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| **N. UNFAIR LABOR PRACTICES**  Nothing precludes a grievance from asserting that an agency committed a statutory unfair labor practice. The jurisdiction of an arbitrator to decide a ULP issue permits adjudication of that issue without the formality of a ULP proceeding before the FLRA: a charge, an investigation, and the discretionary issuance of a ULP complaint subject to hearing by an administrative law judge under relatively formal procedural rules.  ...Under established case law, an arbitrator is authorized to decide whether an Agency's alleged action or inaction constitutes an unfair labor practice, just as an Administrative Law Judge would decide if the complaining party had filed a ULP charge under the procedures of 5 U.S.C. 7118 instead of a grievance under 5 U.S.C. 7121. In such cases, the grievant has the burden of proving a violation....  AFGE, Council 220, AFL-CIO and SSA, 106 LRP 57164 (2006 Horowitz)  For an arbitrator to determine a ULP issue, the contract must not exclude ULPs from its coverage and the ULP issue must actually be submitted to the arbitrator.  The FLRA ruled that arbitrators do have the authority to decide ULP claims, but only if the two conditions set forth in NTEU Chapter 168, 99 FLRR 1-1025, are met. These two conditions are:  The parties must not have agreed to exclude ULPs from the scope of the negotiated grievance procedure, and  The issue of whether the Agency committed a ULP in violation of the Statute must have been properly submitted to the arbitrator.  In the FLRA's decision in APGE, National Council of HUD Locals, 98 FLRR 1-1184, the union argued, "When a grievance under § 7121 of the Statute involves an alleged unfair labor practice, arbitrators must apply the same standards and burdens that would be applied by an administrative law judge in a ULP proceeding."  AFGE, Council of Prison Locals 1030 and Dept. of Justice, 103 LRP 2130, 103 FLRR-2 67 (2001 Fox)  If a grievance asserts a ULP, the grievance may be barred in a parallel ULP charge filed earlier with the FLRA. An election of remedies is involved.  The determination of whether a grievance is barred by an earlier-filed ULP requires examining whether the grievance involves the same "issues", that is, whether the grievance arose out of the same set of factual circumstances as the ULP and whether the theory advanced in support of the grievance and the ULP are substantially similar. U.S. Department of the Army Finance and Accounting Center, Indianapolis, Indiana and American Federation of Government Employees, Local 1411, 38 FLRA 1345, 1351 (1991) (Army Finance), petition for reviewed denied sub nom American Federation of Government Employees AFL-CIO, Local 1411 v. FLRA,. 960 F.2d. 176, 177-78 (D.C. Cir. 1992) (Local 1411). Only if both tests are met is a subsequent action barred by a former one. Local 1411, at 178. See also Federal Bureau of Prisons and American Federation of Government Employees, Local 3690, 18 FLRA 314, 315 (1985), and OLAM Southwest Air Defense Sector (TAC) Point Arena Air Force Station, Point Arena, California and National Association of Government Employees Local R12-85, AFL-CIO, 51 FLRA No. 69 (1996).  ...  The Union may act to protect both its institutional interests and those of individual employees. Although those interests frequently overlap, they have been recognized as different. Thus, 5 U.S.C. 7116(d) does not preclude a union as an aggrieved party to file a ULP in its institutional capacity to enforce its own rights simply because an employee has initiated a grievance procedure, based on the same factual predicate, to enforce his individual rights. Cornelius v. Nutt, 472 U.S. 648, 665 n.20 (1985). Thus, precedent recognizes the different representational roles which unions play and the different legal considerations which flow from those different roles. By extension, that principle would allow the Union to enforce one aspect of interests through arbitration and another set of interests through ULP proceedings, even though there might be factual overlap between the two proceedings.  AFGE, Local 12 and Dept. of Labor, 101 FLRR 2-1191 (2001 Vaughn)  The union bears the burden of proving the existence of a ULP.  As the grieving party, the Union bears the burden of proving the elements of the alleged unfair labor practices by a preponderance of the evidence. American Federation of Government Employees, National Border Patrol Council and U.S. Department of Justice, U.S. Border Patrol, 54 FLRA No 89 at 5-6 (1998), Thus, Local 12 was required to make a prima facie showing that [name] was engaged in protected activity, and that [name]' conduct was in response to this activity. Id. Even if the Union meets its burden, the Agency still may prevail if it demonstrates by a preponderance of the evidence that there was a legitimate justification for [name]s' conduct and that he would have taken the same action even in the absence of the Union's protected activity. Id. However, the Union also may seek to establish either as part of its case-in-chief or after Management has presented evidence of its lawful reasons, that those reasons are pretextual. Id.  AFGE, Local 12 and Dept of Labor, 106 LRP 41859, 107 FLRR-2 4 (2006 Pacht)  Applying law developed by the FLRA, an arbitrator may determine if an agency committed a ULP in connection, for example, with bargaining procedures required to implement changes in conditions of employment.  It is incumbent on the Union, when faced with a management decision it believes falls beyond what is authorized by the collective bargaining agreement, to at least request that the Agency bargain, rather than assume the result is a "done deal" when weeks remain prior to the scheduled date of implementation.  Thus, the failure of the Agency to have a head of agency make the determination of adverse impact precludes a finding that the Union waived its right to negotiate, while the Union's failure to request a negotiation precludes a finding that the Agency refused to bargain.  NTEU Chapter 32 and IRS, Ogden Serv. Ctr., 106 LRP 19833 (2006 Cloke) |

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