



**Union Access
to Meetings:
Investigations
and Formal
Discussions**

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Welcome

Introduction

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Outline

Investigatory Examinations

- What is an examination in connection with an investigation?
- When do employees reasonably believe discipline may result?
- What is an appropriate request for representation?
- Possible violations and remedies

Formal Discussions

- When is a discussion “formal in nature”?
- Examples of discussions formal and not formal
- Possible violations and remedies

CBA provisions relating to these statutory rights

Investigatory Examinations

Statutory Definition of Investigatory Examination

Section 7114(a)(2) of the Statute provides: An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at –

- (B) 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.

Who is a “Representative of the Agency”?

- Attorneys and investigators of the Inspector General’s Office of the same employing office. *NASA v. FLRA*, 527 U.S. 229 (1999)
- However, investigators from separate agency are only “representatives” if there is a “close coordination” between the employing office and outside agency.
- In *U.S. Dep’t of the Air Force, Ogden Air Logistics Ctr.*, 36 F.L.R.A. 748 (1990), criminal investigators were “representatives” because they worked directly with the agency’s labor-relations officials to craft questions in preparation for an arbitration hearing.
- Coworkers can be representatives if they act at direction of employing office. *NTEU v. FLRA*, 835 F.2d 1446, 1451 (D.C. Cir. 1987).

What’s an Examination in Connection with an Investigation?

The FLRA has identified four factors:

1. Designed to ask questions and solicit information;
2. Conducted in a confrontational manner;
3. Designed to secure an admission of wrongdoing; and/or
4. Designed for the employee to explain his/her conduct.

Guidance on Meetings, F.L.R.A. Office of the General Counsel, Sep. 1, 2015

The meeting can be an examination under the Statute even if it’s voluntary, off-site, during non-working hours, or in writing. *U.S. INS, U.S. Border Patrol, Del Rio, Tx.*, 46 F.L.R.A. 363 (1992).

What's an Examination in Connection with an Investigation?

- Meetings where management shares feedback or criticism, reviews performance, announces discipline, or otherwise shares information and does not try to learn anything from the employee are not examinations.
- However, a meeting can quickly convert to an examination if the employer representative starts questioning the employee. *U.S. Air Force, Wright-Patterson AFB*, 10 F.L.R.A. 97, 107 (1982)

When is an Employee's Belief of Discipline Reasonable?

- Based on objective evidence, not the employee's subjective worries.
- In *SSA, Albuquerque, N.M.*, 56 F.L.R.A. 651 (2000), after an employee got into an argument with her supervisor, the supervisor called the employee into a manager's office. The supervisor denied the employee's request for union representation, telling her that this was not a formal reprimand. The supervisor began asking questions and taking notes, similarly to how the supervisor acted before issuing a previous discipline. The supervisor also told the employee that the employee should not question the supervisor again.
- FLRA found the employee's belief of potential discipline reasonable, because all evidence demonstrated that the meeting may be used against the employee in the future, even if the supervisor would not discipline the employee for their argument.

What is an Appropriate Request for Representation?

- No specific format or magic words, but must be a clear statement expressing a desire for union representation.
- Employee can request that a specific union rep attend, but employer may deny request if that rep:
 - is not available;
 - is a subject of the investigation and has not been interviewed;
 - is a witness to the investigation and has not been interviewed; or
 - obstructed a previous interview.

Fed. Bureau of Prisons, Off. of Internal Aff's, 54 F.L.R.A. 1502 (1998)

Union Representative Conduct During Examination

- “For the right to representation to be meaningful, the representative must have freedom to assist, and consult with, the affected employee.” *Dep’t of Veterans Aff’s, Veterans Aff’s Med. Ctr., Jackson, Miss.*, 48 F.L.R.A. 787, 799 (1993).
- Representative has the right to speak and to elicit favorable information from the employee, but the employing office has the right to rein in the representative if they are testifying on behalf of the employee or steering the employee off course. *Nuclear Regul. Comm’n*, 65 F.L.R.A. 79, 86 (2010).
- Union can waive its right to attend, but waiver must be clear, unmistakable, and cannot discriminate against employees in violation of the duty of fair representation. *See Prudential Ins. Co.*, 275 N.L.R.B. 208, 209 (1985).

Violations and Possible Remedies

- If an employing office refused to allow for meaningful representation during an investigatory interview, but issued no discipline after the unlawful interview, the office has committed an unfair labor practice and the remedy is a notice posting and cease and desist order.
- If an office disciplined the employee after an unlawful interview, the office has the burden to show that the discipline was not based on the unlawful interview.
- If the office fails, it must repeat the interview, with an opportunity for union representation, and reconsider based on the employee's responses. Depending on the office's conclusions upon reconsideration, the disciplined employee may be entitled to expungement, back pay, and other make whole relief.

DOJ, INS, Border Patrol, El Paso, Tex., 36 F.L.R.A. 41, 53-54 (1990)

How Can an Office Prepare for Hearings?

- An office has the right to question employees in preparation for an unfair labor practice or arbitration hearing. To do so lawfully, the office must:
 1. Inform the employee of the purpose of the questioning, assure the employee that no reprisal will take place if they refuse, and obtain the employee's participation on a voluntary basis;
 2. Conduct the questioning "in a context which is not coercive in nature"; and
 3. Restrict the questioning to the scope of the inquiry.
- Failure to institute these safeguards is an unfair labor practice.

IRS, Brookhaven Serv. Ctr., 9 F.L.R.A. 930 (1982)

Formal Discussions

- ## Statutory Definition of Formal Discussion
- Section 7114(a)(2) of the Statute provides:

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

 - (A) 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.
 - Unlike for investigatory interviews, the Statute requires the employing office to notify the union *before* a formal discussion.

Policy Considerations

In *NTEU v. FLRA*, 774 F.2d 1181 (D.C. Cir. 1985), the D.C. Circuit outlined three reasons why union access to formal discussions is important:

1. Management decisions influence the propriety and acceptability of various sorts of employee conduct;
2. Employee interests are implicated when an employer decides on a remedy for improper management conduct; and
3. The potential for management intimidation or coercion.

When is a Discussion “Formal in Nature”?

The FLRA weighs several factors:

- the status of the individual who held the discussions;
- whether any other management representatives attended;
- the site of the discussions [supervisor’s office, at the employee’s desk, or elsewhere];
- how the meetings for the discussions were called [formal advance notice or spontaneous];
- how long the discussions lasted;
- whether a formal agenda was established for the discussions;
- the manner in which the discussions were conducted.

FCI Bastrop, Tex., 51 F.L.R.A. 1339, 1343 (1996)

When is a Discussion “Formal in Nature”?

- However, the topic of discussion can immediately make any discussion formal, triggering the right to union representation.
- In *F.E. Warren AFB, Cheyenne, Wy.*, 52 F.L.R.A. 149 (1996), the general manager of a missile factory asked twelve employees to come to his office. He told the employees that they may be laid off in a reduction in force and they should watch their spending and avoid financial binds. The general manager told the employees that he was trying to get more details about buyouts. The meeting lasted about twenty minutes.
- FLRA found that the “purpose and subject matter of the meeting” was of “such gravity” that the Union should have been notified in advance, regardless of presence of other factors.

Examples of Formal Discussions

- An orientation session for six new employees, conducted by the District Manager, in a conference room.
- Employees were introduced to nearly all benefits and policies, including working hours, breaks, leave procedure, life insurance, retirement, health insurance, restrictions on giving and receiving gifts, and prior approval for outside employment.
- The meeting lasted about ninety minutes.

SSA, 16 F.L.R.A. 232 (1984)

