May 8, 2000

**EXECUTIVE SUMMARY**

**SUBJECT:FLRA GENERAL COUNSEL JOSEPH SWERDZEWSKI'S MEMORANDUM TO REGIONAL DIRECTORS ON GUIDANCE IN SEEKING REMEDIES FOR UNFAIR LABOR PRACTICES UNDER THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE**

This Executive Summary of the General Counsel of the Federal Labor Relations Authority's Guidance Memorandum to Regional Directors discusses the Office of the General Counsel policy on seeking remedies for unfair labor practices under the Federal Service Labor- Management Relations Statute (Statute). This memorandum provides guidance on the types of remedies and the elements of proof that are necessary to obtain those remedies. When determining, on behalf of the General Counsel, to issue an unfair labor practice complaint under the Statute, Regional Directors are required to make decisions on the remedy that will be sought in litigation. Regional Directors are guided by the decisions of the Members of the Federal Labor Relations Authority in determining the appropriate legal remedy for unfair labor practices. Obtaining these remedies from the Authority in litigation requires not only a finding that an unfair labor practice violation has occurred, but also a determination that the remedy sought is lawful and appropriate to the violation in the particular circumstances of the case. Thus, it is imperative that the Regions, and the parties, are aware of not only the variety of possible remedies, but also the type of evidence that is necessary to establish the appropriateness of these remedies.

This memorandum serves as guidance to the Regional Directors in investigating, settling and litigating unfair labor practice charges. It is also intended to assist parties in providing evidence and arguments concerning the appropriate remedy to an unfair labor practice charge. By understanding the types of remedies available and the evidence necessary to establish the appropriateness of those remedies, the Regions and the parties will be better suited to resolve unfair labor practice complaints and, if litigation is necessary, to make cogent arguments based on relevant evidence as to the appropriateness of those remedies.

I am making this Guidance Memorandum available to the public to assist union officials and agency representatives to resolve unfair labor practice issues in an expeditious fashion consistent with the requirements of the Statute. This Guidance is a continuation of my Office's commitment to provide the participants in the Federal Service Labor-Management Relations Program with my views on significant topics. This Guidance reflects my views as the General Counsel of the Federal Labor Relations Authority and does not constitute an interpretation by the three-member Authority.

Many of the remedies discussed in this Guidance have been well established by Authority precedent, but those decisions also leave open the possibility for further innovative remedies, as long as the Statute is effectuated, the evidence establishes the need for such a remedy, and the remedy is not otherwise inconsistent with the Statute or other external law. Accordingly, to assist the parties in recognizing and supporting appropriate remedies, attached to this Guidance are: (1) the different types of remedies, both traditional and nontraditional, to specific unfair labor practices and describes the types of evidence that are necessary to establish the appropriateness of those remedies; and (2) a decisional protocol to assist the Regional Director in determining what remedy to seek when litigating an unfair labor practice complaint. This Guidance sets forth established traditional remedies and possible nontraditional remedies for various violations. It is not a limitation on developing new and better remedies not referenced in the Guidance.

**PART I
REMEDIAL AUTHORITY UNDER THE STATUTE**

**Q. #1: What is the statutory authority for the Federal Labor Relations Authority to order agencies and unions to take remedial action for committing unfair labor practice violations?**

Sections 7105 (g)(3) and 7118 (a)(7) of the Statute contain the Authority's remedial power. In sum, the Authority is empowered to: (1) issue cease and desist orders; (2) require parties to negotiate a contract and to give it retroactive effect; (3) order reinstatement of an employee with backpay; and (4) order any remedial action necessary to carry out the purposes and policies of the Statute.

**Q. #2: What are the limitations on the Authority's remedial powers?**

The Authority and the courts have concluded that Congress intended to provide the Authority with broad remedial power. The Statute's broad grant of remedial power to the Authority is tempered only by reference to the purpose of the Statute, which embodies the balance of interests between and among employees, unions, and agencies, and consistency with external law.

**Q. #3: Does the Statute's management rights clause limit the Authority's remedial power?**

No. Section 7106 of the Statute (the management rights clause) does not diminish the Authority's remedial powers. This clause limits only the scope of collective bargaining under the Statute. For example, the Authority will specifically name in its order the title of the appropriate agency or union official to sign a remedial notice.

**Q. #4: What is the purpose of a remedy for an unfair labor practice violation?**

The essential purpose of an Authority remedial order is "to restore, so far as possible, the status quo that would have obtained but for the wrongful act and to deter future misconduct." In other words, the purpose of a remedy is to recreate the conditions and relationships that would have been had there been no unfair labor practice. The deterrence of future violative conduct also is an essential purpose of a remedy. Remedies, however, must not be punitive, and the Authority may not direct a respondent to perform an illegal act.

**Q. #5: What are the Authority's remedy principles?**

All remedies ordered by the Authority, therefore, must meet these standards, referred to as the remedy principles:
a. be consistent with external law;
b. be reasonably necessary to effectively recreate the conditions and relationships with which the unfair labor practice interfered;
c. effectuate the policies of the Statute, including the deterrence of future violative conduct; and
d. are not punitive.

**PART II
OFFICE OF THE GENERAL COUNSEL REMEDY POLICY**

**Q. #1: What is the OGC Remedy Policy?**

The OGC seeks traditional and nontraditional remedies that:

* Recreate the conditions and relationships that would have been had there been no unfair labor practice;
* Restore, so far as possible, the status quo that would have been obtained but for the wrongful act;
* Deter future violations;
* Are appropriate under the particular circumstances of the violation and are supported by the evidence;
* Utilize the full extent of the Authority's remedial power;
* Avoid being punitive;
* Are consistent with external controlling law;
* Are responsive to the legitimate interests of the parties; and
* Effectuate and promote the purposes and policies of the Statute.

**Q. #2: How is the issue of appropriate remedy considered throughout the processing of the ULP charge and ULP complaint?**

Regional Offices consider and evaluate potential appropriate remedies throughout the investigation of an unfair labor practice charge and the litigation of an unfair labor practice complaint. During the investigation of a charge, the Agent obtains relevant evidence, testimonial and documentary, concerning the legitimate interests of the Charging Party in seeking a particular remedy. Throughout the decisional and trial preparation processes, the appropriate remedy is analyzed in the same manner that the elements of the violation are analyzed. The sought remedy is disclosed as part of the pre-hearing disclosure requirement. Documentary evidence pertaining to the appropriate remedy is presented at the hearing, argued, supported in post-hearing briefs, and considered as a basis for the filing of exceptions.

**PART III
TRADITIONAL AND NONTRADITIONAL REMEDIES**

**Q. #1: What is a traditional remedy?**

The Authority has distinguished in its decisions between traditional remedies and nontraditional remedies. For example, a cease-and-desist order accompanied by the posting of a notice to employees is a traditional remedy provided in virtually all cases where a violation is found. The Authority also has identified other remedies that require some form of affirmative action by a respondent as established, or traditional, remedies, such as a retroactive bargaining order, the grant of backpay, and the release of improperly withheld information. Aside from these general references, however, the Authority to date has not clearly identified the factors which differentiate a traditional remedy from a nontraditional remedy.

**Q. #2: Are all traditional remedies granted as a matter of course?**

No. Some traditional remedies, such as status quo ante as a remedy for a failure to bargain over the procedures and appropriate arrangements concerning the exercise of a management right and the grant of backpay, have given rise to criteria of their own. Thus, even though considered traditional by the Authority, evidence must still be presented and legal conclusions made to support these traditional remedies.

**Q. #3: What is a nontraditional remedy?**

The Authority has referred to remedies not routinely granted as a matter of course as nontraditional remedies. Nontraditional remedies must satisfy the same broad objectives that are required of all remedies ordered by the Authority, i.e., they must meet the remedy principles. Thus, assuming that there exist no legal or public policy objections to a proposed, nontraditional remedy, the questions are whether the remedy is reasonably necessary and would be effective to "recreate the conditions and relationships" with which the unfair labor practice interfered, as well as to effectuate the policies of the Statute, including the deterrence of future violative conduct."

**Q. #4: What is the basic distinction between traditional and nontraditional remedies?**

If a remedy is deemed traditional, the Authority, in essence, presumes that these traditional remedies meet the remedy principles. The burden is on the respondent to establish otherwise. Of course, if the traditional remedy has criteria of its own, the burden remains on the General Counsel to satisfy those independent criteria in order to trigger the applicability of the traditional remedy.

On the other hand, the Authority requires an independent factual basis to sustain a nontraditional remedy. This burden lies with the General Counsel. As such, a nontraditional remedy requires a separate factual determination that the specific nontraditional remedy is reasonably necessary and would be effective to recreate the conditions and relationships which would have existed but for the unfair labor practice, as well as to effectuate the policies of the Statute, including the deterrence of future violative conduct.

**Q. #5: What must be established to obtain a nontraditional remedy?**

To obtain a nontraditional remedy, the General Counsel must establish both that the traditional remedy is not adequate, and that the evidence dictates that a nontraditional remedy is necessary. These questions are essentially factual, requiring specific evidence to establish their existence.

**Q. #6: How is this evidence obtained?**

The Regions investigate and litigate these remedies in the same manner that the Regions investigate and litigate the essential elements of a violation. As with other factual questions, the General Counsel bears the burden of persuasion, the ALJ is responsible for initially determining whether the remedy is warranted, and the Authority is responsible for ordering such nontraditional remedies.

**Q. #7: What is the key to obtaining a nontraditional remedy?**

It is essential that when any remedy other than the routinely ordered, traditional remedy is requested, the record contains evidence establishing why it is necessary to order a nontraditional remedy, rather than the routine traditional remedy. Not only must the General Counsel establish that the traditional remedy is not adequate to redress the wrong incurred by the unfair labor practice, but the General Counsel must also establish through evidence that the particular nontraditional remedy sought is appropriate under the remedy principles. Record evidence, not mere policy and equity arguments, is essential to establish the appropriateness of a nontraditional remedy.

**PART IV
POSTING, DISTRIBUTING, AND SIGNING REMEDIAL NOTICES AND THE CONTENTS OF THOSE NOTICES**

**Q. #1: Why are Authority notices posted as part of the remedy for an unfair labor practice violation?**

The posting of a notice provides evidence to bargaining unit employees that the rights guaranteed under the Statute will be vigorously enforced. In many instances, the posting of a notice is the only visible indication to unit employees that a respondent recognizes and intends to fulfill its obligations under the Statute. In addition to ordering certain conduct to cease and desist and any affirmative action to be taken, the notices contain an introductory statement that the Authority has found a violation of the Statute and has ordered the respondent to post and abide by the notice.

**Q. #2: What is the scope of a posting and the signatory on the posting?**

The scope of the posting refers to the identification of the particular locations where a remedial notice to employees will be posted. The signatory indicates the particular management or union official who is ordered to sign the notice. Whenever the scope of the posting is expanded beyond the particular location of the violation, the signatory on the posted notice should be an official with responsibility for the entire posting area. Conversely, whenever the signatory of a posting is an official with responsibility for an area beyond the particular location of the violation, the scope of the posting should encompass that expanded area. In short, the scope of the posting and level of the signatory should be consistent.

**Q. #3: Where should a remedial notice be posted?**

The standard for the scope of a remedial posting is whether the violative conduct affects employees beyond a particular location. Where a respondent's conduct impacts unit employees beyond the particular location where the violation occurred, it is appropriate to require that notices be posted in additional areas. The General Counsel has the burden to present evidence to establish a scope of posting beyond the location of the violation. When litigating a case, the Regions request the greatest appropriate scope of the posting.

**Q. #4: Who should sign a remedial notice?**

Sometimes, signing the notice is the only way that employees know that the lead manager or union official is even aware that a violation of law has occurred. The Authority has long held that the remedial purposes of a notice are best served by requiring the head of the activity responsible for the violation to sign the notice. The highest official of the activity responsible for the violation, however, is not always the head of the activity/ agency or union. As with the scope of the posting, the burden is on the General Counsel to present evidence to establish the appropriate level of the signatory. When litigating a case, the Regions request the highest appropriate official to sign the notice.

**Q. #5: Has the Authority ever ordered the nontraditional remedy of distributing the notice to unit employees, supervisors and managers?**

Yes. Sometimes, it may be necessary to ensure that the notice is distributed in a different or additional manner to impress upon the respondent the seriousness of the violation(s) and to ensure that employees know that their rights under the Statute will be protected. When warranted by the extraordinary circumstances surrounding the violations, such as repeated egregious violations, the Authority has ordered that the signed remedial notice be distributed to each supervisor, manager and employee. Regions also may consider distribution of a notice by electronic mail when appropriate to ensure that the notice is available to all employees affected by the violation.

**Q. #6: Has the Authority ever ordered the nontraditional remedy of reading the notice to unit employees, supervisors and managers?**

Yes. In view of the seriousness of the violations, the Authority on two occasions has ordered that a meeting be held where the agency head, or an Authority agent in the presence of the agency head, reads the notice aloud. In U.S. Penitentiary, Leavenworth, Kansas, 55 FLRA No. 127, 55 FLRA 704, 720 (1999), the chief management official had been personally involved to a significant extent in a pattern of unfair labor practice violations over the course of a seven-month period, many of them egregious, such as making threatening, anti-union statements at a mandatory meeting of all employees and making repeated statements threatening to take action against union officials. The Authority found it was reasonably necessary to require those statements to be retracted, via a reading aloud of the notice, at another meeting of all employees.

**Q. #7: Has the Authority ever ordered the nontraditional remedy of naming specific managers or union officials that engaged in violative conduct in the notice?**

No. The General Counsel, to date, has been unsuccessful in convincing the Authority that it is necessary to name specific offending managers, supervisors or union officials in a posting to recreate the conditions that existed before the violation and to deter future violations. In Leavenworth, for example, the Authority noted that there are no private sector cases where a request for a remedy has been granted. The Authority added that in view of the other ordered remedies, naming particular individuals in the notice is not reasonably necessary to recreate the conditions and relationships with which the unfair labor practice interfered, or to effectuate the policies of the Statute.

**Q. #8: Has the Authority ever ordered the nontraditional remedy of referring to prior violations in the notice?**

Yes. On one occasion, the Authority granted this remedy, noting that the language serves to put both the employees and the respondent on notice of the serious nature of the respondent's unlawful conduct.

**Q. #9: What type of evidence supports these nontraditional scope of posting, signatories and notice distribution remedies?**

To determine the appropriate scope and signatories of a posting and whether any of the above nontraditional posting remedies are appropriate, evidence should include:

* the extent to which unit employees at locations other than the site of the violation know of the violative conduct;
* whether the violation involved high ranking union and/or agency officials;
* how the violation affected employees at different locations within the unit;
* the seriousness, type and number of violations; and
* the manner in which information about policies, personnel matters, job announcements and other important information is routinely disseminated to employees and managers.

**PART V
MONETARY RELIEF**

**Q. #1: What are the rules for ordering an agency to pay money to employees as part of an unfair labor practice remedy?**

The legal doctrine of sovereign immunity requires the party requesting a monetary remedy to establish that there is statutory authority for the expenditure of such funds. Thus, an order by the Authority that an agency remedy an unfair labor practice by providing monetary reimbursement for losses incurred due to an unfair labor practice must be supported by statutory authority to impose such a remedy.

**Q. #2: What is the most common statutory authority to allow an agency to pay money to employees as part of an unfair labor practice remedy?**

One specific statutory authority unambiguously authorizing money damages is the Back Pay Act. An employee found to have been affected by an improper or unwarranted personnel action resulting in the withdrawal or reduction of pay, allowances or differentials may be made whole under the authority of the Back Pay Act. The Back Pay Act also specifically provides for the payment of interest. The Authority has held that the management rights section of the Statute, particularly the right to determine its budget, does not provide any impediment to a make whole remedy based on the Back Pay Act.

**Q. #3: What are some examples of Backpay awards to remedy unfair labor practices?**

The Back Pay Act applies to a variety of unfair labor practices as long as the withdrawal or reduction of pay, allowances or differentials was as a result of the unfair labor practice. For example, a violation of section 7116(a)(2) of the Statute by suspending an employee for engaging in protected activity results in a backpay remedy. Similarly, a unilateral change unfair labor practice that denied an employee an award could result in a money remedy under the Back Pay Act.

**Q. #4: Does the General Counsel take a position on whether a charging party's attorney fees should accompany a backpay remedy for an unfair labor practice violation?**

The Back Pay Act provides an entitlement to reasonable attorney fees. In keeping with the Regions' role as a neutral third party representing the public interest, the General Counsel does not take a position as to whether attorney fees are warranted and the amount of such fees, if any.

**Q. #5: Does the Statute itself constitute authority for the expenditure of such funds under the doctrine of sovereign immunity?**

No. The Authority has held that the remedial provisions of the Statute do not meet the strict test for waiver of liability for money damages under the doctrine of sovereign immunity. Thus, the Statute does not waive sovereign immunity to an award of money damages not related to an unlawful reduction in pay, allowances, or differentials covered by the Back Pay Act. When backpay is not involved, any monetary damages must be unambiguously grounded in some other law.

**Q. #6: Is there a difference between the payment of money to employees and a remedy that incurs costs to a respondent?**

Yes. The Authority will uphold specific remedies that are equitable in nature. Just because a remedy requires an agency to expend money does not automatically translate into a remedy requiring money damages. A monetary award can be either legal or equitable in nature. For example, to remedy a unilateral change that raised parking fees, the Authority could not order that employees be reimbursed for the extra money they spent on parking due the unilateral fee increase. However, the Authority has ordered an agency to reduce the parking fee in the amount unlawfully raised until the employees' losses have been recouped.

**A DECISIONAL ANALYSIS FOR REGIONAL DIRECTORS WHEN DECIDING ON APPROPRIATE REMEDIES FOR UNFAIR LABOR PRACTICES**

The General Counsel bears the burden of establishing the appropriate remedy based on the evidence provided by the Charging Party. The following protocol sets forth a decisional process to assist the Regional Directors in determining what remedy to seek when litigating an unfair labor practice complaint.

1. Identify the traditional remedy for the type of violation at issue.
2. What were the conditions and relationships in existence with which the unfair labor practice interfered?
3. Will the traditional remedy:
a. effectively recreate those conditions and relationships; and
b. effectuate the policies of the Statute, including the deterrence of future violative conduct?
4. If not, what evidence supports the conclusion that the traditional remedy is not sufficient?
5. If not, what nontraditional remedy would satisfy the remedy principles?
6. What specific evidence supports the nontraditional remedy?
7. Is the nontraditional remedy inconsistent with any external law?
8. If the payment of money by an agency is the remedy that is requested, what is the statutory authority for the payment of that money?

**Copyright 2012 © LRP Publications**