FEDERAL LABOR RELATIONS AUTHORITY

OFFICE OF THE GENERAL COUNSEL

UNFAIR LABOR PRACTICE

CASE LAW OUTLINE

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INTRODUCTION

WHAT IS THE OUTLINE OF UNFAIR LABOR PRACTICE CASE LAW AND PROCEDURE?

General Counsel Julia Akins Clark of the Federal Labor Relations Authority is issuing this outline of unfair labor practice case law and procedure to provide our parties with more effective and meaningful tools to understand both the investigative process and the application of Authority case precedent in that process.

A comprehensive overview of unfair labor practice issues will offer our parties a resource that is not otherwise available to them. By openly discussing the investigative process and sharing with the parties the same topical material relied upon by FLRA field investigators, litigators and decision-makers, we hope to promote a better understanding by employees, labor organizations and agency management of their respective rights and responsibilities in collective bargaining, in order to encourage the amicable resolution of labor disputes.

A complete description of all aspects of the unfair labor practice investigative and decision-making process can be found in the *FLRA Office of General Counsel Unfair Labor Practice Case Handling Manual* (*ULP Manual)* which is also posted on this website. The *ULPManual* is a tool used by all OGC staff concerning questions ranging from the filing and docketing of ULP charges, to the investigation, RD decision and disposition of cases.

As with any general overview of legal precedent, this *Outline* cannot address all issues which may arise in the workplace and is not intended to be a substitute for independent legal research. Unique factual circumstances may always impact legal findings and that is certainly true in federal sector labor relations. This *Outline* offers a comprehensive summary to assist our parties in their legal analysis of ULP issues. It is, however, only meant to be a starting point for research and should not be used as a substitute for comprehensive research of any unfair labor practice issue.

ORGANIZATION OF THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority (FLRA) is an independent administrative federal agency created by Title VII of the *Civil Service Reform Act of 1978*, which is commonly known as the Federal Service Labor-Management Relations Statute (Statute). The Statute recognizes the right of most non-postal federal employees to bargain collectively and to participate, through labor organizations of their choice, in decisions affecting their conditions of employment. Employees of the U.S. Postal Service are covered under a different law – *The Postal Reorganization Act of 1970*.

The FLRA consists of several components. They are:

- the Authority
- the Federal Service Impasses Panel
- the Foreign Service Labor Relations Board
- the Foreign Service Impasse Disputes Panel
- the Office of the General Counsel

[For a full discussion of the duties and functions of each FLRA component, please visit the FLRA website at www.flra.gov. Following is a general overview of those functions.]

The Authority is a quasi-judicial body with three full time members appointed by the President, with the advice and consent of the Senate. The Authority adjudicates unfair labor practice disputes and issues raised by representation petitions and exceptions to grievance arbitration awards, and resolves negotiability disputes raised by the parties during collective bargaining.

The Federal Service Impasses Panel (FSIP) resolves impasses between federal agencies and unions representing federal employees. The FSIP consists of seven Presidential appointees who serve on a part-time basis and a staff which also supports the Foreign Service Impasse Disputes Panel. The FSIP may utilize a variety of dispute resolution procedures in assisting the parties, including informal conferences, mediation, fact-finding, written submissions, mediation-arbitration, or the imposition of contract terms through a final action.

The Foreign Service Labor Relations Board, which is composed of three members appointed by the Chairman of the FLRA (who also serves as Chairman of the Board), was created by the *Foreign Service Act of 1980* to administer the labor-management relations program for Foreign Service employees in the U. S. Information Agency, the Agency for International Development and the Departments of State, Agriculture and Commerce. The FLRA General Counsel also serves as General Counsel for the Board. Similarly, the Foreign Service Impasse Disputes Panel, also created by the *Foreign Service Act of 1980*, consists of three part-time members appointed by the Chairman, and resolves impasses for the Foreign Service employees of the agencies noted above.

The Office of the General Counsel (OGC) operates under the direction of the General Counsel, who is appointed by the President, with the advice and consent of the Senate. The General Counsel has direct authority over and responsibility for both headquarters staff of the OGC and field staff of all regional offices around the country. OGC employees investigate unfair labor practice charges filed in the regional offices, file and prosecute complaints, resolve questions concerning representation and similar issues raised in representation petitions, and provide training and alternative dispute resolution services to both labor and management. It is the Office of the General Counsel which has developed this *Outline of Unfair Labor Practice Case Law and Procedure* to assist our parties in understanding the investigative process and the legal precedent relied upon in the decision-making process.

INVESTIGATION OF ULP CHARGES

Each regional office operates under the supervision of a Regional Director (RD) who is, among other duties, charged with investigating and deciding, on behalf of the General Counsel, the merits of unfair labor practice charges filed by any "person" against federal agencies or labor organizations. Regional staff members utilize a variety of methods, including alternative dispute resolution, when investigating ULP cases. Generally, every effort is made to understand the nature of the labor dispute, the interests of the respective parties to the dispute, and whatever attempts may already have been made to informally resolve the matter. Experience strongly suggests that the long term bargaining relationship is enhanced where both parties have played an active role in resolving the labor dispute, as contrasted with a decision which is imposed by a third party.

Where informal resolution is not viable in the preliminary phases of case processing, FLRA Agents arrange for the interview of witnesses with relevant testimony and for the submission of relevant documentary evidence. Initially, the burden is on the Charging Party who filed the charge to provide witnesses and documents in support of the allegations they have raised. *See* Section 2423.4(e) of the FLRA Regulations for further discussion of the submission of evidence. The FLRA Regulations also provide that all parties and persons shall fully cooperate with the Regional Director in the investigation of charges, including making witnesses available for interview and producing documentary evidence. *See* Section 2423.8(b)(1) and (2).

After all evidence has been received and reviewed, the investigating Agent researches the legal issues presented by reading and applying case precedent from Authority Decisions, and prepares a report and recommendation for the Regional Director on the merits. The Regional Director must make the merit determination on all allegations raised, as clarified during the investigation. Where the decision is that the evidence supports a finding that the Statute has been violated, the parties will be advised and settlement recommended. Absent settlement, a formal complaint will issue and the matter will be set for hearing before an Administrative Law Judge of the FLRA. The dispute may, of course, be settled at any time, including subsequent to the issuance of complaint. Consistent with Section 2423.32 of the Regulations, if the case goes to hearing, the General Counsel shall present the evidence in support of the complaint and will have the burden of proving the allegations of the complaint by a preponderance of the evidence. The Administrative Law Judge will issue a written decision on the case. Any party may file Exceptions to that decision with the Authority.

Where the decision is that the evidence fails to support a finding that the Statute has been violated, the Charging Party is notified. The Charging Party is free to request voluntary withdrawal of the charge at any time during the investigation, both before and after a Regional Director decision, and for a variety of reasons. These may include the fact that the parties have informally resolved the matter, that there has been an intervening event (such as the negotiation of a new contract) which would render the matter moot, or that the filing party agrees that the available evidence would not support a violation at this time.

Where the Charging Party disagrees with the decision, the Regional Director will issue a dismissal letter setting forth the basis of the legal conclusions and providing information on

how the decision can be appealed to the General Counsel. Specifically, Section 2423.11 of the Regulations provides that a Charging Party may obtain review of the Regional Director's decision not to issue a complaint by filing an appeal with the General Counsel within 25 days after service of the decision. The dismissal letter will contain a due date for an appeal. There are specific grounds upon which the General Counsel may grant an appeal as follows:

1. The Regional Director's decision did not consider material facts that would have resulted in issuance of complaint;
2. The Regional Director's decision is based on a finding of a material fact that is clearly erroneous;
3. The Regional Director's decision is based on an incorrect statement of the applicable rule of law;
4. There is no Authority precedent on the legal issue in the case; or
5. The manner in which the region conducted the investigation has resulted in prejudicial error.

Upon review, the General Counsel may remand the case to the Regional Director for further action, including additional investigation or issuance of complaint, or sustain the decision of the Regional Director. The decision of the General Counsel is final.

1. TIMELY FILING OF ULP CHARGES [7118(a)(4)]

Are there any time limits for filing a ULP?

Yes. Section 7118(a)(4)(A) of the Statute discusses when a ULP must be filed. It states:

[N]o complaint shall be issued on any unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority.

- The timeliness of a charge is an affirmative defense. This means the charged party must raise this issue before the close of a ULP hearing or the charged party waives the defense. *See Army Armament Research Dev. & Eng'r Ctr. Picatinny Arsenal*, 52 FLRA 527, 532-34 (1996).
- **Equitable tolling:** The doctrine of equitable tolling permits suspension of a statute of limitations when appropriate. For more information about this doctrine, see *Equal Employment Opportunity Comm'n, Wash., D.C.,* 53 FLRA 487, 497 (1997) (setting forth the criteria for the equitable tolling of the statute of limitations in section 7118(a)(4)(A)).

Are there any exceptions to the six-month rule?

Yes. Section 7118(a)(4)(B) of the Statute discusses when the six-month period may be extended. It states:

> *If the General Counsel determines that the person filing any charge was prevented from filing the charge during the 6-month period referred to in subparagraph (A) of this paragraph by reason of-*
>
> *(i) any failure of the agency or labor organization against which the charge is made to perform a duty owed to the person, or*
>
> *(ii) any concealment which prevented discovery of the alleged unfair labor practice during the 6- month period, the General Counsel may issue a complaint based on the charge if the charge was filed during the 6-month period beginning on the day of the discovery by the person of the alleged unfair labor practice.*

- **Failure to perform duty owed:** If a union does not find out about an unfair labor practice within the six-month time period because the agency has failed to perform a duty it owes to the union, the union's charge is still timely if it files the charge within six months of discovering the unfair labor practice. One example of this is when an agency fails to notify the union of a change in conditions of employment. *See U.S. Dep't of Homeland Security, Customs and Border Prot., El Paso, Tex.*, 65 FLRA 422 (2011).

- **Concealment of unfair labor practice:** If a charging party cannot file a charge within six months of the unfair labor practice because the unfair labor practice was hidden or covered up, the charging party can file a charge within six months of finding out about the unfair labor practice. *See Air Force Accounting & Fin. Ctr., Lowry AFB, Denver*, 42 FLRA 1226, 1238 (1991) (charge timely filed within weeks of the union learning of a change where union had no knowledge of change within six months and agency failed to provide notice of change.)

- **Limits of this exception:** Even if the charged party fails to perform a duty it owes to the charging party or covers up an unfair labor practice, the charged party must file a charge within six months of the unfair labor practice if it finds out about it at any point during that time. *See U.S. Nuclear Regulatory Comm'n, Wash., D.C.,* 44 FLRA 370, 381 (1992).

How does the Authority apply the six-month rule in charges alleging non-compliance with arbitration awards?

- The six-month period for filing a ULP charge may begin: (1) when a party expressly notifies another party that it will not comply with an award; or (2) when an award has a deadline for compliance and the deadline passes without the party taking any action to

implement the award. *See U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 61 FLRA 146, 151 (2005).

- **Awards with no deadline:** When a party has not expressly said it will not comply with an award, and the award does not give a deadline for complying, the facts of each case will determine when the six-month period begins to run. In these cases, the Authority will look at what an award requires and what a party's actions have been following the award. *See IRS, Wash., D.C.*, 61 FLRA at 151.

2. BARS TO FILING ULP CHARGES [7116(d)]

Can a party file both a grievance and ULP about the same issue?

No. Section 7116(d) of the Statute bars a party from filing both a ULP and a grievance or statutory appeal over the same issue. It states:

> *Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.*

When will a statutory appeal prevent the Authority from asserting jurisdiction over a ULP?

- The Authority will not assert jurisdiction over a ULP if:
  - The party has filed a statutory appeal and that statutory appeal is based on the same facts as the ULP; and if the legal theory supporting the statutory appeal has been raised or could have been raised to the Merit Systems Protection Board (MSPB). *See U.S. Small Bus. Admin., Wash., D.C.,* 51 FLRA 413, 422 (1995).
  - The Union files a statutory appeal on behalf of the employee and then files a ULP based on the same facts with the focus on the rights of the individual. *See U.S. Small Bus. Admin.*, 51 FLRA at 422.

When will the Authority assert jurisdiction over a ULP even though a union filed a statutory appeal?

- The Authority will assert jurisdiction when a union has filed a statutory appeal on behalf of an employee and then files a ULP based on the same facts but the focus is on the union's right to protect other employees. *Id.*

When will a grievance prevent the Authority from asserting jurisdiction over a ULP?

- Under 7116(d) an earlier-filed grievance bars an unfair labor practice charge when (1) the ULP and grievance are about the same issue; (2) the issue which is being raised in the ULP was raised earlier under the grievance procedure; and (3) the grievance and ULP actions are initiated at the discretion of the same party. *See U.S. Dep't of the Air Force 62nd Airlift Wing McChord AFB, Wash.*, 63 FLRA 677, 679 (2009) (*McChord AFB*).

- **Same issue:** A ULP charge and a grievance involve the same issue when: (1) The ULP charge and the grievance arose from the same set of facts; and (2) The legal theories advanced in support of the ULP charge and the grievance are substantially similar. *See U.S. Dep't of the Army, Army Fin. & Accounting Ctr., Indianapolis, Ind.*, 38 FLRA 1345, 1351 (1991) (*Army Finance*), *petition for review denied sub nom. AFGE, AFL-CIO, Local 1411 v. FLRA*, 960 F.2d 176, 177-78 (D.C. Cir. 1992). The earlier-field grievance does not bar the ULP charge unless both criteria are be satisfied. *Id.*

  - **ULP barred:** In *Army Finance,* 38 FLRA at 1351, the Authority held that a ULP charge related to a proposed suspension and a grievance related to the actual 10-day suspension raised the same issue. The Authority found that the factual predicates in both procedures were the same even though the ULP dealt with the proposed suspension and the grievance dealt with the actual suspension. The grievance and ULP raised the same theory since the aggrieved party alleged in both proceedings that management was disciplining an employee because of union activity. *Id.* Therefore, section 7116(d) barred the ULP. *Id.*

  - **ULP not barred:** In *McChord AFB,* 63 FLRA at 680-81, the ULP and grievance were both based on an employee's suspension. However, the theory advanced in the ULP charge was a statutory violation based on interference and coercion, and the theory advanced in the grievance was a question of contract interpretation and application. Since the theories were not the same, section 7116(d) did not bar the later-filed ULP charge. *Id.*

  - **Arbitration not barred:** In *AFGE, Local2096 and United States Dep't of the Air Force, 20th Space Control,Squadron Detachment 1, Dahlgren Naval Support Facility, Va.*, 67 FLRA 30, 31 (2012) , the legal theories underlying the earlier-filed ULP charge and the grievance were not substantially similar because the ULP alleged that issuance of the supervisory order violated the Statute (section

7116(a)(1)) and the grievance alleged that issuance of the order violated the parties' agreement, and because there was no claim that the pertinent agreement provision mirrors the Statute.

See also U.S. Dep't of Justice, Fed. Bureau of Prisons, Metro. Corr. Ctr., N.Y., N.Y. and AFGE, Council of Prisons Locals #33, Local 3148, 67 FLRA 442 (2014) (Provides a good overview (with multiple citations) of section 7116(d) precedent and how a ULP charge alleging a *statutory* violation does not raise the same "issue" (legal theory) as a grievance alleging a *contractual* violation. 67 FLRA at 444-47.

- **Aggrieved Party:** In order for a grievance or ULP to be barred by section 7116(d), the selection of the grievance or ULP procedure must have been in the discretion of the aggrieved party. *See Equal Employment Opportunity Comm'n & Am. Fed'n of Gov't Employees, Council of EEOC Locals No. 216*, 53 FLRA 465, 472 n.9 (1997). This does not mean the grievance and ULP must be filed by the exact same person for section 7116(d) to apply. Rather, the Authority looks at who the aggrieved party is and whether the party had any choice about whether to file a ULP or grievance, even if the aggrieved party did not formally file the charge. *See Army Finance*, 38 FLRA at 1353-54 (where a union files a ULP charge on behalf of an employee and there is no evidence that the employee tried to prevent the union from doing so, the Authority will conclude the ULP was filed within the employee's discretion within the meaning of section 7116(d)).

  - If a union files a ULP that does not allege violation of an employee's individual rights and does not seek relief for the employee, the ULP is not barred by an employee's grievance. *See McChord AFB*, 63 FLRA at 679. The Supreme Court ruled in *Cornelius v. Nutt* that a union can file a ULP charge to enforce its own independent right even if an employee has previously filed a grievance based on the same issue to enforce his individual rights. *See Cornelius v. Nutt*, 472 U.S. 648, 665 n.20 (1985).

3. UNLAWFUL INTERFERENCE [7116(a)(1)]

What rights do employees have under the Statute?

Section 7102 of the Statute provides:

> *Each employee shall have the right to form, join, or assist any labor organization or to refrain from such activity, freely and without penalty or reprisal, and each employee shall be protected in the exercise of such right . . . .*

Section 7102 states that these rights include the right to:

- Act as a representative of a labor organization;
- Present union's views to agency heads, other executive branch officials, the Congress, or other appropriate authorities;
- Engage in collective bargaining

What kinds of activities are protected by section 7102?

- **Individual Employee:** An employee can form, join, or assist a labor organization in many ways. Under section 7102 an employee may:
  - Hold leadership positions within a union or act in a representational capacity
  - File, process, and pursue grievances: *Indian Health Serv., Crow Hosp., Crow Agency, Mont.*, 57 FLRA 109, 125 (2001).
    - Includes the right to gather evidence in support of the grievance. *Dep't of Justice, Bureau of Prisons, Fed. Corr. Inst., Butner, N.C.*, 18 FLRA 831, 833 (1985).
    - Includes the right to conduct investigations and gather evidence to support ULP charges. *Dep't of Defense Dependent Schools, Mediterranean Region, Naples Am. High School,* 21 FLRA 849, 850 (1986).
  - Assist in organizational campaigns. *U.S. Dep't of Justice*, *INS*, *U.S. Border Patrol San Diego Sector*, *San Diego, Cal.*, 38 FLRA 701, 712 (1990), *rev'd in part*, *INS* v. *FLRA*, No. 91-70078 (9th Cir. 1992).
  - Engage in various solicitation activities on behalf of a union. *Id.*
  - Seek union assistance, pursue grievances and obtain union representation. *Indian Health Serv., Crow Hosp., Crow Agency, Mont.*, 57 FLRA 109, 125 (2001).
  - Exercise or assert a right under the collective bargaining agreement. *U.S. Dep't of Labor Employment and Training Admin., S.F., Cal.*, 43 FLRA 1036, 1037-38 (1992).
  - Discuss the collective bargaining agreement and other representational matters in the workplace during non-work time where it does not disrupt work. *U.S. Dep't of the Navy, Naval Aviation Depot, Naval Air Station Alameda, Alameda, Cal.*, 36 FLRA 705, 714 (1990).

- **Publicize, Post, and Leaflet:** Section 7102 of the Statutes protects the right of employees to publicize matters on behalf of a union that affect unit employees' terms and conditions of employment. *See Dep't of the Air Force, 3rd Combat Support Group, Clark Air Base, Republic of the Phil.,* 29 FLRA 1044, 1048 (1987). For examples, see the following cases:

  - *Gen. Servs. Admin.,* 27 FLRA 643, 645 (1987): Distribution of handbills or literature on behalf of union in non-work areas during non-work time

  - *Overseas Fed'n of Teachers and Dep't of Def. Dependents Schs., Mediterranean Region*, 21 FLRA 757, 759 (1986): Union president sent letters written on union stationery to members of Congress and to the President, seeking assistance concerning a reassignment

  - *Bureau of Prisons, Fed. Corr. Inst., Danbury, Conn.,* 17 FLRA 696, 697 (1985): Union representative gave interview to newspaper reporter concerning possibility of staff reductions at agency

- **Union Insignia:** Generally, employees have the right to wear union insignia at the workplace. If "special circumstances" are found an employer may ban the wearing of union insignia. *See Army and Air Force Exch. Serv., Fort Drum Exch., Fort Drum, N.Y.*, 41 FLRA 85, 87 (1991) (*Fort Drum*).

  - **The Authority's Special CircumstancesTest:** The Authority balances the right of the employee to wear union insignia with an employer's need for production and efficiency. *See U.S. Dep't of Justice, INS, U.S. Border Patrol, San Diego Sector, San Diego, Cal.,* 38 FLRA 701, 715 (1990). The Authority considers several factors, including:

    - Circumstances in which the union insignia is worn
    - Size, shape and color of the insignia
    - Any messages imprinted on the insignia
    - Nature of the employer's activity
    - Employer's need for production and safety

  - **Cases where "special circumstances" existed:** Evidence existed linking the wearing of union insignia to a disruption of the agency's operations and maintenance of safety and discipline. *Id.* at 716-17. The Fifth and Ninth Circuits have held, as a matter of law, that law enforcement agencies may institute anti-adornment uniform policies because the need for strict uniform appearance is tied to the organization's interest in "fostering discipline, promoting uniformity, encouraging *esprit de corps,* and enhancing the identification of its employees as members of its organization . . . ." *INS v. FLRA*, 855 F.2d 1454, 1456 (9th Cir. 1988); *U.S. Dep't of Justice v. FLRA*, 955 F.2d 998, 1004 (5th Cir. 1992).

What standard does the Authority use to determine whether an agency has violated section 7116(a)(1)?

- **The standard:** Whether, under the circumstances, the statement or conduct tends to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Elkton, Ohio*, 62 FLRA 199 (2007).

    - This standard is objective. *Id*. Although the Authority considers the circumstances surrounding the statement, the standard is not based on the employee's own perceptions or on the employer's intent. *Id.*

    - An agency may violate section 7116(a)(1) even if it has not committed other unfair labor practices or shown a general dislike for the union (referred to in Authority cases as union animus). *Id.*

    - "If an employee has to think twice before exercising a statutory right, the employee's right has been interfered with." *Dep't of the Treasury, IRS, Louisville, Ky.*, 11 FLRA 290, 298 (1983) (ALJ Decision adopted by FLRA without discussion).

- The Authority carefully examines the facts and circumstances when it applies the objective standard. For examples, see the following cases:

    - *VA Med. Ctr., Leavenworth, Kan.*, 31 FLRA 1161, 1170 (1988): Statements concerning official time in a midyear appraisal were attempts by management to seek reasonable accommodation between employees' right to perform union activities on official time and the employer's interest in having an employee perform his job, and did not interfere with protected rights.

    - *United States Dep't of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 66 FLRA 589 (2012): Employee and Union President's right to privileged communication is overridden by seriousness of matter and management's need to know the informant's identity.

    - *U.S. Dep't of Agric., U.S. Forest Serv., Frenchburg Job Corps, Mariba, Ky.*, 49 FLRA 1020, 1028-36 (1994): Statement linking employer's view of employee's performance with her protected activity discouraged employee from further engaging in such activity. Because it was not an attempt to resolve a conflict between the employer's and employee's interests it violated the Statute.

Can management officials express their personal views about the union without violating the Statute?

Yes. Section 7116(e) of the Statute protects the expression of personal views::

The expression of any personal view, argument, opinion or the making of any statement which:

(1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election,

(2) corrects the record with respect to any false or misleading statement made by any person, or

(3) informs employees of the Government's policy relating to labor-management relations and representation,

shall not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions, constitute an unfair labor practice . . . .

Statements covered under section 7116(e) do not violate section 7116(a)(1) of the Statute.

What types of statements does section 7116(e) protect?

- If the Authority is not conducting a representational election, persons may express any personal view, argument, or opinion that contains no threat or promise of benefit and is not made under coercive conditions: *Okla. City Air Logistics Ctr. (AFLC), Tinker AFB, Okla.*, 6 FLRA 159 (1981) (adopting the ALJ reasoning and decision).

- Statements made in relation to representational elections that either (1) publicize an election and encourage employees to vote, (2) correct the record with respect to any false or misleading statement, or (3) inform employees of the government's policy relating to labor-management relations and representation: *AFLC*, 6 FLRA 159.
- For examples, see the following cases:

  - **Statements protected:** In *AFLC*, a manager stated to his employees, "The Union isn't worth the paper it's printed on…$11.00 a month isn't worth the money invested in it….The Union has to represent you whether you are a member or not, dues are high, I hate to see you waste your money." 6 FLRA 159, 160 (1981). The statements were permissible since they were not made during a representational election, there was no threat or promise of benefit, and the comments were not made under coercive conditions because each employee had asked the manager for his opinion of the union.
  - **Statements not protected:** In *162nd Tactical Fighter Group, Ariz. Nat'l Guard, Tucson, Ariz.*, the Authority held that a Major's statement to employees that they would be closely watched because they were visible supporters of the union was made under coercive conditions. 18 FLRA 583, 586 (1985).

What are some examples of cases where the Authority found that an agency's conduct or statements violated section 7116(a)(1)?

- A manager told a summer intern that he was an "ungrateful son of a bitch" for pursuing a grievance and that if it were up to the manager, the intern would receive no more extensions of employment. *Fed. Election Comm'n*, 6 FLRA 327, 338 (1981).

- A supervisor told an employee that she should drop the grievance she had filed on her performance evaluation; that if she proceeded with the grievance he would change her evaluation, but she would not really gain anything in the long run; and that if she gained a reputation as a "bitcher" or complainer, her career wouldn't go much further. *U.S. Dep't of the Treasury, Bureau of Alcohol, Tobacco & Firearms, Chi., Ill.*, 3 FLRA 724, 731 (1980) (adopting decision of the ALJ).

- The General Manager of an Exchange told two stewards that if they continued to file grievances there would be a reduction-in-force, the agency would lay everybody off, and there would be nothing left to talk about. *Army and Air Force Exch. Serv., Fort Carson, Colo.*, 6 FLRA 607, 613 (1981).

- Threats or statements that previously filed unfair labor practice charges are worthless and that there will be repercussion for filing such charges. *U.S. Naval Supply Ctr., San Diego, Cal.,* 21 FLRA 792, 806 (1986)

- As a result of its school principal's contact with the Governor of an Indian tribe concerning union problems, the Governor barred a non-employee union representative from entering the Pueblo, thus barring the union representative from entering the school. *Bureau of Indian Affairs, Isleta Elementary Sch., Isleta Pueblo, N.M.,* 54 FLRA 1428, 1438 (1998).

- A supervisor gave an oral reprimand to a union official when he refused a direct order to be silent while representing another employee in an investigatory interview. *FAA, St. Louis, Mo.*, 6 FLRA 678, 687 (1981).

Can an agency's action against a supervisor violate section 7116(a)(1)?

- **Generally, no.** The Statute does not protect supervisors, even when they are engaged in certain activities that would be protected if they were regular employees. However, under certain circumstances, an agency's discipline of a supervisor may be found to have such a chilling effect on the exercise of protected rights by employees that it violates section 7116(a)(1). *See Dep't of the Navy, Portsmouth Naval Shipyard, Portsmouth, N.H.*, 16 FLRA 93 (1984).

Does the Statute protect employees when they are asking other employees to join the union?

- **Yes, depending on the circumstances.** The right to assist a union under section 7102 includes the right to solicit membership on behalf of the union. *See Treasury, IRS, Ogden Serv. Ctr.*, 42 FLRA 1034, 1050 (1991).

- **Solicitation during non-duty time:** Unless there are special circumstances, a policy or ruling that prohibits employees from soliciting union membership on the agency's premises during "non-duty" time violates section 7116(a)(1) of the Statute. *See Okla. City Air Logistics Ctr., AFB, Okla.*, 6 FLRA 159, 190 (1981). The Authority has held that "non-duty" time includes periods where employees are not required to perform their jobs, such as during breaks or a meal period, even if the employee is being paid for the break. Breaks include both scheduled breaks and unscheduled breaks allowed by management. *See U.S. Dep't of the Navy, Naval Air Station*, 61 FLRA 562, 564 (2006).

- **Solicitation in work and non-work areas:** The Statute protects solicitation in non-work areas as well as work areas if the employees being solicited are also in non-duty status, unless the solicitation would disrupt the agency's operations. *See Dep't of Commerce, Bureau of the Census*, 26 FLRA 311, 319 (1987). For instance, an agency violated an employee's section 7102 right to solicit union membership by preventing the employee from showing a union film during non-work time and in a non-work area. *Dep't of Commerce, Bureau of the Census*, 26 FLRA 719, 728 (1987); *see also Dep't of Treasury, IRS, Ogden Service Center*, 42 FLRA 1034, 1050 (1991) (agency violated section 7116(a)(1) by prohibiting a union from engaging in fund-raising activities during non-work time at the entrance to the cafeteria, a non-work area).

Can an agency prohibit a union from distributing literature in non-work areas and during non-work times due to the content of the literature?

- The content of union literature may justify restriction on its distribution if it amounts to flagrant misconduct or otherwise exceeds the boundaries of protected activity. Union literature that is otherwise protected does not lose its protection, however, "merely because its content is offensive, intemperate or insulting." *Dep't of the Air Force, Randolph AFB*, 58 FLRA 14, 19 (2002) (ALJ Decision).

- Under this standard, a union president's article disparaging a manager by using racial epithets and stereotyping was not protected. *Veterans Admin., Washington, D.C.*, 26 FLRA 114 (1987), *aff'd*, 878 F.2d 460 (D.C. Cir. 1989).

- On the other hand, a union's bulletin board notice critical of an agency counselor was protected where it did not contain derogatory or defamatory statements and did not harm the counselor's ability to perform her duties. *Dep't of Justice, BOP, FCI Florence*, 59 FLRA 165, 171-73 (2003).

Can agencies and unions agree on procedures governing the union's access to the agency's premises in order to engage in representational activities?

- **Yes**. An agency and union "may set forth in an agreement procedures for union access to the agency's premises, and the limitations imposed by that contractual agreement may be the basis of a defense for the denial of such access." *Bureau of Indian Affairs Isleta Elem. Sch.*, 54 FLRA 1428, 1438 n.7 (1998); *see also Army and Air Force Exch. Serv., Lowry AFB Exchange*, 13 FLRA 310, 311 (1983) (agency did not violate section 7116(a)(1) by insisting upon union's compliance with agreed-upon procedures for gaining access to agency's facilities by non-employee union representative).

Does the union's statutory right to publicize matters affecting working conditions include the right to post literature on an agency's bulletin board or to place an advertisement in an agency-controlled newspaper?

- **No**. The Authority has held that "[a]lthough the statutory right to publicize matters affecting working conditions extends to using the employer's property as the site of the communication – as in handbilling in nonwork areas – that right does not extend to using the employer's property as the means of communication. Thus, neither a union nor an employee has a statutory right to post material in public areas on agency property." *Dep't of the Air Force, Scott AFB*, 34 FLRA 1129, 1135-36 (1990). Because advertising in an agency's newspaper "is similar to posting on agency bulletin boards or in other public areas," the union also does not have the statutory right under section 7102 to advertise in an agency's newspaper." *Id.* at 1136.

- A union may, however, "establish a right to advertise in such a newspaper or a right of access to other agency property by contract or past practice. Where such a right of access to agency property has been established by past practice, an employer would reasonably tend to discourage union activity in violation of section 7116(a)(1) of the Statute if: (1) the employer discriminatorily denies the union the use of an agency bulletin board or other public area; or (2) the employer removes union material from the employer's property where the union had been permitted to post notices and the posted material meets the employer's established standards." *Id.* (citations omitted).

- Thus, where an agency had a past practice of allowing employees to post notices of all kinds in the teacher's lounge, it violated section 7116(a)(1) of the Statute by forbidding the posting of union literature. *Dep't of Defense Dependents Sch., Mediterranean Region, Naples Amer. High School*, 21 FLRA 849, 850 (1986).

Under what circumstances might an agency restrict a union representative's right to access employees the union represents on the agency's premises?

- An agency may refuse to honor a union's particular designation of its representative to conduct representational activities on the agency's premises where it can demonstrate "special circumstances" that warrant precluding that individual from serving in that capacity. This exception is "construed narrowly to preserve the union's normal prerogatives." *U.S. Penitentiary, Leavenworth*, 55 FLRA 704, 713-14 (1999).

- The Authority has applied this standard to conclude that a federal correctional facility could deny a union president access to the institution for representational purposes where the president had been placed on home duty due to alleged misconduct that gave rise to legitimate security concerns. *Id*.

Can an agency bar non-employee union representatives from entering its premises for representational purposes?

- **It depends on the circumstances**. The Authority has held that employees "have a right, on agency property, to 'learn the advantages' of labor organizations from non-employee organizers, pursuant to section 7116(a)(1) and section 7102." *Dep't of the Air Force, Randolph AFB*, 58 FLRA 14, 19 (2002). The Authority has also recognized that section 7102 encompasses a union's right to designate its representatives, "including a non-employee who will have access to an agency's premises to conduct representational activities." *Bureau of Indian Affairs Isleta Elem. Sch.*, 54 FLRA 1428, 1438 (1998).

- In considering whether agencies must grant access to agency premises to non-employee union organizers for this purpose, the Authority has adopted NLRB precedent as a "appropriate starting point" for its analysis, including the decision in *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105 (1956). *SSA*, 55 FLRA 964, 967 (1999). Under *Babcock*, an employer may deny non-employee union representatives access to employees on company property so long as the union has other channels of communications available for reaching employees and the employer does not discriminate against the union by allowing other similar distributions. *Dep't of the Air Force, Randolph AFB, San Antonio, Tex*., 58 FLRA 14, 18-19 (2002) (ALJ Decision) (also noting, without applying *Babcock*, that this "different standard" applies to the distribution of union literature by non-employees).

- Applying *Babcock*, the Authority found that an agency impermissibly discriminated against a union in violation of section 7116(a)(1) when it "denied [the union] access to distribute information on its outside, public premises after having granted similar access to others." *SSA*, 55 FLRA 964, 967 (1999).

Can an agency's surveillance of employee violate section 7116(a)(1)?

- **Yes, under certain circumstances.** To determine whether management's surveillance of a protected activity interferes with employees' rights under the Statute, the Authority analyzes whether management's presence would "tend" to have a chilling effect on the exercise of protected rights. *See Dep't of the Army, Fort Bragg Sch.*, 3 FLRA 364, 376 (1980). An agency's surveillance may violate the Statute even if the surveillance did not actually stop any employees from exercising their protected rights. *See id.*

- **Management presence at union meetings:** The presence of a school principal at a union organizational meeting reasonably may have prevented teachers from participating in the meeting. *Dep't of the Army, Fort Bragg Sch.*, 3 FLRA 364 at 367.

- **Surveillance for security reasons:** No violation will be found if an agency engages in surveillance because of security considerations. *See Def. Property Disposal Region, Ogden, Utah*, 24 FLRA 653, 657 (1986) (holding surveillance of a union official conducting an investigation of a contract violation was not a violation of section 7116(a)(1) where such observation was performed pending the determination of a security breach).

4. DISCRIMINATION [7116(a)(2) and (4)]

What parts of the Statute discuss discrimination against employees?

Section 7116(a)(2) of the Statute provides:

> *[I]t shall be an unfair labor practice for an agency to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment.*

Section 7116(a)(4) of the Statute provides:

> *[I]t shall be an unfair labor practice for an agency to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit or petition or has given any information or testimony under this Chapter.*

What kind of discrimination is prohibited by sections 7116(a)(2) and (4) of the Statute?

- **Participating in protected activity:** Sections 7116(a)(2) and (4) of the Statute prohibit an agency from discriminating against employees because they engage in protected union activities or because they participate in FLRA investigations or other proceedings. For examples of protected activity, see Section 3 of this outline.

- **Not participating in protected activity:** Sections 7116(a)(2) and (4) of the Statute also prohibit an agency from discriminating against employees if they choose *not* to engage in protected union activities.

What test does the Authority use to decide whether an agency has violated sections 7116(a)(2) and (4) of the Statute?

- The test is described in the Authority decision in *Letterkenny Army Depot*, 35 FLRA 113, 118 (1990) (*Letterkenny*).
- The General Counsel must show that: (1) the employee who was allegedly discriminated against was engaged in protected activity under the Statute; and (2) the protected activity was a motivating factor in the action the agency took against the employee.
  - If the General Counsel does not make this showing, the case is over and the Authority will find that the agency did not violate the Statute.
  - If the General Counsel does make this showing, the Authority will find that the agency did violate the Statute, unless the agency can prove that it had a legitimate reason for the action it took. *See U.S. Dep't of Agric., U.S. Forest Serv., Frenchburg Job Corps, Mariba Ky.*, 49 FLRA 1020 (1994); *22nd Combat Support Group (SAC), March AFB, Cal.*, 27 FLRA 279 (1987).
    - Example: Although the General Counsel showed that an agency transferred an employee shortly after he filed a grievance about a hostile work environment, the Authority decided that his temporary reassignment did not violate the Statute because the agency transferred him for safety reasons. *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr'l Inst., Elkton, Ohio*, 61 FLRA 515, 520-21 (2006).
  - If an agency asserts that it had a legitimate reason for the action it took, the General Counsel may try to show that the reason is pretextual, which means that it is not the real reason. *See Letterkenny*, 35 FLRA at 120 (1990); *Dep't of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 55 FLRA 1201, 1205 (2000).
    - Example: In *U.S. Dep't of Commerce, Nat'l Oceanic and Atmospheric Admin., Nat'l Ocean Serv., Coast and Geodetic Survey, Aeronautical Charting Division, Wash., D.C.*, the Agency asserted that it decided to change an employee's detail and place restrictions on his activity because of an OPM investigatory report. But the Authority found that the reasons set forth in the OPM report were pretextual because they did not provide any information that the agency was not already aware of. 54 FLRA 987, 995 (1998).

What if an agency takes an action against an employee, partially for a legitimate reason, and partially because of the employee's protected activities, i.e. mixed motives?

- If an agency had more than one reason for taking an action, the Authority will find that the agency did not violate the Statute if the agency can prove that (1) there was a legitimate reason for its action; and (2) it would have taken the action even if the employee had not engaged in protected activity. *Dep't of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 55 FLRA at 1205.

  - **Violation not found:** In *Office of Program Operations, Field Operations, SSA San Francisco Region*, the Authority held that although the agency considered an employee's protected activity when it failed to promote him, the agency did not violate section 7116(a)(2). Other factors showed the agency would not have selected the employee even if the employee had not engaged in protected activity. 9 FLRA 73, 74-75 (1982).

  - **Violation found:** In *Hill AFB, Utah*, the Authority ruled that without documents or additional testimony from other witnesses that supported the agency's stated reason for lowering an employee's appraisal, the agency failed to rebut the showing that the lower appraisal was based on the employee's protected activity. 35 FLRA 891, 900 (1990).

What are some examples of cases where the Authority has found an agency discriminated against an employee(s)?

- Agency denied an employee a flight assignment based on an email he sent in his capacity as a union steward. *U.S. Dep't of Transp., FAA,* 64 FLRA 365, 369-70 (2009).

- The Authority found that the agency's stated reason for terminating two probationary nurses (a medical error) was a pretext and that the real reason they were terminated was their protected activity. *Indian Health Serv., Crow Hosp., Crow Agency, Mont.*, 57 FLRA 109, 114 (2001).

- Agency's decision to reduce gain-sharing awards to employees because they engaged in union duties during work time had a foreseeable effect of discouraging employees from engaging in protected union activity and violated section 7116(a)(2) of the Statute. *SSA, Inland Empire Area*, 46 FLRA 161, 176 (1992).

- Agency violated section 7116(a)(4) of the Statute by forcing an employee to sign a statement disavowing knowledge of conduct forming the basis of objections to an election and stating that union activities had played no part in certain actions the agency took against her, where the employee had served as a union observer in the election and was the subject of a ULP charge then under investigation. *Marine Corps Logistics Base, Barstow, Cal.*, 9 FLRA 1046, 1047-48 (1982).

- Agency suspended an employee based on his participation in an unfair labor practice charge. *U.S. Dep't of the Navy, Naval Aviation Depot, Naval Air Station, Alameda, Cal.*, 38 FLRA 567, 569 (1990).

Are there circumstances when an employee, who is otherwise enaged in protected activity, may still lose statutory protections?

- **Yes**. In certain cases, an employee who is engaged in what would be protected union activity may lose that protection if his or her conduct exceeds the boundaries of protected activity. For example, an employee loses protection if he engages in "flagrant misconduct." *U.S. Dep't of the Air Force, Aerospace Maint & Regeneration Ctr., Davis Monthan AFB, Tucson, Ariz.*, 58 FLRA 636, 636 (2003).

- **Definition of flagrant misconduct:** Remarks or conduct that are of such "an outrageous and insubordinate nature" as to remove them from the protection of the Statute. *Naval Facilities Eng'r Command, W. Div, San Bruno, Cal.*, 45 FLRA 138, 156 (1992).
- **Authority's test for deciding whether behavior is flagrant misconduct:** The Authority balances the employee's right to engage in protected activity (which gives leeway for impulsive behavior) against management's right to maintain order and respect for supervision. *Dep't of the Air Force, Grissom AFB, Ind.,* 51 FLRA 7, 10-11 (1995).

    - The Authority considers four factors when applying this test: (1) the place and subject matter of the discussion; (2) whether the outburst or conduct was impulsive or planned; (3) whether the employer's conduct provoked the employee; and (4) the nature of the language or conduct. *Def. Mapping Agency Aerospace Ctr., St. Louis, Mo.,* 17 FLRA 71, 81 (1985).

- **Criminal conduct:** Criminal conduct is not protected activity. *See Long Beach Naval Shipyard, Long Beach, Cal.,* 25 FLRA 1002, 1006 (1987). For example, the D.C. Circuit decided that a physical confrontation which met the legal definition of "assault and battery," was not protected regardless of the circumstances. *Dep't of the Air Force, 315th Airlift Wing v. FLRA,* 294 F.3d 192, 201-02 (D.C. Cir. 2002).

5. AGENCY CONTROL OF LABOR ORGANIZATION [7116 (a)(3)]

Section 7116(a)(3) of the Statute provides that it shall be an unfair labor practice:

> *[T]o sponsor, control or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status . . . .*

What does "equivalent status" mean?

- "Other labor organizations having equivalent status" refers to unions that are not the incumbent union (the union currently certified to represent employees) but have "equivalent status" to the incumbent union.

- **When does a union have "equivalent status?":** A union that has filed a petition to represent employees has equivalent status when a Regional Director determines, and tells the parties, that the petition has a *prima facie* showing of interest and a notice of petition will be posted. *See U.S. Dep't of Def. Dependents Sch., Panama Region*, 44 FLRA 419, 424-25 (1992). A union does not gain equivalent status merely by filing a petition.

- **Agency's treatment of different unions:** An agency is required to give a union that has "equivalent status" the same "services and facilities" that it gives an incumbent union. *U.S. Dep't of Def., Dep't of Army, U.S. Army Air Def. Ctr., and Fort Bliss, Fort Bliss, Tex.,* 29 FLRA 362, 365 (1987). However, when an agency is required to provide a union with a particular service or facility because of a collective bargaining agreement, the Statute does not require the agency to "equalize" the unions' positions. *Id.* at 366; *see also U.S. Dep't of Homeland Security, U.S. Customs and Border Prot.,* 62 FLRA 78, 81-82 (2007) (agency not required to list one union in its directory and user's guide, where the other union had a contractual right to be listed).

How does the Authority decide cases where an agency grants or denies access to agency facilities?

- If an agency is charged with violating section 7116(a)(3) by granting or denying access to services and facilities, the Authority analyzes whether the agency action has sponsored, controlled, or assisted a labor organization. *SSA,* 52 FLRA 1159, 1180 (1997).

  - The Authority looks at whether the agency has, given all the circumstances, interfered with employee freedom of choice by failing to maintain the appropriate arms-length relationship with the labor organization involved. *Id.*

  - The Authority considers the wording of section 7116(a)(3) as well as case law interpreting section 8(a)(2) of the National Labor Relations Act. *Id.*

- **Case example:** In *SSA*, 52 FLRA 1159, 1184-85 (1997), the Authority looked to a case from the private sector, *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105 (1956), to decide whether the agency violated section 7116(a)(3) when it denied a permit to a union to hand out literature in the outdoor areas of the Agency's headquarters. The *Babcock* case said that an employer may prohibit an outside union from handing out union literature if two conditions are met: (1) the union must be able to reach the employees through other methods of communication; and (2) the employer must not discriminate against the union by allowing other unions to hand out materials. *Id.* The Authority concluded (upon remand from a Court of Appeals) that because the employer did not have a

general "no solicitation" rule against outside organizations, it discriminated against the rival union by denying it access. *Soc. Sec. Admin.,* 55 FLRA 964, 967 (1999).

6. DUTY TO BARGAIN IN GOOD FAITH

The Collective Bargaining Relationship

The Statute requires that both agencies and labor organizations, which have a collective bargaining relationship, bargain in good faith. Section 7103(a)(12) of the Statute defines collective bargaining as

> *the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession*.

A labor organization has the right and duty to act for and negotiate agreements on behalf of all employees in the bargaining unit for which it has been recognized as the exclusive representative. (Section 7114(a)(1)) The collective bargaining obligation for both parties, as noted, extends to the "conditions of employment" of the bargaining unit employees. *Antilles Consol. Educ. Ass'n,* 22 FLRA 235, 236 (1986).

What does bargaining in good faith mean?

- The duty to bargain in good faith means the parties must:
  - Approach negotiations with a sincere resolve to reach an agreement
  - Meet at reasonable times and convenient places as frequently as needed
  - Avoid unnecessary delays
- To determine whether a party has bargained in good faith, the Authority looks at all of these factors and considers the situation as a whole. *U.S. Dep't Air Force, HQ, AFLC, Wright-Patterson AFB Ohio*, 36 FLRA 912 (1990).
- Certain conduct, such as unilaterally setting dates for negotiations and unwarranted delays, can be evidence of bad faith bargaining. *U.S. Geological Survey, Caribbean Dist. Ofc. San Juan, P.R.*, 53 FLRA 1006 (1997).

What are "conditions of employment?"

- The term "conditions of employment" is defined in Section 7103(a)(14) as "personnel policies, practices, and matters, whether established by rule, regulation or otherwise, affecting working conditions . . . ."

- **Test for deciding whether something is a condition of employment:** TheAuthority considers two basic factors:

  - Whether the matter relates to bargaining unit employees

  - How the matter affects working conditions of those employees (referred to in Authority cases as the nature and extent of the effect).

    For case examples, see the following: *Antilles Consol. Educ. Assn.*, 22 FLRA 235 (1986); *Dep't of the Air Force, Eielson AFB,* 23 FLRA 605 (1986) (base shopping privileges involved a condition of employment); *see also Am. Fed'n of Gov't Employees, Local 1547*, 64 FLRA 635 (2010) and *Am. Fed'n of Gov't Employees, Local 1547*, 64 FLRA 642 (2010).

- **Working conditions vs. conditions of employment:** The Authority finds no difference between "working conditions" and "conditions of employment" as those terms are practically applied. *U.S. Dep't of the Air Force, 355th MSG/CC, Davis-Monthan AFB, Ariz.*, 64 FLRA 85, 90 (2009).

- **Matters that are NOT conditions of employment:** Under section 7103 (a)(14) (A), (B) and (C) of the Statute, some matters are excluded from the definition of "conditions of employment":

  - Prohibited political activities

  - Matters relating to the classification of a position

  - Matters specifically provided for by federal statute

How are conditions of employment established?

- "Conditions of employment" may be established by agreement or practice. *IRS*, 27 FLRA 322 (1987). Something which is not a condition of employment cannot become a condition of employment just because the parties have an agreement or practice related to it. See *Naval Weapons Station Concord*, 33 FLRA 770 (1988).

- **Past practice test:** A condition of employment is established by past practice if the practice is consistently and openly exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other. *U.S. Dep't of Labor, Wash., D.C.*, 38 FLRA 899 (1990).

- **Past practice that is inconsistent with the parties' contract:** Generally, where parties have included a matter in their negotiated agreement, the agreement will govern unit employees' conditions of employment. Occasionally, parties can establish conditions of employment that are different than or inconsistent with the terms of the contract. To determine if the inconsistent practice is a condition of employment, the Authority applies the past practice test. *U.S. Dep't of the Navy, Naval Avionics Ctr., Indianapolis, Ind.,* 36 FLRA 567 (1990); *United States Dep't of Veterans Affairs N. Ariz. VA Health Care Sys., Prescott, Ariz.* 66 FLRA 963 (2012) (when ALJ's are required to interpret contract language to decide ULP cases they (and arbitrators interpreting contracts) **may** enforce past practices that are contrary to unambiguous contract language).

The following material addresses the duty of Federal agencies and their component activities to bargain in good faith and ways that duty can be violated. A discussion of the duty of labor organizations to bargain in good faith is addressed in a later section.

What section of the Statute does an agency violate if it does not bargain in good faith?

- Section 7116(a)(5). It states that "*it shall be an unfair labor practice for an agency to refuse to consult or negotiate in good faith with a labor organization as required by this chapter.*"

When does an agency have a duty to bargain?

- An agency has a duty to bargain with the exclusive representative in three circumstances:
  - Term negotiations for a collective bargaining agreement. *AFGE, Interdepartmental Local 3723, AFL-CIO*, 9 FLRA 744 (1982).
  - Mid-term negotiations when the union requests bargaining over subjects the parties have not bargained about. *U.S. Dep't of the Interior, Wash., D.C.*, 56 FLRA 45, 50-51 (2000).
  - Agency-proposed changes in conditions of employment, with certain limitations that will be discussed later. *Fed. Bur. of Prisons, FCI, Bastrop, Tex.*, 55 FLRA 848 (1999).

  Duty to bargain vs. scope of bargaining: Determining whether there is a duty to bargain is different from whether any particular subject matter or proposal is negotiable (scope of bargaining). The duty to bargain issue centers on whether and when bargaining must occur if requested by the union.

What are term negotiations?

- Section 7114(a)(4) of the Statute states that both parties shall meet and negotiate in good faith for the purpose of arriving at a collective bargaining agreement. Bargaining for an initial or successor contract is referred to as term negotiations.

- **Official time for contract negotiations:** As discussed later in the Official Time section, Section 7131(a) states that employees representing a union in contract negotiations shall be authorized official time for that purpose.

When do parties have mid-term bargaining obligations?

- Even when parties have a collective bargaining agreement, they may have an obligation to bargain if the union or agency makes a mid-term request to bargain over a subject that the parties have not bargained over.

- When a mid-term bargaining request is made, there will be issues about whether the matter is already "covered by" the agreement. The "covered by" issue is discussed later in this section.

When is an agency obligated to bargain over changes in conditions of employment?

- Before an agency changes bargaining unit employees' conditions of employment, it is required to give the exclusive representative notice and a chance to bargain over the parts of the change that are within the duty to bargain. U.S. Army Corps of Eng'rs, Memphis Dist., Memphis, Tenn., 53 FLRA 79, 81 (1997).

- **Impact of the change:** An agency only has to bargain over a change in conditions of employment if the change has an actual or reasonably foreseeable impact which is more than de minimis. U.S. Dep't of the Air Force, 355th MSG/CC, Davis-Monthan AFB, Ariz., 64 FLRA 85, 89 (2009).

- **Effect of the parties' agreement:** As with mid-term bargaining requests, an agency does not have to bargain over a change if the subject matter of the change is "covered by" the parties' agreement. The "covered by" issue is discussed more specifically later in this section.

- **Requirement that there be a change:** If the agency's action does not change working conditions, there is no duty to bargain. See, e.g., U.S. Dep't of Veterans Affairs, Med. Ctr., Sheridan, Wyo., 59 FLRA 93, 94 (2003) (assignment of acutely ill patients to ward for acutely ill patients did not change working conditions). There must be something new or different about employees' conditions of employment.

What is the *de minimis* test and how does it affect the parties' bargaining obligations?

- **The *de minimis* test:** Unless the facts establish that the impact on bargaining unit employees is more than *de minimis*, there is no duty to bargain. *U.S. Dep't of the Treasury, IRS*, 56 FLRA 906, 910 (2000); *GSA, Region 9, S.F., Cal*., 52 FLRA 1107, 1112 (1997). Whether a change in conditions of employment is more than *de minimis* (important enough to require bargaining), is based on the facts of each case. The Authority looks to see if the nature and extent of the effect or reasonably foreseeable effect on conditions of employment of bargaining unit employees is significant. *Dep't of HHS,SSA,* 24 FLRA 403, 407-08 (1996) (*SSA*).

- **Timing of the test:** The *de minimis* test looks at the facts at the time the change was proposed and implemented. *Portsmouth Naval Shipyard, Portsmouth, NH*, 45 FLRA 574, 575 (1992).

- **Equitable considerations:** The Authority also takes equitable considerations into account when deciding whether a change is *de minimis*. *Dep't of HHS,SSA,* 24 FLRA at 408.

- **Number of employees impacted:** The number of employees affected by the change is a factor in the *de minimis* test, but it is not a controlling consideration. *SSA*, 24 FLRA at 408.

- **Efficacy of a past practice:** When an agency decides to change a past practice, the obligation to bargain depends upon the effects or reasonably foreseeable effects of the change in practice. Whether the practice worked or achieved a stated goal is irrelevant. *Dep't. of Justice, U.S. INS, U.S. Border Patrol, El Paso, Tex.*, 39 FLRA 1325 (1991).

What are some examples of cases where the Authority found changes were more than *de minimis*?

- *SSA, Gilroy Branch Office, Gilroy, Cal.*, 53 FLRA 1358 (1998) (change in appointment schedules that affected employees' ability to complete other work)

- *U.S. Customs Serv., Sw. Region, El Paso, Tex.,* 44 FLRA 1128 (1992) (change in work hours that resulted in loss of overtime opportunities)

- *U.S. Dep't of the Air Force, Air Force Materiel Command*, 54 FLRA 914 (1998) (implementing a program that would affect future career and retirement plans and involved loss of benefit of $25,000)

- *U.S. Dep't of the Treasury, INS*, 56 FLRA 906 (2000) (local office move that resulted in some computers and telephones not working, computer files not accessible, and loss of quality storage cabinets)

What are some examples of cases where the Authority found changes were only *de minimis*?

- *Soc. Sec. Admin, Office. of Hearings & Appeals, Charleston, S.C.*, 59 FLRA 646 (2004) (reduction in reserved parking spaces where employees had no problem getting alternate parking)
- *U.S. Dep't of Homeland Sec., Border & Transp. Sec. Directorate, Bureau. of Customs & Border Prot.., Wash., D.C.*, 59 FLRA 728 (2004) (change in vessel boarding policy where the evidence failed to show an impact on overtime opportunities, compensation, promotion or advancement potential)
- *U.S. Dep't of Homeland Sec., Border & Transp. Sec. Directorate, U.S. Customs & Border Prot., Border Patrol, Tucson Sector, Tucson, Ariz.*, 60 FLRA 169 (2004) (change resulted in increased workload but not new duties).

See the Appendix for a more complete breakdown of cases applying the *de minimis* test.

What is the "covered by" doctrine and when does it apply?

- **Reason for doctrine:** The "covered by" doctrine is based on the idea that a party should not have to bargain over matters contained in or covered by an existing agreement between the parties. *AFGE, Local 225*, 56 FLRA 686, 689 (2000).
- **When it applies:** The "covered by" doctrine applies to bargaining over changes in conditions of employment, management- and union-initiated mid-term proposals*, see, e.g.*, *Soc.Sec. Admin., Tucson Dist. Office, Tucson, Ariz.*, 47 FLRA 1067, 1070-71 (1993), as well as negotiability cases regarding specific proposals, *NATCA, AFL-CIO*, 62 FLRA 174, 176-79 (2007) (finding one proposal outside the obligation to bargain because it was covered by the parties' agreement, but determining that a second proposal was not covered by the agreement); *see also PASS*, 56 FLRA 798, 803-05 (2000).
- **"Covered by" test:** The Authority's test to determine whether a matter is "contained in or covered by an agreement" was set out in *U.S. Dep't of HHS, SSA, Balt., Md*., 47 FLRA 1004, 1018-19 (1993) (*SSA, Balt.*). To determine if a matter is "covered by" an agreement, the Authority applies a two-prong test:
    - Prong 1: Is the subject "expressly contained" in the agreement? If it is, the matter is "covered by" the agreeement and there is no bargaining obligation. If it is not, the Authority looks at Prong 2.
        - To determine whether a matter is expressly contained in the agreement, the Authority does not require that the language in the agreement be exactly the same as the language of the proposal or the proposed change. The Authority will find that a matter is "expressly contained" if a reasonable reader would conclude that the provision settles the matter in dispute. *SSA, Balt.,*47 FLRA at 1018.

- Prong 2: Is the subject "inseparably bound up with" and plainly an aspect of a subject covered by the agreement? If it is, the matter is "covered by" the agreement and there is no bargaining obligation.
    - To determine whether a matter is inseparably bound up with a subject covered by the contract, the Authority determines "whether the subject matter of the proposal is so commonly considered to be an aspect of the matter set forth in the provision that the negotiations are presumed to have foreclosed further bargaining over the matter, regardless of whether it is expressly articulated in the provision." *Id.*
    - It might be difficult to determine whether a matter is an element of something which has already been negotiated. *Id. at 1018-19*. In such situations, the Authority will look at whether, given the circumstances, "the parties reasonably should have contemplated that the agreement would foreclose further bargaining in such instances." *U.S. Customs Serv., Customs Mgmt. Ctr., Miami, Fla.*, 56 FLRA 809, 813-14 (2000). If the subject matter is merely "tangentially" related to the provisions of the agreement, and not included as a subject that should have been contemplated as within the scope of the provision, the Authority will not find that the subject is covered by the provision. *SSA, Balt*. 47 FLRA at 1019; *see U.S. Dep't of Justice, Fed. Bur. of Prisons, Wash., D.C.*, 64 FLRA 559 (2010); *U.S. Dep't of the Treasury, IRS, Nat'l Dist. Ctr., Bloomington, Ill.*, 64 FLRA 586 (2010).

Can a party choose to bargain on a subject "covered by" an agreement?

- **Yes.** A party may choose to bargain over matters contained in or covered by an existing agreeement. *NAGE, Local R3-32*, 61 FLRA 127, 131 (2005). Matters covered by agreements are considered "permissive" subjects of bargaining. *AFGE, Local 3937, AFL-CIO*, 64 FLRA 17, 21 (2009). "Permissive" subjects are discussed later in this section.

Can an agency use a provision in the bargaining agreement to defend its actions?

- **Yes.** When a party is accused of an unfair labor practice, it may claim that a provision in the bargaining agreement permitted the action. In this case, the Authority will determine the meaning of the parties' collective bargaining agreement and will resolve the unfair labor practice charge accordingly. *IRS,* 47 FLRA 1091, 1103 (1993). The Authority will interpret the agreement using the standards and principles that arbitrators and courts use in the federal and private sectors. *Id.* at 1110. This is sometimes referred to as the "contract interpretation" doctrine.
- The Authority has found that in some instances, it is necessary to apply both the "covered by" and "contract interpretation" doctrines in the same case. *See, e.g., U.S.*

Dep't of the Air Force 913th Air Wing, Willow Grove Air Reserve Station, Willow Grove., Pa., 57 FLRA 852 (2002); *AFGE, Local 3937,* 64 FLRA 17 (2009).

Can a union waive its right to bargain over a subject?

- **Yes.** This may happen in a couple of ways:
  - By contract: A union may waive its right to bargaining by agreeing to do so in a negotiated agreement. The contract language must be "clear and unmistakable," *United States Dep't of the Army, Womack Army Med. Ctr., Fort Bragg, N.C.*, 63 FLRA 524, 528 (2009), or it must be shown that the matter was "fully discussed and consciously explored during negotiations" and the union "consciously yielded or otherwise clearly and unmistakably waived its interest in the matter," *United States Dep't of the Interior, Wash., D.C.* , 56 FLRA 45, 53 (2000); U.S. *Dep't of Treasury, INS*, 56 FLRA 906, 911-12 (2000).
  - By inaction: A union may also waive the right to bargain by inaction. This can happen if the union does not timely request bargaining, or request additional information, or request an extension of time. *U.S. Penitentiary, Leavenworth, Kan.*, 55 FLRA 704, 753 (1999).

Once it has been determined that there is a duty to bargain, are there any limits on what can be bargained?

- **Yes.** Once the duty to bargain is established, the scope of bargaining must be determined.
- **Matters excluded from the scope of bargaining:** Certain matters are excluded from the scope of bargaining:
  - Matters which are contrary to government-wide rules and regulations (section 7117 (a)(1)): *United States Dep't of the Army, Headquarters, Fort Carson*, *Colo.,* 48 FLRA 168, 206 (1993)
  - Matters contrary to agency rules and regulations for which there is a compelling need (section 7117(a)(2)): *Dep't of the Treasury, Bureau of Engraving & Printing,* 29 FLRA 1436, 1441 (1987)
    - This issue can only be resolved in a negotiability proceeding under section 7117. *Fed. Emergency Mgmt. Agency*, 32 FLRA 502, 505 (1988). The Supreme Court in *FLRA v. Aberdeen Proving Ground, Dep't of the Army*, 485 U.S. 409, 412-13 (1988), also held that issues relating to whether a "compelling need" for an Agency rule or regulation exists that bars negotiations over a particular subject must be resolved through

section 7117 negotiability procedures and not through the unfair labor practice procedure.

- Proposals that interfere with the agency's right to determine its own internal security practices: *Int' Fed'n of Prof'l and Technical Eng'rs, Local 25*, 33 FLRA 304, 306 (1988).

  - An agency's right to determine its internal security practices includes the right to determine the policies and practices that are necessary to safeguard its operations, personnel, and physical property against internal and external risks. *Int'l Fed'n of Prof'l and Technical Eng'rs, Local 25*, 33 FLRA at 306. However, an agency must show a reasonable connection between its security practices and the security of its operations to establish its right under Section 7106(a)(1) of the Statute to determine the practice. *U.S. Envtl.. Prot. Agency, Wash., D.C.*, 38 FLRA 1328, 1332 (1991).

Does the Statute discuss management rights?

- **Yes.** Certain rights are reserved by the Statute to agency management and are not subject to bargaining. These rights are contained in section 7106(a). Under this section, management has sole discretion to:

  - Determine the agency's mission, budget, organization, number of employees, and internal security practices
  - Hire, assign, direct, layoff, retain, suspend, remove, reduce in grade or pay, and discipline
  - Assign work, contract-out, and decide personnel to perform work
  - Make selections to fill positions from any appropriate source
  - Carry out the agency's mission in emergencies

Does an agency have any bargaining obligations when it is exercising a management right?

- **Yes.** If the agency is exercising a management right, the *effects* of the agency's action may be within the duty to bargain, *see e.g.*, *Pension Benefit Guaranty Corp.*, 59 FLRA 48, 50 (2003), but the scope of bargaining does not include the decision to exercise the right, *see, e.g.*, *AFGE, Nat'l Veterans Affairs Council 53*, 58 FLRA 8, 10 (2002), *aff'd sub nom. AFGE v. FLRA*, 352 F.3d 433 (D.C. Cir. 2003).

What are permissive subjects of bargaining?

- Section 7106(b)(1) of the Statute lists subjects which are not barred from bargaining as reserved management rights, but may be negotiated only if the agency chooses to do so. These subjects include:
  - Numbers, types and grades of employees or positions assigned to an organizational subdivision, work project, or tour of duty
    - Example: *U.S. Dep't of Veterans Affairs Med. Ctr., Lexington, Ky.,* 51 FLRA 386, 391-92 (1995) (numbers, types and grades)
    - Numbers, types, and grades include: the establishment of staffing patterns or the allocation of staff; the determination as to whether, and which, vacant positions assigned to an organizational subdivision will be filled; and the number of employees working part-time or on alternative work schedules. *U.S. Dep't of Def. Am. Forces Radio & Television Broad. Ctr. Riverside, Cal.*, 59 FLRA 759, 760 (2004); *AFGE Local 3354*, 54 FLRA 807, 816 (1998).
  - Technology, methods and means of performing work
    - Example: *Am. Fed'n of Gov't Employees, Local 644,* 40 FLRA 831, 834-35 (1991) (use of beepers off duty is a method and means of performing work)
    - "Method" refers to the way in which an agency performs its work and "means" refers to any instrumentality, including an agent, tool, device, measure, plan, or policy used by an agency to do its work. *Nat'l Ass'n of Indep. Labor, Local 7*, 64 FLRA 1194, 1196 (2010).

How do permissive subjects impact bargaining obligations?

- **No negotiation required:** No party is required to negotiate on permissive subjects. *U.S. Dep't of Treasury, IRS, Wash., D.C.*, 37 FLRA 1423, 1431 (1990).
- **Withdrawing from permissive bargaining:** Parties may withdraw from bargaining over permissive subjects before they have reached an agreement.
- **Agreements on permissive subjects:** Once parties have reached agreement on a permissive subject, it is binding on the parties and agency heads may not disapprove permissive topics upon review under section 7114 (c). *Id*. Either party may elect not to be bound by the permissive agreement once the agreement has expired. *Id.*
- **Bargaining to impasse:** Parties may not insist to impasse on a permissive topic of bargaining. *AFGE, Local 3937,* 64 FLRA 17 (2009).

When do agencies have an obligation to bargain over the substance (not just the effects) of a decision?

- Where a matter is not a reserved management right, a permissive subject of bargaining, or otherwise outside the duty to bargain, it is fully negotiable. This is referred to as "substance" bargaining.

- **Impact and implementation vs. substance bargaining:** If management wishes to change a condition of employment which involves a reserved management right or a permissive subject on which it chooses not to bargain, it only has a duty to bargain procedures for implementing the change and appropriate arrangements for employees affected by the exercise of the management right. This is commonly referred to as "impact and implementation bargaining". *See* section 7106(b)(2) and (3). If, on the other hand, the change concerns a negotiable matter, management may propose the action but must bargain in good faith on the decision itself.

- **Examples of subjects the Authority has found to be substantively negotiable:**

  - Assignment of parking spaces: *U.S. Dep't of Air Force, Williams AFB, Chandler, Ariz.,* 38 FLRA 549 (1990)

  - Water coolers: *U.S. Dep't of Labor*, 38 FLRA 899 (1990)

  - Protective coveralls: *Dep't of Defense, Warner Robbins Air Force Logistics Ctr., Robbins AFB, Ga.*, 35 FLRA 68 (1990)

  - Annual picnic: *U.S. Army Adjutant Gen. Publ'n Ctr., St. Louis, Mo.*, 35 FLRA 631 (1990)

  - Certain leave procedures: *U.S. Dep't of the Air Force Headquarters, Air Force Logistics Command, Wright-Patterson AFB, Ohio*, 38 FLRA 887 (1990)

  - Length of rotation schedules and cross assignment of equally qualified employees: *U.S. Dep't of the Treasury, Customs Serv. Region IV Miami Dist., Wash., D.C.,* 38 FLRA 770 (1990)

  - Employee awards programs: *Dep't of Veterans Affairs Med. Ctr., St. Louis, Mo.,* 50 FLRA 378 (1995).

When does an agency have to engage in impact and implementation bargaining?

- An agency must give the union advance notice and a reasonable opportunity to request bargaining when it is going to exercise a management right (including those reserved under 7106 (a)) that involves a change in working conditions of bargaining unit employees, and the impact or reasonably foreseeable impact is more than *de minimis*. The agency is required to bargain over procedures for implementing the change and

appropriate arrangements for affected employees. This is commonly referred to as "impact and implementation bargaining." *Dep't of Homeland Sec., Customs & Border Prot.*, 64 FLRA 989, 994 (2010). If the agency does not give the union proper notice of the change and implements the change without barganining, this is bad faith bargaining. *See, e.g.*, *U.S. Dep't of the Army, Lexington-Blue Grass Army Depot, Lexington, Ky.,* 38 FLRA 647, 661 (1990).

What is "proper" or "adequate" notice of a change?

- The notice must contain information about the change that is specific enough so the union has a reasonable opportunity to request bargaining. *Ogden Air Logistics Ctr., Hill AFB, Utah*, 41 FLRA 690, 698 (1991).

What are parties' obligations in relation to bargaining requests?

- **Union's obligation to request bargaining:** Once a union is given timely notice of a change, it must timely request bargaining. *Dep't of Homeland Sec., Customs & Border Prot.*, 62 FLRA 263, 265 (2007).
    - Exception: The union does not have to make a demand to bargain in circumstances where a request would be useless; for example, if management has already indicated that it refuses to bargain. *Fed. Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.*, 55 FLRA 848, 855 (1999).
- **Union's bargaining proposals:** There is no requirement for a union to label its proposals as either substance or impact and implementation. To do so would encourage the parties to engage in semantic disputes instead of collective bargaining. *U.S. Dep't of HHS, PHS, IHS, Indian Hosp., Rapid City, S.D.*, 37 FLRA 972, 980 (1990).
- **Agency's obligation to respond to request:** An agency must respond to a union's bargaining request. A failure to do so may constitute bad faith bargaining. *Army & Air Force Exch. Serv., McClellan Base Exch., McClellan AFB, Cal.,* 35 FLRA 764, 769 (1990) (failure to respond to union's bargaining request for over 4 months).

How does the Authority determine whether a proposal is an "appropriate arrangement" under section 7106(b)(3) of the Statute?

- The Authority uses the analysis set forth in *NAGE, Local R14-87*, 21 FLRA 24, 31-32 (1986). *NFFE, Local 2192*, 59 FLRA 868, 870-71 (2004). The Authority determines:
    - Whether the proposal is intended to be an "arrangement" for employees adversely affected by the exercise of a management right. *Id.*

- Whether the claimed arrangement is sufficiently "tailored" to compensate employees suffering adverse effects attributable to the exercise of management's rights. *Id.*

- Whether the proposal "excessively interferes" with the relevant management right. The Authority reaches this determination by weighing the "competing practical needs of employees and managers." *Id.*

Do parties have to bargain over ground rules for negotiations?

- **Yes.** Bargaining over ground rules for negotiations is a mandatory subject within the scope of bargaining. *U.S. Dep't of the Treasury, Customs Serv., Wash., D.C.*, 59 FLRA 703, 709 (2004).

- **Ground rules proposals:** Ground rules proposals must be designed to further, not impede, the bargaining for which the ground rules are proposed. *U.S. Dep't of the Air Force, HQ, AFLC, Wright-Patterson AFB, Ohio*, 36 FLRA 912, 916 (1990).

- **Ground rules and arbitration:** Disagreement with an arbitrator's interpretation of ground rules does not provide a basis on which to find an award deficient. *See, e.g., U.S. Dep't of Veterans Affairs, Reg'l Office, Cleveland, Ohio*, 47 FLRA 363, 368 (1993).

If employees are part of a nationwide consolidated unit, does the local union have a right to bargain?

- **It depends on whether the labor organization at the national level has delegated bargaining authority to the local union.** Once a labor organization is certified as exclusive representative of a consolidated unit, a new bargaining obligation is created which supersedes that which had previously existed at the local level. *Dep't of HHS, SSA,* 6 FLRA 202, 204 (1981) (a party may not demand bargaining with an administrative component lower than the component that is the designated exclusive representative). The mutual obligation to bargain as articulated in the Statute exists only at the level of exclusive recognition. *See Dep't of the Air Force, Ogden Air Logistics Ctr., Hill AFB, Utah*, 39 FLRA 1409, 1417 (1991). To initiate mid-term bargaining in a consolidated unit, the union or its agent must make a request at the level of exclusive recognition unless it has delegated that right to a local union and management has agreed to local level bargaining. *Id.*

- **Resolving disputes over who has authority to bargain:** A dispute as to whether a national-level bargaining agreement authorizes bargaining on certain matters at the local level, is resolved through the arbitration procedure, not through the unfair labor practice or negotiability procedures. *AFGE, AFL-CIO, Local 1661*, 2 FLRA 412, 414 (1980). The parties at the level of exclusive recognition may agree to authorize supplemental

negotiations at a lower level. *Dep't of the Treasury, U.S. Mint, Denver, Colo.*, 3 FLRA 43, 47 (1980).

What happens if management officials above the level of exclusive recognition try to interfere with the bargaining process?

- Agency management above the level of exclusive recognition may not prevent lower level managers from fulfilling their bargaining obligations. *Boston Dist. Recruiting Command, Boston, Mass.*, 15 FLRA 720, 726 n.5 (1984). Where management at the level of recognition has no choice but to ministerially follow the dictates of upper level management, the higher level agency may be found to have violated the Statute. *Dep't of Interior, Water & Power Res. Servs., Grand Coulee Project,* 9 FLRA 385, 388 (1982); *see also Dep't of Interior, Wash., D.C.,* 25 FLRA 91, 96-97 (1987).

If an agency ends a past practice that is unlawful, is it obligated to bargain?

- **Yes, if it would otherwise be required to bargain over the change.** If a past practice exists that is shown to be illegal or contrary to regulations, the agency may terminate the practice even if the union does not agree on the substance of that decision. However, the termination may give rise to a duty to bargain over the impact on employees. *Portsmouth Naval Shipyard*, 5 FLRA 352, 353-54 (1981); *Dep't of the Interior, U.S. Geological Survey, Metairie, La.*, 9 FLRA 543, 544-45 (1982).

Can an agency implement a change if it believes all of the union's proposals are non-negotiable?

- **Yes, but the agency risks violating the Statute.** *U.S. Dep't of HHS, SSA, Balt., Md.*, 39 FLRA 258, 262-63 (1991). If the Authority later determines that any proposals were negotiable, the unilateral implementation may be bad faith bargaining in violation of section 7116(a)(5) of the Statute. *Id.*

Can it ever be an unfair labor practice for an agency to declare a proposal is non-negotiable?

- **Yes, in certain situations.** Generally, disputes over the negotiability of propsoals are resolved through the negotiability process. But if the Authority has previously found a specific proposal to be negotiable, an agency violates the statute by refusing to negotiate on a proposal that is without material differences. *U.S. Dep't of the Army, Fort Stewart Schs., Fort Stewart, Ga.,* 37 FLRA 409, 417 (1990); *Dep't of the Air Force, U.S. Air Force, U.S. Air Force Acad.*, 6 FLRA 548, 549 (1981).

Is it an unfair labor practice for an agency to breach a provision in the collective bargaining agreement?

- **Generally, no.** Most of the time, when alleging that a contract provision has been breached, the avenue of recourse is the parties' negotiated grievance procedure, not a ULP alleging a repudiation. *See, e.g., Marine Corps Logistics Base, Barstow, Cal.,* 33 FLRA 626, 642 (1988). But certain breaches may be so serious that they rise to the level of a repudiation. Under the Statute, it is bad faith bargaining for an agency to repudiate a negotiated agreement.

- **Repudiation test:** To determine whether an agency has repudiated an agreement, the Authority looks at two elements:

  - The nature and scope of the part of the agreement that was breached (in other words, was the breach clear and patent?)

    - If the meaning of a particular term is unclear and a party acts in accordance with a reasonable interpretation of that term, that action will not be a clear and patent breach of the agreement. *See Dep't of the Air Force, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 52 FLRA 225, 231 (1996) (*Robins AFB*).

  - The nature of the part of the agreement that was breached (in other words, did that provision go to the heart of the parties' agreement?)

    - See *Robins AFB*, 52 FLRA at 230-31; *Dep't. of the Air Force, 375th Mission Support Squadron, Scott AFB, Ill.*, 51 FLRA 858 (1996) (*Scott*).

- **Single breach of an agreement**: For there to be a repudiation, there has to be a breach of an obligation imposed by the parties' agreement. *Dep't of Def., Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 40 FLRA 1211, 1219 (1991). Generally, an agency's one-time failure or refusal to comply with a contract provision is not a repudiation of the collective bargaining agreement. *Id.* at 1218-19. But the mere fact that the breach of an agreement may only be a single instance, does not mean that the breach does not violate the Statute. It is the nature and scope of the breach that are relevant. *Id.*

- **Repudiation of verbal agreements:** An agreement can be repudiated even if it is not a written agreement. *U.S. Dep't of Def., Def. Language Inst., Foreign Language Ctr., Monterey, Cal.*, 64 FLRA 735, 746 (2010) (refusal to be bound by an oral agreement constituted a repudiation).

- **Breach of a contract provision that is contrary to law:** There is no unlawful repudiation where the provision violated is contrary to law. *See U.S. Dep't of the Navy, Spvr.of Shipbuilding, Conversion and Repair, Newport News, Va.*, 65 FRLA 1052, 1054 (2011).

What is a bypass?

- **Definition:** An agency unlawfully bypasses the exclusive representative when management deals directly with a unit employee or employees on a matter involving conditions of employment for which it has an obligation to deal with the union as the exclusive representative. *SSA*, 55 FLRA 978, 983-84 (1999); *AFGE, Nat'l Council of HUD Locals* 222, 54 FLRA 1267, 1276 (1998). Dealing directly with unit employees interferes with the union's rights under Section 7114 (a)(1) of the Statute "to act for . . . all employees in the unit." *U.S. DOJ, Bureau of Prisons, FCI, Bastrop, Tex*., 51 FLRA 1339, 1346 (1996) (*Bastrop*).

- **Examples of bypasses:**

  - Agency deals or directly negotiates with unit employees to put pressure on the union to take a certain course of action. *U.S. Customs Serv.,* 19 FLRA 1032, 1048 n.17 (1985); *FAA., L.A., Cal*., 15 FLRA 100, 104, 106 n.3 (1984).

  - Agency communicates directly with bargaining unit employees concerning grievances, disciplinary actions, and other matters relating to the collective-bargaining relationship where the agency knows the employee is represented by the union. *Bastrop*; *Dep't of HHS, SSA, Balt., Md*, 39 FLRA 298, 311 (1991); *see also U.S. DOJ, INS, N.Y. Office of Asylum, Rosedale, N.Y.*, 55 FLRA 1032, 1038 (1999).

  - Agency delivers a disciplinary decision to a unit employee when the agency knows the union is representing the employee in the matter. *McGuire AFB,* 28 FLRA 1112 (1987); *Dep't of the Air Force, Sacramento Air Logistics Ctr., McClellan Air Force Base, Cal.,* 35 FLRA 345 (1988).

- **Agency surveys and bypasses:** An agency questionnaire or poll that only elicits facts from employees is not an unlawful bypass. *Dep't of HHS, SSA,* 19 FLRA 415, 416-17 (1985). But a questionnaire/poll where the agency solicited unit employee opinions and views on existing or soon to be made changes is a bypass of the union. *Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms, Wash. D.C.*, 16 FLRA 528, 543 (1984). Management may directly solicit information from employees about its operations, but it may not attempt to use a poll or survey to bargain directly with them about matters subject to bargaining with the union. *Dep't of Treasury, IRS, Wash., D.C.*, 31 FLRA 832, 838 (1988).

What happens if the parties bargain to impasse?

Section 2470.2(e) of the FSIP's regulations defines an impasse as "that point in the negotiation of conditions of employment at which the parties are unable to reach agreement, notwithstanding their efforts to do so by direct negotiations and by the use of mediation or other voluntary arrangements for settlement." See also *Space Sys. Div.*, 38 FLRA 1485, 1501-02

(1991) ("the Authority has declared that an impasse is that point in negotiations at which the parties are unable to reach agreement").

- **After the parties have bargained in good faith to impasse** --
  - The agency is free to implement the proposed change if it allows the union a reasonable period of time to invoke the FSIP impasse procedure. *Dep't of Labor, Wash. DC*, 60 FLRA 68, 70-71 (2004). To satisfy this obligation the agency must notify the union that it considers bargaining to be at an impasse and inform the union when it intends to implement the proposed change. *U.S. INS, Wash., DC*, 55 FLRA 69, 73 (1999) (*INS*). For example, the Authority found that eight days' notice between impasse and implementation was sufficient in one case, given the specific circumstances involved. *U.S. Air Force, Air Force Logistics Command, Wright-Patterson AFB, Ohio*, 5 FLRA 288, 294 (1981). *See also U.S. Customs Serv.*, 16 FLRA 198, 200 (1984) (eight days'notice); *Dep't of Navy, Naval Supply Ctr., San Diego*, 31 FLRA 1088, 1093 (1988) (11 days' notice).
  - When the agency gives the union appropriate notice and if the union fails to timely invoke the services of the Panel, the Agency may lawfully implement the change (its last best offer). *U.S. Dep't of Labor,* 60 FLRA 68, 71 (2004). The Agency's change must be consistent with and not exceed its last best offer. *INS*, 55 FLRA at 74 n.10.
  - If the union timely invokes the services of the Panel, the agency must maintain the status quo pending the completion of the Panel proceedings. *INS,* 55 FLRA at 72-73.
  - An agency violates section 7116(a)(5) if it implements a negotiable change in a mandatory subject of bargaining while the matter is pending before the Panel unless it can demonstrate that a delay in implementation would have impeded its ability to effectively and efficiently carry out its mission. *SEC*, 62 FLRA 432 (2008)

Can the Panel resolve duty to bargain issues, including negotiability disputes?

- **No.** *Interpretation and Guidance*, 11 FLRA 626 (1983).
  - However, the Panel can resolve negotiability issues based on well-settled Authority finding substantively identical proposals negotiable. *Commander, Carswell Air Force Base, Tex.*, 31 FLRA 620 (1988).

7. REFUSAL TO COOPERATE IN IMPASSE PROCEDURES -- 7116(a)(1) and (6)

How does an agency violate section 7116(a)(6) of the Statute?

- **Failing to maintain the status quo**: A violation occurs if the FSIP directs the agency to maintain the status quo and the agency implements changes in conditions of employment anyway, or if the agency's implementation violates a FSIP procedure. *INS,* 55 FLRA at 78. The Panel procedures for resolving impasses are discussed in the FSIP Dispute Resolution Procedures Guide.

  - The FSIP may direct the union and the agency to include certain language in their agreement. This order is binding during the term of the agreement unless the parties agree to something else. *Western Area Power Admin.*, 25 FLRA 1090 (1987) (FSIP's Order that the parties' future impasses, if any, be resolved through binding arbitration).

  - A party acts at its peril by refusing to comply with a Panel decision. *Dep't of Energy,* 51 FLRA 124, 126 (1995); *Interpretation and Guidance*, 15 FLRA 564, 568 (1984); *NASA,* 12 FLRA 480, 500-01 (1983).

  - If on review, the provision is found lawful, the agency's disapproval or failure to comply with the Panel's decision violates section 7116(a)(1), (5), and (6). *NTE*, 64 FLRA 443 (2010); *HQ, Nat'l Guard Bureau, Wash. D.C.*, 54 FLRA 316 (1998).

What happens if the FSIP orders parties to include provisions in their agreements that conflict with other laws, rules, or regulations?

- **An agency head can review the provisions:** Under section 7114(c) of the Statute, an agency head can review provisions of a collective bargaining agreement that the Panel has directed the parties to adopt. The agency head can disapprove provisions that conflict with the Statute and other applicable laws, rules and regulations. *Interpretation & Guidance*, 15 FLRA 564 at 568. The agency head level disapproval of an agreement under Section 7114(c) goes to the whole agreement, not just the specific provision being reviewed. *Dep't of the Interior, Nat'l Park Serv., Yorktown, Va.*, 20 FLRA 537 (1985).

- **Challenge to agency head review:** If a union disagrees with an agency head's review, it can challenge it. The union does this through filing a negotiability appeal or an unfair labor practice charge. If the agency's disapproval was incorrect, the agency has committed an unfair labor practice. *U.S. Army Headquarters,* 17 FLRA 84 (1985), *aff'd in relevant part sub nom. NFFE v. FLRA*, 789 F. 2d 944 (D. C. Cir. 1986) and *Dep't of Treasury, IRS*, 22 FLRA 821 (1986) (violation by agency level where the disapproval occurred, not the activity level where the impasse originated).

8. THE DUTY TO PROVIDE INFORMATION

What part of the Statute discusses a union's request for information?

Section 7114(b) (4) of the Statute discusses when an agency must give information to a union. It states:

The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation--

in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data--

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining.

What does "normally maintained" mean?

- Information is "normally maintained" if an agency has and maintains the information. *See Dep't of HHS, SSA, Balt., Md.*, 37 FLRA 1277, 1285 (1990).

When is information "reasonably available?"

Definition: Information is "reasonably available" when it is not extremely hard for the agency to get the information. See *Department of HHS, SSA*, 36 FLRA 943, 950 (1990) (*SSA*), where the Authority discusses what is meant by "reasonably available."

- **Examples:** Information may be reasonably available even when the agency has to spend time and money to get the information. For example, the Authority has said information was reasonably available when:

  - It would take management 3 weeks to put the information together: *SSA*, 36 FLRA at 952, 960

  - The agency had to give the union 10,000 documents: *Dep't of Justice*, *U.S. INS, U.S. Border Patrol El Paso, Tex.*, 40 FLRA 792, 804-05 (1991)

- The agency had to spend $1500 getting the information: *U.S. Dept of Air Force, Air Force Logistic Ctr., Sacramento Air Logistics Command, McClellan AFB, Cal.*, 37 FLRA 987, 993-94 (1990)

- **Creating documents:** Agencies may have to create documents that do not exist if they have the information the union is asking for in an electronic format. For examples, see the following cases:

  - *Department of the Navy, Naval Submarine Base, New London, Conn.*, 27 FLRA 785, 797 (1987)

  - *U.S. Dep't of the Air Force, Air Force Logistics Command, Sacramento Air Logistics Ctr., McClellan AFB, Cal.*, 37 FLRA 987, 993 (1990)

When is information "necessary?"

- **What a union must explain to show information is necessary**: A union must explain: (1) why it needs the information; (2) how it will use the information; and (3) how its use of the information relates to its responsibilities under the Statute. The Authority calls this a "particularized need." *See IRS, Wash., D.C. & IRS, Kansas City Serv. Ctr., Kansas City, Mo.*, 50 FLRA 661, 669 (1995) (*IRS, Kansas City*).

  - A union's request must be specific

  - It is not enough for a union to show that information would be useful; the union must show the information is required in order for it to represent the bargaining unit

  - A union must put enough information in its request so the agency can decide whether it is required to provide the information

- **Scope of the union's request:** A union must identify what information it is requesting and explain why it needs that type or amount of information. *See U.S. Dep't of Justice, INS, N. Region, Twin Cities, Minn.*, 51 FLRA 1467, 1472 (1996); *U.S. Dep't of Justice, INS, N. Region, Twin Cities, Minn.*, 52 FLRA 1323, 1330 (1997) (*Twin Cities*); *U.S. Border Patrol, Tucson Sector, Tucson, Ariz.*, 52 FLRA 1231, 1239 (1997). For example, the scope of a request may include:

  - the number of days, weeks, months, or years of information the union needs

  - the types or groups of employees for which the union needs information

- **Union's responsibility to represent employees:** Agencies have a duty to give the union information that would be relevant to any or all of the union's responsibilities under the

Statute. *See Dep't of HHS, SSA*, 36 FLRA 943, 947 (1990). For example, a union may request information that is necessary for it to:

- Administer and oversee the parties' agreements: *FAA*, 55 FLRA 254, 260 (1999); *Dep't of Justice, INS, N. Region, Twin Cities, Minn. v. FLRA*, 144 F.3d 90, 93 (D.C. Cir. 1998)

- Decide whether or not to file a grievance or to process a grievance it has filed: *NLRB v. FLRA*, 952 F.2d 523, 526 (D.C. Cir. 1992)

- **Limits of the "necessary" requirement:**

  - When explaining its need for information, a union does not have to describe exactly how the agency violated a policy, procedure, law, or regulation. *See Health Care Fin. Admin.,* 56 FLRA 156, 162 (2000) *(HCFA)*.

  - If a union has shown that the information is necessary, the agency must provide the information, even if it does not believe the union's theory or argument is right. For example, if a union files a grievance because it believes the agency did not appraise an employee correctly, an agency should not deny the union's request for a copy of the appraisal on the basis that it will show the appraisal was proper. *See IRS, Kansas City*, 50 FLRA at 673.

- **Agency's interest in NOT providing information:** If an agency has a reason that it does not want to provide the information, the agency must explain this to the union.

  - Authority cases call the agency's reason for not providing the information a "countervailing anti-disclosure interest." *See HCFA*, 56 FLRA at 159.
  - An agency must raise its anti-disclosure interests when the union requests the information. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Det. Ctr., Houston, Tex.*, 60 FLRA 91, 93 (2004) (*FBP Houston*); *U.S. Dep't of the Army, Army Corps of Eng'rs, Portland Dist., Portland, Ore.,* 60 FLRA 413, 416 (2004) (*Portland District*). An agency cannot raise its interests for the first time at an unfair labor practice hearing. *See FAA*, 55 FLRA 254, 260 (1999) (*FAA*).

- **When an agency violates the Statute:** An agency's refusal to give the union requested information violates the Statute when the union has shown that the information is necessary and either:

  - The agency has not established an anti-disclosure interest; or

  - The agency has established an anti-disclosure interest but it does not outweigh the union's need for the information. *See IRS, Kansas City*, 50 FLRA at 671*; see also SSA,* 64 FLRA 293, 303 (2009); *Library of Cong.*, 63 FLRA 515, 519 (2009).

What is "guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining?"

- Section 7114(b)(4)(C) states that an agency doesn't have to give information that contains guidance, advice, counsel, or training for management officials related specifically to the collective bargaining process. This includes:

  - Actions that management should take in negotiations with the union

  - How a provision of the collective bargaining agreement should be interpreted and applied

  - How a grievance or unfair labor practice charge should be handled

  - Other labor-management interactions which impact on the union's status as the exclusive bargaining representative of the employees. *See Portland Dist.*, 60 FLRA 413, 416-417; *NLRB*, 38 FLRA 506, 522-23 (1990), *aff'd sub nom. NLRB v. FLRA*, 952 F.2d 523 (D.C. Cir. 1992).

- This is a narrow exception to an agency's duty to provide information. *See NLRB*, 38 FLRA at 520. It doesn't include:

  - Guidance, advice, or counsel to management officials about the conditions of employment of bargaining unit employees. *See NLRB* at 523.

  - A document that only contains recommendations about how to improve the management and operations of an agency. *See Dep't of HHS, Wash., D.C.*, 49 FLRA 61, 67-69 (1994) (*HHS*) (Member Talkin concurring as to other matters).

    - Such a document will be exempt under section 7114(b)(4)(C) only if it discusses actions that management should take with respect to negotiations, the interpretation and application of a collective bargaining agreement, or the handling of grievances or ULPs. *See id.*

    - A document is exempt from disclosure only if it constitutes "strategic information concerning the bargaining process." *Id.* at 69. *Accord NLRB v. FLRA*, 952 F.2d at 530-31 (upholding Authority's "distinction between nonstrategic and strategic information: information about the subject of collective bargaining versus information about the bargaining itself").

When does the Privacy Act prevent an agency from providing information?

- **What the Privacy Act is:** The Privacy Act is a federal law that prohibits an agency from disclosing personal information about federal employees without their consent. It may prevent an agency from providing certain information to a union. 5 U.S.C. section 552(a)(4), and (5).

    - The Privacy Act applies to information contained in an agency "record" within a "system of records" that is retrieved by using an individual's name or other personal identifier. The statute defines "record" and "system of records."

- **Employee consent:** If an employee has said it is okay to release the information the union is requesting, an agency can provide the information without violating the Privacy Act.

    - It is not enough that an employee has asked for union representation in a particular matter; the employee must specifically consent to the release of information. *See United States Dep't of the Air Force, 56th Support Group, MacDill AFB, Fla.*, 51 FLRA 1144, 1150 (1996) (*MacDill AFB*). The Authority's decision in *MacDill AFB* is consistent with court precedent. *See Abramsky v. United States Consumer Prods. Safety Comm'n.*, 478 F. Supp. 1040 (D.C. S.D. N.Y. 1979). *See also Local 2047, AFGE v. Def. Gen. Supply Ctr.*, 423 F. Supp. 481 (D.C. E.D. Va. 1976), *aff'd* 573 F.2d 184 (4th Cir. 1978).

- **Applying the Privacy Act to a request for information:** Even if an employee has not consented to the release of information, an agency may provide information to the union if the Privacy Act does not bar its disclosure. *See U.S. Dep't of Justice, Fed. Bureau of Prisons Fed. Det. Ctr., Houston, Tex.*, 60 FLRA 91, 94 (2004)*; see, e.g., Veterans Admin. Med. Ctr., Jackson, Miss.*, 32 FLRA 133, 137-38 (1988) (Privacy Act prohibition of disclosure without consent does not apply if disclosure is required under the Freedom of Information Act (FOIA)).

    - An agency can provide requested information as long as the disclosure would not result in a clearly unwarranted invasion of personal privacy. *See U.S. Dep't of Justice, Fed. Bureau of Prisons Fed. Det. Ctr., Houston, Tex.*, 60 FLRA at 94.

    - If an agency believes that giving the union the information it requested would be a clearly unwarranted invasion of personal privacy and would violate the Privacy Act, the agency must show that:

        - the information is contained in a system of records as defined in the Privacy Act

        - disclosing the information would implicate employee privacy interests; and

- he nature and significance of thotse privacy interests. *See FBP Houston,* 60 FLRA at 94-95*; U.S. Dep't of Transp., FAA, N.Y. TRACON, Westbury, N.Y.,* 50 FLRA 338, 345 (1995) (*New York TRACON*).

➢ If an agency makes this showing, and the union still wants the information, it must:

- Identify a public interest under FOIA; and

- Show how disclosure of the information will serve that public interest. *See MacDill AFB*, 51 FLRA at 1151.

- **Public Interest under the FOIA:** The Authority has explained that the only relevant public interest under FOIA is the extent to which the requested information would shed light on the agency's performance of its statutory duties, or otherwise inform citizens about the government's activities. This doesn't incule the public interest in collective bargaining or the interest specific to a union in fulfilling its obligations under the Statute, in analyzing Exemption 6 of FOIA. *Id.*

➢ If the union establishes a public interest under FOIA and the agency establishes privacy interests, the Authority will balance the privacy interests of employees against the public interest in disclosure. *See New York TRACON,* 50 FLRA at 392.

- If the privacy interests are greater than the public interest, the disclosure would be a clearly unwarranted invasion of personal privacy under FOIA. This means the agency would not have to provide the information to the union unless another exception to the Privacy Act permitted disclosure. *See New York TRACON*, 50 FLRA at 392.

- If the public interest in disclosure is greater than the privacy interests, the agency could give the union the information without violating the Privacy Act. *See New York TRACON,* 50 FLRA at 392.

- **Information with personal identifiers:** The Authority has never found that the release of personal identifiers enhances any public interest that has been articulated in the documents. *See United States Air Force Headquarters, 442nd Fighter Wing (AFRES), Richards-Gebaur AFB, Mo.*, 50 FLRA 455, 460-61 (1995). Rather, the Authority has consistently found that the public interest could also be "substantially, if not equally, served by the disclosure of sanitized information which does not identify individual employees by name or other identifying information." *Dep't of Transp., FAA., Fort Worth, Tex.,* 51 FLRA 324, 329 (1995). *See also Health Care Fin. Admin.*, 56 FLRA 503, 506 (2000) (release of promotion materials with personal identifiers redacted did not violate the Privacy Act).

- When requested documents concern only one name-identified employee, "it is not possible to redact the documents to protect the identity of the employee whose privacy is at stake." *U.S. Dep't of Justice, Fed. Corr. Facility, El Reno, Okla.*, 51 FLRA 584, 590 (1995). The fact that the "employee's identity is known to the Union does not lessen [the employee's] privacy interests." *Id.* at 589.

- The Agency did not violate the Privacy Act when it did not provide the requested SIS, OIA, and FBI reports, with names included, because disclosure would have resulted in a clearly unwarranted invasion of personal privacy within the meaning of FOIA Exemption 6. Thus, providing the reports is "prohibited by law." *United States Dep't of Justice, Fed. Bureau of Prisons, U.S. Penitentiary, Marion, Ill.*, 66 FLRA 669 (2012)

What is the agency's role once a union has asked for information?

- **Timely reply:** The agency must reply to the union's information request in a timely manner. A timely reply is necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of bargaining. *SSA Baltimore*, 60 FLRA at 679; *U.S. Dep't of Justice, Office of Justice Programs*, 45 FLRA 1022, 1026-27 (1992). The agency must reply even if it does not believe it has to give the information to the union.

- **Information that doesn't exist:** When a union has asked for information that does not exist, the agency is obligated under section 7114(b)(4) of the Statute to inform the union of that fact. *See, e.g., SSA, Balt., Md.*, 60 FLRA 674, 679 (2005) (*SSA Baltimore*); *SSA, Dallas Region, Dallas, Tex.*, 51 FLRA 1219, 1226 (1996) (*SSA Dallas*); *U.S. Naval Supply Ctr., San Diego, Cal.*, 26 FLRA 324, 326-27 (1987). If the agency does not inform the union, it may have violated section 7116(a)(1), (5), and (8) of the Statute. *See U.S. Naval Supply Ctr., San Diego, Cal.,* 26 FLRA at 326-27.

- **Duty to provide information:** Section 7114(b)(4) requires an agency to "furnish" information to the exclusive representative.

  - The agency must actually give the information to the union; it is not enough to allow the union to look at the information. *See U.S. Dep't of Hous. & Urban Dev.,* 42 FLRA 1002, 1003 (1991); *U.S. Dep't of the Navy, Puget Sound Naval Shipyard Bremerton, Wash*, 38 FLRA 3 (1990); *Veterans Admin. & Veterans Reg'l Office Buffalo, N.Y.*, 28 FLRA 260, 266 (1987).

  - An agency must furnish the information without charge. *See AAFES, Dallas, Tex.*, 24 FLRA 292 (1986).

  - An agency must furnish necessary information in a timely manner. For examples, see the following cases:

- *Dep't of Justice, Office of Justice Programs*, 45 FLRA 1022 (1992) (5-month delay unreasonable)

- *U.S. Dep't of the Treasury, U.S. Customs Serv., SW. Region, Houston, Tex.*, 43 FLRA 1362, 1374 (1992) (delay of nine months to supply information violated Statute where no reasonable basis existed for not furnishing it earlier)

- *U.S. Food & Drug Admin. & U.S. Food and Drug Admin., Region VII, Kansas City, Mo.*, 19 FLRA 555, 557 (1985) (5-month delay unreasonable)

- *Bureau of Prisons, Lewisburg Penitentiary, Lewisburg, Pa.*, 11 FLRA 639, 641-42 (1983) (agency did not violate the Statute when it supplied certain information after approximately a two-month delay because it had furnished almost all of the information requested by the union almost immediately and had made a diligent effort to find certain information that was not contained in the current records).

- *Dep't of Transp., FAA, Ft. Worth, Tex.*, 57 FLRA 604 (2001) (agency acted in bad faith by waiting until the day of the arbitration hearing to provide requested documents).

- **Destruction of Information:** An agency should not destroy information the union has requested until any dispute about whether it has to provide the information has been resolved. Destruction is inconsistent with the statutory policy of effective and efficient Government because it makes the union's attempt to get the information through litigation pointless. Destruction of the information interferes with the Authority's ability to fully remedy a failure to furnish the union with information to which it is entitled under the Statute.

  - *Turner v. Hudson Transit Lines, Inc.,* 142 F.R.D. 68, 72-73 (S.D.N.Y. 1991) (a litigant has a duty to retain documents that it knows, or reasonably should know, are relevant to pending or potential litigation or are the subject of a pending discovery request; sanctions are appropriate if such documents are destroyed)

  - Jamie S. Gorelick et al., *Destruction of Evidence* § 3.11 at 93 (1989) ("Destruction of evidence is sanctionable when a party knows or reasonably should know that discoverable material is relevant to pending, imminent, or reasonably foreseeable litigation.").

9. FORMAL MEETINGS [7114 (a) (2) (A)]

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

An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment.

What are the elements of a formal discussion?

- For a discussion to be a formal discussion, it must be shown that:
  - There is a discussion
  - Which is formal
  - Between one or more agency representatives and one or more unit employees or their representatives
  - Concerning any grievance or any personnel policy or practice or other general condition of employment
- In looking at these elements, the Authority has stated it will be guided by the intent and purpose of Section 7114 (a)(2)(A) -- to provide the union with an opportunity to safeguard its interests and the interests of bargaining unit employees -- viewed in the context of the union's full range of responsibilities under the Statute. *U.S. Dep't of Justice, Bureau of Prisons, Fed. Corr. Inst., Ray Brook, N.Y.,* 29 FLRA 584, 588-89 (1987).

What is a discussion?

- **A "discussion" is any meeting between agency representatives and unit employees.** *Dep't of Def., Nat'l Guard Bureau, Tex. Adjutant Gen.'s Dep't, 149th TAC Fighter Group (ANG)(TAC), Kelly AFB*, 15 FLRA 529, 532 (1984) (*Kelly AFB*) ("legislative history supports the conclusion that Congress intended to continue treating "discussion" as synonymous with 'meeting'"); and *Veterans Admin., Wash., D.C.*, 37 FLRA 747, 754 (1990) (*VA, Brockton*) (same).
- **Conversation not required:** A meeting can be a discussion even if a conversation does not take place. *Kelly AFB*, 15 FLRA at 531-33 (announcement of new staffing policy was a "discussion"); *VA, Brockton*, 37 FLRA at 754 (meeting between agency and employees to announce a work schedule and have employees select their shifts was a discussion, even though the employees did not speak); *U.S. Dep't of Justice Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.*, 51 FLRA 1339, 1340-42 (1996) (*FCI, Bastrop*) (meeting with the warden to try to resolve differences before filing a grievance was a discussion, although neither employee nor supervisor were permitted to speak).

- **Written questionnaire:** In *Kaiserlautern Am. High School, Dep't of Def. Dependents Schs., Ger. N. Region*, 9 FLRA 184, 187 (1982), the Authority found that giving a written questionnaire to employees to gather information was not a "discussion" within the meaning of section 7114(a)(2)(A). The questionnaire contained one question and a manager individually handed the questionnaire to unit employees to voluntarily complete on an anonymous basis.

What does "agency representative" mean?

- An agency representative does not need to be a supervisor. *Luke AFB, Ariz.*, 54 FLRA 716, 730 (1998) (*Luke I*), *enf. denied on other grds*, 208 F.3d 221 (9th Cir. 1999) (table), *cert. denied*, 531 U.S. 819 (2000). An agency representative may include:

  - An attorney from the Judge Advocate General's office who has settlement authority: *Luke I*, 54 FLRA at 730.

  - A contract EEO investigator: *SSA, Office of Hearings & Appeals, Boston Reg'l Office, Boston, Mass.*, 59 FLRA 875 (2004), request for reconsideration granted as to remedy, 60 FLRA 105 (2004).

  - A private independent contractor under contract with an agency to provide Employee Assistance Program Services to bargaining unit employees: *Def. Logistics Agency, Def. Depot Tracy, Tracy, Cal.*, 39 FLRA 999, 1013 (1991) (private sector independent contractor under contract with an agency to provide Employee Assistance Program services to bargaining unit employees was a representative for purposes of section 7114(a)(2)(A) of the Statute).

What is a unit employee?

- Employees working in the bargaining unit represented by the union. A unit employee is someone who is covered by the parties' collective bargaining agreement and is subject to dues withholding. Unit employees may include:

  - Alternate supervisors: *Dep't of the Air Force, Sacramento Air Logistics Command, McClellan AFB, Cal.*, 38 FLRA 732, 734 (1990) (alternate supervisors are bargaining unit employees because they continue to be covered by the collective bargaining agreement and are subject to dues withholding during the time they perform as alternate supervisors).

- A team leader, if the team leader does not fit the definition of "supervisor" in section 7103(a)(10): *Gen. Servs. Admin., Region 2, N.Y., N.Y.*, 54 FLRA 864, 874-77 (1998).

What types of subject matters are included in a formal discussion?

- Grievance, personnel policy or practice, or other general condition of employment. A discussion is not a "formal discussion" unless it is about one of those subject matters.

What is the definition of "grievance" for purposes of a formal discussion?

- Grievance is defined in section **7103(9)**, and it is defined broadly. It includes 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.

- **Grievance procedures in the collective bargaining agreement:** An employee's complaint can be a "grievance" under the Statute even if it is not a formal grievance filed under the grievance procedure. *Luke I*, 54 FLRA at 730-31 (mediation/investigation session associated with an EEO complaint concerned a grievance).

- **Examples of meetings that are about "grievances":**

  - A meeting between an employee and supervisor where the meeting related to work assignments and job performance that had been the subject of a counseling session that resulted in the employee's removal, and where the employee attempted to file an informal grievance: *INS, Rosedale*, 55 FLRA at 1035-37.

  - Meetings where parties are trying to informally resolve a dispute before filing a formal grievance: *FCI, Bastrop*, 51 FLRA at 1344-45 (meeting between unit employee and supervisors was a "grievance" where the union had met with the

agency twice prior to the meeting, as required by the negotiated agreement, in an attempt to informally resolve the differences between the employee and the supervisor).

- Interviews of bargaining unit employees by agency representatives to prepare for a ULP hearing: *F.E. Warren AFB,* 31 FLRA at 552.

- Interviews of bargaining unit employees by agency to prepare for third-party proceedings in which the union is against the agency: *VA, Long Beach*, 41 FLRA at 1379-80 (telephone interviews of bargaining unit employees by agency representative to prepare for an MSPB hearing was about a "grievance"); *Dep't of the Air Force, Sacramento Air Logistics Ctr., McClellan AFB, Cal.*, 35 FLRA 594, 604 (1990) (agency interview of bargaining unit employee who was to be called as a witness in arbitration hearing was about a grievance); *see also Dep't of the Air Force, Sacramento Air Logistics Ctr., McClellan AFB, Cal.*, 29 FLRA 594, 604 (1987) (*McClellan AFB*).

- Supervisor's meeting with bargaining unit employee to discuss employee's call to security concerned a grievance. *United States Dep't of Defense, U.S. Air Force, 325th Fighter Wing, Tyndall Air Force Base, Fla.*, 66 FLRA 256 (2011) (no exceptions filed to ALJ's finding that call to security was a "grievance").

Are statutory appeals such as EEO complaints and MSPB appeals "grievances?"

- **EEO complaints and the 9th Circuit Decision:** The Authority has stated that EEO complaints are grievances under section 7114(a)(2)(A) of the Statute. *Marine Corps Logistics Base, Barstow, Cal.,* 52 FLRA 1039, 1046 (1997) (meeting where management gave employee a proposed settlement agreement for a formal EEO complaint concerned a "grievance"). In *Luke I*, the Authority held that EEO meetings were formal discussions about a grievance and that neither EEOC regulations nor other statutes excluded such meetings from the requirements of Section 7114(a)(2)(A). The Ninth Circuit reversed the Authority in that case, rejecting the right of a union to be notified and given the opportunity to participate in the mediation of an employee's formal EEO complaint. *Luke AFB v. FLRA*, 208 F.3d 221 (9th Cir. 1999) (table), *cert. denied*, 121 S.Ct. 60 (2000).

- **Authority's position on EEO complaints after 9th Circuit's decision:** the Authority continues to find that EEO complaints are grievances. *See U.S. Dep't of the Air Force, 436th Airlift Wing, Dover AFB, Dover, Del.*, 57 FLRA 304 (2001). The Authority restated its *Luke* holding that a mediation session of an EEO complaint is a "grievance" within the meaning of section 7114(a)(2)(A), even when the collective bargaining agreement expressly excludes EEO complaints from the negotiated grievance procedure. Moreover, a union has a right to attend such mediations, even where a "neutral" party,

such as a mediator, conducts the meetings, and when the employee has not chosen the union as his representative. In *Dover*, the Authority found that the presence of a union at such meetings does not conflict with EEOC regulations, the Privacy Act, or any other right to confidentiality an EEO claimant might have.

- **More Authority cases about EEO complaints:**
  - *U.S. Dep't of the Air Force, Davis-Monthan AFB, Tucson, AZ*, 64 FLRA 845 (2010)
  - *U.S. Dep't of the Air Force, Luke AFB, Ariz.*, 58 FLRA 528 (2003) (*Luke II*)
  - *Pension Benefit Guar. Corp. Wash., D.C.*, 62 FLRA 219 (2007).
  - *U.S. Dep't of Agric., Forest Serv., Los Padres Nat'l Forest, Goleta, Cal.,* 60 FLRA 644 (2005) (Authority rejected the claim that the presence of a Union representative at EEO mediation sessions would conflict with EEOC regulations, ADRA, Privacy Act and other laws and regulations).
- **EEO complaint filed by non-unit employee:** A union is not entitled to representation at a discussion of a non-unit employee's EEO complaint. *Nuclear Regulatory Comm'n*, 29 FLRA 660, 662-63 (1987).
- **MSPB Appeals:** Discussions related to MSPB issues may be "grievances," depending on the facts. For examples, see the following cases:
  - Cases where the discussion WAS a grievance:
    - Settlement discussions relating to an employee's appeal to the MSPB concerned a "grievance." *Gen. Servs. Admin., Region 9, Council 236*, 48 FLRA 1348, 1355 (1994).
    - Telephone interview of unit employee by agency attorney in preparation for an MSPB hearing concerned a "grievance." *VA, Long Beach*, 41 FLRA at 1380.
  - Cases where the discussion WAS NOT a grievance:
    - Discussions with a unit employee in preparation for an MSPB hearing did not concern a "grievance" because the MSPB appeal was from a supervisor/management official, not an employee. *General Services Admin.,* 50 FLRA 401, 404 (1995).
    - A meeting to discuss an oral reply to a 30-day suspension did not concern a "grievance" because the agency had not yet taken final adverse action and there was nothing yet to grieve. *U.S. Dep't of Justice, Bureau of Prisons, Federal Corr. Institution (Ray Brook, N.Y.*), 29 FLRA 584, 590-91

(1987) (adopting *NTEU v. FLRA*, 774 F.2d 1181 (D.C. Cir. 1985), *aff'd sub nom. Am. Fed'n of Gov't Employees, Local 3882 v. FLRA*, 865 F.2d 1283 (D.C. Cir. 1989)).

What is a personnel policy or practice?

- **Definition:** A personnel policy or practice is a general rule that applies to agency employees, not a single action the agency takes with respect to individual employees. *INS, Rosedale*, 55 FLRA at 1035 (discussion between employee and agency officials concerning work assignments and job performance which focused only on the employee and her immediate supervisor did not concern "personnel policy or practice"). For more examples, see the following cases:

  - A meeting that was limited to the temporary assignment of two unit employees who work in an office of at least 95 employees did not concern a "personnel policy or practice". *Bureau of Field Operation, SSA, S.F., Cal.*, 20 FLRA 80, 83 (1985) (*SSA, San Francisco*).

  - A meeting relating to a reorganization concerned a personnel policy or practice or other general condition of employment, even though only two employees were immediately affected, because of the potential changes to other employees' conditions of employment. *U.S. Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr., Detachment 12, Kirtland AFB, N.M.*, 64 FLRA 166 (2009) (*Kirtland AFB*).

- **Last chance agreements:** A last chance agreement is not a "personnel policy or practice" because the agreement is an action taken with respect to an individual employee. *Am. Fed'n of Gov't Employees, Council 214, Ohio*, 38 FLRA 309, 330-31 (1990), *enforced sub nom. U.S. Dep't of the Air Force, Wright-Patterson AFB, Ohio v. FLRA*, 949 F.2d 475 (D.C. Cir. 1991).

What is a general condition of employment?

- **Definition:** A general condition of employment concerns "conditions of employment affecting employees in the unit generally." *NRC*, 29 FLRA at 663 (meeting did not concern a condition of employment because the employee who filed the EEO complaint was not a bargaining unit employee at the time, the complaint was about events that happened outside the bargaining unit, and the nature of the meeting was a discussion to settle the complaint). For examples, see the following cases:

  - Where a meeting was about management interference with employee picketing, the meeting involved protected rights under the Statute and concerned "conditions of employment." *F.E. Warren*, 31 FLRA at 552.

- A meeting that was limited to the temporary assignment of two unit employees who work in an office of at least 95 employees had no effect on "conditions of employment" of bargaining unit employees. *SSA, San Francisco*, 20 FLRA at 83.

- Discussion of a reorganization was about a personnel policy or practice or other general condition of employment, because of the potential for changes to many employees' working conditions, even though only two employees were immediately affected. *Kirtland AFB,* 64 FLRA 166.

- Discussions were about "general conditions of employment" when they addressed a supervisor's conduct and the atmosphere that existed in the office. *GSA*, 50 FLRA at 404.

How can you tell whether a meeting is "formal" in nature?

- **By looking at all of the circumstances.** The Authority refers to this as the "totality of the circumstances." *F.E. Warren AFB, Cheyenne, Wyoming*, 52 FLRA 149, 156-58 (1996) (*F.E. Warren*). The circumstances include:

  - whether the person who held the meeting is only a first-level supervisor or is higher up;

  - whether any other managers/supervisors attended the meeting;

  - where the meeting took place (e.g., in the supervisor's office, at each employee's desk, in the general work area, or elsewhere);

  - how long the meeting lasted;

  - how the meeting was called (advanced notice v. last-minute);

  - whether the meeting had a formal agenda;

  - whether employees were required to attend;

  - how the meeting was conducted (consider transcription of comments); and any other factors deemed relevant.

  Dep't of Labor, Office of the Assistant Sec. for Admin. & Mgmt., Chi., Ill., 32 FLRA 465, 470 (1988) (*Dept. of Labor*).

What are some cases where the Authority found meetings were formal in nature?

- *Dep't of Agric., Forest Serv., Los Padres Nat'l Forest,* 60 FLRA 644 (2005) (meetings were formal because (1) they were scheduled more than two weeks in advance; (2) they had a purpose, which was to mediate EEO complaints; (3) they were held away from employees' work sites; and (4) agency representatives who had full authority to settle the EEO complaints attended the meetings).

- *Dep't of the Air Force, 436th Airlift Wing, Dover AFB, Dover, Del.*, 57 FLRA 304 (2001) (meeting was formal because (1) it was scheduled one week in advance; (2) it had an established purpose; (3) it was held away from the employee's work area; (4) additional agency representatives attending the meeting; and (5) the meetings followed a traditional mediation format).

- *U.S. Dep't of Justice, INS, N.Y. Office of Asylum, Rosedale, N.Y.*, 55 FLRA 1032, 1038 (1999) (*INS, Rosedale*) (meeting called to discuss issues raised in grievance, work assignments, and job performance was formal because it: (1) was scheduled in advance; (2) was conducted by a supervisory asylum officer; (3) took place in the supervisor's office; (4) was mandatory; and (5) the results of the meeting were reported to the agency director, although no notes were taken).

- *Luke AFB, Arizona*, 54 FLRA 716, 724-28 (1998) (*Luke I*), *rev'd*, 208 F.3d 221 (9th Cir. 1999) (table), *cert. denied*, 531 U.S. 819 (2000) (mediation/investigation session of EEO complaint was formal because: (1) the Judge Advocate General attorney represented a high level of management; (2) the attorney and the employee communicated extensively through the EEO mediator, responding to each other's settlement positions; (3) the session took place outside of the employee's work area; (4) the length of the session lasted three hours; (5) a memorandum was prepared that listed the objectives and procedures for the sessions; (6) although attendance was not mandatory, employee could reasonably conclude that her complaints could be adversely if she did not attend).

- *F.E. Warren*, 52 FLRA 149 (1996) (meeting was formal because (1) the first-level supervisor gave employees advance notice; (2) the meeting was conducted by a second-level supervisor in his office; and (3) the meeting lasted for 15-30 minutes).

- *Dept. of Labor*, 32 FLRA at 470-71. (meeting was formal where: (1) meeting was required (since meeting was held by mutual agreement, the identity of the party who proposed the required meeting in the stipulation to dismiss an MSPB appeal is not relevant); (2) subject matter and agenda were specified; (3) memorandum was issued to employee following the meeting; (4) meeting was conducted by supervisor; (5) meeting was held in supervisor's office; (6) meeting lasted one hour; (7) employee answered questions posed by supervisor that were evaluated by the agency's representatives).

- *SSA, Baltimore, Md.,* 18 FLRA 249, 250 (1985) (meeting to discuss employee's grievance was formal because: (1) the district manager, a fourth-level supervisor, initiated it; (2) it was held in the district manager's office behind closed doors; and (3) attendance was mandatory).

- *SSA, Office of Hearings & Appeals, Boston Reg'l Office, Boston, Mass.*, 59 FLRA 875 (2004); *request for reconsideration granted as to remedy*, 60 FLRA 105 (2004) (the fact that interviews were conducted by telephone did not lessen the formal nature of the discussions).

What are some cases where the Authority found meetings were NOT formal in nature?

- *U.S. Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Richmond, Va.*, 63 FLRA 440 (2009) (meeting to discuss upcoming arbitration was not formal because: (1) the length of the meeting (15-30 minutes) was partly due to questions the employee asked; (2) the meeting was held away from the employee's work site, but this was because the employee had no private office there).

- *Dep't of Veterans Affairs, N. Ariz. VA Healthcare, Prescott, Ariz.*, 61 FLRA 181 (2005) (meeting was not formal because (1) attendance was voluntary for the single employee who attended; (2) there was only one agency representative present; (3) the meeting only lasted fifteen minutes; (4) there was no formal agenda prepared in advance of the meeting; and (5) the settlement discussions leading up to the meeting were initiated by the employee).

- *United States Dep't of Energy, Rocky Flats Field Office, Golden, Colo.*, 57 FLRA 754 (2002) (although the meeting addressed the settlement of an EEO complaint, took place in an Agency representative's office, and lasted for 30 minutes, the meeting was not formal because the employee initiated the meeting in an impromptu manner).

- *Department of Veterans Affairs, Veterans Affairs Med. Ctr., Gainesville, Fla.*, 49 FLRA 1173, 1175 (1994) (meeting was not formal because it: (1) was scheduled and conducted in the same manner as previous monthly meetings; (2) was informational rather than formal (33 topics were covered in 30 minutes); and (3) agency statements about disciplinary policy and work requirements were nothing more than routine reminders of past policies and requirements).

- *Marine Corps Logistics Base*, 45 FLRA 1332, 1335 (1992) (meeting called to seek volunteers for overtime was not a formal discussion because: (1) the meeting was held on the shop floor; (2) the meeting lasted only 10 minutes; (3) only one management official, a first-line supervisor, attended the meeting; (4) no agenda was prepared; and (5) no notes were taken).

- *Dep't of HHS, SSA and SSA Field Operations, Region II*, 29 FLRA 1205, 1208 (1987) (meeting to introduce supervisor was not formal because: (1) it was spontaneous; (2) it was one-on-one with employee and supervisor; (3) it was unstructured; (4) it lasted for 20 minutes; (5) it was at the supervisor's desk; (6) no notes were taken; (7) no advance notice of the meeting was given and (8) there was no preparation for the meeting).

- *Dep't of HHS, SSA, Baltimore, Md. and Chicago, Ill. Region*, 15 FLRA 525, 527 (1984) (meeting to discuss changes regarding the teleclaims process was not formal because it: (1) was not scheduled in advance; (2) was held at the desks of the employees involved; (3) lasted only five minutes; and (4) involved six employees and a supervisor and General Counsel).

- *Def. Logistics Agency, Def. Depot Tracy, Tracy, Cal.*, 14 FLRA 475, 477 (1984) (meeting of supervisor with five or six unit employees to instruct them on agency leave policy was not formal because it: (1) was not scheduled in advance; (2) was called by a first-line supervisor on his own initiative, with no other management person present; (3) was held in the supervisor's office, adjacent to the employees' work station; and (4) lasted no more than 10 minutes).

- *Office of Program Operations, Field Operations, SSA, San Francisco Region*, 9 FLRA 48, 49-50 (1982) (two brief meetings at the desks of individual employees that were initiated by a manager to discuss discontinuing the practice of allowing part-time employees to work overtime were not formal discussions; and an impromptu meeting with a supervisor that was initiated by employees to discuss these concerns was not a formal discussion).

What are the union's rights if an agency is holding a formal discussion?

- The union must have an opportunity to be represented at the formal discussion. The agency must give the union enough notice so the union can choose the representative who will attend the meeting. *McClellan AFB*, 29 FLRA at 606 ("actual representation" was not enough since the employee who received notice was not the designated representative for the matter under discussion); *see also Gen'l. Servs. Admin., Region 9, Los Angeles, Cal.,* 56 FLRA 683, 685 (2000) (notice to a local representative was not enough because union did not have the opportunity to choose its own representative).

- Union representative is the subject of the meeting: A union's interest cannot be adequately represented at a formal discussion if the person who attends is also the subject matter of the discussion. *McClellan AFB,* 29 FLRA at 606 (bargaining unit employee who was involved in the formal discussion could not adequately represent interests of union); *see also Dep't of the Air Force, 63rd Civil Eng'rs Squadron, Norton AFB, Cal.*, 22 FLRA 843, 847 (1986).

Does the agency still have to give the union notice if an employee has asked a union representative to attend the meeting?

- **Yes.** The union has a statutory right to receive notice and have an opportunity to be represented at a formal discussion. Although an employee may ask a union representative to be his or her personal representative for a meeting, the agency should still notify the union of the meeting. *Luke I*, 54 FLRA at 722-23 n.6 (union president's attendance as the emp*loyee's p*ersonal representative at mediation/investigation session did not relieve agency of obligation to inform union in advance about the formal discussion).

Does the union have a right to participate in a formal discussion?

- **Yes.** The union has the right to comment, speak and make statements. But this does not mean a union representative can take charge of or disrupt the meeting. Comments by a union representative must be reasonable. The union representative must have respect for orderly procedures, and the comments must be related to the subject matter addressed by the agency representatives at the meeting. *U.S. Nuclear Regulatory Comm'n*, 21 FLRA 765 (1986); *see also U.S. Dep't of the Army New Cumberland Army Depot New Cumberland. Pa.*, 38 FLRA 671 (1990).

10. INVESTIGATORY EXAMINATIONS (*WEINGARTEN*) [7114 (a)(2)(B)]

Section 7114 (a)(2)(B) of the Statute states:

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

This section gives a labor organization the right to be represented during investigatory examinations of employees. *See U.S. Dep't. of Justice, Bureau of Prisons, Safford, Ariz.*, 35 FLRA 431, 438-40 (1990) (discussing purposes and policies underlying Section 7114 (a)(2)(B)). Section 7114 (a)(2)(B) of the Statute is similar to the private sector Supreme Court decision in *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), and for that reason it is often called the *Weingarten* right.

When does a union have the right to be represented at an investigatory examination?

- **When all of the elements in Section 7114(a)(2)(B) are met**. The elements include:
  - Agency representative: The person examining the employee must be an agency representative
  - Unit employee: The employee being examined must be a bargaining unit employee
  - Examination in connection with an investigation: The agency representative must be examining the employee in connection with an investigation
  - Reasonable belief: The employee must have a reasonable belief that he or she may be disciplined as a result of the examination
  - Request for representation: The employee must ask for representation

Who is a "representative of the agency"?

- The Authority has concluded that the following people were agency representatives:
  - A supervisor: *Marine Corps Logistics Base*, 4 FLRA 397 (1980)
  - Agents of the agency's Office of Management and Integrity: *U.S. Customs Serv., Region VII, L.A., Cal.,* 5 FLRA 297 (1981)
  - An agency's Internal Security Inspectors, even where the inspectors were from a different geographical and organizational part of the agency: *IRS*, *Wash., D.C.,* 4 FLRA 237 (1980)
  - Investigators from a related activity within an agency: *Lackland AFB Exch.*, Tex., 5 FLRA 473 (1981)
  - Office of Inspector General agent: *U.S. Dep't of Labor, Mine Safety and Health Admin.*, 35 FLRA 790 (1990)
  - OPM investigators who completed background interviews of certain "excepted" employees and were under agency control and performed an agency function. *NTEU and United States Dep't of the Treasury, IRS*, 66 FLRA 506 (2012); *But see Id* at 510. (OPM investigators of covered employees, which include other "excepted" service employees, are not representatives of an agency because they performed a task that was a function of OPM, not an agency).
- **Agency's supervision of investigators:** The degree of supervision exercised by agency management over investigators is irrelevant when the investigators are employees of the same agency and their purpose when conducting interviews is to solicit information concerning possible misconduct on the part of agency employees in connection with

their work. *U.S. Dep't. of Justice*, *Office of the Inspector Gen., Wash., D.C.,* 47 FLRA 1254 (1993).

Who is a unit employee?

- For a union to have a right to be represented at an examination the employee who is examined must be a member of the bargaining unit represented by the union. *Food & Drug Admin., Newark Dist. Office, W. Orange, N.J.,* 47 FLRA 535, 556 (1993).

- **Tenure status of employee:** Every employee in the bargaining unit has a right to be represented at an examination. It does not matter whether the employee is full-time or probationary. *Dep't. of Veterans Affairs, Veterans Affairs Med. Ctr., Jackson. Miss.*, 48 FLRA 787, 797 (1993).

- **What about employees who have moved in or out of the bargaining unit?:** To determine whether a union has the right to be represented at an investigatory meeting, the parties should look to see if the employee is a bargaining unit member at the time of the interview, not if the employee was a bargaining unit member during the events being discussed in the interview. *Dep't. of the Navy*, Charleston *Navy Shipyard, Charleston, S.C.*, 32 FLRA 222, 231 (1988).

What is an "examination in connection with an investigation"?

- The *Weingarten* right applies when an agency representative tries to get information from an employee to decide whether to take action or what action might be appropriate.

- **Performance evaluation and counseling meetings:** These types of meetings are not examinations in connection with an investigation. The purpose of such meetings is to give employees information about their performance. *IRS*, *Detroit, Mich*., 5 FLRA 421 (1982) (performance evaluation); *IRS*, 8 FLRA 324 (1982) (counseling). But an agency cannot avoid the requirements of the Statute just by calling an interview a "counseling session." The *Weingarten* right might apply to these meetings if all the elements of Section 7114 (a)(2)(B) are present. *FAA, St. Louis Tower, Bridgton, Mo*, 6 FLRA 678 (1981) (although called a "counseling session," a meeting where an employee was questioned about use of abusive language in the control tower was an investigatory examination).

- **Disciplinary meetings:** Meetings where an agency representative advises an employee that disciplinary action will be taken or where the representative warns the employee about discipline are not examinations if the agency representative does not try to get information from the employee, have the employee admit wrongdoing, or have the employee explain his conduct. *U.S. Air Force, 2750th Air Base Wing Headquarters, Air*

Force Logistics Command, Wright-Patterson AFB, Ohio, 9 FLRA 871, 872 (1982); *IRS*, 15 FLRA 360 (1984). But when an employee is questioned before the agency has decided what action to take, the right to representation applies. *U.S. Dept. of Navy, Marine Corps Logistics Base*, *Albany, Ga*., 4 FLRA 397 (1980) (employee was questioned regarding a three day absence); *Lackland AFB Exch., Tex.,* 5 FLRA 473 (1981) (employee was questioned about cash register shortage).

- **Criminal and civil investigations:** An "examination" may relate to either a criminal or a civil investigation. *U.S. Dep't. of Justice, Wash., D.C.*, 56 FLRA 556, 560 (2000) (relying upon *NASA v. FLRA*, 527 U.S. 229, 237 (1999), the Authority found the criminal aspect of an investigation as opposed to the administrative aspect does not require a different outcome); *U.S. Dep't of Justice*, *INS, Border Patrol El Paso*, *Tex.*, 42 FLRA 834, 840 (1991) (an employee's right to union representation under § 7114 (a)(2)(B) of the Statute applies to all investigations conducted by an agency, including criminal investigations).

- **Location and timing of examination:** An examination does not have to occur at the job site, or on duty time. *IRS, L.A. Dist. Office*, 15 FLRA 626 (1981) (a tax audit of an IRS employee that took place in an attorney's office as part of an on-going investigation was an examination).

- **Can an examination be in writing?** An examination does not have to be face-to-face questioning. It may be done in writing. *U.S. INS, U.S. Border Patrol, Del Rio, Tex.*, 46 FLRA 363, 371 (1992) (agency conducted examination where it required a border patrol agent to prepare a memorandum explaining the circumstances of a prisoner escape).

When does an employee have a reasonable belief that she might be disciplined?

- **Objective standard: When an agency requires an employee to submit to an interview, and the employee reasonably believes this could result in disciplinary action, the employee has a right to request union representation.** *U.S. Dep't. of INS, Border Patrol, El Paso, Tex.*, 42 FLRA 834 (1991). Objective factors determine if the employee's belief is reasonable. Subjective feelings of the employee are not relevant. *IRS v. FLRA,* 671 F.2d 560, 563 (D.C. Cir. 1981). In some cases, the circumstances plainly show that an employee's fear of discipline is reasonable, such as where the agency representative tells the individual he is being questioned about possible cash register manipulation. *Lackland AFB Exch.*, 5 FLRA 473 (1981). In other cases, a fear of discipline might be reasonable even if the threat of discipline is not immediately obvious. For example, in a case where an agency regulation stated that information could not be used as evidence in a personnel action, it could still be accessed and later used to start a new investigation that could result in discipline. In that case, there was a reasonable fear of discipline. *Dep't. of Veterans Affairs, Veterans Affairs Med. Ctr., Hampton, Va.*, 51 FLRA 1741, 1748-49 (1996).

- **Employee who is not the subject of the investigation:** Even where the employee is not the direct subject of the current investigation, circumstances may show the employee's

fear of discipline was reasonable. *IRS,* 4 FLRA 237 (1980), *aff'd sub nom. IRS, Wash. D.C. v. FLRA*, 671 F.2d 560 (D.C. Cir. 1982) (employee not suspected of wrongdoing, but had tax records of another employee who was the subject of an investigation; employee could have reasonably believed that discipline may result if his control of the tax records was improper); *U.S. Dep't. of Justice, Office of the Inspector Gen., Wash., D.C.*, 47 FLRA 1254 (1993) (although only a witness, the employee interviewed could have reasonably believed that discipline would result if he was found to have knowledge of others' misconduct).

- **Agency assures employee that discipline will not result from interview:** If the agency assures an employee that discipline will not result, the employee may no longer have a reasonable belief that he will be disciplined. *U.S. Dep't. of Justice, Office of the Inspector Gen., Wash., D.C.*, 47 FLRA 1254 (1993). It depends on the facts of the case.

Does the employee being interviewed have to request representation?

- **Yes.** The employee has to request representation. *U.S. Dep't. of Justice, Fed. Bureau of Prisons*, *Terre Haute, Ind.*, 38 FLRA 1438, 1441 (1991), *citing Norfolk Naval Shipyard, Portsmouth, Va.*, 35 FLRA 1069, 1077 (1990). An employee's request does not have to be in a specific form, but it must be enough to let management know the employee wants representation. *Norfolk Naval Shipyard, Portsmouth, Va.*, 35 FLRA 1069, 1074 (1990*)* citing *U.S. Dep't. of Justice, Bureau of Prisons, Metro. Corrs Ctr., N.Y., N.Y.,* 27 FLRA 874, 880 (1987). For example, when an employee stated he would like to speak with a lawyer or somebody to advise him or explain what was happening, that was a request for representation. *U.S. Dep't. of Justice, Fed. Bureau of Prisons, Office of Internal Affairs, Wash., D.C,.* 55 FLRA 388, 394 (1999).

- Request that is not made to person conducting the examination: The request does not necessarily need to be made to the person conducting the examination. For example, if an employee asks the agency's detectives three times and a manager another time for a representative, the employee does not waive representation if he does not make another request to the OSI agent conducting the examination. *Lackland AFB Exch.*, *Lackland AFB, Tex.*, 5 FLRA 473, 486 (1981).

What should management do when an employee has requested representation?

- When an employee has a right to representation and has requested it, the agency must do one of the following:
  - Grant the request
  - Discontinue the interview

- Offer the employee the choice between continuing the interview without representation or having no interview at all.

Norfolk Naval Shipyard, Portsmouth, VA., 35 FLRA 1069, 1077 (1990); *U.S. Dep't of Justice, INS, Border Patrol, El Paso, Tex*., 42 FLRA 834, 839 (1991). *See also Dep't of Justice, INS, Border Patrol, El Paso, Tex.* v. *FLRA,* 939 F.2d 1170 5th Cir.1991) (upholding management's right to offer an employee these choices).

Can an employee waive the right to union representation?

- **Yes.** Objective factors decide if the employee waived his right to representation. Waiver is not found if it was coerced. *Dep't of Justice, INS, Border Patrol, El Paso, Tex.*, 36 FLRA 41 (1990). For example, where management denied an employee's request for union representation and told the employee he did not have to answer any questions and was free to leave, the employee's decision to stay was not coerced. *U.S. Dep't of Justice, U.S. Penitentiary, Leavenworth, Kan.*, 46 FLRA 820, 822 (1992).

- **What if the employee has waived his right to representation in the past?** The fact that an employee has declined union representation at past interviews does not mean the employee waives his right to representation at future interviews. *U.S. Dep't. of Justice, Fed. Bureau of Prisons, Office of Internal Affairs, Wash., D.C.*, 55 FLRA 388, 394 n.10 (1999).

- **Cases where employee validly waived the right to representation:**

  - After requesting union representation, the employer and employee waited for the union representative for 30 minutes. The employer suggested that the interview continue. The employee shrugged and went on with the interview. In this case, there was no evidence of coercion and the employee validly waived his right to representation. *Army & Air Force Exch. Serv.*, *Rocky Mountain Area Exch., Fort Carson, Colo.*, 16 FLRA 794, 802-03 (1984).

  - Where an employee did not bring a representative to the meeting after the agency had postponed the meeting several times to allow him to get one, the agency did not violate the Statute by going forward with the interview. *Dep't of Labor*, *Employment Standards Admin.*, 13 FLRA 164 (1983) (agency took "every reasonable step" to provide an opportunity for representation).

- **Cases where employee did not validly waive the right to representation:**

  - Agency comments prevented an employee from making an uncoerced decision as to whether to have his union representative present. *Dep't of Justice, INS, Border Patrol, El Paso, Tex.*, 36 FLRA 41, 50-52 (1990)

- Employee's waiver was coerced where the agency investigator told the employee he might be accused of criminal misconduct and it would not be in his best interest if he had a union representative at the interview. *U.S. Dep't of Justice, INS, Border Patrol, El Paso, Tex.*, 42 FLRA 834, 839-40 (1991).

Does the union have a right to choose which representative will attend an examination?

- **Yes**, although there are some exceptions:

  - **"Special circumstances:"** An agency can stop a particular union representative from attending the examination if it can show "special circumstances" that justify excluding that representative. An agency must show how the integrity of the investigation would be undermined if it allowed the representative to attend the examination. *Fed. Bureau of Prisons, Office of Internal Affairs, Wash., D.C.*, 54 FLRA 1502, 1513 (1998). For example, an agency may bar an individual who is the subject of an investigation from serving as a union representative until after he has finished his interview. *Fed. Prison Sys., Fed. Corr. Inst., Petersburg, Va.*, 25 FLRA 210, 228-29 (1987); *U.S. Dep't of Treasury, U.S. Customs Serv., Customs Mgmt. Ctr., Ariz. & U.S. Dep't of Treasury, U.S. Customs Serv., Office of Internal Affairs, Tucson, Ariz.*, 57 FLRA 319 (2001) (potential conflict of interest of a union representative was sufficient to establish special circumstances to bar him from serving as the representative).

  - **Union representative has engaged in obstructive behavior:** *N.J. Bell Tel. Co.*, 308 NLRB 277, 282 (1992) (representative engaged in obstructive behavior during an earlier examination)

  - **Specific union representative is not available:** An agency need not postpone an examination just because a specific union representative is not available. *U.S. INS, N.Y. Dist. Office, N.Y., N.Y.,* 46 FLRA 1210, 1221 (1993). The Authority has followed the rationale of private sector NLRB decisions. *Pacific Gas and Elec. Co.*, 253 NLRB 1143 (1981); *Roadway Express, Inc.*, 246 NLRB 1127, 1129 (1979) (off-site representative is not readily available and an on-site representative is available); *Coca-Cola Bottling Co. of L.A.*, 227 NLRB 1276, 1276 (1977) (employer need not postpone an investigation where shop steward is unavailable and other representative is available).

What is a union's role in an investigatory examination?

- **Active participation:** A union representative has the right to actively participate in the examination as long as he does not prevent the employer from conducting the investigation or compromise the integrity of the investigation. *Headquarters, Nat'l*

Aeronautics & Space Admin., Wash., DC, 50 FLRA 601, 607 (1995). A union representative can be more than an observer -- he can be active in an employee's defense. *Fed. Aviation Admin.*, *St. Louis Tower, Bridgeton, MO.,* 6 FLRA 678, 686 (1981). The right to actively participate means the representative can:

- Speak or otherwise participate on the record in a formal proceeding: *U.S. Dep't. of Justice, Bureau of Prisons, Safford, Ariz.*, 35 FLRA 431, 440 (1990) and *FAA, St. Louis Tower, Bridgeton, MO,* 6 FLRA 678, 687 (1981) (violation of the Statute when a union representative was disciplined for taking an active role at the investigatory interview *and* for not abiding by agency order to be quiet*); U.S. Customs Serv., Region VII, L.A., Cal.*, 5 FLRA 297, 307 (1981) (violation of the Statute where a representative's participation was limited to a "practice interview" prior to actual taped interview and comments at end of interview).

- Ask questions, help the employee express views, seek clarifications, and suggest other avenues of inquiry: *U.S. Customs Serv.*, *Region VII, L.A., Cal.,* 5 FLRA 297 (1981); *U.S. Dep't. of Justice, Wash., D.C.*, 46 FLRA 1526, 1568 (1993), *remanded on other grounds, U.S. Dep't. of Justice v. FLRA*, 39 F.3d 361 (D.C. Cir. 1994).

- **Limitations on the union's right to actively participate:** Management can insist that the employee respond to questions, and it is management's right to decide the scope of the examination. The union representative may not answer for the employee, tell the employee not to answer questions, or interfere with the investigation. *Dep't. of the Treasury, IRS, Jacksonville Dist.*, 23 FLRA 876, 878-79 (1986).

- **Tape recording the interview:** The union representative has no right to tape record an interview if it is against agency policy. *U.S., INS, San Diego, Cal.*, 13 FLRA 591, 604-05 (1984).

- **Consulting with the employee:** The union representative normally has a right to consult with the employee. *Dep't. of Veterans Affairs, Veterans Affairs Med. Ctr., Jackson*, *Miss.,* 48 FLRA 787, 799 (1993) (right to consult at Nurse Professional Standards Board hearing). But any right to speak privately outside an interview room depends upon whether it is reasonably necessary to do so to ensure active and effective union representation. *Bureau of Prisons, Office of Internal Affairs, Wash., D.C.*, 52 FLRA 421, 438-39 (1996) (not reasonably necessary where union representative and employee had a right to speak to each other in the examination room and could also speak to each other during 15-minute hourly breaks). *Cf. U.S. Dep't. of Justice, Wash., D.C.*, 46 FLRA 1526, 1569 (1993), *remanded on other grounds, U.S. Dep't. of Justice v. FLRA*, 39 F.3d. 361 (D.C. Cir. 1994) (no evidence that a brief conference between the employee and the representative outside the hearing of the investigator would have interfered with the objective of the investigation or compromised its integrity).

11. REGULATIONS IN CONFLICT WITH CONTRACT [7116 (a)(7)]

Section 7116 (a)(7) of the Statute provides:

It shall be an unfair labor practice for an agency to enforce any rule or regulation (other than a rule or regulation implementing § 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed.

When does an agency violate section 7116 (a)(7)?

- An agency violates this section when it relies on regulations issued after the parties' negotiated agreement. *Dep't of HHS, Health Care Fin. Admin.,* 39 FLRA 120, 132 (1991) (a ban on smoking). But parties may agree to allow later regulations to override the negotiated agreement. *U.S. Dep't of the Air Force, Seymour Johnson AFB*, 57 FLRA 772, 774 (2002); *U.S. Dep't of Def., Def. Mapping Agency, Hydrographic/Topographic Ctr., Wash., D.C.*, 42 FLRA 674, 676 (1991).

What does section 2302 of Title 5, mentioned in 7116(a)(7), relate to?

- Section 2302 relates to prohibited personnel practices. *U.S. Dep't of the Army, Fort Campbell Dist.,Third Region, Fort Campbell, Ky.,* 37 FLRA 186 (1990).

How does the Authority interpret section 7116 (a)(7)?

- **Government-wide rules and regulations:** Government-wide rules or regulations are rules, regulations, or official policy declarations that generally apply throughout the Federal Government. They are binding on the Federal agencies and Federal officials to which they apply. *NTEU, Chapter 6 & IRS, New Orleans Dist.*, 3 FLRA 748, 754-55 (1980). Under Section 7117 (a)(1), government-wide rules and regulations bar the negotiation of, and agreement on, union proposals that conflict with them. Government-wide rules and regulations govern a matter in dispute, even if the collective-bargaining agreement covers the same matter.

- **Renewed bargaining agreements:** Under section 7116(a)(7), pre-existing collective-bargaining agreement provisions govern for the express term of the agreement, but parties may agree to let subsequently-issued regulations override such an agreement. *U.S. Dep't of the Air Force, Seymour Johnson AFB*, 57 FLRA 772, 774 (2002); *U.S. Dep't of*

Def., Def. Mapping Agency, Hydrographic/Topographic Ctr., Wash., D.C., 42 FLRA 674, 676 (1991). Provisions of a renewed agreement do not override government-wide regulations that exist on the date of the new term of the collective-bargaining agreement. *U.S. Dep't of Def., Def. Contract Audit Agency, Cent. Region,* 37 FLRA 1218 (1990).

12. OFFICIAL TIME

Section 7131 of the Statute governs the issue of entitlement to official time, that is, the duty time afforded for the purpose of engaging in collective bargaining activities on behalf of the exclusive representative. The specific provisions are as follows:

Section 7131(a) provides:

Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status.

Section 7131(b) provides:

Any activities performed by any employee relating to the internal business of a labor organization (including solicitation of membership, elections of labor organization officials and collection of dues) shall be performed during the time the employee is ina non-duty status.

Section 7131(c) provides:

Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time during the time the employee would otherwise be in duty status.

Section 7131(d) provides that all other official time shall be granted in the amount agreed by the agency and exclusive representative to be reasonable, necessary and in the public interest.

Which employees can be granted official time under section 7131(a)?

- Employees who are negotiating on behalf of the bargaining unit in which they are employed, but not a different bargaining unit. *U.S. Naval Space Surveillance Systems, Dahlgren, Va.*, 12 FLRA 731, 733-34 (1983) (*Dahlgren*), *aff'd sub nom. Am. Fed'n of Gov't Employees, Local 2096 v. FLRA*, 738 F.2d 633 (4th Cir. 1984). *Interpretation & Guidance*, 2 FLRA 265 (1979).

What section of the Statute does an agency violate if it does not grant 7131(a) official time?

- **Section 7116(a)(1) and (8).** *Veterans Admin. Cent. Office, Wash. D.C.*, 23 FLRA 512, 515-16 (1986) (*VA Cincinnati*)

What types of activities are included under section 7131(a)?

- **Negotiation of local supplemental agreements:** The right to official time under section 7131(a) includes negotiation of a local supplemental agreement. *Am. Fed'n of Gov't Employees v. FLRA*, 750 F.2d 143 (D.C. Cir., 1984); *VA Cincinnati*, 23 FLRA 512.

- **Travel time:** When an employee must travel during duty time to participate in 7131(a) negotiations, the employee is on official time when traveling. *Dep't of the Treasury, Bureau of the Pub. Debt*, 17 FLRA 1045 (1985).

Does an agency have to give an employee official time if a representation petition has been filed related to the union's status?

- **Yes.** Since an agency has to continue to recognize the existing union and fulfill its obligations to that union until the representation petition has been resolved, it must grant official time to representatives of the certified union. *See Morale, Welfare & Recreation Directorate, Marine Corps Air Station, Cherry Point, North Carolina*, 48 FLRA 686, 687-88 (1993); *U.S. Dep't of the Air Force, HQ Air Force Materiel Command*, 49 FLRA 1111, 1119 (1994) (*AFMC*). If an agency denies 7131(a) official time to union representatives while a representation petition is pending, the agency violates the Statute. *Dep't of the Navy, Naval Weapons Station, Yorktown, Va.,* 55 FLRA 1112 (1999).

Does an agency violate the Statute any time it denies official time?

- **No.** An agency violates the Statute if it denies official time for negotiations under section 7131(a) or for FLRA proceedings under section 7131(c), but most official time questions will be covered by section 7131(d). That section requires the union and agency to bargain over and agree on other types and amounts of official time. *AFMC*, 49 FLRA at 1119 (1994). Disputes over section 7131(d) official time are answered by the parties' contract, not the Statute. *U.S. Dep't of the Army, HQ 10th Mountain Div. , Fort Drum, N.Y.*, 64 FLRA 337, 339 (2009). If a union has a complaint about 7131(d) official time (or other contractual issues), it should file a grievance through the negotiated grievance procedure.

13. UNFAIR LABOR PRACTICE CONDUCT BY UNIONS [7116 (b)]

Duty of Fair Representation

Section 7114 (a)(1) states:

> *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. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.*

What is the duty of fair representation?

- It is the duty of the union to represent fairly all employees included in its bargaining unit. The union's duty of fair representation comes from section 7114 (a)(1) of the Statute. Where a union is acting as the exclusive representative of bargaining unit employees, it has to represent all unit employees without discrimination. This includes employees who are not dues-paying members of the union. A union violates Section 7116 (b)(1) and (8) of the Statute if it breaches the duty of fair representation. *See, Fort Bragg Ass'n of Educators, Nat'l Educ. Ass'n, Fort Bragg, N.C.*, 28 FLRA 908, 918 (1987) (*Fort Bragg*).

To what actions does the duty of fair representation apply?

- The duty of fair representation applies to "union representational activities grounded in the union's status as exclusive representative." *NFFE Local 1827*, 49 FLRA 738, 746 (1994); see also *NATCA*, 66 FLRA 467, 472 (2012) (duty of fair representation applies "'[w]hen a union uses a power which it alone can yield"') (quoting *AFGE v. FLRA*, 812 F.2d 1326, 1328 (10th Cir. 1987)). This includes:
    - Matters arrived at through collective bargaining: *Antilles Consol. Educ. Ass'n,* 36 FLRA 776 (1990) (duty applies to a union's administration of a dental/optical plan it negotiated and solely administered pursuant to a bargaining agreement provision)

- Filing and processing grievances: *Am. Fed'n of Gov't Employees, Local 1345, Ft. Carson, Colo. (In Trusteeship) & Am. Fed'n of Gov't Employees,* 53 FLRA 1789 (1998); *NTEU*, 38 FLRA 615, 623 (1990) ("The Authority has consistently found that a union acts as the exclusive representative of all unit employees, members and non-members alike, with regard to all stages of grievance processing.")

- Distributing proceeds of a grievance settlement: *Am. Fed'n of Gov't Employees, Local 3354,* 58 FLRA 184 (2002)

- **When the duty does not apply:** The duty of fair representation does not apply when a union is acting outside the authority granted under Section 7114. "If a union does not serve as the exclusive agent for the members of the bargaining unit with respect to a particular matter, there is no corresponding duty of fair representation." *Antilles Consolid. Educ. Ass'n*, 36 FLRA 776, 789 (1990). For example, the duty of fair representation does not apply to a union's representation of employees:

  - In a lawsuit: *Fort Bragg Assoc. of Educ., NEA, Fort Bragg, N.C.*, 28 FLRA 908 (1987) ($500 fee for non-members to join a class-action lawsuit is not a violation)

  - In MSPB proceedings: *NTEU v. FLRA*, 800 F.2d 1165, 1171 (D.C. Cir. 1986)

How does a union violate the duty of fair representation?

- A union breaches the duty of fair representation when it acts discriminatorily, arbitrarily or in bad faith with respect to a matter to which the duty applies. *NATCA*, 66 FLRA 467, 472 (2012).

How does the Authority decide if a union has acted discriminatorily with respect to non-members?

- The union must undertake representational activities "without discrimination and without regard to labor organization membership." *NFFE, Local 1827*, 49 FLRA 738, 746 (1994).

- The Authority uses the same test that it uses in cases alleging an agency has discriminated. *AFGE, Local 3354, AFL-CIO*, 58 FLRA 184 (2002); *AFGE, Local 1345, Ft. Carson, Colo. (In Trusteeship) & AFGE, AFL-CIO*, 53 FLRA 1789 (1998); *Letterkenny Army Depot*, 35 FLRA 113 (1990); see also *AFGE Local 1164*, 53 FLRA 1812, 1812 (1998) (union

did not violate duty of fair representation by refusing to approve a non-member's request for hardship reassignment under an MOU, notwithstanding the union's statements referencing the employee's non-member status, where the union established a legitimate reason for the denial and that its decision would have been the same regardless of the employee's non-member status). See Section 4 on Discrimination, above.

What are some examples of a union violating its duty to non-members?

- **Union insurance plans:** A union violates the duty of fair representation if it requires non-members to pay a fee for a union administered insurance plan and does not require members to pay the same fee. *Antilles Consol. Educ. Ass'n,* 36 FLRA 776 (1990).

- **Grievance settlement:** When a union distributes money from a grievance settlement, and states that it is first-come, first-serve for employees to get the money, the union violates the duty of fair representation if the union pays its dues-paying members before it pays non-members who submitted their claims first. *See AFGE,* 58 FLRA 184 (2002); see also *Loring AFB, Limestone, Me.*, 43 FLRA 1087 (1992) (union and agency jointly liable for distributing grievance settlement proceeds in a manner favoring union members).

Can a union exclude non-paying members from its decision-making processes without violating the duty of fair representation?

- **Yes, with exceptions.** A union may, as part of its internal governing procedures, exclude non-members from contract ratification votes and from polls taken to determine the union's positions in negotiations. *NATCA*, 55 FLRA 601, 605 (1999). But if the union has exclusive discretion to determine a condition of employment, it may not exclude non-members from the process used to determine or decide the condition. Thus, where a union is authorized under its bargaining agreement to decide the type of seniority to be used in calculating seniority-based benefits "without further negotiations" with the agency, the union cannot exclude non-members from any poll it may conduct to help it decide the issue. *NFFE, Local 1827*, 49 FLRA 738 (1994).

- On the other hand, where a union determined a seniority policy to be applied in the bargaining agreement by a vote of delegates to its national convention, it did not violate the duty of fair representation by excluding non-members from voting where the

delegates were found to have been acting as representatives of the entire bargaining unit. *NATCA*, 55 FLRA 601**,** 605 (1999).

When does a union violate its duty of fair representation in cases where union membership is not the issue?

- **The standard:**

  Where union membership is not a factor, a union violates the duty of fair representation when it acts arbitrarily or in bad faith. *NATCA*, 66 FLRA 467, 472 (2012); *AFGE Local3283*, 61 FLRA 426, 427 (2005).

How does the Authority determine whether a union has acted "arbitrarily" in violation of the duty of fair representation?

- "[A] union's actions are arbitrary only if … the union's behavior is so far outside a 'wide range of reasonableness … as to be irrational.'" *Loring AFB, Limestone, Me.*, 43 FLRA 1087, 1099 (1992) (quoting *ALPA v. O'Neill*, 499 U.S. 65, 67 (1991)).

- Mere negligence or ineptitude is not enough to establish that a union's actions are arbitrary; rather, a union's actions will be deemed arbitrary if it does not have a reason for the actions it took. *Id*.

- Thus, a union was found not to have violated the duty of fair representation where its president failed to file a timely grievance due to his inexperience and absence on sick leave, supporting the conclusion that the president was "simply negligent*." AFGE, Local 3529,* 31 FLRA 1208, 1213 (1988).

- On the other hand, where a union misled a bargaining unit employee into believing a grievance would be filed, repeatedly ignored attempts by the employee to have the grievance filed, and the employee relied on the union's promise to his detriment, the union violated the duty of fair representation when it failed to file the grievance in a timely fashion. The evidence supported the finding that it was "implausible" that the union accidentally mishandled the grievance and that the union "deliberately and unjustifiably" failed to file the grievance. *Int'l Ass'n of Machinists & Aerospace Workers, Local 39, AFL-CIO*, 24 FLRA 352 (1986).

How does the Authority determine whether a union has acted in "bad faith" in violation of the duty of fair representation?

- "Unlike the 'wide range of reasonableness' standard for allegedly arbitrary conduct – which involves an objective inquiry – determining whether a union acted … in bad faith requires a subjective inquiry into motives." *NATCA*, 66 FLRA 467, 472 (2012).

- Thus, a union was found to have acted in bad faith when it redefined how seniority would be calculated under its bargaining agreement in order to punish unit members who had worked in supervisory/management positions. *Id*.

- A union was also found to have acted in bad faith when it refused to represent a bargaining unit employee due to animosity arising from his support for a rival union. *AFSCME, Local 2477*, 22 FLRA 739 (1986); *see also AFGE, Local 1857*, 28 FLRA 677 (1987) (union acted in bad faith where it excluded a unit employee from a grievance back-pay list based on co-workers' animosity arising from the employee's involvement in reporting disciplinary infractions).

Union Membership

Section 7116(c) states:

> *For the purpose of this chapter it shall be an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by such exclusive representative except for failure—*
>
> *a. to meet reasonable occupational standards uniformly required for admission, or*
>
> *b. to tender dues uniformly required as a condition of acquiring and retaining membership.*
>
> *This subsection does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this chapter.*

When does section 7116(c) protect a union's discipline of bargaining unit employees?

- **Non-members:** A union can discipline a non-member for conduct that happened while the person was a member. Discipline can include suspension and restitution. *AFGE, Local 987*, 53 FLRA 364 (1997).

- **Members who try to de-certify the union:** The union can discipline its members for conduct that the Statute appears to protect. For example, a union that disciplined its steward who discussed bringing in another labor organization with the agency's personnel office and with other employees, did not violate the Statute. A labor organization is entitled to "expel a member for filing a decertification petition because it represents an attack on the very existence of the union." *AFGE,* 29 FLRA 1359 (1987); *see Tawas Tube Products, Inc.,* 151 NLRB 46 (1965).

When does a union's discipline of bargaining unit employees violate the Statute?

- If it threatens or disciplines a member for filing unfair labor practice charges. *AFGE, AFL-CIO*, 29 FLRA 1359 (1987); *see also NAGE, R5-66*, 17 FLRA 796 (1985); *Overseas Educ. Ass'n*, 15 FLRA 488 (1984); *AFGE, Local 1857*, 44 FLRA 959 (1992) (union violated Statute by disciplining a steward who assisted another employee in filing a ULP charge against the union).

- If it tries to get the agency to discipline an employee who merely criticized union officials. *AFGE , Local 3475*, 45 FLRA 537 (1992) (union attempted to have agency discipline an employee for allegedly using non-work time to prepare and distribute materials critical of local officials); *Overseas Educ. Ass'n*, 11 FLRA 377 (1983) (union asked agency to discipline an employee for distributing an open letter critical of the local president).

Unlawful Interference

Section 7116 (b)(1) of the Statute states that it is an unfair labor practice.for a labor organization:

> *To interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter . . .*

What standard is used to decide whether a union has violated section 7116 (b)(1)?

- An objective standard is used. This does not depend on the actual feelings of the employee. The test is whether, under the circumstances, the union's actions or statements tend to interfere with or coerce employees in the exercise of rights protected by the Statute. That is, whether an employee could reasonably infer coercion or a threat. *AFGE, Local 1931, AFL-CIO, Naval Weapons Station Concord, Concord, Cal.*, 34 FLRA 480, 487 (1990).

What are some examples of 7116(b)(1) violations?

- Statements that the union would not take a grievance to arbitration because the employee was not a union member: *NTEU*, 38 FLRA 615, 623 (1990).
- A union newsletter article about overtime issues stating that non-dues paying employees wishing to file grievances should join the union to assure prompt representation: *AFGE, Local 987, Warner Robins, Ga.*, 35 FLRA 720 (1990).
- A letter stating that if the employee and other non-members had become members of the union, their views would have been heard and counted regarding the seniority policy: *Nat'l Air Traffic Controllers Ass'n, MEBA/AFL-CIO*, 55 FLRA 601 (1999).
- Union made statements at an orientation session for new employees that gave the impression that employees who were not union members would not get the same quality of representation in grievances and unfair labor practices as would union members: *AFGE, Local 2437*, 53 FLRA 256 (1997).
- Union's decision to remove a steward because of testimony in an FLRA ULP hearing case: *NTEU*, 6 FLRA 218 (1981).
- Expelling an employee from union membership because he filed or caused other employees to file unfair labor practice charges against the union: *AFGE, Local 1857, AFL-CIO*, 44 FLRA 959, 968 (1992).

Are there any situations in which unions can treat non-members differently than members?

- **Yes.** A union may limit participation in its meetings to members, *NFFE, Local 1827*, 49 FLRA 738, 741 (1994), and has the right to choose its own representatives, *AFSCME, Local 2910*, 23 FLRA 352 (1986). All unit employees are entitled to vote in an election to determine whether there will be union representation. But once a union is chosen as the exclusive representative, the union then acts for, and negotiates collective-bargaining agreements covering, all employees. Its members ratify and approve such agreements in the manner provided by the labor organization's governing requirements. *AFGE, Local 2000, AFL-CIO*, 14 FLRA 617 (1984).

Cause or Attempt to Cause Discrimination

Section 7116(b)(2) of the Statute states that it is an unfair labor practice for a labor organization:

> *To cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter . .*

When will a union's actions violate section 7116(b)(2)?

- If it tries to have an employee disciplined because the employee took part in activity protected by the Statute. *AFGE, Local 3475,* 45 FLRA 537 (1992).

What are some examples of section 7116(b)(2) violations?

- A union refused to help an employee get information about a grievance and asked the employer to discipline the employee, allegedly for unlawful use of a copy machine. The union took these actions because the employee was not a member of the union. *Overseas Educ. Ass'n*, 11 FLRA 377 (1983).

- A union agreed to agency rules that allowed union members to participate in asbestos testing as an excused absence, while others could participate in the program only on off-duty hours. *Dep't of the Army, Watervliet Arsenal, Watervliet, N.Y.*, 39 FLRA 318, 336 (1991).

- A union violated Sections 7116(b)(1), (2), and (8) by entering into and enforcing agreements that required an employee to get, fill out, and submit dues withholding revocation forms at the union office. *Dep't of the Navy, Portsmouth Naval Shipyard, Portsmouth, N.H.*, 19 FLRA 586 (1985).

Unlawful Discipline of Members

Section 7116(b)(3) of the Statute makes it an unfair labor practice for a union:

> *To coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee . . .*

What is the purpose of section 7116(b)(3)?

- Congress included this section to try to protect union members from union actions that interfere with union members' job duties. Congress wanted to ensure that: (1) employees will be able to perform their duties, even if the union takes an action against one of its members; and (2) the government will be able to effectively and efficiently conduct its business without interference from union actions against their members. *AFGE, Local 1738*, 29 FLRA 178 (1987).

Discrimination in Membership

Section 7116(b)(4) of the Statute states that it is an unfair labor practice for a labor organization:

> *To discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or non-preferential civil service status, political affiliation, marital status, or handicapping condition . . .*

This section prohibits a union from denying membership or expelling employees from membership for discriminatory reasons, which are listed in the section.

Refusal to Bargain

Section 7116(b)(5) of the Statute states that it is an unfair labor practice for a labor organization:

> *To refuse to consult or negotiate in good faith with an agency as required by this chapter;*

Unions have the same duty as agencies do to approach and participate in the collective bargaining process in good faith. See Section 6, above, on Duty to Bargain. A union violates section 7116(b)(5) if it fails to do this.

What are some examples of section 7116(b)(5) violations?

- Union insists to impasse on a subject that is "covered by" an agreement: *AFGE, Local* 3937, 64 FLRA 17 (2009)
- Union insists to impasse on using a recording device during contract negotiations: *Sport Air Traffic Controllers Organ*., 52 FLRA 339 (1996)
- Union refuses to sign an agreement which has the terms the parties agreed to in negotiations: *Dep't of Def., Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 40 FLRA 1211, 1218 (1991).
- If it appears that the union negotiator has the authority to bind the union in negotiations, and there is no agreement that says something different, the union cannot insist that higher-level union officials must approve the agreement. The union is required to sign the agreement that has the agreed-upon terms. *Nat'l Council of SSA Field Operations Locals - Council 220, AFGE,* 21 FLRA 319 (1986).
- Union refuses to negotiate over the scope of the grievance procedure, which is a mandatory subject of bargaining: *AFGE, Local 3723,* 9 FLRA 744 (1982).
- Union repudiates a memorandum of understanding or an agreement in its entirety: *AFGE,* 21 FLRA 986 (1986).
- Union repudiates a settlement agreement negotiated with the agency in settlement of a grievance: *AFGE, Local 1923,* 20 FLRA 749 (1985).

But no violation was found and the union did not repudiate the negotiated agreement by refusing to pay arbitration costs where it had entered into an agreement with the employee and the arbitrator that the employee would pay the cost of the arbitration (*AFGE, AFL-CIO*, 56 FLRA 1021 (2000)); or where the evidence demonstrated all employees had to agree to pay costs of the arbitration and the union attempted to work out a payment plan (*AFGE, Local 1909, Fort Jackson, S.C.*, 41 FLRA 18 (1991)).

Refusal to Cooperate in Impasse Procedures

Section 7116(b)(6) of the Statute states that it is an unfair labor practice for a labor organization:

> *To fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter . . .*

This section is very similar to the agency's duty under section 7116(a)(6). See Section 6 , above.

When does a union violate section 7116(b)(6)?

- A union can challenge an order of the Federal Service Impasses Panel in an unfair labor practice proceeding, but it will violate Section 7116(b)(6) of the Statute if the order is found to be proper and the union refuses to comply with it. *AFGE, Local 3732*, 16 FLRA 318 (1984).

Strike, Work Stoppage or Slowdown

Section 7116(b)(7) of the Statute states that it is an unfair labor practice for a union:

> (A) *To call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or (B) To condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity . . .*

What are some examples of section 7116(b)(7) violations?

- The Professional Air Traffic Controller's Organization (PATCO) called, participated in, and supported a strike at FAA facilities. As a result, PATCO lost, by definition, its status as a labor organization under Section 7103(a)(4) of the Statute. The remedy included decertification. *Prof'l Air Traffic Controller's Org.*, 7 FLRA 34 (1981).

- Approximately 60 employees, along with their union leaders, left their workplaces and gathered before the Office Director in order to protest and orally grieve the poor physical conditions and maintenance of the office. This action was a work stoppage within the meaning of the Executive Order that came before the Statute, not an acceptable method of presenting a grievance. *AFGE, Local* 3369, 4 FLRA 126 (1980).

When is picketing a violation of section 7116(b)(7)?

- **When it interferes with an agency's operations.** This is decided by looking at factors such as the government interest involved, the sensitivity of the agency's function and its purpose, where the picketed agency is located, how long the picketing lasts, and the number and actions of the picketers. *AFGE, Local 2369,* 22 FLRA 63 (1986); *P.R. Air Nat'l Guard, 156th Airlift Wing (AMC), Carolina, P.R.*, 56 FLRA 174 (2000).

Refusal to Comply with Other Provisions

Section 7116(b)(8) of the Statute states that it is an unfair labor practice for a union:

> *To otherwise fail or refuse to comply with any provision of this chapter.*

What are some examples of section 7116(b)(8) violations?

- An employee trying to get other employees to join the union or doing other internal union business during duty time: *AFGE, Local 987*, 37 FLRA 119 (1990); *SEIU, Local 556,* 17 FLRA 862 (1985).

- Union refuses to go to arbitration of an agency-filed grievance: *AFGE, Local 1457*, 39 FLRA 519, 528 (1991).

14. REMEDIES IN UNFAIR LABOR PRACTICE CASES [7118 (a)(7)]

Section 7118(a)(7) of the Statute describes the powers of the Authority to remedy unfair labor practices, which include ordering an agency or union to:

1. Cease and desist from the unfair labor practice conduct
2. Renegotiate a collective bargaining agreement consistent with its order and give the amended agreement retroactive effect
3. Reinstate employees with backpay as appropriate
4. Take other action that will carry out the purpose of the Statute

What is the purpose of the remedies in section 7118(a)(7)?

- The Authority issues a remedial order in every case in which it finds an unfair labor practice. *F.E. Warren AFB, Cheyenne, Wyo.*, 52 FLRA 149, 161 (1996) (*F.E. Warren*). The purposes of a remedy are to restore, as far as possible, the *status quo* that would have existed if the Respondent had not violated the Statute, and to deter future misconduct. *Fed. Bureau of Prisons, Wash., D.C.*, 55 FLRA 1250, 1256-58 (2000). A remedy may not be punitive or in conflict with the law. *F.E. Warren*, 52 FLRA at 161 (punitive); *Portsmouth Naval Shipyard, Portsmouth, N.H.*, 49 FLRA 1522, 1532 (1994) (contrary to law).

What are the traditional remedies?

- The Authority has distinguished traditional from nontraditional remedies. *F.E. Warren,* 52 FLRA at 160-61. The two traditional remedies ordered in every case require a charged party to: (1) **cease and desist** from the unlawful act(s) that violated the Statute; and (2) **post,** for 60 days, in areas described by the Authority, a hard copy of a **Notice to Employees** signed by a charged party representative chosen by the Authority. *F.E. Warren,* 52 FLRA at 160-61 (1996) (*F.E. Warren*). In addition, in *United States Dep't of Justice, Fed. Bureau of Prisons, Fed. Transfer Ctr., Okla. City, Okla.,* 67 FLRA 221, 222-26 (2014), the Authority held that electronic-notice posting is a traditional remedy. The Authority stated as follows:

> In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with emmployees by such means.

When will the Authority order nontraditional remedies?

- **When traditional remedies are not enough.** *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Ocean Serv., Coast & Geodetic Survey, Aeronautical Charting Div., Wash., D.C.*, 54 FLRA 987, 1021-22 (1998). This is decided by looking at whether a nontraditional remedy is reasonably necessary, whether it would recreate the conditions and relationships with which the unfair labor practice interfered, and whether it would serve the Statute's policies. *Id.* Additional affirmative remedies, both traditional and nontraditional, are listed for specific categories of unfair labor practices described below.

Unilateral Change

- **Status quo ante remedy:** When an agency unlawfully implements a change in conditions of employment, the most effective traditional remedy is status quo ante relief. This remedy requires the agency to go back to the way things were before the change. The availability of this remedy encourages agencies to fulfill their bargaining obligations before implementing a change. *FDIC v. FLRA*, 977 F.2d 1493, 1498 (D.C. Cir. 1992).

  - **Cases where agency was required to bargain over the changed condition of employment (substance bargaining):** In these cases, status quo ante relief will be ordered, unless there are special circumstances. *FDIC, Wash., D.C., FDIC, N.Y., N.Y.*, 41 FLRA 272, 279 (1994). The Authority has not developed specific criteria for identifying special circumstances, but considers the facts of each case. *See SSA*, 64 FLRA 199 (2009); *SSA, Office of Hearings & Appeals, Region II, Buffalo Office of Hearings & Appeals, Buffalo, N.Y.*, 58 FLRA 722, 727 (2003).

  - **Cases where agency was only required to bargain implementation procedures and appropriate arrangements for affected employees (impact and implementation bargaining):** In these cases, the following factors are considered to decide whether status quo ante relief is appropriate:

    (1) whether, and when, management provided notice of the change to the union;

    (2) whether, and when, the union requested bargaining;

    (3) the willfulness of the agency's failure to bargain;

    (4) the nature and extent of the change's negative impact on bargaining unit employees; and

    (5) whether, and to what degree, a status quo ante remedy would disrupt or impair the efficiency and effectiveness of agency operations. *Fed. Corr. Inst.*, 8 FLRA 604, 606 (1982). The appropriateness of this remedy is determined on a case-by-case basis by balancing the nature

and circumstances of the particular violation against the degree of disruption in government operations that the remedy would cause. *FCI*, 8 FLRA at 606; *United States Dep't of Defense, Peterson AFB, Colorado Springs, Colo*., 61 FLRA 688, 694-95 (2006) (RIF).

- **Bargaining order and retroactive effect:** Another traditional remedy in unilateral change cases is an order to bargain and apply the agreement reached retroactive to the date the agency made the change. *F.E. Warren,* 52 FLRA at 160-61; *Dep't of Veterans Affairs Med. Ctr., Asheville, NC*, 51 FLRA 1572, 1580 (1996). This remedy is frequently ordered when status quo ante relief is inappropriate, *e.g., United States Dep't of the Army, Letterkenny Army Depot, Chambersburg, Pa.*, 60 FLRA 456, 457 (2004), or when the evidence shows some bargaining unit employees have been harmed, but their identity is unknown, *e.g., FDIC, Wash, D.C.,* 48 FLRA 313, 330-31 (1993), *petition for review denied sub nom. FDIC v. FLRA*, No. 93-1694 (D.C. Cir. 1994). This remedy "approximate[s] the situation that would have existed had the respondent fulfilled its statutory obligations." *Id.*

- **Make-whole remedies:** The Authority also orders agencies to make employees whole for harm they suffered as the result of the change in their conditions of employment. The harm may be nonmonetary. *U.S. Dep't of Justice, Exec. Office for Immigration Review, Bd. of Immigration Appeals*, 55 FLRA 454, 457 (1999) (restoration of annual leave).

  - **Monetary make-whole remedies and sovereign immunity:** Employees may lose money because of an agency's change. When employees lose money, the doctrine of sovereign immunity may prohibit monetary relief. The United States is immune from liability for money damages unless sovereign immunity is waived unequivocally. *INS, L.A. Dist., L.A., Cal.*, 52 FLRA 103, 104 (1996). The Statute does not have such a waiver. *Id*. at 105. But the Back Pay Act, 5 U.S.C. §§ 5595-5597, does have a waiver of sovereign immunity. Under that Act, an employee affected by an unjustified or unwarranted personnel action may obtain money for the withdrawal or reduction in pay, allowances, or differentials resulting from that action. Under the Back Pay Act, a unilateral change unfair labor practice could result in a backpay remedy. *Air Force Flight Test Ctr., Edwards AFB, Cal.*, 55 FLRA 116, 125 (1999). The Back Pay Act also allows employees to get interest. *FAA*, 55 FLRA 1271, 1276-77 (2000).

- **Equitable remedies:** The doctrine of sovereign immunity does not apply to equitable remedies. *Dep't of the Army, U.S. Commissary, Ft. Benjamin Harrison, Indianapolis, Ind. v. FLRA*, 56 F.3d 273 (D.C. Cir. 1995). An equitable remedy "attempt[s] to give the plaintiff the very thing to which he was entitled." *Id. at 312*, quoting *Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988). For example, a remedy that requires an agency to reduce parking rates for unit employees for a period to offset their added parking costs is equitable in nature. *U.S. Dep't of Veterans Affairs*, 55 FLRA 1213, 1216 (2000).

Bargaining in Bad Faith

- **Bargaining order:** The remedy for bargaining in bad faith, in violation of Section 7116(a)(5) (agency) or 7116(b)(5) (union) of the Statute, is an order to bargain in good faith. *U. S. Dep't of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson AFB, Ohio*, 36 FLRA 524, 534-35 (1990) (agency violation); *AFGE, Local 3937, AFL-CIO*, 64 FLRA 17 (2009) (union violation).

- **Nontraditional remedy:** Extension of the union's certification year, which protects the union against a challenge from another union for an additional period. *United States Geological Survey, Caribbean Dist. Office, San Juan, P.R.*, 53 FLRA 1006, 1015-22 (1997).

Discrimination Based on Protected Activity

- **Rescission and make-whole remedy:** The remedies for a section 7116(a)(2) or 7116(a)(4) violation are rescission of the unlawful agency action and making employees whole for lost pay, allowances and differentials under the Back Pay Act. *U.S. Geological Survey,* 50 FLRA 548, 552-53 (1995). In a case where an agency unlawfully discriminates between employees by providing a benefit to some of them, the agency also could be required to provide the benefit to the employees who had not received it. *Dep't of the Army, Watervliet Arsenal, Watervliet, N.Y.*, 39 FLRA 318 (1991).

Refusal to Execute (Sign) an Agreement and Repudiation of an Agreement

- **Refusal to sign agreement:** The remedy is an order to sign the agreement. *U. S. Dep't of Transp., FAA, Standiford Air Traffic Control Tower, Louisville, Ky.*, 53 FLRA 312, 321 (1997) (agency violation); *Nat'l Council of SSA Field Operations Locals, Council 220, Am. Fed. of Gov't Employees,* 21 FLRA 319, 32-22 (1986) (union violation).

- **Repudiation of agreement:** The remedy is an order to implement, reinstate, or comply with the repudiated agreement or the repudiated terms. *U. S. Dep't of Justice, Fed. Bureau of Prisons, FCI Danbury, Danbury, Conn.*, 55 FLRA 201, 205 (1999). Make-whole relief also is available for any loss of pay, allowances and differentials resulting from repudiation. *Dep't of Def. Dependents Sch.*, 54 FLRA 259, 264-72 (1998).

Denial of a Union Representative at Investigatory Examinations

- **Repeat of examination and reconsideration of decision:** If an agency has denied an employee the right to union representation under section 7114(a)(2)(B) of the Statute, and the employee has been disciplined, the Authority orders the agency to repeat the

investigatory examination if the union and employee agree to. During the repeat examination, the agency must give the employee his or her full rights to union representation. *Dep't of Justice, Fed. Bureau of Prisons, Office of Internal Affairs, Wash., D.C.*, 55 FLRA 388, 395 (1999). The agency is then ordered to reconsider the discipline after repeating the investigatory examination. *Id.* If the agency reduces or rescinds the discipline, the agency must make the employee whole. *Id.* The agency is required to notify the employee of the results of the reconsideration and, if the discipline is not rescinded entirely, give the employee grievance and appeal rights under the collective bargaining agreement and outside law or regulation. *Id.*

Formal Discussion

- **Notice to union:** Where the agency has denied the union the chance to be represented at a formal discussion under section 7114(a)(2)(A) of the Statute, the Authority orders the agency to provide prior notice to the union and the opportunity to be represented at any formal discussion. *FAA, Airways Facilities Div., Nw. Mountain Region, Renton, Wash.*, 60 FLRA 819, 821-22 (2005).

Duty to Furnish Data

- **Give the union information:** If an agency has not given a union information it asked for under section 7114(b)(4) of the Statute, the Authority orders the agency to give the union the information. *FAA*, 55 FLRA 254, 261 (1999). An agency violates the Statute if it denies a union's request for information, even if it later changes its mind and decides to give the union the information. *SSA,* 64 FLRA 293, 297 (2009). The union is entitled to a remedial order even if the agency claims that the union should no longer need the data due to a later event, such as a grievance being resolved or the union going to arbitration without the information. *Bureau of Indian Affairs, Uintah & Ouray Area Office, Ft. Duchesne, Utah,* 52 FLRA 629, 640 (1996).

- **Nontraditional remedy:** The Authority may order an agency not to raise a timeliness issue in connection with a grievance or arbitration where the union asked for information so it could make an informed decision about whether to file a grievance. *Health Care Fin. Admin.*, 56 FLRA 503, 507 (2000).

Failure to Withhold Union Dues or Process Requests to Cancel Dues

- **Agency's failure to process an employee's dues withholding request:** If an agency does not process a bargaining unit employee's dues withholding request, or unlawfully stops withholding dues, the Authority orders it to give the union the regular and periodic dues that should have been withheld, and to process future withholding requests as required

by Section 7115 of the Statute. *Morale, Welfare & Recreation Directorate, Marine Corps Air Station, Cherry Point, N.C.*, 48 FLRA 686, 691 (1993).

- **Union's failure to process dues withholding request or request to stop paying dues:** If a union fails to comply with section 7115, the Authority will order the union to process an employee's request to withhold or stop withholding dues. Or the Authority will order the union to ask the agency to start or stop withholding dues. *Fed. Employees Metal Trades Council, AFL-CIO, Mare Island Naval Station*, 47 FLRA 1289, 1295 (1993).

Failure to Comply With an Arbitration Award

- **Order to comply:** Section 7122 (a) of the Statute sets forth the procedure to follow if a party wishes to file exceptions to an arbitration award. When no one files timely exceptions, or when the Authority denies the exceptions, the award becomes "final and binding." The Authority will not review the merits of an arbitration award in a ULP proceeding. Where the award is clear and unambiguous, the Authority orders the parties to comply with the award. *U.S. Dep't of Transp., FAA, NW. Mountain Region, Renton, Wash*., 55 FLRA 293, 300 (1999) (agency's claim in a ULP proceeding that it could not comply with an arbitration award is an "impermissible collateral attack" on the award).

Statutory Official Time

- **Restore annual leave:** If an agency refuses to grant section 7131(a) or 7131(c) official time, the Authority orders the agency to restore any annual leave an employee used for activities that should have been granted official time. *Dep't of the Navy, Naval Weapons Station, Yorktown, Va.*, 55 FLRA 1112, 1114-15 (1999).

Union Duty of Fair Representation

- **Make-whole remedy:** Duty of fair representation violations are remedied by an order that the union fairly represent all unit employees. *AFGE, Local 3615,* 53 FLRA 1374, 1376 (1998). If the employee was denied benefits because of the union's actions, the Authority may order the union to take steps to rescind the action and to make employees whole for money they lost. *NFFE, Local 1827*, 49 FLRA 738, 748-50 (1994).

Signing, Posting and Distributing Notices

- **Purpose of notices:** As noted earlier, a traditional remedy in unfair labor practice cases includes posting of a Notice to Employees or Members by the respondent in the case. A

notice serves two purposes: (1) It shows employees that their rights under the Statute will be vigorously enforced; and (2) It shows employees that a respondent recognizes and intends to follow the Statute. *U.S. Dep't of Justice, Fed. Bureau of Prisons, Office of Internal Affairs, Wash., D.C.*, 55 FLRA 388, 394 (1999); *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 61 FLRA 146, 152 (2005).

- **Distribution of notices:** The Authority considers the purposes of a notice when deciding how broadly it should be posted. If management makes a change in one directorate (or department, division, etc.) and only unit employees in that directorate are affected, the posting may be limited to that location. *Air Force Materiel Command, Warner Robins Air Force Logistics Ctr., Robins AFB, Ga.*, 54 FLRA 1529, 1536-37 (1998). But, in a case where an agency did not give the union advance notice of formal discussions with bargaining unit employees at a field office, and the meetings had been directed and coordinated by the agency's regional level management, a wider area of posting was required. *SSA, Office of Hearing & Appeals, Boston Reg'l Office, Boston, Mass.*, 60 FLRA 105 (2004). Also, an agency may have to post a notice wherever bargaining unit employees are located, even if the agency disciplined a single employee in violation of section 7116 (a)(2). An agency was required to do this where the disciplined employee was the president of the union, the discipline was imposed because the president had filed unfair labor practice charges, and an agency official higher than management at the local level signed the letter of discipline. *Nat'l Park Serv.*, 54 FLRA 940, 947 (1998).

- **Nontraditional notices:** When an agency violates the Statute, the Authority requires agencies to post notices in hard copy on all agency bulletin boards and other locations where the agency usually posts notices to employees, along with electronic distribution if the agency customarily communicates with its employees by such means. If the Authority decides that these postings will not fully satisfy the purposes of a notice, the Authority may order the agency to distribute the notice in nontraditional ways. For example:

  - **Notice to supervisors:** Where an agency committed similar violations repeatedly, and a large number of employees witnessed the violations, the Authority ordered the agency to distribute the notice to all supervisors, managers and employees. *United States Penitentiary, Florence, Colo.*, 53 FLRA 1393, 1394 (1998).

  - **Meeting:** An agency was required to hold a meeting of all bargaining unit employees, and have the head of the agency or an Authority Agent read the notice aloud at the meeting. *U.S. Penitentiary, Leavenworth, Kan.*, 55 FLRA 704, 719 (1999). The Authority ordered this remedy because the head of the agency had, for several months, made threatening, anti-union statements, had made these statements at mandatory all-employee meetings, and had repeatedly threatened to take action against union officials.

  - **NOTE: An electronic-notice posting is a traditional remedy, see p. 85-86, above.**

- **Union notices:** In cases where a union has violated the Statute, the Authority orders the union to post the notice at its business offices and other locations where it normally posts notices, and to give a signed copy of the notice to management so it can post the notice in obvious places where affected employees are located. *Nat'l Ass'n of Air Traffic Specialists, Macon, Ga.*, 59 FLRA 261, 263 (2003). If the Union customarily communicates with its members and unit employees by electronic means, then the union will distribute the notice electronically as well.

- **Who signs the notice:** A notice must be signed by the highest official of the agency or activity, or union representative, responsible for violating the Statute. *SSA*, 64 FLRA 293, 297 (2009); *Dep't of HHS, Reg'l Personnel Office, Seattle, Wash.*, 48 FLRA 410, 411 (1993).

APPENDIX: *DE MINIMIS*

Sections 7114(b) and 7116(a)(5) of the Statute require an agency to bargain in good faith with the union representing its employees. The Authority has held, however, that an agency has no duty to bargain over a matter that has a *de minimis* effect on conditions of employment. *Dep't of HHS, SSA*, 24 FLRA 403 (1986).

Application: The *de minimis* standard applies to substance bargaining as well as impact and implementation bargaining. *SSA, Office of Hearings and Appeals, Charleston, S.C.*, 59 FLRA 646 (2003*), petition for review denied, Ass'n of Admin. Law Judges v. FLRA*, 397 F.3d 957 (2005).

Standard: The nature and extent of the effect or reasonably foreseeable effect of the change on conditions of employment is the primary determinant of whether a change has a *de minimis* effect on conditions of employment. *Dep't of HHS, SSA*, 24 FLRA 403 (1986).

Factors:

- Equitable considerations are taken into account in balancing the various interests involved. *See, e.g.*, *GSA, Region 9, San Francisco, Cal.*, 52 FLRA 1107 (1997).
- Number of affected employees not a controlling factor. Application limited to situations where bargaining will be required. *See, e.g.*, *Veterans Admin. Med. Ctr., Phoenix, Ariz.*, 47 FLRA 419 (1993)
- Bargaining history not a controlling factor. Application limited to situations where bargaining will be required.
- Size of the bargaining unit is not a factor.

Reasonably Foreseeable Analysis: Where the appropriate inquiry involves an analysis of the reasonably foreseeable effect of a change in conditions of employment, such an analysis is based on what a respondent knew, or should have known, at the time of the change. *Portsmouth Naval Shipyard Portsmouth, N.H.*, 45 FLRA 574 (1992).

Location of Effect of Change: Whether or not the effect of the change is experienced outside of the workplace is irrelevant. *Veterans Admin. Med.Ctr., Phoenix, Ariz.*, 47 FLRA 419 (1993).

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EXAMPLES OF *DE MINIMIS CHANGES*

1. Procedures for Employee Feedback: *Dep't of the Treasury, IRS and NTEU*, 64 FLRA 972 (2010). The Agency changed the content and follow-up process of voluntary employment surveys. Specifically the agency (1) changed the focus of the surveys from "employee satisfaction" to "employee engagement," and (2) eliminated a single, mandatory meeting where it shared the results of the surveys and replaced it with routinely scheduled group meetings where managers discussed with employees what was expected of them at work, the importance of that work, and how that work related to the Agency's mission and goals. This change was *de minimis* because focusing on "employee engagement" did not adversely affect employees in any way; "employee engagement" encompassed the concept of "employee satisfaction;" and the change in the meeting structure did not change employees' conditions of employment in a way that was more than *de minimis*.

2. Procedures for Assigning Work & Duties/Tasks: *NTEU*, 64 FLRA 462 (2010). The Agency revised certain provisions in its Internal Revenue Manual. Under the new provisions, Revenue Officers (ROs) had to perform in-office duties for others and themselves on a rotating basis, and had to follow certain procedures before first contacting a taxpayer. The rotating assignment of office duties had only a *de minimis* effect because the ROs spent seventy to eighty-five percent of their time in the office whether or not they were performing the rotating duty. The pre-contact procedures had a *de minimis* effect because there was little evidence that they resulted in more work or would have a foreseeable impact on performance evaluations.

3. Duties/Tasks: *Dep't of Homeland Security, Border and Transp. Security Directorate, U.S. Customs and Border Prot., Border Patrol, Tucson Sector, Tucson, Ariz.*, 60 FLRA 169 (2004). The Agency directed aliens arrested at a backlogged station to be taken to a nearby station for processing. Before this order, agency policy was that each border station processed the aliens it arrested. This change in policy was *de minimis* because the Agency did not assign employees new duties; the agency took steps to manage the additional processing workload; and risks such as exposure to disease and assault by aliens were already part of an agent's job.

4. Duties/Tasks: *Dep't of Homeland Security, Border and Transp. Security Directorate, Bureau of Customs and Border Prot., Wash., D.C.*, 59 FLRA 728 (2004). The U.S Customs Service allowed Customs Inspectors to perform in-stream/midstream boarding of vessels only when authorized and only in extraordinary circumstances. Before, Customs Inspectors regularly boarded vessels in-stream/midstream. The General Counsel argued that the order effectively removed one of the Customs Inspectors' job duties and their ability to earn overtime. The change was *de minimis* because using in-stream/midstream boarding as a way to make overtime was largely a matter of personal preference; it was not reasonably foreseeable that the change would result in a drop in the amount of available overtime; and

the change would not take away the skills and experience Customs Inspectors needed for their job.

5. Parking: *SSA, Office of Hearings and Appeals, Charleston, S.C.*, 59 FLRA 646 (2003*), petition for review denied sub nom., Ass'n of Admin. Law Judges v. FLRA*, 397 F.3d 957 (2005). The Social Security Administration reduced the number of reserved parking spaces assigned to the Administrative Law Judges (ALJs). The ALJs sometimes had to park in different spaces because of the change, but they continued to have access to parking; they did not have to pay for parking; they did not lose their "in and out" privileges; and they had no trouble finding parking spaces.

6. Procedures for Organization of Files: *SSA, Office of Hearings and Appeals, Nashville, Tenn.*, 58 FLRA 363 (2003). The Social Security Administration started a new procedure where Administrative Law Judges (ALJs) would receive case files that were not "marked up." A case file that is "marked up" is organized into folders with marked exhibits, an exhibit list, and page numbers. Before, all of the case files the ALJs received was "marked up." The impact of the change was not more than *de minimis* because "marking-up" a file was only one way of identifying and finding documents. Senior Staff Attorneys identified relevant documents in case files before giving the files to an ALJ.

7. Relocation: *GSA, Region 9, San Francisco, Cal.*, 52 FLRA 1107 (1997). The Agency temporarily moved an employee to another building after the Union complained that she could not get ready for an EEO hearing because she did not have enough privacy. In the new office, the employee did not have a fax machine, filing cabinet, telephone answering machine, chairs for visitors, or manuals needed to do her work. The evidence showed that the changes were minor, were the normal consequences of any office relocation, and could be handled through administrative channels. Equitable considerations also supported a conclusion that the move's effect was *de minimis*, since the move was temporary and the Agency moved the employee at the Union's request.

8. Reorganization: *Portsmouth Naval Shipyard, Portsmouth, N.H*, 45 FLRA 574 (1992). The Agency stopped using unit employees to give recertification training to other unit employees. The Union was worried that cancelling the recertification training would make trainers more vulnerable in a reduction-in-force. There was no evidence the Agency would need to reduce the number of trainers, so cancelling the recertification training did not increase the trainers' vulnerability.

9. Procedures for Assigning Work: *HHS, SSA, Baltimore, Md.*, 36 FLRA 655 (1990). The Agency changed the assignment of claims serviced by its Claims Representatives (CRs) and Claims Development Clerks (CDCs). The Agency used an alphabetical assignment system, where it assigned each CR and each CDC claimants from a specific portion of the alphabet. The only impact of the change was that different CRs and CDCs had to work with each other. There was no evidence that the employees' job performance depended on the nature of their personal relationships. Which employees worked together was only a matter of personal

preference, so the change in the assignment system did not have more than a *de minimis* effect on conditions of employment.

10. Duties/Tasks: *Dep't of Labor, Wash., D.C.*, 30 FLRA 572 (1987). An employee was reassigned from the position of Mail Clerk to Workers' Compensation Clerk. The positions were the same except that the new position required the employee to type correspondence. Even though the employee's in-grade increases and bonuses could be impacted, and she could face adverse action if she did not type the correspondence at a satisfactory level, the impact of the change was *de minimis*. The typing duty was only 10% to 20% of the employee's day; the Agency proportionately reduced her former duties; she did not have to learn a new skill; she only needed a minimal amount of training with some new forms and the use of a word processor; and her hours, pay, desk location, and promotion opportunities were the same.

11. Relocation: *Customs Serv., Wash., D.C.*, 29 FLRA 307 (1987). The Agency temporarily reassigned the Canine Enforcement Officers (CEOs) to work a different lot, where they worked only on trucks. The change was *de minimis* because the new location was less than one minute away from the former lot, the CEOs did not lose the chance to make seizures and earn points towards their performance appraisals, and the difference between working only on trucks and working on cars and trucks (as they had before) was not significant.

12. Reorganization: *Dep't of HHS, SSA*, 24 FLRA 403 (1986). The Agency reassigned an employee back to a unit she had worked in before after only three months in her new position. The change was *de minimis* because the employee had only worked in the unit she was leaving for three months, the reassignment did not change her pay or grade, her hours were the same, and the duties of the two positions were very similar. The reassignment did not have any effect on the employees in the unit she was leaving because the agency reassigned the employee due to a decrease in workload.

13. Relocation: *NTEU, Chapter 26 and United States, Dep't of the Treasury, IRS,* 66 FLRA 650, 652-53 (2012). The Authority found an arbitral award not contrary to law. The Arbitrator found that the relocation of a non-bargaining unit employee to vacant space in an appeals office where bargaining unit employees are located had only a *de miminis* impact on bargaining unit employees as (1) no bargaining unit employee was asked to move or was displaced; (2) there was no change in the layout, furnishings or lease; and (3) nothing was taken away from the bargaining unit.

EXAMPLES OF CHANGES MORE THAN DE MINIMIS

14. Relocation: *United States Dep't of the Air Force, Air Force Materiel Command, Space and Missile Systems Ctr., Detachment 12, Kirtland AFB, N.M*, 64 FLRA 166 (2009). An employee was ordered to move into a smaller office as well as to move out of an office space that he used to do training sessions and store training equipment. Because of the move, the employee was unable to effectively communicate training information to other employees since the computer, telephone, and fax machine at his new office did not work for two weeks after the move. Also, the employee was not able to do face-to-face training because of the loss of training space, and he became strained for storage in his office because of the space the training materials took up. The order to relocate had a negative effect on the employee's ability to perform his training duties, so the change in conditions of employment was more than *de minimis.*

15. Duties/Tasks: *United States Dep't of the Air Force, 355th MSG/CC, Davis-Monthan AFB, Ariz.*, 64 FLRA 85 (2009). The Agency assigned an employee working as a taxi driver to do daily security checks on the grounds of the base in addition to his normal job duties. The change was more than *de minimis* because the employee had to be trained for eight days, drive over rougher terrain, use more discretion and independent judgment than he used before, and prepare daily and monthly written reports.

16. Leave: *United States Dep't of the Treasury, IRS,* 62 FLRA 411 (2008). The Agency ended a past practice of giving employees four hours of administrative leave to go to Employee Appreciation Day each year. The Agency's practice of granting administrative leave fostered "a productive work relationship between employees and management" which benefited employees in terms of "morale" and gave them "a sense of teamwork." Thus, ending the practice had more than a *de minimis* effect on bargaining unit employees' conditions of employment.

17. Reorganization: *United States Gen. Servs. Admin.,* 62 FLRA 341 (2008). The Agency decided to stop all rotational assignments in its office in Puerto Rico. Because of the decision, employees could not send their children to a school system run by the Department of Defense because it was only for families of non-military government personnel who were on a rotation in Puerto Rico. The Authority noted the Agency's argument that because no employee had ever been required to rotate out of the Puerto Rico office, ending rotational assignments did not change the employees' chance of rotating to another office. But lost school access was an effect that was not "outside the scope" of the Agency's decision and thus, the change had more than a *de minimis* effect on employees' conditions of employment.

18. Training: *AFGE, Nat'l Border Patrol Council, v. FLRA*, 446 F.3d 162 (2006) overruling *United States, Dep't of Homeland Security, Border and Transp. Security Directorate, Bureau of Customs and Border Prot., Wash., D.C.*, 60 FLRA 943 (2005). The Agency changed the number of hours of remedial firearms training for employees from eighty hours to eight hours. The D.C. Circuit Court overruled the Authority and held that the change was more than *de minimis*. At least one officer became eligible for termination because of his deficiency in firearms training; the change drastically reduced every probationary officer's ability to remedy a firearms deficiency; and no equivalent training program for firearms was implemented.

19. Reorganization: *United States Dep't of Veterans Affairs Med. Ctr., Leavenworth, Kan.*, 60 FLRA 315 (2004). The Agency reassigned two nurses to a different unit. The unit the nurses were originally assigned to was open on the weekends, giving them the chance to earn a pay differential and overtime. The unit the Agency reassigned them to was closed on the weekends. While the nurses were not guaranteed weekend hours in the original unit, the lost chance to earn pay differential and overtime was reasonably foreseeable to the Agency when it made the reassignment.

20. Reorganization & Relocation: *Pension Benefit Guaranty Corp.*, 59 FLRA 48 (2003). The Agency ordered employees to be reassigned and relocated. The effects were greater than *de minimis* because it was reasonably foreseeable that the reassignment would cause one of the employees to travel less, make overtime less available, and result in the employee having to give up her laptop. Also, it was reasonably foreseeable that the employees would lose access to a window and have smaller office spaces because of the relocation.

21. Duties/Tasks: *United States Dep't of the Air Force, 913th Air Wing, Willow Grove Air Reserve Station, Willow Grove, Pa.*, 57 FLRA 852 (2002). The Agency began requiring its lead security guards to do shift supervisor duties if the shift supervisor was gone. Although the new policy only affected three guards in a bargaining unit of 240 employees, the new duties were a significant addition to their duties, and it was reasonably foreseeable that they could affect the relative qualification for promotion of all bargaining unit employees.

22. Relocation: *U.S. Dep't of the Treasury, IRS*, 56 FLRA 906 (2000). The Agency moved nine bargaining unit employees from the ninth to the third floor. The change was more than *de minimis* because of the problems that happened during the move. Some computers did not work, employees were denied security access to get computer files, and one employee was originally denied storage cabinets to replace the storage cabinets she lost in the move.

23. Certification & Training: *U.S. Dep't of Justice, INS, Wash., D.C.*, 55 FLRA 93 (1999). The Agency adopted a "side-handle baton" as a standard intermediate use-of-force weapon for Border Patrol Agents and began a mandatory training program for use of the weapon. Before, a "straight baton" was optional equipment for the agents. The new training program had a foreseeable impact that was more than *de minimis* because the program had mandatory certification and refresher training requirements, employees could not carry the

side-handle baton if they did not successfully complete the certification class, and employees could be disciplined if they failed to properly use the side-handle baton.

24. Job Status & Benefits: *Air Force Materiel Command*, 54 FLRA 914 (1998). The Agency decided to offer voluntary separation incentive pay (VSIP) to employees so the Agency could offer those positions to interns. The VSIP program had more than a *de minimis* effect on conditions of employment because the decision whether or not to accept a VSIP affected employees' present and future job status and their benefits and compensation.

25. Duties/Tasks: *SSA, Malden Dist. Office*, 54 FLRA 531 (1998). The Social Security Administration reassigned duties from the Operations Supervisors to the Claims Representatives (CRs). The reassignment was more than *de minimis* because the CRs had to spend an average of 10 minutes on 1 to 2 cases each day to do the new duties, and the CRs had not performed the duties before.

26. Duties/Tasks: *SSA, Gilroy Branch Office, Gilroy, Cal.*, 53 FLRA 1358 (1998). The Agency began requiring Claims Representatives (CRs) to do six claim interviews on Friday. Before, CRs used Fridays to do adjudication work on claims they had already done. The loss of adjudication time resulted in increases in voluntary overtime and affected the CRs' ability to manage and control their workload. The change also affected the CRs' Friday lunch periods and the way they scheduled leave. Also, it was reasonably foreseeable that the change would add a significant number of appointments to the CRs' workload.

27. Equipment: *GSA, Nat'l Capital Region, Fed. Prot. Serv. Div., Wash., D.C.*, 52 FLRA 563 (1996). The Agency ended its practice of allowing police officers to carry their weapons between home and work and instead, required officers to return their weapons to a work location at the end of their shifts and pick up the weapons at the beginning of the next shift. The change was more than *de minimis* because it would take from 2 to 90 minutes per shift for an officer to return his weapon, depending on his place in line.

28. Procedures for Performance Appraisal: *United States EEOC, Wash., D.C.*, 48 FLRA 306 (1993). The Agency revised its performance appraisal system. Before, the Agency gave employees "a reasonable opportunity" to improve performance and to correct deficiencies. Under the new standard, employees would have a limit of 30 to 90 days to reach an acceptable level of performance. This change was more than *de minimis* because it was reasonably foreseeable that there could be a considerable difference in the length of periods allowed for improvement after the new policy took effect, and this change would affect the employees' ability to show improvement.

29. Tour of Duty (Daily): *Veterans Admin. Med. Ctr., Phoenix, Ariz.*, 47 FLRA 419 (1993). The Agency changed an employee's daily tour of duty by requiring the employee to start and end one hour later, causing him to be unable to report to a second job. The one-hour change was more than *de minimis*, since it was reasonably foreseeable that the change would affect the employee's outside activities and hurt his ability to satisfy other

commitments. It was irrelevant that the change affected only one employee and that the effect of the change was felt outside the workplace.

30. Reorganization: *INS, Border Patrol Del Rio, Tex.*, 47 FLRA 225 (1993). The Agency shut down an organizational unit because there was not enough work to do in the unit. Even though there were only 1 to 2 bargaining unit employees working in the unit, the change had a more than *de minimis* effect on the employees who were or would have been assigned to the unit. The employees who might have been assigned to the unit could be required to work weekends and on less desirable shifts, to wear uniforms, to rotate frequently from one assignment to another, and would have less of opportunity chance to perform the specialized work available in the unit, which could have an effect on performance ratings.

31. Tour of Duty (Weekly): *Veterans Admin. Med. Ctr., Prescott, Ariz.*, 46 FLRA 471 (1992). The Agency changed the days of the week the employees were required to report for duty. If an agency changes the days on which an employee is required to report to work as part of the employee's regularly established weekly tour of duty, that change has more than a *de minimis* effect because it will disrupt responsibilities and commitments that the employee has made based on the previously scheduled days off.

32. Parking: *Bureau of Engraving and Printing, Wash., D.C.*, 44 FLRA 575 (1992). The Agency changed its parking arrangements when it reassigned day shift employees, carpools, and vanpools to off-site facilities. The change was more than *de minimis* because the off-site parking was not secured, except for a parking attendant, and it was .7 miles from the facility, a 15-minute walk.

33. Tour of Duty (Daily): *Air Force Accounting and Fin. Ct., Denver, Colo.*, 42 FLRA 1196 (1991). The Agency implemented a duty roster that required employees to adjust their arrival times for up to two hours and their departure times for up to two and one-half hours for weeklong periods throughout the year on a rotating basis. Before, under a flextime program, employees could choose their arrival and departure times.

34. Procedures for Assigning Work & Reorganization: *HHS, SSA, Baltimore, Md.*, 41 FLRA 1309 (1991). The Agency implemented a reorganization plan. Before the reorganization, the Agency maintained a log was to equalize the distribution of interviews assigned to Claims Representatives (CRs) based on difficulty. After the change, the Agency distributed work without considering the type of claim it was assigning. The reorganization also eliminated a teleclaims unit and incorporated the work into a preexisting walk-in claims unit. Because the reorganization plan changed the previous method of equalizing claims and required all CRs to handle teleclaims in addition to walk-in claims, the change was more than *de minimis*.

35. Job Status & Benefits: *Ogden Air Logistics Center, Hill AFB, Utah*, 41 FLRA 690 (1991). The Agency changed on-call employees to non-pay status due to a lack of funding and work. The

change to non-pay status had more than a *de minimis* effect on employees because on-call employees lost money, unearned service credit, and benefits.

36. Equipment: *Justice, INS, Border Patrol, El Paso, Tex.*, 39 FLRA 1325 (1991). The Agency stopped paying Border Patrol agents to have their vehicles cleaned twice a month, and when the vehicle underwent scheduled maintenance. Because the vehicles were driven over unpaved dirt roads and were exposed to large amounts of dirt and dust, the change was more than *de minimis*.

37. Benefits: *Def. Logistics Agency, Def. Depot Tracy, Tracy, Cal.*, 39 FLRA 999 (1991). The Agency decided to contract out the Employee Assistance Program (EAP), which assisted employees with problems relating to drug and alcohol abuse. Before, the EAP provided in-house assessment and referral services as well as assigned peer counselors to give follow-up support. After the Agency contracted out the EAP, employees were required to seek assistance by calling a toll-free telephone number, help was not always available immediately, and peer counselors were not assigned to new clients to give follow-up support.

38. Duties/Tasks & Discipline: *Treasury, Customs Serv., Wash., DC*, 38 FLRA 875 (1990). The Agency issued a directive requiring employees to "tactfully refuse to cooperate" with GAO or other agency representatives trying to do an audit, investigation, survey, or evaluation. The Agency could discipline employees for failing to follow the directive. Because the directive assigned additional duties to the employees with respect to audits, investigations, surveys, and evaluations, and subjected employees to expanded discipline for failing to perform these duties, the change was more than *de minimis*.

39. Relocation: *HHS.SSA, Baltimore, Md.*, 36 FLRA 655 (1990). The Agency changed bargaining unit employees' seating assignments. The effect of the change on working relationships did not show the change was more than *de minimis*, but other factors did, including the move of one-fourth of all unit employees and one employee's loss of window access.

40. Breaks: *HHS, SSA, Baltimore, Md.*, 34 FLRA 765 (1990). The Agency changed its break policy. The new policy required: (1) claims representatives (CRs) to notify their supervisor when taking a break; and (2) all other employees (non-CRs) to notify their supervisor and give a reason when taking a break outside their scheduled break period. Employees could be disciplined and considered AWOL if they failed to follow the break policy. Before the change, the CRs could take their breaks when they chose, non-CRs did not have to give a reason for the change in break time, and the non-CRs' notification requirement was not strictly enforced. The new break policy was more than *de minimis*.

41. Reorganization & Relocation: *HHS, SSA, Baltimore, Md.*, 31 FLRA 651(1988). The Agency adopted a Front End Interviewing (FEI) plan for its Claims Representatives, which required it to change the workflow procedures for servicing claims and to revise the floor plan. Before the change in workflow procedures, all duties were done at the representative's assigned

work-desk and the workday was a mix of interviewing claimants, working on the adjudication of claims, and other case processing. After the change, employees could be assigned to an entire day of interviewing or an entire day of non-interviewing duties. The revised floor plan affected how the Agency assigned interviews to individual employees, the length of the assignments, reliefs, and the responsibility for keeping interview desks fully equipped. The floor plan also affected heating, lighting, ventilation, safety, noise, security, and work interruption and inconvenience during construction.

42. Reorganization: *HHS, Family Support Admin.*, 30 FLRA 346 (1987). The Agency created a Work Programs Division in its Office of Family Assistance. To staff the new division the Agency reassigned employees whose specialty was work programs or whose functional area was similar to the tasks performed in work programs. But as part of the reassignment, several employees were required to do different work under different supervision, undergo training, and travel. The reassignment had the potential to affect employees' career and promotional opportunities and negatively affect their performance ratings. The Authority distinguished this case from *Dep't of HHS, SSA*, 24 FLRA 403, 405-08 (1986) (*SSA*), noting that unlike the employees in *SSA*, several of the employees in this case had never performed the specific duties or functions assigned to them in the Work Programs Division.

43. Parking: *Customs Service, Wash., D.C.*, 29 FLRA 307 (1987). As part of a special operation plan the Agency permanently prohibited Customs Inspectors from parking in a lot that was used by the Agency for inspecting vehicles. Before the prohibition, the Agency had banned parking in the lot during special operations, but had always lifted the bans when the special operation was over. Continuing the parking prohibition past the time that it was actively used for the special operation was more than a *de minimis* change.

44. Reorganization: *Customs Serv., Wash., D.C.*, 29 FLRA 307 (1987). The Agency reassigned Customs Inspectors on a voluntary basis to a detail not to go over 120 days. The reassignment of the Customs Inspectors had a substantial impact on those the Agency selected and those the Agency did not select. The Customs Inspectors assigned to the detail had changing shifts (as opposed to an assigned shift for an entire month) and the Agency deleted them from the overtime pool. Those not assigned to the detail were had more overtime obligations, forfeited scheduled days off because there were fewer Customs Inspectors in the unit, and were at a disadvantage for promotion.

45. Relocation: *IRS, Wash., D.C.*, 27 FLRA 664 (1987). For a sixty-day period, the agency reassigned 20 Revenue Officers (ROs) from various posts in Denver to a call site located 12-16 miles outside of Denver. The reassignment increased the ROs' commute from 3 to 35 miles. The reassignment also altered work schedules and lunch breaks. At their permanent posts in Denver, the ROs were on flexible hours with 45 minutes for lunch. At the call-site, they were placed on the 8:00 a.m. to 4:30 p.m. shift with 30 minutes for lunch. The actual impact and the reasonably foreseeable impact of the reassignment was more than *de minimis*.

46. Duties/Tasks: *HSS, SSA*, 26 FLRA 344 (1987). The Agency implemented a study to review samples of benefits being paid to claimants under the Social Security and Supplemental Security Income programs. The effects of the study were more than *de minimis* because the study was to last at least a year, it required Quality Review Analysts (QRAs) to get and record more information in 10 percent of their cases, and it was reasonably foreseeable that the additional time required by the study would affect the performance of the QRAs.

47. Equipment: *Dep't of Def., Air Force, Air Force Logistics Ctr., Tinker AFB*, *Okla.*, 25 FLRA 914 (1987). The Agency installed a third degreaser in its Plasma Spray Unit. The change was more than *de minimis* because the conditions at the time the degreaser was installed could create health hazards for employees working near a degreaser. The Agency was expected to know about conditions in the work environment that could create health hazards for employees.

48. Certification: *Veterans Admin., Veterans Admin. Med. Ctr., Muskogee, Okla.*, 25 FLRA 875 (1987). The Agency changed the clinical privileges of two doctors. After the privileges were changed, the doctors were only allowed to perform general medical and minor surgical procedures. Their former privileges allowed them to perform in areas of surgical specialty. The change in clinical privileges had a significant effect on the two physicians' professional well-being and on their professional credentials. The change was permanent and the physicians suffered limitations in their future assignments and in their retention standing at the hospital.

49. Relocation: *Environmental Prot. Agency*, 25 FLRA 787 (1987). The Agency relocated twelve employees and reorganized their working space. Even though the move was a short distance, the change was more than *de minimis* because the new offices were smaller, the available space for storing files was much less, and there was more noise in the new location.

50. Certification: *Army and Air Force Exch. Serv.*, 25 FLRA 740 (1987). The Agency expanded the class of employees whose driving records were verified. Before the expansion, the Agency only verified the records of drivers who operated "over-the-road" vehicles. The change was more than *de minimis* because after the expansion, the Agency verified all employees' driving records, and the Agency disciplined two employees as a result.

51. Job Status: *Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson AFB Base, Ohio*, 25 FLRA 541 (1987). The Agency implemented a moratorium on the permanent promotion of certain General Schedule-332 unit employees. Before the moratorium, the Agency had used temporary promotions in some situations, but it normally gave promotions on a permanent basis. The moratorium on permanent promotion was more than a *de minimis* change. It was reasonably foreseeable that some employees who would ordinarily have received permanent promotions would not receive them during the moratorium and would be ineligible for grade and pay retention in the event of an involuntary downgrade.

52. Reorganization: *IRS*, 24 FLRA 999 (1986). The Agency implemented a program entitled "Instructor Opportunities with Historically Black Colleges and Universities." Those employees selected for the program were removed to non-bargaining units to partake in the program for a period of three to nine months. The change was more than *de minimis* because the program could have a foreseeable impact on the remaining employees' workload and on the selected employees' ability to do their duties when they went back to their bargaining unit positions.

53. Duties/Tasks: *Dep't of Labor, Occupational Safety and Health Admin.*, 24 FLRA 743 (1986). The Agency assigned Industrial Hygienists to perform administrative duties for 30-day periods on a rotating basis. The change was more than *de minimis* because the administrative duties were either new tasks or ones the Industrial Hygienists had not done very often, and the new duties could decrease the time the employees had to do their normal inspection duties.

54. Breaks: *Veterans Affairs W. Los Angeles Med. Ctr., Los Angeles, Cal.*, 24 FLRA 714 (1986). The Agency relocated the nurses' break-room to a location that was not as close to the patient-care area. The change was more than *de minimis* because the change in location disrupted the work routine of the nurses and made their performance less efficient. Being further away from the patient-care area meant the nurses were unable to hear calls for assistance from fellow nurses and the foreseeable result was that nurses would forego breaks in order to remain in the patient care area and be available in case of an emergency.

55. Earning Potential: *United States Dep't of the Treasury, IRS, and NTEU*, 66 FLRA 528, 530 (2012). The Agency's decision to move reclassified employees into different award pools caused changes in the awards-pool system that could ultimately affect which employees received performance awards. This change had a greater than *de minimis* effects on unit employees.

56. Duties/Tasks: *United States Dep't of Homeland Security, U.S. Customs and Border Prot., El Paso, Tex.*, 67 FLRA 46, 49 (2012). The Agency changed the conditions of employment of agents who are assigned to administrative duties when it denied them computer access. It was reasonably foreseeable that the effects of the change had a greater than *de minimis* effect on the agents. Among other things, the Authority noted that the computer system is an integral part of the Agency's communication system. It is used to communicate critical agency and employment-related information to employees.