GG. CLOSING ARGUMENT

OVERVIEW:

Section 2423.30(e) states that "[a]ny party shall be entitled, upon request, to a reasonable period prior to the close of the hearing for oral argument, which shall be included in the official transcript of the hearing." Traditionally, the Trial Attorney submits written briefs to the ALJ in support of the complaint, although oral arguments are also available. Generally, when oral argument is presented at the hearing, the Trial Attorney also submits a written brief to the ALJ.

OBJECTIVE:

To provide guidance to Trial Attorneys on the benefits derived from presenting an oral argument; criteria for presenting oral argument in lieu of filing a brief; and an outline of the topics to cover during the presentation of an oral argument.

1. BENEFITS DERIVED FROM PRESENTATION OF CLOSING ARGUMENT:

- Trial Attorney ensures that Respondent has notice of the GC's legal theory of the case;
- Trial Attorney has the opportunity to amend the complaint, if necessary;
- Trial Attorney explains any previous amendments;
- Trial Attorney can persuade ALJ on credibility determinations while testimony is still fresh; and
- Trial Attorney sets forth the evidence presented, summarizes the important points and how they relate to the legal theories upon which the GC bases its case.

2. ORAL ARGUMENT IN LIEU OF FILING A BRIEF:

Generally, the Trial Attorney does not waive the right to file a brief when s/he makes a closing argument. However, if all sides agree to waive the filing of written briefs, the Trial Attorney, after consulting with the RA, as necessary, could also waive that right.

Criteria:

If oral argument is to be used as a substitute for the written brief, the Trial Attorney considers the following criteria:

- Factual evidence lends itself to oral presentation;
- GC theory and legal precedent clear;
- Ability to analyze facts and relate to precedent;
- Ability to appropriately address Respondent's defenses;
- Ability to prepare in short period of time; and

- Requested remedy lends itself to oral presentation, with appropriate case cites.

3. OUTLINE OF ORAL ARGUMENT IN LIEU OF BRIEF:

If the above criteria are met, the Trial Attorney crafts a closing argument that succinctly sets forth the evidence at the hearing, as well as responds to the defenses raised. The relevant case law is set forth and an analysis of the evidence to the case law that clearly presents the GC's theory is presented. Presentation of an oral argument generally follows the guidelines for a written brief. See Part 3, Chapter B concerning Brief Writing. The presentation follows this outline:

- Restatement of allegations of complaint, including any explanation of amendments;
- GC evidence, both testimony and documents, in as much detail as is necessary to fully argue the matter. Any basis for credibility determinations;
- Any response to the defenses of the Respondent, including any arguments regarding credibility. Note any instances where Respondent has failed to deny or has admitted conduct;
- Relevant case law, with appropriate citations. Analysis of particular evidence to case law; and
- Conclusion, including references to requested remedy and basis of same.

4. GREATER CONSIDERATION IS GIVEN TO DOING AN ORAL ARGUMENT IN ADDITION TO FILING A BRIEF WHEN IT IS NECESSARY TO:

- Make sure legal theory is understood by ALJ and opposing counsel;
- Emphasize a point;
- Argue the credibility of witnesses;
- Ask for adverse inferences;
- Clarify certain points/matters if either the ALJ or opposing counsel appears to be confused; and
- Utilize the particularly adept oral advocacy skills of the Trial Attorney.

5. ORAL ARGUMENT IN EACH CASE DECIDED BY BENCH DECISION:

In each case decided by a bench decision, the Trial Attorney presents a brief closing argument. It is important to present oral argument because it will be included in the official transcript of the hearing and may prove to be important should the case be presented to the Authority on exceptions filed by a party. See § 2423.30(e).

☞ *The Trial Attorney is flexible and is prepared to respond to any questions and/or comments from the ALJ. If the above criteria are met, the Trial Attorney comes to the hearing prepared to orally argue the case. If the ALJ voices a preference for oral argument, that wish is respected, especially if the above criteria are met.*

EXAMPLE OF CLOSING ARGUMENT
IN FORMAL DISCUSSION CASE

Your Honor, the complaint in this matter alleges that the Respondent violated the Federal Service Labor-Management Relations Statute by conducting a formal meeting with bargaining unit employees, without first notifying the Union and allowing it the opportunity to be present. The evidence clearly supports a finding that the meeting at issue was formal within the meaning of § 7114(a)(2)(A) of the Statute, and that the Respondent's failure to provide the Union notice of the meeting and the opportunity to be present was violative of § 7116(a)(1) and (8) of the Statute.

The General Counsel presented three witnesses during the hearing. The Union President, Amanda Forthright, credibly testified that she is the representative who normally receives notice of formal meetings from management officials, and that she then selects the appropriate Union official and/or steward to attend the meeting on behalf of the Union. The meeting at issue in this matter occurred on June 2, 1997 and involved employees in the Research Department. The Union did not receive any prior notice that a meeting was scheduled. Forthright works in the Development Department and does not have daily contact with the Research Department which is located in another building on Respondent's facility. The Union steward assigned to that area had been on extended sick leave during May and June 1997.

The General Counsel's other witnesses, Virginia Trueblue and Maria Sincere, both consistently testified regarding the manner in which the meeting was called and conducted. In that regard, all employees in the Research Department received an e-mail announcement on May 28, 1997, stating that there would be a meeting in the auditorium on June 2. On June 2, both Trueblue and Sincere were reminded by their individual supervisors that there was a 10 a.m. meeting. All employees of the Research Department who were at work that day came to the auditorium on June 2 at 10 am. Present for the Respondent were the first line supervisors and

the Department Director. Also present was the Labor Relations Specialist and two Management Analysts from Headquarters. Trueblue is a member of the union and did not see any union representatives at the meeting.

The Department Director ran the meeting and did almost all of the talking. At the beginning of the meeting he announced that he was going to discuss the upcoming budget conference at Headquarters and the possibility of a reduction-in-force in the Research Department as a result of the conference. According to Trueblue and Sincere, he proceeded to inform the employees that due to political pressures, it appeared that certain portions of the agency budget that had been dedicated to the Research Department were being transferred to other departments within the agency. In part this was due to lack of marketable results from the Research Department in the last 6 months, in part due to Congressional interest in funding projects developed in other departments. The Department Director indicated that no decision had been made regarding the budget, but that he wanted employees to know that there were serious indications of a substantial loss of funding and that employees could be subject to a reduction-in-force. There was also the possibility that certain employees could be transferred to other departments at the same location or even different agency locations. However, he reiterated that no decisions had been made and that no criteria had been established for these types of decisions.

Trueblue and Sincere both testified that the employees were quite upset, both because of the budget issues and the possibility that a reduction-in-force would lead to losing jobs and/or being transferred to other departments and locations. Also, they were upset because of the apparent targeting of the Research Department and the lack of understanding by Headquarters of the importance of their work. Several employees raised issues regarding seniority, performance appraisals and the alternative work schedule. The Department Director did not answer any questions, but indicated he would check into several issues and get back with the employees. The meeting lasted about 20 to 30 minutes.

The Respondent presented the Department Director and the Labor Relations Specialist as witnesses. The Department Director indicated that he had called the meeting to inform the employees of the issue of the budget since rumors had been rampant for several days and he wanted to maintain his good relationship with his employees. He assumed that the union steward was at the meeting, although he did not specifically look for her. The Labor Relations Specialist asserted that the meeting did not meet the formality requirements of the Statute, since it only lasted

about 20 minutes, there was no formal agenda, no minutes were taken, and the presence of employees was not mandatory.

In order to find that a formal discussion occurred, the evidence must show that there was (1) a discussion, (2) that was "formal," (3) between one or more representatives of the agency and one or more unit employees or their representatives, (4) concerning any grievance or any personnel policy or practice or other general condition of employment. As the Authority stated in U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution (Ray Brook, New York), 29 FLRA No. 52, 29 FLRA 584 (1987), in making determinations under § 7114(a)(2)(A), the Authority is "guided by that section's intent and purpose--to provide the union with an opportunity to safeguard its interests and the interests of employees in the bargaining unit--viewed in the context of a union's full range of responsibilities under the Statute."

In this matter, the General Counsel asserts that evidence presented today clearly establishes that all of the elements of a formal discussion set forth in § 7114(a)(2)(A) of the Statute have been met, and that the Respondent has failed to abide by such requirements by holding a meeting without giving the union notice and opportunity to be present. The evidence clearly shows that the June 2 meeting was a discussion between representatives of the Respondent and unit employees concerning a general condition of employment, specifically the budget issues and possibility of a reduction in force for the employees in Research Department. With regard to the issue of whether the discussion was "formal", the General Counsel, relying on the Authority's analysis in F.E. Warren Air Force Base, Cheyenne, Wyoming, 52 FLRA No. 17, 52 FLRA 149 (1996), asserts that the purpose of the discussion in this matter is sufficient in itself to establish formality. The purpose of the meeting was to inform employees that the budget of the Research Department was under scrutiny and could be drastically reduced and that the employees could be subject to a reduction-in-force, including the possibility of loss of jobs and transfer to other positions and locations. After reviewing the totality of the facts and circumstances, the evidence establishes that the June 2, 1997 meeting was a formal discussion of which the union should have been notified in advance.

However, even if the Administrative Law Judge fails to find that the purpose and subject matter of the meeting establishes formality, the General Counsel asserts that a review of the evidence in light of certain factors set forth in Authority decisions, including U.S. Department of Labor, Office of the Assistant Secretary for Administration and Management, Chicago, Illinois, 32 FLRA No. 69, 32 FLRA 465 (1988), establishes formality. In this regard, the meeting was announced on May

28, 1997, three working days before the meeting, and that employees were reminded of the meeting on June 2, 1997. Although the Respondent argues that the meeting was not mandatory, the testimony of Trueblue and Sincere shows that all employees believed that they were required to attend the meeting and that, in fact, all of the employees in the Research Department did attend the meeting. The meeting was conducted in the auditorium, which is separate from the employees' normal work locations. Although there was no formal agenda for the meeting, the meeting had been called for the specific purpose of informing the employees of the budget issues and the possibility of a reduction-in-force, which the Department Director relayed to all employees. The meeting was clearly organized and controlled for this single purpose, and a formal agenda was therefore not necessary. Although the meeting only lasted between 20 and 30 minutes, and no notes were taken, the General Counsel asserts that the lack of these elements, in view of the totality of the facts and circumstances in the June 2, 1997 meeting, is not sufficient to overcome a finding of formality.

In conclusion, the General Counsel asserts that the evidence establishes that the Respondent conducted a formal meeting with bargaining unit employees in the Research Department on June 2, 1997 and failed to give the union notice and the opportunity to be present. Under these circumstances, the General Counsel requests that the Administrative Law Judge find that the Respondent has violated § 7116(a)(1) and (8) of the Statute by failing to abide by the requirements of § 7114(a)(2)(A) of the Statute. As set forth in the opening statement, the General Counsel is seeking a remedy that includes the posting of a notice to employees, signed by the Respondent's Director.

☞ *The remedy requested above is only one potential remedy that the GC may seek in a formal discussion case. There are other remedies (non-traditional) that the GC may seek in a formal discussion case depending upon the circumstances of the case. Consult the RA or litigation specialist on this matter and see Part 1, Chapter D concerning Remedy.*

Q **Part 1, Chapter D concerning Remedy;**

Part 2, Chapter HH concerning Bench Decision; and

Part 3, Chapter B concerning Brief Writing.

RESERVED