**Formal Discussion**

**Overview**

Formal discussion is a term contained in the Federal Service Labor-Management Relations Statute at 5 USC 7114(a)(2)(A). It refers to meetings held by representatives of agency management with bargaining unit employees concerning grievances, personnel policies or practices, or general conditions of employment. When such meetings are held, it is the responsibility of management to notify the union in advance and give it an opportunity to attend and participate.

**Key Points**

These key-point summaries cannot reflect every fact or point of law contained within a source document. For the full text, follow the link to the cited source. The references to ***Broida*** in this Quick Start Guide are to federal employment law expert Peter Broida's treatise, *A* *Guide to Federal Labor Relations Authority Law and Practice* (Dewey Publishing Inc.), to which ***cyber*FEDS®** has exclusive Web rights.

**The basics**

* An exclusive representative of an appropriate unit is entitled to the opportunity to be represented at any formal discussion between one or more representatives of an agency and one or more bargaining unit employees concerning any grievance, personnel policy or practice, or other general condition of employment of unit employees. 5 USC 7114(a)(2)(A).
* Whether a formal discussion takes place is dependent on the employee's bargaining unit status at the time of the discussion. *Customs and Border Protection, El Paso, Texas*, 107 LRP 67513, 62 FLRA 241 (FLRA 2007).
* The purpose of the formal discussion provision is to give the union the opportunity to safeguard both its own institutional interests and the interests of bargaining unit employees*. Border Patrol, El Paso*, *Texas*, 93 FLRR 1-1063, 47 FLRA 170 (FLRA 1993).
* The term "discussion" is viewed as synonymous with "meeting." Consequently, dialogue between the management and bargaining unit attendees is not necessary for a determination that the meeting was a formal discussion. *Pension Benefit Guaranty Corporation*, 107 LRP 67511, 62 FLRA 219 (FLRA 2007). *FCI, Bastrop*, *Texas*, 96 FLRR 1-1048, 51 FLRA 1339 (FLRA 1996).

**What qualifies?**

* To qualify as a formal discussion a meeting must include four specific elements. They are: a) at least one representative of agency management and at least one bargaining unit employee in attendance; b) a discussion, which is c) formal in nature, and d) concerns either a grievance or a personnel policy, practice, or other condition of employment of unit employees. *GSA, Region 9*, 94 FLRR 1-1005, 48 FLRA 1348 (FLRA 1994).
* The U.S. Court of Appeals, D.C. Circuit, ruled that the term "grievance" as used in 5 USC 7103(a)(9) should be interpreted broadly to include complaints and appeals filed under other statutes. Interviews with bargaining unit employees to prepare them as witnesses in a hearing before the Merit Systems Protection Board are formal discussions. *NTEU v. FLRA*, 85 FLRR 1-8022, 774 F.2d 1181 (D.C. Cir. 1985).
* ***Broida:*** A meeting to resolve a grievance between an employee and his first-level supervisor, where the supervisor is to present to the employee a reevaluation of his performance, was not formal. No other supervisor was present, the meeting lasted only 10 minutes, it was called informally and was not scheduled in advance, there was no formal agenda, and the supervisor's comments were not noted or transcribed. *Ogden Air Logistics Center, Hill AFB*, 85 FLRR 1-1124, 17 FLRA 948 (FLRA 1985). [*Broida Guide to FLRA Law and Practice:* Discussions Concerning Grievances](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Section+I:+Representation+During+Formal+Discussions,+Subsection+01:+Defining+Formal+Discussion,+Part+G:+Discussions+Concerning+Grievances).
* ***Broida:*** A meeting that concerned a grievance, was initiated by telephone between a fourth-level supervisor and an employee, and was held at the supervisor's office was formal. *Social Security Administration*, 85 FLRR 1-1178, 18 FLRA 249 (FLRA 1985). [*Broida Guide to FLRA Law and Practice:* Discussions Concerning Grievances](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Section+I:+Representation+During+Formal+Discussions,+Subsection+01:+Defining+Formal+Discussion,+Part+G:+Discussions+Concerning+Grievances).
* ***Broida:*** A meeting that involved discussion and resolution of a grievance was formal. The grievant was called to the office by management, one of whom was not just a first-level supervisor, and the meeting was neither impromptu nor casual. *Civil Engineers Squadron, Norton AFB*, 86 FLRR 1-1708, 22 FLRA 843 (FLRA 1986). [*Broida Guide to FLRA Law and Practice:* Discussions Concerning Grievances](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Section+I:+Representation+During+Formal+Discussions,+Subsection+01:+Defining+Formal+Discussion,+Part+G:+Discussions+Concerning+Grievances).
* A meeting where the agency discussed with workers the realignment of personnel pursuant to a reorganization constituted a formal discussion. *Kirtland AFB*, 109 LRP 63373, 64 FLRA 166 (FLRA 2009).
* Conversations conducted by telephone may qualify as formal discussions. *SSA, Office of* *Hearings and Appeals*, 104 LRP 26001, 59 FLRA 875 (FLRA 2004).
* Discussions of performance standards applicable to employees in general may qualify as formal discussions. *SSA, Dallas*, 86 FLRR 1-1827, 23 FLRA 807 (FLRA 1986).
* Meetings held to discuss intended or possible changes in conditions of employment, even if the potential changes are de minimis and an exercise of management rights, qualify as formal discussions. *VA Medical Center, New York*, 93 FLRR 1-1152, 47 FLRA 1072 (FLRA 1993).
* A meeting to discuss the settlement of an appeal before the MSPB is a formal discussion. *General Services Administration*, 97 FLRR 1-1137, 53 FLRA 925 (FLRA 1997).
* Formal employee orientation sessions usually qualify as formal discussions. *Social Security Administration*, 84 FLRR 1-1703, 16 FLRA 232 (FLRA 1984).
* Meetings with employees to gather information regarding conditions of employment, e.g. general environment in the office, may be formal discussions*. General Services Administration*, 95 FLRR 1-1047, 50 FLRA 401 (FLRA 1995).
* A meeting held to announce and discuss a reduction in force is a formal discussion. *Warren AFB*, 96 FLRR 1-1106, 52 FLRA 149 (FLRA 1996).
* A union is entitled to determine who will represent it at a formal discussion. *GSA,* *Region* *9*, 94 FLRR 1-1005, 48 FLRA 1348 (FLRA 1994).

**Representatives**

* The union has the right to designate its own representative to attend a formal discussion. *Customs and Border Protection, El Paso, Texas*, 107 LRP 67513, 62 FLRA 241 (FLRA 2007).
* Individuals acting on behalf of or at the direction of agency management, such as an agency attorney, may qualify as representatives of the agency for the purpose of identifying formal discussions. *436th Airlift Wing*, 101 FLRR 1-1149, 57 FLRA 304 (FLRA 2001).
* EEO officials and counselors who are not part of the bargaining unit may qualify as management representatives for the purpose of determining formal discussions. [*FLRA General Counsel's Guidance on the Relationship between the Federal Service Labor-Management Relations Statute and EEO Matters*](http://www.cyberfeds.com/CF3/index.jsp?contentId=5003&chunkid=199099) (January 1999).
* The fact that a union official received notice of a formal discussion in his capacity as an employee may not satisfy the requirement to provide formal notification to the union if it deprives the union of the right to select its own representative. *GSA, Region 9*, 94 FLRR 1-1005, 48 FLRA 1348 (FLRA 1994).
* Failure to send a representative to a formal discussion after receiving proper notice constitutes a waiver of the union's right. *National Labor Relations Board*, 92 FLRR 1-1330, 46 FLRA 107 (FLRA 1992).
* A union representative at a formal discussion has the right to state the union's position on the subject matter discussed at the meeting, but not to take charge of or disrupt the meeting. *New Cumberland Army Depot*, 90 FLRR 1-1618, 38 FLRA 671 (FLRA 1990).
* The union's active participation may be limited to some degree when the meeting concerns a statutory procedure, e.g., a deposition in a MSPB appeal, and the union is not acting as the employee's representative. *Border Patrol, El Paso*, *Texas*, 93 FLRR 1-1063, 47 FLRA 170 (FLRA 1993).

**Formality**

* The formality of a discussion is determined based on the totality of circumstances surrounding it. Factors taken into consideration include the number and level of management representatives in attendance, whether the meeting was scheduled or impromptu, whether a formal agenda was used, how long the meeting lasted, the location of the discussion, whether attendance was mandatory, and how the meeting was conducted. *Luke AFB*, 98 FLRR 1-1150, 54 FLRA 716 (FLRA 1998).
* Because the determination of formality is based on the totality of the circumstances, a meeting may have some indicia of formality and still not be a formal discussion. *Veterans Affairs Medical Center, Richmond, Va.*, 109 LRP 34003, 63 FLRA 440 (FLRA 2009).
* Impromptu discussions, as opposed to formally scheduled or mandatory meetings, generally are not considered formal. *Department of Energy, Rocky Flats*, 102 FLRR 1-1074, 57 FLRA 754 (FLRA 2002).
* A discussion that begins as an informal meeting may evolve into a formal discussion triggering the union's right to be given the opportunity to attend. *Defense Depot, Tracy*, *Calif.,* 90 FLRR 1-1519, 37 FLRA 952 (FLRA 1990).
* A meeting between a supervisor and a new employee to orient the employee to the work environment, including a tour and introduction to coworkers, was informal. *SSA, Region* *2*, 87 FLRR 1-1557, 29 FLRA 1205 (FLRA 1987).

**Notice of formal meetings**

* ***Broida:*** A union was not properly notified of a formal meeting by the presence of its representative if the representative happens to be the grievant and is otherwise unrepresented. *Civil Engineers Squadron, Norton AFB*, 86 FLRR 1-1708, 22 FLRA 843 (FLRA 1986).[*Broida Guide to FLRA Law and Practice:* Notice of Formal Meetings](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Section+I:+Representation+During+Formal+Discussions,+Subsection+07:+Notice+of+Formal+Meetings).

**Exclusions**

* Routine informational staff meetings that may include reminders of policies usually do not qualify as formal discussions. *VA Medical Center, Gainesville*, *Fla.,* 94 FLRR 1-1130, 49 FLRA 1173 (FLRA 1994).
* A meeting held to discuss a last chance agreement is not a formal discussion. *Wright-Patterson AFB*, 90 FLRR 1-1591, 38 FLRA 309 (FLRA 1990).
* Despite its ruling in *Wright-Patterson AFB*, 90 FLRR 1-1591, 38 FLRA 309 (FLRA 1990), the FLRA found the agency bypassed the union when it negotiated a last chance agreement with an employee and not the union. The FLRA found no inconsistency between this decision and *Wright-Patterson AFB*. *Social Security Administration*, 99 FLRR 1-1144, 55 FLRA 978 (FLRA 1999).
* Meetings with employees to gather factual information regarding agency operations do not constitute formal discussions. *Internal Revenue Service*, 84 FLRR 1-1468, 14 FLRA 698 (FLRA 1984).
* Individual performance counseling sessions do not qualify as formal discussions. *Social Security Administration*, 84 FLRR 1-1381, 14 FLRA 28 (FLRA 1984).
* An oral reply to a proposed adverse action does not constitute a formal discussion. *FCI, Ray Brook*, *N.Y.*, 87 FLRR 1-1520, 29 FLRA 584 (FLRA 1987).

**Meetings regarding testimony**

* A pre-arbitration meeting to discuss an employee's potential testimony is a formal discussion. *GSA, Region 2*, 98 FLRR 1-1161, 54 FLRA 864 (FLRA 1998).
* An agency cannot use the attorney work product privilege to refuse to notify the union of a meeting with unit employees to prepare for their testimony in a third-party proceeding. *McClellan AFB*, 90 FLRR 1-1264, 35 FLRA 594 (FLRA 1990).
* The attorney work product privilege cannot be used to preclude a particular union representative from attending a meeting with a unit employee who will serve as a witness in arbitration, even when the representative will be the union's advocate at the arbitration. *Customs and Border Protection*, 107 LRP 67513, 62 FLRA 241 (FLRA 2007).
* A meeting to prepare a unit employee as a witness in arbitration is a formal discussion even when the employee will appear as a witness on behalf of the agency. *Customs and Border Protection*, 107 LRP 67513, 62 FLRA 241 (FLRA 2007).
* Meetings with employees to gather facts in preparation for a third-party proceeding may be held outside the union's presence if three precautions are observed: 1) employees must be advised of the interview's purpose and assured of no reprisal if they refuse to participate; 2) the questioning must occur in a non-coercive context; and 3) the questions must not exceed the scope of the inquiry's legitimate purpose. *General Services Administration*, 95 FLRR 1-1047, 50 FLRA 401 (FLRA 1995); *IRS, Brookhaven Service Center*, 82 FLRR 1-1638, 9 FLRA 930 (FLRA 1982).

**EEO complaints**

* The FLRA applied the D.C. Circuit's ruling in *NTEU v. FLRA*, 85 FLRR 1-8022, 774 F.2d 1181 (D.C. Cir. 1985), and concluded that a meeting held to discuss settlement of an EEO complaint filed by a bargaining unit employee is a formal discussion. *Marine Corps, Barstow*, 97 FLRR 1-1026, 52 FLRA 1039 (FLRA 1997).
* Reversing an FLRA decision, the 9th Circuit ruled that an EEO complaint is not a grievance covered by the labor relations statute, and the union is not entitled to an opportunity to attend a meeting between an individual EEO complainant and agency representatives. *Luke AFB*, 100 FLRR 1-8002, 208 F.3d 221 (9th Cir. 1999).
* Upholding a ruling of the FLRA, the D.C. Circuit held that a meeting with a bargaining unit employee to discuss settlement of an EEO complaint is a formal discussion if all elements of formality are present. However, the court concluded that if a direct conflict exists between the rights of the individual complainant and those of the union, the conflict would have to be resolved in favor of the individual. *436th Airlift Wing*, 103 LRP 2316, 316 F.3d 280 (FLRA 2003).
* ***Broida:*** The FLRA restated its position regarding post-complaint settlements and mediation in EEO cases in *Luke AFB*, 103 LRP 22276, 58 FLRA 528 (FLRA 2003), likely perpetuating the split in the Circuits. [*Broida Guide to FLRA Law and Practice:* EEO Proceedings -- Post-Complaint Settlement Discussions and Adjustments; Mediation](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Section+I:+Representation+During+Formal+Discussions,+Subsection+01:+Defining+Formal+Discussion,+Part+D:+EEO+Proceedings:+Post-Complaint+Settlement+Discussions+and+Adjustments;+Mediation).
* ***Broida:*** In *Department of Agriculture, Forest Service*, 105 LRP 9311, 60 FLRA 644 (FLRA 2005), the FLRA reaffirmed the right of the union to notice and an opportunity to be present at post-complaint settlement discussions and mediations.[*Broida Guide to FLRA Law and Practice:* EEO Proceedings -- Post-Complaint Settlement Discussions and Adjustments; Mediation](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Section+I:+Representation+During+Formal+Discussions,+Subsection+01:+Defining+Formal+Discussion,+Part+D:+EEO+Proceedings:+Post-Complaint+Settlement+Discussions+and+Adjustments;+Mediation).
* In order for the union to be entitled to notice and an opportunity to attend a meeting regarding an individual EEO complaint, the meeting must be formal. An impromptu meeting initiated by an employee was not formal. *Department of Energy, Rocky Flats*, 102 FLRR 1-1074, 57 FLRA 754 (FLRA 2002).
* Contractors hired by the agency to conduct EEO investigations are representatives of the agency even though they are acting as neutrals with no authority to discuss conditions of employment or to seek to resolve the complaint. *Pension Benefit Guaranty Corporation*, 107 LRP 67511, 62 FLRA 219 (FLRA 2007).
* The agency acted unlawfully when it honored an employee's request that the union not be present at the discussion of an EEO complaint. The employee did not state how the union's presence would interfere with his rights. *Davis-Monthan Air Force Base*, 110 LRP 33498, 64 FLRA 845 (FLRA 2010).