

ELEMENTS OF A FORMAL DISCUSSION

5 U.S.C. 7114(a)(2)(A)

Management must give notice to the Union, if the following occur:

1. *a discussion*

2. *formal in nature*

factors to consider:

- Who held the meeting, first level supervisor or higher level
- Were other management officials present?
- Where held?
- How long did the meeting last
- How was meeting called (e.g., in advance or impromptu)
- Was there a formal agenda?
- Was employee attendance mandatory?
- How was meeting conducted? (e.g. minutes taken)?

3. *between an agency representative and bargaining unit employee*

4. *subject matter must concern*

- any grievance or
- a personnel policy or practices or
- any other general condition of employment

FORMAL DISCUSSION ELEMENT	FACTORS INDICATING A FORMAL DISCUSSION	FACTORS NOT INDICATING A FORMAL DISCUSSION
FORMALITY	Do you intend to require employees to attend?	Do you intend to make attendance voluntary?
FORMALITY	Do you intend to take notes or minutes or record the results of the meeting, use an agenda or a plan for conducting the meeting?	Do you intend to have a casual conversation?
FORMALITY	Do you intend to hold the meeting in a conference room or other non-workplace area?	Do you intend to hold the meeting on the shop floor?
FORMALITY	Do you intend to invite higher level management officials or other agency employees not involved in the day-to-day work with the employees?	Do you intend to only have a first line supervisor present?
FORMALITY	Do you intend to schedule the meeting in advance?	Do you intend to inform employees just before the meeting is to take place to gather together?
FORMALITY	Do you intend to conduct the meeting for a scheduled amount of time?	Do you intend to plan to only talk for a few minutes?
FORMALITY	Do you intend to discuss a significant topic of concern to the employees and the union?	Do you intend to discuss a routine topic?
SUBJECT MATTER	Do you intend to discuss any pending grievance, whether at the informal or formal stages of the negotiated grievance procedure?	Do you intend to discuss a matter of concern raised by a particular employee?
SUBJECT MATTER	Do you intend to discuss a workplace matter of concern to employees generally?	Do you intend to meet only with one employee to discuss a performance matter that concerns only the employee?
SUBJECT MATTER	Do you intend to discuss a personnel policy or practice that pertains generally to all the employees?	Do you intend to meet with one or a few employees to discuss the routine monitoring of job functions?
SUBJECT MATTER		Do you intend to discuss an employee's job performance or conduct?
SUBJECT MATTER	Do you intend to discuss a formal EEO complaint?	Do you intend to discuss an informal EEO complaint?

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

UNIONS CAN - -	UNIONS CANNOT - -
<p>Designate its own representative to attend the formal discussion</p> <p>Ask management for a short delay so that a representative versed in the subject matter of the meeting may attend to represent the union</p>	<p>Unreasonably delay the meeting because a particular representative is not able to attend at the scheduled time</p> <p>Insist that more than one union representative attend</p>
<p>Designate a particular individual (with backup) as the union official to receive notice of all formal discussions or designate different individuals depending upon the type of meeting</p>	<p>Refuse to attend a formal discussion where there has been actual notice which allowed the union to select a representative of its choice, but there was no formal notice of the meeting</p>
<p>Ask management what the meeting is going to be about</p>	<p>Demand that all information to be discussed at the meeting first be discussed only with the union (assuming the meeting would not be a bypass)</p> <p>Demand that other unrelated topics be added to the agenda</p>
<p>Clarify matters being discussed</p>	<p>Engage in an argument with the management officials conducting the meeting which interferes with the purpose of the meeting</p>
<p>Represent the interests of the bargaining unit</p>	<p>Raise issues that are not related to the topic or purpose of the meeting so as to disrupt the meeting and thwart its purpose</p>
<p>Speak, comment and make statements about the subject matter of the meeting</p>	<p>Take charge of the meeting so as to disrupt the meeting and thwart its purpose</p>
<p>Ask questions concerning the matter being discussed</p>	<p>Act in a manner that disrupts the meeting</p>
<p>Propose to negotiate at the applicable time over the manner in which the formal discussion right will be implemented by the parties</p>	<p>Insist that the notice be given and meeting be conducted in a particular manner as decided by the union</p>

APPENDIX A

FORMAL DISCUSSIONS

Element #1: A discussion must take place.

Rule of Law: For purposes of section 7114(a)(2)(A), a discussion is any meeting between representatives of the agency and unit employees.

Department of Defense, National Guard Bureau, Texas Adjutant General's Department, 149th TAC Fighter Group (ANG)(TAC), Kelly Air Force Base, 15 FLRA No. 111, 15 FLRA 529, 532 (1984) (Kelly Air Force Base) (legislative history supports the conclusion that Congress intended to continue treating "discussion" as synonymous with "meeting"); and Veterans Administration, Washington, D.C. and VA Medical Center, Brockton, Massachusetts, 37 FLRA No. 60, 37 FLRA 747, 754 (1990) (VA, Brockton) (to the same effect).

< ***No actual conversation need take place.***

Kelly Air Force Base, 15 FLRA at 531-33 (announcement of new staffing policy was a "discussion"); VA, Brockton, 37 FLRA at 754 (meeting between agency and employees to announce a work schedule and have employees select their shifts where the employees engaged in no dialogue was a discussion); U.S. Department of Justice Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas, 51 FLRA No. 109, 51 FLRA 1339, 1340, 1342 (1996) (FCI, Bastrop) (meeting held with the warden to try to resolve differences before filing a grievance where neither employee nor supervisor were permitted to speak was a discussion).

BUT

< ***Polling of employees for information-gathering purposes is not a discussion.***

Kaiserlautern American High School, Department of Defense Dependents Schools, Germany North Region, 9 FLRA No. 28, 9 FLRA 184, 187 (1982) (questionnaire containing one question which a manager individually handed to unit employees to voluntarily complete on an anonymous basis to gauge their morale was not a discussion)

Element #2: The discussion must be “formal.”

Rule of Law: “Formality”, in some instances, may be established by the purpose of a discussion or the context in which a discussion takes place, or in other situations, by considering the totality of the circumstances.

F.E. Warren Air Force Base, Cheyenne, Wyoming, 52 FLRA No. 17, 52 FLRA 149, 156-58 (1996) (because the purpose of a meeting that was called was to prepare employees to be laid off, the meeting was a formal discussion; and another meeting called to announce that buyouts might be available and to determine whether any employees might be interested in accepting them is a formal discussion based on the totality of the circumstances)

Totality of circumstances is considered by considering relevant factors:

- (1) whether the individual who held the discussions is merely a first-level supervisor or is higher in the management hierarchy;**
 - (2) whether any other management representatives attended;**
 - (3) where the individual meetings took place (e.g., in the supervisor=s office, at each employee’s desk, or elsewhere);**
 - (4) how long the meetings lasted;**
 - (5) how the meetings were called (formal advance notice v. spontaneity or informality);**
 - (6) whether a formal agenda was established;**
 - (7) whether each employee=s attendance was mandatory;**
 - (8) the manner in which the meeting was conducted (consider transcription of comments);**
- and
any other factors deemed relevant.**

E.g., Department of Labor, Office of the Assistant Secretary for Administration and Management, Chicago, Illinois, 32 FLRA No. 69, 32 FLRA 465, 470 (1988) (Dept. of Labor).

A. Other Examples of Situations Where “Purpose” of Meeting Established Formality.

< ***Interviews by agency representatives with bargaining unit employees in preparation for third-party proceedings in which the union has an adversary role, are formal discussions.***

United States Immigration and Naturalization Service, United States Border Patrol, El Paso, Texas, 47 FLRA No. 11, 47 FLRA 170, 183-84 n.6 (1993) (depositions conducted by respondent in preparation for MSPB proceedings are formal discussions because they are conducted and controlled by agency representatives; third party hearings and court proceedings are **not** formal discussions because they are **not** controlled or conducted by an agency representative); Veterans Administration Medical Center, Long Beach, California, 41 FLRA No. 106, 41 FLRA 1370, 1379-80 (1991) (VA, Long Beach) (telephone interview of unit employee by agency attorney in preparation for an MSPB hearing), enforced sub nom. Department of Veterans Affairs Medical Center, Long Beach, California, 16 F.3d 1526, 1530-31 (9th Cir. 1994).

B. Totality of the Circumstances Considered

< ***Application of Factors Where Formal Discussion Was Found***

Id. (formality found based on totality of circumstances: (1) meeting was required (since meeting was held by mutual agreement, the identity of the party who proposed the required meeting in the stipulation to dismiss an MSPB appeal is not relevant); (2) subject matter and agenda was specified; (3) memorandum was issued to employee following the meeting; (4) meeting was conducted by supervisor; (5) meeting was held in supervisor's office; (6) meeting lasted for one hour; (7) employee answered questions posed by supervisor that were evaluated by the agency's representatives).

U.S. Department of Justice, Immigration and Naturalization Service, New York Office of Asylum, Rosedale, New York, 55 FLRA No. 170, 55 FLRA 1032, 1038 (1999) (INS, Rosedale) (meeting called to discuss issues raised in grievance, work assignments and job performance was formal because it: (1) was scheduled in advance; (2) was conducted by a supervisory asylum officer; (3) took place in the supervisor's office; (4) was mandatory; and (5) the results of the meeting were reported to the agency director (although no notes were taken))

Luke Air Force Base, Arizona, 54 FLRA No. 75, 54 FLRA 716, 724-28 (1998) (Luke Air Force Base), reversed, 208 F 3d 221 (9th Cir Dec 30, 1999) (table), cert. denied, 2000 WL 798175 (Oct. 2, 2000) (mediation/investigation session of EEO complaint was formal because: (1) the Judge Advocate General attorney represented a high level of management; (2) the attorney and the employee communicated extensively through the EEO mediator, responding to each other's settlement positions; (3) the session took place outside of the employee's work area; (4) the length of the session lasted three hours; (5) a memorandum was prepared that listed the objectives and procedures for the sessions which was tantamount to an agenda; (6) although attendance was not mandatory, employee could reasonably conclude that her complaints could be adversely affected were she not to attend)

Social Security Administration, Baltimore, Maryland, 18 FLRA No. 33, 18 FLRA 249, 250 (1985) (meeting to discuss employee's grievance was formal because it: (1) was initiated by the district manager--the fourth-level supervisor; (2) was held in the district manager's office behind closed doors; and (3) attendance was mandatory)

< ***Application of Factors Where Formal Discussion Was Not Found***

Marine Corps Logistics Base, 45 FLRA No. 133, 45 FLRA 1332, 1335 (1992) (meeting called to solicit volunteers for overtime was not a formal discussion because: (1) the meeting was held on the shop floor; (2) the meeting lasted only 10 minutes; (3) only one management official, a first-line supervisor attended the meeting; (4) no agenda was prepared; and (5) no notes of the meeting were taken).

Department of Health and Human Services, Social Security Administration and Social Security Administration Field Operations, Region II, 29 FLRA No. 89, 29 FLRA 1205, 1208 (1987) (meeting to introduce supervisor was not formal because: (1) it was spontaneous; (2) it was one-on-one with employee and supervisor; (3) it was unstructured; (4) it lasted for 20 minutes; (5) it was conducted at the supervisor's desk; (6) no notes were taken; (7) no advance notice of the meeting was given and (8) there was no preparation for the meeting)

Defense Logistics Agency, Defense Depot Tracy, Tracy, California, 14 FLRA No. 78, 14 FLRA 475, 477 (1984) (meeting of supervisor with five or six unit employees to instruct them on agency leave policy was not formal because it: (1) was not scheduled in advance; (2) was called by a

first-line supervisor on his own initiative, with no other management person present; (3) was held in the supervisor's office, adjacent to the employees' work station; and (4) lasted no more than 10 minutes).

Office of Program Operations, Field Operations, Social Security Administration, San Francisco Region, 9 FLRA No. 9, 9 FLRA 48, 549-50 (1982) (two brief meetings at the desks of individual employees that were initiated by a manager to discuss discontinuing the practice of allowing part-time employees to work overtime were not formal discussions; and an impromptu meeting with a supervisor that was initiated by employees to discuss these concerns was not a formal discussion).

Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Chicago, Illinois Region, 15 FLRA No. 110, 15 FLRA 525, 527 (1984) (meeting to discuss changes regarding the teleclaims process was not formal because it: (1) was not scheduled in advance; (2) was held at the desks of the employees involved; (3) lasted only five minutes; and (4) involved six employees and a supervisor and General Counsel).

Department of Veterans Affairs, Veterans Affairs Medical Center, Gainesville, Florida, 49 FLRA No. 112, 49 FLRA 1173, 1175 (1994) (dietetic service meeting was not formal because it: (1) was scheduled and conducted in the same manner as previous monthly meetings; (2) was informational rather than formal (33 topics were covered in 30 minutes); and (3) agency statements about disciplinary policy and work requirements were nothing more than routine reminders of past policies and requirements).

Element #3: **The formal discussion must be between one or more representatives of the agency and one or more unit employees or their representatives."**

Rule of Law: **Representatives of the Agency - see Weingarten discussion under Element #2, Rule of Law, equally applicable to formal discussions.**

< ***"Nothing in section 7114(a)(2)(A) of the Statute requires that a representative be a supervisor."***

Luke Air Force Base, 54 FLRA at 730 (Attorney from Judge Advocate General's Office was a representative of the agency and had settlement authority)

< ***An outside contractor may function as a representative of the agency."***

Defense Logistics Agency, Defense Depot Tracy, Tracy, California, 39 FLRA No. 86, 39 FLRA 999, 1013 (1991) (private sector independent contractor under contract with an agency to provide Employee Assistance Program services to bargaining unit employees was a representative for purposes of section 7114(a)(2)(A) of the Statute)

Rule of Law: **For purposes of section 7114(a)(2)(A), a unit employee is one who is covered by the parties' collective bargaining agreement and is subject to dues withholding.**

Department of the Air Force, Sacramento Air Logistics Command, McClellan Air Force Base, California, 38 FLRA No. 64, 38 FLRA 732, 734 (1990) (alternate supervisors are bargaining unit employees because they continue to be covered by the collective bargaining agreement and are subject to dues withholding during the time they perform as alternate supervisors).

General Services Administration, Region 2, New York, New York, 54 FLRA No. 86, 54 FLRA 864, 874-77 (1998) (team leader is a unit employee where indicia of supervisor under section 7103(a)(10) are not present).

Nuclear Regulatory Commission, 29 FLRA No. 57, 29 FLRA 660, 662-63 (1987) (NRC) (union is not entitled to representation at a formal discussion of an EEO complaint filed by a non-unit employee).

Element #4: The formal discussion between one or more representatives of the agency and one or more unit employees or their representatives must "concern any grievance or any personal policy or practice or other general condition of employment."

Rule of Law: *Grievance* - For purposes of section 7114(a)(2)(A), a grievance is defined broadly as stated in section 7103(9) to include any complaint:

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee, labor organization, or agency concerning (i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or (ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.

INS, Rosedale, 55 FLRA at 1035-37 (meeting between employee and supervisors concerned a "grievance" where it related to work assignments and job performance that had previously been the subject of a counseling session that resulted in the employee's removal and where the employee attempted to file an informal grievance).

< ***A "grievance," as defined by the Statute, is not dependent on the scope of a negotiated grievance procedure.***

Luke Air Force Base, 54 FLRA at 730-31 (mediation/investigation session associated with an EEO complaint concerned a grievance).

< ***A "grievance" may affect an employee or employees in the bargaining unit generally.***

Id.

< ***Meetings that are required under the negotiated agreement to attempt to informally resolve a dispute before filing a formal grievance are "grievances."***

FCI, Bastrop, 51 FLRA at 1344-45 (meeting between unit employee and supervisors was a "grievance" where the union had met with the agency twice prior to the meeting, as required by the negotiated agreement, in an attempt to informally resolve the differences between the employee and the supervisor, i.e., meeting was in response to the union's efforts to informally resolve the differences which were the basis for a potential grievance).

< ***Interviews by agency representatives of bargaining unit employees in preparation for ULP hearing concerned a "grievance."***

Department of the Air Force, F.E. Warren Air Force Base, Cheyenne, Wyoming, 31 FLRA No. 35, 31 FLRA 541, 552 (1988) (F.E. Warren).

- < ***Interviews by agency representatives of bargaining unit employees in preparation for third-party proceedings in which the union has an adversary role concern a "grievance."***

VA, Long Beach, 41 FLRA at 1379-80 (telephone interviews of bargaining unit employees by agency representative to prepare for an MSPB hearing concerned a "grievance").

Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California, 35 FLRA No. 68, 35 FLRA 594, 604 (1990) (agency interview of bargaining unit employees who was to be called as a witness in arbitration hearing concerned a "grievance").

Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California, 29 FLRA No. 53, 29 FLRA 594, 604 (1987) (McClellan AFB) (to the same effect).

- < ***"Grievance" within the meaning of section 7114(a)(2)(A) can encompass a statutory appeal.***

2 U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution (Ray Brook, New York), 29 FLRA No. 52, 29 FLRA 584, 590-91 (1987) (adopting NTEU v. FLRA, 774 F.2d 1181 (D.C. Cir. 1985) v meeting to discuss oral reply to 30-day suspension did not concern a "grievance" because agency had not yet taken final adverse action and there was nothing yet to grieve), affirmed sub nom. American Federation of Government Employees, Local 3882 v. FLRA, 865 F.2d 1283 (D.C. Cir. 1989)

Marine Corps Logistics Base, Barstow, California, 52 FLRA No. 107, 52 FLRA 1039, 1046 (1997) (Barstow) (meeting at which management presented an employee with a proposed settlement agreement of a formal EEO complaint concerned a "grievance").

General Services Administration, Region 9 and American Federation of Government Employees, Council 236, 48 FLRA No. 140, 48 FLRA 1348, 1355 (1994) (settlement discussions relating to employee=s appeal to the MSPB concerned a "grievance"); VA, Long Beach, 41 FLRA at 1380 (telephone interview of unit employee by agency attorney in preparation for an MSPB hearing concerned a "grievance").

But see Internal Revenue Service, Fresno Service Center, Fresno California v. FLRA, 706 F.2d 1019, 1024 (9th Cir. 1983) (EEO complaint was not a "grievance" because the regulatory EEO procedures involved in the case were unrelated to the contractual grievance process).

General Services Administration, 50 FLRA No. 61, 50 FLRA 401, 404 (1995) (GSA) (discussions with unit employee in preparation for MSPB hearing did not concern a "grievance" because all of the elements in section 7103(a)(9) are not met v the "complaint" heard by the MSPB was not from an "employee" but rather from a "supervisor or management official").

Rule of Law: Personnel policy or practice - involves "general rules applicable to agency personnel, not discrete actions taken with respect to individual employees."

INA, Rosedale, 55 FLRA at 1035 (discussion between employee and agency officials concerning work assignments and job performance which focused only on the employee and her immediate supervisor did not concern a personnel policy or practice).

American Federation of Government Employees, Council 214 and U.S. Department of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 38 FLRA No. 34, 38 FLRA 309, 330-31 (1990) (Wright-Patterson AFB) (last chance agreement does not concern a "personnel policy or practice" because it involves only a discrete action taken with respect to an **individual** employee), enforced sub nom. U.S. Department of the Air Force, Wright-Patterson Air Force Base, Ohio v. FLRA, 949 F.2d 475 (D.C. Cir. 1991)

Bureau of Field Operation, Social Security Administration, San Francisco, California, 20 FLA No. 9, 20 FLRA 80, 83 (1985) (SSA, San Francisco) (meeting that was limited to the temporary assignment of two unit employees who work in an office of at least 95 employees did not concern "personnel policy or practice").

Rule of Law: General Condition of Employment - concerns "conditions of employment affecting employees in the unit generally."

NRC, 29 FLRA at 663 (meeting did not concern any condition of employment generally affecting the employees in the bargaining unit "in view of the non-bargaining unit status of the employee at the time of the EEO complaint, the fact that the complaint concerned matters which took place entirely outside the bargaining unit, and the nature of the January 2 meeting, that is, a discussion of the possible settlement of the individual's complaint").

F.E. Warren, 31 FLRA at 552 (subject matter of meeting concerned alleged management interference with employee picketing which involves protected rights under the Statute and concerns "conditions of employment").

SSA, San Francisco, 20 FLRA at 83 (meeting that was limited to the temporary assignment of two unit employees who work in an office of at least 95 employees had no effect on "conditions of employment" of bargaining unit employees)

Wright Patterson AFB, 38 FLRA at 330-31 (a last chance agreement meeting does not involve "other conditions of employment" because it involves only a discrete action with respect to a single employee)

GSA, 50 FLRA at 404 (although the discussions did not concern a grievance they did concern "general conditions of employment" because they addressed the supervisor's conduct that occurred and the atmosphere that existed in the office).

< **Settlement agreements under the EEO Statute are not excluded from the definition of a conditions of employment under section 7103(a)(14)(C).**

Barstow, 52 FLRA at 1047 (mere reference to a matter in another statute is not sufficient to exclude it from the definition of conditions of employment under section 7103(a)(14)(C) B no statutory provision "specifically provides for" the conduct of settlements of EEO complaints

Notice Requirement

Rule of Law: Prior notice to a union of a formal discussion is necessary to enable the union to choose its own representative.

McClellan AFB, 29 FLRA at 606 ("actual representation" was not sufficient since the employee who received notice was not the designated representative in the matter under discussion)

General Services Administration, Region 9, Los Angeles, California and American Federation of Government Employees, Council 236, 56 FLRA No. 114, 56 FLRA 683, 685 (2000) (Authority upheld Arbitrator's finding that "actual," not formal, notice to a local representative, was insufficient because union did not have an opportunity to be represented including the opportunity to designate a representative of its own choosing)

< **A union's interest cannot be adequately represented at a formal discussion if the person who attends is also the subject of the matter to be discussed.**

Id. at 606 (bargaining unit employee who was involved in the formal discussion could not adequately represent interests of union)

Department of the Air Force, 63rd Civil Engineers Squadron, Norton Air Force Base, California, 22 FLRA No. 91, 22 FLRA 843, 847 (1986) (union's interest cannot be adequately represented at a formal discussion of a grievance where the union representative is the subject of the discussion and would be put in the position of representing himself)

< **An employee's selection of a personal representative for a discussion does not obviate the necessity of notifying the union of a formal discussion as it is the union that has the statutory right to receive notice and an opportunity to be represented at a formal discussion.**

Luke Air Force Base, 54 FLRA at 722-23 n.6 (union president's attendance as the employee's personal representative at EEO mediation/investigation session did not relieve agency of obligation to inform union in advance about the formal discussion)

EEO CASE
59 FLRA 875

