NATIONAL ASSOCIATION

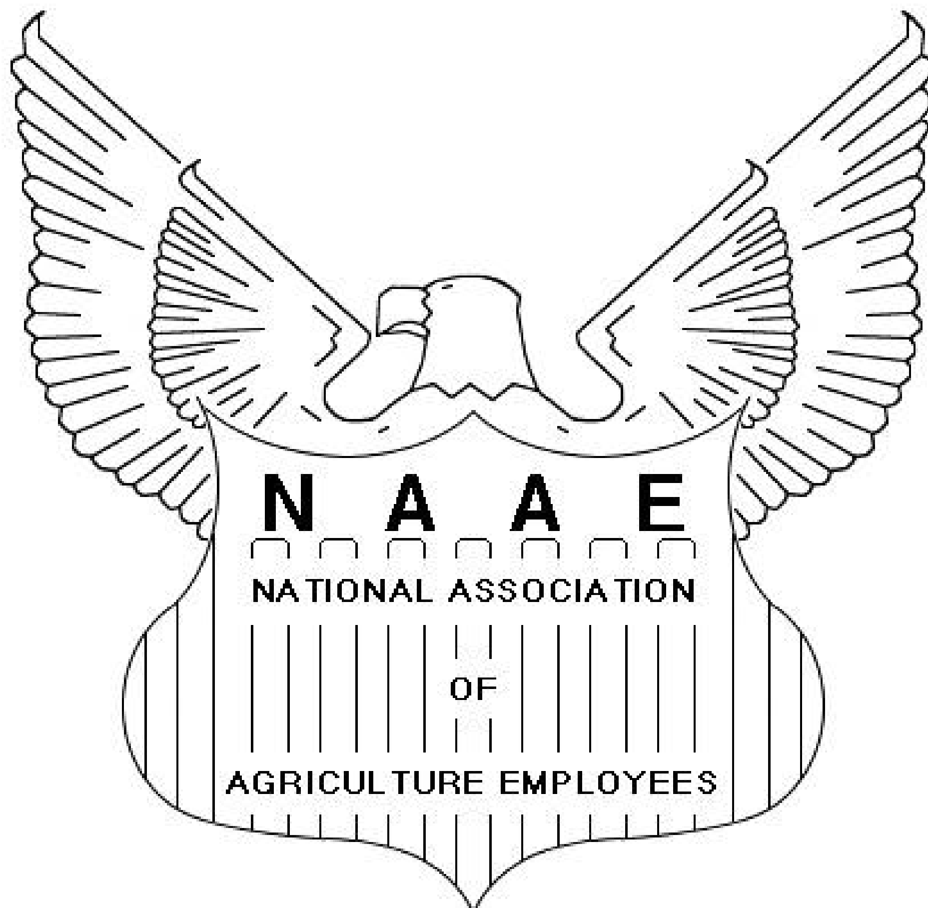
OF AGRICULTURE EMPLOYEES

LMR MANUAL:

AN OUTLINE OF THE

FEDERAL SECTOR LABOR-MANAGEMENT RELATIONS PROGRAM

WITH MODEL FORMS AND CHECK LISTS



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Chapter 1: FEDERAL SECTOR LABOR-MANAGEMENT RELATIONS PROGRAM

I. Background

Federal employees have no right to bargain with any employer in the absence of a law, rule, or regulation granting that right. No federal agency has a constitutional obligation to deal with a labor union. For federal employees, meaningful labor relations rights originated with President Kennedy's Executive Order 10988 in 1962. The Order protected the right of federal workers to form, join, and assist labor unions. In 1969, President Nixon greatly expanded these rights in Executive Order 11491, creating a true labor relations system with a centralized structure for coordinating and administering the collective bargaining process and a mechanism for resolving federal labor-management disputes.

Finally, in 1978, Congress passed the Civil Service Reform Act (CSRA), granting federal employees statutory protections similar to those that workers in private industry possess. The CSRA now appears as a separate chapter in the federal statutes or laws, specifically as Chapter 7 in Title 5 of the United States Code. It is often referred to generally by this statutory reference, abbreviated as 5 U.S.C. Chapter 7, or to a specific section number within Chapter 7.

II. Civil Service Reform Act of 1978

The CSRA, like the Executive Orders, affirms the rights of federal employees to form, join, and participate in unions and union activities, but increases the protections surrounding these rights. The CSRA eliminates the threat of the arbitrary cancellation or dilution of bargaining rights. It establishes an administrative mechanism free from outside interference and procedures, such as the election of union representatives, designed to protect the unionization process.

Congress created the Federal Labor Relations Authority (FLRA) to administer the CSRA. FLRA is a neutral, independent federal agency, headed by three executives the President appoints to five-year terms. FLRA's functions are to:

- determine appropriate bargaining units;
- supervise elections and certify exclusive bargaining agents;
- determine negotiability disputes;
- rule on exceptions to arbitration awards; and
- investigate, hear, and decide unfair labor practice charges.

A. Scope of CSRA.

The CSRA covers non-managerial and non-supervisory employees of most executive branch agencies, including the USDA and APHIS. Each employee, not a supervisor or management official, has the protected right to form, join (or to refrain from joining), or assist a labor organization without fear of penalty or reprisal. These rights include acting as a labor union representative, presenting the union's views to agency authorities, other government officials, and Congress, and engaging in collective bargaining.

B. Exclusive Recognition, Representative.

A labor union, elected and certified to represent the employees assigned to a specific segment of a workforce, known as the "bargaining unit," becomes the exclusive representative of all employees in that bargaining unit. As the exclusive representative, the labor union is the sole agent authorized to act for and negotiate collective bargaining agreements covering all employees, union and non-union members alike, in the bargaining unit. Management may not discuss personnel policies or practices or other general conditions of employment with an individual employee or with a representative of any other group. In order to fulfill its obligations, the federal agency must give the exclusive representative (the union) the opportunity to be present at:

(1) any formal discussion between a management representative and one or more bargain ing unit employees concerning any grievance, personnel policy or practice, or other general condition of employment; and

(2) any examination by an agency representative of a bargaining unit employee in connec tion with an investigation if the employee (a) reasonably believes the examination may lead to disciplinary action and (b) requests union representation.

The CSRA requires the union, in exercising its representational rights, to represent the interests of all employees in the bargaining unit, without regard to membership in that labor organization. This is the duty of fair representation.

C. Scope of Bargaining.

The CSRA requires federal agencies to negotiate in good faith with unions regarding any "condition of employment." The statute defines "condition of employment" as a personnel policy, practice, or matter, whether established by rule, regulation, or otherwise, that affects working conditions. However, Congress carved out exceptions to that general bargaining obligation.

The CSRA excludes three specific subjects from the definition of "condition of employment," making them, therefore, non-negotiable as to their substance (5 U.S.C. §7103(a)(14)):

A. matters covered by federal statute (e.g., rate of base pay, leave, and health insurance contribution);

(2) matters concerning the classification of any position; and

(3) matters relating to prohibited political activities.

The CSRA further states that items otherwise negotiable are not negotiable as to substance if:

(1) they conflict with a government-wide rule or regulation (Section 7117(a)(1)); or

(2) a compelling need exists, i.e., an agency's own rule or regulation is essential, as op posed to merely helpful, to the accomplishment of the agency's mission.

Although these exceptions seem fairly narrow, the statute further breaks down the duty to bargain into three categories, creating additional exceptions and conditions:

(1) illegal subjects—those involving "management rights," which are non-negotiable as to substance (Section 7106(a));

(2) permissive subjects—those negotiable as to their substance only at Management's option (Section 7106 (b) (1)); and

(3) mandatory subjects—everything not excluded by the various exceptions listed above, which are all negotiable.

Although the CSRA grants Management the authority to make certain decisions free of the obligation to negotiate the substance of its basic decision (e.g., "management rights" issues and "permissive" subjects of bargaining the agency elects not to negotiate), the statute obligates the Agency to negotiate the procedures to be used in carrying out those decisions, including any adverse impact its decision creates (Section 7106(b)(2)). This more limited process is generally called "impact-and-implementation" (or "I&I") bargaining.

Even as to the illegal subjects, the CSRA creates a very limited, but important exception. Management must negotiate as to substance any Union proposal that directly interferes with a §7106(a) management right if the Union proposes an "appropriate arrangement" designed to protect bargaining unit employees adversely affected by the exercise of that management right (Section 7106(b)(3)).

D. Negotiated Grievance and Arbitration Procedures.

The CSRA requires each negotiated collective bargaining agreement to contain a grievance procedure. The procedure becomes the sole mechanism available to bargaining unit employees, the Union, and the Agency to address grievances. Furthermore, each grievance procedure must provide for the binding arbitration of unresolved grievances. By law, only the Union may invoke this arbitration provision, not an individual employee grievant.

E. Official Time.

In analyzing official time, the time spent conducting negotiations and performing representa tional functions must be distinguished from the time spent carrying out internal union business. Employees are entitled to official time while serving as union representatives in negotiating collective bargaining agreements and in performing representational functions if they otherwise would be in a duty status. The amount of that official time a must be

determined through negotiations between the Union and the Agency.

The term “representational functions” includes such activities as:

(1) investigating and discussing potential grievances;

(2) investigating, preparing, and presenting statutory appeals and discrimination com plaints;

(3) attending meetings with management officials;

(4) reviewing and preparing responses to proposed directives;

(5) preparing for negotiations;

(6) serving as a representative at formal discussions and investigatory interviews of unit employees; and

(7) receiving training in the labor-management relationship.

Internal union business may be performed only on union time (non-government time). It includes collection of dues, election of union officers, and solicitation of members.

F. Unfair Labor Practice.

An unfair labor practice (ULP) is a management action (and sometimes a union action) that violates the statutory rights contained in Chapter 7 of the CSRA. In contrast, grievances generally concern the violation of negotiated contract provisions. A specific action may violate both the statute and the contract. Whether a grievance or ULP is more appropriate in a given situation when both are possible is a determination each local branch must work out with its NAAE Regional Vice President on a case-by-case basis.
An unfair labor practice occurs when the federal agency or the union:

(1) interferes with, restrains, or coerces any employee in that employee’s exercise of any right contained in Chapter 7 of the U.S. Code (also of the CSRA);

(2) refuses to consult or negotiate in good faith with the opposing party;

(3) fails or refuses to cooperate in impasse procedures and impasse decisions; or

(4) otherwise fails to comply with any provision of Chapter 7 of the U.S. Code (CSRA).

The federal agency commits an unfair labor practice if it:

(1) encourages or discourages membership in any labor organization by discriminatory treatment;

(2) sponsors, controls, or otherwise assists any labor organization; (This does not prohibit an agency from furnishing customary and routine facilities and services to a union.)

(3) disciplines or otherwise discriminates against an employee in response to the em ployee's filing a complaint, affidavit, or petition or giving information or testimony in accordance with Chapter 7; or

(4) enforces agency regulations in conflict with a pre-existing, negotiated agreement.

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

(1) attempts to cause an agency to discriminate against any employee in that employee's exercise of any right under Chapter 7;

(2) hinders or impedes a bargaining 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; or

(4) calls or participates in a strike, work stoppage, or slowdown or fails to take action to prevent or stop such activities.

The Office of the General Counsel of the FLRA investigates unfair labor practice complaints and issues and prosecutes unfair labor practice charges if its investigation reveals the Agency (or Union) may have committed a significant unfair labor practice.

III. Duty of Fair Representation

A union with exclusive recognition status such as NAAE must fairly, impartially, and in good faith represent the interests of all employees in that bargaining unit, regardless of whether they are union members. A Union representative's failure to fulfill this requirement could influence a bargaining unit employee to file an unfair labor practice charge against the Union. To ensure all NAAE representatives perform their duties in a fair, impartial, and consistent matter, thus protecting the rights of all unit employees, they must:

A. represent the interests of all employees in the unit, regardless of union membership status;

B. settle similar grievances in a consistent manner as far as possible, recognizing the Union's right to interpret ambiguous contract language;

C. not waive, ignore, or attempt to change an employee's rights and benefits guaranteed by the clear language of the contract;

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 same standards for determining whether to process a grievance or submit it to arbitration;

F. exercise care, thoroughness, and diligence in investigating whether to file a grievance, processing the grievance, and presenting it to Management;

G. never agree to withdraw an employee's grievance in exchange for settling one or more other grievances, without that employee's concurrence; and

H. properly and fully document all actions and related rationale associated with handling every employee's case in order to respond to future questions or challenges.

IV. Processing Unfair Labor Practices

As noted, an unfair labor practice (ULP) is an agency or union action violating the other's rights spelled out in Chapter 7 of the U.S. Code (CSRA).

NAAE's policy is to have the local branch discuss all unfair labor practice charges related to incidents occurring at the local level with its Regional Vice President and file them only with the concurrence of the Regional Vice President.

Generally, in order to determine whether a ULP has been committed, the local NAAE branch must examine the eight criteria listed in Section 7116(a) of the U.S. Code, 5 U.S.C. §7116(a). See pp. I-7 and I-8. When an action violates provision(s) of both Section 7116(a) and the Union contract with Management, the Union must decide whether to file a ULP with FLRA or a grievance with the Agency. The law prohibits using both procedures to resolve the same issue. 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 is appropriate.

B. If the action violates both a contract provision and Section 7116(a), a grievance generally is appropriate. (For example, if the complaint is that a local union representative has not been selected for promotion because of union activities, a grievance citing violations of the employee rights article of the contract should 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, a grievance generally is more appropriate.

D. If the action violates only a contract provision, a grievance may be filed, but in some circum stances a ULP also may be appropriate to challenge a contract violation.

Once the local NAAE representative determines the filing of a ULP is the proper course of action, that representative should confer with his or her Regional Vice President. The local representative must provide the Regional Vice President with the name, title, and phone number of the Agency contact (i.e., the Agency's local labor relations officer) and the basis of the charge, together with a concise 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 FLRA's processing of ULPs has been subject to delays of months and even years. Alternatively, the negotiated grievance and arbitration procedures, when handled expeditionaly, can result in a final, binding decision in three to four months after filing, particularly in relatively straight-forward disputes. 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 Union-Agency disputes. Moreover, in recent months, FLRA field staff have become much more resistant to issuing ULP charges against federal agencies in response to union-filed ULP complaints.

V. Examples of Agency Unfair Labor Practices

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

(1) A supervisor told a local union officer, he should be as interested in performing his job functions as he was in carrying out his union duties.

(2) A supervisor stated to a local union officer 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 the removal of a bargaining unit employee who had filed a classification appeal from his position as an acting supervisor.

(2) A 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, although 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 rooms.

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

(1) Three employees who testified at an ULP hearing were subsequently disciplined for allegedly unrelated actions, but in a later ULP trial, the discipline was found motivated by a desire to retaliate against the employees because of their earlier testimony.

(2) The agency's explanation for restricting an employee's right to exchange daily shift assignments was found to be a pretext. The actual reason was 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, never 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 called for all employees. Meeting attendance was mandatory; an agency official conducted the meeting; the agenda was written; and the subject concerned a matter not generally discussed with the employees.

(2) Management refused to implement an arbitration award.

Chapter 2: PROCESSING GRIEVANCES

The Civil Service Reform Act (CSRA) requires all labor contracts between federal-sector unions such as NAAE and federal agencies such as APHIS to include grievance procedures, terminating in binding arbitration.

I. The Grievance Procedure

A. Definition. The CSRA defines a "grievance" in 5 U.S.C. §7103 as any complaint:

(1) by any employee or labor organization (i.e., the union) concerning any matter relating to the employment of an employee; or

(2) by any employee, labor organization, or agency concerning—

a. the effect or interpretation of a collective bargaining agreement or a claim of breach of that agreement; or

b. any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.

B. Coverage.

The grievance procedure is available to resolve all disputes about matters addressed in NAAE's collective bargaining agreement with Management, including past practices. It also reaches specific violations of any law, rule, or regulation. If an employee files a grievance, Management must accept and process the grievance, regardless of how trivial the Agency considers the complaint.

C. Exclusions.

The CSRA in 5 U.S.C. §7121 excludes certain issues or subjects from the negotiated grievance procedure. These excluded matters are:

(1) prohibited political activities;

(2) retirement, life insurance, and health insurance;

(3) suspension or removal for national security reasons;

(4) any examination, certification, or appointment; and

(5) the classification of any position not resulting in reduced employee pay or grade.

In addition, the federal-sector labor contract may include a negotiated agreement to exclude any designated matter from coverage of the grievance procedure. The NAAE-APHIS/PPQ Collective Bargaining Agreement (the "Red

Book") specifically excludes RIF actions, matters filed and accepted under EEO complaint procedures, and non-selection for lateral or hardship transfer positions.

Negotiated grievance procedures such as NAAE's that cover (i.e., do not exclude) discrimination complaints, adverse actions, or actions based on unacceptable performance give bargaining unit employees the option to use either the grievance procedure (with an appeal to FLRA) or the statutory appeals process (i.e., EEOC or MSPB), but not both.

D. Types of Grievances:

(1) Employee: a grievance an individual employee files, usually against the Agency

(2) Union: a grievance NAAE files on behalf of a bargaining unit employee or itself.

(3) Management: a grievance the Agency files against the Union.

E. Purposes of Grievance Procedure:

(1) to resolve, in an orderly manner, disputes arising in the workplace;

(2) to provide labor contract interpretations;

(3) to protect the negotiated contract rights of employees and the Union;

(4) to establish precedent;

(5) to ensure uniform, fair treatment of bargaining unit employees; and

(6) to maintain relative peace in the workplace.

II. Grievance Investigation, Preparation, And Presentation

The primary responsibility for investigating a potential grievance rests with the local NAAE representative. How thoroughly the representative investigates the complaint often determines whether the grievance is eventually won or lost. The local NAAE rep should take the following steps in the investigative process:

A. Interview the Grievant Before the Grievance Is Filed.

(1) Talk with and listen carefully to the prospective grievant.

(2) Ask clarifying questions, distinguishing carefully between fact, fantasy, exaggeration, and opinion, in light of the emotional condition of the grievant and other circumstances.

(3) Restate the complaint to the grievant in summary form to ensure his/her full understand ing and

agreement as to the facts, asking the grievant to correct any mistakes or misunderstandings.

(4) Obtain a complete description of the circumstances generating the complaint:

- who committed the alleged violation?
- what was the violation? (Talk to each person—both in and out of the bargaining unit—who may have observed the incident or has first-hand knowledge of the situation.)
- when did the violation occur? (Obtain date, time, and relationship of the incident's occurrence with the employee's assigned working hours. For example, did the incident occur at a bar after work as opposed to the worksite?)
- where did the violation occur? (Determine the surrounding circumstances, e.g., room number, desk location, relative position of all principal parties, and witnesses, etc.)
- why did Management take the action it did? (Determine the Agency's motivation for taking actions forming the basis for the complaint.)

(5) Determine whether a past practice exists at the port dealing with similar incidents and, if so, what that practice has been.

(6) Determine what remedies the grievant should request.

B. Analyze The Complaint.

(1) Review all available information gleaned from the investigation.

(2) Analyze the case.

(3) Determine if the complaint is actually a grievance or only a gripe resolvable through a method other than the grievance procedure.

C. Conduct The Necessary Research.

(1) If the complaint appears to be a grievance, identify and research all related national and local contract articles, provisions, and MOUs, Agency directives, orders, and manuals, supplements to Agency orders and manuals, relevant government-wide, Department, and Agency laws and regulations, and all other written publications relating to the alleged violation.

(2) Draft the employee's case on paper, study it, review it with the employee, and look for any inconsistencies or holes.

(3) Be alert for and collect all documents supporting the grievant's case.

D. Develop Arguments. Plot a strategy to guide the grievance through its various stages, including ultimately arbitration. Draft the grievant's summary of facts and supporting argu ments with Management's anticipated opposing position in mind, including its anticipated excuses.

E. Grievance Preparation.

(1) Become organized and focused. Prepare a file folder for each grievance, using and completing the **GRIEVANCE CHECKLIST.** (See Attachment No. 1.)

(2) Write a short, concise statement of the grievance and remedy. Start with an accurate summary of the facts—not arguments—surrounding the grievance. (This written record will be important at later stages.)

(3) Avoid philosophizing or arguing the grievant's case in the written grievance to be submitted to Management. Otherwise, those arguments could limit or preclude future arguments and assist Management in crafting more effective responses to the assumptions behind those arguments.

(4) In the case of an individual employee grievance, request an opportunity to meet with Management to present the grievant's complete case before filing the grievance. Failure to do so may prompt the arbitrator to deny a complete remedy because the Union and the grievant deprived Management of the opportunity to learn all the relevant facts associated with the complaint.

(5) Be accurate, be brief, be concise, but be complete.

(6) Always state the complete remedy requested. A realistic correlation should exist be tween the desired corrective action and the stated grievance. (For example, a promotion is not an appropriate remedy for a violation of an employee's right to overtime assignments.) Ask for everything to which the grievant may be entitled, including backpay and attorney's fees. Include a catch-all request for "any other relief the arbitrator deems appropriate." Failure to make a complete request could severely hamper the grievant's opportunity to be made whole.

(7) Include in the written grievance only the information necessary to explain the grievance. Do not complicate the case unnecessarily.

(8) Remember, the grievance is an official record. It reflects the image of the local NAAE representative, his/her branch, and the Union. Be polite, respectful, and professional.

F. Grievance Presentation.

(1) Submit the grievance, in writing (preferably typed), in a timely manner. (See Attachment No. 2.)

(2) Represent the grievant at all grievance meetings. Be supportive. Never side with Management against the grievant or belittle or embarrass him/her.

(3) Once a grievance has been filed, do not go outside established grievance procedures to settle the grievance. Free-lancing could weaken the Union and jeopardize the local's integrity in the eyes of Management, Union members, and bargaining unit employees.

(4) Focus the meeting discussions on the issues, not on personalities or extraneous matters.

(5) Before attending the grievance meeting, determine with the grievant who will present the case. Normally, the Union representative should do all the talking, particularly if the grievant is emotionally upset or has difficulty expressing him/herself.

(6) Do not become defensive. Respond with the facts, not bluff or fabrication.

(7) Act respectfully toward all participants. Relationships must continue beyond the griev ance meeting.

(8) Be conscious of the expected role of a union representative. Be serious. Demand respect. By law, the Union's local representative is considered to be equal to any management official. The grievant is entitled to be treated with a full measure of dignity.

(9) Listen closely. Maintain a record of the discussion. (Attachment No. 3.)

(10) Stay calm.

(11) Do not "horse trade" grievances. Settle each grievance on its own merits.

G. Grievance Forwarding.

(1) Determine from the contract the date when Management's response is due. See Art. X, Sec. 3. The countdown for advancing the grievance to the next step begins on that date.

(2) If the grievance has not been resolved by the conclusion of the first step, determine whether the grievance warrants pursuit to the next level or step. Does the grievant want to pursue it to the next step? Do the facts justify this pursuit? Is the issue significant and winnable?

(3) If the grievance is to be pursued, forward it to the next level in accordance with the time limits specified in NAAE's contract. (NAAE has negotiated specific time limits for processing grievances through each of the various steps.) Failure to process a grievance in a timely fashion invalidates the right to pursue the complaint and dilutes the rights of all bargaining unit employees.

(4) The Union representative receiving any grievance response from Management should signed and date it.

(5) Complete relevant portions of the GRIEVANCE CHECKLIST, Attachment No. 1.

III. Arbitration.

Labor arbitration is the commonly accepted appeal process to which unions and employers submit labor contract disputes not resolved at earlier stages of the negotiated grievance procedure. Through arbitration before a trained third-party neutral, the Union and the Agency bring final and binding resolution of questions regarding contract interpretation and application without unnecessary disruption of the work flow.

There are two distinct types of arbitration—"rights" and "interest." "Rights" arbitration settles disputes, arising in the form of grievances, related to the interpretation or application of the rights of the parties under the labor contract. "Interests" arbitration resolves bargaining deadlocks regarding which terms and conditions should be included in a labor contract under negotiation. The discussion below focuses only on "rights" (or grievance) arbitration.

Labor arbitration is an extension of the collective bargaining process. The parties have ended the negotiating phase and next must try to convince an arbitrator their respective positions should be sustained; however, only the Union has the option of electing to arbitrate an unresolved grievance, and under NAAE's contract, only the National President of NAAE may invoke arbitration. The Agency can not decline to arbitrate. Arbitrators' roles are similar to those of judges. They must decide the cases presented to them. They are frequently lawyers or professors with expertise in the areas of labor-management relations and collective bargaining. They are, for the most part, independent, objective "referees." The Union and Management jointly select them from lists the Federal Mediation and Conciliation Service (FMCS) provides.

Arbitration is an expensive but imperfect process. The Union's decision to submit a grievance to arbitration requires serious deliberation. The winning side is likely to use the victory to demand similar settlements of grievances involving the same or similar issues when they arise.

The National Executive Committee of NAAE makes the decision to submit a grievance to arbitration after consulting with the local branch and NAAE legal counsel. NAAE must bear the costs of the arbitration, likely to run $3,000 or more per case, after splitting the arbitrator's fees with Management. The criteria for deciding whether to arbitrate a particular grievance are many. The Union's Executive Committee takes into consideration the likelihood of winning based on evaluating such factors as the meaning of the contract language, previous related arbitration decisions rendered under the same or similar contract provisions, agency regulations, federal laws, and prior court and FLRA decisions. It must consider whether the ultimate decision will have a broad impact, beyond the local impact on the grievant. It also must consider the potential consequences of a negative decision and whether the projected gains are worth the associated risks and costs. The Union must be extremely careful to protect its contractual rights at this stage, but also mindful of the need to make prudent, judicious use of its limited funds.

If the National Executive Committee of NAAE determines not to pursue arbitration of a particular grievance, it may cooperate with the grievant in the event he or she wishes to pursue the matter to arbitration on his or her own. In that event, the grievant must pay the entire cost of the Union's share of the arbitration.

The arbitrator's primary task in reaching a decision on an unresolved grievance is to examine the contract language in an effort to determine the parties' intent when they drafted their agreement. If the language is clear and unambiguous, the arbitrator must apply its terms and conditions. When the language is vague, the arbitrator will look to other sources to determine its meaning, such as the contract's bargaining history, the parties' mutually accepted past practice, and previous

agreements that could be considered precedent. Most arbitrators consider past practice and precedent to be an extension of the contract itself.

In order to assist the Union's Executive Committee in deciding whether to submit a grievance to arbitration, local Union representatives must:

(1) fully investigate each complaint;

(2) write grievances in clear, concise language;

(3) maintain thorough, legible records;

(4) maintain an accurate list of witnesses;

(5) complete the GRIEVANCE CHECKLIST; and

(6) send a complete grievance file to the NAAE Regional Vice President immediately after receiving the Agency'sfinal-step response, the decision of the Deputy Administrator. (See Attachment No. 4.)

GRIEVANCE CHECKLIST

Grievance # **Date:**

Type: Individual **Union Chapter #**

1. Grievant's name:

Job Title:

2. Work location/office:

Immediate supervisor:

3. Article(s)/law/rule/regulation violated:

4. Name of local NAAE representative handling case:

5. Step 1:

A. Date grievance filed:

B. Date meeting held:

C. Name of supervisor:

D. Date written decision due:

E. Date written decision received:

F. Date related information requested:

G. Date(s) information and information response received:

6. Step 2:

A. Date Step 1 response appealed:

B. Date meeting held:

C. Name of management official:

D. Date Step 2 response due:

E. Date Step 2 response received:

7. Step 3:

A. Date Step 2 response appealed:

B. Date meeting held:

C. Name of official:

D. Date Step 3 response due:

E. Date Step 3 response received:

F. If arbitration is requested, date response and other relevant information mailed to National Regional Vice President:

8. Grievance Forwarding Checklist:

A. Grievance Form submitted to Management.

B. All Management replies. (Indicate on each reply the date the Union received them and the name of the recipient.)

C. All written correspondence in the local branch's possession related to the grievance .

D. All records of discussions related to the grievance.

E. All related interview and grievance investigation forms.

F. Detailed statement explaining the facts surrounding the grievance.

9. **List the names of all witnesses,** including titles and work phone numbers, and other persons who may have observed or have knowledge of the complaint/contract violation:

   A.

   B.

   C.

   D.

10. **List all applicable rules, laws, and regulations.** This list includes all CFR provisions, FPM chapters, National or local contract provisions, Agency regulations or directives, local orders and MOUs, standard operating procedures, and other related publications or documents pertaining to this grievance:

    A.

    B.

    C.

    D.

11. **Forward all files.** If the local NAAE representative or president wants the grievance consid ered for arbitration, mail a copy of the grievance and all materials to the National Regional Vice President immediately after receiving Management's response to the final step of the grievance.

Note: This CHECKLIST form is for NAAE use only and not to be submitted to Management.

GRIEVANCE FORM

Branch No. Date:

Step No.

Oral Presentation Requested: Yes
No

Grievant:

Position Title and Work Station:

Grievant's Immediate Supervisor:

Union Representative: Name/Telephone number

Specific article/law/rule/regulation violated:

Statement of the alleged violation and pertinent facts:

Remedies requested:

____________________________ ____________________________

Employee's signature NAAE Representative's signature

RECORD OF DISCUSSION

NAAE Representative: Date:

Grievant: Grievance No.

Participants:

Alleged violation:

Summary of Discussion:

SUGGESTED CONTENTS OF
CASE FILES SENT TO REGIONAL VICE PRESIDENT

1. **A "Briefing Memo"** containing at least the following sections:

   A. **Date a representation decision must be made,** e.g., arbitration invocation deadline, MSPB appeal deadline, EEOC filing deadline, FLRA filing deadline, etc.);

   B. **Agency's position,** a brief statement of the Agency's factual allegations, legal arguments, and proof in support of its case, including any cited sources of legal authority, any relevant language in the step decisions, and comments Management made during meetings;

   C. **Union's position,** a statement of the Union's factual allegations, legal arguments, and proof in support of its facts and arguments, including a response to every allegation and argument the Agency made, all cited sources of legal authority (applicable contract provisions, regulations, and law), and descriptions of any past practices, comparisons to any similarly situated employees, any expected witness testimony, etc.;

   D. **Analysis of all the reasons** the case should—and should not—be subjected to arbitration, including the ideal as well as minimum remedy or remedies acceptable to the grievant and to the local union branch; and

   E. **Union representative's recommendation** and reasoning.

2. **Completed Grievance Checklist** (Attachment No. 1).

3. **Initiating document,** e.g., the grievance, proposal letter, etc.

4. **"Reply" file** if there has been an oral or written reply, containing hearing or meeting notes, written submissions, documents, etc.;

5. **"Decisions" file** containing Management's reply decisions in chronological order;

6. **"Defenses" file** analyzing the defenses (or allegations) the grievant has raised;

SUGGESTED CONTENTS OF
CASE FILES SENT TO REGIONAL VICE PRESIDENT

7. **“Documentation” file** with documents clearly referenced to the allegation or defense each document supports and copies of all information requests submitted and all responses received;

8. **“Correspondence” file** containing all correspondence, memoranda, e-mails, etc. not included items (1) through (7) above, arranged in chronological order;

9. **“Notes” file** containing all notes of interviews and investigations, highlighting the portions to which the Regional Vice President should pay special attention;

10. **Any other files** that help to organize the material and assist in understanding and pursuing the grievance.

NAAE

Attachment No. 5

GRIEVANCE STATUS CHART

Local # ______

Grievance	#	1st Step <u>Due</u> Filed	Answer <u>Due</u> Received	2nd Step <u>Due</u> Filed	Answer <u>Due</u> Received	3rd Step <u>Due</u> Filed	Answer <u>Due</u> Received	Date File To be sent To Reg. VP	Arb. Invoc. Due

Local Union Representative

Chapter 3: NEGOTIATIONS

Unions negotiate to "protect and expand" the rights of employees and the Union's ability to represent them more effectively. But that is an incomplete statement of the purpose. NAAE also negotiates to provide a powerful service to its broad membership. Negotiations are the strongest response to the age-old employee question, "what does the Union do for me"? Unlike grievances, usually filed on behalf of an individual employee, negotiations are conducted on behalf of a specific group of employees—everyone in the local branch or in the entire nationwide bargaining unit. Focusing on negotiations as a "service" helps the Union representative decide how to proceed and how to involve employees to build support for the Union.

Another reason NAAE negotiates is to build Management's respect for the Union. Once Management recognizes the Union will insist on playing a significant role in what changes are implemented and how, and once Management recognizes the Union will be a tough, effective negotiator, Management is less likely to suggest adverse changes in the first place. Supervisors and other managers are less likely to pursue unpopular changes knowing they will be publicly analyzed by trained national union negotiating teams, litigated in arbitration, and, all the while, held up to criticism for stirring up adverse employee reaction and comments.

The Union should not use the negotiations process to oppose all changes Management proposes, but should resort to its system of checks and balances to eliminate or lessen any adverse impact of those changes on bargaining unit employees. If NAAE fails to do that, Management will soon start acting as if the Union may be ignored.

I. When May the Union Negotiate?

A union typically may request negotiations at two points in time. The first occurs when the collective bargaining agreement, National or Local, is about to expire, and the Union wants to modify and improve it. This is known as "term" negotiations.

The second opportunity—and the one discussed below—is "mid-term" negotiations. It occurs when the collective bargaining agreement is in effect, but either Management or the Union wants to change a working condition not covered in that agreement. (NAAE takes the position that neither Management nor the Union may seek to change anything already in—i.e., "covered by"—the agree ment, only matters not covered by the agreement.)

When Management proposes a "mid-term" change, the Union has the legal right to negotiate. A change occurs when Management—

- establishes a new policy, directly or indirectly, or changes on existing policy.
- moves to strictly enforce a previously loosely or inconsistently implemented policy
- abolishes a policy or practice
- alters working practices in response to forces beyond Management's control
- gradually implements change one employee at a time

- revises an interpretation of established rules or policies.

NAAE should respond to every change, asking to negotiate, unless a good reason exists not to. See the attached model response, page III-12. By doing so, NAAE demonstrates for bargaining unit employees the collective power of the Union, the service the Union provides them, and the role the Union has in making decisions at the work place. NAAE also seizes upon a statutory right to protect employees from the adverse effects of Management's policy changes. Absent a timely request, NAAE gives up its right to negotiate.

Management must give NAAE reasonable notice of a proposed changes at least two weeks before planning to implement it, and can not implement that change until negotiations have been completed, absent some compelling need. To do otherwise violates the law and subjects Management to stiff penalties.

II. Who May Negotiate?

Generally, the Agency's legal obligation is to serve notice of proposed changes on and negotiate with the National office of NAAE, not the local branch. However, the National may and has in many situations transferred this obligation to the local branch and the local branch president, typically when the proposed change is purely local in scope.

Any local president confused about who is to conduct the negotiations should call his or her Regional Vice President.

III. Negotiability

Once the local branch president or the National Executive Committee of NAAE has determined that initiating negotiations on a specific subject will promote the goals of the Union or has received notice from Management of a proposed "change" in an employment condition, thus triggering the Union's legal right to negotiate, the next question is whether the subject of the proposed change is negotiable and, if so, to what extent. This is called a determination of "negotiability." The right to bargain may extend to the "substance" of the proposed change or it may extend only to the "impact and implementation" ("I&I") associated with that substance. It may also extend to both—substance and "I&I."

In determining the nature or limit on the Union right's to negotiate, the law distinguishes between "mandatory," "permissive," and "illegal" subjects of bargaining. They are referenced in Chapter 7 of the Civil Service Reform Act (CSRA), now found in Title 5 of the U.S. Code. Below is a checklist for determining whether the Union has the right to engage in "substance" negotiations.

A. Mandatory Subjects (5 U.S.C. §7102)

If either party requests, the other party must negotiate over any issue falling within the broad concept of "conditions of employment." Even within the broad "conditions of employment" certain statutory limitations may block or impair the right to negotiate.

B. Illegal Subjects (5 U.S.C. §7106(a))

One statutory limitation is the "management rights" clause. Congress has carved out certain areas of Management decision-making that are protected from union bargaining power. As a result, both parties are prohibited from negotiating over any decision directly affecting any one of the following prohibited topics:

(1) mission

(2) budget

(3) organization

(4) number of employees

(5) internal security practices

(6) decision made, in accordance with applicable law, to:
a. hire
b. assign
c. direct
d. lay off
e. retain employees in the agency
f. suspend
g. remove
h. reduce in grade or pay
I. take other disciplinary action
j. assign work
k. contract out
l. determine personnel by which to conduct agency operations
m. select from a promotion roster, or
n. steps necessary in an emergency.

Even though Management is entitled to make the decision to implement any of the above changes without negotiating the substance of its action, it must, if the Union requests, negotiate over the adverse impact of that decision and the procedures necessary to implement it—"I&I" bargaining. Additionally, Management has the burden of asserting and then proving the Union's own "substance" proposal violates a Management right and is, therefore, non-negotiable.

C. Permissive Subjects (5 U.S.C. §7106(b))

Congress has decreed three subjects of bargaining negotiable, at the Union's request, only if and when Management agrees to negotiate them. These "permissive" topics are:

(1) numbers, types, and grades of employees or positions assigned to an organizational subdivision, work project, or tour of duty,

(2) technology, and

(3) method and means of doing the work.

If the local negotiated agreement contains a permissive subject of bargaining, it is binding even though Management did not intend to negotiate the specific provision. Similarly, Management has the burden of asserting and then proving the Union's "substance" proposals are non-negotiable in light of these exceptions to the general duty to bargain the substance of any Management-proposed change.

Management must, if the Union requests, negotiate the adverse impact and implementing procedures of any decision falling within the Management-rights or permissive-subject areas even if the Union may not negotiate the substance of that decision.

D. Government-wide Rules and Regulations (5 U.S.C. §7117)In addition to the prohibited and permissive-subjects exceptions to Management's obligation to bargain, Congress creates a third exception to Management's obligation to negotiate: if the Union's proposal would change or conflict with a government-wide rule or regulation, Management is prohibited from negotiating the issue. This exception is very limited. The controlling principles are:

(1) Unions can not propose and the Agency may not negotiate anything that would change a government-wide (such as OPM or GSA) rule or regulation.

(2) Unions may submit and the Agency must negotiate a proposal that would change an agency-wide (such as USDA or APHIS) or primary national subdivision (such as PPQ) rule or regulation, unless the Agency shows a compelling need to maintain a consistent rule or regulation, one without the Union's proposed change.

(3) Management loses the right to raise its compelling-need argument to avoid negotiations over a change in an agency or primary national subdivision rule or regulation if the Union represents the majority of employees in that agency or primary national subdivision.

IV. Contesting Negotiability

The statute (5 U.S.C. §7117©) lists the procedural steps the Union negotiator must follow when Management asserts a Union proposal is non-negotiable.

A. When management asserts a proposal of the local branch is non-negotiable as contrary to rule, law, or regulation (e.g., it interferes with Management's absolute rights under 5 U.S.C. §7106(a) or with Management's permissive rights under §7106(b) and Management elects not to bargain), the local Union negotiator should discuss the negotiability of the local's proposal(s) with the Regional Vice

President, look for ways to rephrase the proposal to meet Management's obligation, and then refile.

B. If the Union believes the proposal is negotiable and the local branch elects to contest Management's decision not to negotiate, it should request Management to give the Union its statement of non-negotiability in writing. The local must file a negotiability petition with the closest regional office of FLRA within 15 calendar days after Management's first statement of non-negotiability. If the local agrees the proposal is non-negotiable or elects not to appeal it, the local should simply resubmit a negotiable proposal instead.

C. The local Union negotiator should demand to continue negotiations on any portion of the local's proposals that Management finds negotiable. If Management refuses, he or she must be prepared to file an unfair practice charge with FLRA (within 180 days) or, if necessary, go to impasse to resolve these issues.

D. The Union negotiator should review Management's formal response to the Union's FLRA negotiability petition in order to determine if the Union should fight it or withdraw and submit substitute negotiable proposals.

E. Upon a favorable FLRA ruling—the Union's proposal is negotiable—the Union negotiator should reopen negotiations. Upon an unfavorable ruling, he or she should submit revised negotiable proposals and start negotiations.

V. "Appropriate Arrangements" Bargaining

While normally not required to bargain over a §7106(a) management right (except, of course, I&I as discussed in VI below), agencies **ARE** required to bargain over union-proposed appropriate arrangements for employees adversely affected by the exercise of that management right. 5 U.S.C.§7106(b)(3). In other words, the statute creates a special exception to the management rights negotiating prohibition. In order to compel the Agency to negotiate over a union proposal interfering with a protected management right, NAAE must establish that its proposal would create an arrangement satisfying six criteria the FLRA has adopted**:**

A. The specific management right the Union proposal would violate must be identified.

B. Management's exercise of that right must adversely impact bargaining unit employees.

C. The adverse impact on employees must be real, not speculative.

D. The Union's proposal must be an arrangement applying only to those employees who are in fact adversely affected.

E. The Union's proposal must not excessively interfere with the exercise of the management right.

F. The benefits of the proposed arrangement to adversely affected employees must outweigh any intrusive effect on Management and its right.

Even if the NAAE representative does not specifically cite "appropriate arrangement" as the asserted statutory basis for Management's obligation to negotiate, FLRA nevertheless requires the Agency to analyze NAAE's negotiating proposal to determine whether it is an appropriate arrangement, and, if the Agency concludes it is not, the Agency must prove that it is not to the satisfaction of FLRA.

VI. Impact and Implementation Bargaining

Even though NAAE may not be able to bargain over the substance of a change because it is an illegal or a permissive subject or even one barred by conflicting government-wide regulations, NAAE always has the right to bargain over the adverse impact on employees of the change or the procedures to implement the change. This I&I bargaining approach requires the Union to proceed indirectly rather than directly in trying to protect bargaining unit employees. A fine line often exists between "substance" and "I&I" proposals. The local Union representative should consult his or her Regional Vice President in preparing proposals that are sensitive to this distinction.

VII. The Steps of Bargaining

Below is a step-by-step analysis of the bargaining process associated with mandatory subjects of bargaining, i.e., conditions of employment or the I&I questions associated with bargaining non-negotiable subjects.

A. Negotiations will produce several outcomes or paths.

If the Agency commits an unfair labor practice, e.g., by refusing to bargain in good faith, the Union may file a ULP and pursue an appropriate remedy through FLRA. It also may file a grievance with the Agency for violating the law. If Management bargains in good faith, but declares a Union proposal non-negotiable, the Union may appeal that declaration to FLRA. In either of these two situations, the Union will have to decide whether it continues bargaining, pending the outcome of these appeals.

If bargaining proceeds without a ULP filing or negotiability appeal, the parties will either reach an early decision resolving their differences or they will reach an impasse and then must pursue mediation through the Federal Mediation and Conciliation Service (FMCS) and, if not resolved, arbitration through the Federal Service Impasses Panel (FSIP).

B. Bargaining Substance of Agency Change Decisions.

Once the Agency develops a change proposal, the Agency will act in accordance with either paragraph (1) or (2) below. Each calls for a different Union response.

(1) The Agency gives formal specific notice to the Union that it plans a change. Notice normally will arrive at least two weeks (30 days at the National level) before the change is scheduled to be implemented. At this point and in response:

(a) the Union specifically waives its right to bargain over the change, and the Agency implements; or

(b) the Union fails to request bargaining and submit proposals addressing the change and, by its lack of response, waives its right to bargain. (To be safe, the Union must respond with proposals within the time frame specified in the National Agreement (seven days) or in the local contract or even sooner if the situation requires.) The Agency is free to implement its proposal if the Union does not respond; or

(c) the Union requests to negotiate, submitting proposals and ground rules, requesting documents and other information under 5 U.S.C. §7114(b), and reserving the right to amend its proposals. In response to the Union's position,

(i) the Agency refuses to bargain and implements, prompting the Union to file a ULP charge with FLRA or a grievance with the Agency, seeking an order to bargain and return to the conditions of employment existing before the change, or

(ii) in lieu of (i), the Agency begins bargaining, three days after receipt of the Union's proposals unless local contract provides otherwise.

(2) The Agency gives the Union no advance notice, and the change is implemented. In response:

(a) the Union fails to act within six months of learning of the change and loses its right to file a ULP charge and thus to bargain; or

(b) the Union, upon learning of the change, asks Management to roll back implementation (return to the *"status quo ante"*) and to bargain. If the Union chooses this path, the likely responses are:

(i) Management rolls back and bargains; or

(ii) Management refuses to bargain, prompting the Union to file a ULP charge to force bargaining and a roll-back.

(iii) A third possibility exists. Management refuses to roll back, but agrees to bargain. The Union negotiator should consult with the Regional Vice President, but the right response is likely to be to bargain and also to file a ULP or grievance.

C. Bargaining Impact and Implementation.

Once the Agency decides to make a change in a substantively non-negotiable area, the Agency will act in accordance with either paragraph (1) or (2) below. Each calls for a different Union response.

(1) The Agency gives formal specific notice to the Union (usually two weeks in advance) that it plans a change. At this point and in response:

(a) the Union specifically waives its right to bargain over the change, and the Agency implements; or

(b) the Union fails to request bargaining and submit proposals addressing the change and, by its lack of response, waives its right to bargain. (To be safe, the Union should respond within the contractually specified time frames or sooner if the situation demands.) The Agency is free to implement its proposal if the Union submits no response; or

(c) the Union requests to negotiate the impact and implementation issues, submitting specific proposals (and ground rules, when appropriate), requesting more information under §7114(b), and reserving the right to amend its pending proposals. In response to either Union position,

(i) the Agency refuses to bargain and instead proceeds to implement, or

(ii) if it does implement, the Union files a ULP charge with FLRA or a grievance with the Agency, seeking an order calling for bargaining and a return to the conditions of employment existing prior to the unilateral change, i.e., to the *status quo ante*, or

(iii) the Agency begins to bargain, three days after receipt of the Union's proposals unless the local contract provides otherwise.

(2) The Agency gives the Union no advance notice, and the change is implemented. In response:

(a) the Union fails to act within six months of learning of the change and loses its right to file a ULP and thus to bargain; or

(b) the Union, upon learning of the change, asks Management to roll back implementation and to bargain. The likely responses are:

(i) Management rolls back and bargains; or

(ii) Management refuses to bargain, prompting the Union to file a ULP to force bargaining and a roll-back.

(iii) A third possibility exists. Management refuses to roll back, but agrees to bargain. The Union negotiator should consult with the Regional Vice President, but the right response is likely to be to bargain and also to file a ULP or grievance.

VIII. Strategy and Tactics

The objective in any type of collective bargaining is to reach agreement. It is not trial by combat or a debating society. Negotiators who approach it with such an attitude pose serious obstacles to developing constructive labor-management

relations. The following tactics may facilitate reaching sound agreements in negotiations and workable resolutions to grievances:

A. **The "Yes" Habit.** Start discussions from points of common agreement rather than from obvious controversy and dispute. Securing a basis of agreement on which to build makes subsequent favorable accommodations more easily reached on disputed issues.

B. **Assume Agency Acceptance.** Do not allow Management to think the Union lacks confidence in the reasonableness or acceptability of any of the Union's major proposals.

C. **Create The "Forced Choice."** The more that rides on a given decision, generally the more difficult it is to reach agreement. Avoid, if at all possible, offering Management a choice between something and nothing. A meaningful "forced choice" eases the burden of a weighty decision. Consider offering Management a choice between alternatives, a viable Union strategy when crafting two alternative proposals of relatively equal value to the Union.

D. **Allow for Face-Saving.** Be gracious after "winning" a point. Credit Management's sincerity and fair-mindedness. Gloating over minor "victories" may discourage the other side from offering reasonable compromises in the future.

E. **Don't Assume the Burden of Proof Unnecessarily.** In collective bargaining, the Union is usually the moving party, submitting proposals or challenging Management action through the grievance procedure. This does not mean the Union is obligated to assume the burden of proving its case. Management should be forced to explain its reasons for proposing a change in working conditions or for rejecting a Union demand or proposal. Furthermore, many times, the Agency has the initial burden of proof, particularly when it initiates actions such as discipline or transfers.

F. **Explain, Discuss, Persuade—Don't Plead.** Collective bargaining is not collective begging. Demonstrate respect and courtesy; demand the same consideration.

G. **Explain the Advantages of the Union's Proposal.** Frequently, the Union's proposal carries some important even significant advantages for the Agency. Point them out as additional factors in support of the Union's case.

H. **Keep Discussions Problem-Oriented, Not Personality Centered.** If both parties recognize a mutual interest in solving problems of common concern, they will create an atmosphere for reaching sound agreements. Personality-centered clashes will mar the potential for a systematic, conscientious search for answers that work, that maximize satisfaction on the job while minimizing frustrations.

I. **Value a Change in Subject.** When it becomes apparent no agreement can be reached at the time, "table" or postpone further discussion of the issue and move on to less controversial matters. The solution to the "tabled" issue may appear as negotiations proceed or opportunities for compromise arise.

J. **Be a Good Listener.** Allow each speaker to finish talking. There will be time enough after all the facts are on the table to offer a counter-proposal or to refute or deny Management's assertions.

K. **Do Not Hurry the Negotiations.** Attempts to force the discussion may irritate Management negotiators and cause the bargaining atmosphere to deteriorate. On the other hand, if negotiations slow down too much, call for a recess.

L. **Identify the Techniques Producing the Best Results.** Discard those negotiating tactics that irritate Management negotiators. Try the techniques first that minimize existing differences.

M. **Question the Evidence Offered.** Through questions—what is the Agency trying to achieve? why? -- the Union's bargaining team may gain new insights into the other side's point of view and perhaps develop arguments the Union may use. Questions also may expose weaknesses in Management's position.

N. **Use Only Valid Data and "Facts."** Be honest and know the information before presenting it at the table. Erroneous statements can seriously affect negotiations, creating an atmosphere of distrust, even hostility.

O. **Hold Statistical Materials in Reserve, Carefully Preparing an Opening for Their Use.** If used before their implications are fully apparent or a favorable atmosphere has been created, cold statistics lose their impact. Graphs may be more convincing than raw figures.

P. **Be Factual Organized and Logical, Not Emotional or Personal.** Think through the arguments, issues, and problems. Avoid inflammatory remarks questioning the sincerity or good faith of the other party. Address only the merits. Do not personalize negotiations.

Q. **Beware of Arguments of "Principle."** Negotiators become more emotional and stubborn about principles than they do about specifics.

R. **Avoid Taking a Public Stand.** Publishing articles or posting notices in advance of or during negotiations, publicizing the Union's position and attacking Management's, may make concessions difficult and stall or hamper the negotiations.

IX. Using Negotiations to Build Membership

Because negotiations affect groups of employees, bargaining unit employees will be motivated to get involved. If they get involved, they will appreciate the value of the services NAAE provides, and Union membership will grow. As a general rule, the local branch President should take the following steps in negotiations to influence membership growth:

- Hold a meeting with the affected employees to solicit their opinions, ideas, data, etc.

- Publicize the proposals the Union submits and the problems Management's proposals create.

- Select at least one member from the affected unit for the Union's negotiating team.

- Publicize when Management forces the Union to go to the FSIP or the FLRA to settle a contract dispute.

- When agreement is reached, meet with all affected employees to announce and explain the contract or other resolution.

X. Model Letters

Attached are model letters the local branch may use to move through the negotiations process.

NAAE

To:

Re: Request to Negotiate

NAAE exercises its right to negotiate, to the full extent permitted by law, all negotiable matters, i.e., substance and impact and implementation, associated with the following matter:

In order to be able to draft our proposals and submit them in a timely manner, we request a prompt briefing. If you elect to deny us a briefing, please inform us of this election immediately so we may submit timely proposals based on what little we now know.

Until negotiations and any related impasse procedures are completed, we ask that you delay any and all implementation. If any implementation has already occurred, we request you undo it and return to the status quo ante until agreement is reached or negotiations are concluded.

Sincerely,

NAAE Local Branch # ________

by:_________________________

NAAE

To:

Re: Information Request Associated With Negotiations

Because we must consider whether to negotiate or negotiate further regarding a certain matter and how to frame or rephrase our proposals, the Union requests the following information and materials in accordance with 5 U.S.C.§7114(b)(4):

The requested information is necessary and pertinent to the negotiations because

If this information is not made available to us under 5 U.S.C. §7114 by [date], we ask you to immediately consider this request also as one made under the Freedom of Information Act in order to expedite disclosure. If necessary to process this request, please forward this letter promptly to the appropriate FOIA officer within APHIS.

Please inform us of the reason(s) for the denial of each item requested, the statutory, regulatory, or contractual basis for such denial, and the name and title of the official denying each part.

Sincerely,

NAAE Local Branch #_____

by: ______________________

NAAE

To:

Re: Impasse Resolution

We consider the Union and the Agency to be at a negotiations impasse over the following matter(s):

We are petitioning for outside assistance to resolve this impasse. Until the impasse is resolved, we request that you not implement any aspect of the proposed change. If you ignore or otherwise disregard this request and implement, please explain the statutory or regulatory basis for your decision to implement and the facts and circumstances that support or justify such unilateral action.

Sincerely,

NAAE Local Branch #____

by:______________________

Chapter 4: DISCIPLINARY AND ADVERSE ACTIONS

Disciplinary and adverse actions require the full range of representation skills of local union representatives. In the process, they will find their roles changing: first listener and counselor; then investigator; then advocate; and often negotiator or mediator. To be effective, they must be able to distinguish between disciplinary and adverse actions, investigate a disciplinary or adverse action charge, build a defense and shape it into an oral or written reply, deal with the affected employee, take advantage of the available sources of information, and finally, turn disciplinary and adverse action situations into opportunities for building Union membership.

A local NAAE representative has a responsibility to the Union to ensure the integrity of the NAAE-Agency Collective Bargaining Agreement. This Agreement allows disciplinary or adverse action only if it will promote the efficiency of the service. The local representative is responsible to see that any proposed action meets that standard and to challenge those that do not. The law also requires the local NAAE representative to represent the affected employee in a competent and fair manner.

I. Distinguishing Between Disciplinary and Adverse Actions.

The statute defines and distinguishes between disciplinary and adverse actions:

A. **Disciplinary Actions** are defined as suspensions of 14 calendar days or less (5 U.S.C. §7502), written reprimands, and oral admonishments confirmed in writing.

B. **Adverse Actions** are defined as removals, suspensions for more than 14 days, reductions in grade, reductions in pay, and furloughs of 30 days or less. See 5 U.S.C.§7512. They do not include, however, RIFs (reductions-in-force), downgrades, or removals for unacceptable performance.

II. Mandatory Procedures.

The federal statute requires the Agency to follow certain procedure whenever it proposes to take either adverse action or disciplinary action involving a suspension of 14 days or less. Its failure to do so may be "good cause" to overturn the action.

The prescribed statutory procedures consist of four elements:

(1) **The Notice Letter:** the written proposal, issued in advance, to take the action and the specific reasons for it;

(2) **The Investigation:** reasonable opportunity for the local NAAE representative (or the accused employee's attorney) to review the information on which the Agency relies and any other information he or she deems relevant, to interview the accused employee and other employees, and to collect statements supporting the employee's case;

(3) **The Reply:** the accused employee's reasonable opportunity to reply, telling his/her side of the story, prepared and presented either orally or in writing, or both; and

(4) **The Decision:** the decision from Management (but not from the proposing Agency official) sustaining, in whole or in part, or dismissing the specifications of wrong-doing, and announcing what action the Agency proposes to take.

The elements outlined above, described in more detail below, apply only to actions more serious than a letter of reprimand, such as a one-day suspension. See 5 U.S.C. §§7502, 7513. For a letter of reprimand, oral admonishment reduced to writing, or other less severe action, the law does not require advance notice and reply opportunity.

A. The Notice Letter.

(1) **Content.** Every notice letter should contain the following characteristics:

- **Advance Notice.** In adverse actions, the employee must receive not less than 30 days' notice of the proposed action.

- **Specificity.** The notice letter must be specific enough to inform the employee of the charges against him/her and to enable the employee to respond to them. A notice letter simply stating the employee has been insubordinate or falsified a document, but fails to identify what order was not complied with or which document was falsified denies him/her an opportunity to make an informed response and thus lacks adequate specificity.

(2) **Procedural Steps.** When an employee receives a notice letter and seeks NAAE representation, that representative should take certain steps in order to represent the accused employee effectively:

- **Designate in writing NAAE as representative.** (Attachment No. 1) Identifying the local representative as the employee's representative entitles that rep to official time and access to the information needed to handle the employee's case.

- **Prepare a reply.** An employee may reply either orally or in writing or both. The local Union rep should always request the opportunity for an oral reply and exercise the right to reply only after discussing the best method with the National Regional Vice President.
- **Request in writing needed information.** (Attachment No. 2) Citing the statutory basis, 5 U.S.C. §7114(b)(4), the local representative should request all information on which the Agency has relied in proposing the action and whatever other information the rep thinks may be necessary and relevant in order to prepare the employee's reply.

- **Involve the employee.** As soon as possible, the local rep should ask the employee to explain, privately and preferably in writing, his/her answers to the charges and specifications and relate any other information deemed important. Without the employee's cooperation, an adequate reply is impossible to present. Involving the employee right away makes the employee focus his/her attention on the charges and fixes the employee's version of what occurred.

B. The Investigation.

At this stage, the local representative is more investigator and factor-gatherer than advocate. The best reply, oral or written, is no better than the investigation preceding it. The local rep must be aware and make use of available legal resources to obtain information.

Every notice letter will state the employee is entitled to review the material upon which the Agency relies in proposing the action. The NAAE rep's request for information should begin with this demand. Because the Agency may shape this information to its liking, additional information may be needed to formulate the reply. The NAAE rep is also entitled to all information necessary and relevant to representing the bargaining unit employee; he or she should consider requesting not simply what will prove or disprove the specific charges, but also what will lead to such evidence and what will prove any mitigating circumstances. The scope of information requested will vary from case to case. Some items to be considered include:

(1) Agency Table of Discipline.

(2) Other notice and decision letters the Agency has issued involving conduct similar to the conduct with which the employee is charged.

(3) Statements given to Management by other employees or third parties concerning the specifications charged.

(4) Any investigative report of the charges the Agency receives.

(5) The employee's prior disciplinary record, if any.

(6) All materials maintained in the employee's performance/conduct file.

(7) Any Agency manual sections, official memoranda, or directives governing the conduct charged in the notice letter.

(8) The employee's time and attendance, travel, and daily activity records, if any, for the date(s) at issue in the notice letter.

(C) Making The Reply.

A reply permits the employee to respond to the charges made, to tell his/her side of the story before the Agency determines what action to take. Replies may be oral (before the designated Management representative) or in writing (to the Management representative designated in the charging notice letter as the deciding official), or both. Whichever form the Union rep and the employee choose, the representative should make the reply. This is one reason union members pay their dues. Furthermore, the Union rep is trained in this matter**;** the employee is not. The statute gives only seven days for a reply, but the Agency normally allows the employee and his/her Union rep reasonable additional time if requested.

An oral reply is not a hearing. The employee and his/her NAAE rep may present statements, exhibits, documents, and affidavits, but the employee may not be cross-examined even if the reply is oral. The Union rep should deflect any unwanted questions of the employee, even from the Management officer conducting the oral reply conference, asserting, "We understand cross- examination is not permitted here," or "We will be happy to take your questions down and respond to them in writing when this reply has been certified."

There are benefits and disadvantages to each type of reply.

(1) Benefits of Oral Reply:

- Face-to-face meetings may be more persuasive.
- Opportunity to present an employee who attracts sympathy or appears especially truthful and knowledgeable about the events.
- Informality of the proceedings.
- Ability to pursue a point the NAAE rep believes is impressing the oral reply official.
- Ability to clear up confusion and respond to questions or points raised by the Oral Conference Official.
- Opportunity to persuade the Oral Conference Official to submit a favorable (to the employee) report and recommendation to the deciding official.

(2) Benefits of Written Reply:

- Opportunity to supplement an oral reply with additional facts or evidence.
- Ability to prepare a precise, careful reply addressing the issues involved rather than focusing on how to control a temperamental, unpredictable employee who does not attract sympathy during the oral reply.
- Better control over presentation of facts adverse to the employee.

(3) Basic Do's and Don'ts of any Oral/Written Reply

The NAAE Representative Must:

- Request oral reply and prepare the written reply.
- Engage the employee in working with the NAAE rep when preparing the reply.
- Design a plan of action governing each person's role during the oral reply conference.

- Make the reply, allowing the employee to speak only under controlled conditions (i.e., if the employee is particularly articulate, credible, and sympathetic).

- Come to the oral reply session well prepared and organized with the employee's plan of action sketched out on paper.

- Take charge of the reply conference, controlling where it is going and what is said, emphasizing important issues; and deflecting unwanted questions.

- Ask clarifying questions and record the questions and responses in writing.

- Request the opportunity to read and certify for correctness any transcript or Oral Conference Official's notes of an oral reply.

- Be persuasive; take on the role of an advocate.

The NAAE Representative Must Not:

- Admit guilt (nor shou ld the employee), unless cleared in advance with the Union attorney/Regional Vice President.

- Make an extemporaneous or "off the cuff" reply.

- Leave the employee to give the reply.

- Permit Management to ask the employee unwanted or embarrassing questions.

- Lose his or her temper or let the employee lose his/hers.

- Get sidetracked from the major points selected in the plan of action for the reply.

D. The Decision.

Once the Agency issues its decision, the NAAE rep must watch for the presence of the following factors:

(1) In adverse actions, the proposing official can not make the decision, but may do so in decisions related to disciplinary actions.

(2) The decision must be in writing and state the specific reasons for the action taken.

(3) The decision must be based on findings limited to the specifications in the notice letter.

(4) The penalty imposed, if any, must be no greater than the penalty proposed in the notice letter.

(5) The decision letter must describe the employee's appeal rights and time limits for appealing.

As soon as the local NAAE representative receives a copy of the Agency decision, he or she should notify the Regional Vice President. If the Agency takes adverse action against the employee, the employee has the right to challenge the decision, electing either to appeal to the Merit Systems Protection Board (MSPB) or to file a grievance with the Agency through the Collective Bargaining Agreement's grievance system, but not both. The grievance procedure concludes with arbitration. NAAE will take the employee's case to arbitration or the MSPB if the case is of sufficient merit and the issues have broad implications, a decision to be made at the National level. The local NAAE rep should not commit the Union to arbitrating the grievance or appealing to MSPB until after the National has notified him or her of its determination. Because only a limited time period exists within which to invoke arbitration or file an appeal to MSPB, it is crucial for the NAAE local rep to notify the Regional Vice President in sufficient time to enable him/her to make a recommendation on a further appeal before that time limit expires. Failure to observe the time limits prevents consideration of any appeal.

III. Substantive Matters.

An effective defense begins with developing specific facts about the employee's case as they relate to six questions.

A. Did The Employee Do What The Specifications Charge? The burden of proof in disciplinary and adverse actions is on the Agency, not the employee, to prove the charges. If the local NAAE representative has requested the information relied upon by the Agency and it does not prove the employee did what is charged, the rep should state this fact forcefully in the reply. Without witnesses to the alleged conduct or documentary evidence to support Management's allegations, the charges may be overturned.

Substantive defenses exist to many of the most common grounds the Agency asserts to justify a disciplinary or adverse action:

(1) Criminal Conduct. A sufficient connection or nexus must exist between the alleged off- duty criminal conduct of the employee and the mission of the Agency.

(2) Falsification. Falsification is an intentional or willful act. Ignorance or inadvertence is a defense. The Agency also must prove it was the employee who falsified the document, especially if the document was under the custody and control of others.

(3) Misuse Of Government Vehicle. If the stopping point was in route to or from the temporary duty point, the vehicle may not have been misused. The Agency must prove willfulness. Sudden emergencies prompting the use of the vehicle also may be a defense.

(4) AWOL. If the leave was previously approved or not specifically denied, an AWOL charge may not be appropriate.

(5) Forced Leave. An employee should not be placed on forced leave when he/she does not present a clear and immediate threat to government property or the well-being of himself, fellow employees, or the public.

(6) Insubordination. If the employee asserts a plausible explanation for failing to respond, the Agency must prove the employee's intent to be insubordinate. Was an actual order given and was it clearly understood? Was the assigned duty impossible to perform?

B. **Why Did The Employee Do It?** Even if the employee did what is charged, defenses may be asserted to defeat the Agency's attempt at discipline or to justify mitigating (reducing) the penalty imposed. Several possible defenses are:

(1) Was the employee clearly informed in advance the alleged act/conduct was prohibited or was an order actually given?

(2) Was the employee able to do what the Agency claims should have been done? Valid defenses may be available when the directions or standards are vague, subjective, or conflicting or when the employee is suffering from illness or alcoholism. Federal law requires agencies to take affirmative action to rehabilitate alcoholics, including counseling, extending leave for treatment, and evaluating the employee's fitness for duty.

(3) Did Management provoke the employee?

(4) Did Management participate in or ignore the same conduct in the past?

(5) Were the employee's acts merely inadvertent rather than intentional?

C. **Have Other Employees Done The Same Or Similar Acts?** Similar offenses should result in like penalties. If the employee's penalty is harsher than the penalty Management imposed on other employees for similar conduct, the penalty may be mitigated (lessened or reduced) or overturned. It could also indicate:

- reprisal for previous grievance or EEO activity
- reprisal for other union-related activity
- discrimination based on age, race, sex, religious, or national origin.

If such reprisals or discrimination are present, they constitute prohibited personnel practices, violating federal law found in 5 U.S.C. §2302(b)(1).

D. How Long Has Management Been Aware Of The Acts? If Management delays for a substantial length of time after learning of the charged acts before proposing the discipline, the disciplinary or adverse action may be overturned or reduced.

- Delay in discipline dilutes any corrective value of the discipline.
- Delay tends to undercut the alleged seriousness of the charged acts.
- Facts in evidence may be lost or destroyed.
- Recollections may fade; witnesses may leave.

E. Does The Act Bear Upon The Mission Of The Agency?

(1) Nexus. In disciplinary and adverse actions, the law requires a logical, foreseeable, adverse effect or connection between the offense charged and the mission of the Agency. The law calls this connection "nexus." In the following instances, a sufficient nexus was not found, and the discipline was overturned when the employee was disciplined for:

- refusing to perform an act the Agency did not require,
- associating with an individual with a criminal record,
- exhibiting private homosexual preference,
- "mooning" private citizens in a parking lot,
- smoking a small amount of marijuana in the privacy of his home, and
- failing to pay a valid personal debt.

(2) Was a Prohibited Personnel Practice committed? Management commits an unlawful "prohibited personnel practice" if it discriminates against an employee on the basis of conduct not adversely affecting the performance of the employee or other employees. Whenever the local NAAE representative believes no "nexus" exists between the conduct charged and the efficiency of the service, the rep's reply on behalf of the employee should state that, "the Agency is committing a 5 U.S.C. §2302(b)(10) prohibited personnel practice."

The statute, 5 U.S.C. §2302(b), lists 11 prohibited personnel practices. The law not only provides severe penalties for individuals responsible for prohibited personnel practices (e.g., up to and including removal and disbarment from federal employment), it also permits an employee who successfully defeats a disciplinary action to recover attorneys fees. The fear of these very serious consequences could influence the Agency not to impose discipline in close cases.

F. **Does The Penalty Fit The Offense?** Even if the employee is found guilty of the offense charged, arbitrators and the MSPB are empowered to reduce the penalty imposed whenever they conclude the penalty is excessive or unreasonable. In assessing the reasonableness of the penalty, the MSPB has set out the following factors (known as the "Douglas Factors") for consideration:

(1) The nature and seriousness of the offense and its relation to the employee's duties, position, and responsibilities, including whether the offense was (a) intentional, technical, or inadvertent, (b) committed maliciously or for gain, or (c) frequently repeated;

(2) The employee's job level and type of employment, including supervisory role, contacts with the public, and prominence of the position;

(3) The employee's past disciplinary record;

(4) The employee's past work record, including length of service, performance on the job, ability to get along with the fellow workers, and dependability;

(5) The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisor's confidence in the employee's ability to perform assigned duties;

(6) Consistency of the penalty with penalties imposed upon other employees for the same or similar offenses;

(7) Consistency of the penalty with the Agency's table of penalties;

(8) The notoriety of the offense and its impact on the reputation of the Agency;

(9) The clarity with which the employee was on notice of any rules that were violated, or the clarity with which the employee had been warned about the conduct in question;

(10) The potential for the employee's rehabilitation;

(11) Mitigating circumstances surrounding the offense, such as unusual job tensions, personality problems, mental impairment, harassment, bad faith, and malice of or provocation on the part of others involved in the matter; and

(12) The adequacy and effectiveness of alternative sanctions to deter similar future conduct by the employee or others.

The arbitrator should consider and apply the same "Douglas Factors" in grievance cases, too. Discipline should be corrective rather than punitive in nature. Discipline also should be progressive—the penalty for the second offense more harsh than the penalty for the first.

IV. Where To Appeal.

Once the Agency determines to impose discipline, the employee may take several paths to appeal the action. Different legal and practical considerations are involved. Therefore, neither the local NAAE representative nor the employee should choose one path until all options have been discussed with the Regional Vice President and, if necessary, NAAE General Counsel.

A. Disciplinary actions may be appealed only through the Union's grievance and arbitration procedures, unless prohibited discrimination was involved. In that case, an EEO complaint or an unfair labor practice charge (if the action so qualifies) may be filed. The NAAE contract spells out the time limits for grieving a matter and the step and level at which the grievance must be filed.

B. Adverse actions may be appealed either to the Agency through the grievance/arbitration process, to the MSPB, or, if prohibited discrimination is involved, to the Equal Employment Opportunity Commission.

Once an employee selects either to file a grievance and arbitrate or to appeal to the MSPB and actually files that grievance or appeal, the choice can not be altered. Other options are foreclosed. Depending upon to which forum an action is appealed, the route the matter follows is traced below, listed in chronological order from top to bottom:

MSPB	ARBITRATIONS		EEO
Only Adverse Actions	Adverse Actions	Disciplinary Actions	
Presiding official's initial decision	arbitration	arbitration	Informal investigation (by the counselor)
Full MSPB decision	Federal Circuit Court of Appeals	FLRA	Formal investigation hearing
Federal Circuit Court of Appeals	Supreme Court		U.S. District Court
Supreme Court			Supreme Court

V. Membership-Building

When effectively handled, every adverse or disciplinary action can be turned into an opportunity to strengthen existing membership ties and to build new ones at the National and local levels.

Every employee must understand that union representation is always based on the merits of the case. In a meritorious case, the facts, as stated, will establish a contract violation under FLRA legal principles, sufficient evidence will support the employee's arguments, and credible witnesses will be identified. When arbitration is at issue, an additional factor as to "merit" arises: the matter in controversy must have broad implications for the Union members as a whole, not just for the employee who wishes to appeal.

Every local union representative has heard the argument that the Union must represent members and non-members alike. But that is not true in all circumstances. The duty to represent arises from NAAE's status as the exclusive representative of the bargaining unit employees. When NAAE controls the rights of employees—at the bargaining table and in the grievance/arbitration process created by the contract—NAAE must represent members and non-members alike without regard to union membership. In those situations, employees have no choice but to work with and through the Union to vindicate their rights. Only the Union can negotiate with Management or invoke arbitration. The Union may not discriminate.

In any other proceeding created outside the contract (i.e., by statute or regulation), the employee has a statutory right to challenge Management on his/her own, without Union consent or assistance. In those situations, the Union does not have a duty to represent the employee, no matter how much merit the employee's case may have. Therefore, although NAAE's policy is to represent union members who have meritorious cases before the MSPB and in other statutory arenas (e.g., EEO, Privacy Act, court actions), NAAE has no such policy for non-members.

In every instance, the local NAAE representative should ask a recipient of a disciplinary or adverse action letter whether he or she is a union member. If the employee answers no, the NAAE rep should ask him/her to join.

Beyond this, consider also as a marketing/recruiting tool:

- posting on the Union bulletin board a notice of victories related to rescinding any action, mitigating a penalty, or settling favorably a case;
- posting on the Union bulletin board favorable arbitration awards; and
- urging employees the local NAAE rep has successfully represented to give testimonials at local branch meetings and during recruiting drives.

NAAE **Attachment No. 1**

NAAE Local No.

USDA/APHIS/PPQ
Agency address

Re: (employee's name)

Dear :

I hereby designate NAAE as my representative in the matter of the [disciplinary/adverse action] which has been proposed in the letter dated____________________________ and received on __________________________, 2000. I request an [oral/written] reply. Please contact my representative, Mr./Ms. , NAAE Branch [President], to arrange a mutually convenient date.

Sincerely,

(employee's signature)

NAAE **Attachment No. 2**

NAAE Branch No.

USDA/APHIS/PPQ
Agency address

Re: (employee's name)

Dear :

Pursuant to our right stated in the notice letter to Mr./Ms. , dated _______________, 200_, and our right under 5 U.S.C. §7114(b), please furnish a copy of all materials relied upon in proposing the (disciplinary/adverse action) and the information listed below:

If my request is denied in whole or in part, please inform me of the name and the position and title of the official making the decision to deny each item and the statutory or regulatory basis on which the denial of each element is based.

Sincerely,

(Union representative's signature)

Chapter 5: FORMAL MEETINGS AND INVESTIGATORY INTERVIEWS

The local NAAE representative is responsible for attending and participating in formal meetings and investigatory interviews. The representative must be able to recognize these meetings, must know the rights of employees and NAAE, and must understand the representative's role at such meetings. The Civil Service Reform Act spells out the rights of employees and unions and the corresponding duties of agencies at these meetings.

I. Formal Meetings: What Are They?

Section 7114(a)(2) of the statute states:

> An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at -- (A) 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 law requires that when a formal meeting is held, NAAE has a right to be notified and the opportunity to be present as the representative of bargaining unit employees. But before the Agency is required to invite NAAE, four distinct elements must be present:

(1) There must be a discussion intended;

(2) It must be formal;

(3) It must be between one or more representatives of the agency and one or more employees in the unit; and

(4) It must concern a grievance, personnel policy, practice, or general condition of employment.

If all four elements are present, NAAE is entitled to advance notice and the opportunity to attend the meeting. However, the absence of any element eliminates the right to be present.

A. The Requirement Of A Discussion.

The statute states there must be a formal discussion. Even without give-and-take dialogue between Management and the employee and/or the NAAE representative, the meeting may be a "discussion." According to the Federal Labor Relations Authority (FLRA), meetings to make statements or announcements can be formal discussions, even when the announcements are not of a change in personnel policies, practices, or working conditions.

B. The Discussion Must Be "Formal."

It is not enough that a discussion or meeting occurs between Management and unit employees. It must also be "formal." Determining whether a meeting is formal depends upon

(1) Who calls the meeting. If that person is a supervisor or management official, the first criteria is met.

(2) Where the meeting is held. Meetings conducted at individual employees' desks are not formal.

(3) How long the meeting lasts. Brief discussions generally are not considered "formal."

(4) How the meeting is called. If called by Management and attendance is mandatory, then it is "formal."

(5) Whether there is a formal agenda. If there is, the meeting is formal.

(6) How the meeting is conducted. If an employee's identity and comments are written down, the meeting is formal.

C. The Meeting Must Be Between Management And Unit Employees.

NAAE only represents employees in the bargaining unit. The right to union representa tion does not apply to supervisors, management officials, or those employees specifically excluded under NAAE's Collective Bargaining Agreement.

D. The Subject Matter Of The Meeting.

The statute lists grievances, personnel policies, practices, and general conditions of employment as appropriate subjects for formal meetings. The easiest to recognize is a meeting concerning a grievance filed under the Collective Bargaining Agreement. A meeting between a supervisor and employee to discuss a grievance the employee has filed or intends to file is a formal meeting. The NAAE representative must be given notice and the right to be present, even when an employee filing the contract grievance does not want or request union assistance. This right to be present does not encompass a meeting called in accordance with a statutory appeal, such as a meeting to discuss a ULP or EEO charge or a settlement. Congress has placed victims of discrimination in a special position above the interests of the unit as a whole. Management interviews of unit employees prior to Merit Systems Protection Board (MSPB) hearings are formal. NAAE believes this same principle also applies to pre-arbitration hearing interviews of unit employees.

The less clear-cut subject areas involve determining whether meetings deal with personnel policies, practices, and general conditions of employment. Personnel policies and practices are general rules applicable to agency personnel generally and are not individual actions taken with respect to individual employees. Thus, a counseling session concerning one employee's work is not formal, whereas a meeting to discuss the port's leave policy as it applies to all employees is.

Conversations to broadcast and gather personnel information in an attempt to find work for employees designated for furloughing are not formal discussions. Individual discussions between a supervisor and unit employees to solicit comments about redistributing the work of an employee who has resigned or is going on TDY are not formal meetings. Meetings with employees to conduct a workload review, to discuss performance, or to provide individual counseling are not formal discussions. A meeting to discuss an evaluation is not a formal meeting.

Meetings to discuss implementation of group performance standards and critical elements are formal discussions. Meetings called to discuss such subjects as leave policies, discipline and adverse action policies, promotion policies, outside employment policies, overtime policies, and GOV/POV use policies, to name a few, qualify as formal discussions.

Furthermore, in the formal meeting the Agency must provide certain warnings to any employee it interviews and observe certain protocol. Management must:

(1) inform the employee of the purpose of the questioning and assure the employee his/her participation is voluntary and no reprisal will occur if he/she refuses;

(2) the questioning must occur in a non-coercive (non-threatening) context; and

(3) the questions may not exceed the scope of legitimate inquiry. (For example, Management can not inquire as to the Union's strategy or what questions the Union has asked.)

II. The Representative's Role In A Formal Meeting.

Once notified of a formal discussion, the designated NAAE representative has the right to attend and to participate, but not to disrupt the meeting, dominate it, or interfere with the Agency's statement or explanation. The purpose of the meeting and all of the surrounding circumstances will determine the extent of the NAAE representative's right to participate. He or she has the right to make a statement on behalf of NAAE as to the Union's position on the issues and role in the process. The right to represent means the right to speak, comment, and make statements. Any effort by the Agency to restrain the exercise of this right is an unfair labor practice.

III. Investigatory Interviews: Weingarten Meetings.

The second type of meeting Section 7114(a)(2) covers is the investigatory interview, commonly referred to as the "Weingarten" Meeting, named after the private sector court case of the same name. This statutory section states:

> An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at -- **...** (B) any examina tion 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 statutory right of union representation at investigatory meetings has six elements, all of which must be present for the right to apply. The required elements are:

A. There must be an examination (the questioning) of the employee with the intent to solicit information. A meeting to warn an employee to cease a pattern of disruptive conduct is not an examination. Likewise, a meeting held merely to inform an employee of a decision already made or to discuss an annual performance evaluation is not an examination.

B. The questioned employee must be in the NAAE bargaining unit.

C. The interviewer or questioner must be a representative of the Agency. This literally means any agent of Management, whether in your particular port, office, region, area, or other organizational component. It means not only line supervisors, but also staff management officials. It also includes inspectors of the Inspection Service or OIG, but it does not mean someone from another agency, such as OPM or the EEOC.

D. The examination must be in connection with an investigation. That is, there must be an ongoing inquiry of which the examination is only a part. This is the other half of why performance evaluation meetings, workload reviews, counseling sessions, and meetings to issue warnings do not qualify for coverage. An examination in connection with broader investigation refers to the Agency representative questioning an employee about a passenger or importer complaint or about theft, fraud, or the seizure of property.

E. The employee must have a reasonable belief he/she will be disciplined. The right to representation extends not only to an employee who is the subject of the investigation, but also to employees who are only questioned as witnesses—so-called third-party witnesses. The "reasonable belief of discipline" must be based on objective factors and not the employee's subjective state of mind. That is, whether the employee "actually fears" discipline is not controlling. What does control is whether there exists evidence which would allow a person reasonably to believe discipline "may or could" result. But the Agency's express grant of immunity from discipline is sufficient to dispel any reasonable fear of discipline on the part of the employee. When an express assurance of immunity is provided, the Agency does not violate the statute when it denies an employee's request for representation. The grant does not have to be in writing, although a written assurance is preferable or at least witnessed by the local union representative.

F. Finally, the employee must request representation. If the employee does not affirma tively ask for representation, the Agency is not obligated to arrange union representation or even to remind the employee of the right to have representation. The law only obligates the Agency to notify employees annually of the right. This places a burden on local branches to get the word out regularly to employees so they will be prepared to exercise this valuable protection when the time comes.

IV. The NAAE Representative's Role in Weingarten Meetings.

A. Prior to the Weingarten Meeting, the local NAAE representative should meet with the employee. He or she should remind the employee that his/her job, career, and livelihood may be in jeopardy and to follow the rep's instructions. The employee should be advised to be truthful, but to answer only the question asked and not to offer answers or suggest other questions. The answers should be brief. A question that can be answered "yes" or "no" should be answered that way. Never qualify or add to a "yes" or "no" answer unless absolutely necessary. Making additional statements to please or cozy up to the questioner will only lead to more questions. Investigators will try to get an employee to talk until he or she finally says something that may be useful to them.

The NAAE rep should advise the employee never to use "could be," "perhaps," "it's possible," or "maybe" as part of the answer. If the employee can not remember, then an answer of "I have no specific recollection" is proper. If the employee has no direct knowledge, he/she should be instructed to say so. The employee should never answer a question he/she does not understand; instead, the employee or the rep should ask to have it clarified.

The NAAE rep should instruct the employee to control his/her voice, temper, and rate of speech and to avoid displaying indignation over false accusations, lies, or implications of guilt. The employee should be encouraged to be calm, taking his/her time in answering and thinking out the answers before speaking. If he/she gets confused, upset, or tired, the employee should ask the NAAE representative to request a brief recess. Finally, the employee should be cautioned never to make statements about other employees unless he/she knows those statements to be absolutely true and the response is essential in order to answer a question properly.

B. The right to Union representation at an investigatory meeting means the right to participate. This means the NAAE representative may speak, make statements, and clarify questions. The employee's representative is expected to interrupt, offering comments in the form of questions or statements as to possible infringement of employee rights. The Agency violates the statute if it attempts to silence an employee's representative. However, Management always retains the option of terminating or not conducting the examination if it decides the interview in the presence of the Union representative will not produce the desired results.

The NAAE representative should arrive on time, introduce himself or herself and the employee, record the investigator's pocket commission or badge number, and always ask the investigator what the basis is of the interview and whether the employee is the subject of the investigation or merely a third-party witness. The rep should ask that questions be clarified, look at "evidence" shown the employee, assist the employee in making an answer, remind the employee how to answer (e.g., to refrain from saying "perhaps," "maybe," or "it's possible" if an employee does not remember an event and to answer only the question asked), and assist in bringing out favorable facts. Finally, the representative should always advise the employee not to sign anything on the spot.

C. After establishing the basis of the interview, the NAAE Representative should ask the investigator whether the employee is suspected of a violation of law, rule of conduct, or regulation that might result in criminal prosecution. If the answer is "yes," the rep must immediately advise the employee to say nothing and ask if the investigator intends to give the employee Miranda warnings, advising the employee of his/her absolute right to remain silent and the right to counsel. Anything the employee says can be used in a prosecution, so he/she should say nothing.

If Miranda warnings are given, the rep should advise the employee to seek the assistance of a criminal attorney. Now the employee is not only in jeopardy of losing a job and career, but also of facing criminal prosecution, conviction, and prison term or fine. The session should be adjourned while the employee secures a criminal attorney. Under no circumstances should the employee say anything.

In some situations, the investigation may be criminal in nature, but the employee is given immunity from criminal prosecution. If so, the employee will be warned that he/she is then expected to answer the questions. The warning, known as the "Kalkines Warning," named after the court case of Kalkines v. U.S., must be read to the employee:

> I want to advise you, Mr./Ms. ______________, that you have all the rights and privileges guaranteed by the laws of the United States and the Constitution of the United States, including the right to be represented by counsel at this inquiry, the right to remain silent, although you may be subject to disciplinary action for the failure to answer material and relevant questions relating to the performance of your duties as an employee of APHIS/PPQ. I further advise you that the answers you may give to the questions propounded to you at this proceeding, or any information or evidence which is gained by reason of your answers, may not be used against you in a criminal proceeding, except that you may be subject to criminal prosecution for any false answer that you may give under any applicable law.

If Miranda or Kalkines warnings are not given, the employee's representative should ask whether the investigation is only administrative in nature. If the response is "yes," the representative's notes should reflect that he/she inquired about any possible criminal prosecution, the answer was no, and the employee was not provided Miranda warnings, but was advised the investigation was administrative. At this point, the investigator will probably state that criminal prosecution is possible only if the employee knowingly gives false answers to the questions. If the investigation is administrative, the employee is required to answer. If he/she refuses, the employee faces discipline, even discharge, for failing to do so.

The employee's representative should record everything, particularly every question and answer, but without becoming visibly agitated or angry. The relationship should be kept formal and businesslike, without any "off-the-record" discussions with the investigator. If the representative needs to make a point or a statement, ask for clarification of a question, help the employee, or request a brief recess, he/she should do it in a professional manner.

Take all regular breaks, including coffee breaks and lunch periods. At the end of the employee's regular work day, the rep should request the interview to stop. If the investigator is not finished, he/she can continue at another time.

At the conclusion of the interview, the employee probably will be asked to sign a statement, affidavit, or a summary of the interview. The representatives should advise the investigator the employee respectfully declines to sign anything. However, if the employee is only a third-party witness and not the subject of the investigation, he/she may agree to review a written statement or summary at a later date, correct it (with the help of the Union representative), and send it back signed to the investigator. At this point, the representative should pack his/her materials and ask the investigator if there is anything else. If not, both should leave.

Upon returning to his/her office, the representative should first advise the employee that if he/she is called again by anyone regarding this meeting or any related matter, he/she is immediately to request his/her presence. Next, the representative should call NAAE's Regional Vice President and explain what occurred.

V. Special "Weingarten" Situations.

A. The local NAAE representative is allowed to be present at an investigatory meeting because the employee has a reasonable fear of discipline. What happens if the questioning agent or inspector gives the employee an express grant of immunity from any action? FLRA has held that such a grant is sufficient to dispel any reasonable fear of discipline, and the Agency legally may deny the employee a representative. If immunity is granted, the supervisor or Management representative should be asked to give the immunity to the employee in writing before the rep leaves.

B. If the employee has been arrested or indicted on a still-pending criminal matter occurring away from the job and is interviewed for possible administrative action concerning his or her job, the rep should advise the employee not to answer any question and to secure a criminal attorney. Since the employee has not been given immunity from the outside criminal charges, answers to administrative questions could waive the employee's constitutional rights in the criminal proceeding. An employee does not have to face administrative proceedings when criminal prosecution is also occurring. As a result, if the employee does not answer the questions asked and the agency tries to discipline the employee, MSPB or an arbitrator should dismiss the discipline or overturn the discharge. In this situation, NAAE's attorney should be contacted

C. What happens if the employee appears for the interview with his/her representative and all of the elements exist to justify union representation, but the Agency denies the employee's request and does not allow the representative to be present? If the employee on his or her own decides not to answer any questions because of the unlawful denial of representation, the Agency will be stopped from disciplining the employee for refusing. An employee can not be held insubordinate for exercising a right provided by law when the Agency violates its duty to the employee under that law. In this situation, it is important the employee state he/she is prepared to undergo the interview and to answer questions, provided he/she is allowed a representative. This makes the refusal clearly based on the Agency's unlawful conduct. This is a risky course for an employee, and the Union representative first should encourage the employee to answer, but under protest. If the employee decides not to answer, that decision clearly must be his or her own.

D. What remedies are available to an employee who is unlawfully refused representation, but then answers questions at an interview? The Agency's refusal is an unfair labor practice, and NAAE will prosecute. The outcome will be suppression of any evidence gathered as a result of the unlawful interview and may be rescission of discipline or reinstatement. But be aware, oftentimes the Agency will already have the evidence secured from another source and simply seeks to confirm it at an interview. In that case, it still may be used. This is another reason why an employee's refusal to answer is risky. An employee who lawfully refuses to answer and is discharged may be reinstated, as long as all the evidence the Agency relied on as the basis for the discharge was gathered at the unlawful interview. These situations require close coordination between the local Union representative and his/her NAAE Regional Vice President.

VI. NAAE Rep Interview Check-List.

A. Prepare for the Interview.

(1) Meet with the employee. (NAAE's Collective Bargaining Agreement does not yet provide "official time" for this purpose, but that right is a top priority demand during the current round of national contract negotiations.)

(2) Caution the employee to respond truthfully, but to answer only the question asked.

(3) Advise the employee to try to respond with a simple "yes" or "no" answer.

NOTE: Explain the difference between open-ended and closed-ended questions. The representative must be alert for open-ended questions—for example, "tell us everything you know about ..."—and must ask the interviewer to frame the question more specifically.

(4) Advise the employee not to mention any other employee when responding unless absolutely required to do so.

(5) Advise the employee to testify only to matters about which he/she has definite knowledge. "I do not know" or "I do not remember" are acceptable answers.

(6) Advise the employee never to testify to matters about which he/she is unsure.

B. Information Sources for Preparing A Defense:

(1) The appropriate NAAE-Agency contract, local or national.

(2) OPM and Agency regulations governing Agency management.

(3) Agency guidelines and directives intended to assist supervisors decide whether to impose discipline.*

(4) Documents and correspondence related to other similar cases.*

(5) The Agency's Table of Discipline.

(6) The Agency's investigative reports related to the charges.*

(7) The employee's prior disciplinary record and performance file.*

(8) The employee's time and attendance, travel, and daily activity records.*

NOTE: The NAAE representative should request these documents from the Agency pursuant to the Federal Labor-Management Relations Statute, 5 U.S.C. §7114(b)(4), in advance of the interview if time permits.

C. Representing the Employee at the Interview.

(1) Arrive on time.

(2) Introduce the employee and yourself to the interrogators/interviewers.

(3) Record the interrogator's pocket commission or badge number.

(4) Maintain a business-like demeanor throughout the interview.

(5) Ask if the employee is suspected of a violation which might lead to criminal prosecution. If the answer is yes:

a. advise the employee not to respond further; and

b. ask the interrogator whether he/she plans to issue the employee the Miranda warning

-- if yes, advise the employee he/she should consult a criminal attorney

-- if no, determine whether the investigation is administrative in nature. If yes, the employee must respond or possibly suffer removal or other severe penalty.

(6) Record all questions and answers. Be alert for open-ended questions.

(7) Take all regular breaks, and stop the interview at the end of the employee's regular workday.

(8) Advise the employee not to sign anything, at least not until you have talked with your Regional Vice President.

(9) After the interview is finished, inform the employee to request union representation if anyone begins again to discuss the matter with him/her.

(10) Inform your Regional Vice President about the interview immediately after it ends