

Other Actions - Chapter 11

Besides grievance and Unfair Labor Practice charges, there are other actions that a Union Steward may consider taking in order to resolve a complaint:

- Responses to Proposed Performance-Based or Disciplinary Actions
- MSPB
- OSC
- EEOC
- Health & Safety
- UMC meetings
- Legislative Action
- OIG

Responses to Proposed Actions

Employees may receive the following notices of proposed actions:

- Proposed downgrade (e.g., from GS-11 to GS-11) due to poor performance (Article 23)
- Proposed removal – i.e., a proposal to be terminated/fired (Article 24)
- Proposed suspension without pay due to inappropriate conduct (Article 24)

When dealing with these matters, local Union representatives should contact the NFFE Local 1998 leadership. It is very important to understand that there are two different concepts involved: 1) performance and 2) conduct. An employee may perform at a good level but have poor conduct (e.g., insubordination, drinking on the job, hitting a coworker). That employee may receive an Exceeds Expectation or Outstanding on his/her appraisal because of the good performance but be suspended without pay or even removed due to the conduct. Another employee may have exemplary behavior (always respectful, always on time, etc.) but perform poorly (e.g., making too many errors accepting applications at the public counter). That employee may never be suspended or reprimanded, but might go on a Performance Improvement Plan and even eventually, if the performance does not improve, be downgraded or removed.

Douglas Factors: When addressing disciplinary matters in response to a proposed action, the Union must address the Douglas Factors. Article 24, Section 5 states:

DOUGLAS FACTORS: The Employer agrees to fully apply the relevant “Douglas factors” when administering disciplinary and adverse actions to bargaining unit employees. The Douglas factors are:

- a. The nature and seriousness of the offense, and its relation to the employee’s duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
- b. The employee’s job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
- c. The employee’s past disciplinary record;
- d. The employee’s past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
- e. The effect of the offense upon the employee’s ability to perform at a satisfactory level and its effect upon supervisors’ confidence in the employee’s work ability to perform assigned duties;
- f. Consistency of the penalty with those imposed upon others within the Department of State for the same or similar offenses;
- g. Consistency of the penalty with any applicable agency table of penalties;
- h. The notoriety of the offense or its impact upon the reputation of the agency;
- i. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
- j. Potential for the employee’s rehabilitation;
- k. Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
- l. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Merit Systems Protection Board Appeals Procedure

IMPORTANT: There is only "one bite at the apple" - for issues that can be appealed to the MSPB, an employee may either file an MSPB appeal or a grievance, but not both.



Note: The Duty of Fair Representation does not include MSPB proceedings.

The Merit Systems Protection Board (MSPB) hears statutory appeals.

Statutory appeals include:

- Adverse actions
- Reductions in force (RIFs)
- Equal employment opportunity (EEO) matters
- Classification appeals

Is the MSPB the appropriate route? The following questions may help you determine if a statutory appeal is appropriate:

- *Adverse Actions:* Is there a letter of removal, suspension for more than fourteen (14) days, furlough for thirty (30) days or less, or reduction in grade or pay?
- *Reductions-in-Force:* Is the employee subject to job loss or downgrading in a reduction-in-force (RIF)?
- *Equal Employment Opportunity:* Has the employee received different treatment because of his/her –
 - Race
 - Color
 - Creed
 - Sex
 - Age
 - Religion
 - National origin
 - Handicapping condition
 - Political affiliation
 - Marital status
 - Pregnancy

Jurisdiction: The situations relevant to Passport Services bargaining unit employees that the MSPB covers are listed here (other scenarios that are not relevant have been deleted):

§ 1201.3 Appellate jurisdiction.

- (a) *Generally.* The Board has jurisdiction over appeals from agency actions when the appeals are authorized by law, rule, or regulation. These include appeals from the following actions:
- (1) Reduction in grade or removal for unacceptable performance (5 CFR part 432; 5 U.S.C. 4303(e));
 - (2) Removal, reduction in grade or pay, suspension for more than 14 days, or furlough for 30 days or less for cause that will promote the efficiency of the service. (5 CFR part 752, subparts C and D; 5 U.S.C. 7511-7514);
....
 - (5) Reconsideration decision sustaining a negative determination of competence for a general schedule employee (5 CFR 531.410; 5 U.S.C. 5335(c));
 - (6) Determinations affecting the rights or interests of an individual or of the United States under the Civil Service Retirement System or the Federal Employees' Retirement System (5 CFR parts 831, 839, 842, 844, and 846; 5 U.S.C. 8347(d)(1)-(2) and 8461(e)(1); and 5 U.S.C. 8331 note, Federal Erroneous Retirement Coverage Corrections Act);
 - (7) Disqualification of an employee or applicant because of a suitability determination (5 CFR 731.501);
 - (8) Termination of employment during probation or the first year of a veterans readjustment appointment when:
 - (i) The employee alleges discrimination because of partisan political reasons or marital status; or
 - (ii) The termination was based on conditions arising before appointment and the employee alleges that the action is procedurally improper (5 CFR 315.806, 38 U.S.C. 2014(b)(1)(D));
....
 - (10) Separation, demotion, or furlough for more than 30 days, when the action was effected because of a reduction in force (5 CFR 351.901);
....

- (12) Failure to restore, improper restoration of, or failure to return following a leave of absence an employee or former employee of an agency in the executive branch (including the U.S. Postal Service and the Postal Rate Commission) following partial or full recovery from a compensable injury (5 CFR 353.304);
- (13) Employment of another applicant when the person who wishes to appeal to the Board is entitled to priority employment consideration after a reduction-in-force action, or after partial or full recovery from a compensable injury (5 CFR 302.501, 5 CFR 330.209);
....
- (15) Failure to re-employ a former employee after movement between executive agencies during an emergency (5 CFR 352.209);
- (16) Failure to re-employ a former employee after detail or transfer to an international organization (5 CFR 352.313);
....
- (19) Employment practices administered by the Office of Personnel Management to examine and evaluate the qualifications of applicants for appointment in the competitive service (5 CFR 300.104); and
....

Electronic filing: The MSPB is one of the few authorities that allows electronic/online filing of appeals. The MSPB does not accept appeals by email, rather the appeal can be submitted via the MSPB website: <http://www.mspb.gov/>

Office of Special Counsel Complaint Procedure

IMPORTANT: There is only "**one bite at the apple**" - for issues that can be submitted to the OSC, an employee may either file an OSC complaint or a grievance, but not both.

The Office of Special Counsel (OSC) handles whistleblower protection issues, potential Hatch Act violations, and complaints dealing with the "prohibited personnel practices", which state that the Employer may not:



- (1) discriminate against an employee or applicant based on race, color, religion, sex, national origin, age, handicapping condition, marital status, or political affiliation;
- (2) solicit or consider employment recommendations based on factors other than personal knowledge or records of job-related abilities or characteristics;
- (3) coerce the political activity of any person;
- (4) deceive or willfully obstruct anyone from competing for employment;
- (5) influence anyone to withdraw from competition for any position so as to improve or injure the employment prospects of any other person;
- (6) give an unauthorized preference or advantage to anyone so as to improve or injure the employment prospects of any particular employee or applicant;
- (7) engage in nepotism (*i.e.*, hire, promote, or advocate the hiring or promotion of relatives);
- (8) engage in reprisal for whistleblowing – *i.e.*, take, fail to take, or threaten to take or fail to take a personnel action with respect to any employee or applicant because of any disclosure of information by the employee or applicant that he or she reasonably believes evidences a violation of a law, rule or regulation; gross mismanagement; gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety (if such disclosure is not barred by law and such information is not specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs – if so restricted by law or Executive Order, the disclosure is only protected if made to the Special Counsel, the Inspector General, or comparable agency official);
- (9) take, fail to take, or threaten to take or fail to take a personnel action against an employee or applicant for exercising an appeal, complaint, or grievance right; testifying for or assisting another in exercising such a right; cooperating with or disclosing information to the Special Counsel or to an Inspector General; or refusing to obey an order that would require the individual to violate a law;
- (10) discriminate based on personal conduct which is not adverse to the on-the-job performance of an employee, applicant, or others; or
- (11) take or fail to take, recommend, or approve a personnel action if taking or failing to take such an action would violate a veterans' preference requirement; and
- (12) take or fail to take a personnel action, if taking or failing to take action would violate any law, rule or regulation implementing or directly concerning merit system principles at 5 U.S.C. § 2301.

For more information, check out the OSC's website: <http://www.osc.gov/>

Equal Employment Opportunity Procedure

IMPORTANT: There is only "one bite at the apple" - for issues that can be challenged using the EEO procedure, an employee may either file an EEO complaint or a grievance, but not both.



An employee who feels he/she has been discriminated against based on race, color, religion, sex, nation origin, disability, or age may file either a grievance or an EEO complaint, but not both. The employee may request a Union representative to assist him/her. The EEO Counselor may provide information to the complainant. The employee has 45 days to contact the EEO Counselor after the discriminatory action.

For more information, see the EEOC's website: <http://www.eeoc.gov/>

According to the EEOC website the following remedies can be sought:

EEOC's policy is to seek full and effective relief for each and every victim of discrimination. The remedies may include:

- posting a notice to all employees advising them of their rights under the laws EEOC enforces and their right to be free from retaliation;
- corrective or preventive actions taken to cure or correct the source of the identified discrimination;
- nondiscriminatory placement in the position the victim would have occupied if the discrimination had not occurred;
- compensatory damages;
- back pay (with interest if applicable) and lost benefits; and
- stopping the specific discriminatory practices involved.

Deadlines for filing a complaint with a federal agency:

Employees or applicants who believe that they have been discriminated against by a federal agency have the right to file a complaint with that agency. The first step is to contact an EEO Counselor at the agency within 45 days of the discriminatory action. The individual may choose to participate in either counseling, or in ADR when the agency offers ADR. Ordinarily, counseling must be completed within 30 days and ADR within 90 days. At the end of counseling, or if ADR is unsuccessful, the individual may then file a complaint with the agency.

Appeals:

A dissatisfied complainant may appeal to EEOC an agency's final action within 30 days of receipt. The agency may appeal a decision by an EEOC administrative judge within 40 days of receiving the administrative judge's decision.

On class complaints, a class agent may appeal an agency's final decision on the merits of the class complaint within 30 days from receipt, or a class member may appeal the final decision on his or her claim for individual relief within 30 days from receipt of the final decision.

For more information, contact the EEO Counselor, the EEOC website, and read Article 17 of the contract.

Keep in mind that the Union has a right to attend formal meetings, including formal EEO mediation efforts. In *57 FLRA No. 65*, the Authority ruled that an agency had committed an Unfair Labor Practice by excluding the Union from attending a formal EEO mediation meeting, in a case where the employee did not seek Union representation:

The complaint alleges that the Respondent violated §§ 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (Statute) by conducting a formal discussion with a bargaining unit employee concerning the mediation of a formal Equal Employment Opportunity (EEO) complaint without affording the Union notice and an opportunity to be represented pursuant to § 7114(a)(2) of the Statute. The Judge concluded that the Respondent violated the Statute as alleged.

Upon consideration of the Judge's decision and the entire record, we adopt the Judge's findings, conclusions, and recommended Order to the extent consistent with this decision.

....

Elzey F. Jones, Jr. is a member of the bargaining unit represented by the Union. The Union and the Respondent have a collective bargaining agreement, which provides that the negotiated grievance procedure (NGP) does not cover grievances concerning EEO complaints.

In November 1999, Mr. Jones filed a formal EEO complaint in connection with a suspension that he had received. In early 2000, pursuant to EEOC regulations, 29 C.F.R. pt. 1614, Jones requested mediation of his complaint.

The Respondent requested that the General Counsel's Office of the Department of Air Force assign a mediator. In response, the General Counsel's Office referred this request to the Resolution Group, a private firm having a contract with the Air Force. This contract provides that the

Resolution Group will provide mediation services pursuant to the Alternate Dispute Resolution Act, 5 U.S.C. § 571 *et seq.* (ADR Act). Kathy Fragnoli was designated as the mediator.

The Resolution Group provided the Respondent's EEO Officer available dates for the mediation. After coordination with the Respondent's legal representative, Assistant Staff Judge Advocate Captain Richard Rockenbach, the mediation was scheduled at least a week prior to the agreed upon date. In response to Mr. Jones's request, the Respondent, through its EEO Officer, arranged for the mediation to be held at a local hotel. Prior to the mediation, the Resolution Group sent Mr. Jones and Captain Rockenbach information concerning the mediation. At the mediator's request, Mr. Jones and Captain Rockenbach signed an agreement regarding the confidentiality of the mediation.

The mediation session was attended by Mediator Fragnoli, Mr. Jones, and Captain Rockenbach. Captain Rockenbach, who had no supervisory authority over Mr. Jones, had authority to resolve the complaint within parameters set by the squadron commander. The Respondent's EEO Officer did not attend the mediation. The session was led by and followed a format established by Mediator Fragnoli. It lasted approximately six hours, of which about 20% was spent in joint sessions and the rest in individual caucuses. The Union was neither [v57 p305] notified of, nor given an opportunity to attend, the mediation.

....

The Respondent's argument that a mediation session, by its very nature, cannot be a formal discussion lacks merit because the Authority has already determined otherwise. See *Luke*, 54 FLRA 716. The fact that the EEOC has required agencies to establish ADR procedures in an effort to informally resolve complaints is not determinative of whether a meeting to discuss such a complaint is a formal discussion under § 7114(a)(2)(A). Rather, that determination can be reached only after application of the Authority's formal discussion criteria.

We recognize that the EEOC has opined, in the comments announcing its ADR rule, that the activity conducted in connection with an agency ADR program during the EEO process would not be a formal discussion within the meaning of the Civil Service Reform Act. 64 Fed. Reg. 37,644, 37,645 (1999). However, we reject the Respondent's argument that *Chevron* requires [v57 p307] that we defer to the EEOC's view in this regard. First, interpretations which lack the force of law -- do not warrant *Chevron*-style deference. *Christensen v. Harris County*, 120 S. Ct. 1655, 1657 (2000). The EEOC's comments in its Federal Register notice do not have the force of law. Second, *Chevron* only grants an agency deference when it is offering a permissible construction of the

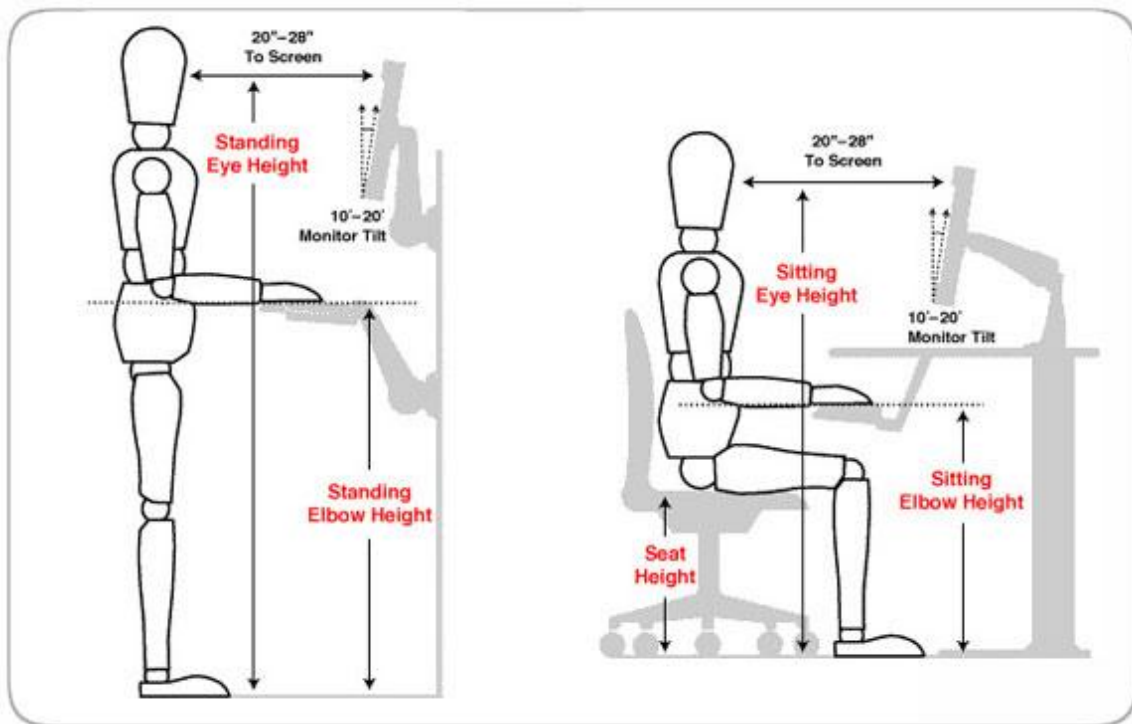
statute which it administers. 467 U.S. at 837. The passage quoted from the Federal Register reflects that the EEOC has interpreted the Federal Service Labor-Management Relations Statute which is administered by the Authority, not the EEOC.

Health & Safety Problems

Employees can pursue worker's compensation claims for on-the-job injuries, can report safety/health violations to the Occupational Safety and Health Administration (OSHA), and can request "reasonable accommodations" from the Employer for issues such as carpal tunnel syndrome.



All ergonomic issues, such as repetitive motion injuries, should be communicated to the NFFE Local 1998 Ergonomics Officer. The Ergonomics Officer may then communicate these issues to the Department of State ergonomics staff and/or to HQ.



For ergonomic issues, you can also go to the Occupational Safety and Health Administration (OSHA) website on the subject:

<http://www.osha.gov/SLTC/ergonomics/index.html>

For information on worker's compensation, you can go to the Department of Labor's Office of Workers' Compensation Programs website:
http://www.dol.gov/esa/owcp_org.htm

Union/Management Council Meetings

The UMC meetings and the partnership process can be a valuable and constructive means to address many problems, especially problems that do not easily fit into other categories. UMC meetings have addressed traditional labor-management issues such as work schedules, dress code, and promotion qualifications, but also issues such as maintaining clean bathrooms, ways to meet production goals, and celebrations. See Chapter 12 for more information.

If there are a number of complaints on a subject, but the employees do not want to take any of the actions available to them, then oftentimes the UMC can be a good forum in which to address them.

Concerns about Management decisions and policies can also be addressed in UMC meetings.

Legislative Action

Sometimes important nationwide passport issues do not get resolved through communication between the Union and Management. Writing to Congress is a valid alternative:

Example: In early 2004, NFFE FL 1998 did a successful letter writing campaign to Congress. As a result, more criminals were added to the NameCheck database (we went from only 50,000 names to over one million) and our non-productive time doubled (from 30 minutes to 60 minutes a day).

See Chapter 14 for more information.



Office of Inspector General (OIG)

“OIG inspects each of the approximately 260 embassies, diplomatic posts, and international broadcasting installations throughout the world, to determine whether policy goals are being achieved and whether the interests of the United States are being represented and advanced effectively. Additionally, OIG performs specialized security inspections and audits in support of the Department's mission to provide effective protection to our personnel, facilities, and sensitive intelligence information. OIG also audits Department and BBG operations and activities to ensure that they are as effective, efficient, and economical as possible. Finally, OIG investigates instances of fraud, waste, and mismanagement that may constitute either criminal wrongdoing or violation of Department and BBG regulations.” (Quoted from the DOS OIG website)

The OIG has investigated issues in Passport Services in the past as a result of allegations made by employees and the Union. These issues centered around the integrity of the passport process. Employees who have specific concerns about malfeasance by staff would not normally file a grievance- rather; they should normally contact the OIG. Whistleblowers are legally protected; however employees may elect to report concerns anonymously.

Please contact the OIG for the Department of State to report any allegations of fraud, waste, and mismanagement regarding the Department of State.

By email: oighotline@state.gov

By phone: 1-800-409-9926

By mail: Office of Inspector General
HOTLINE
P.O. Box 9778
Arlington, Virginia 22219

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