



Office of
Legal Counsel

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

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MEMORANDUM

TO: Carlton M. Hadden, Director
Office of Federal Operations

FROM: Peggy R. Mastroianni *Peggy R. Mastroianni*
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SUBJECT: FLRA Policy Concerning EEO Complaint Process

I. Background:

On January 26, 1999, the General Counsel of the Federal Labor Relations Authority (FLRA) issued "Guidance on Applying the Requirements of the Federal Service Labor-Management Relations Statute to Processing Equal Employment Opportunity Complaints and Bargaining over Equal Employment Opportunity Matters."¹ The guidance reflected the views of the then General Counsel and did not necessarily constitute an interpretation by the three-member Authority. The General Counsel did not coordinate the guidance with the EEOC prior to issuing it.²

Section 7114(a)(2)(A) of the Federal Service Labor-Management Relations Act (FSLRA) states that unions shall be given the opportunity to be represented at any formal discussion between a representative of the agency and employees in the bargaining unit concerning any grievance, personnel policy or practice or general condition of employment. Part III of the lengthy General Counsel Guidance concerns "A Union's Right to be Represented at Meetings Involving EEO Matters." The General Counsel gave an expansive interpretation to section 7114, applying it broadly to the EEO complaint process established by EEOC in its Part 1614 regulations. The

¹ A review of the FLRA website disclosed that the "EEO Guidance" is currently being revised, and is not available on the website, www.flra.gov.

² Executive Order 12067 requires all federal agencies to submit proposed rules, regulations, policies, procedures or orders concerning equal employment opportunity to EEOC and other interested federal agencies at least 15 days prior to public announcement. The Order provides that disputes between EEOC and other federal agencies concerning matters covered by the order should be resolved through good faith efforts; if such efforts fail, disputes may be referred to the Executive Office of the President.

Guidance states that agencies have a duty under the FSLRA to provide the union notice and an opportunity to be represented at mediation or settlement sessions involving EEO complaints (presumably when filed by a member of the bargaining unit only). The guidance also suggests that the same may be true for EEO investigator witness interviews if the witness is a member of the bargaining unit (presumably when both the complainant and the witness are bargaining unit members).

When EEOC staff became aware of the FLRA General Counsel's Guidance and its effect on the EEO complaint process, we initiated discussions with the General Counsel and his staff to register objections to union participation in the EEO complaint process, except where the complainant has requested union representation. We noted that the Guidance should have been coordinated with EEOC and other affected federal agencies under Executive Order 12067. We expressed our concerns about the privacy interest of the complainants and the chilling effect the union's presence might have on settlement discussions or witness interviews. Finally, we sought to discuss possible compromises. The FLRA General Counsel and his staff declined to reconsider the positions taken in the guidance that concerned EEOC.

The Commission has not taken an official position on the guidance, apart from language in the preamble to the 1999 amendments to Part 1614. The preamble states that it is EEOC's "intention ... that agencies establish informal processes to resolve claims. Thus any activity conducted in connection with an agency ADR program during the EEO process would not be a formal discussion within the meaning of the [FSLRA]." 64 Fed. Reg. 37645 (July 12, 1999).

II. Court Cases:

Prior to the FLRA General Counsel guidance, courts had considered several unfair labor practice allegations by unions complaining that they were not informed of or invited to participate in administrative personnel dispute procedures. In *IRS, Fresno Service Center v. FLRA*, 706 F.2d 1019 (9th Cir. 1983), the court held that an EEO pre-complaint settlement conference was not a "formal discussion" of a "grievance" within the meaning of the FSLRA. In three other cases, courts of appeals held that interviews of employees conducted by agencies' attorneys in preparation for hearings at the Merit System Protection Board (MSPB) constituted formal discussions in connection with a grievance (the MSPB appeal) and that the agencies should have notified the unions and given them an opportunity to be represented at the interviews. *NTEU v. FLRA*, 774 F.2d 1181 (D.C. Cir. 1985); *Department of Veteran's Affairs v. FLRA*, 3 F.3d 1386 (10th Cir. 1993); *Department of Veteran's Affairs Medical Center, Long Beach, CA v. FLRA*, 16 F.3d 1526 (9th Cir. 1994).

After issuance of the FLRA General Counsel guidance, federal unions began to challenge agencies' failure to notify them and give them the opportunity to be represented at various EEO

complaint proceedings.³ The challenges took the form of unfair labor practices brought by the unions before the FLRA, and the unions won many of them. In many cases, EEOC was not aware of the unfair labor practices, or of the resulting court of appeals litigation. In an unpublished opinion concerning a union challenge to an agency's failure to notify it and give it an opportunity to be represented at a settlement conference involving an EEO complaint, the Ninth Circuit held that EEO complaints are not grievances under section 7114 of the FSLRA. *Luke Air Force Base v. FLRA*, 208 F.3d 221, 1999 WL 1278058 (9th Cir.), *cert. denied*, 531 U.S. 891 (2000). Unfortunately, since the case is unpublished, it cannot be relied on as precedent.

In 2001, the Air Force notified EEOC about two other cases it was defending. EEOC provided its views on the cases to the Department of Justice as it prepared its appeals. In a case arising at Dover Air Force Base, the FLRA concluded that the agency had committed an unfair labor practice when it conducted a mediation of a formal EEO complaint filed by a member of the bargaining unit without notifying the union and giving it an opportunity to be represented at the mediation. In the other case, arising at Tinker Air Force Base, the FLRA similarly found that an unfair labor practice occurred when the agency conducted interviews of bargaining unit employees during its investigation of an two EEO complaints without notifying the union and giving it an opportunity to be represented at the interviews.

EEOC's Office of General Counsel supported the Department of Justice's arguments in the two Air Force cases that an EEO complaint is not a grievance under the FSLRA, and that the FLRA's interpretation of its statute directly conflicts with EEOC's regulatory scheme for EEO complaint processing. More specifically, EEOC's Office of General Counsel argued three points. First, the confidential nature of EEO investigations and complaint resolution procedures requires the exclusion of unions except where the union's presence is expressly requested by the complainant, and then, only in those portions of the proceedings where the union representative is appropriately present. Second, where the proceeding to which the union seeks access is actually part of an ADR process established pursuant to Part 1614, the Alternative Dispute Resolution Act also dictates that unions be excluded unless expressly requested by the complainant. Finally, EEOC argued that the Privacy Act requires that information contained in documents generated by an employee's EEO complaint be kept confidential.

The D.C. Circuit, in *Dover Air Force Base v. FLRA*, 316 F.3d 280 (2003), held that an EEO complaint is a "grievance" under the FSLRA and that the union was entitled to notice and an opportunity to be represented at the mediation of an EEO complaint. The court found that neither the Alternative Dispute Resolution Act nor the Privacy Act precluded the union's presence at the mediation. Likewise, the court also found that nothing in Title VII, Part 1614 or Management Directive 110 precluded union representation in EEO proceedings. Finally, the

³ In some cases, the EEO complainant was represented by the union. Nevertheless, the cases all concerned the union's right to have a representative present during various EEO proceedings to represent, not the individual complainants, but the collective rights of the union.

court noted that the complainant had not objected to the union's presence. The Tinker AFB appeal was dismissed by the Tenth Circuit on jurisdictional grounds: because the Air Force failed to raise the arguments presented on appeal before the FLRA first, the court did not reach the merits of whether an EEO complaint is a "grievance" or whether the witness interviews constituted "formal discussions" under the FLSRA.

Since the *Dover* decision, the Department of Justice has decided not to recommend appeals of FLRA cases involving union requests to be present at EEO proceedings unless the FLRA requires the union's presence at an EEO pre-complaint session, the FLRA requires the union's presence at an EEO session over the objection of the complainant, or the FLRA refuses to honor a newly enacted statute or EEOC regulation that governs union attendance at EEO proceedings.

III. Tactical Advice:

As the discussion above indicates, EEOC staff have explained their disagreement with the FLRA's position regarding union participation in EEO proceedings to the FLRA at various times and in various fora. The FLRA has not altered its position. In addition, the court decisions noted above weigh in favor of the FLRA position. Because the unions have the right to pursue their claims regarding access to EEO proceedings at the FLRA, and not at EEOC, it is unlikely that EEOC would have an opportunity to issue a decision on the subject. If EEOC were to issue guidance to other agencies recommending that they exclude unions from EEO settlement talks, mediations, and witness interviews, the unions would likely file unfair labor practices against the agencies that followed such guidance, and the agencies would probably lose. The Department of Justice would not pursue an appeal except as outlined above.

Despite this quandary, we offer several recommendations on the subject. First, agencies can continue to refuse to notify unions about proceedings at the pre-complaint or counseling stage. This position is supported by the Ninth Circuit decision in *IRS, Fresno Service Center*, and by the Department of Justice's litigation posture noted above.

Second, when complainants who are members of the bargaining unit file formal complaints, EEO offices may ask whether they object to the union's presence at any settlement discussions, mediation, or interviews of bargaining unit witnesses⁴. If the complainant objects to the union's participation, the objection should be recorded in the file. Based on the objection, the agency can refuse to notify the union. The risk is that the union will file an unfair labor practice with the FLRA. However, if the agency loses the ULP, the Department of Justice might be more inclined to appeal the case to the appropriate court of appeals.

⁴ Not all witness interviews qualify as "formal discussions" under the FLSRA. Interviews scheduled in advance and formal in nature are more likely to qualify; interviews on the spot, without advance notice and conducted informally may not be considered to be "formal discussions." See, e.g., *U.S. Department of the Air Force, 436th Airlift Wing, Dover Air Force Base, Dover, Delaware*, 57 FLRA 304, 307 (2001), *aff'd*, 316 F.3d 280 (D.C. Cir. 2003).

Third, we encourage EEO Directors to meet with their agency labor-management relations staff to discuss their concerns about the issue. We have learned that at least one agency has entered into an agreement with a union stating that the agency will not ask complainants whether they object to the union's attendance at an EEO proceeding, but will honor an objection if the complainant makes one sua sponte. If the labor-management relations personnel in an agency are familiar with the EEO process and the EEO Office's concerns about union participation in the process, they are in a better position to negotiate agreements with the unions that take those concerns into account.

If you have any questions, please call Thomas J. Schlageter, Assistant Legal Counsel, at 663-4668 or Kathleen Oram, Senior Attorney, at 663-4681.