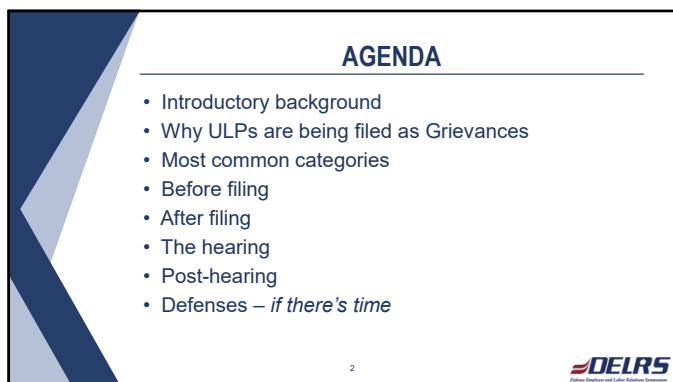
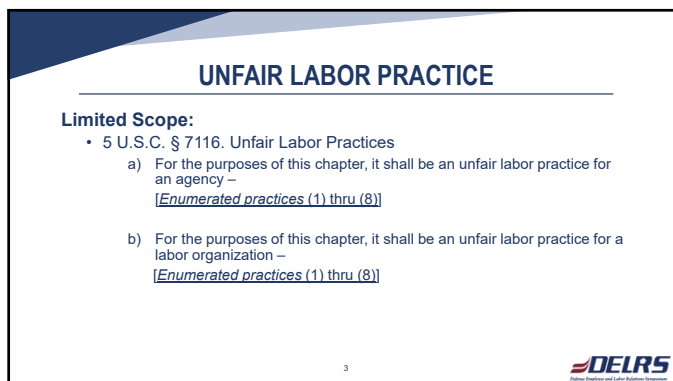




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3

GRIEVANCE

Broad Scope:

- 5 U.S.C. § 7103(9) "grievance" means **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




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ULP AS GRIEVANCE

5 U.S.C. § 7116(d):

- *[Matters covered under 5 U.S.C. § 7116 which also fall within the coverage of a negotiated 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**"




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FLRA STATUS*

- **Chair Susan Tsui Grundmann**
 - Confirmed and serving
 - Former NFFE General Counsel
- **Member Colleen Duffy Kiko**
 - Confirmed and serving
 - Former FLRA Chair
- **Member Vacant**
 - Anne Wagner, Associate Special Counsel, nominated January 2024
- **General Counsel Vacant**
 - Suzanne Summerlin, Deputy GC, FEA, nominated June 2023, renominated January 2024
- **ULP Backlog**
 - Estimated between 250-450
 - Normally, about 4000 filings per year
 - ULP filings are down
- **Staff shortages and Reorganizations led to a push to settle or dismiss**


*As of March 5, 2024



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ULP PROCESSING ABSENT A GENERAL COUNSEL


- Regional Offices continue to accept ULP charges
- Regional OGC continues to conduct investigations
- If charge has merit, **no complaint may issue** until a General Counsel is appointed and confirmed by the Senate
 - FLRA-sanctioned Settlement agreements await approval of the General Counsel
 - Negotiation of settlements is still encouraged – private settlements may occur outside FLRA jurisdiction
- Regional Director may dismiss a charge found to lack merit
 - Prior to dismissal, may permit charging party an opportunity to withdraw
- If charge is dismissed:
 - Appeal must be timely filed, but resolution must await confirmation of GC



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GRIEVANCE PROCESSING ABSENT A GENERAL COUNSEL


- Same as always -- IAW the collective bargaining agreement:
 - Grievance filed, processed, decided IAW the collective bargaining agreement
 - Binding arbitration may follow, IAW the collective bargaining agreement
 - Exceptions to arbitral awards proceed thru the FLRA, as always -- General Counsel opinion not required



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MOST COMMON CATEGORIES


- Bargaining violations
 - Most important, most frequent and most severe remedies
- Unilateral change, bad faith, surface bargaining
- Formal meetings
 - Typically, least severe remedy – BUT – see *Tyndall AFB*, 66 FLRA No. 45
- Failure to provide information
 - Often w/legalistic defenses
- Weingarten
 - Inexcusable—train your managers!



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BEFORE THE CHARGE/GRIEVANCE IS FILED

- Most cases are won or lost before the charge is filed
- **KEY** – *Especially in bargaining and request for information cases – BUILD YOUR CASE AS IT HAPPENS!*
- You may not prevent management from committing a ULP – especially in bargaining cases – BUT, how the ULP is committed may be as important as whether it was committed




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BEFORE THE CHARGE IS FILED (cont.)

Hints:


- Common sense is not common
- Train supervisors to not commit ULPs
- Don't joke about the union, even in "private" situations
- Be careful of social media, email contents, and addressees
- Try hard not to be stupid
 - See: *FAA and NATCA, 64 FLRA No. 58*
 - Supervisor told steward his actions were a reprisal



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BEFORE THE CHARGE IS FILED (cont.)

- In any conflict with the Union – especially in bargaining and information request cases – be thinking, "How am I going to defend this if the Union files a ULP or a grievance?"
- Keep detailed records
- Once you decide on a defense, take action accordingly, and as proactively as possible




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EXAMPLES – BEFORE CHARGE IS FILED

Bargaining disputes:

- Document everything -- in writing, even a contemporary MFR
- Advocate ["spin"] agency positions, as necessary – stress that you want to reach agreement
- Don't miss a chance to document Union delay, bad faith, misbehavior
- Keep bargaining after implementation (and be more generous)
- If all else fails and you need to implement, consider filing pre-emptively against the Union




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EXAMPLES [CONT.]

Information Requests:

- Don't say NO until, at least, the third response
- Initial response should be to ask for particularized need (may do 2-3 times)
- If request is illegal, say why (w/case citations) and allow union to respond
- Offer to address valid needs another way (i.e., chart)
- If "no" IS the proper answer, cite ALL applicable reasons or countervailing interests
 - See HCFA and AFGE, 56 FLRA No 19 (2000)




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EXAMPLES [CONT.]

Information Requests (cont.):


- Note: "Unduly *Burdensome*" is typically a loser of an excuse
- If at loggerheads – always make a counteroffer
 - e.g., instead of 150 hours, offer a partial response that takes 30



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ONCE THE CHARGE IS FILED


- As soon as you know what the Union is alleging, develop your "Theory of the Case"
- The Goal is a finding of Not Guilty
- How do I get there?
 - Argue the facts
 - Argue case law
- Your theory is your Road Map to victory – Follow it throughout the process, everything you do is based on how you get to that goal



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INVESTIGATION AND PREPARATION


- The FLRA Agent -- yes, the prosecutor -- is your friend!
- Get as much information as you can (preferably before you give any out)
 - Clarify the charge
 - *What is the Union claiming?*
 - *When did they claim it happened?*
- Provide a written response
 - Facts and law
- Provide innocent explanations for uncontested facts
- Know your Agent -- friendly, informal oral argument may be OK



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MAKING YOUR LEGAL ARGUMENT


- Be Consistent – Line up the ducks, know what page everyone is on
- Make sure your argument actually fits your facts
- Argument should tell a story; we're Not Guilty, because ...
- Argument should be adaptable to unknowns, but one you can stick with through to the hearing
- Make sure your research is current
- Don't make stupid arguments
 - i.e., a "litigation position" vs. your honest belief
 - Litigation is **not** a law school exam, "alternative theories" smell bad



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FLRA AND WITNESSES


- **NEVER** PROVIDE WITNESS STATEMENTS!
- Allow Agent to meet management witnesses?
 - Decide on a case-by-case basis
 - Do it only if it will help the case
- Remember your Theory of the Case
 - e.g., explanation of why we had to implement
- Use only strong, reliable, prepared witnesses
- Know what they will say (treat it like a deposition)
- Discuss Theory of Case with witnesses, but don't "coach"



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DISCOVERY, THE FLRA WAY


- FLRA regulations don't provide for discovery
- Your discovery should occur during the investigation
 - Obtain as much as possible from the FLRA Agent (including documents)
 - Control access to official time and keep record of union witnesses
 - Research each witnesses' possible testimony -- keep a file on each
 - Goal is to know what will happen before it does



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ONCE THE COMPLAINT/GRIEVANCE IS FILED


- Read and analyze it carefully
- Respond on Time -- Fail to timely respond and you lose -- can't appeal
- Admit what you have to, deny everything else (within reason)
- Depending on the allegations in the Complaint
 - Revisit your Theory of Case
 - The charge may allege one thing, General Counsel may prosecute another



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AT THE HEARING


- The Hearing is a **Court Proceeding** - Treat it that way!
- Decorum:
 - Professional attire (incl. witnesses)
 - King's English
 - **BE ON TIME** (Cardinal Sin)
 - Treat Judge/Arbitrator with respect!
- Don't overdo objections – know when to object (when its important) and be courteous
- Arrogance is not allowed

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TRIAL STRATEGY


- "All the world's a stage...."
- TELL A STORY – typically, the best story wins
 - Don't try to control the facts
 - Your job is to tell the Judge why the interpretation of those facts shows innocence, not guilt
- Opening statement - lay out your story
 - Admit those facts you can't dispute
 - Show why they don't prove guilt

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ELEMENTS OF PROOF


- Know the Charge's Elements of Proof
- Remember – the prosecution must prove all elements of the charge
- You only have to disprove one
- Focus on your opponent's weakness! Reference the elements and the weakness in your opening

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DIRECT TESTIMONY


- This is the meat of your case - where it's typically won or lost
- Follow the story laid out in the opening
- Start and end with the two best witnesses - bury any weak ones in the second act -- be wary of requests to schedule them out of order
- Make sure there's a logical flow to the witnesses' testimony

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WITNESSES


- First and foremost – TELL THE TRUTH!
- Be factual - no opinions or emotions
- Keep it short - answer the question, then stop talking
- Don't volunteer info
- Make sure the "We love our Union" message comes out, leave any anti-union feelings outside
- Prepare witnesses thoroughly
- Prepare them for cross examination

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CROSS EXAMINATION


- You are not Tom Cruise! Witnesses NEVER say, "You can't handle the truth!" on the stand!
- Plan ahead
 - Have a goal – show/highlight facts favorable to your case
 - Undercut credibility of a **key** witness
- Not every witness needs to be cross examined
 - If the witness' testimony won't further your goal, **don't** cross examine
- No fishing
 - Only ask a question if **you already know** the answer

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CROSS EXAMINATION (cont.)


- Review any affidavits first - look for contradictions or any material facts omitted
- Keep it Simple
 - No more than three points
 - Don't let the witness repeat damaging direct testimony
 - Quit while you're ahead - don't ask one question too many! [Lincoln?]
- Be courteous and professional



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CLOSING ARGUMENT AND BRIEFS


- Follow the story of the opening Statement and your Theory of Case
- Address any issues raised by the Judge
- Keep it straight to the point
- Be thorough!
 - *Any issues not raised at the hearing or in the brief can't be raised on appeal*



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APPEALS/EXCEPTIONS


- Prevailing is unlikely, only appeal if you have something to gain
- Don't be afraid to raise novel arguments or suggest overturning precedents – particularly if requesting a return to a past precedent
- A key reason to file – it may delay an adverse remedy or result in a diminished adverse remedy, esp. status quo ante, back pay
- Agency/DCPAS consultation/permission is required



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APPEALS/EXCEPTIONS (cont.)


- In discussion w/DCPAS -- Focus on the law, not the facts
 - FLRA rarely overturns factual findings
 - Were all elements of proof met?
 - Look for inconsistencies in case law
 - Current FLRA may be receptive to reversing precedent -- research old pro-management cases
- Remember your time limits! FLRA is unforgiving, there is no agency excuse for missing a deadline!



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DEFENSES


1. "Covered By" Doctrine
 - A. Is the subject expressly contained in the bargaining agreement?
 - B. Is the subject matter of the change "inseparably bound up with" and plainly an aspect of, a subject covered by the Agreement?
 - *U.S. Dep't of HHS, SSA, 47 FLRA 1004 (1993);*
 - *AFGE Local 225, 56 FLRA FLRA 686 (2000)*
 - *Customs and Border Protection and AFGE, 70 FLRA No. 125 (2018)*



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DEFENSES (cont.)

2. Particularized Need for information
 - Always include in response to requests
 - Always raise as a defense in information cases
 - "The Union is entitled" is not particularized need
 - Review other legal defenses (Privacy act, etc.)
3. Threats – Primarily Credibility




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DEFENSES (cont.)

4. Reprisal - hard to prove

- Two Part Test - Focus on second prong:
 - 1) Legitimate reason to take action
 - 2) Would have taken action even w/o union activity
 - Helps if official who took action did not know of protected activity or had no anti-union animus
 - *Letterkenny Army Depot*, 35 FLRA 113 (1990)
- Flagrant misconduct – FLRA may be open to giving new guidance




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DEFENSES (cont.)

5. Bargaining behavior charges – “Surface Bargaining” or allegation of bad faith

- Show you acted in good faith
- Considered proposals, gave valid reasons for not accepting
- Followed process, gave notice, exchanged proposals, met with union
- Had “sincere desire to reach agreement” – just not the agreement to the Union’s unreasonable position




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DEFENSES (cont.)

6. Unilateral change

- Emergency – may be hard to prove
 - Timely notification and bargaining after implementation are key
 - Real emergency – not just change in policy
 - Agency’s claim of emergency-required unilateral action is reviewable, and the agency must support its determination
 - See *VA and AFGE*, 58 FLRA 549 (2003)
- De minimis Impact (I&I only)
 - Old Authority – almost nothing is de minimis – effect on one employee is enough
 - See *Air Force*, 64 FLRA 166 (2009)
 - New Authority – perhaps more receptive
 - FLRA Regions reasonable – focus on investigation
 - Show no harm – “Complaint will not effectuate the purposes of the Statute”




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DEFENSES (cont.)

6. Unilateral change (cont.)

- Non-negotiable proposals
 - Must show all Union proposals are nonnegotiable, and that the Union was given opportunity to file additional negotiable proposals
- Union's proposals don't address the change (I&I only)
 - Different from negotiability – it's a form a bad-faith bargaining to condition agreement on one issue on agency agreement to another
- Inferred waiver – Rare, disfavored




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DEFENSES (cont.)

6. Unilateral change (cont.)


- Union refused to bargain or engaged in bad faith delay
 - Full-court press to expedite negotiations
 - Document Union delays, agree to reasonable proposals, aggressive stance on negotiability
 - Best defense is a good offense
 - File ULP (w/Agency/DCPAS consultation/approval) against Union for refusing to bargain when you implement



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REMEDIES


- FLRA has Broad Powers - status quo, back pay, TRO
 - May urge "other action that will carry out the purpose of the Statute"
 - See 5 U.S.C. § 7118(a)(7)
- Don't use them much – unlikely to do so now
- Standard Remedy
 - Posting (incl. electronic)
 - Cease and Desist Order
- Other remedies may include Back Pay and Retroactive Bargaining



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STATUS QUO ANTE

- Death Penalty of Remedies
 - Substantive Bargaining Cases -- status quo will be granted absent "special circumstances."
 - Decided on a case-by-case basis
 - See SSA, 64 FLRA 199 (2009) and FDIC, 41 FLRA 272 (1994)
 - Urge use of "other action that will carry out the purpose of the Statute"
 - 5 U.S.C. § 7118(a)(7)
 - Might work – who knows?
 - I & I Cases
 - This is where pre-charge case-building really matters




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 **ANY QUESTIONS**



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 **THANK YOU FOR ATTENDING**



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