

Unfair Labor Practice Charges (ULP)

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EMPLOYMENT LAW FOR FEDERAL EMPLOYEES . . . PERIOD!!

What is a ULP?

- An Unfair Labor Practice (ULP) is a violation of the union-management relationship as described in 5 U.S.C. 71 (“the statute”). The types of violations that are considered a ULP are specified in 5 U.S.C. 7116. The Federal Labor Relations Authority (FLRA) is the federal agency with responsibility of enforcing the statute.

What is a ULP?

- Most ULP's are committed by the agency against the union, but the union can also commit a ULP. When a violation has been committed, the union files a "Charge Against An Agency" on FLRA Form 22 with the regional office of the FLRA.

Who May File a ULP?

- ❑ Any person (individual, labor organization, or agency) may file. 5 U.S.C. § 7103(a)(1) and 5 C.F.R. § 2423.3(a)
- ❑ Charges may be filed against agencies or activities.
- ❑ Charges may be filed against labor organizations.

How Do You File a ULP?

- ❑ Charges may be filed in person, via mail, or by facsimile.
- ❑ Charge must include a clear and concise statement of facts alleged to constitute an unfair labor practice.
- ❑ Duty to submit supporting evidence and list of potential witnesses.

Where to File the ULP?

- ❑ Charge is filed with the Regional Director for the region in which the alleged ULP occurred.
- ❑ If ULP occurred in more than one Region, charge may be filed with the Regional Director in either Region.

Labor Contract Requirements regarding the Notification of Intent to File ULP

- ❑ An agreement between a union and an agency which contains a requirement for pre-charge filing, notification, or settlement efforts is enforceable.
- ❑ If the Region finds the charging party has not followed a required procedure, the charge is dismissed to allow for compliance with that required procedure.
- ❑ However, these agreements between an activity and a union do not limit an individual employee's right to file. *Headquarters, Fort Sam Houston, 8 FLRA 394 (1982).*

FLRA Investigations

- All parties are afforded an opportunity to present their evidence and views to the Regional Director. § 2423.8(a)
- Investigation is to the extent the Regional Director deems necessary. § 2423.8(a)
- “All persons *shall cooperate fully with the* Regional Director in the investigation of the charges. charges.” § 2423.8(b)

Cooperation Includes

- ❑ Making relevant witnesses available to provide sworn/affirmed testimony
- ❑ Producing relevant documentary evidence
- ❑ Providing position statements

What Happens During Investigations?

- ❑ To determine the validity of the allegations of the charging party and whether an unfair labor practice under 5 U.S.C. § 7116 has occurred.
- ❑ To provide for a reasonable opportunity for the charged party to rebut the charge.

FLRA's Decision

- ❑ *Complaint* - If all or part of the charge establishes a violation of the Statute and the Regional Director determines to proceed, the Region issues and serves a complaint which sets time and place for hearing.
- ❑ *Dismissal* - If all or part of the charge does not establish a violation of the Statute, the Regional Director dismisses the charge or that part of the charge. 5 U.S.C.
- ❑ *Withdrawal* - Charging party may request to withdraw the charge.

Most Common Reasons ULPs are Dismissed

- ❑ Timeliness (must file within 6 months of violation)
- ❑ Insufficient evidence -- even if true, the allegations do not constitute a ULP under the Statute
- ❑ Lack of cooperation (union representative does not provide additional evidence, witness list, affidavit to FLRA, etc.)

Most Common ULPs

- Bypass
- Good Faith Bargaining
- Unilateral Changes
- Weingarten Rights
- Formal Meetings
- Discrimination
- Interference

Bypass

- ❑ **Bypassing the Union - 5 U.S.C. 7116 (a)(1) and (5) - Management bypasses the union and directly notifies employees of changes in working conditions; or**
- ❑ **Agency knows Union filed grievance but goes directly to grievant to discuss or try to settle.**

Good Faith Bargaining

- A labor organization which has been accorded exclusive representation is the exclusive representative of the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering all employees in the unit.

Good Faith Bargaining

- ❑ It is an unfair labor practice for an agency or union to “refuse to consult or negotiate in good faith.”
- ❑ Determination is based on the totality of circumstances.

Good Faith Bargaining

- ❑ Did the agency/union:
- ❑ approach negotiations with sincere resolve to reach agreement?
- ❑ have duly authorized representatives present?
- ❑ meet as frequently as necessary?
- ❑ avoid unnecessary delays?
- ❑ execute/implement agreement?

Good Faith Bargaining

- Parties are obligated to bargain during the term of a collective bargaining agreement on negotiable proposals concerning matters not “contained in or covered by” the existing agreement unless the parties have waived their right to bargain about the subject matter.

U.S. Dep’t of the Interior, Wash., D.C. & U.S. Geological Survey, Reston, Va., 56 FLRA 45 (2000); U.S. INS, U.S. Border Patrol, Del Rio, Tex., 51 FLRA 768 (1996).

Unilateral Changes

- At any time, prior to making a change in a policy or practice concerning bargaining unit employees' conditions of employment, an agency is required to provide the union with notice and an opportunity to bargain over those aspects of the change that are within the duty to bargain.

Fed. Bur. of Prisons, FCI, Bastrop Tex., 55 FLRA 848 (1999).

Unilateral Changes

- ❑ What Parties need to ask:
- ❑ Is there a “change?”
- ❑ Is the impact on conditions of employment *de minimis* (small impact)?
- ❑ Is the proposed change “covered by the contract?”
- ❑ Did the union waive its right to bargain over the proposed change? (i.e. wait to long to submit a demand to bargain?)

Unilateral Changes

- ❑ Was there a change?
- ❑ The determination as to whether a change in conditions of employment has occurred involves a case-by-case analysis and an inquiry into the facts and circumstances regarding the agency's conduct and employees' conditions of employment

Unilateral Changes

- ❑ *De Minimis Test:*
- ❑ Unless the facts establish that the impact on bargaining unit employees is more than *de minimis*, no duty to bargain.
- ❑ The Authority looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change evident at the time the change was proposed and implemented.

Unilateral Changes

- Examples of *de minimis* changes:
- Reduction in reserved parking spaces where employees had no problem securing alternate parking. *SSA, Office of Hearings & Appeals, Charleston, S.C., 59 FLRA 646 (2004).*
- Change in policy regarding vessel boarding where evidence failed to show that overtime opportunities impacted or compensation, promotion or advancement potential impacted by differing skills required. *U.S. DHS, Border & Transp. Sec. Directorate, Bureau of Customs & Border Prot., Wash., D.C., 59 FLRA 728 (2004).*
- Temporary relocation of one employee to new building, resulting in only slight inconvenience. *Gen. Services Admin. Region 9, S.F., Cal., 52 FLRA 1107 (1997).*

Unilateral Changes

- ❑ Examples of **more than** *de minimis* changes:
- ❑ Change in work hours that resulted in loss of overtime opportunities. *U.S. Customs Serv., S.W. Region, El Paso, Tex., 44 FLRA 1128 (1992).*
- ❑ Implementation of VSIP program that would affect future career and retirement plan, and involved loss or benefit of \$25,000. *U.S. Dep't of the Air Force, Air Force Materiel Command, 54 FLRA 914 (1998).*
- ❑ Local office move that resulted in some computers and telephones being inoperable, computer files not accessible, and loss of quality storage cabinets. *U.S. Dep't of the Treasury, IRS, 56 FLRA 906 (2000).*

Unilateral Changes

- Is the change “covered by” the parties’ agreement?
- An agency is not required to bargain during the term of an agreement over matters that are “contained in or covered by an agreement.” *U.S. Dep’t of HHS, SSA, Balt., Md., 47 FLRA 1004 (1993).*

Unilateral Changes

- “Covered By” Test:
- Prong 1: Is the subject matter of the change “expressly contained” in the collective bargaining agreement? If not, expressly encompassed . . .
- Prong 2: Is the subject matter of the change “inseparably bound up with,” and plainly an aspect of, a subject covered by the agreement? *U.S. Customs Serv., Customs Mgmt. Ctr., Miami, Fla.*, 56 FLRA 809 (2000); *U.S. Dep’t of HHS, SSA, Balt., Md.*, 47 FLRA 1004 (1993).

Unilateral Changes

- Resolution of “Covered By” Disputes:
- Disputes involving differing and supportable interpretations of a collective bargaining agreement must be resolved through negotiated grievance procedures. *INS & INS Newark Dist.*, 30 *FLRA* 486, 490-91 (1987)

Unilateral Changes

- ❑ What Must an Agency Do When it Proposes a Change in Conditions of Employment?
- ❑ Provide Union reasonable notice and opportunity to request bargaining.
- ❑ If the union requests bargaining, respond.
- ❑ Bargain to the extent required by the Statute.
- ❑ Generally, maintain the *status quo until the bargaining process is completed*.
- ❑ Cooperate with Federal Service Impasses Panel, if requested by union, prior to implementation.

U.S. DOD, Defense Commissary Ag., Peterson Air Force Base, Colo. Springs, Colo., 61 FLRA 688 (2006); U.S. DOJ, INS, Wash., D.C., 56 FLRA 351 (2000); U.S. INS, Wash., D.C., 55 FLRA 69 (1999).

Unilateral Changes

- ❑ What Must the Union Do to Protect its Right to Bargain?
- ❑ Timely request to bargain.
- ❑ Submit negotiable proposals.
- ❑ Bargain in good faith.
- ❑ Timely request FSIP assistance if impasse is reached.

U.S. Dep't of Labor, Wash., D.C., 60 FLRA 68, 70 (2004).

Unilateral Changes

- ❑ Did the Union Waive Its Right to Bargain?
- ❑ By inaction
- ❑ Failure to timely request bargaining, request additional information or request an extension of time. *U.S. DOD, Def. Commissary Ag., Peterson Air Force Base, Colo. Springs, Colo., 61 FLRA 688 (2006); U.S. Penitentiary, Leavenworth, Kan., 55 FLRA 704 (1999).*

“Weingarten” Meetings (Investigatory meetings)

- ❑ Section 7114(a)(2)(B) of the Statute entitles the union to be given the opportunity to be represented at:
- ❑ an examination of an employee in connection with an investigation;
- ❑ If the employee reasonably believes that disciplinary action may result against the employee; AND
- ❑ If the employee requests representation.

Fed. Bureau of Prisons, OIA, Wash., D.C. & Fed. Bureau of Prisons, OIA, Aurora, Colo. & Fed. Bureau of Prisons, OIA, Littleton, Colo., 54 FLRA 1502 (1998); NLRB v. Weingarten, Inc., 420 U.S. 251 (1975).

“Weingarten” Meetings (Investigatory meetings)

- ❑ “Examination”
- ❑ Where management’s meeting with the employee is designed to “ask questions, elicit additional information, have the employee admit his alleged wrongdoing, or explain his conduct.” *Dep’t of the Treasury, Internal Revenue Service, 15 FLRA 360, 361, 370 (1984).*
- ❑ Questions **must** be asked!
- ❑ If employee gets called into meeting and handed a proposal to remove and no questions are asked – NO violation!

“Weingarten” Meetings (Investigatory meetings)

- A *Weingarten* “Examination” Includes:
 - Meeting to discuss inconsistencies in employee’s written and oral statements to management. *U.S. DOJ, Bur. Of Prisons, Metro. Correct. Ctr., N.Y., N.Y., 27 FLRA 874 (1987).*
 - Requiring employees to prepare written memos designed to elicit information and have employees explain conduct. *U.S. INS, U.S. Border Patrol, Del Rio, Tex., 46 FLRA 363 (1992).*
 - Interview of employee who was not subject of investigation but had reasonable basis to fear discipline. *IRS, Wash., D.C. & IRS, Hartford, Dist. Office, 4 FLRA 237 (1980), enforced, IRS v. FLRA, 671 F.2d 560 (D.C. Cir. 1982).*

“Weingarten” Meetings

(Investigatory meetings)

- ❑ A *Weingarten* “Examination” Does NOT Include:
 - ❑ Meeting solely concerned with an employee’s performance evaluation. *IRS, Detroit, Mich., 5 FLRA 421(1981).*
 - ❑ Meeting called to counsel an employee. *Dep’t of Treasury, IRS, 15 FLRA 360 (1984).*
 - ❑ Meeting limited to informing an employee of a decision already reached. *U.S. Air Force, 2750 Air Base Wing Hdqtrs., Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 9 FLRA 871 (1982).*

“Weingarten” Meetings (Investigatory meetings)

- ❑ Once the elements of a *Weingarten meeting* are met, an agency must:
- ❑ Grant the request for representation
- ❑ Discontinue the interview; or
- ❑ Offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview at all. *Norfolk Naval Shipyard, Portsmouth, Va., 35 FLRA 1069 (1990).*

Formal Meetings

- ❑ Section 7114(a)(2)(A) provides: An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at:
- ❑ any formal discussion
- ❑ between one or more representatives of the agency and one or more employees in the unit or their representatives
- ❑ concerning any grievance or any personnel policy or practices or other general condition of employment

Formal Meetings

- ❑ What makes the meeting “formal?” Things the FLRA look at:
- ❑ The level of supervisory or management officials conducting the meeting;
- ❑ Whether other supervisors or management officials attended;
- ❑ How long the meeting lasted;
- ❑ How the meeting was called;
- ❑ Where the meeting was held;
- ❑ Whether a formal agenda was established for the meeting;
- ❑ Whether attendance was mandatory;
- ❑ Were notes taken or a record made of the meeting;
- ❑ The subject matter addressed during the meeting; and
- ❑ The manner in which the meeting was conducted.

F.E. Warren Air Force Base, Cheyenne, Wyo., 52 FLRA 149 (1996) ; Dep’t of HHS, SSA, Bureau of Field Operations, S.F., Cal., 10 FLRA 115 (1982).

Formal Meetings

- SUBJECT MATTER

- Grievance;
- Personnel policy or practice; or
- General condition of employment

Formal Meetings

- ❑ Discussions held to meet the subject matter test:
- ❑ Grievance Meeting, *U.S. DOJ, INS, N.Y. Office of Asylum, Rosedale, N.Y., 55 FLRA 1032 (1999)*
- ❑ Meeting to discuss policies and procedures concerning annual leave. *U.S. DOD, Def, Logist. Ag., Def. Depot Tracy, Tracy, Cal., 37 FLRA 952 (1990)*
- ❑ Interview in preparation for an arbitration hearing or ULP hearing; *Dep't of the Air Force, F. E. Warren Air Force Base, Cheyenne, Wyo., 31 FLRA 541 (1988).*

Formal Meetings

- ❑ Discussions held NOT to meet the subject matter test:
- ❑ Counseling session with employee and supervisor . *F. E. Warren Air Force Base, Cheyenne, Wyo., 52 FLRA 149 (1996).*
- ❑ Meeting to inform two employees of a temporary reassignment in duties . *Bureau of Field Operations, SSA, S.F., Cal., 20 FLRA 80 (1985).*
- ❑ Discussion limited to manner in which four specific employees reported their productivity. *U.S. GPO, Pub. Documents Distrib. Ctr., Pueblo, Colo., 17 FLRA 927 (1985).*

Formal Meetings

□ Advance Notice

- A union is entitled to advance notice of a formal discussion so it can decide whether to attend and, if so, to designate a representative of its own choice to attend the meeting.

- Exception:

- Union has actual notice, *and*
 - Appropriate representative had opportunity to attend meeting.

Dep't of the Air Force, Sacramento Air Logistics Ctr., McClellan Air Force Base, Cal., 29 FLRA 594 (1987); see also GSA, Reg. 9, L.A., Cal., 56 FLRA 683 (2000).

Discrimination

- ❑ Discrimination Defined:
- ❑ 5 U.S.C. § 7116(a)(2) It is an unfair labor practice for an Agency to *encourage or discourage Union membership in a labor organization by discriminating in connection with hiring, tenure, promotion or other conditions of employment.*
- ❑ 5 U.S.C. § 7116(a)(4) It is an unfair labor practice for an Agency to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under the Statute.

Discrimination

- ❑ What is Protected Activity?
- ❑ Protected Activity: Employees have the right to form, join or assist Unions or to refrain from such activity. 5 U.S.C. § 7102.

Discrimination

□ FLRA Examples:

- Filing a petition to form a Union
- Serving as a Union Steward
- Filing a grievance
- Giving a statement to an FLRA Agent in a ULP
- Participating in contract negotiations

Discrimination

- ❑ Proving Discrimination
- ❑ To establish a *prima facie case of discrimination*:
 - ❑ 1. Employee was engaged in protected activity;
 - ❑ 2. Discriminatory action was taken against the employee; *and*
 - ❑ 3. Employee's protected activity was a motivating factor in the Agency's treatment of the employee.
Letterkenny Army Depot, 35 FLRA 113 (1990).

Discrimination

- ❑ *Letterkenny: Evidence of Motivating Factor*
- ❑ Nature, Extent and Timing of protected activity?
- ❑ Was the Agency aware of the protected activity?
- ❑ Nature of action taken against employee?
- ❑ How were other employees who were not engaged in protected activity treated? (Disparate Treatment)
- ❑ Explanation give by Management
- ❑ Did Management follow its own Procedures?
- ❑ Is there evidence of anti-Union animus? (e.g., anti-union statements)
- ❑ ***Ultimate Question: Was the protected activity a motivating factor in the action?***

Discrimination

- ❑ Even if the evidence shows a link between the protected activity and the action taken, no violation will be found if:
- ❑ there was a legitimate justification for the action;
and
- ❑ the same action would have been taken even in the absence of the protected activity.

Interference

□ Interference:

□ 5 U.S.C. § 7102 Employee's Rights

- Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal.

Interference

- ❑ Examples of Protected Activity:
 - ❑ Filing a grievance
 - ❑ Asserting a contract right
 - ❑ Requesting union representation
 - ❑ Representing the union in a matter
 - ❑ Attending union meetings
 - ❑ Refusing to join a union
 - ❑ Executing a dues allotment
 - ❑ Testifying at an arbitration hearing

Interference

- Interference by An Agency
- It is a violation of § 7116(a)(1) for an agency to interfere with, restrain or coerce an employee in the exercise by the employee of any right under the Statute.

Interference

□ Objective Standard

- While the circumstances surrounding the making of the statement(s) are taken into consideration, the standard is not based on the subjective perceptions of the employee or on the intent of the management representative.

U.S. DOJ, Fed. Bureau of Prisons, FCI, Safford, Ariz., 59 FLRA 318 (2003) (citing Dep't of the Air Force, Scott Air Force Base, Ill., 34 FLRA 956 (1990)).

Interference

- *Examples:*
- *Threatening employees with reprisal if they exercise their rights under the Statute. Fed. Election Comm'n, 6 FLRA 327 (1981).*
- Making implied threats against union representatives for assisting employees in filing and prosecuting grievances under the negotiated grievance procedure. *U.S. Penitentiary, Florence, Colo., 52 FLRA 974 (1997).*

Interference

- ❑ Free Speech Proviso
- ❑ Personal opinions are protected
- ❑ 5 U.S.C. § 7116(e) states:
- ❑ The expression of any view, argument, opinion or the making of any statement which –
 - ❑ (1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election,
 - ❑ (2) corrects the record with respect to any false or misleading statement made by the person, or
 - ❑ (3) informs employees of the Government's policy relating to labor-management relations and representation,
- ❑ Shall not, if the expression contains no threat or reprisal of force or promise or benefit or was not made under coercive conditions, (A) constitute an unfair labor practice under any provision of this chapter, or (B) constitute grounds for the setting aside of any election conducted under any provision of this chapter.

Duty of Fair Representation

- ❑ ULP filed *against* the Union
- ❑ Under § 7114 of the Statute, where a union is accorded exclusive recognition and is acting as the employees' exclusive representative, it is "responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership." 5 U.S.C. § 7114(a)(1)

Duty of Fair Representation

- Scope of Duty
- The duty of fair representation does not apply when a union is acting outside the authority granted under § 7114 of the Statute as the exclusive representative.
 - Examples:
 - filing a law suit
 - MSPB proceedings
 - EEOC proceedings (not under the collective bargaining agreement)

Fort Bragg Assoc. of Educ., NEA, Fort Bragg, N.C., 28 FLRA 908 (1987); see also NTEU v. FLRA, 800 F.2d 1165, 1171 (D.C. Cir. 1986).

Duty of Fair Representation

- DFR Where Membership is a Factor
- A union may not discriminate against non-members
 - When the union is acting as the exclusive representative under § 7114 of the Statute
 - Examples
 - Matters arrived at through collective bargaining *Antilles Consolidated Educ. Assoc., (OEA/NEA), San Juan, P.R., 36 FLRA 776 (1990).*
 - Filing grievances, *AFGE, Local 1345, Ft. Carson, Colo. (In Trusteeship) & AFGE, AFL- CIO, 53 FLRA 1789 (1998).*
 - Distribution of the proceeds of a grievance settlement, *AFGE, Local 3354, AFL-CIO, 58 FLRA 184 (2002).*

Duty of Fair Representation

- ❑ DFR Where Membership is NOT a Factor
- ❑ Union action or inaction must amount to more than negligence or ineptitude
- ❑ The union's action must have been arbitrary or in bad faith
- ❑ The union's action must have resulted in disparate or discriminatory treatment of a unit employee

AFGE, Local 3282, 61 FLRA 426 (2005); NFFE, Local 1453, 23 FLRA 686 (1986).