

Representational Issues - Chapter 4

As a Union Steward, it is important that you are familiar with a number of key concepts and issues. These include:

- Union Principles
- The Duty of Fair Representation
 - Bargaining Unit Employees
 - (Dues-paying) Union Members
- Official Time
- Internal Union Business
- Weingarten Rights
- Formal Meetings/Formal Discussions
- Criminal Investigations
- Changes in Working Conditions

Other important matters are covered in subsequent chapters of this training manual. They include how to handle complaints, meeting deadlines, filing grievances, filing Unfair Labor Practice charges, participating in Union/Management Council meetings, and conducting negotiations.

Union Principles

The following are principles that all Union Representative should adhere to:

- **Non-Discrimination:** We do not discriminate on the basis of race, color, religion, sex, sexual orientation, national origin, age, marital status, disability, or political party. As we learn at the IAMAW's Winpisinger Center, you aren't being a true unionist if you are racist, sexist, or elitist.
- **Selflessness:** We represent the needs of all bargaining unit employees, not solely our own. If you have a situation that should be addressed by the Union, seek out another Union official to represent you (e.g., the national level officers). A Union official should virtually never file a grievance on his/her own behalf.
- **Duty of Fair Representation (DFR):** We do not discriminate on the basis of union membership in matters of the contract (filing grievances or bargaining); however, we only represent dues paying members in MSPB, EEO, OSC, and other statutory appeals matters.
- **Loyalty to the employees:** Communicate with employees prior to making deals with Management. We represent the employees in our office and they are counting on us.
- **Openness:** Secrets are antithetical to union principles (unless it involves a confidential situation - see below), so beware of Managers trying to bind

you to a secret policy matter, as the whole point of having a union is that our strength comes from working together. Make it clear to the managers that you deal with that it is your duty to consult with the employees that you represent, and to obtain guidance from Local 1998 national level officers as well as NFFE officials, prior to making deals.

- **Confidentiality/Trustworthiness**: When dealing with an employee's personal situation, only share information with other Union reps (unless they do not wish it to be shared) and do not share with other employees.
- **Respect/Dignity**: We need to practice what we preach, so it is important to always treat others with respect and dignity.
- **Democracy**: The office may not be a democracy, but we are: respect the election process and election results.
- **Solidarity**: We are far stronger together than we are apart. Do not all prey to the "divide and conquer" game: government worker vs. contractor; one office vs. another - PPT/XX vs. PPT/YY; "old-timer" vs. "rookie"; adjudication vs. processing; union member vs. non-union member. Work together and share problems and solutions with each other.
- **Integrity**: We must remain loyal to the highest morals and ethics – set an example for others to follow. Wisely and frugally spend union funds, and accurately account for their expenditure. Be on time and fully participate in union-funded training courses.
- **Solving problems**: Try to solve problems and address complaints and grievances in an amicable, professional manner, as early and informally as possible, and in a way that allows the manager to "save face". Do not file a grievance if it is not necessary, but never fail to file a grievance over a valid complaint in order to "get along" with Management.

The Duty of Fair Representation

As a labor union in the federal workplace, NFFE Local 1998 is required by the "Duty of Fair Representation" ("DFR") to represent all bargaining unit employees, regardless of Union membership status, in a number of areas. Because we are the "exclusive representative", we must speak for – and listen to – all of the bargaining unit employees in those areas where the DFR applies.

Bargaining unit employees ("BUE"): all of the government employees of the Agency (in our case, Passport Services) who are eligible for union membership. This includes Passport Specialists, Contact Representatives, and Processors. It also includes some members of the Passport Legal office. This excludes supervisors and managers and certain other members of the staff. This also excludes contractors because they are non-governmental staff.

Dues-paying Union members: those BUE who have elected to pay Union dues.

Where does the DFR apply?

The DFR applies to those matters covered by the collective bargaining agreement (“contract”) and the grievance procedure. The Union may not discriminate on the basis of whether someone is or is not a dues-paying member when deciding to file or not to file a grievance, or choosing to invoke or not to invoke arbitration. The decisions on whether to pursue grievances must be based on the merits of the case.

The DFR also applies to negotiations – both contract negotiations (for a successor collective bargaining agreement) and to mid-term negotiations, such as bargaining over a change in working conditions (e.g., the reorganization of an office, or work schedule changes). The Union must speak for – and listen to – all of the bargaining unit employees, even those who are not dues paying members.

Where does the DFR not apply?

The DFR does not apply to appeals of actions other than grievances. A Union may choose to discriminate on the basis of whether someone is or is not a dues-paying Union member in other appeals or actions, such as appeals to the Merit Systems Protection Board (MSPB), the Office of Special Counsel (OSC), Equal Employment Opportunity (EEO) cases, and worker’s compensation claims.

The DFR also does not apply to matters involving the internal business of the Union. Only dues-paying Union members determine who represents the Union, and in turn who represents all of the bargaining unit employees (for example, at Union-Management Council meetings, during negotiations, etc.). If a bargaining unit employee would like to vote and participate in this decision making, he/she must join the Union.

Why must the Union represent non-dues paying members in grievances?

We must represent all bargaining unit employees in grievances and negotiations because that is the law. If the Union fails to abide by this requirement, then we may be subjected to an Unfair Labor Practice charge filed by an employee or by Management.

What is the NFFE Local 1998 DFR Policy?

The long-standing NFFE Local 1998 DFR Policy, reaffirmed in August 2005, is that we will only represent dues-paying Union members in the areas that are not covered by the DFR. For example, NFFE Local 1998 only represents dues-paying Union members in cases involving the MSPB, OSC, EEO, and worker’s compensation claims. For matters involving grievances and negotiations, our

policy is synonymous with the requirements of the DFR: we will represent all bargaining unit employees in matters involving grievances under the collective bargaining agreement and in negotiations with Management.

Official Time

Official time is paid work time to perform Union representational and contract administration duties. Official time is governed by 5 U.S.C. 7131.

5 U.S.C. 7131(d) provides that:

(d) Except as provided in the preceding subsections of this section--

(1) any employee representing an exclusive representative, or

(2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative, shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

Pursuant to 5 U.S.C. 7131(d), the amounts of official time that the agency (Passport Services) and the exclusive representative (NFFE Local 1998) agreed to be reasonable, necessary, and in the public interest is found in Article 7 of 2009 Master Agreement. The amounts can be summed up as follows:

- Union President: 28/hours/week
- Vice President: 16 hours/week
- Chief Steward: 16 hours/week
- Secretary-Treasurer: 6 hours/week
- Recording Secretary: 2 hours/week
- Senior Steward: 6 hours/week
- Union Steward: 5 hours/week

What representational activities do NOT count against the normally allotted time per week?

There are a number of representational activities for which a Union representative will need additional time that does NOT count against the normal amount of official time specified in Article 7 of the Master Agreement. These include the following:

- Official time to participate in FLRA proceedings (for example, Unfair Labor Practice charges, Negotiability Appeals, etc.) is governed

separately by 5 U.S.C. 7131(c). See Article 7, Section 5d of the Master Agreement.

- Official time to participate in collective bargaining (including FSIP proceedings) with Management is governed separately by 5 U.S.C. 7131(a). See Article 7, Section 5d and Article 12, Section 11a.
- Official time to participate in Management-initiated meetings does not count against the normally allotted official time. See Article 7, Section 5d.
- Official time to participate in Union/Management Committee meetings. See Article 4, Section 5.
- Official time to draft/review Union/Management Committee meeting minutes. See Article 4, Section 13.
- Official time to participate in the annual Management safety inspection. See Article 32, Section 4.
- Official time to represent employees for Merit System Protection Board proceedings (see ___/___/___ settlement)
- Official time to represent employees for EEO cases
- Official time to represent employees in arbitration - Article 22, Section 7.
- Official time to meet with Department of State Office of Civil Rights officials. See Article 17, Section 3.
- Official time to represent employees in offices who have no Union reps (see Article 7, Section 1e)

When/why should a Union Steward use official time?

A Union Steward uses official time when handling/investigating an employee complaint (Chapter 8), when participating in a formal meeting or a Weingarten meeting (read below), when preparing and processing a grievance (Chapter 9), ULP (Chapter 10), or other appeals action (Chapter 11), and when preparing for and participating in negotiations (Chapter 13) and partnership meetings (Chapter 12). A Union Steward also needs to use official time for representational training (Chapter 2), including reading this self-study guide. In addition, a Union Steward needs to use official time to participate in the Union response/position on representational issues (Chapter 12 and Chapter 13).

A new Union Steward needs to use a significant amount of official time to become familiar with the contract, the laws and regulations, and other materials (this Steward Manual and the NFFE Local 1998 website) that will aid him/her in serving as a qualified/prepared representative of the bargaining unit employees.

All Union Stewards need to use official time on an ongoing basis in order to stay current with recent decisions and case law, as well as additions of representational materials to the website.

How does a Union Steward obtain official time?

The procedures for obtaining official time are covered by Article 7, Sections 6a

and 6b of the contract. Union Stewards are encouraged to schedule, on a regularly occurring basis, at least some of their official time (see Article 7, Section 6a). Other time may be obtained as needed (see Article 7, Section 6b). A Union Steward may email his/her supervisor and indicate the time needed, a contact phone number (if he/she is not going to be at his/her desk), and a general description of the duties to be performed. For example, a Union Steward may email the following statement: "I am seeking to use 2 hours of official time to read and prepare a response to Management's reply to the Union's Informal Grievance. I would like to use the official time between 2:00 and 4:00 on June 7th. Please email me back and let me know if this would work for you. I would take the time at my desk."

Remember: official time is not leave, so do not use the OPM Form 71 (formerly SF-71) to obtain official time. This is recognized by Article 3 of the Master Agreement, which states in part (under the definition of "Official Time"): "OPM Form 71 shall not be used to obtain or document official time."

What should a Union Steward do if the official time is denied?

If the purpose of the official time was clearly communicated and the time was absolutely denied (i.e., Management did not offer a reasonable alternative), then the Union Steward should promptly communicate with the Union leadership and inform them of what happened. NFFE Local 1998 has had to file a number of grievances regarding official time, in addition to taking one to an arbitration hearing in 2012. The Union leadership and/or the Union Steward may choose to file a grievance over the denial of official time.

If the need for official time is pressing, such as an approaching deadline, Union officers may request additional time by informing the office Director of the deadline in danger of being missed, along with the representational functions performed thus far that week, if any. If the Union Steward still has no recourse other than to perform the representational work on his/her own personal time (during lunch, breaks, after work, on the weekend), then it is important to record the amount of personal time that was spent on the representational work as a result of the improper denial of official time. The Union may choose to include in the grievance the requested relief that the Union Steward be compensated in the form of straight-time pay, plus interest, or compensatory time off in an amount equal to the personal time spent on representational work. Overtime pay for representational work is not permitted.

Internal Union Business

Internal Union business is the solicitation of Union membership (see Chapter 17), the election of Union officials, and the collection of Union dues. Internal

Union business may not be performed on work time and must be performed during the employees' personal time (lunch, breaks, after work, on the weekend) – this is a requirement of Article 7, Section 7 of the contract as well as 5 U.S.C. 7131(b).

However, if there are problems, including delays in processing of Union dues, then official time may be used (normally by the Secretary-Treasurer or Recording Secretary) to investigate or contest (via grievance or ULP) those delays, as there may be a violation of Article 9 of the contract. In addition, 32 hours of official time are provided to the Secretary-Treasurer for financial reports per Article 7, Section 5(a)(iii).

Membership drives and Union elections must be done at breaks and lunches, or other non-work time. The Union may use tables and easels for the membership drives, per Article 7, Section 8 of the contract.

Weingarten Rights

As stated in Article 6, Section 3a of the Master Agreement, an employee has the right to the opportunity to be represented by the Union at:

Any examination of the employee by a representative of the Employer in connection with an investigation if the employee reasonably believes that the examination may result in disciplinary action against the employee and the employee requests representation. Employees shall be provided annual notification of this Weingarten Right via a sole topic email within the two (2) months prior to Labor Day.

Further, a bargaining unit employee who is not being directly investigated, but simply examined in connection with another employee's examination, also has the full rights as described under Weingarten Rights. A simple gathering of facts may inadvertently lead to self-incriminatory information related to violations of law, rule, or agency policy as well as negotiated policy.

The two key aspects of the Weingarten Rights are:

- 1) The meeting must involve the possibility disciplinary action (the employee must reasonably believe this); and
- 2) The employee must request representation

Weingarten Rights are NOT the same as Miranda Rights, where law enforcement must notify a subject of his/her rights to an attorney. Management

does not have to notify the employee that he/she has a right to Union representation, though it is a good idea. It is the responsibility of the employee to request the Union representative.

Management has a legal obligation to notify employees of this right on an annual basis, as well as a contractual obligation to send a “sole topic” email on this subject in the two months leading up to Labor Day (this is because in the past the annual notification was sometimes buried in the eDepartment notices). Management sent its first notification under this new provision on September 3, 2009:

From: Rojas, Steve
Sent: Thursday, September 03, 2009 2:17 PM
To: NFFEBUE-CENTRAL
Subject: Annual Notification of Weingarten Right

Title 5 of the U.S. Code, Chapter 71 et.seq. and the Foreign Service Act of 1980 provide that the exclusive representative of employees of the Department of State shall be given the opportunity to be represented at any examination of an employee by a Department official in connection with an investigation if:

- the employee reasonably believes that the examination may result in disciplinary action against the employee; and
- the employee requests such representation.

The employee's right to representation under the conditions set forth above is known as the Weingarten right. This right extends to all Bargaining Unit employees of the Department, irrespective of union membership. The exclusive representative of employees of the Department of State, Passport Services, is the National Federation of Federal Employees Local 1998. Article 6 of the Master Agreement further clarifies instances where Weingarten rights would be appropriate.

While Management has the obligation to notify employees of this right, still the Union Steward should make sure to inform new employees of this right during the orientation session covered by Article 10 of the contract and should also make sure to remind all employees of this right on a regular basis.

An example of a Weingarten discussion would be when a supervisor asks an employee to come to his/her office to discuss why the employee was late. The employee could reasonably conclude that this was an examination that may lead to disciplinary action, even though it is beginning with only “itty bitty” questions. The employee must invoke his/her right to a Union representative and then the supervisor should temporarily halt the meeting while the Union rep can be located. However, Management does not have to unreasonably delay its investigation meeting if a union representative is not reasonably available.

Formal Meetings/Formal Discussions

As stated in Article 7, Section 4 of the Master Agreement:

FORMAL DISCUSSIONS: The Union shall be provided an opportunity to be present at any formal discussions between Management and any bargaining unit employee(s) concerning any grievance, personnel policy or practices or other general condition of employment.

In addition, as stated in Article 6, Section 2 of the Master Agreement, an employee has the right to the opportunity to be represented by the Union at:

FORMAL DISCUSSIONS: Management has the responsibility to invite the Union to any formal discussion between one or more representatives of the Employer and one or more bargaining unit employee(s) or their representatives concerning any grievance or any personnel policy, practice, or other general condition of employment.

Finally, there is a requirement to invite the Union to attend formal meetings during the EEO process, as stated in Article 17, Section 9 of the Master Agreement:

FORMAL DISCUSSIONS: The Union will be given an opportunity to have a representative present at any formal discussions with bargaining unit employees during the EEO process, including those where possible settlements may be made. This does not include the informal stage.

The important distinction between a Weingarten meeting and a formal meeting/discussion is that in the Weingarten meeting, the obligation is on the employee to initiate Union involvement, while in a formal meeting the obligation is on Management to notify the Union of the meeting and allow the Union Steward to attend and participate.

Also, keep the following points in mind:

- Electronic means of communication may be considered formal discussions, though it is an issue that has yet to be ruled upon.
- An EEO settlement that impacts working conditions triggers the right to representation. It cannot abrogate a collective bargaining agreement. If there is formal EEO settlement discussion, then Management must invite the Union representative to be present, even if the employee did not file a grievance through the Union.
- The more significant the issue, the greater the Union right to be present.
- A formal meeting could involve a representative of the Agency other than

managers or supervisors, such as a lawyer or inspector general. For example, a lawyer that interviews bargaining unit employees as witnesses for an arbitration case is having a formal meeting.

- Notice is essential. If a union representative is present, but not aware that this would be a formal discussion, it is not sufficient notice.

Criminal Investigations

As a Union Steward, while you often function in ways that are similar to that of an attorney (advocating, negotiating), it is important to keep in mind that there are very important distinctions. As a union representative, if you receive criminal knowledge, you have no confidentiality privilege. You may have to testify. Avoid putting yourself in a position to testify against a bargaining unit employee.

For example, you could be present at a formal meeting as the Union representative in a case where a law enforcement official is acting as a representative of the employer. At that point you should step aside, without providing any advice and suggest that the employee seek legal assistance.

Changes in working conditions

Change is a regular part of our work lives. If Management approaches you and informs you of a potential change in working conditions, remind them that the notice should be in writing (email is okay). For examples of "working conditions", see the contract - almost everything covered by the contract deals with working conditions. Common concerns include work schedules, dress code, seating/desk assignments, Duty Officer schedule, etc. **The most important thing that the Union Steward needs to do is to clearly and unmistakably invoke the Union's right to bargain.** This can be done via email. In addition, the Union Steward should consult with the other Union reps in the office, with the bargaining unit employees, and with the Local 1998 leadership and, as applicable, NFFE Business Reps.

If Management makes a change in working conditions without notifying the Union then that potentially is a contract violation and/or an Unfair Labor Practice. Also, if notification is given, but Management refuses to grant the Union's request, that may also be a violation.

For more information on this, see Article 12 of the Master Agreement and Chapter 13 of this Steward Manual.