

FEDERAL LABOR RELATIONS AUTHORITY

# Guidance on Meetings

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**Office of the General Counsel**

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## **GUIDANCE ON MEETINGS**

### **OVERVIEW**

The Office of General Counsel has developed this guidance to assist parties in determining their respective rights and obligations during formal discussions, investigatory examinations and other meetings or discussions which may trigger representational rights under the Federal Service Labor-Management Relations Statute.

The Statute provides for representation in two well-established instances when certain conditions have been met: formal discussions and investigatory examinations. The Statute also prohibits agencies from bypassing exclusive representatives, and dealing directly with unit employees, regarding grievances and other matters relating to the collective bargaining relationship.

The three sections of this Guidance address these topics by examining the Statutory authority of these representational rights; the scope and purpose of the rights; the types of meetings and discussions to which they apply; and the appropriate remedies. While this Guidance is intended to assist the parties in understanding this important area of law, it does not represent legal advice, nor should it be interpreted to predict the legal outcome in any particular case.

# GUIDANCE ON MEETINGS

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## I. Formal Discussions

### A. Statutory Authority

Section 7114(a)(2) of the Statute provides:

An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at –

(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment.

### B. Purpose of the Right

Section 7114(a)(2)(A) of the Statute was established “to provide the union with an opportunity to safeguard its interests and the interests of employees in the bargaining unit viewed in the context of a union’s full range of responsibilities under the Statute.”<sup>1</sup> By attending formal discussions, the exclusive representative is “assured the opportunity to hear, along with unit employees, about matters of interest to unit employees and be in a position to take appropriate action to safeguard those interests.”<sup>2</sup>

### C. Elements of Formal Discussion

In order for the section 7114(a)(2)(A) formal discussion right to exist, the following elements must be satisfied: (1) a discussion; (2) which is formal in nature; (3) between at least one or more agency representatives and one or more unit employees or their representatives; (4) concerning any grievance or personnel policy or practice or other general condition of employment.<sup>3</sup>

The Authority examines the totality of the circumstances presented in each case, guided by the intent and purpose of the section.<sup>4</sup> A failure to afford a union an opportunity to be represented at a section 7114(a)(2)(A) formal discussion constitutes a violation of sections 7116(a)(1) and (8) of the Statute. Each of the above-listed elements is discussed in greater detail below.

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<sup>1</sup> *DOJ, BOP, FCI, Ray Brook*, 29 FLRA 584, 589 (1987) (*FCI Ray Brook*), *aff’d*, *AFGE v. FLRA*, 865 F.2d 1283 (D.C. Cir. 1989); *see also DOD, Air Force 325<sup>th</sup> Fighter Wing, Tyndall AFB*, 66 FLRA 256, 259 (2011) (*Tyndall AFB*) (purpose of the provision is to “afford an exclusive representative the opportunity to be present at discussions addressing matters of interest to unit employees”).

<sup>2</sup> *DOD, Nat’l Guard Bureau, Tex. Adjutant General’s Dep’t, 149<sup>th</sup> TAC Fighter Group, Kelly AFB*, 15 FLRA 529, 532 (1984) (*Kelly AFB*).

<sup>3</sup> *INS, NY Office of Asylum, Rosedale, N.Y.*, 55 FLRA 1032, 1034 (1999) (*INS, Rosedale*).

<sup>4</sup> *FCI Ray Brook*, 29 FLRA at 588-89; *see also VA, N. Ariz. VA Healthcare Prescott, Ariz.*, 61 FLRA 181, 186 (2005) (“we consider these factors in view of the totality of the circumstances”).

## 1. Discussion

For purposes of section 7114(a)(2)(A), a “discussion” is a meeting between representatives of the agency and unit employees. There does not have to be an actual conversation, debate, or dialogue between agency officials and unit employees to meet the “discussion” element.<sup>5</sup> Thus, if the other requirements of section 7114(a)(2)(A) are met, a meeting for the sole purpose of making a statement or announcement is a formal discussion.<sup>6</sup> In addition, a telephone conversation may constitute a formal discussion.<sup>7</sup> On the other hand, surveys of employees for information-gathering purposes have been found not to constitute a discussion.<sup>8</sup> The Authority has further held that “even if a meeting does not begin as a formal discussion, it may nonetheless develop into or become a formal discussion.”<sup>9</sup>

## 2. Formality

To determine whether a discussion is “formal in nature,” the Authority examines the purpose and nature of a discussion, as well as several factors set forth in Authority precedent, including:

- a. the status of the individual who held the discussions;
- b. whether any other management representatives attended;
- c. the site of the discussions [in the supervisor’s office, at the employee’s desk or elsewhere];
- d. how the meetings for the discussions were called [formal advance notice or spontaneous];
- e. how long the discussions lasted;
- f. whether a formal agenda was established for the discussions; and

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<sup>5</sup> *DOJ, BOP, FCI, Bastrop, Tex.*, 51 FLRA 1339, 1343 (1996) (*FCI Bastrop*).

<sup>6</sup> *Kelly AFB*, 15 FLRA at 532 (1984) (holding that the “legislative history supports the conclusion that Congress intended to continue treating ‘discussion’ as synonymous with ‘meeting’”); *see also Tyndall AFB*, 66 FLRA at 260.

<sup>7</sup> *SSA, OHA, Bos. Reg’l Office, Bos., Mass.*, 59 FLRA 875, 878-79 (2004) (*SSA, OHA, Bos.*), *request for reconsideration granted as to remedy*, 60 FLRA 105 (2004).

<sup>8</sup> *Kaiserlautern Am. High Sch., DOD Dependents Sch., Germany N. Region*, 9 FLRA 184, 187 (1982) (questionnaire containing one question which a manager individually handed to unit employees to support application for school accreditation was not a discussion). Solicitation of employees’ views with respect to negotiable conditions of employment through polls or questionnaires can, however, constitute an unlawful bypass of the exclusive representative, as discussed more fully in the section of this Guidance addressing “Bypass”.

<sup>9</sup> *Dep’t of the Army, New Cumberland Army Depot, New Cumberland, Pa.*, 38 FLRA 671, 677 (1990) (*New Cumberland Army Depot*).

g. the manner in which the discussions were conducted.<sup>10</sup>

In some cases, the Authority has also considered “an eighth factor, namely, whether attendance by the bargaining unit employee was mandatory.”<sup>11</sup>

In general, the more significant the subject matter of the discussion, the less the Authority will rely upon the enumerated factors to establish formality. Thus, in some situations, the “purpose of the discussion [is] sufficient in itself to establish formality.”<sup>12</sup> For instance, where the purpose of a meeting was to inform employees that they were targets of a reduction-in-force, the Authority found it “highly implausible” that the agency “would leave an announcement of such gravity to a spontaneous, causal encounter with affected employees,” and therefore concluded the meeting met the formality threshold “even if evidence regarding the factors did not indicate formality.”<sup>13</sup> Formality has also been established with respect to meetings conducted for the purpose of interviewing bargaining unit employees in preparation for third-party proceedings, such as MSPB cases.<sup>14</sup>

In cases where the Authority has relied upon the enumerated factors, it has emphasized that the factors are not meant to be rigidly applied to each case.<sup>15</sup> Although the outcome of each case is heavily dependent upon its particular facts, the following examples illustrate the conditions under which meetings have been found to be “formal”:

- A meeting initiated when a first-line supervisor walked to the employee’s cubicle, asking her to come to a conference room; attended by a member of management; lacked a formal agenda but had the clear purpose of discussing the employee’s placement on administrative leave; and lasted no more than 15 minutes.<sup>16</sup>
- A meeting held to mediate an EEO dispute at a neutral location away from the worksite; scheduled in advance; followed pre-established agenda; lasted three hours; attended by an attorney representing the agency; and resulted in signed settlement agreement.<sup>17</sup>

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<sup>10</sup> *FCI Bastrop*, 51 FLRA at 1342; *Dep’t of Energy, Rocky Flats Field Office*, 57 FLRA 754, 755 (2002) (*DOE, Rocky Flats*).

<sup>11</sup> *VA, Cent. Ark. Veterans Healthcare Sys., N. Little Rock, Ark.*, 63 FLRA 169, 172 (2009) (*VA, N. Little Rock*).

<sup>12</sup> *F.E. Warren AFB, Cheyenne, Wyo.*, 52 FLRA 149, 156 (1996) (*Warren AFB*).

<sup>13</sup> *Id.* at 155-57.

<sup>14</sup> *INS, Border Patrol, El Paso, Tex.*, 47 FLRA 170, 183 (1993) (*INS, El Paso*); *VAMC, Long Beach, Cal.*, 41 FLRA 1370, 1379-80 (1991) (telephone interview of unit employee by agency attorney in preparation for an MSPB hearing), *enf’d sub nom., VAMC, Long Beach v. FLRA*, 16 F.3d 1526 (9<sup>th</sup> Cir. 1994).

<sup>15</sup> *VAMC, Richmond, Va.*, 63 FLRA 440, 443 (2009) (noting that the factors “are illustrative, and other factors may be identified and applied as appropriate”).

<sup>16</sup> *Tyndall AFB*, 66 FLRA at 274-75.

<sup>17</sup> *Luke AFB, Ariz.*, 54 FLRA 716, 726 (1998) (*Luke AFB*), *rev’d on other grounds, Luke AFB v. FLRA*, 208 F.3d 221 (9<sup>th</sup> Cir. 1999).

- A phone interview by an EEO investigator of an employee to obtain information about another employee's EEO complaint; employee was given advance notice; conversation was tape-recorded; lasted 20 minutes; and resulted in a written statement.<sup>18</sup>
- A meeting conducted by an attorney on behalf of management; attended by a personnel officer; scheduled in advance; held in the legal offices away from the employee's worksite; and with clearly defined objectives.<sup>19</sup>
- A meeting to discuss enforcement of the dress code; called by the division director in accordance with a letter from the acting regional commissioner; attended by several management officials; planned and announced in advance; and which lasted for 20-25 minutes.<sup>20</sup>
- A meeting to advise an employee as to the nature and scope of his duties, held pursuant to an MSPB settlement; attended by the second-level supervisor; planned in advance by the supervisors; lasted approximately one hour; and for which attendance was mandatory.<sup>21</sup>
- A meeting called to discuss issues raised in a grievance conducted by a supervisor; took place in the supervisor's office; scheduled in advance; attendance was mandatory; and, although no notes or minutes were taken of the meeting, its results were reported to the agency director.<sup>22</sup>
- A meeting held by a fourth-level supervisor in his office to respond to an employee's grievance; attended by the second-level supervisor; planned in advance; lasted 25-30 minutes; and for which attendance was mandatory.<sup>23</sup>
- A meeting conducted by a second-level supervisor to orient six new employees; arranged in advance; followed a pre-arranged plan; lasted one and a half hours; attendance was mandatory; and at which employees were presented an orientation package.<sup>24</sup>

Where a meeting is brief, spontaneous or deals with a performance issue particular to the bargaining unit employee, the Authority is less likely to find that it meets the "formality" requirement. In reaching this conclusion, the Authority has noted that the word "formal" was inserted as an amendment to the Civil Service Reform Act of 1978 "to make clear that this subsection does not require that an exclusive representative be present during highly personal,

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<sup>18</sup> *SSA, OHA, Bos.*, 59 FLRA at 879.

<sup>19</sup> *Luke AFB, Ariz.*, 58 FLRA 528, 532-33 (2003) (*Luke AFB II*).

<sup>20</sup> *Customs Serv., Region VIII, S.F., Cal.*, 18 FLRA 195, 197-98 (1985).

<sup>21</sup> *DOL, Office of the Assistant Sec'y for Admin. & Mgmt., Chi., Ill.*, 32 FLRA 465, 470 (1988) (*DOL, Chi.*).

<sup>22</sup> *INS, Rosedale*, 55 FLRA at 1038.

<sup>23</sup> *SSA, Balt., Md.*, 18 FLRA 249, 250 (1985).

<sup>24</sup> *SSA*, 16 FLRA 232, 233 (1984).



informal meetings such as counseling sessions regarding performance.”<sup>25</sup> Applying these principles and the enumerated factors, the Authority has found that the following meetings did not constitute “formal” discussions:

- Routine, periodic counseling meetings between an employee and his first-line supervisor, with no other management personnel present, regarding the employee’s job performance.<sup>26</sup>
- A meeting between a new employee and his supervisor at the supervisor’s desk to introduce co-workers; was spontaneous; lasted for 20 minutes; had no prepared agenda; and no notes were taken.<sup>27</sup>
- A phone conversation between an EEO contractor and an employee to discuss another employee’s EEO complaint; interview was not scheduled in advance; was terminated by the employee; and was not documented by affidavit or confirming letter.<sup>28</sup>
- A meeting with an EEO Representative to discuss an employee’s EEO complaint which was impromptu and initiated by the employee.<sup>29</sup>
- A mandatory meeting to distribute information regarding a management survey concerning organizational and staffing requirements; lasted 15 minutes; and was conducted solely by first-level supervisor with no agenda or minutes.<sup>30</sup>
- A meeting to solicit volunteers for overtime assignments; attended by only the first-line supervisor; held on the shop floor; lasted 10 minutes; no prepared agenda; and no notes were taken of the meeting.<sup>31</sup>
- A meeting with five or six unit employees to announce a change in sick leave policy; involved only the first-line supervisor; held in the supervisor’s office; not scheduled in advance; and lasted no more than 10 minutes.<sup>32</sup>
- A meeting to discuss changes in the teleclaims process; not scheduled in advance; held at the employees’ desks; and lasted 5 minutes.<sup>33</sup>

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<sup>25</sup> *Warren AFB*, 52 FLRA at 156 (quoting *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978* (Comm. Print 1979) (*Legislative History*) at 957).

<sup>26</sup> *SSA*, 14 FLRA 28, 28 (1984).

<sup>27</sup> *SSA, Field Operations Region II*, 29 FLRA 1205, 1207 (1987).

<sup>28</sup> *SSA, OHA, Bos.*, 59 FLRA at 878.

<sup>29</sup> *DOE, Rocky Flats*, 57 FLRA at 755 (“We note that the Authority has not previously found such impromptu, employee-initiated discussions to constitute formal discussions within the meaning of § 7114(a)(2)(A) of the Statute”).

<sup>30</sup> *DLA, Def. Distrib. Region West*, 48 FLRA 744, 745 & n.2 (1993).

<sup>31</sup> *Marine Corps Logistics Base Barstow, Cal.*, 45 FLRA 1332, 1335-36 (1992).

<sup>32</sup> *DLA, Def. Depot Tracy, Cal.*, 14 FLRA 475, 477 (1984).

### 3. Participants in the Discussion

For a union to have the right to be represented at a formal discussion, at least one agency representative and at least one bargaining unit employee must be present. Because both sections 7114(a)(2)(A) and 7114(a)(2)(B) use the same term “representative of the agency” and there is “no legislative history indicating otherwise,” the Authority has held that it is appropriate to “give [these] same terms the same meaning.”<sup>34</sup> Accordingly, additional guidance on the scope of this term can be found in the discussion of representational rights arising from section 7114(a)(2)(B) in the Guidance addressing “Investigatory Examinations”.

The Statute does not require a “representative of the agency” to be a supervisor. For instance, the Authority has found that an attorney from the Judge Advocate General’s Office acted as the agency’s representative during mediation of an EEO claim.<sup>35</sup> Similarly, it has found that outside contractors acted as agency representatives during formal discussions.<sup>36</sup>

A bargaining unit employee for purposes of this section of the Statute is one who included in the exclusive representative’s bargaining unit.<sup>37</sup> Concluding that it is the employee’s status “at the time of the formal discussion that is the controlling factor for determining the applicability of § 7114(a)(2)(A),” the Authority has held that the union had the right to be represented at an interview of a bargaining unit member who it listed as a witness for a grievance arbitration where the questions related only to the employee’s actions as an acting supervisory agent four years earlier.<sup>38</sup> The union, however, is not entitled to representation at a formal meeting to discuss settlement of an EEO complaint filed by an employee who was not in the bargaining unit represented by the union “at the time of the events giving rise to the complaint or at the time of the filing of the complaint,” even where the employee was a member of the bargaining unit at the time of the discussion.<sup>39</sup>

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<sup>33</sup> *SSA, Balt., Md.*, 15 FLRA 525, 527 (1984).

<sup>34</sup> *PBGC, Wash., D.C.*, 62 FLRA 219, 223 (2007).

<sup>35</sup> *Luke AFB*, 54 FLRA at 730.

<sup>36</sup> *DLA, Def. Depot Tracy, Cal.*, 39 FLRA 999, 1013 (1991) (independent contractor providing an employee assistance program was a representative of the agency); *SSA, OHA, Bos.*, 59 FLRA at 879-80 (contract EEO investigator is an agency representative); *PBGC, Wash., D.C.*, 62 FLRA at 222 (same).

<sup>37</sup> *Dep’t of the Air Force, Sacramento Air Logistics Command, McClellan AFB, Cal.*, 38 FLRA 732, 734 (1990) (holding that “alternate supervisors” meet this condition where they “continue to be covered by the parties’ collective bargaining agreement” and “continue to be subject to dues withholding”).

<sup>38</sup> *DHS, Border & Transportation Sec. Directorate, Customs & Border Prot., El Paso, Tex.*, 62 FLRA 241, 247-49 (2007) (*CBP, El Paso*) (also noting that even if the employee’s status when he took the disputed actions was relevant, the record supported the “alternate finding” that he was not a supervisor, and was a bargaining unit employee, on that date as well).

<sup>39</sup> *Nuclear Regulatory Comm’n*, 29 FLRA 660, 662-63 (1987) (*NRC*) (noting that the “complaint concerned matters which took place entirely outside the bargaining unit”).

#### **4. Subject Matter of the Discussion**

To be a formal discussion, the meeting must concern a personnel policy or practice, a general condition of employment, or a grievance.

##### ***a. Personnel Policy or Practice or General Condition of Employment***

The phrase “any personnel policy or practices” in section 7114(a)(2)(A) of the Statute means “general rules applicable to agency personnel, not discrete actions taken with respect to individual employees.”<sup>40</sup> The Authority has also held that “other general conditions of employment [are] ‘limited to those discussions (except grievance meetings) which concern conditions of employment affecting employees in the unit generally.’”<sup>41</sup>

Applying these criteria, the Authority has applied section 7114(a)(2)(A) rights to a meeting called to discuss enforcement of a dress code policy;<sup>42</sup> to address alleged management interference with Statutory rights;<sup>43</sup> to announce a change in workweek and staffing;<sup>44</sup> to inform employees of a reduction-in-force;<sup>45</sup> and to discuss implementation of a compressed work schedule.<sup>46</sup>

The formal discussion representation right does not apply to meetings related to discrete actions taken with respect to individual employees. Thus, a discussion between an employee and agency officials that was limited to the employee’s work assignments and job performance did not constitute a formal meeting,<sup>47</sup> nor did a meeting related to an employee’s “last chance agreement,”<sup>48</sup> or an oral reply meeting in response to a proposed adverse action.<sup>49</sup> Similarly, a meeting limited to discussing the temporary assignment of two unit employees did not concern a

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<sup>40</sup> *AFGE Council 214*, 38 FLRA 309, 330 (1990) (quoting *Bureau of Field Operations, SSA, S.F., Cal.*, 20 FLRA 80, 83 (1985) (*SSA, S.F.*), *enfd sub nom., Dep’t of the Air Force, Wright-Patterson AFB v. FLRA*, 949 F.2d 475 (D.C. Cir. 1991)).

<sup>41</sup> *AFGE Council 214*, 38 FLRA at 330.

<sup>42</sup> *Customs Serv., Region VIII, S.F., Cal.*, 18 FLRA at 197-98.

<sup>43</sup> *Dep’t of Air Force, F.E. Warren AFB*, 31 FLRA 541, 552 (1988) (*Warren AFB II*) (meeting involved alleged management interference with employee picketing).

<sup>44</sup> *Kelly AFB*, 15 FLRA at 530.

<sup>45</sup> *HUD*, 15 FLRA 438, 439 (1984).

<sup>46</sup> *New Cumberland Army Depot*, 38 FLRA at 677.

<sup>47</sup> *INS, Rosedale*, 55 FLRA at 1035.

<sup>48</sup> *AFGE Council 214*, 38 FLRA at 330-31 (“Inasmuch as the last chance agreement meeting would involve only the discrete action taken with respect to an individual employee, the proposed meeting would not involve a personnel policy or practice or other conditions of employment within that section”).

<sup>49</sup> *FCI Ray Brook*, 29 FLRA at 588-89.

“personnel policy or practice.”<sup>50</sup> The Authority has also held that the representation right does not apply to a meeting addressing “routine reminders of past policies and requirements.”<sup>51</sup>

On the other hand, the Authority rejected an argument that a meeting concerning a reorganization did not relate to a personnel policy or practice or other condition of employment where only two employees had actually been affected, because it was reasonably foreseeable that other employees would also be relocated.<sup>52</sup> In addition, a meeting does not have to deal with a specific policy or practice to meet this element. For instance, the Authority has held that a discussion with several bargaining unit employees about a supervisor’s conduct, as well as the “general environment in the office, including matters involving employee morale and social relationships,” concerned general conditions of employment.<sup>53</sup> A meeting that does not begin by addressing conditions of employment may nonetheless develop into or become a formal discussion.<sup>54</sup>

### ***b. Grievances***

Section 7103(a)(9) of the Statute defines “grievance” as “any complaint -

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee, labor organization, or agency concerning – (i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or (ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.”

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<sup>50</sup> *SSA, S.F.*, 20 FLRA at 83; *see also GPO, Public Documents Distrib. Ctr., Pueblo, Colo.*, 17 FLRA 927, 929 (1985) (“The discussion did not involve conditions of employment affecting employees in the unit generally, but instead concerned the manner in which four specific employees in one small subcomponent of the Respondent’s operations were reporting their productivity”).

<sup>51</sup> *VAMC, Gainesville, Fla.*, 49 FLRA 1173, 1175-76 (1994).

<sup>52</sup> *Dep’t of the Air Force, Air Force Materiel Command, Space and Missile Sys. Ctr., Detachment 12 Kirtland AFB, N.M.*, 64 FLRA 166, 174 (2009) (further rejecting the argument that the purpose of the meeting was merely “to provide information” about the reorganization, since “there is a high potential for changes to employees’ conditions of employment” arising from the reorganization); *see also GSA, Region VIII, Denver, Colo.*, 19 FLRA 20, 22 (1985) (holding that the purpose of a meeting at which employees’ work schedules were discussed “was not limited to the discrete application of a personnel policy, but rather involved a general discussion of that policy and how it was working”).

<sup>53</sup> *GSA*, 50 FLRA 401, 404-05 (1995); *see also New Cumberland Army Depot*, 38 FLRA at 677 (“[t]he subject matter of safety concerns a general condition of employment”).

<sup>54</sup> *DLA, Def. Depot Tracy, Cal.*, 37 FLRA 952, 960 (1990) (“whether or not the meeting concerned a ‘personnel policy or practice’ when it began, it developed into a discussion concerning a ‘personnel policy or practice’ ... that concerned a general condition of employment of all warehouse employees.”).

The Authority interprets the term “grievance” for formal discussion purposes in light of its broad statutory definition.<sup>55</sup> Grievances at both the initial and informal stages of a grievance procedure have been found to be “grievances” for formal discussion purposes.<sup>56</sup> Moreover, a meeting can “concern” a grievance “even where it [does] not directly involve a grievant, such as where it was held to interview witnesses scheduled to testify in a grievance arbitration hearing.”<sup>57</sup> The Authority has rejected the argument that affording union representational rights during interviews conducted by the agency’s attorneys would offend the attorney work product privilege, noting that “nothing in our decision requires an agency attorney to disclose to a union his or her thoughts or impressions, whether written or otherwise, resulting from the interview.”<sup>58</sup>

A matter does not have to be subject to the negotiated grievance procedure to be considered a “grievance.” For instance, a meeting to discuss the placement of an employee on administrative leave because she called security to complain of harassment was found to constitute a formal discussion because it concerned a “grievance” within the meaning of the Statute.<sup>59</sup> On the other hand, the Authority has held that a meeting requested by an employee to present an oral reply to a proposed suspension did not concern a “grievance” because no adverse action had yet been taken, and the meeting did not involve application of the parties’ contractual grievance procedure.<sup>60</sup> In another case, the Authority concluded that interviews of employees for the purpose of investigating and rendering a decision on a grievance did not constitute formal discussions.<sup>61</sup>

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<sup>55</sup> *Tyndall AFB*, 66 FLRA at 259.

<sup>56</sup> *FCI Bastrop*, 51 FLRA at 1344-45 (manager’s meeting with employee and his supervisor to direct them to “quit acting like children” and to go back to work concerned a grievance on grounds that it “was not simply a counseling session, but was in response to the Union’s efforts under the parties’ CBA to informally resolve the differences which were the subject of a potential grievance”); see also *INS, Rosedale*, 55 FLRA at 1035-37 (meeting concerned a “grievance” where it related to an employee’s work assignments and job performance that had been the subject of a counseling session and culminated in employee’s removal, and where the employer was on notice that the union had attempted to file an informal grievance on the employee’s behalf).

<sup>57</sup> *Tyndall AFB*, 66 FLRA at 260 (citing *VA, N. Little Rock*, 63 FLRA at 172); see also *Dep’t of the Air Force, Sacramento Air Logistics Ctr., McClellan AFB, Cal.*, 35 FLRA 594, 605-06 (1990) (*McClellan AFB*) (same conclusion with respect to telephone and office interviews by agency’s counsel of union’s designated witness for an arbitration).

<sup>58</sup> *McClellan AFB*, 35 FLRA at 607 (“The Respondent has not cited any provision of the Statute or its legislative history which demonstrates that Congress intended to exclude from the coverage of section 7114(a)(2)(A) formal discussions which involve interviews by agency attorneys of unit employees who are known to be scheduled to testify for the union in upcoming third-party proceedings.”); see also *VAMC, Denver, Colo.*, 44 FLRA 768, 770 (1992) (same), *aff’d*, *VA v. FLRA*, 3 F.3d 1386 (10<sup>th</sup> Cir. 1993); *CBP, El Paso*, 62 FLRA at 244-47 (concerns over the attorney work product privilege did not justify agency’s exclusion of the union’s president as its representative at a pre-arbitration interview).

<sup>59</sup> *Tyndall AFB*, 66 FLRA at 260 (noting, without deciding, the ALJ’s undisputed finding that the call to security constituted a “grievance”).

<sup>60</sup> *FCI Ray Brook*, 29 FLRA at 590-91.

<sup>61</sup> *SSA*, 18 FLRA 42, 46 (1985) (“Here, the meetings between the management representative and the employees were not formal discussions under the steps of the grievance procedure, but instead were examinations of unit

### c. MSPB Appeals

The term “grievance” also encompasses statutory appeals filed by bargaining unit members,<sup>62</sup> including MSPB appeals.<sup>63</sup> Thus, interviews of bargaining unit employees by agency representatives to prepare for an MSPB hearing,<sup>64</sup> as well as formal depositions related to MSPB appeals,<sup>65</sup> constitute “formal discussions” for which the union has the right to be present. Settlement discussions related to a bargaining unit employee’s MSPB appeal also constitute “formal discussions.”<sup>66</sup> However, MSPB hearings, and federal court hearings related to MSPB cases, do not constitute “formal discussions” because these proceedings “are not conducted by agency representatives” but are instead “controlled by administrative or Federal judges.”<sup>67</sup>

The Authority has held that an MSPB appeal filed by a supervisory or management official is not a “grievance” within the meaning of the Statute. In that same decision, however, the Authority concluded that the union had the right to representation at discussions with unit employees in preparation for a hearing on the claim because employees were asked whether the supervisor or other employees had told jokes of a sexual nature or had misused government vehicles – and were otherwise asked about the “atmosphere that existed in the office” – since these questions concerned their “conditions of employment.”<sup>68</sup>

The Authority has rejected the argument that the presence of a union representative at agency interviews in preparation for an MSPB hearing was inconsistent with the Freedom of Information Act (FOIA), the Privacy Act or the agency’s attorney-client or attorney work product privilege.<sup>69</sup>

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employees in connection with an investigation by management for the purpose of making a decision in the grievance,” which the Authority concluded should instead be evaluated under section 7114(a)(2)(B)).

<sup>62</sup> *Luke AFB II*, 58 FLRA at 533.

<sup>63</sup> *FCI Ray Brook*, 29 FLRA at 589-90; *NTEU v. FLRA*, 774 F.2d 1181(D.C.Cir. 1985).

<sup>64</sup> *VAMC, Denver*, 44 FLRA 408, 408 (1992), *aff’d*, *VA v. FLRA*, 3 F.3d 1386 (10<sup>th</sup> Cir. 1993); *see also VAMC, Long Beach, Cal.*, 41 FLRA at 1379-80 (same conclusion with respect to telephone interviews).

<sup>65</sup> *INS, El Paso*, 47 FLRA at 183-84.

<sup>66</sup> *GSA, Region 9*, 48 FLRA 1348, 1355 (1994) (meeting with an employee, her attorney, and an agency representative to discuss settlement of an MSPB complaint that resulted in a last chance agreement constituted a formal discussion by its “very nature”), *following remand*, 53 FLRA 925 (1997); *see also DOL, Chi.*, 32 FLRA at 471 (meeting with employee and his lawyer pursuant to an MSPB settlement to discuss the employee’s position responsibilities and conduct upon reinstatement constituted a formal discussion).

<sup>67</sup> *INS, El Paso*, 47 FLRA at 183 n.6.

<sup>68</sup> *GSA*, 50 FLRA at 404.

<sup>69</sup> *VAMC, Long Beach, Cal.*, 41 FLRA at 1381-82. The Authority found that neither the Privacy Act nor FOIA is applicable to the pre-hearing investigation. Further, it rejected the agency’s assertion, based on *Upjohn v. United States*, 449 U.S. 383 (1981), that the union’s presence at the interviews would violate the attorney-client privilege because the employees “were not interviewed in their capacity as representatives of the [agency], nor about actions they had taken in the course of their official duties.” *Id.* at 1382. It rejected the agency’s assertion of attorney work product privilege for the same reasons set forth in *McClellan AFB*, 35 FLRA at 607-08.

#### *d. EEO Complaints*

Formal EEO complaints constitute “grievances” within the meaning of section 7114(a)(2)(A).<sup>70</sup> Accordingly, settlement and mediation conferences related to EEO complaints constitute “formal discussions” for which the union has the right to be represented.<sup>71</sup>

It should be noted, however, that the Authority’s conclusion in this regard has not been uniformly adopted by the federal circuit courts. Specifically, the Ninth Circuit Court of Appeals reversed the Authority’s conclusion on this issue, holding instead that a unit member’s EEO complaint was not a “grievance” because it was brought pursuant to EEOC procedures, which are “discrete and separate” from the grievance process. In support of this conclusion, the Ninth Circuit noted that the parties’ collective bargaining agreement explicitly excluded discrimination claims from the grievance procedure.<sup>72</sup>

The U.S. Court of Appeals for the D.C. Circuit, however, has endorsed the Authority’s approach, finding that a formal EEO complaint constituted a “grievance,” even where the parties’ bargaining agreement explicitly excluded discrimination claims.<sup>73</sup> The Authority has reiterated this position in several subsequent decisions.<sup>74</sup>

The Authority has rejected the argument that the union’s presence at discussions involving EEO complaints conflicts with EEOC regulations, the Privacy Act, the Administrative Dispute Resolution Act, “and other statutes and regulations that protect the confidentiality of certain information and records.”<sup>75</sup> It has held, however, that a “direct” conflict of interest between the union’s institutional rights and the employee’s rights to confidentiality in mediation and settlement discussions must be resolved in favor of the employee.<sup>76</sup> Moreover, the D.C. Circuit

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<sup>70</sup> *Dep’t of the Air Force, 436<sup>th</sup> Airlift Wing, Dover AFB, Dover, Del.*, 57 FLRA 304, 308 (2001) (*Dover AFB*) (employee’s formal EEO complaint “that he was a victim of illegal discrimination by his employing agency is undeniably a complaint by [an] employee concerning [a] matter relating to [his employment], *i.e.*, a grievance under the Statute’s definition”), *aff’d, Dep’t of the Air Force, 436<sup>th</sup> Airlift Wing, Dover AFB v. FLRA*, 316 F.3d 280 (D.C. Cir. 2003).

<sup>71</sup> *Marine Corps Logistics Base, Barstow, Cal.*, 52 FLRA 1039, 1048 (1997) (EEO settlement conference); *Dover AFB*, 57 FLRA at 308-10 (EEO mediation session); *Dep’t of the Air Force, Davis-Monthan AFB*, 64 FLRA 845, 849 (2010) (*Davis-Monthan AFB*) (EEO ADR/mediation conference).

<sup>72</sup> *Luke AFB*, 208 F.3d 221 (9<sup>th</sup> Cir. 1999) (unpublished), *reversing Luke AFB*, 54 FLRA 716.

<sup>73</sup> *Dep’t of the Air Force, 436<sup>th</sup> Airlift Wing, Dover AFB v. FLRA*, 316 F.3d 280, 287 (D.C. Cir. 2003).

<sup>74</sup> *Luke AFB II*, 58 FLRA at 533 (“we respectfully disagree with the Ninth Circuit’s determination to the contrary that the formal discussion right ... does not apply to complaints filed under EEOC’s statutory procedure because they are discrete and separate from the grievance process”); *SSA, OHA, Bos.*, 59 FLRA at 880 (noting that the Authority “has already addressed and resolved this issue”); *Davis-Monthan AFB*, 64 FLRA at 849 (“although the Ninth Circuit agrees with the Respondent’s position ... the D.C. Circuit and the Authority have repeatedly rejected this approach and have held that a formal EEO complaint is a grievance within the meaning of § 7114(a)(2)(A)”).

<sup>75</sup> *Dep’t of Agric., Forest Serv., Los Padres Nat’l Forest, Goleta, Cal.*, 60 FLRA 644, 651-53 (2005) (*Los Padres Nat’l Forest*); *Luke AFB II*, 58 FLRA at 534-36.

<sup>76</sup> *Luke AFB II*, 58 FLRA at 535 & n.13 (citing *NTEU v. FLRA*, 774 F.2d 1181, 1189 n.12 (D.C.Cir. 1985)).

Court has “not foreclose[d] the possibility that an employee’s objection to union presence could create a ‘direct’ conflict that should be resolved in favor of the employee.”<sup>77</sup>

In applying these principles, the Authority has found that an employee’s objection to the union’s presence because it would be a “waste of time” did not “establish the requisite direct conflict,” where the employee testified that his objection “was not based on any concerns over confidentiality, privacy interests, or that the Union’s presence would disrupt the mediation process.”<sup>78</sup> It has also rejected the argument that the union’s prior representation of alleged wrongdoers in unrelated hostile work environment claims justified excluding the union in an EEO mediation session.<sup>79</sup>

The right to representation also attaches to investigative interviews associated with EEO complaints.<sup>80</sup> Indeed, the Authority has found representational rights related to EEO complaints even where the employee who filed the complaint did not designate the union as his or her representative in the case,<sup>81</sup> and where the parties have excluded discrimination claims from the scope of their negotiated grievance procedure.<sup>82</sup>

Not all discussions related to EEO complaints, however, constitute “formal discussions.” The union’s representation right only applies to formal discussions of EEO complaints brought by employees within its bargaining unit. Thus, the right does not attach to complaints “filed by an employee who was not in the unit represented by the Union at the time of the events giving rise to the complaint or at the time of the filing of the complaint.”<sup>83</sup> Moreover, the Authority has indicated that the representation right would not attach to discussions related to EEO claims at the “pre-complaint” counseling stage.<sup>84</sup> In distinguishing between informal and formal

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<sup>77</sup> *Dep’t of the Air Force, 436<sup>th</sup> Airlift Wing, Dover AFB*, 316 F.3d at 287.

<sup>78</sup> *Davis-Monahan AFB*, 64 FLRA at 850.

<sup>79</sup> *Los Padres Nat’l Forest*, 60 FLRA at 653; see also *Luke AFB II*, 58 FLRA at 535 n.14 (finding that the employee’s “demonstrated willingness to discuss her complaint with, and to seek advice from, the Union regarding proposed terms of the settlement agreement strongly indicates that the employee would not have objected to the Union’s presence at the mediation and settlement discussions on confidentiality grounds”).

<sup>80</sup> *SSA, OHA, Bos.*, 59 FLRA at 879-80 (interviews conducted by agency’s EEO contractor); *PBGC, Wash., D.C.*, 62 FLRA at 222 (EEO contractor’s interviews with eleven bargaining unit employees).

<sup>81</sup> *Los Padres Nat’l Forest*, 60 FLRA at 653 (“[t]he employee’s choice of personal representative under the EEOC regulations does not have any bearing on the separate right of the Union to attend such mediation hearings”).

<sup>82</sup> *Id.*, 60 FLRA at 651 (“the statutory definition of a grievance is not dependent on the scope of a negotiated grievance procedure”).

<sup>83</sup> *NRC*, 29 FLRA at 662-63, 665 (noting, however, that if the settlement of the complaint “results in a change in unit employees’ conditions of employment, an agency is obligated to give prompt notice of the change to the exclusive representative of the unit employees and to provide the union with an opportunity to bargain to the extent required by the Statute”).

<sup>84</sup> *SSA, Field Operations, NY Region*, 16 FLRA 1021, 1022 n.1 (1984), *overruled on other grounds*, *Luke AFB*, 54 FLRA at 729; *Marine Corps Logistics Base, Barstow*, 52 FLRA at 1046 (distinguishing pre-complaint meeting at issue in *IRS, Fresno* from discussion involving formal EEO complaint in part because “at the precomplaint stage, the EEO counselor is prohibited from revealing the identity of a person consulting him”).



complaints, the Authority has explained that “[u]nder EEOC regulations and directives, the formal EEO complaint process begins with the filing of a formal complaint after the issuance of the notice of right to file a discrimination complaint.”<sup>85</sup>

#### *e. Unfair Labor Practice Complaints*

Unfair labor practice complaints fall within the statutory definition of a “grievance” as it applies to section 7114(a)(2)(B).<sup>86</sup> Accordingly, an interview by an agency attorney of a bargaining unit employee in preparation for an upcoming unfair labor practice hearing constitutes a “formal discussion” at which the union is entitled to be represented.<sup>87</sup>

#### **D. Notice of the Meeting**

Section 7114(a)(2)(A) of the Statute requires an agency to notify the union in advance of a formal discussion so the union has an opportunity to choose its own representative.<sup>88</sup> The Authority has emphasized that the right to designate its own representative is “of considerable practical importance to the union,” insofar as it “may decide to choose a representative who would be unaffected by the matters to be discussed at the meeting or one who is outside the direct supervisory chain of those conducting the meeting.”<sup>89</sup> Thus, if the union has designated a representative for a grievance arbitration hearing, an agency violates the statute by failing to provide the designated representative with notice regarding its interview of a bargaining unit employee who is scheduled to be a witness at the hearing.<sup>90</sup>

Where a union official receives actual notice of a formal meeting, but not formal notice “as a union representative,” the Authority will determine whether the actual notice was sufficient to provide the union with the opportunity to be represented at the meeting, including the

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<sup>85</sup> *Los Padres Nat’l Forest*, 60 FLRA at 649 (rejecting agency’s argument that complaint was not “formal” until it issued a letter acknowledging acceptance of the complaint).

<sup>86</sup> *Warren AFB II*, 31 FLRA at 552.

<sup>87</sup> *Id.* at 551-52.

<sup>88</sup> *Dep’t of the Air Force, Sacramento Air Logistics Ctr., McClellan AFB (McClellan AFB II)*, 29 FLRA 594, 605. The Authority affirmed this principle in *CBP, El Paso*, 62 FLRA at 244, further concluding that the agency’s interference with the union’s choice of representative was not justified under the “special circumstances” exception it has applied to the union’s designation of representatives under section 7114(a)(2)(B) of the Statute, which pertains to investigatory examinations. This exception is more fully discussed in the section of this Guidance addressing “Investigatory Examinations”.

<sup>89</sup> *McClellan AFB II*, 29 FLRA at 605.

<sup>90</sup> *Id.* at 606 (holding that notice to the bargaining unit witness was not sufficient because he was “the bargaining unit employee involved in the formal discussion, so it is not at all clear he could have adequately represented the Union’s interests”); see also *Dep’t of the Air Force, 63<sup>rd</sup> Civil Engineers Squadron, Norton AFB*, 22 FLRA 843, 847 (1986) (union’s interest cannot be adequately represented at a formal meeting to discuss a grievance where the union representative is the grievant and therefore would be “placed in the position of representing himself in his own grievance”).

opportunity to designate a representative of its own choosing.<sup>91</sup> Thus, the Authority has held that notice of a formal meeting provided to a union steward by virtue of his attendance at the meeting as an employee did not satisfy the notice requirement where the union president, who was normally notified of formal discussions, did not receive notice of the meeting.<sup>92</sup> Similarly, the Authority affirmed an arbitrator's finding that notice of a formal meeting to the union's local representative was not sufficient where the union had a contractual right to determine whether to send a national or other representative to formal meetings.<sup>93</sup> In another case, the Authority held that the burden of informing the union of a mediation session regarding an EEO complaint did not shift to the complainant bargaining unit member simply because he had chosen to be represented in the matter by a union representative.<sup>94</sup>

Upon receiving notice of a formal discussion, the union may waive its right to be represented at the discussion if the waiver is "clear and unmistakable." Applying this standard, the Authority found that a union waived its statutory right to be represented at certain formal discussions involving unit employees when, upon being provided with detailed notice of the discussions, it told management that it did not need to know about these meetings.<sup>95</sup> On the other hand, the exclusion of EEO disputes from the parties' negotiated grievance procedure does not equate to a waiver of the union's interest in being represented at formal discussions involving EEO complaints.<sup>96</sup>

## **E. Union Participation in the Meeting**

The union's right to be represented at formal discussions "means more than merely a right to be present," and encompasses the right to "comment, speak and make statements," so long as the representative does not take charge of, usurp, or disrupt the meeting.<sup>97</sup> The extent of the union's participation is governed by "a rule of reasonableness, which requires that there be respect for orderly procedures and that the comments be related to the subject matter addressed by the agency representative(s) at the meeting."<sup>98</sup> For example, an agency violated the Statute when its management representative interrupted the union's representative several times when he attempted to explain his understanding of new procedures related to a reorganization.<sup>99</sup> An

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<sup>91</sup> *McClellan AFB II*, 29 FLRA at 605-06; see also *GSA, Region 9, L.A., Cal.*, 56 FLRA 683, 685 (2000) (same).

<sup>92</sup> *Dep't of Treasury, Customs Serv., Miami, Fla.*, 29 FLRA 610, 614 (1987).

<sup>93</sup> *GSA, Region 9, L.A., Cal.*, 56 FLRA at 685.

<sup>94</sup> *Luke AFB*, 54 FLRA at 722-723 n.6 (concluding that the attendance of the union representative at an earlier mediation session did not relieve the agency of its obligation to inform the union of future sessions).

<sup>95</sup> *NLRB*, 46 FLRA 107, 110 (1992).

<sup>96</sup> *Dover AFB*, 57 FLRA at 309-10 (noting that the union might have agreed to exclude such matters "in order to avoid the expenditure of resources required to process an EEO grievance to arbitration").

<sup>97</sup> *Nuclear Regulatory Comm'n*, 21 FLRA 765, 767-68 (1986).

<sup>98</sup> *Id.* at 768 (noting further that the Authority will "consider the purpose of the meeting ... and all of the surrounding circumstances in determining the extent of a union representative's right to participate").

<sup>99</sup> *Id.*

agency was also found to violate the Statute by not allowing a union representative to comment regarding the compressed work schedule being discussed at a formal meeting.<sup>100</sup>

A union representative is bound by confidentiality rules that apply to the meeting or proceeding, such as those imposed by the Administrative Dispute Resolution Act or EEOC regulations.<sup>101</sup> Moreover, when formal discussions occur in the course of statutory appeals procedures, the union's institutional role is "obviously more restricted than its role in a negotiated grievance procedure."<sup>102</sup> For example, in determining the role of the union representative during depositions related to an MSPB complaint, the Authority relied upon federal procedural rules to conclude that the union had the right to be present but not to "actively participate at the deposition."<sup>103</sup>

## **F. Remedies for Formal Discussion Violations**

To address violations of section 7114(a)(2)(A), the Authority routinely orders the respondent agency (1) to commence providing the union with advance notice and the opportunity to be represented at formal discussions; and (2) to post a remedial notice.<sup>104</sup>

Under limited circumstances, the Authority has also ordered the agency to repeat the meeting to enable the union to ask questions and make comments as if it had been given notice of the meeting and an opportunity to actively participate. For instance, where the agency violated the Statute by denying the union's request to attend a meeting with a bargaining unit member to discuss his performance standards following his reinstatement pursuant to an MSPB settlement, the Authority required the agency, upon the request of the union, to repeat the meeting in the presence of the union's representative.<sup>105</sup> In another case, however, the Authority declined to order remedial training of supervisors who conducted formal discussions in violation of section 7114(a)(2)(A) because the supervisors' actions were not based on "ignorance of obligations under the Statute" – insofar as the "state of the law" was not settled at the time of the formal

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<sup>100</sup> *New Cumberland Army Depot*, 38 FLRA at 677.

<sup>101</sup> *Luke AFB II*, 58 FLRA at 535-36 (finding no indication in the record "that the Union would have objected to or failed to comply with any confidentiality requirements imposed by the mediator").

<sup>102</sup> *NTEU v. FLRA*, 774 F.2d 1181, 1188 (D.C.Cir. 1985).

<sup>103</sup> *INS, El Paso*, 47 FLRA at 187.

<sup>104</sup> See, e.g., *Luke AFB II*, 58 FLRA at 536; see also *FAA, Airways Facilities Division, Nw. Mountain Region, Wash.*, 60 FLRA 819, 821 (2005) (rejecting agency's argument that order should not specifically reference the opportunity to be represented at "discussions to mediate settlement of formal EEO complaints filed by bargaining unit employees" on grounds that "it is appropriate to set forth this level of detail ... to ensure that the Respondent avoids committing a similar unfair labor practice in the future").

<sup>105</sup> *DOL, Chi.*, 32 FLRA at 472-73 (noting the union's "obvious interest" in a meeting where "the job description, performance elements and performance standards of a position in the unit," as well as the employee's use of official time and the union's office, were discussed).

discussions – and it was not otherwise apparent how the training would effectuate the purpose and policies of the Statute.<sup>106</sup>

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<sup>106</sup> *VAMC, Phx., Ariz.*, 52 FLRA 182, 186 (1996) (also rejecting a request that the supervisors who committed the violations be specifically named in the posted notice).

## II. Investigatory Examinations

### A. Statutory Authority

Section 7114(a)(2) of the Statute provides:

An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at –

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if –

(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

(ii) the employee requests representation.

### B. Purpose of the Right

The union's right under the Statute to be represented at investigatory examinations is based on the similar right of private sector employees that was established by the Supreme Court in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) (*Weingarten*). When enacting the Statute, Congress modeled section 7114(a)(2)(B) after the Court's holding in *Weingarten* and, as a result, the term "Weingarten rights" is commonly used in the federal sector when referencing the union's right to be present at an investigatory interview. The Statute's legislative history "demonstrates that this statutory requirement is intended to provide rights to Federal sector bargaining unit employees consistent with those" provided by the *Weingarten* decision.<sup>107</sup>

The Supreme Court's decision in *Weingarten* was based upon the premise that when an employee is questioned during an investigatory examination which the employee perceives may result in discipline, the employee "may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors," and that a "knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview."<sup>108</sup> The Court also reasoned that by attending the interview, the exclusive

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<sup>107</sup> *BOP, Office of Internal Affairs, Wash., D.C. & Aurora, Colo. & BOP, FCI Englewood, Littleton, Colo.*, 54 FLRA 1502, 1509 (1998) (*FCI Englewood*), citing *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978* (Comm. Print 1979) (*Legislative History*) at 926; see also *NASA v. FLRA*, 527 U.S. 229, 236 (1999) ("Congress' specific endorsement of a Government employee's right to union representation by incorporating it in the text of the FSLMRS gives that right a different foundation than if it were merely the product of an agency's attempt to elaborate on a more general provision in light of broad statutory purposes"); cf. *INS, N.Y. Dist. Office, N.Y.C., N.Y.*, 46 FLRA 1210, 1218 (1993) (*INS, N.Y.C.*) (noting "that the legislative history of section 7114(a)(2)(B) also reflects Congressional recognition that the right to representation might evolve differently in the private and Federal sectors and that NLRB decisions would not necessarily be controlling in the Federal sector").

<sup>108</sup> *DOJ, BOP, Safford, Ariz.*, 35 FLRA 431, 439 (1990) (*BOP Safford*) (quoting *Weingarten*, 420 U.S. at 262-63).

representative “protects ‘the interests of the entire bargaining unit’” and “is able to exercise ‘vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly.’”<sup>109</sup> The Authority has concluded that the “purposes underlying the *Weingarten* right in the private sector – promoting a more equitable balance of power and preventing unjust disciplinary actions and unwarranted grievances – also apply to the right to representation created by section 7114(a)(2)(B).”<sup>110</sup>

### **C. Elements of a Section 7114(a)(2)(B) Claim**

In order for the representational right under section 7114(a)(2)(B) to be triggered, the following elements must be satisfied: (1) the meeting must be an examination of an employee by a representative of the agency; (2) in connection with an investigation; (3) the employee must reasonably believe that the examination may result in disciplinary action against the employee; and (4) the employee must request representation.<sup>111</sup> Each of the above-listed elements is discussed in greater detail below.

#### **1. Participants in the Meeting**

##### ***a. Employee in the Unit***

Representational rights under section 7114(a)(2)(B) are limited to employees in an appropriate unit. It is the employee’s bargaining unit status at the time of the investigatory examination – rather than his or her bargaining unit status during the events giving rise to the examination – which determines the *Weingarten* right.<sup>112</sup> The Authority has applied section 7114(a)(2)(B) rights to probationary employees.<sup>113</sup>

##### ***b. Representative of the Agency***

In most situations, the agency representative who conducts an investigatory examination will be the first or second level supervisor or a manager from the same agency or organization as the employee being investigated. In these types of situations, there usually is no disagreement about whether an agency representative participated in the meeting.

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<sup>109</sup> *FCI Englewood*, 54 FLRA at 1509 (quoting *Weingarten*, 420 U.S. at 260-61).

<sup>110</sup> *BOP Safford*, 35 FLRA at 439-40.

<sup>111</sup> *DOI, Bureau of Land Mgmt., Eugene Dist., Portland, Or.*, 68 FLRA 178, 181 (2015) (*BLM Portland*).

<sup>112</sup> *Dep’t of Navy, Charleston Naval Shipyard, Charleston, S.C.*, 32 FLRA 222, 228-31(1988) (*Charleston Shipyard*) (where employee was on detail to a position represented by AFGE during events giving rise to the investigation, but was represented by FEMTC during the examination, the employer violated the statute by refusing to allow an FEMTC representative to be present at the examination). The Authority distinguished this outcome from its decision in *Nuclear Regulatory Comm’n*, 29 FLRA 660 (1987), which was decided under section 7114(a)(2)(A).

<sup>113</sup> *VAMC, Jackson, Miss.*, 48 FLRA 787, 797-98 (1993) (*VAMC Jackson*) (“We find no basis on which to conclude that the employees’ status as probationers affects their statutory rights as Federal employees under section 7114(a)(2)(B). Nothing in the Statute or legislative history indicates that the rights afforded by section 7114(a)(2)(B) are based on an employee’s tenure status.”), *rev’d on recons. on other grounds*, 49 FLRA 171 (1994).

A parent agency is responsible for the actions of investigators it employs and utilizes to investigate its employees.<sup>114</sup> This is true even where the investigators receive direction and oversight by outside entities,<sup>115</sup> or where investigators from a separate component or a different regional office within the agency are utilized.<sup>116</sup> The Supreme Court has affirmed the Authority's position that an agency may be held responsible for the actions of investigators employed by its Office of Inspector General (OIG) when examining the agency's bargaining unit employees, even though OIG investigators operate with significant autonomy within agencies. The Court rejected the argument that section 7114 rights do not apply to such examinations because the investigators are not employed by the same entity within the agency that collectively bargains with the union.<sup>117</sup> The Authority has applied this principle to both civil and criminal OIG investigations.<sup>118</sup>

A subordinate activity can also be held responsible for the actions of investigators employed by another entity with the same agency so long as there is significant collaboration between the activity and the investigators with respect to the investigation. For example, the Authority has held subordinate activities responsible for the conduct of investigators from an agency's Office of Special Investigations (OSI) where there was "close collaboration" during the investigation between the activities and the OSI, including coordination regarding interview questions and the sharing of results and other work product.<sup>119</sup> Conversely, the Authority concluded that an activity was not responsible for the conduct of investigators from its agency's OIG where the activity's

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<sup>114</sup> *DOL, Mine Safety & Health Admin.*, 35 FLRA 790, 802-03 (1990) (*DOL, MSHA*) (investigator from the agency's Office of Inspector General acted as agency's representative).

<sup>115</sup> *DOJ, INS Border Patrol, El Paso, Tex.*, 36 FLRA 41, 50 (1990) (*INS, El Paso*) ("Because the [Office of Professional Responsibility] investigators are employed by the INS, as is [the interviewed employee], and were questioning [the employee] regarding possible misconduct on the part of agency employees in connection with their work, the fact that they were questioning [the employee] under the direction and oversight of a U.S. Attorney does not affect our determination that they were acting as representatives of the Agency"), *remanded sub nom. on other grounds, INS, El Paso v. FLRA*, 939 F.2d 1170 (5<sup>th</sup> Cir. 1991).

<sup>116</sup> *IRS, Wash., DC & Hartford Dist. Office*, 4 FLRA 237, 245-48 (1980) (*IRS, Hartford*), *enf'd sub nom. IRS, Hartford v. FLRA*, 671 F.2d 560 (D.C. Cir. 1982); *see also DOD, Def. Criminal Invest. Serv., DLA*, 28 FLRA 1145, 1149-50 & n.2 (1987) (holding the Department of Defense responsible for the actions of investigators employed by the Defense Criminal Investigative Service (DCIS), a component of its OIG, even where the employees being interviewed were employed by the DLA, a separate component within DOD, on grounds that "[a]n organizational entity of an agency not in the same 'chain of command' as the entity at the level of exclusive recognition violates section 7116 of the Statute by unlawfully interfering with the rights of employees other than its own"), *enf'd sub nom. DCIS v. FLRA*, 855 F.2d 93 (3d Cir. 1988).

<sup>117</sup> *NASA*, 527 U.S. at 237-43 (1999) (rejecting agency's argument that the OIG's independence under the Inspector General Act rendered the OIG's employees incapable of acting as agency representatives).

<sup>118</sup> *DOJ, Wash., DC*, 56 FLRA 556, 560 (2000) (the relationship between the Office of Inspector General and the agency discussed in *NASA*, 527 U.S. 229 does not change when a criminal matter is investigated).

<sup>119</sup> *Dep't of Air Force, Ogden Air Logistics Ctr., Hill AFB, Utah*, 36 FLRA 748, 764 (1990) (*Hill AFB*); *see also Lackland AFB Exch., Lackland, AFB, Tex.*, 5 FLRA 473 (1981) (*Lackland AFB*) (subordinate activity held responsible for conduct of OSI investigators where it worked closely with the investigators during the investigation and used their work product for its own purposes); *but see Hill AFB*, 68 FLRA 460, 464-65 (2015) (holding that AFOSI investigators cannot act as representatives of an agency under section 7114(a)(2)(B) by virtue of their exclusion from the Statute's provisions pursuant to Executive Order 12,171), *appeal docketed*, No.15-9542 (10<sup>th</sup> Cir. June 9, 2015).

involvement was generally limited to referring the matter to the OIG and arranging the interview schedules, and it did not provide substantive input into the conduct of the investigation.<sup>120</sup>

An agency can also be held liable for *Weingarten* violations committed by investigators employed by a separate federal agency where it is shown that the investigators were performing a function of the agency by conducting the examination, and the agency exercised sufficient control over the investigators' actions during the examination.<sup>121</sup> The Authority has concluded, however, that investigators employed by agencies or activities excluded from coverage of the Statute by virtue of an Executive Order issued under section 7103(b)(1) of the Statute do not act as "representatives" of an agency when conducting investigatory examinations, and that section 7114(a)(2)(B) therefore does not apply to such examinations.<sup>122</sup>

### *c. Representative of the Union*

The exclusive representative has the right to designate its representatives when fulfilling its responsibilities under section 7114(a)(2)(B) and – absent "special circumstances" – an agency violates the Statute when it refuses to honor the union's designation of a representative.<sup>123</sup> The union has the right to choose which individual will serve as its representative at a particular examination, and it may designate its attorney to serve as a *Weingarten* representative.<sup>124</sup> Because the representation right belongs to the union, an agency cannot cure its failure to provide requested union representation by instead offering to provide the employee with legal counsel during the examination.<sup>125</sup>

An agency may prohibit a particular representative from representing the employee if it can demonstrate "special circumstances" that justify precluding that particular individual from serving as a representative. The "special circumstances" exception, however, is narrowly construed "to preserve the union's normal prerogatives."<sup>126</sup> Applying this standard, the Authority has held that an agency was justified, in order to "preserve the integrity of [the] investigation," in refusing to accept the union's designated representative because he was a witness to the incident under investigation who had yet to be interviewed.<sup>127</sup> An agency may also deny the union's

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<sup>120</sup> *DOJ, BOP, FCI Forrest City, Ark.*, 57 FLRA 787, 790 (2002) (holding that sufficient level of collaboration requires an "active and continuing effort by the activity to be involved in the investigation").

<sup>121</sup> *NTEU*, 66 FLRA 506, 510-11 (2012) (OPM investigators acted as the agency's representatives when conducting background investigations for which the agency was primarily responsible, and which OPM performed by virtue of authority delegated from the agency, but not when conducting suitability determinations, which is an OPM function independent of agency control), *review denied sub nom. NTEU v. FLRA*, 754 F.3d 1031 (D.C.Cir. 2014).

<sup>122</sup> *Hill AFB*, 68 FLRA at 464-65 (because AFOSI's exclusion from the Statute under Executive Order 12,171 "preclude[s] finding AFOSI to be a 'representative of the [A]gency' under § 7114(a)(2)(B) of the Statute," conduct of AFOSI investigators could not form the basis of a *Weingarten* violation).

<sup>123</sup> *FCI Englewood*, 54 FLRA at 1512-13.

<sup>124</sup> *Fed. Prison Sys., FCI Petersburg, Va.*, 25 FLRA 210, 212 (1987) (*FCI Petersburg*).

<sup>125</sup> *Lackland AFB*, 5 FLRA at 486-87.

<sup>126</sup> *FCI Englewood*, 54 FLRA at 1513.

<sup>127</sup> *FCI Petersburg*, 25 FLRA at 211. This exception does not apply, however, if the union representative's examination as part of the investigation had been completed. *FCI Englewood*, 54 FLRA at 1513 (the "mere fact that



choice of representative where the representative is the subject of the investigation because “the subject of an investigation, unlike a witness, has a direct stake in the outcome of the investigation.”<sup>128</sup> The Authority has also favorably noted NLRB precedent holding that an employer may deny the union’s choice of representative because the representative engaged in obstructive behavior during an earlier investigative examination.<sup>129</sup>

Whether an agency must postpone an examination because a particular union representative is not available depends upon such factors as the reason for the representative’s unavailability; the availability of other capable representatives; and the impact of postponing the investigation.<sup>130</sup> Applying these factors, the Authority has held that an agency did not violate section 7114(a)(2)(B) when it refused to postpone investigatory interviews due to the unavailability of the union’s designated representatives, where the interviews were scheduled a week in advance, the inability of the designated representatives to attend the interviews was not caused by any agency action but rather “resulted from the Union’s decision to have the officers attend other functions,” and the agency did not otherwise interfere with the Union’s ability to designate another representative to attend the interviews.<sup>131</sup>

## **2. An Examination in Connection with an Investigation**

### ***a. Governing Factors***

The right to representation under section 7114(a)(2)(B) only applies to an examination in connection with an investigation. Because the term “examination” is not defined by the Statute, the Authority examines the totality of circumstances surrounding each particular meeting and considers such factors as whether the meeting was: (1) designed to ask questions and solicit information from the employee; (2) conducted in a confrontational manner; (3) designed to secure an admission from the employee of wrongdoing; and/or (4) designed for the employee to explain his/her conduct.<sup>132</sup>

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the chief steward was a witness to the incident under investigation alone is not enough to warrant precluding her from serving as the Union’s representative,” where the agency failed to show how this would harm the integrity of its investigation).

<sup>128</sup> *Dep’t of Treasury, Customs Serv., Customs Mgmt. Ctr., Ariz.*, 57 FLRA 319, 322 (2001) (*Customs Serv., Ariz.*).

<sup>129</sup> *FCI Englewood*, 54 FLRA at 1512 (citing *N.J. Bell Tel. and Local 827, IBEW*, 308 NLRB 277, 282 (1992)).

<sup>130</sup> *INS, N.Y.C.*, 46 FLRA at 1222-23.

<sup>131</sup> *Id.* (noting, however, that a postponement “would have better served all parties’ interests”); *see also FCI Englewood*, 54 FLRA at 1512 (agency not required to postpone an examination to accommodate the attendance of the union’s off-site designated representative where an on-site representative was available to attend the examination).

<sup>132</sup> *See, e.g., DOJ, BOP, Metro. Corr. Ctr., N.Y.C., N.Y.*, 27 FLRA 874, 879 (1987) (*Metro. Corr. Ctr.*) (agency sought information from the employee about previous statements to management and asked for explanations of inconsistencies); *see also Dep’t of Navy, U.S. Marine Corps Logistics Base, Albany, Ga.*, 4 FLRA 397, 403 (1980) (employee questioned about absences); *Lackland AFB*, 5 FLRA at 485 (employee questioned about cash shortages); *FAA, St. Louis Tower, Bridgeton, Mo.*, 6 FLRA 678, 686 (1981) (*FAA, Bridgeton*) (employee questioned about use of abusive language).

A meeting or hearing need not be mandatory to be considered an “examination” so long as it constitutes the employee’s chance to be heard on the matter being investigated.<sup>133</sup> Unlike the representational rights related to formal discussions, the right to representation under section 7114(a)(2)(B) is “not contingent upon the subject matter of the examination – that is, whether it concerns a grievance, personnel policy or practice, or other general condition of employment.”<sup>134</sup> An “examination” may relate to either a criminal or civil investigation.<sup>135</sup>

Moreover, an examination does not have to occur on-site, nor does it have to occur on the employee’s duty time, to implicate representational rights.<sup>136</sup> An “examination” can also take place via telephone<sup>137</sup> or pursuant to a request for a written response.<sup>138</sup> The Authority has held, however, that an agency’s covert monitoring of an employee’s telephone conversations with a customer did not constitute an “examination” because “there was no direct questioning or examination of the employee by agency management,” and the employee did not feel compelled to respond to questions posed during the conversations.<sup>139</sup> On the other hand, an employee’s questioning of another employee at the insistence of a special agent who was investigating the employee’s misconduct “plainly” constituted an “examination” where the questions were provided by the special agent for purposes of the investigation.<sup>140</sup>

#### ***b. Performance Meetings, Counseling Sessions, Desk Audits***

The Authority has routinely held that performance counseling sessions and other meetings intended to convey concerns over the quality or timeliness of an employee’s work performance do not constitute “examinations” within the meaning of section 7114(a)(2)(B) where they are not designed to elicit information from the employee, but rather to inform and counsel the employee

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<sup>133</sup> *AFGE, Local 1941 v. FLRA*, 837 F.2d 495, 499 (D.C. Cir. 1988) (although physician was technically not required to appear and answer questions at meeting of hospital’s credentials committee, the meeting constituted an “examination” because as a “practical matter” the physician had no choice but to attend if he wished to be heard on matters concerning his professional competence); *VAMC Jackson*, 48 FLRA at 798 (although nurses were not ordered to attend a standards board hearing, they were required to appear if they wished to be heard regarding their retention following probationary period).

<sup>134</sup> *Charleston Shipyard*, 32 FLRA at 230-31 (noting further that “Congress intended that the focus of the right under section 7114(a)(2)(B) be on the timing of the examination and, more particularly, the employee’s need for protection due to the confrontational nature of the examination”).

<sup>135</sup> *DOJ, Wash., D.C.*, 56 FLRA at 560; *see also IRS, Jacksonville Dist. & Se. Reg’l Office of Inspection*, 23 FLRA 876, 878-79 (1986) (*IRS Jacksonville*).

<sup>136</sup> *IRS, L.A. Dist. Office*, 15 FLRA 626, 637 (1984) (a tax audit of an IRS employee that took place in an attorney’s office as part of an on-going investigation into employee’s misconduct was an “examination”).

<sup>137</sup> *NTEU v. FLRA*, 835 F.2d 1446, 1451 (D.C. Cir. 1987).

<sup>138</sup> *INS, Border Patrol, Del Rio, Tex.*, 46 FLRA 363, 363 (1992) (*INS, Del Rio*) (rejecting argument that memorandum required of border patrol agent explaining circumstances of a prisoner escape did not constitute an “examination” because it was not confrontational).

<sup>139</sup> *IRS Jacksonville*, 23 FLRA at 879-80 (further concluding that the presence of a union representative during such surveillance would be “utterly incongruous with the surreptitious nature of the agency’s surveillance activities”).

<sup>140</sup> *NTEU*, 835 F.2d at 1450-51.

regarding performance deficiencies.<sup>141</sup> It has reached the same conclusion regarding meetings to announce disciplinary actions,<sup>142</sup> as well as meetings conducted for the purpose of giving the employee an assignment or a test<sup>143</sup> or as part of a non-disciplinary classification desk audit.<sup>144</sup> However, the title of a meeting or the way management characterizes it does not control whether the meeting is a counseling session or an investigatory examination.<sup>145</sup> Also, a meeting that starts off as a performance counseling session may turn into an examination in connection with an investigation depending upon the dialogue and dynamics of the meeting.<sup>146</sup>

*c. Physical Exams, Fitness for Duty Exams, Security Clearance Interviews*

The Authority has affirmed an arbitrator's finding that *Weingarten* rights attached to an interview conducted with an employee to determine whether his security clearance should be withdrawn.<sup>147</sup> In reaching this conclusion, it rejected the agency's argument that section 7114(a)(2)(B) did not apply to security clearance examinations because the Executive Order and federal regulation governing such examinations do not incorporate *Weingarten* rights into the security-clearance process, holding that "nothing in those authorities indicates that §7114(a)(2)(B) is inapplicable to investigatory interviews that are conducted in connection with security-clearance investigations."<sup>148</sup>

The Authority has not explicitly ruled on whether a physical examination, a drug test or a car search can constitute an investigatory examination for purposes of section 7114(a)(2)(B).<sup>149</sup>

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<sup>141</sup> *SSA, Albuquerque, N.M.*, 56 FLRA 651, 655 (2000) (*SSA Albuquerque*) ("[t]he fact that a conversation occurs need not automatically convert a meeting into an 'exam'"); *see also, IRS*, 8 FLRA 324, 331 (1982) (meeting was not an "examination" and instead was "pure counseling" in nature where its sole purpose was to "highlight [the employee's] deficiencies ... and tell him how to raise the level of his performance to expected standards"); *Air Force 2750th Air Base Wing HQ, Air Force Logistics Command, Wright-Patterson AFB, Ohio*, 9 FLRA 871, 872 (1982) (*Wright-Patterson AFB*) (meetings were conducted "for the sole purpose of, and were limited to, informing the employee of a decision already reached" that improper conduct had occurred and to counsel the employee); *Air Force 2750th Air Base Wing HQs, Air Force Logistics Command, Wright-Patterson AFB, Ohio*, 10 FLRA 97, 99 (1982) (*Wright-Patterson AFB II*) ("counseling session during which [the employee] was made aware of performance deficiencies without being solicited for additional information" was "remedial rather than investigatory in nature"); *IRS*, 15 FLRA 360, 361 (1984) (meeting to warn employee about making threats to co-workers is not an "examination" where it was not designed to "ask questions, elicit additional information, have the employee admit his alleged wrongdoing, or explain his conduct").

<sup>142</sup> *Wright-Patterson AFB*, 9 FLRA at 872.

<sup>143</sup> *Dep't of Navy, Portsmouth Naval Shipyard*, 7 FLRA 766, 780 (1982) (meeting where employee is informed that his work assignment was to take a test to determine where he needed help, but where "no questions of an investigatory nature were asked," is not an "examination").

<sup>144</sup> *OPM*, 20 FLRA 183, 184 (1985) ("section 7114(a)(2)(B) by its own terms does not apply to a nondisciplinary classification desk audit").

<sup>145</sup> *FAA, Bridgeton*, 6 FLRA at 686 (meeting where employee was questioned about use of abusive language is investigatory examination despite being called a "counseling session").

<sup>146</sup> *Wright-Patterson AFB II*, 10 FLRA at 107; *SSA, Albuquerque*, 56 FLRA at 658.

<sup>147</sup> *Nuclear Regulatory Comm'n*, 65 FLRA 79, 83 (2010) (*NRC*) ("the plain wording of § 7114(a)(2)(B) does not exclude security-clearance-related examinations from the definition of 'examination'").

<sup>148</sup> *Id.* at 81.

<sup>149</sup> The NLRB has found that a drug test conducted as part of an investigation can constitute an investigatory examination under *Weingarten*. *Safeway Stores*, 303 NLRB 989 (1991); *see also Ralph's Grocery Co.*, 361 NLRB

Moreover, neither the Authority nor the NLRB has squarely decided whether *Weingarten* rights apply to interviews conducted in connection with physical exams, including fitness-for-duty examinations. The NLRB has held that a physical fitness-for-duty exam did not trigger *Weingarten* rights because it was not “part of a disciplinary procedure,” even where it was “promoted by personnel problems such as excessive absenteeism,” and even where the result of the exam “might lead to recommendations respecting the employee’s future work assignments.”<sup>150</sup> It premised this conclusion, however, upon its finding that the exams were not confrontational, and upon the “absence of evidence that questions of an investigatory nature were in fact asked at these examinations,” and suggested that in a different case “it might be appropriate and feasible to provide union representation during the interview portion of an examination while excluding the representative from the ‘hands on’ physical examination.”<sup>151</sup>

The Authority has adopted a similar approach by rejecting the premise that a fitness for duty examination could never qualify as an investigatory interview under section 7114(a)(2)(B), and instead remanding an arbitrator’s decision for further factual findings “relating to whether the specific fitness-for-duty examination in this case was conducted in connection with an investigation.”<sup>152</sup> Towards this end, the Authority noted that the arbitrator had failed to make factual findings “concerning the nature of the questions asked during the fitness-for-duty examination that would allow the Authority to determine whether they were investigatory in nature.”<sup>153</sup> Because these issues were not addressed by the Authority upon its reconsideration of the case following its remand to the arbitrator, this issue remains unresolved.

### **3. Reasonable Belief of Discipline**

To trigger the right to representation, an employee must reasonably believe that the examination may result in disciplinary action against the employee. The reasonable belief determination is based on objective – not subjective – factors.<sup>154</sup> The relevant inquiry is “whether, in light of the *external* evidence, a reasonable person would decide that disciplinary action might result from

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No. 9 (July 31, 2014). Additionally, in *DOJ, BOP, FCI*, 14 FLRA 334, 351-52 (1984), the ALJ found that *Weingarten* rights apply to employee strip searches, but the Authority did not reach this issue on review of the decision.

<sup>150</sup> *USPS*, 252 NLRB 61, 61 (1980).

<sup>151</sup> *Id.*

<sup>152</sup> *DOJ, BOP, FCC, Coleman, Fla.*, 63 FLRA 351, 354 (2009).

<sup>153</sup> *Id.* On remand, the arbitrator found that *Weingarten* did not apply because the examination was not administered by agency representatives, but awarded damages to the grievant because he was harassed and constructively discharged. The Authority set aside this decision because it exceeded the arbitrator’s authority, and did not further discuss the issue of whether the examination was in connection with an investigation within the meaning of section 7114(a)(2)(B). *DOJ, BOP, FCC, Coleman, Fla.*, 66 FLRA 300 (2011).

<sup>154</sup> *Lackland AFB*, 5 FLRA at 485 (employee reasonably believed discipline could arise where she was informed at the outset of the interview that she is being investigated for cash register shortages); *IRS v. FLRA*, 671 F.2d 560 (D.C. Cir. 1982) (affirming ALJ’s refusal to consider affidavit demonstrating that the employee did not actually fear discipline); *NTEU*, 835 F.2d at 1451 (employee who was asked questions by another employee at the secret behest of management “could not have had a reasonable apprehension of punishment”).

the examination.”<sup>155</sup> An employee need not be the subject of the investigation to have a reasonable belief that discipline could arise from his responses to interview questions.<sup>156</sup> Similarly, even where the purpose of the interview is not to determine possible disciplinary action against the employee, the employee may still harbor a reasonable belief that discipline could arise from the interview where the agency admits that information obtained during the interview could be used for a disciplinary action.<sup>157</sup>

A reasonable belief of discipline can also be found even if the agency was not contemplating discipline at the time of the examination. It is the possibility, rather than the inevitability, of future discipline that determines the right to representation.<sup>158</sup>

In some circumstances, an express grant of immunity from possible disciplinary action is sufficient to cure an employee’s objective fear of discipline arising from the interview.<sup>159</sup> Grants of immunity, however, do not defeat an employee’s reasonable fear of potential discipline where the employee has a reasonable basis for doubting the validity of the immunity.<sup>160</sup> Moreover, even where an administrative regulation places limits on the use of information obtained during an

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<sup>155</sup> *AFGE, Local 2544 v. FLRA*, 779 F.2d 719, 724 (D.C.Cir. 1985) (emphasis in original); see also *BLM Portland*, 68 FLRA at 181 (employee reasonably feared discipline even if management told him meeting was to address safety concerns and was non-disciplinary where other factors, including the presence of three supervisors, supported the reasonable belief).

<sup>156</sup> *IRS, Hartford*, 4 FLRA at 250 (employee who was responsible for safekeeping and confidentiality of tax records of the investigated employee could have reasonably believed that discipline may result if his handling of the tax records was deemed improper); *DOJ, OIG, Wash., D.C.*, 47 FLRA 1254, 1282 (1993) (although only a witness, an employee who was interviewed as part of an investigation could have reasonably believed that discipline would result if he was found to have knowledge of the misconduct of others).

<sup>157</sup> *NRC*, 65 FLRA at 80 (affirming arbitrator’s finding that even if revocation of a security clearance is not a disciplinary action, employee could reasonably fear discipline arising from a security clearance interview based upon agency’s admission that “information obtained in the course of a security clearance interview could be used in a disciplinary proceeding”).

<sup>158</sup> *Wright-Patterson AFB*, 9 FLRA at 880-81 (employee reasonably feared discipline based upon management’s inquiry into his misconduct, even where management was not contemplating discipline at the time of the interview); *Dep’t of Navy, Norfolk Naval Base, Norfolk, Va.*, 14 FLRA 731, 747 (1984) (*Norfolk*) (employee had a reasonable belief that discipline could arise from investigation into his alleged insubordination where possible administrative decisions were being formulated at the time of the interview); see also *AFGE, Local 2544*, 779 F.2d at 724 (noting that “disciplinary action will rarely be decided upon until after the results of the inquiry are known”).

<sup>159</sup> *SSA, Albuquerque*, 56 FLRA at 658 (“a grant of immunity may eliminate reasonable fear of discipline”).

<sup>160</sup> *AFGE, Local 2544*, 779 F.2d at 724-26 (employee could have reasonably harbored doubts about the ability of Office of Professional Responsibility agents to grant him administrative immunity, where neither the employee, the union representative nor the disciplining officer had ever heard of such immunity; there was no “ascertainable policy for granting immunity”; and the employee had no way of knowing whether the grant was otherwise authorized by agency policy); see also *BLM Portland*, 68 FLRA at 181 (affirming arbitrator’s decision that employee reasonably feared disciplined under the circumstances “[e]ven assuming the Agency told the grievant the meeting was for safety concerns and was non-disciplinary”).

investigatory interview, an employee may still be found to have a reasonable fear of discipline arising from the interview where he is not informed of this limitation.<sup>161</sup>

#### **4. Employee's Request for Union Representation and Agency's Response**

The union's right to be represented at an examination is dependent upon the employee's request for representation.<sup>162</sup> An employee's request must be sufficient to put the employer on notice of the employee's desire for representation but need not be made in any specific form.<sup>163</sup> An employee need not repeat an otherwise sufficient request for representation throughout different phases of an investigatory interview.<sup>164</sup> Absent a request by the employee for representation, however, the union does not have an independent right to attend the investigatory interview.<sup>165</sup>

Whether the employee has adequately requested representation depends upon the facts of each case. An agency should seek clarification of a statement if it is uncertain a request has been made. The failure to do so has been viewed as a denial which effectively prohibits the employee from making the request clearer and forecloses further discussion to clarify the request.<sup>166</sup>

If an employee makes a valid request for representation, an agency has three options: (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice between continuing the interview without representation or having no interview and foregoing the benefits that might be derived from the interview.<sup>167</sup> If the agency has given an employee the option of continuing an interview without representation or having no interview at all, and the employee elects to continue without representation, the employee has waived the right to

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<sup>161</sup> *VAMC Hampton, Va.*, 51 FLRA 1741, 1748-49 (1996) (also noting that an independent disciplinary investigation could have resulted from the interview).

<sup>162</sup> *DOJ, BOP, Terre Haute, Ind.*, 38 FLRA 1438, 1441 (1991).

<sup>163</sup> *DOJ, BOP, Office of Internal Affairs, Wash., D.C.*, 55 FLRA 388, 394 (1999) (*BOP, OIA*) (employee who requests an attorney and then states "I want somebody to talk to" has sufficiently requested union representation); see also *Metro. Corr. Ctr.*, 27 FLRA at 880 (employee's statement that "maybe I need to see a union rep" was a valid request); *Norfolk Naval Shipyard, Portsmouth, Va.*, 35 FLRA 1069, 1074 (1990) (*Portsmouth*) (while no specific format is required, the request must put the employer on notice that the employee desires representation); *DOJ, INS & Border Patrol, Wash., D.C.*, 41 FLRA 154, 167 (1991) (employee's statement that "he would like to speak to a lawyer or somebody to advise him" is sufficient); *INS, Del Rio*, 46 FLRA at 373 ("I am officially requesting representation" is sufficient to trigger representation rights for two other employees where employee is acting as spokesperson for the other employees).

<sup>164</sup> *Lackland AFB*, 5 FLRA at 486-87 (employee was not required to repeat request for union representation to OSI agent where request was already made three times before to agency detectives); *Norfolk*, 14 FLRA 82, 83 (1984) (not necessary for employee to repeat request to supervisor who later attended the examination).

<sup>165</sup> *Portsmouth*, 35 FLRA at 1077 (where employee did not request representation, agency could order union steward to leave the examination).

<sup>166</sup> *BOP, OIA*, 55 FLRA at 394 (agency "effectively foreclosed further discussion to clarify whether [the employee] wanted a Union representative").

<sup>167</sup> *Portsmouth*, 35 FLRA at 1077; see also *DOL, MSHA*, 35 FLRA at 804 (employee whose request for union representation is denied must be offered a choice between continuing the interview without a union representative or having no interview).

representation.<sup>168</sup> Where an employee requests union representation for only one line of questioning, the agency does not violate the Statute by ceasing that line of inquiry but proceeding with questioning on other issues.<sup>169</sup>

Although an employee may waive the right to representation, the waiver must be “clear and unmistakable.”<sup>170</sup> Whether an employee has waived his or her right to representation is determined by objective factors, and a waiver is not valid if it is coerced by agency representatives.<sup>171</sup> For instance, where an employee was informed by an agency investigator that he might be accused of criminal misconduct and it would therefore be in his best interest not to have a union representative present at an interview, the employee’s subsequent waiver was deemed to be a product of coercion.<sup>172</sup> Moreover, an employee’s waiver of union representation in a prior interview does not prospectively apply to future interviews on the same subject.<sup>173</sup> On the other hand, where an employee requests union representation but then agrees to proceed with an interview prior to the representative’s appearance, the Authority has found that the employee validly waived his right to representation.<sup>174</sup> The Authority has also found no violation of the Statute where the agency postponed an interview to allow the employee to obtain his union representative but then proceeded with the interview after the employee returned without his representative.<sup>175</sup>

Where all of the elements of section 7114(a)(2)(B) have been met, an agency commits an unfair labor practice by disciplining an employee for requesting and insisting upon union representation at an investigatory interview.<sup>176</sup>

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<sup>168</sup> *DOJ, U.S. Pen., Leavenworth, Kan.*, 46 FLRA 820, 822 (1992) (after employee’s request for union representation was denied, the employee’s continued participation in the interview was uncoerced where he was told that he did not have to answer any questions and was free to leave); *but see Metro. Corr. Ctr.*, 27 FLRA at 880 (employee did not abandon request for representation by failing to stop the investigatory interview where employee was “at no time informed that he could leave the room”).

<sup>169</sup> *SSA, Balt., Md.*, 19 FLRA 748, 748 (1985) (no violation because “when the employee indicated that, if the inquiry concerning his use of official time continued, he would wish to have a Union representative present, the Respondent’s official ceased this line of questioning”).

<sup>170</sup> *Portsmouth*, 35 FLRA at 1077.

<sup>171</sup> *INS, El Paso*, 42 FLRA 834, 838 (1991).

<sup>172</sup> *Id.*; *but see INS, El Paso v. FLRA*, 939 F.2d 1170, 1175 (5<sup>th</sup> Cir. 1991) (“The mere fact that an interview would benefit an employee is not sufficient to render the decision to participate involuntary”).

<sup>173</sup> *BOP, OIA*, 55 FLRA at 394 n. 10 (Statute affords right to representation “at each such examination”).

<sup>174</sup> *DOJ, BOP, FCI*, 14 FLRA at 336 (employee waived request for representation when, after being told the union representative would be there in ten minutes, the employee told management it could proceed with the interview); *Army & Air Force Exch. Serv., Rocky Mtn. Area Exch., Fort Carson, Nev.*, 16 FLRA 794, 802-03 (1984) (employee withdrew request for union representation when, after waiting for union representative who was en route, the employer suggested that the interview continue because it was close to quitting time and the employee merely shrugged and proceeded with the interview).

<sup>175</sup> *DOL, Emp’t Standards Admin.*, 13 FLRA 164, 164 (1983) (finding that the agency took “every reasonable step” to provide the opportunity for representation).

<sup>176</sup> *Norfolk*, 14 FLRA at 748-49; *VAMC, Fort Wayne, Ind.*, 39 FLRA 717, 721 (1991).

#### D. Union Representative's Participation at the Examination

The union representative at an investigatory examination has the right to take an active role. This includes the freedom to assist and consult with the affected employee.<sup>177</sup> This also includes the right to speak or otherwise participate on the record in a formal proceeding.<sup>178</sup> The union representative's role properly includes seeking clarification of questions and suggesting other avenues of inquiry.<sup>179</sup> The union representative can also elicit favorable facts from the employee.<sup>180</sup> Moreover, the Authority has found that a union representative did not engage in impermissible conduct during an investigatory exam where he made statements for the record, pointed to an employee's previous answers in a document to refresh his recollection, and whispered in the employee's ear to ensure that his answer to a question was complete.<sup>181</sup> An agency commits an unfair labor practice by improperly disciplining a union representative for attempting to effectively and legitimately assist the employee during an interview.<sup>182</sup>

An agency, however, may limit the union representative's participation if the representative is interfering in its ability to achieve the legitimate objectives of the investigation or if otherwise necessary to ensure the investigation's integrity.<sup>183</sup> On this point, the Authority has favorably cited the principle that an employer "'is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation.'"<sup>184</sup> It has also emphasized that the "presence of a Union representative at an examination does not interfere with management's right to insist that the employee be responsive, or [with] its right to decide

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<sup>177</sup> *NRC*, 65 FLRA at 84.

<sup>178</sup> *VAMC Jackson*, 48 FLRA at 799 ("precluding the Union representative from speaking or otherwise participating on the record in the formal proceedings does not equate to meaningful representation"); *BOP Safford*, 35 FLRA at 440 (violation where union representative told to remain silent); see also *NASA*, 50 FLRA 601, 609 (1995) (agency violated Statute by imposing ground rules on OIG examination relegating union representative to "role of a mere 'witness' at the examination" and instructing the employee not to speak or look at the representative), *enf'd sub nom. FLRA v. NASA*, 120 F.3d 1208 (11th Cir. 1997), *aff'd*, 527 U.S. 229 (1999); see also *Customs Serv., Region VII, L.A., Cal.*, 5 FLRA 297, 307 (1981) (*Customs Serv., Cal.*) (violation where a representative's participation was limited to "practice" interview prior to actual taped interview); *FAA, Bridgeton*, 6 FLRA at 687 (union representative unlawfully disciplined for taking an active role during investigatory interview and for not abiding by an agency order to be quiet).

<sup>179</sup> *NRC*, 65 FLRA at 84 (noting that "'some interruption by way of comments [regarding] the form of questions or statements as to possible infringements of employee rights, should properly be expected from the employee's representative'" (quoting *Customs Serv., Cal.*, 5 FLRA at 307)).

<sup>180</sup> *BOP, OIA*, 52 FLRA 421, 433 (1996) (union representative's role includes the "right to assist the employee in presenting facts").

<sup>181</sup> *NRC*, 65 FLRA at 85-86 (explaining that, "[b]y not allowing the union representative to counsel the employee before he answered questions and then precluding the employee from adding to his answers after he had answered them without assistance, the Agency did not allow the union representative to assist the employee in presenting facts in his own defense").

<sup>182</sup> *FAA, Bridgeton*, 6 FLRA at 687 (discipline unlawful where union representative's actions were not of "such an outrageous and insubordinate nature to remove them from the protection of the Statute").

<sup>183</sup> *NASA*, 50 FLRA at 607.

<sup>184</sup> *NRC*, 65 FLRA at 84 (quoting *Weingarten*, 420 U.S. at 260)



the scope of the examination.”<sup>185</sup> In addition, the union representative’s participation may be limited if the representative is verbally abusive or interferes with the interview by interrupting the employee’s answers.<sup>186</sup> An agency may also prohibit a union representative from tape recording an interview if doing so would be contrary to agency policy.<sup>187</sup>

The Authority has held that, while the Statute does not grant a *per se* right to engage in private conferences outside the presence of an investigator during an investigatory examination, an agency should allow such conferences where they are necessary to afford the union representative the ability to effectively represent the employee and do not interfere with the integrity of the investigation.<sup>188</sup> Conversely, where the union representative and the employee were allowed to confer in the conference room during 15-minute hourly breaks, the agency was not required to allow additional conferences outside of the interrogation room.<sup>189</sup>

Confidential communications between a union representative and an employee that occur during the course of representation constitute protected activity under the Statute. An agency may not interfere with the confidentiality of such information unless its confidentiality has been waived or the agency establishes an overriding need for the information.<sup>190</sup>

## **E. Union’s Right to Information About the Examination**

Since effective representation at an investigatory examination often would be difficult or impossible without certain information, information requested in connection with a union's representation of an employee at such an investigation is relevant to a union’s representational responsibilities under the Statute. The right to representation includes access to information that will allow the union to become familiar with the employee's circumstances and to effectively assist the employee and participate in the interview.<sup>191</sup> In considering requests for such information, the Authority balances the right of a union to obtain relevant information for an investigatory examination against the interests of an agency in investigating and disciplining

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<sup>185</sup> *IRS Jacksonville*, 23 FLRA at 878-79.

<sup>186</sup> *NRC*, 65 FLRA at 84; see also *AFGE, Local 2145*, 64 FLRA 661, 664-65 (2010) (applying the “flagrant misconduct” test in *Dep’t of Air Force, Grissom AFB, Ind.*, 51 FLRA 7, 11-12 (1995), to determine whether agency could legitimately discipline a union official for actions taken while representing a unit member during an investigatory hearing pursuant to section 7114(a)(2)(B)).

<sup>187</sup> *INS, San Diego, Cal.*, 13 FLRA 591, 604-05 (1993) (union representative could not insist upon tape recording an interview thereby obstructing the Office of Professional Responsibility in its conduct of the investigation), *enfd sub nom. INS v. FLRA*, 760 F.2d 278 (9<sup>th</sup> Cir. 1985).

<sup>188</sup> *DOJ, Wash., D.C.*, 46 FLRA 1526, 1569 (1994) (brief conference outside of hearing room did not interfere with the integrity of the investigation), *vacated and remanded on other grounds, DOJ v. FLRA*, 39 F.3d 361 (D.C. Cir. 1994).

<sup>189</sup> *BOP, OIA*, 52 FLRA at 432-35.

<sup>190</sup> *Customs Serv., Ariz.*, 57 FLRA at 324-25 (finding that agency had established need to question employee about whether union representative told him to lie during an earlier investigatory examination, where the agency had no other way to ascertain this information).

<sup>191</sup> *Id.*

misconduct.<sup>192</sup> Applying this standard, the Authority has held that a union was not entitled to copies of investigative reports, subpoenaed documents and other records contained in a special agent's investigatory file because it was already familiar with the employee's circumstances and its disclosure would have interfered with the agency's legitimate interests.<sup>193</sup>

## F. Remedies

### 1. Unlawful Denial of Union Representation

Remedies for violations of section 7114(a)(2)(B) include traditional posting and cease and desist orders. Where an agency has committed multiple violations of section 7114(a)(2)(B), the Authority has ordered a broad posting remedy extending to members of the bargaining unit beyond those who work at the site where the violations occurred.<sup>194</sup>

Where an employee's union representative is unlawfully denied the ability to assist the employee in presenting a defense to the charges being investigated, the employee may have suffered an unjustified disciplinary action because the representative might have helped the employee to clarify the facts and circumstances involved in the investigation. Under these circumstances, the Authority has also held that a cease and desist order may not adequately recreate the conditions that would have existed in the absence of the *Weingarten* violation.<sup>195</sup>

Accordingly, where an agency has denied representation rights under section 7114(a)(2)(B) and disciplinary action ensued, the Authority provides the agency with an opportunity to demonstrate that no discipline occurred or will occur based upon the interview and that no information will be retained in the employee's personnel records from the interview that could adversely affect the employee.<sup>196</sup> If the agency cannot demonstrate that no disciplinary action arose from information obtained during the interview, then the agency may be ordered, upon the union's and employee's request, to repeat the investigatory interview and afford the employee full rights to union representation.<sup>197</sup>

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<sup>192</sup> *FAA, New Eng. Region, Burlington, Mass.*, 35 FLRA 645, 650-54 (1990).

<sup>193</sup> *Id.* at 654.

<sup>194</sup> *BOP, OIA*, 55 FLRA at 395 (“We note the multiple violations, combined with the fact that the investigators' work is not limited to one facility but rather involves assignment throughout the locations of the bargaining unit. In these circumstances, it is reasonable to assume that the Respondent's disregard for *Weingarten* rights is of import to unit employees well beyond the facility where the violations occurred”).

<sup>195</sup> *BOP Safford*, 35 FLRA at 446-47.

<sup>196</sup> *INS El Paso*, 36 FLRA at 52; *see also BOP, OIA*, 55 FLRA at 395 (ordering that employee is to be protected from future discipline based on any information obtained in the investigative interview and that his record be expunged of any adverse information obtained during the interview).

<sup>197</sup> *BOP Safford*, 35 FLRA at 446; *DOJ, OIG, Wash., D.C.*, 47 FLRA at 1264-66; *VAMC Jackson*, 48 FLRA at 797; *BOP, OIA*, 55 FLRA at 395.

After repeating the investigatory interview, the agency must then reconsider the disciplinary action taken against the employee without reference to or reliance upon the information obtained in the unlawful interview. If the agency concludes the disciplinary action was unwarranted or mitigating the penalty is warranted, the employee is made whole for any losses suffered to the extent consistent with the agency's decision. The agency is required to notify the employee of the results of the reconsideration, including any make-whole remedies to be afforded the employee and, if relevant, provide the employee any grievance or appeal rights that may exist under the parties' negotiated agreement, law, or regulation with respect to the agency's reconsideration.<sup>198</sup>

## **2. Unlawful Discipline for Requesting Union Representation**

Where a disciplinary action has been taken *because* the employee engaged in protected activity, a traditional make-whole remedy is appropriate. Thus, if an employee was disciplined for insisting upon union representation at an investigatory interview, the Authority will impose a traditional make-whole remedy, which includes rescission of the disciplinary action.<sup>199</sup> The Authority has also ordered an agency to rescind a suspension imposed on an employee based upon the misconduct of his union representative during an investigatory meeting.<sup>200</sup> On the other hand, the Authority has held that “a make whole remedy will not be ordered where the disciplinary action taken relates solely to employee misconduct independent of the examination itself.”<sup>201</sup>

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<sup>198</sup> *Id.*

<sup>199</sup> *Norfolk*, 14 FLRA at 732 (reprimand expunged where based on refusal to submit to unlawful interview); *Metro. Corr. Ctr.*, 27 FLRA at 884 (suspension revoked where it was based upon employee’s lawful refusal to submit memorandum as part of a meeting where he was denied union representation, where agency cannot demonstrate it would have imposed the same penalty for the incident being investigated); *VAMC, Fort Wayne, Ind.*, 39 FLRA at 721 (affirming arbitrator’s order revoking three-day suspension for requesting union representation during investigatory examination).

<sup>200</sup> *INS, San Diego, Cal.*, 13 FLRA at 592.

<sup>201</sup> *Norfolk*, 14 FLRA at 84 (no restoration ordered for lost wages and benefits flowing from employee’s refusal to obey lawful management directives).

### III. Bypass

#### A. Statutory Authority

Section 7114(a)(1) of the Statute provides:

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

#### B. Scope and Purpose of the Right

“[O]nce 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.”<sup>202</sup> An agency violates this obligation when it deals directly “with either another union or with unit employees on matters that are within the sole authority of that exclusive representative.”<sup>203</sup> These matters include “grievances, disciplinary actions and other matters relating to the collective bargaining relationship.”<sup>204</sup>

Such conduct “constitutes direct dealing with an employee, and is violative of [section] 7116(a)(1) and (5) of the Statute, because it interferes with the union’s rights under [section] 7114(a)(1) of the Statute to act for and represent all employees in the bargaining unit.”<sup>205</sup> It also constitutes an independent violation of section 7116(a)(1) of the Statute “because it demeans the union and inherently interferes with the rights of employees to designate and rely on the union for representation.”<sup>206</sup>

#### C. Matters Giving Rise to Bypass Violations

##### 1. Grievances

Section 7121 of the Statute sets forth the framework and requirements for negotiated grievance procedures. With respect to an employee’s right to representation during a grievance, subsection (b)(1)(C) requires that grievance procedures do the following:

(i) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances; [and]

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<sup>202</sup> *AFGE Nat’l Council of HUD Locals 222*, 54 FLRA 1267, 1276 (1998) (*AFGE HUD Locals 222*).

<sup>203</sup> *Id.*

<sup>204</sup> *DOJ, BOP, FCI, Elkton, Ohio*, 63 FLRA 280, 282 (2009) (*FCI Elkton*) (quoting *DOJ, BOP, FCI, Bastrop, Tex.*, 51 FLRA 1339, 1346 (1996)).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*; but see *AFGE HUD Locals 222*, 54 FLRA at 1283 n.20 (noting that the Authority’s test for an independent (a)(1) violation arising from a bypass allegation differs from the National Labor Relation Board, which “generally does not find an independent violation of section 8(a)(1) based on the fact of direct dealings alone”).

(ii) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding.

When a union represents an employee in grievance proceedings (either because the union filed the grievance on the employee's behalf, or because the employee otherwise designated the union as his or her representative), an agency may not bypass the union by dealing directly with the employee regarding the grievance.<sup>207</sup>

The obligation to deal with the union regarding grievances applies to all steps of the negotiated grievance procedure. Thus, an agency violates the Statute if it does not furnish, at the same time as the employee, "the written decision when rendered at each step of the negotiated grievance procedure, or if the employee, and not the Union, is voluntarily furnished information bearing on the grievance."<sup>208</sup> The obligation also applies to an agency's solicitation of information regarding the grievance,<sup>209</sup> and discussions involving settlement of the grievance.<sup>210</sup>

In determining whether a meeting concerns a "grievance" for purposes of resolving a bypass allegation, the Authority has applied the same definition of "grievance" as it applies to allegations concerning "formal discussions" under section 7114(a)(2)(A) of the Statute. Thus, where the Authority found that an agency violated section 7114(a)(2)(A) by failing to provide the union with an opportunity to be represented at a discussion regarding a "potential" grievance – which the Authority found constituted a "grievance" within the meaning of section 7114(a)(2)(A) – it also found that the agency unlawfully bypassed the union by communicating directly with the employee regarding the grievance.<sup>211</sup>

An agency does not commit an unlawful bypass by dealing directly with employees regarding matters for which the union has no statutory right or obligation to represent the employee and the employee has not chosen the union to represent him or her in the matter.<sup>212</sup>

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<sup>207</sup> *SSA, Balt., Md.*, 39 FLRA 298, 311 (1991) (*SSA, Balt.*); *Dep't of Air Force, 355<sup>th</sup> SPTG/CG, Davis-Monthan AFB, Ariz.*, 63 FLRA 635, 635 (2007) (*Davis-Monthan AFB*); see also *SSA, OHA*, 25 FLRA 571, 575 (1987) (the union's statutory right "to be present during the grievance proceeding" includes the implied right to be notified when a grievance is filed by an employee on the employee's own behalf, and to be served, upon request, with copies of documents related to the grievance) (applying predecessor to Section 7121(b)(1)(C)(ii)).

<sup>208</sup> *SSA*, 16 FLRA 434, 449 (1984); see also *Davis-Monthan AFB*, 63 FLRA at 641 (agency bypassed union by delivering first step grievance response directly to unit employee).

<sup>209</sup> *SSA, Balt.*, 39 FLRA at 312 (agency bypassed union by sending letter to employee directing him to file grievance in a different forum and soliciting information regarding the grievance).

<sup>210</sup> *IRS, Memphis Serv. Ctr., Memphis, Tenn.*, 17 FLRA 107, 115 (1985) (*IRS, Memphis*) (agency bypassed union when it informed grievant's husband that a previously rejected offer to settle the grievance was still available).

<sup>211</sup> *DOJ, BOP, FCI, Bastrop, Tex.*, 51 FLRA 1339, 1344-46 (1996).

<sup>212</sup> *GPO*, 23 FLRA 35, 40 (1986) (agency did not unlawfully bypass a union by dealing directly with an employee to informally adjust her EEO complaint where employee "had elected to pursue her complaint of discrimination as an appeal under the regulatory process of the EEOC, and the exclusive representative had no statutory rights or obligations to represent her in that process"); see also *VA, Wash., D.C.*, 48 FLRA 991 (1993) (adopting without precedential significance the ALJ's conclusion that the agency bypassed the union by failing to provide copies of final decision letters to unit employees concerning their EEO complaints where the union was the employees' designated representative).

## 2. Negotiable Conditions of Employment

An agency unlawfully bypasses the exclusive representative when it negotiates directly with bargaining unit employees regarding negotiable conditions of employment.<sup>213</sup> Agency communications with unit employees can also constitute an unlawful bypass if they are designed to put pressure on the union to take a certain course of action.<sup>214</sup>

Applying these principles, the Authority has found that agencies unlawfully bypassed the exclusive representative by dealing directly with unit employees regarding the establishment of work schedules or hours,<sup>215</sup> seating arrangements,<sup>216</sup> last chance agreements,<sup>217</sup> alternative selection procedures,<sup>218</sup> and changes to agency policies.<sup>219</sup> An unlawful bypass was also found where an agency issued job solicitations to unit employees for positions at new hearing centers prior to meeting with the union regarding the establishment of the new centers.<sup>220</sup>

Conversely, an agency was found not to have unlawfully bypassed the union by conducting an orientation session for new employees regarding administrative matters – even where the session constituted a “formal discussion” – where there was no evidence the agency attempted to “deal or negotiate directly with employees, or urged employees to put pressure on the Union to take a certain course of action, or threatened or promised benefits to employees.”<sup>221</sup> The Authority has similarly held that an agency’s mere announcement of changes to a sick leave call-in procedure

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<sup>213</sup> *SSA, 55 FLRA 978, 982-83 (1999)* (such conduct also constitutes an independent violation of section 7116(a)(1) because it “demeans the Union and inherently interferes with the rights of employees to designate and rely on the Union for representation”).

<sup>214</sup> *Dep’t of Transp., FAA, L.A., Cal., 15 FLRA 100, 104 n.3 (1984) (FAA, L.A.)*.

<sup>215</sup> *Air Force Accounting & Fin. Ctr., Lowry AFB, Denver, Colo., 42 FLRA 1226, 1239 (1991) (Lowry AFB)* (agency bypassed the union when a manager gave unit employees permission to develop a schedule for providing late office coverage to address the effects of the agency’s decision to implement a rotating work schedule); *DOI, Bureau of Indian Affairs, Gallup, N.M., 52 FLRA 1442, 1442 (1997)* (manager bypassed union by presenting unit employees three options to resolve a budget shortfall by reducing work hours, requiring them to choose one option, and agency implemented their choice without notice or bargaining with the union); *FAA, L.A., 15 FLRA at 104* (agency “required unit employees to provide direct input concerning the development of a new watch schedule and solicited their assistance in establishing alternative schedules, one of which was adopted and put into effect” over the union’s objections).

<sup>216</sup> *IRS, Kansas City Service Ctr., Kansas City, Mo., 57 FLRA 126, 129-30 (2001) (IRS, Kansas City)* (agency bypassed the union by soliciting bargaining unit employees to develop seating arrangements for employees affected by decision to discontinue night-shift).

<sup>217</sup> *SSA, 55 FLRA at 982-83* (agency unlawfully bypassed the union when it negotiated a last chance agreement directly with an employee, on grounds that the agreement affected a condition of employment).

<sup>218</sup> *Dep’t of Treasury, ATF, Wash., D.C., 16 FLRA 528, 543 (1984)* (manager bypassed union by meeting with unit employees regarding possible alternative selection procedures and informing them: “How do you guys want to handle this? It’s whatever you decide.”).

<sup>219</sup> *DOJ, INS, 14 FLRA 578, 579 (1984)* (agency bypassed union by meeting with unit employees to ascertain their views concerning changes to housing policy).

<sup>220</sup> *SSA, ODA, Nat’l Hearing Ctr., 66 FLRA 193, 196 (2011)*.

<sup>221</sup> *SSA, 16 FLRA 232, 243 (1984)*.

did not constitute an unlawful bypass, absent any indication that the supervisor “either attempted to negotiate or to otherwise deal directly with employees concerning the change.”<sup>222</sup>

### **3. Polling and Information Gathering**

While agencies may not negotiate directly with bargaining unit employees regarding negotiable conditions of employment, they “must have the latitude to gather information, including opinions, from unit employees to ensure the efficiency and effectiveness of [their] operations.”<sup>223</sup> As part of its “overall management responsibility to conduct operations in an effective and efficient manner, an agency may question employees directly, provided that it does not do so in a way that amounts to attempting to negotiate directly with them concerning matters that are properly bargainable with their exclusive representative.”<sup>224</sup>

In determining whether a survey, poll or questionnaire constitutes an unlawful bypass, the Authority considers the nature of the information sought, the manner in which the survey is conducted, and whether the information was used in a way that would undermine the status of the exclusive representative.<sup>225</sup> It also considers the extent to which the agency has involved the union in the process, including whether it gave the union notice or invited the union to bargain regarding any proposed changes resulting from the survey.<sup>226</sup> Applying these principles, the Authority has found that the following agency actions constituted an unlawful bypass:

- While considering the union’s demand to bargain a proposal to change the tour of duty for the night shift, the agency polled unit employees regarding their views and decided not to negotiate based on the results; the agency did not seek the union’s agreement to the polling and the union did not consent to it.<sup>227</sup>
- Manager issued memos to unit employees soliciting their views on possibly eliminating evening shift on weekends and then conducted a mandatory meeting for the same purpose.<sup>228</sup>

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<sup>222</sup> *DLA, Def. Depot Tracy, Tracy, Cal.*, 14 FLRA 475, 478 (1984); see also *HUD, Wash., D.C. Area Office*, 20 FLRA 374, 378 (1985) (no unlawful bypass for merely notifying employees of proposed reorganization after having so notified the union).

<sup>223</sup> *NTEU v. FLRA*, 826 F.2d 114, 123 (D.C. Cir. 1987) (quoting *IRS (Dist., Region, Nat’l Office Units)*, 19 FLRA 353, 354 (1985)).

<sup>224</sup> *IRS*, 64 FLRA 972, 977 (2010); see also *NTEU*, 826 F.2d at 123 (cautioning that the “search for reliable information may not be used as a screen behind which to subvert” the union’s role as exclusive representative).

<sup>225</sup> *IRS*, 31 FLRA 832, 838 (1988); see also *IRS*, 64 FLRA at 977-78.

<sup>226</sup> *AFGE HUD Locals 222*, 54 FLRA at 1279 (“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 is not involved in direct dealing in violation of the Statute.”).

<sup>227</sup> *SSA, Balt., Md.*, 28 FLRA 409, 430-32 (1987) (*SSA, Balt.*).

<sup>228</sup> *Dep’t of Transp., FAA*, 19 FLRA 893, 895 (1985) (holding that the agency was “not merely attempting to gather information or opinions concerning its operations but directly sought the opinions of these bargaining unit employees as to proposed changes in their conditions of employment”).

The Authority has found that the following agency actions did *not* constitute unlawful bypass:

- Agency conducted meetings, with the union in attendance, to receive unit employee input regarding work processes and suggestions for work improvements; the agency’s representatives did not discuss implementation of the suggestions, and the agency instructed supervisors that they could not commit to implement a suggestion until the agency’s bargaining obligations had been met.<sup>229</sup>
- Agency polled unit employees to determine if they preferred to be assigned to a new satellite office; the poll contained no indication that expression of intent would result in reassignment and did not seek employees’ opinions regarding the manner in which employees should be chosen for assignment; the agency advised and requested comments from the union, which did not object, shared the results with the union, indicated it would negotiate on matters related to the new office, and negotiated with the union before the office was opened.<sup>230</sup>
- Agency issued a memorandum to unit employees announcing a reorganization which also solicited employee suggestions for improving the work plan; the union was provided advanced notice of the reorganization and an opportunity to bargain before it was implemented, and the agency did not seek to negotiate with employees or use any information obtained from employees to undermine the status of the exclusive representative.<sup>231</sup>
- Agency issued a questionnaire to unit employees “merely [seeking] factual information in order to effectively avoid and prevent fraud and abuse” within an agency program.<sup>232</sup>
- Agency distributed a survey to employees gauging their reaction to possible use of new equipment and asking for recommended changes to work assignments; the agency notified the union in advance of its intent to distribute the survey, provided the union with copies, and promised to bargain with the union if it determined that changes were necessary as a result of the study.<sup>233</sup>
- Agency distributed questionnaires to unit employees to determine how newly implemented appraisal system was working for purposes of a draft report; the agency was “not attempting to negotiate with unit employees concerning the establishment of performance standards, but rather was merely seeking information as to how the existing standards were working.”<sup>234</sup>

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<sup>229</sup> *IRS*, 64 FLRA at 977-78.

<sup>230</sup> *IRS*, 31 FLRA at 837-38.

<sup>231</sup> *SSA, Balt., Md.*, 20 FLRA 768, 770 (1985).

<sup>232</sup> *SSA*, 20 FLRA 125, 127 (1985).

<sup>233</sup> *IRS (Dist., Region, Nat’l Office Units)*, 19 FLRA 353, 354-55 (1985), *aff’d*, *NTEU v. FLRA*, 826 F.2d 114 (D.C. Cir. 1987).

<sup>234</sup> *Customs Serv.*, 19 FLRA 1032, 1035 (1985), *aff’d*, *NTEU v. FLRA*, 826 F.2d 114 (D.C. Cir. 1987).



- Agency distributed questionnaires to newly hired employees soliciting suggestions for improvements in recruitment and processing practices; even though no notice was provided to the union, the survey was not an attempt to negotiate directly because, among other things, employees were assured that the information gathered would not be discussed with certain management officials and there was no evidence of actual negotiations with the employees.<sup>235</sup>
- Agency conducted “town hall” meeting to discuss employees’ suggestions or initiatives for improving conditions of employment of disabled or handicapped employees; the agency invited the union to attend and participate.<sup>236</sup>
- Agency conducted interviews of unit employees to assess the accuracy of a case assignment guide; the agency was “merely attempting to gather factual information to determine whether its case assignment procedures were working as envisioned.”<sup>237</sup>
- Agency conducted a poll assessing the morale of unit employees in response to an accreditation report saying it was low; the agency was “merely gathering information to enable it to respond to a finding by an independent agency so that it might overcome an evaluation report affecting its accreditation.”<sup>238</sup>

#### **4. Disciplinary Matters**

An agency unlawfully bypasses the exclusive representative when it deals directly with a unit employee concerning a disciplinary matter for which the agency knows the employee is being represented by the union.<sup>239</sup> The Authority has concluded, however, that an agency did not unlawfully bypass the exclusive representative by conducting a post-termination meeting with an employee represented by the union to discuss his retirement contributions, insurance, military service, leave and final paycheck. The meeting did not constitute a bypass because it had no influence or impact upon the “decision already made and tendered,” insofar as it dealt solely with administrative matters and neither the employee’s termination nor his appeal rights were discussed.<sup>240</sup>

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<sup>235</sup> *Dep’t of Def., Office of Dependent Schs.*, 19 FLRA 762, 764 (1985), *aff’d*, *NTEU v. FLRA*, 826 F.2d 114 (D.C. Cir. 1987).

<sup>236</sup> *SSA*, 19 FLRA 415, 416-17 (1985).

<sup>237</sup> *IRS (Dist., Region, Nat’l Office Unit)*, 14 FLRA 698, 699-700 (1984).

<sup>238</sup> *Kaiserslautern Am. High Sch., Dep’t of Def. Sch., Ger. N. Region*, 9 FLRA 184, 186-87 (1982).

<sup>239</sup> *438<sup>th</sup> Air Base Group, McGuire AFB, N.J.*, 28 FLRA 1112, 1112 (1987) (*McGuire*) (agency bypassed union by reading notice of suspension to employee and failing to provide a copy of the decision to the union); *see also Dep’t of Air Force, Sacramento Air Logistics Ctr., McClellan AFB*, 35 FLRA 345, 345 (1990) (*McClellan*) (agency bypassed union by refusing to allow it to attend meetings at which bargaining unit employees were provided final decisions on disciplinary actions for which they were represented by union).

<sup>240</sup> *FCI Elkton*, 63 FLRA at 282.

## 5. Direct Dealings with Another Union

An agency also violates its obligation to deal only with an exclusive representative when it deals with another union on matters within the sole authority of the exclusive representative.<sup>241</sup> In determining whether an unlawful bypass arises under these circumstances, the Authority examines “whether the agency’s actions undermine the rights of the exclusive representative,” including whether the agency’s contacts with the other union “involve matters within the scope of the statutory authority of the exclusive representative” and whether the agency “preserve[d] the exclusive representative’s role in the determination of conditions of employment.”<sup>242</sup>

Applying these principles, the Authority concluded that an agency did not unlawfully bypass the exclusive representative by including another union on a reorganization task force.<sup>243</sup> In that case, the exclusive representative was also a full participant on the task force, and any changes to unit employees’ conditions of employment were reliant on either (1) consensus of the task force as a whole, or (2) in the absence of consensus, separate bargaining between the agency and the exclusive representative.

### D. Defenses to Bypass Allegations

The Authority has held that an agency may deal directly with bargaining unit employees regarding negotiable conditions of employment if it “first obtains the consent of their Union.”<sup>244</sup> Mere notification to the exclusive representative is not enough.<sup>245</sup> Instead, the agency must secure the union’s agreement. Moreover, the Authority has rejected an agency’s argument that a provision in the parties’ bargaining agreement committing the parties to “work together in minimizing the adverse impact on employees involuntarily reassigned” permitted the agency to deal directly with unit employees on such matters, where there was no evidence the provision was intended to allow the agency to bypass the union and it did not address meetings between management representatives and unit employees.<sup>246</sup>

The Authority has similarly rejected arguments that a union waived its right to be present at meetings where disciplinary decisions are delivered by virtue of bargaining agreement provisions that do not clearly and unmistakably waive the right,<sup>247</sup> or by virtue of past practice where the

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<sup>241</sup> *AFGE HUD Locals 222*, 54 FLRA at 1276.

<sup>242</sup> *Id.* at 1280.

<sup>243</sup> *Id.* at 1281-82 (citing *Central Management Co.*, 314 NLRB 763, 767 (1994) and *Allied-Signal, Inc.*, 307 NLRB 752, 753-54 (1992)).

<sup>244</sup> *Air Force Logistics Command, Ogden Air Logistics Ctr., Hill AFB, Utah*, 43 FLRA 736, 737 (1991) (*Hill AFB*) (quoting *Toledo Typographical Union No. 63 v. NLRB*, 907 F.2d 1220, 1222 (D.C. Cir. 1990)).

<sup>245</sup> *Id.* at 737. In *Dep’t of Navy, Pearl Harbor Naval Shipyard, Pearl Harbor, Haw.*, 29 FLRA 1236 (1987), the Authority adopted the ALJ’s conclusion that the establishment and implementation of a program which involves employees in discussions of negotiable conditions of employment is a permissive subject of bargaining which cannot be implemented absent the exclusive representative’s agreement.

<sup>246</sup> *IRS, Kansas City*, 57 FLRA at 129-30.

<sup>247</sup> *McGuire*, 28 FLRA at 1124 (finding that language in the parties’ collective bargaining agreement must “constitute . . . a clear and unmistakable waiver” of the right to be present); *McClellan*, 35 FLRA at 356 (concluding that the union did not “clearly and unmistakably” waive its right to be present at meetings where final disciplinary

record failed to “establish a sufficient and consistent past practice to constitute a clear and unmistakable waiver.”<sup>248</sup> An exclusive representative was, however, found to have “effectively consented” to an agency’s dealings with a unit employee regarding a last chance agreement where it was given a “full opportunity to negotiate over the terms” of the agreement but “did not evidence any interest in doing so.”<sup>249</sup>

## **E. Remedies for Bypass Violations**

Remedies for bypass violations include traditional posting and cease and desist orders. The affirmative action required in these orders is typically tailored to address the particular type of bypass found to have occurred.<sup>250</sup> Where an agency has been found to have bypassed the exclusive representative by negotiating directly with unit employees regarding a change in conditions of employment, and is also found to have violated the Statute by failing to give notice to and bargain with the union regarding the change, the Authority has additionally ordered the agency to rescind any agreements that resulted from the bypass and to afford the union the opportunity to bargain.<sup>251</sup> Similarly, where an agency was found to have unlawfully bypassed the union with respect to its attempts to settle a grievance, the agency was ordered to, “[u]pon request, attempt to resolve [the employee’s] grievance by dealing directly” with the union.<sup>252</sup>

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decisions are delivered to unit employees by virtue of bargaining agreement article providing employees with two copies of disciplinary notices).

<sup>248</sup> *McGuire*, 28 FLRA at 1124.

<sup>249</sup> *Hill AFB*, 43 FLRA at 737 (holding that “by its conduct, the Union evidenced the requisite consent”).

<sup>250</sup> See, e.g., *McGuire*, 28 FLRA at 1113 (ordering agency to “[f]urnish or deliver all decisions or other responses involving disciplinary proceedings to designated union representatives of employees at the same time as they are furnished or delivered to employees”); *SSA, Balt.*, 39 FLRA at 314 (ordering agency to “[f]urnish or deliver all communications pertaining to grievances to designated Union representatives at the same time as they are furnished or delivered to employee grievants”); *SSA, Balt.*, 28 FLRA at 410 (ordering agency to cease and desist from “dealing directly with [bargaining unit] employees by soliciting their opinions concerning personnel policies, practices, and matters affecting their working conditions”).

<sup>251</sup> *Lowry AFB*, 42 FLRA at 1241.

<sup>252</sup> *IRS, Memphis*, 17 FLRA at 108.