

ATTACHMENT 1H

May 25, 1994

MEMORANDUM

TO: Regional Directors
FROM: Joe Swerdzewski, General Counsel
SUBJECT: Settlement Policy

After considering the recommendations of the Maximizing the Statute Work Group and the Regional Directors, the following is my policy on settlements.

Policy

The General Counsel will seek settlements that enhance the relationship between the parties; resolve the issues that have brought the parties to seek FLRA assistance; and further the purposes and policies of the Federal Service Labor-Management Relations Statute.

The parties will be involved in developing the remedy which best meets the interests of the parties. Remedies will not be proposed by the Regional Offices until discussed with the parties. Remedies which meet the needs of the parties and which further the purposes and policies of the Statute will be explored even if not substantially similar to the traditional remedies ordered by the Authority after litigation.

Absent unusual circumstances, bilateral settlement agreements will be approved by Regional Directors. Regional Directors have the authority to approve unilateral settlement agreements in accordance with established criteria which effectively remedy the allegations of the complaint. The Office of the General Counsel will seek formal settlement agreements in cases in which the Charged Party has shown a deliberate and contumacious unwillingness to abide by the requirements of the Statute.

Objective

This policy seeks:

- To resolve the specific issue brought before the FLRA to the satisfaction of the parties;
- To bring the parties together and to enhance their relationship by resolving underlying disputes while improving the parties' relationship and their communication.
- To involve the parties in developing a remedy which satisfies the legitimate needs of the parties and which promotes the purposes and policies of the Statute.
- To ensure that the FLRA is expending its resources on meaningful issues and that the Regions are abiding by uniform policies.

This policy provides the flexibility for parties, with Office of the General Counsel assistance, to craft solutions responsive to the particular needs of our customers. Bilateral settlement agreements acceptable to the parties that allow for creativity and a broad range of solutions will be approved by the Regional Directors if not otherwise repugnant to the purposes and policies of the Statute.

This policy broadens the circumstances in which unilateral settlements will be approved by not rigidly requiring the same remedy as that sought at hearing. Settlements will focus on the ultimate goal of the Office of the General Counsel of enhancing the bargaining relationship between the parties by seeking meaningful, creative remedies. This policy may lead to more litigation when it is determined that a novel and creative remedy is required.

Under this policy, The Regions will seek formal settlements, to be approved by the FLRA and enforced in court, when other avenues of settlement have been exhausted, and a party continues to be a recidivist violator of the Statute.

Background

This settlement policy is issued in conjunction with the prosecutorial discretion policy to maximize the Statute for all parties. The Office of the General Counsel has been criticized as being too rigid and inflexible in seeking and approving settlements. This policy provides the Regional Directors with the flexibility to develop new and innovative approaches to meet the needs of our customers. As a result of these new policies, the Office of the General Counsel will be able to concentrate its resources in order to seek better and more meaningful remedies.

Currently, the majority of the unilateral settlement agreements approved by Regional Directors and upheld by the Office of Appeals are substantially similar to remedies that the Regions seek before Administrative law Judges or the Authority. The parties may not routinely be involved in the process of developing a proposed remedy. There have been few variations concerning scope of postings of remedial Notices and the signatory to the Notice. Few unilateral settlement agreements have been approved without a remedial Notice posting. This policy provides for more creativity and responsiveness by the Regions to the parties' needs. Regional Directors will involve the parties in fashioning novel and creative remedies which address and resolve the specific underlying disputes.

This policy also allows for formal settlement agreements, approved by the FLRA and enforced in court, in those situations where past informal settlements have not had the requisite deterrent effect on future violative conduct.

Implementation

Regional Directors will not approve any settlements, bilateral or unilateral, which are repugnant to the Statute (for example, a settlement agreement in a 7116(a)(2) discrimination case which provides no relief to the individual employee discriminatee). Regional Directors also will not propose remedies without first obtaining input from the parties concerning their interests. The Regions will not be restricted to seeking remedies which are substantially similar to the traditional remedies ordered after litigation.

The traditional format of the settlement agreement will no longer be a restriction on the authority of a Regional Director to approve a settlement agreement. Settlement agreements no longer need be approved on FLRA Forms 54, 55, 57 and 58 as long as the agreement indicates that the Region is responsible for monitoring compliance and non-compliance will result in revocation of the settlement agreement and issuance of a complaint.

Settlement agreements may allow for limited postings, no postings, a posting of something other than an FLRA Notice To All Employees (such as a memorandum of understanding, letter, announcements in facility newspapers or newsletters, verbal announcements to individuals or groups of employees etc.), or whatever creative remedy the parties agree upon. This authority to approve such creative remedies removes the current restriction that settlement agreements must follow a specific format, including a Notice To All Employees, signed and posted for a 60 day period.

This policy provides for creativity by the Regions and the parties in framing settlements that are suitable to the specifics of each case. This policy allows for creative remedies which resolve not only the specific issue but also improves broader relationship issues. Remedies could include mandatory training for supervisors or union officials, specifying the names of supervisors or union officials in notices who committed the violations, communications from managers to supervisors or from union presidents to stewards regarding their obligations under the Statute, ordering parties to bargain an agreement on specific issues, requiring the charged party to pay travel and per diem for bargaining sessions, and/or the use of time tables for bargaining.

In order for this settlement policy to be consistently and fairly applied by the Regions, the Regional Directors and our customers must have a common understanding of the objective criteria which will be examined to determine if a settlement effectuate the purposes and policies of the Statute. A number of factors are appropriate for consideration. All the facts and circumstances present in a particular case will be examined under these criteria before a Regional Director determination is made to approve or disapprove a settlement agreement. The importance of the various factors will vary dependent upon the particular circumstances of each case. These factors are not intended to be all inclusive. Special circumstances may arise which should be considered before a determination to approve or disapprove a settlement is made. These criteria will not be applied in a vacuum, but rather in conjunction with the other criteria listed. For example, even though one criteria may indicate that a unilateral settlement agreement should not be approved, other criteria may outweigh that consideration and indicate that the settlement in the totality of the circumstances would effectuate the purposes and policies of the Statute. Similarly, even though a unilateral settlement agreement may provide for the traditional remedy which the Authority has ordered in similar circumstances, all the criteria should be considered to determine whether a novel remedy beyond that normally granted is appropriate. These are the

basic criteria which the Regional Directors will apply prior to approving or disapproving a unilateral settlement agreement:

Does the agreement remedy the specific allegations of the complaint?

Does the agreement remedy the specific harm caused by the violation - to the individual and/or the institution?

Has the charged party committed the same or similar violation repeatedly?

Does the agreement enhance the relationship of the parties?

Has the Charging Party raised valid objections to the settlement?

What purpose does the settlement serve?

What are the benefits of litigation; considering the criteria set forth under prosecutorial discretion: nature of the violation; harm to the bargaining relationship; harm to employees; pattern of conduct; cure; changed circumstances; and/or precedential value.

How does the settlement communicate to employees their rights under the Statute and communicate to affected employees the terms of the settlement?

What is the cost (time, resources and travel) involved in litigating the case, in relation to the nature of the violation.

Does a non-admissions clause undermine the effectiveness of the remedy under all the circumstances of the case.

Formal settlement agreements should be sought in situations in which the Charged Party has demonstrated its unwillingness to abide by the Statute. Such conduct could be demonstrated by repeatedly violating the Statute in a certain area of law (such as bypass, formal discussion, etc.), even though it has signed settlement agreements, posted notices, received training and other creative solutions have been proposed and accepted. In cases involving nationwide bargaining units or consolidated bargaining units, the other Regions will be kept informed of the status of proposed formal settlements.

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