

# **PART 3**

## **THE INVESTIGATION**

## A. PREPARATION FOR INVESTIGATION

**OVERVIEW:** Before beginning an investigation, each Agent's preparation is consistent with OGC policies.

**OBJECTIVE:** To provide guidance to the Agent on matters s/he considers in the initial stages of preparing to investigate a ULP.

### 1. THE AGENT COMPLIES WITH OGC POLICIES IN DEVELOPING INVESTIGATIVE PLAN:



An Agent always has an investigative plan that is consistent with the following OGC policies:

- Quality of investigations - sets forth a general framework to guide Agents in determining investigative methodology ([See Part 3, Chapter C](#));
- Scope of investigations - provides guidance on reviewing the charge and initial contacts to determine the extent of investigation required to permit RD to make a determination on the merits ([See Part 3, Chapter D](#));
- Injunction - requires an initial review of charges to determine if the criteria for processing under the Injunction Policy are met ([See Part 2, Chapter E](#));
- Settlement - outlines appropriate activities Agents can engage in while preparing for an investigation ([See Part 4, Chapter G](#)); and
- Prosecutorial discretion - provides criteria for declining to issue complaint even though violation has occurred ([See Part 4, Chapter F](#)).

**2. C+P FACTORS CONSIDERED IN DETERMINING WHETHER THE INVESTIGATIVE PLAN IS WRITTEN:**

- Experience level of Agent;  
All new employees discuss plan with supervisor/mentor.
- Number of issues in the charge;
- Complexity of issues in the charge;
- Number of witnesses; and
- Prior experiences with the party.

**3. STEPS TO PREPARE FOR AN INVESTIGATION:**

- Identify the issues of the charge;
- Review the information and documents received to date to develop areas of inquiry;
- Research relevant case law;
- Identify witnesses and ensure that they will cover all allegations, as appropriate;
- Depending on situation, the Agent may contact witnesses directly or have the Charging Party contact and advise witnesses of the date, time, location, and purpose of the investigation;
- Identify and arrange for documents to be made available on site or have documents sent to Agent;
- Explore potential for on-site settlement with parties (See [Part 4, Chapter G](#) concerning Settlements);
- Determine if any related cases have been filed in the Region or in any other Region or before any other administrative body; and

- Consider providing ADR programs. [See Part 1, Chapter B](#) concerning ADR Services.

See [Part 2, Chapters I, J, K, and L](#), which describe the process to follow in certain specific situations where there is/are related case/s.



*See [ATTACHMENT 3A1](#) for practical pointers on case processing including preparing for an investigation.*



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

[Part 2, Chapter E](#) concerning Injunctions;

[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 C](#) concerning Quality Standards for Investigations;

[Part 3, Chapter D](#) concerning Scope of Investigations;

[Part 4, Chapter F](#) concerning Prosecutorial Discretion; and

[Part 4, Chapter G](#) concerning Settlements.

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## B. ALTERNATIVE CASE PROCESSING PROCEDURE

**OVERVIEW:** Pursuant to § [2423.7](#), the OGC provides a voluntary ADR procedure to assist parties in resolving pending ULP charges prior to an RD determination on the merits of the charge.

**OBJECTIVE:** To provide guidance concerning the objectives of an alternative case processing procedure; criteria for determining whether to offer the procedure; an explanation of the process; and ground rules for the parties to adhere to during the intervention.

1.  **GENERAL DESCRIPTION OF THE ALTERNATIVE CASE PROCESSING PROCEDURE:**

Under specified criteria described below, and if both parties agree, an RD utilizes an alternative case-processing technique to assist the parties in resolving the dispute underlying the pending charge by facilitating an interest-based problem-solving approach, rather than initially investigating the particular facts and determining the merits of the charge. Since the merits of the charge are not relevant to this ADR procedure, no evidence on the ULP charge is gathered during the procedure. The process and role of the OGC are fully explained to the parties.

2. **OBJECTIVES WHEN USING AN ALTERNATIVE CASE PROCESSING PROCEDURE:**

- To establish an approach to be applied by all the Regions when determining whether a charge is initially investigated and evidence and positions are obtained and a determination is made on the merits of the charge, or whether an alternative case processing approach is suggested to the parties.
- To establish the criteria which govern when certain charges may be processed under an alternative approach to resolve the underlying dispute.

- To allow the OGC to proceed in a manner that affords the parties an opportunity to enhance their relationship regardless of whether a charge warrants a full investigation and issuance of a complaint or a dismissal letter.
- To encourage the parties to resolve their problems at the earliest stage possible after the filing with a third party.
- To allow the charge to be fully investigated and decided on the merits if the alternative case processing efforts do not result in a resolution of the dispute (See § [2423.7\(c\)](#)).

**3. C+P CRITERIA APPLIED IN DETERMINING WHETHER TO OFFER THE ADR PROCEDURE TO THE PARTIES:**

- **NUMBER OF PENDING CHARGES INVOLVING THE PARTIES**

**Is there a block of charges filed within the same time frame involving the parties?**

The filing of a block of charges involving the same parties within a short time frame may indicate that the dispute arises from a lack of communication and understanding between the parties rather than a legal dispute over statutory rights and obligations. RDs consider this factor in determining whether to offer intervention as an alternative case processing technique.

- **AGREEMENT OF THE PARTIES TO PARTICIPATE**

**Do both parties agree to participate in an intervention?**

The parties must agree to participate in the alternative case processing procedure before the OGC assists them in resolving the dispute underlying the charge. Absent their agreement, the OGC does not suspend an investigation and then facilitate a resolution of the dispute under the alternative case processing procedure.

- **COMMITMENT TO THE PROCESS AND AUTHORITY TO RESOLVE THE ISSUES**

**Are both parties committed to resolving their dispute and will both parties send representatives who are empowered to resolve the underlying dispute?**

To show their commitment to the alternative case processing procedure, the parties must empower their representatives by authorizing them to settle the dispute. Absent the parties' agreement to send empowered representatives to the intervention, the OGC does not undertake to facilitate resolution of the dispute under the alternative case processing procedure and does not suspend an investigation.

- **TYPE OF DISPUTE**

**What is the nature of the basis of the charge/s?**

Some charges concern institutional and relationship issues, such as the duty to bargain and the duty to furnish information, while other charges are more focused on individual statutory rights to engage in protected activity. In determining whether to offer the alternative case processing procedure, the RD examines the type of dispute and determines whether the dispute concerns an institutional and relationship matter as opposed to an individual statutory right which is a legal issue. Similarly, some disputes are isolated in nature and others are more recurring. The RD examines whether the dispute is ongoing and represents an inability to resolve problems without third-party assistance in deciding whether to offer the alternative case processing procedure.

- **EXPERIENCE OF THE PARTIES**

**Are the parties experienced in Federal sector labor-management relations?**

The degree of experience of the parties varies. For example, inexperienced leadership may result from changes in Union leadership and in Agency management. The alternative case processing procedure may help educate the parties on their various rights and



responsibilities under the Statute, as well as introduce ADR techniques to give the parties an opportunity to resolve their dispute without the need for a third party. The RDs consider the experience of the parties when determining whether to offer intervention as an alternative case processing technique.

- **RIPENESS OF THE DISPUTE FOR RESOLUTION**

**Does the dispute lend itself to resolution within a reasonable period of time?**

Some disputes are not ripe for resolution because of the need to wait for some future occurrence before the parties are willing or able to resolve the matter. For example, a Union may choose not to resolve a matter until after the election of new officers. Similarly, an Agency may not be in a position to resolve a matter until a new manager or labor relations adviser scheduled to join the Agency actually joins the management team. In other situations, the parties may be unable to resolve the matter because of some event or force over which they have no control, such as an order from a higher level in the Agency or Union hierarchy. RDs consider these types of situations in determining whether the dispute is ripe for resolution and whether to offer the alternative case processing procedure.

- **OGC ABILITY TO PROVIDE FOLLOW-UP**

**Can the OGC provide requested follow-up services to the parties?**

Sometimes, after a successful intervention, the parties jointly request the OGC to continue to provide support to the parties' improving relationship. This could constitute a request for such services as interest-based problem-solving training, ADR design, or partnership facilitation. RDs consider the ability of the OGC to provide these services when deciding whether to offer the alternative case processing procedure as an option to the parties.

**4. EXPLANATION OF THE ALTERNATIVE CASE PROCESSING PROCEDURE:**

Before OGC employees utilize the alternative case processing procedure to assist the parties in resolving disputes underlying ULP

charges, they fully explain and disclose the role of the RO agent. **The alternative case processing procedure does not proceed unless both parties accept that role and the Agent fully explains the following:**

- The purpose of the alternative case processing procedure is to resolve the underlying dispute without determining the merits of the charge (See § [2423.7\(b\)](#));
- The role of the Agent is to assist the parties in that endeavor by facilitating an interest-based problem solving approach;
- The alternative case processing procedure allows the parties an environment to use an interest-based approach to resolve their dispute;
- Since the merits of the charge are not relevant to the alternative case processing procedure, no evidence on the ULP charge is gathered during the intervention;
- Although some facts surrounding the dispute, of necessity, will probably be disclosed during the alternative case processing procedure, no evidence is received by the Agent. Similarly, no positions of the parties on the merits of the charge are solicited or received by the Agent;
- The Agent makes no notations in the RO case file concerning the merits of the case or any other matters discussed during the intervention;
- If the parties are unable to resolve the dispute, the Region conducts a full investigation on the merits of the charge and processes the case as if there had been no intervention efforts;
- The alternative case processing procedure is another form of resolution and the information disclosed during the intervention is treated in the same manner as information disclosed and positions taken during settlement discussions;

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- Any investigation is separate and distinct from any resolution or intervention efforts;



*If evidence has already been taken, the Region may decide to attempt to resolve the dispute as part of the investigative process rather than curtailing the investigation in favor of the alternative case processing procedure.*

- If the alternative case processing procedure does not result in resolution of the dispute and the withdrawal of the charge, and an investigation on the merits is required, the RD assigns another RO Agent to the investigation, unless the parties and the RD agree otherwise. (See § [2423.7\(c\)](#)); and
- The parties agree to certain required ground rules:
  - The alternative case processing procedure is viewed as a resolution discussion--there are no attributions of what is said during the session--"what's said in the room stays in the room." For example, the union will not publish a report in the union newsletter of what a particular management official or management in general said during the session and management will not discuss with a local newspaper reporter what a particular union official or the union in general said during the session;
  - Neither party takes any reprisal for any statements made during the session;
  - All participants conduct themselves within the range of acceptable behavior at the session;
  - No ULP charges or grievances are filed based on any occurrences at the session; and
  - All participants feel free to express their interests and honestly attempt to resolve the dispute.



*If the alternative case processing procedure proves unsuccessful and another Agent undertakes an investigation, there is no communication about the facts or merits of the case or the positions of the parties, but communication concerning matters involving the ADR process is permissible. The Agent informs the parties of this expectation at the beginning of the alternative case processing procedure. Maintaining this “Chinese Wall” is necessary to ensure the integrity of the RO and the OGC.*

See [ATTACHMENT 1B1](#) which describes the alternative case processing procedure.

**5. NOTIFICATION OF THE PARENT OR NATIONAL ORGANIZATION:**

The Agent discusses with the parties if it is desired that the parties' National or parent organization be notified of the use of an alternative case processing procedure and, if so, how it will be accomplished.

**6. ENFORCEMENT:**

A party who fails to comply with the terms of any agreement reached as a result of this process may be found to have repudiated that agreement in violation of § [7116](#)(a)(1) and (5) of the Statute. See [Department of Defense Dependents Schools](#), 50 FLRA No. 62, 50 FLRA 424, 426 (1995).

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## C. QUALITY STANDARDS FOR INVESTIGATIONS

**OVERVIEW:** This Chapter discusses the OGC's Quality Standards for Investigations which are applicable to all RO employees.

**OBJECTIVE:** To list and explain the standards which guide the field Agent in conducting a quality investigation and to enlighten the parties as to these standards.

### 1. OBJECTIVES OF QUALITY STANDARDS:

- Every participant in the investigation of a ULP charge has a right to expect that the investigation undertaken will meet certain basic standards of quality, even though the investigatory method and the scope of all investigations need not be the same for each particular charge.
- Every participant also has a right to expect that those standards of quality will be the same, regardless of which RO may be conducting the investigation.

### 2. QUALITY STANDARDS APPLICABLE TO EVERY INVESTIGATION:

- Regardless of the investigative methodology, every investigation meets the quality standards;
- The investigation obtains the best possible evidence;
- All evidence is relevant and assists the RD in reaching a proper disposition of the case;
- The case file contains all relevant evidence and information discovered or submitted during the investigation;

- All participants in the investigation are treated fairly and equitably and the GC's investigative methods are explained to the participants; and
- Charges are processed as expeditiously as possible.

### 3. EXPLANATION OF THE STANDARDS:

- **REGARDLESS OF THE INVESTIGATIVE METHODOLOGY, EVERY INVESTIGATION MEETS THE QUALITY STANDARDS**

RDs have discretion to utilize a variety of techniques to obtain evidence during an investigation of ULP charges: (a) the taking of affidavits in person; (b) the collection of documentary evidence; (c) the taking of a sworn affidavit through the use of a telephone interview; (d) the use of sworn interrogatories transmitted to and from the Region by mail; and (d) the use of letters from the RO confirming information obtained orally from a party.

- **THE INVESTIGATION OBTAINS THE BEST POSSIBLE EVIDENCE**

In investigating ULP charges, the Regions may obtain a variety of types of evidence: (a) sworn testimonial evidence; (b) documentary evidence; (c) physical evidence; (d) sworn questionnaires and (e) letters confirming conversations. Evidence obtained from Charged Parties meets the same standards as evidence obtained from Charging Parties.

Regions also obtain other non-evidentiary types of information: (a) unsworn written testimonial information; (b) unsworn oral information, and (c) position statements and legal arguments.

The Regions explain to the parties why various types of evidence and information are appropriate to the investigation and the differences between that information which is, and that which is not, evidence.

- **ALL EVIDENCE IS RELEVANT AND ASSISTS THE RD IN REACHING A PROPER DISPOSITION OF THE CASE**

The test for determining relevancy during the investigation is whether the evidence can reasonably be expected to assist the RD in reaching a proper disposition of the case. Significant hearsay statements may be accepted during the investigation even though their use may be limited at trial. There is no obligation to accept evidence which clearly makes no independent contribution to an understanding of the case or its resolution or which is duplicative.

- **THE CASE FILE CONTAINS ALL RELEVANT EVIDENCE AND OTHER INFORMATION DISCOVERED OR SUBMITTED DURING THE INVESTIGATION**

The case file contains all relevant documentary and testimonial evidence discovered and submitted during the investigation and other non-evidentiary information. See [Part 3, Chapter F](#) concerning Evidence, in General, for a discussion of what is, and is not, evidence.

- **ALL PARTICIPANTS IN THE INVESTIGATION ARE TREATED FAIRLY AND EQUITABLY AND THE INVESTIGATIVE PROCESS IS EXPLAINED TO THE PARTICIPANTS**

The object of a ULP investigation includes not only the formal disposition of a charge, but also the goal of assisting the parties in resolving their differences through cooperation rather than litigation. It is critical that the parties have faith in the investigative process, that they perceive the investigating agent as neutral and impartial, and that they accept the investigation as fairly identifying their interests and their views of the case. Thus, the manner in which the investigation is conducted is as important as the evidence it obtains.

To achieve this standard, all investigating Agents:

- Clarify, whenever appropriate, the purposes and procedures of the investigation;
- Answer any questions about how the Region has decided to conduct the investigation;



- Avoid giving an impression of coercing a participant toward a particular result;
  - Give no indication of favoring one party's position over that of another; and
  - Conform to appropriate ethical standards of behavior at all times. See [Part 5, Chapter B](#), which discusses Ethics issues.
- **CHARGES ARE PROCESSED AS EXPEDITIOUSLY AS POSSIBLE**

ULP charges are processed as expeditiously as possible, taking into consideration the resources available to the RO and the number of pending cases.

#### 4. IMPLEMENTATION OF QUALITY STANDARDS:

All RDs ensure that each ULP investigation conforms as closely as possible to the quality standards. Each Region develops and implements procedures to:

- Ensure that investigations and decision-making are conducted in a timely and efficient manner;
- Enable all RO employees to understand the importance of maintaining a high level of quality in investigations and to understand the standards for quality in the OGC;
- Identify any assistance and training which OGC employees may require to meet quality standards;
- Assess the quality of the investigation in every ULP case;
- Ensure that applicable quality standards have been met before taking any dispositive action; and
- Provide that high levels of quality continue to be maintained in all investigations.

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- Explain to the Region's customers the intent of these policies and how they will be applied to their cases;
- Obtain continuing feedback from the participants on the quality of ULP investigations;
- Identify any practices which might reasonably lead those participants to question whether they have been treated fairly and equitably; and
- Correct any deficiencies which may exist.



*To implement the overall goal of conducting a quality investigation, RDs meet periodically with employees to develop, implement, and modify, as required, an action plan which addresses the above.*



**[Part 3, Chapter F](#) concerning Evidence, in General; and**

**[Part 5, Chapter B](#) concerning Ethics.**

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## D. SCOPE OF INVESTIGATIONS

**OVERVIEW:** After a charge is docketed and assigned to an Agent, the process of investigating the alleged ULP/s begins. This Chapter sets forth a policy and uniform criteria that RDs apply in determining the type and extent of an investigation of a charge.

**OBJECTIVE:** To provide principles and applicable criteria that govern the scope of an Agent's investigation of a ULP charge.

1.  **SCOPE OF ULP INVESTIGATIONS:**

RDs, under the direction and supervision of the GC, conduct such investigations of ULP charges as deemed appropriate under the totality of the circumstances surrounding the charge. All ULPs are investigated to the extent that the RD has sufficient information to render a determination on the merits of the charge. See § [2423.8\(a\)](#). Not all charges, however, are required to be investigated in the same manner and to the same extent.

2. **C+P CRITERIA FOR DETERMINING THE SCOPE OF INVESTIGATIONS:**

To process expeditiously and decide ULP charges fairly and consistently, RDs utilize the following established criteria to determine the scope of an investigation:

- Whether the facts support a determination that a violation of the Statute has occurred or is occurring; or
- Whether the case law supports the theory of violation alleged in the charge; or
- Whether there is jurisdiction over the charge; or

- Whether all elements of the statutory violation are established; or
- Whether, even assuming the charge has merit, prosecutorial discretion not to issue a complaint should be exercised applying the prosecutorial discretion criteria set forth at [Part 4, Chapter F](#).

### 3. RDS MAY CONCLUDE AN INVESTIGATION:

a. *When:*

If, during the investigation, the RD determines that any of the first four criteria (section 2, above) have not been met or that prosecutorial discretion should be exercised, the RD may decide to conclude the investigation.

b. *The Agent does the following once the RD has decided to conclude an investigation:*

- Explains to the Charging Party the basis for the RD's decision to conclude the investigation;
- Solicits withdrawal of the charge; and
- Absent withdrawal, explains to the Charging Party that the RD will dismiss the charge.



See [Part 4, Chapter A](#) concerning an Agent's Involvement in Withdrawal Requests Prior to an RD determination for discussion of limited circumstances when an Agent may solicit withdrawal of a charge **before** an RD determination of the merits of a charge.

### 4. EXPLANATION OF THE CRITERIA:

- **WHETHER THE FACTS SUPPORT A DETERMINATION THAT A VIOLATION OF THE STATUTE HAS OCCURRED OR IS OCCURRING**

**Are there sufficient facts for the RD to render a determination on the merits of the charge?**

ULP charges are investigated to the extent that sufficient information has been revealed which permits the RD to render a determination on the merits of the charge. Not all charges, however, are required to be investigated to the same extent in order to obtain that information necessary to render a merit determination. All investigations, regardless of the scope of the investigation, are conducted in accordance with the quality standards set forth in [Part 3, Chapter C](#).

- **WHETHER THE CASE LAW SUPPORTS THE THEORY OF VIOLATION ALLEGED IN THE CHARGE**

**Is the case law clear that the charge has no merit?**

Sometimes, after an Agent has an initial discussion with the Charging Party concerning the theory of violation contained in the charge, it is clear that there would be no ULP finding even if all allegations in the charge, and all allegations made by the Charging Party while discussing the charge, are true. In these circumstances, the Agent provides a copy of the controlling Authority case law to the Charging Party. No withdrawal is solicited and the charge is not dismissed under this criterion without providing the Charging Party an opportunity, as appropriate, to discuss the background of the charge and the basic facts and theory of violation supporting the charge.

- **WHETHER THERE IS JURISDICTION OVER THE CHARGE**

**Is it clear that there is no jurisdiction over the charge?**

In other limited situations, after an initial discussion of the dispute contained in the charge, it is clear that the Authority has no jurisdiction over the dispute.

**Examples of no jurisdiction over the charge**

- **Untimely filing**-- the exceptions in § [7118](#)(a)(4)(B) of the Statute are inapplicable, and the violation is not of a continuing nature. See [EEOC](#), 53 FLRA at 493-96 (1997) (viewing use of a continuing violation theory with disfavor).

- **7116(d) bar**– the charge may clearly be barred by a previously filed grievance under § [7116\(d\)](#) of the Statute and there is no question that the parties and the issues in the previously filed grievance are identical under Authority precedent.
- **ULP is not stated on the face of the charge**
- **Charge filed with the wrong third party**

In these particular circumstances, the Agent fully explains the basis for the RD's decision not to issue complaint. No withdrawal is solicited and the charge is not dismissed under this criterion (no jurisdiction) without first providing the Charging Party an opportunity, as appropriate, to discuss the background of the charge and the basic facts and theory of violation supporting the charge.

- **WHETHER ALL ELEMENTS OF THE STATUTORY VIOLATION ARE ESTABLISHED**

**Is it clear that an element of the statutory violation is missing?**

After the initiation of the investigation it becomes uncontested that an element of the statutory violation is missing. In most of these instances, it is the Charging Party which readily admits, when giving the details of the occurrences underlying the charge, that evidence required to support an element of proof of the alleged violation is missing.

**Examples where elements of statutory violation are not established:**

- **Weingarten examination element is missing**-- a Charging Party witness may state that no request was made for a union representative at an investigatory examination. See § [7114\(a\)\(2\)\(B\)](#) of the Statute.
- **Formal discussion element is missing**-- it may become undisputed that the exclusive representative received actual, timely notice of a formal discussion. See § [7114\(a\)\(2\)\(A\)](#) of the Statute.


In these types of situations, absent unusual circumstances, the RD concludes that the investigation has been completed to the extent that the RD can render a well-informed and supportable decision on the merits of the charge. No withdrawal is solicited and the charge is not dismissed under this criterion without providing the Charging Party an opportunity, as appropriate, to discuss the background of the charge and the basic facts and theory of violation supporting the charge.

- **WHETHER, EVEN ASSUMING THE CHARGE HAS MERIT, PROSECUTORIAL DISCRETION SHOULD BE EXERCISED UNDER THE CRITERIA SET FORTH IN [PART 4, CHAPTER F](#)**

**Should prosecutorial discretion be exercised under the applicable criteria?**

In some situations, after an investigation has been initiated, it becomes clear that even if all the allegations in the charge and the allegations made by the Charging Party when discussing the case are true, the charge may nonetheless be dismissed, absent withdrawal, by applying the prosecutorial discretion criteria. In these circumstances, the Region assumes that the charge has merit and the scope of the investigation focuses on gathering information responsive to the prosecutorial discretion criteria to determine if prosecutorial discretion is applicable to the charge.

If the RD determines, based on the application of the prosecutorial discretion criteria, that the charge should be dismissed, absent withdrawal, the Agent explains the criteria to the Charging Party and the basis for the RD's application of the criteria to the charge. If the RD determines that prosecutorial discretion is inapplicable, the Region completes the investigation consistent with the scope of investigations criteria in this chapter and the Quality Standards for Investigations set forth in [Part 3, Chapter C](#).

 *Even in situations where it appears clear, consistent with the above criteria, that a charge has no merit, the Agent always gives a Charging Party an opportunity, as appropriate, to discuss the background of the charge and the basic facts and*



*theory of violation supporting the charge. No withdrawal is solicited, and no dismissal letter is issued, until the Charging Party has been given this opportunity. See § 2423.8(a), which requires that all parties involved in an investigation be given an opportunity to present their evidence and views to the RD. The Agent documents in the case file that s/he has provided this opportunity.*

**5. RD DISAGREES WITH AGENT’S DECISION TO SOLICIT A WITHDRAWAL:**

Should an RD disagree with an Agent’s decision to solicit withdrawal and determine that more evidence is needed, another Agent will be assigned to investigate the case unless the parties and the RD do not object to the same Agent continuing the investigation. See also Part 4, Chapter A.



**Part 3, Chapter C concerning Quality Standards for Investigation;**

**Part 4, Chapter A concerning Agent’s Involvement in Withdrawal Requests Prior to a Regional Director Merit Determination;**

**Part 4, Chapter F concerning Prosecutorial Discretion; and**

**Part 5, Chapter B concerning Ethics.**

## E. ARRANGING ON-SITE INVESTIGATIONS

**OVERVIEW:** After developing an investigatory plan, as applicable, the Agent next considers making plans to do an on-site investigation of the alleged ULP/s.

**OBJECTIVE:** To provide guidance concerning when it is appropriate to conduct an on-site investigation and the administrative matters that an Agent considers such as notifying the Agency of plan to go on-site, arranging for official time for witnesses and what to do if Agency management declines to make a witness available.

### 1. WHEN TO DO AN ON-SITE INVESTIGATION:

**C+P** The Agent considers the following in deciding whether to do an on-site investigation:

- Agent first has an initial discussion with the Charging Party before deciding whether to go on-site;
- The type of charge determines whether to go on-site, e.g., when there is physical evidence on-site that must be seen;
- Generally, go on-site if case is local;
- Generally, go on-site when cost is not a factor;
- Generally, go on-site when difficult credibility disputes are present;
- Generally, go on-site when the Charging Party alleges a [§ 7116\(a\)\(2\)](#) violation unless the RD/RA/DRD approves otherwise under the scope of investigations criteria (see [Part 3, Chapter D](#) concerning the Scope of Investigations);
- Go on-site when there are multiple ULPs to be investigated;

- Consider going on-site if settlement would be facilitated; and/or
- Consider going on-site when the parties are new to the ULP process.



*In all cases, the Agent reviews the case file and applies the Quality Standards for Investigations ([Part 3, Chapter C](#)) and Scope of Investigations ([Part 3, Chapter D](#)) to determine if the case warrants an on-site investigation.*

## **2. NOTIFICATION TO AGENCY OF PLAN TO GO ON-SITE:**



Under all circumstances, when an Agent plans to go on-site for an investigation, s/he gives timely notification to the Agency's representative. This rule applies whether or not official time for an employee witness has been requested, e.g., the Agent is merely going to the Union office. Confirmation of an on-site visit is permitted by e-mail.


## **3. OFFICIAL TIME FOR WITNESSES:**



- a. *Official time under Section [7131\(c\)](#) of the Statute:*

Contact the designated Agency representative by telephone or by letter and make a request. The request covers the following matters:


- List of persons needed for the interview;
- Advise that other witnesses may be identified once on-site;
- Arrange for the location of interviews;
- Telephone affidavits (See [Part 3, Chapter I](#));
- Advise that another on-site interview may be necessary; and
- Ask that supervisors be informed to arrange for release.

 Official time is only requested if it is [7131\(c\)](#) time. It is not requested if it falls under Section [7131\(d\)](#) (contract time, for example, the representative is entitled to 100% official time under the contract). In the latter instance, it is the responsibility of the witness to arrange for official time in accordance with the agreement with the Agency.

See [ATTACHMENT 3E1](#) for a Sample Letter requesting Official Time.

b. *Special circumstances:*

- i. Request official time for witness to do either of the following on duty time:
  - Review a telephone affidavit sent by the Agent (request the amount of time that would have been taken had the affidavit been taken on-site); or
  - Complete a questionnaire or an interrogatory.

 *The Agent indicates in the official time request to the Agency that, in lieu of an on-site affidavit, the Region has determined that a reasonable amount of official time is needed to, e.g., review a telephone affidavit or complete a questionnaire). Tell the Agency when the document has to be returned. If the Agency asks how much time is necessary, i.e., what “reasonable” means, ask for that amount of time that would have been asked for had the investigation been completed on-site.*

- ii. Shift changes:
  - It is permissible to request an employee’s change of shift to facilitate the interview. Discuss with the employee first before contacting the Charged Party’s representative and inform the representative that the Charged Party is not required to accommodate request; or

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- If no shift change can be arranged, the Agent adjusts the his/her schedule, if conflict is known in advance.



*Do not request that an employee be paid overtime to provide an affidavit.*

- iii. Options when the shift ends before the interview is completed (while on official time):
  - Conclude the interview, provide the witness with a date certain to submit further evidence to the Agent, and send confirming letter; or
  - If the RD approves, extend travel to continue the interview and make a note in case file.



*When planning the investigation, in order to conduct an efficient and effective interview, it is the Agent's responsibility to arrange carefully interviews with special consideration given to employees' work schedules. In only the rarest of instances should an Agent be faced with the end of a shift and an employee who does not wish to be detained any longer.*

- c. *Agent's responsibilities with respect to official time granted a witness:*
  - If requested, verify the use of official time at the time it is used;
  - If requested after official time is used, decline to provide a statement or otherwise verify official time and cite regulation, § 2411.11 and [2423.8\(c\)](#) stating that the Agent cannot become a witness in any proceedings that Agency may take against employee unless the GC approves.

**4.**



**MANAGEMENT DECLINES TO MAKE A WITNESS AVAILABLE:**

- If the reasons are legitimate, e.g., work exigencies, make other arrangements;

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- If no other purpose is apparent other than to delay/impede the investigation, first make the request in writing. If that is declined, the RD/RA makes a request to higher-level management.
- If Agent arrives on-site and a management official overruled the decision to make the employee/s available or the person is on annual leave, the Agent:
  - Tries to work around the situation if the reason the employee does not show for the interview appears to be legitimate; or
  - Talks to a management official on-site about making the employee available; and
  - Gathers as much evidence as is possible.



*The Agent telephones the RD/RA/DRD for guidance, if necessary. The Agency's interference with the investigation may be grounds for a new charge.*



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

**[Part 3, Chapter D](#) concerning Scope of Investigations; and**

**[Part 3, Chapter I](#) concerning Telephonic Affidavits.**

RESERVED

## F. EVIDENCE, IN GENERAL

**OVERVIEW:** The material facts that are used by an RD to decide the case are substantiated in accordance with the Quality Standards for Investigation ([Part 3, Chapter C](#)). It is the Agent's responsibility to investigate the ULP charge and to obtain the best evidence upon which the RD may base a decision.

**OBJECTIVE:** To provide an overview of the types of evidence that may be relied upon in deciding a ULP charge and the assessment of the relevance and weight of that evidence.

### 1. EVIDENCE V. INFORMATION:

- a. *Evidence is any type of proof, or probative matter, if presented at trial, could be the basis for finding facts at issue.*

For example:

- Witness statements;
- Records;
- Documents;
- Signed confirming letters; and
- Objects.

- b. *Information is knowledge that is obtained from an investigation that helps to understand and process the ULP, but that by itself, cannot provide a basis upon which an RD decides a case.*

For example:



- Oral statements to an Agent; and
- Charged Party's Statement of Position. An Agent may receive an e-mail concerning a Statement of Position.



*For example--in a § [7116\(a\)\(1\)](#) and (5) unilateral change case, where an Agent receives information from the Charged Party that alleges that the Agency gave oral notification of the change to the Union well before the change took place, the Agent may “test” that **information** with the Charging Party, i.e., the Agent develops a line of questioning specifically concerning the alleged oral notification of the change. The Charging Party’s response to these questions, captured in an affidavit, constitutes **evidence** that the RD may use in deciding the case.*

*Another example--in a Section [7116\(b\)\(1\)](#) and (8) duty of fair representation case, where an Agent receives information from the Charged Party that states that the Agency had informed the Charging Party that s/he was obligated to provide information to the Union in order for the Union to be able to determine the merits of the grievance, the Agent may “test” that **information** with the individual Charging Party. The Charging Party’s response to these questions, captured in an affidavit, constitutes **evidence** that the RD may use in deciding the case.*

## 2. DETERMINING THE BEST METHOD OF OBTAINING EVIDENCE:

The following investigative techniques are not mutually exclusive and may be combined during the investigation dependent upon the particular case situation:

- The taking of affidavits and collection of documentary evidence in person;
- The taking of a sworn affidavit through use of a telephone interview;
- The use of sworn interrogatories transmitted to and from the Region by mail; and

- The use of letters from the RO confirming information obtained orally from a party.

3.



**THE INVESTIGATION OBTAINS THE BEST POSSIBLE EVIDENCE:**

In investigating ULP charges, Agents may obtain a variety of types of evidence and information: (a) sworn testimonial evidence; (b) documentary evidence; (c) unsworn written testimonial information; (d) unsworn oral information, and (e) position statements and legal arguments.

4.

**CHOOSING BETWEEN DOCUMENTARY AND SWORN TESTIMONIAL EVIDENCE:**

a. *Preference for documentary evidence:*

Documentary evidence is evidence which has been reduced to writing prior to the investigation for purposes unrelated to the investigation itself, thus enhancing its credibility.

This type of evidence, when available, is almost always preferable to testimonial evidence on the same point because testimonial evidence is directly related to the investigation itself, thereby diminishing its credibility.

The Agent always determines whether relevant documentary evidence exists and emphasizes its importance to the parties who have access to that evidence .

b. *Situations where documentary evidence is critical:*

In some cases, documentary evidence may be so critical that no decision on the merits can be made without it, regardless of testimony.

For example:

- contract interpretation - no case which turns on a question of contract interpretation is decided without the relevant portions of the contract at hand; and

- [7116](#)(d) grievance bar - no decision on a contested § [7116](#)(d) grievance bar is made without a copy of the grievance.

c. *Situations where testimonial evidence suffices:*

Only when it is clear that the parties are unable to produce documents which are known to exist does the Agent attempt to reproduce that evidence through testimony.

## 5. **ASSESSING RELEVANCE AND WEIGHT OF EVIDENCE:**

a. *Relevance:*

- i. The Agent's responsibility is to ensure that all evidence assembled in the case file, whether documentary or testimonial, is relevant.
- ii. The test for determining relevance is whether it can reasonably be expected to assist the RD in reaching a proper disposition of the case.
- iii. Examples:
  - Otherwise significant hearsay statements may be accepted during the investigation even though their use would be limited at trial.
  - An Agent has no obligation to accept evidence which clearly makes no independent contribution to an understanding of the case or its resolution--including:
    - Obviously irrelevant material; and
    - Material which merely duplicates evidence already obtained.



*Although the Agent, not the parties, is responsible for deciding during the investigation whether proffered evidence is*

*relevant, any doubts are resolved by accepting the documents.*

*The taking of evidence is always as balanced as possible, and includes not only material which tends to support the allegations in the charge but any available and relevant material which tends to refute the allegations as well. Thus, as a neutral investigator, an Agent explores all potential evidence, whether supportive of the charge or exculpatory. The purpose of the investigation is to obtain all relevant facts to enable a decision on the merits of the charge, not to prepare a charge for the possibility of a hearing before an ALJ.*

b. *Weight:*

i. The Agent's responsibility is:

- To develop all factual evidence that would assist the RD in assessing the weight of the evidence:

The Agent inquires into the source of all evidence when that source is not otherwise apparent:

- In the case of documentary evidence, the Agent establishes the purpose for which the document was originally prepared and the circumstances of its preparation.
- In the case of testimonial evidence, the Agent establishes the competence of the witness and the witness's interests, if any, in the case.
- To maintain neutrality while taking evidence and the integrity of the decision-making process.
- **Not** to present personal opinions to the Charging Party without supervisory approval. See the discussion below and [Part 4, Chapter A](#) concerning an Agent's Involvement in Withdrawal Requests Prior

to a RD Determination (in particular page [4A-3](#) which discusses solicitation of a withdrawal prior to an RD decision on the merits based on an agent's evaluation of the weight of the evidence).



*Absent supervisory approval, the views of the Agent on the applicable law, weight of the evidence and the application of the law to the evidence is presented at the Region's agenda, not to the Charging Party prior to a Regional decision in the case. Presenting personal opinions prior to the Region's decision, which may not ultimately be adopted by the Region, will incorrectly cause Charging Parties to perceive that their charge was neither fully investigated nor fairly decided. In most cases, the Agent is the Charging Party's sole contact with the Region. It is, therefore, imperative that all Agents recognize the critical role they fill in representing the Region to the parties. Thus, an Agent is extremely cautious when assisting the parties in resolving their dispute prior to an RD decision on the merits. S/he maintains his/her neutrality and conveys to the parties that, absent resolution of the dispute, the RD will render a decision on the merits of the charge.*

- ii. The RD ultimately determines the weight of the evidence. However, an Agent may be authorized to solicit withdrawal prior to an RD merits decision:
  - After receiving supervisory approval, the Agent may have a frank discussion with the Charging Party about the Agent's view of the evidence obtained thus far in an investigation; or
  - Without supervisory approval, on a case-by-case basis according to the RD's exercise of discretion, the Agent discusses with the Charging Party his/her view of the weight of the evidence.

**6. BALANCE BETWEEN THE AMOUNT OF NECESSARY EVIDENCE AND THE AMOUNT OF EVIDENCE THAT THE CHARGING PARTY INSISTS ON SUBMITTING:**

The RD exercises discretion in determining the amount of evidence required to complete an investigation by applying the scope of investigations criteria set forth at [Part 3, Chapter D](#). If a party insists on submitting additional evidence beyond that required by the Agent, the Agent explains why the evidence is not required, but that documentary evidence or additional statements submitted by a date certain will be accepted and considered. See § [2423.8\(a\)](#), which states that “all parties involved are afforded an opportunity to present their evidence and views to the Regional Director.”

If the Charging Party insists that more affidavits should be obtained from other witnesses not deemed necessary by the Agent, the Agent explains why those statements are not necessary and confirms, in that person’s affidavit, a confirming letter, or a memorandum to the file, the substance of the witness’s testimony according to the Charging Party. The Agent also informs the Charging Party that if the Charging Party still wants to submit additional information, signed and sworn statements and documentary evidence will be received by the Region up to a date certain.



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

[Part 3, Chapter D](#) concerning Scope of Investigations; and

[Part 4, Chapter A](#) concerning Agent’s Involvement in Withdrawal Requests Prior to a RD Determination.

RESERVED

## G. DOCUMENTARY EVIDENCE

**OVERVIEW:** In preparing for the investigation, the Agent considers what types of documentary evidence, from either the Charging or Charged Party, are necessary to be able to develop the most complete record possible.

**OBJECTIVE:** To explain the utility of obtaining documentary evidence during the investigation.

### 1. DEFINITION OF DOCUMENTARY EVIDENCE:

Documentary evidence is evidence which has been reduced to writing prior to the investigation for purposes unrelated to the investigation itself. Because it has been created for purposes other than the investigation, it is inherently more probative than affidavits or other forms of evidence which have come into existence solely as a result of the investigation. See [Part 3, Chapter F](#) concerning the discussion on documents as best evidence.

### 2. REQUIREMENTS OF CASE FILE:

a. *Original or clean copies of the document;*



*An Agent may receive evidentiary documents that were created electronically as an attachment to an e-mail. The RD may rely on these in making a merit decision **but**, prior to issuance of complaint, a hard copy of the document must be in the case file.*

b. *Source of documentary evidence:*

The case file identifies where the documentary evidence came from--its original source.

c. *Meaning of documentary evidence:*



The case file contains evidence which explains the meaning of the documentary evidence. If the document “speaks for itself,” no other evidence is required to explain its meaning. If, however, it may be subject to differing interpretations or explanations, the case file contains evidence, either documentary or testimonial, which explains its meaning. See [Part 2, Chapter C](#) concerning organization of the case file for additional discussion.

**3. USE OF THE INTERNET:**

The Internet is a valuable source for obtaining documentary evidence from sources other than the parties. For example, many Government regulations, directives, and other publications are contained on the Internet. See FLRA Librarian’s Guide to the World Wide Web for a listing of many of these sites.



[Part 2, Chapter C](#) concerning the Case File; and

[Part 3, Chapter F](#) concerning Evidence, in General.

## H. AFFIDAVITS TAKEN IN PERSON

**OVERVIEW:** An affidavit is the preferred means of recording any witness's testimony during an investigation of charges involving the facts that are in dispute.

**OBJECTIVE:** To provide guidance concerning the mechanics of taking an affidavit, the characteristics of a quality affidavit, and the right to representation at interviews.

1.  **GENERAL RULES PERTAINING TO ALL AFFIDAVITS:**

a. *Preparing the witness:*

Prior to taking an affidavit in person, the investigating Agent interviews the witness at the witness' work site, at the RO, or at any other mutually convenient location. The Agent prepares the witness's affidavit during the interview or shortly thereafter.

b. *Length and content of any affidavit:*

The nature of the case governs the length and content of any affidavit. Before preparing any affidavit (and, whenever possible, before opening the interview), the Agent anticipates whether the proof to be secured will be predominantly testimonial or documentary.

Examples:

i. *Predominantly testimonial: Formal discussion:*

Charges alleging formal discussions or coercive statements normally turn on what witnesses heard other people say, and the Agent can expect in such cases to ask for short, focused statements from a number of individuals.

ii. *Predominantly documentary: Refusal to bargain or to provide information:*

In charges alleging a refusal to bargain or to provide information, the evidence has often already been reduced to writing. Very little testimony may be necessary in such cases and the investigation may be better served by sworn questionnaires. If testimony is not required, the affidavit does not merely refer to existing documentary evidence but instead concentrates on such things as whether and how the Union orally explained its request to the Agency or described its need for the information requested.

c. *Where testimony of two or more witnesses conflicts:*

In this instance, care is taken to ensure that each witness is testifying about the same thing and has similar competence to do so. It is not unusual for each witness to a formal discussion or a coercive statement to remember a slightly different version of what was said, and the cumulative weight of this testimony may prove more persuasive than any single statement alone. If witnesses contradict each other, however, the Agent is careful to establish whether they were in the same location at the same time and in a position to hear the same thing being said. Any factors which might contribute to their different recollections (bias, for example) are explored.

d. *Witness reviewing the affidavit:*

Whenever possible, the Agent gives the affidavit to the witness for review, correction and signature while the witness and the Agent are still at the same location. If this is done, the affidavit may be handwritten. Or, if the Agent prefers, the affidavit may be typed on a laptop computer. In unusual cases, depending on time and resources, it may be necessary to prepare the affidavit at the RO or elsewhere and mail it to the witness for signature.



*For example, if the employee's shift has ended and the interview must be terminated because the employee is unwilling to continue the interview, the Agent may prepare the affidavit at the RO after the interview has been terminated. See [Part 3, Chapter E](#) concerning Arranging On-Site Investigations and issues relating to official time for witnesses. In these cases, even though the affidavit follows from a*

*personal interview, it is administratively handled as if it were a telephone affidavit as discussed in [Part 3, Chapter I](#).*

2.  **BASIC STEPS OF TAKING AN ON-SITE AFFIDAVIT: THE AGENT DOES THE FOLLOWING:**

- Introduces him/herself and describes his/her role and the ULP process;
- Explains why s/he is there;
- Gives a general statement of the case and issues;
- Explains the confidentiality attached to the interview and use of affidavits (identity of the individual who submits a statement and/or information will not be disclosed unless it becomes necessary to produce the statement if the witness testifies at trial but the **substance or content** of the statement may be disclosed as part of the investigatory process);
- Explains that the affiant will have a chance to read the affidavit, to make changes by initialing and crossing-out, and to discuss if certain representations are inaccurate;
- Explains that issues concerning significant changes to the affidavit will be discussed;
- Explains the role of a representative, if one is present, i.e., the Agent reminds the witness that it is his/her testimony that is sought, not the representative's testimony; and
- Explains the necessity of affirming the truth of the matters asserted (last page of affidavit) after the affiant agrees to the contents of the affidavit.

See [ATTACHMENT 3H1](#) for a Sample Form for an Affidavit.

3. **CHARGING PARTY WITNESS AFFIDAVIT/S--THEORY OF THE CASE AND ESSENTIAL FACTUAL ELEMENTS:**

Each case file contains documentation that establishes a clear explanation of the theory of allegations that underlies the charge and the essential factual elements in the case in sufficient detail and accuracy to permit the RD to make a determination. This critical information is often provided by a single person in the form of an affidavit. However, in some instances the person who has knowledge of the facts is not the same person who can explain the theory underlying the allegation/s. Thus, it is necessary to obtain more than one affidavit to cover the theory of the allegation and the essential facts. Whether prepared after an in-person or a telephone interview, such affidavits:

- Set out all the essential factual elements in the case;
- Are obtained from individuals with first-hand knowledge of the events giving rise to the charge--in many cases, the person who signed the charge; and
- Contain a clear explanation of the allegations in the charge if the particular affiant signed charge.



*There is no requirement that the person filing the charge be the individual with the essential facts, as long as that person can refer the Region to such a witness to obtain an affidavit. If the affidavit is taken from a witness other than the individual who signed the charge, the allegations of the charge are explained or clarified in either an affidavit from, or a confirming letter to, the individual who signed the charge. In this case, the Agent ensures that the individual who provides the affidavit or confirming letter has the authority to bind the Charging Party and that the affidavit or confirming letter contains a statement to this effect.*

#### **4. ADDITIONAL AFFIDAVITS:**

Additional affidavits may be necessary to: (1) corroborate the testimony in the affidavit that sets out the essential elements in the case and/or contains a clear explanation of the allegations in the charge, or (2) describe significant facts not known to the other

witnesses. Each affidavit ideally complements the remainder of evidence in the case file without duplication or digression. Other affidavits, which serve neither of the latter purposes nor contribute to the investigation, are discouraged. For example, an affidavit which merely states that the affiant agrees with the statement of another affiant instead of independently stating the affiant's testimony is not useful. See [Part 3, Chapter F](#) concerning relevant evidence.

5.  **CHARACTERISTICS OF A QUALITY AFFIDAVIT:**

A quality affidavit contains:

- **A full identification of the witness and of the witness's competence for testifying--qualify the witness:**

For example, for a union witness, this includes such things as the witness's union affiliation, union offices held, position at work and, when relevant, brief employment history. It also is clear from the affidavit how the witness came to know the facts s/he or she is describing. ("I attended the meeting of June 14 and I heard the director say that unions were a waste of time" or "I did not attend the meeting, but my supervisor told me the next day what the director said.")

- **A restatement or clarification of the allegations;**
- **An unambiguous chronological account of all the factual elements of the alleged violation about which the witness has direct knowledge:**

This requires that before opening the interview the Agent has a clear understanding of the elements of the violation. In a bargaining case, for example, the Agent must establish, among other things, whether the witness can testify about notice. In a formal discussion case, the witness is asked about the elements of formality.

- **An equally clear identification of those elements about which the witness does not have knowledge;**

If the bargaining case alleges a change in practice, and the witness is a union officer who might be expected to know about notice, but does not, the affidavit reflects that the witness does not know if the union was notified in advance of the change. If the witness has no idea whether attendance at the discussion was mandatory, the affidavit reflects that the witness did not know if employees were required to attend the meeting. **This confirms that the Agent has asked the essential question addressing an element of a violation.**

- **A full explanation of any legal or conclusionary assertions which the witness may offer;**

The Agent ordinarily resists any attempt by a witness to insert summary or judgmental comments into an affidavit, and does not allow such comments to stand alone. For example, the Agent does not permit a witness to testify that a supervisor made derogatory remarks about the Union, without being required to recount just what those remarks were.

- **No paraphrasing or rephrasing of what is in a document;**

The document speaks for itself. But, the affidavit may discuss the circumstances, intent, state of mind, clarify what is in the document, and discuss something that is not in the document itself.

- **Information about contracts, grievances and other related matters;**

- **Post-charge information to bring the situation up to date for prosecutorial discretion, settlement and remedy purposes;**

- **No quotation marks--state what the witness says;**

State what the witness said rather than trying to quote the witness's recollection of what someone else said. This protects the credibility of the witness should the witness testify at trial. Only in rare instances is it appropriate to use

quotations in an affidavit, e.g., an (a)(1) statement where the statement is significant and exact.

- **No blank spaces (draw a line through the unused portion of any page) to protect the integrity of the document; and**
- **No statement that the Agent provided a copy of affidavit to affiant.**



*The Agent inserts anything else that seems appropriate to the situation (such as statements reflecting that the witness has nothing more to add about what the witness heard at the meeting or the witness does not remember any other discussions with the Union about the status of the grievance). At the same time, the Agent remembers that the taking of an investigative affidavit is not an exercise in trial preparation. Thus, the determination as to whether information is relevant is not whether the information would be admissible at trial, but whether it can reasonably be expected to assist the RD, in conjunction with other evidence, in reaching a proper conclusion of the case--whether to issue a complaint and notice of hearing, absent settlement. Although hearsay statements may not be admissible, they may nonetheless contain useful information which could lead to direct evidence or corroborate other evidence.*

6.  **DOCUMENTS REFERRED TO IN THE AFFIDAVIT:**

- Do not attach documents referred to in an affidavit to the affidavit;
- Make sure that documents referred to in an affidavit are in the case file; and
- Specifically reference and incorporate previous affidavits only if necessary.

7.  **AFFIDAVITS COVERING MULTIPLE CHARGES:**



a. *Charges not related:*

If affidavits covering multiple charges are not related, the Agent takes background information separately and then takes evidence separately for each charge, i.e., separate affidavits are prepared for the witness.

b. *Charges are related:*

If the charges are related, before the Agent takes evidence on each of the charges, s/he may first take background information that is applicable to all of the charges, and then take statements for each charge.



*After the background information, start a new page when taking evidence pertaining to a specific charge. Start another new page when you begin taking evidence pertaining to a different charge. This will facilitate the sanitization process that will be required in the event that complaint issues with respect to only one of the charges and the affiant testifies at trial, and it becomes necessary to turn over that witness's affidavit to respondent's counsel. See LM Part 2, Chapter T concerning Jencks Act and the Production of Witness's Statement at Hearing (p. 162).*

8.  **REPRESENTATION OF THE CHARGING PARTY, CHARGED PARTY, AND NEUTRAL WITNESSES:**

a. *Witnesses have a right to representation at an interview:*

It is preferable, based on sound investigative practices, to interview all prospective witnesses alone. All persons interviewed have a right, upon individual request, to be represented at the interview by a representative of the individual's choice.

b. *Interview of an agent of a party:*

- i. Contact the designated representative before contacting a witness who is an agent of a party.



*A representative who also has personal knowledge of the events which underlie the charge **may not** be a witness because of the inherent credibility issues presented.*

- ii. If a witness is an agent of a party, i.e., a Union steward, the **party** has the right to be present, if requested. The agent has no right to a personal representative because the right to a representative is exercised by the **Union** supplying the representative. The right is waived if no request is made.

**Exception: If an agent of a party requests that no party representative be present, there is no need to contact the party representative if the agent of the party understands the process.**



*If a supervisor comes forward on his/her own and asks to be a witness, the Agent makes sure that the supervisor understands that s/he is not protected under the Statute and that the affidavit contains a statement that the supervisor declined representation.*

**Exception: If a representative is also a witness s/he cannot be a representative for any other witness.**

- iii. The notice of a right of parties to be present is explained in a statement describing the ULP process that is sent with the opening letter (See [Part 2, Chapter B](#), concerning the opening letter).
- c. *Witnesses whose status has changed from the time of the events to the time of the interview:*
    - If the witness was a Union agent at time of events but is a temporary or permanent supervisor at the time of

the interview, then treat the witness as a Union agent; or

- If the witness was an employee at time of events but is a temporary or permanent supervisor at the time of the interview, then treat the witness as an employee; or
- If the witness was a supervisor at time of the event but in the unit at the time of the interview, then treat the witness as an agent of Agency; or
- If the witness was a Union agent at time of the event but is in the unit at the time of the interview, then treat as an agent of Union; or
- If the witness was an agent of the Agency or Union representative at the time of event, but is in a different Agency at the time of the interview, then there is no need to contact the charged Agency or Union representative before interviewing the witness; or
- If the witness was a temporary or permanent supervisor at time of event, but is in a different Activity at the same Agency at the time of the interview, then contact the Agency representative before interviewing the witness; or
- If the witness was an agent of the Agency or Union at the time of the event, but is retired at the time of the interview, then there is no need to contact the charged Agency or Union representative before interviewing the witness.



**[Part 2, Chapter B](#) concerning Docketing the Charge;**

**[Part 3, Chapter E](#) concerning Arranging On-Site Investigations;**

**[Part 3, Chapter F](#) concerning Evidence, in General;**

**[Part 3, Chapter I](#) concerning Telephonic Affidavits;**

LM, Part 2, Chapter T concerning Jencks Act.

## I. TELEPHONIC AFFIDAVITS

**OVERVIEW:** Under certain circumstances, the Agent takes a witness's affidavit over the telephone instead of in person.

**OBJECTIVE:** To provide guidance on the criteria for taking a telephone affidavit and the mechanics of taking an affidavit over the telephone. [See Part 3, Chapter E](#) for discussion of requesting official time for taking and reviewing a telephonic affidavit.

### 1. **C+P** CRITERIA FOR TAKING A TELEPHONIC AFFIDAVIT:

Whenever practical, prudent, and consistent with the Scope of Investigations Policy, Regions conduct on-site investigations of ULP charges and obtain affidavits in person. However, RDs have discretion to authorize utilizing telephonic affidavits, under the following criteria:

- **No jurisdiction; untimely-filed charge; charge is barred**

The charge on its face, the supporting evidence submitted with the charge, and the conversation with the Charging Party, confirm that there is no jurisdiction over the dispute; the charge is clearly untimely; or that the charge is clearly barred by an earlier-filed grievance; or

- **Prosecutorial discretion**

The charge on its face, the supporting evidence submitted with the charge, and the conversation with the Charging Party reveal that, based on the application of the prosecutorial discretion factors, further processing of the charge is not warranted; or

- **Remote witnesses**

The witnesses are in a remote location (a remote location with several cases, however, is given consideration for an on-site investigation); or

- **Costs**

The costs involved in an on-site investigation, the parties' relationship, the issues involved, the nature of the case and expected testimony, and the number of charges involved indicate that an on-site investigation would not enhance the parties' relationship or be a prudent use of OGC resources.



*Section [7116\(a\)\(2\)](#) discrimination allegations and difficult credibility disputes normally would not be appropriate for telephonic affidavits.*

## 2.



### **HOW TO TAKE A TELEPHONIC AFFIDAVIT:**

The Agent generally applies the same rules as when on-site and also considers the following:

- Inquire as to who is in the room and/or can hear;
- Do not affirm over the phone;
- The affidavit form has the affirmation on it (the form need not be notarized);
- The Agent's signature is not on the affidavit;
- The affidavit is prepared after a telephone interview and is either mailed, faxed or e-mailed to the witness, covered by a letter or a message setting a date for its return. The affiant is advised to make any changes in pen on a hard copy of the affidavit (or a print-out in the case of e-mail). The affiant is requested to sign and return the copy to the RO. The letter or message states that if the affidavit is not returned by the requested date, a decision will be made without it or the

charge will be dismissed for lack of cooperation if no additional evidence has been submitted;

- If the affidavit is prepared in the RO, it is typewritten; and

See [ATTACHMENT 3I1](#) for a Sample Telephonic Affidavit.

- Fax is an acceptable means of delivery, both for the parties to send documents to the RO and for the Agent to send documents to the parties.



*Dispositive action normally is not taken in a case before all the witness affidavits have been signed and returned. Any instance in which a witness fails or refuses to return an affidavit is noted in the case file. If a witness/s fails to provide an affidavit/s that sets forth the essential factual elements in the case and a clear explanation of the allegations in the charge, the case is dismissed for lack of cooperation. See [Part 4, Chapter H](#), concerning dismissal letters.*

*As in every other aspect of the investigation, the Region takes all reasonable steps to ensure that all parties or witnesses have been fairly and equitably treated and that the Region's investigative methods and rationale for decision making have been explained.*

### 3. USE OF UNSIGNED/UNRETURNED TELEPHONIC AFFIDAVITS:

Unsigned/unreturned telephonic affidavits are **not** evidence--they are information. See [Part 3, Chapter F](#) which discusses the difference between evidence and information.



[Part 3, Chapter E](#) concerning Arranging On-Site Investigations;

[Part 3, Chapter F](#) concerning Evidence, in General; and

[Part 4, Chapter H](#) concerning Dismissal Letters.

RESERVED



## J. SWORN QUESTIONNAIRES TRANSMITTED TO AND FROM THE REGION BY MAIL

**OVERVIEW:** Use of a questionnaire, which is defined as a sworn interrogatory, can be an effective means of gathering evidence during an investigation.

**OBJECTIVE:** To provide guidance concerning the circumstances when it is appropriate to use a questionnaire during an investigation and the mechanics of doing so.

### 1. **WHEN TO USE A SWORN QUESTIONNAIRE:**

**C+P** RDs have discretion to use this alternative case processing technique of gathering evidence when there are no material issues of fact in dispute in the case. The Regions have discretion to develop their own questionnaires in situations where they deem this technique useful. In any event, a questionnaire is **not** sent until after the Agent has made a telephonic contact with the party.

These types of cases normally are based upon evidence which is impersonal, and predominantly documentary, involving undisputed facts which set forth the material information required to make a decision. In some cases, effective use is made of questionnaires, which are often shorter and more quickly prepared than affidavits and which do not require a personal interview of the witness.

- a. *An example of **appropriate** use of a questionnaire:*
- Bargaining and information cases which consist primarily of correspondence.

- b. *An example of when the use of an **affidavit** would be **appropriate**, i.e., use of an **questionnaire** would usually be **inappropriate**:*
- Cases which potentially turn on a witness's credibility--what a witness has seen or heard, e.g., (a)(1) statement cases, Weingarten cases.



*In almost every case, the decision to prepare a questionnaire rather than an affidavit is guided by the initial interview with the Charging Party. If the Agent decides that a questionnaire is appropriate, this decision is explained to the Charging Party before the questionnaire is sent to the Charging Party.*



*Also note that parties, on their own volition, may submit interrogatories or position papers when filing or responding to a charge.*

## 2.



### **CHARACTERISTICS OF A QUALITY QUESTIONNAIRE:**

- It is prepared after an exploratory interview with the witness or, if the witness is known to be competent and cooperative, no interview is required;
- It typically consists of questions appropriate to the type of violation alleged;
- When sent from the RO, it is administratively handled in the same manner as telephone affidavits are processed-- typewritten and accompanied by a cover letter to either the Charging or Charged Party explaining:
  - The purpose and importance of the questionnaire;
  - The manner in which the questionnaire is to be completed, including the date by which it must be returned;
  - The options for processing the charge after the questionnaire is received by the Region; and

**The Investigation  
Sworn Questionnaires Transmitted  
to and from the Region by Mail**

- Because the questionnaire, in select cases, is the equivalent of an affidavit that establishes the essential elements in the case and contains a clear explanation of the allegations in the charge, the Charging Party's failure to timely return the sworn and signed questionnaire constitutes a failure to cooperate in the investigation and will result in dismissal of the charge.

See [ATTACHMENT 3J1](#) for a Sample Cover Letter for a Questionnaire.

- Contains the same oath as contained in a sworn affidavit and there is no need that it be notarized;
- Functions as a checklist for the elements of proof associated with each allegation in a charge;
- In some circumstances, it may need to be supplemented by collateral affidavits or other statements;
- It is as self-contained as possible and is drafted to include all the elements of proof of the statutory violation and proposed remedy, and any other matters which the Region deems relevant in those type of violations; and
- Is drafted with a high degree of clarity and precision because it constitutes a series of questions prepared from the point of view of the Agent rather than that of the witness. It may be an informal supplement to the investigation or may be a substitute for a sworn affidavit.

**3. REGIONS SHARE QUESTIONNAIRES VIA E-MAIL:**

See [ATTACHMENT 3J2](#) for an example of a Questionnaire.

**The Investigation  
Sworn Questionnaires Transmitted  
to and from the Region by Mail**

RESERVED

## K. INVESTIGATORY SUBPOENAS

**OVERVIEW:** The investigatory subpoena is a rarely used investigatory technique to obtain evidence from the Charged Party or a Third Party. The GC has authority under § [7132](#)(a) of the Statute to issue an investigatory subpoena and to enforce an investigatory subpoena in an appropriate United States district court under § [7132](#)(b). Section [2423.8](#)(c) of the Regulations addresses the issuance and enforcement of investigatory subpoenas.

**OBJECTIVE:** To provide guidance concerning: (a) the criteria for requesting that the GC issue an investigatory subpoena; (b) the process for requesting and obtaining an investigatory subpoena; (c) service of investigatory subpoena; (d) revocation of an investigatory subpoena and (e) enforcement of investigatory subpoena.

### 1. **WHEN DOES AN RD CONSIDER REQUESTING THAT THE GC ISSUE AN INVESTIGATORY SUBPOENA:**

An RD considers requesting the issuance of an investigatory subpoena when a Charged Party fails or refuses to cooperate during an investigation and the criteria listed below are satisfied. It may also be requested when a Third Party has critical evidence it is not willing to provide.

### 2. **C+P CRITERIA RD'S APPLY IN DETERMINING WHETHER TO REQUEST THAT THE GC ISSUE AN INVESTIGATORY SUBPOENA:**

- Whether the evidence submitted by the Charging Party and any neutral witnesses establishes a potential violation (if the Region has sufficient evidence for the RD to decide the merits

of the charge, it is not necessary to require the Charged Party to produce additional evidence);

- Whether the evidence sought is relevant and material and is neither privileged, unduly repetitious nor unreasonably cumulative;
- Whether the evidence is necessary to decide a factual issue which must be resolved to determine whether or not a violation of the Statute has occurred, and that evidence is not otherwise available;



*Cases which turn on the credibility of a witness, e.g., § 7116(a)(1), (2) and (b)(1) are normally not proper candidates for consideration of the issuance of an investigatory subpoena to take a witness's statement but it may be necessary to subpoena a crucial document(s) deemed material to the case under § 7116(a)(1) and (2).*


- Whether the evidence sought is not within the control of the Charging Party;
- Whether the evidence can be produced without an undue burden and is specific, narrowly tailored, and reasonable;
- Whether the Charged Party is likely to comply with the subpoena, and failing that, the prospect for successful enforcement of the subpoena in court.

### 3. **PROCESS FOR REQUESTING AND OBTAINING GC'S ISSUANCE OF INVESTIGATORY SUBPOENA:**

- The Agent seeks voluntary cooperation (do **not** discuss matter of investigatory subpoena with the Charged Party's representative) and documents contacts with a confirming letter or in a memo to the file;
- If cooperation is not given, then, based on the above criteria, the Agent requests that the RD request the GC to issue an investigatory subpoena;

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- RD decides whether to request the GC to issue the investigatory subpoena based on the above criteria. Such request is made by memorandum (no discussion with the Charged Party's representative about investigatory subpoena occurs); and

 *The memorandum states the allegation, the evidence obtained thus far and how the criteria listed above are applied.*

- GC decides to issue the subpoena or denies the request.

**4. BEFORE THE SUBPOENA ISSUES, THE CHARGED PARTY HAS A LAST CHANCE TO COOPERATE WITH THE INVESTIGATION:**

After the GC grants the RD's request to issue an investigatory subpoena, the Agent expeditiously contacts the Charged Party's representative and gives the Charged Party a last chance to cooperate with the investigation. The Agent informs the Charged Party's representative that, absent voluntary compliance, a subpoena will issue, and, absent compliance with the subpoena, enforcement will be sought in an appropriate United States district court.

 *The Agent documents this contact with the Charged Party's representative in the case file.*

See [ATTACHMENT 3K1](#) for a Sample Investigatory Subpoena.

**5. SERVICE OF SUBPOENA:**

Any individual who is at least 18 years old and who is not a party to the proceeding may serve a subpoena and certify that s/he did so by:

- Delivering it to the witness in person;
- Registered or certified mail; or
- Delivering the subpoena to a responsible individual (named in the document certifying the delivery) at the residence or place of business (as appropriate) of the person for whom the subpoena was intended.

## 6. REVOCATION OF SUBPOENA:

### a. *Procedural requirements:*

Any person who does not intend to comply with a subpoena has five days from the date of service of the subpoena to petition in writing to revoke the subpoena. Such a person is required to serve the GC with a copy of the petition to revoke.

### b. *Standards governing the GC's ruling on a petition to revoke:*

The GC revokes the subpoena if: (a) witness or evidence which is required to be produced is not material and relevant to the matters under investigation or in question in the proceedings; (b) if the petition does not describe with sufficient particularity the evidence sought; or (c) if for any other reason sufficient in law, the subpoena is invalid.

## 7. ENFORCEMENT PROCEEDINGS:

Upon the failure of any person to comply with a subpoena, the RD contacts OGC HQ immediately for the GC's determination whether to institute proceedings in a United States district court for the enforcement of the subpoena.

If it is determined to institute enforcement proceedings, OGC HQ will coordinate such action with the RD.



**LM, Part 1, Chapter K concerning Subpoenas at Trial.**



## L. INTERVIEWS WHEN NO AFFIDAVITS ARE TAKEN

**OVERVIEW:** During the course of the investigation, the Agent sometimes interviews a witness when no affidavit is taken. Instead, the Agent will record a note to the file or draft a confirming letter.

**OBJECTIVE:** To provide guidance on the use of confirming letters and notes to the file.

### 1. A MEMORANDUM TO THE FILE IS NOT EVIDENCE:

If an Agent obtains substantive information orally that is to be relied upon by an RD in making a decision, the information is contained in either a sworn affidavit, documentary evidence, sworn questionnaire or a confirming letter. Other information, which does not constitute material facts and which is not relied upon by the RD in making a merits determination, may be noted in a memorandum to the file to be used for background purposes. Conversely, evidence or substantive information bearing on the merits is **not** noted in the case log.

### 2. CONFIRMING LETTERS OF CHARGING PARTY WITNESS:

a. *When a confirming letter is used:*

A confirming letter, properly obtained, may be used by the Region in determining the merits of the case.

Not every conversation with a party or a witness results in evidence suitable for trial, but often these conversations do result in information which can be useful in resolving the case. In order to rely on information received orally, the Agent confirms any relevant substantive information received about the case in a letter to the party or witness who provided it. A confirming letter may be used to clarify allegations of a charge or for corroborating evidence.


Examples of appropriate use of a confirming letter:

- Charging Party informs the Agent telephonically that the events giving rise to the charge arose outside the timeliness provisions of the Statute (§ [7118\(a\)\(4\)\(A\)](#)) and the conversation reveals that none of the exceptions apply (§ [7118\(a\)\(4\)\(B\)](#)); and
  - A party telephonically informs an Agent that it is challenging an action clearly outside the jurisdiction of the Statute.
- b. *Contents of a confirming letter:*

Confirming letters clearly state the factual information received from the party or witness, explain that the information will be considered by the RD in deciding the merits of the case, and give the party or witness a reasonable period of time to advise the Agent of any inaccuracies or changes in the information.

Confirming letters do **not** include the Agent's assessment of the case. The Agent does not discuss his/her assessment of the case with either party unless, under the criteria stated in [Part 4, Chapter A](#) concerning Solicitation of Withdrawals, the Agent is permitted to solicit a withdrawal prior to an RD's decision on the merits.

Confirming letters are **not** used to revise a charge that requires more than a minor clarification. Rather, an amended charge is required. See [Part 2, Chapter B](#) concerning Docketing the Charge and, in particular, when an Amended Charge is necessary.

 *There is no requirement that a Charging Party witness sign a confirming letter. If it is determined that it is necessary for the Charging Party witness to affirm certain facts, an affidavit or supplemental affidavit remains the preferred means of recording witness testimony involving facts that are in dispute. However, Regions have discretion to require a Charging Party witness to sign and return a confirming letter.*

See [ATTACHMENT 3L1](#) for a Sample Confirming Letter for Charging Party Witness that is used to support a Dismissal of the Charge; and [ATTACHMENT 3L2](#) for a Sample Confirming Letter for Charging Party Witness that supports the Charging Party.

**3. INTERVIEWS WITH CHARGED PARTY REPRESENTATIVES AND OTHER AGENTS WHEN NO AFFIDAVITS ARE TAKEN:**

- a. *Charged Party's legal position is presented orally in interview with representative:*

An oral presentation of a legal position is not evidence. It may be used for background and information purposes only and does not bind a Charged Party to any legal position. See [Part 3, Chapter F](#) for a discussion of evidence v. information.

- b. *Use of facts presented orally in the interview with Charged Party representatives and other agents:*

An oral presentation of the facts is not evidence and it may be used for background and information purposes only.

- c. *Charged Party confirming letters:*

- i. Only use if the representative or agent agrees to such use, understands the process, and can partake in the process, e.g., do not use if the representative indicates that s/he is not permitted by the Agency or Union to confirm or not confirm;
- ii. If the party is represented, make sure the representative gets a copy; and
- iii. A signature is necessary to use as evidence to support dismissal or complaint.

**Rationale for obtaining a signature on Charged Party confirming letters and not for Charging Party confirming letters.** Unlike Charging Party confirming letters, which need not be signed in order to be used in determining the merits of a charge, a confirming letter of a Charged Party witness may not be used in determining the merits of a charge unless it is signed. For purposes of using a confirming letter to support the dismissal of a charge, it is quite different to rely on something stated, but not sworn to, by a Charging Party

witness to dismiss a charge, than to rely on something stated, but not sworn to, by a Charged Party witness to dismiss a charge. Thus, it is required that Charged Party confirming letters be signed. For the purposes of using a confirming letter to support issuance of complaint, very seldom, if ever, would a complaint issue absent a signed/sworn Charging Party statement. Moreover, for the purposes of providing further support for the issuance of a complaint, it is acceptable to rely on an unsigned Charging Party's confirming letter and corroborating evidence already obtained, because that witness can be pre-tried and called as a GC witness at trial to obtain direct testimony. On the other hand, do not rely on an unsigned Charged Party witness confirming letter to support issuance of a complaint because of the uncertainty of that person's testimony at trial.

Thus, the above policy was adopted to require Charged Party confirming letters to be signed, as well as requiring the Agent to ensure that the Charged Party witness agrees to the use of a confirming letter, understands the process, and indicates the authority to confirm or not to confirm by their party.

See [ATTACHMENT 3L3](#) for a Sample Confirming Letter of a Charged Party Witness.

**4. INTERVIEWS WITH NON-PARTY WITNESSES GIVING FACTS WHEN NO AFFIDAVITS ARE TAKEN:**

- a. *Use of facts presented orally in an interview with non-party witnesses:*

As stated above, oral presentations of facts are not evidence and may be used solely for background and information purposes.

- b. *Confirming letters:*
  - i. Are used for corroborating evidence;
  - ii. Are used to obtain additional facts after on-site investigation; and

- iii. Need not be signed.

See [ATTACHMENT 3L4](#) for a Sample Confirming Letter of a Non-party witness.



[Part 2, Chapter B](#) concerning Docketing the Charge

[Part 3, Chapter F](#) concerning Evidence, in General; and

[Part 4, Chapter A](#) concerning Agent's Involvement in Withdrawal Requests Prior to a Regional Director Merit Determination.


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Interviews when no Affidavits are Taken**

RESERVED

## M. IMPROPERLY OBTAINED OR PURLOINED INFORMATION/EVIDENCE

**OVERVIEW:** During the course of an investigation, a witness or party's representative may provide, or seek to provide, evidence that may have been improperly obtained or purloined by that party. Such evidence could include documents obtained by a party or individual under "questionable circumstances," or other evidence, such as a tape recording or videotape, that may have been surreptitiously recorded without the consent of one or both of the parties. The OGC has an interest in obtaining the best evidence upon which to base an RD decision as well as to maintain the highest ethical standards.

**OBJECTIVE:** To provide guidance concerning the Agent's decision whether to accept and use evidence that may have been improperly obtained or purloined by a party.

1.  **AN AGENT OF THE FLRA NEVER ENGAGES IN COMPLICITY IN IMPROPERLY OBTAINING EVIDENCE**
  
2. **AN AGENT IS ADVISED THAT A WITNESS HAS EVIDENCE THAT MAY HAVE BEEN IMPROPERLY OBTAINED/PURLOINED:**

If, during the course of an investigation, a party's representative or witness wishes to provide evidence that s/he identifies as having been improperly obtained or purloined, the Agent:

- a. *Warns the individual of the potential consequences of providing evidence:*

The Agent informs the individual who is attempting to provide the evidence that the individual may be subject to disciplinary or legal

charges if the Region uses the evidence and it is disclosed who provided it. The individual is cautioned and advised that the Region cannot protect his/her identity. If the Region decides to use the evidence, it cannot ensure that the individual's identity will be kept confidential. After being appropriately cautioned, if the individual decides that s/he does not want the Region to use the evidence, the Agent does not accept the evidence.

b. *Notification to RD/RA/DRD:*

If, after advising the individual as above, the individual still decides to submit evidence which has been identified as having been improperly obtained or purloined, the Agent contacts the RA/DRD/RD immediately for guidance to determine whether to accept the evidence.

**3. C+P CRITERIA FOR DETERMINING WHETHER TO ACCEPT AND USE SUCH EVIDENCE:**

Consider the following in determining whether to accept documents that have been improperly obtained or purloined:

- Will liability (criminal or civil) attach to the individual who provided the evidence to the Region should a complaint issue and the evidence is ultimately introduced (or an attempt is made to introduce) at the hearing? The Region attempts to avoid a situation in which its Agents may be called upon to testify in an arbitration, administrative, civil or criminal proceedings related to evidence it introduced, or attempted to introduce, at hearing; and
- Does the cost of accepting the evidence and using it for a merit determination, and perhaps ultimately at trial outweigh any benefit to be gained by accepting and using the evidence? In other words, is the negative impact upon the ULP proceeding and the integrity of the OGC outweighed by any benefit of achieving the ultimate goal of determining whether a violation has occurred?





*In deciding whether to accept the improperly obtained or purloined evidence, the Region may review the evidence. Thus, if the evidence is an improperly obtained tape or video recording, the Region may listen to the tape or view the video as part of deciding whether to accept the evidence. If the evidence is a document that is presented directly to the Agent in the field or is received by mail, the evidence also may be reviewed as part of the process in applying the above criteria to determine if the evidence should be accepted. If the evidence is not accepted, however, it is not used in determining the merits of the charge. However, the Region may follow up and attempt to discover other evidence which may then be properly obtained on the subject matter of the rejected evidence.*

**4. AUTHORITY PRECEDENT: THE AUTHORITY HAS NOT ADDRESSED THIS MATTER IN ANY DECISIONS BUT THE FOLLOWING TWO ALJ DECISIONS ARE INSTRUCTIVE:**

National Labor Relations Board, Region 24, Case No. 2-CO-50, ALJD Rpt. No. 5 (1981) (NLRB, Region 24) (In a ULP proceeding against the union for surreptitiously taping a bargaining session, the ALJ, in dicta, found that, in deciding that the union had violated the Statute, “the National Labor Relations Board has refused to admit the tape as evidence in a refusal to bargain proceeding, on the ground that such a recording would inhibit severely the willingness of parties to express themselves freely, and seriously impair the collective bargaining process”); see also Sport Air Traffic Controllers Organization (SATCO), 52 FLRA No. 32, 52 FLRA 339, 345-46 (1996) (Adopting ALJ’s finding, in which he relied upon NLRB, Region 24, that respondent union violated § 7116(b)(1) and (5) by insisting to impasse on the tape recording of the parties’ collective bargaining negotiations).

U.S. Department of Justice, Immigration and Naturalization Service, Border Patrol, Case No. 6-CA-90255, ALJD Rpt. No. 94 (1991) (ALJ stated in response to the GC’s argument that respondent’s evidence should be given no weight since it was not provided to the Region during the investigation: “An Administrative Law Judge is not charged with the responsibility of policing investigations and overseeing the collection of evidence necessary to prove or disprove the allegations of

a charge. Absent a showing that evidence was somehow obtained illegally, the Administrative Law Judge's sole function with respect to documentary evidence proffered at a hearing is to determine its relevance and legal sufficiency").

## **5. NLRB/COURT PRECEDENT:**

### *a. Initial strict exclusionary rule:*

Hoosier Cardinal Corp., 67 NLRB 49 (1946) (Board agent obtained records from an officer of a cited union organization who was secretly a member of a rival union and Board indicated it would not consider evidence in order "to refrain from any appearance of surreptitious dealing with one of the parties").

### *b. Loosening of the strict rule: Evidence allowed as long as Board Agent not involved in improper activity:*

Air Line Pilots Association, 97 NLRB 929 (1951) and General Engineering, 123 NLRB 586 (1959) (Board held that it would allow the introduction of allegedly illegally-obtained evidence as long as government agents were not involved in the taking of the documents).

Cory Coffee Services, Div. of Cory Food Services, Inc., 242 NLRB 601 (1979) (where Board attorney asserted that the purloined document came to Board agents during its investigation and that no Board agent "obtained it from Respondent's office," the ALJ stated that he could not find that the Board's attorney or its agents knew these documents had been stolen or that the Board had any involvement in the taking of the documents, and therefore was "unable to conclude that the proceedings should be dismissed outright on the basis that respondent has been denied due process of law or that its rights have been seriously prejudiced by the Region's clandestine use of this 'purloined evidence'").

NLRB v. South Bay Daily Breeze, 415 F.2d 360, 365 (9th Cir.1969) (in upholding Board's decision, court stated that "where the Board merely accepts and makes use of evidence illegally obtained by private individuals, exclusion of such evidence is not required by the Act").

## **N. DISCLOSURE OF EVIDENCE-- DISCUSSING THE CONTENTS AND FURNISHING COPIES**

**OVERVIEW:** The Agent gathers evidence and information during the course of an investigation. At times, s/he uses that evidence to develop other evidence so that the case file contains the best evidence needed for the RD to make a merit determination.

**OBJECTIVE:** To provide guidance concerning under what circumstances various types of evidence may be disclosed to the other party and how evidence that is not disclosed may be used to obtain additional evidence.

1.  **DISCLOSURE OF A PARTY'S DOCUMENTARY OR PHYSICAL EVIDENCE:**

- a. *Distinction between public and non-public evidence:*
  - i. The rule of confidentiality applies to non-public evidence, See Section [2423.8\(c\)](#). Non-public evidence is evidence that is within an Agency's or Union's internal control and is not distributed externally, e.g., minutes of a Union or Agency-management meeting; intra-management or intra-union memorandum; or an employee's performance appraisal.
  - ii. If the evidence is public information it can be discussed with, shown and provided to, the other party if it is necessary to obtain the complete facts.

- b. *The document may be shared if, on its face, it shows that the other party has already obtained it.*
- c. *If the document is internal, i.e., non-public:*
  - i. Ask the party who provided it for permission to furnish a copy to the other party.
  - ii. If permission is granted, it can be discussed with, shown to, and provided to the other party.
  - iii. If such permission is declined, and the document purports to establish a fact, then the Agent informs the other party that s/he has a document establishing a certain fact that is disclosed and discussed, but does not identify, show, or furnish the document to that party.

## 2. DISCLOSURE OF AFFIDAVITS, SWORN QUESTIONNAIRES, AND CONFIRMING LETTERS:

- a. *The rule of confidentiality applies to affidavits, sworn questionnaires and confirming letters and the affidavit form refers to the confidentiality rule. See § 2423.8(c).*

See [Part 3, Chapter H](#) concerning Affidavits Taken in Person, which discusses this rule.

- b. *How to obtain a party's response to facts represented in an affidavit, confirming letter or sworn questionnaire:*

The Agent uses the fact to frame questions but is careful not to disclose its origin, or show, or furnish copies, of the evidence.



[Part 3, Chapter H](#) concerning Affidavits Taken in Person.

## O. DUTY OF THE CHARGING PARTY

**OVERVIEW:** Section [2423.8\(b\)](#) codifies the duty of a Charging Party to cooperate: “In connection with the investigation of charges, all persons are expected to cooperate fully with the Regional Director.”

**OBJECTIVE:** To provide guidance concerning what actions are taken when a Charging Party is uncooperative during the course of an investigation.

### 1. PURSUANT TO § [2423.8\(b\)\(1\)](#), COOPERATION INCLUDES:

- Making Union officials, employees and Agency supervisors and managers available to give sworn/affirmed testimony regarding matters under investigation;
- Producing documentary evidence pertinent to the matters under investigation; and
- Providing statements of position on the matters under investigation.

### 2. **DISMISSALS FOR LACK OF COOPERATION AND DISMISSALS ON THE MERITS FOR PARTIAL COOPERATION:**

- a. *When the Charging Party does not respond to the Agent's request that charge be clarified by amended charge:*

If, after the Region docketed the charge, it is determined that the charge needs to be clarified before the investigation can be started, the Agent assigned to the case contacts the Charging Party representative by telephone to advise of the need for clarification by an amended charge. A confirming letter of the conversation is sent advising that if the clarification is not provided by a date certain (within 10 days of date of

letter), the charge will be dismissed, absent withdrawal. If an attempt at contacting by telephone was unsuccessful, Charging Party is either sent a letter or an e-mail message (record contains copy of message and certification of receipt) stating the need to clarify within a date certain or the charge will be dismissed, absent withdrawal. See [Part 2, Chapter B](#) concerning Docketing the Charge, and in particular, clarification and the need for an amended charge.

See [ATTACHMENT 3O1](#) for a Sample Letter to Charging Party - Dismissal for Lack of Cooperation in failing to provide clarification of charge.

- b. *Lack of cooperation at the outset of an investigation--no evidence submitted:*

The Agent advises the Charging Party's representative, at least once by telephone, and in a confirming letter, that the Region is considering dismissing the charge for noncooperation, and provides the Charging Party with a reasonable period of time to respond. If still unable to contact the representative by telephone, the Agent sends a letter setting forth the Region's particular concerns. Charge is not dismissed until a reasonable effort to contact the Charging Party's representative by telephone has been made and s/he has been given a reasonable time to receive the letter. If the Charging Party fails to submit the evidence requested despite the opportunity to do so, the charge is dismissed for lack of cooperation. The case file contains documentation of the unsuccessful attempts to contact the Charging Party.

See [ATTACHMENT 3O2](#) for a Sample Letter to Charging Party - Dismissal for Lack of Cooperation during the Investigation.

- c. *Dismissal on the merits--additional evidence not submitted during investigation:*

This situation arises where the Charging Party has submitted some evidence that is either insufficient or incomplete and the Agent has requested that additional evidence be submitted. If the Charging Party has been given a fair opportunity to submit the evidence but did not do so, the Region dismisses the charge on the merits with a notation to that effect in the case file. Examples include:

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Duty of the Charging Party**

- Repeatedly not returning phone calls;
  - Not keeping telephone or meeting appointments;
  - Not returning telephone affidavits;
  - Not submitting documents; and
  - Not providing knowledgeable witnesses.
- d. *When the Region is contacted after an established deadline but before a dismissal letter issues for failure to cooperate or before a dismissal letter issues on the merits:*

The Agent advises Charging Party's representative that a dismissal letter is being prepared but that its issuance will be delayed if the evidence is submitted within a specific time (as deemed appropriate by RA/DRD/RD). The Agent also tells the representative that any evidence received will be presented to the RD for a determination regarding whether to reopen the case for further investigation or go forward with the dismissal.

- e. *Evidence received after the established deadline but before dismissal letter issues for failure to cooperate or before dismissal issues on the merits:*

Similarly, evidence that is actually received **after** the deadline imposed but before issuance of the dismissal letter will be considered by the RD for a determination whether to reopen the case for further investigation or to go forward with the dismissal.

- f. *When a witness refuses to continue an investigative interview due to end of shift:*

See [Part 3, Chapter E](#) concerning Arranging On-Site Investigations and issues relating to official time for witnesses.

- g. *When a party continuously files a substantial block of charges at one time that have routinely been dismissed or withdrawn after a non-merit determination:*

Despite regional efforts to train/educate the Charging Party concerning the Statute and to improve labor-management relations, RDs have discretion to require these Charging Parties to submit their supporting evidence or respond in writing to questions concerning the charges, **before** determining the scope and method of the investigation. If there is no timely response, the charges are processed like other situations where the Charging Party fails to cooperate in an investigation.

- h. *Circumstances arise during the investigation where conduct inhibits investigation and Agent's response:*
  - i. If a scheduled witness does not show up for an interview, the Agent gives the witness a date certain to provide the information and/or to take a telephone affidavit. This is confirmed in a letter to the Charging Party with an admonition concerning the lack of cooperation and consequences should there be non-compliance by a date certain, i.e., dismissal.
  - ii. If a representative does not make certain documents available when the Agent is on-site, as had been pre-arranged, the Agent gives the Charging Party a date certain to produce the documents and confirms this in a letter with an admonition concerning lack of cooperation and consequences should there be non-compliance by a date certain, i.e., dismissal.



*The lack of cooperation discussed here does not include abusive behavior on the part of representatives or witnesses. That subject is covered in [Part 3, Chapter S](#) concerning *Dealing with Parties that Display Abusive Behavior During an Investigation*.*

### 3. CASE PROCESSING TECHNIQUES:

As part of the investigatory process, RDs may exercise discretion to mandate certain case-processing techniques, such as to require attendance with a RO representative to discuss the charge.



**C+P** RDs apply the following criteria in determining whether to use an alternative case-processing technique:

- If the charge evidences a relationship issue between the parties;
- The charge is a repeat filing;
- The charge is one of many charges concerning the same event that underlies each charge;
- The parties have participated in previous ADR programs; and
- The Charged Party is willing to cooperate in the alternative case-processing technique.

See [ATTACHMENT 303](#) for a Sample Letter to the parties which mandates implementation of an alternative case processing technique.



*Although the Charging Party may be required to participate in the above alternative case processing technique, it cannot be required to settle a charge.*



**[Part 2, Chapter B](#) concerning Docketing the Charge;**

**[Part 3, Chapter E](#) concerning Arranging On-Site Investigations;  
and**

**[Part 3, Chapter S](#) concerning Dealing with Parties that Display Abusive Behavior During an Investigation.**

RESERVED

## P. DUTY OF THE CHARGED PARTY

**OVERVIEW:** An investigation is conducted effectively and obtains the best evidence upon which an RD may rely if the Charged Party, as well as the Charging Party, cooperates during an investigation. Such cooperation is contemplated under § [2423.8\(b\)](#), which does not distinguish between the level of cooperation given by the two parties.

**OBJECTIVE:** To provide guidance concerning the Charged Party's duty to cooperate during the course of an investigation.

### 1. **CHARGED PARTY COOPERATION IS SOUGHT THROUGHOUT THE ENTIRE PROCESSING OF THE CHARGE:**

A Charged Party's cooperation is specifically sought concerning the following matters:

- In the opening letter and the first telephone contact with the Charged Party's representative where the benefits of cooperation are explained;
- In arranging for § [7131\(c\)](#) official time;
- In seeking a position statement and documents, even if the Charged Party will not allow witnesses to be interviewed, or has no witnesses (See § [2423.8\(b\)\(3\)](#)); and
- In seeking background information even if no evidence through witnesses and/or documents is provided. For example, this information may be in the form of:
  - Unsworn position statements; or
  - Personal telephone interviews which do not lead to affidavits or confirming letters.



*Evidence obtained from Charged Parties meet the same standards as evidence obtained from Charging Parties. The Agent does not close an investigation without determining whether the Charged Party will provide evidence meeting these standards.*

## 2. **USE OF THE INVESTIGATORY SUBPOENA:**

Where a Charged Party fails or refuses to cooperate and the RD has deemed such cooperation appropriate, the GC may, in appropriate cases, exercise authority pursuant to § [7132](#) of the Statute to issue an investigatory subpoena. See [Part 3 Chapter K](#) for a discussion of investigatory subpoenas including criteria for determining when to request issuance of an investigatory subpoena.



**[Part 3, Chapter K](#) concerning Investigatory Subpoenas.**

## Q. RESOLVING DISPUTES DURING INVESTIGATIONS AND PRIOR TO A MERIT DETERMINATION

**OVERVIEW:** RO Agents encourage the informal resolution of the allegations in the ULP charge throughout the investigation prior to a determination on the merits of the charge. See § [2423.1\(b\)](#). Agents assist the parties, using an interest-based problem-solving approach, in resolving the dispute which gave rise to the filing of the charge.

**OBJECTIVE:** To provide the Agent with the principles and general techniques which facilitate the informal resolution of ULP charges.

### 1. GUIDELINES WHEN ASSISTING THE PARTIES IN RESOLVING THEIR DISPUTE:

- Agents employ an interest-based problem-solving approach, that utilizes skills, techniques, and strategies, when assisting the parties in resolving the dispute which gave rise to the filing of the ULP charge;
- This dispute resolution technique is employed as part of the investigation of the charge and does not constitute a separate alternative case processing procedure, as discussed in [Part 3, Chapter B](#);



*Attempts to resolve the dispute informally do not delay the investigation or the RD's decision on the merits of the charge. Rather, as part of initially exploring the allegations and facts of the case, the Agent utilizes his/her experience, knowledge of the parties, and acceptance as a neutral, to uncover the parties' respective interests in the matter in dispute and*

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*suggest options which resolve the dispute and result in the withdrawal of the charge.*

- The Agent explains the benefits of resolution and clarifies the relationship between the attempt to resolve the dispute prior to an RD determination on the merits of the charge and the taking of positions and evidence;
- Discussions occur on site or telephonically, if possible, with both parties together. If not possible, the Agent communicates separately with the parties but continues to employ an interest-based approach;
- Agents propose solutions and prepare draft resolutions, but the parties must adopt any resolution as their own, share a common understanding of both parties' commitments under the resolution and understand the process to resolve any allegations of non-compliance with that resolution; and
- If the parties are unable to resolve their dispute during initial conversations, the Agent begins taking evidence and, as appropriate during the investigation, continues to attempt resolution of the dispute.

**2. C+P CRITERIA AND PRINCIPLES GOVERNING THE RESOLUTION OF ULP CHARGES:**

An Agent applies these criteria and principles when assisting the parties in resolving the dispute which gave rise to the filing of the ULP charge prior to an RD determination on the merits of the charge:

- Attempt to resolve only those charges that lend themselves to a party resolution. For example, charges which fall within the scope of investigations criteria, listed at [Part 3, Chapter D](#), concerning Scope of Investigations, may not be appropriate;
- Utilize interest-based problem-solving principles (issues, interests, options, criteria and solutions);

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- Avoid “shuttle diplomacy”, i.e., acting as a messenger between the parties’ offers and counteroffers;
- Explore both parties’ interests, not just what the charged party is willing “to give up” to “get rid of” the charge;
- Attempt to discuss the resolution with both parties together, but the same techniques can be utilized with separate discussions;
- Time is of the essence. If there is no resolution and withdrawal of the charge, the taking of evidence immediately commences if on-site or as soon as practicable if discussions were telephonic;
- No evidence (testimonial or documentary) is initially taken on the merits of the charge, although facts may be discussed to place the issue and the parties’ interests in context;
- No discussion of the merits of the charge;
- The applicable law may be discussed, as appropriate, especially when exploring the parties’ respective best alternatives to a negotiated agreement (BATNAs);
- Both parties understand how the investigation proceeds before beginning; that is, attempts to resolve the dispute and then the taking of evidence; and
- The criterion utilized in reaching agreement is whether the resolution is legal and consistent with the purposes and policies of the Statute, just as when unsolicited withdrawals are submitted based on a party agreement.

3.



**APPLICATION OF INTEREST-BASED PROBLEM-SOLVING  
PROCESS TO RESOLUTION OF ULP CHARGES:**

- Agent describes the process:

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- No evidence (affidavits or documentary) is initially taken on the merits of the charge--although facts may be discussed to place the issue and the parties' interests in context;
  - No discussion of the merits of the charge--although the applicable law may be discussed;
  - If no mutual resolution of the dispute and Charging Party withdrawal of the charge, the investigation proceeds with the taking of evidence, but resolution still may occur anytime thereafter;
  - Party resolution has the same force and effect as any other party agreement resulting in the withdrawal of the charge;
  - The parties own any agreement and must agree and understand both parties' commitments;
  - Initial time limits on discussions are established; and
  - Clarification of the necessity to empower the parties' representatives to agree to resolution.
- The Agent clarifies and identifies the **dispute** that caused the filing of the charge and tests that identification with the parties respectively.
  - The Agent understands the **parties' respective interests** and tests that understanding with the parties respectively.
  - The Agent **explains the approach** to developing a resolution. The Agent and parties present options, which are explored and modified, and no party commits until final agreement is reached.
  - The Agent **controls and implements** the process, exploring the parties' alternatives, as appropriate.
  - The Agent assists the parties in **memorializing** their agreement and the charge is **withdrawn**.



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

[Part 3, Chapter D](#) concerning Scope of Investigations.

## R. ENSURING EMPLOYEE SAFETY DURING AN INVESTIGATION

**OVERVIEW:** It is essential to ensure the safety of Agents and other people who are involved in an investigation. The Agent must know what to do should a situation arise that may compromise personal safety, whether at the RO or in the field.

**OBJECTIVE:** To provide guidance concerning safety during an investigation and the procedure to follow when a safety concern arises during the course of an investigation.

### 1. DEFINITIONS OF POTENTIALLY THREATENING SITUATIONS\*:

a. *Workplace violence:*

An aggressive action intended to cause, or capable of causing, death or serious bodily injury to oneself or others, or damage to property. Workplace violence includes abuse of authority, intimidating or harassing behavior, threats, and hostile and abusive language.

b. *Assault:*

To attack someone physically or verbally, causing bodily or emotional injury, pain and/or distress. This might involve the use of a weapon, and includes actions, such as hitting, punching, pushing, poking, or kicking.

c. *Intimidating or harassing behavior:*

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\* HEALTH AND HUMAN SERVICES DEPARTMENT, GUIDELINES FOR UNDERSTANDING AND RESPONDING TO VIOLENCE IN THE WORKPLACE 3-5 (1996).

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Threats or other conduct which create a hostile environment, impairs Agency operations, or frightens, alarms or inhibits others. Psychological intimidation or harassment includes making statements which may be false, malicious, disparaging, derogatory, rude, disrespectful, abusive, obnoxious, insubordinate, or which have the intent to hurt others' reputation. Physical intimidation or harassment may include holding, impeding or blocking movement, following, stalking, touching or any other inappropriate physical contact or advances.

d. *Stalking:*

Malicious approach or pursuit of another person with intent to create fear of serious bodily injury or death.

e. *Threat:*

Any oral or written expression or gesture that conveys an intent to cause physical harm to people or property. Statements such as, "I'll get him" or "if you don't see it my way you'll end up just like those people at the Post Office" are examples of threatening expressions.



*The above definitions are not all inclusive. Employees should report incidents of workplace violence even if they might not fall within a particular definition. There is no standardized profile of a potentially threatening person or situation and an individual's "gut feeling" may be the best judge of a situation. Put simply, an employee knows a threat or intimidation or other disruptive behavior when s/he experiences it. Always err on the side of caution. All reports of incidents will be taken seriously.*

## **2. ROLES AND RESPONSIBILITIES OF ALL EMPLOYEES:**

- To report promptly any acts of violence, threats, and similar disruptive behavior according to the procedure detailed below;
- To interact responsibly with those persons who are involved in the investigation, including all witnesses, the public, and other employees;

- To cooperate fully in any internal or external investigations/assessments of allegations of workplace violence; and
- If a manager, to take whatever action is appropriate under the circumstances to ensure the safety of all employees; to report all incidents to the FLRA's OIG; and to implement any corrective measures identified by the OIG or other management authority with the responsibility and authority to make such recommendation.

**3. STEPS TO FOLLOW WHEN CONFRONTED BY THREATENING BEHAVIOR POSING AN IMMINENT DANGER:**

Situations are so varied that it is difficult to draw up a set of procedures that work in all situations. The following list of steps is intended as a guide:

- Remain as calm as possible;
- Secure your own safety--never stand directly in front of or make sudden movements with a violent or hostile person and, if possible, remove yourself from the room;
- Immediately dial 911 to summon the local authorities;
- Continue to remain calm, speaking slowly, softly and clearly;
- Ask the person to sit down; see if s/he is able to follow directions;  
and
- Be careful not to provoke the person by being critical or judgmental and not appearing to be empathetic.

**4. REPORTING POTENTIALLY THREATENING INCIDENT:**

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- As soon as possible after a potentially threatening incident occurs, the Agent calls regional management and reports the incident;
- The appropriate regional manager notifies the IG at 202-482-6570, immediately and then notifies the OGC;
- Within the next business day, the Agent prepares a written report of the incident regional management explaining the facts;
- The incident is documented in the case file; and
- The IG takes action, as appropriate.

**5. CONTENTS OF THE AGENT'S REPORT:**


A report of a threatening incident contains the following information:

- Name of the person making threats and his/her relationship to the FLRA;
- Name of the potential victim;
- Name of any witnesses;
- Where/when (date) the incident occurred;
- The specific language of the threat or harassing behavior; and
- If known, any precursor events to the incident.

**6. RD CONSIDERS CHANGES IN THE RELATIONSHIP WITH A PARTY IN LIGHT OF AN INCIDENT:**

After the threatening incident has occurred, the RD exercises discretion in considering whether it is necessary to change the way in which the RO relates with the party in light of the circumstances concerning the incident. Before doing so, the RD consults with OGC HQ. For example, a policy determination may be made concerning whether

future contact with a party will be by telephone or require the party to come to the RO.

 *At any time during the course of an investigation, it is appropriate for the Agent to terminate an investigatory activity s/he is engaged in if the Agent perceives that his/her safety is an issue.*

## 7. STEPS TO REPORT NON-THREATENING INCIDENTS:

See [Part 3, Chapter S](#) concerning Dealing with Parties that Display Abusive Behavior During an Investigation. These instances do not involve behavior which could reasonably be construed to be a threat. Examples are: (a) making false statements; (b) disrupting an interview; (c) continued use of profanity after the individual has been requested to cease its use; (d) making harassing statements; and (e) other inappropriate disrespectful behavior. The Agent reports the incident to regional management as soon as possible.



[Part 3, Chapter S](#) concerning Dealing with Parties who Display Abusive Behavior During an Investigation.

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## S. DEALING WITH PARTIES WHO DISPLAY ABUSIVE BEHAVIOR DURING AN INVESTIGATION

**OVERVIEW:** It is the policy of the OGC to treat its customers in a professional manner with respect and courtesy, and to expect that OGC employees will be treated similarly by its customers. Abusive behavior, including the use of profanity or other offensive language, will not be tolerated. A party's representative or witness's behavior during an investigation that interferes with the investigation, but does not threaten employee safety or constitute a lack of cooperation within the meaning of § [2423.8\(b\)](#) (see [Part 3, Chapter O](#) concerning Duty of the Charging Party), may constitute such abusive behavior. This type of behavior, which may occur telephonically or on-site, is unacceptable and will not be tolerated. **It is important to note that to determine whether a particular action constitutes abusive behavior requires an exercise of judgment.** For example, an Agent must differentiate between an individual who is simply frustrated with his/her circumstances and an individual whose behavior is, in fact, abusive.

**OBJECTIVE:** To provide guidance and the procedure to follow when a representative or witness is abusive during the course of an investigation.

### 1. DEFINITION OF ABUSIVE BEHAVIOR:

Abusive behavior is conduct which does not threaten the safety of an Agent, but which interferes with the ability of an Agent to perform his/her duties. Examples of abusive behavior are:



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- Disrupting an interview;
- Continued use of profanity after the Agent has requested that its use cease;
- Making harassing, malicious, rude, derogatory, insubordinate or disparaging statements;
- Insisting on discussing disputes with, or disagreements about the actions of, or allegations against, the OGC, the Region, the FLRA, or a particular OGC employee, or other extraneous matters, after the Agent has requested the individual to restrict any comments to the investigation; and
- Other inappropriate or disrespectful behavior that interferes with the Agent's ability to conduct the investigation.



*Employees are encouraged to report incidents that involve abusive behavior that might not fall within these particular definitions. There is no standardized profile of behavior that interferes with an investigation and subjects an Agent to abuse. If an Agent is unsure whether the conduct s/he has been subjected to is abusive behavior by a representative or a witness, the Agent reports the situation to the Region. In addition, see [Part 3, Chapter R](#) concerning Ensuring Employee Safety During an Investigation for a discussion of how to handle **threatening** situations.*

## **2. ROLES AND RESPONSIBILITIES OF ALL EMPLOYEES:**

- To report promptly, under the below procedure, when an employee believes that s/he is being subjected to abusive behavior;
- To interact responsibly with those persons who are involved in the investigation, including all witnesses, the public, and other employees;
- To inform those persons who are involved in the investigation, including all witnesses, the public, and other employees, when

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the Agent perceives that their behavior is unacceptable and request that the behavior cease; and

- If a manager, to take whatever action is appropriate under the circumstances to ensure that investigations are not interfered with and that Agents are not abused.

**3. STEPS TO FOLLOW IF EXPERIENCING ABUSIVE BEHAVIOR:**

a. *General situations:*

Situations are so varied that it is difficult to draw up a set of procedures that work in all situations. The following list of steps is intended as a guide:

- Do not respond in kind to the individual;
- In general, inform the individual in a professional and calm manner that: (a) the displayed behavior is unacceptable and (b) the Agent will terminate the conversation if the behavior continues.

b. *Conduct during a telephone conversation:*

If the conduct occurs during a telephone conversation, and after the above general protocol is followed, the conduct continues, inform the individual that the Agent will not continue the call while the behavior continues and that the Agent will call back to continue the conversation at a later date. The Agent then makes a note to the file and discusses the matter with RO management.

c. *Conduct in the RO or during an on-site visit in the RO city:*

If the conduct occurs in the RO or during an on-site visit in the RO city, and after the above general protocol is followed, the conduct continues, inform the individual that the Agent is taking a break to allow the individual to modify the behavior. Prior to terminating the investigation, the Agent contacts regional management to obtain guidance on whether the interview should be continued or whether other action is

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necessary. The Agent then makes a note to the file and follows the guidance received.

d. *Conduct occurs during an on-site visit outside of the RO city:*

If the conduct occurs during an on-site visit outside of the RO city, and after the above general protocol is followed the conduct continues, inform the individual that the Agent is taking a break to allow the individual to modify the behavior. Unless previously discussed with regional management, the Agent calls regional management to obtain guidance on whether the interview should be continued if the behavior continues after the break. The Agent then makes a note to the file and follows the guidance received.

**4. THE RD CONSIDERS CHANGES IN THE RELATIONSHIP WITH A PARTY IN LIGHT OF AN INCIDENT:**

A situation may arise when, despite following the above protocol, a particular representative of a party continues a pattern of abusive behavior during investigations, which, although neither threatening nor uncooperative, interferes with the investigation. Prior to changing the manner in which the Region will deal with the party (for example, limiting future contact with the party to telephone or meetings at the RO), the RD consults with OGC HQ.



**[Part 3, Chapter O](#) concerning Duty of the Charging Party; and  
[Part 3, Chapter R](#) concerning Ensuring Employee Safety During an Investigation.**