FOP NDW LABOR COMMITTEE
STEWARD TRAINING

FEBRUARY 24, 2020

PHIL GRIFFIN, CHAIRMAN

SHOP STEWARD TRAINING
July 10, 2017

What is a grievance?

Generally a grievance is a violation of a specific provision of the contract, past practice, written policy or settlement agreement but it is important to understand the definition in your contract, as every contract is unique.

What do I do if I think the employer is violating the contract, past practice, written policy or settlement agreement?

You are taking an important first step by getting educated about what a grievance is and preparing for the process before an issue arises. It is important to understand your contract's grievance procedure and the timelines that apply before a grievance occurs.

Every contract has a grievance procedure that outlines timelines and steps that must be followed when filing a grievance. If the timelines or steps are not followed the grievance may be deemed invalid regardless of merit. So it is important to understand the timelines and steps that apply in your contract.
Once you think an event has occurred which may give rise to a grievance contact your steward or union representative.

What information will the steward need from me in order to investigate a possible grievance?

The steward should help the grievant make a written complaint so that an investigation can be conducted. In order to investigate the validity of a grievance the steward will need to know:

Who is involved?
What happened?
When did the incident occur?
Where did the incident occur?
Why is this a grievance?
How should the issue be resolved?

How do I write a grievance?

It is important that the grievant work with you as a steward or union representative when preparing a grievance. If it is necessary to present a written formal grievance, you should contact your Executive Board member who can assist you - If our lawyer is needed, the Chairman will facilitate that process Your steward and union representative are prepared to support you in your presentation if you choose. You are not alone in this process.

Often times the first step in the grievance process is to raise the issue verbally to a first line supervisor to allow the opportunity for the grievance to be resolved informally at the lowest possible level. Often issues are resolved without ever putting them in writing.

Every contract process is unique and must be followed properly. Some contracts require the employee or steward to fill out a specific grievance form. Other agreements do not permit employees to file a grievance without assistance and approval of the union. Again, its is imperative that you understand your contract's grievance procedure.

What information should be included in a grievance?

Again, work with your steward and union representative to prepare a grievance, but generally a grievance states the date and time of the occurrence that gave rise to the grievance, who the grievance is addressed to, who it is from, the step the grievance is at in the grievance process, a short statement of facts, the sections of the contract violated, and the proposed remedy. Remember, each contract is unique and may have specific requirements of what information or forms must be presented as part of the grievance process.

When drafting a grievance it is very important to not limit the contract sections violated or the remedy. Although some contractual provisions are unique the following underlined phrases should be used in every grievance:
Management's actions violate the contract, including but not limited to, Section . . .
and _____,

The FOP requests that the grievant be made whole in every way, including but not limited to.. . . . including attorney fees and costs and any other relief the arbitrator deems necessary, appropriate and just.

The FOP requests a meeting concerning this grievance.

procedure.

ARTICLE 34

GRIEVANCE PROCEDURE

Section 34.01 **Definitions**

A grievance is any complaint by an employee concerning any matter relating to the employment of the employee; or by the Union concerning any matter relating to the employment of any unit employee; or by any employee, the Union or Employer concerning:

a. The effect or interpretation, or claim of breach of this agreement; or

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

Section 34.02 **Process**

The Employer and the Union recognize that disagreements will arise in a work situation. As a result, employees and supervisors are encouraged to attempt to resolve grievances or other work related concerns informally and at the lowest level possible. However, the Employer recognizes that employees, groups of employees, the Union or the Employer are entitled to file and seek resolution of grievances under the provisions of the negotiated grievance procedure. The Employer agrees not to interfere with, restrain, coerce or engage in any reprisal against an employee or Union representative for exercising the rights contained in this Agreement and this Article.

Section 34.03 **Procedures**

a. This procedure provides for the timely consideration of grievances. This article will be the exclusive procedure available to the Parties and the employees in the unit for resolving grievances. Any employee, group of

employees or the Parties may file a grievance under this procedure. The Parties shall cooperate to resolve the grievances informally at the earliest possible time and at the lowest possible supervisory level.

b. The Parties understand that grievances may be local or regional in nature. As such, the processing of regional grievances will begin at Step 3.

Section 34.04 **Exceptions**

This procedure shall not apply to any grievance concerning:

a. Any claimed violation of 5 U.S.C. Chapter 73, subchapter III (Relating to prohibited political activities).

b. Retirement, life insurance, or health insurance.

c. A suspension or removal under 5 U.S.C. 7532 (Relating to national security matters).

d. Any examination, certification, or appointment referred to in 5 U.S.C. 7121 (c)(4).

e. The classification of any position which does not result in the reduction-in-grade or pay of any employee.

f. The discharge of probationers or trial period employees.

g. Non-selection for promotion from a group of properly rated and ranked candidates except if such action is alleged to have been taken for discriminatory reasons prohibited by statute, that issue may be grieved under this procedure;

h. Filling of supervisory positions or other positions outside the bargaining unit;

i. The grant, or failure to grant, a quality step increase, cash award or honor award, or the adoption of, or failure to adopt, an employee suggestion or invention;

j. Written or verbal counselings, warnings, or notices of proposed actions;

k. An appeal by an employee of a reduction-in-force action;

l. Any matter affecting conditions of employment over which the Employer has no jurisdictional control (e.g., traffic violations, revocations of base decals, eligibility for a security clearance);

m. Letters of Requirement;

n. Denial of Voluntary Separation Incentive Pay or Voluntary Early Retirement; or

o. Any dispute concerning the application or interpretation of OMB Circular A-76.

Section 34.05 **EEO Limitations**

In matters relating to Equal Employment Opportunity; Prohibited Personnel Practices; Whistle Blowing; adverse actions; removal or reduction in grade for unacceptable performance; reduction in grade, reduction in pay; and a furlough of thirty (30) days or less, an aggrieved employee will have the option of utilizing this grievance Procedure or any other procedure available in law or regulation, but not both. An employee will have exercised that option when a grievance or appeal within a statutory procedure has been filed within the applicable time limits.

Section 34.06 **Union Representation**

Employees are entitled to be assisted by the Union in the presentation of grievances. Any employee or group of employees covered by this procedure may present grievances without the assistance of the exclusive representative, as long as the exclusive representative has been given the opportunity to be present during the grievance proceedings. No other individual(s) may serve as the employee's representative in the proceedings of a grievance under this procedure, unless approved and designated in writing by the Union. The right of individual presentation does not include the right of taking the matter to arbitration unless the Union agrees to do so.

Section 34.07 **Disciplinary Action**

In disciplinary and/or adverse action cases where a decision has been made in response to a notice of proposed disciplinary/adverse action, the grievance may be filed directly to the CNRNDW Operations Officer (N3) or designee within fifteen (15) days of the final decision.

Section 34.08 **Time Limitation**

A grievance must be initiated within thirty (30) calendar days of the incident or knowledge of the incident which gave rise to the grievance by the Union or the employee. Any grievance failing to comply with this time limit will not be presented or considered at a later time except by mutual consent of the Parties.

Section 34.09 **Necessary Information**

Employee, Union or Employer initiated grievances will be processed in accordance with the following steps and will contain, as a minimum, the following information:

a. The issue or occurrence giving rise to the grievance.

b. The provision(s) of this Agreement, law, rule, or regulation alleged to have been violated.

c. Relevant evidence and information.

d. The relief requested.

e. Whether a meeting is requested during Step 1.

STEP 1

An employee/representative will first present the grievance in writing to the Step 1 Employer representative (Chief of Police) with a copy transmitted to the HRO-W (faxed copy is acceptable). The Chief of Police will review the complaint and provide a written response within seven (7) calendar days of the receipt of the grievance.

STEP 2

If the employee/representative is not satisfied with the decision at Step 1, he/she may seek further consideration of the grievance by submitting the written grievance to the Step 2 Employer representative (Security IPD) within seven (7) calendar days of the receipt of the answer at Step 1. The IPD will provide a written decision within seven (7) calendar days of the receipt of the grievance.

STEP 3

If the employee/representative is not satisfied with the decision at Step 2, he/she may seek further consideration of the grievance by submitting the written grievance to the Step 3 Employer representative (Installation Commanding Officer (ICO)) within

seven (7) calendar days of the receipt of the answer at Step 2. The ICO will provide a written decision within seven (7) calendar days of the receipt of the grievance.

STEP 4

If the employee/representative is not satisfied with the decision at Step 3, he/she may seek further consideration of the grievance by submitting the written grievance to the Step 4 Employer representative (Regional Security Officer) within seven (7) calendar days of the receipt of the answer at Step 3. The Regional Security Officer will provide a written decision within seven (7) calendar days of the receipt of the grievance.

STEP 5

If the employee/representative is not satisfied with the decision at Step 4, he/she may seek further consideration of the grievance by submitting the written grievance to the Step 5 Employer representative (Deputy Operations Officer (Deputy N3)) within seven (7) calendar days of the receipt of the answer at Step 4. The Deputy N3 will provide a written decision within seven (7) calendar days of the receipt of the grievance.

Section 34.10 **Arbitration**

If the Employer's decision in Step 5 is unsatisfactory, the Union may invoke arbitration in accordance with this agreement.

Section 34.11 **Step Advancement**

At any step where the Union or employee does not advance the grievance to the next step, the grievance will be deemed resolved. Where the Employer fails to respond with the allotted period and no extension of time has been requested, the grievance will

advance to the next step.

Section 34.12 **Request for Time Extension**

Either party may request in writing and receive extensions of the time limits prescribed above.

Section 34.13 **Union Initiated/Employer Initiated Grievances**

Union or Employer initiated grievances will be filed directly with the Union Chair or the ICO or designee within fifteen (15) calendar days of the incident or knowledge of the incident which gave rise to the grievance. Any grievance failing to comply with this time limit will not be presented or considered at a later time except by mutual consent of the Parties. The Parties may extend all time limits in this Article by mutual consent. Such extensions shall be confirmed in writing. A final written decision will be issued within seven (7) calendar days of receipt of the grievance. If the decision is unsatisfactory, the Union or Employer, as the case may be, may invoke arbitration in accordance with this agreement.

Section 34.14 **Timeliness**

A complaint will not be arbitrable if a timely notification, as prescribed in Section 34.10 or 34.13 is not served on the other Party. Notification will not be deemed complete without the serving Party providing copy notification to the HRO-W Labor Relations Department.

ARTICLE 35

ARBITRATION PROCEDURE

Section 35.01 **Arbitration**

a. The Commandant or his designee shall be provided the opportunity to review unresolved grievances before Arbitration is invoked. Any time involved in this review does not count against submission timeframes specified in 35.01b.

b. Either the Union or the Employer may request a grievance be subject to arbitration. Arbitration requests must be submitted within forty five (45) days of the final step decision under the Grievance Procedure. Within ten (10) days, the Parties shall meet in an attempt to agree on an arbitrator and define the issue. If the Parties are unable to agree upon an arbitrator, they shall then immediately request the Federal Mediation and Conciliation Service (FMCS) submit a list of ten (10) arbitrators qualified to hear Federal sector issues. The Parties shall meet within five (5) working days after the receipt of such list. If they cannot agree upon one of the arbitrators, then the Employer and the Union will alternately strike one name from the list with a toss of the coin determining who strikes first. The Arbitrator's award shall be binding on both parties subject only to exceptions and appeals filed in accordance with Chapter 71 or 5 U.S.C.

c. The Arbitration hearing will be held, if possible, on the Employer's premises during regular day shift hours of the basic workweek. A reasonable number of participants, as determined by the Arbitrator during the pre-hearing, may attend without loss of pay if they are otherwise in a duty status. Such employees shall be excused from duty.

Section 35.02 **Scheduling/Official Time/Witnesses**

The Arbitrator will hear the grievance as promptly as practicable on a date and

site mutually agreeable to the Parties. The grievant will be given a reasonable amount of official time for preparation and to present the grievance. All requests to schedule such time will be made by an employee directly to his/her immediate supervisor. Employees who are called as witnesses will also be on official time. Only those individuals identified during the pre-hearing conference by the Union as witnesses and determined by the Arbitrator as essential participants will be released from duty to participate. The Employer agrees to adjust the schedules of witnesses to allow them to appear at the arbitration. Each party will bear the expense of its own witnesses. Each party will bear the expense of its own witnesses who are not employed by the employer or who are not located at the duty location where the grievance arose.

Section 35.03 **Pre-Hearing Procedures**

a. As soon as possible after the selection of the Arbitrator, but not later than ten (10) days before a scheduled hearing, the Parties will meet in an attempt to stipulate facts and issues in the case for joint submission to the Arbitrator. The meeting requirement may be met in person, by telephone or any other method the Parties agree upon. The Parties will exchange copies of exhibits they intend to present. This Section will not preclude a party from introducing rebuttal documents without prior notice. At this time, the Parties will also exchange lists of potential witnesses to the scheduled hearing. This Section will not preclude a party from introducing rebuttal witnesses without prior notice. The parties will provide the Arbitrator with a general description of the testimony each of the witnesses will offer. The Arbitrator will determine if each desired witness will be permitted to testify.

b. Where no material issues of fact exist, the Parties may agree to forego a formal hearing and present the grievance directly to the Arbitrator for a written decision based on stipulations and written submissions. In such circumstances, the Arbitrator will be authorized by the Parties to make findings and conclusions and issue an award based on those submissions.

c. If a party questions arbitrability, it will be raised no later than the pre-hearing conference. Arbitrability will be a threshold issue the Arbitrator must rule on before receiving testimony as to the merits of the dispute.

d. The Arbitrator will be provided with a copy of the Agreement at least seven (7) days prior to the pre-hearing conference. During the pre-hearing conference, the Parties will review the pre-hearing procedures that are contained in this Section.

Section 35.04 **Hearing Procedures**

a. The Arbitrator will have the following authority:

1. Administer oaths and affirmations;
2. Make determinations as to the calling, examining, and cross-examining of witnesses and introduction into record of documentary or other evidence;
3. Rule upon offers of proof and receive relevant evidence and stipulation of facts with respect to any issue; approve/disapprove cumulative evidence;
4. Limit lines of questioning or testimony, which are immaterial, irrelevant, unduly repetitious, or customarily privileged;

5. Regulate the course of the hearing, including ruling on motions when appropriate;
6. Draw any appropriate inference if a party fails to present facts or witnesses that the Arbitrator deems necessary.
7. Hold conferences for the simplification of the issues by consent of the Parties;
8. Request the Parties at any time during the hearing to state their respective positions concerning any issue in the case or theory in support thereof.
9. Continue the hearing from day to day, or adjourn it to a later date with appropriate notice;
10. Take official notice of any material fact not appearing in evidence in the record which is among the traditional matters of judicial notice;
11. Sequester or exclude witnesses where appropriate.

b. The Arbitrator will confine himself/herself to the precise issue submitted for arbitration and will have no authority to determine any other issues not so submitted to him/her. The Arbitrator will have no authority to change, alter, modify, delete or add to the terms and/or provisions of this Agreement.

Section 35.05 **Rights of the Parties**

The Parties will have the right to:

a. Appear in person or by representative.

b. Examine and cross-examine witnesses.

c. Introduce into the record relevant evidence.

d. Have a reasonable period prior to the close of the hearing for oral argument. Presentation of a closing argument does not preclude a party from filing a post hearing brief.

e. File a post hearing brief with the Arbitrator. No reply brief may be filed unless requested or approved by the Arbitrator with a copy served on the other party.

f. Have copies of all documents filed with the Arbitrator at any stage of the preceding simultaneously served on the other party.

Section 35.06 **Award**

The Arbitrator will submit his/her decision to the Parties as soon as possible, but in no event later than thirty (30) days following the close of the record before him/her unless the Parties mutually agree to a specific extension. The Arbitrator will make findings of fact and conclusions of law setting forth the basis of the decision. The decision of the Arbitrator is final and binding except that exceptions may be filed in accordance with Section 35.08. If post hearing briefs are to be filed and the Union's advocate is an employee of the Employer, official time in accordance with Article 20 will be granted to prepare the post hearing brief. The request to schedule such time will be made by an officer directly to his/her respective Chief of Police.

Section 35.07 **Expenses/Costs**

The Arbitrator's fees and expenses will be borne 50% by the Employer and 50% by the Union. If a verbatim transcript of the hearing is made and either party desires a copy of the transcript, the party will bear the expense of the copy or copies they obtain.

The Parties will share equally the cost of the transcript, if any, supplied to the Arbitrator. If, prior to the arbitration hearing or decision, the Parties resolve the grievance, any cancellation fee will be borne equally by the Parties. If a party requests arbitration and later withdraws the request for any reason other than resolution, or requests a delay in a scheduled arbitration, that party will pay the full cost of any cancellation fee and other charges imposed by the Arbitrator.

Section 35.08 **Exceptions to the Arbitrator's Award**

a. The Parties retain their rights under 5 U.S.C. 7122, 7123, and 7702.

b. Any exceptions to an award must be filed in accordance with the rules and regulations of the Federal Labor Relations Authority (FLRA).

c. The filing of an exception with the FLRA will serve to stay any implementation of the award until the Authority renders a final decision on the matter.

Section 35.09 **Expedited Arbitration**

a. By mutual consent and in cases other than disciplinary/adverse actions, either party may refer a particular grievance to expedited arbitration in lieu of the normal arbitration process in this procedure. An arbitrator will be selected as described in Section 35.01.

b. The hearing will be conducted as soon as possible and will be informal in nature. There will be no briefs and no official transcripts, and the Arbitrator will issue a decision as soon as possible, but no later than five (5) days after the official closing of the hearing, unless otherwise agreed between the Parties.

Section 35.10 **Right to Information**

The Union has the right to request information in accordance with Section 05.11.

Section 35.11 **Attorney fees**

In any event where a party petitions the Arbitrator for an award of attorney fees, the Parties will apply the procedures and precedent of the Merit Systems Protection Board in seeking an award of fees.

What is an Unfair Labor Practice (ULP)?

The Federal Service Labor-Management Relations Statute (the Statute) protects federal employees' rights to organize, bargain collectively, and participate in labor organizations of their choosing – and to refrain from doing so. A ULP is conduct by agencies or unions that violates rights that the Statute protects or the rules that it establishes.

You can find more detailed information about the various ULPs and filing and responding to a ULP charge on our ULP Resources page. Also, check out our frequently asked questions about the ULP-charge process. If you are ready to file, click here.

Employee Rights

Employees covered by the Statute have the right to form, join, or assist a union, or to refrain from such activity, without reprisal, including the right to:

- Organize, or attempt to organize, a union in the workplace
- Act as a union representative
- Seek union assistance
- File or pursue a grievance
- Refuse to form, join, or assist a union
- Be fairly represented by their union

Agency ULPs

An agency commits a ULP when it violates rights that the Statute protects. Examples include:

- Threatening an employee that her career would not go much further if she proceeded with her grievance
- Transferring an employee to an undesirable job because she filed a ULP charge
- Eliminating employees' compressed work schedules without giving their union notice and an opportunity to bargain over the change
- Refusing to grant an employee's request for a union representative during an investigatory (*Weingarten*) interview, when the employee reasonably fears discipline

Union ULPs

A union commits a ULP when it violates rights that the Statute protects. Examples include:

- Refusing to process a grievance because an employee is not a union member
- Threatening an employee for filing a ULP charge
- Refusing to negotiate in good faith with an agency
- Calling, participating in, or supporting a strike, work stoppage, or slowdown

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY

CHARGE AGAINST AN AGENCY

FOR FLRA USE ONLY
Case No.
Date Filed

1. AGENCY AGAINST WHICH CHARGE IS BROUGHT

a. Name of Charged Agency (include address, city, state, & ZIP)

b. Agency Representative (include name, title, address)

tel. fax

e-mail

2. CHARGING PARTY

a. Name of Charging Party (include address, city, state, & ZIP)

b. Charging Party Representative (include name, title, address)

tel. fax

e-mail

3. BASIS OF THE CHARGE

a. Set forth a clear and concise statement of the facts constituting the alleged unfair labor practice, including date and location of the particular acts.

b. Which subsection(s) of 5 U.S.C. 7116(a) do you believe the Agency has violated? (1) ☐ (2) ☐ (3) ☐ (4) ☐ (5) ☐ (6) ☐ (7) ☐ (8) ☐

c. Have you or anyone else raised this matter in any other procedure? No ☐ Yes ☐ If yes, where?

☐ Grievance Procedure
☐ Federal Mediation and Conciliation Service
☐ Federal Service Impasses Panel
☐ Equal Employment Opportunity Commission
☐ Merit Systems Protection Board
☐ Office of Special Counsel
☐ Other Administrative or Judicial Proceeding
☐ Negotiability Appeal to FLRA
☐ Other _____

4. DECLARATION

I DECLARE THAT I HAVE READ THIS CHARGE AND THAT THE STATEMENTS IN IT ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF.
I UNDERSTAND THAT MAKING WILLFULLY FALSE STATEMENTS CAN BE PUNISHED BY FINE AND IMPRISONMENT, 18 U.S.C. 1001.

THIS CHARGE WAS SERVED ON THE PERSON IDENTIFIED IN BOX 1b BY [check all appropriate boxes]

☐ In Person ☐ 1st Class Mail ☐ Fax ☐ Commercial Delivery ☐ Certified Mail ☐ e-mail (see reverse)

Type or Print Your Name | Your Signature | Date

Form Exempt Under 44 U.S.C. 3512

FLRA Form 22 (Rev. 10/2014)

INSTRUCTIONS FOR COMPLETING FORM 22:

General

Use this form if you are charging that a federal agency committed an unfair labor practice under paragraph (a) of section 7116 of the Federal Service Labor-Management Relations Statute. File an original form with the appropriate Regional Director, Federal Labor Relations Authority. If you do not know that address, go to the FLRA's website at www.flra.gov or contact the Office of the General Counsel, Federal Labor Relations Authority, (202) 218-7910. If filing the charge by fax, you need only file a fax-transmitted copy of the charge (with required signature) with the Region. You assume responsibility for receipt of a charge. A charge is a self-contained document without a need to refer to supporting evidence and documents that are also submitted to the Regional Director along with the charge. If filing a charge by fax, do **not** submit supporting evidence and documents by fax. See 5 C.F.R. Part 2423 for an explanation of unfair labor practice proceedings and, in particular, §§ 2423.4 and 2423.6, which concern the contents, filing, and service of the charge and supporting evidence and documents.

Instructions for filling out each numbered box

#1a. Give the full name of the agency, and component if applicable, you are charging and the mailing address, including the street number, city, state, zip code. If you are charging more than one agency or component with the same act, file a separate charge for each agency or component.

#1b. Give the full name, title, and other contact information for the agency's representative. Be as specific and as accurate as possible.

#2a. Give the full name of the union or individual filing the charge and the mailing address, including the street number, city, state, zip code. If the union is affiliated with a national organization, give both the national affiliation and local designation.

#2b. Give the full name, title, and other contact information for you or your representative. Providing all available contact information, especially e-mail addresses, will assist the investigation of your charge.

#3a. It is important that the basis for the charge be *brief* and *factual*, rather than opinion. Describe what happened that constitutes an unfair labor practice, who did it, where it occurred and when.

-Give dates and times of significant events as accurately as possible.
-Give specific locations when important, e.g., "The meeting was held in the auditorium of Building 36."
-Identify who was involved by title, e.g., "Chief Steward Pat Jones" or "Lou Smith, the File Room Supervisor."
-Tell what happened, in chronological order.

#3b. Identify which one or more of the following subsections of 5 U.S.C. 7116(a) has or have allegedly been violated. Subsection (1) has already been selected for you because a violation of (2) through (8) is an automatic violation of (1). List all sections allegedly violated:

7116(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency-

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;
(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;
(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;
(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;
(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;
(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or
(8) to otherwise fail or refuse to comply with any provision of this chapter.

#3c. If you or anyone else that you know of has raised this same matter in another forum, check the appropriate box or boxes.

#4. Type or print your name. Then sign and date the charge attesting to the truth of the charge and that you have served the charged party (individual named in box #1b). Check the box or boxes for all the methods by which you served the charge. You may serve the charge by e-mail only if the Charged Party has agreed to be served by e-mail.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY

CHARGE AGAINST A LABOR ORGANIZATION

FOR FLRA USE ONLY
Case No.
Date Filed

1. CHARGED LABOR ORGANIZATION

a. Name of Charged Labor Organization (include address, city, state, & ZIP)

b. Charged Labor Organization Representative (include name, title, address)

tel. fax

e-mail

2. CHARGING PARTY

a. Name of Charging Party (include address, city, state, & ZIP)

b. Charging Party Representative (include name, title, address)

tel. fax

e-mail

3. BASIS OF THE CHARGE

a. Set forth a clear and concise statement of the facts constituting the alleged unfair labor practice, including date and location of the particular acts.

b. Which subsection(s) of 5 U.S.C. 7116(b) and/or (c) do you believe the Labor Organization has violated?
716(b)(1) ☐ (b)(2) ☐ (b)(3) ☐ (b)(4) ☐ (b)(5) ☐ (b)(6) ☐ (b)(7) ☐ (b)(8) ☐ 7116(c)(1) ☐ (c)(2) ☐

c. Have you or anyone else raised this matter in any other procedure? No ☐ Yes ☐ If yes, where?

☐ Grievance Procedure
☐ Federal Mediation and Conciliation Service
☐ Federal Service Impasses Panel
☐ Equal Employment Opportunity Commission
☐ Merit Systems Protection Board
☐ Office of Special Counsel
☐ Other Administrative or Judicial Proceeding
☐ Negotiability Appeal to FLRA
☐ Other _____

4. DECLARATION

I DECLARE THAT I HAVE READ THIS CHARGE AND THAT THE STATEMENTS IN IT ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF.
I UNDERSTAND THAT MAKING WILLFULLY FALSE STATEMENTS CAN BE PUNISHED BY FINE AND IMPRISONMENT, 18 U.S.C. 1001.

THIS CHARGE WAS SERVED ON THE PERSON IDENTIFIED IN BOX 1b BY [check all appropriate boxes]

☐ In Person ☐ 1st Class Mail ☐ Fax ☐ Commercial Delivery ☐ Certified Mail ☐ e-mail (see reverse)

Type or Print Your Name | Your Signature | Date

Form Exempt Under 44 U.S.C. 3512

FLRA Form 23 (Rev. 10/2014)

30 022

INSTRUCTIONS FOR COMPLETING FORM 23:

General

Use this form if you are charging that a labor organization or its agents committed an unfair labor practice under paragraph (b) and/or (c) of section 7116 of the Federal Service Labor-Management Relations Statute. File an original form with the appropriate Regional Director, Federal Labor Relations Authority. If you do not know that address, contact the Office of the General Counsel, Federal Labor Relations Authority, (202) 218-7910. If filing the charge by fax, you need only file a fax-transmitted copy of the charge (with required signature) with the Region. You assume responsibility for receipt of a charge. A charge is a self-contained document without a need to refer to supporting evidence and documents that are also submitted to the Regional Director along with the charge. If filing a charge by fax, do not submit supporting evidence and documents by fax. See 5 CFR Part 2423 for an explanation of unfair labor practice proceedings and, in particular, §§ 2423.4 and 2423.6, which concern the contents, filing, and service of the charge and supporting evidence and documents.

Instructions for filling out each numbered box

#1a. Give the full name of the labor organization (including the name of the local and number and its national or international affiliation, if any) you are charging and the mailing address, including the street number, city, state, zip code. If you are charging more than one labor organization with the same act, file a separate charge for each labor organization.

#1b. Give the full name, title and other contact information for the labor organization's representative. Be as specific and as accurate as possible.

#3b. Identify which one or more of the following subsections of 5 U.S.C. 7116(b), and/or (c) has or have allegedly been violated. List all sections allegedly violated:

7116(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization-
(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
(2) to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;
(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;
(4) to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;
(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;
(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;
(7) (A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or
(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or
(8) to otherwise fail or refuse to comply with any provision of this chapter.

7116(c) For the purpose of this chapter it shall be an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by such exclusive representative except for failure-
(1) to meet reasonable occupational standards uniformly required for admission, or
(2) to tender dues uniformly required as a condition of acquiring and retaining membership. This subsection does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or by laws to the extent consistent with the provisions of this chapter.

#3a. It is important that the basis for the charge be *brief* and *factual*, rather than opinion. Describe what happened that constitutes an unfair labor practice, who did it, where it occurred and when.
-Give dates and times of significant events as accurately as possible.
-Give specific locations when important, e.g., "The meeting was held in the auditorium of Building 36."
-Identify who was involved by title, e.g., "Chief Steward Pat Jones" or "Lou Smith, the File Room Supervisor."
-Tell what happened, in chronological order.

#2a. Give the full name of the Charging Party and the mailing address, including the street number, city, state, zip code. If a union, and affiliated with a national organization, give both the national affiliation and local designation. If an agency, give the name of the agency and, if applicable, component.

#2b. Give the full name, title, and other contact information for you or your representative. Providing all available contact information, especially e-mail addresses, will assist the investigation of your charge.

#3c. If you or anyone else that you know of has raised this same matter in another forum, check the appropriate box or boxes.

#4. Type or print your name. Then sign and date the charge attesting to the truth of the charge and that you have served the charged party (individual named in box #1b). Check the box or boxes for all the methods by which you served the charge. You may serve the charge by e-mail only if the Charged Party has agreed to be served by e-mail.

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Part 3 - Investigatory Examinations

A. Purpose of the Right

The right in the Statute for union representation during investigatory examinations is premised on the similar private sector right of employees established by the Supreme Court in NLRB v. J. Weingarten, Inc., 420 U.S. 251, 95 S. Ct. 959 (1975) (Weingarten). [n29] When enacting the Statute, Congress fashioned section 7114(a)(2)(B) after the Court's holding in Weingarten, and as a result, the term "Weingarten rights" is commonly referred to in the Federal sector when referencing the union's right to be present at an investigatory interview under section 7114(a)(2)(B). [n30]

The purpose of allowing an employee in an investigatory examination situation to seek union representation is to ensure that the agency can accomplish the purpose of the investigation -- to obtain all of the relevant facts and explore all issues regarding the matter under investigation. The right was not intended to allow an employee or his/her union to "hide" or confuse the facts, to refuse to answer or mislead investigators, or to delay or impede investigations. Rather, the right was intended to allow an employee, who may be nervous, fearful or inarticulate under the circumstances, the opportunity to raise all relevant facts and issues related to the matter under investigation. This interest should be consistent with the agency's interest in investigating the matter in the first instance. In fact, if implemented properly, an agency should welcome a union representative at these types of investigatory examinations because the union representative's presence should result in a more thorough and complete investigation.

B. Elements of an Investigatory Examination

1. Statutory Language

Section 7114(a)(2)(B) of the Statute provides:

§ 7114. Representation rights and duties.

(a). . . . . .

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at-

. . . . . .

(B) any examination 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.

(3) Each agency shall annually inform its employees of their rights under paragraph (2)(B) of this subsection.

Thus, in order for the section 7114(a)(2)(B) investigatory examination right to exist: (1) there must be a meeting between an employee and a representative of the agency; (2) the meeting must constitute an examination in connection with an investigation; (3) the employee must reasonably fear discipline; and (4) the employee must request union representation.

2. Participants at the Meeting

a. Employee in the Unit

The investigatory examination right to representation applies only to employees in a bargaining unit. Unlike the private sector Weingarten right which has been extended to unrepresented employees by a recent decision of the National Labor Relations Board, [n31] the right under the Statute is limited to the specific circumstances set forth in section 7114(a)(2)(B). That section limits the right to an employee in an appropriate unit.

b. Representative of the Union

Similarly, contrary to the private sector, [n32] the right to represent does not extend to any representative other than the union that exclusively represents the appropriate bargaining unit. Although the union may designate the individual to serve as its representative at a particular examination, that choice belongs to the union and not to the employee. For example, a union could designate a private attorney to serve as the union's representative at the investigatory examination, but the employee could not choose to be represented by a private attorney unless the union agreed to designate that attorney as the union representative. Moreover, the presumption that a union can designate the particular individual it wants as its representative may be rebutted where the agency can demonstrate "special circumstances" that warrant precluding that particular individual from serving. [n33] It may be necessary to postpone an examination because a particular union representative is not available, depending upon such factors as whether: the representatives' unavailability was caused by the agency, other capable representatives were available, and the impact of the postponement on the investigation. [n34]

c. Representative of the Agency

In most instances, the representative of the agency who conducts an investigatory examination will be the first or second level supervisor or, at a minimum, a manager from the same agency/organization as the employee being investigated. In these types of situations, there usually is no disagreement whether an agency representative participated in the meeting.

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The Authority also routinely has found that an agency is responsible for the conduct of investigators who are not part of the organizational segment where the investigation occurs and the employee is employed, but rather who are employed by another office within the same agency. [n35] Similarly, the Authority routinely has found that an agency is responsible for the conduct of investigators who are not part of the same agency where the investigation occurs and employee is employed, but rather who are employed by another agency within the same Federal Department. [n36]

However, one issue which had been in dispute was resolved when the Supreme Court affirmed the Authority's and the Eleventh Circuit's decisions that an Office of the Inspector General investigator is a "representative of the agency" when examining a bargaining unit employee who reasonably fears that discipline might result from the examination. [n37] The Court rejected the argument that "representative" is limited to the entity that collectively bargains with the union. The Court also held that the Authority's decision is consistent with the Inspector General Act, which provides that an agency's OIG investigators are "employed by, act on behalf of, and operate for the benefit of" that agency. [n38] The Authority also reaffirmed that the Supreme Court's decision did not disturb precedent that the investigatory examination right to representation extends to criminal investigations. [n39]

Situations also arise, however, where an investigatory examination of a unit employee is undertaken by an outside law enforcement entity, such as a local sheriff's office or the Federal Bureau of Investigation. In my view, in those situations, the law enforcement entity does not serve as an agency representative. Nonetheless, the participation of an agency representative in that exam may satisfy the requirement that the interview be by a representative of the agency. [n40] Thus, in those situations, factors such as the agency representative's assistance in setting up the interview, presence during the interview, and participation at the interview would be relevant.

3. An Examination in Connection with an Investigation

a. Factors to Consider

In order to trigger the investigatory examination right in the federal sector, there must be an examination in connection with an investigation. The term "examination" is not defined by the Statute. Thus, the Authority examines the totality of circumstances surrounding each particular meeting and considers such factors as whether the meeting: (1) was designed to ask questions and solicit information from the employee; [n41] (2) was conducted in a confrontational manner; (3) was designed to secure an admission from the employee of wrongdoing; and/or (4) required the employee to explain his/her conduct. [n42]

b. Performance Meetings and Counseling Sessions

Agencies routinely meet with employees to discuss performance matters. Some of these meetings involve merely reviewing an employee's individual work plan or development plan, while others involve concerns over the quality, quantity or timeliness of the employee's work performance. These latter meetings are commonly referred to as performance counseling sessions. Applying the above factors, the Authority has held that a meeting conducted for the sole purpose of informing the employee of a decision which has already been reached, or for counseling an employee on individual performance is not an "examination" under section 7114(a)(2)(B). [n43] However, note that the title or

characterization of the meeting given by a manager to describe a meeting does not control whether the meeting, in fact, is a counseling session or an investigatory examination. Similarly, a meeting that starts off as a performance counseling session may turn into an examination in connection with an investigation dependent upon the dialogue and dynamics of the meeting. [n44]

4. Reasonable Belief of Discipline

An employee must reasonably believe that the examination may result in disciplinary action against the employee to trigger the investigatory examination representational right. The reasonable belief determination is based on an evaluation of objective, rather than subjective factors. [n45] A reasonable belief of discipline can be found even if the agency did not contemplate discipline at the time of the exam. It is the possibility rather than the inevitability of future discipline that determines the right to representation. [n46]

5. Employee Request for Union Representation and Agency Response

An employee's request for representation must be sufficient to put the employer on notice of the employee's desire for representation and need not be made in any specific form, but rather depends upon the facts of each case. [n47] As noted in the strategy section at Section E.2. and 3., an agency should clarify a statement if it is uncertain if a request has been made. The failure to do so has been viewed as a denial which effectively prohibits the employee from making the request clearer and forecloses further discussion to clarify the request. [n48]

If an employee makes a valid request for representation, an agency has three options: (1) grant the request, (2) discontinue the interview, or (3) offer the employee the choice between continuing the interview without representation or having no interview. [n49] If, after having been given the option of continuing an interview without representation or having no interview at all, an employee elects to continue without representation, the right to representation has been waived.

6. Union Representative Participation at the Examination

The union representative at an investigatory examination has the right to take an active role. This includes the freedom to assist and consult with the affected employee. [n50] However, the Statute does not grant a per se right to engage in private conferences outside the presence of an investigator during an investigatory examination. [n51] Rather, the Authority will evaluate all of the agency's actions to determine whether they interfered with the active and effective participation by the union representative. Thus, some situations may call for a private conference. Moreover, the union's involvement must not interfere with the legitimate interests and prerogatives of the agency, recognized by the Supreme Court in Weingarten and by the Authority, in achieving the objective of the examination, preserving the integrity of the investigation, and avoiding an adversarial contest. [n52]

7. Union Right to Information About the Examination

Since effective representation at an investigatory examination often would be difficult or impossible in the absence of necessary information, information requested in connection with a union's representation of an employee at such an investigation is relevant to the representational function of the union under the Statute. Adopting the private sector

standard, [n53] the Authority balances the right of a union to obtain relevant information for an investigatory examination against the interests of an agency employer in investigating and disciplining misconduct. [n54] Thus, there is no general right to discovery and the agency need not reveal its case nor the information it thus far has obtained. However, the representation right does encompass access to information that will allow the union to become familiar with the employee's circumstances and to effectively assist the examined employee and participate in the interview. [n55]

8. Unfair Labor Practice Remedy

a. Traditional Remedy for an Investigatory Examination Violation

In addition to a traditional cease and desist order and a remedial posting, where there has been a denial of representation rights under section 7114(a)(2)(B) and discipline has ensued, the Authority orders the agency, upon request of the union and the employee, to repeat the investigatory interview and to afford the employee full rights to union representation. [n56] After repeating the investigatory interview, the agency is ordered to reconsider the disciplinary action taken against the employee. [n57] If on reconsideration the agency concludes that the disciplinary action was unwarranted or that a mitigation of the penalty is warranted, the employee is made whole for any losses suffered to the extent consistent with the agency's decision on reconsideration. [n58] The agency is required to notify the employee of the results of the reconsideration, including whatever make- whole actions are to be afforded the employee and, if relevant, afford the employee any grievance or appeal rights that may exist under the parties' negotiated agreement, law or regulation with respect to the agency's action in reconsidering the disciplinary action. [n59]

b. When A Traditional Make-Whole Remedy for an Investigatory Examination Violation is Appropriate

Where a disciplinary action has been taken because the employee engaged in protected activity, a traditional make-whole remedy is appropriate. [n60] For example, the imposition of discipline for requesting a representative at an investigatory interview would be remedied by a traditional make-whole order.

c. Evidence to Establish a Make-Whole Remedy for an Investigatory Examination Violation

To determine whether a make-whole remedy is appropriate to remedy an investigatory examination violation, evidence should be developed to establish:

- whether the reason that the employee was disciplined was for asserting a right to representation, or for not attending the meeting without a representative, or for another reason; and

- whether other employees had received similar discipline for a similar reason.

C. What Should Happen at an Investigatory Examination -- Role of the Parties

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As noted above at section A of this Part, an agency is entitled to conduct investigatory examinations. The union is also entitled to actively participate on behalf of the unit employees who request a union representative. As noted above in Section B.6. of this Part describing the legal parameters of the union's right to actively participate, a balance must be struck between the agency's right to conduct the investigation and examine the employee, and the union's right to represent the employee. These two interests are not in conflict, and if implemented properly, may coexist and result in obtaining the most relevant information from the exam. However, if either party does not understand or accept its role, the potential for conflict remains great.

As with formal discussions, it is my view that a lack of a common understanding of both parties' roles at investigatory examinations often gives rise to conflict. The purpose of the examination should be for the agency to obtain all relevant information to enable the agency to determine what action, if any, is required on the matter under investigation. If the agency officials conducting the examination view themselves as detectives seeking a confession, agencies should not be surprised that a union representative might engage in tactics to thwart any attempt to incriminate the employee. On the other hand, the role of the union representative as originally envisioned by the Supreme Court is to assist the employee in providing all relevant information known to the employee. If a union representative attempts to hide facts or impede the examination, the union should not be surprised if an agency goes to great lengths to avoid having a union representative present. The employee's role at the examination is to be honest and frank in responding to questions. It is the employee's responsibility to answer the questions -- not the union representative's. The union representative may clarify questions, provide exculpatory evidence and explanations, point out the context of the events, and raise contract issues and other union institutional interests. Absent a firm understanding and appreciation of the parties' respective roles, not only is there a potential for conflict, but also a diminished chance for a successful examination.

D. Investigatory Examination Checklist

The following are questions which may assist union representatives and agency officials to determine whether a planned meeting is an investigatory examination. The goal is make the proper determination before a meeting occurs, rather than evaluating whether the agency violated the Statute after the meeting has taken place.

INVESTIGATORY EXAMINATION ELEMENT	FACTOR INDICATING AN INVESTIGATORY EXAMINATION	FACTOR NOT INDICATING AN INVESTIGATORY EXAMINATION
PARTICIPANTS	Do you intend to have an agency or department employee, or a contractor as a substitute for the agency, conduct the exam?	Do you intend to have an outside law enforcement official not affiliated with the agency or department, without agency or department participation, conduct the exam?
PARTICIPANTS	Do you intend to examine a unit employee?	Do you intend to examine an employee who is not in the bargaining unit?

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EXAMINATION IN CONNECTION WITH AN INVESTIGATION	Do you intend to ask questions of, or solicit information from, the employee about a matter under investigation?	Do you intend to ask questions about a routine workplace issue?
EXAMINATION IN CONNECTION WITH AN INVESTIGATION	Do you intend to secure an admission from the employee or ask the employee to explain his/her conduct?	Do you intend to ask the employee for his/her opinions on a topic?
REASONABLE BELIEF OF DISCIPLINE	If you were in the employee's place, and under the circumstances, would you be concerned that a response could "get you in trouble with " management?	If you were in the employee's place, and under the circumstances, would you have no "worries" about providing any information about the topic under investigation?
REQUEST FOR REPRESENTATION	Did the employee make a clear request for representation?	Did the employee make no request for representation?

The following is a general list of the actions which an exclusive representative may and may not take with respect to an investigatory examination.

UNIONS CAN - -	UNIONS CANNOT - -
Designate its own representative to represent the employee at the exam, absent special circumstances	Designate a representative whose participation as a representative will interfere with the employer's interest in achieving the objective of the investigation or compromise its integrity
Ask management for a short delay so that a representative versed in the subject matter of the exam may attend to represent the union	Unreasonably delay the exam because a particular representative is not able to attend at the scheduled time
	Insist that more than one union representative attend
Ask management what the investigation is about	Demand that all questions to be discussed or documents to be referred to at the meeting be given first to the union representative before the meeting
Briefly consult with the employee before the exam	Delay the exam
Raise relevant facts and issues related to the investigation	Hide or confuse facts, mislead the investigators or delay or impede the investigation

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coworker or private attorney. Making clear requests should eliminate any conflict over this issue.

2. Train Agency Officials to Differentiate a Denial of a Request for a Union Representative From a Statement that the Agency Does Not Believe a Representative Is Required Under the Circumstances.

Similar to disputes over whether there has been a request, there also are disputes over whether there has been a denial. Again, it is in the interest of the union, the agency, and the employee that denials of requests be clear. If an employee is uncertain, the employee should specifically ask if his/her request is being granted or denied. If an agency is attempting to explain why it does not believe that a representative is warranted, the agency official should be clear that the agency is not denying the request, but merely engaging in a non-coercive discussion. Agency officials also must be cognizant of the difference between discussing why it does not think a union representative is warranted and coercing an employee into not exercising the right to request a union representative. [n61] Making intentions clear should eliminate conflict over whether there has been a denial.

3. Train Agency Officials to Understand The Options When an Employee Requests Union Representation.

As discussed above at section B.5., when a employee requests a union representative the agency may grant the request, terminate the exam of the employee, or offer the employee the option of either continuing without a representative or not continuing the examination. When choosing the last option, the agency must be certain not to do so in a manner that interferes with, restrains or coerces the employee into continuing the exam without a representative. For example, an agency official may not imply that the employee will be disciplined on the underlying matter if the employee does not continue without a representative. Another option, of course, is for the agency to act at its peril based on its legal opinion that there is no right to a union representative at that particular meeting. Again, whatever course of action is taken, the agency must be clear so that all participants may intelligently evaluate and select their options.

4. Issues Concerning the Identity of the Representative and the Scheduling of the Examination

Although the union has the right to select its representative, disputes often arise when the particular representative is not available at the time the agency schedules the examination. As with formal discussions, an agreement between the union and the agency which establishes factors for the parties to consider when an exam is scheduled may alleviate these types of problems. [n62] If the union designates a particular representative who is not available for the scheduled meeting, the agency may consider postponing the interview if it does interfere with the investigation. If the interview cannot be postponed, the agency should explain its reasons to the union and ensure that the union has an opportunity to select another representative. Recall, it is the union, and not the employee or the agency, that controls the designation of the union representative.

5. Sharing Information Prior to an Examination

Again, as noted above at section B.7., the type and amount of information required to be supplied by an agency to a union representative will vary depending upon the particular

facts of each situation. The parties may avoid disputes over sharing information by agreeing upon either a protocol or factors to consider that address whether any information about the exam will be shared before the exam takes place, and whether an employee will be allowed to meet with the union representative prior to the exam. If these issues are addressed through the collective bargaining process, there will be a guide for both parties that addresses their interests.

6. Clarifying the Role of The Union Representative

Similarly, general agreement upon the role of the union representative should curtail subsequent allegations that an agency allowed a representative to be present at an investigatory examination but not to participate. Educating agency officials and union representatives on the role of the representative, the role of the agency officials participating in the exam, and the obligation of the employee being interviewed to cooperate should alleviate many potential problems. For example, union and agency participants should have a common understanding of the difference between a union representative consulting with an employee and clarifying a question or answer from answering questions for the employee and delaying and disrupting the interview. Should a dispute arise during the exam, the parties should articulate their concerns and seek an accommodation, as opposed to abruptly terminating the interview. If the parties share expectations before the exam begins, there should be few disputes over the role of the union representative.

Footnote # 29 - Part III

In *Weingarten*, the Supreme Court explained that when an employee is questioned during an investigatory examination which the employee perceives may result in discipline, the employee "may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors[,]" whereas "[a] knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview." Id. at 263. The Court also stated that an exclusive representative's presence at the interview "safeguard[s] not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly." *Id.* at 260-61.

Footnote # 30 - Part III

Federal Bureau of Prisons, Office of Internal Affairs, Washington, D.C. and Federal Bureau of Prisons, Office of Internal Affairs, Aurora, Colorado and Federal Bureau of Prisons, Federal Correctional Institution Englewood, Littleton, Colorado, 54 FLRA No. 133, 54 FLRA 1502, 1509 (1998) (*FCI Englewood*), *citing Legislative History* at 926 (1979).

Footnote # 31 - Part III

Epilepsy Foundation of Northeast Ohio, 331 NLRB No. 92 (2000) (the Board recently reversed existing precedent and held that the *Weingarten* rights extend to employees in nonunionized workplaces, returning to the rule established from 1982 to 1985 by *Materials Research Corp.*, 262 NLRB 1010 (1982)).

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Footnote # 32 - Part III

Good Samaritan Nursing Home, 250 NLRB 207 (1980) (a unionized employee may request that a co-worker or a union representative be the representative).

Footnote # 33 - Part III

FCI Englewood, 54 FLRA at 1513 (no special circumstances establishing harm to the integrity of the interview by allowing a union representative who also was a witness to the incident under investigation).

Footnote # 34 - Part III

U.S. Immigration and Naturalization Service, New York District Office, New York, New York, 46 FLRA No. 114, 46 FLRA 1210, 1223 (1993) (no obligation to postpone the exam under the circumstances, although it "would have better served all parties' interests").

Footnote # 35 - Part III

See, e.g., Department of Justice, Immigration and Naturalization Service, Border Patrol, El Paso, Texas, 36 FLRA No. 6, 36 FLRA 41, 50 (1990), *remanded sub nom. on other issues Department of Justice, Immigration and Naturalization Service, Border Patrol, El Paso, Texas v. FLRA*, 939 F.2d 1170 (5th Cir. 1991) (INS Office of Professional Responsibility (OPR) investigators were "representatives" of INS for purposes of section 7114(a)(2)(B) and INS was responsible for the conduct of its organizational entity, OPR, even though OPR agents were acting under the direction and oversight of the U.S. Attorney).

Footnote # 36 - Part III

See, e.g., Department of Defense, Defense Criminal Investigative Service, Defense Logistics Agency and Defense Contract Administration Services Region, New York, 28 FLRA No. 150, 28 FLRA 1145 (1987) (DCIS), *enforced sub nom. Defense Criminal Investigative Service, Department of Defense v. FLRA*, 855 F.2d 93 (3rd Cir. 1988) (DCIS (part of DOD) investigators acted as representatives of DOD within the meaning of section 7114(a)(2)(B) when investigating DLA employees about alleged involvement in a shooting).

Footnote # 37 - Part III

National Aeronautics and Space Administration, Washington, D.C. and NASA, Office of the the Inspector General v. FLRA, 119 S. Ct. 1979 (1999) *affirming, FLRA v. National Aeronautics and Space Administration, Washington, D.C.*, 120 F.3d 1208 (11th Cir. 1997), *affirming*, 50 FLRA No. 82, 50 FLRA 601 (1995).

Footnote # 38 - Part III

Id. 119 S. Ct. at 1985.

Footnote # 39 - Part III

U.S. Department of Justice, Washington, D.C. and U.S. Department of Justice, Office of the Inspector General, Washington, D.C., 56 FLRA No. 87, 56 FLRA 556, 560 (2000) (the relationship between the Office of Inspector General and the agency does not change when a criminal matter is investigated).

Footnote # 40 - Part III

DCIS, 28 FLRA at 1149 (section 7114(a)(2)(B) applies to OIG investigations that involve allegations of criminal activity, including when an investigation is jointly conducted by the OIG and local police).

Footnote # 41 - Part III

See, e.g., United States Department of Justice, Bureau of Prisons, Metropolitan Correctional Center, New York, New York, 27 FLRA No. 97, 27 FLRA 874, 879 (1987), *reconsideration dnied*, 29 FLRA No. 48, 29 FLRA 482 (1987) (agency sought information from the employee about previous statements to management and asked for explanations of inconsistencies).

Footnote # 42 - Part III

See, e.g., Department of the Treasury, Internal Revenue Service, 15 FLRA No. 78, 15 FLRA 360, 361 (1984) (IRS) (meeting concerning employee's threats against other employees was not an "examination" where the employee was warned about conduct, and no information about the conduct was solicited).

Footnote # 43 - Part III

United States Air Force 2750th Air Base Wing Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 9 FLRA 871, 872, 9 FLRA No. 117 (1982) (meetings were conducted for the sole purpose of, and were limited to, informing the employee of a decision that improper conduct had occurred and to counsel the employee).

Footnote # 44 - Part III

The Authority has not yet ruled on whether such matters as whether a physical examination accompanied by an interview, a drug test or a car search is an investigatory examination. Should such cases arise, the Office of the General Counsel will analyze all the circumstances, including whether any dialogue occurred and whether the exam was part of a specific investigation, and present such issues to the Authority when the facts indicate an examination in connection with an investigation occurred. *See, e.g., U.S. Postal Service*, 252 NLRB 61 (1980) (physical exam without any interview was not a *Weingarten* meeting) and *Safeway Stores*, 303 NLRB 989 (1991) (drug test as part of an investigation into an employee's conduct was a *Weingarten* meeting).

Footnote # 45 - Part III

Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Hartford District Office, 4 FLRA 237 (1980), *enforced sub nom. Internal Revenue Service, Washington, D.C. v.*

FLRA, 671 F.2d 560, 563 (D.C. Cir. 1982) (reasonable belief of discipline even though the employee was not the subject of an investigation).

Footnote # 46 - Part III

American Federation of Government Employees, Local 2544 v. FLRA, 779 F.2d 719, 723 (D.C. Cir. 1986).

Footnote # 47 - Part III

United States Department of Justice, Bureau of Prisons, Metropolitan Correctional Center, New York, New York, 27 FLRA No. 97, 27 FLRA No. 874, 880 (1987) (employee's statement that "maybe I need to see a union rep." was a valid request).

Footnote # 48 - Part III

U.S. Department of Justice, Federal Bureau of Prisons, Office of Internal Affairs, Washington, D.C., 55 FLRA No. 64, 55 FLRA 388, 402-03 (1999) (proceeding with the exam after the employee stated he "wanted to talk to somebody" was viewed as a preemptive denial).

Footnote # 49 - Part III

Norfolk Naval Shipyard, Portsmouth, Virginia, 35 FLRA No. 116, 35 FLRA 1069, 1077 (1990).

Footnote # 50 - Part III

Department of Veterans Affairs, Veteran Affairs Medical Center, Jackson, Mississippi, 48 FLRA No. 83, 48 FLRA 787, 789 (1990) (unfair labor practice because the representative not allowed to speak).

Footnote # 51 - Part III

Bureau of Prisons, Office of Internal Affairs, Washington, D.C. and Phoenix, Arizona, 52 FLRA No. 43, 52 FLRA 421, 432-35 (1996) (representative not prevented from taking an active role even though prevented from conferring with the employee outside of the examination room).

Footnote # 52 - Part III

Federal Aviation Administration, New England Region, Burlington, Massachusetts, 35 FLRA No. 73, 35 FLRA 645, 654 (1990) (disclosure of requested information would have interfered with the agency's legitimate interests).

Footnote # 53 - Part III

Pacific Telephone & Telegraph Co., 262 NLRB 1048 (1982), *enforced in relevant part*, 711 F.2d 134 (9th Cir. 1983).

Footnote # 54 - Part III

FAA Burlington, 35 FLRA at 650-54 (1990) (union was familiar with the employee's circumstances and the misconduct under investigation and did not need the information).

Footnote # 55 - Part III

Id.

Footnote # 56 - Part III

U.S. Department of Justice, Federal Bureau of Prisons, Office of Internal Affairs, Washington, D.C., 55 FLRA No. 64, 55 FLRA 388, 395 (1999).

Footnote # 57 - Part III

Id.

Footnote # 58 - Part III

Id.

Footnote # 59 - Part III

Id. (citing *United States Department of Justice, Bureau of Prisons, Safford, Arizona*, 35 FLRA No. 56, 35 FLRA 431, 447-48 (1990).

Footnote # 60 - Part III

Charleston Naval Shipyard, 32 FLRA No. 37, 32 FLRA 222, 233-34 (1988) (adopting the conclusions and analysis that were applied by the NLRB in *Taracorp Industries*, 273 NLRB 221, 221-23 (1984), the Authority indicated that in cases involving violations of section 7114(a)(2)(B), traditional make-whole remedies would not be ordered where the "only violation is the denial of an employee's request for representation at an investigatory interview").

Footnote # 61 - Part III

U.S. Department of Justice, Immigration and Naturalization Service, Border Patrol, El Paso, Texas, 42 FLRA No. 56, 42 FLRA 834,839-40 (1991) (statements by an agency investigator to an employee that it would not be in best interest of employee if the union representative were present at the interview were deemed coercive).

Footnote # 62 - Part III

The presumption that a union can designate the individual it wants as its representative during an investigatory examination may be rebutted only where the agency can demonstrate "special circumstances" that warrant precluding a particular individual from serving in this capacity, i.e., agency must show how the integrity of the investigation would be undermined. Federal Bureau of Prisons, Office of Internal Affairs, Washington,

D.C. and *Federal Bureau of Prisons, Office of Internal Affairs, Aurora, Colorado, and Federal Bureau of Prisons, Federal Correctional Institution Englewood, Littleton, Colorado*, 54 FLRA No. 133, 54 FLRA 1502, 1513 (1998) (*FCI Englewood*).

APPENDIX B CASE LIST