



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

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Welcome

Introduction

- John Mickley – OCWR Associate General Counsel
- john.mickley@ocwr.gov
- 202-579-5040

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- When do employees reasonably believe discipline may result?
- What is an appropriate request for representation?
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- Examples of discussions formal and not formal
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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)

Examples of Formal Discussions, cont'd

- Mediation of individual employee's EEO complaint alleging she was denied promotion based on her race and sex, held at a separate office.
- Mediation was attended by the employee, a management representative, and the mediator.
- Mediation lasted six hours and mostly consisted of parties speaking to mediator in separate rooms.
- Before the meeting, the mediator asked the employee if she intended to bring a personal representative and she said she did not have one.
- FLRA rejected agency's argument that the employee's confidentiality interest outweighed any right the union had to attend.

Dep't of the Air Force, Luke AFB, Ariz., 58 F.L.R.A. 528 (2003)

Examples of Formal Discussions, cont'd

- A union steward filed a grievance on behalf of an employee relating to poor treatment from the employee's supervisor.
- Two weeks later, a manager notified the employee that they'd meet the next day to discuss the employee's work performance. The manager did not inform the steward about the meeting.
- The employee, the supervisor, and the manager attended the meeting. At the meeting, the manager asked the employee about the issues raised in the grievance without mentioning the grievance and tried to resolve the issues between the employee and the supervisor.
- FLRA found that the union should have been notified in advance of the meeting, because it was a formal discussion concerning a grievance.

INS, N.Y. Off. of Asylum, Rosedale, N.Y., 55 F.L.R.A. 1032 (1999)

Examples of Formal Discussions, cont'd

- Employee was disciplined for being intoxicated at work and filed a grievance challenging the discipline.
- Union provided management with a list of witnesses the union intended to call at arbitration hearing. Management attorney began calling the witnesses and asking about the incident. Conversations lasted less than 25 minutes.
- FLRA finds that these are formal discussions to which the union should have been invited, rejecting agency arguments that these conversations were insufficiently formal and that inviting the union would have improperly infringed on attorney work product.

Dep't of the Air Force, McClellan AFB, Cal., 35 F.L.R.A. 594 (1990)

Examples of NOT Formal Discussions

- An impromptu meeting, initiated by the employee, with an EEO representative to discuss the employee's EEO complaint. *Dep't of Energy, Rocky Flats Field Off., Golden, Colo.*, 57 F.L.R.A. 754 (2002).
- Oral presentation by employee in response to a proposed suspension, before suspension had been announced or any grievance had been filed. *U.S. DOJ, Bureau of Prisons, FCI, Ray Brook, N.Y.*, 29 F.L.R.A. 584 (1987)
- First-line supervisor's ten-minute unscheduled meeting with five unit employees announcing a change to sick leave policy. *Def. Logistics Agency, Def. Depot, Tracy, Cal.*, 14 F.L.R.A. 475 (1984)

Union Rep Conduct During Formal Discussion

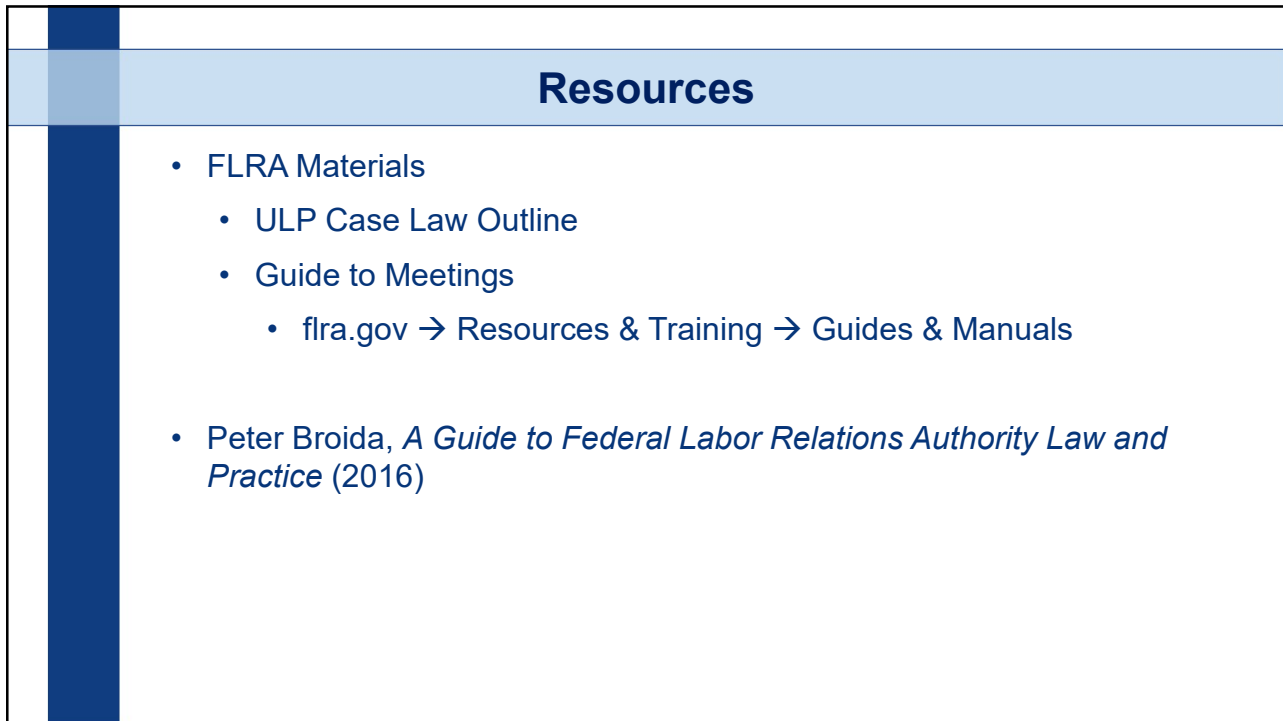
- Union reps have the right to “comment, speak, and make statements,” as long as they do not try to usurp the meeting and confine their comments to the subject matter raised by management. *U.S. Nuclear Regul. Comm’n*, 21 F.L.R.A. 765 (1986).
- Union reps must follow whatever confidentiality rules may apply. *Dep’t of the Air Force, Luke AFB, Ariz.*, 58 F.L.R.A. 528 (2003)
- Union reps’ right to speak may be limited by the procedural rules of the forum – e.g., the rep will be permitted to speak more at a staff meeting than at an arbitration hearing.
- Union can decline to attend individual meetings, or waive right to attend future meetings, but any waiver must be clear and unmistakable.

Violations and Possible Remedies

- Most violations result in notice posting and cease and desist order.
- When the union could only obtain information from the meeting, management can be ordered to repeat a formal discussion in the presence of the union. *U.S. Dep’t of Lab., Off. of the Assistant Sec’y for Admin. & Mgmt., Chicago, Ill.*, 32 F.L.R.A. 465 (1988).

CBA Provisions about Meetings

- ## CBA Provisions
- Collective bargaining agreements can expand union access to meetings or clearly define it by, for example, itemizing the types of meetings for which management will notify the union and the timeframe of the notification.
 - Collective bargaining agreements can waive the union's right to access a meeting, but any notice must be clear and unmistakable. For example, in *Dep't of the Air Force, McClellan AFB*, 35 F.L.R.A. 345 (1990), the FLRA found that the union did not waive its right to be present at investigatory examinations or formal discussions when it negotiated a CBA provision that management must deliver two copies of a discipline to an employee.



Questions?