

# **JOINT TRAINING SESSION**

## **I. The Federal Service Labor-Management Relations Statute (5 U.S.C. §§7101 et seq.) (referred to as the “Statute”)**

### **A. Findings and Purpose (5 U.S.C. §7101(a)(1)):**

- 1. “. . . Labor organizations and collective bargaining . . . are in the public interest.”**
- 2. Protecting the employee’s right to organize, bargain collectively, and participate in a labor organization safeguards the public interest, contributes to the effective conduct of the public business, and encourages amicable settlements of employee-employer disputes.**

### **B. Employee Rights (5 U.S.C. §7102)**

- 1. Every employee has the right to form, join, or assist any labor organization, and to refrain from this activity, without fear of penalty or reprisal.**
- 2. “Employee” defined (5 U.S.C. §7103(a)(2)) as . . . an individual employed in an agency, excluding supervisors, management officials, and Foreign Service employees.**
- 3. Includes right to act as labor union representative and engage in collective bargaining with respect to conditions of employment.**  
**-- what are “conditions of employment”? (See II.(B)(1) below)**

## **C. Management Rights (5 U.S.C. §7106)**

### **1. Management has exclusive right to (5 U.S.C. §7106(a)):**

- determine the Agency's mission, budget, organization, number of employees, and internal security practices**
- hire, assign, direct, lay off, and retain employees**
- suspend, remove, reduce in grade or pay, or discipline employees**
- assign work**
- make contracting-out determinations**
- determine the Agency's personnel**
- select employees to fill positions, and**
- act during emergencies**

### **2. Management and the Union may negotiate, but only at the election of the Agency, proposals addressing (5 U.S.C. §7106(b)(1)):**

- “numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty” and**
- “technology, methods, and means of performing work”**
- President Bush rescinded Executive Order 12871. It had provided that: “The head of each agency . . . shall negotiate over the subjects set forth in 5 U.S.C. §7106(b)(1) and instruct subordinate officials to do the same.”**

**D. Rights and Duties of Exclusive Representatives** (5 U.S.C. §7114)

**1. The certified labor organization is the exclusive representative** (5 U.S.C. §7103(a)(16)).

**2. Duty of Fair Representation**

- represent the interests of all employees in bargaining unit without discrimination and without regard to membership in the Union
- except when representation would result in potential conflict of interest (5 U.S.C. §7120(c))
- standard = not arbitrary, capricious, discriminatory, or in bad faith

**E. Scope of Representation** (5 U.S.C. §7114(a))

**1. Collective Bargaining** (See Part II. below)

**(a) Definition of Bargaining** (5 U.S.C. §7103(a)(12), (14))

- meet at reasonable times, consult and bargain in good faith
- execute a written document incorporating agreement reached through collective bargaining, but no obligation to reach agreement
- only with respect to conditions of employment, i.e., personnel policies, practices affecting working conditions (except position classification)

**(b) May adopt minority position**

**(c) Only Union members may ratify**

- 2. Representation in Grievances (See I. (F) below)**
  - (a) Definition of Grievance (5 U.S.C. §7103(a)(9))**
    - any complaint concerning a matter relating to the employment of an employee, an interpretation or violation of a collective bargaining agreement, or a violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.**
  - (b) Representation of Union and non-Union employees in b.u. alike**
  - (c) Union right to information (5 U.S.C. §7114(b)(4)):**
    - maintained in regular course of Agency business**
    - reasonably available**
    - reasonably necessary for full and proper discussion, understanding, and negotiation**
- 3. Formal Discussion (5 U.S.C. §7114(a)(2)(A))**
  - (a) Must be a (i) discussion, (ii) formal, (iii) between one or more Agency representatives and one or more bargaining unit members, (iv) concerning a grievance, general personnel policy or practice, or general condition of employment.**
  - (b) If all four elements present, NAAE entitled to reasonable advanced notice and opportunity to attend.**

**(c) Whether meeting is “formal” depends upon circumstances:**

- supervisor calls meeting**
- held at supervisor’s desk or room**
- lasts more than a brief minute**
- mandatory attendance**
- formal agenda**
- “minutes” written down**

**(d) NAAE Rep’s role is to:**

- attend, participate, but not disrupt, dominate, or interfere**
- state Union’s position**
- speak, comment, and make statements**

**4. Investigative (Weingarten) Meeting (5 U.S.C. §7114(a)(2)(B))**

**(a) An examination of a bargaining unit member by Agency representative in connection with an investigation IF**

- employee reasonably believes disciplinary action may result, AND**
- employee requests Union representation.**

**(b) Issues for determining right to Union Rep:**

- is it an “examination”? (questions, interrogation)**
- is questioner an Agency representative?**
- can the employee reasonable fear discipline will result from meeting?**

- (c) Express grant of immunity from discipline will dispel fear-of-discipline claim**
- (d) NAAE Rep's role:**
- meet with employee to advise of rights and "coach" how to answer**
  - participate in meeting (speak, make statements, clarify questions)**
  - establish basis for interview**
  - ask whether employee suspected of violation that could result in criminal prosecution (if so, ask for "Miranda" warnings and suggest retaining criminal attorney)**
  - if interview is part of criminal investigation and employee is granted immunity from prosecution, employee must answer if given "Kalkines" warning**
  - absent "Miranda" and "Kalkines" warnings, ask whether investigation is only administrative**
  - keep minutes**
  - advise employee not to sign statement on spot (need to review and correct)**
- (e) Agency Rep may elect not to hold meeting and may terminate at any time**

## **F. Grievances**

- 1. “Grievance” is any complaint (5 U.S.C. §7103(a)(9)):**
  - (a) by an employee or the Union concerning any matter relating to employment of employee or**
  - (b) by any employee, the Union, or the Agency concerning**
    - the effect or interpretation of Collective Bargaining Agreement or alleged breach of that Agreement or**
    - any alleged violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment**
- 2. The grievance procedure, spelled out in the Collective Bargaining Agreement (the “Green Book”), is available to resolve all workplace disputes about matters addressed in the Green Book, including past practices and specific violations of any law, rule, or regulation.**
  - “past practice”: elements are continuous, open, unchallenged practice effecting conditions of employment**
- 3. Grievance procedure may be used to achieve a variety of purposes, not just dispute resolution:**
  - ensure uniform, fair treatment of bargaining unit employees**
  - provide “Green Book” interpretations**
  - protect negotiated contract rights of employees and the Union**
  - establish precedent**

- maintain relative peace in the workplace
4. **Certain issues or subjects are excluded from negotiated grievance procedure (5 U.S.C. §7121(c)):**
    - prohibited political activities
    - retirement, life insurance, and health insurance
    - suspension or removal for national security reasons
    - examination, certification or appointment
    - classification of any position not resulting in reduced employee pay or grade
    - matters specifically designated as excluded in Green Book (RIF actions, actions filed and accepted under EEO complaint procedures, and non-selection for lateral or hardship transfer positions)
  5. **Employees have option to use grievance procedure (with an appeal to FLRA) or statutory appeals procedures (i.e., EEOC or MSPB), but not both, to address discrimination complaints, adverse actions, or actions based upon unacceptable performance.**
  6. **An employee may file an individual grievance, usually against the Agency, but also against the Union, either at national or local level.**
  7. **The Union may file grievance against the Agency on behalf of itself or bargaining unit employees.**
  8. **Management may file grievance against the Union on behalf of the Agency.**



- 9. Consult the Green Book, Article 16, for applicable grievance procedures:**
- (a) present grievance informally to first-line supervisor within 30 days of act or occurrence or date the employee becomes aware of act or occurrence**
    - except a grievance concerning a continuing practice may be presented at any time**
    - even though informal, employee must make clear to supervisor he/she is presenting a grievance, the subject of the grievance, and the relief sought**
  - (b) supervisor to whom informal grievance is presented has 10 days to decide**
  - (c) if not resolved, grievant must prepare and submit written formal grievance to grievant's servicing Labor Relations Specialist within 14 days of informal decision, stating**
    - grievant's name, position, title, grade, organizational unit, address, and work number**
    - identification of management official(s) committing grieved action**
    - detailed statement of circumstances of grievance, including date**
    - summary of steps taken to resolve and results**

- general and specific corrective action desired
- employee or Union representative signature
- (d) Agency's Step 1 Responsible Official (identified in supervisor's informal-grievance response) has 21 days from receipt of formal grievance to issue written decision
  - must first "meet" (in person or by phone) with grievant or Union rep to address grievance
- (e) If dissatisfied, grievant has 14 days to submit written grievance to Step 2 Responsible Official (named in Agency answer to Step 1 grievance)
- (f) Step 2 Responsible Official has 21 days from receipt of Step 2 grievance to issue written decision
  - may meet with grievant if requested and deemed productive in resolving grievance
- (g) If dissatisfied, grievant has 14 days to appeal Step 2 grievance to Deputy Administrator as Step 3
- (h) Deputy Administrator has 14 days after receipt of Step 3 grievance to issue decision
  - may meet with grievant if requested
- (i) If Deputy Administrator's decision does not resolve grievance, the Union, through the National President, has 30 days within which to invoke arbitration

- 10. If Agency official charged with deciding fails to issue timely decision, grievant may, upon expiration of deadline, forward grievance to next highest level as though decision issued and is unsatisfactory to grievant**
  - grievant (or Union rep) must forward to next level before end of 14-day period if no timely response from Responsible Official**

### **G. Unfair Labor Practices**

- 1. 8 Agency actions are ULPs (5 U.S.C. §7116(a))**
  - interfere with, restrain, coerce employee in the exercise of employee rights**
  - encourage/discourage membership in Union**
  - retaliate against employee who has filed complaint or given information related to Statute**
  - refuse to consult and negotiate with Union in good faith**
  - fail or refuse to cooperate in impasse procedure**
  - enforce any rule or regulation conflicting with Collective Bargaining Agreement provision if provision was in effect prior to rule or regulation**
  - catch-all, “otherwise fail or refuse to comply with any provisions of [Statute]”**
- 2. 8 Union actions are ULPs (5 U.S.C. §7116(b))**
  - urge Agency to discriminate against an employee in the exercise of employee’s statutory rights**

- discriminate against employee in terms of Union membership
  - refuse to consult and negotiate with Agency in good faith
  - fail or refuse to cooperate in impasse procedure
  - call or participate in a strike, work stoppage, or slowdown or in picketing of Agency if picketing would interfere with Agency operations
  - otherwise fail or refuse to comply with Statute
3. In addition, Union action denying membership to eligible employees is ULP (5 U.S.C. §7116(c)).
  4. What cannot be challenged as ULP? (5 U.S.C. §7116(d))
    - any action challengeable under a statutory appeal procedure (e.g., EEO, MSPB (discipline), RIFs)
    - any action “covered by” contract
  5. Action or conduct challengeable as both ULP and grievance may, at election of aggrieved, be challenged under either, but not both, procedures.
    - once filed, Union or employee has elected and is “locked in”
  6. ULP filing procedures:
    - file “charges” with FLRA Regional Office
    - file within 6 months (5 U.S.C. §7118(a)(4)(A)), absent concealment
    - use FLRA form to prepare and file
    - provide complete description plus available supporting evidence and documents

- 7. What is FLRA's obligation?**
  - attempt informal resolution, then investigate charges if efforts fail
  - may file complaint against Agency (but has prosecutorial discretion not to file)
  - if not filed, will notify charging party and give option to withdraw charges
  - if charges not withdrawn, FLRA must provide written reasons for decision not to file complaint
  - written decision not to file complaint may be appealed to FLRA General Counsel in Washington, DC
- 8. Hearing Process**
  - if complaint issues, Agency must answer
  - FLRA General Counsel will represent Union's interest
- 9. If Administrative Judge finds Agency committed ULP, statute spells out remedies (5 U.S.C. §7118(a)(7)).**

## **II. Collective Bargaining: The Statutory Framework**

- A. Duty to Bargain in Good Faith (5 U.S.C. §§7114(b), 7103(a)(12))**
  - applies to both sides
  - sincere effort to reach collective bargaining agreement
  - negotiators empowered to negotiate any condition of employment and bind negotiating party

- **meet at reasonable times in convenient places as frequently as necessary**
- **Agency must furnish, upon Union request, information reasonably available and necessary for full and proper discussion, understanding, and negotiations** (5 U.S.C. §§7114(b)(4))
- **sign written document setting forth agreed-to terms and take steps to implement (after conclusion of negotiations)**
- **no obligation to agree to any proposal or make any concession**

## **B. Subjects of Bargaining**

1. **“Conditions of employment”** (5 U.S.C. §7103(a)(14)):
  - “. . . personnel policies, practices, and matters affecting working conditions”**
2. **Five categories of “conditions of employment” excluded from the Agency’s obligation to bargain over substance:**
  - (a) **Matters relating to political activity or classification of a position, or covered by a specific federal statute** (5 U.S.C. §7103(a)(14)).
  - (b) **Any matter in conflict with a federal law or government-wide rule or regulation** (5 U.S.C. §7117(a)(1)).
  - (c) **Any matter in conflict with agency (or USDA)-wide rule or regulation for which FLRA determines a “compelling need” exists** (5 U.S.C. §7117(a)(2)).

- 3. Negotiability of I&I proposals. Agency must negotiate Union’s impact-and-implementation proposals addressing Agency change even when its substance is not negotiable because it is one of the five excluded conditions of employment, is an exclusive Management right, or is a permissive topic Management declines to negotiate (5 U.S.C. §7106(b)(2)).**
  - exceptions: (i) the impact is de minimis, (ii) matter to be negotiated is already covered by the agreement, or (iii) Union has clearly and unmistakably waived its bargaining rights**
- 4. Negotiability of “appropriate arrangements.” Agency must negotiate substance of Union proposal directly interfering with an exclusive management right (5 U.S.C. §7106(a)) or involving a permissive topic (5 U.S.C. §7106(b)(1)) if Union proposal accommodates those bargaining unit employees adversely affected by the Agency’s proposed change (5 U.S.C. §7106(b)(3)).**
- 5. Negotiability of Ground Rules. Ground rules, procedures for negotiating substance or impact and implementation of the Agency proposal, are negotiable.**
  - generic national and local groundrules already negotiated (Green Book, Art. 22, Secs. 4, 5)**

- 6. Agency-head Review (5 U.S.C. §7114(c)).**
  - (a) Agency head has 30 days to approve local and national agreements**
    - only basis for disapproval: contrary to the Statute or any other applicable rule, law, or regulation**
  - (b) If Agency head takes no action within 30 days, the agreement takes effect and is binding (if legal).**
  - (c) Before Agency-head review, NAAE Executive Committee and Labor Relations Branch Chief review local agreements for consistency with national Collective Bargaining Agreement**

**C. Failure To Negotiate Agreement: Three Scenarios**

- 1. Negotiability Disputes. Management asserts the Union proposals are “non-negotiable because they conflict with a law, rule, or regulation”**
  - (a) Negotiability appeals procedures (5 U.S.C. §7117(c); 5 C.F.R. §2424.1):**
    - (i) Union in writing requests non-negotiability declaration from the Agency in writing**
    - (ii) Union files timely negotiability petition with FLRA (15 days from declaration)**
    - (iii) Agency files its written position with FLRA (30 days)**
      - locking in Agency position**
    - (iv) Union files response (15 days)**
      - locking in Union**
    - (v) Agency may file reply (15 days)**



- (b) **FLRA decision is binding:**
  - (i) **resume negotiations if FLRA rules for negotiability**
  - (ii) **resubmit proposal if FLRA rules non-negotiable, but suggests ways to overcome objection**
- 2. Impasse. Negotiations lead to an impasse, *i.e.* parties can not reach agreement (5 U.S.C. §7119).**
  - (a) Invoke FMCS mediation/assistance services**
    - **must mediate first**
  - (b) Request Federal Service Impasses Panel assistance**
    - **either party may request FSIP resolution**
    - **FSIP decision is binding**
    - **FSIP has procedural flexibility**
- 3. Failure/Refusal to Negotiate. Agency (or Union) declines to negotiate, asserting it lacks discretion or does not like Union (or Agency) proposals:**
  - (a) Union files timely ULP with FLRA (180 days)**  
(5 U.S.C. §7116(a)(5), or)
  - (b) Union files timely grievance (30 days)**

**D. Waiver of Union Negotiating Rights**

- 1. Express (in Contract, the Green Book)**
- 2. Implied**
  - **disfavored**
- 3. Does not timely respond, *i.e.* acquiesces**
- 4. “Covered-by” Doctrine**
  - **no “two bites” at the apple**

## **E. Mid-Term Bargaining**

- 1. Both Agency and Union have right to propose changes in working conditions before Contract expires**
  - unless subject is “covered by” existing Contract or Contract excludes mid-term negotiations**
- 2. “Covered-by” Doctrine**
  - it restricts Union and Agency**
- 3. Re-Openers:**
  - (a) Change in applicable regulations**
  - (b) Agency head review, negotiability determination**
  - (c) General reopener in Contract**
  - (d) Contract duration, expiration**

## **F. Right to Information (5 U.S.C. §7114(b)(4))**

- Only Union may request data, but only to extent not prohibited by law**
- Must be maintained in regular course of Agency’s business**
- Must be reasonably available (can not compel Agency to create) and necessary for full and proper discussion, understanding, and negotiation (provide particularized-need statement)**
- But can not constitute guidance, advice, or training for Management officials relating to collective bargaining.**

**G. Official Time** (5 U.S.C. §7131)

- 1. Awarded for negotiation of collective bargaining agreement**
  - including attendance at impasse proceedings**
- 2. Employee must be in official duty status**
- 3. Not available for time spent conducting internal union business**
- 4. Agency and the Union may agree upon reasonable and necessary official time for Union reps or members of bargaining unit to handle other matters covered by the Statute**
  - see Green Book, Art. 11**