

Unfair Labor Practices - Chapter 10

Unfair Labor Practice charges (ULP's) are normally only filed by the NFFE Local 1998 leadership (Union President, Vice President, Secretary-Treasurer, Recording Secretary, and Chief Steward). However, Union Stewards must know about the ULP process as they play a vital role in investigating and supporting the charge. Also, there may be an occasion where a Union Steward files a ULP.

This chapter covers the following:

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Purpose of an Unfair Labor Practice (ULP) Charge

What is a ULP?

A ULP is a charge filed by the Union, the Agency, or an employee, alleging a violation of the Federal Service Labor Management Relations Statute (FSLMRS) – 5 U.S.C. Chapter 71. This law governs how Management and the Union can act, and governs their rights and responsibilities as well as the rights of employees. Essentially, a ULP charge is a formal accusation that the law has been broken. The Federal Labor Relations Authority (FLRA) is authorized by that same law to be the agency that investigates and prosecutes ULP charges.

A ULP charge is filed with the FLRA.

There is no statutory authority for the FLRA to issue a complaint until a General

Counsel has been appointed (for about a year between 2001 and 2002 this position was vacant, and it was vacant again for part of 2009).

Avoiding filing ULP's

It is never the goal of NFFE Local 1998 to file a ULP, unless it is necessary and warranted. Any problems or disputes that can be resolved amicably, early, and informally without resorting to a ULP should be. However, there will be times when a ULP is necessary, and – as explained in Chapter 4 – a Union Rep should never fail to file a ULP and should always be mindful of timeframes and deadlines.

Preventing ULP's filed against the Union

Always adhere to the principals espoused in our Bylaws, the NFFE and IAMAW Constitutions, the law, and Chapter 9 of this Steward Manual. Especially be mindful of the Duty of Fair Representation. We do not want a charge filed against the Union.

What actions can be contested via a ULP?

ULP's filed by the Union

The Union can file ULP's on issues such as:

- Failure to properly/timely deduct Union dues
- Changing working conditions without providing advance notice (and the opportunity to negotiate over the change) to the Union
- Unilaterally terminating a compressed work schedule agreement
- Discriminating against a Union representative in his/her evaluation because of his/her Union activity
- Failure to allow a Union representative to be present when requested, and when appropriate (Weingarten meeting): the employee must have asked for a union representative for there to be a Weingarten violation.
- Refusing to bargain in good faith
- Failing to provide information requested by the Union (as allowed under 5 U.S.C. 7114): the test of whether a ULP was committed on an information request is whether the union has provided a "particularized need"

Remember, violations of the contract are subject to grievances. The prohibitions listed in 5 U.S.C. 7116 are subject to either a ULP or to a grievance.

The list of charges that the Union may file against Management is found at 5 U.S.C. 7116(a):

§ 7116. Unfair labor practices

(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.

ULP's filed against the Union

Management and/or an employee may file a ULP against a union for a number of reasons, including failing to abide by the Duty of Fair Representation (DFR). A ULP filed against a union for this reason is called a "DFR charge".

The list of charges that Management and employees may file against the Union is found at 5 U.S.C. 7116(b):

§ 7116. Unfair labor practices

(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.

As you can see, (7)(A) is the provision of law that makes it illegal to strike or conduct a work slowdown. However, the law also makes it clear that we can do informational picketing:

Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

5 U.S.C. 7116(c) adds:

- (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 bylaws to the extent consistent with the provisions of this chapter.

Grievance vs. ULP: only one bite at the apple

According to 5 U.S.C. 7116(d):

Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

So, the Union may file either a grievance or a ULP on a violation, but may not file both. On the FLRA Form 22 (discussed below) if you check “Yes”, then that most likely means you are attempting to take two bites at the apple.

Why file a ULP instead of a grievance?

A ULP does not cost anything, while a grievance that goes to arbitration can – if the Union loses – cost thousands of dollars. The FLRA investigators have the authority to compel information and statements and would normally be investigating a violation much sooner than a violation that went through the grievance steps and then went to arbitration.

Why file a grievance instead of a ULP?

Depending on FLRA staffing levels and caseload, a ULP can take some time to process while a grievance and arbitration decision can take less time – though that is not true in all cases. Also, the FLRA is limited to investigating a violation of the FLMSRS only, while a grievance (and an arbitrator) can also address contract violations. Finally, the FLRA General Counsel and the three members of the Authority are appointed by the President of the United States, so depending on his/her relationship and positions towards labor organizations, there may be times when a grievance is the better route to go than a ULP.

Abrogation of the contract

The only time the Union can file a ULP over a violation of the contract is when Management abrogates – wholly and willfully refuses to abide by the terms – of any portion of the contract.

The ULP process

Information on filing Unfair Labor Practice Charges can be found at the FLRA's website: <http://www.flra.gov/>.

Taking action on a complaint

1. If you believe a ULP has been committed, contact the Local 1998 leadership (Union President, Vice President, Secretary-Treasurer, Recording Secretary, and Chief Steward). They will normally file the ULP.
2. File the ULP with the FLRA office that covers the region where you work (can be found on the FLRA website). A ULP concerning nationwide Passport Services issues would be filed with the FLRA office in Washington, DC. The FLRA may workload transfer the case to another region as it sees fit.
3. The form used for filing a ULP charge is FLRA Form 22. You can complete it online at the FLRA website, but you cannot submit it online.
4. The instructions for completing the FLRA Form 22 are on the reverse side (second page) of the form.
5. You may file a ULP by fax, or by mailing. If filed by fax do not send another copy by regular mail. You still must serve the charged party (normally this means you must fax it to Passport Services HQ as well as the Department of State's Chief Labor-Management Negotiator).
6. When writing the charge, present a brief description of the unfair labor practice.
7. You also need to start preparing a lengthier explanation, in writing, but that is not normally included with the FLRA Form 22 charge.
8. When you sign the form, you are making a sworn declaration that must be true to the best of your knowledge. False statements are potentially subject to criminal charges.
9. You may contact the FLRA for assistance in resolving a dispute prior to filing.
10. After about one week, check with the FLRA to see if the charge has been received (if you have not received a confirmation letter).
11. Statements and affidavits remain confidential unless the case goes to a hearing.
12. The FLRA will give sufficient information to the charged party to defend themselves without disclosure of who provide the information.
13. The FLRA needs more than information, they need documentation/proof to support the case. The FLRA cannot force Management to cooperate.
14. Two weeks before a hearing, there will be disclosure between the parties of evidence and witnesses and what they will testify to.
15. Witnesses – including the Union representative filing the charge – may be required to sign sworn affidavits after being interviewed by FLRA

- investigators.
16. The charging party has 30 days to appeal a dismissal.
 17. After the investigation, if a charge is supported by the FLRA's Regional Director, then he/she takes on the case and advocates for it on behalf of the charging party. When a charge filed by the Union is supported by the FLRA's Regional Director, then the Union ceases to be the advocate and instead takes on more of the role of victim or witness. The Regional Director takes on the role of the prosecutor.
 18. The Regional Director will usually try to settle the case. If this is not accomplished, then the case will be brought before an Administrative Law Judge (ALJ).
 19. The decision by the ALJ can be appealed, within 25 days, to the Authority (the 3-member panel that is part of the FLRA).
 20. The final decision can order the Agency to make an employee whole, to return to status quo ante (the way things were before a change), or other appropriate relief. The decision cannot order damages for pain and suffering, other other things similar to orders in civil suits.
 21. The final decision can order the Agency head to sign a "posting" - a written admission of wrongdoing coupled with a commitment to not repeat the violation. The acknowledgement is posted at visible locations within a bargaining unit.

The role of the Steward/obtaining guidance

Normally, ULP's are filed by the NFFE local 1998 leadership (Union President, Vice President, Secretary-Treasurer, Recording Secretary, and Chief Steward). However, Senior Stewards and Stewards may file ULP's when warranted, but must first check with the Local 1998 leadership.

Deadlines

Per 5 U.S.C. 7118(a)(4)(A), a ULP must be filed within 6 months of the date that the alleged violation occurred.

Appealing a negative FLRA decision

The Union may appeal the denial of a ULP by an FLRA Regional Director to the General Counsel. This is done by the Local 1998 leadership, the NFFE General Counsel, or a NFFE Business Representative. Make sure to notify the Local leadership immediately after the denial is received so that deadlines can be met.