

ATTACHMENT 2G1

ELEMENTS OF COMMON VIOLATIONS

Violations of section 7116(a)(1) and (8) of the Statute:

FORMAL DISCUSSION - Section 7114(a)(2)(A) of the Statute

An exclusive representative has the right to be present at:

- Discussion that was--
- Formal (was meeting scheduled in advance; whether employees were required to attend; whether management officials above employees' first line supervisor attended; whether the meeting was held outside the regular work area; whether the meeting had an agenda, the duration of the meeting; whether minutes were taken of the meeting)--
- Between 1 or more Agency representatives and 1 or more unit employees or their representatives--
- Concerning any grievance or any personnel policy or practice or other general condition of employment.

See, e.g., F.E. Warren Air Force Base, Cheyenne, Wyoming, 52 FLRA No. 17, 52 FLRA 149, 155 (1996).

WEINGARTEN VIOLATION - Section 7114(a)(2)(B) of the Statute

An exclusive representative has the right to be present at:

- Examination of a unit employee in connection with investigation;
- By a representative of the Agency;
- Employee reasonably believes that examination against employee; and
- Employee requests representation

See, e.g., Headquarters, National Aeronautics and Space Administration, Washington, D.C., 50 FLRA No. 82, 50 FLRA 601, 606-22 (1995) (finding of violation against Headquarters where it is responsible for actions which affect one of its subcomponents), enforced sub nom. FLRA v. National Aeronautics and Space Administration, Washington, D.C., 120 F.3d 1208 (11th Cir. 1997), affirmed sub nom. National Aeronautics and Space Administration v. FLRA, 119 S. Ct. 1979 (1999).

Violation of section 7116(a)(1), (5) and (8) of the Statute:

DATA INFORMATION - Section 7114(b)(4)

To the extent not prohibited by law (e.g., the Privacy Act), an exclusive representative has the right to receive data from the agency, upon request, which is:

- Normally maintained;
 - Reasonably available;
 - Necessary
- union's particularized need weighed, if applicable,
- against agency's countervailing interest; and
- Information requested **must not** be guidance, advice, counsel, or training for management officials relating to collective bargaining.

See, e.g., Department of Health and Human Services, Social Security Administration, New York Region, New York, New York, 52 FLRA No. 113, 53 FLRA 1133, 1139-50 (1996).

Violation of section 7116(a)(1) and (2):

- Unit employee against whom the alleged discriminatory action was taken was involved in protected activity; and
- Such activity was a motivating factor in the Agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment

and

after GC meets burden, Respondent does not show, as an affirmative defense, that:

- There was a legitimate justification for its action; and
- The same action would have been taken even in the absence of protected activity.

See, e.g., United States Air Force Academy, Colorado Springs, Colorado, 52 FLRA 874, 878-79 (1997) (citing Letterkenny Army Depot, 35 FLRA No. 15, 35 FLRA 113 (1990)).

Violation of section 7116(a)(1) and (5):

UNILATERAL CHANGE IN CONDITIONS OF EMPLOYMENT:

- Without regard to the contract, the Agency gave no notice and opportunity to bargain over a change in condition of employment, and
- Change had more than de minimis impact on unit employees' conditions of employment--consideration of:

nature and extent of the effect (e.g., temporary or permanent, major or minor) or

reasonable foreseeable effect of the change

if established, consider whether Respondent has established "covered by" affirmative defense

See, e.g., General Services Administration, Region 9, San Francisco, California, 52 FLRA No. 112, 52 FLRA 1107, 1111 (1997); Air Force Materiel Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, 53 FLRA No. 88, 53 FLRA 1092, 1093 (1998) (rejection of "covered by" affirmative defense).

REPUDIATION OF THE PARTIES AGREEMENT:

- Nature and scope of the alleged breach of agreement (i.e., was the breach clear and patent); and

- Nature of the agreement provision allegedly breached (i.e., did the provision go to the heart of the parties' agreement).

See, e.g., Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Illinois, 51 FLRA No. 72, 51 FLRA 858, 861-62 (1996) (citing Department of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, 40 FLRA No. 106, 40 FLRA 1211 (1991).

Violation of section 7116(a)(1):

The standard for determining a violation:

Whether, under the circumstances, the Agency's statement or conduct would tend to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive influence from the statement.

See, e.g., U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky, 49 FLRA No. 97, 49 FLRA 1020, 1034 (1994).

INVESTIGATING AN ALLEGED MID-TERM CHANGE: SAMPLE QUESTIONS

To the charging party and witnesses:

Grievances: Has a grievance been filed which is any way related to this dispute? In writing?

The change: What was the alleged change? When did it occur? When did you first learn of the change? Do you have a practice and/or contractual procedure which requires notice and/or a settlement effort before a charge is filed? Why the delay in filing the charge after learning of the change?

Implementation: Was the change implemented or announced by a written document, for example, by memorandum? Do you have a copy? When and how did you or the union receive or become aware of this writing? Who else might have a copy if you don't? Can you point up the change as it appears in this writing? Was the announcement or implementation oral? Who was present? How were you informed if you weren't present? What was said?

Collective bargaining agreement(s): Please provide a copy of the applicable collective bargaining agreement(s)? Is the change here at issue related to anything in the collective bargaining agreement(s)? How is the Union usually informed of such matters? Are you claiming that the collective bargaining was violated or repudiated? How?

Negotiations/discussions at other levels: Have Union and Agency management representatives above the local (or below the national) discussed and/or negotiated concerning this issue? What is the relationship between those discussions and/or negotiations and this dispute?

Impact: How are employees affected by the change? Will they be doing different work or be expected to do more? Will they perform higher or lower graded work or work for which they are unsuited? Will they have different starting or quitting times, be away from their usual colleagues, or work in unusual, variable, or out of the way locations? Under differing supervision? Is there an impact outside of their work hours?

Contacts between the parties: Have you raised an issue about the change with Agency management, in writing or orally? Any documents exchanged? If there were oral contacts, when did they occur, who was present and what was said? Did you ask for information? Did you request bargaining? Were you asked to provide proposals? What were the proposals? What was management's

reaction? Are any further exchanges in writing or meetings planned? Do you need and desire settlement assistance?

Resolution desired: What settlement do you seek?

To the Charged Party

The Union is claiming that _____.

Change: Has there been a change? A change which affects employees' conditions of employment? A change which doesn't affect conditions of employment?

Implementation: If there was any change, how and when was the change implemented? In writing? Can you provide a copy? Orally? Who made the announcement, to whom? Can I speak to that person? Under what circumstances? Is there a unusual practice for notification? Was this practice followed? Any reason for a different practice on this occasion? Did the Union respond? Was a response requested?

Impact: Any affect on what work is performed, or when, where, how, or by whom it is performed? Any change in employee supervision or the manner in which employees will be appraised? Any change in employees' physical working conditions? A change in employees' contact with other employees or other persons?

Settlement discussions: Have management and union representatives discussed this issue? When? Who was present? Are the discussions continuing? Has management requested or received Union proposals? A management response?

Contact with management officials and supervisors: May we speak to the management officials and/or supervisors who were directly involved in the action which is being complained of. What would induce you to allow us to have such discussions?

Scope of bargaining issues and procedures: Have you claimed that the subject is outside of your duty to bargain under the Statute? In writing? Were there any other exchanges in writing between the parties connected with this dispute?

INVESTIGATING AN "EXAMINATION" OR "WEINGARTEN" SITUATION: SAMPLE QUESTIONS

Meeting: When did the meeting occur? Who initiated the meeting? Who was present? Was the employee and/or Union informed in advance? How? Was anything said before or during the meeting about the presence of a Union representative? Who said what on that subject? Was it done in writing?

Subject: What was discussed? Was that known in advance? Was the employee questioned? About the employee's work, conduct or behavior? About others' work, conduct or behavior?

Implications: Was anything said about discipline for anyone? For this employee or any other employee? Was the employee told that he or she had to answer the questions or that they must answer honestly? Was anything said about immunity from discipline for anyone? Are employees disciplined for the matters discussed at the meeting? How severe is the penalty, if any? Has discipline been proposed or imposed on anyone in connection with the matters discussed at the meeting?

Representation: Did the employee say or write anything before or during this meeting about his or her need or desire for Union assistance or Union representation? Concerning any assistance or representation? Did management's representatives respond? Any back and forth on this subject? Was the meeting delayed for this purpose? For how long? When and how was the union informed of the need for representation, if any? Do the parties have a common practice for these situations? How did it work here? Anything special or unusual about this situation?

Further investigation: Who else has direct knowledge of this situation? May we speak to them directly? Does any written record exist for what happened before, during, or as a result of this meeting?

Investigating an Allegation of “Discrimination”: SAMPLE QUESTIONS

Charging Party

Management’s Action: What management action is being complained of? When, how, where, and by whom was the action implemented or announced? Who was affected? How? What explanation was given, if any? Do you know of any records that exist or may exist which would show whether the action was or was not justified?

Protected Activity (to Union representatives and employee witnesses): Have any employees affected by the action been acting as Union representatives or been represented by the Union? Have they been promoting Union activity or trying to induce employees to engage in such activities? What were those activities? When did they take place? Does a written record of such activities exist? Were meetings involved? What was the subject of the meetings? Who was present? To your knowledge, what management officials were involved? How were they involved? Were the management officials involved the action complained of affected by these employee activities? Directly? Indirectly?

Is there any reason why the management officials taking the action might be sensitive to the employee’s protected activity, because of what they’ve done, how they did it, or behaved? Have these people, management officials and employees, had difficulties with each other?

Management’s action and animus: Did these management officials complain of the affected employees’ protected activities, to you or anyone else, orally or in writing? What comments? By whom? When?

Other explanations for the actions: Have these management actions or like actions been taken concerning the affected employees at other times? When? What explanations, if any, were given? Are there any explanations for the actions other than the explanation in your charge? Do you know of, or can you think of, any other explanation?

Charged Party

Management’s action: The Union is referring to _____ and is alleging that this action was taken in retaliation for employees’ protected activity. Can you furnish the written record(s) used to justify the action, if any, and any written record of the action itself? Can I speak with and take information from the management officials directly involved?

What action was taken? When? Who was affected? What explanation has been given or is being given for the action? Has this action or similar actions been taken for these employees at other times? When? Any written records? Who would explain the basis for the action?

Employees protected activities: What management officials were involved in the employees' protected activities, by being affected by the employees' protected activities or while acting as representatives for management? What other experiences have these management officials had in dealing with these employees, other employees, or Union representatives on these or related matters? Any other contacts of this type at all? Does any written record exist concerning these matters? Any witnesses?

Animus: Were any oral or written comments made to the affected employees or others regarding their protected activities? Is there any reason why the management officials taking the action might be sensitive to the employee's protected activity because of what the employees did, how they did it, or the way they behaved? Have these people, management officials and employees, had difficulties with each other?

INVESTIGATING AN “INFORMATION” ALLEGATION: SAMPLE QUESTIONS

Information request: What information or data was requested? Was the request made orally or in writing? When was the request made? Who made the request? To whom was the request made? Was this request made the way requests are usually made? Anything unusual about the request here?

Why is the Union making this request? What is the representation issue? How would this information, if furnished, help the Union with the representation issue? How does the Union expect to use this information? Was this explained to management, orally or in writing, when the request was made? In conjunction with or separate from the information request?

If the information concerns individual employees and the identity of the employees could be determined from the information supplied, by name, social security number, or other means, did the Union ask that the information be supplied with this data? Without such data? If the Union asked for the information with the personal identifier data included, did the Union explain why it needed the information in that form? As compared to getting the information without such data?

Management response: Did management respond to the request, orally or in writing? Did management ask for a clarification of what was being asked for? Did it ask for an explanation or clarification on why the Union needed this information or why the Union needed the information in the form in which it was requested? With or without personal identifiers? Did management inquire into how the Union planned to use the information?

Did management object to furnishing the information for any reason; for example, any of the reasons it could refer to under section 7114(b)(4)? What reasons? What rationale has management given or will not give to support this response?

If the information does contain personal identifiers data, is this information maintained in a system of records in accordance with the Privacy Act? What system of records? What are the “routine uses?” Is the Union a routine user?

Union response to management: Has the Union responded in any way to management’s response to the request? Orally or in writing? Can the Union adjust or narrow its request so that it meets management’s concerns or objections and still satisfy the Union’s informational need? Has the Union made such an effort? Has it been communicated to management?

Discussions and negotiations: Have one or both parties attempted to work out any disagreement(s) they may have about the request? Can management suggest a method for adjusting the request or its response to satisfy its concerns or objections and the Union's informational needs?

INVESTIGATING AN INDEPENDENT STATEMENT CASE OR (A)(1) VIOLATION: SAMPLE QUESTIONS

Independent (a)(1) violations: An independent (a)(1) violation arises when a statement is made by a management official or supervisor orally or in writing which expressly or impliedly interferes with, restrains, coerces any employee in the exercise by the employee of any right under the Statute. Statements which are not seen or heard and statements made by persons who lack influence over employees do not interfere with, restrain, or coerce employees.

Written statement: What is the written statement? Do you have a copy? Who wrote the statement? What is their position? Did someone else originate the statement or require or influence its writing? What is their position? How did you come to have a copy? Who else may have a copy? How was the statement distributed, if at all? Was it intended to be made available to a select group? Was it posted on a bulletin board? Who knows of the statement's existence and its contents? How did they come to know?

Was the statement in response to an action or statement by others? What action(s) or statement(s)? Has anything occurred regarding the statement's contents since it was made?

Oral statement: What was said? When? Who was present? Is it possible that someone not present heard the statement? Someone near the area or who may have been passing by? How do you know of the statement if you were not present? How did others, if any, come to learn of what was said?

Who made the statement? Was there anything in their statement, their behavior, or the context to suggest that they were speaking for themselves or others? Was the statement made in reaction to what others said or did? What may have been said or done? Has anything occurred regarding the statement's contents since it was made?

Purpose or effect: What is there in the context, when the statement was made, to explain its meaning? A history? What is the best interpretation of this statement that you could give, in favor of the writer or speaker? If the purpose or effect complained of is not readily apparent from the writing or what was said, how do you account for or explain that purpose or effect?

What is the problem with this statement? From your point of view? From others' point of view?

Remedy: What would remedy your complaint about this statement? How would you implement the remedy? Will this remedy improve or harm the parties' relationship in any way?