UNFAIR LABOR PRACTICE (ULP)
INFORMATION FOR SUPERVISORS

The following provides general information to supervisors concerning the subject of ULP's. It offers guidance to supervisors in dealing with union officials and employees who are represented by labor organizations, particularly with regard to how to avoid committing a ULP.

1. What is an Unfair Labor Practice (ULP)?

A ULP is an action, which violates the rights of a party covered by the federal labor law (Title VII of the Civil Service Reform Act, 5 United States Code, Chapter 71). The parties covered by the labor law are, of course, employees, employee organizations (unions), and agencies. In this regard, any party covered by the labor law may either commit or be the victim of a ULP.

2. What are some of the rights guaranteed by labor law?

- Employee: To form, assist, or join a labor organization or to refrain from doing so.
- Employee Organization: To act for and negotiate collective bargaining agreements for all employees that it represents (that is, those in the bargaining unit).
- Agency: To determine the mission, budget, organization, and number of employees in the agency.

3. What are some examples of ULPs?

Some examples of ULPs include a management (or union) refusal to consult or negotiate in good faith; an agency's implementation of a personnel policy without providing the union the opportunity to bargain, discrimination against an employee because they are a union officer or member, or interference in the exercise of an employee's rights under the labor law.

4. What is the relationship between grievances and ULPs?

There is a very close relationship because both actions stem from disagreements which arise from the three-way relationship that exists among employees, the union and management.

5. Is there a difference between grievances and ULPs?

Yes, the differences relate mainly to the nature of the disagreement between the parties and the resolution procedure used to resolve the disagreement. Grievances relate to disagreements over the interpretation and application of a collective bargaining agreement between union and management or agency personnel regulations and are decided by an arbitrator. ULPs relate to disagreements over the coverage and meaning of the labor law and are decided by the Federal Labor Relations Authority (FLRA).

6. Can a violation of a collective bargaining agreement ever be a ULP?

Yes, it can, but only under the most extraordinary of circumstances. One of the parties to the agreement must knowingly, deliberately, and willfully violate the agreement. For example, a ULP occurred in a case where one of the parties to the labor agreement announced that the agreement was no longer in effect (even though it was), and that grievances would not be processed. However, given the federal labor law's broad definition of a grievance, a ULP can be filed as a grievance, if the employee or union chooses.

7. Is it true only a union can file a ULP with the FLRA?
No. As indicated above, any individual employee, union, or agency covered by the labor law may file a ULP. As a practical matter, however, 95 percent of all ULPs are filed by unions against agencies because the labor law is generally designed to protect the employee's right to organize and be represented by a labor union.

8. When may a ULP be filed?
A ULP may be filed anytime within 6 months of the date the injured party became aware of the violation of the labor law.

9. Who will help me if I am charged with a ULP?
A Labor Relations Specialist from the Human Resources Office will represent you and the Office of Indian Education Programs.

10. Who determines if a ULP has been committed and how is this done?
The FLRA decides ULPs, and its process for determining if a ULP has been committed is divided into two phases. The first phase is the charge phase. During this phase a representative of one of the regional offices of the General Counsel of the FLRA independently investigates the matter to see if there are sufficient grounds to conduct a formal hearing. If sufficient evidence does not exist, the FLRA regional office will dismiss the charges and drop the matter. The regional director's decision to drop the matter is subject to review by the FLRA General Counsel. If it is the decision of the regional office that sufficient evidence does exist to require a complete investigation, a formal complaint is issued and a hearing is scheduled. The purpose of the hearing is to develop facts sufficient for the FLRA to determine whether a ULP has indeed been committed.

11. What happens during the course of the General Counsel's investigation of a ULP charge?
An agent of the FLRA General Counsel will come to the location where the ULP charge was filed and interview the various parties and persons involved in the charge and collect any pertinent documentation. The agent will interview employees and union officials and take their testimony in the form of sworn statements. *NOTE: See the next questions for information concerning a request by a FLRA investigator to speak to a supervisor.*

12. What if the FLRA investigator wants to discuss the charges with me or other supervisors?

As a supervisor, you do not talk to an FLRA representative unless a representative from Employee & Labor Relations in the OIEP Human Resources Office is with you!!!

13. If the General Counsel requires my evidence in the form of a written, sworn statement, do I have to make one?
Not unless you are directed by an OIEP Human Resources Office representative to make such a statement. As a supervisor you are a management agent, consequently, you must coordinate with the Labor Relations Officer (LRO) in the Human Resources Office before providing any statement or document to the FLRA general counsel's representative. Be sure to obtain a copy of any statement that you sign.

14. Are all ULP charges investigated by the General Counsel?
Yes.

15. What happens after the FLRA General Counsel completes the investigation?
If the General Counsel's investigator finds sufficient evidence to indicate that a ULP may have occurred, a complaint will be issued and a hearing will be held if necessary. The hearing will be conducted by a FLRA Administrative Law Judge (ALJ) who is supposed to play a neutral role. Based on the evidence developed at the hearing, the ALJ will provide a recommended decision to the FLRA. The FLRA will issue a decision, which is ordinarily accepted as final. If either of the parties are dissatisfied, however, procedures exist to obtain review in court (although management opportunities in that regard are limited).

16. What happens if the union files frivolous ULPs as a means of harassment?
The filing of what management considers to be frivolous ULPs by the union is one of the more troublesome aspects of the labor law, insofar as we are concerned. The FLRA is bound by law to investigate all ULP charges, and those charges are presumed to be valid until the FLRA determines otherwise. By and large there is not much that can be done unless the situation gets completely out of hand; e.g., 300 to 400 ULP charges in a year at a given activity. In those situations, contact may be made through the Human Resources Office with the General Counsel's Office in Washington D.C., to attempt to resolve the situation.

17. What happens if the agency is found guilty of committing a ULP?
The FLRA may prescribe whatever remedy is necessary to correct the ULP. This may include revoking the management action that caused the ULP in the first place, and requiring management to go back to the situation as it existed before the ULP. Generally however, the remedy consists of requiring the guilty party to sign and post a notice to employees which indicates that it will stop committing the ULP and that it will not take such actions in the future. In this regard, the FLRA does not have the authority to impose discipline on a supervisor or manager who willfully commits a ULP, but the Office of Indian Education Programs does, and will, if the circumstances warrant. Thus, while you are not expected to be a labor relations expert, you are expected to know and abide by the basic rules that govern labor relations.

18. When is an employee entitled to union representation?
By law, employees are entitled to union representation in two situations. The two situations are;

1. Formal meetings (by far the more common situation), and
2. Investigatory interviews or examinations, referred to as "Weingarten discussions".

Representation rights in formal meetings are covered in this section; investigatory interviews are addressed in questions 28 to 45.

19. May an employee have a right to union representation to addition to those required by law?
Yes. Your negotiated labor agreement may, for example, provide for union representation at informal meetings or grievances. In addition, a representation right may be established by past practice (see question 49 through 51 for discussion on past practice). Thus, the following discussion cannot address those locally negotiated practices affecting representation rights. Check your labor contract or contact your Labor Relations Specialist in this regard.

20. How do I know if I am involved in a formal meeting or discussion with an employee?
The following four conditions must be present for a meeting to be considered formal:

1. A discussion must take place.
2. The discussion must be formal (see question 21 for guidance as to the circumstances which make a meeting formal).
3. The discussion must be between one or more management representatives and one or more employees in the bargaining unit or their union representatives.
4. The discussion must concern a grievance, changes in general personnel policy or practice, or some other general condition of employment. This is an important factor, as counseling an employee on individual performance or conduct or on compliance with existing work rules and policies does not entitle the employee to union representation.

21. O.K., I understand three of the conditions, but there are days when it seems I'm always meeting with employees and/or their union representatives. How can I tell which meetings are formal?
You must consider each meeting in its entirety to determine if it is formal. In reaching this determination you must bear in mind that the FLRA has indicated that if some of the following conditions are present the meeting is, in all likelihood, formal.

- The management representative who holds the meeting is a first line supervisor or higher.
- Other agency representatives besides the first line supervisor attend the meeting.
- The meeting is held away from the work site or shop floor.
- The meeting goes on for a relatively long period of time.

- The meeting is scheduled in advance.
- An agenda is established for the meeting.
- The employees are required to attend.
- The meeting is conducted according to a set of procedures; e.g., chairperson presides, minutes are taken, attendance is verified.
- The meeting involves a discussion concerning changes in working conditions, personnel practices or conditions of employment.

22. If an employee approaches me and asks a question about work rules or personnel practices, is this a formal discussion or meeting?
No, not usually. Since the employee initiated the conversation in an informal setting, the supervisor is free to respond to the employee's question. However, if during the conversation, the supervisor establishes or changes general personnel practices or work rules, the meeting or discussion could be considered formal. In addition, any discussion you have with the employee concerning a grievance they may have filed is a formal meeting or discussion. Consult the Labor Relations Office concerning questions on the negotiated grievance procedures.

23. Suppose I want to call an employee's attention to an existing work procedure – is that a formal meeting or discussion?
The discussion of work procedures, assignments, or performance is normally not a formal meeting or discussion under the law. Nor is counseling an employee regarding individual performance. For example, reminding an employee to wear safety equipment is not a formal meeting or discussion under the law.

24. I have decided to hold a formal meeting or discussion. What happens next?
Contact the Labor Relations Officer to find out the method of inviting the union as well as the appropriate union official to be invited. Having learned that, an invitation should be extended to the union.

25. If I plan to hold a formal discussion or meeting with employees, do I have to tell the employee that he or she has the right to union representation?
Your obligation is to tell the union of the scheduled meeting or discussion and give the union the opportunity to be present. You do not have to tell the employee of the union's right to attend.

26. If the employee does not want a union representative at a formal discussion or meeting but the union demands to be present, do I allow the union representative in the meeting or discussion? And, if I do, what role does the union representative play?
The answer to the first question is yes, the law gives the union the right to be present at any formal discussion or meeting about grievances, and general policy, practices, or conditions of employment. Since the employee does not want to be represented by the union, the union representative is representing the interests of the union. The

representative has a right to express the views of the union on the matter under discussion.

27. What role does the union representative play in a formal meeting or discussion?

The union representative is entitled to participate actively in the meeting. As the representative of bargaining unit members, the union representative is allowed to ask questions, make comments, offer suggestions, etc. Note that this role is somewhat different from that played by the union representative in investigatory interviews.

28. How do I know if I am involved in an investigatory (Weingarten) interview as opposed to a formal meeting or discussion?

A Weingarten type meeting occurs when you or a representative of the agency conducts a question and answer type of interview with a bargaining unit member to obtain information in the course of an ongoing investigation. Under such circumstances, the employee may have a right to union representation.

29. Incidentally, the term "Weingarten" interview comes from the title of a landmark Supreme Court decision providing for the rights described below in the private sector. These same rights were adopted by Congress in the Civil Service Reform Act for federal employees. In other words a "Weingarten" right means an employee in the bargaining unit is entitled to a representative whenever I ask a question?

Absolutely not! A bargaining unit member is entitled to a union representative only if he or she is being interviewed and the following four conditions are met.

1. The investigatory interview or examination of the employee occurs because management is seeking specific information regarding the actions of that employee.
2. The examination is conducted by a representative of the agency, that is any management official.
3. The employee has a reasonable belief that some form of disciplinary action will be taken as a result of the interview.
4. The employee requests union representation.

30. Does the interview or examination have to occur in connection with a formal investigation?

No, an "investigation" occurs even when a supervisor seeks information to determine whether discipline should be taken against an employee, for example, and the supervisor calls him or her into the office to determine if that is the case and, if so, why.

31. What if I obtain the services of an appropriate union representative yet the employee refuses to cooperate?

You may advise the employee that he or she can be disciplined for refusing to answer your questions. If the employee still refuses, then initiation of disciplinary action may well be warranted for the refusal to cooperate; contact the Employee Relations Office as soon as possible.

32. If the employee asserts his or her Constitutional Fifth Amendment right to silence, what do I do?

Contact the Labor Relations Office immediately. If there is a possibility of criminal charges, the Labor Relations Office will determine if the US attorney wishes to prosecute before you proceed with the interview. In cases where criminal charges are possible, an improper interview or improper grant of immunity could severely damage the government's criminal case. If there is to be no prosecution, or the matter does not involve criminal acts, you may give the employee a choice, as follows…

1. If you talk, the government cannot use what you say in a criminal prosecution against you; however, the Bureau of Indian Affairs can use what you say in an administrative disciplinary action against you.
2. If you refuse to talk, you can be disciplined (including removal) for refusal to talk.

Be sure your questions are narrowly focused. Ask the employee only about the specific misconduct you are investigating. Remember, if the employee asserts his or her Fifth Amendment right to silence, stop and contact the Labor Relations Office.

33. If I choose to conduct the investigatory interview with a union representative present, to what extent must I allow the union representative to participate in the interview?

The Supreme Court has said:

1. The purpose of the union representative is to assist the employee by clarifying facts or bringing our favorable information.
2. The employer may insist on hearing the employee's account of the incident.
3. The employer need not permit an argument to develop with the union representative.
4. The employer has no duty to bargain with the union representative.

34. Does this mean that I can force the union to be quiet during the interview?

Absolutely not. Although you may insist that the employee, not the union representative, answer your questions; you must allow the union representative an opportunity to clarify facts or bring out favorable information.

35. What do I do if the union representative becomes so argumentative as to completely disrupt the interview process?

Warn the union representative and employee that if the union representative continues to disrupt the meeting, you will be forced to end the interview and make your disciplinary decision on the basis of other information (without the benefit of the employee's input).

36. The union is forever criticizing me but I'm never allowed to respond, because my response would be a ULP, right?

This is not quite true. As a legal matter, Title VII of the Civil Service Reform Act, 5 U.S.C., Chapter 71, does allow freedom of expression for supervisors. Such expression, however, must not threaten or interfere with employee rights regarding union activity, membership or representation. For example, any statement you make

that may have a “chilling” effect upon an employee in the exercise of his or her rights may be a ULP. However, agency management may, in some instances, “correct the record” if erroneous or misleading union comments are made. In this regard, whether or not a manager’s statement is a ULP often depends on the particular circumstances surrounding the incident. The best advice we can give is to call the Labor Relations Office for advice before you say anything! This may be hard to do in the heat of an argument, but…

37. Must I give a union representative official time whenever he or she demands it?

No. Ordinarily, official time is granted subject to workload requirements; in other words, if the union representative is in the middle of a “rush” job, or if you have some important work for him or her to do, you can delay release (if otherwise appropriate). However, if the representative is temporarily denied release he or she must be released as soon as workload obligations allow.

38. What control do I have over the actions of a union steward who comes into my organization?

The steward must advise you of his or her presence, why he or she is there, and the anticipated duration of the visit.

39. My steward often refers to “past practice” as a reason for preventing changes in working conditions. What is “past practice”?

A “past practice” is nothing more than the way things have always been done. Such does not have to be written down in the labor contract, but can arise on the basis of regular, repeated action on your part (or inaction -- if you knowingly let something happen repeatedly). For example, allowing employees to leave early from the work site in order to clean up before going to lunch would be a “past practice” even if there is no contractual provision on the subject.

40. How can I tell if a “past practice” exists?

Generally, the existence of the four following factors will indicate that a “past practice” exists:

1. The practice was clear and applied consistently.
2. The practice was not a special, one-time benefit or meant at the time as an exception to a general rule.
3. Both the union and management knew the practice existed and management agreed with the practice or, at least allowed it to occur.
4. The practice existed for a substantial period of time and it had occurred repeatedly.

41. How can I change a “past practice” without committing a ULP?

Generally speaking, you cannot stop an established and accepted “past practice” unilaterally. Rather, you must give notice to the union of your intent to do so and, if the union so requests, engage in negotiations to try to resolve any differences.

42. What is meant by the term Impact and Implementation (I&I) Bargaining?
When an agency decides to act, two types of negotiations may result. First, negotiations on the decision itself may be in order. Second, negotiating on the effects of the decision (which is I&I bargaining) is generally required. Call the Labor Relations Office on all issues which may involve a bargaining obligation.