

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 05-01

December 10, 2004

TO: All Employees, Office of the General Counsel

FROM: Arthur F. Rosenfeld, General Counsel

SUBJECT: Summary of Operations (Fiscal Year 2004)

Attached is a copy of the Summary of Operations for Fiscal Year 2004. Based upon the accomplishments reported in this Summary of Operations, all employees of the Office of the General Counsel, Field and Headquarters, deserve great praise for outstanding performance.

My sincere appreciation and congratulations for the excellent manner in which you carry out the mission of the Agency year after year. You have my gratitude and, I am certain, the gratitude of the labor-relations community for a job well done.

/s/
A.F.R.

Attachment
cc: NLRBU
NLRBPA

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SUMMARY OF OPERATIONS FISCAL YEAR 2004

INTRODUCTION

This summary continues the General Counsel's practice of providing an annual overview of the operations of the Office of the General Counsel.

As the summary reflects, the record of performance achieved by the staffs of the Headquarters and Regional Offices of the General Counsel in Fiscal Year 2004, based on preliminary statistical reports, was once again outstanding.

Of special note in FY 2004:

- A 96.1% settlement rate was achieved in the Regional Offices in meritorious unfair labor practice cases.
- Initial elections in union representation elections were conducted in a median of 39 days from the filing of the petition, with 93.6% of such elections conducted within 56 days, both an improvement over last year.
- The Regions promptly responded to over 204,855 inquiries from the public through the Public Information Program, an increase of 8.5% over last year. Under this program we provided immediate assistance to members of the public regarding workplace disputes and saved Agency resources by discouraging the filing of charges that clearly lack merit.
- On December 15, 2003, the Agency launched a toll-free telephone service designed to provide cost-free and easy access to information about the Agency to the public. The toll-free number (1-866-667-NLRB) is equipped to handle English and Spanish-speaking callers. Recorded messages provide a general description of the Agency's mission and referrals to other government agencies and Information Officers in Regional Offices. By the end of FY 2004, the toll-free telephone service received 26,136 calls, 11,449 of which were connected to Regional Offices for further assistance.
- The Regions won 82.7 percent of Board and ALJ decisions in whole or in part.
- A total of \$208,796,028 was recovered on behalf of employees as backpay or reimbursement of fees, dues, and fines, with 4,666 employees offered reinstatement.
- The Regions have continued to reduce the inventory of cases deferred under the Board's Collyer policy. In FY 2003, the Regions reduced the number of deferred cases pending for more than 3 years from over 2000 to 336. During FY 2004, the Regions reduced the number of deferred cases pending for more than 2 years to 667.

I extend my sincere appreciation to all staff members for their continued hard work and dedication to public service and for the cooperative manner in which they have responded to the priorities in case handling. My thanks also to those who practice before us for the cooperation and assistance that they extended to us in our efforts to administer the Act effectively and efficiently.

/s/

Arthur F. Rosenfeld
General Counsel

ORGANIZATION OF THE OFFICE OF THE GENERAL COUNSEL

The Office of the General Counsel is composed of six major components. These components are responsible for the various casehandling, administrative and personnel functions of the office. The six components are: the Division of Operations-Management and Regional Offices, the Division of Advice, the Division of Enforcement Litigation, the Division of Administration, the Office of Equal Employment Opportunity and the Office of Employee Development.

The Division of Operations-Management includes Headquarters and Regional Office staffs. The Headquarters staff has the responsibility on behalf of the General Counsel for the operations of the Regional, Subregional and Resident Offices, and the coordination of the casehandling of those offices with the Washington Divisions of the Office of the General Counsel and the Board.

There are 32 Regional Offices, 3 Subregional Offices and 17 Resident Offices. Each Regional Office is headed by a Regional Director who is responsible for the management of the office and any attached Subregional or Resident Offices and for the investigation and initial determination of the merits of unfair labor practice cases and representation cases. The Regional Director is also responsible for resolving through settlement or litigation the unfair labor practice charges found to warrant further proceedings, and for the conduct of representation elections.

The Division of Advice has the function of rendering substantive legal advice to the General Counsel and to Regional Offices in cases presenting novel or complex issues, cases of national interest or cases which involve developing and changing areas of the law. The Division also processes requests for injunctive relief under Section 10(j) of the Act, litigates injunction cases in Federal appellate courts under Section 10(l) and 10(j) and indexes and classifies Board and Court decisions under the Act.

The Division of Enforcement Litigation is responsible for the Agency's litigation in the United States Court of Appeals and the Supreme Court of the United States as well as for contempt and miscellaneous litigation in Federal and State Courts.

The Office of Appeals is a major component of the Division of Enforcement Litigation. This office reviews appeals from Regional Directors' refusals to issue complaint in unfair labor practice cases and recommends proposed action to be taken thereon by the General Counsel. It also processes appeals from the Regional Directors' denials of requests for documents under the Freedom of Information Act.

The Division of Administration is under the general supervision of the General Counsel and has been delegated responsibility for the development, direction and coordination of administrative staff support functions for both the Board and the General Counsel.

The Office of Equal Employment Opportunity is dedicated to giving managers, supervisors, and employees timely professional assistance and advice in understanding

and promoting diversity in the workplace. Its mission includes providing assistance to all Agency employees to avoid or resolve discrimination and harassment complaints. In so doing, the OEEO serves as EEO counselor to Agency employees and manages the EEO complaint processing system for the Agency.

The Office of Employee Development is responsible for the training needs of Agency employees. It is the mission of the OED to develop an agency-wide approach to training, to assist managers in providing employees with needed development opportunities and to help managers and supervisors manage their own careers and obtain developmental opportunities.

I. General Information

The information set forth below reflects the work of the various case handling Divisions during the Fiscal Year 2004 based on preliminary statistical reports.

II. Regional Offices

Case Intake

The NLRB's processes can be invoked only by the filing of an unfair labor practice charge or a representation petition by a member of the public. The Agency has no authority to initiate proceedings on its own. Total case intake during FY 2004 was 31,789, compared to 33,738 cases in FY 2003, representing a 5.8 percent decrease in intake. Unfair labor practice case intake was 26,892, a 6.6 percent decrease from the FY 2003 intake of 28,794. Representation case intake was 4,588, a decrease of 1.9 percent over the FY 2003 intake of 4,677. Petitions filed in unit deauthorization, unit amendment and unit clarification (UD, AC and UC) cases increased by 15.3 percent from the previous year's intake with the filing of 309 cases in FY 2004 as compared to 268 cases filed in FY 2003.

Regional Professional Staff

The average professional staff handling the workload in the Regional Offices remained virtually level during FY 2004, with 928.40 employees as compared to 927.56 in FY 2003. As of the end of September 2001 the professional workforce in the Field was 1004. As a result of severely restricted budgets in Fiscal Years 1994 through 1999 the NLRB was not able to hire sufficient numbers of investigators and attorneys and as a consequence the average professional staffing level for the Regional Offices declined from 930 to 874. In FY 2000 and FY 2001 more substantial budgets were provided to the Agency supporting hiring increases to process both current case intake and the backlog of cases that had developed during the years of budget shortfalls. Only limited hiring took place in FY 2002 and FY 2003 because of delay in the enactment of our final budget. In fact, in FY 2003 Agency funding, along with funding for a number of other government agencies, was delayed until February, when a final appropriation was approved by Congress. As a result of this delayed and reduced hiring, we experienced an increase in situations pending under investigation from 4796 at the end of FY 2002 to 4893 at the end of FY 2003. After a year of level staffing, however, the Regions were

able to reduce the number of situations pending from 4893 at the end of FY 2003 to 4175 at the end of FY 2004, a decrease of 14.7 percent.

Information Officer Inquiries

The General Counsel's Public Information Program continued to prevent a large number of nonmeritorious cases from being filed with the Agency while continuing to provide assistance to members of the public with disputes cognizable under the Act or by referring them to appropriate agencies or organizations. In FY 2004, the total number of inquiries received through the Public Information Program was 204,855, an increase of 8.5 percent from the 188,751 inquiries received during FY 2003.

On December 15, 2003, the Agency launched a toll-free telephone service designed to provide cost-free and easy access to information about the Agency to the public. The toll-free number (1-866-667-NLRB) is equipped to handle English and Spanish-speaking callers. Recorded messages provide a general description of the Agency's mission and referrals to other government agencies and Information Officers in Regional Offices. By the end of FY 2004, the toll-free telephone service received 26,136 calls, 11,449 of which were connected to Regional Offices for further assistance.

The rate of charge acceptance (percent of instances in which a public contact results in a charge being filed) was 3.8 percent, down from the 4.2 percent in FY 2003. Since the inception of this program in 1978, the Agency has reduced its charge acceptance rate from 9.2 percent to the current 3.8 percent rate. The merit rate for such charges was 29.9%, which is consistent with historic levels.

Unfair Labor Practice Cases

Settlements

The Agency's effectiveness and efficiency in administering the Act is greatly enhanced by its ability to effect a voluntary resolution of unfair labor practice cases, cases which, after investigation, are deemed worthy of prosecution. (See merit factor, *infra*). Over the years, the Agency has had an excellent settlement record due to the efforts of staff and the cooperation of the Bar. In FY 2004, the Regions obtained 9,424 settlements of unfair labor practice cases, representing a rate of 96.1 percent of total merit cases, as compared to 9,247 settlements in FY 2003 and a rate of 92.8 percent. Over the last 10 years the settlement rate has ranged from between 91.5 and 99.5 percent.

Complaints

In FY 2004 the Regional Offices issued 1,965 complaints as compared to 2,171 in FY 2003. The median time to issue complaints from charge filing was 102 days in FY 2004, as compared to the median of 104 days in FY 2003.

Merit Factor

The percentage of unfair labor practice cases in which a Regional Director determines that formal proceedings are warranted is called the merit factor. Many merit cases are settled by the parties before the issuance of complaint. In FY 2004 the merit factor was 37.7 percent, compared to 37.9 percent in FY 2003. Since 1980, the merit factor for all charges has fluctuated between 32 and 40 percent.

Litigation Results

The Regional Offices won 82.7 percent of Board and Administrative Law Judge decisions in whole or in part in FY 2004, down slightly from 84.1 percent in FY 2003.

Remedies

Amounts recovered on behalf of employees as backpay or reimbursement of fees, dues, and fines in FY 2004, was \$208,796,028, compared to \$92,395,514 in FY 2003. In FY 2004, 4,666 employees were offered reinstatement, as compared to 3,511 in FY 2003. Remedies secured often vary greatly from year-to-year because occasional cases involve extraordinarily large amounts of money or large numbers of employees. The remedies secured in FY 2004 include a \$97,182,500 settlement in a single case involving 889 employees as well as a \$25,000,000 settlement involving 411 employees.

Section 10(l) Activity

The Regional Offices filed 5 petitions for 10(l) injunctions with the appropriate district courts in FY 2004, as compared to 7 petitions filed in FY 2003. Three of these petitions resulted in court orders and/or settlements, one was withdrawn, and one was pending at the end of FY 2004.

Cases Deferred to Arbitration

The Regional Offices continued to reduce the number of cases pending for significant periods after having been deferred pursuant to the Board's Collyer deferral policy (Collyer Insulated Wire, 192 NLRB 837 (1971)). During FY 2002, the Regions began this project by communicating with the parties to those cases in deferred status for 5 or more years and inquiring as to the status of the dispute. If the charging party was not cooperating in securing an arbitral resolution to the dispute, the charge was dismissed. If the charged party was at fault for the delay in reaching arbitration, the deferral was revoked and the investigation pursued. As a result of this more aggressive policy, the number of cases Collyer-deferred for 5 year or longer was reduced from approximately 1000 cases to 384. In FY 2003 the Regional Offices turned their

attention to cases deferred in excess of 3 years. As a result, the number of cases deferred 3 years or longer was reduced from approximately 2000 to 356. In FY 2004, the Regions began making inquiries concerning the status of cases in deferral for 2 or more years. These efforts led to a reduction in the number of such cases to 675 on October 1, 2004 from 3,217 that had been pending on October 1, 2002.

Representation cases

Elections

The Regions conducted 2,537 initial elections in FY 2004, of which 89.0 percent were held pursuant to agreement of the parties, compared to 2,659 initial elections and an 88.5 percent election agreement rate for FY 2003. The median time to proceed to an election from the filing of a petition was 39 days in FY 2004, a slight improvement from the 40-day median in FY 2003. 93.6 percent of all initial representation elections were conducted within 56 days of the filing of the petition in FY 2004, as compared to 92.5 percent in FY 2003.

Regional Director Decisions

In FY 2004, Regional Directors issued 328 decisions in contested representation cases after hearing in a median of 35 days. In FY 2003, Regional Directors issued 414 decisions in a median time of 39 days.

III. Division of Enforcement Litigation

Appellate Court Branch

In FY 2004, the Appellate Court Branch received 153 cases. Private parties filed petitions to review the Board's order in 79 of the 153 cases, and the Regional Offices referred the remaining 74 cases for court enforcement. By filing briefs in 82 cases and closing 57 cases on compliance, default judgment, or dismissal of court proceedings the Branch disposed of 139 cases in 2004. In FY 2003, the total intake of enforcement and review cases was 85 cases and dispositions totaled 128. Oral arguments were presented in 62 cases in FY 2004, compared with 103 cases in FY 2003. The median time for filing applications for enforcement was 28 days in FY 2004, compared with 21 days in FY 2003. The median time for both enforcement and review cases from receipt of cases to filing of briefs was 146 days in 2004, compared with 215 days in FY 2003. In FY 2004, the Board filed one petition for rehearing and filed responses to petitions for rehearing in 2 cases. The Branch handled 71 summary enforcement cases, and 25 consent cases. By contrast, in FY 2003, the Branch handled 71 summary enforcement cases and 44 consent cases.

In FY 2004, the United States courts of appeals decided 62 enforcement and review cases involving the Board, compared with 115 in FY 2003. Of these cases 72.6 percent were won in whole and 80.6 percent were won in whole or in part, compared with success rates in whole and in part in FY 2003 of 75.7 percent and 87.0 percent respectively. In FY 2004, 3.2 percent were remanded entirely compared with 6.1

percent in FY 2003. Also in FY 2004, 16.1 percent of cases were total losses compared with 7.0 percent in FY 2003.

Supreme Court Branch

In FY 2004, oppositions to private parties' petitions for certiorari were filed in three cases. In FY 2003, six oppositions were filed. In addition, during FY 2004, 25 memoranda respecting certiorari were submitted to the Board, as compared to 33 memoranda in FY 2003. In FY 2004, as in FY 2003, the Board did not file any petitions for certiorari or briefs to the Supreme Court on the merits. Although the Board did not formally participate as *amicus* in any cases, in one federal case that required the lower court to harmonize the NLRA with other federal statutes, the General Counsel transmitted the Agency's view respecting certiorari to the Solicitor General.

In FY 2004, as in FY 2003, the Supreme Court decided no Board cases on the merits. The Court denied five private party petitions for certiorari and granted none. In FY 2003, the Court denied nine private party petitions for certiorari and granted none.

Special Litigation Branch

The Special Litigation Branch is primarily responsible for representing the Board or the General Counsel in litigation in the District and Bankruptcy Courts of the United States, and the United States Courts of Appeals, in all cases except those arising directly from the enforcement of Board Decisions and Orders. In FY 2004, the Special Litigation Branch had an intake of 184 cases and closed 202 cases. This compares with an intake of 167 cases and the closing of 171 cases in FY 2003. In FY 2004, ethics cases, addressing contacts with represented persons during Board proceedings, comprised 100 of the 184 cases received and 98 of the 202 cases closed.

In FY 2004 the Branch filed 62 briefs: 10 appellate court briefs, 22 district court briefs, 27 bankruptcy court briefs, 2 state court briefs, and 1 brief to a federal agency. The Branch also sent 91 memos to the Board and Regional offices, including 70 ethics memos. This compares to FY 2003 when the Branch filed 66 briefs, 6 to the appellate courts, 23 to the district courts, 30 to the bankruptcy courts, 1 to the state courts, and 6 to federal agencies. In FY 2003 the Branch also sent 111 memos to the Board and Regional offices, including 89 ethics memos.

In FY 2004, the Branch participated in 17 oral arguments and received 12 decisions, as follows: 5 in appellate courts (3 wins and 2 EAJA cases where we successfully litigated a reduction in the amount of fees sought), 4 in district courts (3 wins/1 loss) and 3 in bankruptcy court (2 wins/1 loss). This compares with FY 2003 when the Branch participated in 11 oral arguments and received 9 decisions, all wins, as follows: 4 district court decisions, 2 bankruptcy court decisions, and 3 appellate court decisions.

Contempt Litigation and Compliance Branch

In FY 2004, 445 cases were referred to the Contempt Litigation and Compliance Branch for consideration for contempt or other appropriate action to achieve compliance with the Act, compared to 367 cases in FY 2003. Of the 159 contempt or other formal submissions, voluntary compliance was achieved in 20 cases during the fiscal year, without the necessity of filing a contempt petition, or other initiating papers and 29 other cases settled after the filing of a formal pleading in court, but before trial. In 68 other cases, it was determined that contempt or other proceedings were not warranted; and in 25 cases interim advice or assistance was given and the cases were returned to the Regions for further administrative processing. The remaining 17 cases continue to be processed. In FY 2003, voluntary compliance was achieved in 23 of the 123 formal submissions without the necessity of filing a contempt petition or other initiating papers, and 18 cases were settled after the filing of a formal pleadings in court, but before trial. In 48 other cases, it was determined that contempt or other proceedings were not warranted

Seven civil contempt or equivalent adjudications were awarded in favor of the Board in FY 2004 (including one writ of body attachment), compared to twelve in FY 2003. During FY 2004 the Contempt Litigation and Compliance Branch also obtained 34 other court orders in aid of compliance, as compared to nine in FY 2003. During FY 2004, the Branch collected \$6,000 in fines and \$1,437,766 in backpay, while recouping \$400,000 in court costs and attorneys' fees incurred in contempt litigation. In FY 2003, the Contempt Litigation and Compliance Branch collected \$46,250 in fines and \$13,585,418 in backpay, while recouping \$18,153 in court costs and attorneys' fees incurred in contempt litigation. In FY 2004, the Branch also conducted 149 asset/entity database investigations pursuant to requests from the Regions, as compared to 202 in FY 2003.

Office of Appeals

In FY 2004, the Office of Appeals received 3008 appeals from Regional Directors' refusals to issue complaints, a slightly more than 1.3 percent increase from the 2,969 appeals received in FY 2003. In FY 2004, the office disposed of 3,219 appeals, a 12.5 percent increase over the 2,861 cases decided in FY 2003. The percentage of reversals of Regional Directors' dismissals was 1 percent, a slight decrease from the 1.2 percent in FY 2003. Median time to process appeals in FY 2004 was 36 days, a significant decrease from FY 2003, where the median was 44 days. Median time to process 33 sustained appeals was 110 days in FY 2004, up from 93 days in FY 2003 to process 35 sustained appeals. In FY 2004, the Office of Appeals also received 49 appeals under the Freedom of Information Act, and closed 47, compared with 25 appeals received under the Freedom of Information Act in FY 2003 with 25 closed.

IV. Division of Advice

During FY 2004, the Division of Advice processed its cases in a median of 21 days, compared to 22 days in FY 2003. Also, during FY 2004, the Division received

676 cases and closed 704 cases, compared to 866 cases received and 845 cases closed in FY 2003.

Section 10(j) Injunction Activity

In FY 2004, the Injunction Litigation Branch received 70 cases, as compared to the 90 cases received in FY 2003. Section 10(j) relief was authorized in 14 cases, or 20 percent of the cases in FY 2004, as compared to 17 cases, or 19 percent of the cases in FY 2003. In addition, the success rate, i.e., the percentage of authorized 10(j) cases in which the Agency achieved either a satisfactory settlement or substantial victory in litigation for cases, was 100% percent in FY 2004, the same success rate as FY 2003.

Injunction Litigation Branch

In addition to requests for Section 10(j) authorization, during FY 2004 the Injunction Litigation Branch handled 64 other cases, compared to 90 such cases in FY 2003. These cases involved appeals from district court decisions in 10(j) or 10(l) cases, contempt of district court decrees, and litigation advice to regions in their litigation of 10(j) and 10(l) cases. The Branch handled 5 appeals that were pending at the beginning of the fiscal year and 3 appeals that were filed during FY 2004, compared to 4 appeals that were pending at the beginning of FY 2003 and 7 appeals that were filed during FY 2003. Of these 8 cases in FY 2004, the Branch won one decision, lost 1 decision, satisfactorily resolved 1 other before decision, and 5 were pending decision at the end of FY 2004 and remain pending as of the publication date of this Summary of Operations. This compares to 11 cases in FY 2003, in which the Branch lost 1 court decision, satisfactorily resolved 5 others before decision, and 5 were pending decision at the end of FY 2003. Of these 5 cases, the Board won 2, lost 1 and 2 are among the 5 cases that remain pending. The Branch also authorized the Regions to institute contempt proceedings in 1 case during FY 2004, as compared to 2 cases during FY 2003.

V. The Office of Equal Employment Opportunity (OEEO)

The Office of Equal Employment Opportunity (OEEO) reports that nine complaints of alleged discrimination were filed during FY 2004. At the beginning of the fiscal year, there were 3 cases pending investigation. The median number of days elapsing for cases under investigation at the beginning of FY 2004 was 47 days. At the end of FY 2004, there were 3 cases pending investigation with a median of 94 days. It should be noted that during this period, the OEEO issued 17 final Agency decisions and settled 2 complaints. Currently, there are 17 cases pending appeal at the Equal Employment Opportunity Commission (EEOC), 9 cases pending hearing at EEOC, and 9 cases filed in United States District Court.