


# Unfair Labor Practices

*Charges Against the Agency*

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# Unfair Labor Practice (ULP) Defined

- 5 U.S.C., Chapter 71 creates rights and obligations on the part of unions, management and employees.
- Failure to perform obligations results in the filing of an unfair labor practice (ULP).
- Contract violations should be addressed through the grievance procedure.

# The Federal Labor Relations Authority (FLRA) vs. the Authority

- The FLRA has 7 Regional Directors
  - ULP investigation, complaint issuance, hearings
  - Unit certification and clarification
- The Authority has 3 Members
  - exceptions to ALJ decisions
  - exceptions to arbitration awards
  - appeals from unit certification/clarification
  - negotiability appeals

# What is a ULP?

5 USC 7116(a)

# The 8 Violations

- No inference with Chapter 71 rights
- No commission of reprisal
- No favoritism toward one union
- Provide information to unions
- Bargain in good faith
- Cooperate in impasse procedures
- No prospective enforcement of rules conflicting with CBA
- Prevent bypass of exclusive bargaining representative

# 1) No unlawful interference with employee rights

- Seeking to enforce a contract right
- Soliciting members on non-work time/areas  
13 FLRA 409 (1983)
- Publicizing matters affecting working conditions - 43 FLRA 318 (1991)
- Filing grievances under a CBA -  
5 USC 7121(b)(1)(C)(ii)
- Acting as a representative for a union  
5 USC 7102(1)

## 2) No unlawful commission of reprisal

- Encouraging/discouraging membership through conditions of employment

5 USC 7116(a)(2)

- Disciplining/discriminating against employee because he/she had filed a complaint, affidavit, petition, etc.

5 USC 7116(a)(4)

# Proof of Unlawful Reprisal

35 FLRA 113 (1990)

- Employee engaged in protected activity
- Activity motivated agency action
- Action concerned employment condition
- Exceptions
  - Action unchanged if no protected activity
  - Flagrant misconduct



# Flagrant Misconduct

50 FLRA 212 (1995)

- No protection if the employee engages in flagrant misconduct
- Factors considered
  - Place and subject matter
  - Impulsive vs. designed action
  - Management provocation
  - Nature of conduct
- Speech/activity loses protection by exceeding bounds of protected activity.

# Examples of Flagrant Misconduct

- Verbal assaults coupled with physical contact causing a reasonable person to be apprehensive of “some (additional) unpredictable blow.”

294 F.3d 192 (D.C. Cir. 2002)

- “Kiss my ass” without provocation.

59 FLRA 767 (2004)

- Compare older cases where use of profanity is not flagrant misconduct.

55 FLRA 875 (1999), 44 FLRA 1395 (1992)

### 3) No unlawful favoritism toward one union

- Sponsoring/controlling/assisting a labor organization other than the customary and routine - 5 USC 7116(a)(3)
- Arms-length test under the totality of circumstances: did the employer interfere with employee freedom of choice?

52 FLRA 1159 (1997)

## 4) Duty to provide information

- Normally maintained in the regular course of business
- Reasonably available/necessary for full and proper discussion, understanding and negotiation of subjects in the scope of bargaining
- Does not constitute guidance, advice, counsel, or training for management

5 USC 7114(b)(4)

# Making an Information Request

*5 U.S.C. 7114(b)(4)*

You can't always get  
what you want.

# 7114(b)(4) Request Considerations

- Is the subject *grievable*?
- Does the information impact working conditions?
- Is there a “particularized need”?
- Is there a privacy issue?
- Is there a time constraint?

# Statement of Particularized Need

- Requires specificity

50 FLRA 661 (1995)

- Why information needed
- Uses for information
- Connection between uses and representational responsibilities

- Establish relevant time period

51 FLRA 462 (1995)

# Disclosure Not Prohibited by Law

Privacy Act prohibits disclosure if

- Maintained in system of records
- Disclosure implicates privacy interests
- Nature and significance of interests
- Compare if public interest in disclosure outweighs privacy interest

50 FLRA 338(1995). See 51 FLRA 216 (1995)



# Items to Include in a 7114 Request

- All documents relied upon to formulate management's policy/response/position
- Pertinent regulations, orders, memoranda, guidelines, directives
- Specific statutory references

# 7114 Request Should Include

- Define terms
- Define scope of request
- Require agency objections to be stated
- Require explanation of “destroyed” items
- Include a deadline
- Make the request “continuing”

## 5) Duty to Bargain in Good Faith

- Meeting/negotiating in good faith for purposes of collective bargaining -- 5 USC 7114(a)(4)
- Using sincere resolve to reach agreement  
5 USC 7114(b)(1). 36 FLRA 524 (1990)
- Meeting with duly authorized representatives  
5 USC 7114(b)(2). 39 FLRA 650 (1991)
- Meeting at reasonable times and convenient places  
5 USC 7114(b)(3). 36 FLRA 524 (1990)
- Furnishing data – 5 USC 7114(b)(4)
- Executing agreement in writing – 5 USC 7114(b)(5)

## 3 Types of Bargaining

- Prohibited – management rights, working conditions of other BU, sole/exclusive discretion retained, compelling need
- Permissive – numbers/types/grades, means and methods of performing work
- Mandatory – procedures, appropriate arrangements, impact and implementation

# Type of Proposal Impacts Bargaining

- Proposals addressing prohibited subjects are non-negotiable
- Proposals addressing permissive subjects are negotiable at the agency's election
- Proposals addressing mandatory subjects are fully negotiable
  - Excessive interference test

*Duty to Bargain in Good Faith*  
**Scope of Bargaining :**  
**Triggers to Bargaining**

Management must bargain a change in working conditions, which is not *de minus* and where the impact is adverse.

# Condition of Employment

5 USC 7103(a)(14)

- Personnel policies, practices and matters
- Established by rule, reg, or past practice
- Exceptions:
  - prohibited political activities
  - position classification
  - specific provisions in Federal Statute

# Change Defined

- Written practice
  - law, rule, regulation, policy
- Past practice
  - consistent
  - significant period of time
  - followed by both parties or one with the knowledge of the other
- Recapture



# De Minimus Defined

24 FLRA 403 (1986)

- Nature of the change
- Permanent v. temporary
- Number of employees impacted
- Established procedures by the parties

# Discharge of Duty to Bargain

- Notice
  - scope of proposed change
  - certainty of change
  - planned timing of change
- Opportunity to bargain
- Union waiver
  - inaction
  - untimely request

# Duty is Violated

- Fails to provide notice/ opportunity to bargain  
55 FLRA 69 (1999)
- Ignores timely union request to bargain  
35 FLRA 764 (1990)
- Fails to maintain status quo  
35 FLRA 296 (1990)
- Repudiates the “heart of the agreement”  
51 FLRA 858 (1996)

# Duty is *not* violated

- If no duty exists to bargain
- If matter is “covered by contract”
  - is expressly contained in CBA
  - considered an aspect of express provision
  - inseparably bound with express provision

47 FLRA 1004 (1993)

# Duty to Bargain v. Negotiability

- Covered by contract = grievance
- More than *de minimus* impact/change = ULP
- Refusal to bargain over subject matter = ULP or Negotiability appeal
- Refusal to bargain over specific proposals = Negotiability appeal
- Interpretation of management rights = Negotiability appeal

## 6) Duty to cooperate in impasse procedures

- Unresolved impasses resolved by FSIP

5 USC 7119. See 5 USC 7116(a)(6)

- Agency must maintain status quo during impasse

55 FLRA 69 (1998)

## 7) Duty to avoid conflicting prospective enforcement of rules

Enforcement of rules or regs in conflict with the CBA violates this duty if CBA was in effect *before* the rule or reg.

Exception: 2302 rules and regs

## 8) Duty to not to bypass union representatives

- Formal discussions – 5 USC 7114(a)(2)(A)
  - agency representative(s)
  - bargaining unit member(s)
  - grievance/personnel policy/practice/CoE
- Investigatory examinations – 5 USC 7114(a)(2)(B)
  - bargaining unit employee
  - agency representative(s)
  - employee reasonably fears discipline may result
  - employee requests union representation



# Official Time

5 USC 7131

- Equal numbers on bargaining over CBA, ground rules, I & I, and delegated issues  
5 USC 7131(a)
- Participation in ULPs and impasses  
5 USC 7131(c)
- Negotiated official time  
5 USC 7131(d)
- Exception: No internal union business  
5 USC 7131(b)

# The Mechanics of ULPs

The who, what, and  
when of ULPs

# Who

- Union files against Management
- Management files against Union
- Employee files against Management or Union
- Filed the region where the ULP occurred.  
5 CFR 2423.6(a)

# What

## 5 CFR 2423.3(a)(5)

- A clear, concise statement of facts
- A statement of sections violated so an investigation can be initiated
- Original and 4 copies filed with the FLRA
- A certificate of service showing notice to the charged party

# When

- ULP is filed when the RD receives it
- Filed within 6 months of occurrence
- Charging parties must elect between grievances and ulps
  - Same facts, theory and party
  - Union vs. employee initiated ULP

# ULP Roadmap

- ULP filed
- Regional Director investigates
- Regional Director make a 'merits' determination
  - ULP is withdrawn
  - ULP is settled (unilateral v. bilateral)
  - RD issues a complaint
    - The administrative hearing process begins

# Unfair Labor Practices

## *Charges Against the Union*

5 U.S.C. 7116(b)  
Charges filed by  
Management v. by  
Employee

# Charges filed by Management

- Bargaining in bad faith
  - Refusal to sign/honor settlement agreement
  - Refusal to arbitrate
- Striking
- Picketing v. disrupting agency operations
- Coercion/interference with protected rights



# Charges filed by employees: Duty of Fair Representation

Unions have a duty to represent all bargaining unit employees fairly and equitably in:

- the negotiation of a contract
- the administration of a contract.

# DFR - Lessons Learned



Never use the term “member” in a sentence involving non-dues paying members.

# Commandment Violations or the “Wrath” of the FLRA

Posting

Back Pay

Bargaining Order

Return to Status Quo

# The FLRA Moral

You can't get what you want.  
You may get what you need.  
You never know what the  
Authority will say.