**OOC BROWN BAG LUNCH SERIES**
**UNFAIR LABOR PRACTICE PROCESS AND PROCEDURE**
**OCTOBER 19, 2016**

## I. Introduction

Section 220 of the Congressional Accountability Act of 1995 ("CAA") incorporates certain provisions of the Federal Service Labor-Management Relations Statute ("FSLMRS" or "Statute") to the legislative branch. 2 U.S.C. § 1351. Specifically, the CAA grants the rights, protections, and responsibilities established under 5 U.S.C. §§ 7102, 7106, 7111 through 7117, 7119 through 7122, and 7131 to employing offices and to covered employees and representatives of those covered employees. 2 U.S.C. § 1351(a)(1). The following outline discusses unfair labor practice case law, the General Counsel's process and procedure for filing and investigating unfair labor complaints from employing offices and unions, and appeals to the Office of Compliance's Board of Directors.

## II. OOC ULP Process

### A. General Counsel Authority

The OOC General Counsel (GC) exercises the same authority delegated to the General Counsel of the Federal Labor Relations Authority under 5 U.S.C. §§ 7104 and 7118 – **the authority to investigate allegations of ULPs and to file and prosecute complaints regarding ULPs.**

### B. ULP Charge

i. **Who can file?** "Any person" can file a charge alleging that an employing office, employing activity, or labor organization has engaged in an unfair labor practice with the OOC GC. (2 U.S.C. § 1351(c)(2) ; OOC Reg. 2423.3)

ii. **Timely filing of ULP charge.** A ULP charge must be filed within **180 days** of the occurrence of the alleged unfair labor practice. (2 U.S.C. §1351(c)(2))

Note: While the FSLMRA Statute ("Statute") provides for exceptions to the 180 day (6 month) rule under § 7118(a)(4), §7118's incorporation into the CAA is limited by the 2 U.S.C. §1351(c)(2) language "except as otherwise provided in this section". §1351(c)(2) does not explicitly provide for any exceptions to the 6 month rule and the Board has not directly addressed whether there are any exceptions to the 180 day rule codified under Part D of the CAA. However, the Board's decision in *Perez v. Office of Rep. Sheila Jackson-Lee* may shed light on how it might rule on this issue.

*Perez v. Office of Rep. Sheila-Jackson Lee*. No. 04-HS-21 (CV, RP), 2005 WL 6236947 (OOC Board June 29, 2005). On an appeal from the Hearing Officer's order dismissing the complaint, the Board reversed the Hearing Officer's decision that he lacked jurisdiction to entertain the complaint because the complainant had not complied with the 180 day time limitation imposed by § 402 of the CAA. The Board held that the 180 day time limit was more akin to a statute of limitations rather than a jurisdictional requirement and was therefore subject to equitable tolling in extraordinary and carefully circumscribed instances.

**iii. Bars to filing ULP charges**

**Negotiability**

**a. Exclusive.** Cases which deal solely with an employing office's allegation that the duty to bargain in good faith does not extend to the matter proposed for bargaining and which do not involve an allegation of a change in work conditions cannot be raised as an unfair labor practice charge. (OOC Reg. 2423.5)

**b. Mixed.** If a labor organization files an unfair labor practice that involves a negotiability issue and also files a petition for review under the negotiability process, it must elect to proceed under one process. The labor organization must make its selection in writing, and the selection is required regardless of which process was initiated first. (OOC Reg. 2423.5)

**Grievance** A party is barred from filing both a ULP and a grievance over the same issue. (5 U.S.C. § 7116(d))

### iv. General Counsel Response to the ULP Charge

**a. Independent and Informal Resolution Encouraged.** It is the policy of the Board and GC to encourage parties to meet and make good faith attempts to resolve concerns regarding alleged unfair labor practices before a charge is filed, and to encourage informal resolution after a charge has been filed. To that end, the GC will generally not commence investigation of a ULP charge until the parties have had a reasonable length of time, not to exceed 15 calendar days, to attempt to resolve the unfair labor practice allegation informally. (OOC Reg. 2423.3)

**b. Responsive actions.** In addition to investigating ULP charges, the General Counsel may take any of the following actions as appropriate:

- Approve a request to withdraw a charge;
- Refuse to file a complaint;
- Approve a written settlement and recommend that the Executive Director approve a written settlement agreement in accordance with the provisions of section 414 of the CAA;
- File a complaint;
- Upon agreement of all parties, transfer to the Board for decision, after filing of a complaint, a stipulation of facts in accordance with the provisions of 2429.1(a) of this subchapter; or
- Withdraw a complaint

(OOC Reg. 2423.9)

**c. GC Request for Withdrawal**. If the GC determines that the charge is not timely, or fails to state an unfair labor practice, or for other appropriate reasons, the GC may request the charging party to withdraw the charge. If the party does not submit the withdrawal within a reasonable amount of time, the General Counsel may decline to file a complaint. (OOC Reg. 2423.10)

## C. Complaint

If, after investigating the charge, the GC determines that the respondent has engaged in an unfair labor practice, the GC may file a complaint. The complaint is filed with the OOC Executive Director Division. The respondent must file an answer to the complaint with the OOC.

i. **Filing not appealable.** The GC's decision to file a complaint is not subject to review. ( OOC Reg. 2423.12(a))

ii. **Answer.** The Respondent must file an answer to the complaint with the OOC within 15 days of receipt. (OOC Reg. 2423.13)

iii. **Intervention**. Any person involved and desiring to intervene in any ULP proceeding may file a motion with the OOC to that effect. The motion must state the grounds upon which such person claims involvement. (OOC Reg. 2423.15)

**D. Decision on ULP Complaint**

The ULP complaint is adjudicated by a Hearing Officer appointed to the matter by the OOC Executive Director. (2 U.S.C. §1351 (c)(2))

i. **Dismissal.** The Hearing Officer may dismiss the complaint on the basis that it is frivolous or fails to state a claim upon which relief may be granted. ( 2 U.S.C. § 1405 (b); OOC Proc. §5.03(a))

ii. **Summary Judgment.** The GC or Respondent may file a motion for summary judgment. The Hearing Officer may issue summary judgment on some or all of the complaint. (OOC Proc. § 5.03(d))

iii. **Hearing.** Unless the complaint is dismissed before the hearing or a motion for summary judgment is granted, the hearing officer will conduct a closed hearing on the matter. (2 U.S.C. §1405 (d))

iv. **Subpoena Power.** The hearing officer has subpoena power for the production of documentary evidence and to compel witness attendance. (2 U.S.C. §1405(f))

v. **Precedents.** The Hearing Officer's decision is guided by OOC Board decisions and judicial decisions under the law made applicable by the CAA. (2 U.S.C. §1405(h))

**E. Appeals**

**Board Review.** An aggrieved party may seek review of the Hearing Officer's decision and order with the OOC Board. (OOC Reg. 2423.27)

i. **30 day timeline.** The petition for review must be filed within 30 days of the entry of the Hearing Officer's decision in the OOC records. (2 U.S.C. §1406 (a))

ii. **Standard of review.** The Board shall set aside a decision of the hearing officer if the Board determines that the decision was:
   a. Arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law
   b. Not made consistent with required procedures; or
   c. Unsupported by substantial evidence.

iii. **Violation found.** If the Board finds a violation of applicable unfair labor practice laws, the Board shall issue an order requiring any combination of the following:
   a. To cease and desist from any such unfair labor practice in which the employing office or labor organization is engaged;
   b. Requiring the parties to renegotiate a collective bargaining agreement in accordance with the order of the Board and requiring that the agreement, as amended, be given retroactive effect;
   c. Requiring reinstatement of an employee with backpay in accordance with 5 U.S.C. § 5596; or
   d. Such other action as will carry out the purpose of the chapter 71, as applied by the CAA.
   (OOC Reg. 2423.29(b))

iv. **Violation not found.** If the Board does not find a violation of applicable unfair labor practice laws, the Board shall dismiss the complaint. (OOC Reg. 2423.29(c))

**Judicial Review**

The General Counsel or Respondent to the complaint may file a petition for review of the Board's decision with the United States Court of Appeals for the Federal Circuit. While any person may file a ULP charge, and an aggrieved party may seek review of a decision or order of the Hearing Officer on the ULP Complaint, the right to judicial review of the Board decision lies exclusively with the General Counsel or Respondent. (2 U.S.C. § 1351(c)(3)).

*Morris v. Office of Compliance*, 608 F.3d 1344 (Fed. Cir. 2010).

*Note: Although Morris involves an attempt to seek review of a Board decision on arbitration, and does not involve adjudication of a purely ULP-related matter, it is instructive on the appropriate interpretation of*

*the applicable CAA provisions governing judicial review of Board decisions on ULP matters.*

A legislative employee sought review of the Board's decision to deny his exceptions to an arbitration decision on a ULP related matter. The employee argued that the right to judicial review of the matter was not limited to the General Counsel and Respondent under 2 U.S.C. §1351(c)(3) based upon this section's reference to section 7123(a) of the FLSMR statute, which contains 'any person aggrieved' language. The Court rejected this argument, reasoning that §1351(c)(3) of the CAA did not specifically incorporate the portion of §7123(a) which contained 'any person aggrieved' language and that the portions of § 7123(a) which were specifically incorporated were incorporated for the purposes of specifying the subject matter that could not be appealed under the CAA, and not for the purposes of expanding the scope of parties entitled to judicial review. The court held that only the General Counsel or Respondent may seek judicial review of a Board decision under §1351(c)(3).

## F. Enforcement

When a party is required to take remedial action pursuant to a Hearing Officer or Board Decision, the party is required to file a compliance report with the OOC detailing the manner in which compliance with the decision or order has been achieved. (OOC Reg. 2423.30, OOC Proc. §8.03)

i. **30 day timeline.** The compliance report must be submitted within 30 days after the decision or order becomes final and goes into effect by its own terms. (OOC Proc. § 8.03)

ii. **Compliance not achieved**. The report must be submitted within 30 days even if compliance has not been achieved (fully or partially). If compliance is not fully completed, the report must specify why compliance with any provision of the decision or order has not yet been fully accomplished, the steps being taken to achieve full compliance, and the anticipated completion date. (OOC Proc. § 8.03)

iii. **Petition for enforcement**. Any party may petition the Board for enforcement of a final decision of the Office or the Board. The Board may direct the General Counsel to petition the United States Court of Appeals for the Federal Circuit for enforcement if the Board finds that a party has failed to comply with its decision and order. (OOC Proc. 8.03(d)-(f))

## III. Unfair Labor Practice Examples and Explanations

### A. Discrimination

**What parts of the FSLMRS discuss discrimination against employees?**

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

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

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

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

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

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

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

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

- The test is described in the FLRS decision in *Letterkenny Army Depot*, 35 FLRA 113, 118 (1990) (Letterkenny) and was adopted by the OOC Board in *U.S. Capitol Police Bd. v. FOP*, 2002 WL 34461688, Case No. LMR-CA-0037 (OOC Board June 11, 2002).

- The General Counsel must show that: (1) the employee who was allegedly discriminated against was engaged in protected activity under the Statute; and (2) the protected activity was a motivating factor in the action the agency took against the employee.

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

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

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

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

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

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

## B. Agency Control of Labor Organization

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

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

**What does "equivalent status" mean?**

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

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

- Agency's treatment of different unions: An agency is required to give a union that has "equivalent status" the same "services and facilities" that it gives an incumbent union.

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

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

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

- Case example: In *SSA*, 52 FLRA 1159, 1184-85 (1997), the Authority looked to a case from the private sector, *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105 (1956), to decide whether the agency violated section 7116(a)(3) when it denied a permit to a union to hand out literature in the outdoor areas of the Agency's headquarters. The Babcock case said that an employer may prohibit an outside union from handing out union literature if two conditions are met: (1) the union must be able to reach the employees through other methods of communication; and (2) the employer must not discriminate against the union by allowing other unions to hand out materials. Id. The Authority concluded (upon remand from a Court of Appeals) that because the employer did not have a 27 general "no solicitation" rule against outside organizations, it discriminated against the rival union by denying it access. *Soc. Sec. Admin.*, 55 FLRA 964, 967 (1999).

## C. Duty to Bargain in Good Faith

The FSLMRS requires that both employing offices and unions, which have a collective bargaining relationship, to 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 employing office and the exclusive representative of employees in an appropriate unit in the employing office to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession.

A union has the right and duty to act for and negotiate agreements on behalf of all employees in the bargaining unit for which it has been recognized as the exclusive representative. (Section

7114(a)(1)) The collective bargaining obligation for both parties, as noted, extends to the "conditions of employment" of the bargaining unit employees. *Antilles Consol. Educ. Ass'n*, 22 FLRA 235, 236 (1986).

**What does bargaining in good faith mean?**

The duty to bargain in good faith means the parties must:

- Approach negotiations with a sincere resolve to reach an agreement
- Meet at reasonable times and convenient places as frequently as needed
- Avoid unnecessary delays

To determine whether a party has bargained in good faith, the FLRA looks at all of these factors and considers the situation as a whole. *U.S. Dep't Air Force, HQ, AFLC, Wright-Patterson AFB Ohio*, 36 FLRA 912 (1990).

Certain conduct, such as unilaterally setting dates for negotiations and unwarranted delays, can be evidence of bad faith bargaining. *U.S. Geological Survey, Caribbean Dist. Ofc. San Juan, P.R.*, 53 FLRA 1006 (1997).

**When does an employing office have a duty to bargain?**

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

1.**Term negotiations** – Section 7114(a)(4) of the Statute states that both parties shall meet and negotiate in good faith for the purpose of arriving at a collective bargaining agreement. Bargaining for an initial or successor contract is referred to as term negotiations. *AFGE, Interdepartmental Local 3723, AFL-CIO*, 9 FLRA 744 (1982).

- Section 7114(a)(4) of the Statute states that both parties shall meet and negotiate in good faith for the purpose of arriving at a collective bargaining agreement. Bargaining for an initial or successor contract is referred to as term negotiations.
- Official time for contract negotiations: As discussed later in the Official Time section, Section 7131(a) states that employees representing a union in contract negotiations shall be authorized official time for that purpose.

2. **Mid-term negotiations** – when the union requests bargaining over subjects the parties have not bargained about. *U.S. Dep't of the Interior, Wash., D.C.*, 56 FLRA 45, 50-51 (2000). Even when parties have a collective bargaining agreement, they may have an obligation to bargain if the union or employing office makes a mid-term request to bargain over a subject that the parties have not bargained over.

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- When a mid-term bargaining request is made, there will be issues about whether the matter is already "covered by" the agreement.

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

- Before an employing office changes bargaining unit employees' conditions of employment, it is required to give the exclusive representative notice and a chance to bargain over the parts of the change that are within the duty to bargain. *U.S. Army Corps of Eng'rs, Memphis Dist., Memphis, Tenn.*, 53 FLRA 79, 81 (1997).
- Impact of the change: An employing office only has to bargain over a change in conditions of employment if the change has an actual or reasonably foreseeable impact which is more than de minimis. *U.S. Dep't of the Air Force, 355th MSG/CC, Davis-Monthan AFB, Ariz.*, 64 FLRA 85, 89 (2009).
- Effect of the parties' agreement: As with mid-term bargaining requests, an employing office does not have to bargain over a change if the subject matter of the change is "covered by" the parties' agreement.
- Requirement that there be a change: If the employing office's action does not change working conditions, there is no duty to bargain. *See, e.g., U.S. Dep't of Veterans Affairs, Med. Ctr., Sheridan, Wyo.*, 59 FLRA 93, 94 (2003) (assignment of acutely ill patients to ward for acutely ill patients did not change working conditions). There must be something new or different about employees' conditions of employment.

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

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

- Timing of the test: The *de minimis* test looks at the facts at the time the change was proposed and implemented. *Portsmouth Naval Shipyard, Portsmouth, NH*, 45 FLRA 574, 575 (1992).
- Equitable considerations: The FLRA also takes equitable considerations into account when deciding whether a change is de minimis. *Dep't of HHS,SSA*, 24 FLRA at 408.

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

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

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

• Reason for doctrine: The "covered by" doctrine is based on the idea that a party should not have to bargain over matters contained in or covered by an existing agreement between the parties. *AFGE, Local 225*, 56 FLRA 686, 689 (2000).

• When it applies: The "covered by" doctrine applies to bargaining over changes in conditions of employment, management- and union-initiated mid-term proposals, *see, e.g., Soc.Sec. Admin., Tucson Dist. Office, Tucson, Ariz*., 47 FLRA 1067, 1070-71 (1993), as well as negotiability cases regarding specific proposals, *NATCA, AFL-CIO*, 62 FLRA 174, 176-79 (2007) (finding one proposal outside the obligation to bargain because it was covered by the parties' agreement, but determining that a second proposal was not covered by the agreement); *see also PASS*, 56 FLRA 798, 803-05 (2000).

• "Covered by" test: The Authority's test to determine whether a matter is "contained in or covered by an agreement" was set out in U.S. Dep't of HHS, SSA, Balt., Md., 47 FLRA 1004, 1018-19 (1993) (SSA, Balt.). To determine if a matter is "covered by" an agreement, the Authority applies a two-prong test: ¬

**Prong 1**: Is the subject "expressly contained" in the agreement? If it is, the matter is "covered by" the agreeement and there is no bargaining obligation. If it is not, the Authority looks at Prong 2.

**Prong 2**: Is the subject "inseparably bound up with" and plainly an aspect of a subject covered by the agreement? If it is, the matter is "covered by" the agreement and there is no bargaining obligation.

**What are Management Rights?**

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

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

**Does an employing office have any bargaining obligations when it is exercising a management right?**

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

**What are permissive subjects of bargaining?**

• Section 7106(b)(1) of the Statute lists subjects which are not barred from bargaining as reserved management rights, but may be negotiated only if the employing office chooses to do so. These subjects include:

- Numbers, types and grades of employees or positions assigned to an organizational subdivision, work project, or tour of duty - Example: *U.S. Dep't of Veterans Affairs Med. Ctr., Lexington, Ky*., 51 FLRA 386, 391-92 (1995) (numbers, types and grades)
- Technology, methods and means of performing work - Example: *Am. Fed'n of Gov't Employees, Local 644*, 40 FLRA 831, 834-35 (1991) (use of beepers off duty is a method and means of performing work)

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

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

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

• **Examples of subjects the FLRA has found to be substantively negotiable**:

- Assignment of parking spaces: *U.S. Dep't of Air Force, Williams AFB, Chandler, Ariz.*, 38 FLRA 549 (1990)
- Water coolers: *U.S. Dep't of Labor*, 38 FLRA 899 (1990)

- Protective coveralls: *Dep't of Defense, Warner Robbins Air Force Logistics Ctr., Robbins AFB, Ga.,* 35 FLRA 68 (1990)
- Annual picnic: *U.S. Army Adjutant Gen. Publ'n Ctr., St. Louis, Mo*., 35 FLRA 631 (1990)
- Certain leave procedures: *U.S. Dep't of the Air Force Headquarters, Air Force Logistics Command, Wright-Patterson AFB, Ohio,* 38 FLRA 887 (1990)
- Length of rotation schedules and cross assignment of equally qualified employees: *U.S. Dep't of the Treasury, Customs Serv. Region IV Miami Dist., Wash., D.C.*, 38 FLRA 770 (1990)
- Employee awards programs: *Dep't of Veterans Affairs Med. Ctr., St. Louis, Mo.*, 50 FLRA 378 (1995).

**When does an employing office have to engage in impact and implementation bargaining?**

- An employing office must give the union advance notice and a reasonable opportunity to request bargaining when it is going to exercise a management right (including those reserved under 7106 (a)) that involves a change in working conditions of bargaining unit employees, and the impact or reasonably foreseeable impact is more than de minimis. The employing office is required to bargain over procedures for implementing the change and appropriate arrangements for affected employees. This is commonly referred to as "impact and implementation bargaining." *Dep't of Homeland Sec., Customs & Border Prot.*, 64 FLRA 989, 994 (2010). If the employing office does not give the union proper notice of the change and implements the change without bargaining, this is bad faith bargaining. *See, e.g., U.S. Dep't of the Army, Lexington-Blue Grass Army Depot, Lexington, Ky*., 38 FLRA 647, 661 (1990).

**What is proper notice of the proposed change?**

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

**What are the parties' obligations in relation to bargaining requests?**

- Union's obligation to request bargaining: Once a union is given timely notice of a change, it must timely request bargaining. *Dep't of Homeland Sec., Customs & Border Prot.*, 62 FLRA 263, 265 (2007).
- Union's bargaining proposals: There is no requirement for a union to label its proposals as either substance or impact and implementation. To do so would encourage the parties to engage in semantic disputes instead of collective bargaining. *U.S. Dep't of HHS, PHS, IHS, Indian Hosp., Rapid City, S.D.,* 37 FLRA 972, 980 (1990).

- Employing office's obligation to respond to request: An employing office must respond to a union's bargaining request. A failure to do so may constitute bad faith bargaining. *Army & Air Force Exch. Serv., McClellan Base Exch., McClellan AFB, Cal*., 35 FLRA 764, 769 (1990) (failure to respond to union's bargaining request for over 4 months).

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

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

• Repudiation test: To determine whether an employing office has repudiated an agreement, the Authority looks at two elements:

- The nature and scope of the part of the agreement that was breached (in other words, was the breach clear and patent?) - If the meaning of a particular term is unclear and a party acts in accordance with a reasonable interpretation of that term, that action will not be a clear and patent breach of the agreement. *See Dep't of the Air Force, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 52 FLRA 225, 231 (1996) (Robins AFB).
- The nature of the part of the agreement that was breached (in other words, did that provision go to the heart of the parties' agreement?) - *See Robins AFB*, 52 FLRA at 230-31; *Dep't. of the Air Force, 375th Mission Support Squadron, Scott AFB, Ill.*, 51 FLRA 858 (1996) (Scott).

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

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

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

**What is a bypass?**

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

- Examples of bypasses:

    - Employing office deals or directly negotiates with unit employees to put pressure on the union to take a certain course of action. *U.S. Customs Serv.*, 19 FLRA 1032, 1048 n.17 (1985); *FAA., L.A., Cal.*, 15 FLRA 100, 104, 106 n.3 (1984). Employing office communicates directly with bargaining unit employees concerning grievances, disciplinary actions, and other matters relating to the collective bargaining relationship where the employing office knows the employee is represented by the union. *Bastrop; Dep't of HHS, SSA, Balt., Md,* 39 FLRA 298, 311 (1991); *see also U.S. DOJ, INS, N.Y. Office of Asylum, Rosedale, N.Y.,* 55 FLRA 1032, 1038 (1999).

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

## D. Duty to Provide Information

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

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

> The duty of an employing office and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—

in the case of an employing office, 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 employing office in the regular course of business;

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

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

**What does "normally maintained" mean?**

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

**When is information "reasonably available?"**

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

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

- It would take management 3 weeks to put the information together: SSA, 36 FLRA at 952, 960
- The employing office had to give the union 10,000 documents: Dep't of Justice, U.S. INS, U.S. Border Patrol El Paso, Tex., 40 FLRA 792, 804-05 (1991)
- The employing office had to spend $1500 getting the information: U.S. Dept of Air Force, Air Force Logistic Ctr., Sacramento Air Logistics Command, McClellan AFB, Cal., 37 FLRA 987, 993-94 (1990)

Creating documents: Agencies may have to create documents that do not exist if they have the information the union is asking for in an electronic format. *See, e.g.*, *Department of the Navy, Naval Submarine Base, New London, Conn.*, 27 FLRA 785, 797 (1987).

**When is information "necessary?"**

• What a union must explain to show information is necessary: A union must explain: (1) why it needs the information; (2) how it will use the information; and (3) how its use of

the information relates to its responsibilities under the FSLMRS. The FLRA calls this a "particularized need." S*ee IRS, Wash., D.C. & IRS, Kansas City Serv. Ctr., Kansas City, Mo.*, 50 FLRA 661, 669 (1995) (IRS, Kansas City).

- A union's request must be specific
- It is not enough for a union to show that information would be useful; the union must show the information is required in order for it to represent the bargaining unit
- A union must put enough information in its request so the employing office can decide whether it is required to provide the information

- Scope of the union's request: A union must identify what information it is requesting and explain why it needs that type or amount of information. *See U.S. Dep't of Justice, INS, N. Region, Twin Cities, Minn.*, 51 FLRA 1467, 1472 (1996). For example, the scope of a request may include:
  - the number of days, weeks, months, or years of information the union needs
  - the types or groups of employees for which the union needs information

• When an employing office violates the FSLMRS: An employing office's refusal to give the union requested information violates the Statute when the union has shown that the information is necessary and either:

- The employing office has not established an anti-disclosure interest; or

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

**What is the employing office's role once a union has asked for information?**

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

• Information that doesn't exist: When a union has asked for information that does not exist, the employing office is obligated under section 7114(b)(4) of the Statute to inform the union of that fact. *See, e.g., U.S. Naval Supply Ctr., San Diego, Cal.*, 26 FLRA 324, 326-27 (1987). If the employing office does not inform the union, it may have violated section 7116(a)(1), (5), and (8) of the FSLMRS.

• Duty to provide information: Section 7114(b)(4) requires an employing office to "furnish" information to the exclusive representative.

- The employing office must actually give the information to the union; it is not enough to allow the union to look at the information. *See U.S. Dep't of Hous. & Urban Dev.*, 42 FLRA 1002, 1003 (1991)

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

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

  - *Dep't of Justice, Office of Justice Programs*, 45 FLRA 1022 (1992) (5-month delay unreasonable)
  - *U.S. Dep't of the Treasury, U.S. Customs Serv., SW. Region, Houston, Tex.*, 43 FLRA 1362, 1374 (1992) (delay of nine months to supply information violated Statute where no reasonable basis existed for not furnishing it earlier)
  - *U.S. Food & Drug Admin. & U.S. Food and Drug Admin., Region VII, Kansas City, Mo.*, 19 FLRA 555, 557 (1985) (5-month delay unreasonable)
  - *Bureau of Prisons, Lewisburg Penitentiary, Lewisburg, Pa*., 11 FLRA 639, 641- 42 (1983) (employing office did not violate the Statute when it supplied certain information after approximately a two-month delay because it had furnished almost all of the information requested by the union almost immediately and had made a diligent effort to find certain information that was not contained in the current records)
  - *Dep't of Transp., FAA, Ft. Worth, Tex*., 57 FLRA 604 (2001) (employing office acted in bad faith by waiting until the day of the arbitration hearing to provide requested documents)

## E. Formal Meetings

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

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

**What are the elements of a formal discussion?**

- For a discussion to be a formal discussion, it must be shown that:
  - There is a discussion
  - Which is formal
  - Between one or more employing office representatives and one or more unit employees or their representatives

**What is a discussion?**

- A "discussion" is any meeting between employing office representatives and unit employees. *Dep't of Def., Nat'l Guard Bureau, Tex. Adjutant Gen.'s Dep't*, *149th TAC Fighter Group (ANG)(TAC), Kelly AFB*, 15 FLRA 529, 532 (1984) ("legislative history supports the conclusion that Congress intended to continue treating "discussion" as synonymous with "meeting").

- Conversation not required: A meeting can be a discussion even if a conversation does not take place. *Kelly AFB*, 15 FLRA at 531-33 (announcement of new staffing policy was a "discussion"); *VA, Brockton*, 37 FLRA at 754 (meeting between employing office and employees to announce a work schedule and have employees select their shifts was a discussion, even though the employees did not speak); *U.S. Dep't of Justice Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.*, 51 FLRA 1339, 1340-42 (1996) (meeting with the warden to try to resolve differences before filing a grievance was a discussion, although neither employee nor supervisor were permitted to speak).

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

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

- By looking at all of the circumstances. The FLRA refers to this as the "totality of the circumstances." F*.E. Warren AFB, Cheyenne, Wyoming*, 52 FLRA 149, 156-58 (1996) (F.E. Warren). The circumstances include:
  - whether the person who held the meeting is only a first-level supervisor or is higher up;

- whether any other managers/supervisors attended the meeting;
- where the meeting took place (e.g., in the supervisor's office, at each employee's desk, in the general work area, or elsewhere);
- how long the meeting lasted;
- how the meeting was called (advanced notice v. last-minute);
- whether the meeting had a formal agenda;
- whether employees were required to attend;
- how the meeting was conducted (consider transcription of comments); and any other factors deemed relevant. *See Dep't of Labor, Office of the Assistant Sec. for Admin. & Mgmt., Chi., Ill*., 32 FLRA 465, 470 (1988).
- Concerning any grievance or any personnel policy or practice or other general condition of employment. To determine whether the meeting is formal in nature, the General Counsel looks to the "totality of the circumstances." F.E. Warren AFB, Cheyenne, Wyoming, 52 FLRA 149, 156-58 (1996) (F.E. Warren). The circumstances include:
    - whether the person who held the meeting is only a first-level supervisor or is higher up;
    - whether any other managers/supervisors attended the meeting;
    - where the meeting took place (e.g., in the supervisor's office, at each employee's desk, in the general work area, or elsewhere);
    - how long the meeting lasted;
    - how the meeting was called (advanced notice v. last-minute);
    - whether the meeting had a formal agenda;
    - whether employees were required to attend;
    - how the meeting was conducted (consider transcription of comments);
    - and any other factors deemed relevant. Dep't of Labor, Office of the Assistant Sec. for Admin. & Mgmt., Chi., Ill., 32 FLRA 465, 470 (1988) (Dept. of Labor).

## F. Investigatory Examinations (Weingarten)

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

> An exclusive representative of an appropriate unit in an employing office shall be given the opportunity to be represented at ... any examination of an employee in the unit by a representative of the employing office in connection with an investigation if (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and (ii) the employee requests representation.

This section gives a labor organization the right to be represented during investigatory examinations of employees. *See U.S. Dep't. of Justice, Bureau of Prisons, Safford, Ariz*., 35 FLRA 431, 438-40 (1990) (discussing purposes and policies underlying section 7114

(a)(2)(B)). Section 7114 (a)(2)(B) of the Statute is similar to the private sector Supreme Court decision in *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), and for that reason it is often called the Weingarten right.

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

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

## G. Regulations in Conflict with Contract

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

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

**When does an employing office violate section 7116 (a)(7)?**

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

## H. ULP conduct by Union

**Duty of Fair Representation**

Section 7114 (a)(1) states:

> A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

**What is the duty of fair representation?**

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

**Union Membership**

Section 7116(c) states:

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

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

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

- Members who try to de-certify the union: The union can discipline its members for conduct that the Statute appears to protect. For example, a union that disciplined its

steward who discussed bringing in another labor organization with the employing office's personnel office and with other employees, did not violate the Statute. A labor organization is entitled to "expel a member for filing a decertification petition because it represents an attack on the very existence of the union." *AFGE*, 29 FLRA 1359 (1987); *see Tawas Tube Products, Inc.*, 151 NLRB 46 (1965).

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

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

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

## Unlawful Interference

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

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

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

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

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

- Statements that the union would not take a grievance to arbitration because the employee was not a union member: *NTEU,* 38 FLRA 615, 623 (1990).

- A union newsletter article about overtime issues stating that non-dues paying employees wishing to file grievances should join the union to assure prompt representation: *AFGE, Local 987, Warner Robins, Ga*., 35 FLRA 720 (1990).

- A letter stating that if the employee and other non-members had become members of the union, their views would have been heard and counted regarding the seniority policy: *Nat'l Air Traffic Controllers Ass'n, MEBA/AFL-CIO*, 55 FLRA 601 (1999).

- Union made statements at an orientation session for new employees that gave the impression that employees who were not union members would not get the same quality of representation in grievances and unfair labor practices as would union members: *AFGE, Local 2437*, 53 FLRA 256 (1997).

- Union's decision to remove a steward because of testimony in an FLRA ULP hearing case: *NTEU*, 6 FLRA 218 (1981).

- Expelling an employee from union membership because he filed or caused other employees to file unfair labor practice charges against the union: *AFGE, Local 1857, AFL-CIO*, 44 FLRA 959, 968 (1992).

**Cause or attempt to cause discrimination**

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

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

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

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

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

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

- A union agreed to employing office rules that allowed union members to participate in asbestos testing as an excused absence, while others could participate in the program only on off-duty hours. *Dep't of the Army, Watervliet Arsenal, Watervliet, N.Y.*, 39 FLRA 318, 336 (1991). 82

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

**Unlawful Discipline of Members**

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

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

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

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

**Discrimination in Membership**

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

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

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

**Refusal to Bargain**

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

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

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

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

- Union insists to impasse on a subject that is "covered by" an agreement: *AFGE, Local 3937*, 64 FLRA 17 (2009)

- Union insists to impasse on using a recording device during contract negotiations: *Sport Air Traffic Controllers Organ.,* 52 FLRA 339 (1996)

- Union refuses to sign an agreement which has the terms the parties agreed to in negotiations: *Dep't of Def., Warner Robins Air Logistics Ctr., Robins AFB, Ga.,* 40 FLRA 1211, 1218 (1991).

- If it appears that the union negotiator has the authority to bind the union in negotiations, and there is no agreement that says something different, the union cannot insist that higher-level union officials must approve the agreement. The union is required to sign the agreement that has the agreed-upon terms. *Nat'l Council of SSA Field Operations Locals - Council 220, AFGE*, 21 FLRA 319 (1986).

## Refusal to Cooperate in Impasse Procedures

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

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

This section is very similar to the employing office's duty under section 7116(a)(6).

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

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

## Strike, Work Stoppage, or Slowdown

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

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

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

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

- Approximately 60 employees, along with their union leaders, left their workplaces and gathered before the Office Director in order to protest and orally grieve the poor physical

conditions and maintenance of the office. This action was a work stoppage within the meaning of the Executive Order that came before the Statute, not an acceptable method of presenting a grievance. *AFGE, Local 3369*, 4 FLRA 126 (1980).

## IV. **OOC Board ULP Decisions**

*USCP v. FOP*, 2002 WL 34461688, Case No. LMR-CA-0037 (OOC Board June 11, 2012) – The Board decided the issue of whether the USCP committed an unfair labor practice by suspending a bargaining unit employee for five days because he successfully had grieved an earlier disciplinary action. In doing so, the Board adopted the FLRA's *Letterkenny* decision prescribing a "preponderance of evidence standard for the General Counsel to establish a rebuttable presumption of discrimination in mixed motive cases arising under 5 U.S.C. §7116(a)(1) & (2)…[i]f the General Counsel succeeds in that showing, the burden of persuasion then shifts to the employer to rebut the presumption by establishing, through a preponderance of the evidence, that it would have taken the same action even absent the employee's protected activity." *Id.* at 3. The Board ultimately remanded the matter to the hearing officer for further proceedings.

*USCP v. FOP*, 2016 WL 3753511, Case No. 15-LMR-01(CA) (OOC Board July 5, 2016) – The USCP sought review of a hearing officer decision which found that the USCP engaged in certain ULP's when it issued a Command Discipline Report, filed with a warning to the Chairman of the FOP, for being absent without leave. The Board affirmed the Hearing Officer's decision finding specifically that the USCP issued discipline to the Chairman because he had engaged in protected union activity when he complained about the USCP's handling of unscheduled emergency shifts. In doing so, the Board further articulated its framework for analyzing the General Counsel's claims of discrimination based on protected union activity – to show a *prima facie* case of discrimination, the General Counsel must show that: (1) the employee against whom the alleged discriminatory action was taken had engaged in protected activity; and (2) such activity was a motivating factor in the employing office's treatment of the employee. The burden then shifts to the employing office to demonstrate, by a preponderance of the evidence, that: (1) there was a legitimate justification for its action; and (2) the same action would have been taken even in the absence of protected activity.

*USCP v. FOP*, 2016 WL 5943737, Case No. 15-LMR-02(CA) (OOC Board Sept. 27, 2016) – The General Counsel sought review of the hearing officer's order granting the USCP's motion to dismiss the complaint for being untimely. Specifically, the hearing officer concluded that the FOP did not file the ULP charge with the General Counsel within 180 days of becoming aware of the alleged unfair labor practice and therefore granted the motion and dismissed the complaint. In reversing the hearing officer's decision the Board relied on case law and the FRCP's liberal pleading standard finding that the hearing officer failed to draw all reasonable inferences in favor of the General Counsel. Indeed, the Board found that the General Counsel's

complaint alleged sufficient facts, which if taken as true, to prove that the ULP charge was timely filed.