

FLRA

Office of the General Counsel

*“Perspectives from the Office of the General
Counsel, Federal Labor Relations Authority”
VA Office of General Counsel Training Forum
July 15, 2010 * Nashville, TN*



2009-12 Goals and Priorities

- Eliminate backlog of complaint and appeals cases within first 180 days.
- Restore information resources manuals, guidance and training within the first 18 months.
- Improve Unfair Labor Practice and REP case processing in relation to current time targets and shorten existing time targets within the first term.

2009-12 Goals and Priorities

- **Eliminate backlog of complaint and appeals cases within first 180 days.**
 - All 342 backlogged complaint cases have been settled, tried or scheduled for trial.
 - All 800 appeals cases completed on time.
 - FLRA agents are now working current cases.

2009-12 Goals and Priorities

- **Restore information resources manuals, guidance and training within first 18 months.**
 - Historical manuals and guidance posted.
 - Regular training resumed, training materials posted.
 - Updated manuals and case law summaries in process.
 - E.O. 13522 training launched.

2009-12 Goals and Priorities

- **Improve Unfair Labor Practice and REP case processing timeliness and shorten existing time targets.**
 - Current time target for ULP and REP cases 120 days. OGC meets target 48% for ULP and 65% REP.
 - Critical to good government that OGC performance in relation to these targets improve AND that these targets be reduced.

Information Resources

*Practice Materials (Manuals, Guidance)
Education and Training*



Information Resources

- An updated ULP manual will be published by the end of July 2010, and a comprehensive ULP case law outline shortly thereafter. We are presently updating the REP Hearing Officer's Guide as well.
- Quarterly statutory training in Regional Office cities, REP accretion and successorship training, and E.O 13522 training. Training materials posted at [http://www.flra.gov/OGC Training](http://www.flra.gov/OGC_Training)

Executive Order 13522
Creating Labor-Management Forums to
Improve Delivery of Government Services

FLRA Training Support



Training Courses

- Joint FLRA OGC/FMCS training
- FLRA 7106 (b) (1) Pilot Project training

Joint FLRA OGC/FMCS Training

- Round One of Open Training is Complete
- Training dates in May-June, 2010
- 8 sessions (2 in Washington, D. C., and 1 each in Atlanta, Boston, Chicago, Dallas, Denver and Oakland)
- Open to labor-management pairs from any agency, limited to roughly 18 pairs per session
- Trained a total of 302 individuals
- Participation included representatives from a broad range of agencies and unions.

Open Training: Round Two Scheduled

- Training dates July-September, 2010
- 7 sessions (Atlanta, Boston, Chicago, Dallas, Denver, Oakland and Washington, D.C.)
- Open to labor-management pairs from any agency, limited to roughly 18 pairs per session

Open Training: Round Two Schedule

July 20-21

Washington, D.C.

August 4-5

Chicago

August 11-12

Boston

August 18-19

San Francisco

August 24-25

Dallas

September 14-15

Atlanta

September 27-28

Denver

Agency/Union Specific Training

Training completed

- Peace Corps
- Forest Service
- Department of Labor (Field)
- Department of Labor (Local 12)
- Department of Veterans Affairs (HQ)
- Marine Corps
- Treasury (BEP, BPD, Mint, FMS, Dept Offices)
- NLRB
- FAA

Agency/Union Specific Training

Training scheduled

- Agriculture
- Navy (Portsmouth Naval Shipyard)
- Army (general)
- Army (Rock Island Arsenal)
- Army (Redstone Arsenal)
- VA (VAMC Tuscaloosa, AL)
- VA (VISN 23 Minneapolis)

Agency/Union Specific Training

Training in planning stage

- Farm Service Agency (USDA)
- Navy (Norfolk Naval Shipyard)
- Navy (general)
- Environmental Protection Agency

FLRA 7106 (b) (1) Pilot Project Training

- Available to each bargaining committee participating in pilot projects pursuant to E.O. 13522.
- Standard educational materials and exercises presented by senior FLRA attorneys.

FLRA OGC/FMCS Course Overview

- Day One: FLRA: Overview of Executive Order 13522, Collective Bargaining under the Statute, including section 7106(b)(1) and Pre-Decisional Involvement.
- Day Two: FMCS: Introduction to Labor-Management Forums, skill building and next steps for starting a Labor-Management Forum.

E.O. 13522 Purpose

- To establish a cooperative and productive form of labor-management relations throughout the executive branch.
- To improve the delivery of government services to the American people.

E.O. 13522

- The Executive Order does not
 - Abrogate any collective bargaining agreement;
 - Limit, preclude, or prohibit management from electing to negotiate over § 7106(b)(1) matters;
 - Impair or otherwise affect authority granted by law to agencies (i.e. it does not expand bargaining rights);
 - Create any right to administrative or judicial review.

E.O. 13522 Summary and Focus

- Executive Order 13522 seeks to improve the delivery of high quality government services by establishing:
 - A cooperative and productive form of labor-management relations ;
 - Agency LM forums to identify problems and propose solutions to better serve the public, improve employee work life and labor-management relations;
 - Pre-decisional involvement for employees and their union representatives in all workplace matters to the fullest extent practicable.

Two Categories of § 7106(b)(1) Matters

1. Numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty
2. Technology, methods, and means of performing work

“Technology, methods, and means”

- Authority defined the “technology . . . of performing work” as the technical method that will be used in accomplishing or furthering the performance of the agency’s work. *See NTEU*, 62 FLRA 321, 326 (2007).
- The legislative history of the Statute indicates that the term “methods” was intended to mean *how* work is performed and the term “means” was intended to mean *with what*.

“Methods, and means”

Two-Prong Test

- First, the proposal must concern a “method” or “means” as defined by the Authority.
 - “Method” refers to the way in which an agency performs its work.
 - “Means” refers to any instrumentality, including an agent, tool, device, measure, plan, or policy used by an agency for the accomplishment or furtherance of the performance of its work.
- Second, it must be shown that:
 - (1) there is a direct and integral relationship between the particular methods or means the agency has chosen and the accomplishment of the agency’s mission; and
 - (2) the proposal would directly interfere with the mission-related purpose for which the method or means was adopted.

See GSA, 54 FLRA 1582, 1589-90 & n.6 (1998).

“Technology, methods, and means”

- Proposals the Authority has found concern the “technology, methods, and means of performing work” include:
 - Proposals concerning the forms, documents, or electronic systems that an agency uses in accomplishing its mission. *See AFGE, Local 3529, 57 FLRA 172, 175-76 (2001).*
 - Proposals concerning the introduction of new technologies that will assist the agency in fulfilling its mission more efficiently. *See AFGE, Local 3129 SSA Gen. Comm., 58 FLRA 273, 275 (2002).*
 - Proposals concerning the requirement that employees wear a prescribed uniform while performing work. *See AFGE, Local 1869, 63 FLRA 598 (2009); NAGE, Locals R12-122, R12-222, 38 FLRA 295, 304 (1990). But see NTEU, 61 FLRA 48, 52 (2005) (where agency did not explain how the uniform related to how work was done, proposal concerning uniform requirement did not “involve the methods and means of performing work”).*

“Technology, methods, and means”

- Proposals the Authority has found do *not* concern the “technology, methods, and means of performing work” include:
 - Proposals concerning contracting out. *See GSA*, 54 FLRA 1582, 1590 (1998) (Proposals concerning contracting out do not relate to the way in which an agency *performs its work* or the *tools* or *devices* that may be used in accomplishing it. Rather, such proposals relate to an agency’s decision-making process concerning *by whom* the work is best performed).
 - Proposals concerning the assignment of duties to particular employees. *See AFGE, Local 1985*, 55 FLRA 1145, 1148 (1999) (Proposals involving “who will perform work, not the way in which the work is performed” are not electively negotiable under § 7106(b)(1)).
 - Proposals concerning the location at which work will be performed. *See PASS*, 56 FLRA 798, 803 (2000).
 - Proposals concerning performance standards and rating levels. *See U.S. EPA, Chi., Ill.*, 62 FLRA 350, 352 (2008); *AFGE, Council of GSA Locals Council 236*, 55 FLRA 449, 452 (1999) (Such proposals concern ‘how an agency evaluates’ the work, rather than ‘how employees will do their work,’ which is the concern of § 7106(b)(1)).

Bargaining Permissive Subjects

Under the Statute

- Agencies are not required to bargain over a permissive subject of bargaining, i.e., those matters which are either outside the scope of bargaining required of the parties or are negotiable at the election of an agency pursuant to § 7106(b)(1). *See FDIC, Headquarters*, 18 FLRA 768, 771 (1985).
 - *This applies to both proposals advanced by management and union*
- If parties reach an agreement to bargain over § 7106(b)(1) matters, then that agreement is enforceable. *See SSA, Balt., Md.*, 55 FLRA 1063, 1069 (1999); *U.S. Dept. of Commerce, PTO*, 54 FLRA 360, 387 n.27 (1998); *see also U.S. Dep't of Def. Am. Forces Radio & Television Broad. Ctr. Riverside, Cal.*, 59 FLRA 759, 760 (2004).
- If management at the local level exercises its discretion to bargain on a § 7106(b)(1) matter and reaches an agreement, then agency head may not subsequently disapprove that provision under § 7114(c) simply because it relates to § 7106(b)(1) matters. *See NATCA*, 61 FLRA 336 (2005).
- Where parties' agreement includes matters covered by § 7106(b)(1), upon the expiration of that negotiated agreement, either party retains the right to unilaterally terminate the practice embodied in such a provision. *See FAA, NW Mtn. Region Seattle, Wash.*, 14 FLRA 644, 648-49 (1984).

Pre-Decisional Involvement

Under EO 13522 Agencies must establish labor-management forums and, through the forums

- Allow employees and union **pre-decisional involvement** to the fullest extent practicable on all workplace matters without regard to negotiability under §7106 of the Statute
- Expeditiously provide information to union representatives, where not prohibited by law
- Make good-faith attempt to resolve issues concerning proposed changes to conditions of employment, including those involving §7106(b)(1)

PRE-DECISIONAL INVOLVEMENT

Executive Order 13522 does not define the term
“pre-decisional involvement”

E.O. leaves PDI for Labor-Management Forums to
define according to the needs of the organization

PRE-DECISIONAL INVOLVEMENT

PDI does not:

Expand the duty or scope of bargaining

Waive any rights of the parties under the Statute

PRE-DECISIONAL INVOLVEMENT

Basic Principles

PDI occurs early when ideas are forming

Participants have common expectations

Information is freely shared

Joint development of solutions

Consensus based problem-solving, focused on interests

Early Involvement

Management:

- At what point should union be involved?

Union:

- At what point does union want to be involved?

Answer to both questions varies with the issue presented

Common Expectations

Is there a Common Understanding of what Authority will be Delegated to the Labor Management Forum?

What will Occur After PDI?

- Consensus reached – proceed to implementation without further bargaining
- Recommendation accepted by principals
- Recommendation modified and accepted
- MOA on PDI consensus
- No Consensus reached – revert to proper place in existing labor-management relationship
- Will statutory bargaining be required?

Case Processing Improvement

Staffing at the FLRA

Case/Agent Metrics

Technology

Case Process Improvement



Evolution of Staffing and Time Targets at the FLRA

- Original Structure: 9 Regional Offices
- Each RO used to have 1 SES RD, 1 GS-15 Manager, GS-14 Supervisors and Several Agents
- Time Target: 60 Days for ULP and Rep Cases
- Time Targets Adjusted to a percentage of pending cases at the end of each month that were over 90 days old

Evolution of Staffing/Time Targets

- 1990-94: Reassessment of Case Load and Budget Led to Changes
- Structure: 7 Regional Offices (NY and LA Became Sub-Offices)
- Staffing: SES RD, GS-15 Regional Attorney or DRD, 11 Agents – Total of 77 Agents
- Time Target: Not More than 15% of Pending ULP Cases Over 90 Days Old at End of Month

Evolution of Staffing/Time Targets

- 2004-2005 Reassessment of Caseload: Assumed 34% Decrease in Caseload Due to Projected Loss of DOD and DHS Because of Legislative Changes (NSPS and DHS Personnel Systems)
- Based on this Projection, 2005-08 FLRA Political Leadership Reduced Budget Requests and Staffing Level from 77 to 39 OGC agents.
- Of necessity, time targets were also increased from 90 to 120 days for ULP and REP cases

Evolution of Staffing/Time Targets

- **Current Situation and Challenge**

- Presently: 7 Regional Offices
- Only 4 Currently have SES RD's, 3 have GS-15 RD's, Only 2 Have GS-15 Supervisors
- Only 5-8 Agents in Each Office, Total of 42 Agents
- NSPS and DHS Changes Never Materialized, Still Handling 4000 ULPs Per Year and 300 Rep Cases
- Current time target for ULP and REP cases 120 days. OGC meets target 48% for ULP and 65% REP.
- Critical to good government that OGC performance in relation to these targets improve AND that these targets be reduced.

Cases Filed/Agent Ratio Analysis

Fiscal Year	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
ULP Cases Filed	6167	5716	5129	4551	4036	4788	4677	3569	3593	4275*
REP Cases Filed	376	338	309	347	285	276	297	289	256	266**
Total Cases Filed	6543	6054	5438	4898	4321	5064	4974	3858	3849	4541
Total Agents	77	73	68	66	57	46	39	39	39	42
Cases/Agent	85	83	80	74	76	110	128	99	99	108

Pending Cases/Agent Ratio Analysis

April 30	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
ULP Cases	2034	1805	1458	884	977	1130	2270	1632	1501	1781
REP Cases	172	198	167	118	114	119	127	121	112	106
Total Cases	2026	2003	1625	1002	1091	1249	2397	1753	1613	1887
Total Agents	77	73	68	66	57	46	39	39	39	42
Cases/Agent	29	27	24	15	19	27	61	45	41	45

Potential for Significant Increases in Work Load

- Possible Passage of Public Safety Employer-Employee Cooperation Act
- Possible Election for 40,000 + Transportation Security Officers

ULP and Rep Case Time Targets

- Current OGC Target: 120 Days for All Cases
 - In ULP cases, only meeting this goal 48% of the time
- NLRB OGC benchmarks:
 - Cases are Prioritized
 - Highest Priority Cases: 49 Days (7 Weeks)
 - Next Priority: 63 Days (9 Weeks)
 - Lowest Priority: 114 Days (12 Weeks)
 - NLRB OGC performs well in relation to benchmarks

Return on Investment: More Agents Equals More Productivity

- Current Cadre of 42 Agents is Mostly Experienced
- New Agents Would be Added at GS-11 Level, Cost Only About \$63,000/yr. plus Benefits
- Each Agent Would Eventually Be Expected to Process About 75 Cases Per Year
- Would Increase Overall Productivity and Timeliness, with Ultimate Benefits to Efficiency of Federal Agencies by Resolving ULP and Representation Disputes
- Under Current Budget Only Able to Hire Two New Agents, One in Atlanta and one in Washington

Technology Will Help

- E-filing
- Remote Access Voting
- Web-based conferences to facilitate stipulations, settlement, pre-hearing preparations
- Video REP hearings

Case Process Improvement

- Integrate ADR into all aspects of case process.
 - ULP regulations amended
 - Agents trained
- Look at ULP and Rep Case Processes from Top to Bottom and Find Bottlenecks and Fix Them

Case Process Improvement

- Emphasize Quality Investigations as Well as Timeliness
- Open to Suggestions from Parties on Prioritizing Cases and Improving Our Case Processes

FLRA

Office of the General Counsel

Update on case law and practice



EEO Mediation as Formal Discussion

- Despite employee/complainant's objection, Union must be notified of EEO Mediation Session and Provided Opportunity to Attend, Pursuant to 7114(a)(2)(A)
- EEO Complaint is "Grievance" Under 7114(a)(2)(A)
- On facts of case, employee's objection to union's presence did not establish "direct conflict" between any individual right of the employee and the union's statutory right to be present

United States Dept. of the Air Force, Davis-Monthan Air Force Base, Tucson, Ariz., 64 FLRA No. 158 (May 28, 2010)

Bargaining To Impasse Over Subject Covered by a CBA

- Bargaining over a subject covered by a CBA is permissive, not mandatory
- A party bargains in bad faith, in violation of Statute, by insisting on bargaining to impasse over a subject covered by a CBA

AFGE, Local 3937, AFL-CIO, 64 FLRA 17 (2009)

Bargaining To Limit Scope Of Covered By Doctrine

- The Covered By Doctrine is not a right under the Statute
- Bargaining over a proposal to limit the scope of the Covered By Doctrine is mandatory

NTEU and United States Customs Serv., 64 FLRA 156 (2009)

Authority Does Not Defer To ALJ Findings

- ALJ findings, including credibility determinations, accepted by Authority if supported by preponderance of evidence (i.e., not substantial evidence)

Upheld findings of violations of 7116(a)(1) and (5) for failure to provide notice and opportunity to bargain over I & I of direction that employee vacate particular room and over reorganization and realignment

United States Dep't of the Air Force, Air Force Materiel Command, Space and Missile Systems Ctr., Detachment 2, Kirtland Air Force Base, N.M., 64 FLRA 166 (2009)

Formal Discussion Of General Conditions Of Employment

- Intent behind 7112(a)(2)(A) of Statute: afford union opportunity to be present at formal discussions addressing matters of interest to unit employees in order to safeguard their interests
- Discussion of reorganization = “high potential for changes to employees’ conditions of employment” (reassignments, relocations, and changes in assigned duties, and changes in lines of supervision are reasonably foreseeable)

United States Dep’t of the Air Force, Air Force Materiel Command, Space and Missile Systems Ctr., Detachment 2, Kirtland Air Force Base, N.M., 64 FLRA 166 (2009)

How Do Conditions Of Employment Differ From Working Conditions?

“[T]here is no substantive difference between ‘conditions of employment’ and ‘working conditions’ as those terms are practically applied” under the Statute.

United States Dep’t of the Air Force, 355th MSG/CC, Davis-Monthan Air Force Base, Ariz., 64 FLRA 85 (2009)

Necessary Functioning Of Agency Defense

- Agency may change employees' working conditions before bargaining if change is necessary for functioning of agency (here, a change in promotion procedures)
- Agency has burden to prove “that its actions were in fact consistent with the necessary functioning of the agency, such that a delay in implementation would have impeded the agency’s ability to effectively and efficiently carry out its mission.”

United States Dep’t of the Treasury, Internal Revenue Serv., Wash., D.C., 64 FLRA 127 (2009)

Official Time Negotiated Under Section 7131(d) Of The Statute

- Statute does not confer right to official time to distribute fliers concerning a proposed regulatory change affecting unit employees
- Parties may establish right to official time for such a purpose through negotiations
- Denial of union representative's request for contractual official time does not necessarily implicate union's statutory right to designate representatives

United States Dep't of the Army, Headquarters, 10th Mountain Div. (Light Infantry), & Ft. Drum, Ft. Drum, N.Y., 64 FLRA 337 (2009)

When Does a Union Not Have a Right To Information Possessed By Inspector General?

A union's right to information from an agency under section 7114(b)(4) of the Statute does **not** extend to information possessed by an Office of Inspector General that is not an agent or component of the agency because the information is not reasonably available or normally maintained by the agency, i.e., agency had no control over the OIG with regard to the information

United States Dep't of the Treasury, Internal Revenue Serv., 63 FLRA 664 (2009)

Obscenity Does Not Alone Remove Speech From Protection

Union President statement “Fuck you, I don’t give a fuck” to supervisor protected when made:

- While President engaged in representational activity in a work area
- During discussion within scope of union’s legitimate concerns
- Impulsively, not with design
- Briefly, in a normal conversational tone, and without being heard by others

United States Dep’t of Trans., Fed. Aviation Admin., Wash., D.C., 64 FLRA 410 (2010)

Grounds For Excluding Employee From Unit Timely Raised if Presented Before D&O Issued

Statutory grounds for excluding employee from a bargaining unit first raised in a post-hearing brief must be considered by Regional Director in representation proceeding before Decision and Order issued

United States Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Hampton, Va., 63 FLRA 593 (2009)

Repudiation of Contract Term: Heart Of The Contract

- Whether term of CBA goes to its heart depends on importance of the term relative to entire CBA
- Requirement that agency retain employee in a duty or approved leave status while undergoing drug rehabilitation goes to heart of CBA
- Cases in which terms of an agreement were found to go to its heart are identified in cited case

United States Dep't of the Air Force, Aerospace Maint. and Regeneration Ctr., Davis-Monthan Air Force Base, Tucson, Ariz., 64 FLRA 355 (2009)

Repudiation of Oral Agreement

- Agency repudiated oral agreement concerning administrative rank advancement of certain employees to higher pay bands under Faculty Personnel System (FPS)
- Parties may enter into oral agreements, and such agreements bind the parties.
- Prong 1 -- Clear and patent breach – Chancellor had authority, clear and unambiguous, meeting of the minds
- Prong 2 – terms solely concerned how former GS employees in new FPS system would be administratively rank advanced

United States Dep't of Defense, Language Defense Inst., Foreign Language Ctr., Monterrey, Calif., 64 FLRA 735 (2010)

Remedy For Employees Harmed by Repudiation Of Contract Term

- Even when contract repudiation is an institutional claim by a union, remedial relief may be available for individual employees injured by the agency's failure to comply with repudiated contract term.
- Consideration must be given to remedial relief the injured employees received in other forums, such as MSPB.

United States Dep't of the Air Force, Aerospace Maint. and Regeneration Ctr., Davis-Monthan Air Force Base, Tucson, Ariz., 64 FLRA 355 (2009)

When Do Employees Automatically Become Members of An Existing Bargaining Unit?

Employees are automatically included in a bargaining unit if, after a Certification of Representative was issued, they were hired, reassigned or placed in newly-created positions, and the positions they occupy fall within the description of the bargaining unit.

United States Dep't of the Air Force, Randolph Air Force Base, San Antonio, Tex., 64 FLRA 656 (2010)

7116(d)

Section (d) bar not found:

- ULP alleged (a)(1) violation pertaining to union rights – interference with statutory rights under section 7102 (supervisor told employee told that disciplinary action might have been less severe had he prepared his own written response)
- Grievance was over employee's suspension – alleged violation of contract

U.S. Dep't of the Air Force, 62nd Airlift Wing, McHord Air Force Base Wash., 63 FLRA 677 (2009)