refusal to grant official time required by the Statute is to restore any annual leave that was used in lieu of the official time that should have been granted.[45]

### 2. Nontraditional Remedy for a Statutory Official Time Violation

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[44] Federal Employees Metal Trades Council, Mare Island Naval Shipyard, 47 FLRA No. 118, 47 FLRA 1289, 1295 (1993) (remedy for union's violation of section 7116(b)(1) and (8) by directing the agency to terminate the charging party's dues allotment in disregard of section 7115).

[45] Department of the Navy, Naval Weapons Station, Yorktown, Virginia and Navy, Atlantic Ordnance Command, Yorktown, Virginia, 55 FLRA No. 181, 55 FLRA 1112, 1114-15 (1999) (during the pendency of a representation petition that was filed after a reorganization, the agency was obligated to continue to recognize the existing unit under section 2422.34(a) of the regulations, and therefore violated section 7116(a)(1) and (8) when it denied union officials' requests for official time under section 7131(a) to negotiate changes in employees' conditions of employment).

Where official time has been denied to union officials who nevertheless performed representational duties on nonduty time and the parties' collective bargaining agreement provides for authorization of official time in that instance, section 7131(d) entitles the aggrieved employee to reimbursement at the appropriate straight-time rate for the amount of time that should have been official time.[46]

#### 3. Evidence to Establish that a Nontraditional Remedy for a Section 7131(a) or (c) Official Time Violation is Appropriate

To determine whether a a nontraditional remedy for an official violation is appropriate, evidence should be developed to establish:

- the amount of annual leave used in lieu of official time;
- the amount of time worked off the job on matters that would have been worked on official time; and
- the existence of prior violations based on the failure to grant official time.

### L. Section 7116(a)(1) and (b)(1)--Interference, Restraint or Coercion

#### 1. Traditional Remedy for an Interference Violation

A traditional cease and desist order and a remedial posting is the standard remedy for section 7116(a)(1) unfair labor practices.[47]

#### 2. Nontraditional Remedy for an Interference Violation

The nontraditional remedies discussed in section P may be appropriate for remedying discrimination violations. In those situations, just as in all situations where a nontraditional remedy is requested, the evidence must establish that the traditional remedy is inadequate to remedy the violation(s) and that the requested nontraditional remedy is necessary to effectuate the remedy principles. Thus, the Authority will order specific remedial action when it is established that such action is necessary to recreate the conditions that existed before the unfair labor practice violation occurred. For example, in one case where a non-employee union representative was denied access to a remote facility, and access to that facility was controlled by an outside entity (an Indian tribe), the respondent agency was ordered to request, in writing and orally, access to the facility. Absent a grant of access to the non-employee union representative, the respondent was ordered to transport its employees, upon request, with official time for the transportation, to an off-site location during non-work time to meet periodically with their union representatives.[48] In other situations, the violative conduct might have "chilled" employees in the exercise of their protected statutory

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[46] U.S. Department of Defense, Defense Contract Audit Agency, Northeastern Region, Lexington, Massachusetts and American Federation of Government Employees, Council of Locals 163, 47 FLRA No. 122, 47 FLRA 1314, 1322 (1993) (citation omitted).

[47] American Federation of Government Employees, AFL-CIO and American Federation of Government Employees, Local 1164, 53 FLRA No. 162, 53 FLRA 1812, 1819 (1998) (a union was ordered to cease and desist from questioning employees about their union membership and soliciting membership in a coercive manner when an employee is seeking union assistance in a matter for which the union is responsible as the exclusive representative).

[48] Bureau of Indian Affairs, Isleta Elementary School, Pueblo of Isleta, New Mexico, 54 FLRA No. 124, 54 FLRA 1428, 1443-44 (1998) (Authority also ordered agency to make any other necessary arrangements for non-employee and employee union representatives to represented unit employees that had existed prior to the denial of access).

rights. Before requesting a remedy to dissipate that chill, the General Counsel must present evidence to establish that such a chill indeed exists.

#### 3. Evidence to Establish that a Nontraditional Remedy for an Interference Violation is Appropriate

To determine whether a nontraditional remedy for an interference violation is appropriate, evidence should be developed to establish:

- whether a grievance meeting should be rerun;
- whether the violative conduct had an impact on union membership;
- whether the violative conduct had an impact on employee involvement in the union;
- whether the violative conduct had an impact on employees exercising their statutory rights to engage in protected activity; and
- whether employees have voiced concern to the union about "thinking twice" before being publically associated with the union.

### M. Section 7116(a)(2) and (4)--Discrimination

#### 1. Traditional Remedy for a Discrimination Violation

In addition to a traditional cease and desist order and a remedial posting, the Authority routinely orders the violative action to be rescinded and employees made whole under the Back Pay Act for lost pay, allowances and differentials to remedy an unfair labor practice where the action took place in retaliation for the exercise of protected statutory rights.[49]

#### 2. Nontraditional Remedy for a Discrimination Violation

The nontraditional remedies discussed in section P of this Part may be appropriate for remedying discrimination violations. Often these types of violations are accompanied by other related unfair labor practices. In these situations, just as in all situations where a nontraditional remedy is requested, the evidence must establish that the traditional remedy is inadequate to remedy the violations and that the requested nontraditional remedy is necessary to effectuate the remedy principles. For example, the traditional make-whole remedy does not account for any lost work opportunities as a result of the violation.

#### 3. Evidence to Establish that a Nontraditional Remedy for a Discrimination Violation is Appropriate

To establish that a nontraditional remedy for a discrimination violation is appropriate, evidence should be developed to establish:

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[49] See, e.g., U.S. Geological Survey and Caribbean District Office, San Juan, Puerto Rico, 50 FLRA No. 76, 50 FLRA 548, 552-53 (1995) (agency ordered to reinstate ten temporary employees and make them whole for any loss of pay or benefits suffered as a result of their unlawful termination).

- whether the discriminatee lost out on a special or significant training or work opportunity that he/she would have had but for the discrimination.

## N. Section 7116(a)(3)--Assistance, Sponsorship or Control

### 1. Traditional Remedy for a Section 7116(a)(3) Violation

A traditional cease and desist order and a remedial posting is the traditional remedy for an agency that unlawfully provides services and facilities to a union that is not in equivalent status with an incumbent union.[50]

### 2. Nontraditional Remedy for a Section 7116(a)(3) Violation

Section 7116(a)(3) violations can occur if an agency provides unlawful support for an incumbent union as well as a rival union. In either situation, a nontraditional remedy may be to take those affirmative actions necessary to place the union that was not unlawfully assisted in the position it would have been in but for the violation. In essence, identify those actions that need to be taken to "level the playing field" between the two unions that had been unleveled by the agency's violation.

### 3. Evidence to Establish that a Nontraditional Remedy for a Section 7116(a)(3) Violation is Appropriate

To determine whether a nontraditional remedy for a section 7116(a)(3) violation is appropriate, evidence should be developed to establish:

- the effect of the violation on the incumbent union when a rival is unlawfully assisted;
- the effect of the violation on the rival union when the incumbent is unlawfully assisted; and
- whether the union that was assisted gained an unfair advantage, and if so what.

## O. Duty of Fair Representation

### 1. Traditional Remedy When The Duty of Fair Representation Violation Concerns a Matter Other Than a Dispute With an Agency Which Would Have Been Decided Under The Negotiated Grievance Procedure But For The Duty of Fair Representation Violation by the Union

[50] U.S. Department of the Air Force, Barksdale Air Force Base, Bossier City, Louisiana, 45 FLRA No. 58, 45 FLRA 659, 667 (1992) (agency ordered to cease providing a non-employee representative of a rival union access to its premises for purposes of conducting an organizational campaign when the employees were represented by another union and the rival had not obtained equivalent status nor established that it could not communicate with employees because of their inaccessibility).

In addition to a traditional cease and desist order and a remedial posting, duty of fair representation violations traditionally are remedied by an affirmative order for the union to fairly represent all unit employees.[51] Where the duty of fair representation violation resulted in action causing employees to be denied benefits, the Authority also will order the offending union to take affirmative steps to rescind that action and to make employees whole for their monetary losses as if there had been no violation.[52]

### 2. Nontraditional Remedy When the Duty of Fair Representation Violation Concerns a Matter Which Would Have Been Decided Under the Negotiated Grievance Procedure But For The Duty of Fair Representation Violation by the Union[53]

Some duty of fair representation violations concern situations where the union did not properly represent an employee in a dispute with the agency. The union's violation has precluded the employee(s) from having the underlying dispute with the agency decided under the negotiated grievance procedure. In these types of situations, the dispute between the employee and the agency is based on a contractual right and seldom concerns statutory rights that may be pursued by the employee against the agency through the unfair labor practice process. As such, the union's violation often involves either the failure to file a timely grievance or the failure to properly process a grievance. Often, the result of the union's violation of its duty of fair representation leaves the employee with no process to pursue the dispute with the agency because the grievance procedure cannot be invoked due to untimeliness or because the grievance already had been improperly pursued. In these situations, the Regions apply the following decisional protocol:

#### a. Initially, the Union Should Be Ordered to Seek to Process the Grievance

The Regions seek an order requiring the union to request the agency to process or reprocess a grievance, even if untimely. If the agency agrees, the union is required to process the grievance in accordance with its duty of fair representation. The employee is therefore placed in the same position as if the violation had not occurred since the employee's dispute with the agency will be processed as it would have been processed absent the violation.

#### b. When The Merits of the Grievance Cannot Be Decided Under the Negotiated Grievance Procedure

If the agency refuses to process an untimely grievance or to reprocess a grievance, the issue remains as to how to place the affected employee in the same situation as if there had been no violation. The finding of a violation of the duty of fair representation does not require a finding that the underlying dispute which motivated the employee to seek union assistance was meritorious. However, the issue of appropriate remedy in these types of circumstances where the grievance cannot be processed does require an exploration of what effect, if any, should be given to whether the employee's dispute with the agency was meritorious.

##### i. The Impact of the Merits of the Underlying Grievance

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[51] American Federation of Government Employees, Local 3615, AFL-CIO , 53 FLRA No. 123, 53 FLRA 1374, 1376 (1998) (order to represent the interests of all unit employees without discrimination and without regard to union membership).

[52] National Federation of Federal Employees, Local 1827, 49 FLRA No. 71, 49 FLRA 738, 748-49, 750 (1994) (union ordered to request the agency to reinstate the previous type of seniority used for calculating benefits and further ordered the union to make unit employees whole for any loss of pay, benefits and differentials suffered as a result of the action caused by the union that changed the seniority-based benefits calculations).

[53] A more detailed discussion of the development of this approach is contained in the Guidance on "The Duty of Fair Representation" (January 27, 1997).

The union should be given the opportunity to avoid a make-whole order as a duty of fair representation remedy by being provided the opportunity to contest whether the underlying dispute between the employee and the agency was meritorious.

#### ii. The Burden of Proof on the Merits of the Underlying Grievance

The Regions do not seek a make-whole remedy unless the evidence establishes the merits of the underlying grievance. To require the union to make employees whole when it has not been established that the unfair labor practice was the direct reason why those employees had suffered a loss would not be consistent with those remedial objectives outlined by the Authority in F.E. Warren Air Force Base, Cheyenne, Wyoming, 52 FLRA No. 17, 52 FLRA 149, 160-62 (1996) (F.E. Warren AFB).

### 3. Evidence to Establish that a Nontraditional Remedy for a Violation of the Duty of Fair Representation is Appropriate

To determine whether a nontraditional remedy for a duty of fair representation violation is appropriate, evidence should be developed to establish:

- whether a grievance had been processed and, if so, the result; and
- whether the grievance, in fact, was meritorious.

## P. Nontraditional Remedies Applicable to Different Types of Violations

Dependent upon the circumstances surrounding the particular violation, the General Counsel has requested the Authority to grant nontraditional remedies requiring specific affirmative action deemed necessary to effectively remedy the particular violation and effectuate the purposes and polices of the Statute. These remedies may be appropriate to remedy a variety of unfair labor practices.

### 1. Placing Responsibility on the Particular Supervisor or Manager that Engaged in the Conduct that Violated the Statute

#### a. Standard for Placing Responsibility on the Particular Supervisor or Manager Who Engaged in the Conduct that Violated the Statute as a Remedy for an Unfair Labor Practice

In those few cases involving the most blatant and egregious violations, the General Counsel has requested that some form of responsibility, accountability and acknowledgment of wrong doing be associated with the particular supervisor or management official who engaged in such egregious conduct. The Authority denied the General Counsel's request in one case that the official personnel fille of a supervisor who committed violations be annotated because the nontraditional remedy ordered by the Authority, that the notice be distributed to all supervisors and management officials, in its view, was tailored to fit the circumstances and sufficiently addressed the General Counsel's concern for deterrence.[54] In another decision, the Authority found that the General Counsel had not established the need for disciplining the three supervisors responsible for the violations where the violations were

[54] U.S. Penitentiary, Florence, Colorado, 53 FLRA No. 124, 53 FLRA 1393, 1394 (1998) (Florence Penitentiary).

directed at one individual and not widespread, the supervisors involved were not defiant of prior Authority orders, and the violations were not flagrant.[55]

The Authority also has held that placement of a nondisciplinary entry in the personnel file of the offending management official was not appropriate where the offender was not named as a party to the cases, was not represented at the hearing and was not placed on notice that future disciplinary actions against him might be affected by the Authority's decision. The Authority noted that the official did not have the same opportunity to defend himself before the ALJ that he would have had if he had received such notice. The Authority, noting it had denied a similar remedy in Florence Penitentiary, found that granting the remedy raises substantial due process considerations.[56]

**b. Requesting an Order to Refer a Matter to the Office of the Special Counsel**

While reluctant to assign individual responsibility or accountability to individual supervisors or managers, the Authority indicated in Leavenworth that under the appropriate circumstance, it would consider referring a matter to the Office of Special Counsel or order a respondent to make such a referral in order to request an investigation into whether a management official committed prohibited personnel practices and any action that the Special Counsel might deem appropriate.[57]

**c. Placing Responsibility on the Particular Supervisor or Manager Who Engaged in the Conduct that Violated the Statute as a Remedy for an Unfair Labor Practice or Requesting an Order to Refer a Matter to the Office of the Special Counsel**

**In view of the paucity of decisions in this area, the Regions are requested to contact the Office of the General Counsel before issuing complaint in a case where the Region deems the nontraditional remedy of either placing responsibility on the particular supervisor or manager who engaged in the conduct that violated the Statute or requesting an order to refer a matter to the Office of the Special Counsel to be appropriate.**

**2. Training Managers and Supervisors or Union Officials About the Statute and Directing Issuance of a Memorandum to Managers or Supervisors or Union Officials Reminding Them of Specific Statutory Obligations**

**a. Remedy Requiring that Managers and Supervisors or Union Officials Receive Information About the Statute**

The Authority has found that an arbitration award that required an agency to send first and second-line supervisors to workshops on sexual harassment did not interfere with an agency's right to discipline employees because supervisors are not employees, nor with its right to assign work, since the workshops were for obtaining information

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[55] U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Ocean Service, Coast and Geodetic Survey, Aeronautical Charging Division, Washington, D.C., 54 FLRA No. 92, 53 FLRA 987, 1022 (1998).

[56] U.S. Penitentiary, Leavenworth, Kansas, 55 FLRA No. 127, 55 FLRA 704, 719 (1999) (Leavenworth).

[57] Id. at 719 -20, 721.

and not for training.[58] However, the General Counsel has not yet been able to obtain such a remedy for an unfair labor practice. In one decision, even though the offending supervisors ignored Authority precedent, the Authority denied the remedy noting that the "facts and circumstances [did] not establish that the supervisors' actions were based on their ignorance of obligations under the Statute or that, for any reason, training of the supervisors is reasonably necessary to effectuate the purposes and policies of the Statute".[59] In another case, the Authority again rejected a training remedy because it was not demonstrated how such a remedy would satisfy the remedy principles.[60]

**b. Issuing a Memorandum to Managers or Supervisors or Union Officials**

In one case, the Authority refused to order the respondent to issue a memorandum to managers reminding them of their statutory obligations.[61] The Authority noted that "[a]lthough the education of supervisors and managers about their responsibilities under the Statute is always a salutary objective . . . the traditional remedy . . . should . . . accomplish the objective of future deterrence."

**c. Evidence to Establish that the Training of Managers and Supervisors or Union Officials on the Statute, or that Issuance of a Memorandum to Managers or Supervisors or Union Officials, are Appropriate Remedies for an Unfair Labor Practice**

To determine whether training managers and supervisors or union officials, or whether a memorandum should be issued to managers and supervisors or union officials reminding them of their statutory obligations are appropriate remedies, evidence should be developed to establish:

- what formal training, if any, the managers, supervisors or union officials have had on the Statute, and the particulars of that training;
- whether the responsible officials consulted with staff a specialist before committing the violation;
- whether effective labor relations is part of the official's performance plan;
- past similar violations; and
- the extent to which the violation was caused by a lack of knowledge of the requirements of the Statute.

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[58] U.S. Department of the Air Force, Air Force Flight Test Center, Edwards Air Force Base, California and American Federation of Government Employees, Local 3854, 48 FLRA No. 8, 48 FLRA 74, 87-89 (1993) (the Authority upheld an arbitrator's award that management officials attend workshops and seminars on sexual harassment); and U.S. Department of Justice, U.S. Federal Bureau of Prisons, U.S. Penitentiary, Lewisburg, Pennsylvania, and American Federation of Government Employees, Council of Prison Locals, Local 148 C-33, 39 FLRA 1288, 1303-05 (1991) (Lewisburg) (the Authority upheld an arbitrator's award requiring a supervisor to take sensitivity training).

[59] Department of Veterans Affairs Medical Center, Phoenix, Arizona, 52 FLRA No. 18, 52 FLRA 182, 186 (1996).

[60] Federal Bureau of Prisons, Office of Internal Affairs, Washington, D.C., 54 FLRA No. 133, 54 FLRA 1502, 1515-17 (1998) (the Authority rejected the General Counsel's requested remedy of nationwide training for supervisors because the record did not demonstrate that the requested remedy was necessary since the respondents recognized their obligations under the Statute. The remedy principles listed were: (1) why the remedy is reasonably necessary; (2) how the remedy would effectively recreate the conditions and relationships with which the unfair labor practice interfered and (3) how the policies of the Statute would be effectuated or how future violative conduct would be deterred).

[61] F. E. Warren AFB, 52 FLRA at 162.

### 3. Time Tables for Compliance Actions

#### a. Use of Time Tables

Another nontraditional remedy that may be applicable to a variety of unfair labor practice violations is to establish time tables for an agency or union to undertake specific affirmative actions ordered by the Authority. For example, the remedy could require that an employee be promoted within 14 days of service of the decision.

#### b. Evidence to Establish that Time Tables to Effectuate Affirmative Action Is an Appropriate Remedy

To determine whether a specific time table to effectuate compliance with affirmative actions is appropriate, evidence should be developed to establish:

- the impact and continuing impact of the violation on the employee(s);
- prior violations; and
- whether time is of the essence.

### 4. Order to Seek Rescission of an Action Not Within the Sole Control of the Respondent

#### a. Requiring a Respondent to Rescind an Action Not Within Its Sole Control

In one decision, the Authority found that respondents violated section 7116(a)(1) and (2) when a law enforcement officer of the Department of Defense, who was acting as an agent of the respondents, issued a criminal citation to an employee, in connection with the employee's activities on behalf of an exclusive representative under the Statute.[62] The Authority ordered the respondents to rescind the citation to the extent that it was within their possession and control.[63] The Authority also ordered the respondents to serve a copy of the Authority decision and order on the magistrate and any other authorities who may have control of the citation and to request the magistrate and such other authorities to give appropriate effect to the Authority's decision for the matters within their jurisdiction.[64]

#### b. Evidence to Establish that Another Entity May Have Some Control over an Action that Is Ordered to Be Rescinded

To determine whether the order should take into consideration whether the affirmative action ordered is within the sole control of the respondent, the following evidence needs to be developed:

- the extent of the agency's or union's power to effectuate the order;

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[62] Long Beach Naval Shipyard, Long Beach, California and Long Beach Naval Station, Long Beach, California, 25 FLRA No. 84, 25 FLRA 1002 (1987).

[63] Id. at 1006-07.

[64] Id.

- what action(s) the agency or union may take that is within it’s authority;
- what action the agency or union may take to influence the entity that has the final control over the ordered action; and
- what action would be next best to satisfy the remedy principles in the event that the outside entity does not take the ordered action.

### 5. Joint and Several Liability

#### a. Holding Both Agency and Union Respondents Jointly and Severally Liable

In a case where both the union and the agency were charged with violating the Statute based on the same set of events, and the remedy involves the payment of money, the Authority, relying on private sector precedent, has held that joint and several liability may be appropriate where no basis was argued or apparent for finding one respondent primarily and the other secondarily liable, and both respondents knew, or should have known, that their actions were unlawful.[65]

#### b. Requesting that Both Agency and Union Respondents Should be Jointly and Severally Liable

Whenever an agency and a union are respondents in a consolidated unfair labor practice complaint alleging violations of the Statute which resulted in monetary losses to employees, the Regions should seek an order requiring joint and severable liability.

[65] U.S. Air Force, Loring Air Force Base, Limestone, Maine, 43 FLRA No. 90, 43 FLRA 1087, 1101 (1992).

**ATTACHMENT 2--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 A

# BACK PAY ACT

## TITLE 5 OF THE UNITED STATES CODE
## GOVERNMENT ORGANIZATION AND
## EMPLOYEES
## PART III--EMPLOYEES
## SUBPART D--PAY AND ALLOWANCES
## CHAPTER 55
## PAY ADMINISTRATION

## SUBCHAPTER IX--SEVERANCE PAY AND BACK PAY

**Sec.**



### § 5596. Back pay due to unjustified personnel action

(a) For the purpose of this section, "agency" means - -

(1) an executive agency;

(2) the Administrative Office of the United States Courts, the Federal Judicial Center, and the courts named by section 610 of title 28;

(3) the Library of Congress;

(4) the Government Printing Office; and
(5) the government of the District of Columbia.

(b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee - -

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect - -

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and
(ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, or under

chapter 11 of title I of the Foreign Service Act of 1980, shall be awarded in accordance with standards established under section 7701(g) of this title; and

(B) for all purposes, is deemed to have performed service for the agency during that period, except that - -

(i) annual leave restored under this paragraph which is in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Office of Personnel Management, and

(ii) annual leave credited under clause (i) of this subparagraph but unused and still available to the employee under regulations prescribed by the Office shall be included in the lump-sum payment under section 5551 or 5552(1) of this title but may not be retained to the credit of the employee under section 5552(2) of this title.

(2)(A) An amount payable under paragraph (1)(A)(i) of this subsection shall be payable with interest.

(B) Such interest - -

(i) shall be computed for the period beginning on the effective date of the withdrawal or reduction involved and ending on a date not more than 30 days before the date on which payment is made;

(ii) shall be computed at the rate or rates in effect under section 6621(a)(1) of the Internal Revenue Code of 1986 during the period described in clause (i); and

(iii) shall be compounded daily.

(C) Interest under this paragraph shall be paid out of amounts available for payments under paragraph (1) of this subsection.

(3) This subsection does not apply to any reclassification action nor authorize the setting aside of an otherwise proper promotion by a selecting official from a group of properly ranked and certified candidates.

(4) The pay, allowances, or differentials granted under this section for the period for which an unjustified or unwarranted personnel action was in effect shall not exceed that authorized by the applicable law, rule, regulations, or collective bargaining agreement under which the unjustified or unwarranted personnel action is found, except that in no case may pay, allowances, or differentials be granted under this section for a period beginning more than 6 years before the date of the filing of a timely appeal or, absent such filing, the date of the administrative determination.

(5) For the purpose of this subsection, "grievance" and "collective bargaining agreement" have the meanings set forth in section 7103 of this title and (with respect to members of the Foreign Service) in sections 101 and 1002 of the Foreign Service Act of 1980, "unfair labor practice" means an unfair labor practice described in section 7116 of this title and (with respect to members of the Foreign Service) in section 1015 of the Foreign Service Act of 1980, and "personnel action" includes the omission or failure to take an action or confer a benefit.

(c) The Office of Personnel Management shall prescribe regulations to carry out this section. However, the regulations are not applicable to the Tennessee Valley Authority and its employees, or to the agencies specified in subsection (a)(2) of this section.

## APPENDIX B

## Subpart H--Back Pay

### Sec. 550.801 Applicability.

(a) This subpart contains regulations of the Office of Personnel Management to carry out section 5596 of title 5, United States Code, which authorizes the payment of back pay, interest, and reasonable attorney fees for the purpose of making an employee financially whole (to the extent possible) when, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance), the employee is found by an appropriate authority to have been affected by an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due to the employee. This subpart should be read together with this section of law.

(b) This subpart does not apply to any reclassification action.

### Sec. 550.802 Coverage.

(a) Except as provided in paragraph (b) of this section, this subpart applies to employees, as defined in Sec. 550.803 of this subpart.

(b) This subpart does not apply to--

(1) Employees of the government of the District of Columbia; and

(2) Employees of the Tennessee Valley Authority.

### Sec. 550.803 Definitions.

In this subpart:

*Agency* has the meaning given that term in section 5596(a) of title 5, United States Code.

*Appropriate authority* means an entity having authority in the case at hand to correct or direct the correction of an unjustified or unwarranted personnel action, including (a) a court, (b) the Comptroller General of the United States, (c) the Office of Personnel Management, (d) the Merit Systems Protection Board, (e) the Equal Employment Opportunity Commission, (f) the Federal Labor Relations Authority and its General Counsel, (g) the Foreign Service Labor Relations Board, (h) the Foreign Service Grievance Board, (i) an arbitrator in a binding arbitration case, and (j) the head of the employing agency or another official of the employing agency to whom such authority is delegated.

*Collective bargaining agreement* has the meaning given that term in section 7103(a)(8) of title 5, United States Code, and (with respect to members of the Foreign Service) in section 1002 of the Foreign Service Act of 1980 (22 U.S.C. 4102(4)).

*Employee* means an employee or former employee of an agency

*Grievance* has the meaning given that term in section 7103(a)(9) of title 5, United States Code, and (with respect to members of the Foreign Service) in section 1101 of the Foreign Service Act of 1980 (22 U.S.C. 4131). Such a grievance includes a grievance processed under an agency administrative grievance system, if applicable.

*Pay, allowances, and differentials* means monetary and employment benefits to which an employee is entitled by statute or regulation by virtue of the performance of a Federal function.

*Unfair labor practice* means an unfair labor practice described in section 7116 of title 5, United States Code, and (with respect to members of the Foreign Service) in section 1015 of the Foreign Service Act of 1980 (22 U.S.C. 4115).

*Unjustified or unwarranted personnel action* means an act of commission or an act of omission (i.e., failure to take an action or confer a benefit) that an appropriate authority subsequently determines, on the basis of substantive or procedural defects, to have been unjustified or unwarranted under applicable law, Executive order, rule, regulation, or mandatory personnel policy established by an agency or through a collective bargaining agreement. Such actions include personnel actions and pay actions (alone or in combination).

### Sec. 550.804 Determining entitlement to back pay.

(a) When an appropriate authority has determined that an employee was affected by an unjustified or unwarranted personnel action, the employee shall be entitled to back pay under section 5596 of title 5, United States Code, and this subpart only if the appropriate authority finds that the unjustified or unwarranted personnel action resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee.

(b) The requirement for a “timely appeal” is met when--

(1) An employee or an employee's personal representative initiates an appeal or grievance under an appeal or grievance system, including appeal or grievance procedures included in a collective bargaining agreement; a claim against the Government of the United States; a discrimination complaint; or an unfair labor practice charge; and

(2) An appropriate authority accepts that appeal, grievance, claim, complaint, or charge as timely filed.

(c) The requirement for an “administrative determination” is met when an appropriate authority determines, in writing, that an employee has been affected by an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee.

(d) The requirement for “correction of the personnel action” is met when an appropriate authority, consistent with law, Executive order, rule, regulation, or mandatory personnel policy established by an agency or through a collective bargaining agreement, after a review, corrects or directs the correction of an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee.

**Sec. 550.805 Back pay computations.**

(a) When an appropriate authority corrects or directs the correction of an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due an employee--

(1) The employee shall be deemed to have performed service for the agency during the period covered by the corrective action; and

(2) The agency shall compute for the period covered by the corrective action the pay, allowances, and differentials the employee would have received if the unjustified or unwarranted personnel action had not occurred.

(b) No employee shall be granted more pay, allowances, and differentials under section 5596 of title 5, United States Code, and this subpart than he or she would have been entitled to receive if the unjustified or unwarranted personnel action had not occurred.

(c) Except as provided in paragraph (d) of this section, in computing the amount of back pay under section 5596 of title 5, United States Code, and this subpart, an agency may not include--

(1) Any period during which an employee was not ready, willing, and able to perform his or her duties because of an incapacitating illness or injury; or

(2) Any period during which an employee was unavailable for the performance of his or her duties for reasons other than those related to, or caused by, the unjustified or unwarranted personnel action.

(d) In computing the amount of back pay under section 5596 of title 5, United States Code, and this subpart, an agency shall grant, upon request of an employee, any sick or annual leave available to the employee for a period of incapacitation if the employee can establish that the period of incapacitation was the result of illness or injury.

(e) In computing the amount of back pay under section 5596 of title 5, United States Code, and this subpart, an agency shall deduct--

(1) Any amounts earned by an employee from other employment undertaken to replace the employment from which the employee had been separated by the unjustified or unwarranted personnel action during the period covered by the corrective action, but not including additional or “moonlight” employment the employee may have engaged in both while Federally employed and erroneously separated; and

(2) Any erroneous payments received from the Government as a result of the unjustified or unwarranted personnel action, which, in the case of erroneous payments received from a Federal employee retirement system, shall be returned to the appropriate system. Such payments shall be recovered from the back pay award in the following order:

(i) Retirement annuity payments (except health benefits and life insurance premiums);

(ii) Refunds of retirement contributions;

(iii) Severance pay;

(iv) Lump-sum payment for annual leave (and the annual leave shall be recredited for the employee's use under part 630);

(v) Health benefits and life insurance premiums, if coverage continued during the period of erroneous retirement; and

(vi) Other authorized deductions.

(f) For the purpose of computing the amount of back pay under paragraph (e) of this section, interest shall be included in the amount from which deductions for erroneous payments are made, as required by Sec. 550.805(e)(2) of this part. (g) An agency shall credit annual leave restored to an employee as a result of the correction of an unjustified or unwarranted personnel action in excess of the maximum leave accumulation authorized by law to a separate leave account for use by the employee. The employee shall schedule and use annual leave in such a separate leave account as follows: (1) A full-time employee shall schedule and use excess annual leave of 416 hours or less by the end of the leave year in progress 2 years after the date on which the annual leave is credited to the separate account. The agency shall extend this period by 1 leave year for each additional 208 hours of excess annual leave or any portion thereof. (2) A part-time employee shall schedule and use excess annual leave in an amount equal to or less than 20 percent of the employee's scheduled tour of duty over a period of 52 calendar weeks by the end of the leave year in progress 2 years after the date on which the annual leave is credited to the separate account. The agency shall extend this period by 1 leave year for each additional number of hours of excess annual leave, or any portion thereof, equal to 10 percent of the employee's scheduled tour of duty over a period of 52 calendar weeks.

**Sec. 550.806 Interest computations.**

(a) Interest begins to accrue on the date or dates (usually one or more pay dates) on which the employee would have received the pay, allowances, and differentials if the unjustified or unwarranted personnel action had not occurred.

(b) In computing the amount of interest due under section 5596 of title 5, United States Code, the agency shall reduce the amount of pay, allowances, and differentials due for each date described in paragraph (a) of this section by an amount determined as follows:

(1) Divide the employee's earnings from other employment during the period covered by the corrective action, as described in Sec. 550.805(e)(1) of this part, by the total amount of back pay prior to any deductions;

(2) Multiply the ratio obtained in paragraph (b)(1) of this section by the amount of pay, allowances, and differentials due for each date described in paragraph (a) of this section.

(c) The agency shall compute interest on the amount of back pay computed under section 5596 of title 5, United States Code, and this subpart before making deductions for erroneous payments, as required by Sec. 550.805(e)(2) of this part.

(d) The rate or rates used to compute the interest payment shall be the annual percentage rate or rates established by the Secretary of the Treasury as the overpayment rate under section 6621(a)(1) of title 26, United States Code (or its predecessor statute), for the period or periods of time for which interest is payable.

(e) On each day for which interest accrues, the agency shall compound interest by dividing the applicable interest rate (expressed as a decimal) by 365 (366 in a leap year).

(f) The agency shall compute the amount of interest due, and shall issue the interest payment within 30 days of the date on which accrual of interest ends.

(g) To the extent administratively feasible, the agency shall issue payments of back pay and interest simultaneously. If all or part of the payment of back pay is issued on or before the date on which accrual of interest ends and the interest payment is issued after the payment of back pay is issued, the amount of the payment of back pay shall be subtracted from the accrued amount of back pay and interest, effective with the date the payment of back pay was issued. Interest shall continue to accrue on the remaining unpaid amount of back pay (if any) and interest until the date on which accrual of interest ends.

(h) This section shall not apply to any determination made before December 22, 1987, if the determination was no longer subject to reconsideration or higher-level review or appeal on December 22, 1987.

**Sec. 550.807 Payment of reasonable attorney fees.**

(a) An employee or an employee's personal representative may request payment of reasonable attorney fees related to an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee. Such a request may be presented only to the appropriate authority that corrected or directed the correction of the unjustified or unwarranted personnel action. However, if the finding that provides the basis for a request for payment of reasonable attorney fees is made on appeal from a decision by an appropriate authority other than the employing agency, the employee or the employee's personal representative shall present the request to the appropriate authority from which the appeal was taken.

(b) The appropriate authority to which such a request is presented shall provide an opportunity for the employing agency to respond to a request for payment of reasonable attorney fees.

(c) Except as provided in paragraph (e) of this section, when an appropriate authority corrects or directs the correction of an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due an employee, the payment of reasonable attorney fees shall be deemed to be warranted only if--

(1) Such payment is in the interest of justice, as determined by the appropriate authority in accordance with standards established by the Merit Systems Protection Board under section 7701(g) of title 5, United States Code; and

(2) There is a specific finding by the appropriate authority setting forth the reasons such payment is in the interest of justice.

(d) When an appropriate authority determines that such payment is warranted, it shall require payment of attorney fees in an amount determined to be reasonable by the appropriate authority. When an appropriate authority determines that such payment is not warranted, no such payment shall be required.

(e) When a determination by an appropriate authority that an employee has been affected by an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee is based on a finding of discrimination prohibited under section 2302(b)(1) of title 5, United States Code, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-5(k)).

(f) The payment of reasonable attorney fees shall be allowed only for the services of members of the Bar and for the services of law clerks, paralegals, or law students, when assisting members of the Bar. However, no payment may be allowed under section 5596 of title 5, United States Code, and this subpart for the services of any employee of the Federal Government, except as provided in section 205 of title 18, United States Code, relating to the activities of officers and employees in matters affecting the Government.

(g) A determination concerning whether the payment of reasonable attorney fees is in the interest of justice and concerning the amount of any such payment shall be subject to review or appeal only if provided for by statute or regulation.

(h) This section does not apply to any administrative proceeding that was pending on January 11, 1979.

**Sec. 550.808 Prohibition against setting aside proper promotions.**

Nothing in section 5596 of title 5, United States Code, or this subpart shall be construed as authorizing the setting aside of an otherwise proper promotion by a selecting official from a group of properly ranked and certified candidates.