

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 06-01

November 28, 2005

TO: All Employees, Office of the General Counsel

FROM: Arthur F. Rosenfeld, Acting General Counsel

SUBJECT: Summary of Operations (Fiscal Year 2005)

Attached is a copy of the Summary of Operations for Fiscal Year 2005. 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.

Because this likely will be the last Summary of Operations that issues under my name, I want to take this opportunity to convey my sincere appreciation and congratulations for the excellent manner in which you carry out the mission of the Agency year after year. This Summary of Operations and those I have issued over the past four years evinces your commitment to the work of the Agency.

The efficacy of any General Counsel is almost wholly dependent on the talent and high level of competence of those who carry out his or her policies. I have been consistently impressed and inspired by your willingness to assist me in meeting my goals, your dedication to the mission of this Agency and the high caliber of your performance.

I have enjoyed my all too brief time as General Counsel. I am confident that the public will always be able to count on the high quality of your work and your commitment to the National Labor Relations Act. 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

Distribution:  
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MEMORANDUM GC 06-01

## SUMMARY OF OPERATIONS FISCAL YEAR 2005

### INTRODUCTION

This summary continues my 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 2005, based on preliminary statistical reports, was once again outstanding.

Of special note in FY 2005:

- The Office of the General Counsel made all of its performance goals under the Government Performance and Results Act of 1993 in its Headquarters and Regional Offices.
- The median time in which the Regions achieved informal resolution of over 90% of the unfair labor practice cases was 60 days.
- A 97.2 percent settlement rate was achieved in the Regional Offices in meritorious unfair labor practice cases.
- The Regions won 87.2 percent of Board and ALJ decisions in whole or in part.
- Initial elections in union representation elections were conducted in a median of 38 days from the filing of the petition, with 94.2 percent of such elections conducted within 56 days, both an improvement over last year.
- The Regions promptly responded to over 216,723 inquiries from the public through the Public Information Program, a 5.8 percent increase 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.
- A total of \$84,628,885 was recovered on behalf of employees as backpay or reimbursement of fees, dues, and fines, with 2,842 employees offered reinstatement.
- The Regions continued to reduce the inventory of cases deferred under the Board's Collyer policy. By the end of FY 2005, the Regions reduced the number of Collyer cases pending more than three years by 33 percent and deferred cases pending more than two years by 12 percent.

As I prepare to leave the Office of the General Counsel of the National Labor Relations Board, I want to take this opportunity to convey my appreciation and thanks to those who practice before the Agency for the cooperative spirit shown during my term. While I recognize that we may not have always seen eye to eye with respect to the positions to be taken in specific cases or with regard to case processing, you have always approached these matters in a professional and principled manner. Your cooperation and assistance has been key to the Agency's success in administering the Act effectively and efficiently.

I have greatly enjoyed all the wonderful opportunities I have had to participate in conferences and discussions about the Agency and the law. These occasions have provided me with excellent and helpful insights which have enhanced my tenure as General Counsel and been of great assistance to me in the decision-making process. I look forward to a continuing dialogue with the labor-relations community.

/s/

Arthur F. Rosenfeld  
Acting 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, three 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' denial 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 reports to both the Board and the General Counsel and 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 casehandling Divisions during Fiscal Year 2005 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 2005 was 29,620, compared to 31,789 cases in FY 2004, representing a seven percent decrease in intake. Unfair labor practice case intake was 24,726, a 9.2 percent decrease from the FY 2004 intake of 26,892. Representation case intake was 4,894, an increase of six percent over the FY 2004 intake of 4,588. Petitions filed in unit deauthorization, unit amendment and unit clarification (UD, AC and UC) cases decreased by 17 percent from the previous year's intake with the filing of 257 cases in FY 2005, compared to 309 cases filed in FY 2004.

### Regional Professional Staff

The average professional staff handling the workload in the Regional Offices decreased during FY 2005 to 899.4 employees as compared to 928.40 in FY 2004. 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 through FY 2005 because of delay in the enactment of our final budget. Despite this delayed and reduced hiring, we were able to reduce situations

pending under investigation from 4,175 at the end of FY 2004 to 3,940 at the end of FY 2005.

### Information Officer Inquiries

The General Counsel's Public Information Program continued to provide assistance to members of the public by referring inquiries not covered by the National Labor Relations Act to appropriate agencies or organizations while preventing a large number of nonmeritorious charges from being filed with the Agency.

The Agency's 51 field offices received 216,723 public inquiries in FY 2005, a 5.8% increase over the 204,855 received during FY 2004. Included within these 216,443 inquiries were contacts made to the Agency's toll-free telephone service. Callers to the toll-free number may listen to messages recorded in English and Spanish that provide a general description of the Agency's mission and connections to other government agencies or to Information Officers located in the Agency's Regional Offices. In FY 2005, the toll-free telephone service received 63,209 calls, of which 24,199 were connected to Regional Offices for further assistance. From December 15, 2003, to September 30, 2004, 26,136 calls were received through the toll-free service, 11,449 of which were connected to the Regional Offices.

To extend its public services efforts across the internet, the Agency added a public information "Questions" page to its website [www.nlr.gov](http://www.nlr.gov) designed to provide answers to frequently answered questions involving the NLRA and NLRB procedures. Since its inception on February 28, 2005, this new feature has received 518,325 visits, 181,109 of which involved inquiries that could be satisfied by answers provided through the site's electronic search system. In addition, Agency personnel provided 4,652 direct email responses to specific inquiries from the public. In total, the Agency provided 402,484 responses to inquiries from the public.

The rate of charge acceptance (percent of inquiries from the public in which the contact results in a charge) was approximately 4.1% in FY 2005, which is slightly higher than the 3.8% rate experienced in FY 2004. Prior to the inception of the Public Information Program in 1978, the Agency's charge acceptance rate was 9.2%.

### 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 2005, the Regions obtained 8,232 settlements of unfair labor practice cases, representing a rate of 97.2 percent of total merit cases, compared to 9,424 settlements in FY 2004 and a rate of 96.1 percent.

Over the last 10 years the settlement rate has ranged from between 91.5 and 99.5 percent.

### Complaints

In FY 2005 the Regional Offices issued 1,440 complaints as compared to 1,965 in FY 2004. The median time to issue complaints was 93 days in FY 2005, compared to the median of 102 days in FY 2004.

### Merit Factor

The percentage of unfair labor practice cases in which a Regional Director achieves a settlement, adjustment, or determines that formal proceedings are warranted is called the merit factor. In FY 2005 the merit factor was 36.5 percent, compared to 37.7 percent in FY 2004. Since 1980, the merit factor has fluctuated between 32 and 40 percent.

### Litigation Results

The Regional Offices won 87.2 percent of Board and Administrative Law Judge decisions in whole or in part in FY 2005, up from 82.7 percent in FY 2004. Over the last 10 years, the percentage of wins ranged between 78 and 88 percent.

### Remedies

The Regional Offices recovered \$84,628,885 on behalf of employees as backpay or reimbursement of fees, dues, and fines in FY 2005, compared to \$208,726,028 in FY 2004. In FY 2005, a total of 2,842 employees were offered reinstatement, compared to 4,666 in FY 2004. Remedies secured often vary greatly from year-to-year because occasional cases involve extraordinarily large amounts of money or large numbers of employees. For instance, the remedies secured in FY 2004 included a \$97,182,500 settlement in a single case involving 889 employees as well as a \$25,000,000 settlement in a case involving 411 employees.

### Section 10(l) Activity

The Regional Offices filed four petitions for 10(l) injunctions with the appropriate district courts in FY 2005, compared to five petitions filed in FY 2004. Three of these petitions resulted in court orders and/or settlements and one was withdrawn at the end of FY 2005.

### Cases Deferred to Arbitration

The Regional Offices continued to reduce the number of cases that have been 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 Collyer deferred cases for five years or longer was reduced from approximately 1,000 to 384. In FY 2003, the Regional Offices turned their attention to cases deferred in excess of three years. As a result, the number of cases deferred three years or longer was reduced from approximately 2,000 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. By the end of FY 2005, the Regions reduced the number of Collyer cases pending more than three years to 242 cases, a reduction of 33 percent over the previous year, and deferred cases pending more than two years to 587 cases, a reduction of 12 percent.

### Representation cases

#### Elections

The Regions conducted 2,715 initial elections in FY 2005, of which 91.1 percent were held pursuant to agreement of the parties, compared to 2,537 initial elections and an 89.0 percent election agreement rate for FY 2004. In FY 2005, the median time to proceed to an election from the filing of a petition was 38 days, a slight improvement from the 39-day median in FY 2004. 94.2 percent of all initial representation elections were conducted within 56 days of the filing of the petition in FY 2005, compared to 93.6 percent in FY 2004.

#### Regional Director Decisions

In FY 2005, Regional Directors issued 287 decisions in contested representation cases after hearing in a median of 36 days. In FY 2004, Regional Directors had issued 328 decisions in a median time of 35 days.

### **III. Division of Enforcement Litigation**

#### Appellate Court Branch

In FY 2005 the Appellate Court Branch received 156 cases. Private parties filed petitions to review the Board's order in 82 of the 156 cases, and the Regional Offices referred the remaining 74 cases for court enforcement. By filing briefs in 88 cases and closing 53 cases on compliance, default judgment, or dismissal of court proceedings the Branch disposed of 141 cases in 2005. In FY 2004 the total intake of enforcement and review cases was 153 cases and dispositions totaled 139. Oral arguments were presented in 60 cases in FY 2005, compared with 62 cases in FY 2004. The median

time for filing applications for enforcement was 26 days in FY 2005, compared with 28 days in FY 2004. The median time for both enforcement and review cases from receipt of cases to filings of briefs was 177 days in FY 2005, compared to 146 days in FY 2004. In FY 2005, the Board filed two petitions for rehearing and filed one response to a petition filed against the Agency. The Branch handled 55 summary enforcement cases and 39 consent cases. By contrast, in FY 2004, the Branch handled 71 summary enforcement cases and 25 consent cases.

In FY 2005, the United States Courts of Appeals decided 73 enforcement and review cases involving the Board, compared with 62 in FY 2004. Of these cases 94.5% were enforced in whole or in part, and 78.1% were won in whole, compared with success rates in part and in whole of 80.6% and 72.6% respectively in FY 2004. In FY 2005, 1.4% of cases were remanded entirely compared with 3.2% in FY 2004. Also in FY 2005, 4.1% of cases were total losses compared with 16.1% in FY 2004.

### Supreme Court Branch

In FY 2005, oppositions to private parties' petitions for certiorari were filed in seven cases; in an eighth case, a waiver of response was filed. In FY 2004, three oppositions were filed. In addition, during FY 2005, 15 memoranda respecting certiorari were submitted to the Board, as compared to 25 memoranda in FY 2004. In FY 2005, as in FY 2004, the Board did not file any petitions for certiorari or briefs on the merits.

In FY 2005, as in FY 2004, the Supreme Court decided no Board cases on the merits. The Court denied six private party petitions for certiorari and granted none. In FY 2004, the Court denied five private party petitions for certiorari and granted none.

### Special Litigation Branch

In FY 2005, the Special Litigation Branch had an intake of 180 cases and closed 170 cases. This compares with an intake of 184 cases and the closing of 202 cases in FY 2004. In FY 2005, ethics cases, addressing contacts with represented persons during Board proceedings, comprised 119 of the 180 cases received and 116 of the 170 cases closed.

In FY 2005, the Branch filed 42 briefs: 10 appellate court briefs, 12 district court briefs, 19 bankruptcy court briefs, and one state court brief. The Branch also sent 87 memos to the Board and Regional Offices, including 61 ethics memos. In FY 2004, the Branch filed 62 briefs, 10 to the appellate courts, 22 to the district courts, 27 to the bankruptcy courts, two to the state courts, and one to a federal agency. In FY 2004, the Branch also sent 91 memos to the Board and Regional Offices, including 70 ethics memos.

In FY 2005, the Branch participated in 12 oral arguments (eight of which were by telephone) and received 12 decisions, as follows: four in appellate courts (three wins/one loss (EAJA)), six in district courts (five wins/one loss), and two in bankruptcy

courts (both wins). This compares with FY 2004 when the Branch participated in 17 oral arguments and received 12 decisions, as follows: five in appellate courts (three wins and two EAJA cases where we successfully litigated a reduction in the amount of fees sought), four in district courts (three wins/one loss - an EAJA case for which we successfully negotiated a 50% settlement), and three in bankruptcy court (two wins/one loss).

### Contempt Litigation and Compliance Branch

In FY 2005, the Contempt Litigation and Compliance Branch had an intake of 355 cases, compared to 445 cases in FY 2004. Of the 355 cases, 216 were requests for assistance in achieving compliance. The remaining 139 cases were formal recommendations to initiate contempt or other court proceedings. Voluntary compliance was achieved in 27 of those cases without the necessity of filing any court papers, 22 other cases settled after the filing of a pleading in court, but before trial, and 25 cases continue to be processed. In 50 other cases, it was determined that contempt or other proceedings were not warranted; and in 13 cases interim advice or assistance was given and the cases were returned to the Regions for further processing. In FY 2004, voluntary compliance was achieved in 20 of the 159 formal submissions without the necessity of any court filing, and 29 cases were settled after the filing of formal pleadings in court, but before trial. In 68 other cases, it was determined that contempt or other proceedings were not warranted.

Seventeen civil contempt or equivalent adjudications were awarded in favor of the Board in FY 2005, (including two writs of body attachment), compared to seven in FY 2004. During FY 2005 the Contempt Litigation and Compliance Branch also obtained 24 other court orders in aid of compliance, as compared to 34 in FY 2004. During FY 2005, the Branch collected \$26,000 in fines and \$9,219,219 in backpay or other compensatory damages, while recouping \$8,400 in court costs and attorneys' fees incurred in contempt litigation. In FY 2004, CLCB collected \$6,000 in fines and \$1,437,766 in backpay or other compensatory damages while recouping \$400,000 in court costs and attorneys' fees incurred in contempt litigation. In FY 2005, the Branch also conducted 153 asset/entity database investigations pursuant to requests from the Regions, as compared to 149 in FY 2004.

### Office of Appeals

In FY 2005, the Office of Appeals received 2,453 appeals from Regional Directors' refusals to issue complaints, an 18.4 percent decrease from the 3,008 appeals received in FY 2004. In FY 2005, the office disposed of 2,661 appeals, a 17.3 percent decrease from the 3,219 cases decided in FY 2004. The percentage of reversals of Regional Directors' dismissals was 1.3 percent, a slight increase from the 1.0 percent in FY 2004. Median time to process appeals in FY 2005 was 18 days, half of the time it took in FY 2004, when the median was 36 days. Median time to process 34 sustained appeals was 83 days in FY 2005, a 25 percent decrease from the 110 days in FY 2004 to process 33 sustained appeals. In FY 2005, the Office of Appeals

also received 36 appeals under the Freedom of Information Act, and closed 38, compared with 49 appeals received under the Freedom of Information Act in FY 2004 with 47 closed.

#### **IV. Division of Advice**

##### Regional Advice Branch

During FY 2005, the Division of Advice processed its cases in a median of 19 days, compared to 21 days in FY 2004. Also, during FY 2005, the Division received 705 cases and closed 716 cases, compared to 676 cases received and 704 cases closed in FY 2004. The median age of cases pending at the end of FY 2005 was 24 days, as compared to 9 days in FY 2004.

##### Injunction Litigation Branch

In FY 2005, the Injunction Litigation Branch received 61 cases, as compared to the 70 cases received in FY 2004. Section 10(j) relief was authorized in 15 cases, or 25 percent of the cases in FY 2005, compared to 14 cases, or 20 percent of the cases in FY 2004. 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 was 93 percent in FY 2005, compared to 100 percent in FY 2004.

In addition to requests for Section 10(j) authorization, the Injunction Litigation Branch handled 47 other cases during FY 2005, compared to 64 such cases in FY 2004. 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 five appeals that were pending at the beginning of the fiscal year and four appeals that were filed during FY 2005, compared to five appeals that were pending at the beginning of FY 2004 and three appeals that were filed during FY 2004. Of these nine appeal cases in FY 2005, the Branch won one decision, lost one decision, satisfactorily resolved two others before decision, and five were pending decision at the end of FY 2005. This compares to eight cases in FY 2004, in which the Branch won one decision, lost one decision and satisfactorily resolved one other before decision: five were pending decision at the end of FY 2004. The Branch also handled two requests for contempt proceedings in FY 2005, as compared to one case during FY 2004.

#### **V. The Office of Equal Employment Opportunity (OEEEO)**

The Office of Equal Employment Opportunity (OEEEO) handled four complaints of alleged discrimination filed during FY 2005. At the beginning of the fiscal year, there were three cases pending investigation. The median number of days elapsing for cases under investigation at the beginning of FY 2005 was 110 days. At the end of FY 2005, there were no cases pending investigation. It should be noted that during this period, the OEEEO issued seven final Agency decisions and settled five complaints. Currently,

there are 16 cases pending appeal at the Equal Employment Opportunity Commission (EEOC), four cases pending hearing at EEOC, and five cases filed in United States District Court.

## **VI. Division of Administration**

As required by the Accountability for Tax Dollars Act of 2002, the NLRB now must prepare an annual Performance and Accountability Report (PAR). In [November 2004](#), after undergoing its first full financial audit and receiving an unqualified opinion from its auditors on its financial statements, the Division of Administration prepared and [submitted the Agency's first PAR to OMB and Congress](#). Incorporated in the report was the NLRB's FY 2004 performance data as required by the Government Performance and Results Act (GPRA), and the annual report on the effectiveness and efficiency of our internal management controls as required by the Federal Managers' Financial Integrity Act. The report also included audited financial statements, presenting a fair and accurate picture of the Agency's financial position.

In 2004, the Division of Administration led an Agency-wide workforce assessment, which resulted in a five-year Workforce Plan. The objective of this Plan, in line with the President's Management Agenda (PMA), is to use workforce planning and restructuring to make the NLRB more citizen-centered and ensure that the Agency has the diverse workforce—with the right people, with the right skills, in the right places—to effectively accomplish its mission.

In accordance with the PMA, the Division of Administration led the Agency's competitive sourcing initiative to examine whether the Agency was utilizing outsourcing opportunities to the fullest extent possible to enhance cost efficiencies and program performance. Pursuant to this initiative, the Division of Administration's mailroom operation was outsourced [at the beginning of FY 2005](#).