

Meetings

Under the Federal Service Labor-
Management Relations Statute



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- These materials have been provided by the Office of the General Counsel. They are intended to supplement the discussion portion of the training presentation and must be understood in the context of that discussion.
 - While the handouts will assist in understanding various legal issues, they do not represent legal advice or guidance. Also, since each case depends upon its own unique facts and the application of various legal precedent, they should not be relied upon to predict the legal outcome in any particular case.
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Training Available at FLRA.gov

- the Office of the General Counsel has 7 short training videos covering all aspects of the union's right to be present at *investigatory examinations*
- please find those videos, and others, here:

flra.gov/resources-training/training/video-training

MEETINGS

Types of Meetings Under the Statute

- Investigatory Examinations (*Weingarten*)
 - Formal Discussions
 - Bypasses under 7114(a)(4)
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Investigatory Examinations

- Section 7114(a)(2)(B) provides a *procedural safeguard* for employees who are under investigation by their agency
- Representation at an investigatory interview promotes a more *equitable balance* of power between labor and management
- Requiring employees to attend, alone, an investigatory interview which they reasonably believe may result in discipline *perpetuates the inequality* the Statute was designed to eliminate
- A single employee confronted by an employer investigating whether certain conduct deserves discipline may be *too fearful or inarticulate* to accurately relate the incident being investigated or too ignorant to raise extenuating factors

Investigatory Examinations

- Participation of a union representative will facilitate the factfinding process and a fair resolution of an agency investigation
- Representation contributes to preventing unjust discipline and unwarranted grievances
- The existence of this right strengthens the morale of the federal workforce

Representation of an employee is *not the equivalent of obstruction*

Elements of Investigatory Examinations

1. Agency representative
2. Bargaining unit employee
3. Examination in connection with an investigation
4. Employee reasonably believes that discipline may result
5. The employee requests representation

Each of these five elements MUST BE PRESENT.

Agency Representative

Who is an agency representative?

- Agency representatives in the same chain of command or the same agency as that of the employee.
 - agents of the agency's Office of Management and Integrity
 - Internal Security Inspectors, even when they are from a different geographical and organizational part of the agency
 - investigators from a related activity within an agency

Agency Representative



Agency Representative

KEY: whether the outside investigator is under *agency control* and *performing an agency function*

- OIG agents
- OPM investigators
- Contractor serving as EEO Investigator

Permitting an agency to delegate its authority to investigate employees without holding it *responsible for its obligations* under § 7114(a)(2)(B) of the Statute, would permit the agency to *evade* those obligations

Bargaining Unit Employee

Definition of Employee

- Section 7103(a)(2) of the Statute states:
“An employee is an individual employed by an agency as defined by the Statute...”
 - The Statute covers agency employees, unless *otherwise excluded* from coverage
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Bargaining Unit Employee

Exclusions

- Some agencies, like the FBI, CIA, and GAO, are *excluded* from coverage by the Statute
 - Some agencies, like the Secret Service and DEA, are *excluded* from coverage by Executive Order
 - Since these are not agencies under the Statute, their employees are not protected by Section 7114(a)(2)(b) – a Union cannot represent them at investigatory examinations
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Bargaining Unit Employee

Exclusions

- Other employees of covered agencies are excluded by Section 7112(b) of the Statute because they are managers, supervisors, confidentials, personnelists, internal auditors, or engaged in national security
 - These employees are not protected by Section 7114(a)(2)(B) – a Union cannot represent them at investigatory examinations
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Bargaining Unit Employee

1. Employee of an Agency covered by the Statute
2. Not excluded under Section 7112(b)
3. In a bargaining unit recognized or certified by the FLRA

These employees may have representation

Bargaining Unit Employee

- The right under Section 7114(a)(2)(B) applies to any employee in any bargaining unit:
 - Professional or non-professional
 - WG or GS
 - Full time or part-time
 - Probationary or Temporary
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Bargaining Unit Employee

Bargaining Unit Employee

Critical Question

At the time of the *investigatory examination*, is the employee in a unit represented by a union?

IN A UNIT = YES

NOT IN A UNIT = NO

Questions about the agency
representative or bargaining
unit employee elements?

Examination in connection with an Investigation

“Examination” is not defined by the Statute

- A meeting’s unique circumstances determine its categorization – the “totality of the circumstances”
- Is the meeting:
 - Designed to ask questions and solicit information from the employee?
 - Designed to secure an admission of wrongdoing?
 - Designed for the employee to explain his/her conduct?
 - Conducted in a confrontational manner?

Any of these factors may satisfy this element

Examination in connection with an Investigation

- A meeting is an investigatory examination *even if* it is:
 - Conducted off the worksite
 - Conducted outside of duty hours
 - Conducted telephonically or virtually, rather than in-person
 - Conducted in writing, such as requiring written responses to questions or for written explanations of conduct
 - Not mandatory, if it is the employee's sole chance to be heard on the matter being investigated
 - Section 7114(a)(2)(B) applies when an agency representative tries to *obtain information* from an employee *to decide* whether to take action or what action might be appropriate
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Examination in connection with an Investigation

“Examination” includes:

- Meetings to discuss inconsistencies in an employee’s written and oral statements to management
- Requiring employees to prepare written memos designed to elicit information and have employees explain conduct
- Security clearance examinations
- Drug tests – the Authority has not addressed this, but an ALJ with the Office of Administrative Law Judges found that drug tests were examinations for which employees had the right to representation

Examination in connection with an Investigation

“Examination” does not include:

- Meetings solely concerned with an employee’s performance
- Meetings called to counsel an employee on conduct
- Meetings to give an assignment of work
- Meetings to conduct a test
- Non-disciplinary classification desk audits
- Meetings limited to informing an employee of a decision already reached – no questions asked of employee

The title of the meeting or how the agency characterizes it does *not* control whether it is an investigatory examination

Examination in connection with an Investigation



Reasonable Fear of Discipline

- *Objective standard*: When an agency requires an employee to submit to an interview, and the employee *reasonably* believes this could result in disciplinary action, the employee has a right to request union representation
 - Objective factors determine if the employee's belief is reasonable
 - Subjective feelings of the employee are not relevant

Reasonable Fear of Discipline

- In some cases, the circumstances plainly show an employee's fear is reasonable, such as when an employee is told they are being questioned about their conduct
- In other cases, a fear of discipline might be reasonable even if the threat of discipline is not immediately obvious
 - Even when an agency regulation stated that information could not be used as evidence in a personnel action, it could still be accessed and later used to start a *new investigation* that could result in discipline
 - Interviews of employees who are not the subject of investigation, but have a reasonable basis to fear discipline

Reasonable Fear of Discipline

- If the agency assures an employee that discipline will not result, the employee *may* no longer have a reasonable belief that s/he will be disciplined
 - This not a hard and fast rule
 - It depends on the facts of the case
- If the agency does give this assurance, it *may not* later discipline the employee based on the information obtained during the examination

Reasonable Fear of Discipline

Reasonable Belief of
Discipline



Request for Representation

- In order to obtain representation, an employee *must* request representation
- While the employee must request representation, the right under Section 7114(a)(2)(B) is the *exclusive representative's* right to be given the opportunity to attend the meeting with the employee
- The employee's request *triggers* the union's right to represent the employee and the bargaining unit

Request for Representation

- An employee's request does not have to be in a specific form, but must be *enough to let management know* the employee wants representation
 - There are no magic words
- The request does not necessarily have to be made to the person conducting the examination
 - The employee may request representation from the manager, supervisor, or the investigator
- The employee does not need to continue to request representation if it has been repeatedly denied

Request for Representation

Questions on the examination in connection with an investigation, reasonable fear of discipline, or request representation elements?

Once the elements of an investigatory examination meeting are met, an agency must:

- Grant the request for representation

OR

- Discontinue the interview

OR

- Offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview at all

Union Role at Investigatory Examinations

- A union representative has the right to *actively* participate in the examination as long as s/he does not prevent the agency from conducting the investigation
 - To speak or otherwise participate on the record in a formal proceeding
 - Ask questions
 - Help the employee express views
 - Seek clarification
 - Suggest other avenues of inquiry
- The agency is free to insist upon hearing the employee's own account of the matter

Limitations on the Union's Right to Designate a Representative:

While a union ordinarily has the right to choose which representative will attend an examination, there are two recognized exceptions:

- An agency may reject a particular representative where it can demonstrate “special circumstances,” such as to preserve the integrity of the investigation
- An agency need not necessarily postpone the examination to allow an employee to be represented by a particular union official if another is available

Example 1

- Employee was called to supervisor's office and questioned in an investigation of her conduct. The employee was not told of her right to Union representation, and did not request representation
- Did the Activity have a Statutory duty to inform the employee of her right?
- Did the Activity violate the Statute by not providing representation? No, see citation below.

Example 2

- An employee was required to appear before a "board of investigation" regarding a workplace incident
- The Union President, who represented the employee, was not permitted to speak or otherwise participate in the board's interview of the employee
- Did the agency violate the Statute by not permitting the union representative to participate? Yes, see citation below.

Questions about
investigatory interviews?

Break for 10 minutes

FORMAL DISCUSSIONS

- Section 7114(a)(2)(A) 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

The Authority is guided by the intent and purpose of Section 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.

Elements of Formal Discussions

1. Discussion/meeting
 2. Formal
 3. Agency representative
 4. Bargaining unit employee
 5. Subject matter is a grievance, or personnel policy or practice, or general condition of employment
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Discussion

- A “discussion” is any meeting between an agency representative and unit employees
- A conversation is *not* required
 - announcement of new staffing policy
 - announce work schedule and have employees select shift
 - grievance resolution meeting where employee was not permitted to speak

Agency Representative

- An agency representative need not be a supervisor or manager
 - an attorney from the JAG
 - a contract EEO investigator
 - contractor providing EAP services

Bargaining Unit Employee

- An employee in a bargaining unit
 - includes alternate supervisors
 - includes team leaders

Subject Matter – Grievance

- A discussion is not a “formal discussion” unless it is about a grievance, personnel policy or practice, or other general condition of employment
- “Grievance” is defined broadly – any *complaint*.
 - by an employee concerning a matter relating to the employment of the employee
 - by any labor organization concerning a matter relating to the employment of any employee

OR

- by any employee, labor organization, or agency, concerning a CBA or claiming a violation of any law, rule, or regulation, affecting conditions of employment

Subject Matter – Personnel Policy or Practice

- A personnel policy or practice is a *general rule* that applies to agency employees
 - not a single action the agency takes with respect to individual employees
 - meeting limited to the temporary assignment of two unit employees did not concern personnel policy or practice
 - meeting relating to a reorganization concerned a personnel policy or practice or other general condition of employment, even though only two employees were immediately affected, because of the *potential* changes to other employees' conditions of employment

Subject Matter – General Condition of Employment

- concerns "conditions of employment" affecting employees in the unit generally
 - a meeting about management interference with employee picketing, involved protected rights under the Statute and concerned general conditions of employment
 - discussions that addressed a supervisor's conduct and the atmosphere that existed in the office concerned general conditions of employment

Discussions held to meet the subject matter test:

- grievance meetings
- meeting to discuss policies and procedures concerning annual leave
- interview in preparation for a ULP or other third-party hearing

Discussions held NOT to meet the subject matter test:

- counseling session between employee and supervisor
- meeting to inform two employees of a temporary reassignment in duties
- discussion limited to manner in which four specific employees reported their productivity

Formality: “Totality of the Circumstances”

- whether the person who held the meeting is a first-level supervisor *or is higher up*
- whether *other* supervisors or management officials attended
- *how long* the meeting lasted – 5 minutes vs. 60 minutes
- *how* the meeting was called – advanced notice vs. last minute
- *where* the meeting was held – in the supervisor's office, at each employee's desk, in the general work area, or elsewhere
- whether a *formal agenda* was established for the meeting
- whether employees were required to attend
- were *notes* taken or a *record* made of the meeting
- the *subject matter* addressed during the meeting
- the *manner* in which the meeting was conducted

Meetings found to be formal discussions

- meetings scheduled more than two weeks in advance; purpose was to mediate EEO complaints; held away from employees' work sites; and agency representatives had full authority to settle
- scheduled one week in advance; had an established purpose; held away from the employee's work area; additional agency representatives attended; and followed traditional mediation format
- meeting was mandatory; subject matter and agenda were specified; memo issued to employee after meeting; conducted by supervisor; held in supervisor's office; lasted one hour; employee answered questions posed by supervisor that were evaluated by the agency's representatives
- meeting about employee grievance; initiated by fourth-level supervisor; held in the district manager's office behind closed doors; attendance was mandatory
- interviews conducted telephone do not lessen the formal nature of the discussions

Meetings found not to be formal discussions

- meeting to discuss upcoming arbitration not formal because the length of the meeting (15-30 minutes) was partly due to questions the employee asked; the meeting was held away from the employee's work site, because the employee had no private office
- not formal because attendance was voluntary for the single employee who attended; only one agency representative present; only lasted fifteen minutes; no formal agenda prepared in advance; the settlement discussions leading up to the meeting were initiated by the employee
- meeting addressed the settlement of an EEO complaint, but took place in an agency representative's office, lasted for 30 minutes, impromptu meeting initiated by employee
- scheduled and conducted in the same manner as previous monthly meetings; informational; statements by agency representatives nothing more than routine reminders of past policies and requirements
- meeting to introduce supervisor; spontaneous; was one-on-one with employee and supervisor; unstructured; lasted for 20 minutes; at the supervisor's desk; no notes taken; no advance notice; no preparation for the meeting

Union Rights

- A union is entitled to *advanced notice* of a formal discussion
 - so it can decide whether to attend
 - if so, to designate a representative of its *own choice* to attend the meeting
 - a union's interest cannot be adequately represented when the person who attends is also the subject of the meeting
- The union has the right to comment, speak, and make statements at the meeting
 - the union representative cannot take charge of or disrupt the meeting
 - comments by a union representative must be reasonable and related to the subject matter addressed at the meeting
 - union representative must have respect for orderly procedures

Brookhaven Warnings

- when management interviews employees "to ascertain necessary facts" *in preparation for third-party proceedings*, it *must* provide safeguards to protect employee rights under section 7102 of the Statute
- a failure to do so violates 7116(a)(1) of the Statute

Brookhaven Safeguards

What are the safeguards?

- management must inform the employee the purpose of the questioning
 - obtain the employee's participation on a voluntary basis
 - assure the employee that no reprisal will take place if they decline to participate
 - the questioning must occur in a context which is not coercive in nature
 - the questions must not exceed the scope of the legitimate purpose of the inquiry or otherwise interfere with the employee's statutory rights
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Example

The supervisor reported to the manager that no one had volunteered for overtime. The manager directed that the employees be assembled immediately for a meeting. The manager told employees that their names would be placed on the overtime roster and if no one volunteered, mandatory assignments would be made. The brief meeting ended after this announcement.

Is this a formal meeting? No, see citation below.

Example

In preparation for an MSPB hearing, an attorney representing the agency interviewed an employee, who was to appear at the MSPB hearing as a witness for the agency. Also present at the interview were two labor relations specialists who were serving as co-counsel to the agency. Prior to the interview, the employee was directed to attend a meeting in one of the labor relations specialist's office. The employee left his work area and reported to the office of the labor relations specialist. During the 30 minute interview, the employee was questioned extensively about the MSPB matter. The attorney took notes of the employee's responses and later typed up these notes.

Is this a formal meeting? [Yes, see citation below.](#)

Example

A meeting was called to discuss changes regarding the teleclaims process. The meeting was not scheduled in advance and was held at the desks of the employees involved. The meeting lasted five minutes and was attended by the six employees affected and a supervisor and the General Counsel.

Is this a formal meeting? No, see citation below.

Bypasses

- bypasses are defined in connection with the *duty to bargain* in good faith under Section 7114(a)(4)
 - a bypass is a failure of the duty to bargain in good faith
- an agency unlawfully bypasses the exclusive representative when management *deals directly* with a unit employee or employees on a matter involving conditions of employment for which it has an obligation to deal with the union as the exclusive representative
- dealing directly with unit employees interferes with the union's rights under Section 7114(a)(1) of the Statute "to act for . . . All employees in the unit"

Bypass Occurs When:

- an agency communicates directly with bargaining unit employees
- concerning grievances, disciplinary actions, or conditions of employment
- where the agency knows the employees are represented by the union

Bypasses

Agency Surveys and Polls

- while agencies may not negotiate directly with bargaining unit employees regarding negotiable conditions of employment, they may *gather information*, including opinions from unit employees, to ensure the efficiency and effectiveness of their operations
 - an agency may question employees directly, provided that it does not do so in a way that *amounts to attempting to negotiate* directly with them concerning matters that are properly bargainable with their exclusive representative
 - the search for reliable information may not be used as a *screen* behind which the union's role as exclusive representative is subverted

Bypasses

Agency Surveys and Polls

- To determine if a bypass has occurred the Authority considers
 - the nature of the information sought
 - the manner in which the survey is conducted
 - whether the information was used in a way that would undermine the status of the exclusive representative
 - the extent to which the agency has involved the union in the process, including
 - whether the agency gave the union notice of the survey/poll
 - whether the agency invited the union to bargain regarding any proposed changes resulting from the survey

Actions Held to be Bypasses

- agency deals or directly negotiates with unit employees to put pressure on the union to take a certain course of action
- negotiating a change in working conditions directly with an employee
- agency communicates directly with bargaining unit employees concerning grievances, disciplinary actions, and other matters relating to the collective bargaining relationship, where the agency knows the employee is represented by the union
- agency delivers a disciplinary decision to a unit employee when the agency knows the union is representing the employee in the matter
- manager meets directly with unit employee to discuss consensual settlement of complaints made against him by co-workers by asking employee to move floors

Example

- Two employees who had been represented by the union in responding to proposed actions requested that the union representative be present in meetings held to present the decisions. Both requests were denied. The supervisors presented the agency decisions on the proposed actions without the designated union representatives present.
- Did the agency bypass the union? Yes, see citation below.

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