

## CHAPTER 4

### FEDERAL SECTOR LABOR-MANAGEMENT RELATIONS

The starting point in understanding the Federal Sector Labor Relations is recognition of the fact that no employee has a right to bargain with any employer in the absence of a law, rule, or regulation. Further, there is no constitutional requirement that the federal employer deal with a labor union. Simply stated, "No Law - No Right." For federal employees, meaningful labor relations rights originated with President Kennedy's Executive Order 10988 in 1962. The Order marked a significant change in the federal government's policy regarding unionization of federal workers. Specifically, the order protected the right of Federal workers to form, join, and assist labor unions.

Later, in 1969, President Nixon greatly expanded these rights in Executive Order 11491. This Order created a true labor relations system by establishing a centralized structure for coordinating and administering the collective bargaining process and by installing the Federal Labor Relations Council (FLRC) as the mechanism for resolving federal labor-management disputes.

Between 1970 and 1975, E.O. 11491 was amended three times. Although these changes broadened slightly the scope of bargaining and increased the number of issues subject to a negotiated grievance procedure, they did not improve significantly the collective bargaining rights of federal workers.

It was not until after the passage of the Civil Service Reform Act (CSRA) in 1978 that federal workers enjoyed statutory protections similar to those possessed by their brother and sister workers in private industry.

#### **I. Civil Service Reform Act of 1978**

The CSRA, much like the executive orders, affirmed the right of federal employees to form and to join unions and to participate in union activities. Furthermore, as a result of its enacting the CSRA, the Congress increased the protections surrounding federal employees' bargaining rights by eliminating the threat of the arbitrary cancellation or dilution of bargaining rights; establishing a number of procedures, such as the representation election, which were intended to protect the unionization process; and establishing an administrative mechanism which was designed to be free of outside interference.

The CSRA is administered by the Federal Labor Relations Authority (FLRA). The Authority is a neutral, independent, bi-partisan body, headed by three executives who are appointed by the President to fixed, five-year terms. The FLRA's functions are to:

- A. determine appropriate bargaining units.

- B. supervise elections and certify exclusive bargaining agents.
- C. make negotiability determinations.
- D. rule on exceptions to arbitration awards.
- E. investigate, hear, and decide unfair labor practice charges.

A review of the Act's principal provisions follows.

**A. Coverage**

The Act covers the non-managerial and non-supervisory employees of most executive branch agencies. Employees in such organizations as the General Accounting Office, the FBI, the CIA, and the Federal Labor Relations Authority are excluded.

**B. Employees' Rights**

Each employee, who is not a supervisor or management official in a covered agency, has the protected right to form, to join, or to assist a labor organization, or to refrain from such activity without fear of penalty or reprisal. These rights include such activities as acting as a labor union representative; presenting the union's views to agency authorities, other government officials, and Congress; and engaging in collective bargaining.

**C. Exclusive Recognition: Rights and Responsibilities**

Exclusive recognition is the status awarded to a labor union which has been elected and certified to represent the employees assigned to a specific segment of a workforce, commonly referred to as the bargaining unit.

A labor union which has been accorded exclusive recognition status is the sole agent authorized to act for and to negotiate collective bargaining agreements covering all employees -- whether union members or not -- in the bargaining unit. Management may not discuss personnel policies or practices or other general conditions of employment with an individual employee or an agent of any other representative group.

In order to fulfill its obligations, an agency must give the exclusive representative the opportunity to be present at:

1. any formal discussion between a management representative and one or more bargaining unit employees, whether union members or not, concerning any grievance, personnel policy or practice, or other general condition of

employment.

2. any examination of a bargaining unit employee, whether a union member or not, by an agency representative in connection with an investigation if:
  - a. the employee reasonably believes the examination may lead to disciplinary action; and
  - b. the employee requests representation.

The Act requires that, in exercising its representational rights, the union must represent the interests of all employees in the bargaining unit in those areas for which it is the exclusive representative, without regard to membership in that labor organization. This is the duty of fair representation.

#### **D. Scope of Bargaining**

1. Agencies are required by the CSRA to negotiate in good faith with unions regarding any "condition of employment." The term "condition of employment" is defined as a personnel policy, practice or matter, whether established by rule, regulation or otherwise, which affects working conditions. However, exceptions to that bargaining obligation exist, as described below.
  - a. The CSRA specifically excludes the following subjects from the definition of "condition of employment," and they are therefore nonnegotiable (Section 7103(a)(14)):
    - 1) matters covered by Federal Statute (e.g., rate of pay, leave, health insurance contribution);
    - 2) matters concerning the classification of any position; or
    - 3) matters relating to prohibited political activities.
  - b. The Act further states that items which would otherwise be negotiable are not negotiable if:
    - 1) they conflict with a government-wide rule or regulation (Section 7117(a)(1)); or
    - 2) a compelling need exists (an agency's own rule or regulation is essential -- as opposed to helpful -- to the accomplishment of the agency's mission).

2. Although these exceptions seem fairly narrow, the statute further breaks down the duty to bargain into three categories:
  - a. illegal subjects -- those involving "management rights" (Section 7106(a));
  - b. permissive subjects -- those which are only bargainable at management's option (Section 7106(b)(1)); and
  - c. mandatory subjects of bargaining -- everything that is not excluded by the various exceptions listed above.

Note: A full explanation of these various categories describing the duty to bargain can be found in Chapter 14, Negotiations.

3. Although the CSRA grants management the authority to make certain decisions free of the obligation to negotiate the substance of the basic decision (e.g., "management rights" issues or "permissive" subjects of bargaining), the agency is obligated to negotiate the procedures to be used in carrying out those decisions. (Section 7106(b)(2)). The agency must also negotiate regarding any adverse impact created by its decision. (Section 7106(b)(3)). This process is generally called "impact and implementation" bargaining.

#### **E. Negotiated Grievance and Arbitration Procedures**

The CSRA requires that each negotiated agreement contain a grievance procedure which will be the sole mechanism available to bargaining unit employees, the union, and the agency. Furthermore, each grievance procedure must provide for the binding arbitration of unresolved grievances. By law, the invocation of this arbitration provision may be made only by the union or the agency, and not by an individual grievant.

#### **F. Official Time**

In discussing official time, distinctions must be made between official time spent performing representation functions, conducting negotiations, and carrying out internal union business.

1. Negotiations. Employees serving as union representatives while negotiating collective bargaining agreements are entitled to official time, if they otherwise would be in a duty status.
2. Representation. The amount of official time a federal employee is authorized for performing representational functions is determined through negotiations between the union and the employing agency. Although authorization for the performance

of specific representational functions varies between contracts, the term "representational functions" includes such activities as:

- a). the discussion of potential grievances.
  - b). the investigation, preparation, and presentation of statutory appeals and discrimination complaints.
  - c). attending meetings with management officials.
  - d). reviewing and preparing responses to proposed directives.
  - e). preparing for negotiations.
  - f). serving as a representative at formal discussions and investigatory interviews of unit employees.
  - g). receiving training in the labor-management relationship.
3. Internal Union Business. Internal union business is to be performed on personal time, paid or unpaid leave, or off-duty time (non-government time) and includes collection of dues, election of union officers, and solicitation of members. Stated simply, an employee may not use official time to perform such tasks.

## **G. Unfair Labor Practice**

An Unfair Labor Practice (ULP) is an action by the management of a federal agency or the union which violates the statutory rights contained in Chapter VII of the CSRA. Generally, the ULP can be distinguished from a grievance by remembering that while the ULP concerns the violation of Chapter VII rights, a grievance concerns the violation of one or more negotiated contract provisions. When a specific action may violate the provisions of both the Act and a labor contract, case law generally requires that the issue is to be processed through the negotiated grievance procedure. Whether a grievance or ULP is more appropriate in a given situation is a question each chapter must work out with its NTEU field representative on a case-by-case basis. This discussion will focus on the issue of identifying and processing ULPs.

An unfair labor practice occurs when either a federal agency or a union:

1. interferes with, restrains, or coerces any employee in that employee's exercise of any right contained in Chapter VII.
2. refuses to consult or to negotiate in good faith with the opposing party.

3. fails or refuses to cooperate in impasse procedures and impasse decisions.
4. otherwise fails to comply with any provision of Chapter VII of the CSRA.

Other actions, which, if committed by a federal agency, would constitute unfair labor practices are:

1. encouraging or discouraging membership in any labor organization by discriminatory treatment.
2. sponsoring, controlling, or otherwise assisting any labor organization. This does not prohibit an agency from furnishing customary and routine facilities and services to a union.
3. disciplining or otherwise discriminating against an employee as a result of that employee's having filed a complaint, affidavit or petition, or having given information or testimony in accordance with Chapter VII.
4. enforcing agency regulations that conflict with a pre-existing, negotiated agreement.

Likewise, a union commits an unfair labor practice if it:

1. causes or attempts to cause an agency to discriminate against any employee in that employee's exercise of any right under Chapter VII.
2. hinders or impedes a unit member's work performance or productivity.
3. discriminates against an employee regarding the terms or conditions of membership in the union on the basis of race, color, creed, national origin, sex, age, preferential or non-preferential civil service status, political affiliation, marital status, or handicapping condition.
4. calls or participates in a strike, work stoppage or slowdown, or fails to take action to prevent or stop such activities.

The General Counsel of the FLRA investigates unfair labor practice charges and issues and prosecutes unfair labor practice complaints. Procedures for filing unfair labor practice charges will be examined later in this chapter.

## **II. Duty of Fair Representation**

A union possessing exclusive recognition status must fairly, impartially, and in good faith represent the interests of all employees in that unit, whether those employees are union members or not. This requirement is the Duty of Fair Representation. A union representative's failure to fulfill this requirement could result in a bargaining unit employee's filing of an unfair labor practice charge or lawsuit against the Union. Consequently, all NTEU representatives must perform their duties in a fair, impartial, and consistent manner, in order to protect the rights of all unit employees.

To ensure that all NTEU representatives fulfill their obligations under the Duty of Fair representation, they must:

- A. represent the interests of all employees in the unit, regardless of union membership status.
- B. not waive, ignore, or attempt to change an employee's benefits and rights guaranteed by the clear language of the contract.
- C. settle similar grievances in a consistent manner as far as possible, recognizing the Union's right to interpret ambiguous contract language as it determines proper.
- D. not refuse to process a grievance for improper and illegal reasons, such as social prejudices, personal hostility, or union membership status.
- E. consistently apply the standards used for determining whether to process a grievance or submit it to arbitration.
- F. exercise care and diligence in investigating whether a grievance should be filed, processing the grievance, and presenting it to management. In other words, in each case, the union officer or steward should conduct a thorough investigation to determine whether a violation actually occurred, comply with all time related processing requirements, and never act in a manner which would allow another person to infer that the representative is unconcerned about the resolution of the issue.
- G. generally not agree to withdraw an employee's grievance in exchange for settling one or more other grievances, without that employee's concurrence. Any exceptions to this practice should only be made after discussion with your National Field Representative/Assistant Counsel.
- H. properly and fully document all actions, and related rationale, associated with handling employees' cases in order to respond to future questions or challenges.

It is also important that you understand when NTEU representatives do not have a duty to represent employees. In recent decisions, the U.S. Court of Appeals and the FLRA have identified situations where NTEU has no duty of fair representation. Specifically, in cases where employees are subjected to severe disciplinary action or are fired for conduct or unacceptable performance, they may

challenge such actions via statutory appeals procedures. NTEU has no legal obligation to represent employees in adverse actions since employees enjoy statutory appeal rights. However, as a benefit to a member, we will provide the services of an NTEU National Field Representative/Assistant Counsel to defend meritorious cases at no cost.

### **III. Processing Unfair Labor Practices**

As noted previously, an unfair labor practice (ULP) is an action, performed by an agent of either an agency or a union, which violates the other's rights contained in Chapter VII of the CSRA.

The NTEU policy is that all unfair labor practice charges related to incidents occurring at the chapter level are to be filed by the field representative servicing the chapter.

Generally, in order to determine whether a ULP has been committed, one must examine the criteria in Section 7116(a) of the CSRA. However, under some circumstances, an action may violate one or more provisions of Section 7116(a) and the contract. In such situations, the Union must decide whether to file a ULP or a grievance, for the law prohibits the engaging of both procedures over the same issue. Therefore, listed below are guidelines for determining whether to file a ULP or a grievance.

- A. If the action appears to violate only a provision of Section 7116(a), a ULP would be appropriate.
- B. If the action violates both a contract provision and Section 7116(a), a grievance generally would be appropriate. For example, if the charge were that a steward had not been selected for promotion because of union activities, a grievance citing violations of the contract's promotion and employee rights articles would be filed.
- C. If the dispute involves not only a possible violation of Section 7116(a), but also an arguable interpretation of a contract provision, such as whether local negotiations are required regarding a particular matter, the filing of a grievance generally would be appropriate.
- D. If the action violates only a contract provision, a grievance must be filed. The filing of a ULP would be improper.

Once the field representative has determined that the filing of a ULP is the proper course of action for addressing a particular situation, the chapter representative must provide the field representative the following information.

1. Name and mailing address of the agency against which the charge should be filed.
2. Name, title, and phone number of the agency contact (i.e., the agency's local labor relations officer).

3. Number of bargaining unit employees.
4. Basis of the charge. To accomplish this task, you must promptly prepare and send the field representative a concise and legibly written statement of the facts surrounding the alleged unfair labor practice, including the date and place of occurrence and the name(s) and title(s) of each person(s) involved in and witnessing the incident.

Since the passage of the CSRA, the processing of ULPs has been subject to delays of months and even years. Alternatively, grievance and arbitration procedures, when handled in an expeditious fashion, can result in a final, binding decision in 60 to 90 days after filing. Thus, while the initial expense of the grievance and arbitration procedure may exceed that of the ULP, the resulting savings in terms of time and morale frequently make the grievance/arbitration procedure the best choice for resolving disputes and problems between the Union and the agency.

#### **IV. Examples of Agency Unfair Labor Practices**

##### **A. 5 U.S.C. 7116(a)(1) Violations**

1. A supervisor told a steward, with whom he was discussing potential disciplinary action during an investigatory interview, that the steward should be half as interested in his job as he was in performing union duties.
2. Supervisor stated to a union steward, during a meeting in which the steward was representing an employee, "I don't need any union people counseling my employees. What's between me and my employees is confidential and none of the union's business."

##### **B. 5 U.S.C. 7116(a)(2) Violations**

1. A high ranking supervisor ordered that a bargaining unit employee who had filed a classification appeal be removed from his position as an acting supervisor.
2. An agency management official threatened an employee with discipline if she did not cease her union activities.

##### **C. 5 U.S.C. 7116(a)(3) Violations**

1. The agency knowingly allowed a rival union to conduct solicitation activities among represented workers, even though the rival organization had not filed a representation petition.

2. The agency consistently denied a union the use of meeting facilities, but gave another union unrestricted access to the agency's meeting room facilities.

**D. 5 U.S.C. 7116(a)(4) Violations**

1. Three employees who testified at an unfair labor practice hearing were subsequently disciplined for allegedly unrelated actions. The administrative law judge in a subsequent ULP trial found that the discipline had been motivated by a desire to retaliate against the three employees because of their earlier testimony.
2. The agency's explanation for having placed a restriction on an employee's right to exchange daily shift assignments was found to be a pretext. The actual reason for the denial was that the employee had previously submitted an affidavit in an unfair labor practice proceeding.

**E. 5 U.S.C. 7116(a)(5) Violations**

1. The agency unilaterally changed its employee travel reimbursement practice, which had never been reduced to written policy, without giving the union an opportunity to bargain.
2. The agency failed to give the union adequate notice of the planned transfer of a large number of employees.

**F. 5 U.S.C. 7116(a)(6) Violations**

1. Management refused to implement an order of the Federal Service Impasses Panel (FSIP).
2. The agency refused to submit required documents to the FSIP and to attend an FSIP proceeding.

**G. 5 U.S.C. 7116(a)(8) Violations**

1. The Agency failed to notify the union of a formal meeting which it had called for all employees. Meeting attendance was mandatory; the meeting was conducted by an agency official; the agenda was written; and the subject concerned conditions of employment.
2. Management refused to implement an arbitration award.