

F. EXCEPTIONS

OVERVIEW:

The contents of exceptions include: (1) the specific findings, conclusions, determinations, rulings, or recommendations being challenged; (2) the grounds relied upon; and (3) the relief sought. Briefs supporting exceptions set forth: (1) all relevant facts; (2) the issues to be addressed; and (3) a separate argument for each issue. [See Part 3, Chapter B](#), above. Any party may file an opposition to exceptions and/or cross-exceptions. Exceptions are filed in a separate document along with a supporting brief.

OBJECTIVE:

To provide guidance on: (1) circumstances warranting the filing of exceptions to an ALJD; (2) substantive and procedural considerations; and (3) criteria and issues relating to the filing of cross-exceptions and/or oppositions to exceptions.

1. BASES FOR FILING EXCEPTIONS:

The Trial Attorney files exceptions if one or more of the following is present in the case:

- An opportunity to develop legal precedent;
- The ALJ has either misapplied, ignored, or distorted an existing legal doctrine or analytical standard;
- The ALJ has failed to make specific factual findings supported by the record or the ALJ has made the required factual finding but failed to consider this factual finding in reaching his/her conclusion of law;
- The ALJ's credibility determinations are erroneous and are based on considerations **other than** witness demeanor, such as: (1) the witness's opportunity and capacity to observe the event in question; (2) the witness's character as it relates to honesty; (3) prior inconsistent statements by the witness; (4) the witness's bias or lack thereof; (5) the consistency of the witness's testimony with other record evidence; and (6) the inherent improbability of the witness's testimony. [Department of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia](#), 55 FLRA No. 194, 55 FLRA 120, 1204-05 (2000) (*Warner Robins*) (citations omitted); [U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Oceans Service, Coast Guard and Geodetic Survey, Aeronautical Charting Division, Washington, D.C.](#), 54 FLRA No. 92, 54 FLRA 987, 1006-07 (1998) (where credibility determinations are based on considerations other than witness demeanor, the Authority reviews the record as a whole, i.e., reasons for deferring to the ALJ are less compelling).

Thus, before filing exceptions to an ALJ's credibility determination, the Region needs to establish that: (1) the error in the credibility determination concerned material facts that would result in a finding of a violation; and (2) there is record evidence supporting one of the five factors listed above that shows that the ALJ clearly erred in making a credibility determination. Where a credibility determination is made solely on the basis of the ALJ's judgment regarding a witness's demeanor, no exceptions are filed. [24th Combat Support Group, Howard Air Force Base, Republic of Panama](#), 55 FLRA No. 45, 55 FLRA 273, 279 (1999); [American Federation of Government Employees, Local 3615, AFL-CIO](#), 53 FLRA No. 123, 53 FLRA 1374, 1375 (1998) (Authority will not overrule an

ALJ's credibility determination unless a clear preponderance of all relevant evidence demonstrates that the determination is incorrect because only an ALJ has had the benefit of observing the witnesses while they testified); Bureau of Engraving and Printing, Western Currency Facility, Fort Worth, Texas, 51 FLRA No. 85, 51 FLRA 1014, 1015 (1996) (citing standard for overruling an ALJ's credibility determination); see also ULPCHM Part 4, Chapter D concerning Regional Director Merit Determinations; compare Warner Robins, 55 FLRA at 1204.

- The ALJ failed to address a particular remedial request. See U.S. Department of Health and Human Resources, Social Security Administration, 50 FLRA No. 50, 50 FLRA 296, 298-300 (1995) (GC excepted to ALJ's failure to address request for make-whole relief).
- The ALJ's conduct at the hearing failed to conform to minimal standards of judicial behavior. U.S. Department of Veterans Affairs, Medical Center, Jamaica Plain, Massachusetts, 51 FLRA No. 73, 51 FLRA 871, 875, 877 (1996) (GC excepted to ALJ's inappropriate behavior, interrupting counsel six times, refusing to allow counsel to complete a sentence repeating a phrase "that's a lot of hot air").

The Trial Attorney examines the ALJD in light of the above factors and makes a recommendation to the RA. **The Deputy GC is contacted if a determination is made not to file exceptions, and the reasons for this conclusion are included in the ALJ Analysis.**

2. FORMAT AND CONTENT OF EXCEPTIONS:

a. *Format:*

Exceptions and the supporting brief are **two** documents with separate title pages and headings for each. They may be stapled together but should easily be identifiable as two separate documents.

L But see Air Force Flight Test Center, Edwards Air Force Base, California, 55 FLRA No. 21, 55 FLRA 116, 118 (1999) (Respondent's labeling of "issues to be argued" considered as "exceptions" and §§ 2423.26-28 do not require parties to file exceptions and supporting brief in two separate documents).

b. *Content:*

- Exceptions should mirror sections of the Argument in the brief — discuss violation and elements of; and
- Address other specific findings of ALJ alleged to be in error. If the Trial Attorney fails to file exceptions to specific factual findings that may relate to other factual findings that were excepted to, the Authority may nevertheless adopt the findings without precedential significance pursuant to § 2423.41. See,

e.g., [U.S. Department of Housing and Urban Development, Rocky Mountain Area, Denver, Colorado](#), 55 FLRA No. 99, 55 FLRA 571, 573 (1999) (complaint alleging unilateral change dismissed notwithstanding past practice of deviating from a provision that requires a union official to sign in and out of work – no exceptions filed concerning ALJ’s finding with respect to another provision of the parties’ agreement that bars any local arrangements that contradict the agreement).

See [ATTACHMENT 3F1](#) for examples of Exceptions and [ATTACHMENT 3F2](#) for an outline of a brief specifically showing how Exceptions have been incorporated.


3. WAIVER AND THE SUFFICIENT PARTICULARITY STANDARD:

a. *Exception not argued is waived:*

If issues of law or fact were not preserved for appeal during the trial stage, review is precluded.

See § 2429.5 which states that “[t]he Authority will not consider evidence offered by a party, or any issue, which was not presented in the proceedings before the . . . Administrative Law Judge . . .” [Federal Aviation Administration](#), 55 FLRA No. 203, 55 FLRA 1271, 1274 (2000) (exception dismissed because Respondent failed to raise the rescinded OPM regulation before the ALJ as its defense for repudiating an MOU); [Department of Transportation, Federal Aviation Administration, Fort Worth Texas](#), 55 FLRA No. 157, 55 FLRA 951, 956-57 (1999) (arguments concerning enforceability of MOU which could have been raised in defending the alleged repudiation and cannot be made for the first time in exceptions); [U.S. Penitentiary, Leavenworth, Kansas](#), 55 FLRA No. 127, 55 FLRA 704, 716 (1999) (Authority did not consider “covered by” argument because Respondent did not raise “covered by” defense before the ALJ); [24th Combat Support Group, Howard Air Force Base, Republic of Panama](#), 55 FLRA No. 45, 55 FLRA 273, 281 n.12 (1999); [U.S. Department of Justice, Federal Bureau of Prisons, FCI Danbury, Connecticut](#), 55 FLRA No. 37, 55 FLRA 201, 204 (1999) (Authority declined to consider management right issue not raised to ALJ and “changes of position on an issue dealt with below are covered under the general rule prohibiting the raising of new issues on appeal”); [U.S. Department of Energy, Western Area Power Administration, Golden](#),

Colorado, 56 FLRA No. 2, 56 FLRA 9 (2000) (Respondent is precluded from relying on certain provisions of parties' agreement where the argument was not based on such provisions before the ALJ) petition for review filed sub nom. U.S. Department of Energy, Western Area Power Administration, Golden, Colorado v. FLRA, No. 00-1162 (D.C. Cir. filed Apr. 14, 2000); Department of Veterans Affairs, Medical Center, Muskogee, Oklahoma, 53 FLRA No. 103, 53 FLRA 1228, 1229 (1998) (rejecting exceptions based upon evidence or issues that could have been, but were not, raised before ALJ); Social Security Administration, Baltimore, Maryland, 53 FLRA No. 87, 53 FLRA 1053, 1060 (1997) (to the same effect); National Naval Medical Center, 54 FLRA No. 93, 54 FLRA 1078, 1079 and n.1 (1998) (mere mentioning of pay and Thrift Savings Plan issues in opening statement is not sufficient notice to Respondent that issues are in dispute; claim that seeks monetary relief that was not sought before the ALJ was not properly before the Authority); U.S. Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Illinois, 51 FLRA No. 54, 51 FLRA 599, 599-600 n.1 (1995) (rejecting GC's argument which had not been argued before the ALJ); but cf. U.S. Department of Transportation, Federal Aviation Administration, Northwest Mountain Region, Renton, Washington, 55 FLRA No. 46, 55 FLRA 293, 298 n.6 (1999) (Authority denied GC's motion to strike the Respondent's references to the cost of complying with the ALJ's order, finding such evidence that was directed toward compliance with the ALJ's remedy and to alleged deficiencies in that remedy could not have been presented to the ALJ), 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).

 *But, the Authority will consider an argument made in response to an ALJ's finding which was not argued or alleged in the complaint, and, as such, could not have been made prior to the ALJD. Department of the Air Force, Grissom Air Force Base, Indiana, 51 FLRA No. 2, 51 FLRA 7, 11 (1995) (GC's argument based on ALJ's finding considered by Authority).*

b. "Sufficient particularity" standard:

The Authority has historically avoided rejecting exceptions or supporting briefs because they fail to comply with certain requirements relating to the content of exceptions and briefs. See United States Customs Service, South Central Region, New Orleans District, New Orleans, Louisiana,

53 FLRA No. 67, 53 FLRA 789, 794 (1997) (Customs Service, South Central Region) (exceptions set forth portions of ALJ decision with “sufficient particularity” under then-§ [2423.27](#)(a)(2)); U.S. Department of Veterans Affairs, Veterans Affairs Medical Center, Dallas, Texas, 51 FLRA No. 77, 51 FLRA 945, 950-51 (1996) (to the same effect); Long Beach Naval Shipyard, 44 FLRA No. 83, 44 FLRA 1021, 1036 (1992) (brief in support of exceptions is sufficient under then-§ [2423.28](#)(a)).

However, under § [2423.41](#)(a), the “[f]ailure to comply with any filing requirement established in § [2423.40](#) may result in the information furnished being disregarded” (emphasis added).

✍ Where no ground is stated to support an exception, the Authority adopts the ALJ’s conclusion. *E.g.*, Internal Revenue Service, Austin District Office, Austin, Texas, 51 FLRA No. 95, 51 FLRA 1166, 1176 (1996).

c. *Reference to evidence not in record not considered:*

Section 2429.5 of the Regulations provides that the Authority will not consider evidence offered by a party that was not first presented in the proceedings before the ALJ. Customs Service, South Central Region, 53 FLRA at 794.

d. *ALJ findings adopted without precedential significance:*

Pursuant to § [2423.29](#)(a), the Authority will adopt, without precedential significance, those findings to which no exceptions were filed. 24th Combat Support Group, Howard Air Force Base, Republic of Panama, 55 FLRA No. 45, 55 FLRA 273, 281 n.13 (1999).

4. CRITERIA FOR FILING CROSS-EXCEPTIONS AND OPPOSITION:

a. *Cross-exceptions: Situations which may require the filing of cross-exceptions:*

- The ALJ has failed to provide all the remedies sought by the GC;


See, e.g., F.E. Warren Air Force Base, Cheyenne, Wyoming, 52 FLRA No. 17, 52 FLRA 149, 153 (1996)


(GC excepted to ALJ's failure to recommend order that was neither onerous nor punitive).


- The ALJ has found a violation but on a different ground than that argued by the GC or has rejected a particular theory that the GC wishes to raise on appeal. See, e.g., [U.S. Department of Justice, Immigration and Naturalization Service, New York, Office of Asylum, Rosedale, New York](#), 55 FLRA No. 170, 55 FLRA 1032 (1999) (Authority agreed with underlying basis of GC's cross-exception that ALJ correctly found a violation of § 7114(a)(2)(A) because the meeting concerned a grievance **not** a personnel policy); and
- The GC has prevailed on a major issue in the case and the OGC had decided to accept the remedy ordered, but after the Respondent filed exceptions, the OGC decided to file cross-exceptions to raise the remedy issue.


b. *Opposition to exceptions:*

- **It is OGC policy to file an opposition to Respondent's exceptions** even where the exceptions raise nothing new and constitute mere disagreement with the ALJ's conclusions; and
- GC may simply incorporate by reference his/her post-hearing brief to the ALJ.

 (1) *A failure to file an opposition may lead the Authority to speculate why no opposition was filed;*

 (2) *A party which has missed the deadline for timely filing an opposition may file a motion to strike in an attempt to challenge the GC's exceptions. See [Department of the Air Force, Grissom Air Force Base, Indiana](#), 51 FLRA No. 2, 51 FLRA 7, 10-11 (1995) (Authority rejected Respondent's motion to strike);*

 (3) *The Regulations do not provide for the filing of a response to an opposition. [U.S. Department of Labor, Washington, D.C.](#), 51 FLRA No. 41, 51 FLRA 462, 463 n.1 (1995) (Authority declined to consider GC's motion to correct the record because it was construed as a response to an opposition); and*

 (4) *Mootness -- Where Respondent files an exception alleging mootness, the Trial Attorney files an opposition because a case does not become moot simply because a particular remedy may no longer be appropriate. When a cease and desist order and the posting of notice remain viable remedies, a case is not moot unless the former exclusive representative is no longer recognized, and no individual rights are involved. See [Federal Aviation Administration](#), 55 FLRA No. 44, 55 FLRA 254, 261 (1999) (citation omitted).*

5. EXTENSIONS OF TIME:

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

Q [Part 3, Chapter B](#) concerning Briefs.

