

Chapter 1



Traps and Pitfalls in Handling ULPs

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Introduction

There are no two ways about it. It is easy to make expensive errors in handling ULP's. The rules of the game can be confusing. This chapter outlines the unusual FLRA organization, and where you fit into this scheme. The chapter also discusses some of the most common errors in handling ULP's and the reasons ULP's get filed in the first place.

Understanding the ULP Process

The unfair labor practice process exists solely to provide an enforcement mechanism for rights established in the Federal Service Labor-Management Relations Statute (Statute or law from now on). It does not protect rights established under any other laws, or under labor agreements.

In plain English, if an individual, union or agency believes there has been a violation of rights provided by this law, filing a ULP charge is the legal remedy for enforcing those rights. For example, a union that concludes an agency improperly refused to bargain on a workplace change may file a ULP charge to compel the agency to restore the original conditions and to gain an opportunity to bargain about the change.

In this way the ULP process functions much like other legal complaint processes. By filing a charge, a party is claiming a violation of the law. Standing alone, however, the charge has no effect. Initially it is nothing more than an allegation that the law has been violated in some way.

Filing a ULP charge leads to an investigation by the General Counsel of the FLRA (GC). Functioning like a combination police force and prosecutor's office, the GC determines whether there is enough evidence of a violation to enter a formal complaint. If there is, it then formally assumes the role of prosecutor, and attempts to prove the alleged violation occurred. In fact, the General Counsel could not personally look into the thousands of cases filed each year. The General Counsel is a political appointee — nominated by the President and confirmed by the Senate. In order to accomplish the day to day of the organization, the General Counsel has established a network of Regional Offices, each of which is headed by a Regional Director. It is the Regional Director who carries out the work of the General Counsel's office on a daily basis.

Acting for the General Counsel, each Regional Director functions much like a district attorney within his or her assigned geographic area. Like a criminal prosecutor, the Regional Director may prosecute — or not prosecute — a case as he or she sees fit. There are some important dif-

ferences between the two, however. The typical District Attorney we see on prime time television is constantly on the lookout for wrongdoing. She seeks out the bad guys and locks them up. In contrast, FLRA Regional Directors do not go out looking for wrongdoers. They do not try to track down potential ULP's. Only when someone files an unfair labor practice charge can the Regional Director examine all of the facts and circumstances.

Why is this important to people involved with ULP charges? Practitioners do not always realize that they are dealing with a prosecutor—particularly during the investigation of the ULP charge. Although it is true that the friendly Field Agent is, a third party and is just “trying to get the facts,” he or she is also ultimately an agent of the prosecutor.

This is an important point to remember also because practitioners tend to forget that all prosecutors have discretion. The GC can pick and choose those cases (s)he “likes” or particularly wants to pursue, and throw out those that (s)he does not. This decision by the GC is not reviewable by the courts.² Accordingly, the impression you and your case make on the GC's representatives can be crucial in determining whether a ULP charge dies on the vine or turns into a full blown “Federal case.”

It's easy to see how this is so. If the prosecutor throws out your case there isn't much you can do about it. On the other hand, if you're on the receiving end of a ULP prosecution, the GC is not likely to change his/her mind once it's made up. Once (s)he has decided to issue a complaint and prosecute, nothing short of settlement or defeat is likely to change his/her stance. This can be a helpful insight to keep in mind in developing your approach to a ULP issue.

Responsibilities of the Charging Party

If you are filing a charge, it is *you*, not the GC's representative, who will:

- Develop a “theory of violation” for the charge.
- Interview witnesses and gather documents to present to the GC.
- Decide what you want to accomplish through the charge, and what you can reasonably expect to get through horse trading or a settlement agreement.

The GC *will not* develop your case for you. Consequently, if you feel the other party has violated the Statute in some way, it is up to you to have evidence ready for presentation, as well as an explanation of how the facts add up to a violation of the law. This combination of fact and legal theory is your “theory of the case” or “theory of violation.” After investigating the case, the Re-

gional Director may not embrace your case theory. The Regional Director may have a completely different view of the case. As explained in Chapter 4 under “Dismissal,” the Regional Director does not have the final say in such cases. You may opt to have your charge dismissed and then continue to press your “theory of violation” by appealing the case to the General Counsel in Washington, D.C.

Responsibilities of the Charged Party

If you are representing a Charged Party *you*, not the GC, must:

- Remember that the General Counsel does have the power to subpoena documents or testimony. While rarely used, any decision to withhold witnesses or documents may be weighed against the General Counsel’s subpoena power
- Decide what degree of cooperation is appropriate during the investigation of the charge.
- Evaluate and respond to settlement offers that come your way.
- Identify and raise all potential defenses to the charge.
- Develop counter offers to settlement proposals offered by the Charging Party or the General Counsel.

Again, the GC’s representative is not there to establish your innocence by developing evidence in your favor, or by figuring out an effective counter argument to a claimed violation of the law. The GC is not concerned with settlement options that are a good deal for you or your agency. It is up to *you* to make the critical decisions at each step and to carry through on them.

Common Mistakes in Drafting ULP Charges

At most federal activities, an observant person could easily look around and find at least one unfair labor practice committed every day. Does this mean that it would make sense for a union to file a charge each time it thinks a ULP has occurred?

Probably not. Most unions recognize that it is more effective to file charges on only the most important issues, rather than to take “flyers” on four or five each week. Unions which use the ULP process too frequently, or which complain about every minor issue, lose credibility and influence, both with the agency and the GC. It’s the old “boy who cried wolf too often” principle at work.

Another common mistake is that of taking the “shotgun” approach to filing or defending against a ULP charge. To illustrate, a few years ago I began an investigation of 13 separate charges that a union representative had filed at a single federal activity.

All 13 charges involved events occurring within a four week period; 8 involved actions against the same employee; 7 involved the conduct of a single supervisor. Five or six separate meetings or interviews were referenced in the charges. The charges alleged that almost every day-to-day action by management was discrimination.

After review and analysis, however, this paperwork nightmare was boiled down to two simple charges. Where the original charges read like novels, rambling on for pages, the two surviving charges consisted of one sentence each. One alleged a discriminatory transfer based on union activity; the other claimed a Weingarten meeting without allowing a representative to attend. Once pinpointed, both were found to have merit. Accordingly, both were quickly resolved through an informal settlement.

What’s the point? Simply this. It is important for both parties to identify specific issues and defenses. Otherwise, genuine problems will get lost in the shuffle as the parties spend time and effort dealing with inflated charges and specious defenses.

What’s Chargeable?

Another common error is trying to use ULP’s as a substitute for the grievance procedure. The ULP process does not handle the same kinds of problems as the grievance procedure. The negotiated grievance procedure enforces *contract* rights; the ULP process enforces *statutory* rights. Although there is some overlap, generally the rights in the law are different from those established in the contract. Consequently, choosing the ULP process to complain of a contractual violation is a serious mistake.

Let me give you an example of how these two important rights get confused. Suppose that an angry manager informs a shop steward he can no longer investigate or file grievances or speak to coworkers about their problems. This provides a vivid example of *interference with the legal right to represent employees and engage in union activity*. Consequently it is a violation of section 7116(a)(1).³

Now let’s change the facts slightly. Suppose that the manager tells the steward that he will get no more official time this year because, in his opinion, the steward has already used more than the allowable amount of official time specified in the contract. While this also may seem to be interference with a legal right, it is not. This manager is not stopping anyone from representing employees or acting as a union representative. Rather, he is just applying the contract as he interprets it.

The supervisor's interpretation of the contract could be wrong, but there would be no apparent violation of a *statutory* right here. At most, this dispute would involve "differing and arguable interpretations" of the parties' contract. And therefore, even if wrong, the manager's actions might amount to a violation of the *contract*, but not a violation of the law. His actions in this second example would not constitute a ULP, since there is no violation of *law* at stake.⁴

What's the point? Both union and management representatives need to recognize that the ULP procedure is a powerful but limited tool. It is not a way for resolving any and all problems. Rather, it exists only for the purpose of interpreting and enforcing rights under the Federal labor relations law.

Why Unions File ULP Charges

Odd though it may seem, the filing of a ULP is not usually a "legal" event. Fortunately, relatively few people pursue ULP's merely to explore or establish interesting legal principles.

Generally, the motives for filing a ULP are more practical. The most common reason for filing ULP charges is simply to get management to *start* doing something, or to *stop* doing something. As a general rule, when a union reaches those goals—usually through an informal settlement—the charge has served its purpose and is happily discarded.

ULP charges are also filed for many other reasons. Charges are often filed for purely tactical or sometimes political reasons. Here are some of the "unofficial" reasons for filing ULP's.

1. ULP's For Tactical or Strategic Reasons

As noted, filing a ULP may prod the other side into taking an action, regardless of whether a genuine violation is likely. For example, sometimes the bargaining process involves foot-dragging by one of the parties. A ULP may be useful to pressure one side back to the table and get them moving again.

2. Use of ULP Process As Money-Saving Device Or As A Court Of Last Resort

Grievance arbitration can be costly. It saps union treasuries. So when unions have a choice between filing a grievance or a ULP, the union may view the ULP as the better choice based on economic considerations.

Similarly, sometimes a union member will approach the steward with a case that the steward recognizes to be a clear loser. The employee may feel picked on, singled out and poorly treated,