FEDERAL LABOR RELATIONS AUTHORITY

OFFICE OF THE GENERAL COUNSEL

UNFAIR LABOR PRACTICE

CASE LAW OUTLINE

JULIA AKINS CLARK

GENERAL COUNSEL

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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)]

The Statutory Language

Section 7118(a)(4)(A) provides:

> *[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 period for filing a charge is an affirmative defense that is waived if it is not raised prior to the close of a ULP hearing. *Army Armament Research Dev. & Eng'r Ctr. Picatinny Arsenal*, 52 FLRA 527, 532-34 (1996). However, the doctrine of equitable

tolling permits suspension of a statute of limitations under appropriate circumstances. *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)).

Exceptions to the Six Month Rule

Section 7118(a)(4)(B) provides:

> *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.*

Where the charging party was prevented from filing the charge within six months of the unfair labor practice charge due to concealment which prevented discovery, the charging party may file within six months of learning of the alleged violation. *U.S. Nuclear Regulatory Comm'n, Wash., D.C.,* 44 FLRA 370, 381 (1992) (charge is timely only if the concealment or failure to comply with a duty owed prevented the filing of the charge within six months of the alleged events); *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.)

Application of Standard in Charges Alleging Non-Compliance with Arbitration Awards

The six-month statutory filing period for filing a ULP charge may be triggered: (1) when a party expressly notifies a party that it will not comply with the obligations required by an award, or (2) when an award establishes a deadline for implementing obligations required by the award and the deadline passes without the party taking any action to implement the award. *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 61 FLRA 146, 151 (2005).In situations where there has been no express declaration of noncompliance or no deadline established by the award, the facts of each case, based upon what an award requires and what a party's actions have been following the award, will determine

whether a party has failed to comply with an arbitration award and hence when the time period under § 7118(a)(4)(A) has begun to run. *Id.*

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

Section 7116(d) of the Statute provides:

> *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.*

STATUTORY APPEAL v. ULP

In cases in which the factual predicate of the ULP and the statutory appeal is the same and the legal theory supporting the statutory appeal has been or could properly be raised to the MSPB, the Authority will decline to assert jurisdiction over the unfair labor practice pursuant to section 7116(d). *U.S. Small Bus. Admin., Wash., D.C.,* 51 FLRA 413, 422 (1995).

The Authority will decline jurisdiction in cases where the ULP focuses on the rights of an individual employee; conversely, the Authority will assert jurisdiction when the ULP focuses on the union's institutional interest in protecting the rights of other employees. *Id.*

GRIEVANCE v. ULP

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

Issue - Factual Predicate and Theory

To determine whether a ULP charge and a grievance procedure involve the same issue the Authority will look at (1) whether the ULP charge and the grievance arose from the same set of factual circumstances and (2) whether the legal theories advanced in support of the ULP charge and the grievance are substantially similar. *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). Both criteria must be satisfied for the ULP charge to be barred by the earlier grievance. *Id.*

In *Army Finance,* 38 FLRA at 1351*,* the Authority held that a ULP charge relating to a proposed suspension and a grievance relating to the actual 10-day suspension raised the same issue in both procedures. The Authority found that the factual predicates were the same in both procedures regardless of the fact that the suspension was proposed in the former and actually imposed in the latter, and the grievance and ULP raised the same theory where in both proceedings the aggrieved party alleged that management was taking disciplinary action against an employee because of union activity. *Id.* Therefore, the ULP was barred under section 7116(d). *Id.*

In contrast, in *McChord AFB,* 63 FLRA at 680-81, the factual predicate of an employee's suspension was the same in both the ULP charge and grievance; however, the theory advanced in the ULP charge concerned solely a statutory violation based on interference and coercion and the theory advanced in the grievance was a question of contract interpretation and application. As the theories were not the same, the subsequently-filed ULP charge was not barred under section 7116(d). *Id.*

Aggrieved Party

Application of section 7116(d) requires that "selection of the ULP [or grievance] procedure was in the discretion of the aggrieved party." *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). Under section 7116(d), the term "party" attaches when the choice of particular procedures has been made by the aggrieved party, regardless of who is formally the filing party. *See, e.g., Army Finance*, 38 FLRA at 1353-54 (ULP charge filed by the union was filed in the discretion of the same aggrieved party as a subsequently-filed grievance and therefore barred consideration of the later grievance).

Where a union, in its representational capacity, files a ULP charge alleging harm to a unit employee, and there is no indication that the employee had attempted to preclude the union from filing on the employee's behalf, the Authority will conclude that the ULP charge was filed on the employee's behalf and in the employee's discretion within the meaning of section 7116(d) of the Statute. *Army Finance,* 38 FLRA 1353-54 (holding that a ULP charge filed by the union was at the discretion of the employee because it specifically alleged a violation of the employee's rights and was filed soon after the Agency proposed to discipline the employee). Conversely, a ULP filed by a union that neither alleges violations of an employee's individual rights nor seeks relief for the employee is not barred by a grievance filed by an employee. *McChord AFB*, 63 FLRA at 679.

The Supreme Court ruled in *Cornelius v. Nutt* that a union is not precluded from filing an unfair labor practice charge to enforce its own independent right if an employee has previously filed a grievance based on the same issue to enforce his individual rights. *Cornelius v. Nutt*, 472 U.S. 648, 665 n.20 (1985).

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

Employee Rights Under the Statute

Section7102 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 also specifies that these protected rights include the right to act as a representative of a labor organization; the right to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress or other appropriate authorities; and the right to engage in collective bargaining.

Protected Activity

Under section 7116(a)(1) of the Statute, it is an unfair labor practice to interfere with the rights protected by section 7102. There are many ways in which an employee can form, join, or assist a labor organization. For example, employees may hold leadership positions within a union or act in a representational capacity and, in this capacity, they have the right to file and process grievances, they may assist in organizational campaigns, and they may engage in various solicitation activities on behalf of a labor organization. *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*, *Immigration & Naturalization Serv.* v. *FLRA*, No. 91-70078 (9th Cir. 1992). Also, the right to seek union assistance, pursue grievances and obtain union representation in dealing with the agency on the employee's behalf is protected activity under Section 7102. *Indian Health Serv., Crow Hosp., Crow Agency, Mont.*, 57 FLRA 109, 125 (2001).

Individual Employee: An individual employee is protected under section 7102 of the Statute when exercising or asserting 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). Employees have the right to discuss the collective bargaining agreement and other representational matters in the workplace during non-work time where there is no disruption of work. *U.S. Dep't of the Navy, Naval Aviation Depot, Naval Air Station Alameda, Alameda, Cal.*, 36 FLRA 705, 714 (1990). An employee's right to file and process a grievance encompasses the right to gather evidence in support of that grievance. *Dep't of Justice, Bureau of Prisons, Fed. Corr. Inst., Butner, N.C.*, 18 FLRA 831, 833 (1985). For example, in *Dep't of Defense Dependent Schools, Mediterranean Region, Naples Am. High School,* 21 FLRA 849, 850 (1986), the Authority found interference with a protected right where the agency prohibited employees from conducting investigations and gathering evidence in support of ULP charges.

Publicize, Post, and Leaflet: The right to publicize matters affecting unit employees' terms and conditions of employment on behalf of a union is protected under section 7102 of the Statute. *Dep't of the Air Force, 3rd Combat Support Group, Clark Air Base, Republic of the Phil.*, 29 FLRA 1044, 1048 (1987); *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: Employees have the right to wear union insignia at the workplace; however, if "special circumstances" are found an employer may be justified in banning the wearing of union insignia. *Army and Air Force Exch. Serv., Fort Drum Exch., Fort Drum, N.Y.*, 41 FLRA 85, 87 (1991) (*Fort Drum*). To determine whether special circumstances exist, the Authority balances the right of the employee to wear union insignia with an employer's need for production and efficiency. *U.S. Dep't of Justice, Immigration and Naturalization Serv., U.S. Border Patrol, San Diego Sector, San Diego, Cal.,* 38 FLRA 701, 715 (1990) (*INS San Diego*). The Authority considers the circumstances in which the union insignia is worn, the size, shape and color of the insignia, as well as any messages imprinted thereon, the nature of the employer's activity, and the employer's need for production and safety. *Id.* In cases where special circumstances were found to exist, there has been evidence linking the wearing of union insignia to a disruption of the employer's operations and maintenance of safety and discipline. *Id.* at 716-17. For example, 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 . . . ." *Immigration & Naturalization Serv. 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).

Standard for Determining Violations of § 7116(a)(1)

The standard for determining whether management's conduct violates §7116(a)(1) is an objective one. *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Elkton, Ohio*, 62 FLRA 199 (2007). The question is 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. *Id*. In order to find a violation of section 7116(a)(1), it is not necessary to find other unfair labor practices or to demonstrate union animus. *Id.* While the circumstances surrounding the making of the statement are taken into consideration, the standard is not based on the subjective perceptions of the employee or on the intent of the employer. *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, Internal Revenue Serv., Louisville, Ky.*, 11 FLRA 290, 298 (1983) (ALJ Decision adopted by FLRA without discussion).

Where Ambiguous

Where the facts of the case are ambiguous the Authority will adopt the interpretation of the accused party. *U.S. Penitentiary, Florence, Colo.*, 52 FLRA 974, 983 (1997) (ALJ decision adopted by the Authority). In *U.S. Air Force, Lowry AFB, Denver, Colo.,* the Authority explained that it would not be proper to "choose the unlawful and eschew the innocent of two equally available interpretations." 16 FLRA 952, 961 (1984) (quoting *Dep't of the Navy, Portsmouth Naval Shipyard*, 6 FLRA 491, 496 (1981)).

Expression of Personal Views

Section 7116(e) of the Statute provides:

> *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 constitute interference under section 7116(a)(1) of the Statute. Section 7116(e) covers two separate and distinct situations: first, the expression of any personal view, argument or opinion, excluding representational elections, that contains no threat of reprisal or force or promise of benefit and is not made under coercive conditions; second, statements 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 . *Okla. City Air Logistics Ctr. (AFLC), Tinker AFB, Okla.*, 6 FLRA 159 (1981). (adopting the ALJ reasoning and decision).

In *AFLC, Tinker AFB, Okla.,* 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 Authority upheld the ALJ’s finding that the statements were permissible pursuant to 7116(e) as they were not made while a representational election was being held and there was “no threat of reprisal or force 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. In contrast, in *162nd Tactical Fighter Group, Arizona 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 and was not permissible pursuant to 7116(e). 18 FLRA 583, 586 (1985).

Direct Threats

The agency violated §7116(a)(1) of the Statute when 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).

An agency violated §7116(a)(1) of the Statute when 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 agency violated §7116(a)(1) of the Statute when 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) (adopting decision of ALJ).

Threats or statements that previously filed unfair labor practice charges are worthless and that there will be repercussion for filing such charges also violate §7116(a)(1). *U.S. Naval Supply Ctr., San Diego, Cal.,* 21 FLRA 792, 806 (1986) (adopting decision of the ALJ).

Implied Threats

An agency violated section 7116(a)(1) of the Statute when, 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).

An agency violated §7116(a)(1) of the Statute when 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. *Fed. Aviation Admin., St. Louis, Mo.*, 6 FLRA 678, 687 (1981).

Supervisors are not protected under the Statute when engaged in certain activities for which, if they were employees, they would be statutorily protected. However, under certain circumstances, discipline taken against a supervisor may be found to have such a chilling effect on the exercise of protected rights by employees that it interferes with, or coerces such employees in the exercise of their rights under the Statute in violation of §7116(a)(1). *Dep't of the Navy, Portsmouth Naval Shipyard, Portsmouth, N.H.*, 16 FLRA 93 (1984).

Not every statement dealing with an employee's protected activity violates the Statute. The Authority carefully examines the facts and circumstances present, in applying its objective standard. *See 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); *cf., 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 perception of employee's performance with her protected activity effectively discouraged employee from engaging further in such activity, and was not viewed as attempt to resolve conflict between managing efficiently and employee's right to engage in protected activity).

Solicitation of Membership

The right to assist a union under section 7102 includes the right to solicit membership on behalf of the union. *Treasury, IRS, Ogden Serv. Ctr.*, 42 FLRA 1034, 1050 (1991) (citing *Dep't of Commerce, Bureau of Census*, 26 FLRA 311 (1987)).

A policy or ruling prohibiting solicitation of union membership by employees on the premises during "non-duty" time, in the absence of a showing of special circumstances, violates section 7116(a)(1) of the Statute. *Okla. City Air Logistics Ctr., AFB, Okla.*, 6 FLRA 159, 190 (1981). The Authority has held that periods of time during which the performance of the job function is not required, such as breaks or a meal period, fall within the category of "non-duty" status, regardless of whether the employee is paid for the break or whether management schedules versus merely permits the break. *U.S. Dep't of the Navy, Naval Air Station*, 61 FLRA 562, 564 (2006).

Solicitation is permitted in non-work areas as well as work areas where the employees being solicited are also in non-duty status, absent disruption of the activity's operations. *Dep't of Commerce, Bureau of the Census*, 26 FLRA 311, 319 (1987).

Surveillance

To determine whether management's surveillance of a protected activity interferes with, restrains, or coerces employees in their right to form, join, or assist a labor organization, such as to constitute a violation of §7116(a)(1), the Authority analyzes whether the presence of management would "tend" to have a chilling effect on the exercise by the employees of their protected rights. *Dep't of the Army, Fort Bragg Sch.*, 3 FLRA 364, 376 (1980). It is not a necessary element that the employees were in fact affected in the exercise of their protected rights by the surveillance. *Id.*

In *Department of the Army, Fort Bragg Schools*, the Authority found that the presence of a school principal at a union organizing meeting reasonably may have inhibited teachers in participating in the meeting and was therefore a violation of §7116(a)(1). 3 FLRA 364 at 367. In circumstances where surveillance is undertaken of an employee engaged in a protected activity because of security considerations, the Authority will decline to find a violation of §7116(a)(1). *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)]

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.*

Protected Activity as a Motivating Factor

Sections 7116(a)(2) and (4) of the Statute prohibit discrimination against employees because they engage in (or refrain from engaging in) protected union activities or because they participate in FLRA investigations or other proceedings. The analysis used for both forms of discrimination is described in the Authority decision in *Letterkenny Army Depot*, 35 FLRA 113, 118 (1990) (*Letterkenny*).

The *Letterkenny* analysis requires that the General Counsel make a *prima facie* showing that (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity within the meaning of the Statute, and (2) that the exercise of this activity was a motivating factor in the agency's action. *Id.* If the General Counsel fails to make the required *prima facie* showing, the case ends without further inquiry; however, if a prima facie case is made then an apparent unlawful motive has been established and, if there is no other evidence of a legitimate basis for the action, a violation of the Statute will be found. *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).

Mixed Motive Cases

Under the *Letterkenny* analysis, an agency may rebut the *prima facie case* if, by a preponderance of the evidence, the agency establishes that (1) there was a legitimate justification for its action, and (2) the same action would have taken place even in the absence of protected activity. *Dep't of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 55 FLRA 1201, 1205 (2000). In *Office of Program Operations, Field Operations, SSA San Francisco Region*, the Authority held that although protected activity was considered when failing to promote an employee, there was no violation of section 7116(a)(2) because other considerations demonstrated that the employee would not have been selected even absent the protected activity. 9 FLRA 73, 74-75 (1982). A different result is seen in *Hill AFB, Utah*, in which the Authority ruled that in the absence of corroborating testimony from other witnesses or documentary evidence to support a justification for lowering appraisals, the Respondent failed to rebut by a preponderance of the evidence the *prima facie* case that the lower appraisal was based upon the exercise of protected activity. 35 FLRA 891, 900 (1990).

The General Counsel may seek to establish that the agency's purported reasons for taking the action were pretextual. *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 at 1205. For 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 the decision to change an employee's detail and place restrictions on his activity was the result of an OPM investigatory report; however, 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 prior to the report. 54 FLRA 987, 995 (1998). Accordingly, the agency failed to rebut the General Counsel's *prima facie* case for discrimination. *Id.*

Examples of Discrimination Decisions

Denying an employee a flight assignment based upon an email sent in his capacity as a union steward violated section 7116(a)(2) of the Statute. *U.S. Dep't of Transp., Fed. Aviation Admin.,* 64 FLRA 365, 369-70 (2009).

Although the GC established a *prima facie* case of discrimination against a union official under section 7116(a)(2) by showing that he was transferred shortly after filing a contract grievance alleging a hostile work environment, the Authority determined that his temporary reassignment pending an investigation did not violate the Statute because the interest in promoting a safe working environment served as a legitimate justification for the transfer. *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr'l Inst., Elkton, Ohio*, 61 FLRA 515, 520-21 (2006).

As a general rule, a probationary employee can be terminated for a good reason or even for no reason at all; however, a probationary employee cannot be terminated for engaging in protected activity under the Statute. *See Indian Health Serv., Crow Hosp., Crow Agency, Mont.*, 57 FLRA 109, 114 (2001) (finding that a medical error was used as pretext for the decision to terminate two probationary nurses for engageing in protected activity and thus, that the termination was in violation of section 7116(a)(2)).

Reducing gain-sharing awards to employees because they engaged in union representational 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).

An 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 which were taken 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).

The suspension of an employee based on his participation in the filing of an unfair labor practice charge and giving a statement to an agent of the FLRA violated section 7116(a)(4) of the Statute. *U.S. Dep't of the Navy, Naval Aviation Depot, Naval Air Station, Alameda, Cal.*, 38 FLRA 567, 569 (1990).

Union Activity May Lose Protections In Certain Circumstances

In certain unique cases, an employee who is otherwise engaged in what would be protected union activity may lose that protection if his or her conduct exceeds the boundaries of protected activity, such as by "flagrant misconduct." *U.S. Dep't of the Air Force, Aerospace Maint & Regeneration Ctr., Davis Monthan AFB, Tucson, Ariz.*, 58 FLRA 636, 636 (2003). Remarks or conduct that are of such "an outrageous and insubordinate nature" as to remove them from the protection of the Statute constitute

flagrant misconduct. *Naval Facilities Eng'r Command, W. Div, San Bruno, Cal.*, 45 FLRA 138, 156 (1992).

In deciding whether behavior constitutes flagrant misconduct, the Authority balances the employee's right to engage in protected activity, which permits leeway for impulsive behavior, against management's right to maintain order and respect for supervision on the job site. *Dep't of the Air Force, Grissom AFB, Ind.,* 51 FLRA 7, 10-11 (1995). The Authority considers four factors in this analysis: (1) the place and subject matter of the discussion; (2) whether the outburst or conduct was impulsive or designed; (3) whether the employee was provoked by the employer's conduct; and (4) the nature of the intemperate language or conduct. *Def. Mapping Agency Aerospace Ctr., St. Louis, Mo.,* 17 FLRA 71, 81 (1985).

Criminal conduct will not be protected. *Long Beach Naval Shipyard, Long Beach, Cal.,* 25 FLRA 1002, 1006 (1987). In this context, the D.C. Circuit determined that a physical confrontation which met the legal definition of "assault and battery," will not be protected regardless of provocation and other 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 . . . .*

Equivalent Status

A petitioning union acquires equivalent status for purposes of section 7116(a)(3) when a Regional Director determines, and notifies the parties, that the petition includes a *prima facie* showing of interest and merits further processing. *U.S. Dep't of Def. Dependents Sch., Panama Region*, 44 FLRA 419, 424-25 (1992). Equivalent status is acquired at such time as the Regional Director determines, and notifies the appropriate parties, that a notice of a petition will be posted. *Id.* The mere filing of a representation petition does not automatically confer on a filing party a status equivalent to that of an incumbent. *Id.*

An agency is required to provide a union that has "equivalent status" the same "services and facilities" that it provides 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 by a collective bargaining agreement to provide a union with a particular service or facility, the Statute does not require that 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 so listed).

Access Without Equivalent Status

In *SSA,* 52 FLRA 1159, 1180 (1997), the Authority, on remand from the Court of Appeals for the D.C. Circuit, established its approach in analyzing cases where a rival union, lacking equivalent status, sought and was denied access to agency facilities.

If an agency is charged with violating section 7116(a)(3) by granting or denying access to services and facilities over which the agency exercises control, the Authority analyzes whether the agency action has sponsored, controlled, or assisted a labor organization. *Id.* In making this determination, the Authority looks to whether the agency has, in the totality of circumstances, interfered with employee freedom of choice by failing to maintain the appropriate arms-length relationship with the labor organization involved. The Authority is guided in this determination by considering the wording of section 7116(a)(3) as well as FLRA case law and precedent interpreting section 8(a)(2) of the NLRA. *Id.*

In *SSA*, 52 FLRA 1159, 1184-85 (1997), the Authority, applying the new approach, looked to the private sector precedent in *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105 (1956), to determine whether section 7116(a)(3) was violated when the Agency denied a permit to a labor organization to distribute literature on the outdoor areas of the Agency's headquarters complex. Under the *Babcock* analytical framework, an employer may validly prohibit an outside union from distributing union literature if two conditions are present: first, the union must be able to reach the employees through other available channels of communication; and second, the employer must not discriminate against the union by allowing distribution by other organizations. *Id.* The Authority concluded that the evidence was insufficient to show discrimination against the rival union, *id.* at 1189-90; however, after appeal and a second remand from the Court of Appeals, the Authority concluded that because the employer did not have a general "no solicitation" rule against outside organizations, it therefore discriminated against the rival union by denying it access, *Soc. Sec. Administration,* 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*.

The duty to bargain in good faith includes the obligation "to approach negotiations with a sincere resolve to reach a collective bargaining agreement ... and ... to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays." *U.S. Dep't Air Force, HQ, AFLC, Wright-Patterson AFB Ohio*, 36 FLRA 912 (1990). In determining whether a party has bargained in good faith the totality of the circumstances in a case must be considered. *Id.* at 916.Certain conduct such as unilaterally setting dates for negotiations and unwarranted delays can constitute evidence of bad faith bargaining. *U.S. Geological Survey, Caribbean Dist. Ofc. San Juan, P.R.*, 53 FLRA 1006 (1997).

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 accorded recognition 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).

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 . . . ." In deciding whether a proposal involves a condition of employment of bargaining unit employees, the Authority considers two basic factors:

(1) whether the matter proposed to be bargained pertains to bargaining unit employees

(2) the nature and extent of the effect of the matter proposed to be bargained on working conditions of those employees.

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). The Authority has held that the Statute creates no substantive distinction 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).

"Conditions of employment" may be established either by agreement or practice. *Internal Revenue Serv.*, 27 FLRA 322 (1987). In order for a condition of employment to be established by past practice, the practice must be 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). Something which is not a condition of employment cannot become a condition of employment by either practice or agreement. See *Naval Weapons Station Concord*, 33 FLRA 770 (1988).

Generally, where the parties have included a matter in their negotiated agreement and the matter is not otherwise inappropriate for bargaining, the agreement will govern unit employees' conditions of employment. There are, however, occasions where the parties by their conduct can establish conditions of employment which are different than or inconsistent with the terms of the contract. In such circumstances, as discussed above, it must be demonstrated that the practice was consistently and openly exercised over a significant period of time and followed by both parties, or followed by one and not challenged by the other. *U.S. Dep't of the Navy, Naval Avionics Ctr., Indianapolis, Ind.,* 36 FLRA 567 (1990).

Section 7103 (a)(14) (A), (B) and (C) of the Statute expressly exclude certain matters from the definition of "conditions of employment" as follows:

1. prohibited political activities
2. matters relating to the classification of a position
3. matters specifically provided for by Federal statute.

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.

The Agency's Duty to Bargain in Good Faith [7116(a)(5)]

Section 7116(a)(5) of the Statute provides:

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

The Duty to Bargain (Whether and When to Bargain)

An agency has a duty to bargain with the exclusive representative in three circumstances:

(1) term negotiations for a collective bargaining agreement. *AFGE, Interdepartmental Local 3723, AFL-CIO*, 9 FLRA 744 (1982);

(2) mid-term negotiations when the union requests bargaining over subjects not already bargained by the parties. *U.S. Dep't of the Interior, Wash., D.C.*, 56 FLRA 45, 50-51 (2000);

(3) on agency-proposed changes in conditions of employment, with certain limitations. *Fed. Bur. of Prisons, FCI, Bastrop, Tex.*, 55 FLRA 848 (1999).

The determination of whether there is a duty to bargain is different than and separate from a question of whether any particular subject matter or proposal is negotiable. The duty to bargain issue centers on whether and when bargaining must occur if requested by the exclusive representative.

Term Negotiations

Section 7114(a)(4) of the Statute specifically provides 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 contracts is referred to as term negotiations. As discussed later in the Official Time section, Section 7131(a) provides that employees representing the exclusive representative in contract negotiations shall be authorized official time for that purpose.

Mid-Term Negotiations

Even where a collective bargaining agreement may exist, it is possible for a bargaining obligation to arise where there is a mid-term request by the union or agency and the subject has not already been bargained by the parties. This situation will require examination of the parties' bargaining history and can raise issues as to whether the matter is already "covered by" the agreement (fully discussed later).

Changes in Conditions of Employment

The Authority has held that, prior to implementing a change in conditions of employment of bargaining unit employees, an agency is required to provide the exclusive representative with notice and an opportunity to bargain over those aspects of the change that are within the duty to bargain. *U.S. Army Corps of Eng'rs, Memphis Dist., Memphis, Tenn.*, 53 FLRA 79, 81 (1997).

A management-initiated change may trigger a duty to bargain when there will be a resulting change in unit employees' conditions of employment and the change has 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). As with mid-term bargaining requests, it must be established that the subject matter of the change is not "covered by" the parties' agreement and that the union has not waived its right to bargain. (See next section below.)

Initially, the facts must establish that the agency's action involves a change that is something new or different about employees' conditions of employment. If the 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).

The *De Minimis* Test

Whether a change in conditions of employment is more than *de minimis* (significant enough to require bargaining), is based on the facts of each case. The Authority examines the specific circumstances to determine whether 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*). This analysis is of the facts evident at the time the change was proposed and implemented. *Portsmouth Naval Shipyard, Portsmouth, NH*, 45 FLRA 574, 575 (1992). Equitable considerations are also to be taken into account. *Dep't of HHS,SSA,* 24 FLRA at 408. 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).

In applying the *de minimis* test, the number of employees affected is a factor considered, but is not a controlling consideration. *SSA.* In proposing to change a past practice, the obligation to bargain depends upon the effects or reasonably foreseeable effects of the change in practice, not the efficacy of the practice itself. *Dep't. of Justice, U.S. Immigration & Naturalization Serv., U.S. Border Patrol, El Paso, Tex.*, 39 FLRA 1325 (1991).

Examples of cases where the Authority has found more than *de minimis* impact include: *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 plan 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 being inoperable, computer files not accessible, and loss of quality storage cabinets).

Examples of cases where the Authority found impact was *de minimis* include: *Soc. Sec. Admin, Office. of Hearings & Appeals, Charleston, S.C.*, 59 FLRA 646 (2004) (reduction in reserved parking spaces where employees had no problem securing 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 overtime opportunities or compensation, promotion or advancement potential were impacted); *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 Appendix for a more complete breakdown of cases where the Authority found that the impact was *de minimis*, and cases where the Authority found it was not.

The Covered By Doctrine

The "covered by" doctrine rests on the principle that a party is not obligated to bargain over matters contained in or covered by an existing agreement between the parties. *AFGE, Local 225*, 56 FLRA 686, 689 (2000). The "covered by" doctrine may be applied to bargaining over both 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).

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.*) and calls for application of a two-prong test as follows:

> Prong 1: Is the subject "expressly contained" in the collective bargaining agreement? and, if not expressly encompassed . . .
>
> Prong 2: Is the subject matter of the change "inseparably bound up with," and plainly an aspect of, a subject covered by the agreement?

With respect to Prong 1, in deciding whether the matter is expressly contained in the collective bargaining agreement, the Authority "will not require an exact congruence of language, but will find the requisite similarity if a reasonable reader would conclude that the provision settles the matter in dispute." *SSA, Balt.,*47 FLRA at 1018.

As to Prong 2, in order to decide whether a subject is inseparably bound up with a subject expressly 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 is recognized that it may be difficult to determine whether the matter which is sought to be bargained is, in fact, an element of something which has already been negotiated. *Id. at 1018-19.* In such situations, the Authority will look to whether, based on the circumstances of each case, "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 intended 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, Internal Revenue Serv.., Nat'l Dist. Ctr., Bloomington, Ill.*, 64 FLRA 586 (2010).

Contract Interpretation

This issue arises in cases where an agency asserts that it was privileged to take a given action based on certain provisions of a collective bargaining agreement. In *Internal Revenue Serv., Wash., D.C.*, 47 FLRA 1091, 1103-04 (1993), the Authority stated that, when a party claims "as a defense to an alleged unfair labor practice that a specific contract provision of the parties' collective bargaining agreement permitted its actions alleged to constitute an unfair labor practice, the Authority, including its administrative law judges, will determine the meaning of the parties' collective bargaining agreement and will resolve the unfair labor practice accordingly." *Id.* at 1103. The Authority will apply the same standards and principles interpreting collective bargaining agreements as applied by arbitrators and courts in the Federal and private sectors. *Id.* at 1110.

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); *Am. Fed'n of Gov't Employees, Local 3937,* 64 FLRA 17 (2009).

It should be noted that, while not obligated to bargain over matters contained in or covered by an existing agreement, the Authority has held that a party may at its own discretion elect to bargain. *NAGE, Local R3-32*, 61 FLRA 127, 131 (2005). As such, matters covered by agreements are properly considered "permissive" subjects of bargaining (discusses below under Scope of Bargaining). *Am.Fed'n of Gov't Employees, Local 3937*, *AFL-CIO*, 64 FLRA. at 24.

Waiver

Even where there might otherwise be a duty to bargain, a labor organization may waive or relinquish the right to bargain over a subject in several ways. First, the union may waive bargaining by agreeing to do so in a negotiated agreement. Either the contract language must be "clear and unmistakable," *United States Department 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 Department of the Interior, Wash., D.C.* , 56 FLRA 45, 53 (2000); U.S. *Dep't of Treasury, INS*, 56 FLRA 906, 911-12 (2000).

Second, a union may also waive the right to bargain by inaction, that is, by failure to timely request bargaining, additional information or an extension of time. *U.S. Penitentiary, Leavenworth, Kan.*, 55 FLRA 704, 753 (1999).

Scope of Bargaining (What Parties May Negotiate)

Where it is established that there is a duty to bargain, the scope of bargaining must then be determined. In addition to those matters already discussed as being excluded from the duty to bargain, certain other matters are excluded from the scope of bargaining, such as, 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); and 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).

As concerns whether there is a compelling need for an agency rule or regulation which would bar negotiation over a particular subject, the Authority determined that this issue can be resolved only 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.

The Authority has consistently held that 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).

Management Rights [7106(a)]

Certain rights are reserved by the Statute to agency management and are not subject to bargaining. While the effects of changing working conditions by exercising a reserved management right may be within the duty to bargain, *see e.g.*, *Pension Benefit Guaranty Corp.*, 59 FLRA 48, 50 (2003), the scope of bargaining does not include the decision to exercise the right, *see, e.g.*, *Am. Fed'n of Gov't Employees, Nat'l Veterans Affairs Council 53*, 58 FLRA 8, 10 (2002), *aff'd sub nom. Am. Fed'n of Gov't Employees v. FLRA*, 352 F.3d 433 (D.C. Cir. 2003). The reserved management rights set out in section 7106(a) leave to management's sole discretion the right to determine the agency's mission, budget, organization, number of employees, and internal security practices; to hire, assign, direct, layoff, retain, suspend, remove, reduce in grade or pay, and discipline; to assign work, contract-out, and decide personnel to perform work; to make selections to fill positions from any appropriate source; and to carry out the agency's mission in emergencies.

Permissive Subjects [7106(b)(1)]

Section 7106(b)(1) of the Statute sets out a listing of subjects which, while not barred from bargaining as reserved management rights, may be negotiated at the election of the agency. The permissive subjects include the numbers, types and grades of employees orpositions assigned to an organizational subdivision, work project or tour of duty;, and the technology, methods and means of performing work. *See, e.g., U.S. Dep't of Veterans Affairs Med. Ctr., Lexington*, *Ky.,* 51 FLRA 386, 391-92 (1995) (numbers, types and grades); *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).

No party is required to negotiate on permissive topics. *U.S. Dep't of Treasury, IRS, Wash., D.C*., 37 FLRA 1423, 1431 (1990). Parties may withdraw from permissive bargaining, short of reaching an agreement; however, once an agreement on a permissive topic is reached, 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.* In addition, parties may not insist to impasse on a permissive topic of bargaining. *Am. Fed'n of Gov't Employees, Local 3937,* 64 FLRA 17 (2009).

The Authority has found that "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).

The Authority construes "method" to refer to the way in which an agency performs its work and "means" to refer to any instrumentality, including an agent, tool, device, measure, plan, or policy used by an agency for the accomplishment or furtherance of the performance of its work. *Nat'l Ass'n of Indep. Labor, Local 7*, 64 FLRA 1194, 1196 (2010).

Bargaining Substance

Where a matter under consideration is neither a reserved management right, a permissive subject of bargaining or otherwise outside the duty to bargain pursuant to law or regulation, it is then fully negotiable. This is referred to as "substance" bargaining. If, for example, management wishes to change a condition of employment which involves a reserved management right or a permissive subject on which it elects not to bargain, its duty to bargain will be only as to procedures for implementing and appropriate arrangements for employees affected by the management exercise. *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. This subject is more fully discussed below under "Impact and Implementation Bargaining."

Examples of subjects that the Authority has found to be substantively negotiable include: assignment of parking spaces, *U.S. Dep't of Air Force, Williams AFB, Chandler, Arizona,* 38 FLRA 549 (1990); water coolers, *U.S. Department 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); and employee awards programs, *Dep't of Veterans Affairs Med. Ctr., St. Louis, Mo.,* 50 FLRA 378 (1995).

Impact and Implementation Bargaining [7106 (b)(2) and (3)]

When an agency determines to exercise a management right (including those reserved under 7106 (a) which involves a change in working conditions of bargaining unit employees, and the impact or reasonably foreseeable impact is more than *de minimis*, the exclusive representative must be given advance notice and a reasonable opportunity to request bargaining over procedures for implementing 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). Where proper advance notice is not provided and the change is implemented unilaterally, this will constitute 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).

Notice of the Proposed Change

Prior to implementation of a change in the conditions of employment of unit employees, an agency must provide a union with reasonable notice of the change and an opportunity to bargain, as appropriate, over the substance and/or impact and implementation of the change. *Ogden Air Logistics Ctr., Hill AFB, Utah*, 41 FLRA 690, 698 (1991). The notice provided by an agency to a union must be sufficiently specific or definitive regarding the actual change contemplated so as to adequately provide the union with a reasonable opportunity to request bargaining. *Id.*

Request to Bargain

Once a labor organization is provided timely notice, it must exercise its statutory right by timely requesting bargaining. *Dep't of Homeland Sec., Customs & Border Prot.*, 62 FLRA 263, 265 (2007). There is, however, no requirement for the union to make a demand to bargain in circumstances where a request would be futile, as where management has already indicated that it refuses to bargain. *Fed. Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.*, 55 FLRA 848, 855 (1999). There is no requirement for a union to label its proposals as either substance or impact and implementation as 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, South Dakota*, 37 FLRA 972, 980 (1990).

Likewise, it is expected that an agency will appropriately 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).

Impact and Implementation Proposals

In determining whether a proposal is an appropriate arrangement under section 7106(b)(3) of the Statute, the Authority uses the analysis set forth in *National Association of Government Employees, Local R14-87*, 21 FLRA 24, 31-32 (1986). *NFFE, Local 2192*, 59 FLRA 868, 870-71 (2004). The Authority first determines whether the proposal is intended to be an arrangement for employees adversely affected by the exercise of a management right. *Id.* Second, the claimed arrangement must also be sufficiently "tailored" to compensate employees suffering adverse effects attributable to the exercise of management's rights. *Id.* If a proposal is determined to be an arrangement pertaining to the exercise of management's rights, then the Authority

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

Ground Rules for Bargaining

Bargaining over the 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 must at a minimum, 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). 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).

Impasses in Bargaining

Once the parties have bargained in good faith to impasse, the agency is free to implement the proposed change if a reasonable period of time is first allowed to the union to invoke the FSIP impasse procedure. *FAA, Airway Facilities Ctr.*, 5 FLRA 817 (1981). 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).

An agency must provide the union with notice of the date of implementation after impasse is reached. *Dep't of HHS, SSA*, 35 FLRA 940, 949 (1990). This requirement furthers the process of collective bargaining because (1) when a change in conditions of employment is to be implemented is a matter within the sole control and knowledge of an agency; and (2) providing notice of implementation is not burdensome to an agency. *Id.*

Bargaining in Nationwide Consolidated Units

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 with respect to conditions of employment which affect any employees within the unit since a contrary finding would render consolidation meaningless. *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, a request must be made by the union at the level of exclusive recognition or its agent unless the right to initiate bargaining has been

delegated to a local union by the exclusive representative and management has agreed to local level bargaining. *Id.*

Where there is a dispute as to whether a master agreement, negotiated at the national level, authorizes bargaining on certain matters at the local level, the proper forum for resolving such disputes is not the unfair labor practice or negotiability procedures, but arbitration. *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).

Unlawful Interference with a Collective Bargaining Relationship

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).

Unlawful Past Practices

A past practice is defined as what is actually being practiced by the agency's supervisors in the workplace, not what agency management has directed or believes is being practiced. If a past practice exists that is shown to be illegal or contrary to regulations, the agency may terminate the practice without agreement from the union on the substance of that decision; however, the termination may give rise to a duty to bargain over the impact subsequent to implementation. *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).

Agency Implementation Based on Non-Negotiability of Proposals

Where a union submits bargaining proposals over a proposed change and an agency refuses to bargain based on its position that the proposals are not negotiable, the agency acts at its peril in implementing the change. *U.S. Dep't of HHS, SSA, Balt., Md.*, 39 FLRA 258, 262-63 (1991). If the Authority later determines that proposals were negotiable, the unilateral implementations may be found to constitute bad faith and a violation of section 7116(a)(5) of the Statute. *Id.*

Where the Authority has previously found a specific proposal to be negotiable, an agency refusal to negotiate in good faith on a proposal which is without material differences, in similar circumstances, will violate the Statute. *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).

Repudiation of Negotiated Agreements

When it is alleged that there has been bad faith bargaining by repudiating a negotiated agreement, the Authority examines two elements:

> (1) the nature and scope of the agreement allegedly breached (that is, was the breach clear and patent); and
>
> (2) the nature of the agreement provision allegedly breached (that is, did the provision go to the heart of the parties' agreement).
>
> See *Dep't of the Air Force, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 52 FLRA 225, 230-31 (1996) (*Robins AFB*); *Dep't. of the Air Force, 375th Mission Support Squadron, Scott AFB, Ill.*, 51 FLRA 858 (1996) (*Scott*).

Under Authority precedent, repudiation requires the 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, a single instance of failure or refusal to comply with a contract provision does not constitute a rejection of the collective bargaining agreement tantamount to repudiation. *Id.* at 1218-19. However, 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.*

With respect to the first element, it is necessary to demonstrate "`a clear and patent breach of the terms of the agreement." *Robins AFB* at 231. 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 constitute a clear and patent breach of the agreement. *Id.* As to the second element, where the nature and scope of the agency's action go to the heart of the collective bargaining agreement itself, the Authority will find a repudiation or rejection of the agreement and a violation of the Statute. *Id.* Moreover, it is not necessary for an agreement to be reduced to writing in order to establish repudiation. *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).

Bypass

An agency engages in an unlawful bypass of 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*).

In this regard, an agency bypasses the union when it deals or directly negotiates with unit employees to put pressure on the union to take a certain course of action. *Dep't of Agric. Food Safety & Inspection Serv., Wash., D.C.*, 59 FLRA 68, 73 (2003); *see also U.S. Customs Serv.,* 19 FLRA 1032, 1048 n.17 (1985); *FAA., L.A., Cal*., 15 FLRA 100, 104, 106 n.3 (1984).

An agency bypasses the union when it communicates directly with bargaining unit employees concerning grievances, disciplinary actions and other matters relating to the collective bargaining relationship where the agency has knowledge 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). An agency bypasses the union when it delivers to a unit employee a decision letter on a disciplinary action when the union was known to be 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).

A questionnaire or poll that only elicits facts from employees has been found not to be an unlawful bypass. *Dep't of HHS, SSA,* 19 FLRA 415, 416-17 (1985). However, a questionnaire/poll where unit employee opinions and views were solicited on existing or soon to be made changes has been found to be 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, so long as it does 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).

7. THE DUTY TO FURNISH INFORMATION

Section 7114(b) (4) of the Statute provides:

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.

Normally Maintained

Requested information is "normally maintained" by an agency, within the meaning of section 7114(b)(4) of the Statute, if the agency possesses and maintains the information. *Cf. Dep't of HHS, SSA, Balt., Md.,* 37 FLRA 1277, 1285 (1990).

Reasonably Available

In *Department of Health and Human Services, SSA*, 36 FLRA 943, 950 (1990), the Authority defined what is meant by the phrase "reasonably available," stating that "available" referred to information which is accessible or obtainable, while "reasonable" referred to means that are not extreme or excessive. *Id.* In this case, the Authority found that the information was reasonably available notwithstanding that it would take management three weeks to compile it. *Id.* at 952, 960; *see also Dep't of Justice*, *U.S. Immigration & Naturalization Serv., U.S. Border Patrol El Paso, Tex.*, 40 FLRA 792, 804-05 (1991) (10,000 documents not an excessive burden); *U.S. Dept of Air Force, Air Force Logistic Ctr., Sacramento Air Logistics Command, McClellan AFB, Cal.,* 37 FLRA 987, 993-94 (1990) ($1500 in costs to retrieve information not excessive).

The Authority has long held that agencies are required to create documents that do not exist when the information in question was maintained electronically, so long as it was not unduly burdensome to do so. *E.g.*, *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) (Agency required to provide the information even though it required the creation of documents and even though the information was not maintained in the form requested).

Necessary

To demonstrate that requested information is "necessary," a union "must establish a particularized need for the information by articulating, with specificity, why it needs the requested information, including the uses to which the union will put the information, and the connection between those uses and the union's representational responsibilities under the Statute." *IRS, Wash., D.C. & IRS, Kansas City Serv. Ctr., Kansas City, Mo.*, 50 FLRA 661, 669 (1995) (*IRS, Kansas City*). Satisfying this burden requires more than a conclusory or bare assertion of need. *Id.* at 670. The burden is not satisfied by merely showing that the information would be useful or relevant. *Id.* at 669. Instead, a union must establish that the information is "required" in order for the union to adequately represent its members. *Id.* at 670.

A union's burden under *IRS, Kansas City* extends to articulating and establishing the necessity of the particular information it has requested, including the scope of a request. *U.S. Dep't of Justice, INS, N. Region, Twin Cities, Minn.*, 51 FLRA 1467, 1472 (1996) (citing *U. S. Dep't of Labor, Wash., D.C.*, 51 FLRA 462, 476 (1995)). The scope of a request encompasses not only the type of the information requested, but also the "temporal and geographic" aspects of the request. *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). The union's responsibility for articulating its interests in the requested information must permit an agency to make a reasoned judgment as to whether disclosure of the information is required under the Statute. *IRS, Kansas City,* 50 FLRA at 670.

In articulating a particularized need for information, a union is not required in its request to describe the exact nature of the agency's alleged misapplication or violation of policy, procedure, law or regulation. *See Health Care Fin. Admin.,* 56 FLRA 156, 162 (2000) *(HCFA)*. In addition, whether requested information would accomplish the union's stated purpose is not determinative of whether it is necessary within the meaning of the Statute. *IRS, Kansas City*, 50 FLRA at 673.

The Authority has long held that the duty to furnish information to a union applies not only to information needed to negotiate an agreement, but also to data relevant to its administration and the full range of a union's representational responsibilities under the Statute. *Dep't of HHS, SSA*, 36 FLRA 943, 947 (1990) (quoting *Am. Fed'n of Gov't Employees, AFL-CIO, Local 1345 v. FLRA*, 793 F.2d 1360, 1363 (D.C. Cir. 1986)*; see also FAA*, 55 FLRA 254, 260 (1999) (union demonstrated a particularized need for information to administer the parties' agreement); *Dep't of Justice, Immigration & Naturalization Serv., N. Region, Twin Cities, Minnesota v. FLRA*, 144 F.3d 90, 93 (D.C. Cir. 1998) (union may request information under the Statute "by articulating a particularized need for the information in terms of fulfilling its representational duties and overseeing the administration of the collective bargaining agreement"); *NLRB v. FLRA*, 952 F.2d 523, 526 (D.C. Cir. 1992) (citation omitted) (Section 7114 creates a duty to provide information that would enable the union to process a grievance or to determine whether or not to file a grievance.).

The agency is responsible for establishing any countervailing anti-disclosure interests and, like the union, must do so in more than a conclusory way. *HCFA*, 56 FLRA at 159. Such interests must be raised at or near the time of the union's request. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Det. Ctr., Houston, Tex.*, 60 FLRA 91, 93 (2004) (*FBP Houston*) (citation omitted). The Authority will not consider anti-disclosure interests that are not raised at or near the time of the Union's request. *U.S. Dep't of the Army, Army Corps of Eng'rs, Portland Dist., Portland, Ore.,* 60 FLRA 413, 416 (2004) (*Portland District*); *FAA*, 55 FLRA 254, 260 (1999) (*FAA*) (agency must articulate non-disclosure interests in response to information request and not for the first time at the unfair labor practice hearing).

A violation of the Statute will be found if "a union has established a particularized need . . . for the requested information and either: (1) the agency has not established a countervailing interest; or (2) the agency has established such an interest but it does not

outweigh the union's demonstration of particularized need." *IRS, Kansas City*, 50 FLRA at 671*; see also SSA,* 64 FLRA 293, 303 (2009); *Library of Cong.* , 63 FLRA 515, 519 (2009).

Does Not Constitute Guidance, Advice, Counsel, or Training Provided for Management Officials or Supervisors, Relating to Collective Bargaining

Section 7114(b)(4)(C) exempts from disclosure information that contains guidance, advice, counsel, or training for management officials relating specifically to the collective bargaining process, such as: (1) courses of action agency management should take in negotiations with the union; (2) how a provision of the collective bargaining agreement should be interpreted and applied; (3) how a grievance or a ULP charge should be handled; and (4) other labor-management interactions which have an 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 section "constitutes a narrow exception to an agency's duty to furnish data under section 7114(b) of the Statute." *NLRB*, 38 FLRA at 520. It does not exempt from disclosure guidance, advice, or counsel to management officials concerning the conditions of employment of bargaining unit employees. *See id.* at 523. Further, a document that merely contains recommendations regarding how to improve the management and operations of an agency is not exempt from disclosure. *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 from disclosure under section 7114(b)(4)(C) only if it addresses courses of action 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.* In this connection, 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").

Privacy Act Considerations

The Privacy Act regulates the disclosure of any information contained in an agency "record" within a "system of records," as those terms are defined in the Privacy Act, which is retrieved by reference to an individual's name or some other personal identifier. 5 U.S.C. section 552(a)(4), and (5). With certain enumerated exceptions, the Privacy Act prohibits the disclosure of personal information about Federal employees without their consent. Therefore, if an employee has consented to the release of the requested information, the Privacy Act interposes no bar to that disclosure. In *United States Dep't of the Air Force, 56th Support Group, MacDill AFB, Fla.*., 51 FLRA 1144, 1150 (1996)

(*MacDill AFB*), the Authority held that an employee's designation of the union as his or her representative in connection with a particular matter is not sufficient to constitute consent by the employee to disclosure of information pertaining to that employee under section 552a(a)(b). *MacDill AFB*, 51 FLRA at 1150. The holding 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).

Even in the absence of the employees' consent, the information may still be disclosable if disclosure is not otherwise barred by the Privacy Act. *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 not applicable if disclosure is required under FOIA). More particularly, if disclosure of the requested information would not result in a clearly unwarranted invasion of personal privacy, it is disclosable even in the absence of the consent of the person who is the subject of the information. *U.S. Dep't of Justice, Fed. Bureau of Prisons Fed. Det. Ctr., Houston, Tex.*, 60 FLRA at 94.

An agency asserting that disclosure of particular information constitutes a clearly unwarranted invasion of personal privacy within the meaning of Exemption 6 of the Freedom of Information Act so as to be prohibited by the Privacy Act is required to demonstrate: (1) that the information sought is contained in a system of records within the meaning of the Privacy Act; (2) that disclosure would implicate employee privacy interests; and (3) the nature and significance of those 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 the agency makes the requisite showings, the burden shifts to the union to: (1) identify a public interest cognizable under the FOIA; and (2) demonstrate how disclosure of the requested information will serve that public interest. *See MacDill AFB*, 51 FLRA at 1151.

The Authority explained that the only relevant public interest to be considered under the FOIA is the extent to which the requested disclosure would shed light on the agency's performance of its statutory duties, or otherwise inform citizens concerning the activities of the Government. In particular, the Authority held that the public interest in collective bargaining that is embodied in the Statute, or specific to a union in fulfilling its obligations under the Statute, will not be considered in analyzing the application of Exemption 6 of the FOIA. *Id.*

If both the public interest cognizable under the FOIA and privacy interests are established, the Authority will balance the privacy interests of employees against the public interest in disclosure. *New York TRACON,* 50 FLRA at 392. If the balance leads to the conclusion that the privacy interests are greater than the public interest at stake, the requested disclosure would constitute a clearly unwarranted invasion of personal privacy under FOIA Exemption 6 and, therefore, that disclosure would be prohibited by law (the Privacy Act) under section 7114(b)(4) of the Statute. *Id.* Accordingly, the agency would not be required to furnish the information, unless disclosure was

permitted under another exception to the Privacy Act. *Id.* If the public interest in disclosure is greater than the privacy interests disclosure would be required under the FOIA (since it does not fall within FOIA Exemption 6). *Id.* Since disclosure under the FOIA is an exception to the Privacy Act, disclosure of the information would not be prohibited by the Privacy Act. *Id.*

Information with Personal Identifiers

In cases subsequent to *New York TRACON* that concern requests for information containing personal identifiers, such as *United States Air Force Headquarters, 442nd Fighter Wing (AFRES), Richards-Gebaur AFB, Mo.*, 50 FLRA 455, 460-61 (1995), the Authority has yet to find any support to establish that the release of personal identifiers enhances any public interest which has been articulated in the documents. Rather, the Authority consistently has found that "the public interest that would be served by disclosure of the requested information also could 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).

In addition, the Authority has held that when requested documents concern only one name-identified employee, "it is not possible to redact the documents to protect the identity 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.

Duty to Respond

The Authority has consistently held that, when information requested by a union from an agency 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). A timely reply to a union's request for information 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). Failure to inform a union of the nonexistence of requested information may constitute a violation of section 7116(a)(1), (5), and (8) of the Statute. *U.S. Naval Supply Ctr., San Diego, Cal.,* 26 FLRA at 326-27.

Duty to Furnish

Section 7114(b)(4) requires an agency to "furnish" information to the exclusive representative, and an offer to permit a union to look at the data does not satisfy the agency's duty to furnish the information. *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 16 (1990); *Veterans Admin. & Veterans Reg'l Office Buffalo, N.Y.*, 28 FLRA 260, 266 (1987). An agency is required to furnish the information without charge. *AAFES, Dallas, Tex.*, 24 FLRA 292 (1986).

An agency is also required to furnish necessary information in a timely manner. *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), *Cf. 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 the respondent 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 respondent's current records). *See also 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

In *SSA Dallas Region, Dallas, Tex.*, 51 FLRA 1219, 1225-26 (1996), the Authority held that:

"An agency's duty under Section 7114(b)(4) to furnish certain information upon a union's request is a component of the agency's obligation to negotiate in good faith. *See U.S. Dep't of Transp., FAA, N.Y. TRACON, Westbury, N.Y.*, 50 FLRA 338, 341 (1995) (*FAA*). In creating this statutory obligation, "Congress recognized the significance that information plays in a union's ability to pursue the full range of its representational responsibilities." *Id.* at 342. Indeed, although the Authority has recognized significant limitations on the disclosure of information under 7114(b)(4), such as those that flow from the Privacy Act, it has continued to view the "ability to exchange information [as] central to the labor-management relationship." *Id.* at 344. *See also IRS, Kansas City*, 50 FLRA at 668.

The knowing destruction by agency personnel of requested information prior to the point at which the merits of an information request have been determined is inconsistent with the Statute. The obligation of an agency to provide information pursuant to Section 7114(b)(4) is rendered meaningless if the agency does not consider itself obliged to preserve requested information until resolution of any dispute over whether it need be

disclosed. Destruction is inconsistent with the statutory policy of effective and efficient Government because it renders futile litigation to obtain information that is disclosable. *Cf. 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."). By the same token, destruction of requested information sabotages the effective vindication of employee rights under the Statute by interfering with the Authority's ability to fully remedy a failure to furnish the exclusive representative with information to which it is entitled under Section 7114(b)(4)."

8. 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.*

To find that a meeting constitutes a "formal discussion" under Section 7114(a)(2)(A) of the Statute, it must be shown that:

1. there is a discussion;
2. which is formal;
3. between one or more representatives of the agency and one or more unit employees or their representatives;
4. concerning any grievance or any personnel policy or practice or other general condition of employment.

In examining these elements the Authority has held 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).

A Discussion

For purposes of section 7114(a)(2)(A), a “discussion” is any meeting between representatives of the agency 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*) (to the same effect).

No actual conversation need 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 where the employees engaged in no dialogue was a discussion); *U.S. Dep’t of Justice Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.*, 51 FLRA 1339, 1340-42 (1996) (*FCI, Bastrop*) (meeting held with the warden to try to resolve differences before filing a grievance where neither employee nor supervisor were permitted to speak was a discussion).

In *Kaiserlautern American 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 for information-gathering purposes is was not a “discussion” within the meaning of section 7114(a)(2)(A). The questionnaire contained one question which a manager individually handed to unit employees to voluntarily complete on an anonymous basis to gauge their morale and the Authority concluded that this did not amount to a discussion.

An Agency Representative

"Nothing in Section 7114(a)(2)(A) of the Statute requires that a 'representative' 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) (Attorney from Judge Advocate General's Office was a representative of the agency and had settlement authority). An outside contractor may function as a "representative of the agency." *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) (Contract EEO investigator was a representative for purposes of section 7114(a)(2)(A) of the Statute); *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).

Unit Employee

Generally, the term unit employee includes those employees working in the bargaining unit represented by the exclusive representative. For purposes of Section 7114(a)(2)(A), a unit employee is one who is covered by the parties' collective bargaining agreement and is subject to dues withholding. *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 is a unit employee where indicia of supervisor under section 7103(a)(10) are not present. *Gen. Servs. Admin., Region 2, N.Y., N.Y.*, 54 FLRA 864, 874-77 (1998).

Subject Matter of the Discussion

In order to be a formal discussion under the Statute, the subject addressed must be a grievance, personnel policy or practice, or general conditions of employment.

Grievance

For purposes of Section 7114(a)(2)(A), a grievance is defined broadly as stated in Section 7103(9) to include 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.

A "grievance," as defined by the Statute, is not dependent on the scope of a negotiated grievance procedure. *Luke I*, 54 FLRA at 730-31 (mediation/investigation session associated with an EEO complaint concerned a grievance). A "grievance" may affect an employee or employees in the bargaining unit generally. Id. A meeting between an employee and supervisors concerned a "grievance" where it related to work assignments and job performance that had previously 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 that are required under the negotiated agreement to attempt to informally resolve a dispute before filing a formal grievance are "grievances." *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, i.e., meeting was in response to the union's efforts to informally resolve the differences which were the basis for a potential grievance).

Interviews by agency representatives of bargaining unit employees in preparation for a ULP hearing concerned a "grievance." *F.E. Warren AFB,* 31 FLRA at 552. Likewise, interviews by agency representatives of bargaining unit employees in preparation for third-party proceedings in which the union has an adversary role concern a "grievance." *VA, Long Beach*, 41 FLRA at 1379-80 (telephone interviews of bargaining unit employees by agency representative to prepare for an MSPB hearing concerned a "grievance"). An agency's interview of a bargaining unit employee who was to be called as a witness in arbitration hearing concerned a "grievance". *Dep't of the Air Force, Sacramento Air Logistics Ctr., McClellan AFB, Cal.*, 35 FLRA 594, 604 (1990); *see also Dep't of the Air Force, Sacramento Air Logistics Ctr., McClellan AFB, Cal.*, 29 FLRA 594, 604 (1987) (*McClellan AFB*).

Statutory Appeals

A "grievance" within the meaning of Section 7114(a)(2)(A) can encompass statutory appeals including EEO complaints and MSPB appeals.

EEO Complaints

The Authority considers formal EEO complaints to constitute grievances under Section 7114(a)(2)(A) of the Statute. *Marine Corps Logistics Base, Barstow, Cal.,* 52 FLRA 1039, 1046 (1997) (meeting at which management presented an employee with a proposed settlement agreement of a formal EEO complaint concerned a "grievance"). In *Luke I*, the Authority held that such EEO meetings were "formal discussion[s] . . . concerning [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, however, 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).

In *U.S. Dep't of the Air Force, 436th Airlift Wing, Dover AFB, Dover, Del.*, 57 FLRA 304 (2001), the Authority reviewed the rationale of its *Luke* decision, in light of its rejection by the Circuit Court, and the Authority declined to modify its position. The Authority reiterated 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, the union has a right to attend such mediations, even when they are conducted by a "neutral" party, such as a mediator, and when the employee has not designated the union as his representative. Notwithstanding the Ninth Circuit's decision in *Luke*, the Authority found in *Dover* that the presence of a union at

such meetings does not conflict with EEOC regulations, the Privacy Act or other expressions of an EEO claimant's right to confidentiality.

The Authority has reiterated this position in *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*) and *Pension Benefit Guar. Corp. Wash., D.C.*, 62 FLRA 219 (2007). *See also 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).

A union is not, however, entitled to representation at a discussion of an EEO complaint filed by a non-unit employee. *Nuclear Regulatory Comm'n*, 29 FLRA 660, 662-63 (1987).

MSPB Appeals

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); *see also VA, Long Beach*, 41 FLRA at 1380 (telephone interview of unit employee by agency attorney in preparation for a MSPB hearing concerned a "grievance"). In comparison, discussions with a unit employee in preparation for an MSPB hearing did not concern a "grievance" because the underlying MSPB appeal was not from an employee but rather from a supervisor or management official. *General Services Admin.,* 50 FLRA 401, 404 (1995). Also, 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. FLR*A, 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)).

Personnel Policy

A personnel policy or practice involves "general rules applicable to agency personnel, not discrete actions taken 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").

A last chance agreement does not concern a "personnel policy or practice" because it involves only a discrete 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).

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*). However, the Authority more recently determined that 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 for 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*).

General Condition of Employment

A general condition of employment concerns "conditions of employment affecting employees in the unit generally." *NRC*, 29 FLRA at 663 (meeting did not concern any condition of employment generally affecting the employees in the bargaining unit "in view of the non-bargaining unit status of the employee at the time of the EEO complaint, the fact that the complaint concerned matters which took place entirely outside the bargaining unit, and the nature of the January 2 meeting, that is, a discussion of the possible settlement of the individual's complaint").

Where the subject matter of a meeting concerned alleged 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. However, discussion of a reorganization concerned 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 concerned "general conditions of employment" when they addressed a supervisor's conduct t and the atmosphere that existed in the office. *GSA*, 50 FLRA at 404.

Elements Of "Formality"

"Formality" is established by considering the totality of the circumstances. *F.E. Warren AFB, Cheyenne, Wyoming*, 52 FLRA 149, 156-58 (1996) (*F.E. Warren*). Totality of circumstances includes relevant factors such as the following:

(1) whether the individual who held the meeting is merely a first-level supervisor or is higher in the management hierarchy;

(2) whether any other management representatives attended the meeting;

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

(4) how long the meeting lasted;

(5) how the meeting was called (advance notice v. spontaneity);

(6) whether a formal agenda was established for the meeting;

(7) whether an employee's attendance was mandatory at the meeting;

(8) the manner in which 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*).

Examples of Cases Where Formality Was Found

Dep't of Agric., Forest Serv., Los Padres Nat'l Forest, 60 FLRA 644 (2005) (meetings were formal because (1) meetings were scheduled more than two weeks in advance; (2) the meetings had an established purpose to mediate EEO complaints; (3) the meetings were held in locations away from employees' work sites; (4) the meeting attendees included agency representatives with full authority to settle the EEO complaints).

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

U.S. Dep't of Justice, Immigration and Naturalization Serv., 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 which was tantamount to an agenda; (6) although attendance was not mandatory, employee could reasonably conclude that her complaints could be adversely affected were she not to attend).

F.E. Warren, 52 FLRA 149 (1996) (meeting was formal because (1) the employees received advance notice of the meeting from their first-level supervisor; (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. (formality found based on totality of circumstances: (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 was 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 it: (1) was initiated by the district manager--the fourth-level supervisor; (2) was held in the district manager's office behind closed doors; and (3) attendance was mandatory).

A telephone conversation may be a formal discussion. *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 the interviews were conducted by telephone did not diminish the formal nature of these discussions).

Examples of Cases Where Formality Was Not Found

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) while the meeting lasted 15-30 minutes, the length of meeting was partly due to questions asked by the employee; (2) while the meeting was held away from the employee's work site, 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 for the single employee who attended was voluntary; (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) (despite the fact that 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 meeting was initiated by the employee 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 solicit 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 of the meeting were taken).

Dep't of Health and Human Servs., 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 conducted 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).

The Union's Right to be Represented

The Statute requires that the exclusive representative be "afforded an opportunity to be represented" at a formal discussion. The Authority has held that the agency must afford the union sufficient prior notice of a formal discussion to allow the union to designate its own representative to attend. *McClellan AFB*, 29 FLRA at 606 ("actual representation" was not sufficient since the employee who received notice was not the designated representative in the matter under discussion); *see also Gen'l. Svces. Admin., Region 9, Los Angeles, Cal.,* 56 FLRA 683, 685 (2000) (notice to a local representative was insufficient because union did not have the opportunity to designate a representative of its own choosing).

A union's interest cannot be adequately represented at a formal discussion if the person who attends is also the subject of the matter to be discussed. *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).

An employee's selection of a personal representative for a discussion does not obviate the necessity of notifying the union of a formal discussion as it is the union that has the statutory right to receive notice and an opportunity to be represented at a formal discussion. *Luke I*, 54 FLRA at 722-23 n.6 (union president's attendance as the employee's personal representative at mediation/investigation session did not relieve agency of obligation to inform union in advance about the formal discussion).

The Right of the Union to Participate

The language in Section 7114(a)(2)(A) of the Statute that the "exclusive representative ... shall be given the opportunity to be represented" at a formal discussion means more than merely a right to be present. *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). It also means that a union representative has a right to comment, speak and make statements. But this does not entitle a union representative to take charge of, usurp or disrupt the meeting. *Id*. Comments by a union representative must be governed by a rule of reasonableness, which requires that there be respect for orderly procedures and that the comments be related to the subject matter addressed by the agency representatives at the meeting. *Id.*

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

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

> 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 of the Statute is similar to the private sector Supreme Court decision in *National Labor Relations Board v. J. Weingarten*, 420 U.S. 251 (1975) and for that reason is often referred to as the *Weingarten* right. Section 7114 (a)(2)(B) of the Statute represents a statutory recognition of this legal concept, but defines it as the right of a labor organization to be represented during investigatory examinations of employees. . *See, also, 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)).

REQUIRED ELEMENTS

It is important to recognize that all elements addressed in Section 7114(a)(2)(B) must be present for the union to have the right to be represented at the interview.

Agency Representative

For the right of representation to attach, the investigatory interview must be conducted by a representative of the agency. The Authority has concluded that an agency representative conducted the investigatory interview where: the employee was questioned by his supervisor (*Marine Corps Logistics Base*, 4 FLRA 397 (1980)); where the employee was questioned by agents of agency's Office of Management and Integrity (*U.S. Customs Serv.*, *Region VII, L.A., Cal.,* 5 FLRA 297 (1981)); and where the employee was questioned by the agency's Internal Security Inspectors, even where the inspectors were from a different geographical and organizational part of the agency. *Internal Revenue Serv.*, *Wash., D.C.,* 4 FLRA 237 (1980)).

Other cases where the Authority addressed the issue of an agency representative conducting investigatory examinations include *Lackland AFB Exch.*, Tex., 5 FLRA 473 (1981) (investigators from a related activity within an agency acted as agency representatives in conducting Weingarten interviews); *Dep't. of Def., Def. Criminal Investigative Serv., Def. Logistics Agency and Def. Contract Admin., Serv. Region, N.Y.*, 28 FLRA 1145 (1987), a*ff'd sub nom*. *Def. Criminal Investigative Serv. (DCIS) Dep't. of Def. v. FLRA*, 855 F.2d 93 (3rd Cir. 1988). (Air Force Office of Special Investigations

acted as representatives of the agency in questioning an Air Force Exchange employee since the Defense Criminal Investigative Service was an organizational component of the Department of Defense); *U.S. Dep't of Labor, Mine Safety and Health Admin.*, 35 FLRA 790 (1990) (an Office of Inspector General agent is a representative of the agency within the meaning of the Statute); and *Nat'l Aeronautics and Space Admin.*, 527 U.S. 229, 237 (1999), *aff'g* 50 FLRA 601 (1995) (agency is liable for statutory violation if the IG limits a union's participation in an investigatory interview).

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).

Unit Employee

The right of the labor organization to be represented at the investigatory meeting is governed by the employee's status as a member of the bargaining unit at the time of the interview, not by the status at the time of the events giving rise to the interview. *Dep't. of the Navy*, *Charleston Navy Shipyard, Charleston, S.C.*, 32 FLRA 222, 231 (1988). The right to be represented is not governed by the tenure status, such as whether the employee is full-time or probationary, of the employee. They need only be employed in the unit represented by the union. *Dep't. of Veterans Affairs, Veterans Affairs Med. Ctr., Jackson. Miss.*, 48 FLRA 787, 797 (1993).

The right to be represented does not apply where employees are not members of the bargaining unit represented by the exclusive representative. *Food & Drug Admin., Newark Dist. Office, W. Orange, N.J.,* 47 FLRA 535, 556 (1993).

Examination In Connection With An Investigation

The *Weingarten* right applies when an agency representative seeks information from a unit employee prior to deciding whether to take action or what action might be appropriate. Performance evaluation and counseling meetings are not examinations in connection with an investigation. The purpose of such meetings is to provide the employee with information about management's assessment of their performance. *Internal Revenue Serv*., *Detroit, Mich*., 5 FLRA 421 (1982) (performance evaluation); *Internal Revenue Serv.*, 8 FLRA 324 (1982) (counseling). However, simply labeling a meeting as a "counseling session" or "inquiry" does not necessarily remove a meeting from the ambit of Section 7114 (a)(2)(B)**,** if the required elements are present. *Fed. Aviation Admin, St. Louis Tower, Bridgton, Mo*, 6 FLRA 678 (1981) (although termed a "counseling session," a meeting where an employee is questioned about use of abusive language in the control tower, was an investigatory examination).

Meetings where an employee is just advised that discipline will be taken (*U.S. Air Force, 2750th Air Base Wing Headquarters, Air Force Logistics Command, Wright-Patterson AFB, Ohio*, 9 FLRA 871, 872 (1982)); or where an employee is warned, but no questions are asked, there is no attempt to elicit additional information, to have the employee admit his alleged wrongdoing, or explain his conduct (*Internal Revenue Serv.*, 15 FLRA 360 (1984)) are not examinations in connection with an investigation. However, when an interview of an employee involves questioning prior to a decision on what action should be taken, 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).

An "examination" may relate to either a criminal or civil investigation. *U.S. Dep't. of Justice, Wash., D.C.*, 56 FLRA 556, 560 (2000) (relying upon *Nat'l Aeronautics & Space Admin. 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*, *Immigration & Naturalization Serv., 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).

An examination does not have to occur at the job site, or on duty time. *Internal Revenue Serv., 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).

An examination need not involve face to face questioning and may be conducted in writing. *U.S. Immigration & Naturalization Serv., U.S. Border Patrol, Del Rio, Tex.*, 46 FLRA 363, 371 (1992) (the requirement that a border patrol agent prepare a memorandum explaining the circumstances of a prisoner escape constituted an "examination").

Reasonable Belief

When an employee is required by an agency to submit to an interview, which the employee reasonably believes could result in disciplinary action, the employee has a right to request union representation at that interview. *U.S. Dep't. of Immigration & Naturalization Serv., Border Patrol, El Paso, Tex.*, 42 FLRA 834 (1991). The Authority looks to objective factors, not the subjective feelings of the employee, to determine the presence of a "reasonable belief." *Internal Revenue Serv. v. FLRA,* 671 F.2d 560, 563 (D.C. Cir. 1981).

In some cases, the circumstances plainly indicate that an employee's fear of discipline is reasonable, such as where the individual is told that he is being questioned about possible cash register manipulation. *Lackland AFB Exch.*, 5 FLRA 473 (1981). In other cases, the reasonableness of the fear, while not immediately apparent, may still be legitimate in the circumstances of the case.

For example, even where an agency regulation provided that information could not be used as evidence in a personnel action, it could be accessed and later used to conduct a new investigation which 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) Likewise, even where the employee is not the direct subject of the current investigation, circumstances may justify a finding that the employee's fear of discipline from the examination was reasonable. *Internal Revenue Serv.,* 4 FLRA 237 (1980), *aff'd sub nom. Internal Revenue Serv., 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, could have reasonably believed that discipline may result if his conduct in controlling tax records was deemed 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 the misconduct of others).

It also should be noted that where an employee is given an assurance that discipline will not result, such as with a grant of immunity, it may be found that the employee would no longer reasonably fear discipline. *Id.*

Request for Representation

Before the entitlement under Section 7114 (a)(2)(B) will attach, a request for representation must be made by the employee. *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 for representation must be sufficient to put management on notice of the employee's desire for representation, but need not be made in any specific form. *Norfolk Naval Shipyard, Portsmouth, Va.*, 35 FLRA 1069, 1074 (1990*)* citing *U.S. Dep't. of Justice, Bureau of Prisons, Metro. Corrections Ctr., N.Y., N.Y.,* 27 FLRA 874, 880 (1987) Thus, an employee's stating that he would like to speak with a lawyer or somebody to advise him or explain what was happening, was sufficient to be 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).

The request need not necessarily be made to the person conducting the examination. Where, for example, an employee asks the agency's detectives three times and a manager another time for a representative, the employee does not waive representation by not again requesting it from the OSI agent conducting the examination. *Lackland AFB Exch.*, *Lackland AFB, Tex.*, 5 FLRA 473, 486 (1981).

Management Options

When a valid employee request for representation has been made, the agency is permitted one of three options: (1) grant the request; (2) discontinue the interview; (3) 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, Immigration & Naturalization Serv., Border Patrol, El Paso, Tex*., 42 FLRA 834, 839 (1991). *See also Dep't of Justice, Immigration & Naturalization Serv., Border Patrol, El Paso, Tex.* v. *FLRA,* 939 F.2d 1170 5th Cir.1991) (upholding management's right to offer an employee these choices).

Waiver

An employee may waive the right to representation in a *Weingarten* meeting. The Authority will look to objective factors to determine whether there was an uncoerced waiver of representation by the employee. *Dep't of Justice, Immigration & Naturalization Serv., Border Patrol, El Paso, Tex.*, 36 FLRA 41 (1990). For example, where an employee's request for union representation was denied, the employee was told that he did not have to answer any questions and was free to leave. The employee's decision to stay was uncoerced. *U.S. Dep't of Justice, U.S. Penitentiary, Leavenworth, Kan.*, 46 FLRA 820, 822 (1992).

Where an employee withdrew a request for a union representative when, after waiting for 30 minutes for union representative who was on route, the employer suggested that the interview continue and the employee merely shrugged and went on with the interview, there was no evidence of coercion. *Army & Air Force Exch. Serv.*, *Rocky Mountain Area Exch., Fort Carson, Colo.*, 16 FLRA 794, 802-03 (1984).

Where an employee failed to bring a representative to the meeting after it had been postponed several times to allow him to obtain one, no violation was found when the agency proceeded with the interview. *Dep't of Labor*, *Employment Standards Admin.*, 13 FLRA 164 (1983) The Authority found that the agency had taken "every reasonable step" to provide an opportunity for representation.

If the evidence shows that a waiver was coerced, the Authority will conclude that a violation of the Statute occurred if the agency proceeds with the investigatory interview. *Dep't of Justice, Immigration & Naturalization Serv., Border Patrol, El Paso, Tex.*, 36 FLRA 41, 50-52 (1990). (Agency comments precluded employee from making an uncoerced decision as to whether to have his union representative present.) A statement by the agency investigator to an employee that he might be accused of criminal misconduct and it would not be in his best interest if the union representative were present at the interview, was deemed coercive. *U.S. Dep't of Justice, Immigration & Naturalization Serv., Border Patrol, El Paso, Tex.*, 42 FLRA 834, 839-40 (1991).

The fact than an employee had declined union representation at previous interviews does not establish whether the employee would request representation at a subsequent examination. *U.S. Dep't. of Justice, Fed. Bureau of Prisons, Office of Internal Affairs, Wash., D.C.*, 55 FLRA 388, 394 n.10 (1999).

Union's Right to Designate its Representative

As with formal discussions, a union may generally designate its representative to attend an investigatory examination. There are circumstances, however, where the agency can demonstrate "special circumstances" that warrant precluding a particular individual from serving in this capacity. An agency must show how the integrity of the investigation would be undermined. *Fed. Bureau of Prisons, Office of Internal Affairs, Wash., D.C.*, 54 FLRA 1502, 1513 (1998). The Authority also followed the private sector rationale of NLRB decisions in *New Jersey Bell Telephone* Company, 308 NLRB 277, 282 (1992) (a representative's obstructive behavior during an earlier investigatory examination); *Pacific Gas and Electric 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); and *Coca-Cola Bottling Co. of Los Angeles*, 227 NLRB 1276, 1276 (1977) (employer need not postpone an investigation where shop steward is unavailable and other representative is available)).

Agency may bar an individual who is the subject of an investigation from serving as a union representative until after his/her interview has been completed. *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).

There is no obligation to postpone a *Weingarten* interview merely because a specific union representative is not available. *U.S. Immigration & Naturalization Serv., N.Y. Dist. Office, N.Y., N.Y.,* 46 FLRA 1210, 1221 (1993).

Union's Role in an Investigatory Examination

A union representative has the right to actively participate in assisting an employee in an investigation as long as s/he does not interfere with the employer's interest in achieving the objective of the investigation or compromise its integrity. *Headquarters, Nat'l Aeronautics & Space Admin., Wash., DC*, 50 FLRA 601, 607 (1995). A union representative can be active in an employee's defense and need not sit as a observer only. *Fed. Aviation Admin.*, *St. Louis Tower, Bridgeton, MO.,* 6 FLRA 678, 686 (1981).

The union representative normally has a right to consult with the affected 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). However, any right to confer 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 confer in the examination room and could confer 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).

The union representative has a right to 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 *Fed. Aviation Admin., 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).

Though this type of meeting is not meant to become adversarial, a union representative can comment on the form of questions, help the employee express views, seek clarifications, and suggest other avenues of inquiry. Placing unwarranted restrictions may be tantamount to failure to allow representation. *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).

The presence of a union representative in an examination does not interfere with management's right to insist that the employee be responsive, or its right to decide the scope of the examination. The union representative may not answer for the employee, instruct the employee to refuse to answer questions or interfere with the investigation. *Dep't. of the Treasury, Internal Revenue Serv., Jacksonville Dist.*, 23 FLRA 876, 878-79 (1986).

The union representative has no right to tape record an interview when such taping is contrary to agency policy. *U.S., Immigration & Naturalization Serv., San Diego, Cal.*, 13 FLRA 591, 604-05 (1984).

10. COOPERATION WITH IMPASSE PROCEDURES [7116 (a)(6)]

Section 7116 (a)(6) of the Statute provides:

It shall be an unfair labor practice for an agency to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter.

The Authority has set out a modified framework for determining whether an agency that implements a change in conditions of employment has violated section 7116(a)(6) of the Statute depending upon whether maintenance of the *status quo* has been directed by Federal Service Impasses Panel (FSIP) procedures or decisions. *United States Immigration & Naturalization Serv., Wash., D.C.*, 55 FLRA 69 (1999).

The Statute envisions Authority review of an FSIP Decision and Order through unfair labor practice procedures initiated by the party alleging non-compliance with the Decision and Order. *State of N.Y., Div. of Military & Naval Affairs,* 2 FLRA 186 (1979). Agencies which fail to implement FSIP orders thereby violate Section 7116 (a)(6). *State of Nev. Nat'l Guard,* 7 FLRA 245 (1981); *Div. of Military & Naval Affairs, State of N.Y.,* 8 FLRA 158 (1982).

The FSIP may direct the parties to include in their agreement language the FSIP finds appropriate which, absent contrary agreement by the parties, is binding during the term of the agreement. *Western Area Power Admin.*, 25 FLRA 1090 (1987) (FSIP's Order that the parties' future impasses, if any, be resolved through binding arbitration).

Section 7114(c) of the Statute includes the right of an agency head to review provisions of a collective bargaining agreement imposed on the parties by the Panel, and to disapprove those provisions which are not in accordance with the Statute and other applicable laws, rules and regulations. *Interpretation & Guidance*, 15 FLRA 564 (1984), *aff'd sub nom*. *Am. Fed'n of Gov't Employees v*. *FLRA,* 778 F.2d 850 (D.C. Cir. 1985).

The agency level disapproval of an agreement under Section 7114(c) goes to the whole agreement, not just the specific provision under scrutiny. *Dep't of the Interior, Nat'l Park Serv., Yorktown, Va.*, 20 FLRA 537 (1985). A challenge to the agency head Section 7114(c) disapproval can either be filed as a negotiability appeal or as an unfair labor practice. If the disapproval by the agency of a provision ordered by FSIP was incorrect, an unfair labor practice will be found. *U.S. Army Headquarters,* 17 FLRA 84 (1985), *aff'd in relevant part. sub nom. Nat'l Fed'n of Fed. Employees 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).

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.

Government-wide rules or regulations are rules, regulations, or official declarations of policy that are generally applicable throughout the Federal Government and are binding on the Federal agencies and Federal officials to which they apply. *Nat'l Treasury Employees Union, Chapter 6 & Internal Revenue Serv., New Orleans Dist.*, 3 FLRA 748, 754-55 (1980). Under Section 7117 (a)(1) of the Statute, 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 to which they apply, even if the same matter is covered by a collective bargaining agreement under the Statute.

A limitation on the application of rules or regulations in the workplace concerns the ability of an agency to implement a rule or regulation which conflicts with an existing collective bargaining agreement as set forth in Section 7116 (a)(7). The reference to Section 2302 of Title 5 in Section 7116 (a)(7) denotes the provision of law concerning prohibited personnel practices. *U.S. Dep't of the Army, Fort Campbell Dist.,Third Region, Fort Campbell, Ky.,* 37 FLRA 186 (1990).

The Authority interprets Section 7116 (a)(7) as meaning that pre-existing collective bargaining agreement provisions are to govern for the express term of the agreement. Provisions of a renewed agreement do not operate to override government-wide regulations existing on the effective 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). Conversely, a subsequently issued regulation does not nullify the terms of a collective bargaining agreement already in effect. *Dep't of HHS, Health Care Fin. Admin.,* 39 FLRA 120 (1991). While Section 7116 (a)(7) generally prevents agencies from enforcing a regulation that conflicts with a pre-existing collective bargaining agreement, parties may agree to allow subsequently issued regulations to 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).

An agency violates Section 7116 (a)(1) and (7) by relying on its regulations issued subsequent to the parties' negotiated agreement. *Dep't of Health & Human Services, Health Care Fin. Admin.,* 39 FLRA 120, 132 (1991) (a ban on smoking).

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.

Under Section 7131(a), entitlement to official time applies only when an employee is 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).

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); *Veterans Admin. Cent. Office, Washington, D.C.*, 23 FLRA 512 (1986) (*VA Cincinnati*). When it is required that an employee travel to participate in 7131(a) official time activities when otherwise in duty status, travel time is included as official time. *Dep't of the Treasury, Bureau of the Pub. Debt*, 17 FLRA 1045 (1985). A refusal to grant

official time to which an employee is entitled under Section 7131(a) violates section 7116(a)(1) and (8) of the Statute. *VA Cincinnati,* 23 FLRA at 515-16.

Since an agency is required to continue to recognize the existing exclusive representative, and to fulfill its obligations to that exclusive representative, until the issues raised by a pending representation petition are resolved (*See Morale, Welfare & Recreation Directorate, Marine Corps Air Station, Cherry Point, North Carolina*, 48 FLRA 686, 687-88 (1993)), this includes the continued granting of official time to representatives of the certified bargaining unit. *U.S. Dep't of the Air Force, HQ Air Force Materiel Command*, 49 FLRA 1111, 1119 (1994) (*AFMC*). A failure to authorize Section 7131(a) official time to designated union representatives for negotiations while a representation petition concerning the status of the unit is pending before the Authority violates the Statute. *Dep't of the Navy, Naval Weapons Station, Yorktown, Va.,* 55 FLRA 1112 (1999).

While Sections 7131(a) and (c) specifically address official time entitlement for contract bargaining and participation in FLRA proceedings, most official time questions will arise under and be governed by Section 7131(d) which provides for the parties to bargain and agree on contractual entitlement. *AFMC*, 49 FLRA at 1119 (1994). Disputes over the entitlement to Section 7131(d) official time raise contractual, not statutory, issues. *U.S. Dep't of the Army, HQ 10th Mountain Div. , Fort Drum, N.Y.*, 64 FLRA 337, 339 (2009). The proper forum to resolve disputes over contractual issues, such as 7131(d) official time, is the negotiated grievance procedure.

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

DUTY OF FAIR REPRESENTATION

The Union owes a duty of fair representation to all employees included in its bargaining unit. Section 7114 (a)(1) of the Statute establishes the duty of fair representation. In accordance with section 7114(a)(1), where a union is acting as the exclusive representative of its unit members, its activities must be undertaken without discrimination and without regard to union membership. A breach of the duty of fair representation violates Section 7116 (b)(1) and (8) of the Statute. *See, Fort Bragg Ass'n of Educators, Nat'l Educ. Ass'n, Fort Bragg, N.C.*, 28 FLRA 908, 918 (1987) (*Fort Bragg*).

Where Membership is a Factor

A union may not discriminate against non-members when the union is acting as the exclusive representative under Section 7114 of the Statute. This exclusivity applies only to matters which concern the employees' conditions of employment within the

meaning of the Statute. *Antilles Consol. Educ. Ass'n (OEA/NEA), San Juan, P.R.*, 36 FLRA 776 (1990) (matters arrived at through collective bargaining); *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) (filing grievances); *Am. Fed'n of Gov't Employees, Local 3354,* 58 FLRA 184 (2002) (distribution of the proceeds of a grievance settlement).

The Authority applies the same analytical framework for deciding cases involving discrimination against non-members by unions as it does in cases involving allegations of discrimination by agencies. *Am. Fed'n of Gov't Employees, Local 3354, AFL-CIO*, 58 FLRA 184 (2002); *Am. Fed'n of Gov't Employees, Local 1345, Ft. Carson, Colo. (In Trusteeship) & Am. Fed'n of Gov't Employees, AFL-CIO*, 53 FLRA 1789 (1998); *Letterkenny Army Depot*, 35 FLRA 113 (1990).

A requirement that non-members pay an administrative fee to participate in a union administered insurance plan, where members pay no fee at all, violates the duty of fair representation. *Antilles Consol. Educ. Ass'n, (OEA/NEA), San Juan, P.R.*, 36 FLRA 776 (1990).

When an exclusive representative decides to represent unit employees in any matter which affects their conditions of employment, it has the duty under Section 7114 to represent unit employees fairly, and may not discriminate on the basis of union membership. *American Fed'n of Gov't Employees*, 17 FLRA 446 (1985). The duty of fair representation does not apply when a union is acting outside the authority granted under Section 7114 of the Statute as the exclusive representative. In such cases, the union is not required to treat members and non-members the same. *Fort Bragg Assoc. of Educ., NEA, Fort Bragg, N.C.*, 28 FLRA 908 (1987) (filing a law suit); *NTEU v. FLRA*, 800 F.2d 1165, 1171 (D.C. Cir. 1986) (MSPB proceedings).

Distribution of the proceeds of a grievance settlement, where the union had previously established the principle of first-come, first-served to collect claims, violates the duty of fair representation if union members are paid who had submitted claims after non-members or who had not followed the procedures. *American Fed'n of Gov't Employees,* 58 FLRA 184 (2002).

A union may look to the views of its members concerning the exercise of contractually delegated powers, such as possible proposals to establish a condition of employment, without permitting all bargaining unit employees to take part in the decision. However, where the agency has agreed under the contract to give the union discretion to determine the type of seniority to be used in calculating seniority-based benefits, this directly affects all unit employees. And the union may not exclude non-members from a

poll to make this decision. *Nat'l Fed'n of Fed. Employees, Local 1827*, 49 FLRA 738 (1994). Contrast this with a situation where the union determined the seniority policy by a vote of delegates to its national convention and the delegates operated as representatives of the employees. *Nat'l Air Traffic Controllers Ass'n, MEBA/AFL-CIO*, 55 FLRA 601 (1999).

Where Membership is Not a Factor

Where union membership is not a factor, the standard for determining whether an exclusive representative has breached its duty of fair representation under Section 7114 (a)(1) is whether the union deliberately and unjustifiably treated one or more bargaining unit employees differently from other employees in the unit. That is, the union's actions must amount to more than mere negligence or ineptitude. The union must have acted arbitrarily or in bad faith, and the action must have resulted in disparate, discriminatory treatment of a bargaining unit employee. *Nat'l Fed'n of Fed. Employees, Local 1827*, 49 FLRA 738 (1994); *Nat'l Fed'n of Fed. Employees, Local 1453*, 23 FLRA 686 (1986); *Tidewater Va. Fed. Employees Metal Trades Council /Int'l Ass'n of Machinists, Local No. 441*, 8 FLRA 217 (1982).

No breach of the duty of fair representation will be found when a union is merely "inept, negligent, unwise, insensitive or ineffectual." A breach wiII be found where a union's conduct is improperly motivated by irrelevant or invidious considerations, or where its conduct is wholly arbitrary or grossly negligent. Mere negligence wiII not support a finding of a breach. *Am. Fed'n of Gov't Employees, Local 1457, AFL-CIO*, 43 FLRA 575 (1991).

A union breached its duty of fair representation when its actions misled an employee into thinking that the union was going to file a grievance on his behalf, and the employee's reliance on the union caused him to lose the right to file a timely grievance. These actions amounted to more than mere negligence and led to the conclusion that the union deliberately and unjustifiably failed to file a grievance on behalf of the employee. *Int'l Ass'n of Machinists & Aerospace Workers, Local 39, AFL-CIO*, 24 FLRA 352 (1986).

The Authority may infer that a union's negligent failure to file a grievance was intentional where the circumstances make it "implausible" that the union's mishandling of the grievance was inadvertent and where it has failed to rebut this "clear inference." *Int'l Ass'n of Machinists & Aerospace Workers, Local 39, AFL-CIO*, 24 FLRA 352, 353 (1986).

In other situations, the circumstances may call for a different result. Where, for example, the union president's illness and absence from work, taken together with the inexperience of the union's leadership, resulted in the failure to timely file a grievance, the facts may dictate that the union was negligent, but not in violation of the Statute. *Am. Fed'n of Gov't Employees, Local 3529,* 31 FLRA 1208 (1988).

OTHER UNION CONDUCT

Section 7116 (c)

This section of the Statute provides that 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 two reasons:

(1) a failure to meet reasonable occupational standards uniformly required for admission, or

(2) a failure to tender dues uniformly required as a condition of acquiring and retaining membership.

This subsection does not preclude a labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this chapter.

A union's right to enforce discipline under the second sentence of Section 7116 (c) extends to discipline such as the suspension and restitution of a non-member for conduct occurring while the individual was a member. *Am. Fed'n of Gov't Employees, Local 987*, 53 FLRA 364 (1997).

The Authority has recognized that certain activities, asserted to be protected, can be the subject of union discipline under the Statute. A union's discipline of its steward who discussed bringing in another labor organization with the agency's personnel office and with other employees was not a violation. The Authority expressed its agreement with the NLRB that 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." *Am. Fed'n of Gov't Employees,* 29 FLRA 1359 (1987); *see Tawas Tube Products, Inc.,* 151 NLRB 46 (1965).

In the same case, however, the Authority acknowledged that a union's ability to enforce discipline is not unlimited. A union may not threaten or discipline a member because the member has filed unfair labor practice charges. *Am. Fed'n of Gov't Employees, AFL-*

CIO, 29 FLRA 1359 (1987); *see also Nat'l Ass'n of Gov't Employees, R5-66*, 17 FLRA 796 (1985); *Overseas Educ. Ass'n*, 15 FLRA 488 (1984); *Am. Fed'n of Gov't Employees, 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). The Authority has found a violation of the Statute where an employee who merely criticized union officials was disciplined in a manner that affected the employee's status as an employee. *Am. Fed'n of Gov't Employees , Local 3475*, 45 FLRA 537 (1992) (union violated Statute by attempting 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 violated Statute by requesting agency to discipline an employee for distributing an open letter critical of the local president).

Unlawful Interference

Section 7116 (b)(1) of the Statute provides 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 . . .*

In determining whether there has been unlawful interference, objective rather than subjective standards are to be used. The test is whether, under the circumstances, the 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. *Am. Fed'n of Gov't Employees, Local 1931, AFL-CIO, Naval Weapons Station Concord, Concord, Cal.*, 34 FLRA 480, 487 (1990).

For example, statements that a grievance would not be processed to arbitration because the employee was not a union member violated Section 7116 (b)(1). *Nat'l Treasury Employees Union*, 38 FLRA 615, 623 (1990). Similarly, 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 violated Section 7116 (b)(1). *Am. Fed'n of Gov't Employees, 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 violated Section 7116 (b)(1). Under the circumstances, the union conveyed the

impression that non-member views did not count. *Nat'l Air Traffic Controllers Ass'n, MEBA/AFL-CIO*, 55 FLRA 601 (1999).

A union violated Section 7116(b)(1) by making statements at an orientation session for new employees that created the impression that employees who were not union members would not receive the same quality of representation in grievances and unfair labor practices as would union members. *Am. Fed'n of Gov't Employees, Local 2437*, 53 FLRA 256 (1997).

Removal of a steward from the union because of testimony in an arbitration case may violate Section 7116(b)(1). *Nat'l Treasury Employees Union*, 6 FLRA 218 (1981). Likewise, expelling an employee from union membership because he filed or caused other employees to file unfair labor practice charges against the union violates the Statute. *Am. Fed'n of Gov't Employees, Local 1857, AFL-CIO*, 44 FLRA 959, 968 (1992).

The Union is accorded great latitude in exercising its rights as the exclusive representative of the unit. All unit employees are entitled to vote in an election to determine whether there is to be union representation. But once a labor organization is chosen as the exclusive representative, the labor organization 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. *Am. Fed'n of Gov't Employees, Local 2000, AFL-CIO*, 14 FLRA 617 (1984). Similarly, a labor organization may limit participation in its meetings to members (*Nat'l Fed'n of Fed. Employees, Local 1827*, 49 FLRA 738, 741 (1994)), and has the right to designate its own representatives. *AFSCME, Local 2910*, 23 FLRA 352 (1986).

Cause or Attempt to Cause Discrimination

Section 7116(b)(2) of the Statute provides 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 . . .*

Where a union goes beyond its own internal process and seeks to interfere in the employee's relationship to the employer, then the union's actions are subject to examination and its motives scrutinized. Where the evidence establishes an unlawful motive – that the union sought to have the employee disciplined because the employee engaged in activity protected by the Statute – the union is found to have violated

Sections 7116(b)(1) and (2). *Am. Fed'n of Gov't Employees, Local 3475,* 45 FLRA 537 (1992).

A union violated Sections 7116(b)(1) and (2) by refusing to help an employee obtain information relative to a grievance and by requesting the employer to discipline the employee allegedly for unlawful use of a ditto machine, where both actions were found to be as a result of the employee's non-membership in the union. *Overseas Educ. Ass'n*, 11 FLRA 377 (1983).

Where a labor organization agreed to agency provisions which allow union members to participate in asbestos testing as an excused absence, while others could participate in the program only on off-duty hours, it violated Sections 7116(b)(1) and (2). *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) of the Statute by entering into and enforcing agreements requiring an employee to obtain, execute 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 . . .*

The Authority has defined the Congressional intent behind Section 7116(b)(3) as being an attempt to protect union members from acts by a labor organization which interfere with the performance of the members' duties as Federal employees, to ensure that: (1) employees will be able to perform their required duties without suffering adverse consequences as a result of their union's actions with respect to the employees' status as members of the union, and (2) the government will be able to perform its business in an effective and efficient manner without interference resulting from actions taken by

unions against their members. *Am. Fed'n of Gov't Employees, Local 1738*, 29 FLRA 178 (1987).

Discrimination in Membership

Section 7116(b)(4) of the Statute provides 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 of the Statute prohibits a union from denying membership or expelling employees from membership for discriminatory reasons, as defined therein.

Refusal to Bargain

Section 7116(b)(5) of the Statute provides 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;*

As more fully discussed previously under Outline Section 6, labor organizations have the same duty under the Statute to approach and participate in the collective bargaining process in good faith as their agency counterparts. A failure to do so represents a violation of Section 7116(b)(5).

Where a union insists to impasse on a subject that is "covered by" an agreement (*Am. Fed'n of Gov't Employees, Local* 3937, 64 FLRA 17 (2009)); or insists to impasse on using a recording device during contract negotiations (*Sport Air Traffic Controllers Organ.*, 52 FLRA 339 (1996)) bad faith bargaining will be found in violation of Section 7116(b)(5) of the Statute.

A refusal by the union to sign an agreement which embodied agreed upon terms reached by the parties in negotiations is also bad faith bargaining. *Dep't of Def., Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 40 FLRA 1211, 1218 (1991).

Where a union negotiator possessed apparent authority to bind the union in negotiations, absent agreement to the contrary, the union may not insist that an agreement reached in bargaining is subject to approval by higher-level union officials. The union was required to sign a written memorandum of understanding embodying the agreed-upon terms. *Nat'l Council of SSA Field Operations Locals - Council 220, Am. Fed'n of Gov't Employees,* 21 FLRA 319 (1986).

Refusal by a union to negotiate over the scope of the grievance procedure, which is a mandatory subject of bargaining, is a violation of Section 7116 (b)(5). *Am. Fed'n of Gov't Employees, Local 3723,* 9 FLRA 744 (1982).

When a party, including a labor organization, repudiates a memorandum of understanding or an agreement in its entirety, such conduct is violative of the Statute. *Am. Fed'n of Gov't Employees,* 21 FLRA 986 (1986). Likewise, a union violates Section 7116(b)(1) and (5) by repudiating a settlement agreement negotiated with the agency in settlement of a grievance. *Am. Fed'n of Gov't Employees, Local 1923,* 20 FLRA 749 (1985).

However, the union did not repudiate the negotiated agreement by refusing to pay arbitration costs where the union had entered into an agreement with the employee and the arbitrator that the employee would pay the cost of the arbitration (*Am. Fed'n of Gov't Employees, 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 (*Am. Fed'n of Gov't Employees, Local 1909, Fort Jackson, S.C.*, 41 FLRA 18 (1991)).

Refusal to Cooperate in Impasse Procedures

Section 7116(b)(6) of the Statute provides 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 imposes upon a labor organization a similar duty as that applied to agencies under Section 7116(a)(6) (*See Outline Section 10*) .

While a union may challenge an order of the Federal Service Impasses Panel in an unfair labor practice proceeding, it will violate Section 7116(b)(6) of the Statute if said order is deemed proper and the union refuses to comply with the order. *Am. Fed'n of Gov't Employees, Local 3732*, 16 FLRA 318 (1984).

Strike, Work Stoppage or Slowdown

Section 7116(b)(7) of the Statute provides 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 . . .*

By calling, participating in, and condoning a strike at FAA facilities, PATCO was found to be in violation of Section 7116(b)(7)(A) and also to have 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).

When 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, the incident was found to be a work stoppage within the meaning of the Executive Order which preceded the Statute, rather than an acceptable method of presenting a grievance. *Am. Fed'n of Gov't Employees, Local* 3369, 4 FLRA 126 (1980).

Since picketing is an unfair labor practice only if it interferes with an agency's operations it must be determined in each case whether the picketing actually caused "interference." The focus of the inquiry must be whether the inconvenience or disturbance to particular agency operations resulting from the picketing constitutes an unfair labor practice. The picketing in each case must be considered in terms of such factors as the government interest involved, the sensitivity of the function and its purpose, the location of the picketed operation, the duration of the picketing, and the number and conduct of the picketers. *Am. Fed'n of Gov't Employees, 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 provides that it is an unfair labor practice for a union:

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

The solicitation of union membership or conduct of other internal union business while the employees are on duty is a violation of Section 7116 (b)(8). *Am. Fed'n of Gov't Employees, Local 987*, 37 FLRA 119 (1990); *SEIU, Local 556,* 17 FLRA 862 (1985).

The unilateral refusal by a union to proceed to arbitration of agency filed grievances is a violation of Section 7116(b)(8). *Am. Fed'n of Gov't Employees, 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, including ordering an agency or labor organization to:

1. Cease and desist from the unfair labor practice conduct
2. Renegotiate a collective bargaining agreement consistent with its order and giving 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

The Authority issues a remedial order in every case in which an unfair labor practice is found. *F.E. Warren AFB, Cheyenne, Wyo.*, 52 FLRA 149, 161 (1996) (*F.E. Warren*). The essential purposes of a remedy in an unfair labor practice case are to restore, as far as possible, the status quo that would have obtained but for the wrongful act 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).

The Authority has distinguished traditional from nontraditional remedies. *F.E. Warren,* 52 FLRA at 160-61. The Authority may provide a nontraditional remedy when traditional remedies are determined to be inadequate. *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). Whether a nontraditional remedy will be provided depends on whether it is reasonably necessary and would be effective to recreate the conditions and relationships with which the unfair labor practice interfered, as well as effectuate the policies of the Statute. *Id.*

The two traditional remedies provided in every case require a Respondent to: cease and desist from engaging in conduct like that is found in a case to be in violation of the Statute; and to post, for 60 days, in areas described by the Authority, a hard copy of a Notice to Employees signed by a Charged Party representative identified by the Authority. *F.E. Warren,* 52 FLRA at 160-61 (1996) (*F.E. Warren*). Additional affirmative remedies, both traditional and nontraditional, are provided for specific categories of unfair labor practices, as described below.

Unilateral Change

The most effective traditional remedy to recreate the conditions that existed before a change was unlawfully implemented is status quo ante relief. In addition, the availability of such a remedy provides a disincentive to agencies to implement changes in working conditions without first fulfilling statutory bargaining obligations. *FDIC v. FLRA*, 977 F.2d 1493, 1498 (D.C. Cir. 1992).

In a unilateral change case in which bargaining over the changed condition of employment is mandatory, status quo ante relief will be provided absent special circumstances. *Fed. Deposit Ins. Corp., Wash., D.C., Fed. Deposit Ins. Corp., 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).

In unilateral change cases in which the duty to bargain is limited to implementation procedures and appropriate arrangements for adversely affected employees, the following factors are considered in deciding 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 conduct in failing to discharge its bargaining obligation; (4) the nature and extent of the change's adverse 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) (*FCI*). 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 would be caused by the remedy. *FCI*, 8 FLRA at 606.

Another traditional remedy in unilateral change cases is an order to bargain and apply the agreement reached retroactive to the date the change was made. *F.E. Warren,* 52 FLRA at 160-61; *Dep't of Veterans Affairs Med. Ctr., Asheville, NC*, 51 FLRA 1572, 1580 (1996). This remedy frequently has been provided when status quo ante relief

has been determined to be 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 could not be ascertained, *e.g., Fed. Deposit Ins. Corp., Wash, D.C.,* 48 FLRA 313, 330-331 (1993), *petition. for review denied sub nom. FDIC v. FLRA*, No. 93-1694 (D.C. Cir. 1994). By requiring retroactive application of an agreement, the remedy "approximate[s] the situation that would have existed had the respondent fulfilled its statutory obligations." *Id.*

The Authority also orders employees to be made whole for harm suffered as the result of an unlawful unilateral change in their conditions of employment. The harm may be nonmonetary. *U.S. Dep't of Justice, Executive Office for Immigration Review, Bd. of Immigration Appeals*, 55 FLRA 454, 457 (1999) (restoration of annual leave).

Employees also may suffer monetary harm as a result of a unilateral change unfair labor practice. When employees suffer monetary harm, the doctrine of sovereign immunity may preclude monetary relief. The United States is immune from liability for money damages unless sovereign immunity is waived unequivocally. *Immigration & Naturalization Serv., Los Angeles Dist., Los Angeles, Cal.*, 52 FLRA 103, 104 (1996). The Statute does not include such a waiver. *Id*. at 105. The Back Pay Act, 5 U.S.C. §§ 5595-5597, however, does include a waiver of sovereign immunity. Under that Act, an employee affected by an unjustified or unwarranted personnel action may obtain monetary relief for the withdrawal or reduction in pay, allowances or differentials, resulting from that action. Pursuant to 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 provides for the payment of interest. *Fed. Aviation Admin.*, 55 FLRA 1271, 1276-77 (2000).

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, the Authority has determined that a requirement that an agency reduce parking rates for unit employees for a period of time to offset their added parking costs resulting from an unlawful unilateral change is equitable in nature. *U.S. Dep't of Veterans Affairs*, 55 FLRA 1213, 1216 (2000).

Bargaining in Bad Faith

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 affirmative 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); *Am. Fed. of Gov't Employees, Local 3937, AFL-CIO*, 64 FLRA 17 (2009) (union violation). A nontraditional remedy could be the extension of the union's certification year, which protects the union against a challenge from another union, for an additional period of

time. *United States Geological Survey, Caribbean Dist. Office, San Juan, P.R.*, 53 FLRA 1006, 1015-1022 (1997).

Discrimination Based on Protected Activity

The remedies provided in a case involving a violation of section 7116 (a)(2) or 7116 (a)(4) of the Statute 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 an Agreement and Repudiation of an Agreement

The remedy for a party's failure to comply with a request by the other party to execute (sign) an agreement the parties reached is an affirmative order to execute the agreement. *U. S. Dep't of Transp., Fed. Aviation Admin., 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).

The remedy for repudiation of all or some of the terms of a negotiated agreement is an affirmative 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

Where there has been a denial of representation rights under Section 7114(a)(2)(B) of the Statute, and an employee has been disciplined, the Authority orders the agency, upon request of the union and the employee, to repeat the investigatory examination and to afford the employee full rights of 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 further ordered to reconsider the discipline after repeating the investigatory examination. *Id.* If the discipline is then reduced or rescinded entirely, the employee must be made whole. *Id.* Finally, the agency is required to notify the employee of the results of the reconsideration and, if the discipline is not rescinded entirely, afford the employee grievance and appeal rights under the applicable collective bargaining agreement and external law or regulation. *Id.*

Formal Discussion

Where there has been a denial of representation rights under section 7114(a)(2)(A) of the Statute, the Authority affirmatively orders the agency to provide prior notice to the union and the opportunity to be represented at any formal discussion. *Fed. Aviation Admin., Airways Facilities Div., Nw. Mountain Region, Renton, Wash.*, 60 FLRA 819, 821-22 (2005).

Duty to Furnish Data

If an Agency has failed to comply with section 7114(b)(4) of the Statute by failing to provide information requested by a union, the Authority affirmatively orders the agency to provide the information. *FAA*, 55 FLRA 254, 261 (1999). The Authority has also found that the later furnishing of the information by an agency does not alter the fact that it violated the Statue when it denied the union's request. *SSA,* 64 FLRA 293, 297 (2009). Likewise, a claim that the union should no longer need the data due to an intervening event (grievance was resolved or the union went to arbitration without the data) does not affect the union's entitlement to a remedial order. *Bureau of Indian Affairs, Uintah & Ouray Area Office, Ft. Duchesne, Utah,* 52 FLRA 629, 640 (1996).

The Authority may provide a nontraditional remedy of prohibiting an agency from raising a timeliness issue in connection with a grievance or arbitration where the agency unlawfully failed to provide information the union requested in order to make an informed decision as to whether to file a grievance. *Health Care Fin. Admin.*, 56 FLRA 503, 507 (2000). The Authority found this remedy effectively recreated the conditions that would have existed but for the violation of the Statute.

Failure to Withhold Union Dues

An agency that fails to process a bargaining unit employee's dues withholding request, or unlawfully ceases withholding dues, is ordered to remit to 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). The remedy for a union's failure to comply with Section 7115 is an affirmative order to process an employee's request to withhold or cease withholding dues, or to request that the agency initiate, reinstate, or cease withholding of dues. *Fed. Employees Metal Trades Council, AFL-CIO, Mare Island Naval Station*, 47 FLRA 1289, 1295 (1993).

Failure to Comply With an Arbitration Award

Section 7122 (a) of the Statute sets forth the procedure to follow if a party wishes to file exceptions to an arbitration award with the Authority. When no timely exceptions are filed or when timely exceptions are denied by the Authority, 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 will order 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

If an agency refuses to grant official time required by Section 7131(a) or 7131(c) of the Statute, the Authority orders the agency to restore any annual leave that was used in lieu of the official time that was requested. *Dep't of the Navy, Naval Weapons Station, Yorktown, Va.*, 55 FLRA 1112, 1114-15 (1999).

Union Duty of Fair Representation

Duty of fair representation violations are remedied by an affirmative order that the union fairly represent all unit employees. *Am. Fed. of Gov't Employees, Local 3615,* 53 FLRA 1374, 1376 (1998). Where such a violation resulted in an action causing employees to be denied benefits, the Authority has ordered the union to take affirmative steps to rescind the action and to make employees whole for their monetary losses as if there had been no violation. *Nat'l Fed'n of Fed. Employees, Local 1827*, 49 FLRA 738, 748-50 (1994).

Signing, Posting and Distributing Notices

As previously noted, a traditional remedy in unfair labor practice cases includes the posting of a Notice to Employees or Members by the appropriate respondent in the case. A notice serves two purposes. First, it provides evidence to employees that their rights under the Statute will be vigorously enforced. Second, it indicates to employees that a respondent recognizes and intends to fulfill its obligations under 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, Internal Revenue Serv., Wash., D.C.*, 61 FLRA 146, 152 (2005).

The Authority considers those two purposes when deciding how broadly a Notice must be posted. In a case when a unilateral change was made by management in one directorate and only unit employees in that directorate were 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). However, in a case where a union was not given advance notice of formal discussions with bargaining unit employees at a field office but the meetings had been directed and coordinated by the agency's regional level management, a wider area of posting will be required. *SSA, Office of Hearing & Appeals, Boston Reg'l Office, Boston, Mass.*, 60 FLRA 105 (2004). Similarly, the Authority has ordered a posting wherever bargaining unit employees were located in a case involving discipline of a single employee in violation of section 7116 (a)(2) of the Statute. In that case, the disciplined employee was the president of the union representing the entire unit, the discipline was imposed because the president had filed unfair labor practice charges, and the letter of discipline was signed by an agency official higher than management at the local level. *Nat'l Park Serv.*, 54 FLRA 940, 947 (1998).

When an agency violates the Statute, the Authority requires notices to be posted in hard copy on all agency bulletin boards and other locations where notices to employees customarily are posted. Where the Authority determines that such postings will not fully satisfy the purposes of a notice, or the broader remedial purposes described above, the Authority has ordered nontraditional methods of distribution. In *United States Penitentiary, Florence, Colo.*, 53 FLRA 1393, 1394 (1998), where the agency continually committed violations similar in nature and an unusually large number of employees witnessed the violations, the Authority ordered the agency to distribute the notice to all supervisors, managers and employees.

In another case, the Authority ordered the nontraditional remedy of having the activity convene a meeting of all bargaining unit employees, and having the head of the activity or an Authority Agent read the notice aloud at the meeting. *U.S. Penitentiary, Leavenworth, Kan.*, 55 FLRA 704, 719 (1999). The Authority provided that remedy because the activity, through its head, engaged in a pattern over several months of making threatening, anti-union statements, including at mandatory all-employee meetings, as well as repeatedly threatening to take action against union officials.

In a recent decision by an Administrative Law Judge in *Department of Homeland Security, U.S. Customs & Border Prot., El Paso, Texas*, (OALJ 10-03, Jan. 27, 2010, Case Nos. DA-CA-08-0179 and DA-CA-08-0180, no exceptions filed) an agency was ordered to use email to send a remedial Notice to employees in addition to posting on bulletin boards. Specifically, the ALJ found that the agency primarily uses email to communicate with its employees and employees do not routinely look to bulletins boards to view documents posted py the agency. Under these circumstances, a traditional posting was not adequate. *Cf. U. S. Dep't of Justice, Fed. Bureau of Justice, Fed. Corr. Inst., Florence, Colo.*, 59 FLRA 165, 173-74 (2003) (record did not support ordering agency to post notice on its television monitors and over its electronic mail system).

In cases involving violations of the Statute committed by a union, the Authority orders the union to post the notice at its business offices and other locations where it normally posts notices, and to provide a signed copy of the notice to management so it can post

the notice in conspicuous places where affected employees are located. *Nat'l Ass'n of Air Traffic Specialists, Macon, Ga.*, 59 FLRA 261, 263 (2003).

The Authority orders that a Notice be signed by the highest official of the agency or activity, or union representative, responsible for the violation of the Statute. *SSA*, 64 FLRA 293, 297 (2009); *Dep't of Health & Human Serv., 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).

EXAMPLES OF *DE MINIMIS* AND MORE THAN *DE MINIMIS* CHANGES

Examples of *De Minimis* Changes

1. **Procedures for Employee Feedback:** *Dep't of the Treasury, Internal Revenue Serv. and Nat'l Treasury Employees Union*, 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. The Arbitrator found and the Authority upheld the finding that the change was *de minimis*, reasoning that 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 and focus on "employee engagement" did not change employees' conditions of employment in a manner that was greater than *de minimis*.

2. **Procedures for Assigning Work & Duties/Tasks:** *Nat'l Treasury Employees Union*, 64 FLRA 462 (1010). The Agency revised certain provisions in its Internal Revenue Manual. Pursuant to the revisions Revenue Officers (ROs) were required to perform in-office duties for others as well as themselves on a rotating basis, as well as to take certain procedures before initiating a contact with a taxpayer. The Authority upheld the Arbitrator's finding that 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, and the pre-contact procedures had a *de minimis* effect because there was little evidence that they resulted in additional 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 transported to a nearby station for processing. Prior to the order, agency policy was that each border station processed the aliens it arrested. The Authority found that the change in policy was *de minimis*, reasoning that the change did not involve the assignment of either new duties, or duties that were not previously performed; the agency had taken measures to manage the additional processing workload; and concerns for exposure to disease, risk of assault by aliens, and other such risks were an inherent 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 restricted Customs Inspectors from performing in-

stream/midstream boarding of vessels only when authorized and only in extraordinary circumstances. Previously, Customs Inspectors regularly boarded vessels in-stream/midstream. The General Counsel argued that the order effectively removed a duty from the job function of customs inspectors and the ability to earn overtime. The Authority held that the change was *de minimis*, reasoning that preference for in-stream/midstream boarding as a means to make overtime was largely a matter of personal preference, it was not reasonably foreseeable that the restriction on in-stream/midstream boarding would result in a drop in the amount of overtime compensation available, and the loss of opportunity to perform the function would not deprive the Customs Inspectors of skills and experience needed for their profession.

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. The Authority found that while the ALJs, at times, had to park in different spaces as a result of the change, the ALJs continued to have access to parking at their place of employment; they continued to not have to pay for parking; they did not lose their "in and out" privileges; they had no difficulty in finding spaces in which to park; and there was nothing in the record that there would be any additional reasonably foreseeable effect at the time of the change. The Authority held that the change was *de minimis*.

6. **Procedures for Organization of Files:** *SSA, Office of Hearings and Appeals, Nashville, Tenn.*, 58 FLRA 363 (2003). The Social Security Administration instituted a new procedure whereby Administrative Law Judges would receive On the Record (OTR) case files that that were not "marked up,"—which is a file that is organized into various folders, with marked exhibits, an exhibit list, and page numbers. Previously, all of the case files the ALJs received were "marked up." The Authority upheld the finding of the Judge that the impact of the change on conditions of employment was not more than *de minimis* because "marking-up" a file was *merely* one method of identifying and locating documents and Senior Staff Attorneys did identify relevant documents in OTR files prior to forwarding the files to an ALJ.

7. **Relocation:** *GSA, Region 9, San Francisco, Cal.*, 52 FLRA 1107 (1997). An employee was temporarily moved to another building after the Union complained that she was unable to properly prepare for an EEO hearing due to a lack of 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 perform her work. The Authority found that the changes were minor and the normal consequences of any office relocation that could be handled through administrative channels. Furthermore, equitable considerations supported a conclusion that the effect of the move was *de minimis* as the move was temporary and in response to a request from the Union that she be relocated.

8. **Reorganization:** *Portsmouth Naval Shipyard, Portsmouth, N.H*, 45 FLRA 574 (1992). The Agency discontinued using unit employees to provide recertification training to other unit employees. The Union's principal concern with cancelling the recertification training was that the trainers would be more vulnerable to inclusion in a forthcoming reduction-in-force. The Authority found that there was no indication that any reduction in the number of trainers would be required and thus, it was not reasonably foreseeable that the cancellation of recertification training increased the vulnerability of the trainers. Accordingly, the change was *de minimis*.

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, whereby each CR and each CDC was assigned a specific portion of the alphabet of claimants to service; as such, each CR overlapped with a corresponding CDC in the cases each one handled. The Authority found that the only impact of the change in the alphabetical assignment was that different CRs and CDCs would be required to work with each other. Noting that there had been no showing that, apart from employees' personal preferences, the employees' accomplishment of their work depended in any way on the nature of their personal relationships, the Authority held that the effect of the change in the alphabetical assignment system was not sufficient to establish that the effects of the change were more than *de minimis*.

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. The Authority noted that even though failure to perform the function of typing correspondence at a satisfactory level could result in the withholding of within-grade increases and bonuses or adverse action, the impact of the change was *de minimis* because the typing function only required about 10% to 20% of her time each day, her former duties were proportionately reduced, she was not required 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 opportunities for promotion remained 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. The Authority upheld the Judge's decision that the change was *de minimis*. In reaching this conclusion the Judge noted that the new location was less than one minute away from the former lot, the CEOs did not lose opportunities to make seizures and earn points towards their performance appraisals, and while the CEOs were working exclusively on trucks in the new lot as opposed to both cars and trucks in the former lot, the distinction 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 previously worked in after only three months

because of a decrease in work in her current unit. The Authority held that the change was *de minimis*, reasoning that the employee had only worked in the unit she was leaving for three months, the reassignment did not involve a loss in pay or grade, the reassignment did not change her hours, and the duties of the two positions were substantially similar. Furthermore, the reassignment did not have any effect on the employees in the unit she was leaving because the reassignment was directed as a result of a decrease in workload.

Examples of Changes More Than *De Minimis*

13. **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 conduct training sessions and store training equipment. As a result of the move to a new office, the employee was unable to effectively communicate training information to other employees because the computer, telephone, and fax machine at his new office were not functional for two weeks following the move. Furthermore, because of the loss of the training space, the employee was not able to conduct face-to-face training and he became strained for storage in his office because of the space the training materials took up. The Authority found that the order to relocate had an adverse effect on the employee's ability to perform his training duties and that the changes in his conditions of employment resulting from the order were more than *de minimis.*

14. **Duties/Tasks:** *United States Dep't of the Air Force, 355th MSG/CC, Davis-Monthan AFB, Ariz.*, 64 FLRA 85 (2009). An employee working as a taxi driver was assigned the task of performing daily security checks on the grounds of the base in addition to his normal job responsibilities. The Authority held that the new assignment constituted a change in conditions of employment that was more than *de minimis*, reasoning that it required him to undergo training for eight days, drive over rougher terrain, exercise higher degrees of discretion and independent judgment than he previously used, and electronically prepare daily and monthly written reports on a permanent basis.

15. **Leave:** *United States Dep't of the Treasury, Internal Revenue Serv.,* 62 FLRA 411 (2008). The Agency ended a past practice of granting employees four hours of administrative leave to attend Employee Appreciation Day each year. The Authority found that 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," and thus, ending the practice had more than a *de minimis* effect on bargaining unit employees' conditions of employment.

16. **Reorganization:** *United States Gen. Servs. Admin.,* 62 FLRA 341 (2008). The Agency decided to terminate all rotational assignments in its office in Puerto Rico. As a result of the decision, employees were no longer able to send their children to a school system run by the Department of Defense as availability was limited to "to the 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, terminating rotational assignments did not change the employees' chance of rotating to another office; however, 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.

17. **Training:** *Am. Fed'n of Gov't Employees, 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 provided to 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*. The Court reasoned that at least one officer became eligible for termination because of his deficiency in firearms training, the policy change drastically reduced every probationary officer's ability to remedy a firearms deficiency—increasing the likelihood of termination—and no equivalent training program for firearms was implemented.

18. **Reorganization:** *United States Dep't of Veterans Affairs Med. Ctr., Leavenworth, Kan.*, 60 FLRA 315 (2004). Two nurses were reassigned to a different unit. The unit the nurses were originally assigned to was open on the weekends, giving them the opportunity to earn a pay differential and overtime; however, the unit they were reassigned to was closed on the weekends. The Authority noted that while the nurses were not guaranteed weekend hours in the original unit, the lost opportunity to earn pay differential and overtime was reasonably foreseeable to the agency when the reassignment was made. Accordingly, the reassignment was more than *de minimis*.

19. **Reorganization & Relocation:** *Pension Benefit Guaranty Corp.*, 59 FLRA 48 (2003). The Pension Benefit Guaranty Corporation ordered the reassignment and relocation of employees. The Authority held the effects were greater than *de minimis*, finding that 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. Additionally, the Authority held that the effect of the office relocation was greater than *de minimis*, finding that it was

reasonably foreseeable that the employees would lose access to a window and have smaller office spaces within which to work.

20. **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 assume shift supervisor duties in the absence of shift supervisors. The Authority found that 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. *The Authority held* that the effect of the change in lead guard duties was more than *de minimis*.

21. **Relocation:** *U.S. Dep't of the Treasury, Internal Revenue Serv.*, 56 FLRA 906 (2000). The Agency moved nine bargaining unit employees from the ninth to the third floor. The ALJ found and the Authority upheld the decision that the change was more than *de minimis*, noting that several problems occurred with the move itself—including some computers being inoperable and the denial of security access to retrieve computer files—and one employee was originally denied storage cabinets to replace the storage cabinets that she lost in the move.

22. **Certification & Training:** *U.S. Dep't of Justice, Immigration and Naturalization Serv.*, *Wash., D.C.*, 55 FLRA 93 (1999). The Immigration and Naturalization Service adopted a "side-handle baton" as a standard intermediate use-of-force weapon for Border Patrol Agents and instituted a mandatory training program for use of the weapon. Previously, a "straight baton" was optional equipment for the agents. The Authority upheld the decision of the ALJ that the side-handle baton training program had a foreseeable impact on unit employees that was more than *de minimis*, noting that the program had mandatory certification and refresher training requirements, failure to satisfactorily complete the initial certification or the recertification course would lead to withdrawing authorization to carry the side-handle baton, and failure to properly use the side-handle baton could result in disciplinary action.

23. **Job Status & Benefits:** *Air Force Materiel Command*, 54 FLRA 914 (1998). The Air Force Materiel Command decided to offer voluntary separation incentive pay (VSIP) to employees so that their vacated positions could be offered to interns. The Authority held that the VSIP program had more than a *de minimis* effect on bargaining unit employees' conditions of employment, reasoning that the decision whether or not to accept a VSIP had an effect on employees present and future job status as well as their benefits and compensation.

24. **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). To perform the new duties the CRs had to spend an average of 10 minutes on 1 to 2 cases each day. Furthermore, the CRs had never

performed the new duties. The Authority found that the reassignment had more than a *de minimis* effect on the employees' conditions of employment.

25. **Duties/Tasks:** *SSA, Gilroy Branch Office, Gilroy, Cal.*, 53 FLRA 1358 (1998). The Gilroy Branch of the Social Security Administration began requiring Claims Representatives (CRs) to conduct six claim interviews on Friday, where previously Fridays had been used for adjudication work on claims that had been conducted previously. The Judge found that the loss of adjudication time resulted in increases in voluntary overtime and impacted the CRs' ability to manage and control their workload, and the change also affected the CRs' Friday lunch periods as well as the manner in which they scheduled planned leave. Furthermore, it was reasonably foreseeable that the change would add a significant number of appointments to the CRs' workload. The Authority upheld the Judge's finding that the effect of the change on unit employees' working conditions was more than *de minimis.*

26. **Equipment:** *GSA, Nat'l Capital Region, Fed. Prot. Serv. Div., Wash., D.C.*, 52 FLRA 563 (1996). The Agency terminated its practice of permitting police officers to transport their weapons between home and work and, in lieu thereof, required officers to return their weapons to a work location at the end of their shifts and pick up the weapons there at the beginning of the next shift. *The Authority found that the* return of the weapon would vary from 2 to 90 minutes per shift, depending on the officer's place in line to return the weapon. The Authority held the effect of the change on the officers' conditions of employment was more than *de minimis*.

27. **Procedures for Performance Appraisal:** *United States Equal Employment Opportunity Comm'n, Wash., D.C.*, 48 FLRA 306 (1993). The Agency revised its performance appraisal system. Prior to the revision in policy, employees were given "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. The Authority found that it was reasonably foreseeable that there could be a considerable difference in the duration of periods allowed for improvement after the new policy took effect, and that this change would affect the ability of employees to show the improvement necessary to correct deficiencies in their work performance. Accordingly, the Authority found that the change was more than *de minimis*.

28. **Tour of Duty (Daily):** *Veterans Admin. Med. Ctr., Phoenix, Ariz.*, 47 FLRA 419 (1993). The Agency changed an employee's daily tour of duty when it required the employee to start and end one hour later, causing him to be unable to report to a second job. The Authority found that the one-hour change was more than *de minimis*, concluding that it was reasonably foreseeable that the change in the employee's hours would affect the employee's outside activities and impair his ability to satisfy prior commitments. The Authority noted that it was irrelevant that the change affected only one employee and that the effect of the change was experienced outside of the workplace of the agency.

29. **Reorganization:** *Immigration and Naturalization Serv., Border Patrol Del Rio, Tex.*, 47 FLRA 225 (1993). The Agency shut down an organizational unit because there was a declining amount of work to do in the unit. The Authority held that even though there were only 1 to 2 bargaining unit employees working in the unit and the work in the unit was declining, the change had a more than *de minimis* effect on the employees who were or would have been assigned to the unit. The record supported the finding that 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 an opportunity to perform the specialized work available in the unit, which could have an effect on performance ratings.

30. **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. The Authority held that 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 clearly has more than a *de minimis* effect on the employee's working conditions as it will disrupt responsibilities and commitments that the employee has made predicated on the previously scheduled days off and the effect is reasonably foreseeable at the time the agency makes the change.

31. **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 off-site parking was not secured, except for a parking attendant, and it was .7 miles from the facility, a 15-minute walk. Accordingly, the Authority found that the change had more than a *de minimis* effect on the employees.

32. **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 2 hours and their departure times for up to 2 and one-half hours for week-long periods throughout the year on a rotating basis in order to keep all offices open from 6:30 a.m. to 5:30 p.m. Previously, under a flextime program, employees were not restricted in their choice of arrival or departure time. The Authority found that the change was more than *de minimis*.

33. **Procedures for Assigning Work & Reorganization:** *HHS, SSA, Baltimore, Md.*, 41 FLRA 1309 (1991). The Agency instituted a reorganization plan. Prior to the reorganization, a log was maintained to equalize the distribution of interviews assigned to Claims Representatives (CRs) based on difficulty; however, following the change, work was to be distributed with no consideration given to the type of claim that was being assigned. Furthermore, the reorganization eliminated a teleclaims unit and incorporated the work into a preexisting walk-in claims unit. The Authority held that because the reorganization plan changed the previous method of

equalizing the claims assigned to employees and required all CRs to handle teleclaims in addition to walk-in claims, the change was more than *de minimis*.

34. **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 Authority held that the change to non-pay status had more than a *de minimis* effect on employees, reasoning that the change resulted in the on-call employees' loss of compensation, unearned service credit, and benefit costs and the loss of compensation.

35. **Equipment:** *Justice, Immigration and Naturalization Serv., Border Patrol, El Paso, Tex.*, 39 FLRA 1325 (1991). The Agency stopped paying for Border Patrol agents to have their vehicles cleaned twice a month and when the vehicle underwent scheduled maintenance. The Authority found that because the vehicles were driven over unpaved dirt roads and thus exposed to large amounts of dirt and dust, the nature and extent and the reasonably foreseeable effects of not paying for the cleaning of vehicles was more than *de minimis*.

36. **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 provided assistance with problems relating to drug and alcohol abuse. Previously, the EAP provided in-house assessment and referral services as well as assigned peer counselors to provide follow-up support. After the EAP was contracted out, employees were required to seek assistance by calling a toll-free telephone number, sometimes help was not always available immediately, and peer counselors were not assigned to new clients to provide follow-up support. The Authority held that the nature and extent of the effects and the foreseeable effects of the changes in the EAP services on bargaining unit employees were more than *de minimis*.

37. **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 attempting to conduct an audit, investigation, survey, or evaluation, and subjected employees to discipline for failing to do so. The Authority found that the directive assigned additional duties to the employees with respect to audits, investigations, surveys, and evaluations conducted by other agencies and subjected employees to expanded discipline for failing to perform those duties and therefore, constituted a change in their conditions of employment that was more than *de minimis*.

38. **Relocation:** *HHS.SSA, Baltimore, Md.*, 36 FLRA 655 (1990). The Agency changed the seating assignments of bargaining unit employees. The Authority noted that while the effect of the change in seating assignments on employees' working relationships does not establish that the impact of the changes was more than *de minimis*, other effects of the change, including the move of one-fourth of all unit employees and one employee’s loss of access to a window, were sufficient to

support the conclusion that the changes in seating arrangements were more than *de minimis*.

39. **Breaks:** *HHS, SSA, Baltimore, Md.*, 34 FLRA 765 (1990). The Agency changed its break policy, specifically the notification requirements. 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 when taking a break at other than their scheduled break period and to provide a reason. Failure to comply with the break policy could result in disciplinary actions and being considered AWOL. Prior to the change in policy, the CRs could take their breaks when they chose and non-CRs did not have to provide a reason to their supervisor for the changed break time and the requirement was not strictly enforced. The Authority held that the new break notification requirements changed conditions of employment and that the change in break policy was more than *de minimis*.

40. **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. Prior to the change in workflow procedures, all duties were performed at the representative's assigned work-desk and the work-day was a mix of interviewing claimants, working on the adjudication of claims and other case processing work from this location; however, after the change employees could expect to be assigned to an entire day of interviewing or an entire day of non-interviewing duties. The revised floor plan affected how interviewing assignments were made to individual employees, the scheduling and duration of the assignments, reliefs, and responsibility for keeping interview desks fully equipped with forms as well as matters involving heating, lighting, ventilation, safety, noise, security and work interruption and inconvenience during construction. Accordingly, the Authority upheld the ALJ's findings that the change was more than *de minimis*.

41. **Reorganization:** *HHS, Family Support Admin.*, 30 FLRA 346 (1987). The Agency created a Work Programs Division within 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 needed to be performed in work programs; however, as part of the reassignment several of the employees were required to perform different work under different supervision, to undergo training, and to engage in travel. The Authority upheld the ALJ's finding that the reassignment of the employees had the potential to (1) affect their career and promotional opportunities, and (2) adversely affect their performance ratings. Furthermore, the Authority distinguished the case from *Dep't of HHS, SSA*, 24 FLRA 403, 405-08 (1986) (*SSA*), noting that like the employees in *SSA*, the employees in this case were not asked to perform duties outside of their official position descriptions, but 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.

42. **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 inspection of vehicles. Prior to the prohibition, the Agency had banned parking in the lot during special operations; however, the bans had always been lifted at the conclusion of the special operation. The Authority upheld the Judge's decision that continuing the parking prohibition past the time that it was actively used for the special operation was more than a *de minimis* change.

43. **Reorganization:** *Customs Serv., Wash., D.C.*, 29 FLRA 307 (1987). The Agency reassigned Customs Inspectors on a voluntary basis to a detail not to exceed 120 days. The Authority upheld the Judge's finding that the reassignment of the customs inspectors to the detail had a substantial impact on those customs inspectors that were selected as well as those not selected for the detail. The Customs Inspectors assigned to the detail were subjected to changing shifts as opposed to an assigned shift for an entire month and also deleted from the overtime pool. Those not assigned to the detail were subjected to greater overtime obligations, forfeiture of scheduled days off due to the depletion of the number of customs inspectors in the unit, and were put at a disadvantage in the area of promotion.

44. **Relocation:** *Internal Revenue Serv., Wash., D.C.*, 27 FLRA 664 (1987). For a period of sixty days 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. Furthermore, the reassignment altered the work schedules and lunch breaks; at their permanent posts in Denver they were on flexible hours with 45 minutes for lunch; but 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 Authority found that the actual impact and the reasonably foreseeable impact of the reassignment on the employees was more than *de minimis*.

45. **Duties/Tasks:** *HSS, SSA*, 26 FLRA 344 (1987). The Agency implemented a study to review samples of the benefits being paid to claimants under the Social Security and Supplemental Security Income programs. The Authority held that the effects of implementing the study were more than *de minimis*, noting that the study was to last for at least a year, it required the Quality Review Analysts (QRAs) to collect and record additional 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.

46. **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 Authority found that the nature and extent and the reasonably foreseeable effect of installing the third degreaser was more than *de minimis*. The Authority based its conclusion on the fact that it was reasonable to expect that the agency was knowledgeable of conditions in the work environment that could produce health hazards for employees associated with the operation of a degreaser, and the

literature supported the finding that conditions existing at the time of installation of the degreaser could produce health hazards for employees working near a degreaser.

47. **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 permitted to perform general medical and minor surgical procedures; whereas, their former privileges allowed them to perform in areas of surgical specialty. The Authority found that the change in clinical privileges had a significant effect on the two physicians' professional well-being and on their professional credentials, noting that the change was permanent and the physicians suffered limitations in their future assignments and in their retention standing at the hospital.

48. **Relocation:** *Environmental Prot. Agency*, 25 FLRA 787 (1987). The Agency relocated twelve employees and reconfigured their working space. The authority held that the change was more than *de minimis*, noting that even though the move was a short distance, the offices the employees moved into were smaller, the available space for storing files was much less, and there was much more noise in the new location.

49. **Certification:** *Army and Air Force Exch. Serv.*, 25 FLRA 740 (1987). The Agency expanded the class of employees whose driving records were verified. Prior to the expansion, only the records of the drivers that operated “over-the-road” vehicles were verified; whereas, the expanded class included all employees. The Authority agreed with the Judge that the change was more than *de minimis*, noting that the expanded policy led to the discipline of two employees.

50. **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. Prior to the moratorium temporary promotions had been used in some situations, but promotions were normally given on a permanent basis. The Authority held that the moratorium on permanent promotion was more than a *de minimis* change. The Authority reasoned that 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.

51. **Reorganization:** *Internal Revenue Serv.*, 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 Authority found that it was reasonable to conclude that the program could have a foreseeable impact on the workload of remaining employees as well as on the selected employees' ability to perform their duties upon return to

their bargaining unit positions. Accordingly, the Authority held that the change was more than *de minimis*.

52. **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 Authority held the change was more than *de minimis*, noting that the administrative duties required them to perform new tasks or ones they had only performed on an infrequent basis, and the new duties could decrease the time the employees had to accomplish their normal inspection duties.

53. **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 in proximity to the patient-care area. The Authority held that the change was more than *de minimis*, relying on the finding that the change of location of the break room disrupted the work routine of the nurses and made the performance of their duties less efficient. Being farther 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 an emergency situation should arise.