

FF. REOPENING OF THE GENERAL COUNSEL'S CASE

OVERVIEW:

After the GC's case has been presented and Respondent has rested its case and the Trial Attorney discovers that either an element of proof was not addressed in the presentation of the GC's case-in-chief, or that evidence that supports the GC's case was not presented, the Trial Attorney moves to reopen the GC's case-in-chief. If the record is closed, a motion to reopen the record may be filed as long as the ALJD has not been issued.

OBJECTIVE:

To provide guidance concerning when to move to reopen the GC's case and the law applicable.

1. CASE LAW: AFTER THE RECORD HAS BEEN CLOSED:

- a. *An ALJ has discretion to determine whether to reopen the record for receipt of additional evidence.*

SBA, 54 FLRA 837, 848 (1998) (Authority upheld ALJ's exercise of discretion in not reopening record when request to reopen record was based on individual's lack of active participation in the hearing); Pension Benefit Guaranty Corporation, 52 FLRA No. 132, 52 FLRA 1390, 1398 (1997) (citations omitted) (PBGC), aff'd sub nom. Power v. FLRA, 146 F.3d 995 (D.C. Cir. 1998).

- b. *Generally, motions to reopen a record are disfavored; they are reserved for extraordinary circumstances.*

Id. at 1399 (citations omitted) ("strong public policy in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases").

Cf. International Brotherhood of Electrical Workers, Local 648 v. NLRB, 440 F.2d 1184, 1185 (6th Cir. 1971) (Local 648) (court approved of trial examiner's reopening of the record, referring to Supreme Court's admonition that courts "should not deprive employees of their lawful rights because of neglect on the part of the NLRB"). For example, an ALJ may exercise discretion to reopen the record if a motion is made before s/he has issued a decision and within days after the close of the hearing. Id.

2. WHEN TO MOVE TO REOPEN RECORD FOR RECEIPT OF ADDITIONAL EVIDENCE:

- a. *Either at the hearing, or after record is closed, if an element of proof was not addressed in the presentation of GC's case.*
- b. *If evidence is discovered after the hearing that was not introduced and is critical to the GC's case.*

Compare PBGC, 52 FLRA at 1399 (evidence not in existence at the time of the original hearing weighs against reopening because it would “perpetuate continuation of all trials”) (citation omitted) with U.S. Department of Treasury, Internal Revenue Service, Washington, D.C., 40 FLRA No. 31, 40 FLRA 303, 309 (1991) (Authority suggested that parties file to reopen the record to introduce exhibits that were not in existence prior to the close of the hearing).

- ~~12~~ (1) *Always make your best argument in favor of reopening the record. As stated above, the decision to reopen the record is within the ALJ's discretionary power.*
- ~~12~~ (2) *The closer to the hearing that a motion is made, the greater the likelihood that the motion may be granted. Compare Local 648 (motion filed within days of the close of the hearing granted) with PBGC (motion filed after case remanded by D.C. Circuit to FLRA and from FLRA to ALJ denied where evidence did not exist at time of original trial).*
- ~~12~~ (3) *If the motion is granted, the topics covered under the headings “General Counsel’s Case” and “Respondent’s Case” apply.*

RESERVED