Association of Civilian

Technicians Officer & Steward

Manual

Keep The Faith

Duty...Dignity...Dedication

50+ Years of Serving & Representing

Civilian Technicians Since

1960

Revised: August 2021

SERVING & REPRESENTING CIVILIAN TECHNICIANS SINCE 1960

CONGRATULATIONS, ACT REPRESENTATIVE
(Officers & Stewards)

You have taken on a key position in this exceptional Association for Employees On behalf of the National Executive Board, and myself, I would like to commend you for undertaking this responsibility.

There will be many times when you will have the satisfaction of hearing "a job well done". Other times you may wonder if it is worth all the effort and time spent outside of your employed position.

Without your diligence as a Representative, Technicians' rights may possibly be ignored, eroded or violated. Therefore, it is through your efforts that due process for your co-workers will be protected; through a representative of ACT.

With you as an ACT representative the full scope of the Labor/Management Relations Act is certain to be complied with and thereby fully protecting all of the interests of your fellow Employees.

Your collective bargaining agreement is the most important tool to aid you in your role as an ACT Representative. You must know and understand your contractual provisions; most important is your grievance procedure. Read all of the contract articles carefully. Commit them to memory! Apply them with **Duty...Dignity...Dedication** and you will successfully accomplish your representational goals.

Once you are able to competently discharge the responsibilities of being an Association Representative you will go about your duties with the certain knowledge that your fellow members will then believe in what is right and stand behind the truth. You will be trusted, relied upon, and looked to for guidance in protecting their rights. You will also know that this National Technician Labor Organization will stand by you in **Duty...Dignity...Dedicatio**

Tom Mahoney

Keep the Faith,
National President ACT

ASSOCIATION OF
CIVILIAN TECHNICIANS

OFFICERS & STEWARDS TRAINING MANUAL

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FORWARD

Public Law 95-454: The Congress finds that - - experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them –

(A) safeguards the public interest,
(B) contributes to the effective conduct of public business, and
(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

The importance of the steward's role has increased greatly as a result of the Civil Service Reform Act (P.L. 95-454). The steward is the vital link in keeping a constructive relationship working between the Association and Management.

Taking into consideration the different functions a steward must perform, and the different states and activities with which we, as an Association must deal, we have confined ourselves mainly to general principals of stewardship which, with minor adaptations, could be used in any state or activity.

The steward in each activity will have to supplement this information with other material pertinent to his own state regulations and policies, and the negotiated bargaining agreement, to solve problems peculiar to his own installation.

SECTION 1

NATIONAL GUARD TECHNICIAN ACT

Public Law 90-486

32 U.S.C / Chapter 7 / Section 709
Technician Employment Use Status

&

5 USC 3101: General authority to Employ

(Reference)

NATIONAL GUARD TECHNICIAN ACT
32 U.S.C / Chapter 7 / § 709
Technician: Employment, Use, Status

(a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsections (b) and (c), persons may be employed as technicians in—

(1) the organizing, administering, instructing, or training of the National Guard;

(2) the maintenance and repair of supplies issued to the National Guard or the armed forces; and

(3) the performance of the following additional duties to the extent that the performance of those duties does not interfere with the performance of the duties described by paragraphs (1) and (2):

(A) Support of operations or missions undertaken by the technician's unit at the request of the President or the Secretary of Defense.

(B) Support of Federal training operations or Federal training missions assigned in whole or in part to the technician's unit.

(C) Instructing or training in the United States or the Commonwealth of Puerto Rico or possessions of the United States of—

(i) active-duty members of the armed forces;

(ii) members of foreign military forces (under the same authorities and restrictions applicable to active-duty members providing such instruction or training);

(iii) Department of Defense contractor personnel; or

(iv) Department of Defense civilian employees.

(b) Except as authorized in subsection (c), a person employed under subsection (a) must meet each of the following requirements:

(1) Be a military technician (dual status) as defined in section 10216 (a) of title 10.

(2) Be a member of the National Guard.

(3) Hold the military grade specified by the Secretary concerned for that position.

(4) While performing duties as a military technician (dual status), wear the uniform appropriate for the member's grade and component of the armed forces.

(c) **(1)** A person may be employed under subsection (a) as a non-dual status technician (as defined by section 10217 of title 10) if the technician position occupied by the person

has been designated by the Secretary concerned to be filled only by a non-dual status technician.

(2) The total number of non-dual status technicians in the National Guard is specified in section 10217 (c)(2) of title 10.

(d) The Secretary concerned shall designate the adjutants general referred to in section 314 of this title to employ and administer the technicians authorized by this section.

(e) A technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States. However, a position authorized by this section is outside the competitive service if the technician employed in that position is required under subsection (b) to be a member of the National Guard.

(f) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned—

(1) a person employed under subsection (a) who is a military technician (dual status) and otherwise subject to the requirements of subsection (b) who—

(A) is separated from the National Guard or ceases to hold the military grade specified by the Secretary concerned for that position shall be promptly separated from military technician (dual status) employment by the adjutant general of the jurisdiction concerned; and

(B) fails to meet the military security standards established by the Secretary concerned for a member of a reserve component under his jurisdiction may be separated from employment as a military technician (dual status) and concurrently discharged from the National Guard by the adjutant general of the jurisdiction concerned;

(2) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;

(3) a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned;

(4) a right of appeal which may exist with respect to paragraph (1), (2), or (3) shall not extend beyond the adjutant general of the jurisdiction concerned when the appeal concerns activity occurring while the member is in a military pay status, or concerns fitness for duty in the reserve components;

(5) with respect to an appeal concerning any activity not covered by paragraph (4), the provisions of sections 7511, 7512, and 7513 of title 5, and section 717 of the Civil Rights Act of 1991 [1] (42 U.S.C. 2000e–16) shall apply; and

(6) a technician shall be notified in writing of the termination of his employment as a technician and, unless the technician is serving under a temporary appointment, is serving in a trial or probationary period, or has voluntarily ceased to be a member of the National Guard when such

membership is a condition of employment, such notification shall be given at least 30 days before the termination date of such employment.

(g) (1) Except as provided in subsection (f), sections 2108, 3502, 7511, and 7512 of title 5 do not apply to a person employed under this section.

(2) In addition to the sections referred to in paragraph (1), section 6323(a)(1) of title 5 also does not apply to a person employed under this section who is performing active Guard and Reserve duty (as that term is defined in section 101(d)(6) of title 10).

(h) Notwithstanding sections 5544 (a) and 6101 (a) of title 5 or any other provision of law, the Secretary concerned may prescribe the hours of duty for technicians. Notwithstanding sections 5542 and 5543 of title 5 or any other provision of law, such technicians shall be granted an amount of compensatory time off from their scheduled tour of duty equal to the amount of any time spent by them in irregular or overtime work, and shall not be entitled to compensation for such work.

(i) The Secretary concerned may not prescribe for purposes of eligibility for Federal recognition under section 301 of this title a qualification applicable to technicians employed under subsection (a) that is not applicable pursuant to that section to the other members of the National Guard in the same grade, branch, position, and type of unit or organization involved.

(j) In this section:

(1) The term "military pay status" means a period of service where the amount of pay payable to a technician for that service is based on rates of military pay provided for under title 37.

(2) The term "fitness for duty in the reserve components" refers only to military-unique service requirements that attend to military service generally, including service in the reserve components or service on active duty.

5 USC 3101: General authority to employ

§3101. General authority to employ Each Executive agency, military department, and the government of the District of Columbia may employ such number of employees of the various classes recognized by chapter 51 of this title as Congress may appropriate for from year to year.

SECTION 2

OFFICERS & STEWARDS INFORMATIONAL GUIDE

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Summaries

THE ROLE OF THE STEWARD

The steward holds an important position in the Chapter, and the effectiveness of the Association depends on your every action. You need to be well informed regarding your duties, your responsibilities and the rights of your members. The stewards along with the supervisor play a vital role in the operating efficiency of the agency unit.

A steward should know his agency regulations and policies as well as the labor management agreement. They should be familiar with their fellow employees in their area of responsibility and should have a working knowledge of benefits and entitlements available to the technician workforce.

Know the method/steps of grievance handling within your agency. Be sure to keep within the time limits of each step. You may have the best grievance in the world, but end up losing it because you failed to meet the time lines.

Your success as a steward depends partly on your ability to resolve problems at the lowest level possible. Approaching the supervisor as an equal and seeking a solution to a potential grievance. You are protected from retaliation in the performance of your steward duties under Federal Statutes.

Answer questions of members and non-members regarding their rights as Federal employees and as Association members. Should you not know the answers, don't fake it! Get the needed answers from your local officers, or your national field representative. This will insure your integrity as well as that of the Association.

The steward is a vital link in the building of membership and is responsible for recruiting and retaining members in the Association.

SKILLS OF A GOOD STEWARD

1. Ability to get the true and complete facts. (Distinguish between fact and opinion)
2. Ability to distinguish between grievance and gripe and to evaluate the grievance.
3. Ability to discuss and argue grievances logically, persuasively and calmly.
4. Ability to be a good listener and a keen observer.
5. Ability to write grievances clearly, concisely, and completely.
6. Ability to be diplomatic, fair and objective.
7. Ability to take a stand with management or fellow workers.
8. Ability to keep your word.
9. Ability to gain the respect of management.
10. Ability to resolve grievances at the lowest level and in the shortest time possible.
11. Ability to provide leadership.

- But remember: Leadership does not mean leading people around by the nose telling them what to do.
- Leadership does mean **MOTIVATING** people:

  . . .to **STAND** on their own two feet
  . . .to **MAKE** their own decisions
  . . .to **CARRY** them out in the best union tradition

- Leadership does mean **UNITING** people:

  . . .to **DISCUSS** their problems
  . . .to **PROPOSE** solutions to the problems
  . . .to **DETERMINE** a consensus
  . . .to **ESTABLISH** a position reflecting that consensus
  . . .to **STIMULATE** membership participation in establishing that consensus
  . . .to **FINALIZE** (and formalize) that consensus democratically by majority vote.

- Leadership does mean **INSPIRING** other members to back up one another and, of course, back up their official spokesman.

The Grievance Machinery in Motion

Section 7103(a)(9) "grievance" means any complaint--

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee, labor organization, or agency concerning-

(i) the effect or interpretation, or a claim of reach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

In determining whether or not you have a grievance, you must consider the following two points:

- Does it violate law, agency regulations or policies or your labor management agreement?
- Has the aggrieved technician been treated unfairly by any management official?

If the answer to either question is yes, you have a valid grievance. The steward must remember that every complaint is not necessarily a grievance. Some grievances emanate from personality conflicts. These arguments between employees are not true grievances, and should not be treated as such. These situations may be resolved through other means. Remember the following:

- Get the full story
- Check the records
- Put it in writing
- Be a good listener
- In your discussion with the supervisor do not get sidetracked
- Present your case on the basis, of fact, not opinion
- Don't trade. Never settle one grievance to get a favorable agreement on another
- If you win your case don't brag about your victory
- Be fair, You expect management to be fair so you be fair also
- Do not interpret the Contract

INVESTIGATING & PRESENTING GRIEVANCES

THOSE FIVE IMPORTANT "W's" IN EVERY GRIEVANCE

WHO - is involved in the grievance? Name(s), addresses, and phone number (for the steward's private use only); service computation date; job description, and shift. (Don't forget the supervisor or other management representatives who make this a grievance.)

WHEN - did the grievance occur? On what day and at what time did the act or omission take place which created the grievance? (Shift, date, and time is needed.) If you don't know or can't recall the exact date or time, state: "On or about."

WHERE - did the grievance occur? The Exact Location.

WHAT - happened on the grievance? This question tells the story of the grievance. What happened to the aggrieved and what did the Employer/ Agency do?
Often grievances are not simple and usually involve several things happening at once. In getting the facts, you have to constantly ask yourself, "Do I understand this case? Do I have the facts straight in my mind?" Until you definitely have the story clearly in mind, you should continue, to ask, "What happened?", until it is clear.

WHY - is it a grievance? The answer to this question is that the agency violated Article____Section_____ of the contract. In outlining the violations, do not be satisfied with a single section of the contract. If more

than one section has been violated, the stronger your case will be. This does not mean, of course, that you can throw in any violation at all. You must determine what clauses or practices have been violated and then list them in the grievance.

Don't forget the most important part of your grievance: - **WHAT REMEDY ARE YOU REQUESTING?** What adjustments are necessary to completely correct the injustice? To "make the grievant whole?" (i.e., to place the. grievant in the same position he would have been had not the grievance occurred). What action does the Union want management to take? It is very important to be specific in your request for settlement and don't forget retroactivity of the remedy where applicable.

NOTE: A well-written grievance need not be long or complicated. Simply state the situation as concisely and straightforward as you can. Support for your contention can flow from your informal discussion with management Remember, any effort to furnish management with exhaustive details prematurely, may result in something being left out, or even worse, giving away too much of your case.

P.S. Don't forget that inevitable and irrepressible 6th "W" Write it down.

WHERE IS INFORMATION OBTAINED?

1. From the Grievant:

Check your five "W's" first
Ask the grievant about his previous record
(a) Quality and quantity of his work
(b) Previous discipline record (similar or different cases?)
(c) Attendance record?
(d) Attitude (has management made this an issue in the past?) Are there any letters of warning or reprimands on file? If so, what was the nature and incident of the reprimand.

2. From Other Records: If records are being requested from the agency, you **MUST** refer to §7114(b)(4) of the Statute when making your request:

(a) Do chapter records show similar cases in the past? (e.g., settled grievances, arbitration awards, management directives, past practices).

(b) Check with other stewards on how you might proceed in this case.

(c) Ask the employee to keep records. (i.e., unavoidable delays spent in wash room, times late, meetings held with supervisor, cases closed, etc.)

(d) Request from management records or statements. (**First Step:** Have the employee obtain a copy of his NGB Form 904-1 / automated supervisors brief.

3. From Witnesses: Witnesses can greatly help a grievance, but there are several things to guard against when using them.

(a) Be certain that you fully understand the witness' story. Go over it with each witness to make sure that

they tell the same story each time. This is not a matter of a witness lying as much as people's memories acting in strange ways. Some people remember more clearly than others. Be certain that your witness has a good memory and can repeat his story accurately. And, if possible, obtain a signed statement.

(b) Be sure that the witness is willing to help you and the grievant all the way through the grievance procedure. A witness might say that he saw what happened but refuses to tell it to management. Make clear to the witness that you are depending on him to support the case by telling what he knows. You must make him understand that he might be called before management and an arbitrator. It is better not to have a witness than to have one who you depend upon but who later backs down and refuses to testify. It is extremely helpful to have the witness sign a written statement of his story.

SUGGESTIONS FOR PRESENTING THE GRIEVANCE

1. The Problem of Dealing with Human Beings

(a) No two people are approachable in the same manner. This applies to union members and employer officials alike.

(b) The steward is after results that will benefit the worker and the group as a whole; he must suppress personal likes, dislikes, fears and prejudices.

2. Some Points to Remember When Presenting the Case

(a) Prepare the case beforehand:

. . . Have your facts down in writing.

. . . Have notes organized to guide your presentation

. . . Anticipate the employer's argument and have answers ready.

. . . Make an effort to talk to the employee alone before you meet with the supervisor.

. . . Talk the case over, if necessary, with other stewards or others who might help.

(b) Avoid arguments among union representatives in the presence of management:

. . . If you have a difference of opinion during a meeting, take a recess and discuss the problem out in private, always present a united front to the employer.

(c) Keep to the point:

. . . Avoid getting led off on side issues by management.

(d) Get the main point of management's argument:

. . . Try to narrow the area of difference between union and management.

(e) Avoid getting excited.

(f) Treat employer representatives as you would want to be treated:

. . . Let any break in good relations come first from the other side.

. . . Remember that the management representative to whom you are speaking is not always personally responsible for the complaint or grievance; therefore, you may get less cooperation from him by trying to place the blame on his shoulders.

(g) Avoid unnecessary delays:

. . . If the employer asks for more time, try to determine whether it is an attempt to stall or is based on a sincere desire for more facts needed to settle the case.

. . . Remember, the more time that passes, the "cooler" the grievance becomes, and the less support you will get from the worker or workers involved.

. . . The longer the complaint or grievance is tied up by the employer, the more difficult it will be for the union to gather and remember the facts and merits of the case.

. . . The more grievances that are piled up in the procedure, the more likely that management will try to "horse trade", that is, settle a few grievances for dropping of others.

. . . If the grievances are made a part of contract negotiations, management may attempt to trade off other contract demands for settlement of grievances that should have been taken care of previously.

(h) Settle the grievance at the lowest possible step:

. . . Try to settle the grievance at the first step of the grievance procedure but make sure it is properly settled.

. . . This saves time.

. . . It helps build better relationships.

. . . The steward will feel like the vital part of the union that he is.

. . . Don’t pass the buck - if you can settle the, grievance at the first step, do so.

(i) Avoid bluffing:

. . . It is only a matter of time until your bluff is called. It is, in the long run, wiser to develop a reputation for honesty.

(j) Maintain your position on a grievance until proven wrong, show me the law, regulations etc.

(k) Enforce the contract:

. . . If the union has not complained about similar violations of the contract or past practices before, why should the employer give in now?

. . . The best contract in the world has no value if the workers and stewards do not require the employer to live up to its terms.

SUMMARY

Your Responsibilities:

As a steward you are first line representative of ACT and your chapter. This is a tremendous responsibility, sometimes discouraging, but you have the support and respect of your fellow Association officers and members.

Your Rights:

Under the provisions of your negotiated agreement and its grievance procedure and the STATUTE, it is your established right to speak freely in protecting the working conditions, as well as the dignity and security of the jobs of all ACT members.

Your Duties:

Be a good ACT member. Understand the principles and provisions of your Association constitution and by-laws. Support your Leadership. Regularly attend 1ocal meetings. Understand agency regu1ations, policies and the provisions of your agreement. Constantly strive to improve ACT / Management relationships. Know your people and their jobs. **Recruit new members**.

STEWARDS CHECKLIST FOR HANDLING GRIEVANCES

1. Know your contract and agency regulations.
2. Know your members and their jobs.
3. Handle problems before they are magnified into grievances
4. Submit only just grievances to management.
5. Get all the facts to support your grievance case.
6. Keep written records of grievances.
7. Settle grievances on the basis of their merits.
8. Maintain a positive, friendly relationship with management.
9. Strive for a satisfactory settlement in the first stage of the grievance procedure. Failing that, follow through to an acceptab1e decision.
10. Keep grievant informed as to the progress of their grievance.

TIPS FOR HANDLING GRIEVANCES

1. Determine whether or not a grievance exists:

- Listen carefully - get all the facts and make notes.
- Don't jump to conclusions - personally investigate the complaint conditions.
- Find the cause and determine if management is at fault.
- Be fair and honest. If a grievance does not exist, turn it down.
- Contact your Chapter President / Field Rep for advice.

2. Prepare the grievance properly:

- Print or typewrite your facts in proper grievance form.
- Remember your five "W's" - who is involved, what happened, when did it happen, where did it happen, why is it a grievance, & include the appropriate remedy.
- Monitor contractual time limits.

3. Approach the supervisor in a friendly but positive manner.

- State your case briefly and clearly.
- Be calm and attentive.
- Presenting grievances for adjustment is your right and responsibility, do it with confidence.
- Make management justify its position.
- Make every grievance stand on its own merits.
- Persuade the supervisor to settle on the spot.
- If you reach a favorable settlement, thank him and don't brag about it.
- If no settlement is reached, pass the grievance together with all facts to the next step of the grievance procedure without delay.
- Keep the aggrieved employee informed of the exact status of his grievance.
- Contact your National Field Representative for advice.

SECTION 3

(I&I)

IMPACT & IMPLEMENTATION BARGAINING

&

APPROPRIATE BARGAINING

&

THREE PROCEDURAL FAILURES WHEN DEALING WITH APPROPRIATE BARGAINING

&

THE RIGHT TO INFORMATION (DATA)

&

PRIVACY ACT AND DISCLOSURE OF INFORMATION

&

FLRA SETS STADARDS ON DISCLOSURE TO UNIONS

&

ANIMUS

IMPACT & IMPLEMENTATION (I&I) BARGAINING PREAMBLE

Although many management decisions may be nonnegotiable, for example, a determination to conduct a reduction in force, the immediate impact or reasonably foreseeable effects of those decisions may be negotiable, for example, the ability of employees who are downgraded to secure consideration for future vacancies at a higher grade.

Impact bargaining obligations may arise by reason of new management directives and policies, or by reason of informal changes in working conditions. ***§7106(b)(2)(3)***

If a nonnegotiable change in working conditions is made by management, the impact must be of some significance before the 1&1 bargaining obligation can be pressed by the union. If the union cannot establish that the changes in working conditions are significant, then the changes are referred to as *de minimis* (minimal) and management will usually decline to bargain the changes with the union.

This is not to say that the union should not proceed with a request to negotiate with management over the changes being made. A management change in the workplace may initially appear to be insignificant or minor in nature, but after some serious thought, research, of discussion with other union members or officials, an entirely different view or picture of the event(s) may materialize.

It is very important to realize, that inaction on your part may constitute a waiver of your rights (union and employees) under the Federal Labor Management Relations Statute (FLMRS). That is why you must take the position that any changes in the workplace may be changes in working conditions. And so, with a minimum of delay, you must provide management, with an oral followed by a formal written request to bargain over whatever changes are being proposed.

Some of the following are situations that require bargaining:

1. Relocation of Work: The reassignment of an employee involves a relocation of work performance and requires impact bargaining. 8 FLRA 605 (1982) (Decision of ALJ), 29 FLRA 891 (1987) (change in where duties would be performed during a period of renovation of facilities.)

2. Contracting Out: Although contracting out itself may not be a negotiable condition of employment, implementation bargaining concerning contracting out is a negotiable matter. 29 FLRA 1110 (1987)

3. Changes in Duties: A significant addition to the duties of an employee is a change in working conditions warranting notice to the union and impact bargaining, if requested. In fact, there is an obligation to bargain over the impact and implementation of any changes in job duties. 8 FLRA 623 (1982) (Decision of ALJ)

- A change from one or two day voluntary details to 30-day mandatory details required impact bargaining. 16 FLRA 98 (1984)
- Assignment of employees to 120-day details, involving different supervisors but essentially the same work, required impact bargaining. There was reasonably foreseeable effect of impact upon performance appraisal and promotional opportunities. 30 FLRA 346 (1987)
- A change in a program that required increased travel, that some employees welcomed and others avoided, was a change that resulted in more than *de minimis* effect on unit employees and required impact bargaining. 16 FLRA 845 (1984) (AU Decision)
- Management should have bargained over a decision to assign employee's administrative duties for a month at a time on a rotating basis. 24 FLRA 743 (1986)
- A study devised and initiated by management for a period of one year in which the possibility existed where changes brought about by the study concerning caseload, office layout/facilities, etc., could become permanent was an appropriate matter for bargaining. 16

FLRA 141 (1984)

4. Equipment Changes: Changes in equipment used by employees, resulting in reasonably foreseeable safety problems, necessitates impact bargaining. (Installation of a new degreaser) 25 FLRA 914 (1987)

5. Hours of Work or Shift: A change in duty hours of employees requires impact bargaining. 30 FLRA 961 (1988)

- Reassignment of employees from one shift to another requires an agency to bargain over impact and implementation. 8 FLRA 605 (1982)
- A change in starting or quitting times of unit employees requires impact bargaining. 8 FLRA 605 (1982)
- An increase in the number of employees per shift, and enlargement of duties of the positions on the shift requires impact bargaining. 17 FLRA 843 (1985)
- Although a decision to abolish a tour of duty and assign the employees to another shift was nonnegotiable, the impact of that decision was negotiable. 16 FLRA 3 (1984)

6. Overtime: Management has the right to change the assignment of work, but it must bargain over the impact first. 9 FLRA 762 (1982)

- Overtime assignments that have become regular, predictable, and expected by employees, for a period of years, become an established condition of employment and cannot be terminated absent impact bargaining. 9 FLRA 762 (1982)
- A modification of procedures followed by employees to notify management of their intent to work overtime requires advance notice to the union before implementation and an opportunity for impact bargaining. 19 FLRA 136 (1985) (AU Decision)

7. Reduction of Employment: An agency decision to change tours of duty from eight to six hours a day was not in itself negotiable, but the agency was obligated to negotiate the impact of its decision. A ***status quo ante*** *remedy* was appropriate absent a showing that agency operations would be unduly disrupted or impaired by not negotiating. 13 FLRA 459 (1983)

- The agency had an obligation to bargain over its decision to close the day after Thanksgiving and require the use of annual leave, countered by a union proposal to allow use of administrative leave for the day. 21 FLRA 814 (1986)

8. Breaks: A change in the location of a break area, and the consequential impact on the ability of employees to take their designated breaks, was unlawful in the absence of 1&1 bargaining. 24 FLRA 714 (1986)

9. Leave Procedures: A change in the manner of filling out sick or annual leave slips requires bargaining over a change in this practice. 10 FLRA 235 (1982)

10. Performance Standards & Critical Elements: The impact and implementation of performance standards and critical elements on an employee or employees are negotiable. The union is entitled to notice of the changes and an opportunity to bargain. 14 FLRA 390 (1984), 16 FLRA 1135 (1984), 43 FLRA 434 (1991) This does not mean that the standards or elements themselves are negotiable.

11. Work Review Methods: The establishment of a new means of reviewing work at an office constituted a change in working conditions within management's discretion but required advance notice to the union of the change for the purpose of impact and implementation bargaining. 4 FLRA 488 (1980) (AU Decision)

12. Training Program Requirements: Changes in the qualification requirements for entry into a training program designed to equip employees to function in a career field required impact bargaining. 17 FLRA 254 (1985)

13. Upward Mobility Program: An expansion of the size of an upward mobility program, involving more employees, and diminishing the opportunities for selection of those previously eligible, and which would have more than *de minimis* impact on bargaining unit employees, would require impact bargaining. 18 FLRA 875 (1985)

14. Office Reorganization: Relocation of offices, and, particularly, a change in the allocation of space and facilities to conduct union activities at a new office location, required bargaining as to the impact and implementation. Also, failure to delay implementation in face of other proposals can be an unfair labor practice. 41 FLRA 1268 (1991)

15. Downgradings - Position Reclassification: Although bargaining proposals directly relating to classification of positions do not concern conditions of employment within the duty to bargain, the duty does extend to implementation of downgradings resulting from reclassification of positions and to the impact of those reclassifications on affected employees. 23 FLRA 396 (1986)

16. Parking: The impact and implementation of establishing a paid parking program falls within the duty to bargain. 22 FLRA 875 (1986) The relocation of a work site where transportation arrangements changed and the allocation of parking spaces for employees required impact bargaining. 25 FLRA 843 (1987)

APPROPRIATE BARGAINING

The FLRA has stated that: "In order to determine whether a change in conditions of employment requires bargaining .in this and future cases, the pertinent facts and circumstances presented in each case will be carefully examined. In examining the record, we will place principal emphasis on such general areas of consideration as the nature and extent of the change on conditions of employment of bargaining unit employees. Equitable consideration will also be taken into account in balancing the various interests involved."
Dept. of Health & Human Services. Social Security Admin. and AFGE Local 1760 24 FLRA 42 (1986)

The Authority has repeatedly held that "the Statute requires that, prior to effecting a change in established conditions of employment, an agency must give the exclusive representative adequate advance notice and an opportunity to negotiate over such change and/or the impact and implementation thereof" See U. S. Dept. of Justice, Federal Prison System. 12 FLRA 4 (1983)

In this and future cases where the Authority addresses a management allegation that a union proposal of appropriate arrangements is nonnegotiable because it conflicts with management rights described in section 7106 (a) or (b) (1), the Authority will consider whether such an arrangement is appropriate for negotiation within the, meaning of section 7106 (b) (3) or, whether it is inappropriate because it excessively interferes with the exercise of management's rights.

In making this determination, the Authority will first examine the record in each case, to ascertain as a threshold question whether a proposal is in fact intended to be an arrangement for employees adversely affected by management's exercise of its rights. In order to address this threshold question, the union should identify the management right or rights claimed to produce the alleged adverse effects, the effects or

foreseeable effects on employees which flow from the exercise of those rights, and how those effects are adverse. **In other words, a union must articulate how employees will be detrimentally affected by management's actions and how the matter proposed for bargaining is intended to address or compensate for the actual or anticipated adverse effects of the exercise of the management right or rights.**

Once the Authority has concluded that a proposal is in fact intended as an arrangement, the Authority will then, determine whether the arrangement is appropriate or whether it is inappropriate because it excessively interferes. This will be accomplished, as suggested by the D. C. Circuit, by weighing the competing practical needs of employees and managers. In balancing these needs, the Authority will consider such factors as:

(1) What is the nature and extent of the-impact experienced by the-adversely affected employees, that is, what conditions of employment are affected and to what degree?

(2) To what extent are the circumstances giving rise to the adverse affects within an employee's control?

For example, compare AFGE Local 2782 and Bureau of the Census. 14 FLRA 801 (1984) (proposal applies to employees demoted through no fault of their own) with NLRB Union and NLRB, Office of the General Counsel 18 FLRA 42 (1985) (proposal concerned employees management proposed to demote or terminate due to demonstrated inability or unwillingness to perform acceptably)

(3) What is the nature and extent of the impact on management's ability to deliberate and act pursuant to its statutory rights, that is, what management right is affected; what is the precise limitation imposed by the proposed arrangement on management's exercise of its reserved discretion or to what extent is managerial judgment preserved?

See, for example, ACT Montana Air Chapter and Dept. of the Air Force, Montana Air National Guard, Hq. 120th Fighter Interceptor Group (ADTAC), 20 FLRA 85 (1985) (proposal 1) (proposal which would have precluded management, regardless of circumstances, from obtaining additional personnel with skills unavailable in the unit held to excessively interfere with management rights).

(4) Is the negative impact on management's rights disproportionate to the benefits to be derived from the proposed arrangement?

See, for example, Montana Air National Guard, supra, (proposal 1) (harm to agency's mission balanced against uncertain benefits of the proposal to employees).

(5) What is the effect of the proposal on effective and efficient government operations, that is, what are the, benefits or burdens involved?

These considerations are not intended to constitute an all-inclusive list. As frequently noted in the opinions of various judicial and quasi-judicial entities, an adjudicative body must consider the totality of facts and circumstances in each case before it. Additional considerations will be applied where relevant and appropriate. In as much as a ritualistic or mechanistic approach is neither suggested, nor contemplated, the Authority will expect the parties in cases of this nature file in the future to address any and all relevant considerations as specifically as possible.

IN SIMPLE TERMS THERE ARE FIVE FACTORS OF APPROPRIATE ARRANGEMENTS

1. The nature and extent of the adverse impact of management's decision on workers;
2. The extent to which the adverse effects were within employee's control;
3. The nature and extent of the proposal's impact on management ability to deliberate and aft pursuant to management's statutory rights;
4. Whether the proposed arrangement had a negative impact on management rights disproportionate to the benefits to employees;
5. The proposal's effect on effective and efficient government. AFGE V FLRA 702 F 2d 1183, 1983

THREE PROCEDURAL FAILURES WHEN DEALING WITH IMPACT BARGAINING

THE DUTY TO BARGAIN IN GOOD FAITH IMPOSED BY THE STATUTE REQUIRES AN AGENCY TO BARGAIN DURING THE TERM OF A COLLECTIVE BARGAINING AGREEMENT ON NEGOTIABLE UNION PROPOSALS CONCERNING MATTERS WHICH ARE NOT CONTAINED IN THE AGREEMENT, UNLESS THE UNION HAS WAIVED ITS RIGHT TO BARGAIN ABOUT THE SUBJECT MATTER. SUCH A WAIVER MUST BE ESTABLISHED BY (1) AN EXPRESS AGREEMENT, OR (2) THE PARTIES BARGAINING HISTORY. FOR A WAIVER TO BE FOUND, "THAT WAIVER MUST BE CLEAR AND UNMISTAKABLE".

WAIVER:

A waiver *is* described as an agreement between the parties in which one of the parties voluntarily gives up the right to bargain on an issue to which it otherwise would be entitled to negotiate on.

For a Waiver to be enforceable, it must be Clear and unmistakable. To reiterate, the matter must have been fully discussed and consciously explored during negotiations and one of the parties must have yielded or otherwise waived its right to engage in future bargaining about that matter subject.

INACTION:

Is a failure to respond to an announced change before it is implemented and can result in the loss of the right to negotiate the matter. If the union decides to request bargaining -- or at least request a meeting to determine more information on the issue -- you must do so prior to the announced date of implementation.

ZIPPER CLAUSE:

A written clause in the agreement that provides for the limitation or bars an obligation to negotiate during the life of the agreement.

"NOTE"

If you are unable to determine the impact of a change in working conditions, you must give a reply stating that:

"**At this time the Association cannot determine what impact will affect the bargaining unit employees. However, should there be an impact after the change in working conditions has been implemented; the Association retains its right under the Statute to negotiate the unforeseen impact that had then occurred."**

Take note that the FLRA has ruled that a Union cannot foresee the future regarding all changes in working conditions.

THE RIGHT TO DATA

Under 5 U.S.C. 7114 (b)(4) (Federal Labor-Management Relations Statute), agencies have a legal obligation to provide unions (officers and/or shop stewards) with data that the union needs to intelligently carry out its duties as a recognized bargaining agent.

As a union shop steward, you are entitled to information that is needed under the following circumstances:

- to determine whether a grievance exists; or
- to prepare a grievance for presentation to management; or
- to determine whether or not to drop a grievance or to move a grievance forward under the negotiated grievance procedures; or
- to determine whether to arbitrate a grievance; or
- to prepare for an arbitration hearing.

The following are some of the kinds of data you can request:

- personnel files;
- names of witnesses;
- files of particular (Le., specific instances, dates, locations, etc., of alleged unsatisfactory conduct);
- records (such as payroll records, time records, production material, inspection, attendance, time study, security guard records, and supervisor memos.

In discipline cases, the union should demand a complete copy of the employee's personnel records. You may be surprised and find yourself at a distinct disadvantage at arbitration or disciplinary hearing when management place into evidence past discipline of which you were totally unaware. Also, since unequal punishment is always a potential defense, ask management for a list of workers who have been disciplined for the same type of offense in previous years.

In a contract interpretation case, ask for copies of all notes of collective bargaining sessions concerning the disputed clauses, as well as the dates and contents of any conversations between union and management applying or interpreting the language in dispute.

For other grievances, see sample letters of data request in Section VI:

Although initial requests for information can be made orally, the request must be followed up

in writing. Written requests should be as specific as possible. Clearly identify the records, documents, or facts that you are looking for. Unclear requests, such as for "all documents relating to the incident," do not have to be honored by the employer.

FLRA GENERAL COUNSEL MEMORANDUM TO REGIONAL DIRECTORS ON "INVESTIGATING, DECIDING AND RESOLVING DATA DISPUTES"

This Executive Summary of the Federal Labor Relations Authority's (FLRA) General Counsel's Memorandum to Regional Directors concerns the duty of an agency to furnish information to a union under Chapter 71, 7114 (b)(4) of the Federal Service Labor Management Relations Statute (Statute). The memorandum focuses on two recent Authority decisions in this area.

The Memorandum first discusses how unions and agencies can follow the new approaches set forth in these cases for resolving information questions, and includes sample request and response forms for use by labor and management. The Memorandum also provides guidance on how Regional Directors can help unions and agencies and how unions and agencies can help themselves, in narrowing and resolving disputes over requests for information, without engaging in time consuming and costly litigation. Also attached to the memorandum is a sample issue analysis form to assist the parties in resolving their information dispute prior to filing an unfair labor practice charge.

I. ESTABLISHING THAT THE REQUESTED DATA IS "NECESSARY"

The Authority decision in Internal Revenue Service. Washington. D.C. and Internal Revenue Service. Kansas City Service Center. Kansas City. Missouri, 50 FLRA 86, 50 FLRA 661 (1995) discussed the parties' obligation to communicate and articulate their respective interests in disclosing information, and set forth a new approach to determining whether information is "necessary" under Chapter 71, 7114(b)(4) of the Statute. The case addressed: (1) what unions must show to establish their need for information; (2) what agencies must show to establish any interests they may have against providing the requested information; (3) what both parties must communicate to each other; and (4) when an unfair labor practice will be found to occur. Each of these matters is discussed in turn.

FLRA NEWS

FEDERAL LABOR RELATIONS AUTHORITY - WASHINGTON, DC 20424

Contact: Sarah Whittle Spooner www.FLRA.gov FOR IMMEDIATE RELEASE
202-218-7791 October 31, 2011

FLRA GENERAL COUNSEL ISSUES GUIDANCE ON INFORMATION REQUESTS

Julia Akins Clark, General Counsel of the Federal Labor Relations Authority (FLRA), today issued to the public, and posted on the FLRA website, Guidance on Union requests for information from Federal agencies. The Guidance is intended to assist the parties, both Union and management, in determining their rights and obligations regarding information requests related to their collective-bargaining responsibilities under the Federal Service Labor-Management Relations Statute (Statute). The Guidance focuses on the application of the “particularized need” standard, as interpreted by the FLRA, which requires a Union to establish a “particularized need” for the information it requests from a Federal agency. It describes the meaning of this requirement, and what the consequences are if the Union does or does not establish such a particularized

need. In addition, it briefly addresses the application of the Privacy Act to Union information requests under the Statute. Finally, it provides examples of cases where the FLRA has found that a Union has and has not met the "particularized need" standard. And attached to the Guidance are two model forms drafted by the Office of General Counsel, a model form for requesting information, and a model form for responding to such a request.

General Counsel Clark stated that "this Guidance advances the Office of General Counsel's policy of providing the parties in the Federal sector with information resources that they can use on a day-to-day basis in carrying out their collective-bargaining responsibilities. It is based on a careful analysis of existing law, and it should help the parties understand how they can best communicate in a manner which promotes cooperative labor-management relations and the effective functioning of government, as called for by the Statute."

The FLRA administers the labor-management relations program for 1.6 million non-Postal Federal employees worldwide, approximately 1.1 million of whom are represented in 2,200 collective bargaining units. The FLRA is charged with providing leadership in establishing policies and guidance related to Federal sector labor-management relations and with resolving disputes under, and ensuring compliance with, the Statute.

The FLRA's Office of the General Counsel is the independent investigative and prosecutorial component of the FLRA. The Office of the General Counsel, through its seven regional offices, investigates, resolves, and prosecutes unfair labor practice charges. The regional offices also resolve representation questions, which includes the conduct of secret ballot elections to determine a collective bargaining representative, and provide training and assistance to parties on establishing productive and cooperative labor-management relations.

Q #1: ***WHAT MUST A UNION ESTABLISH TO CREATE A SUFFICIENT REQUEST FOR DATA?***

Particularized Need in General. A union requesting information under section 7114(b) of the Statute must now establish a "particularized need" for the requested information. This requires more than a conclusory or bare assertion that the information is or would be relevant or useful. Rather, the union's request for information must, at the time the request is made, articulate and explain the union's interests in disclosure of the information. This articulation by the union must be sufficient to permit an agency to make a reasoned judgment as to whether the information must be disclosed under the Statute.

How to Show Particularized Need: To create a sufficient request for information, which triggers the agency's duty to disclose information if the other elements of section 7114(b)(4) also have been met, a union must articulate, with specificity, at the time it makes the request:

1. Why the union needs the requested information;

2. How the union will use the requested information; and

3. How the articulated use of the Data relates to the unions representational responsibilities under the Statute.

A union must also respond properly to any agency request for further clarification concerning the union's

need for the information, without requiring the union to reveal its strategies or compromising the identity of a potential grievant who wishes anonymity.

Personal Identifiers: The requirement for "particularized need" applies to not only the information requested, but to personal identifiers contained in the requested information as well. These include, for example: name, social security numbers or other information identifying a particular employees. To date, the Authority has rarely found that a union has shown the "particularized need" necessary to entitle it to information containing personal identifiers.

Q #2: *WHAT MUST THE AGENCY ESTABLISH WHEN REFUSING TO DISCLOSE THE INFORMATION?*

To avoid an unfair labor practice, an agency denying a request for information under section 7114(b)(4) because it asserts that the information is not necessary must establish its countervailing anti-disclosure interest. Like a union, an agency does not satisfy its burden by merely making conclusory or bare assertions. An agency cannot simply say "no", but rather must:

1. Assert a countervailing anti-disclosure interest; and

2. Establish its anti-disclosure interest.

Similarly, if an agency refuses to disclose information asserting that some other requirement of section 7114(b)(4) has not been met, the agency must establish that reason.

An agency's failure to communicate and articulate to the union any countervailing anti-disclosure interests or other reasons for not disclosing requested information constitutes a failure to bargain in good faith and an independent unfair labor practice. See Q #4 below.

Q #3: *WHAT MUST BOTH THE AGENCY AND UNION DISCUSS?*

In addition to the above, the agency and union are also expected to discuss the following when determining whether and/or how disclosure of the information is required:

1. Alternative forms or means of disclosure that may satisfy the unions' need for the information; and

2. Alternative forms or means of disclosure that satisfy the agencies' countervailing anti-disclosure interest.

Q #4: *WHEN WILL AN UNFAIR LABOR PRACTICE BE FOUND?*

If the parties are unable to agree on whether or to what extent the requested information will be provided, and the other requirements in section 7114(b)(4) have been met, an unfair labor practice will be found if:

1. The union has established a particularized need for the information; and

2. The agency has not established a countervailing interest in non-disclosure; or

3. The agency's established countervailing interest does not outweigh the union’s demonstration of a particularized need.

An agency's refusal to properly respond to a data request by failing to communicate and articulate to the union its reasons for denying the disclosure of requested information constitutes a refusal to bargain in good faith in violation of the Statute, even if disclosure is not required under section 7114(b)(4).

II. THE PRIVACY ACT AND DISCLOSURE OF INFORMATION

The second recent Authority decision concerned the relationship between section 7114(b) of the Statute, the Privacy Act and the Freedom of Information Act (FOIA). U. S. Department of Transportation, Federal Aviation Administration, New York Tracon, Westbury New York 50 FLRA 55, 50 FLRA 338 (1995)

Q #5: *WHAT MUST THE AGENCY SHOW TO PROPERLY ASSERT THAT THE PRIVACY ACT BARS DISCLOSURE OF THE REQUESTED INFORMATION?*

An agency asserting that the Privacy Act bars disclosure of the requested information is required to demonstrate:

1. That the information sought is contained in a "system of records" within the meaning of the Privacy Act;

2. That disclosure of the information would implicate employee privacy interests; and

3. The nature and significance of those privacy interests.

Q #6: *WHAT MUST THE UNION THEN SHOW TO ESTABLISH THAT THE DATA IS WITHIN EXEMPTION OF THE FOIA AND THUS IS AN EXCEPTION TO THE PRIVACY ACT?*

If the agency makes its requisite showing, the union must then establish:

1. That there is a public interest in the requested information cognizable under the FOIA; and

2. How disclosure of the specific information will serve that public interest; m:

3. That the information *is* covered by a "routine use". **See Q #8**

Definition of Public Interest: The only relevant "public interest" to be considered under the FOIA is the extent to which the requested disclosure would shed light on the agency's performance of its statutory duties, or otherwise inform citizens concerning the activities of the Government. The public interest in collective bargaining that is embodied in the Statute, or specific to a union in fulfilling its obligations under the Statute, will no longer be considered in analyzing the application of Exemption 6 of the FOIA.

Personal Identifiers: The Authority rarely finds any support to establish that the release of personal identifiers enhances any public interest. Rather, the Authority consistently has found that the public interest that would be served by disclosure of requested information containing personal identifiers also could be substantially, if not equally, served by the disclosure of sanitized information which does not identify individual employees by name or other identifying information.

Q #7: *WHAT HAPPENS WHEN BOTH THE AGENCY AND THE UNION MEET THEIR REQUIRED SHOWINGS?*

Once the agency and union establish their respective interests, then:

1. The privacy interests of the employees against disclosure must be balanced against the public interest in disclosure.

2. If the privacy interests are greater than the public interest, the agency is not required to furnish the requested information because it is prohibited by the Privacy Act (unless another exception to the Privacy Act applies-see Q #8 below)

3. If the public interest in disclosure is greater than the privacy interests, disclosure of the information is not prohibited by the Privacy Act and the agency is required to furnish the requested information (assuming, of course, that the other requirements in section 7114(b)(4) are met.)

Q #8: *WHAT IF THE REQUESTED INFORMATION IS COVERED BY THE ROUT/NE USE EXCEPTION TO THE PRIVACY ACT?*

The above exception pertains to the interplay between Exemption 6 of the FOIA and the Privacy Act. Another Privacy Act exception that may require disclosure of the information concerns the "routine use" exception of the Privacy Act. OPM/GOVT-2 is a system of records under the Privacy Act which covers many personnel related matters. Requested information in this system of records may be disclosed if the information is determined to be Relevant and necessary within the meaning of OPM routine use "e". This routine use requires a showing that the information bears a traceable, logical and significant connection to the purpose to be served and that there are no adequate alternative means or sources for satisfying the union's informational needs, such as deletion of personal identifiers. Note that this is a different standard than whether there is a "particularized need" for the information under section 7114(b)(4) of the Statute.

III. RESOLVING DISPUTES OVER THE DISCLOSURE OF INFORMATION

Q #9: *HOW CAN REGIONAL DIRECTORS ASSIST THE PARTIES IN RESOLVING INFORMATION DISPUTES?*

Interest Based Approach To Resolve Particularized Need Disputes: The Regions should assist the parties in communicating their respective interests and in seeking ways in which those competing interests may be accommodated in a timely manner. The articulation and exchange of interests allows the parties to act in good faith and in a reasonable manner to resolve disputes over the disclosure of information, rather than leading the parties into an adversarial and litigious relationship. The parties are encouraged and expected to consider alternative forms or means of disclosure that satisfy both a union's information needs and an agency's countervailing anti-disclosure interests.

To assist the parties to resolve their information dispute after a charge has been filed, the Regions initially should assist the parties in identifying the particular information which is the subject of the disputed request. Often, the parties do not have the same common understanding of exactly what information is subject to the

request. The Regions should then assist the union in articulating exactly why it has requested the information, and the agency in articulating why it has denied the request. Again, parties sometimes are in dispute over the disclosure of information because an agency does not understand why the union requested certain information and the union does not understand why the request was denied.

Thus, under an interest based approach, the issue to be resolved is not whether the union has a statutory right to certain information in the format requested, but rather what information does the union require to adequately represent its members and how can that information be furnished to accommodate competing agency anti-disclosure interests and employee privacy interests. To resolve the issue, it is necessary for the parties to work together to articulate and explain those interests; i.e. how does the union intend to use the information and what is driving the agency's anti-disclosure interests. The Regions should then assist the parties in brainstorming alternatives as to how the union may obtain the information it requires while accommodating the agency's anti-disclosure interests and protecting any employee privacy interests.

Interest Based Approach To Resolve Privacy Act Disputes: The parties also are encouraged to attempt to accommodate employee privacy interests and the union's interests in disclosure. The Regions should inform the parties that the Authority rarely finds any support to establish that the release of personal identifiers enhances any public interest which has been articulated in the documents. Thus, the Regions should explore the possibilities of sanitizing personal identifiers and coding the documents in a manner that allows for the grouping of the documents by category which does not identify individuals or designation by union membership. Coding the information could allow for later identification of specific individuals if the union requested such identification and established a particularized need. Under this method, any requisite additional information could be obtained in a more targeted way.

Q #10: HOW CAN THE PARTIES USE AN INTEREST BASED APPROACH TO RESOLVE THE INFORMATION DISPUTES PRIOR TO THE FILING AN UNFAIR LABOR PRACTICE CHARGE

The Regions should also encourage the parties to utilize an interest based approach to resolve disputes themselves over information requests prior to the filing of an unfair labor practice charge. The parties may follow these steps in resolving any dispute over the disclosure of information:

1. Identify the particular information which is the subject of the disputed request;

2. The union should articulate exactly why it needs the requested information;

3. The agency should articulate exactly what concerns it has about disclosing the information;

4. The parties should then brainstorm alternatives as to how the union may obtain the information it requires while accommodating the agency's anti-disclosure interests;

5. If the requested information is contained in a system of records under the Privacy Act, the union should explain how disclosure of the requested information, including any personal identifiers and the time period encompassed by the request, would shed light on the agency's performance of its statutory duties or otherwise inform citizens of the activities of the Government;

6. The agency should then explain the employee privacy interests in the information which are behind the agency's concerns in disclosing the information; and

7. If the agency's concerns relate to the identification of particular employees, the parties should jointly explore alternative ways to release the information without those personal identifiers.

FLRA SETS STANDARDS ON DISCLOSURE TO UNIONS

The Federal Labor Relations Authority has outlined a new policy on disclosing agency information to federal unions, saying unions must show a specific need for what they are requesting and telling agencies that they must show a legitimate interest against disclosure to justify denying such a request.

The FLRA said that the requesting union must show why it needs the information, how it will use it and how that is important to its representational duties. Merely saying that the information would be relevant or useful wouldn't be enough. The agency, in turn, cannot merely say no. It would have to cite "countervailing anti-disclosure interests" that must outweigh the union's need, in order to deny the request.

The FLRA also said it expects the two sides to consider alternative forms of disclosure that will satisfy the union's representational needs and the agency's interests in protecting information. (50 FLRA 86 1995) See more detailed information in this section.

ANTI – UNION ANIMUS

DEFINITION:

Animus is translated to mean mind or disposition. An anti-union animus is a disposition by an employer against unions or union representatives. This can lead to complications in negotiations and the overall relationship between an employer and a union. Having an anti-union animus can cause an employer to face unfair labor practice charges in certain circumstances.

A. A suggestion from a manager to a union official not to send a letter to a congressman suggesting changes in agency operations because the changes might ultimately hurt the employees was protected speech. There was no explicit or implicit threat or promise. The statement was no more than a prediction of possible adverse effects of the union letter. The action to be avoided was that of a third party, the Congress. The remarks were protected. *US Air Force Lowry AFB and AFGE Local 1974*, 16 FLRA 952, 963–64 (1984) (ALJ Decision). Brief conversations between union organizers and activists and a manager with no history of prior union animus will not be construed as threats to those individuals or the union because the manager states some concerns about the union organizing activity and requests that the union organizers be careful not to disclose confidential information. *FMCS and NAGE Local R3–118*, 9 FLRA 199, 209 (1982) (ALJ Decision).

Reprisal and Discipline Causation Analysis

Letterkenny

1. FLRA summarized its views on the analytical requirements in reprisal cases in *Letterkenny Army Depot and Int'l Bhd. of Police Officers, Local 358*, 35 FLRA 113, 118–22 (1990), involving a claim that a promotion was unlawfully denied to a local union president: in all cases of alleged discrimination, whether "pretext" or "mixed motive," the General Counsel must establish that: the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment. If the General Counsel makes the required "*prima facie*" showing, an agency will not be found to have violated section 7116(a) (2) if the agency can demonstrate, by a preponderance of the evidence, that there was a legitimate justification for its action; and the same action would have been taken even in the absence of protected activity. *Letterkenny* explained…

2. For an example of the application of *Letterkenny* to the reassignment of a union official, review *Customs Serv., Region IV, Miami and NTEU*, 36 FLRA 489, 495–96 (1990). Another good example of application of the burdens of proof is found in *DHHS, SSA, Baltimore and AFGE*, 37 FLRA 161, 170 (1990), involving comparison by the Authority of leave restrictions placed on a union steward and other employees. An extensive analysis of a reprisal case involving the dismissal of a local union president, resulting in a reinstatement order, is found in *Pension Benefit Guaranty Corp. and NTEU*, 39 FLRA 905 (1991), *rev'd and remanded*, *Pension Benefit Guaranty Corp. v. FLRA*, 967 F.2d 658, 663 (D.C. Cir. 1992). In the *PBGC* case, the Authority made an interesting point about disciplinary cases that are proposed by individuals with union animus and decided by officials with no apparent animus, 39 FLRA at 929–30

3. A manager's inquiry to an employee as to why he filed a grievance, coupled with an implied statement that the grievance would only hurt his future career, constituted interference. *SSA and AFGE*, 18 FLRA 249, 258 (1985) (ALJ Decision). Even a statement that is not made with animus toward the union—that things would go more smoothly if matters were handled through the chain of command—constituted a ULP when the remark was made to a bargaining unit employee who would likely think twice before next taking a matter to the union. *Navy Resale Sys. Field Support Office, Commissary Store Group and NAGE Local R4–45*, 5 FLRA 311, 316 (1981) (ALJ Decision).

4. It is unlawful to lower an appraisal because of an individual's union activities. The remedy is withdrawal of the appraisal and reappraisal. *Air Force Logistics Command, Wright-Patterson AFB and AFGE Local 1138*, 14 FLRA 311, 330–31 (1984) (ALJ Decision). Factors suggesting union animus include the timing of events and a sudden drop in the evaluated performance of an employee by a new supervisor who appears to harbor the animus. *SSA, Baltimore and AFGE*, 14 FLRA 499, 530 (1984) (ALJ Decision). An example of analysis of motivation for a lowered appraisal appears in *22nd Combat Support Group, March AFB and AFGE Interdepartmental Local 3854*, 27 FLRA 279 (1987),

involving an employee with an exemplary performance record whose very high appraisals dropped when she made clear her intent to involve the union and grieve reassignment to another supervisor.

5. The standard for determining whether management's statement or conduct violates section 7116(a)(1) of the Statute is an objective one. The question is whether, under the circumstances, the statement or conduct would tend to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement. *For example, Ogden Air Logistics Center*, 35 FLRA at 895. In order to find a violation of section 7116(a)(1), it is not necessary to find other unfair labor practices or to demonstrate union animus. *Id*. at 895–96. Although the circumstances surrounding the making of the statement are taken into consideration, the standard is not based on the subjective perceptions of the employee or the intent of the employer. *Dept. of Air Force, Scott Air Force Base*, *Illinois*, 34 FLRA 956, 962 (1990) (*Scott Air Force Base*).

6. Unless there is union animus, an agency does not commit a ULP by asking an EEO counselor who is also a union officer to explain the nature of her union work so that the agency can ascertain whether there is a conflict of position under § 7120(e); nor is there a ULP committed if the agency admonishes the union official not to engage in specified future conduct that would constitute a conflict or apparent conflict of interest. *Harry S. Truman Memorial Veterans Hosp. and AFGE Local 3399*, 8 FLRA 42, 43–44 (1982).

7. *AFGE Nat'l Council of EEOC Locals No. 216 and EEOC*, 49 FLRA 906 (1994), provides an example of how a single problem, e.g., a suspension, may be litigated under both ULP and grievance procedures if issues are carefully isolated and litigated independently in each forum. In the *EEOC* case isolation of issues allowed litigation in the ULP forum of whether the suspension was motivated by union animus; in the contract forum the dispute was whether the suspension was for just cause. The Authority explained, 49 FLRA at 914–16.

SECTION 4

WEINGARTEN RIGHTS

&

FORMAL DISCUSSION

&

DOUGLAS & METZ FACTORS

&

BROOKHAVEN DOCTRINE

WEINGARTEN RIGHTS

(The Rights of Employees to Union Representation)

Employees have the right to union representation during investigatory interviews by management. These are called "Weingarten Rights."
An investigatory interview occurs when a supervisor questions an employee to obtain information which could be used as a basis for disciplining the employee. The employee must have a "reasonable belief" that discipline may result from what he or she says at the interview.
For example, an employee who is questioned about drugs is clearly involved in an investigatory interview and has the right to request union representation.
However, a foreman who takes a worker aside to give instruction on how to do a job is not conducting an investigatory interview. The possibility of discipline resulting from such a meeting is usually remote.

Rule 1. The employee must make a request for union representation either before or during the interview. Employers have no duty to inform workers of their rights, **unless contractually bound**. Workers who fail to request union representation can be questioned at length.

Rule 2. Once an employee makes a request, the employer must choose from among the following three options:

a. The employer may grant the request meaning that questioning is halted until the union representative arrives and has a chance to consult with the employee.

b. The employer may deny the request and end the interview immediately.

c. The employer may give the employee choice of (1) continuing the interview without a representative or (2) discontinuing the interview.

If the employer ignores or denies a Weingarten request and continues asking questions, the employer is guilty of an unfair labor practice.

Rule 3. If the employer refuses a request for a union representative, the worker has a right to refuse to answer further questions. The employer may not discipline the employee for insubordination.

Unions should educate their members about the Weingarten rights. The presence of a union steward can be crucial. It can save workers from making foolish statements that may lead to discipline or discharge.

QUESTIONS AND ANSWERS

1. Objective reasons to fear discipline

Q. Since an employee only has a right to union representation when he/she has a "reasonable belief" that discipline may result from the interview, what is a reasonable belief?
A. The employee must be able to point to objective factors that warrant a fear that discipline may result from the interview. These factors include:

* the employee's prior disciplinary record
* the events leading to the interview

* the location of the interview
* management representatives present at the interview
* management's opening words at the interview

The crucial issue is **what is in the employee's mind**. It is immaterial that management is "certain" that no disciplinary action will be taken at the meeting or gives such assurances to the employee.

2. Company obligations to inform workers of rights

Q. Does management have to notify the worker of his or her right to union representation?

A. No! Unlike a police interrogation of a suspected criminal, there is no obligation on an employer's part to notify workers of their rights. This is the union's job.

3. Rights of union stewards during interview

Q. When the union steward arrives, what rights does he or she have to take part in the interview and advise the worker?

A. The steward's rights include the following:

* The supervisor must inform the steward of the subject matter of the interview (i.e. "This is a discussion of tardiness, productivity, stealing, etc.).
* The steward must be allowed to speak during the interview.
* The steward can request the supervisor to rephrase or clarify a question so that the worker can understand what is being asked. However, the steward does not have the right to bargain during the interview, or to argue with the supervisor over the purpose of the interview.
* After a question is asked, the steward can draw the employee aside and advise him or her on how to answer.

If any of these rights are denied, the union should file unfair labor practice charges.

4. Demanding to enter supervisor's office

Q. If I see a worker being interviewed in a supervisor's office, can I demand to be present?

A. Not necessarily. The demand for union representation must come from the employee, not from the Union. Unless the worker indicates agreement with your request to be present, the employer can refuse.

5. Interviews of Witnesses

Q. A worker and a supervisor got into a fist fight. If management wants to interview union witnesses, do the witnesses have a right to union representation?

A. Probably not, since they are not the subject of an investigation and the chances of their answers causing them to be disciplined are remote.

6. Threat of greater discipline

Q. An employee was summoned to an interview with his foreman and asked for his steward. In response, the foreman said, "You can request your steward, but if you do, I will have to bring in the plant manager, and you know how temperamental he is. If we can keep it at the level we are at, things will be a lot better for you. "Violation?"

A. Yes! The foreman is threatening greater discipline to coerce an employee into abandoning his Weingarten rights.

7. Employee refuses to attend meeting

Q. An employee was ordered to go to the security office. He asked if he could have a union representative and was denied. Does he have a right to refuse to go to the office?

A. No. Weingarten rights do not mature until the actual interview begins. The employee must go to the office and make his Weingarten request to the official conducting the interview.

8. Telephone calls from management

Q. A worker called in sick, His foreman called to demand an explanation. Does the worker have to explain?

A. No! Weingarten rights apply to telephone calls from management. If the worker has a reasonable fear of discipline, he can refuse to answer until he had consulted with his steward and arranged for the steward to be present.

9. Steward not on premises

Q. If a worker's steward is not on the premises, can the employer insist that the employee accept the presence of another union representative?

A. Yes! Management does not have to delay an investigation if union representatives are nearby.

10. No union representatives on premises

Q. Suppose no union representatives are at the worksite. Does management have to wait?

A. This depends on the subject of the interview. If the interview concerns absenteeism, there is no need for speed and the employer is expected to wait a few hours or even a day if necessary for a union steward to be present. But if the interview concerns theft or some other pressing circumstance, employers can go ahead with the interview without waiting for a union representative to show up.

11. Request for attorney

Q. Can a worker insist on the presence of the union lawyer or his own private attorney?

A. No.

12. Announcing discipline

Q. A worker was called into her foreman's office. The foreman said, "Doreen, yesterday you were insubordinate to your supervisor. Therefore, we are giving you a one-day suspension." Can we contest this discipline because no steward was present?

A. No! Weingarten rights do not apply when employees are summoned to meetings where employers announce previously-decided decisions to impose discipline.

Note: If, however, after announcing the discipline, the employer starts asking question or seeks to have the employee admit guilt, Weingarten rights would apply.

13. Requests to sign warning slips

Q. If a worker is given a warning slip for misconduct, and is asked to sign it, does he have the right to consult his union steward?

A. No. Weingarten rights do not apply because the employer is not questioning the worker, only announcing discipline.

14. Steward's right to representation

Q. Suppose I am called in by my foreman to discuss my "attitude". Do I have the right to a union representative even though I am a steward myself?

A. Yes! You have the right to the presence of another steward or union officer.

15. Walking out of the interview .

Q. Suppose a worker's request for a steward is denied. If management continues to ask questions, can the worker walk out of the interview?

A. No! Workers do not have the right to walk out of meetings with management even under these circumstances. The employee can refuse to answer questions, but must wait until he or she is released by management.

16. Searching lockers

Q. Management searched lockers to look for stolen goods. does a steward have to be present during search?

A. No. Locker searches, car searches, or handbag searches are not investigatory interviews. Employees do not have the right to insist on the presence of a steward during such searches.

17. "Letters of consent"

Q. Management sometimes asks employees to sign "letters of consent" to allow an interview to continue without union representation. Is this legal? Can the employee change his mind after signing?

A. It is not unlawful for management to ask workers to voluntarily sign a "letter of consent". (It would be illegal to force workers to sign the consent.) But even if the letter is signed, a worker has a right to change his or her mind during the interview, and to insist on a union representative as a pre-condition to answering further questions.

18. Offering worker chance to resign

Q. Management called a worker to the personnel department and informed him that he was seen taking government property. They offered him a choice between resigning or being fired. Is this a Weingarten meeting?

A. Yes! The employee is entitled to his union steward because management is not merely announcing already-decided discipline. The steward is needed to advise the worker on how to answer management's question.

19. Objecting to a particular steward

Q. An employee was involved in a fight with her supervisor. When she was questioned, she asked for my presence (I am her steward). The company said she would have to accept another representative because I was a witness to the fight. Is this legal?

A. No. A worker has the right to the presence of their departmental steward, whether or not the steward was a witness to the incident.

20. Medical examinations

Q. The company is recalling the workers after a layoff. They are insisting on medical examinations for those out of work for three months or more. Can workers demand a steward be present during the examination?

A. No! Medical examinations are not investigations of misconduct. Weingarten does not apply.

Section 7114 Rights
The Weingarten Right

Office of the General Counsel Federal Labor Relations Authority

I. THE WEINGARTEN RIGHT

A. The Statutory Language Section 7114(a)(2)(B) of the Federal Service Labor-Management Relations Statute provides:

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

This section of the Statute is based on NLRB v. Weingarten, 420 U.S. 251 (1975) and is often referred to as the Weingarten right.

B. The Five elements of the Weingarten Right

(1) Examination in Connection with an Investigation.

(a) Entails meetings in which employee questioned regarding own conduct.

Meeting, although termed "counseling session," in which employee questioned about use of abusive language in control tower, FAA, 6 FLRA No. 116 (1981)

Meeting in which employee questioned regarding three day absence: Marine Corps Logistics Base, 4 FLRA No. 54 (1980) Interview in which employee questioned about cash register shortage. Lackland AFB Exchange, 5 FLRA No. 60 (1981)

(b) Applies to request by an employee for Union representation at an examination by an agency representative in connection with a criminal investigation. Department of the Treasury, Internal Revenue Service. Jacksonville District and Department of the Treasury, Internal Revenue Service. Southeast Regional Office of Inspection, 23 FLRA No. 108

(c) May include meeting where employee questioned is not subject of investigation. Employee questioned after reported complaint from a taxpayer regarding another employee's alleged disclosure of tax information of that taxpayer, which was in questioned employee's possession. IRS 4 FLRA No. 37 (1980)

(d) Does not include performance evaluation or counseling meetings. IRS, 5

FLRA No. 53 (1982); IRS, 8 FLRA No. 72 However, the right to receive an explanation for substandard performance or conduct does not, under appropriate circumstances, vitiate an employee's right to representation pursuant to Section 7114(a)(2)(B). Tidewater Virginia Federal Employees Metal Trades Council, 15 FLRA, No. 73

(e) Does not include meeting where discipline merely announced. Wright-Patterson AFB, 9 FLRA No. 117; Norfolk Naval Base, 14 FLRA No. 97. However, institutions where employee is represented by the Union in the discipline action is given to employee, this is not violation of Weingarten right, but rather a bypass of the Union. 438th Air Base Group. McGuire Air Force Base. New Jersey, 28 FLRA No. 145, 28 FLRA 1112

(f) Does not include counseling of "remedial" sessions. Wright-Patterson AFB. Ohio, 10 FLRA No. 23 (1982)

(g) Warning employee where no questions asked, not an examination. Meeting was not designed to ask questions, elicit additional information, have the employee admit his alleged wrongdoing, or explain his conduct. IRS, 15 FLRA No. 78

(h) Could include non-verbal investigation. Dept. of Justice, Bureau of Prisons, 14 FLRA, No. 59 Case involving strip search dismissed because employee waived right to representative. But see Marine Corps. Barstow, Case No. 8-CA-l005, et al. Report of OGC July 1981, September 1981 (random search of vehicles not examination) .

(i) Monitoring and taping of a telephone conversation between a taxpayer and an agency employee concerning possible wrongdoing on the part of the employee is not an examination. IRS. Jacksonville, 23 FLRA, No. 108. Also see, Department of the Treasury. BA TF. Southeast Regional Office. Atlanta. Georgia, 24 FLRA No. 59

(2) Employee in the Bargaining Unit.

An employee is entitled to be represented by the Union that represents the bargaining unit that the employee is in at the time of the interview not at the time of the events giving rise to the interview. Department of the Navy, Charleston Navy Shipyard, Charleston. South Carolina. et al. 32 FLRA, No. 37, 32 FLRA 222

(3) By a Representative of the Agency.

(a) Supervisor of employee. Marine Corps Logistics Base, 4 FLRA 54 (1980); FAA, 6 FLRA No. 116 (1981)

(b) Agency's own investigators

Employee questioned by agents of Activity's Office of Management and Integrity. U.S. Customs Service, 5 FLRA No. 41 (1981)

Employee questioned by Agency's Internal Security Inspectors from a different geographical and organizational location of Agency. IRS, 4 FLRA No. 37 (1980)

(c) Investigators from related activity.

Air Force employee interrogated by Air Force Office of Special Investigations with activity's own investigator present. Community of interest between activity and investigators, Lackland AFB Exchange, supra. See also 9-CA-20308, Dept. of Navy. Naval Weapons Station Concord, Report of OGC, October 1982 - December 1982.

Agency representative participating in investigatory interview with FBI - joint investigation. Case No. 4-CA20037, NASA, Report of OGC, April 1982-June 1982. But, Secret Service agent not agent of Bureau of Mint, Department of the Treasury, Bureau of the Mont. U.S. Mint, Denver. CO., Case No. 4-CA-876 ADJ Rpt. 9.

Office of Inspector General agent is a representative of the agency within the meaning of §7114(a)(2)(B), U.S. Department of Labor. MSHA, 35 FLRA No. 84

Defense Criminal Investigative Service as an organizational component of the Department of Defense was acting as a "representative of the agency" that is DOD, an "agency" within the meaning of section 7114(a)(2)(B). Department of Defense. Defense Criminal Investigative Service: Defense Logistics Agency and Defense Contract Administration Services Region. New York, 28 FLRA 150, 28 FLRA 1145. Affirmed sub. nom. Defense Criminal Investigative Service (DCIS) Department of Defense v. FLRA 855 F .2d 93 (3rd Cir. August 18, 1988).

The degree of supervision exercised by management over investigators is irrelevant when the investigators are employees of the same agency and their purpose when conducting interviews is to solicit information concerning possible misconduct on the part of agency employees in connection with their work. Department of Justice. INS. Border Patrol. El Paso. Texas, 36 FLRA 6

(4) Employee Reasonably Believes Disciplinary Action Against Employee May Result From Examination.

(a) Look to objective factors to determine presence of reasonable belief.

Employee not subject to investigation but responsible for records which were allegedly disclosed in violation of disclosure rules is grounds for reasonable belief of discipline. Inquiry into employee's actual subjective fear of discipline not permitted. IRS, 4 FLRA 37 (1980) Employee told that employee was suspected of possible cash register manipulation and was to be questioned by OSI agent on it. Reasonable belief found. Lackland AFB Exchange, supra. Grant of immunity may eliminate reasonable fear of discipline. INS. San Diego CA, 15 FLRA 80. The Court of appeals for the District of Columbia Circuit Overturned decision of Authority in 15 FLRA No. 80 finding that the record evidence failed to support the conclusion adopted by the Authority that the employee could not have reasonably believed

that disciplinary action might result. American Federation of Government Employees. Local 2544 v. FLRA 779 F.2d 719 (D.C. Cir. 1985). See decision on remand of case 21 FLRA 33

(b) Labeling a meeting a "counseling session" or "inquiry" does not necessarily remove the meeting from statutory protection if elements of Weingarten meeting present.

Supervisor sought to "counsel" employee on abusive language employee had just used. Underlying circumstances supported employee's belief discipline might result. FAA, supra.

Fire Station chief did not contemplate discipline, but was inquiring into alleged insubordination. Employee aware insubordination can lead to discipline and that Chiefs inquiry was a "serious" matter. "Reasonable belief" was present. Norfolk Naval Base, supra.

(5) Employee Requests Representation.

To be valid, a request need not be made in a specific form. Instead, a request for union representation must be sufficient to put the respondent on notice of the employee's desire for representation. Norfolk Naval Shipyard, Portsmouth. V A 35 FLRA 116

(a) Request made at meeting to person conducting examination.

Employee asked Supervisor at meeting for representation if supervisor was contemplating any action harmful to her. MCLB. supra.

Employee made request of investigator. INS 4 FLRA 37 (1980)

Request of one management official prior to start of interview sufficient. Norfolk Naval Shipyard 14 FLRA 19

(b) Request need not be made of person asking questions if made by other responsible agents.

On the way to a security office, employee asked Activity's detective for representative; the detective said no because he was not going to question employee. Employee asked the detective again at the security office. Later employee asked manager in office who did not respond. Still later employee asked second detective who did not respond. Employee did not ask OSI agent because felt futile. Both detectives briefed OSI agent before examination by OSI agent and one was present at exam. Lackland AFB Exchange, supra. Request of one management official prior to start of interview sufficient. Need not be repeated. Norfolk Naval Shipyard, supra.

(c) Union representative can make request to be present on behalf of employee. U.S. Customs Service, supra.

(d) Request is sufficiently specific - "counselor" specific enough., Appeals Case No. 2-CA-549 (18-28-81); "Representative" - specific; "Attorney" - not specific.

(6) Waiver of representation.

The Authority will look to objective factors to determine if actions of representatives of management would cause a reasonable person in such circumstances to waive his or her right. Department of Justice, INS, Border Patrol, EI Paso, Texas 36 FLRA 6

C. Related Considerations

(1) Role of Union Representative in Weingarten Meeting.

(a) Union representative not to sit idly by; can be active in employee's defense. FAA, supra.

(b) Though meeting not meant to become adversarial, union representative can comment on form of questions, help employee express view, seek clarifications, and suggest other avenues of inquiry. Placing unwarranted restrictions may be tantamount to failure to allow representation. U.S. Customs Service, supra. Employer may place reasonable limitations on union rep's role to prevent adversary confrontation, but aggressive behavior by management exceeding reasonable bounds interferes with right to representation. Norfolk Naval Shipyard 9 FLRA 55 (1982)

(c) Discipline of union representative for attempting to effectively assist employee is a unfair labor practice. FAA, supra.

(d) Preventing union representative from actively representing employee at meeting denies employee Weingarten right and is an unfair labor practice. FAA, supra.

(e) Discipline of employee for insisting on presence of union representative (where all elements of the Weingarten right are present) is an unfair labor practice. Norfolk Naval Base, supra.

(f) Refusal to permit attorney to act as Union's designated representative in Weingarten meeting is violation. Individuals who were being investigated could not serve as representatives of other employees being investigated until their own investigations had been completed. Federal Prison System, Federal Correctional Institution, Petersburg, Virginia 25 FLRA 16

(2) Options of employer and employee faced with Weingarten Meeting (where all elements are present):

The employer may refuse union representation and carry on the investigation without interviewing the employee. The employee must be given the choice between having an interview unaccompanied by a union representative and not having an interview (thereby foregoing any benefit that might be derived from one). Wright Patterson AFB United States Department of Justice. Bureau of Prisons 9 FLRA 117 Metropolitan Correctional Center, New York, New York 27 FLRA 97 Also see Department of Justice, Immigration and Naturalization Service, Border Patrol, EI Paso, Texas v. FLRA 939 F.2d 1170, U.S. Court of Appeals, Fifth Circuit August 26, 1991 upholding management's right to offer an employee these choices.

Where employee fails to bring representative after meeting postpones several times to allow him to obtain one, no violation. Department of Labor, Employment Standards Administration 13 FLRA 35; agency found to have taken "every reasonable step" to provide opportunity for representation.

(3) Remedy for Violation:

In United States Department of Justice, Bureau of Prisons, Safford. Arizona 35 FLRA 56 the Authority examined the issue of an appropriate remedy for Agency's violation of an employee's right to union representation during an investigatory interview. The Authority ordered the agency, upon request of the union and the employee, to repeat the interview affording the employee full representation rights, and then reconsider the disciplinary action. The Authority further concluded that if, on reconsideration, the agency mitigates the discipline and the employee will be made whole for any losses suffered to the extent consistent with the decision on reconsideration. In Department of Justice, INS, Border Patrol, El Paso. Texas 36 FLRA 6, the Authority went on to hold that respondent will notify the employee of the results of the reconsideration, including what make-whole actions are to be afforded the employee and, if relevant, afford the employee any grievance or appeal rights that may exist under the parties' negotiated agreement, law or regulation with respect to respondent's action reconsidering the disciplinary action.

EXPLANATION OF FORMAL DISCUSSION / WORKING CONDITIONS

Definition:

Section 7114(a)(2)(A) of the Statute provides: "An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment.

Elements of a Formal Discussion:

In order to find that a meeting constitutes a "formal discussion" under Sec. 7114(a)(2)(A) of the Statute, it must be shown that:

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

Department of Veterans Affairs VA Medical, Gainesville, Florida 49 FLRA No. 112, 49 FLRA 1173, 1174 (1994) Veterans Administration Washington, D.C. and VA Medical Center, Brockton Division, Brockton, Massachusetts 37 FLRA 60, 37 FLRA 794 (1990) In examining these elements the Authority has held it will be guided by the intent and purpose of Sec. 7114 (a)(2)(A) to provide the union with an opportunity to safeguard its interests and the interests of bargaining unit employees - viewed in the context of the union's full range of responsibilities under the Statute.

A. What is a discussion?

Congress intended the term "discussion" to be synonymous with "meeting." Meeting held for purpose of making statement or announcement and not to engender dialogue if otherwise formal is a formal discussion. Absence of active dialogue may not be relied upon to justify failure to give notice of formal discussion. Kelly Air Force Base 15 FLRA 111, 15 FLRA 529 (1984) It is not necessary that a debate or argument take place before a meeting may be deemed a formal discussion, nor is it a prerequisite that a dialogue occur between management and employees during a meeting. Department of Defense, National Guard Texas Adjutant General's Department, 149th TAC Fighter Group (ANG) (TAC), Kelly Air Force Base 15 FLRA 529 A meeting to announce a unilateral change which did not meet requirements for formality is not a formal discussion. Defense Logistics Agency Tracy, California 14 FLRA 78, 14 FLRA 475 (1984)

Brief discussion with two employees in work place. and brief employee initiated impromptu discussion concerning hours of work. Not formal. Social Security Administration, San Francisco, California 9 FLRA 9, 9 FLRA 48 (1982)

Discussion over telephone if it otherwise is formal can qualify as a formal discussion. Sacramento Air Logistics Center, McClelland Air Force Base, Sacramento, California 35 FLRA 68, 35 FLRA 594 (1990)

Whether or not a meeting concerns a “personnel policy or practice” when it begins can later develop into a discussion concerning a "personnel policy or practice” within the meaning of Sec.7114 (a)(2)(A) that concerns a general working condition. Meeting may become a formal discussion even if it did not start out to be. U.S. Department of Defense, Defense Logistics Agency, Defense Depot, Tracy, Ca1ifornia 37 FLRA 80, 37 FLRA 952, 960 (1990)

Orientation meetings held to be discussions within the meaning of Sec. 7114 (a)(2)(A) because conditions of employment were discussed. Defense Logistics Agency, Defense Depot, Tracy, California 39 FLRA 86, 39 FLRA 999, 1031 (1991)

Orientation sessions with employees to discuss working conditions with questions and answers taking place at such meetings have been held to be discussions under Sec.7114(a)(2)(A). Department ofHea1th and Human Services, Social Security Administration 16 FLRA 32, 16 FLRA 232 (1984)

Brief, spontaneous or impromptu meeting not held to be a formal discussion because there was no advance planning no agenda and meeting was short. Veterans Administration Washington D.C. and VA Medical Center, Brockton Division, Brockton, Massachusetts 37 FLRA 60, 37 FLRA 747, 751 (1990)

B. Requirements of formality - discussion must be formal

Discussion must be formal within meaning of Sec.7114(a)(2)(A) of Statute for there to be an obligation to notify union. Social Security Administration 10 FLRA 24, 10 FLRA 115 (1982) Social Security Administration 10 FLRA 25, 10 FLRA 120 (1982) and Social Security Administration 10 FLRA 36, 10 FLRA 172 (1982)

Elements of formality:

1. Whether individual holding discussion is first-level supervisor or higher in hierarchy.

2. Presence of other management representatives.

3. Where meeting took place (employee desk or supervisors office)

4. How long meetings lasted

5. How meeting were called (spontaneous or formal notice).

6. Formal agenda established

7. Attendance mandatory.

8. Manner in which meetings conducted (whether notes taken)

Department of Health and Human Services, Social Security Administration Bureau of Field Operations, San Francisco, California 10 FLRA 115 (1982) Thus in determining formality, the Authority will consider the totality of the circumstances presented. Defense Logistics Agency, Defense Depot, Tracy, California 14 FLRA 78, 14 FLRA 475, 477 (1984). See generally National Treasury Employees Union 774 F. 2D 1181, 1189-91 (D.C. Cir. 1985). See. e.g.. Veterans Administration Medical Center, Long Beach, California 41 FLRA 106, 41 FLRA 1370,1380 (1991) A discussion can be formal in the absence of a specific pre-established agenda. Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California. 35 FLRA 68, 35 FLRA 594, 604 (1990)

C. Between one or more employees and one or more agency representatives.

Intra-management discussions or discussions between unit employees only are not formal discussion.

D. Subject matter of meeting must concern grievances, personnel policies, practices, or working conditions.

1. Discussion concerning grievances

a. A meeting which meets the requirements for formality with a unit employee concerning the employee's grievance is a formal discussion. Social Security Administration, Baltimore, Maryland 18 FLRA 33, 18 FLRA 249 (1985)

b. EEO meetings occurring at the informal pre-complaint counseling stage have been held not to be formal discussions within the meaning of the Statute. See. Internal Revenue Service. Fresno Service Center, Fresno, California v. FLRA 706 F.2d 1019 (9th Cir.1983) reversing the Authority's decision in Internal Revenue Service Center, Fresno, California 7 FLRA 54, 7 FLRA 371 (1981) However, See: Social Security Administration, SSA Field Operations 16 FLRA 135, 16 FLRA 1021 (1984) where post complaint formal stage BEO meetings may be formal discussions.

c. A grievance within the meaning of Sec.7114(a)(2)(A) can encompass statutory appeal. U.S. Department of Justice. Bureau of Prisons, Federal Correctional Institution, (Ray Brook New York) 29 FLRA 5, 29 FLRA 584 (1987) aff'd sub

num. American Federation of Government Employees, Local 3882 v. FLRA, 865 F.2d 1283 (D.C. Cir. 1989) An BEO complaint meets the definition of "grievance" within the broad definition of that term in Sec.7114(a)(2)(A), Nuclear Regulatory Commission 29 FLRA 57, 29 FLRA 660 (1987)

d. Interviews of unit employees in preparation for proceedings before a third-party neutral can be formal discussions, e.g., arbitration, unfair labor practice or preparation for MSPB hearings. Veterans Administration Medical Center 41 FLRA 1370, 1379 (1991) end sub num. The Department of Veterans Medical Center Long Beach California v. FLRA 16 F.3d 1526 (9th Cir. 1994) United States Immigration and Naturalization Service United States Border Patrol, El Paso, Texas 47FLRA170, 183 (1993) Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base. Sacramento. California 29 FLRA 53, 29 FLRA 594 (1987) Also see, Department of Air Force, F.E. Warren Air Force Base, Cheyenne, Wyoming 31 FLRA 35, 31 FLRA 541(1988) interplay of Johnnie's Poultry warnings and formal discussion.

e. Gathering facts from unit employees (other than grievant) as part of agency investigation of a grievance prior to preparation for actual hearing may not be considered a formal discussion. Department of Hea1th and Human Services, Social Security Administration 18 FLRA 7, 18 FLRA 42 (1985)

2. Discussions concerning personnel policies, practices and matters affecting working conditions.

a. Discussion of dresscode, U.S. Customs 18 FLRA 27, 18 FLRA 195 (1985)

b. Quality Circle meetings Defense Logistics Agency, Tracy, California Case No. 9-CA-20241; AU Report No. 95.

c. Substantial change in job duties involving safety issues. Norfolk Naval Shipyard Norfolk, Virginia 6 FLRA 22, 6 FLRA 74 (1981)

d. Orientation of new employees. Health and Human Services, Atlanta, Georgia 5 FLRA 58, 5 FLRA 458 (1981) Health and Human Services, Social Security Administration 16 FLRA 33, 16 FLRA 248 (1984) Orientation session for one employee may not be formal discussion Department of Health and Human Services, Social Security Administration and Social Security Field Operations, Region II, 29 FLRA 89

e. Reorganization Bureau of Engraving and Printing Case No. 3-CA2704, AU Report No. 25

f. Interview of employees in connection with study analyzing Group Manager's duties, where employee views sought on training, concerns, time constraints, duties, etc. Internal Revenue Service 11 FLRA 23, 11 FLRA 69 (1983) (but not a by-pass) Not necessary to find a change in working conditions, personnel, policies or practices. Social Security Administration, Northwestern Program Service Center 1 FLRA 88, 1 FLRA 779 (1979)

3. But Not:

a. Discussion of problems personal to employees, without ramifications for other employees. Norfolk Naval Shipyard 1 FLRA 32, 1 FLRA 233 (1979) also Environmental Protection Agency 8 FLRA 98, 8 FLRA 471 (1982) Must involve conditions of employment affecting employment in the unit generally. National Council of SSA field Operations Locals 17 FLRA 121 American Federation of Government Employees Council 214 38 FLRA 34, 38 FLRA 309, 330 (1990)

b. Grievance filed under agency grievance procedures, San Antonio Air Force Station. Case No. 6-CA-732, AU Report No. 1.

c. Job performance discussion. Hanscom AFB, Massachusetts 1FLRA 25, 1 FLRA 195 (1979)

d. Meeting to discuss performance evaluation. Internal Revenue Service, Detroit Michigan 5 FLRA 53, 5 FLRA 421 (1981)

e. Quarterly evaluation sessions to discuss employee performance and to set work related goals. Social Security Administration 14 FLRA 5, 14 FLRA 28 (1984)

E. Opportunity to be represented

1. Exclusive representation entitled to prior notice of formal discussions as to allow it to designate its own representative. Actual representation at formal discussions is not sufficient Department of the Air Force, Sacramento Air Logistics Center, Sacramento, California 29 FLRA 53, 29 FLRA 594 (1987)

2. Unilateral designation of Union's representative at formal discussion violates Statute. Scott AFB Case No. 5-CA-1129; 5-CA-1131, ALJ Report No. 13.

3.Management need not postpone or delay meeting unreasonably as long as adequate opportunity to attend is provided Department of Labor Employment Standards Administration13 FLRA 35,13 FLRA 164 (1983)

F. Right of Union to participate in meeting.

1. Union representative must be allowed to participate, ask questions, propose resolutions, but is not allowed to disrupt or take over meeting. Internal Revenue Service, Fresno, California 7 FLRA 54, 7 FLRA 371 (1981)

2. The language in See. 7114(a)(2)(A) of the Statute that the "exclusive representative...shall be given the opportunity to be represented" at a formal discussion means more than merely a right to be present. It also means that a Union representative bas a right to comment, speak and make statements...this does not entitle a Union representative to take charge of, usurp or disrupt the meeting. Comments by a Union representative must be governed by a rule of reasonableness, which requires that there be respect for orderly procedures and that the comments be related to the subject matter addressed by the agency representatives at the meeting. U.S. Nuclear Regulatory Commission and National Treasury Employees Union 21 FLRA 96, 21 FLRA 765 (1986) Also see, U.S. Department of the Army, New Cumberland Army Depot, New Cumberland, Pennsylvania 38 FLRA 61, 38 FLRA 671 (1990).

The "Douglas Factors" (CNGBI 752)

In determining the appropriate remedy, management must observe the principle of "like penalties for like offenses in like circumstance." This means penalties will be applied as consistently as possible. Management must establish the penalty selected does not clearly exceed the limits of reasonableness. A well-known Merit Systems Protection Board (MSPB) case *(Douglas v. Veterans Administration*) addressed this issue in detail. A number of factors which management must weigh in deciding an appropriate course of action are discussed in this case. These factors are often referred to as the "Douglas Factors". Some factors may not be applicable to a given case; relevant factors must be considered. Bear in mind, however, certain offenses (e.g., drug trafficking) warrant mandatory penalties.

Appropriateness of the Penalty

In both the appellant review and the administrative hearing, a vital consideration is whether or not a disciplinary penalty is fair and reasonable. In determining the appropriate penalty, management must observe the principle of "like penalties for like offenses in like circumstances". This means penalties will be applied as consistently as possible.

b. Consider the nature and seriousness of the offense, and its relation to the technician's duties, position, and responsibilities, including whether the offense was intentional or inadvertent, or was committed maliciously or for gain, or was frequently repeated.

c. Consider the technician's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position.

d. Consider the technician's past disciplinary record.

e. Consider the technician's past work record, including the length of service, performance on the job, ability to get along with fellow workers, and dependability.

f. Consider the effect of the offense on the employee's ability to perform his/her job at a satisfactory level and its effect on supervisor's confidence in the technician's ability to perform assigned duties.

g. Consider the consistency of the penalty with those imposed on other technicians for the same or similar offenses.

h. Consider the consistency of the penalty with NGB guidance regarding disciplinary actions.

i. Consider the notoriety of the offense and its impact on the reputation of the agency.

j. Consider the clarity with which the employee was on notice of any rules violated in committing the offense, or any warning about the conduct in question.

k. Consider the potential for the technician's rehabilitation.

l. Consider mitigating circumstances surrounding the offense such as unusual job tensions, personal problems, mental impairment, harassment or bad faith, malice, provocation on the part of others involved in the matter,

or deployment induced/combat related stress.

m. Consider the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

A supervisor is responsible for ensuring that a disciplinary penalty is fair and reasonable. If a penalty is disproportionate to the alleged violation or is unreasonable, it is subject to being reduced or reversed even if the charges would otherwise be sustained. These factors provide valuable assistance to supervisors in making a penalty determination.

Some of these twelve factors may not be pertinent in a particular case. Some factors may weigh in the employee's favor while other factors may constitute aggravating circumstances that support a harsher penalty. However, it is critical to balance the relevant factors in each individual case and chose a reasonable penalty.

There is no requirement in law, regulation or in "Douglas" that written agency decisions or proposals contain specific, detailed information demonstrating that an agency has considered all of the pertinent mitigating factors in a given case. However, a penalty determination will be entitled to greater deference if the proposal and especially the decision letter contains an evaluation of any mitigating circumstances. It is always better for the Agency to do its own mitigating analysis than to leave it to a third party. In regards to any aggravating factors which may be relied upon to impose an enhanced penalty, these aggravating factors should be included in the proposal notice. This is especially true for prior disciplinary actions. It is only fair to allow the employee to respond to these aggravating factors before a decision is made. Consideration of aggravating factors not communicated to the employee is dangerous and may result in a procedural error and reversal of the disciplinary action.

Factor 1 – Seriousness of the Offense

The reason why this factor is first - it is the most important. In determining the appropriate penalty, a supervisor should consider primarily the nature and seriousness of the misconduct and its relation to the employee's duties, position, and responsibilities. This Douglas Factor provides some guidance in determining the seriousness of an offense.

In evaluating the seriousness of the misconduct, an offense is more severe if it was intentional rather than inadvertent and if it was frequently repeated rather than being an isolated incident. Misconduct is also considered more severe if it is done maliciously or for personal gain.

The agency's table of penalties provides some distinction regarding the severity of the misconduct. For example, sleeping on duty is a serious offense. However, it is considered more serious as provided in our table of penalties where safety of personnel or property is endangered. Moreover, the seriousness of the offense is increased if the employee is involved in what might be described as "pre-meditated" sleeping on duty. What does that mean? If you discover an employee sleeping away from his/her duty station with the lights off, pillow in hand and blanket over body, this intentional action is much more egregious than an employee who just cannot keep his/her eyes open and falls asleep while on position.

There are other examples in the table of penalties that provide guidance in determining the seriousness of misconduct. Misconduct of a sexual nature is a serious offense. However, the severity is increased when the misconduct involves physical touching or promising benefits in exchange for sexual favors in comparison to telling a sexual joke or making a sexual remark inappropriate to the workplace. Sexual jokes are more serious if made directly to an employee rather than if overheard by an employee. The misconduct is even more grievous if the jokes were repeated after the offender was told that the behavior was offensive.

The relationship of the misconduct to the employee's job duties is another important consideration in

determining the seriousness of an offense. Falsification of government documents is a serious offense because it relates to an employee's reliability, veracity, trustworthiness, and ethical conduct. The misconduct is more serious if it relates "to the heart" of an employee's duties and responsibilities. For example, if a Time and Attendance (T&A) Clerk was falsifying his/her time and attendance records and it resulted in more pay or less leave used, this misconduct is very serious. The fact that accurate time and attendance records are a critical element of the employee's position, coupled with the fact that the misconduct resulted in personal gain, increases the gravity of this offense. The misconduct would be considered even more serious if the falsification was not an isolated incident, but reflected falsification over several pay periods.
The supervisor deciding the appropriate penalty is in the best position to determine the seriousness of the offense and how the misconduct relates to the employees duties, position, and responsibilities. Remember, an offense is more serious if it is intentional, frequently repeated, or committed maliciously, or for personal gain.

Factor 2 – The Employee's Position

This factor recognizes a relationship between the employee's position and the misconduct. Factors considered are the employee's job level and the type of employment which may include a supervisory or fiduciary role, contacts with the public, and prominence of the position.
It is a well-recognized principle that a supervisor occupies a position of trust and responsibility and is held to a higher standard of conduct than non-supervisory employees. The Agency's "Standards of Conduct," ER-4.1 outlines the responsibility for a supervisor to provide positive leadership and serve as a role model for their subordinates by demonstrating a commitment and sense of responsibility to their job and loyalty to the organization. Simply put, the Federal Aviation Administration (FAA) expects a supervisor to serve as a role model and not violate workplace rules. When misconduct occurs by a supervisor it is considered more serious. The Agency's table of penalties recognizes this severity in establishing ranges of penalties for supervisors and non-supervisors for offenses under the Discrimination/EEO/Misconduct of a Sexual Nature category. An employee's supervisory status must be considered in determining the penalty for other offenses as well.
Higher ethical standards are not limited to supervisory positions. Employees who hold law enforcement or security positions are also held to higher ethical standards. Employees of the Internal Revenue Service are held to a higher standard of compliance with Federal tax laws. Employees who exercise discretion in regulating, contracting or otherwise conducting government business with private companies are subject to stricter limits in the areas of gifts, gratuities, and conflicting financial interests regarding the companies with which they conduct official business. And if a member of Congress engages in misconduct…uh, bad example, let's not go there.
An employee's contacts with the public as well as the prominence of his/her position are additional considerations, which should be evaluated in relationship with the misconduct. And we must not forget the important element of safety in many of our positions and any misconduct must be weighed against this critical agency mission.
To summarize, the relationship between the employee's misconduct and the employee's position is an important consideration, which must be analyzed as part of the penalty determination.

Factor 3 - Prior Discipline

The Douglas criteria are sometimes referred to generally as mitigating factors. The consideration of past discipline, however, is an aggravating factor, i.e. mitigation in reverse.
In order to use prior discipline as a basis to enhance a current penalty, three criteria must be met. First, the employee must have been informed of the action in writing; second, the employee must have been given an opportunity to dispute the action by having it reviewed, on the merits, by an authority different from the one that took the action; and third, the action must be a matter of record. In deciding to use prior discipline, individuals must be aware of the Gregory decision, which held that prior discipline that is the subject of an

ongoing appeal may not be used to support an enhanced penalty.
Once you've determined that a prior disciplinary action meets the requirements to be available for use, you will need to decide how much weight to give it. There are two major factors to consider here, temporal proximity (i.e. how recently did the prior discipline occur?) and the similarity of the offense. If the employee was disciplined 6 months ago for essentially the same misconduct as the current offense, a good argument can be made that an extra firm penalty is needed this time to achieve the desired change in behavior. On the other hand, if it's been many years since the prior discipline, it is much more difficult to make a convincing case for an enhanced penalty. We also must be mindful of labor agreements that might contain time limits for considering prior discipline.
The same sort of assessment is needed concerning similarity of the offense. Persistent repetition of similar misconduct is more directly relevant to supporting a more severe disciplinary action. The FAA's Table of Penalties recognizes the use of dissimilar offenses in prior discipline in determining the penalty. The first time an employee is formally disciplined is considered a first offense on the Table of Penalties. Continued misconduct involving subsequent violations of rules and regulations may be considered under the second and third offense columns, even if the misconduct is different from the previous offense(s). However, good judgment must be used to weigh prior discipline when choosing an appropriate penalty to correct the situation. If prior discipline is going to be used as an aggravating factor, it must be cited in the proposed notice. Non-disciplinary sanctions such as counseling and non-disciplinary instructional material may be relied upon for imposing an enhance penalty and need to be cited as well in the proposed notice.

Factor 4: Length of Service and Prior Work Record

This factor is especially likely to prompt mitigation. An employee's length of service and prior work record must be evaluated and be balanced against the seriousness of the offense. An employee with many years of exemplary service and numerous commendations may deserve to have his/her penalty mitigated. However, the seriousness of the offense and an evaluation of other Douglas Factors may outweigh an employee's positive work record. It is interesting to note that third parties have rejected the argument that long service supports a stiff penalty since the employee arguable should have "known better." So, if someone is thinking about that rationale – forget it!
An interesting dilemma sometimes occurs when an agency justifies a penalty in part due to what it believes is an employee's past poor performance, but the employee's appraisals demonstrate good or excellent performance. In this case, third parties favor relying upon official appraisals and agency contentions to the contrary are provided little weight in determining the reasonableness of the penalty. This is just one more example of the importance of documentation and communication of performance to employees.

Factor 5 – Erosion of Supervisory Confidence

The analysis of this factor involves much more than a supervisor's statement that he/she has lost confidence in the employee. Specific evidence/testimony as to why an employee can no longer be trusted is critical. Conclusionary and vague statements do not hold much weight with third parties. It is critical for the agency to articulate a relationship between the misconduct and the employee's position and responsibilities. We need to specifically state why there is an erosion of supervisory confidence. A supervisor cannot just say it, he/she has to prove it.
There is a clear inter-relationship between this factor and Factor 2 – Employee's Position. For example, misconduct by a supervisor will undermine his/her ability to require subordinates to adhere to agency policies and regulations. A Time and Attendance (T&A) clerk falsifying T&A's or the theft of property by an employee entrusted with custody and control of the property are just two examples in which the misconduct would severely erode supervisory confidence.

Factor 6 – Disparate Treatment - Consistency of Penalty with that Imposed on Other Employees.

This factor is one of the more technically difficult to apply. One of the basic tenets of the administration of "just cause" is the even-handed application of discipline. However, the principle of "like penalties for like offenses" does not require perfect consistency. On the surface, many incidents of misconduct may seem to be similar. However, a thorough investigation and evaluation may lead to a determination that the misconduct was not substantially similar. And even if the circumstances surrounding the misconduct incident may be substantially similar, the penalty imposed may be different based upon an independent evaluation of the other Douglas Factors.

Third parties look at these consistency factors differently. The Merit System Protection Board (MSPB) views "similarly situated" employees as employees working in the same unit and for the same supervisor. Arbitrators tend to look at the "equitable" nature of labor agreements and focus on the importance of treating employees the same.

Remember that consistency of penalty with that imposed on other employees is only one Douglas Factor to apply. However, if the penalty is different for a similar incident of misconduct, specific reasons for the difference in penalty must be articulated.

Factor 7 – Consistency with Agency Penalty Guide

An important aspect of applying this factor is determining which penalty guide applies to the particular employee being disciplined. The new Human Resource Operating Instructions (HROI), Table of Penalties effective August 11, 2000, covers all non-bargaining unit employees and some of the FAA bargaining units. Others continue to be covered by Appendix 1 of FAPM Letter 2635. Coverage is changing as more negotiations are completed so consult your labor relations specialist for assistance in determining which applies to your situation.

The new Table of Penalties is more comprehensive with more described offenses and more specific penalty ranges than the previous guide. If the particular offense at issue is not in the agency penalty guide, you should review the guide for similar, related offenses. Don't force misconduct into a listed offense unless it accurately fits. Similar offenses can be used to guide penalty selection.

Deviation from the guide is allowed but going beyond or outside the penalty recommended in the table will be closely scrutinized. However, it may be appropriate based upon the facts of a specific case and/or application of other Douglas Factors to impose either a lesser or greater penalty as circumstances dictate. However, remember what they use to say on TV's Hill Street Blues, "Let's be careful out there!"

Factor 8 - Notoriety

Forget the old show business adage "All publicity is good publicity." A high profile agency like the Federal Aviation Administration (FAA) does not need any more media coverage of any employee's misconduct. The notoriety of an offense or its impact on the reputation on the FAA is usually directly related to the seriousness of the misconduct and/or prominence of the employee's position.

This factor is one of the least significant of the Douglas Factors and is usually considered as aggravating. There are certain standards of behavior and conduct expected of FAA employees by our external and internal customers. When these expectations are not met as a result of an employee's misconduct, the reputation of the FAA may be tarnished. In these circumstances, appropriate analysis of this factor may result in considering a more severe penalty.

Factor 9 - Clarity of Notice

How well the FAA informed an employee of the rule that was violated is a factor that may have to be considered in determining the penalty. Breaking an obscure rule will be viewed less harshly than breaking one that is well publicized, and particularly one on which the employee was given specific notice. Non-disciplinary counseling and letters of expectations are methods to communicate what are the requirements of conduct in the workplace. Even with all the turmoil surrounding the Gregory decision consideration may be given to prior disciplinary actions that are currently challenged, not as a second or third action under progressive discipline principles but for the purpose of establishing clear notice.
The Agency's Standards of Conduct (HRPM - ER-4.1 for most employees or FAPM Letter 2635 for those bargaining units where negotiations have not been completed) requires employees to familiarize themselves with these standards as well as the Government-wide Standards of Ethical Conduct for Executive Branch Employees. Supervisors are required to encourage employees to review the Standards of Conduct, and are required to ensure that employees under their supervision review, at least once, the Government-wide Ethical Standards.
Briefings and/or training on the Standards of Conduct to employees can be of assistance in evaluating this factor. Additionally, the new Table of Penalties identified significant changes in the range of penalties for some offenses. For example, FAPM Letter 2635 identified a letter of reprimand to a 5-day suspension for a first offense as the range for fighting or attempting to inflict/inflicting bodily injury to another while on the job or on FAA property. The new Table of Penalties, recognizing concerns over workplace violence, lists a 14-day suspension to removal as the range. Communication of the consequences of an employee's misconduct as viewed under the new Table of Penalties will also be useful in considering the clarity of notice.

Factor – 10 Potential for Rehabilitation

Potential for rehabilitation can be both a major aggravating or mitigating factor. An employee with a significant disciplinary record most likely would have poor potential for rehabilitation. However, an employee with no prior disciplinary record, good prior performance and job dedication would probably have good potential for rehabilitation.
An employee's recognition of a personal problem that may negatively affect conduct weighs favorably in determining an employee's potential for rehabilitation. Willingness to seek counseling assistance through an Employee Assistance Program or any self-help activity to deal, for example, with an anger management problem or a family situation which is negatively affecting attendance are good indicators of a potential for rehabilitation. Simply put, recognizing one has a problem and doing something about it, are factors, which may influence mitigation.
Mitigation means sometimes "you have to say you are sorry." Apologizing for misconduct usually helps. Recognizing a mistake and taking responsibility for one's misconduct are factors that are clearly mitigating. An employee's admission of wrongdoing on his/her own also constitutes a mitigating factor and the earlier the better for possible mitigation. There is no guarantee the truth will set an employee free, but it may result in reducing a penalty.
Admitting wrongdoing, showing remorse and contrition, and getting assistance to deal with the misconduct are just several elements, which may result in mitigation. Conversely, an employee who never apologized, never admitted an error, is not remorseful, is unrepentant, and has been uncooperative, should not expect much mitigation under this factor.

Factor 11 - Mitigating Circumstances

Unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice, or provocation on the part of others involved in an incident are mitigating circumstances, which should be reviewed.
Personal problems, which may place an employee under considerable stress, may be significant to warrant

mitigation. The death of a spouse and a serious illness of family member are “life-shaking” events are examples of such stressors. Specific evidence should be presented how the misconduct was directly related to the personal problems and the subsequent stress.
Evidence that an employee’s medical condition played a part in the charged conduct is ordinarily entitled to considerable weight as a significant mitigating factor. An employee who falls asleep in the workplace after taking medication should not have this behavior excused but the use of medication may be a reason for considering mitigation. However, an employee’s medical condition may not be sufficient in some cases to outweigh egregious acts of misconduct.
Provocation may be considered in certain incidents, for example a fight in the workplace. An employee who may have been provoked to fight may be due some mitigating consideration for the misconduct than the aggressor.

Factor 12 - Adequacy and Effectiveness of Alternative Sanctions

What needs to be done to deter the conduct in the future by the employee or others? This factor is listed last because this consideration should occur after a thorough analysis of all the other Douglas Factors. Remember, there is only one absolute penalty, which can be given without a Douglas analysis – the 30-day suspension required under law for misuse of a government vehicle. All other penalty determinations should undergo thorough reasoning under the Douglas Factors. It is important to note a case was recently lost in another government agency when the deciding official stated the Agency’s zero tolerance policy on workplace violence required him to remove the employee from governmental service. He was introduced the “World of Douglas” by way of the Merit Systems Protection Board’s decision.
The feasibility of other alternative sanctions can be greatly limited by other Douglas Factors. For example, an employee who has a significant disciplinary record and shows limited potential for rehabilitation should expect the worse. However, demotion to a non-supervisory position instead of a removal may be the appropriate penalty for a supervisor who failed to discharge his/her required supervisory responsibilities but had a good record in non-supervisory positions.
The deciding official must be prepared to support a penalty and communicate why it is the appropriate penalty. Remember, making an example of an employee is not an appropriate result of the disciplinary process. Applying these factors in determining the appropriate penalty is the objective.

Metz Factors (TPR 752)

Metz v. Dept. of Treasury, 780 F.2d 1001 (Fed. Cir. 1986), threats would be evaluated based upon: (1) the listener’s reactions; (2) the listener’s apprehension of harm; (3) the speaker’s intent; (4) any conditional nature of the remarks; (5) the circumstances surrounding the incident.

BROOKHAVEN DOCTRINE

Under its Brookhaven doctrine, the Authority requires that when management interviews employees "to ascertain necessary facts" in preparation for third-party proceeding, it must provide certain safeguards to protect employee rights under section 7102 of the Statute, 9 FLRA at 933.

In Brookhaven, the Authority articulated those safeguards as follows:

(1) Management must inform the employee who is to be questioned of the purpose of the questioning, assure the employee that no reprisal will take place if he or she refuses, and obtain the employee's participation on a voluntary basis;

(2) The questioning must occur in a context which is not coercive in nature; and

(3) The questions must not exceed the scope of the legitimate purpose of the inquiry or otherwise interfere with the employee's statutory rights. Id. In F.E. Warren, the Authority concluded that the Brookhaven assurances need not be applied on a per se basis.

SECTION 5

PREPARATION FOR THIRD PARTY PROCEEDING

&

PROBATIONARY EMPLOYEE

INTERVIEWING AND PREPARING WITNESSES FOR THE PROPER METHOD OF ANSWERING QUESTIONS BEFORE A THIRD PARTY

The following list of questions and proper responses can be used to prepare a witness who is going to be examined at an administrative hearing.

1. Who shoulders the burden of proof in disciplinary cases? *The Agency.*

2. What is the role or purpose of a witness in a hearing? *To provide data in a clear, factual manner.* -- *To the extent that this is done, the testimony will be deemed creditable by the hearing examiner.*

3. What is the most common error committed by witnesses? *Failure to give a direct response.*

4. What are the consequences of this kind of behavior? *Hearings are delayed and one's credibility is diluted.*

5. While testifying, what should one say in response to a question which one cannot answer factually? *"I don't know" or "I'm not certain."* -- *What you don't know, you don't know. There is no harm in not knowing certain things.*

6. Does the witness "loose face" if he or she admits to not having information or knowledge about a given question? *No.* -- *In Fact, it helps the witness' credibility.*

7. What happens if a witness attempts to furnish a less than factual piece of testimony? *The witness will very likely lose creditability.*

8. How is the Hearing Examiner likely to regard hesitation by a witness to a question which obviously merits a direct answer? *It may reduce the witness' creditability.*

9. What is likely to happen if, in one's testimony, one gives a windy, extraneous response? *The Hearing Examiner will see through such smoke screens and will begin to have doubts about the witness' creditability.*

10. How valid is testimony from a witness about what he/she or someone else thought? *Hearing Examiners want facts, not hearsay, opinions, thoughts, feelings, beliefs or conclusions.*

11. Is it "legitimate" for the opposing counsel to attempt to dilute or discredit a witness' testimony? *Yes! A witness who is sure of his or her facts should be able to withstand a reasonable amount of "harassment" by the opposing counsel.*

12. Should a witness restate a question put to him or her before answering it? *No! It may look to the Hearing*

Examiner that the witness is stalling for time to figure out a "correct" response. Again, directness is expected in one's testimony.

13. What should a witness do when a question is posed which may have a possible damaging effect? *Simply give a direct, factual answer.*

14. How should a witness answer to a question which may be hostile, embarrassing or demanding? *Don't rise to the bait! Avoid defensiveness. Keep your cool and answer the question clearly and factually.*

15. Should a witness inform opposing counsel about interviews with his/her counsel if asked?
Yes! *This is an acceptable part of preparation for the hearing.*

16. What is likely to happen if a witness volunteers more information than is requested? *This may provide the opposing counsel with an opportunity to open up a whole new line of attack.*

The above questions are not inclusive of the ones that will be asked in conjunction with the situation/case. As a reminder, all witnesses/potential witnesses must be interviewed before the hearing. The above information regarding interviewing witnesses can be used in all third party hearings. The interview can be conducted by a chapter representative or your national field representative.

PREPARATION FOR THIRD PARTY PROCEEDING

1. Types: arbitration, administrative hearing, unfair labor practice (ULP).
2. Be prepared to continue to go to any of the above.
3. Notify your Field Rep in the beginning and send copies of the file.
4. Start to gather your information list, i.e. personnel records, regulations, contract language, policy letters, etc.
5. Start a witness list to include as to what they will testify to.
6. You send a 7114(b)(4) request for information / data.
7. Be sure to have your Field Rep coordinate the date for the hearing with the employer’s representative and yourself.

PROBATIONARY EMPLOYEES

New Employees who receive an initial non-temporary appointment will have a one- or two-year trial period. The trial period is the final and highly significant step in the overall evaluation of an Employee. It provides the final indispensable test, that of actual performance on the job, which no preliminary evaluation can approach in making a valid assessment.

During the trial period, the Employee's conduct and performance in the actual duties of his position may be observed, and he/she may be separated from employment without undue formality as circumstances warrant. For management, the trial period properly employed, provides protection against the retention of an Employee who, in spite of having passed any preliminary evaluation, is found in actual practice to be lacking in fitness and capacity to acquire fitness for permanent Government service.

Therefore, a new Employee serving a probationary period will be given a probationary period evaluation by his/her supervisor, no earlier than the beginning of the 9th month, nor later than the end of the tenth month of their probationary period. This evaluation is not considered an official performance appraisal for the purpose of appeal rights. However, even prior to this time period, the probationary employee may be terminated without detailed explanation.

An Employee serving a trial/probationary period will not be given an official performance appraisal until after first completing the required 12 months of Federal Service.

- If a new Employee changes career fields during the probationary period, a new probationary period begins upon assumption of his/her job duties in the new career field.

- Probationary employees in a bargaining unit position are eligible and may join the Association at any time and have their union dues withheld through payroll deductions.

- A probationary employee may file a grievance concerning a direct violation of any of the provisions within the negotiated labor-management agreement.

- When the Employer terminates a probationary employee based on deficiencies in performance or conduct, regulations require only that the Employer notify the employee, in writing, of the reasons for the termination and the effective date of the action.

Position	Probation Period
T32 –Excepted	1 year
T5 – Excepted	1 year
T5 – Competitive	2 year

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