

Hello NWP Reps and Members:

Welcome to LR Chronicles number 6. This version of the LR Chronicles explains the rights of employees and the rights of the Union regarding what is termed as a "Formal Discussion." A Formal Discussion is covered under Federal Law at 5 USC 7114(a)(2)(A) and your 2003 collective bargaining agreement in Article 6, Section 3.

5 USC 7114(a)(2)(A) states **"An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy practices or other general condition of employment."**

Article 6, Section 3 of your collective bargaining agreement states **"As specifically provided under 5 USC 7114 (a)(2)(A), the Union shall be given advance notice and the opportunity to designate a representative to attend any formal discussion between one (1) or more representatives of the Agency and one (1) or more employees in the unit or their representatives concerning any grievance or any personnel policies or practices, or other general condition of employment. The Agency shall advise the Union at the corresponding level, in advance, of the subject matter."**

The Federal Labor Relations Authority (FLRA) has issued tons of case law that explains what the law states and clarifies certain situations that cover what is and is not a Formal Discussion. I will explain to you some of the case law that the FLRA has issued regarding this very important topic.

What is a Formal Discussion? The FLRA has stated:

- Meetings between one or more unit employees OR their representatives and one or more agency officials;
- Concerning any Grievance; or
- Any personnel policy or practices; or
- Other general condition of employment

The FLRA has also stated that there must be certain elements present for there to be a formal discussion. Some of those elements are:

- A “discussion” must take place
  1. Discussion is synonymous with “meeting”
  2. No actual dialogue needs to take place
  3. “Polling” employees for information gathering purposes is not a Formal Discussion.
- The Discussion must be Formal
- Must concern personnel policy or practice applicable to agency personnel GENERALLY
- Not discrete actions taken with respect to individual employees

The FLRA has also stated that in order to determine whether or not a Formal Discussion has taken place, the “Totality of Circumstances must be considered. Some of these circumstances include:

- Whether the individual who held discussion is merely a first-level supervisor or is higher in the management hierarchy
- Whether other management representatives attended
- Where the meetings took place (supes office, at employees desk, etc.)
- How long the meeting lasted
- How the meetings were called (Formal advance notice, informal or spontaneity)
- Whether a formal agenda was established
- Whether each employees attendance was mandatory
- The manner in which the meeting was conducted.

The FLRA has also described, albeit in somewhat confusing terms what constitutes “Formality.” Here is what they have said:

- Formal is distinguished from impromptu (on the job discussions)
- Status of individual who held the discussion
- Whether or not any other management representatives attended
- Site of the discussions
- How the meetings were called

- How long the meetings lasted
- Whether or not a formal agency was established
- The manner in which the discussions were conducted

Additionally, the FLRA has given examples in some of their decisions on what types of meetings that they have considered to be "Formal" and those that they have not considered to be "Formal." They have considered the following types of meetings to be "Formal" in nature:

- Interviews by agency representatives with BUEs in preparation for 3rd party proceedings in which the Union has an adversary role. (An example would be where the Union and the Agency are preparing for an arbitration hearing and the agency wants to conduct interviews with bargaining unit employees. The Union has a right to advance notice and the right to be present during this interview. More importantly, the employee has NO obligation to speak with any agency representative under this circumstance. They may tell the agency that they prefer not to speak with them, with or without the Union. This is backed up also by FLRA case law)
- Anything to do with a grievance or ULP (Except actual 3rd party proceedings)

They have considered the following types of meetings to not be "Formal" in nature:

- 3rd party hearings and court proceedings (Because they are NOT controlled by the agency.)
- Brief meetings at an employees desk to discuss discontinuing practice of allowing part-time employees to work O/T
- Impromptu meeting initiated by employee to discuss O/T
- Last Chance Agreement (Only discrete action taken on one employee)

The FLRA has also stated the specific purposes of why the Union must be notified in advance of any Formal Discussion. They have stated the purpose of the Formal Discussion right is:

- To represent the "institutional" interests of the exclusive representative

- Union's presence and participation will enable meeting to be successful and productive

Additionally, an employee has a right to confer with their delegated/designated Union representative both BEFORE and AFTER the Formal Discussion meeting. This is done on duty time and not on the employee's own time.

I know this is somewhat confusing and fairly ambiguous, but that is the way the FLRA works. As usual, if there are any questions regarding this very important topic, please contact your FACREP and he/she will contact the appropriate LR Advocate to answer any questions that he/she can't.

Thank you,

Mike Hull  
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