



SPRING CONFERENCE 2001

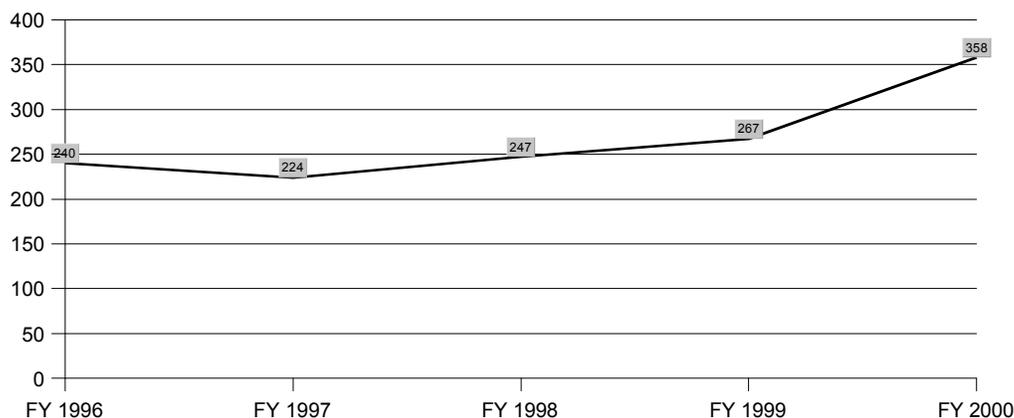
THE RIGHT TO REPRESENTATION AT
MEETINGS – THE LAW AND STRATEGIES TO
AVOID CONFLICT

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ULP CHARGES FILED BY ALLEGATION

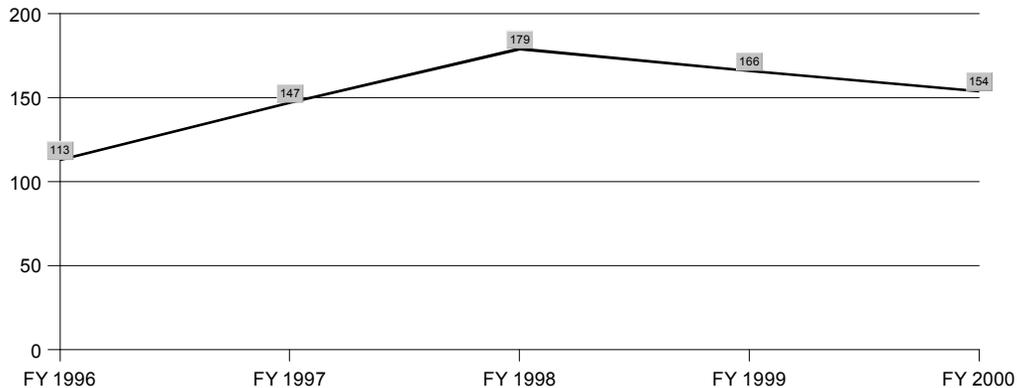
FY 1996 - FY 2000 - Formal Discussion



There was 49% increase in ULP charges alleging formal discussion violations filed FY 2000 in comparison with FY 1996.

ULP CHARGES FILED BY ALLEGATION

FY 1996 - FY 2000 Investigatory Interview
(Weingarten)



There was a 36% increase in ULP charges alleging Weingarten violations filed in FY 2000 in comparison with FY 1996

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WHEN IS AN EMPLOYEE ENTITLED TO REPRESENTATION AT MEETINGS AND WHEN IS AN EXCLUSIVE REPRESENTATIVE ENTITLED TO REPRESENT EMPLOYEES AT MEETINGS?

Representation Rights in General

Formal Discussions

Investigatory Examinations

Bypasses

Grievances Under the Negotiated Grievance Procedure

Contract Representation Right

Establishment of Representation Rights by Practice ***

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FORMAL DISCUSSIONS

Purpose of the Right

- < Successful and productive meeting

Elements of a Formal Discussion

- < A discussion
- < Formal in nature
- < Between at least one or more agency representative and one or more unit employees or their representatives
- < Concerning any grievance or personnel policy or practices or other general condition of employment ***

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DISCUSSION

No need for actual discussion,
debate or dialogue

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FORMALITY

Purpose and nature of a discussion

Illustrative factors

- < Who held the discussion
- < Who attended
- < Site of the discussion
- < How the meeting was called
- < Length of the discussion
- < Formal agenda
- < Manner in which the discussion was conducted***

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PARTICIPANTS IN THE DISCUSSION

Representative of the agency

- < No need for management or supervisory authority
- < Contractor***

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SUBJECT MATTER OF THE DISCUSSION

“any personnel policy or practices” =
general rules applicable to agency personnel

“general condition of employment” =
concern conditions of employment affecting
unit employees generally.

“grievance” = section 7103 (a)(9)

- < Initial, informal stages of a grievance procedure
- < Statutory appeals
- < No need to be subject to the negotiated grievance procedure
- < Can change into a formal discussion
- < Potential grievance ***

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NOTICE OF THE MEETING

Union has opportunity to choose its own
representative

“actual representation” is not sufficient

“actual” v. “formal” notice may be
sufficient ***

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UNION PARTICIPATION IN THE MEETING

Opportunity to speak, comment and make statements

No right to take charge of , usurp or disrupt

Rule of reasonableness, orderly procedures***

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UNFAIR LABOR PRACTICE REMEDY

Traditional - cease and desist order, remedial posting, don't do it again

Nontraditional

< - mgt. re-holds meeting

< - union meeting with same employees

Factors:

< Employees uncertain as to what position and action the union has taken

< Misrepresentation of union's views

< "hot button" issue

< Employees difficult to reach ***

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WHAT SHOULD HAPPEN AT A FORMAL DISCUSSION - ROLE OF THE PARTIES

Agency = conduct meetings and accomplish its purpose

Union = present its institutional perspective

What sometimes happens at a formal discussion

< Misunderstanding and lack of appreciation of roles***

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STRATEGIES TO AVOID FORMAL DISCUSSION CONFLICT

Understand and accept purpose of allowing unions to be represented at the formal discussion

Understand and accept roles of the parties***

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STRATEGY - NOTICE OF MEETING TO DESIGNATED UNION REPRESENTATIVES

Union designates representative to receive notice

< Be clear

The timing of the notice and scheduling of the meeting

< Avoid stubbornness, embrace accommodation

Exchange of information prior to a formal discussion

< Be reasonable

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STRATEGY - UNDERSTANDING HOW THE UNION REPRESENTATIVE WILL PARTICIPATE

Balance the agency's need to run an efficient meeting achieving the meeting's purpose with the union's right to actively participate ***

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STRATEGY - RECOGNITION DURING THE MEETING OF STATUTORY AND CONTRACTUAL OBLIGATIONS

Need to know your rights ***

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STRATEGY - ROUTINELY SCHEDULED MEETINGS

Set date, time and place

Notice, sharing information and
participation protocol ***

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STRATEGY - PROTOCOL FOR SCHEDULING

Notice and scheduling

Identify factors ***

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INVESTIGATORY EXAMINATIONS

Purpose of the Right

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

Not to hide or confuse the facts, to refuse to answer to mislead investigators, nor to delay or impede investigation***

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ELEMENTS OF AN INVESTIGATORY EXAMINATION

A meeting between an employee and a representative of the agency

An examination in connection with an investigation

Employee reasonably fears discipline

Employee requests union representation***

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PARTICIPANTS AT THE MEETING

Employee in the unit

Representative of the union

< “special circumstances” that warrant precluding that particular individual from serving

< postpone an exam - why unavailable, other capable reps available, impact on the investigation***

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REPRESENTATIVE OF THE AGENCY

~~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
- < 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
- < Office of the Inspector General investigator is a “representative of the agency”
- < Outside law enforcement entity -agency representative assistance in setting up, attending and participation at the exam***

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AN EXAMINATION IN CONNECTION WITH AN INVESTIGATION

Totality of circumstances

- < Designed to ask questions and solicit information from the employee
- < Conducted in a confrontation manner
- < Designed to secure an admission from the employee of wrongdoing
- < Require the employee to explain conduct***

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PREFORMANCE MEETINGS AND COUNSELING SESSIONS

Routinely meet with employees to discuss performance matters, review individual work or development plan, discuss quality, quantity or timeliness

Counseling sessions

Informing the employee of a decision already reached

Title or characterization of meeting not controlling

Change in meeting character***

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REASONABLE BELIEF OF DISCIPLINE

Objective factors

Agency intent not controlling***

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EMPLOYEE REQUEST FOR UNION REPRESENTATION AND AGENCY RESPONSE

Sufficient to put the employer on notice of desire for representative:

< Clarify if unclear

Employer's options

< Grant the request

< Discontinue the interview

< Offer the employee the choice between continuing the interview without representation or having no interview = waiver

< Act at your peril***

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UNION REPRESENTATIVE PARTICIPATION AT THE EXAMINATION

Active role - assist and consult

Private conference outside the presence of an investigator during exam

- depends***

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UNION RIGHT TO INFORMATION ABOUT THE EXAMINATION

Balance union right to effectively represent
with agency right to investigate and discipline

Union right to information to become familiar
with employee's circumstances and to
effectively assist and participate

No general right to discovery

Agency need not reveal its case nor the
information it thus far has obtained ***

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UNFAIR LABOR PRACTICE REMEDY

Traditional - cease and desist order, remedial
posting, redo and reconsider

Traditional make-whole remedy -discipline
because employee requested a representative
< Reason for discipline - - for asserting a right to rep,;
for not attending the meeting without a rep,; for
another reason
< Whether other employees had received similar
discipline for a similar reason ***

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WHAT SHOULD HAPPEN AT AN INVESTIGATORY EXAMINATION -ROLE OF THE PARTIES

Agency = conduct exam and examine employee

Union = actively participate and represent employee and institutional interests by –

- < Clarifying
- < Providing
- < Providing
- < Pointing
- < Raising

Employee = honest and frank in responding to questions ***

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WHAT SOMETIMES HAPPENS AT AN INVESTIGATORY EXAMINATION

Misunderstood and lack of appreciation of roles***

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STRATEGIES TO AVOID INVESTIGATORY EXAMINATION CONFLICT

Understand and accept purpose of
allowing union representative to
participate

Understand and accept roles ***

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STRATEGY - TRAIN EMPLOYEES TO MAKE CLEAR REQUESTS FOR UNION REPRESENTATION

Be clear***

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STRATEGY - 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

Employee - specifically ask if request is being granted or denied

Agency - distinguish denial from engaging in a non-coercive discussion over right

< Difference between discussing why agency does not think a union representative is warranted and coercing employee into not exercising the right ***

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STRATEGY - TRAIN AGENCY OFFICIALS TO UNDERSTAND THE OPTIONS WHEN AN EMPLOYEE REQUESTS UNION REPRESENTATION

Difference between options and coercion ***

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STRATEGY - ISSUES CONCERNING THE IDENTITY OF THE REPRESENTATIVE AND THE SCHEDULING OF THE EXAMINATION

Union right to select its representative

If representative is unavailable - prior agreement, factors

Be reasonable - postpone, reasons ***

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STRATEGY - SHARING INFORMATION PRIOR TO AN EXAMINATION

Prior agreement, factors

Pre-exam consultation***

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STRATEGY - CLARIFY THE ROLE OF THE UNION REPRESENTATIVE

Educating agency officials and
union representatives

Avoid stubbornness, embrace
accommodation ***

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BYPASSES

DUTY TO DEAL ONLY WITH THE UNION

An agency

- < Must deal only with the union that
exclusively represents the bargaining unit
employees
- < May not deal with the employees directly,
even if the agency offers the union an
opportunity to be present and to actively
participate
- < Union can insist that the agency only deal
with it ***

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- TEST = is the matter something over which the union has a statutory right to represent the employees?
- < What statutory right grants the union the right to deal exclusively with the agency over the subject matter at issue?
 - < Does the subject matter concern a grievance under a negotiated grievance procedure or a negotiable COE?
 - < Were the parties engaged in, or preparing for, collective bargaining over the subject matter?
 - Negotiable agency the
 - Examples= obtain processes programs implementation.***

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STRATEGIES TO AVOID BYPASS SITUATIONS

Issue = unlawful bypass v. lawful agency communication or meeting with unit employees

- < Refrain from meeting alone with any employee involved in a grievance filed under the negotiated agreement
- < Keep the union informed of intentions to communicate with unit employees over COE
- < Notification to, and involvement of, the union in surveys***

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GRIEVANCE UNDER THE NEGOTIATED GRIEVANCE PROCEDURE

RIGHT TO REPRESENTATION

Section 7121 options:

- < A grievance may be filed by a union on behalf of the employee
 - Deal only with the union
- < An employee may file a grievance on his/her own behalf;
 - Union afforded the opportunity to be present***

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STRATEGIES TO AVOID DISPUTES OVER REPRESENTATION AT GRIEVANCES

Refrain from meeting alone with any grievant who has filed a grievance

Once an agency has recognized the union as a representative in a dispute between a unit employee and the agency, even if no grievance, the agency acts at its peril if it deals only with the employee regarding the matter, even if such dealing is limited to delivering the final decision.

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ESTABLISHMENT OF REPRESENTATION RIGHTS THROUGH CONTRACTS

Negotiated additional right to representation in contract = contract right

Negotiate how the parties will exercise and implement their statutory rights = contract right

Negotiate limitation on statutory right = defense to ULP and contract interpretation ***

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ESTABLISHMENT OF RIGHTS THROUGH PAST PRACTICE

Right to representation created through a practice

Practice may not be modified by either party without fulfilling the statutory bargaining obligation***

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STRATEGIES TO AVOID DISPUTES OVER REPRESENTATION RIGHTS CREATED BY CONTRACT AND PAST PRACTICES

Clear contract language, joint
bargaining history and examples

Parties understand consequences
