



**Unprotected  
Speech in  
Labor-  
Management  
Relations**

Office of Congressional  
Workplace Rights

Office of the  
General Counsel

March 2026  
Labor-Management Forum

*advancing  
workplace rights,  
safety & health, and  
accessibility in the  
legislative branch*



**Welcome**

## Introduction

- John Mickley – OCWR Associate General Counsel
- [john.mickley@ocwr.gov](mailto:john.mickley@ocwr.gov)
- 202-579-5040

## Topics

- Statutory framework;
- Threats and other coercive statements;
- The neutrality requirement; and
- Unprotected speech by union officials.

	<h2 style="margin: 0;">Statutory Framework</h2>

	<h3 style="margin: 0;">Statutory Framework</h3>
	<p>2 U.S.C. § 1351, aka Section 220 of the Congressional Accountability Act, applies 5 U.S.C. §§ 7101-7135, the Federal Service Labor Management Relations Statute, to most of the Legislative Branch.</p>

## Statutory Framework

5 U.S.C. § 7102 – Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right –

(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, 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

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

## Statutory Framework

5 U.S.C. § 7116(a) – It is an unfair labor practice for an Agency –

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment . . .

(4) 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;

## Statutory Framework

5 U.S.C. § 7116(e) – 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, (A) constitute an unfair labor practice under any provision of this chapter, or (B) constitute grounds for the setting aside of any election conducted under any provisions of this chapter.

## Threats and Other Coercive Statements

## Unlawful Statements Under 7116(a)(1)

Statements or conduct are unlawfully coercive when they have a reasonable tendency to interfere with or restrain employees' rights under § 7102. This is an objective test and does not rely on the subjective impression of the employee or the intent of the speaker.

*Dep't of Transportation, FAA, 64 F.L.R.A. 365, 370 (2009).*

This makes each case very fact-specific. The timing, exact wording, and location of a manager's statement may be crucial in determining whether it was objectively coercive.

## Unlawful Statements Under 7116(a)(1)

- Summer intern filed grievance over an offer for an extended stint. Management gave him an offer, but he kept grievance open.
- After learning that grievance was open, Supervisor called him "the most ungrateful son of a bitch I ever met . . . I am really sorry I went ahead and got you the extension. If it's up to me, you won't get another."
- FLRA found the statement to be a clear threat: if you engage in union activity, you will not work here anymore.
- The agency was required to post a notice detailing the violation.

*Federal Election Commission, 6 F.L.R.A. 327 (1981).*

### Unlawful Statements Under 7116(a)(1)

- Employee union representative visited another location to investigate potential grievance.
- Manager called union rep, asking why he visited. Union rep said the visit had been approved by another manager. Manager said, “you think you’re real big in the Union now. You’re just a little union shit.”
- Union rep said he did not appreciate being talked to like that. Manager said, “you should file a ULP, you haven’t made one stick yet.”
- Union filed ULP. FLRA found manager’s statements not coercive. Manager’s statements disparaged the individual, but were not a broader effort to discourage union activity.

*HHS, SSA, Region II, 23 F.L.R.A. 648 (1986)*

### Unlawful Statements Under 7116(a)(1)

- Firefighter who was also shop steward spent 550 hours in a two-year period on official time. His mid-year appraisal was fully satisfactory, but supervisor said that he had not conducted enough inspections and alarm tests because he had taken too much official time.
- Nine days later, the supervisor denied firefighter’s official time request at 1:00 pm, asking that he conduct inspections and take the official time at 2:30pm instead.
- FLRA found the statements lawful and not coercive. The supervisor was trying to accommodate the firefighter’s use of official time, asking him to take it during different shifts. He did not interfere with the firefighter’s ability to take official time in the future.

*VA Med. Ctr., Leavenworth, Kan., 31 F.L.R.A. 1161 (1988).*

### Unlawful Statements Under 7116(a)(1)

- Forest Service Purchasing Agent used official time in 2% of one year and 28% the next, yet her production remained the same.
- Her supervisor made several comments that her official time was affecting her ability to get her work done. In the first year, her rating was Superior and in the second it was Fully Successful, a rung lower.
- The FLRA found the statements unlawful. “It would be reasonable for an employee in [her] position to infer . . . That her performance would be perceived as deficient so long as she spent time on protected activity.”
- The agency was required to rescind the second appraisal and post a notice detailing the violation.

*Dep’t of Agriculture, 49 F.L.R.A. 1020, 1034-35 (1994)*

### Unlawful Statements Under 7116(a)(1)

- Other potentially unlawful coercive statements include:
  - Promising benefits if employees stop engaging in union activity;
  - Soliciting grievances directly from employees;
  - Questioning employees about their or their coworkers’ union sympathies; and
  - Statements that engaging in union activity will be futile.

# The Neutrality Requirement

## The Neutrality Requirement

7116(e) allows management representatives to share their “personal view, argument, opinion . . . [as long as the] expression contains no threat or reprisal or force or promise of benefit or was not made under coercive conditions.”

The FLRA interprets this to mean that agencies **may not** share an official position about unionizing and must remain neutral during and after a union organizing campaign. If the FLRA determines that the agency’s conduct, by an objective standard, interfered with employees’ free choice in a union election, the FLRA may decide to rerun the election.

*Gov’t Publishing Office, 74 F.L.R.A. 264, 277 (2025)*

## The Neutrality Requirement

This interpretation of 7116(e) prohibits management from engaging in “anti-union” campaigns, parts of which may be lawful in the private sector:

- “Captive audience” group or one-on-one meetings during work hours to express management opinion on unionization; and
- Emails, text messages, or other written communication instructing employees to “vote no.”

## The Neutrality Requirement

- Before an election, agency sent employees “Union Election Fact Sheet,” saying that if the union won it “would be employees’ exclusive representative for EEO complaints, MSPB appeals, and disability cases.”
- Union lost election and filed objections.
- FLRA found that the inaccurate Fact Sheet had the potential to interfere with employee free choice and ordered the election rerun. Not necessary to show actual interference, actual malice by the agency, or that the statement was a “substantial departure from the truth.”

*Dep’t of the Army, 68 F.L.R.A. 649 (2015)*

## The Neutrality Requirement

- Before an election, commanding officer told employees he was “disappointed” that union had distributed campaign literature at the base because it violated his agreement with the union that there would be no campaigning on base.
- After this statement, union removed campaign literature.
- Union lost election and filed objections, including to the commanding officer’s statement, seeking a rerun election.
- FLRA denied objection and found officer’s statement within the “correct the record” exception of 7116(e).

*162<sup>nd</sup> Tactical Fighter Group, 22 F.L.R.A. 122 (1986).*

## Unprotected Speech by Union Officials

## Unprotected Speech by Union Officials

- Union officials acting in their official capacity may not be disciplined for actions taken in their official capacity unless their conduct exceeds the bounds of protected activity.
- The FLRA balances an employee's right to "use intemperate, abusive, or insulting behavior" while advocating for the union's position with management's right to "maintain order and respect for its supervisory staff on the jobsite."
- To that end, the FLRA finds that employees lose the protection of the statute while engaging in protected activity if they engage in "flagrant misconduct."

*Grissom Air Force Base*, 51 F.L.R.A. 7, 12 (1995)

## Unprotected Speech by Union Officials

The balancing test weighs the following factors to determine if the misconduct was flagrant enough to lose protection:

1. The place and subject matter of the discussion;
  - In front of coworkers, on the shop floor, unrelated to ongoing labor-management discussions = more likely to be flagrant
2. Whether the outburst was impulsive or planned;
  - Planned = more likely to be flagrant
3. Whether the outburst was provoked;
  - Unprovoked = more likely to be flagrant
4. The nature of the intemperate language and conduct.

## Unprotected Speech by Union Officials

- Local union president came to represent employee, but supervisor told him that meeting would not be disciplinary and he needed to leave.
- President got angry and went face-to-face with the supervisor, pressing his stomach against hers and forcing her to arch her back over a counter to avoid him.
- Confrontation lasted about 10-20 seconds.
- President received a three-day suspension for his conduct.
- Union filed ULP, alleging that the suspension was a discipline for protected activity.
- *Continued on next slide...*

## Unprotected Speech by Union Officials

- ALJ and FLRA found a ULP – union president’s misconduct was not so “flagrant” as to lose protection of the statute.
- D.C. Circuit reversed, finding that the facts adopted by the ALJ likely amount to an assault. The nature of the conduct is beyond any acceptable limit for a union official.
- Moreover, there was no provocation. The supervisor lawfully and peacefully informed the president that the meeting was not disciplinary and no representation was necessary.
- “Physical intimidation and touching amounting to assault and battery, during the course of otherwise protected activity, is not condoned nor immunized by the federal labor laws.”

*Dep’t of the Air Force v. FLRA*, 294 F.3d 192 (D.C. Cir. 2002)

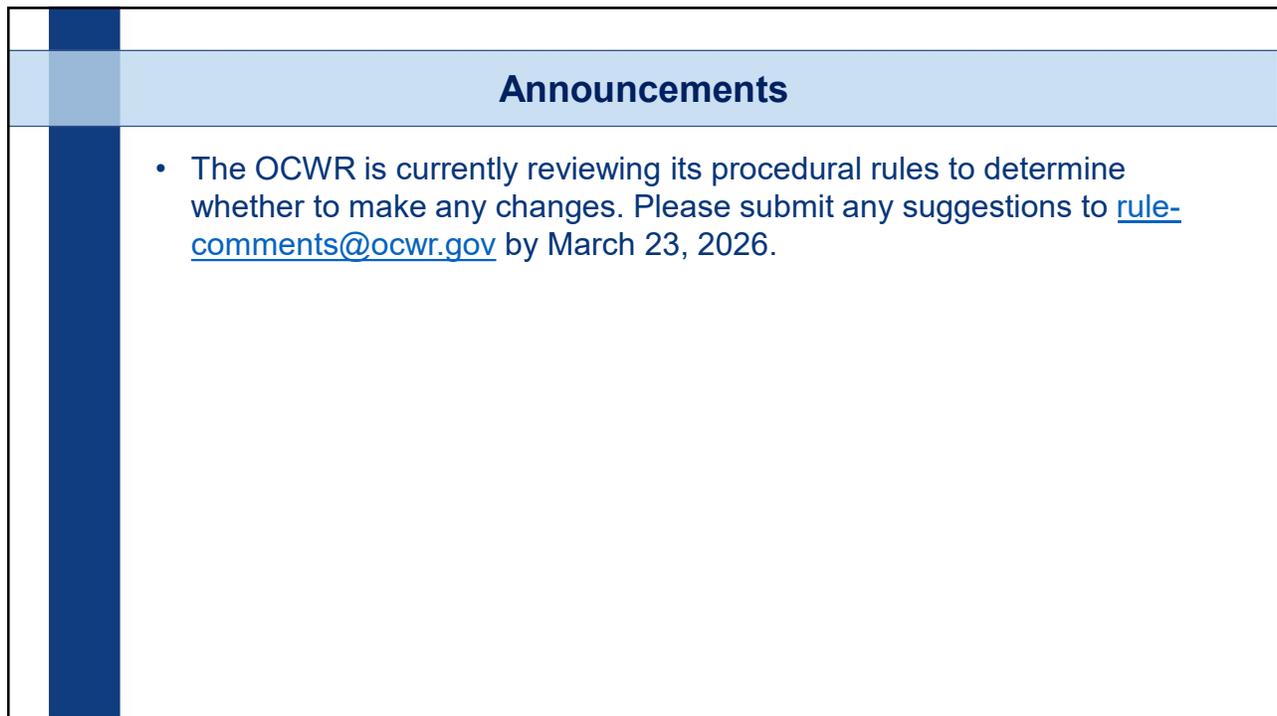
## Unprotected Speech by Union Officials

- After a casual conversation with an EAP Counselor, prison employee was put on administrative leave pending psychological fitness for duty evaluation.
- Union representative distributed flyers telling prison employees that if they meet with the Counselor “YOU BETTER HAVE A UNION REPRESENTATIVE.”
- Warden removed the flyers from bulletin boards, told representative to stop distributing them, and referred the incident to the Office of Internal Affairs for investigation.
- Union filed ULP, alleging that removal of flyers and opening investigation improperly restricted protected activity.
- *Continued on next slide...*

## Unprotected Speech by Union Officials

- FLRA found a ULP. Posting and distributing the flyers was protected activity. They did not contain any derogatory or defamatory statements and the agency failed to prove that they harmed Counselor’s ability to do her job. (Note: Counselor did not testify).
- Because the conduct was protected and not disruptive, the agency’s referral to the OIA was also inappropriate. Because there was no misconduct, an investigation of protected activity is intimidating and inappropriate.

*Bureau of Prisons, FCI Florence, 59 F.L.R.A. 165 (2003)*



	<b>Resources</b>
	<ul style="list-style-type: none"><li>• FLRA Materials<ul style="list-style-type: none"><li>• ULP Case Law Outline<ul style="list-style-type: none"><li>• <a href="https://www.flra.gov">flra.gov</a> → Resources &amp; Training → Guides &amp; Manuals → “ULP Case Law Outline”</li></ul></li></ul></li><li>• Peter Broida, <i>A Guide to Federal Labor Relations Authority Law and Practice</i> (2022)</li></ul>

	<b>Questions?</b>