



MANUAL TRANSMITTAL

Department of the Treasury
Internal Revenue Service

39.2.2

APRIL 11, 2022

EFFECTIVE DATE

(04-11-2022)

PURPOSE

- (1) This transmits revised CCDM 39.2.2, Labor and Related Matters; Labor and Employment Litigation.

BACKGROUND

- (1) This section is being revised to provide current policy and procedure concerning Labor and Employment Litigation within the Office of Chief Counsel.

MATERIAL CHANGES

- (1) The subsection heading of CCDM 39.2.2 was changed from Handling Cases to Labor and Employment Litigation.
- (2) CCDM 39.2.2.1 and related subsections were revised to reflect current procedures for processing cases before the Merit Systems Protection Board.
- (3) Language reflecting current policy pertaining to litigation holds was added to CCDMs 39.2.2.1, 39.2.2.2, 39.2.2.5 and related subsections.
- (4) Exhibits 39.2.2-1 and 39.2.2-2 were deleted.
- (5) CCDM 39.2.2.1.1 was deleted for clarity and brevity, and relevant information contained in that section was incorporated into CCDM Section 39.2.2.1. As a result of deleting this subsection, headings and numberings under 39.2.2.1 have changed throughout.
- (6) CCDM 39.2.2.2 and related subsections were revised to reflect current procedures for processing arbitration cases, including the current procedures for initiating procurement requests found in 39.2.2.2.1, and current policy pertaining to Agency-Head review in certain arbitration matters found in 39.2.2.2.4.
- (7) CCDM 39.2.2.3 and related subsections were revised to reflect current procedures for processing Unfair Labor Practice cases, including the addition of new subsection 39.2.2.3.1, Pre-Complaint Investigation. As a result of this addition, headings and numberings under 39.2.2.3 have changed throughout.
- (8) CCDM 39.2.2.4 and related subsection were revised to reflect current procedures for processing Representation and Unit Determination cases.
- (9) CCDM 39.2.2.5 was revised to reflect current procedures for processing EEOC cases, including the addition of references to EEOC electronic case processing platforms in 39.2.2.5.1, and the deletion of CCDM 39.2.2.5.2, which was incorporated into the other subsections. As a result of this deletion, heading and numberings under 39.2.2.5.2 have changed throughout.
- (10) CCDM 39.2.2.6 was revised to be more broadly applicable to Labor and Personnel cases in general.
- (11) CCDM 39.2.2.7 was revised to reflect current procedures for coordinating Significant Cases.
- (12) CCDM 39.2.2.9 was revised to clarify procedures for processing requests for attorneys' fees and/or litigation costs.

- (13) Minor typographical errors were corrected and editorial changes made throughout.

EFFECT ON OTHER DOCUMENTS

This section supersedes CCDM 39.2.2, dated March 9, 2011.

AUDIENCE

Chief Counsel

Mark Kaizen
Associate Chief Counsel
General Legal Services

39.2.2

Labor and Employment Litigation

Table of Contents

39.2.2.1 Merit Systems Protection Board Cases

39.2.2.1.1 Merit Systems Protection Board Cases without a Hearing

39.2.2.1.2 The Merit Systems Protection Board Hearing

39.2.2.1.3 Appeals

39.2.2.1.4 Settlement of Merit Systems Protection Board Cases

39.2.2.2 Arbitration Cases

39.2.2.2.1 Prehearing Procedures

39.2.2.2.2 The Arbitration Hearing

39.2.2.2.3 Appeals

39.2.2.2.4 Settlement of Arbitration Cases

39.2.2.3 Unfair Labor Practice Cases

39.2.2.3.1 Pre-Complaint Investigation

39.2.2.3.2 GLS Actions after Issuance of a Complaint

39.2.2.3.3 The FLRA Hearing

39.2.2.3.4 Appeals

39.2.2.3.5 Settlement of Unfair Labor Practice Cases

39.2.2.4 Representation and Unit Determination Cases

39.2.2.4.1 Prehearing Procedures

39.2.2.4.2 Representation Hearings

39.2.2.4.3 Appeals

39.2.2.5 Equal Employment Opportunity Cases

39.2.2.5.1 Pre-Hearing Procedures

39.2.2.5.2 Class Actions

39.2.2.5.3 EEOC Hearings

39.2.2.5.4 Appeals

39.2.2.5.5 Settlement of EEO Cases

39.2.2.6 Procedures for Settlement of Labor and Personnel Litigation Cases

39.2.2.7 Significant Case Coordination

39.2.2.8 GLS Representation or Assistance to Agencies Other than the Internal Revenue Service and the Office of Chief Counsel

39.2.2.9 Processing Awards of Attorney's Fees and Litigation Costs Made Against the Agency

39.2.2.1

(04-11-2022)

Merit Systems**Protection Board Cases**

- (1) The Associate Chief Counsel (General Legal Services) (GLS) represents the Internal Revenue Service and the IRS Office of Chief Counsel (hereinafter referred to as the Agency) when there is an appeal of an Agency action or an appeal based on whistleblowing to the Merit Systems Protection Board (MSPB). This representation includes appeals alleging violations of the USERRA and VEOA statutes.
- (2) Detailed procedures for processing MSPB appeals are found in 5 C.F.R. Part 1201 (MSPB Practices and Procedures), Part 1208 (USERRA and VEOA Appeals), and Part 1209 (Personnel Actions Allegedly Based on Whistleblowing).
- (3) In representing the Agency in MSPB proceedings, the assigned GLS attorney must exercise diligence in ensuring compliance with any orders issued by the Administrative Judge, including the Acknowledgment Order, Scheduling Orders, Hearing Orders, Affirmative Defenses Orders, and any Orders to Show Cause. Depending on the particular case, effective client representation may include filing a Motion to Dismiss for Lack of Jurisdiction or a Motion to Stay the filing of the Agency File and/or the service of discovery until the MSPB has decided any jurisdictional issue and/or the parties have engaged in settlement discussions. The GLS attorney will consider propounding discovery in all MSPB cases, and any decision not to engage in discovery must be approved by the Area Counsel (GLS) and, as appropriate, the Chief, CLP.
- (4) In MSPB cases, as in all cases handled by GLS, the assigned GLS attorney is responsible for ensuring that appropriate measures are in place to ensure the preservation of any necessary paper and electronic information and evidence. Although the form of the notification may differ from case to case, a litigation hold should be issued in each MSPB case, in accordance with internal Chief Counsel and GLS policies regarding litigation holds in MSPB cases.
- (5) In all aspects of hearing preparation and litigation, the GLS attorney will ensure that any disclosure of tax returns and return information is consistent with I.R.C. 6103. The GLS attorney will ensure that any disclosure of information is consistent with the Privacy Act.

39.2.2.1.1

(08-11-2004)

Merit Systems**Protection Board Cases
without a Hearing**

- (1) Where an MSPB appeal is to be decided on the record without a hearing, the GLS attorney must ensure that the record before the Administrative Judge is complete and contains sufficient information to render a decision in the Agency's favor. Information typically contained in a complete record could include the following, depending on the facts of the case:
 - a. Any relevant documentary evidence not previously provided in the Agency File.
 - b. Declarations submitted pursuant to 28 U.S.C § 1746 from any Agency witness who can support the factual allegations in the Agency's case or refute allegations made by the Appellant.
 - c. A declaration submitted pursuant to 28 U.S.C. § 1746 from the Deciding Official, explaining how the Douglas factors were considered and weighed in making his or her decision, and refuting any affirmative defenses alleged by the Appellant, as appropriate.
 - d. A written closing statement which incorporates any declaration(s) and clearly sets forth the facts, the applicable law, and persuasive arguments supporting the Agency's case.

39.2.2.1.2
(04-11-2022)
**The Merit Systems
Protection Board
Hearing**

- (1) Prior to litigating a case before the MSPB, the assigned GLS attorney should have a thorough understanding of the applicable order of proceedings and burdens of proof, the elements of each charge at issue, and an in-depth understanding of the facts and law applicable to the Agency's case. Although the Federal Rules of Evidence are not strictly applied during MSPB proceedings, the assigned attorney should have a thorough understanding of the rules and their function in protecting the record and should be prepared to raise timely and relevant objections where necessary.
- (2) If the hearing is being held virtually, the GLS attorney should ensure, prior to the hearing, that they have a full understanding of how to capably navigate the features of the electronic platform being used, and that they are familiar with any forum-specific or GLS-specific requirements for conducting electronic hearings. Additionally, the attorney should have sufficiently practiced using the platform prior to the hearing to ensure, to the extent possible, that any technical issues have been identified and resolved prior to the hearing.
- (3) At the hearing, the GLS attorney should be prepared to introduce relevant documentary, testimonial, and other evidence which supports the Agency's case. Although the witnesses called in each case will differ, in addition to fact witnesses, the Deciding Official will generally testify at the MSPB hearing in discipline cases to explain how the Douglas factors were considered and weighed in making the decision and with respect to other relevant matters. Exceptions to providing the testimony of the Deciding Official should be rare and only in those instances when it is determined that the testimony is not in the best interest of the case. The decision not to have the Deciding Official testify must be approved by the Area Counsel (GLS) and, as appropriate, the Chief, CLP.
- (4) The assigned GLS attorney should be prepared to make an oral closing at the conclusion of the MSPB hearing, but should also consider requesting, in each case, the opportunity to provide a written closing brief, if the GLS attorney determines that a written closing brief would be beneficial in supporting the Agency's case. Prehearing conferences present a good opportunity for the GLS attorney to ask the MSPB Administrative Judge about closings and whether the Judge will order an oral or written closing.
- (5) MSPB proceedings are recorded by a court reporter provided by the MSPB. In each MSPB proceeding, the assigned GLS attorney should consider obtaining a recorded copy of the hearing from the MSPB and, where specific citations to the record would be beneficial, a written transcription of the proceedings. The attorney should follow GLS-specific guidance, in consultation with his or her manager, for ensuring that funding is properly secured prior to ordering a written transcript.

39.2.2.1.3
(08-11-2004)
Appeals

- (1) The MSPB regulations governing appeals are found at 5 C.F.R. Part 1201, Subpart C.
- (2) If a decision is adverse to the Agency's position, the GLS attorney will:
 - a. Promptly review the decision to determine whether grounds for review or appeal exist and determine the applicable time frames for review or appeal.

- b. Consult with the appropriate client organizations which have final authority for deciding whether to appeal and with the servicing labor or employee relations offices.
- c. Prepare a written appeal for filing, if necessary.
- d. Process any review or appeal consistent with the procedural guidance issued by the Area Counsel (GLS) and Associate Chief Counsel (GLS) or designee. Consultation with the Chief, CLP, is required in seeking review or appeal of cases that require the involvement of the General Counsel's Office, Department of the Treasury, Office of Personnel Management, the Department of Justice (DOJ), or when appealing a significant case.
- e. Ensure compliance with General Counsel Order No. 10 and/or General Counsel Order No. 4.
- f. Ensure that any appeal to the Court of Appeals or higher has the approval of the Chief Counsel or Chief Counsel's delegate.

(3) **Appeals by Opposing Party.** If an opposing party files an appeal after the MSPB issues an initial decision favorable to the Service or Counsel, the GLS attorney will:

- a. Promptly review the appeal to determine the extent of the Agency's response and to determine the applicable time frames for responding to the appeal.
- b. Consult with the appropriate servicing labor or employee relations offices and client organizations.
- c. Prepare a response to the appeal, if necessary.
- d. Process any review or appeal consistent with the procedural guidance issued by the Area Counsel (GLS) and the Associate Chief Counsel (GLS) or designee.

39.2.2.1.4
(08-11-2004)
**Settlement of Merit
Systems Protection
Board Cases**

- (1) See CCDM 39.2.2.6, Procedures for Settlement of Labor and Personnel Litigation Cases.

39.2.2.2
(04-11-2022)
Arbitration Cases

- (1) The Associate Chief Counsel (GLS) represents the Internal Revenue Service and the IRS Office of Chief Counsel in arbitration proceedings invoked under the collective bargaining agreements between the IRS and the IRS Office of Chief Counsel and the National Treasury Employees Union (NTEU or Union). The collective bargaining agreement in effect at the time the cause of action arose delineates the types of subject matters that may be invoked to arbitration.
- (2) Detailed information about arbitration processes and procedures are included in the applicable IRS National Agreement or Chief Counsel Collective Bargaining Agreement, primarily under the specific article entitled "Arbitration".
- (3) Throughout the arbitration process, the GLS attorney assigned to an arbitration will work closely with the assigned IRS or IRS Office of Chief Counsel Labor Relations (LR) Specialist who is generally the Specialist who handled the underlying case prior to NTEU's invocation of arbitration. This work includes, but is not limited to:
 - a. Issuing litigation holds in accordance with GLS policy to ensure the preservation of necessary information and evidence;

- b. Gathering the documents and other evidence necessary to prove the Agency's case;
 - c. Coordinating with and gathering information from the Agency's witnesses, and preparing the witnesses for hearing; and
 - d. Securing funding for the arbitrator and, if necessary, a court reporter, and arranging for the hearing room or virtual platform.
- (4) Because of the importance of the respective roles LR and GLS play in the arbitration process, it is important for the GLS attorney and the assigned LR Specialist to establish and maintain a productive and cooperative working relationship. The GLS attorney will keep the specialist appropriately informed of key information and developments in the case, including scheduling issues, requests for additional information, and the status of settlement discussions.
- (5) In representing the Agency in arbitration proceedings, the assigned GLS attorney will be prepared to make both opening and closing statements, introduce relevant documentary, testimonial, and other evidence that supports the Service's or Counsel's case, and submit a post-hearing brief, if permitted by the applicable collective bargaining agreement. A decision to not file a post-hearing brief where one is permitted by the applicable collective bargaining agreement must be approved by the Area Counsel (GLS) or the Chief, CLP, as appropriate.

39.2.2.2.1
(04-11-2022)

Prehearing Procedures

- (1) In arbitration proceedings, as in all cases handled by GLS, the assigned GLS attorney is responsible for ensuring that appropriate measures are in place to preserve any necessary paper and electronic information and evidence. Although the form of the notification may differ from case to case, a litigation hold should be issued in each arbitration case, in accordance with internal Chief Counsel and GLS policies regarding litigation holds in arbitration cases.
- (2) Once the Agency and the Union have agreed upon a hearing date, the assigned GLS attorney will advise the servicing LR Specialist to make arrangements for a suitable hearing room, the procurement of an arbitrator, and the procurement of a court reporter (if needed) for the date(s) the hearing has been scheduled, and will monitor the LR Specialist's efforts to make these arrangements. In the absence of exceptional circumstances that would dictate otherwise, the following procedures should be followed:
- a. As soon as practicable after the hearing date has been established (and wherever possible at least 90 days in advance of the hearing date), the GLS attorney should submit a written request to the LR Specialist to procure the arbitrator and court reporter (if needed) and schedule the hearing room (Procurement Memo). The Procurement Memo should include all necessary details required for procurement of the arbitrator and court reporter, including but not limited to the arbitrator's name, contact information, rates, cancellation policy, estimated services, and estimated travel costs; the hearing date, time and location; and the contact information for the GLS attorney and NTEU Representative. For conventional arbitrations requiring a court reporter, the Procurement Memo should also specify the number and type of transcripts required and instructions as to where the transcripts should be delivered.
 - b. Simultaneous with the scheduling of the hearing date, the assigned GLS attorney will notify the arbitrator that he or she is not authorized to

perform any services or incur any expenses in connection with the arbitration, including charging a cancellation fee, until the arbitrator has received a finalized purchase order.

- c. The GLS attorney should exercise diligence in monitoring the status of any procurement request, which might include: requesting to be copied on correspondence involving arbitrator and court reporter procurement, verifying that the information transmitted to Procurement is accurate, and following up with the LR Specialist periodically to ensure that the procurement request is being timely processed. In all cases, the GLS attorney will obtain a copy of the final purchase order prior to the date on which the arbitrator or court reporter services are required.

- (3) In preparing for the hearing and in identifying and interviewing prospective witnesses, there may be occasions where the GLS attorney determines that a bargaining unit employee would be a beneficial witness. In such cases, where required by the nature of the meeting or discussion with the bargaining unit employee (i.e., a formal discussion), the GLS attorney will provide NTEU with notice of the meeting or discussion with the bargaining unit employee, and NTEU will have the opportunity to attend and witness, but not participate in, the meeting or discussion.
- (4) In all aspects of hearing preparation and litigation, the GLS attorney will ensure that any disclosure of tax returns and return information is consistent with I.R.C § 6103. The GLS attorney will ensure that any disclosure of information is consistent with the Privacy Act.

39.2.2.2.2
(04-11-2022)

The Arbitration Hearing

- (1) Because of the importance of accurately framing the issues to be decided in an arbitration case, the GLS attorney should bring to the hearing a written statement of the issue(s) to be presented to the arbitrator for resolution, and should attempt to reach agreement on the issue statement with the NTEU Representative. If an agreement cannot be reached, the GLS attorney will submit the Agency's issue statement to the arbitrator. If the parties do not agree on the issue statement, the arbitrator will generally determine the issue(s) for resolution on his or her own.
- (2) Issues of arbitrability or grievability are threshold matters that should be addressed at the hearing prior to review of the merits under consideration, particularly where the applicable collective bargaining agreement provides for deciding such issues prior to deciding the merits. The GLS attorney should be aware of any contractual limitations on the Agency's ability to present arbitrability or grievability arguments at arbitration. The GLS attorney should always be prepared to try the case on the merits, regardless of the strength of the Agency's arbitrability and/or grievability arguments.
- (3) In cases where NTEU has raised a claim of discrimination in arbitration, the GLS attorney must ensure that the Agency is prepared to object at arbitration where the NTEU has failed to identify the basis of the alleged discrimination and the specific facts upon which the allegation of discrimination rests.
- (4) The GLS attorney should be prepared to make an opening statement in all arbitration hearings, and in cases where there is no court reporter, should consider bringing a written copy of the Agency's opening statement to submit to the Arbitrator and NTEU Representative.

- (5) The GLS attorney should normally request the arbitrator to sequester witnesses if there is a dispute on the facts and an anticipated conflict in the testimony. If witnesses are sequestered, they will be excluded from the hearing room except while they are testifying. Any request to sequester should be made at the start of the hearing and take into consideration whether the witness is a fact witness or an expert witness.
- (6) Prior to litigating an arbitration case, the assigned GLS attorney should have a thorough understanding of the applicable order of proceedings and burdens of proof, the elements of each charge at issue, and have an in-depth understanding of the facts and law applicable to the Agency's case. Although the Federal Rules of Evidence are not strictly applied during arbitration proceedings, the assigned attorney should have a thorough understanding of the rules and their function in protecting the record and should be prepared to raise timely and relevant objections where necessary for the presentation of the Agency's case.
- (7) If the hearing is being held virtually, the GLS attorney should ensure, prior to the hearing, that they have a full understanding of how to capably navigate the features of the electronic platform being used, and that they are familiar with any forum-specific or GLS-specific requirements for conducting electronic hearings. Additionally, the attorney should have sufficiently practiced using the platform prior to the hearing to ensure, to the extent possible, that any technical issues have been identified and resolved prior to the hearing.
- (8) At hearing, the GLS attorney should be prepared to introduce relevant documentary, testimonial or other evidence which supports the Agency's case. Although the witnesses called in each case will differ, the Deciding Official will generally testify at the arbitration hearing in discipline cases to explain how the Douglas factors were considered and weighed in making the decision and with respect to other relevant matters. Exceptions to providing the testimony of the Deciding Official in a case where the Deciding Official's testimony would be relevant should be rare and only in those instances when it is determined the testimony is not in the best interest of the Agency's case. The decision not to have the deciding official testify in a case where the Deciding Official's testimony would be relevant must be approved by the Area Counsel (GLS) and, as appropriate, the Chief, CLP.
- (9) If the GLS attorney believes that the testimony of a witness no longer employed by the Agency (e.g., a retired employee) is necessary to support the Agency's case, the attorney should balance the expense and/or effort necessary to produce the former employee against the Agency's potential exposure at the arbitration hearing. Under the Federal Service Labor Management Relations Statute, an arbitrator does not have the power to subpoena witnesses, yet each party to the hearing is obligated to produce witnesses on the day of the hearing. An arbitrator has the authority to keep the evidentiary record open in order to hear the testimony of additional witnesses only in "emergency" situations and the contract specifies that the term "emergency" has the same meaning that it has in 5 U.S.C. § 7106.
- (10) At the close of the hearing, the GLS attorney should be prepared to make an oral closing statement where the applicable collective bargaining agreement provides for oral closings, and to discuss scheduling the filing of post-hearing briefs, where the applicable collective bargaining agreement provides for post-hearing briefs. Where briefs will be submitted, the GLS attorney will ensure that the dates for submission of post-hearing briefs to the Arbitrator are established, when applicable, under the provisions of the collective bargaining

agreement. The GLS attorney should submit copies of applicable case law to NTEU and the arbitrator regardless of whether the arbitration is conventional, expedited, or streamlined.

39.2.2.2.3
(04-11-2022)
Appeals

- (1) **Appeals of Decisions Adverse to the Agency.** If the Agency receives an adverse arbitration decision, the assigned GLS attorney will review the decision to determine whether grounds for review or appeal exist and determine the applicable time frames for review or appeal:
 - a. The Agency may file exceptions to an arbitrator's decision to the Federal Labor Relations Authority (FLRA) where the subject matter of the decision falls within the jurisdiction of the FLRA.
 - b. In cases not within the jurisdiction of the FLRA, the Agency may seek review of an arbitrator's decision only through the Office of Personnel Management (OPM) by requesting that OPM intervene in the arbitration to request that the arbitrator reconsider his or her decision. If the arbitrator denies OPM's request for reconsideration, OPM can then appeal the arbitrator's decision to the U.S. Court of Appeals for the Federal Circuit. Any decision to seek review of an arbitrator's decision through OPM must be coordinated with, and receive approval from, the Area Counsel (GLS), the Associate Chief Counsel (GLS) or designee, and the Chief, CLP.
 - c. In any case where an appeal of an arbitrator's decision will be filed, either with the FLRA or through OPM, the GLS attorney must consult with the appropriate client organization that has final authority for deciding whether to appeal and with the servicing labor or personnel relations offices. See CCDM 39.2.2.6, Settlement of Labor and Personnel Litigation Cases.
 - d. Any appeal of an arbitrator's decision to the U.S. Court of Appeals or higher must be approved by the Chief Counsel or Chief Counsel's delegate, and any decision to appeal must be made in compliance with Treasury General Counsel Order 10 and/or General Counsel Order 4.
- (2) **Appeals by Opposing Party.** If an opposing party files an appeal, the GLS attorney will process any review or appeal consistent with the procedural guidance issued by the Area Counsel (GLS) and the Associate Chief Counsel (GLS) or designee.

39.2.2.2.4
(04-11-2022)
Settlement of Arbitration Cases

- (1) In settling any arbitration case, the assigned GLS attorney must secure the approval of the appropriate Settlement Official, the assigned Area Counsel, and, as appropriate, the Chief, CLP and/or Associate Chief Counsel (GLS) or designee. See also CCDM 39.2.2.6, Settlement of Labor and Personnel Litigation Cases.
- (2) Additionally, Agency Head Review (AHR) of a settlement agreement is required where the case being settled involves the following:
 - a. Unfair labor practice (ULP) charges;
 - b. Any matter affecting the conditions of employment of more than one employee; or
 - c. Settlements that relate to the rights and benefits accruing to NTEU as the exclusive representative of bargaining unit employees.

39.2.2.3
(04-11-2022)
**Unfair Labor Practice
Cases**

- (1) The Associate Chief Counsel (GLS) represents the Internal Revenue Service and the IRS Office of Chief Counsel (hereinafter Agency) in handling Unfair Labor Practice (ULP) charges filed against the Agency
- (2) Detailed procedures for processing Unfair Labor Practice cases are found at 5 C.F.R. Part 2423.
- (3) ULP charges are typically filed by the National Treasury Employees Union (NTEU or Union) with the regional office of the Federal Labor Relations Authority (FLRA), which investigates the charges. If the assigned FLRA investigator ultimately finds that charges are warranted following the investigation, the FLRA will file a formal complaint against the Agency, and the FLRA General Counsel will present evidence in support of the complaint and have the burden of proving the charges in the complaint by a preponderance of the evidence. Because of the unique nature of the proceedings in ULP cases before the FLRA, in handling such a case, the assigned GLS attorney should have a thorough understanding of the FLRA process and roles throughout the processing of the case, and should exercise care and due diligence in fulfilling his or her representational duties.
- (4) In Unfair Labor Practice cases, as in all cases handled by GLS, the assigned GLS attorney is responsible for ensuring that appropriate measures are in place to ensure the preservation of any necessary paper and electronic information and evidence. Although the form of the notification may differ from case to case, a litigation hold should be issued in each Unfair Labor Practice case, in accordance with internal Chief Counsel and GLS policies regarding litigation holds in Unfair Labor Practice cases.

39.2.2.3.1
(04-11-2022)
**Pre-Complaint
Investigation**

- (1) Upon receipt of a charge, the GLS office assigned to the case must file a designation of representative with the FLRA Regional Director, and advise the Regional Director in writing that all requests for information, documents, and interviews of agency employees should be directed to the assigned GLS attorney. Labor Relations and any management officials involved in the matter should be advised of GLS's representational role and advised to send any inquiries to the assigned GLS attorney.
- (2) The GLS attorney will review the case to determine the facts, identify and interview prospective witnesses, and identify and gather necessary documents. The GLS attorney will specifically request that the Authority provide GLS with any information and documents the Union/employees provided to the Authority.
- (3) During the course of the FLRA's investigation, the FLRA investigator may request to interview a bargaining unit employee, in which case the GLS attorney will notify the servicing Labor Relations office so that appropriate arrangements can be coordinated with the employee's immediate supervisor.
- (4) If the FLRA investigator requests to interview a management employee, such request will generally be denied, and should only be granted where the GLS attorney determines, with the approval of the Area Counsel (GLS), that it is in the interest of the case to grant such a request. If the Agency decides to grant the investigator's request for an interview, the GLS attorney will advise the management employee not to participate in an interview without the presence of counsel and will brief the management employee prior to the interview as to the areas likely to be discussed.

- (5) As an alternative to granting an investigator's request for an interview of a management employee, the GLS attorney may consider requesting that the investigator submit written interrogatories to be answered by the management employee and/or that the management employee submit a written affidavit to the investigator. Prior to communicating this to the investigator, any such communication must be reviewed and approved by the Area Counsel (GLS).
- (6) During and/or after any interview, neither the GLS attorney nor the management employee will sign any affidavit or notes taken by the investigator.
- (7) The GLS attorney will file a position paper in response to an Unfair Labor Practice charge with the FLRA Regional Director. The assigned attorney, in consultation with the Area Counsel, should decide on the depth and breadth of the position paper. At the time of the filing of the position paper, if the Authority has failed to provide the information requested pursuant to subparagraph (2) above, the position paper should make clear that the Agency made the request, the requested information was not provided, and that the Agency's position is being provided based on the limited information available to it at the time of filing. This position paper is served only upon the FLRA and the position paper should make clear that the Agency does not authorize the sharing of the position paper with NTEU or any other parties.

39.2.2.3.2
(04-11-2022)
**GLS Actions after
Issuance of a Complaint**

- (1) If the FLRA Regional Director issues a formal complaint and notice of hearing, the GLS attorney will notify the appropriate servicing Labor Relations office and client organization to advise them of the receipt of the complaint and notice of hearing.
- (2) The GLS attorney will file an answer to the complaint within the time limits set forth in the applicable regulations, addressing each allegation in the complaint.
- (3) The GLS attorney assigned to the case will conduct additional investigations, as appropriate, to determine the facts, to identify, interview and prepare prospective witnesses, and to identify and gather necessary documents.
- (4) In all aspects of hearing preparation and litigation, the GLS attorney will ensure that any disclosure of tax returns and return information is consistent with I.R.C. § 6103. The GLS attorney will ensure that any disclosure of information is consistent with the Privacy Act.
- (5) Except for motions made during a prehearing conference or hearing, all motions will be in writing and prepared and filed in accordance with applicable regulations or other guidance. Prehearing motions and motions made at the hearing will be filed with the Administrative Law Judge. Motions for an interlocutory appeal of any ruling and responses must be filed in accordance with applicable regulations.

39.2.2.3.3
(04-11-2022)
The FLRA Hearing

- (1) Prior to litigating an FLRA case, the assigned GLS attorney should have a thorough understanding of the applicable order of proceedings and burdens of proof, the elements of each charge at issue, and have an in-depth understanding of the facts and law applicable to the Agency's case. Although the Federal Rules of Evidence are not strictly applied during FLRA proceedings, the assigned attorney should have a thorough understanding of the rules and their function in protecting the record and should be prepared to raise timely and relevant objections where necessary.

- (2) If the hearing is being held virtually, the GLS attorney should ensure, prior to the hearing, that they have a full understanding of how to capably navigate the features of the electronic platform being used, and that they are familiar with any forum-specific or GLS-specific requirements for conducting electronic hearings. Additionally, the attorney should have sufficiently practiced using the platform prior to the hearing to ensure, to the extent possible, that any technical issues have been identified and resolved prior to the hearing.
- (3) At hearing, the GLS attorney should be prepared to make opening and closing statements and introduce relevant documentary and testimonial evidence which supports the Agency's case and refutes the complaint's charges.
- (4) The GLS attorney will prepare and file a post-hearing brief in accordance with applicable regulations, Administrative Law Judge orders, and any other guidance. Any decision to not file a post-hearing brief should be exceedingly rare, and any such decision must be approved by the Area Counsel (GLS) coordinated with and concurred with by the Chief, CLP.

39.2.2.3.4
(04-11-2022)
Appeals

- (1) **Appeals by the Agency.** If the Agency receives an unfavorable FLRA decision, the assigned GLS attorney will review the decision to determine whether grounds for filing an appeal exist.
 - a. Any decision to file an appeal will be made in consultation with the appropriate client organizations with final authority to decide whether to file an appeal, in consultation with the Chief, CLP, and with the approval of Area Counsel (GLS) and Associate Chief Counsel (GLS) or designee.
 - b. Any appeal to the Court of Appeals or higher must be approved by the Chief Counsel or Chief Counsel's delegate, and any decision to appeal must be made in compliance with Treasury General Counsel Order 10 and/or General Counsel Order 4.
- (2) **Appeals by Opposing Party.** If an opposing party files an appeal after the FLRA issues a decision favorable to the Agency, the GLS attorney will process any review or appeal consistent with the procedural guidance issued by the Area Counsel (GLS) and the Associate Chief Counsel (GLS) or designee.
- (3) The regulations governing filing exceptions to an Administrative Law Judge's Decision are found at 5 C.F.R. Part 2423, Subpart D.

39.2.2.3.5
(04-11-2022)
**Settlement of Unfair
Labor Practice Cases**

- (1) See CCDM 39.2.2.6 Procedures for Settlement of Labor and Personnel Litigation Cases.

39.2.2.4
(08-11-2004)
**Representation and Unit
Determination Cases**

- (1) In exercising its delegated authority, the Associate Chief Counsel (GLS) may encounter cases in which a labor organization, employee, group of employees or the Agency has filed a petition with the FLRA seeking a change in representation status for an employee or group of employees or for a determination of the appropriate bargaining unit for representation purposes.
- (2) This subsection describes the procedures the GLS attorney will use in representing IRS or Counsel management when assigned a representation case.

39.2.2.4.1
(04-11-2022)**Prehearing Procedures**

- (1) If an Area Counsel (GLS) office is notified of the filing of a representation petition, the Area Counsel will forward a copy of the petition to the Chief, CLP.
- (2) The assigned GLS attorney will handle the representation matter in accordance with the FLRA regulations governing representation proceedings which are found in 5 C.F.R. Part 2422.
- (3) In providing representation, the GLS attorney will advise the Agency regarding its pre-hearing obligations, including posting of the notice of petition; timeliness of the petition; and the obligation of the parties to meet, furnish relevant information, cooperate and use their best efforts to secure agreement as set out the FLRA regulations. The attorney will ensure compliance with all requests of the Regional Director of the FLRA.
- (4) In all aspects of hearing preparation and litigation, the GLS attorney will ensure that the disclosure of tax return and return information is consistent with I.R.C. § 6103. The GLS attorney will that any disclosure of information is consistent with the Privacy Act.
- (5) In lieu of a hearing, the parties may enter into a joint stipulation that addresses all the facts necessary to decide the matter. A Regional Office investigation may also be an appropriate alternative to a hearing in some cases. In such cases, the Regional Director reviews the record and issues a Decision and Order based on the stipulation or investigation.

39.2.2.4.2
(04-11-2022)**Representation Hearings**

- (1) Although representation hearings are considered investigatory and not adversarial, GLS's role during the proceedings, as in all cases, is to advocate on behalf of its client. To that end, the GLS attorney should ensure the development of a complete record of relevant and material facts upon which the Regional Director can make an appropriate unit determination. There is no burden of proof, with the exception of proceedings on objections to elections, and the formal rules of evidence do not apply.
- (2) If a hearing is scheduled, the GLS attorney should be prepared to make both opening and closing statements, introduce relevant documentary and testimonial evidence which supports the Service's or Counsel's case, and submit a post-hearing brief with the Regional Director. A decision to not file a post-hearing brief must be approved by the Area Counsel (GLS) or Chief, CLP, as appropriate.
- (3) If the hearing is being held virtually, the GLS attorney should ensure, prior to the hearing, that they have a full understanding of how to capably navigate the features of the electronic platform being used, and that they are familiar with forum or GLS-specific requirements for conducting electronic hearings. Additionally, the attorney should have sufficiently practiced using the platform prior to the hearing to ensure, to the extent possible, that any technical issues have been identified and resolved prior to the hearing.

39.2.2.4.3
(04-11-2022)**Appeals**

- (1) **Appeals by the Agency.** If the Agency receives an unfavorable FLRA decision, the assigned GLS attorney will review the decision to determine whether there are applicable grounds for initiating an appeal through an application for review.
 - a. Any decision to file an application for review will be made in consultation with the appropriate client organizations with final authority to decide

whether to pursue an appeal, in consultation with the Chief, CLP, and with the approval of the Area Counsel (GLS) and Associate Chief Counsel (GLS) or designee.

- b. Any appeal to the Court of Appeals or higher must be approved by the Chief Counsel or Chief Counsel's delegate, and any decision to appeal must be made in compliance with Treasury General Counsel Order 10 and/or General Counsel Order 4.
 - c. Consultation with the Chief, CLP, is required in all cases involving representation decisions adverse to the Agency's position.
- (2) **Appeals by Opposing Party.** If an opposing party initiates an appeal after the issuance of an initial or final decision favorable to the Agency, the GLS attorney will process any application for review consistent with the procedural guidance issued by the Area Counsel (GLS) and the Associate Chief Counsel (GLS) or designee.
- (3) The regulations governing filing an application for review with the FLRA from a Decision and Order of a Regional Director are found at 5 C.F.R. § 2422.31.

39.2.2.5
(04-11-2022)
**Equal Employment
Opportunity Cases**

- (1) The Associate Chief Counsel (GLS) represents the Internal Revenue Service and the IRS Office of Chief Counsel in discrimination complaints at the EEOC hearing and appellate stages brought by employees, former employees, applicants for employment, class complainants, and other parties (for example, contract employees).
- (2) This chapter addresses the statutory EEO process outlined under 29 C.F.R. §1614.101, et seq., not under a negotiated grievance procedure.

39.2.2.5.1
(04-11-2022)
Pre-Hearing Procedures

- (1) In EEOC cases, as in all cases handled by GLS, the assigned GLS attorney is responsible for ensuring that appropriate measures are in place to preserve any necessary paper and electronic information and evidence. Although the form of the notification may differ from case to case, a litigation hold should be issued in each EEOC case, in accordance with internal Chief Counsel and GLS policies regarding litigation holds in EEOC cases.
- (2) Upon receipt of an initial or acknowledgment order from the EEOC, the GLS attorney will ensure compliance with any orders contained therein and all pertinent regulatory requirements. The GLS attorney must be keenly aware of the great variety of requirements contained in EEOC orders including use of FEDSEP (Federal Sector EEO Portal), HECAPS (Hearings Electronic Case Processing System), and any other EEOC procedures specifically tailored to the case such as Preliminary Case Information (PCI) orders, Prehearing Submissions requiring witness lists and exhibits, and other pre-hearing procedures.
- (3) The GLS attorney will prepare the case for hearing including determining the facts, identifying and interviewing prospective witnesses, and identifying and gathering necessary documents.
- (4) Consistent with 29 C.F.R. § 1614.109, the GLS attorney should use discovery to facilitate the preparation of the case. A decision not to engage in discovery, in any particular case, must be approved by the attorney's supervisor. If the opposing party files a motion to compel discovery against the Agency, the GLS attorney will notify the supervisor in a timely manner.

- (5) After reviewing the Investigative File (IF) and any information or documents obtained through discovery, the GLS attorney should consider in each case whether a Motion for a Decision Without a Hearing to dispose of some or all of the issues in the case should be prepared and filed. A decision not to file such a Motion, in any particular case, must be approved by the attorney's supervisor.
- (6) The GLS attorney will ensure that appropriate arrangements for a hearing room and court reporter have been made in advance of the hearing. The GLS attorney will in all cases ensure, consistent with GLS procedures, that any necessary purchase orders have been issued, and are part of the case file, prior to the hearing.
- (7) In all aspects of hearing preparation and litigation, the GLS attorney will ensure that any disclosure of tax return and return information is consistent with I.R.C. § 6103. The GLS attorney will ensure that any disclosure of information is consistent with the Privacy Act.

39.2.2.5.2
(04-11-2022)
Class Actions

- (1) Upon receipt of a class complaint, the GLS attorney will notify the responsible management officials, and their supervisors, if appropriate, of the receipt of the case by GLS.
- (2) The GLS attorney will review the class complaint to determine if the regulatory and legal requirements of 29 C.F.R. § 1614.204 have been met such as numerosity, commonality, etc. If appropriate, the GLS attorney will prepare a response and Motion to Dismiss on the grounds that the complaint does not meet the regulatory requirements for a class complaint.
- (3) The Area Counsel and/or the GLS attorney will coordinate all representation in class complaints with the Chief, CLP.
- (4) Upon notice of class certification, the GLS attorney will take appropriate steps to ensure that necessary records and evidence are preserved through the applicable litigation hold procedures.

39.2.2.5.3
(04-11-2022)
EEOC Hearings

- (1) The GLS attorney should be prepared to make both an opening statement and a closing argument. The GLS attorney should consider asking permission of the administrative judge to submit a written post-hearing brief in appropriate cases.
- (2) Prior to the hearing in a case before the EEOC, the GLS attorney should have a thorough understanding of the applicable order of proceedings and burdens of proof, the elements of each charge at issue, and have an in-depth understanding of the facts and law applicable to the Agency's case. Although the Federal Rules of Evidence are not strictly applied during EEOC proceedings, the GLS attorney should have a thorough understanding of the rules and their function in protecting the record and should be prepared to raise timely and relevant objections where necessary.
- (3) If the hearing is being held virtually, the GLS attorney should ensure, prior to the hearing, that they have a full understanding of how to capably navigate the features of the electronic platform being used, and that they are familiar with any forum-specific or GLS-specific requirements for conducting electronic hearings. Additionally, the attorney should have sufficiently practiced using the

platform prior to the hearing to ensure, to the extent possible, that any technical issues have been identified and resolved prior to the hearing.

- (4) At the hearing, the GLS attorney should be prepared to introduce relevant documentary and testimonial evidence which supports the Agency's case. Although the witnesses called in each case will differ, in addition to fact witnesses, the Responsible Management Official (RMO) will generally testify at the hearing. The decision not to have the RMO testify must be approved by the attorney's supervisor.

39.2.2.5.4
(04-11-2022)
Appeals

- (1) **Appeals by the Agency.** If a decision is adverse to the agency's position, the GLS attorney will:
 - a. Promptly review the decision to determine whether grounds for review or appeal exist and determine the applicable time frames for review or appeal.
 - b. Consult with the appropriate client organizations which have final authority for deciding whether to appeal and with the servicing EEO Office.
 - c. Prepare a written appeal for filing, if necessary.
 - d. Process any review or appeal consistent with the procedural guidance issued by the Area Counsel (GLS) and the Associate Chief Counsel (GLS) or designee.
 - e. Ensure compliance with General Counsel Order No. 10 and/or General Counsel Order No. 4.
 - f. Ensure that any appeal to the Court of Appeals or higher has the approval of the Chief Counsel or Chief Counsel's delegate.

Note: Consultation with the Chief, CLP is required in seeking review or appeal of cases that require the involvement of the General Counsel's Office, Department of the Treasury, Office of Personnel Management, DOJ, or when it is a significant case.

- (2) **Appeals by Opposing Party.** If an opposing party files an appeal after the issuance of a decision favorable to the Service or Counsel, the GLS attorney will:
 - a. Promptly review the appeal to determine the extent of the Agency's response and to determine the applicable time frames for responding to the appeal.
 - b. Consult with the responsible management officials, and their supervisors, if appropriate.
 - c. Prepare a response to the appeal.
 - d. Process any review or appeal consistent with the procedural guidance issued by the supervisor.

39.2.2.5.5
(04-11-2022)
Settlement of EEO Cases

- (1) See CCDM 39.2.2.6, Procedures for Settlement of Labor and Personnel Litigation Cases.

39.2.2.6

(04-11-2022)

Procedures for Settlement of Labor and Personnel Litigation Cases

- (1) When considering settlement, the GLS attorney should analyze the relative strengths and weaknesses of the entire case and consult with the appropriate IRS or IRS Office of Chief Counsel client(s) to discuss the possible legal and practical ramifications of any potential settlement proposal or position.
- (2) In IRS cases involving an issue of contract interpretation under the IRS-NTEU Collective Bargaining Agreement, the appropriate client having settlement authority is the Director, Labor/Employee Relations & Negotiations, Human Capital Office, or other official(s) with delegated authority.
- (3) In Office of Chief Counsel cases involving an issue of contract interpretation under the Office of Chief Counsel-NTEU Collective Bargaining Agreement, or where any monetary settlement is being contemplated, the client having settlement authority is the Associate Chief Counsel (Finance & Management).
- (4) In all cases where settlement is being discussed, the GLS attorney should ensure appropriate coordination with any involved LR/ER or EDI Specialists, which may include discussions with servicing field specialists and/or embedded LR and EEO specialists.
- (5) Although the GLS attorney assigned to a particular case may provide the settlement official with an assessment of the relative strengths, weaknesses and risks in a case, and valuable input on the merits of settling or not settling a case, the ultimate decision as to whether to settle a case lies with the settlement official, and not with GLS.

39.2.2.7

(04-11-2022)

Significant Case Coordination

- (1) The Associate Chief Counsel (GLS) must be kept informed of significant issues and cases handled by the Area Counsel (GLS) offices and by the Claims, Labor and Personnel Law Branch. Consistent with GLS internal guidance relating to Significant Case Coordination, attorneys will promptly bring significant cases to the attention of the Deputy Associate Chief Counsel (GLS) and/or the Chief, Claims, Labor and Personnel Law Branch.
- (2) The Deputy Associate Chief Counsel (GLS) must be notified within two business days of the Area Counsel (GLS) or Chief, CLP becoming aware of any case that must be reported to the Office of General Counsel, Department of the Treasury, in compliance with General Counsel Order No. 10 and/or General Counsel Order No. 4.
- (3) The Associate Chief Counsel (GLS) must be promptly notified of any appeal to the Court of Appeals or higher that needs the approval of the Chief Counsel or designee.

39.2.2.8

(08-11-2004)

GLS Representation or Assistance to Agencies Other than the Internal Revenue Service and the Office of Chief Counsel

- (1) Occasionally, the Associate Chief Counsel (GLS) may be asked to furnish legal counsel to Treasury bureaus and activities other than the Service and the Office of Chief Counsel in connection with matters including, but not limited to:
 - Unit determination cases
 - Arbitration matters
 - Unfair labor practice complaints
 - EEO matters
 - Related personnel/labor relations questions

- (2) For a GLS attorney to undertake representation in these situations, prior authorization must be obtained by the chief legal officer of the Treasury bureau or activity seeking representation or assistance from the Associate Chief Counsel (GLS).

39.2.2.9
(04-11-2022)

**Processing Awards of
Attorney's Fees and
Litigation Costs Made
Against the Agency**

- (1) The purpose of this subsection is to provide information on the procedures to be used for processing payments of awards of attorneys' fees and litigation costs.
- (2) Whenever a case handled by a GLS attorney results in an award of attorney's fees, the attorney of record shall provide a memorandum to the agency official responsible for payment (i.e., Controller, Beckley West Virginia or other appropriate office) which shall include the following:
- a. A statement that payment of the award is proper and lawful;
 - b. A statement citing the basis for payment, i.e., Back Pay Act, Title VII, etc.;
 - c. A statement specifying to whom payment must be made. The statement must include the Taxpayer Identification Number/Social Security Number and address of the payee (even if the payee is a current employee);
 - d. If the payee is not a current employee, the payee's banking information via the ACH Enrollment Form;
 - e. A copy of the document which obligates payment of the award of attorney's fees, and/or litigation costs, e.g., an executed settlement agreement or a decision ordering the Agency to pay the award of attorneys' fees and/or litigation costs;
 - f. The GLS attorney must sign and date the memorandum (either handwritten signature or legible digital signature stamp);
 - g. The memorandum should be addressed to the Beckley Finance Center and initially routed through the Designated Funding Official (e.g., the Settlement Official in the business unit responsible for the payment).
- (3) Before certifying that the payment of attorney's fees is proper and lawful, the GLS attorney must review the invoices or other supporting documents and verify that the fees or costs requested are reasonable in light of the issues and complexity of the case and the amount of work a reasonable attorney would have expended on the case.