

## **PART 2**

# **THE CHARGE**

## A. FILING A CHARGE

**OVERVIEW:** No investigatory action is taken unless and until a charge is filed by any activity, Agency, labor organization or other person which alleges a violation under § [7116](#) of the Statute seeking vindication of the rights accorded under the Statute.

**OBJECTIVE:** To provide guidance concerning the who, what, when, where and how, of filing a ULP charge.

### 1. WHO MAY FILE A CHARGE:

*Section [2423.3](#) states:*

“Any person may charge an activity, agency or labor organization with having engaged in, or engaging in, any unfair labor practice prohibited under 5 U.S.C. 7116.”

“Person” is defined as “an individual, labor organization, or agency.” Section 2421.2 (incorporating the definition at § [7103](#)(a)(1) of the Statute).

### 2. WHERE TO FILE A CHARGE:

a. *Place of occurrence: Section [2423.6](#)(a):*

- i. A charge is filed with the RD for the region in which the alleged ULP has occurred or is occurring. See [ATTACHMENT 2A1](#) for a geographic jurisdictional list for ROs.
- ii. If the alleged ULP occurred or is occurring in more than one region, a charge may be filed with the RD in either region. Id.

- b. *Filing in incorrect region:*
  - i. Charge is date stamped and is deemed filed and is then sent by fax to the proper RO with jurisdiction over matter for docketing; and
  - ii. Parties are made aware that incorrect filing delays an investigation.

### 3. WHEN TO FILE A CHARGE:

- a. *General requirement:*

Under § [7118\(a\)\(4\)\(A\)](#) of the Statute, a charge normally may not be acted upon if the alleged ULP occurred more than six months before the filing of the charge.

- b. *Exceptions:*

- i. Failure to perform a duty owed:

An RD may issue complaint on a charge that would otherwise have been found untimely if it is found that the Charging Party was prevented from filing the charge in a timely manner due to failure of an Agency or Union to perform a duty owed to the charging party. See Section [7118\(a\)\(4\)\(B\)\(i\)](#); cf. U.S. Nuclear Regulatory Commission, Washington, D.C., 44 FLRA No. 30, 44 FLRA 370, 381 (1992) (NRC) (because agency had no duty to inform union of employee's detail to a supervisory position, charge, which was filed more than six months after detailee's attendance at union executive board meeting, is untimely).

- ii. Concealment:

An RD may issue complaint on a charge that would otherwise have been found untimely if it is found that the Charging Party was prevented from filing the charge in a timely manner due to the Agency's concealment which prevented the discovery of the alleged ULP during the six-month period. See Section [7118\(a\)\(4\)\(B\)\(i\)](#); cf. NRC, 44 FLRA at 381 (record evidence fails to show that detail was concealed from union).

iii. Equitable tolling:


Factors to weigh in determining whether the six-month period is equitably tolled:

- Lack of actual notice of the filing requirements;
- Lack of constructive knowledge of the filing requirements;
- Diligence in pursuing one's rights;
- Absence of prejudice to the Charged Party; and
- A Charging Party's reasonableness in remaining ignorant of the notice requirements.

See EEOC, 53 FLRA at 498-99 (1997) (filing action in wrong forum does not justify invoking equitable tolling of statute of limitations).

**4. WHAT TO FILE:**

- a. *Completion of the Charge Form: § [2423.4](#):*
- i. Charges are filed on either a CA or CO standardized form (FLRA Forms 22 and 23) (Revised 1998) or on a form that is substantially similar;
  - ii. Charging Party provides a clear statement of the ULP allegation which includes the specific sections of Statute allegedly violated;
  - iii. Certificate of service section on CO or CA form indicating method of service and name, title, location and date of service is completed;
  - iv. Number of copies: One copy of charge is filed; and
  - v. No attachments: Supporting evidence and documents are submitted to the RO under separate cover.

 RO staff is available to give technical advice concerning completion of the Charge form. (See [Part 1, Chapter A](#) concerning Pre-Charge Assistance).

## 5. HOW TO FILE A CHARGE:



Pursuant to § [2423.6\(a\)](#), the Charging Party files a charge by mail, delivery service, in person, or by fax with the appropriate RD. Filings by e-mail are **not** permitted. Filings are required to be made during normal business hours. **The following additional rules apply to service by fax:**

- Charges are transmitted to a RO fax machine that is dedicated to receiving incoming documents;
- A charge must not exceed a two-page limitation;



*If Charging Party exceeds the two-page limitation, the Region accepts the charge if it is the first time that the Charging Party has exceeded the two-page limitation. In this instance, the Region calls the Charging Party on the telephone and informs the Charging Party of the two-page regulatory requirement and informs the Charging Party that the Region will not accept charges that exceed the two-page limitation in the future.*

- Charging Party assumes the risk if fax machine malfunctions;
- Original signature of Charging Party is not required but a signature is required (can be a copy);
- Charging Party need not submit follow-up hard copy of charge; and
- RO fax machine will record time and date of receipt of the charge.



*Each Region's dedicated fax machine for incoming faxes reflects the correct time and date at all times.*

## 6. CHARGES MAY BE TRANSFERRED AMONG THE REGIONS:

See [Part 2, Chapter D](#) and [Part 5, Chapter D](#) concerning Reviewing the Charge and Parity and [ATTACHMENT 2A2](#) for a Sample Order Transferring Case.



[Part 1, Chapter A](#) concerning Pre-Charge Assistance;

[Part 2, Chapter D](#) concerning Reviewing the Charge; and

[Part 5, Chapter D](#) concerning Parity.


RESERVED

## B. DOCKETING THE CHARGE


**OVERVIEW:** Docketing a charge is the first official action a RO takes when a charge is received.

**OBJECTIVE:** To describe what actions take place at the time a RO docket a charge, which include entering the case into case tracking and sending the parties the opening letter.

### 1. DOCKETING CHARGES RECEIVED BY FAX OR MAIL:

- a.  *Upon receipt, a charge is reviewed and is **not** docketed if it is deficient in one or more of the following ways:*
- There is no signature;
  - The Charging Party or Charged Party is not identified;
  - Some basis for the charge is not stated; and
  - The Charge form is not substantially completed (the matters in each block are not addressed in some way).

If the charge is deficient but it can be determined who filed the charge, it is returned to that person with a notation as to why it has been returned. The Party is also informed that it may be sent to the Region again once the deficiency has been corrected but that it is not considered filed until the deficiency is corrected. Also, a reference is made to timeliness matters. See [ATTACHMENT 2B1](#) for a Sample letter.

 *A charge filed on the wrong form is **not** deficient and is docketed as to what it should have been. For example, a charge filed on a CO form against an Agency is docketed as if it had been filed on a CA form.*



b. *Assigning a case number:*

Once it has been determined to docket the charge, the Region assigns a case number which consists of two letters indicating the Region (AT, BN, CH, DA, DE, SF, or WA) followed by a two-letter designation which indicates the type of case (CA or CO), followed by a five-digit number (the first digit indicates the last digit of the fiscal year in which the charge was filed and the other four digits indicate the sequential number of the case filed in the Region during the fiscal year).

**EXAMPLE**

“WA-CA-90001” is the case number given to the first charge against an Agency filed in FY 99 in the Washington Region.

c. *Docketing similar charges:*

- i. A grouping of charges filed on the same day or within days that raise identical issues received by a Region are counted as one case (i.e., are assigned the same case number, for case tracking purposes) even though there may be different Charging Party individuals;
- ii. In the unlikely event that the dispositive actions may be different, the RD contacts OGC Headquarters to discuss the best way to capture the action; and
- iii. Regions explain to parties that the assignment of a number in no way affects their rights.

**2. CLARIFICATION OF CHARGE IS REQUIRED:**

a. *Amended charge necessary before investigation begins:*

A charge may not be deficient, but nevertheless may need to be clarified in order to begin the investigation, e.g., the underlying basis of the charge is not clear. In this circumstance, it is docketed and a letter is sent to the Charging Party’s representative requesting that the charge be clarified by filing an amended charge within 10 days of the

date of the letter. The Charging Party is also advised that the charge may be dismissed if the amended charge is not received by the RO within the required 10 days. See [Part 3, Chapter O](#), concerning Duty of a Charging Party, for additional discussion on dismissals for lack of cooperation.

The Region does **not** send a copy of the charge to the Charged Party, nor is an opening letter sent (see #5, below), until it receives the Charging Party's clarification in an amended charge.

Once the charge has been sufficiently clarified, the charge and the amended charge are served on the Charged Party.

b. *Clarification during the course of the investigation:*

If, during the investigation, it is necessary to clarify the scope of the charge, a confirming letter, affidavit, or amended charge may be used. Since the Charged Party was put on notice of the basis of the charge when it was filed, there is no need to copy the Charged Party.

**3. DOCKETING CHARGES HANDED TO AN AGENT IN THE FIELD:**

After determining that there are no deficiencies that would preclude docketing, the Agent contacts the Region for a number and affixes the number and date of filing on the charge.

**4. ENTRY INTO ORACLE CASE TRACKING:**

At the time a case number is assigned, the case is entered into the Oracle case tracking system. See [OGC Administrative Manual](#) for details concerning case tracking.

**5. THE OPENING LETTER—FIRST WRITTEN CONTACT WITH THE PARTIES AFTER A CHARGE IS DOCKETED:**



*One standard opening letter ([ATTACHMENT 2B2](#)) is sent to the parties that includes:*

- Acknowledgment of receipt of charge;

- Point of RO contact (name, phone and e-mail--might not be the assigned Agent);
- Case number;
- Designation of representative form;
- Copy of charge;
- Attachment that describes ULP process with reference to ADR processes (See [ATTACHMENT 2B3](#));
- Notification that a RO Agent will be contacting the parties soon and is prepared to discuss their legal position, relevant contract provisions, facts, documents and witnesses, as applicable; and
- If Charged Party representative does not understand the underlying basis of the charge, s/he should either contact the RO point of contact or assigned Agent.




**[Part 3, Chapter O](#) concerning Duty of the Charging Party.**

## C. THE CASE FILE

**OVERVIEW:** The case file is created after a case is docketed and assigned to an Agent for investigation. It contains a compendium of all communication with the parties, relevant evidence and other information discovered, disclosed, or submitted during the investigation as well as information pertaining to post-investigation regional decision-making.

**OBJECTIVE:** To provide guidance concerning the contents of a case file, including the documents contained in the case file and the organization of the case file.

### 1. CREATION OF CASE FILE:

 *Contents of Case File:*

Before a case is assigned to an Agent for investigation, a six-sided case file folder is created and maintained for each charge filed and docketed. The case file contains all relevant evidence and information, correspondence, intra-office and OGC memoranda, and other documents discovered, submitted and developed from any source during the processing of the case to disposition in accordance with [Part 3, Chapters C](#) and [D](#) concerning Quality Standards for Investigations and the Scope of Investigations.

### 2. TYPES OF DOCUMENTS OR MATERIALS IN THE CASE FILE:

The minimum requirements for a case file are that it contain all relevant evidence and information discovered or submitted during the course of the investigation. See [Part 3, Chapter C](#), which discusses Quality Standards for investigations. These documents include:

a. *A case log:*

A case log reflects the manner in which the case was processed, which includes the occurrence of each substantive discussion between

anyone in the Region and any of the parties, their representatives or their witnesses about the merits of the case or the manner in which the case is being processed. The case log lists, in chronological order (most recent entry on top (first)):

- Dates of all substantive contacts;
- Names of each person contacted;
- Either a brief description of each case-processing matter discussed or a reference to a separate file memorandum; and



*Discussion of case-processing matters is **not** evidence. Evidence is contained in other sections of the case file.*

- Notations on any case processing decisions made by the Region during the processing and reviewing of the case. For example, determinations concerning the appropriateness of injunctive relief and decisions concerning the type and scope of the investigation pursuant to the [Part 3, Chapters C](#) and [D](#) concerning the Quality Standards and Scope of ULP Investigations.

Evidence or background information bearing on the merits of the case does **not** appear in the case log but is documented elsewhere in the file.

b. *Affidavits or confirming letters:*

In cases which do not proceed solely on documentary evidence, the Agent secures either: (a) a signed and sworn affidavit (or, if appropriate, a signed and sworn questionnaire) from the lead witness in the case; or (b) a letter to the lead witness which confirms all relevant details of the Agent's interview. If the file does not contain a signed and sworn affidavit or questionnaire from the lead witness when one is indicated, it must contain an explanation of the Region's decision not to require that evidence. The file also discloses what steps the Region has taken to obtain evidence or information from the parties.

c. *Written pre-decisional report:*

Except in cases where disposition (usually on technical grounds) is unmistakable, the case file contains a written pre-decisional report and recommendation by the investigating Agent and/or a written post-decisional report. See [Part 4, Chapter D](#), which discusses the requirements of an FIR.

d. *Agenda Minute:*

The file contains an agenda minute or other statement of the RD's reasons for not issuing a complaint on any portion of a charge whenever the RD's decision differs from the Agent's pre-decisional recommendation, unless the reasons for the RD's decision are fully stated in the dismissal letter. Similarly, whenever the RD decides to issue a complaint on any portion of a charge for reasons different from those in the agent's recommendation, the case file contains an explanation of that decision. See [Part 4, Chapter D](#) for a discussion of an Agenda Minute.

e. *Notes to the file explaining case processing decisions:*

The Agent ensures that the case file contains notes to the file to explain the reasons why a case has been processed in a certain manner. For example, whether an Agent solicited withdrawal prior to a RD determination on the merits and the results of that solicitation; whether injunctive relief was considered; how the file was reviewed to ensure that the quality standards are met; and whether the scope of the investigation was limited.

f. *Memos to the file:*

Memos to the file to reflect conversations which resulted in background information, but not evidence to be relied upon in deciding the merits of the charge, are also contained in the case file.



*Agents may communicate with the parties via e-mail concerning procedural case processing matters, e.g., requesting a party to contact the Agent due to unsuccessful attempts to contact the party telephonically; requesting documents; confirming site visits. The record contains copies of these communications with certifications of their delivery.*

*Documents described under subsections a, b, c, d, e, and f are not subject to disclosure under the Freedom of Information Act as they are exempt from disclosure under Exemption 5. See 5 U.S.C. § 552(b)(5). They come within 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). Documents described under subsection b also are subject to the confidentiality requirements set forth at § 2423.8(d) and, if applicable, the FOIA disclosure exemptions set forth at Exemption 7 concerning records or information compiled for law enforcement purposes. See 5 U.S.C. § 552(b)(7).*

g. *Legal research:*

Any legal research performed in the case is put in the case file.



*In addition to the minimum requirements listed above, the Regions may develop and include in their case files any other internal documents which they consider material to the disposition of the case and consistent with the Quality Standards for Investigations in [Part 3, Chapter C](#).*

### 3. ORGANIZATION OF THE CASE FILE:

a. *Benefits of uniform case file organization:*

- Easy retrieval, identification and use of all file documents;
- Facilitates review, both in the Region and at OGC Headquarters, of cases appealed; and
- Facilitates process of transferring cases between Regions.

b.  *Contents of each side of case file:*

• **SIDE 1: OFFICIAL DOCUMENTS/CORRESPONDENCE**

- Charge/Statement of Service
- Amended Charge/Statement of Service
- Designation of Representative

- Opening Letter to Parties
- Party/Designated Representative Information Sheet
- Withdrawal Request Approval Form
- Dismissal letter/revocation of dismissal letter
- Complaint and Notice of Hearing, Memorandum Upon Issuance of Complaint
- Request for Settlement Judge
- Respondent's Answer
- Settlement Agreement, Notice To Employee/Members, Related Correspondence
- Formal Papers
- Prehearing disclosure filings, documents and Orders; Order and notice of time for prehearing conference call
- Subpoena requests, Subpoenas
- ALJ/FLRA decision of the case
- Compliance correspondence/documents
- Joint letters to Charging and Charged Parties



*Regions differentiate between documents supplied with the charge as supporting evidence and documents attached and incorporated by reference in the body of the charge. If a document is specifically referenced in the charge and therefore may be a part of the formal papers prepared for litigation, it remains with the charge in the file and, if desired, copied for placement in the Charging Party Evidence (side 5) section of the case file. All other documents are placed in the Charging Party Evidence section of the case file.*

*If an Agent takes materials out of the formal case file at any time, copy the material, and return the original to the formal case file. The formal case file is always complete and contains the required documents.*

- **SIDE 2: INTER/INTRA-REGIONAL/OGC DOCUMENTS**
  - Chronology log, Case file summary, telephone log
  - Initial Charged Party contact form
  - Intra-office memoranda/memos to the file
  - Inter-office routing/assignment forms



- Pre-Post Agenda memoranda, FIR, managerial memoranda in reply
- Oracle data entry form
- RO quality checklists, forms
- Research
- Advice request, advice memo
- Appeal, comment on appeal, appeal determination



*If the identification of a document received from either the Charging or Charged Party is self-evident on its face, there is no need to further identify the document. If not self-evident throughout, the document is identified in the file. For example, if only a portion of an Agency manual, regulation, directive, etc., is contained in the file, the file includes the first page or otherwise identifies the regulation by its name, effective date, and authority. If the meaning of a document is self-evident on its face, there is no need to further explain how to read the document. If not self-evident on its face, the file explains how to read the document. For example, if time and attendance records or other similar documents are in the file and it is unclear how to read the document, the file contains an explanation of how to read the document.*

- **SIDE 3: CHARGED PARTY EVIDENCE, INFORMATION, AND CORRESPONDENCE**
  - Charged Party Statement of Position in response to charge
  - All documentary evidence supplied by the Charged Party and Charged Party witnesses
  - Agent correspondence to/from Charged Party/Charged Party witnesses/representative
- **SIDE 4: CHARGED PARTY WITNESS STATEMENTS**
  - Affidavits, confirming letters, interview notes of Charged Party witnesses
  - Completed Questionnaires supplied by Charged Party witnesses

- Affidavits from individuals whose testimony supports the Charged Party
  
- **SIDE 5: CHARGING PARTY EVIDENCE, INFORMATION, AND CORRESPONDENCE**
  - Agent correspondence to/from Charging Party/Charging Party witnesses/representative
  - Collective Bargaining Agreement and related provisions
  - Memoranda of Agreement
  - All documentary evidence supplied by the Charging Party and Charging Party witnesses
  
- **SIDE 6: CHARGING PARTY WITNESS STATEMENTS**
  - Affidavits, confirming letters, interview notes of Charging Party witnesses
  - Completed Questionnaires supplied by Charging Party witnesses
  - Affidavits from individuals whose testimony supports the Charging Party



*It is extremely helpful, although not required, that the contents of each side of the file be in chronological order (most recent document on top (first)).*




[Part 3, Chapter C](#) concerning Quality Standards for Investigations;  
[Part 3, Chapter D](#) concerning the Scope of Investigations; and  
[Part 4, Chapter D](#) concerning Regional Director Merit Determinations.

RESERVED

## D. REVIEWING THE CHARGE

**OVERVIEW:** Soon after a charge is docketed and either before or after it is assigned to an Agent, it is reviewed to determine whether the Charging Party addressed certain matters.

**OBJECTIVE:** To provide guidance concerning what types of general matters are reviewed after a charge is docketed.

1.  **GENERAL MATTERS THAT ARE REVIEWED IN EVERY CASE AFTER A CHARGE IS DOCKETED:**

- Jurisdiction;
- Sufficiency of the charge;
- Whether an ADR program is a possibility (See [Part 1, Chapter B](#) which describes ADR programs);
- Whether there are related cases--representation, negotiability, FSIP, DOL, MSPB, or other ULPs (See [Part 2, Chapters I, J, K, L](#) for a discussion of related case filings). If there are related charges in another Region, fax a copy and/or e-mail a notice of such to the appropriate region. Fax charge to all Regions if it is nationwide in nature. The Regions jointly coordinate (transfer cases, as necessary) where there are related charges or charges that are nationwide in nature. In coordinating the cases, the Regions need to ensure that the legal analysis applied in each Region is consistent (See [ATTACHMENT 2D1](#) for a Sample e-mail notice). See [Part 4, Chapter C](#) concerning matters submitted to the OGC for Advice;
- Whether the case involves novel issues to be submitted for advice;

- Whether the case fits injunction criteria (See [Part 2, Chapter E](#) describing such criteria);
- Whether proper charged party/ies are indicated;
- Whether the contract contains notification requirement (See [Part 1, Chapter A](#) for a discussion of contractual notification requirements);
- Certificate of service box is completed. Failure to sign does not affect the filing of the charge if, in fact, service was made. The RD serves a copy on all parties but is not responsible for such service. The Charging Party is still required to provide service; and
- Whether the stated allegation/s need clarification and, if so, whether clarification is accomplished by confirming letter or by amended charge with notice to charged party. See [Part 2, Chapter H](#) on Amending the Charge for a discussion on how this is accomplished.

## **2. TRANSFER OF CASE TO ANOTHER REGION:**

A transfer may take place if any of the following circumstances applies:

- There is another case/s that is/are related;
- Regional resources require consideration of transfer; or
- Parity concept (See [Part 5, Chapter D](#) for a discussion of parity) needs to be applied.

See also [Part 2, Chapter A](#) on Filing a Charge.

## **3. CONSIDERATION OF ADR PROGRAM OR ALTERNATIVE CASE PROCESSING PROCEDURE:**

When initially reviewing the charge, the Agent considers whether these factors, among others, are present in determining whether to

recommend to the RD at this stage of the investigation that ADR services be offered:

- The charge/s does not involve differing legal interpretations of the Statute;
- The charge/s, in essence, involves disputes between a particular Union representative and a particular Agency official that do not directly involve institutional rights;
- The charge/s involves ongoing disputes over section [7131\(d\)](#) official time and/or other contract benefits;
- The parties seldom meet and communicate in writing or by e-mail;
- The charge/s evidences a basic lack of understanding of the parties' respective rights and obligations under the Statute; and
- The charge/s involves a basic disagreement over a matter, such as the level of bargaining in a nationwide unit, which impacts the labor-management relationship on a consistent basis.

See [Part 1, Chapter B](#) and [Part 3, Chapter B](#), which describe ADR Programs and Alternative Case Processing Procedures and the protocol for making determinations as to which service, if any, will be offered.



[Part 1, Chapter B](#) concerning ADR Services;

[Part 2, Chapter A](#) concerning Filing a Charge;

[Part 2, Chapter H](#) concerning Amending the Charge;

[Part 2, Chapter I](#) concerning Processing Charges Related to FSIP Requests for Assistance;

[Part 2, Chapter J](#) concerning Processing Charges Related to Pending Negotiability Appeals;

[Part 2, Chapter K](#) concerning Processing Charges Related to a Pending Representation Petition;

[Part 2, Chapter L](#) concerning Processing Charges Related to a Pending MSPB, Special Counsel or DOL Case;

[Part 3, Chapter B](#) concerning Alternative Case Processing Procedure;

[Part 4, Chapter C](#) concerning Consultation, Advice and Clearance;  
and

[Part 5, Chapter D](#) concerning Parity.

## E. INJUNCTIONS

**OVERVIEW:** Section [7123\(d\)](#) of the Statute, and § [2423.10\(b\)](#) and (c) provide for the GC, with Authority approval, to seek appropriate temporary relief from an appropriate United States Federal District Court when specific conditions have been met.

**OBJECTIVE:** To provide guidance concerning the identification and processing of cases where appropriate temporary relief is warranted. The Chapter provides an overview of the statutory criteria as well as criteria and principles for ROs to apply in implementing the statutory criteria. The Chapter provides the ROs with a consistent approach in investigating and making recommendations in ULP cases where interim temporary relief is necessary to effectuate the purposes and policies of the Statute.

1.  **RO REVIEWS ALL CHARGES TO DETERMINE WHETHER TO SEEK TEMPORARY RELIEF:**

The Regions review all ULP charges to determine whether the purposes of the Statute will be frustrated if the status quo is not maintained while the ULP complaint is being processed. In those extraordinary circumstances where the status quo must be maintained, the GC requests Authority permission to seek appropriate temporary relief. The Regions fully inform all parties of the various steps involved in processing injunction cases and the parties are afforded the opportunity to resolve the dispute in accordance with [Part 4, Chapter G](#) concerning Settlements.

2. **SECTION [7123\(d\)](#) OF THE STATUTE:**

Section [7123\(d\)](#) of the Statute sets forth the criteria for a district court of the United States to grant appropriate temporary relief (including the right to grant temporary restraining orders) in ULP cases. A court must



conclude that granting such relief is "just and proper" before temporary relief can be granted. In addition, a court cannot grant any temporary relief "if it would interfere with the ability of the Agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed."

### 3. CASE LAW:

Cases where the GC successfully has petitioned district courts for temporary relief:

- A strike by a labor organization (United States v. PATCO, Inc., 524 F. Supp. 160 (D.D.C. 1981);
- A unilateral reorganization resulting in the involuntary transfer and relocation of bargaining unit employees from one state to another (Smith v. Federal Aviation Administration, Civil Action No. C83-1538 C (D. Wash. Nov. 23, 1983);
- The refusal to recognize and enter into collective bargaining negotiations with a newly certified exclusive representative (Reuben v. Federal Deposit Insurance Corporation, 760 F. Supp. 934 (D.D.C. 1991); and
- The unilateral elimination of on-base housing by a military activity where other suitable housing for civilian employees was not available (Petrucci v. United States Southern Command, Department of Defense, Republic of Panama and United States Army South, Republic of Panama, Civil Action No. 94-3786 (E.D. La. Nov. 29, 1994) (unpublished).

### 4. C+P FACTORS THAT DETERMINE WHETHER § 7123(d) INJUNCTIVE CRITERIA ARE MET:

- **SERIOUSNESS OF THE VIOLATION**

**Is the violation serious?**

Not all violations of the Statute are as serious as others. For example, a failure to accord recognition to a union after a valid representation

election is more serious than a failure to afford the union an opportunity to be represented at a routine formal discussion. Moreover, there are degrees of harm within the same category of ULPs. For example, a decision to move the office of one employee to a different floor at the same facility is quite different from a decision to close an entire facility and transfer 100 employees to another state. The RDs consider the seriousness of the violation in deciding whether to recommend that appropriate temporary relief be sought.

- **LEGAL PRECEDENT**

**Is the law clear regarding the violation alleged?**

Courts consider the likelihood of success on the merits in deciding whether to grant injunctive relief. Accordingly, the RDs take into account whether a case involves a violation supported by well-established precedent or if it poses a novel legal theory.

- **DISRUPTION TO THE ESSENTIAL FUNCTIONS OF THE AGENCY RESPONDENT**

**Would the granting of an injunction interfere with the ability of an Agency to fulfill an essential function?**

The Statute prohibits a court from granting injunctive relief if an injunction would prevent an Agency from carrying out its essential functions. The RDs, therefore, consider whether temporary relief would interfere with those essential functions.

- **TIMELINESS OF THE DISPUTE**

**Is the request timely in relationship to the underlying events?**

Courts often are concerned with the current status of a case before the Authority and may be reluctant to grant injunctive relief if the facts establish that the matter has not been processed expeditiously. Therefore, consideration is given to the timeliness of a determination to recommend temporary relief in relationship to when the violation took place as well as the time it has taken to investigate and process the case.

- **THE REMEDY**

**Will the failure to maintain the status quo frustrate the remedial purposes of the Statute?**

Absent appropriate temporary relief, certain violations cannot be remedied effectively after they have been implemented. For example, implementation of a major reorganization that results in the relocation of employees, forced resignations and retirements, or other types of dislocations ordinarily cannot be remedied effectively after implementation. Unless appropriate temporary relief is granted, it is difficult, if not impossible, to restore the status quo through the ULP process because of the passage of time. In other instances make whole and status quo remedies are available. The RDs consider whether the failure to maintain the status quo frustrates the remedial purposes of the Statute in deciding whether to recommend that appropriate temporary relief be sought.

- **HARM TO THE STATUTORY RIGHT TO ORGANIZE AND BE REPRESENTED**

**Does the violation undermine the fundamental right to organize and/or engage in collective bargaining?**

Certain violations of the Statute undermine the bargaining relationship. For example, a refusal to recognize and deal with the employees' exclusive representative after certification denies employees the benefits of representation until the matter is ultimately resolved. Similarly, targeting union officials for a reduction-in-force renders a union unable to carry out its statutory duties as the exclusive representative, undermines the status of the exclusive representative and chills bargaining unit employees in exercising their protected statutory rights. The RDs consider whether the violation undermines the fundamental right to organize and/or engage in collective bargaining when deciding whether to recommend that appropriate temporary relief be sought.

**5. IMPLEMENTATION:**

The following process is followed by the Regions to determine if a charge is a candidate for § [7123](#)(d) relief:

a. *Review all charges:*

Each Region initially reviews all ULP charges and evidence which supports the charge to consider whether the issues and the supporting evidence are of the type which indicate that the GC should consider requesting Authority permission to seek appropriate temporary relief.

In addition, a Charging Party may also request when filing a ULP charge, or during the processing of a charge, that the GC consider requesting Authority permission to seek appropriate temporary relief. [See § 2423.10](#)(b) . If requesting such relief, the Charging Party specifically must make its request in the body of the charge or in writing during the course of the investigation. All charges are reviewed by the Regions for the potential for seeking appropriate temporary relief in the same manner and under the same standards and time frames whether or not a Charging Party specifically requests appropriate temporary relief.

b. *Initial inquiry:*

In those cases where the charges and supporting evidence are of the type which indicate that the GC should consider requesting Authority permission to seek appropriate temporary relief, the Regions conduct an initial inquiry. All charges are reviewed by the Regions and receive similar treatment whether or not a Charging Party requests such relief. A Charging Party's request for appropriate temporary relief does not require the Region to conduct an initial inquiry into whether the charge warrants expedited treatment. Initial inquiries are made when the charge and supporting evidence are of the type which indicates that the GC should consider requesting Authority permission to seek appropriate temporary relief. There is no appeal to the GC or the Authority from an RD's determination not to conduct an initial inquiry.

The Regions document the file on those cases where the Region determines to conduct an initial inquiry. The purpose of the initial inquiry is to determine whether an expedited investigation is warranted to determine the merits of the charge and whether the Region recommends to the GC that temporary relief is appropriate under the

standards in § 7123(d) of the Statute. The purpose and scope of the initial inquiry is clearly discussed by the Region with the Charging Party. The Regions decide whether to expedite an investigation by examining the evidence obtained during the initial inquiry to determine whether there appears to be probable cause that a ULP has occurred, or is continuing to occur, and by applying the six criteria set forth in #4, above, to determine whether it appears that appropriate temporary relief should be sought. All discussions with the parties concerning the initial inquiry are documented in the file.

In deciding whether to expedite investigation of a charge, the Regions require probative evidence to support the allegations of the ULP, as well as the reasons why the Charging Party contends that appropriate temporary relief is just and proper. The Regions have discretion to determine the extent of the initial inquiry and the evidence and other documentation required for the Region to determine whether an expedited investigation is warranted.

## 6. EXPEDITED INVESTIGATION:

### a. *Notification of regional determination on expedited investigation:*

If the Region determines that the initial inquiry does not support an expedited investigation, the file is documented and the case is processed in the same manner as other cases that did not involve the potential for appropriate temporary relief. If a Charging Party had specifically requested appropriate temporary relief and the Region decides not to expedite the investigation, the Region: (a) notifies the Charging Party that the investigation will not be expedited; (b) explains the basis of that decision and that there is no appeal of this determination; (c) informs the Charging Party that the charge will be fully investigated as soon as practicable; and (d) documents the file. There is no appeal to the GC or the Authority of the Region's decision not to expedite an investigation. If the Charged Party was involved in the initial inquiry, the Region also notifies the Charged Party that there will be no expedited investigation and documents the file.

If the Region decides that an expedited investigation is warranted, the Region initially notifies the parties that they are to be prepared for an

expedited investigation, the potential for § [7123](#)(d) relief and documents the file.

b. *The parties' responsibilities in an expedited investigation:*

### **Charging Party's responsibilities**

The Charging Party must be prepared to commence immediately the investigation as soon as the Region advises the Charging Party that it is undertaking an expedited investigation because of the potential for temporary relief. The Charging Party must be prepared to provide the Region with all requested documents and to insure, to the best of the Charging Party's ability, that witnesses are identified by name, telephone number, and work hours and are available for an expeditious investigation. Similarly, the Charging Party must be prepared to present its documented and testimonial evidence to the Region to support the merits of the charge. Use of the fax machine and e-mail may help expedite the investigation.

If an investigation is expedited, the Charging Party must be prepared to present all relevant evidence pertaining to the merits of the charge. The Charging Party also must be prepared to address the six criteria discussed in this Policy (see section 4 above) which the Region evaluates to determine whether appropriate temporary relief should be pursued.

In all cases, during the expedited investigation, a Charging Party must be prepared to present evidence:

- Supporting all elements of the alleged ULP;
- Supporting a determination that immediacy in stopping the alleged unlawful event is imperative since a final order of the Authority would be rendered meaningless or ineffectual by the passage of time that is normally required for the processing of a case through the administrative procedure;

- Establishing why a subsequent remedy as a result of the prosecution of the ULP case would not satisfactorily remedy the violation;
- Establishing how the alleged violative act might undermine the purposes and policies of the Statute, e.g., the effect of the violation on an exclusive representative or Agency institutional right or the effect of the violation on individual employee rights.
- Establishing the impact, if any, on unit employees of the alleged violative act/s, e.g., loss of benefits, relocation, termination and/or reduction-in-force) and the number of employees affected;
- Concerning whether the essential functions of an Agency Charged Party would be interfered with by the granting of temporary relief.

### **Charged Party responsibilities**

Similarly, a Charged Party must be prepared to cooperate in the expedited investigation and present its evidence and argument pertaining to the merits of the charge and the appropriateness of temporary relief. An expedited investigation is not delayed due to a Charged Party's delay in presenting evidence and argument.

c. *Agent conducts expedited investigation:*

Once the decision has been made to expedite the investigation of a charge, the Agent conducts, where possible, an on-site investigation of the charge. If a telephonic investigation is undertaken, affidavits are returned by fax. The investigation is completed within the shortest time period possible.

Affidavits are obtained as part of an investigation. The affidavit is appropriate for submission to a Federal district court; it is typed and addresses the proof elements of the violation and the criteria in § [7123](#) of the Statute. Specifically, the affidavit addresses the elements of the alleged ULP(s) to show "probable cause" that a violation has occurred

or is occurring and to establish the nature of the harm to the remedial purposes of the Statute. See [Part 3, Chapter H](#) on Affidavits.

The RD determines whether to recommend to the GC that temporary relief be sought based on the six criteria in this Policy.

**7. RD DETERMINATION ON THE MERITS OF THE CHARGE AND THE APPROPRIATENESS OF TEMPORARY RELIEF:**

Once the investigation has been completed, the RD makes a determination on the merits of the ULP and on whether to recommend to the GC that temporary relief should be sought.

- If the determination is made that the charge has no merit, the decision is explained to the Charging Party, withdrawal of the charge is solicited, and absent withdrawal, a dismissal letter is issued to both parties.
- If a determination is made that the charge has merit but that temporary relief is not appropriate, the Region informs the parties of the basis of the decision and continues processing the charge.
- If a determination is made that the charge has merit and that the seeking of appropriate temporary relief is being recommended to the GC, the parties are informed: (a) of the basis of the decision on the merits; (b) that the case will be submitted to the GC; and (c) of the process that will be followed.

There is no appeal to the GC or the Authority from the RD's determination whether or not to recommend the seeking of temporary relief. The parties are encouraged to settle the case. The Region emphasizes that it is preferable to resolve all aspects of the case, both the injunction action and the underlying merits of the charge.

**8. PROCESSING OF REQUEST FOR TEMPORARY RELIEF - OGC:**



a. *Submission of the Request for Appropriate Temporary Relief to the OGC:*

The Region orally submits its recommendation to the OGC HQ and also forwards a Memorandum and draft complaint to OGC HQ. The Region also forwards documentation concerning the case that will be submitted to the Authority if the GC decides to seek Authority permission to seek § 7123(d) relief.

i. Oral recommendation:

If the RD decides that a request for a TRO is warranted, immediately after such decision is made, the OGC HQ is notified by e-mail, telephone or fax.

ii. Memorandum and draft complaint:

The Region transmits a memorandum in support of the requested temporary relief to the OGC HQ by e-mail or fax. The following outline is used for each memorandum:

The first section of legal memorandum analyzes the § 7123(d) elements, concludes that there is probable cause that a ULP is being/has been committed, and discusses as applicable:

- The Statute;
- Authority precedent;
- Judicial decisions reviewing Authority actions or determinations;
- Law of other administrative agencies, e.g., NLRB, MSPB, OSC;
- Judicial decisions reviewing other agency actions or determinations;

- Facts and legal theories that would support a violation; and
- Arguments responding to anticipated arguments that respondent will make in opposition to the claim that there is probable cause to believe that a ULP is being committed.

The second section of memorandum concludes that temporary relief would not interfere with the Agency's ability to carry out its essential functions and discusses:

- The Agency functions that will be affected by the temporary relief sought; and
- Arguments responding to anticipated arguments that respondent will make in opposition to the claim that the temporary relief will not interfere with Agency's ability to carry out its essential functions.

The third section of memorandum concludes that temporary relief is just and proper and analyzes and discusses:

- Traditional equitable criteria:
  - The likelihood of success on the merits;
  - The irreparable harm if relief is not granted;
  - The extent that the balance of hardships favors the respective parties; and
  - Whether and how the public interest will be advanced by granting preliminary relief.
- Other applicable criteria establishing that temporary relief is just and proper;
- The FLRA's and NLRB's experience (in cases arising under 29 U.S.C. § 10(j)) in seeking temporary relief in analogous cases, particularly cases arising in the

jurisdiction of the U.S. Circuit Court where this case arose; and

- Arguments anticipated that respondent will make in opposition to the claim that temporary relief is just and proper.
- iii. Documentation concerning the case to be submitted to the Authority
  - Charge/s filed by the Charging Party;
  - Complaint/s issued including any attachments; and
  - Any written submissions of the respondent in response to the charge, complaint, or attempt by the GC to seek temporary relief.
- b. *If the GC decides that temporary relief should not be sought:*
  - i. The GC advises the Region to contact the parties and inform them of the basis for this decision.
  - ii. The GC's decision not to seek approval from the Authority for such temporary relief is final and may not be appealed to the Authority. See § 2423.10(b).
- c. *If the GC decides to forward the Region's request to the Authority:*
  - i. The OGC instructs the Region to issue complaint and to seek the earliest possible hearing date on the ULP complaint. The parties are notified that the Region is issuing a complaint and that the GC is requesting Authority permission to seek immediate relief.
  - ii. Settlement is discussed thoroughly with each party since seeking injunctive relief is often a catalyst for resolution of disputes. Any settlement sought comports with the GC's Settlement Policy and serves the interests of the parties and the purposes and

policies of the Statute. The RO strives to settle the underlying ULP case in its entirety to avoid the need for seeking temporary relief and litigating the case.

**9. THE AUTHORITY’S ACTION ON THE GC’S REQUEST:**

a. *Authority denial of request:*

If the Authority denies the GC’s request, the RO orally notifies the parties of the denial of the request, that this decision cannot be appealed, and that the case will be tried, absent settlement, as soon as practical.

b. *Authority approval of request:*

If the Authority approves the GC’s request, the OGC notifies the Region processing the case, and all other ROs. Further, the OGC informs the national level of the Charged Party of the intent to seek temporary relief and urges officials at that level to assist in settling the case.

**10. SEEKING TEMPORARY RELIEF IN DISTRICT COURT:**

The Region telephonically informs the parties of its intent to file for injunctive relief. This notice is confirmed in writing to the counsel of record for the Respondent. Settlement is vigorously pursued while the preparation of the pleadings continues.

The Region files the appropriate papers in person in the Federal district court having jurisdiction over the matter as soon as possible after the Authority’s authorization. See Section [2423.10\(c\)](#) .

**11. LITIGATION OF THE ULP COMPLAINT AFTER APPROPRIATE TEMPORARY RELIEF HAS BEEN OBTAINED:**

Whenever appropriate temporary relief has been obtained, the Region continues to try to settle the ULP complaint and the injunction action. If subsequent to obtaining appropriate temporary relief an ALJ recommends that the complaint be dismissed, in whole or in part, the Region informs the Federal district court which granted the temporary relief of the possible change in circumstances arising out of the decision of the ALJ.



[Part 3, Chapter H](#) concerning Affidavits Taken in Person; and  
[Part 4, Chapter G](#) concerning Settlements.

RESERVED

## F. ASSIGNING THE CASE

**OVERVIEW:** Either before or after the initial review of the charge has been completed, the case is assigned to an Agent for investigation.

**OBJECTIVE:** To provide criteria and principles to be applied when assigning cases and to give examples of the way in which cases are assigned in the Regions.

### 1. **C+P** FACTORS CONSIDERED IN THE ASSIGNMENT OF CASES:

- Make efficient use of travel and human resources;
- Maximize customer service;
- Maintain a balance in employee caseload based on case types, complexity, and travel;
- Enhance employee effectiveness (may be enhanced by giving employees input in the types and locations of cases; consideration of employees' leave plans and other assignments);
- Assign, investigate, and dispose of cases expeditiously; and
- Minimize the need to reassign cases.

### 2. **EXAMPLES OF PRACTICES IN THE ASSIGNMENT OF CASES:**

- RD/RA/DRD assigns charges to a team leader who assigns them to team members based on certain factors identified above, e.g., caseload, geographical location, complexity of case and experience level of employee, and status of current cases;
- RD/RA/DRD assigns charges to all agents/attorneys;

**The Charge  
Assigning the Case**

- RD/RA/DRD assigns charges to teams based on above factors;
- RD/RA/DRD assigns cases to new employees and remaining employees select cases; and
- RD/RA/DRD assigns cases requiring expedited treatment, e.g., a TRO request.



## G. AGENT'S INITIAL WRITTEN OR ORAL CONTACT WITH THE PARTIES

**OVERVIEW:** After the case is assigned to an Agent, s/he reviews the file and contacts the parties' representatives by letter or by telephone. This occurs after the RO has sent the opening letter to the parties. This begins the investigatory process and is the first opportunity that the Agent has to begin to build a relationship of trust with the parties and to lay the foundation for the Agent's control and conduct of a timely investigation.

**OBJECTIVE:** To provide a list of matters that an Agent considers addressing in the first written or oral communication with the parties.

1.  **AFTER RECEIPT OF A CASE FILE, THE AGENT DRAFTS A LETTER OR TELEPHONES THE PARTIES' REPRESENTATIVES:**

The Agent contacts the Charging and Charged Party representatives identified by the Charging Party on the charge form, except where a party has put the Region on notice that another individual is to be contacted as the representative. In this situation, the Agent contacts the person previously designated who is not the individual identified on the charge form. The Agent discusses, as necessary, the following matters:

- Introduction of Agent including the Agent's e-mail, telephone number and office fax number;



*Agents may inquire if a party has an e-mail address and if so, whether the Agent may communicate at times with the party by e-mail. All e-mail communications with parties are sent certified and the record contains evidence of certification of delivery.*

**The Charge**  
**Agent's Initial Written or Oral Contact with the Parties**


- Discussion of ULP process, e.g., clarify the OGC's and the party's expectations for the investigation, and scheduling of investigation, as necessary;
- A request that certain documents be sent to the Region, e.g., collective bargaining agreement;
- A request that certain documents and other information be made available when on-site for the investigation;
- A request that the Charging Party prepare a witness list with a short description of what information the particular witness will provide;
- Send questionnaire, as appropriate to case, e.g., information case) to be filled out, signed, and returned by a date certain;
- Clarify the issues to assure that the charge represents the intent of the Charging Party. This can be accomplished by confirming letter or by the filing of an amended charge (See [Part 2, Chapter H](#) on amending the charge (be careful about timeliness issue as it relates to amended charges in particular)), in an affidavit, or, as appropriate, in a conference call with both parties followed up by a confirming letter;
- Ascertain whether there are any statutory bars to the charge;
- Express expectation of cooperation by informing:


**Charging Party** of its obligation to provide evidence and to participate fully in the investigation; and

**Charged Party** of the expectation of cooperation and encouraging cooperation during the investigation, e.g., affidavits of Charged Party witnesses, Statement of Position;

- Optional reference in the letter to "Elements of the Violation" ([ATTACHMENT 2G1](#)) to educate the parties on the burdens of proof to establish and rebut prima facie cases; and
- Optional reference to the ADR tip sheet ([ATTACHMENT 2G2](#)).

See [ATTACHMENT 3A1](#) for practical pointers on dealing with the parties, case processing techniques, and general guidance on how to use the computer to organize case files

 *To meet the quality element concerning the timely processing of charges, initial mailing needs to be accomplished expeditiously. See [Part 3, Chapter C](#) on Quality Standards for Investigations.*

 *The Agent uses his/her professional judgment concerning whether the initial telephone contact should be confirmed by a letter. At a minimum, the Agent documents the conversation in the case file log.*

## **2. CONSIDERATION OF ADR PROGRAM OR ALTERNATIVE CASE PROCESSING PROCEDURE:**

At any stage of the investigation, including the early stage when the parties are contacted by telephone or by letter for the first time, the Agent considers whether the case may be an appropriate candidate for the ADR Program ([Part 1, Chapter B](#)) or Alternative Case Processing Procedure ([Part 3, Chapter B](#)). If appropriate, upon review of case file and after discussion with RD/RA/mentor, as is necessary, the Agent may discuss option of using as ADR Program or Alternative Case Processing Procedure. If both parties so request, the RD applies the specified criteria and, if appropriate, assists the parties in improving their relationship.



[Part 1, Chapter B](#) concerning ADR Services;

[Part 2, Chapter H](#) concerning Amending the Charge;

[Part 3, Chapter B](#) concerning Alternative Case Processing Procedure; and

[Part 3, Chapter C](#) concerning Quality Standards for Investigations.

**The Charge  
Agent's Initial Written or Oral Contact with the Parties**

RESERVED

## H. AMENDING THE CHARGE

**OVERVIEW:** After a charge is filed, the Charging Party may determine on its own that it is necessary to amend the charge or, upon review, the Agent may determine that it is necessary to clarify or correct the original charge. A charge may be amended at any time before issuance of a complaint but care is taken to do so in a timely manner. See § [2423.9](#).

**OBJECTIVE:** To provide guidance concerning the process of amending a charge and a list of issues and considerations that may arise when a charge is amended.

### 1. EXAMPLES OF SITUATIONS REQUIRING THAT A CHARGE BE AMENDED:

a. *To add an additional allegation:*

For example, during an investigation where the Charging Party alleges a violation of § [7116](#)(a)(1), (5) and (8) of the Statute based on the Agency's failure to provide information, it is disclosed that a supervisor stated something to the effect that the Union representative would not get the information requested because the Union representative spends too much time making requests for information and too little time doing the work that he was hired to do. In this case, the Agent has the Charging Party amend the charge to include an independent violation of § [7116](#)(a)(1) of the Statute, based on the interference with the person's right to engage in protected activity.

b. *To correct a typographical error in the dates the alleged violation occurred:*

See U.S. Penitentiary, Florence, Colorado, 53 FLRA No. 124, 53 FLRA 1393, 1402 (1998).

- c. *To ensure that the proper parties are charged: interference above the level of exclusive recognition:*

An Agency's higher-level management is charged when it has directed or required management at a subordinate level of exclusive recognition to act in a manner that is inconsistent with the subordinate level's bargaining obligations under § [7116\(a\)\(1\)](#) and (5) of the Statute.

See, e.g., U.S. Department of the Interior, Bureau of Reclamation, Washington, D.C., 46 FLRA No. 2, 46 FLRA 9, 29 (1992), enforcement denied on other grounds sub nom. United States Department of Interior, Bureau of Reclamation v. FLRA, 23 F.3d 518 (D.C. Cir. 1994) (citing Department of the Interior, Water and Power Resources Service, Grand Coulee Project, Grand Coulee, Washington, 9 FLRA No. 46, 9 FLRA 385, 388 (1982) (level of management where exclusive recognition lies is not found to have violated § [7116\(a\)\(1\)](#) and (5) where it has no choice but to ministerially follow the dictates of the Department); and

Headquarters, National Aeronautics and Space Administration, Washington, D.C., 50 FLRA No. 82, 50 FLRA 601, 620-22 (1995) (finding of violation against Headquarters where it is responsible for actions which affect one of its subcomponents), enforced sub nom. FLRA v. National Aeronautics and Space Administration, Washington, D.C., 120 F.3d 1208 (11th Cir. 1997), affirmed sub nom. National Aeronautics and Space Administration v. FLRA, 119 S. Ct. 1979 (1999).

## 2. TIME CONSIDERATIONS UNDER § [7118\(a\)\(4\)\(A\)](#) OF THE STATUTE:

Do not obtain an amended charge alleging violative conduct occurring more than six months prior to the date of the amended charge. If the amended charge does not also include conduct encompassed by the original charge, a complaint based on allegations in the amended charge may be found untimely. Amended charges that are closely related to events or matters complained of in the charge and are based on events occurring within the six-month period preceding the charge are not barred by § [7118\(a\)\(4\)\(A\)](#) of the Statute. United States

Department of Veterans Affairs, Washington, D.C., Veterans Administration Medical Center, Amarillo, Texas, 42 FLRA No. 27, 42 FLRA 333, 340 (1991), rev'd on other grounds sub nom. U.S. Department of Veterans Affairs, Washington, D.C. v. FLRA, 1 F.3d 19 (D.C. Cir. 1993); and NRC, 44 FLRA at 379-80 (1992) (participation in the operation of a union (original charge) and an attempt to oust the union (amended charge) are two separate and distinct activities and therefore amended charge allegations were not encompassed within timely filed original charge).

### 3. WHAT IS REQUIRED TO AMEND A CHARGE:

a. *Amended FLRA Form 22 or 23:*

An amended FLRA Form 22 or FLRA Form 23 with a designation on the face of the form "FIRST AMENDED" or "SECOND AMENDED" before the word "charge." The amended charge contains the charge as amended in its entirety, including amendments. See [ATTACHMENT 2H1](#) for a Sample Letter and Amended Charge Form to be signed and returned.

b. *Mechanisms to withdraw specific allegations:*

A Charging Party who wishes to withdraw allegations in the charge may do so by:

- Filing an amended charge; or
- By a written statement; or
- The Agent may prepare a confirming letter of a telephone conversation with the Charging Party during which the Charging Party expressed the desire to withdraw certain allegations.

### 4. SERVICE REQUIREMENTS:

The service requirements discussed in [Part 2, Chapter A](#) regarding original charges also apply to amended charges. No matter which method described above is used to amend a charge, the Charging Party is required to serve the Charged Party with the amended charge.

**5. RO EMPLOYEES ARE AVAILABLE AT ALL TIMES TO ASSIST THE CHARGING PARTY IN AMENDING A CHARGE:**

See [Part 1, Chapter A](#) concerning Pre-Charge Assistance.

**6. CHARGED PARTY OPPORTUNITY TO RESPOND TO AMENDED CHARGE:**

The Region gives a Charged Party the opportunity to respond to an amended charge if the amendment is something other than a technical amendment, e.g., removing theories and not changing or adding a collateral theory. During the time in which the Charged Party is given an opportunity to respond, the Region takes no action on the amended charge. The Charged Party's representative is asked to submit any evidence, argument, or statement of position, that has not already been provided, within 5 days of the receipt of the amended charge. The amendment may be sent by fax to the Charged Party.



[Part 1, Chapter A](#) concerning Pre-Charge Assistance; and

[Part 2, Chapter A](#) concerning Filing a Charge.



## I. PROCESSING CHARGES RELATED TO FSIP REQUESTS FOR ASSISTANCE

**OVERVIEW:** Occasionally, where a Union and an Agency have reached an impasse in negotiations, a Union files a ULP charge and a request for assistance from FSIP under Part 2471 of the Regulations.

**OBJECTIVE:** To provide guidance to ROs on how to proceed when a Union has filed both a ULP charge and a request for assistance from FSIP.

### WHEN THE UNDERLYING ALLEGATIONS OF A ULP CHARGE CONCERN A NEGOTIATION IMPASSE:

- The RO checks Charge Form 22 to determine if the Union has also filed a request for FSIP's assistance (See § 2423.4(a)(6)(ii));
- If so, the RO contacts the OGC Headquarters with case-identifying information;
- The RO does **not** defer investigation of the ULP charge or any attempts at resolving the ULP charge;
- The RO processes the ULP charge up to an RD decision;
- The RD takes dispositive action If the charge is **non-meritorious**; and
- The RD **does not** take dispositive action if the charge is **meritorious**--the RD notifies OGC Headquarters.

**The Charge  
Processing Charges Related to  
FSIP Requests for Assistance**

RESERVED

## J. PROCESSING CHARGES RELATED TO PENDING NEGOTIABILITY APPEALS

**OVERVIEW:** Occasionally, a Union files a ULP charge when the underlying allegation is also the subject of a negotiability petition that the Union has filed with the Authority.

**OBJECTIVE:** To describe the processing of a ULP charge when there is a pending negotiability appeal concerning the same underlying negotiability dispute.

### 1. CHECK THE CHARGE FORM 22:

When a Union files a ULP charge which involves a negotiability issue, the RO checks to determine whether the Union has also filed a negotiability petition for review of the same negotiability issue with the Authority. See § [2423.4\(a\)\(6\)\(iii\)](#). Check the Charge Form to determine whether the Union has checked “yes” in box 7 indicating that the matter has been raised before the Authority.

### 2. NOTIFY OGC HEADQUARTERS:

Notify and discuss how the negotiability case impacts on the issues raised by the allegations underlying the ULP charge.

**The Charge  
Processing Charges Related to  
Negotiability Appeals**

RESERVED

## **K. PROCESSING CHARGES RELATED TO A PENDING REPRESENTATION PETITION**

**OVERVIEW:** Occasionally, a Charging Party files a charge that is related to a representation petition that has already been filed. Absent the filing of a request to proceed, an election is not held when a ULP charge is filed by a party to a representation case and is based on conduct which would have a tendency to interfere with the free choice of the employees in the election. See RCHM, Chapter 60 concerning concurrent representation and ULP cases, for additional discussion.

**OBJECTIVE:** To provide guidance concerning the processing of a ULP charge that relates to a pending representation petition or that contains a representation issue in it.

### **1. PRIORITY GIVEN TO ULP CHARGES THAT “BLOCK” REPRESENTATION PETITIONS:**

Because the speedy resolution of representation questions is of the utmost importance, a ULP charge that blocks a representation election petition is given the highest priority by the ROs in the investigatory phase of the case.

### **2. NON-MERIT DETERMINATION OF THE ULP CHARGE “UNBLOCKS” A REPRESENTATION CASE:**

Disposition of a charge does not serve to “unblock” the representation proceeding until either: (1) the appeal period expires and no appeal is filed, or (2) if an appeal is filed, and the GC denies the appeal. If the GC remands the case to the RD, the representation case continues to be blocked.

**3. DEFER PROCESSING ULP CHARGE UNTIL RESOLUTION OF PENDING REPRESENTATION CASE:**

Where a ULP charge (that is not “blocking” an election) is so related to an unresolved representation matter that the processing of the representation case will resolve significant issues, the RD makes a determination to defer processing of the ULP charge.

For example, a pending ULP charge with a threshold issue of **unit eligibility** may be deferred pending a petition that seeks clarification of the unit status of the employee/s who are the subject of the ULP charge. By informing the parties of deferral of the charge, the Region retains jurisdiction while resolving the question concerning the unit employee/s’ bargaining unit status. See [ATTACHMENT 2K1](#) for a Sample Letter Deferring ULP Charge.

**4. RO RECEIPT OF ULP CHARGE THAT RAISES REPRESENTATION ISSUE:**

- RO encourages and solicits representation petitions whenever it receives ULP charges that raise a representation matter; and
- If a representation petition is then filed, the RO defers processing the ULP case (if it is not “blocking” an election) during the pendency of the representation case.
- Once the representation issue is resolved, the RD processes the merits of the ULP charge.



*In certain cases, it may be necessary to obtain additional evidence if there are other issues besides whether an employee is in the unit.*

## L. PROCESSING CHARGES RELATED TO A PENDING MSPB, SPECIAL COUNSEL OR DOL CASE

**OVERVIEW:** Occasionally, a Charging Party files a charge that is related to a pending MSPB, Special Counsel or DOL case.

**OBJECTIVE:** To provide guidance concerning how a ULP that relates to a pending MSPB, Special Counsel or DOL case is processed.

### 1. EXPEDITIOUS IDENTIFICATION AND DISPOSITION OF ULP CHARGES THAT RELATE TO CASES BEFORE ANOTHER ADJUDICATORY FORUM:

a. *Charging Party identifies pending related charge:*

A Charging Party may indicate that the issue raised in the charge is also pending in another forum (e.g., by checking the appropriate box of the charge form). See § [2423.4\(a\)\(6\)\(ii\)](#). In this situation, the Agent, in the initial contact with the Charging Party, ascertains the specific details underlying the charge and the matter that is pending in the other administrative forum, including the case identifying number, if any. This may also become apparent after the investigation has begun, e.g., the Charged Party's Statement of Position mentions that matter is pending in another forum.

b. *RD's options:*

i. FLRA clearly lacks jurisdiction:

Absent withdrawal, the RD dismisses a charge if it is determined that it concerns an issue over which some other forum has jurisdiction. For example, ULP charges concerning internal Union matters and which raise issues with respect to noncompliance with § [7120](#) of the Statute are dismissed for lack of jurisdiction. They are appropriately resolved through the procedures established by the DOL pursuant to § [7120](#).

**The Charge  
Processing Charges Relating to a  
Pending MSPB, Special Counsel or DOL Case**

See American Federation of Government Employees, Local 2419, 53 FLRA No. 69, 53 FLRA 835, 841-42 (1997). See Part 3, Chapter D concerning the Scope of Investigations for additional discussion.

ii. FLRA has jurisdiction:

If ULP charge is related to, **but clearly distinguishable from**, an issue which would be within the DOL's jurisdiction under § 7120, the Region proceeds to process the charge.

iii. May defer charge:

If the charge concerns an issue that the Region believes may necessitate deferral of the charge pending resolution of a related issue in another forum, the RD **submits to OGC HQ for advice**.

iv. Undecided whether FLRA has jurisdiction:

If the Region is undecided about whether the FLRA has jurisdiction, the RD **submits to OGC HQ for advice**.

**2. LIAISON WITH MSPB, SPECIAL COUNSEL AND DOL:**

Each Region establishes a liaison or contact person with the MSPB, Special Counsel and DOL within the RO's jurisdiction to:

- Communicate that the FLRA has a case related to one pending at the other Agency;
- Request that any documents that are related to the case and are releaseable to the public be sent to the RO; and
- Provide update to the other Agency when the RD has taken final dispositive action.

**3. REQUEST FOR INFORMATION FROM CASE FILE:**

All requests for information from open case files are referred to OGC HQ before releasing information.