J. PRE-TRIAL PREPARATION OF WITNESSES

OVERVIEW:

Pre-trial preparation of GC witnesses is pivotal to successful ULP litigation. This is the Trial Attorney's opportunity to shape the GC's case-in-chief. Rarely does the GC win a case through cross-examination of Respondent's witnesses. Rather, a case is won through careful construction of the case-in-chief.

OBJECTIVE:

To provide guidance on: (1) the tasks that must be accomplished for effective pre-trial preparation of the GC's witnesses and (2) handling unusual or special circumstances.

1. GOALS OF PRE-TRIAL PREPARATION OF WITNESS:

a. *Establish rapport with the witness:*

If the Trial Attorney did not investigate the case, the initial meeting for trial preparation is the first opportunity to establish some sort of rapport with each witness. Even if the attorney also investigated the case, there may be witnesses called to testify at trial who were not contacted during the investigation. In any event, the fundamental relationship with Charging Party witnesses is transformed by reason of the RD's issuance of the complaint. The Trial Attorney is no longer a "neutral" investigator; rather, s/he is now an advocate who is responsible for prosecuting an alleged violation of the Statute.

b. *Familiarize the witness with the hearing process:*

Ascertain experience level of witness:

- Has witness ever testified at a ULP hearing?

- Has witness ever testified in a courtroom setting?

Explain various aspects of the hearing process:

- That witness may be sequestered.
- That you will question the witness first.
- That witness will be subject to cross-examination, but that it is your role to protect the witness from unfair/improper questioning.
- That ALJ may question witness.
- What happens when objections are made.

Provide general advice to witness:

- Provide copy of document titled "Advice to Witnesses in Preparation for Hearing." (ATTACHMENT 1J)
- Advise the witness **not** to bring notes or other documents to the hearing. (They may be subject to disclosure to Respondent's counsel.)
- Advise the witness to make sure s/he has a clear understanding of the question being asked before giving answer.
- Advise the witness to respond to questions as directly as possible and especially to avoid appearing evasive during cross-examination.
- Advise the witness to maintain composure at all times: do not allow Respondent's counsel to "get to you."
- Discuss the witness's appearance and appropriate attire.

c. *Explain the witness's role in hearing:*

It is critical during pre-trial witness preparation to explain the witness's role in the hearing. At a minimum, this includes an explanation of the GC's theory of violation and a discussion of how the witness's testimony will

assist the GC in presenting that theory to the ALJ and the Authority. This accomplishes at least two things: 1) it heightens the witness's sense of purpose in participating in the GC's prosecution of the case; and 2) it helps prepare the witness for cross-examination by Respondent's counsel.

d. *Review testimony:*

i. *Use of witness statements/affidavits pre-hearing:*

(1) Provide a copy of any statement or affidavit furnished by the witness during the Region's investigation of the charge;

(2) Remind witness that the affidavit is "fair game" for Respondent's counsel during cross-examination; and

(3) Use affidavit to assist in preparing the witness for hearing. This usually provides a workable outline of the major points to be established through the witness' testimony.

ii. *Other uses of witness statements/affidavits at hearing:*

(1) To refresh a witness' recollection;

(2) If a witness is still unable to recall, used as past recollection recorded if the witness is able to testify that the contents of the statement were true when the statement was executed; and

See Part 2, Chapter S, Subsection 4 concerning techniques to elicit testimony when witness cannot recall information sought.

(3) For impeachment purposes.

☞ *Exercise caution in using a statement to refresh recollection or as past recollection recorded because opposing counsel must be*

afforded the opportunity to review the statement before it is given to the witness.

iii. *Where feasible, a complete "dry run" (i.e., from start to finish) of the witness's testimony is accomplished during the final pre-trial meeting with each witness.*

☞ *If possible, the Trial Attorney tries to meet with the witness more than once during trial preparation. There are several benefits to multiple pre-trial meetings with witnesses:*

First, multiple meetings may help the Trial Attorney to conduct a more detailed investigation of the case than was conducted during the Region's initial investigation.

Second, the Trial Attorney may be in a better position to tailor questions to the capabilities of the witness. Some witnesses are competent to handle any situation, while others may only be able to handle a limited number of questions. The scope and detail of the attorney's questions depend on an assessment of the witness's abilities.

Third, if more than one session can be arranged, the witness will be in a better position to assimilate the critical elements of his/her testimony. Even a short break before the "dry run" is helpful for most witnesses to allow the important points to gel.

e. *Review documentary evidence:*

The Trial Attorney presents the witness with a copy of each document to be introduced through the witness. The Trial Attorney initially confirms that the witness has sufficient first-hand knowledge of each document and its contents to establish the evidentiary foundation for introduction of the document into evidence. The Trial Attorney also explains to the witness how the document will be presented to the witness during his/her testimony. During the "dry run," the Trial Attorney incorporates the documents into the witness' testimony.

☞ ***Concerning extraneous markings on documents:*** *Where documents intended to be introduced into evidence contain*

extraneous markings, such as hand-written notes in the margins of a typed document, the witness is asked during pre-trial preparation if s/he can identify the markings. The witness's testimony then incorporates any explanation concerning the origin of the extraneous markings. This averts possible objection by Respondent's counsel to introduction of the document into evidence by reason of unexplained markings on the document.

f. *Prepare questions for direct examination:*

The Trial Attorney presents the majority of his/her case through direct examination of GC witnesses. It is critical that the Trial Attorney plan the direct examination of GC witnesses to present the ALJ with a coherent exposition of all elements of each violation alleged in the complaint.

i. *First, assess why each witness is needed:*

What testimony will this witness present and how will the testimony assist the Trial Attorney in establishing an element of proof necessary to the violation, or in rebutting a defense raised by the Respondent.

ii. *Second, determine the best method of getting the witness's information into the record:*

This is primarily accomplished through the witness's testimony in response to questions posed by the Trial Attorney, but may also be achieved through the introduction of documents which the witness is able to authenticate.

iii. *Questioning the witness:*

(1) Background information:

The first series of questions posed to the witness establishes the witness's name, position of employment, duration of employment and, where relevant, status as a member of the bargaining unit, connection with the labor organization, supervisory hierarchy, etc. This background information shows the ALJ that the witness has information potentially relevant to the proceeding.

EXAMPLE

Q: Would you please state your name and occupation.

A: My name is ____ and I work as an Aircraft Mechanic at Hill Air Force Base in Ogden, Utah.

Q: How long have you held this position?

A: I have been an Aircraft Mechanic at Hill Field since 1983.

Q: Are you connected in any way with AFGE Local 1592?

A: Yes, I have been on 100% official time as the President of Local 1592 since August 1995.

(b) Relevant factual information:

The next series of questions posed to the witness establish the factual information on which one or more elements of the violation (or on which refutation of one or more of the Respondent's defenses) is based.

The preferred method for presenting the operative facts is through a chronological exposition of events.

EXAMPLE

In a unilateral change bargaining case, the witness may testify to his/her first learning of a proposed change and submitting a request to bargain as follows:

Q: Tell us what happened on June 15, 1996.

A: The Chief Steward told me that management proposed to change the duty hours of several employees.

Q: Was the Union notified concerning this change?

A: No.

Q: What did you do when the Chief Steward told you of this change?

A: I made sure that the Chief Steward had confirmed this with some of the affected employees, and then submitted a request to bargain over procedures and appropriate arrangements for employees adversely affected by the proposed change.

Q: I am now handing you what has been marked for identification as General Counsel Exhibit 2. (Hand witness copy of request to bargain.) Can you identify this document?

A: Yes, this is the request to bargain I submitted on June 14, 1996 concerning the change in duty hours.

Q: Your Honor, the General Counsel moves for admission of General Counsel Exhibit 2 into evidence.

Respondent's Counsel: No objection, your Honor.

ALJ: General Counsel Exhibit 2 is received into evidence.

iv. *Tips on how to structure the "Q & A":*

(1) Factual testimony:

The Trial Attorney prepares the witness to provide (and the questions are phrased to call for) **factual** responses. For example, the witness is asked to describe what was said (or what happened), rather than to describe his/her impression of a conversation. Testimony such as, "my supervisor told me that my life would be made miserable if I pursued the grievance" is preferable to, "my supervisor made sure I understood not to take my grievance any further." The latter does not tell the ALJ what the supervisor told the witness. The ALJ wants to know factually what was said, the circumstances under which it was said, and how it was said. The ALJ is not typically interested in what conclusions the witness drew from what was said.

(2) Narrative vs. short and crisp "Q & A":

Depending on the evidence to be elicited from the witness and the ability of the witness, the Trial Attorney considers whether to ask the witness specific directed questions or to allow the witness to testify in narrative form.

☞ *Narrative testimony may be improper since opposing counsel is unable to raise objections, so the Trial Attorney interjects questions at appropriate times.*

Where credibility concerning a particular statement is at issue, testimony may be more persuasive when the witness describes the statement without "prompting" by the Trial Attorney.

EXAMPLE

Q: What happened after you sat down in the Director's office?

A: First, he told me that he had heard about my grievance and was not very happy with it. He also told me that my career would be jeopardized if I got a reputation in the agency as a troublemaker. When I told him I only wanted to have my supervisor treat me the way he treated everyone else, the Director told me that going to the Union was not the way to go about getting favorable treatment from my supervisor.

☞ *In this example the witness could have furnished the same factual testimony in response to three or four questions.*

Other situations where testimony may be more effective when provided in response to a single question (as opposed to several short questions) include background information.

EXAMPLE

Facts concerning the time, date, place and participants at a pivotal meeting may be obtained in response to a single question (as opposed to 4 separate questions):

Q: When was the bargaining session held?

A: The meeting was held at 10:00 a.m. on June 17, 1996 in the Director's conference room. Management was represented by the Director, the Deputy Director, and the Chief of Personnel, while the Union was represented by me, the Chief Steward and the Vice President.

At the same time, it may be advantageous at critical junctures to break the witness's testimony down to a series of responses to specific questions.

EXAMPLE

Where the Personnel Officer's remarks in response to an information request contain many components, the following colloquy may assist the witness in covering all key points:

Q: What did the Personnel Officer tell you regarding management providing the requested information?

A: The Personnel Officer told me that the information was not retained on-site, but was contained in employees' personnel records at Headquarters.

Q: Did you make any comment concerning the location of these records?

A: I asked the Personnel Officer what it would take for him to obtain the records from Headquarters.

Q: What did he say?

A: He said it would just be a matter of making a phone call.

Q: Did the Personnel Officer indicate any concerns about the Union's need for the information?

A: No, in fact, he told me that he understood why the Union needed the information and what the Union planned to use it for.

Q: What about the Privacy Act -- did that come up in your conversation with the Personnel Officer?

A: No, at no time did the agency ever raise Privacy Act concerns in response to our information request.

Q: Then what was the basis for management's denial of your information request?

A: It was never put in writing, but the Personnel Officer told me in that same conversation that it would take too much time to pull together records covering a five-year period for the entire local facility?

Q: How did you respond to this concern?

A: I told him that the Union would be willing to accept the records limited to the Quality Section covering the previous three-year period.

Q: How did he respond to this narrowing of your original information request?

A: He said that he would get back to me.

Q: Did he ever get back to you after that?

A: No, and when the Union didn't hear from him, I called and left messages for the Personnel Officer to call me concerning our information request. When we didn't hear from him for another two weeks, the Union filed this ULP charge.

☞ *The above testimony could be elicited by asking the witness simply to describe what was said during the conversation, with only an occasional prompting question. But where the Trial*

Attorney wishes to ensure coverage of specific points, directed questions may be more useful.

No single factor determines whether the Trial Attorney calls for narrative testimony or uses directed questions. The nature and importance of the testimony and the capabilities of the witness guide the Trial Attorney in balancing these two approaches. The Trial Attorney is prepared to use either approach, depending on how the witness performs while testifying at hearing. For example, if during pre-trial preparation, the witness has testified by narrative but does not do so at the hearing, the Trial Attorney must be prepared to ask more directed questions to cover all key points. The ability to go both ways is, of course, dependent on thorough pre-trial preparation of the witness.

(3) Cover all key points:

The Trial Attorney ensures that the witness provides testimony on all significant matters. The Trial Attorney should consider developing a list of key points to be covered by each witness to be checked prior to turning the witness over to Respondent's counsel for cross-examination.

g. *Prepare for cross-examination:*

The Trial Attorney provides advice to the witness on his/her demeanor during cross-examination. The Trial Attorney explores the basis for any discrepancies between the witness's anticipated testimony and any affidavit furnished by the witness during investigation of the charge. The witness is asked to explain any discrepancies, and the Trial Attorney discusses possible ways to minimize the significance of any discrepancies. Most importantly, the Trial Attorney presents the witness with questions which may be anticipated from opposing counsel during cross-examination. Through the process of trial preparation, the Trial Attorney identifies what parts of the GC's case need to be strengthened. Questioning the witness in this manner provides the Trial Attorney with a view of how the witness may be expected to hold up during cross-examination. It also provides an opportunity to discuss with the witness, how best to ameliorate, the impact of damaging information.

The Trial Attorney explains to a witness that there is nothing improper about working with the Trial Attorney prior to testifying. This prepares the

witness for any cross-examination concerning rehearsed testimony or collusion with the Trial Attorney.

2. UNUSUAL OR SPECIAL CIRCUMSTANCES:

a. *The reluctant and/or hostile witness:*

When it becomes apparent that the witness is reluctant or hostile, the Trial Attorney first attempts to use all of his/her persuasive powers to overcome the witness's reluctance and/or hostility to the case. If this fails, weigh the importance of the witness's testimony to successful litigation of the case. If the testimony is less than vital (e.g., is merely corroborative on minor points), contemplate releasing the witness from testifying. If the testimony is indispensable, first consider limiting the witness's testimony to that which is essential to establishing the violation. If the witness is still reluctant to cooperate, consider whether to threaten enforcement of a subpoena to compel the testimony. Where the witness does not wish to appear supportive of the Charging Party's case, issuance of a subpoena may help overcome the witness's reluctance to testify. This is risky because if the witness ignores the subpoena the GC must seek enforcement of the subpoena in a U.S. District Court. The more significant risk, however, is that threatened with enforcement of a subpoena, the reluctant witness will become further alienated and become less cooperative with the GC's case.

b. *GC witnesses talking to Respondent's counsel:*

Respondent's counsel may request to meet with a GC witness to prepare for hearing. Similarly, a GC witness may inquire about what to do if Respondent's counsel requests such a meeting. Authority precedent generally holds that two types of ULPs may be based on agency officials conducting interviews of bargaining unit employees in preparation for third-party proceedings (including ULP hearings): a violation of § 7116(a)(1) if the interview is not voluntary (i.e., is coercive in nature), or a formal discussion violation if all elements of a formal discussion are established and the union is not afforded the opportunity to be represented.

As a practical matter, however, a witness is asked to let the Trial Attorney know if s/he plans to meet with Respondent's counsel prior to the hearing. Advise Respondent's counsel to comply with Authority precedent requiring that the interview be voluntary, be conducted in a non-coercive manner,

and that the union be afforded an opportunity to be represented at such a formal discussion. Provide the same advice to any bargaining unit employee witness who has been approached by an agency Respondent.

The Trial Attorney has no right to insist on being present at the interview. The Trial Attorney likewise does not request the witness require his/her presence. However, the witness may ask for union representation at the meeting because it could be seen as a formal discussion.

Case citations concerning the formal discussion theory:

Formal Discussion and Violation Found

Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California, 29 FLRA No. 53, 29 FLRA 594, 597-07 (1987) (adoption of the formal discussion theory in holding that the agency's interview of a unit employee who was to be a union witness in preparation for an arbitration proceeding constituted a formal discussion);

Department of Veterans Affairs Medical Center, Phoenix, Arizona, 52 FLRA No. 18, 52 FLRA 182, 203-04 (1996) (ALJD) (extension of formal discussion theory to cover interview of unit employee witnesses in preparation for MSPB hearing);

Veterans Administration Medical Center, Long Beach, California, 41 FLRA No. 106, 41 FLRA 1370, 1379-80 (1991) (VAMC, Long Beach) (violation based on telephone interviews of unit employee in preparation for MSPB hearing) enforced sub nom. FLRA v. Department of Veterans Affairs Medical Center, Long Beach, California, 16 F.3d 1526 (9th Cir. 1994); and U.S. Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah, 36 FLRA No. 78, 36 FLRA 748, 962-70 (1990) (Ogden ALC) (ALJD) (violation based on agency requiring a pre-arbitration interview of unit employee designated to serve as union witness at arbitration).

No Formal Discussion Found

General Services Administration, 50 FLRA No. 61, 50 FLRA 401, 406-07 (1995) (GSA) (citation to Department of the Air Force, F.E. Warren Air Force Base, Cheyenne, Wyoming, Local 2354, 31 FLRA No. 35, 31 FLRA 541 (1988) (F.E. Warren) with approval, but finding no violation by agency conducting interviews of bargaining unit employees in preparation for

MSPB hearing involving removal of a management official, reasoning that MSPB hearing concerning removal of management official did not meet statutory definition of a "grievance" because it was not a "complaint" by an "employee," "labor organization" or "agency" within the meaning of § 7103(a)(9) of the Statute);

Formal Discussion But No Violation Found

F.E. Warren, 31 FLRA at 545-52 (1988) (extension of formal discussion theory to cover ULP hearings where the agency's attorney interviewed a bargaining unit employee witness in preparation for a ULP hearing, but no ULP because Respondent fulfilled its obligations concerning formal discussions); and United States Immigration and Naturalization Service, United States Border Patrol, El Paso, Texas, 47 FLRA No. 11, 47 FLRA 170, 182-87 (1993) (MSPB deposition of complainant held to be formal discussion, but no violation under circumstances where purpose of § 7114(a)(2)(A)--to provide union an opportunity to safeguard its institutional interests--was satisfied by union being permitted to be present at deposition).

Case Citations Concerning the Coercive Interrogation Theory in Violation of § 7116(a)(1) of the Statute.

In Internal Revenue Service and Brookhaven Service Center, 9 FLRA No. 132, 9 FLRA 930, 933 (1982) (Brookhaven), the Authority placed certain limitations on an agency's interview of bargaining unit employees in preparation for third-party proceedings by requiring that:

> (1) management must inform the employee who is to be questioned of the purpose of the questioning, assure the employee that no reprisal will take place if he or she refuses, and obtain the employee's participation on a voluntary basis;
>
> (2) the questioning must occur in a context which is not coercive in nature; and
>
> (3) the questions must not exceed the scope of the legitimate purpose of the inquiry or otherwise interfere with the employee's statutory rights.

In F.E. Warren, 31 FLRA at 549, the Authority declined to apply a per se rule requiring agency representatives to issue "Brookhaven" safeguards in all situations, instead determining whether the circumstances in which interviews of unit employees in preparation for third-party proceedings occur are coercive. The Authority found no 7116(a)(1) violation, noting that the employee was told the purpose of the interview, that the employee declined union representation, that the employee was not threatened with repercussions if he refused to cooperate, and that the agency's questioning related strictly to the matters at issue at the ULP hearing.

See also VAMC, Long Beach, 41 FLRA at 1382-85 (agency's telephone interview of a unit employee in preparation for MSPB proceedings was not voluntary and was conducted under coercive conditions and therefore violated the Statute);

Ogden ALC, 36 FLRA at 770-72 (Authority adopted the ALJ's analysis similarly concluding that the agency independently violated § 7116(a)(1) by the manner in which its agent questioned a known union arbitration witness);

U.S. Department of the Air Force, Griffiss Air Force Base, Rome, New York, 38 FLRA No. 125, 38 FLRA 1552, 1558-60 (1991) (extension of precedent to find a violation based merely on an agency's attempt to coerce participation in such interviews, even when the unit employee witness never answered any questions); and

GSA, 50 FLRA at 406 (Authority reviewed previous decisions and clarified that Brookhaven warnings "apply only where a nexus is established between an agency's interview of a bargaining unit employee in preparation for third-party proceedings and the employee's § 7102 rights" but found no nexus here because there was no showing that the union was in any way involved in the MSPB proceeding (concerning removal of a management official) for which the interviews were conducted or that the MSPB proceeding otherwise implicated any rights protected by § 7102).

☞ *Because the Authority in GSA cited F.E. Warren with approval, there should be little doubt that unit employees' participation as witnesses at ULP hearings satisfies the Authority's requirement in GSA that a nexus be established between the pre-trial interview and the employee's § 7102 rights.*

c. *Supervisors and management officials as witnesses:*

Agents of agency Respondents (i.e., supervisors and/or management officials in "CA" cases) may be called as GC witnesses in certain circumstances.

i. *The Friendly Supervisor:*

When supervisors approach the Trial Attorney about providing testimony helpful to the GC's case, take care to ensure that:

(1) The supervisor is aware that s/he has no statutory protection against agency retaliation for providing testimony;

(2) The supervisor's participation in pre-trial preparation is voluntary; and

(3) The supervisor is informed that his/her participation in pre-trial preparation and in testifying at hearing must be on his/her own time (i.e., official time will not be authorized).

Pre-trial preparation of the friendly supervisor may therefore be limited. To the extent pre-trial preparation of a friendly supervisor can be arranged, however, follow the guidance outlined above. **OGC policy generally does not require the Trial Attorney to inform an agency Respondent's counsel that its supervisor or management official has approached the Trial Attorney about testifying at hearing or to advise counsel of efforts to pre-try a friendly supervisor. Nor must Respondent's counsel be included in any pre-trial preparation of a friendly supervisor.**

ii. *Former Supervisors and Retired Supervisors:*

Trial Attorneys may engage in pre-trial preparation of current bargaining unit employees and retired employees who were supervisors at the time that the events at issue in the hearing occurred to the same extent and under the same conditions as described above for supervisors and management officials in general.

iii. *The Hostile Supervisor:*

There may also be occasions when it is necessary to obtain a supervisor's testimony to establish one or more elements of the GC's **prima facie** case. When this need arises, request that a subpoena be issued to compel the supervisor's testimony. Any pre-trial preparation of a hostile supervisor must be coordinated with Respondent's counsel and will likely be refused. There is no obligation on the part of Respondent's counsel to agree to the interview.

iv. *Supervisors who were bargaining unit employees at the time of the events underlying the complaint:*

When testimony is required from a newly-designated supervisor, but where the testimony relates solely to events which occurred when the supervisor was a bargaining unit employee, schedule pre-trial preparation as though the witness were a Charging Party witness, but with the following variation: A subpoena is issued to the witness, and the Trial Attorney arranges for pre-trial preparation by assuring Respondent's counsel that matters discussed with the witness will relate solely to events that transpired when the witness was a member of the bargaining unit.

d. *Depositions in lieu of testimony at hearing:*

i. *Regulatory authority:*

Section 2423.24(a) provides that an ALJ "shall regulate the course . . . of prehearing matters . . . ."

Section 2423.34(b) provides that after issuing a recommended decision and order the ALJ transmits the decision and record, which includes depositions, if any, to the Authority.

ii. *Testimony at hearing is preferred:*

The Trial Attorney contemplates taking a deposition in lieu of testimony at hearing only if necessary. Testimony at hearing is always preferable because it affords the ALJ a better opportunity to assess the witness's demeanor and credibility.

iii. *Circumstances in which a deposition is considered appropriate:*

(1) Where deposition is the only way to arrange for timely testimony from a critical witness who is unavailable to testify at hearing if the trial cannot be rescheduled to accommodate the witness's appearance at the hearing.

(2) Where there may be questions concerning enforcement of a subpoena but where the witness is willing to provide testimony by deposition, a deposition may be the best means by which to obtain necessary testimony.

See, e.g., Bureau of Indian Affairs, Isleta Elementary School, Pueblo of Isleta, New Mexico and Indian Educators Federation, 54 FLRA No. 128, 54 FLRA 1428, 1452 n.4 (1998) (ALJD) (critical testimony obtained from the Governor of the Pueblo of Isleta by means of a pre-hearing deposition because it was questionable whether the FLRA had jurisdiction to compel the Governor's testimony by means of a subpoena).

(3) Where, upon completion of the hearing, the record is left open for the receipt of additional evidence and testimony on matters that were unknown or unavailable to the parties at hearing.

iv. *Processing requirements:*

(1) *Pre-hearing depositions:*

File a pre-hearing motion pursuant to § 2423.21(b). However, if the witness and the parties agree concerning the scheduling of a pre-hearing deposition, it is preferable to make arrangements for the deposition, and then to submit a transcript of the deposition testimony into evidence as a Joint Exhibit.

(2) *Post-hearing depositions:*

Are within the ALJ's discretion.

See also Part 1, Chapter O concerning depositions.

e. *Disclosure of statements and information obtained from the Respondent:*

The Trial Attorney may not share with GC witnesses during pre-trial any materials obtained from the Respondent during the investigation of the charge. See § 2423.8(d). Although the Regulations do not address what sanctions, if any, may be applied to enforce § 2423.8(d), improper disclosure can only be detrimental to the GC's case. At least two Authority decisions have addressed situations where the Trial Attorney was found in violation of § 2423.8(d). Both generally left the appropriate remedy for such a regulatory violation to the discretion of the ALJ.

Case citations where Respondent's Motion to Strike Testimony based on improper disclosure is denied but ALJ may consider such improper disclosure in determining the credibility of GC witnesses.

Respondent's Statements/Affidavits

Internal Revenue Service, Boston District Office, Boston, Massachusetts and Internal Revenue Service, Andover Service Center, Andover, Massachusetts, 5 FLRA No. 96, 5 FLRA 700, 701 n.2 (1981) (Authority rejected Respondent's contention that GC's witness's testimony be stricken and that the complaint be dismissed because the GC disclosed to its witness the content of statements furnished by Respondent's witnesses during the investigation of the charges but considered such impropriety in determining credibility).

Respondent's Documentary Evidence

Internal Revenue Service and Internal Revenue Service, Brooklyn District, 23 FLRA No. 9, 23 FLRA 63, 80-81 n.4 (1986) (ALJD) (to the same effect).

Section 2423.8(d) specifically applies to the disclosure of the "identity of individuals and the substance of the statements and information they submit or which is obtained **during the investigation**" and therefore appears not to govern the disclosure of documents obtained from the

Respondent by subpoena. The Trial Attorney nevertheless is careful in handling such documents, particularly if the ALJ has issued a protective order covering such documents.

f. *Official Time for GC Witnesses:*

i. *Statutory Provision:*

Section 7131(c) of the Statute provides that "the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status."

ii. *Regulatory Provision:*

Section 2429.13 more broadly provides for official time, which includes travel time, as occurs during the employee's work hours and when the employee would otherwise be in a work or paid leave status, for any employee participating in any phase of any proceeding before the Authority, including unfair labor practice hearings.

Case citations

Official time was authorized

Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California, 26 FLRA No. 83, 26 FLRA 674, 677-78 (1987) (testimony at hearing), rev'd on other grounds, sub nom. Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California v. FLRA, 877 F.2d 1036 (D.C. Cir. 1989) (McClellan AFB).

Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms and National Treasury Employees Union, 10 FLRA No. 3, 10 FLRA 10, 11-12 (1982) (pre-trial preparation); Department of the Treasury, Internal Revenue Service and Department of the Treasury, Internal Revenue Service, Jacksonville District, 15 FLRA No. 108, 15 FLRA 506, 508-09 (1984) (to the same effect).

"CO" case where official time was not authorized

7th Infantry Division (Light), Fort Ord, California, 47 FLRA No. 82, 47 FLRA 864, 868-71 (1993) (Fort Ord).

☞ *The Trial Attorney may request agency management to release employee-witnesses to testify in "CO" cases against unions. As a practical matter, most agencies will not oppose the release of such employee-witnesses on some form of administrative time.*

g. *Witness Fees--Travel and Per Diem Expenses for Non-Federal Employee Witnesses:*

i. *Statutory provision:*

Section 7132(c) provides that witnesses "shall be paid the same fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States."

ii. *Regulatory provision:*

Section 2429.14 provides that witness fees, as well as transportation and per diem expenses "shall be paid by the party that calls the witness to testify" except that Federal employees are not entitled to receive witness fees.

See Federal Aviation Administration, Northwest Mountain Region, Renton, Washington, 51 FLRA No. 81, 51 FLRA 986, 989-92 (1996) (Authority adopted D.C. Circuit's decision in McClellan AFB holding that agencies are not required, under § 7131(c) of the Statute to pay travel and per diem to employees appearing to testify at ULP hearings and rejected § 7132(c) of the Statute as an alternative basis for requiring agency Respondents to pay such travel and per diem expenses).

iii. *Witnesses who are entitled to witness fees:*

Non-federal employees who appear at the insistence of the Trial Attorney, i.e., under subpoena, may submit a claim for reimbursement, Standard Form 1157, Claim for Fees and Mileage of Witness. Two copies of Form 1157 are given to the

witness when the subpoena is served. The witness is instructed to complete, sign and return the claim to the Region that issued the subpoena. Upon the RD's approval, both copies of the form are forwarded to the OGC.

iv. *Regional Authorization of travel and per diem:*

The Trial Attorney checks with the RA well in advance of the trial if s/he needs a witness to testify at the trial and ensures that proper procedures are followed once s/he receives authorization.

Q **Part 1, Chapter O concerning Depositions.**