


D. REMEDY

OVERVIEW:

The investigating Agent, throughout the processing of a ULP charge, and the Trial Attorney, during the litigation of a complaint, determine what evidence will sustain the GC's burden of proof for establishing a remedy for a violation of the Statute. Sections [7105\(g\)\(3\)](#) and [7118\(a\)\(7\)](#) of the Statute, as implemented by § [2423.41\(c\)](#), grant broad remedial powers to the FLRA. See [Federal Bureau of Prisons, Washington, D.C.](#), 55 FLRA No. 202, 55 FLRA 1250, 1258-59 (1996) for a discussion of the Authority's broad remedial powers (citing [NTEU v. FLRA](#), 910 F.2d 964 (D.C. Cir. 1990) (en banc)).

OBJECTIVE:

To set forth the OGC's policy on remedies for ULPs, and to provide guidance on the types of remedies and the elements of proof that are necessary to sustain those remedies.

 See OGC Guidance on Seeking Remedies for Unfair Labor Practices under the Federal Service Labor-Management Relations Statute (ATTACHMENT 1D) for comprehensive guidance on the types of remedies and the elements of proof that are necessary to sustain those remedies **for particular types of violations**.

1. STATUTORY AUTHORITY:

a. Section [7105\(g\)\(3\)](#):

"(g) In order to carry out its functions under this chapter, the Authority. . .

(3) may require an agency or a labor organization to cease and desist from violations of this chapter and

require it to take any remedial action it considers appropriate to carry out the policies of this chapter."

b. *Section [7118\(a\)\(7\)](#):*

"Under this section, upon a determination that an agency or labor organization engaged in an unfair labor practice, the hearing official shall state such findings in writing and shall serve upon the agency or labor organization an order --

(A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged;

(B) requiring the parties to renegotiate a collective bargaining agreement in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect;

(C) requiring reinstatement of an employee with backpay in accordance with § [5596](#) of this title; or

(D) including any combination of the actions described in subparagraphs (A) through (C) of this paragraph or such other action as will carry out the purpose of this chapter.

If any such order requires reinstatement of any employee with backpay, backpay may be required of the agency (as provided in § [5596](#) of this title) or of the labor organization, as the case may be, which is found to have engaged in the unfair labor practice involved."

2. OGC REMEDY POLICY:

The OGC seeks traditional and nontraditional remedies that:

- Recreate the conditions and relationships that would have been had there been no ULP;
- Restore, to the extent possible, the status quo that would have been obtained but for the wrongful act;
- Deter future violations;
- Are not punitive;
- Are responsive to the legitimate interests of the parties; and
- Effectuate and promote the purposes and policies of the Statute.

3. APPROPRIATE REMEDIES ARE CONSIDERED THROUGHOUT THE PROCESSING OF A ULP CHARGE AND ULP COMPLAINT:

ROs consider and evaluate potential appropriate remedies at the outset when investigating a ULP charge through the issuance of a complaint, and if necessary, litigation of a complaint:

- a. *Evidence is obtained pertaining to the appropriate remedy during the investigation of the ULP charge:*

During the investigation of a charge, the Agent obtains relevant testimonial and documentary evidence concerning the legitimate interests of the Charging Party in determining the particular remedy to seek. The investigation reveals what remedial action is necessary to effectuate the OGC's remedial policy stated above at # 2. See [ULPCHM, Part 3](#), concerning Investigations for further discussion.

- b. *Cases that are ready for presentation to the RD for decision contain a recommendation for a particular remedy when the recommendation is for issuance of complaint:*

When a case is presented to the RD for a decision on the merits of the charge, any recommendation for issuance of complaint or alternatives resulting in issuance of complaint are accompanied by a recommendation for an appropriate remedy. Just as recommendations for dismissal of complaint are supported by record evidence, recommendations for an appropriate remedy are also supported by record evidence. RD decisions authorizing issuance of complaint, absent settlement, include the decision on the remedy to be sought in litigation. See [ULPCHM, Part 4, Chapter D](#) concerning Regional Director Merit Determinations for further discussion.

- c. *Notice of remedy in complaint:*

Notice of unique or novel remedies is given in the complaint.

- d. *Transmittal memoranda:*

The transmittal memorandum that accompanies the issuance of a complaint sets forth the remedy to be sought in litigation, cites any novel precedent supporting the remedy, and notes any significant facts or issues pertaining to the appropriateness of the remedy and potential difficulties in obtaining that particular remedy. See [Part 1, Chapter A](#) concerning Issuance of the Complaint for further discussion.

- ✎ A transmittal memorandum, and other pre-decisional documents are not subject to disclosure under the Freedom of Information Act as it is exempted from disclosure under Exemption 5. See 5 U.S.C. § 552(b)(5). A transmittal memorandum comes within the deliberative process privilege which has the purpose of “prevent[ing] injury to the quality of agency decisions.” NLRB v. Sears, Roebuck, & Co., 421 U.S. 132, 151 (1975).*

e. *Preparation for trial:*

In preparing for trial, the Trial Attorney considers the issue of the appropriate remedy. In this regard, the Trial Attorney reviews witness testimony and documentary evidence in the same manner as evidence is reviewed pertaining to establishing the violation. See, [Part 2](#), Chapters I - Q, concerning Preparation for Hearing.

f. *Pre-hearing disclosure requirement:*

Section [2423.23](#)(c) requires the GC to disclose a brief statement concerning the theory of the case, **including the relief sought**, at least 14 days before the hearing. If a nontraditional remedy is sought, all parties must be on notice so that no party may claim surprise. Adherence to the pre-hearing disclosure requirements is especially important in this instance. This rule applies to the Charging Party as well because the Charging Party can always argue for a remedy that differs from that which the GC is seeking. This knowledge may impact upon its desire to argue for or against the remedy sought by the GC and/or to argue for another remedy that it believes is more appropriate.

See [Part 1, Chapter N](#) for a discussion of pre-hearing disclosure requirements concerning the GC's theory of the case.

g. *The hearing:*

The Trial Attorney presents witness testimony and documentary evidence pertaining to the appropriate remedy in the same manner as evidence is presented pertaining to establishing the violation. See Part 2 concerning the Hearing.

If notice of the nontraditional remedy, for some reason, is not given as part of the pre-hearing disclosure, the Trial Attorney sends a letter to the parties as soon as the Region determines to seek that remedy. In addition, at hearing, in the opening statement, the Trial Attorney identifies the novel/unique remedy that will be sought. Since the remedy was not noticed as part of pre-hearing disclosure, this may precipitate an objection from Respondent's counsel. However, even at this late date, such notice does give the Respondent the opportunity to address and fully litigate the

issues that may be required to rebut the GC's remedy evidence and also provides the Charging Party with a chance to put on evidence in support of its own remedy.

Before the close of the hearing, if evidence has been introduced to support the remedy sought, but notification has not yet been made, state the remedy sought. As stated above, be prepared to respond to an objection. At least this allows the parties to brief the remedy issue and makes the filing of supplemental briefs unnecessary.

h. *Post-hearing briefs:*

All post-hearing briefs have a separate section where the sought remedy is discussed. The brief discusses the relevant precedent and, citing record evidence, explains why the requested remedy is necessary and consistent with the purpose of a remedy and contains a proposed notice and order. See [Part 3, Chapter B](#) concerning Briefs for additional discussion.

i. *Exceptions:*

When a Trial Attorney files exceptions to an ALJ's failure to find a specific violation, those exceptions also specifically encompass the ALJ's failure to order the remedy requested. When an ALJ finds a specific violation but fails to order the complete remedy requested, the Region files exceptions when it determines that, under the totality of the circumstances (including the remedy received, the current situation and the interests of the Charging Party) whether the requested remedy should still be sought. See [Part 3, Chapter F](#) concerning Exceptions for additional discussion.

4. TRADITIONAL AND NONTRADITIONAL REMEDIES:

a. *Traditional remedies:*

Traditional remedies, including a cease and desist order accompanied by the posting of a notice to employees that meets the criteria of a remedy, are provided in virtually all cases where a violation is found. F.E. Warren Air Force Base, Cheyenne, Wyoming, 52 FLRA No. 17, 52 FLRA 149, 161 (1996). Unless the specific remedy has given rise to criteria of its own,

the Authority does not require specific evidence to establish that traditional remedies are appropriate. Thus, the Authority will presume in the absence of persuasive contrary evidence, that the traditional remedies are: (1) not contrary to external law or the purposes of the Statute; (2) reasonably necessary to recreate the conditions and relationships with which the ULP interfered, and (3) deter future violative conduct.

In addition to a cease and desist order and a posting of a notice, other established or traditional remedies require the Respondent to undertake some form of affirmative action. Such actions may include an order to:

- retroactive bargaining order
- grant of back pay
- release of improperly withheld information, and
- status quo ante remedies which have given rise to criteria of their own.

See F.E. Warren, 52 FLRA at 161 (citing Federal Correctional Institution, 8 FLRA 604 (1982) (setting forth criteria for status quo ante remedies where Respondent failed to bargain over procedures and appropriate arrangements related to a change); and Federal Deposit Insurance Corporation, 41 FLRA 272, 279 (1991) (setting standard for status quo ante remedy where Respondent failed to bargain over substance of a change)).

e See OGC Guidance on Seeking Remedies for Unfair Labor Practices under the Federal Service Labor-Management Relations Statute (ATTACHMENT 1D) for comprehensive guidance on the types of remedies and the elements of proof that are necessary to sustain those remedies for particular types of violations.

b. *Nontraditional remedies:*

Remedies that are not routinely granted as a matter of course are non-traditional. They must satisfy the same broad objectives as listed under #2, above. See F.E. Warren, 52 FLRA at 161; U.S. Penitentiary, Leavenworth, Kansas, 55 FLRA No. 127, 55 FLRA 704, 719 (1999) (where warden's actions in making repeated anti-union statements at a mandatory meeting were egregious, and where warden was personally involved in many ULP violations in the case, Authority found it reasonably necessary to require warden's statements to be retracted via a **reading aloud** by the warden, or by an Authority agent in the warden's presence, of the notice at another meeting of all employees). Unlike traditional remedies, nontraditional remedies require an independent factual basis as support. Thus, where the GC asks for a nontraditional remedy, the GC must show why a traditional remedy would **not** be effective (in essence, rebutting the Authority's presumption of the effectiveness of a traditional remedy) and why the evidence shows that a nontraditional remedy is necessary. See, e.g., U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Oceans Service, Coast Guard and Geodetic Survey, Aeronautical Charting Division, Washington, D.C., 54 FLRA No. 92, 54 FLRA 987, 1023, 1026 (1998) (nontraditional language in notice to reflect the findings of past

violations is necessary to further assure employees that despite a history of violations the agency recognizes the employees' statutory rights and "put[s] both employees and the Respondent on notice of the serious nature of the Respondent's unlawful conduct").

Whether or not a nontraditional remedy is necessary is a factual question. As with other factual questions, the GC bears the burden of proof. Therefore, to prevail, just like obtaining evidence to support the essential elements of a violation, the record must also contain specific evidence to support a nontraditional remedy. Where the record does not establish a need for a nontraditional remedy, i.e., the evidence is either insufficient or lacking, the Authority will deny the GC's request. See id. at 1022 (need for disciplining supervisors not established in the record).

e *Record evidence, not mere policy and equity arguments, is essential to establishing the appropriateness of a nontraditional remedy. Thus, as discussed above, it is critical that testimonial and documentary evidence is developed throughout the processing of the ULP charge and complaint.*

5. MONETARY RELIEF:

a. *Doctrine of sovereign immunity:*

Applying the legal doctrine of sovereign immunity, the Authority requires the party requesting a monetary remedy to establish that there is statutory authority (other than that provided in the Statute) for the expenditure of such funds.

See [Social Security Administration, Baltimore, Maryland](#), 55 FLRA No. 43, 55 FLRA 246, 250-51 (1999) (Back Pay Act, 5 U.S.C. § 5596(b)(1) and (2)(A), explicitly provides that ULP remedies shall be payable with interest which operates as an explicit waiver of sovereign immunity); [Immigration and Naturalization Service, Los Angeles District, Los Angeles, California](#) 52 FLRA No. 11, 52 FLRA 103, 104-06 (1996) (adopting [Department of the Army, U.S. Commissary, Ft. Benjamin Harrison, Indianapolis, Indiana v. FLRA](#), 56 F.3d 273 (D.C. Cir. 1995) (vacating in part [Department of the Army, U.S. Army Soldier Support Center, Fort Benjamin Harrison, Office of the Director of Finance and Accounting, Indianapolis, Indiana](#), 48 FLRA No. 2, 48 FLRA 6 (1993)).

b. *Equitable relief:*

The Authority will uphold specific remedies that are **equitable** in nature even if the remedy requires the expenditure of money. [U.S. Department of Veterans Affairs](#), 55 FLRA No. 195, 55 FLRA 1213, 1216-17 (2000) (remedy requiring Respondent to reduce parking rates for a period of time necessary to offset the difference between the unlawfully implemented rate and the former rate until such time as the employees have been fully reimbursed is equitable); [U.S. Department of Transportation, Federal Aviation Administration, Northwest Mountain Region, Renton, Washington](#), 55 FLRA No. 46, 55 FLRA 293, 298-99 (1999) (notwithstanding a Respondent's contrary contention, relief ordered by ALJ, to obtain parking spaces for unit employees, at no cost to the employees, in a different location than had been made available by Respondent, is not a remedy for money damages in contravention of the doctrine of sovereign immunity and FAA has authority to obligate funds for interests in property and thus Respondent has authority to expend money to comply with ALJ's order),

petition for review filed sub nom. Department of Transportation, Federal Aviation Administration, Northwest Mountain Region, Renton, Washington v. FLRA, (D.C. Cir. Apr. 29, 1999); Federal Aviation Administration, 55 FLRA No. 203, 55 FLRA 1271, 1277 (2000) (Remedy of make-whole relief for lost appraisal-linked awards due to repudiation of MOU is equitable in nature--the relief is the very thing that was improperly withheld).

- Q [Part 1, Chapter A](#) concerning Issuance of Complaint;
- [Part 1, Chapter N](#) concerning Pre-hearing Disclosure;
- [Part 3, Chapter B](#) concerning Briefs;
- [Part 3, Chapter F](#) concerning Exceptions;
- [ULPCHM, Part 4, Chapter D](#) concerning Regional Director Merit Determinations;
and
- [ULPCHM, Part 5 Chapter J](#) concerning Backpay.