

M. OFFICIAL NOTICE

OVERVIEW:

Section [2423.31](#) permits an ALJ to take “official notice of material facts when appropriate.”

OBJECTIVE:

To provide guidance on what the legal concept of “official notice” means and when it is used.

1. DEFINITION OF “OFFICIAL NOTICE”:

Official notice is a “broader concept than judicial notice.” U.S. Department of the Treasury, Customs Service, Washington, D.C., 38 FLRA No. 74, 38 FLRA 875, 878 (1990) (Customs Service) (citing Macleod v. Immigration and Naturalization Service, 802 F.2d 89, 93 n.4 (3d Cir. 1986) and Dayco Corp. v. Federal Trade Commission, 362 F.2d 180, 186 (6th Cir. 1966)). Significantly, official notice includes “the acceptance of commonly known facts as well as matters within the specialized knowledge or expertise of the administrative agency.” Customs Service, 38 FLRA at 878 (citing 4 Stein, Administrative Law § 25.01 (1986)).

2. PRACTICE AND PROCEDURE:

a. *When is request to take official notice requested?*


Before and during the hearing.

b. *Who is request made to?*

The presiding ALJ.

c. *Why make a request to take official notice?*

The grant of such request for official notice obviates the need to introduce evidence as to those facts.

 Typically, the issue of official notice arises subsequent to the hearing where one party requests either the ALJ or the Authority to take official notice of certain facts. In making a request for such official notice it is important to note the following:

- Both due process and the APA (§ 556(e)) require that a party be provided the opportunity to offer rebuttal evidence to the noticed fact; and
- Be wary of opposing counsel's attempts to use official notice as a means to add to the record, e.g., attachments to briefs, where such matters were not previously presented in a prior proceeding. See § 2429.5; but see *Customs Service*, above. In such a situation, file a Motion to Strike. See [Part 3, Chapter D](#), which addresses Motions to Strike.

3. CASE LAW:

The Authority has endorsed official notice in a variety of circumstances:

See U.S. Department of Veterans Affairs, Veterans Affairs Medical Center, Dallas, Texas, 51 FLRA No. 77, 51 FLRA 945, 953 (1996) (proper to take official notice that performance appraisals and administrative investigations of patient abuse are contained in a system of records);

Social Security Administration, San Francisco Bay Area, 51 FLRA No. 7, 51 FLRA 58, 63 (1995) (proper to take official notice that employee awards data is maintained in a system of records);

Social Security Administration, 47 FLRA No. 32, 47 FLRA 410, 411 (1993) (proper to take official notice of ALJ decisions, including record and transcript in prior case involving same Respondent);

Social Security Administration, 45 FLRA No. 27, 45 FLRA 303, 307-08 (1992) (proper to take official notice of D.C. Circuit decision where decision arises from same facts);

Social Security Administration, Baltimore, Maryland, 22 FLRA No. 41, 22 FLRA 420, 421 n.* (1986) (Authority agreed that ALJ erred in failing to take “administrative notice” of another ALJ’s factual findings establishing union animus in a related case); Cf. National Park Service, National Capital Region, United States Park Police, 48 FLRA No. 127, 48 FLRA 1151, 1163 n.10 (1993) (rejecting official notice for agency regulations which Respondent failed to cite or address in any previous proceedings);

SBA, 54 FLRA No. 83, 54 FLRA 837, 849-50 (1998) (1- ALJ reasonably took official notice of MSPB decision which issued after close of ULP hearing where those proceedings had been the subject of substantial testimony at the hearing and decision was in “the public domain; and 2- Denial of request to take official notice of evidence presented in a different case after the close of the ULP hearing); compare Department of Justice, U.S. Marshals Service and U.S. Marshals Service, District of New Jersey, 26 FLRA No. 104, 26 FLRA 890, 897 (1987) (ALJD) (ALJ rejected official notice of MSPB and arbitration decision offered by Respondent for purposes of witness’s credibility);

Association of Civilian Technicians, Inc. Rhode Island Chapter and U.S. Department of Defense, Rhode Island National Guard, Providence, Rhode Island, 55 FLRA No. 70, 55 FLRA 420 (1999) (Authority took official notice of technical legislative amendments)

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Part 3, Chapter D concerning Motions to Strike.

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