January 26, 1999

MEMORANDUM

TO: Regional Directors

FROM: Joe Swerdzewski
General Counsel

SUBJECT: Guidance on Applying the Requirements of the Federal Service Labor-Management Relations Statute to Processing Equal Employment Opportunity Complaints and Bargaining over Equal Employment Opportunity Matters

This memorandum discusses the application of the Federal Service Labor-Management Relations Statute (Statute) to employment matters concerning equal employment opportunity (EEO).[1] Regional Directors are frequently required to make decisions on the merits of unfair labor charges where the subject matter of the dispute involves EEO issues. This memorandum serves as guidance to the Regional Directors in investigating, resolving, litigating and settling unfair labor practice charges where various aspects of the EEO process may be the subject matter. It also is intended to assist parties in improving their labor-management relationship and avoiding litigation. I am making this Guidance Memorandum available to the public to assist union officials and agency representatives in working together to develop productive labor-management relationships, to avoid unfair labor practice, negotiability and contract disputes over EEO matters, and to obtain a better understanding of the relationship between the Statute and the EEO laws. This Guidance is a continuation of my Office's commitment to provide the participants in the Federal Service Labor-Management

---

[1] The EEO statutes referred to throughout this Guidance which prohibit workplace discrimination in the federal government are: section 717 of Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et. seq.*), which prohibits discrimination against applicants and employees based on race, color, religion, sex and national origin; section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 701 *et. seq.*), which prohibits employment discrimination on the basis of disability; section 15 of the Age Discrimination in Employment Act (29 U.S.C. Chapter 14), which prohibits employment discrimination based on age; and the Equal Pay Act (29 U.S.C. 201 *et. seq.*), which prohibits sex-based wage discrimination.

Relations Program with my views on significant topics.[2] This Guidance reflects my views as the General Counsel of the Federal Labor Relations Authority and does not constitute an interpretation by the three-member Authority.

This Guidance is divided into seven parts. Part I -- "Negotiability and Equal Employment Opportunity Laws" -- highlights many EEO matters in the Federal service that are within the scope of bargaining under the Statute, noting particularly alternative dispute resolution (ADR) programs. Part II -- "Unilateral Changes and Contract Breaches as a Result of an EEO Settlement" -- discusses the duty to bargain over changes in conditions of employment that are made as a result of terms contained in an EEO settlement agreement. In particular, this Part presents strategies by which an agency may fulfill those bargaining obligations while still effectively settling EEO disputes. Part III -- "A Union's Right to Be Represented at Meetings Involving EEO Matters" -- identifies the situations where a union has an institutional right to be represented at meetings where EEO complaints are the topic of discussion. Part IV -- "A Union's Right to Information About Processing EEO Complaints and Other EEO Matters" -- discusses a union's right to information under section 7114(b)(4) of the Statute and presents options to avoid disputes over the provision of EEO information. Part V -- "When Involvement in Processing an EEO Claim Can Be Protected Activity Under the Statute, Official Time and Related EEO ULP Claims" -- explores the relationship between protected statutory activity and processing EEO complaints and discusses when a union representative representing an employee in an EEO proceeding may also be engaged in protected activity. Part VI -- "A Union's Duty of Fair Representation When Representing Employees in an EEO Claim" -- explores the responsibilities that the Statute imposes upon an exclusive representative when representing an employee as the union in an EEO complaint and when otherwise representing the bargaining unit in EEO matters. Lastly, Part VII -- "Negotiated Grievance Procedures and Contractual Rights" — describes how arbitrators and the Authority make determinations if an EEO law has been violated.

---

[2] Previous public guidance memoranda have been issued on "The Duty to Bargain Over Programs Establishing Employee Involvement and Statutory Obligations When Selecting Employees for Work Groups" (August 8, 1995), "Guidance on Investigating, Deciding and Resolving Information Disputes" (January 5, 1996), "Proper Descriptions of Bargaining Units and Identification of Parties to the Collective Bargaining Relationships in Certifications" (December 18, 1996), "The Duty of Fair Representation" (January 27, 1997), "The Impact of Collective Bargaining Agreements on the Duty to Bargain and the Exercise of Other Statutory Rights" (March 5, 1997), "Pre-Decisional Involvement: A Team-Based Approach Utilizing Interest-Based Problem Solving Principles" (July 15, 1997), and "Guidance in Determining Whether Union Bargaining Proposals are Within the Scope of Bargaining Under the Federal Service Labor-Management Relations Statute" (September 10, 1998).

The statutory rights discussed in this Guidance have been well established by Authority precedent, but their application to processing EEO complaints and other EEO matters has not yet been fully developed. Accordingly, to assist the parties in recognizing these rights and their application, attached to this Guidance is a chart summarizing the statutory rights covered by this Guidance and my view of their application to EEO complaints and other EEO matters.

GUIDANCE ON APPLYING THE REQUIREMENTS OF THE FEDERAL SERVICE LABOR MANAGEMENT RELATIONS STATUTE TO PROCESSING EQUAL EMPLOYMENT OPPORTUNITY COMPLAINTS AND BARGAINING OVER EQUAL EMPLOYMENT OPPORTUNITY MATTERS

PART I. NEGOTIABILITY AND EQUAL EMPLOYMENT OPPORTUNITY LAWS

Numerous topics involving equal employment opportunity are within the scope of bargaining under the Statute. This means that these types of matters are subject to negotiations during term negotiations and other occurrences when there is a statutory duty to bargain.[3] This also means that prior to making a change in any of these matters, a party must give notice and, upon request, bargain in good faith to the extent required by the Statute.

A. EQUAL EMPLOYMENT OPPORTUNITY MATTERS ARE CONDITIONS OF EMPLOYMENT

It is well established that most matters concerning EEO constitute conditions of employment within the meaning of section 7103(a)(14) of the Statute.[4] The Authority has clearly held that matters relating to discrimination in employment are within the scope of bargaining under section 7117 of the Statute.[5] Thus, whether the matter involves EEO or any other matters, the Authority applies the same tests to determine

---

[3] My last Guidance -- "Guidance in Determining Whether Union Bargaining Proposals are Within the Scope of Bargaining Under the Federal Service Labor-Management Relations Statute" (September 10, 1998) (Scope Guidance) -- sets forth an analysis of the duty to bargain and the scope of that bargaining under the Statute, citing Authority precedent which establishes the various tests for determining when and whether (duty) and what (scope) is within the statutory bargaining obligation.

[4] Antilles Consolidated Education Association and Antilles Consolidated School System, 22 FLRA No. 23, 22 FLRA 235 (1986) (in deciding whether a proposal involves a condition of employment of bargaining unit employees, the Authority considers two basic factors: (1) whether the matter proposed to be bargained pertains to bargaining unit employees; and (2) the nature and extent of the effect of the matter proposed to be bargained on working conditions of those employees).

[5] E.g., American Federation of Government Employees, Local 1923 and U.S. Department of Health and Human Services, Health Care Financing Administration, Baltimore, Maryland, 44 FLRA No. 116, 44 FLRA 1405, 1419 (1992) (HCFA) (citing American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA No. 77, 2 FLRA 604, 617 (1980) (AFMC), enforced sub nom. Department of Defense v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied sub nom., AFGE v. FLRA, 455 U.S. 945 (1982) (AFLC). See U.S. Department of Defense, Department of the Army and the Air Force, Alabama National Guard, Northport, Alabama and Alabama Association of Civilian Technicians, 55 FLRA No. 15, n. 5 (1998) (the Authority reaffirms that EEO provision are negotiable).

negotiability: whether the proposal interferes with a section 7106(a) reserved management right or section 7106(b)(1) elective management right and whether a proposal is a section 7106(b)(2) procedure or section 7106(b)(3) appropriate arrangement.[6] In so doing, the Authority has found numerous proposals involving EEO matters within the statutory scope of bargaining. For example, in one negotiability decision, the Authority found proposals to be negotiable that would have required an agency to:

> provide equal employment opportunities and treatment to all prospective employees;[7]
>
> identify and describe the duties of officials responsible for the implementation of the EEO and affirmative action program;[8]
>
> conduct a training session on sexual harassment each year for union representatives;[9]
>
> conduct jointly with the union studies and prepare reports concerning the operation and implementation of the agency's affirmative employment program and to meet with the union semiannually to review and discuss the implementation of the plan and to provide a knowledgeable person to facilitate the discussions;[10]
>
> review jointly all requests for personnel actions targeted by the affirmative employment plan;[11]
>
> create a joint agency and union analysis of the composition of the workforce and an evaluation of the personnel system and an agency study of how its selection

---

[6] See Scope Guidance for a listing of Authority precedent interpreting these management rights and for a suggested strategy to develop negotiable appropriate arrangement proposals. The Scope Guidance also discusses the other limitations on the scope of bargaining -- law, government-wide regulations and compelling need agency regulations.

[7] HCFA, 44 FLRA at 1415-21.

[8] Id. at 1421-24.

[9] Id. at 1430-33.

[10] Id. at 1433-39.

[11] Id. at 1439-44.

procedures are implemented and to remedy barriers to affirmative employment by modifying or eliminating qualification procedures;[12]

use tools such as bridge positions to achieve a fair distribution of women and minorities in all job series and at all grade levels;[13]

continue to develop transitional positions that permit qualified minorities and women to move into administrative and professional positions;[14]

waive certain experience requirements and to provide on-the-job training to satisfy that requirement, where appropriate;[15]

provide training to help certain employees reach a journeyman level;[16]

give individuals from identified pools first preference for all entry level positions in a bridge series;[17]

identify each bridge position as such a position when posted;[18]

assure that bridge positions will be used to fill vacant positions to eliminate underrepresentation;[19]

ensure that individuals from under-represented groups who would otherwise be qualified for inclusion on best-qualified lists for certain positions will not be excluded from best-qualified lists based on performance ratings or awards;[20]

---

[12] Id. at 1444-54.

[13] Id. At 1454-58.

[14] Id. at 1459-62.

[15] Id. at 1476-77.

[16] Id. at 1483-86.

[17] Id. at 1493-94.

[18] Id. at 1495-96.

[19] Id. at 1496-99.

[20] Id. at 1502-05.

target a percentage of certain allegedly under represented groups for projected hires;[21]

eliminate undue delay in considering the requests of employees with handicapping conditions for reasonable accommodations and to consider requests for reasonable accommodations as exceptions to general budgetary constraints; [22] and

provide specified reasonable accommodations to qualified employees with handicapping conditions during training, such as modified training and reference materials, a qualified interpreter for the hearing-impaired trainees, and a mentor to provide individualized training.[23]

Certain other proposals relating to EEO were found to be outside the scope of bargaining in this decision because, for example, the proposal interfered with a reserved section 7106(a) management right and did not constitute a section 7106(b)(2) procedure or section 7106(b)(3) appropriate arrangement:

requiring the Personnel Director to certify in writing that the qualifications of officials responsible for implementing the EEO program have been reviewed and meet appropriate standards directly interferes with management's right to assign work;[24]

requiring the agency to conduct a training session on sexual harassment for EEO counselors directly interferes with agency's right to assign work;[25]

requiring the agency to increase the number of employees in certain positions from a specific underrepresented group by a certain number or percentage per year excessively interferes with the agency's right to hire, assign and select (the Authority did not rule on the applicability of section 7106(b)(1)) ;[26]

---

[21] Id. at 1518-19.

[22] Id. at 1531-25.

[23] Id. at 1531-35.

[24] Id. at 1426-29.

[25] Id. at 1430-33.

[26] Id. at 1462-71.

requiring the agency to utilize internal applicants at appropriate grade levels rather than external applicants at higher grade levels excessively interferes with the right to select from any appropriate source;[27] and

requiring the agency to waive qualification requirements for certain positions for individuals from certain underrepresented groups excessively interferes with the right to assign and select employees.[28]

Accordingly, unless a particular proposal is contrary to law, a government-wide rule or regulation, a reserved management right in section 7106(a) of the Statute or an elective right in section 7106(b)(1) of the Statute,[29] or a compelling need agency regulation, a proposal involving EEO matters would be negotiable.

B. AFFIRMATIVE EMPLOYMENT PLANS

The Authority has found that affirmative employment or action plans constitute conditions of employment and their contents are negotiable, unless a particular proposal is contrary to a Federal law or government-wide regulation or interferes with a reserved or elective management right and does not constitute an appropriate arrangement or procedure. The Authority's seminal case, AFLC, concerned proposals that required the agency to establish comprehensive affirmative action plans and programs within the various components of the bargaining unit. The proposals set forth detailed requirements pertaining to such matters as personnel functions that impact EEO, reporting requirements, progress assessments, communication of goals, and surveys of skills and training, to list but a few of the requirements. In particular, the Authority relied upon the legislative history of the Statute in concluding that the subject matter of discrimination in employment is a condition of employment under the Statute. The Authority reasoned that Title VII of the bill reported out of the House Committee (H.R. 11280) contained a definition of the term "conditions of employment" which specifically excluded "policies, practices, and matters relating to discrimination in employment on the basis of race, color, religion, sex, age, national origin, or

---

[27] Id. at 1486-88.

[28] Id. at 1519-21.

[29] For a discussion of the duty to bargain over section 7106(b)(1) elective subjects, see U.S. Department of Commerce, Patent and Trademark Office, 54 FLRA No. 43, 54 FLRA 360 (1998) (Member Wasserman dissenting in part), petition for review filed sub nom. Patent Office Professional Association v. FLRA, No. 98-1377 (D.C. Cir., August 17, 1998) (Executive Order 12871 "Labor-Management Partnerships" is not an election to bargain under section 7106(b)(1) of the Statute).

handicapping condition."[30] The bill passed by the House (the "Udall substitute") did not change this portion of Title VII of the Committee bill.[31] However, Title VII of the bill introduced in, and passed by, the Senate (S. 2640) did not contain this provision or any provision having a similar effect.[32] The bill which was reported out of the House-Senate Conference Committee, and which was subsequently passed by Congress and signed into law by the President, deleted the portion of the House bill which excluded matters related to discrimination in employment from the definition of "conditions of employment."[33] The Conference Committee Report contains no explanation as to why this provision of the House bill was deleted. The Authority found it "reasonable to conclude that the deletion of this exclusion in the bill which was enacted into law indicates that Congress intended such matters to be within the scope of the duty to bargain."[34] "If Congress had intended to exclude matters related to discrimination in employment from the duty to bargain it simply could have enacted the House provision unchanged."[35]

---

[30] Section 7103(a)(14)(A) of H.R. 11280, as reported by the House Committee on Post Office and Civil Service. Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, 96th Cong., 1st Sess., (Nov. 19, 1979) (Legislative History), at 383.

[31] Section 7103(a)(14)(A) of the bill (H.R. 11280), as passed by the House, added the phrase "within an agency subject to the jurisdiction of the Equal Employment Opportunity Commission." Legislative History, at 969.

[32] Section 7202 of the bill (S. 2640) as passed by the Senate and section 7215 of the Senate bill. Legislative History at 557-64 and 577-80.

[33] Section 7103(a)(14) of the Statute.

[34] AFMC, 2 FLRA at 617.

[35] Id. In a post-enactment statement, Congressman Ford stated his view that:

> The conferees, however, decided that under the new labor relations program, Federal sector unions should shoulder their full obligation to help achieve equality of employment opportunities in their agencies. It is the intention of the conferees that the removal of the discrimination exclusion would obligate both agencies and unions to bargain fully over the contents, procedures and effects of affirmative action and EEO plans and programs regardless of management rights clause. . . .

Legislative History, at 991- 92. But see Federal Professional Nurses Association, Local 2707 and U.S. Department of Health And Human Services, Division of Federal Employee Occupational Health, Region III, 43 FLRA No. 39, 43 FLRA 391 (1991) (the

The Authority specifically found that establishing EEO plans does not constitute a methods or means of performing work within the meaning of the elective 7106(b)(1) right, nor does it conflict with the reserved section 7106(a) right of an agency to determine its organization. Rather, the Authority held that matters related to discrimination in employment are within the scope of bargaining under the Statute unless otherwise prohibited by law.[36] Thus, there is a duty to bargain affirmative action plans during term negotiations. Similarly, there is a duty to bargain in good faith over establishing or changing affirmative action plans.[37]

C. ALTERNATIVE DISPUTE RESOLUTION AND PROCEDURES FOR PROCESSING EEO COMPLAINTS

1. The Authority has Found ADR Programs and Procedures For Processing EEO Complaints to be Negotiable Conditions of Employment

The Authority has found that the establishment of ADR programs and procedures for processing EEO complaints constitute conditions of employment that could not lawfully be implemented without fulfilling the statutory bargaining obligation with an exclusive representative. For example, the Authority has found negotiable a proposal that would require an agency to process an EEO complaint in a manner that supplements the requirements of 29 C.F.R. Part 1613, thus creating additional contractual requirements,

---

language of appropriation committee reports and committee member statements do not constitute applicable law under section 7106(a)(2) of the Statute, citing Multnomah Legal Services Workers Union v. Legal Services Corp., 936 F.2d 1547, 1555 (9th Cir. 1991) (post-enactment statements and isolated remarks in committee reports are not clear indications of congressional intent)).

[36] For example, a proposal that would require an agency to assign EEO counselor duties to a certain percentage of employees selected by the union, to the exclusion of other employees, was found to conflict with the reserved management right to assign work. AFLC, 2 FLRA at 622-23.

[37] Library of Congress, 9 FLRA No. 51, 9 FLRA 421 (1982) and Library of Congress, 9 FLRA No. 52, 9 FLRA 427 (1982) (unfair labor practices for unilaterally establishing and changing affirmative action plans) and Harry S. Truman Memorial Veterans Hospital, Columbia, Missouri, 16 FLRA No. 126, 15 FLRA 944 (1984) (unfair labor practice for failing to bargain over ground rules for negotiations of an upward mobility program). Cf. Department of Defense, Department of the Air Force, Armament Division, AFSC, Eglin Air Force Base, 13 FLRA No. 86, 13 FLRA 492 (1983) (the evidence established that the agency bargained in good faith over its affirmative action plan).

including timeliness guidelines, is negotiable.[38] The Authority also has found it to be an unfair labor practice when an agency unilaterally implemented an "EEO Early Settlement Demonstration Project", an alternative dispute resolution project designed to get more voluntary settlements of EEO disputes when an employee elects the agency EEO procedure.[39] In sum, procedural requirements for processing EEO claims, such as establishing additional requirements and time limits(as in HCFA), are usually negotiable, as are alternative dispute resolution processes intended to settle EEO disputes (as in HHS,SSA). Moreover, since an ADR program designed to settle EEO disputes, by definition, concerns EEO matters, it is a condition of employment (as in AFLC).

2. ADR Programs Under the EEOC Proposed Regulation

In February 1998, the Equal Employment Opportunity Commission (EEOC) proposed revisions to its federal sector complaint processing regulations contained at 29 C.F.R. Part 1614 to implement recommendations made by the Chairman's Federal Sector Work Group.[40] The period for comments ended in April 1998. The regulations currently are awaiting finalization.[41]

The EEOC proposed to amend § 1614.102 to require all agencies to establish or make available an alternative dispute resolution (ADR) program for the EEO pre-complaint process.[42] The required pre-complaint ADR program would be in addition to the provisions in the current regulation that encourage the use of ADR at all stages of the

---

[38] HCFA, 44 FLRA at 1507-13.

[39] Department of Health and Human Services, Social Security Administration, 26 FLRA No. 102, 26 FLRA 865 (1987) (HHS, SSA).

[40] 63 Fed. Reg. 8549 (February 20, 1998). The Federal Sector Workgroup issued a report entitled "The Federal Sector EEO Process -- Recommendations for Change" in May 1997.

[41] The EEOC's semi-annual agenda for rulemaking lists these proposed regulations in the "final stage." 63 Fed. Reg. 62479 (Nov. 9, 1998).

[42] Proposed changes to § 1614.102 call for adding the following paragraph:

> (b) In order to implement its program, each agency shall:
> . . . . .
> (2) Establish or make available an alternative dispute resolution program for the equal employment opportunity pre-complaint process.

complaint process.[43] Agencies would have discretion to develop the programs that best suit their particular needs. While many agencies have adopted the mediation model as their ADR initiative, the EEOC noted that other resolution techniques would be acceptable, provided that they conform to the core principles set forth in EEOC's July 17, 1995 ADR Policy Statement, which will be contained in Equal Employment Opportunity Management Directive 110 (EEO MD 110).[44] Agencies have discretion to continue their ADR efforts at any stage in the process, including the formal complaint process. The EEOC reasoned that the ADR programs required by the proposed regulation will make the process more efficient by resolving complaints early and will make the process fairer, by giving complainants an alternative to the counseling process that has been criticized by agency officials and employee representatives.

The proposed regulation at § 1614.105 also requires counselors to advise aggrieved persons that they may choose between participation in the ADR program offered by the agency and the traditional counseling activities provided for in the current regulation. If a matter is not resolved during ADR or during traditional counseling, the counselor will conduct a final interview and the aggrieved person may file a formal complaint. The EEOC in its proposed notice of rulemaking emphasized that agencies would be free to establish the type of ADR program they offer during the counseling period as long as it is consistent with the ADR program core principles set out by EEOC. Before aggrieved persons make a choice between counseling and ADR, they will have an initial counseling session in which counselors must fully inform the aggrieved persons about their rights and the choice between the counseling process and the ADR program.

---

[43] 29 C.F.R. § 1614.603 currently provides:

> Sec. 1614.603 Voluntary settlement attempts
>
> Each agency shall make reasonable efforts to voluntarily settle complaints of discrimination as early as possible in, and throughout, the administrative processing of complaints, including the pre-complaint counseling stage. Any settlement reached shall be in writing and signed by both parties and shall identify the allegations resolved.

[44] The core principles are summarized by the EEOC as follows:

> Any use of ADR under Commission auspices will be governed by certain core principles. Above all, any Commission ADR program must further the agency's mission. It must also be fair, which requires informed voluntariness, neutrality, confidentiality, and enforceability. Recognition of the differing circumstances obtained in the Commission's District Offices suggests that ADR be flexible enough to respond to varied and changing priorities and caseloads. In addition, any EEOC ADR programs must have adequate training and evaluation components.

Counselors also would be required to inform aggrieved persons that if the ADR process does not result in a resolution of the dispute, they will receive a final interview and have the right to file a formal complaint. If the aggrieved person chooses to participate in the agency's ADR program, the role of the counselor would be limited to advising that person of his/her rights and responsibilities in the EEO complaint process, as set forth currently in § 1614.105(b). Counselors, in those instances, would not be required to attempt to resolve the dispute, but would not be precluded from doing so if they believe a matter could be resolved quickly. The EEOC notes that an effective date for the establishment of an ADR program will be included in the final rule, as will a governing EEO management directive by which the ADR program must be established.

The EEOC emphasizes that in response to agency comments to earlier proposals, "agencies would be free to develop ADR programs that would best serve their particular and unique circumstances," and encourages "creativity and flexibility in creating ADR programs", which would encompass "an array of ADR programs."[45] Agencies with limited funds would be allowed to use the services, in whole or in part, of another agency, a volunteer organization, or other resources to provide for their ADR program. The EEOC further notes that based on the flexibility granted to agencies, an agency could exclude circumstances or matters it believes are not appropriate for its ADR program. The EEOC grants agencies discretion to modify its ADR program as circumstances and needs change. What is essential, however, is that all agency ADR programs comply with the spirit of the EEOC's policy statement on the core principles of ADR.[46] Again, the EEOC grants each agency discretion to develop its own procedures in accordance with the regulation and EEO MD 110. The EEOC recognized that "with this flexibility, there will most likely not be uniformity among agencies in the precise roles and responsibilities of EEO counselors and persons conducting ADR activities." The notice of proposed rulemaking, neither in the Summary nor in the Supplemental Information, discusses or ever mentions the role of an exclusive representative in the development and implementation of these ADR programs.

3. ADR Programs, Including Those Envisioned by the EEOC Proposed Regulation, are Negotiable Conditions of Employment

---

[45] 63 Fed. Reg. 8596 (February 20, 1998).

[46] EEO MD 110 will be modified to provide further information and amplify these core principles. EEO MD 110 currently provides policies, procedures and guidance for processing federal sector discrimination complaints under 29 C.F.R. Part 1614. It was issued October 22, 1992 and includes Change One dated October 16, 1995.

Consistent with the above Authority precedent, ADR programs concern conditions of employment and the statutory bargaining obligation must be fulfilled prior to their establishment or any changes in existing ADR programs. Similarly, consistent with that same Authority precedent, the ADR programs envisioned by the EEOC proposed regulations, in my view, are negotiable conditions of employment. Neither the EEO laws implemented by the proposed regulations nor the proposed EEOC regulations themselves, render the establishment of ADR programs outside the statutory scope of bargaining. Thus, I am of the view that an exclusive representative must be given notice and a reasonable opportunity to request to bargain to the extent required by the Statute prior to the implementation of any ADR Program for EEO disputes.[47]

A review of the test to determine when a law restricts the scope of bargaining under the Statute reveals that the EEO laws implemented by the proposed regulations do not remove the establishment of an ADR program from the statutory scope of bargaining. The Scope Guidance emphasizes that the key in deciding whether a matter is specifically provided for by statute is whether the statute grants the agency any discretion over the matter.[48] Under this analysis, the Authority finds a matter is specifically provided for, within the meaning of section 7103(a)(14)(C), only to the extent that the governing statute leaves no discretion to the agency. Thus, when a statute provides an agency with discretion over a matter, it is not excepted from the definition of conditions of employment to the extent of the agency's discretion. Even if the agency's discretion is less than total, that discretion is subject to being exercised through negotiation. Thus, when an agency is granted discretion by a law over some aspects of a matter while, at the same time, the law grants no discretion over other aspects, the aspects which are specifically provided for by the law are excepted from the definition of conditions of employment and the aspects over which an agency has discretion are not excepted.[49] However, negotiation over the exercise of agency

---

[47] Of course, the parties may choose to establish an ADR program for EEO disputes through the use of a predecisional involvement mechanism which affords employees, through their elective representatives, involvement in decision making prior to the finalization of any management decisions or proposals. See "Pre-Decisional Involvement: A Team-Based Approach Utilizing Interest-Based Problem Solving Principles" (July 15, 1997) (Pre-decisional Involvement Guidance).

[48] International Association of Machinists and Aerospace Workers, Franklin Lodge No. 2135 and U.S. Department of the Treasury, Bureau of Engraving and Printing, 50 FLRA No. 87, 50 FLRA 677, 681 (1995) (proposals setting forth the criteria, methods and procedures for establishing wage rates are not specifically provided for in 5 U.S.C. § 5349 and are otherwise consistent with law).

[49] The proposed regulation, in my view, does not grant agencies "sole and exclusive" or "unfettered" discretion. See, e.g., U.S. Department of Defense, Office of Dependents Schools and Overseas Education Association, 40 FLRA No. 41,

discretion is outside the duty to bargain where a law or regulation indicates that an agency's discretion is intended to be exercised only by the agency -- "sole and exclusive" discretion.[50] In those instances, there is no duty to bargain over the exercise of that "sole and exclusive" discretion. The EEO laws implemented by the proposed regulations do not remove any discretion from agencies in establishing ADR programs, nor do they grant agencies "sole and exclusive" discretion to establish ADR programs.

Similarly, the test for determining whether a proposal is specifically provided for by a statute is equally applicable to a government-wide regulation.[51] The proposed EEOC regulations also do not remove any discretion from agencies in establishing ADR programs, nor do they grant agencies "sole and exclusive" discretion to establish ADR programs. Indeed, the EEOC notice of proposed rulemaking grants a significant amount of discretion to agencies in developing their particular ADR program. The Supplemental Information in the Federal Register explaining the proposed regulations lists many examples where an agency may exercise discretion when creating an ADR program, as long as that discretion is in accordance with the EEOC core ADR principles and the EEOC management directive.

The EEOC proposed regulation presents an abundance of opportunities for an agency and union to establish together an ADR program consistent with any EEOC policy statement and the EEOC management directive and as required by the statutory obligation to bargain.[52] Even assuming that the EEOC policy statement and any

---

40 FLRA 425, 441-43 (1991) (the exercise of discretion to determine what constitutes unusual circumstances to justify a waiver concerning requirements for living quarter allowances for teachers overseas is subject to bargaining).

[50] Office Professional Association and U.S. Department of Commerce, Patent and Trademark Office, 53 FLRA No. 61, 53 FLRA 625, 647-50 (1997) (the Authority summarizes its framework for resolving allegations that proposals are inconsistent with law or government-wide regulation) (PTO).

[51] The Authority has construed the term "government-wide regulation" to include regulations and official declarations of policy which apply to the Federal civilian work force as a whole and are binding on the Federal agencies and officials to which they apply. E.g., Overseas Education Association, Inc. and Department of Defense, Office of Dependents Schools, 22 FLRA No. 34, 22 FLRA 351, 354 (1986), aff'd sub nom., Overseas Education Association, Inc. v. FLRA, 827 F.2d 814 (D.C. Cir. 1987) (Department of State Standardized Regulations are government-wide regulations).

[52] Even if a matter is addressed by a government-wide regulation, that matter may still be a condition of employment under the Statute. HCFA, 44 FLRA at 1510 ("section 7103(a)(14) exempts from the definition of condition of employment only those matters

management directive issued by EEOC constitute government-wide regulations within the meaning of section 7117 of the Statute, so that a proposal may not conflict with those government-wide regulations, numerous other matters remain for bargaining. Pursuant to Authority precedent, the "creativity and flexibility" called for by the EEOC in the proposed regulations must be jointly developed by a union and an agency with respect to their application to bargaining unit employees where there are exclusive bargaining relationships and there otherwise is a duty to bargain. [53] Agencies are obligated to bargain prior to establishing or changing these procedural requirements.[54]

Moreover, the parties may decide to provide the union with a role in the ADR program.[55] These ADR programs may or may not include the union as an institution in the processing of EEO complaints by an ADR program.[56] The Authority has found no conflict between the confidentiality provisions contained in the Administrative Dispute Resolution Act (ADR Act)[57] and the Statute.[58] Although that decision involved the right

---

that are governed by Federal statute, and not matters that may be governed by a government-wide regulation, such as 29 C.F.R. Part 1614").

[53] See "The Impact of Collective Bargaining Agreements on the Duty to Bargain and the Exercise of Other Statutory Rights" (March 5, 1997) (Contract Guidance), for a discussion of the duty to bargain under the Statute.

[54] PTO (a proposal is inconsistent with a government-wide regulation if the regulation grants the agency sole and exclusive discretion or if a proposal mandates that an agency apply a standard or procedure that is contrary to the regulation).

[55] See, e.g., International Plate Printers, Die Stampers and Engineers Union of North America, AFL-CIO and Department of the Treasury, Bureau of Engraving and Printing, 25 FLRA No. 9, 25 FLRA 113, 138 (1987) and National Federation of Federal Employees, Local 1256 and K.I. Sawyer Air Force Base, Michigan, 29 FLRA No. 13, 29 FLRA 171, 172-73 (1987) (proposals which provide for union representatives on the EEO committee were negotiable since they did not concern the official duties of the employees, but rather representational responsibilities).

[56] See Part II for a discussion of strategies to avoid disputes over a union's role in processing an EEO complaint.

[57] 5 U.S.C. § 571 et seq.

[58] Luke Air Force Base, Arizona, 54 FLRA No. 75, 54 FLRA 716 (1998) (Luke AFB), petition for review filed sub. nom. Luke Air Force Base, Arizona, v. FLRA, No. 98-71173 (9th Cir. Oct. 9, 1998).

to be represented at formal discussions,[59] in my view, the legal reasoning is equally applicable to a union bargaining proposal requiring union representation during an ADR program.[60] Thus, under Authority precedent, the establishment of an ADR program for EEO disputes would be negotiable, unless a specific proposal is otherwise outside the scope of bargaining.

In sum, matters concerning conditions of employment are subject to collective bargaining when they are within the discretion of an agency and are not otherwise inconsistent with law or government-wide regulation.[61] Before implementing or changing an ADR program, an agency must first give notice and, upon request, negotiate over all negotiable proposals in good faith and consistent with the procedures for bargaining established by the Statute.[62] A failure to do so would be an unfair labor practice.

4. Negotiating ADR Programs and EEO Procedures at the Level of Exclusive Recognition

The duty to bargain exists at the level of exclusive recognition. Thus, although an agency may desire to develop an agency-wide ADR program and EEO processes that are the same for each organizational entity within the agency, the Statute requires the bargaining obligation to be fulfilled with each exclusive representative at each exclusively recognized unit.[63] Parties, however, are free to jointly develop other

---

[59] See Part III for a discussion of a union's statutory right to be represented at meeting concerning EEO complaints.

[60] Luke AFB, 54 FLRA at 733.

[61] Proposals which preclude an agency from doing something it is required to do under a regulation are inconsistent with law or regulation and outside the scope of bargaining. American Federation of Government Employees, National Council of HUD Locals and U.S. Department of Housing and Urban Development, 43 FLRA No. 114, 43 FLRA 1405, 1409-13 (1992) (a proposal precluding an agency from taking disciplinary actions against employees who were found to use illegal drugs was contrary to a regulation that provided that an agency is required to initiate action to discipline any employee who is found to use illegal drugs).

[62] As noted at n. 48, there may be other defense to the duty to bargain, such as the "covered by" and "contract interpretation" defenses. See Contract Guidance.

[63] U.S. Food and Drug Administration, Northeast and Mid-Atlantic Regions, 53 FLRA No. 110, 53 FLRA 1269, 1274 (1998), reconsideration denied, 54 FLRA No. 68 (1998) (FDA, Northeast) (a party is only required to negotiate with the certified exclusive representative and agency, respectively).

methods for fulfilling their statutory bargaining obligations. For example, parties could utilize a Department-wide, agency-wide or region-wide partnership council to develop their ADR programs and EEO processes. The parties could choose from a variety of options, which could vary from developing one ADR program and EEO process for all bargaining units, to agreeing that certain matters will be the same or similar for all separate ADR programs and EEO processes, to developing general guidelines which all ADR programs and EEO processes must satisfy. Whatever the ultimate option agreed upon, the parties should understand what, if any, remaining statutory bargaining obligations over establishment of the ADR program and EEO process remain at the level of exclusive recognition.[64]

PART II. UNILATERAL CHANGES AND CONTRACT BREACHES AS A RESULT OF AN EEO SETTLEMENT

A. DUTY TO BARGAIN OVER CHANGES TO BE IMPLEMENTED PURSUANT TO EEO SETTLEMENTS

It is well established that prior to implementing a change in a condition of employment of bargaining unit employees, an agency is required to provide the exclusive representative with notice and an opportunity to bargain over those aspects of the change that are within the scope of bargaining under the Statute.[65] When an agency exercises a reserved management right and the substance of the decision is not itself subject to negotiation, the agency is nonetheless obligated to bargain over the procedures to implement that decision and appropriate arrangements for unit employees adversely affected by that decision, but only if the resulting changes have more than a de minimis effect on conditions of employment.[66]

Sometimes as a result of a settlement of an EEO complaint, either informal or formal, an agency is obligated to make a change in a condition of employment. This change may involve the exercise of a management right which has no more than a de minimis

---

[64] See Pre-decisional Involvement Guidance.

[65] U.S. Army Corps of Engineers, Memphis District, Memphis, Tennessee, 53 FLRA No. 14, 53 FLRA 79, 81 (1997) (union was not afforded an adequate opportunity to bargain over the elimination of a position) and Department of the Air Force, Scott Air Force Base, Illinois, 5 FLRA No. 2, 5 FLRA 9 (1981).

[66] Department of Health and Human Services, Social Security Administration, 24 FLRA No. 42, 24 FLRA 403, 407-08 (1986) (the Authority reassessed and modified the de minimis standard).

impact on the bargaining unit, and thus does not trigger a bargaining obligation.[67] Others do not involve a change in a condition of employment that would trigger a bargaining obligation.[68] Yet other settlements sometime involve negotiable matters or the exercise of a management right that does have more than a de minimis impact on the bargaining unit.[69]

In my view, the statutory bargaining obligation that attaches to an agency decision to change a condition of employment which otherwise triggers a bargaining obligation is the same whether the agency decision is motivated by a management initiative or by entering into a settlement of an EEO dispute.[70] In other words, an agency, in my view, is not excused from bargaining under the Statute just because the change it has made was the result of a settlement of an EEO dispute rather than a management initiative. If the change triggers a duty to bargain under the Statute, that duty must be fulfilled regardless of the reason which caused management to take that action.

I am aware of no law which permits an agency to avoid a bargaining obligation under the Statute merely by including an otherwise bargainable change in the settlement of an EEO dispute. Just as an EEO settlement is required to otherwise be in accordance with laws,[71] it must not be inconsistent with the Statute. For example, an EEO

---

[67] For example, as a result of an EEO settlement, an agency no longer requires employees to identify their national origin on promotion applications.

[68] For example, in settling an individual employee's EEO complaint, an agency agrees to have a different supervisor reevaluate the employee.

[69] For example, in settling a class action complaint, an agency agrees to restructure its performance appraisal system.

[70] See U.S. Government Printing Office, 23 FLRA No. 6, 23 FLRA 35, 40 (1986) (GPO) ("if the adjustment of an EEO complaint results in a change of unit employees' conditions of employment, the agency would have an obligation under the Statute to give prompt notice of that change to the exclusive representative of the unit employees and provide it with an opportunity to bargain to the extent required by the Statute" (footnote omitted) (dictum).

[71] See, e.g., United States of America v. City of Hialeah, 140 F.3d 968 (11th Cir. 1998) (proposed consent decree's retroactive competitive seniority provisos which would adversely affect legal rights conferred on incumbent police and firefighter employees by their respective collective bargaining agreements could not be approved over the unions' objections) and People Who Care v. Rockford Board of Education School District No. 205, 961 F.2d 1335 (7th Cir. 1992) (U.S. District Court was ordered to vacate those portions of a decree overriding the seniority provisions of collective bargaining agreements or relieving the School Board of its obligation to bargain with

settlement could not require that an employee receive preferential or detrimental treatment because he/she is or is not a union official. Similarly, in my view, an EEO settlement may not empower an agency to unilaterally change a condition of employment that otherwise would have triggered the statutory bargaining obligation.

If a settlement agreement results in the exercise of a management reserved or elective right and has more than a de minimis impact on the bargaining unit, the agency is required to give notice, and upon request, fulfill its obligation to negotiate procedures and appropriate arrangements prior to implementing the change contained in the settlement agreement. Since appropriate arrangements by definition conflict to some extent with a management right, it is possible that a negotiable appropriate arrangement may conflict with the terms of the settlement agreement. In such instances, an agency, in my view, may not refuse to negotiate over a negotiable appropriate arrangement proposal, although it may offer a counterproposal, decline to agree to the proposal and, if necessary, utilize the Statute's impasse procedures.[72] If the settlement agreement concerns a change in a negotiable condition of employment that does not involve a reserved or elective management right, the agency must, in my view, give notice and, upon request, bargain over the substance of the change contained in the settlement to the extent the union presents negotiable proposals. Implementation of a change in a condition of employment without fulfilling the statutory bargaining obligation would be an unfair labor practice.[73]

B. DUTY TO BARGAIN OVER CHANGES TO BE IMPLEMENTED PURSUANT TO EEO CLASS ACTION SETTLEMENTS

The EEOC proposed regulations contain several revisions in class complaints.[74] One proposal requires that an EEOC Administrative Judge approve class settlement agreements pursuant to the "fair and reasonable" standard, even when no class member has asserted an objection to the settlement. The EEOC believes that the proposed change is necessary to protect the interest of the class, and make the regulations consistent with the practice in federal courts where the court must approve any settlement of a class case under a fair and reasonable standard.

---

unions).

[72] The impasse procedures are established at Section 7119 of the Statute and Part 2470 of the Regulations.

[73] Of course, as with all duty to bargain disputes, there may be other defenses to a refusal to bargain allegation, such as "covered by", which would be applicable to these types of situations concerning EEO settlements. See Contract Guidance.

[74] Proposed § 1614.204.

In my view, there is no reason why the statutory bargaining obligation may be thwarted by a class action settlement any more than by an individual settlement. The focus of the analysis is not the means by which the change occurred, but rather whether the action triggers a bargaining obligation under the Statute. Thus, the duty to bargain over changes required by the terms of an EEO class action settlement would be no different than the duty to bargain over other changes in conditions of employment required by individual settlements.

C. DUTY TO ADHERE TO CONTRACTUAL OBLIGATIONS

Similarly, it is well established that a condition of employment created in a negotiated collective bargaining agreement may not be changed during the term of the agreement without the acquiescence of both parties. Indeed, there is no obligation of an agency or a union to even engage in negotiations over changing a contract term unless they elect to do so or have otherwise contractually obligated themselves to do so.[75] Nonetheless, sometimes an EEO settlement agreement changes terms created in collective bargaining agreements. Such conduct, in my view, may constitute a violation of the contract or an unfair labor practice repudiation, if the breach is clear and patent and significant.[76] This view is consistent with Supreme Court precedent which holds that an employer and the EEOC cannot agree to nullify a collective bargaining agreement's provisions:[77]

> In this case, although the Company and the Commission agreed to nullify the collective-bargaining agreement's seniority provisions, the conciliation process did not include the Union. Absent a judicial determination, the Commission, not to mention the Company, cannot alter the collective-bargaining agreement without the Union's consent. Permitting such a result would undermine the federal labor policy that parties to a collective-bargaining agreement must have reasonable assurance that their contract will be honored. Although the ability to

---

[75] For example, a reopener clause may contractually obligate a union and agency to negotiate during the term of an agreement on changes in the existing contract terms.

[76] Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Illinois, 51 FLRA No. 72, 51 FLRA 858 (1996) and Department of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, 40 FLRA No. 106, 40 FLRA 1211, 1218-19 (1991) (the Authority examines two elements in analyzing an allegation of repudiation: (1) the nature and scope of the alleged breach of an agreement (i.e., was the breach clear and patent?); and (2) the nature of the agreement provision allegedly breached (i.e., did the provision go to the heart of the parties' agreement?).

[77] W.R. Grace & Co. v. Local Union 759, International Union of the United Rubber, Cork, Linoleum & Plastic Workers of America, 461 U.S. 757, 771 (1983) (W.R. Grace).

> abrogate the provisions of a collective-bargaining agreement might encourage an employer to conciliate with the Commission, the employer's added incentive to conciliate would be paid for with the union's contractual rights.

The Supreme Court also has recognized the interests of unions to intervene in federal court EEO litigation to prevent an employer from bargaining away members' contractual rights as part of an EEO settlement.[78]

In accord with this rule of law, the EEOC has acknowledged that a complainant in an EEO case may not enforce a settlement agreement against an agency which violates a collective bargaining agreement.[79] See the discussion below under section D for a discussion of strategies that parties may utilize to avoid reneging on EEO settlements that also violate collective bargaining agreements.

D. DUTY TO BARGAIN OVER CHANGES TO BE IMPLEMENTED PURSUANT TO CONSENT DECREES IN EEO CASES

Similarly, I am of the view that the statutory bargaining obligation and contract should not be ignored merely because the settlement which calls for the otherwise bargainable change is the result of a consent decree approved by an EEOC Administrative Judge. In my view, a consent decree settlement also must be consistent with law, including the Statute, and applicable contracts, just as any other settlement agreement.[80] This also is consistent with the Supreme Court's recognition in W.R. Grace that lawful contracts cannot be changed by an administrative agency and employer, but only by judicial determination.

---

[78] Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754 (1989) (a union, not charged with discrimination, which intervenes in a Title VII action for the purpose of protecting the rights of its members may not be found liable for attorneys' fees unless its claim are frivolous, unreasonable, or without foundation; and that union may challenge not only the appropriate remedy but also the entitlement to relief in the first instance).

[79] Pyles v. Postmaster General, Appeal No. 05920044 (Apr. 22, 1992) (relying on Bena v. Frank, 55 F.E.P. 1571 (D. Md 1991)) (the Postal Service had properly withdrawn from a settlement agreement with an EEO complainant and reinstated her administrative complaint after learning that the agreement's terms violated the collective bargaining agreement) and Wilson v. Postmaster General, Appeal No. 1962555 (1996).

[80] See cases cited at n. 71.

E. STRATEGIES TO AVOID UNFAIR LABOR PRACTICE AND CONTRACT DISPUTES CAUSED BY ACTIONS REQUIRED TO BE TAKEN BY THE TERMS OF EEO SETTLEMENTS.

There are various strategies to avoid violating the Statute and contracts when implementing changes required by EEO settlements. The key, however, is to recognize in the first instance the existence of the bargaining obligation. Once the duty to bargain is recognized, an agency and union may adopt a strategy to avoid violating the Statute. Pursuant to §§ 2423.1 and .2 of our new Regulations, Regional Offices should be available to work with parties when processing unfair labor practice charges raising these issues, or upon joint request, to develop strategies to accommodate the rights of individuals under the EEOC regulations and the rights of unions under the Statute. The parties may consider the following four strategies to avoid unfair labor practice and grievance disputes relating to processing EEO complaints.

1. Involve the Union in the Settlement Process.

Involving the union in the settlement process may alleviate any need to bargain over changes that result from an EEO settlement agreement. In essence, this is a form of predecisional involvement where the union may present its interests as an institution where the settlement involves a matter over which there would otherwise be a duty to bargain. That is, if the agency had decided to make the change even absent an EEO settlement, there would be a bargaining obligation. Union representation at settlement conferences could provide a vehicle to afford the union an opportunity to present its institutional interests in a settlement and raise any concerns that a particular settlement may either violate the contract or trigger a statutory bargaining obligation. The union would not be representing the employee unless the employee designated the union as his/her representative. Rather, the union would only be involved to the extent of protecting the efficacy of the collective bargaining agreement and fulfilling the union's role as the exclusive representative of all unit employees.[81] The employee would still be afforded the right to select his/her own personal representative. This strategy is not dependent upon whether the union has an independent statutory right to be present at any settlement discussion, such as a right to be represented at a formal discussion, discussed in Part III.

2. The Agency Keeps the Union Informed of Settlement Progress and Attempts to Satisfy the Union's Institutional Interests in the Settlement Agreement in the Same Manner as Management Interests are Satisfied.

---

[81] This is similar to a union intervening in U.S. District Court EEO litigation to protect its contract. See cases cited at n.71

Another strategy to avoid disputes over changes in conditions of employment required by settlement of an EEO dispute or alleged violations of a contract by terms in an EEO settlement is for an agency to provide the union with an opportunity to review any proposed settlement before it is finalized. Under this strategy, the union would be afforded the same opportunity that other entities (e.g., other management components) are afforded which have an interest in the settlement. Allowing the union the opportunity to review proposed settlements and explain its institutional interests prior to finalization could result in avoiding the need to negotiate over any changes in bargainable matters as a result of the settlement or could allow the settlement agreement to be modified so that there is no contract violation. Just as an agency may take into consideration various interests raised by different management components, and perhaps others, prior to finalizing a settlement agreement, it could merely add the union as one of those entities whose interests are taken into consideration. Again, the purpose of involving the union is not to approve or disapprove the settlement, and not to represent the aggrieved person, but rather to protect the union's institutional interests as the exclusive bargaining representative, and to avoid subsequent litigation.
.

3. The Agency Gives Notice to the Union and Bargains Prior to Implementation of Any Settlement, and Where Necessary, Provides in the Settlement that Implementation Is Dependent upon Fulfilling the Agency's Statutory Bargaining Obligation to the Union.

A third strategy to avoid unfair labor practices is for an agency to give a union notice of any changes called for by a settlement agreement and fulfill the bargaining obligation prior to implementation of those changes. Agencies may choose to incorporate notice in the settlement agreement that the settlement will be implemented in accordance with law, which includes the Statute.

This strategy is analogous to those instances where a level of management above the level of exclusive recognition issues a directive to lower management at the level of exclusive recognition. Although management has the right to dictate to lower level management the manner in which it will exercise its management rights, higher level management may not remove matters from the bargaining table. Thus, what normally occurs is that these higher level directives contain an admonition to management at the level of recognition that the directive should not be implemented until management at the level of exclusive recognition has fulfilled the statutory bargaining obligation.

The strategy suggested here is similar. Prior to implementing a settlement agreement that triggers a statutory bargaining obligation, the agency must fulfill that bargaining obligation. This strategy, however, unlike the other two suggested above, does not

directly deal with settlements that call for action that violates a contract. Rather, involvement prior to agreement by the agency on the settlement provides an opportunity to modify any proposal that violates the contract. To protect against settlement agreements violating collective bargaining agreements, an agency may also put a clause in a settlement agreement requiring that the agreement was not intended to violate the contract and that the agreement will be reopened, or the EEO complaint will continue to be processed, if it is later determined that the agreement violates the contract.

4. The Agency and the Union Clarify the Role of any Union Official Representing an Employee.

Sometimes an employee is represented by a union official as his/her personal representative during the processing of an EEO claim. In these situations, the union official is representing the employee as a personal representative, but that official may also be serving in his/her institutional capacity and representing the union as a result of a contract right[82] or as a representative of the union at a formal discussion.[83] Agencies should clarify the role of the union official and whether that official can bind the union with respect to any statutory obligations that may arise from a settlement agreement. For example, if the union official is merely acting as a personal representative and has no authority to bind the union, the agency should consider one of the above strategies to avoid disputes over statutory obligations resulting from a settlement. On the other hand, if the union official is acting in a union representational capacity, it should be made clear whether the official is binding the union and whether there is a need for further bargaining or grievances over alleged contract violations based on action taken as a result of an EEO settlement agreement.

PART III. A UNION'S RIGHT TO BE REPRESENTED AT MEETINGS INVOLVING EEO MATTERS

A. FORMAL DISCUSSIONS AND EEO MEDIATION

1. Mediation Sessions of Formal EEO Complaints May Be Formal Discussions

---

[82] The Statute does not grant unions a right to represent employees in EEO proceedings. Individual employees have the right to select their own representative, which may or may not be a union official.

[83] Part III discusses a union's right to be represented at meetings involving EEO matters.

The Authority has held that a mediation/ investigation session to resolve formal EEO complaints is a statutory formal discussion where an exclusive representative has the right to be represented and actively participate.[84] In the situation before the Authority, two meetings were arranged by an agency investigator to mediate and, if necessary, investigate an employee's EEO complaints. The union president was present at the first mediation/investigation session, attending as the employee's personal representative. The agency did not provide the union notice and an opportunity to be represented at the second mediation/investigation session on the next day. The second session was attended by the chief EEO counselor and an investigator from another agency organizational component. An agency attorney, located at another office away from the meeting, also reviewed and commented on all proposed settlements while the meeting was in progress, relaying comments through the chief EEO counselor. The Authority concluded that the second mediation/investigation session of the EEO complaints was a "formal discussion" within the meaning of section 7114(a)(2)(A) of the Statute and, therefore, that the agency violated section 7116(a)(1) and (8) of the Statute by failing to provide the union notice and an opportunity to be represented at that mediation/investigation session.[85]

The Authority analyzed the case using the same decisional analysis that it uses for all formal discussion allegations.[86] Of particular note is that the Authority found it

---

[84] Luke AFB, 54 FLRA at 722.

[85] Id. The Authority did not rule on whether the agency violated the Statute by failing to provide the union notice of the first mediation/investigation session, since it was not alleged in the complaint. The Authority did note, however, that section 7114(a)(2)(A) of the Statute places the burden on an agency to provide adequate prior notification so that the union may have the opportunity to designate its representatives for the formal discussion. As such, the statutory burden of informing a union about a formal discussion does not shift to a complainant who has chosen a union official as a personal representative under EEO regulations. The Authority thus commented that the union president's attendance as the employee's personal representative at the first mediation/investigation session did not relieve the agency of its obligation to inform the union in advance about the next day's formal discussion.

[86] In order for a union to have the right to representation under section 7114(a)(2)(A), all the elements of that section must exist. There must be: (1) a discussion; (2) which is formal; (3) between one or more representatives of the agency and one or more unit employees or their representatives; (4) concerning any grievance or any personnel policy or practice or other general condition of employment. General Services Administration, Region 9 and American Federation of Government Employees, Council 236, 48 FLRA No. 140, 48 FLRA 1348, 1354 (1994). For example, the Authority has found that prehearing interviews conducted by an agency in preparation for a third party proceeding, such as an EEO hearing, is a formal discussion. Veterans

unnecessary to address whether the outside investigator and the chief EEO counselor were "representatives" of the agency within the meaning of section 7114(a)(2)(A) of the Statute since the agency was represented by an attorney at the meeting.[87] The Authority thus concluded that the attorney was effectively present at the mediation/investigation session and that the nature of the communication during the mediation/investigation session did not undermine the overall formality of the session, which was found to be formal based upon the totality of the circumstances. The Authority clarified that "a union's statutory right to notice and an opportunity to be present during a discussion is not diminished when the discussion between employees and agency representatives is conducted in a nonconfrontational manner through a neutral third party."[88] The Authority also reaffirmed its position that a grievance within the meaning of section 7114(a)(2)(A) can encompass a statutory appeal.[89]

Although not necessary for the Authority to decide in Luke AFB, I am of the view that the outside investigator was a representative of the agency for section 7114(a)(2)(A) purposes. As to the outside investigator, the Authority has found that a private sector independent contractor under contract with an agency to provide Employee Assistance Program (EAP) services to bargaining unit employees was a representative for purposes of section 7114(a(2)(A) of the Statute.[90] The Authority found a formal

---

Administration Medical Center, Long Beach, California, 41 FLRA No. 106, 41 FLRA 1370 (1991), enforced, 16 F. 3d 1526 (9th Cir. 1994) (an interview conducted by telephone with a unit in preparation for an MSPB hearing was a formal discussion).

[87] The Authority found it clear that both the employee and the attorney were engaged in responding to each other's settlement positions, and that they were no less engaged than if they had been speaking face-to-face -- as they had been speaking the previous day at the first session.

[88] Luke AFB, 54 FLRA at 729.

[89] Id. at 730, citing U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution (Ray Brook, New York), 29 FLRA No. 52, 29 FLRA 584, 589-90 (1987), affirmed sub nom. American Federation of Government Employees Local 3882 v. FLRA, 865 F.2d 1283 (D.C. Cir. 1989) and Marine Corps Logistics Base, Barstow, California, 52 FLRA No. 107, 52 FLRA 1039, 1045-47 (1997). Cf. Nuclear Regulatory Commission, 29 FLRA No. 57, 29 FLRA 660 (1987) (no formal discussion representational right attached since the discussion of an employee's formal EEO complaint because the employee was not in the bargaining unit at the time of the events that gave rise to the EEO complaint or the at the time the EEO complaint was filed).

[90] Defense Logistics Agency, Defense Depot Tracy, California, 39 FLRA No. 86, 39 FLRA 999, 1013 (1991) ("the contractor was functioning as the 'representative of the

discussion violation when the agency failed to provide the union notice and an opportunity to be represented at an EAP orientation session conducted by the counselor. Similar to the situation in DLA, Tracy, an agency is required to process EEO complaints, and it is irrelevant if an agency uses its own personnel or an outside contractor to perform that function. I am of the view that an agency should not be permitted to avoid its labor relations obligations simply by contracting out actions which involve bargaining unit employees. Thus, outside investigators and mediators in EEO proceedings are representatives of an agency for section 7114(a)(2)(A) purposes.

As to the chief EEO counselor, if that position is outside the bargaining unit because it constitutes a management official or supervisor within section 7103(a)(10) or (11) of the Statute, I am of the view that the individual in that position acts as a representative of the agency for formal discussion purposes.[91] Similarly, an EEO counselor who is outside the unit because the incumbent is engaged in personnel work in other than a purely clerical capacity under the section 7112(b)(3) exclusion also should be considered to be a representative of an agency for formal discussion purposes. However, many EEO counselors perform that function as a collateral duty and are bargaining unit employees.[92] Whether such an employee is acting as a representative of an agency for formal discussion purposes when meeting with a bargaining unit employee who has filed an EEO complaint depends upon the particular facts of the case. Regional Directors should submit this issue for casehandling advice if an investigation of a charge establishes that all the other elements of a formal discussion have been established.

A significant aspect of the Authority's decision in Luke AFB was its holding that the presence of a union representative at the mediation/investigation session of the EEO complaints did not conflict with EEO regulations or the ADR Act. The Authority noted that 29 C.F.R. Part 1614 and EEO MD 110 do not prohibit the presence of a union representative at the formal discussion of an employee's EEO complaint. Rather, those regulations merely do not address whether the union has a right to be present. The Authority held that "the fact that 29 C.F.R. Part 1614 does not mention the right of a union to be present at a formal discussion of an EEO complaint does not mean that the

---

agency'") (DLA, Tracy).

[91] See National Labor Relations Board, 46 FLRA No. 14, 46 FLRA 107, 1110-11 (1992) (the Authority found an unlawful formal discussion where the representative of the agency was the EEO Director).

[92] 832nd Combat Support Group, Luke Air Force Base, Arizona, 23 FLRA No. 99, 23 FLRA 768 (1986) (832nd Combat Support Group)(employees who served as collateral duty EEO counselors were not excluded from a bargaining unit under section 7112(b)(3)).

union's presence is forbidden or that that regulation necessarily conflicts with the protections of the Statute."[93]

As to the ADR Act, the Authority noted that section 574, entitled "Confidentiality," deals with circumstances under which certain communications made during dispute resolution proceedings may not be disclosed by the parties or by the neutral outside those proceedings. The Authority concluded that an exclusive representative that is a "party" to the proceedings would presumably be bound by the nondisclosure provisions of 5 U.S.C. § 574. Noting that the focus of section 574 of the ADR Act is on the protection of the confidentiality of alternate dispute resolution proceedings and not on who may attend such proceedings, the Authority concluded that "the mere presence of a union representative at a dispute resolution proceeding where all the elements of section 7114(a)(2)(A) were met, in and of itself, would not conflict with those provisions of the ADR Act."[94]

2. Informal EEO Complaints

The Authority has found that a formal EEO complaint constitutes a grievance for the purpose of triggering the section 7114(a)(2(A) right to representation at a formal discussion.[95] Informal EEO complaints, however, do not constitute a grievance for section 7114(a)(2)(A) purposes. It is unclear, however, if an informal EEO complaint that otherwise involves a personnel policy or practice or other general condition of employment within the meaning of section 7114(a)(2)(A) may be a formal discussion. In this respect, the current EEOC regulations provide that during the informal processing of an EEO complaint, the EEO counselor does not reveal the identity of the aggrieved person, unless authorized to do by that person.[96] Nothing in Title VII, however, guarantees confidentiality to an EEO complainant.[97]

---

[93] Luke AFB, 54 FLRA at 732. Finding no apparent inconsistency between the EEOC regulations and the Statute, the Authority found it not necessary to determine whether those regulations would trump the Statute in general, or section 7114(a)(2)(A) in particular, had there been such a conflict.

[94] Id. at 733. Similar to the EEOC regulations, finding no conflict between the ADR Act and the Statute, the Authority found it unnecessary to determine whether the ADR Act, if applicable, would trump the Statute in general, or section 7114(a)(2)(A) in particular.

[95] Id. at 730-32.

[96] 29 C.F.R. § 1614.105(g). Subsection (g) has not been proposed to be modified.

[97] Sofio v. Secretary of Treasury, Appeal No. 01873285 (1988) ("We also note that nothing in 717 of the Civil Rights Act of 1964, which applies equal employment

Thus, it is unclear if a meeting between a representative of an agency and an employee that is formal in nature and that concerns a personal policy or practice or general condition of employment can be a formal discussion under the Statute if the discussion takes place as part of the processing an informal EEO complaint. Although a proposal to require union representation at an informal EEO meeting may be nonnegotiable because it conflicts with a government-wide regulation (29 C.F.R. § 1614.105(g)), a government-wide regulation may not otherwise restrict the exercise of a statutory right.[98] In view of the novelty of this issue, Regional Directors are requested to submit this issue for casehandling advice should it arise.

3. Strategy to Avoid Formal Discussion Disputes

Part I of this Guidance discusses the establishment of ADR programs under the proposed EEOC regulations and the potential duty to bargain under the Statute over those programs. Part II of this Guidance explores the duty to bargain over changes called for by terms of an EEO settlement agreement and further suggests some strategies to avoid disputes over any potential bargaining obligations. Similarly, in my view, the most effective means to avoid disputes over representation at formal discussions involving mediation of EEO complaints is for the agency and the union to work together in establishing their ADR program.

If parties do not attempt to work together in a collaborative manner concerning the structure of an ADR program, they will be left to their respective statutory and contractual rights and obligations to argue that there either has or has not been a contract violation or unfair labor practice as a result of a unilateral change or

---

opportunity regulations to the federal sector, guarantees federal employees confidentiality in pursuing complaints brought thereunder."). See also Moreover, the EEOC has found that a complainant was not aggrieved by the failure of an agency to provide a private location for counseling. See also, Gaines v. Secretary of the Navy, Appeal No. 01941789 (1995) (an employee who claimed harm because he was unable to contact an EEO counselor without losing his anonymity because the employee had to walk into an open office and sit at a desk in an open space was not aggrieved because there was no evidence that the agency's action adversely affected the employee's ability to pursue his complaints or deterred him from initiating EEO counseling either on his own behalf or on behalf of others).

[98] American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, 29 FLRA No. 40, 29 FLRA 380, 400 (1987), aff'd sub nom. Office of Personnel Management v. FLRA, 130 LRRM 272, 864 F. 2d 165 (D.C. Cir. 1988) (government-wide regulations could not restrict bargaining over otherwise section 7106(b)(2) appropriate arrangements by merely restating management's section 7106(a) rights).

discussion. Parties could avoid most disagreements and misunderstandings about the application of these statutory rights by jointly establishing an ADR program that satisfies the institutional interests of the agency and the union, as well as respecting an individual's right to file and have processed an EEO complaint. For example, the parties could explore and agree upon the manner in which an exclusive representative's right to be represented and actively participate at formal discussions may be accommodated within an ADR program, which may include mediation. Similarly, the parties could address those situations where there may be a conflict between the rights of identifiable victims of discrimination and the interests of the bargaining unit.[99]

B. INVESTIGATORY EXAMINATIONS

Section 7114(a)(2)(B) of the Statute sets forth the right to representation at investigatory examinations. In sum, an exclusive representative must be given the opportunity to be represented at any examination of a unit employee by an agency representative in connection with an investigation if the employee reasonably believes that discipline may result from the examination and requests representation.[100] This right allows the union to represent not only the employee being questioned but also the interests of the entire bargaining unit.

It is possible that situations may arise during the investigation of an EEO complaint that implicate rights under section 7114(a)(2)(B). A situation may occur where a bargaining unit employee being questioned during the investigation of an EEO complaint by an agency representative reasonably believes that discipline may result from the examination and requests representation. For example, perhaps the employee may not have reported an event that should have been reported (such as witnessing a sexual harassment incident) or the employee may personally have been involved in prohibited conduct. In these circumstances, similar to the analysis of the Authority in the formal discussion arena, the issue is whether the elements of section 7114(a)(2)(B) have been

---

[99] See National Treasury Employees Union v. FLRA, 774 F.2d 1181, 1189 n.12 (D.C. Cir. 1985) (in dictum, the court noted that "a direct conflict between the rights of an exclusive representative under section 7114(a)(2)(A) and the rights of an employee victim of discrimination should also presumably be resolved in favor of the latter." (emphasis in the original)).

[100] United States Department of Justice, Bureau of Prisons, Safford, Arizona, 35 FLRA No. 56, 35 FLRA 431 (1990) (the right to representation at an examination is intended to benefit an employee who is called into a meeting in connection with an investigation as well as to benefit the employer and the union).

met and whether there is a conflict between the Statute and the EEOC regulations or other law.[101]

In my view, the section 7114(a)(2)(B) right to representation is not lost merely because the context in which the examination took place is an EEOC investigation. Again, consistent with the Authority's findings in Luke AFB, I am of the view that there is no conflict between the right to representation and the current or proposed EEOC Regulations. Accordingly, the section 7114(a)(2)(B) right does not lose it viability. Rather, I again suggest that when jointly negotiating procedures for effectuating the EEOC's current and future regulations, the parties recognize that situations may occur where an employee being interviewed as part of an EEO investigation triggers union and employee rights under the Statute, and accommodate those rights in a manner that effectuates the purpose and policies of the Statute, as well as the purpose of processing the EEO complaint.

C. BYPASSES

1. Dealings Between an Agency and Unit Employees That are Unlawful Bypasses

Under section 7114(a)(1) of the Statute, once a union is certified as the exclusive representative of an appropriate unit of agency employees, the agency must "deal only with" that representative concerning any matter affecting the conditions of employment of employees in that unit.[102] An agency fails to comply with this obligation when, for example, it deals directly with unit employees concerning matters that are within the scope of the exclusive representative's authority as to unit employees' conditions of employment and thus deprives the union of its rights as an exclusive representative in violation of section 7116(a)(1) and (5) of the Statute. For example, the Authority has found that an agency deals directly with employees in violation of the Statute when it

---

[101] Recall that the Authority found no conflict between the right for a union to be represented at a formal discussion and the EEOC regulations or the ADR Act, and thus did not rule whether the EEOC regulations or the ADR Act, if applicable, would trump the Statute in general, or section 7114(a)(2)(A) in particular.

[102] See American Federation of Government Employees, National Council of HUD Locals 222 and U.S. Department of Housing and Urban Development, 54 FLRA No. 109, 54 FLRA 1267 (1998) (an agency may not deal directly with another union or unit employees on matters that are the sole province of the exclusive representative).

communicates with an employee concerning that employee's grievance.[103] An agency also has been found to have dealt directly with unit employees in violation of the Statute when, without contacting the exclusive representative, it solicits employee assistance in establishing a condition of employment and adopts an alternative suggested by employees.[104] An agency also has been found to have dealt directly with employees in violation of the Statute where the agency threatens and promises benefits to employees, indirectly urging employees to put pressure on the exclusive representative to change its position.[105]

2. Dealings Between an Agency and Unit Employees That are not Unlawful Bypasses

Not all contacts, however, between an agency and employees constitute direct dealings that violate the Statute. Where an agency's contacts with employees on matters affecting conditions of employment do not exclude the exclusive representative, and the agency recognizes its obligation to bargain only with the exclusive representative, the agency has been found not to be involved in direct dealing in violation of the Statute.[106]

---

[103] U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas, 51 FLRA No. 109, 51 FLRA 1339, 1346-47 (1996) (by communicating directly with the employee about a grievance, the agency (1) interfered with the union's rights under section 7114(a)(1) of the Statute to act for and represent bargaining unit employees, thereby violating section 7116(a)(1) and (5) of the Statute; and (2) demeaned the union and inherently interfered with the rights of bargaining unit employees to designate and rely on the union for representation, thereby independently violating section 7116(a)(1) of the Statute).

[104] See Air Force Accounting and Finance Center, Lowry Air Force Base, Denver, Colorado, 42 FLRA No. 85, 42 FLRA 1226, 1239 (1991) (management approval and implementation of employee proposal concerning work schedule constitutes direct dealing which undermined the status of the union) and Department of Transportation, Federal Aviation Administration, Los Angeles, California, 15 FLRA No. 21, 15 FLRA 100, 104 (1984) (agency solicited employee suggestions of alternatives for development of a new watch schedule and adopted one of the alternatives despite union objections).

[105] Iowa National Guard and National Guard Bureau, 8 FLRA No. 101, 8 FLRA 500, 513 (1982) (the agency unlawfully bypassed the union when a management official told technician employees, in effect, that the union's position on the wearing of the military uniform would have a detrimental impact on the employees and that they should ignore the union's position).

[106] See Internal Revenue Service (District, Region, National Office Units), 19 FLRA No. 48, 19 FLRA 353 (1985) (IRS), affirmed sub nom. NTEU v. FLRA, 826 F.2d 114 (D.C.

In addition, the Authority has found that an agency's dealings with employees in a situation where the union has no statutory rights do not constitute direct dealing in violation of the Statute.[107]

3. Direct Dealings Between an Agency and Unit Employees Involving an EEO Matter or Complaint

Only those "direct dealings" concerning EEO matters that constitute agency conduct which undermines the exclusive representative violate the Statute. For example, in GPO, the Authority found no unlawful direct dealing over the settlement of an EEO complaint filed by an individual over her nonselection for a position. The result would have been the same regardless of whether the meeting took place as part of an EEO process or was merely a meeting called by management. On the other hand, if the settlement of an EEO complaint requires the unilateral establishment of a new condition of employment for the bargaining unit as a whole which should have been the subject of negotiations with the union, a bypass has occurred. The key, therefore, is that there must not be direct dealings over a condition of employment that undermines the exclusive representative. Whether the subject matter of those direct dealings is an EEO matter or some other matter is not significant, as along as the direct dealings concerns a condition of employment over which the agency should be dealing with the union, rather than directly dealing with the employees.

4. Strategies to Avoid Bypass Disputes

Again, consistent with the above discussion in Part II concerning changes in conditions of employment triggered by EEO settlements and Part III about meetings, an effective strategy to avoid disputes over bypasses is for an agency and union to jointly establish a process where the union's institutional interests are considered and satisfied prior to any change in conditions of employment. For example, it is possible that settlement agreements resulting from a class action would create new conditions of employment for the bargaining unit as a whole, such as establishing a new training program or new affirmative action goals. In my view, in addition to the bargaining obligation before implementing changes such as these, the development of these negotiable matters without the presence of the union would be a bypass.

Cir. 1987) (no direct dealing in violation of the Statute where agency notified union of employee questionnaire, provided union with copies, agreed to provide union with information derived from questionnaires, and acknowledged obligation to bargain with the union over any changes it made based on information in questionnaires).

[107] See GPO, 23 FLRA at 38-39 (agency did not violate the Statute by dealing directly with employee concerning her EEO complaint because "the exclusive representative had no statutory rights or obligation to represent her in that process").

PART IV. A UNION'S RIGHT TO INFORMATION ABOUT PROCESSING EEO COMPLAINTS AND OTHER EEO MATTERS

A. THE DUTY TO PROVIDE EEO RELATED INFORMATION

Section 7114(b)(4) of the Statute provides for furnishing information to an exclusive representative.[108] The provision of information is yet another area where the Statute and EEO matters and complaints may both be involved. In determining whether an agency has violated the Statute by refusing, upon request, to furnish EEO-related information, the Authority applies the same decisional analysis as it applies in all information cases. In some instances, the Authority has found no duty to furnish EEO related materials.[109]

In other circumstances, the Authority has found violations for the failure to provide EEO-related data.[110] In its recent Luke AFB decision, the Authority rejected the agency's argument that since NY TRACON precludes a union from obtaining a copy of an individual's EEO settlement agreement, a union also should not be afforded a right to be present under the formal discussion right at the mediation of an individual's EEO complaint. The Authority stated that NY TRACON involved a different statutory right with different elements (right to information) than that in Luke AFB (right to be present at a formal discussion), and stated "that the fact that section 7114(b)(4) may not require an agency to disclose an EEO settlement agreement to a union does not mean that a union has no right under section 7114(a)(2)(A) to attend the formal discussion of an EEO complaint, whether that discussion results in a settlement agreement or not."[111]

---

[108] See "Guidance on Investigating, Deciding and Resolving Information Disputes" (January 5, 1996), discussing the duty to furnish information under the Statute and strategies to avoid, narrow, and resolve disputes over information requests arising under section 7114(b)(4) of the Statute.

[109] Federal Aviation Administration, New York Tracon, 51 FLRA No. 12, 51 FLRA 115 (1995) (NY TRACON) (no duty to furnish information since prohibited by the Privacy Act -- the public interest that would be served by providing the union with a copy of an EEO settlement agreement, and thereby disclosing the terms of that agreement, was outweighed by the invasion of privacy that would result).

[110] U.S. Department of Transportation, Federal Aviation Administration, Atlantic City Airport, 43 FLRA No. 18 , 43 FLRA 191, 200-01 (1991) (union was entitled to a copy of an EEO hearing transcript where the union was representing the employee in a grievance and that same employee was the complainant in the EEO case).

[111] Luke AFB, 54 FLRA at 733.

Section 7114(b)(4) does not require the disclosure of information where that disclosure is otherwise prohibited by law. For example, the Privacy Act is one law that may prohibit disclosure under section 7114(b)(4). The Authority to date has yet to find that any EEO laws prohibit disclosure of information. Thus, an EEO law's silence on disclosure does not translate into a prohibition against disclosure under another law, such as the Statute's section 7114(b)(4) requirement.

B. STRATEGY TO AVOID INFORMATION DISPUTES OVER EEO INFORMATION

Parties are free to negotiate over the manner and type of information that will be provided to an exclusive representative. The Authority has clearly stated that section 7114(b)(4) is a "floor," not a "ceiling," on the type of information an agency may agree to release.[112] That is, section 7114(b)(4) establishes the minimum information which must be disclosed to a union. Nothing in section 7114(b)(4) prevents a union from negotiating with an agency for the release of information beyond that to which the union is entitled under the Statute.[113]

In discussing the formation of an ADR program, implementing procedures for processing EEO complaints and/or agency employment plans, an agency and a union may agree upon the type of information that will be provided to the union to enable the union to fulfill its representational responsibilities to the bargaining unit. The parties may decide, for example, that sanitized copies of settlement agreements, copies of court actions served on the agency by an employee, lists of job placement actions or certain statistical employment data should be furnished on a regular basis. Whatever the interests, the parties need not wait for a dispute to develop before exploring the need for sharing information on EEO matters. I suggest that the parties explore what types of information they need to fulfill their respective obligations, while complying with disclosure restrictions contained in other laws, such as the Privacy Act. Similar to suggested strategies to avoid disputes over bargaining and representation matters, the parties could avoid many disputes while at the same time enhance the administration and evaluation of their EEO processes and affirmative employment plans.

---

[112] National Treasury Employees Union and Department of Energy, 22 FLRA No. 12, 22 FLRA 131, 134 (1986) (a proposal was negotiable which would require the agency to provide the union with information regarding the costs of each reduction-in-force affecting unit employees, particularly administrative costs such as severance pay.

[113] See also Merit Systems Protection Board Professional Association and Merit Systems Protection Board, Washington, D.C., 30 FLRA No. 97, 30 FLRA 852, 854-55 (1988) (a proposal was negotiable which would require an agency to provide information about formal studies directly related to unit employees conditions of work).

PART V. WHEN INVOLVEMENT IN PROCESSING AN EEO CLAIM CAN BE PROTECTED ACTIVITY UNDER THE STATUTE, OFFICIAL TIME, AND RELATED EEO and ULP CLAIMS

A. EEO IS NOT PROTECTED ACTIVITY UNDER THE STATUTE

The Statute in section 7102 provides that employees have the right, among others, to form, join or assist a labor organization or to refrain from such activity. The Statute does not extend protection to discrimination based upon any right in an EEO law. Thus, discrimination by an agency against an employee which would be violative of an EEO law is not an unfair labor practice under the Statute.[114] Rather, an employee must seek redress under the EEO laws and procedures (or under a negotiated agreement if covered) for any alleged discrimination based on a protection granted under an EEO law.[115]

B. PROCESSING A GRIEVANCE AND SERVING AS A UNION OFFICIAL ARE PROTECTED ACTIVITIES EVEN WHEN THE SUBJECT MATTER IS AN EEO CLAIM

1. The Statutory Right to Process EEO Grievances under a Negotiated Grievance Procedure

---

[114] Section 7116(b)(4), however, does render it an unfair labor practice for a union to discriminate against an employee with regard to terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition.

[115] See, e.g., American Federation of Government Employees, Local 1867 and U.S. Department of the Air Force, United States Air Force Academy, Colorado Springs, Colorado, 49 FLRA No. 111, 49 FLRA 1164, 1171 (the Authority denied exceptions to an arbitrator's award that found, in part, that a chief steward was not disciplined in reprisal for filing and processing an EEO complaint or for engaging in activity protected by an EEO law) and U.S. Department of the Air Force, Carswell Air 'force Bae, Texas and American Federation of Government Employees, Local 1364, 43 FLRA No. 102, 43 FLRA 1266, 1269-1270) (on exceptions to an arbitrator's award, the Authority left undisturbed the arbitrator's finding that the negotiated grievance procedure excluded grievances over EEO matters).

Section 7121(d) of the Statute provides an employee with an option of pursuing an EEO claim under the EEO statutory appeal or a negotiated grievance procedure.[116] Selection of the negotiated grievance procedure is a right protected by the Statute and any interference with, restraint or coercion of the exercise of that right would be an unfair labor practice. That is, under the Statute, an employee has a right to file a grievance, and a union has the right and obligation to represent employees under that grievance procedure. Any interference with, restraint or coercion of those rights would be an unfair labor practice, even if the grievance involved a matter which alleged a violation of an EEO law. Thus, although violations of EEO laws are not unfair labor practices, employees and union representatives processing grievances involving EEO claims under a negotiated grievance procedure are engaged in protected activity under the Statute.

2. Union Officials Serving as Personal Representatives of Complainants in EEO Proceedings

Similarly, union officials often serve as personal representatives of employees in EEO proceedings. Thus, absent an employee selecting the union or a particular union official as a personal representative, the union's role is limited in EEO proceedings to representing the interests of the bargaining unit, as discussed below.[117] If a union representative serving as a personal representative believes he/she has been subject to disparate treatment because of the service as a personal representative in an EEO proceeding, the union official may seek redress under the applicable EEO laws and procedures. If a union official serving as a personal representative believes he/she has been subject to disparate treatment because of their union affiliation and activities on behalf of the union, the union official may seek redress under the ULP procedures. This dichotomy is similar to any other alleged unlawful discriminatory action. The EEO laws and the Statute protect different rights. EEO laws prohibit discrimination based on race, color, religion, sex, national origin, disability, age, and sexed based wage

---

[116] See U.S. Department of the Air Force, Headquarters, Oklahoma City Air Logistics Center, Tinker Air Force Base, Oklahoma and American Federation of Government Employees, Local 916, 43 FLRA No. 28, 43 FLRA 290, 296-97 (1991) reconsideration denied, 43 FLRA No. 75, 43 FLRA 955 (1992) (a grievance over a failure to promote was bared under section 7121(d) by a previously a filed formal EEO complaint).

[117] See U.S. Department of Health and Human Services, Social Security Administration, Area II, Philadelphia Region and American Federation of Government Employees, Local 1923, 42 FLRA no. 76, 42 FLRA 1105, 1146 (1991) (a proposal was negotiable because it did not allow a union to file an EEO complaint without the aggrieved employee's consent, but rather only allowed the union to represent, and file an EEO complaint on behalf of an employee who has selected the union as his/her representative).

discrimination. The Statute prohibits discrimination based on engaging in, or refusing to engage in, union activity.

Thus, when an employee who is also a union official is serving in the capacity as a personal representative of an another employee in an EEO proceeding, the agency may not treat that union official in a disparate manner because of union affiliation and activities.[118]

3. Union Officials Representing the Union in EEO Proceedings

The Authority has held that "[t]he statutory right of employees to serve as union representatives extends to any of the procedures whereby the union represents the views of the union and the unit employees concerning conditions of employment, including statutory appeals procedures."[119] Thus, when a union representative represents the bargaining unit with respect to EEO matters, that union representative is engaged in protected activity under the Statute, just as if the union representative was processing an EEO grievance under a negotiated grievance procedure.

Similarly, as discussed in Part I, EEO matters concern conditions of employment of unit employees. As such, an agency must satisfy its statutory bargaining obligation with respect to the establishment of, or changes in, conditions of employment concerning the union's role in EEO complaint processing. For example, an agency may not make unilateral changes with respect to the manner in which a union has been represented in EEO proceedings.[120]

4. Union Officials Serving as EEO Counselors

---

[118] Department of the Army, Fort Riley, Kansas, 26 FLRA No. 29, 26 FLRA 222 (1987) (Fort Riley) (unfair labor practice has been found where an agency discriminated against a union official by denying him official time under the EEOC regulations to act as a personal representative of a non-bargaining unit employee in an EEO complaint because of the official's representational duties on behalf of the union).

[119] U.S. Department of the Treasury, Office of the Chief Counsel, Internal Revenue Service, National Office, 41 FLRA No. 41, 41 FLRA 402 (1991) (Department of the Treasury) (section 7116(a)(1) unfair labor practice by an agency prohibiting a bargaining unit employee from acting as a representative of the union in proceedings under the agency's EEO complaint procedure).

[120] Department of Veterans Affairs Medical Center, Muskogee, Oklahoma, 53 FLRA No. 103, 53 FLRA 1228 (1998) (a change in a past practice of allowing union officials to attend EEO hearings for the purpose of monitoring any settlement discussions which may impact the bargaining unit and providing technical advice in the event of such a settlement has been found to be an unfair labor practice).

Union officials, similar to all other employees, may perform a collateral duty as an EEO counsel. Performance of this collateral duty does not usually exclude the employee from the bargaining unit.[121] Performance of this duty, however, in ceratin circumstances, may prevent an employee form serving as a union official. Section 7120(e) of the Statute precludes an employee from acting as a representative of a labor organization where that representation would result in a conflict or apparent conflict of interest or would otherwise be incompatible with law or with the official duties of the employee. The determination whether to bar a union officer or steward from also serving as an EEO counselor based on section 7120(e) is based on all the circumstances and "whether an objectively reasonable person, with knowledge of all the facts and procedures, would question an employee's ability to perform their official duties and act as a manger and/or representative of a labor organization."[122]

Thus, unless this exception is applicable, unit employees who are union officials may not be disqualified from performing collateral duties as EEO counselors. An agency's interference with that right is an unfair labor practice under section 7116(a)(1) of the Statute.

C. OFFICIAL TIME FOR PROCESSING EEO COMPLAINTS UNDER THE EEOC PROCESS

1. Official Time Within Section 7131(d) of the Statute is a Mandatory Subject of Bargaining

Section 7131(d) provides that representatives of an exclusive representative, or any bargaining unit employee, may be granted official time "in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest." The Authority has held in cases arising out of negotiability appeals under section 7105(a)(2)(E) that official time to be negotiated under this section is to be used for a purpose that is related to "labor-management relations activity."[123] Thus, the

---

[121] See 832nd Combat Support Group, 23 FLRA at 771-72.

[122] National Treasury Employees Union, 53 FLRA no. 138, 53 FLRA 1541, 11547-48 (1998) (NTEU) (no conflict of interest when an employee simultaneous served as a chapter president for the union and an ethics official for the agency).

[123] American Federation of Government Employees, Local 2761 and Department of the Army, Army Publications Distribution Center, St. Louis, Missouri, 32 FLRA No. 144, 32 FLRA 1006, 1012 (1988) (official time to attend a co-worker's funeral is not within section 7131(d) of the Statute and is nonnegotiable because it conflicts with the agency's right to assign work); Department of Heath and Human Services, Social

key to whether a proposal for official time is within the scope of bargaining is whether the activity concerns "labor-management relations."

2. Official Time For Activities Which do not Concern Labor-Management Relations is a Permissive Subject of Bargaining

The Authority has held, however, that section 7131(d) does not preclude parties to a collective bargaining agreement from agreeing to provide official time for other matters.[124] Thus, the Authority has held that even though a matter may not relate to labor-management relations activities, "section 7131(d) does not preclude parties from agreeing to provide for official time for other matters; that is, matters other than those relating to labor-management relations activities."[125] "In other words, section 7116(d) affirmatively permits the negotiation of official time for labor-management relations activities; it does not preclude parties from agreeing to provide for official (paid) time in other circumstances unrelated to labor-management relations activities, provided that the granting of official time in those other circumstances is otherwise consistent with the Statute and other applicable laws and regulations."[126] For example, the Authority has noted that official time may be granted to employees to attend hearings before the EEOC and to respond to requests for discovery made in accordance with MSPB discovery procedures.[127] Consistent with an agency's broad discretion to grant paid time in a variety of circumstances, parties may agree in their collective bargaining agreements to provide official time for other matters, provided otherwise consistent with the Statute and other applicable laws and regulations. However, if these matters are not within section 7131(d) of the Statute, that is, if they do not relate to

---

Security Administration and American Federation of Government Employees, AFL-CIO, 27 FLRA No. 54, 27 FLRA 391, 392-93 (1987) (official time for representing a former employee in an unemployment compensation hearing cannot be authorized under section 7131(d)) and National Archives and Records Administration and American Federation of Government Employees, Council 236, Local 2928, 24 FLRA No. 29, 24 FLRA 245 (1986) (official time to assist an employee in a private matter with the police cannot be authorized under section 7131(d)).

[124] American Federation of Government Employees, National Council of Field Labor Locals and U.S. Department of Labor, Mine Safety and Health Administration, Denver, Colorado, 39 FLRA No. 44, 39 FLRA 546, 553 (1991) (Mine Safety) (an arbitrator's award of official time to a grievant to attend an Office of Workers' Compensation Programs appeal hearing was consistent with law).

[125] Id. At 553.

[126] Id.

[127] Id., citing regulations of the EEOC and the Merit Systems Protection Board.

"labor-management relations activity," either party may decline to negotiate and neither party may insist to impasse.[128] However, once agreed to or established though a past practice, official time for non "labor-management relations activity," may not be unilaterally changed.[129]

3. Negotiating Official Time for Union Involvement in EEO Matters, Including Processing EEO Complaints

As noted above, the key is determining whether official time is a mandatory subject of bargaining since it is within section 7116(d) or a permissive subject of bargaining is whether the activity for which official time is requested relates to "labor-management relations activities." The Authority has found that a proposal that would require official time for an EEO complainant and representative "to attend any conference, meeting, hearing, investigation, or trial in connection with an EEO complaint provided a written complaint has been filed" concerns activities "relating to labor-management relations" and thus was negotiable.[130]

The Authority thus has found the use of official time by union officials in connection with matters relating to the processing of EEO complaints within section 7131(d) of the Statute. Since I am bound by Authority precedent, the Regional Directors are advised that parties must bargain, upon request and when there otherwise is a statutory duty to bargain, over the grant of official time to union representatives for attending and participating in EEO processes.

D. PROCESSING RELATED EEO CLAIMS AND UNFAIR LABOR PRACTICES

---

[128] FDA, Northeast, 54 FLRA at 1274 (negotiation of two separate collective bargaining agreements with a union representing one bargaining unit is a permissive subject of bargaining and insistence to impasse was an unfair labor practice).

[129] E.g., American Federation of Government Employees, Local 1815 and U.S. Department of the Army, U.S. Army Aviation Center and Fort Rucker, Fort Rucker, Alabama, 53 FLRA No. 60, 53 FLRA 606 (1997) (contract provision requiring bargaining over competitive areas including supervisors may not be disapproved under section 7114(c)).

[130] AFGE, Local 2761 and National Federation of Federal Employees and Department of the Interior, Bureau of land Management, 29 FLRA No. 122, 29 FLRA 1491, 1503-04, enforced in part and reversed in part as to other matters sub nom. Department of the Interior, Bureau of Land Management v. FLRA, 873 F.2d 1505 (D.C. Cir. 1989) (a proposal that would extend the authorization of official time beyond those provided for by EEOC regulations was negotiable).

The first sentence of section 7116(d) provides that "[issues that can properly be raised under an appeals procedure may not be raised as an unfair labor practice under [the Statute]." Allegations that an employee has been aggrieved on the basis of a motivation which is prohibited by an EEO law are not cognizable as unfair labor practices. For example, the failure to promote an employee because of the employee's race, color, religion, sex, national origin, age or disability does not state an unfair labor practice. Similarly, an allegation that an employee received disparate treatment because of engaging in protected union activity does not raise an actionable EEO claim. Thus, unlike matters appealable to the Merit Systems Protection Board (such as a discharge for engaging in union activity), where an unfair labor practice is barred by the first sentence of section 7116(d), EEO and unfair labor practice claims do not usually involve the same legal issues.[131]

Situations may occur, however, where the same factual situation is involved in both an EEO proceeding and an unfair labor practice proceeding. For example, an employee may file an EEO claim alleging a failure to promote based on a motivation contrary to an EEO law and a union files an unfair labor practice charge alleging, for example, a unilateral change in a training program or the failure to afford the union the right to be represented at a meeting with employees about promotions. In these types of situations, the Regions should continue to keep informed of the status of the related EEO claim.

PART VI. A UNION'S DUTY OF FAIR REPRESENTATION WHEN REPRESENTING AN EMPLOYEE IN AN EEO CLAIM

A. THE DUTY OF FAIR REPRESENTATION

The obligation set forth in the second sentence of section 7114(a)(1) of the Statute is commonly referred to as an exclusive representative's duty of fair representation. The Authority has interpreted this section to require an exclusive representative to represent the interests of all bargaining unit employees: (1) without discrimination; and (2) without regard to whether the employee is a dues paying member of the exclusive representative. The duty of fair representation is grounded in the principle that when a

---

[131] Department of Defense, Defense Mapping Agency Aerospace Center, St. Louis, MO, 17 FLRA No. 18, 17 FLRA 71 (1985) (where an employee's EEO complaint alleged that the letter of reprimand was issued to her because she was a female and an unfair labor practice charge and resulting complaint alleged that the letter of reprimand constituted retaliation for statements made in the course of a grievance meeting (protected activity), there was no section 7116(d) first sentence bar since the unfair labor practice issue could not be raised in an appeals procedure (EEO statutory process).

union attains the status of exclusive representative, it must use that power to fairly and equally represent all members of the unit.[132]

Since the Duty of Fair Representation Guidance contains a detailed analysis of that duty, this portion of this Guidance will only highlight the basic principals of the duty. The Authority has developed two different tests to determine whether there has been a duty of fair representation violation. Basically, an exclusive representative may not treat non-union members differently than dues paying union members in matters over which the union has exclusive control.[133] Thus, the duty not to discriminate based on union membership attaches only when an employee has no right to choose a representative other than the union to represent the employee in the underlying dispute.

In situations where an employee may choose a representative other than the exclusive representative, such as in a proceeding before the Merit Systems Protection Board or in litigation in a U.S. District Court, the exclusive representative may discriminate between dues paying members and non-members and thus may lawfully treat employees differently on the basis of whether or not they pay dues and belong to the union. Since the union in such situations does not have exclusive representation authority, the employees who are not union members may protect their interests by selecting representation from other sources. The Authority has held that an exclusive representative's responsibilities will be analyzed "in the context of whether or not the union's representational activities on behalf of employees are grounded in the union's authority to act as exclusive representative."[134] Thus, when a charge alleges that an exclusive representative has discriminated against a bargaining unit member because that unit employee does not belong to the union, it must initially be determined whether the activities at issue were undertaken by the labor organization in its role as the exclusive representative.

---

[132] American Federation of Government Employees v. FLRA, 812 F.2d 1326, 1328 (10th Cir. 1987) ("the union's duty to represent all employees within its bargaining unit is coterminous with the union's power as exclusive representative").

[133] Fort Bragg Association of Educators, National Education Association, Fort Bragg, North Carolina, 28 FLRA No. 118, 28 FLRA 908 (1987) (a union did not violate its duty of fair representation because the representation at issue was not grounded in any way in the union's role as exclusive representative).

[134] Fort Bragg, 28 FLRA at 918.

The duty of fair representation also concerns a situation where either a union member or a non-member in the bargaining unit claims that the union was ineffective in its attempt to represent an employee in a dispute with an agency.[135]

> [W]here union membership is not a factor, the standard for determining whether an exclusive representative has breached its duty of fair representation under section 7114(a)(1) is whether the union deliberately and unjustifiably treated one or more bargaining unit employees different from other employees in the unit. That is, the union's action must amount to more than mere negligence or ineptitude, the union must have acted arbitrarily or in bad faith, and the action must have resulted in disparate or discriminatory treatment of a bargaining unit employee.

In these situations, the fact that the union was negligent or inept is insufficient to find an unfair labor practice. Rather, the totality of the circumstances must be examined to determine if the union's conduct constituted the type of impropriety deemed violative of the section 7114(a)(1) duty of fair representation.

B. THE DUTY OF FAIR REPRESENTATION APPLIES WHEN A UNION REPRESENTS AN EMPLOYEE IN AN EEO MATTER UNDER A NEGOTIATED GRIEVANCE PROCEDURE

As discussed above in Part V, employees may elect to pursue discrimination complaints under a negotiated grievance procedure if such matters are within the scope of that procedure. In those instances where a grievance is filed, the union's duty of fair representation attaches just as it attaches to all other grievances. The union cannot treat non-members differently from members and it cannot deliberately and unjustifiably treat one or more bargaining unit employees different from other employees in the unit. The subject of the grievance, such as an EEO matter, is not relevant in deciding whether the union has fulfilled its representational obligation.

C. THE DUTY OF FAIR REPRESENTATION MAY APPLY WHEN A UNION REPRESENTS AN EMPLOYEE IN AN EEO MATTER

The Authority has held that the union's duty of fair representation must be grounded in the union's authority to act as the exclusive representative. A recent decision, however, has raised the issue of whether a union is bound by the duty of fair representation when it chooses to represent an employee in its institutional capacity in

---

[135] National Federation of Federal Employees, Local 1453, 23 FLRA No. 92, 23 FLRA 686, 691 (1986) (a union did not violate its duty of fair representation because the union did not deliberately and unjustifiably treat any employee differently from other bargaining unit employees).

a situation where it need not provide that representation; for example, when the union, as an institution, elects to serve as the representative of an employee in an EEO claim.[136] In INS Twin Cities, the Authority, in an information case, stated "that a union lawfully could refuse representation does not mean that, if the union undertakes representation, the union is not acting as the exclusive representative and, as such, may not avail itself of its rights under the Statute." In INS Twin Cities, the Authority found that the union had a right to information under section 7114(b)(4) to represent an employee in an oral reply to a proposed adverse action, a process where the union was not required to provide representation.

In my view, if a union undertakes representation in such circumstances where it is not required to do so, and may therefore avail itself of rights under the Statute, it could be argued that the same union therefore is subject to the requirements of the Statute, at least the duty not to act in a manner, once it undertakes to represent an employee, which constitutes a deliberate and unjustifiable treatment of one or more unit employees different from other unit employees (the duty of fair representation standard when union membership is not a factor).

Thus, when a union official is representing an employee in an EEO claim and the union official is acting in an official capacity and not just as personal representative, the duty of fair representation may apply. Regional Directors have been advised to submit to me for casehandling advice any situation where a union undertakes to represent a unit employee where it otherwise would not be required to do so and the union's conduct meets the Authority's test for violating section 7114(a)(1), so that this issue may be clarified.[137]

PART VII. NEGOTIATED GRIEVANCE PROCEDURES AND CONTRACTUAL RIGHTS

The Authority also applies EEO laws when exceptions to arbitration awards challenge the legality of an arbitrator's decision on an EEO matter. Under section 7122(a) of the Statute, the Authority has jurisdiction to review arbitration awards, including those awards that deal with alleged violations of EEO laws and contractual obligations relating to EEO. For example, the Authority has examined the EEO laws when deciding exceptions to an arbitration award that found, in part, that an employee was

---

[136] U.S. Department of Justice, Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota, 51 FLRA No. 119, 51 FLRA 1467 (1996) motion for reconsideration denied, 52 FLRA No. 121, 52 FLRA 1323 (1997), enforced, 144 F.3d 90 (D.C. Cir. 1998) (INS Twin Cities)

[137] See Duty of Fair Representation Guidance.

not discriminated against based on age for a promotion,[138] that an agency's implementation and administration of a performance appraisal system did not discriminate on the basis of race,[139] and that the failure to select a grievant for promotion was not based on sex discrimination.[140]

When exceptions are filed to an arbitrator's award alleging that the award is contrary to law, the Authority reviews the exceptions de novo. That is, the Authority examines the applicable EEO laws and court precedent to determine whether the arbitrator correctly applied the applicable law.[141] When the Authority finds that an award, or a portion of an award, is contrary to those EEO laws, it has remanded the case to the parties.[142] To assist arbitrators in issuing lawful awards, the parties should brief the arbitrator on the applicable EEO law and its application. To assist the Authority if exceptions to an arbitration award are filed on an alleged violation of an EEO law, the parties' exceptions and opposition should fully brief the Authority on the applicable EEO law and the reasons why the arbitrator's award was, or was not, consistent with that law.

---

[138] Health Care Financing Administration, Department of Health and Human Services and American Federation of Government Employees, Local 1923, 35 FLRA No. 33, 35 FLRA 274, 291-93 (1990) (the Authority interpreted and applied the Age Discrimination and Employment Act).

[139] American Federation of Government Employees, Local 3295 and U.S. Department of the Treasury, Office of Thrift Supervision, Washington, D.C., 51 FLRA No. 3, 51 FLRA 27, 33 (1995) (the Authority reviewed the arbitrator's findings applicable to violations of Title VII of the Civil Rights Act of 1964).

[140] National Treasury Employees Union, and National Treasury Employees Union, Chapter 48 and U.S. Department of the Treasury, Internal Revenue Service, Southeast Region, Richmond District, 54 FLRA No. 105, 54 FLRA 1197 (1998) (the Authority interpreted and applied Title VII of the Civil Rights Act of 1964).

[141] E.g., U.S. Department of Commerce, Patent and Trademark Office and National Treasury Employees Union, Chapter 243, 52 FLRA No. 34, 52 FLRA 358 (1996) (arbitrator applied the proper legal standard in finding race discrimination when an agency failed to select an employee for a position).

[142] E.g., Id. at 372-74 (Authority found the award of compensatory damages to be inconsistent with the Civil Rights Act of 1991).

Attachment: Summary of the Application of Rights under the Federal Service Labor-Management Relations Statute to EEO Matters