

L. MOTIONS

OVERVIEW:

The requirements of motions procedure are governed by § [2423.21](#) and the filing and service requirements are governed by Part 2429.

OBJECTIVE:

To provide guidance concerning the different types of motions that are filed during the course of ULP litigation and the corresponding procedural requirements for filing such motions.

1. PROCESSING REQUIREMENTS:

a. *When and with whom to file a motion:*

i. Pre-hearing motions are filed:

- In writing, except for motions made at a pre-hearing conference;
- With the ALJ; and
- At least 10 days before the hearing, except for motions made at a pre-hearing conference. Cover a pre-hearing motion that is filed less than 10 days before the hearing with another motion requesting ALJ's permission to file a motion that is not filed at least 10 days before the hearing.

§ [2423.21](#)(a), (b).

ii. Hearing and post-hearing motions are filed:


- Orally (hearing) or in writing (post-hearing);
 - With the ALJ; and
 - In the case of a post-hearing motion, within 10 days after the date the hearing closes, or if a motion to correct the transcript, within 10 days after the receipt of the transcript.
- iii. § [2423.21](#)(a), (b).

Post-transmission (after case has been transmitted to the Authority) motions are filed:

- In writing; and
 - With the Authority.
- § [2423.21](#)(a), (c).

b. *Response to Motions:*

Section [2423.21](#)(b), and (c) require parties who desire to respond to motions to do so within five days of service of motion (plus five days, pursuant to § [2429.22](#), if service of motion was made by mail).

 *There is no requirement that a party file a response. If the GC's position has been satisfactorily set forth by the party filing the motion, a response may not be necessary. In most instances, however, a response is filed. Discuss strategy with RA.*

c. *Number of copies:*

An original and four copies, except for one legible copy that meets the facsimile filing requirement.

§§ [2429.24](#) and [2429.25](#).

d. *Requirement for procedural motions:*

All procedural motions, including motions for extension of time, postponement of a hearing, or any other procedural ruling, shall include the position of the other parties on the motion. § [2423.21](#)(a).

Extensions of time to file documents with the Authority will be granted only if a party specifically requests such extension, i.e., the GC, as a non-requesting party, may **not** rely on extension of time granted to the Charging Party or other allied party. Internal Revenue Service, Philadelphia Service Center, 54 FLRA No. 72, 54 FLRA 674, 681 (1998).

2. COMMON TYPES OF MOTIONS:

a. *Motion to Postpone a Hearing:*

- i. *Is filed immediately upon the discovery of the circumstances warranting the postponement.*
- ii. *Criteria for requesting or agreeing to a postponement:*

The GC is expected to be prepared to go to trial on the date scheduled. However, at times, the following factors arise, which individually or cumulatively may support the GC's request for a postponement:

- An essential witness becomes unavailable;
- A settlement appears likely and/or time is needed to consummate a settlement that has been agreed to in principle;
- A significant savings of the government's resources could result by consolidating the case with other cases involving the same parties; and

- Bundling the case(s) for trial with other cases in the same area will result in considerable savings of governmental resources.

In turn, the GC does not oppose a request for a postponement when:

- A delay will not affect the GC's ability to present a strong case;
- A delay will not affect the GC's ability to receive an appropriate remedy;
- The case can be rescheduled within a reasonable period of time;
- There have been no prior postponements;
- The relationship of the parties will not be adversely impacted; **and**
- The Charging Party and/or the Respondent is not opposed to a postponement.

See also [Part 2, Chapter B](#) concerning Postponement or Continuance of Hearing.

b. *Motion for a Bill of Particulars and/or a More Definite Statement:*

Typically this motion is filed with an ALJ after the issuance of a complaint but before an answer is due. The Respondent asserts that it needs additional facts to enable it to file an answer to the complaint and/or to prepare its defense for trial.

i. *First step:*

Determine whether the underlying allegation in the complaint complies with § [2423.20](#)(a) which states that a complaint must set forth the nature of the charge, the basis for jurisdiction, the facts alleged to constitute a ULP, the statutory and regulatory sections involved, and notice of the date, time, and place of the hearing before an ALJ.

ii. *When the complaint does not comply with the requirements:*

File with the ALJ a Response to Motion for Bill of Particulars and Motion to Amend Complaint. Set forth the additional facts or assertions that form the basis of the motion so that Respondent has the facts it needs to file an answer to the complaint. This may be accomplished in one document entitled "Motion to Amend Complaint and Response to Motion for Bill of Particulars."

iii. *When the complaint meets the requirements:*

File a response to the Motion for Bill of Particulars in opposition to the motion. If the response asks for facts that are unknown, file a response to that effect.



Sometimes the name of the person responsible for a particular action, the precise date, time of an event, or the exact location is not known. When this is so, the response may include a statement that the facts being sought are unknown. In other situations, the facts that the GC is asked to divulge are not only unknown but are within the particular knowledge of the Respondent. The GC's response covers this matter.

c. *Motion to Amend a Complaint:*

- i. If an allegation in a complaint is not fully and fairly litigated, the FLRA will not consider the allegation.

Bureau of Prisons, Office of Internal Affairs, Washington, D.C. and Phoenix, Arizona and Federal Correctional Institution, El Reno, Oklahoma, 52 FLRA No. 43, 52 FLRA 421, 428-32 (1996).

- ii. The FLRA may review a matter **sua sponte** and dismiss a complaint because an allegation was not properly plead.

American Federation of Government Employees, Local 2501, Memphis, Tennessee, 51 FLRA No. 139, 51 FLRA 1657, 1660-64 (1996) (Local 2501).

See also discussion above at [Part 1, Chapter C](#), subsection 1.b.iii concerning amended complaint.

- iii. *Trial Attorney considers the following preliminary matters:*

- (1) *Deciding whether to file motion to amend the complaint after answer is filed:*

Whether the motion to amend seeks to make minor changes or make significant substantive changes, the Trial Attorney discusses the need to amend the complaint with the RD or RA before any action is taken.

- (2) *After a decision is made to file a motion to amend the complaint:*

Procedural problems are avoided if all the parties to the proceeding are immediately informed of the GC's intention to move to amend the complaint and the position of the parties is solicited.

See also [Part 1, Chapter C](#) concerning Case File Analysis.

- iv. *Due process arguments raised by Respondent:*


In opposition to a motion to amend a complaint, a Respondent most frequently relies on a claim of “surprise.” Motions to amend complaints are often essential and, at times, case determinative. A Respondent asserts that:

- (1) It lacks enough time to properly respond to the amended complaint or to prepare a defense to a new allegation; or
- (2) It has not been afforded an opportunity to respond to the allegation during the investigatory stage in accordance with § [2423.8](#).

Suggested responses:

- “The facts were unknown until such time as the motion to amend was drafted”;
- The lack of complexity of the allegation and the person accused of engaging in the conduct is present in the courtroom (or readily available) so that there is ample time for Respondent’s representative to consult with that individual and respond to the complaint;
- The addition of this allegation will not result in prolonging this proceeding. But, if the Respondent feels it needs additional time to prepare its defense the Trial Attorney does not oppose a motion to continue or postpone the hearing to a date certain if necessary; and
- The amendment alleges an (or another) instance of (a)(1) conduct and the complaint alleges a discriminatory reassignment of an employee. In this instance, the statement will be offered as evidence of animus and will be

placed in evidence whether the amendment is granted or not. Therefore, the hearing will not be prolonged by granting the GC's motion to amend the complaint because the Respondent has to respond to the statement whether or not the amendment is allowed.

 *ALJs are reluctant to grant a motion to amend where a Respondent claims prejudice, whether real or potential. On the other hand, an ALJ is expected to act in the interest of justice where the government's resources are at stake.*

d. *Motion to Dismiss:*

i. *Whether to treat as a motion to dismiss:*

(1) *Respondent's answer concludes with a request for summary dismissal is not treated as a motion:*

A Respondent's answer that summarily moves for dismissal of the complaint is not treated as a motion to dismiss. The request for summary dismissal is based on the denials in the Respondent's answer. It is not necessary to treat the answer as a motion.

(2) *Motion to dismiss set forth in a separate document with argument and case citations:*

Treat the motion in the same manner as any other motion--refer it to the OALJ.

ii. *At the conclusion of GC's case-in-chief, the evidence must be viewed in the light most favorable to the GC:*

At times, a Respondent will move to dismiss a complaint at the conclusion of the GC's case-in-chief. In responding, it is important to articulate to the ALJ that before such a motion can

be granted all of the evidence must be viewed in the light most favorable to the GC.

- iii. *After the hearing is closed, a motion to dismiss will be granted by the FLRA if a matter becomes moot:*

Compare [Federal Aviation Administration](#), 55 FLRA No. 44, 55 FLRA 254, 261 (1999) (case is not moot even though particular remedy may no longer be appropriate as long as a cease and desist order and a posting of a notice remain viable remedies) with [\(Defense Mapping Agency, Hydrographic/Topographic Center, Louisville Office, Louisville, Kentucky](#), 51 FLRA No. 148, 51 FLRA 1751, 1754-58 (1996) (Respondent's motion to dismiss the complaint granted because the alleged violation was no longer capable of being remedied where the Respondent no longer existed and individual rights were not involved).

- e. *Motion for pre-hearing discovery:*

- i. *Section [2423.23](#) governs pre-hearing disclosure:*

Section [2423.23](#)(a), and (b), which provide for the exchange of proposed witness lists, including a brief synopsis of testimony, and copies of documents intended to be offered into evidence at the hearing, at least 14 days before the hearing at a pre-hearing conference, do not violate "the principles of due process." See [Bureau of Indian Affairs, Phoenix Area Office, Phoenix, Arizona](#), 32 FLRA No. 130, 32 FLRA 903, 907 (1988) (referring to predecessor provision § 2423.14(a) on disclosure of witness lists and documents which is not violative of due process).

- ii. *No other regulatory provisions exist for pre-hearing discovery:*

Accordingly, it is appropriate for the GC to oppose any motion for discovery filed.

iii. *Depositions and responses to interrogatories:*

An ALJ may order the taking of depositions and order responses to interrogatories. Such authority is restricted by GC's policy of protecting the personal privacy and confidentiality of sources of information set forth at § [2423.8\(d\)](#).

f. *Motion to Sever Case or Withdraw Complaint:*

i. *Motion to sever:*

(1) *When is it appropriate to file?*

When one or more cases settle and time does not permit the issuance of an amended complaint.

(2) *When a motion to sever is filed, remember to amend the case caption if that is impacted.*

(3) *A motion to sever any case or cases that have settled is filed with the presiding ALJ at the start of the hearing so that the RD can process the settlement.*

(4) *Presiding ALJ has authority to rule on motion prior to issuance of decision.*

ii. *Motion to withdraw complaint and remand the matter to the RD:*

(1) *When is it appropriate to file?*

In those situations where all the cases set for hearing settle after the hearing is opened.

(2) *The presiding ALJ has the authority to rule on the motion to withdraw a complaint.*

§ [2423.31](#)(e)(1). See also Department of Health and Human Services, Social Security Administration, Social Security Administration Field Operations, New York Region, 32 FLRA No. 6, 32 FLRA 56 (1988).

g. *Motion to Intervene--Who files it and how is it processed:*

i. *Who files it ?*

An agency or labor organization that is not a Charging or Charged party but has a direct interest in a ULP proceeding because of the consequences of the requested remedy. In rare instances, OPM may file a motion to intervene.

ii. *How is it processed?*

A motion to intervene is processed in the same manner as any other motion, see § [2423.22](#), and the GC's position is dictated by the nature of the issues involved.

iii. *Extent of intervenor participation:*

Intervenors may only participate on the issues that the ALJ has determined to affect them.

iv. *Rulings:*

Motions to intervene are granted upon a showing that the outcome is likely to directly affect the movant's rights or duties.

v. *Appeal rights of denial of motion to intervene:*

Denial of a motion to intervene may be appealed pursuant to § [2423.21](#)(d) concerning interlocutory appeals.

h. *Motions for an interlocutory appeal:*

i. *Filing requirements:*

Interlocutory appeal motions are filed with the ALJ within five days of the contested ruling and shall state why interlocutory review is appropriate and why the Authority should modify or reverse the contested ruling. § [2423.31](#)(c). Always request a stay of proceedings when filing a motion for an interlocutory appeal.

See U.S. Department of Veterans Affairs, Veterans Administration Medical Center, San Francisco, California, 40 FLRA No. 30, 40 FLRA 290 (1991) (before the promulgation of § [2423.31](#)(c), Authority granted a joint motion for an interlocutory appeal in a Title 38 case where ALJ denied Respondent's Motion for Summary Judgment and Authority granted the Motion).


ii. *Rulings:*

The ALJ shall grant the motion and certify the contested ruling to the Authority if:

- The question of law or policy is important and about which there is substantial ground for a difference of opinion; and
- Immediate review will materially advance completion of the proceeding, or denial of review will cause undue harm to a party or the public.

If review is granted, the Trial Attorney requests that the ALJ stay the hearing during the pendency of the appeal. If review is denied, exceptions may be taken in accordance with § [2423.40](#) after issuance of the recommended decision and order.

See [Part 2, Chapter I](#) concerning Interlocutory Appeals.

 *In any case where OPM seeks to intervene in a ULP proceeding, the OGC is notified before taking a position.*

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[Part 1, Chapter C](#) concerning Analysis of the Case File;

[Part 1, Chapter F](#) concerning Motions for Summary Judgment;

[Part 1, Chapter N](#) concerning Preparing Formal Documents and Pre-hearing Disclosure;

[Part 2, Chapter B](#) concerning Postponement or Continuance of Hearing;

[Part 2, Chapter H](#) concerning Motions made at the Hearing; and

[Part 2, Chapter I](#) concerning Interlocutory Appeals.

RESERVED