**Unfair Labor Practice**

**Overview**

A violation of the statute by either management or labor is an unfair labor practice. 5 USC 7116 lists the actions that constitute ULPs. Subsection (a) contains the management ULPs, while subsection (b) recognizes potential violations on the part of a union. To be sure nothing has been missed the final ULP listed in both subsections (a) and (b) is "to otherwise fail or refuse to comply with any provision of this chapter."

The vast majority of ULP allegations are initiated by unions, the most common, at least in recent years, being a charge that an agency failed to negotiate in good faith by changing a condition of employment without providing the union an opportunity to bargain. Of those filed against unions, either by an agency or an individual employee, the most common is an allegation that the union somehow treated non-dues paying bargaining unit members differently from employees who were members of the union.

Substantive information concerning specific unfair labor practices is contained in other Quick Start Guides. This guide will deal primarily with the procedural aspects of ULPs. The basic steps of the ULP process are only briefly outlined below. Practitioners are encouraged to examine carefully all of the requirements stated in [5 CFR Part 2423](http://www.cyberfeds.com/CF3/servlet/CFSearchAll?searchstring=&searchscreen=%2FCF3%2Fstatsearch.jsp&destination=index.jsp%3Ftopic%3DMain%26results%3Dyes&db=STATSREGS&thesaurus=yes&sortorder=document&results=100&title=5+CFR&part=2423&restrictors=title&restrictors=part).

**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 charge**

* The ULP process begins with a "charge" made by an agency, a union or a person alleging that an agency or union has engaged in unfair labor practices. 5 CFR 2423.3.
* A charge must inform the charged party of at least the general nature of the alleged violation. *USDA Food Safety and Inspection Service*, 103 LRP 39300, 59 FLRA 63 (FLRA 2003).
* The charge is filed with the FLRA director of the region where the alleged ULP occurred. 5 CFR 2423.6.

**Effect of earlier-filed grievance or appeal**

* ***Broida:*** By its language, Section 7116(d) confirms that issues that properly can be raised as an unfair labor practice or as a grievance may in the discretion of the aggrieved party be raised under the negotiated grievance procedure or the statutory unfair labor practice procedure, but not under both procedures. [*Broida Guide to Federal Labor Relations Authority Law and Practice:* Defining the Issue](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+09:Review+of+Arbitration+Awards,+Subchapter+08:+Grounds+for+Review,+Section+A:+Award+Fails+to+Draw+Its+Essence+From+the+Agreement,+Subsection+02:+Award+Exceeds+Authority+of+Arbitrator,+Part+A:+Defining+the+Issue), *citing* *State of New York, Division of Military and Naval Affairs*, 106 LRP 49968, 61 FLRA 664 (FLRA 2006).
* When a party elects to use the negotiated grievance procedure rather than file a ULP to allege a statutory violation, there is no requirement that an arbitrator frame the issue to address every statutory claim. *State of New York, Division of Military and Naval Affairs*, 106 LRP 49968, 61 FLRA 664 (FLRA 2006).
* When a ULP charge is dismissed by the FLRA regional office, a later filed grievance based on the same factual circumstances and legal theories may not be contested in the negotiated grievance procedure. *GSA, Northeast and Caribbean Region*, 105 LRP 37004, 61 FLRA 1 (FLRA 2005).
* A ULP allegation is barred by 5 USC 7116 (d) only when it arises from the same factual circumstances and legal theories as an earlier filed grievance or MSPB appeal. *Army Human Resources Command, St. Louis*, 109 LRP 63371, 64 FLRA 140 (FLRA 2009), *citing Wildberger v. FLRA*, 98 FLRR 1-8001, 132 F.3d 784 (D.C. Cir. 1998).
* An agency's election to file a ULP charge over a matter that had already been grieved by the union was not barred by 5 USC 7116(d) because the aggrieved parties in each dispute were not the same. *Defense Contract Management Agency, District West, Hurst, Texas,* 103 LRP 3216, 58 FLRA 316 (FLRA 2003).

**Standing to file**

* An individual has standing to file a ULP charge invoking the general counsel's jurisdiction to investigate the charge. *Great Lakes Program Service Center, Chicago*, 80 FLRR 1-3021, 5-CA-71 (General Counsel 1980).
* An employee in the excepted service who did not have appeal rights to MSPB met the definition of "employee" contained in the labor-management relations statute and therefore had standing to file a ULP charge claiming his removal was based on anti-union animus. *Pension Benefit Guaranty Corporation v. FLRA*, 92 FLRR 1-8028, 967 F.2d 658 (D.C. Cir. 1992).
* FLRA lacked jurisdiction over a ULP charge alleging a National Guard technician's removal was retaliation for union activity. Title 32 of the U.S. Code bestowed final and unreviewable authority over adverse actions on the state adjutant general. *Illinois Air Chapter 34 v. FLRA*, 86 FLRR 1-8073, 802 F.2d 1483 (D.C. Cir. 1986).

**Timeliness of charge**

* The timeframe for filing a charge is established by the statute. With limited exception, the FLRA general counsel may not issue a complaint against a party based on an alleged ULP that took place more than 6 months before the charge was filed. 5 USC 7118 (a)(4).
* The time period for filing a ULP charge begins to run when the charging party has clear and unequivocal notice of a violation of the statute. *Immigration and Naturalization Service*, 99 FLRR 1-1004, 55 FLRA 93 (FLRA 1999).
* A party may file a ULP charge more than six months after a respondent's actions when, because the respondent failed to perform a duty required by the statute or the respondent concealed the alleged unlawful action, the charging party did not learn of the action immediately. *Customs Service, El Paso, Texas*, 98 FLRR 1-1228, 55 FLRA 43 (FLRA 1998).
* An allegation that a party's ULP charge was untimely filed is an affirmative defense, not a jurisdictional matter. Consequently, it must be raised before an ALJ before the close of a hearing. *Army Armament Research, Development and Engineering Center*, 96 FLRR 1-1139, 52 FLRA 527 (FLRA 1996).
* An amended charge will be considered timely filed if it is closely related to events or matters contained in the original charge and is based on events occurring within a six month period preceding the charge. *Nuclear Regulatory Commission*, 92 FLRR 1-1086, 44 FLRA 370 (FLRA 1992).

**Regional director/general counsel actions**

* The regional director, on behalf of the FLRA general counsel, investigates a ULP charge. 5 CFR 2423.8.
* If the regional director determines formal proceedings are warranted, the RD files a complaint with the FLRA Office of Administrative Law Judges. A decision to issue a complaint is not subject to review. 5 CFR 2423.20.
* ***Broida:*** 5 CFR 2423.20(c) (2009) allows a complaint to be amended by the regional director at any time before the answer is filed or later by motion to the Office of Administrative Law Judges. [*Broida Guide to Federal Labor Relations Authority Law and Practice:* Amendment of Complaint; Matters Fully and Fairly Litigated](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+08:+Unfair+Labor+Practices,+Subchapter+04:+ULP+Procedures,+Section+E:+Pleadings+and+Preliminaries,+Subsection+02:+Complaint,+Part+C:+Amendment+of+Complaint;+Matters+Fully+and+Fairly+Litigated).
* The regional director may issue a complaint or refuse to do so. The RD may also approve a request to withdraw the charge or approve a written settlement agreement. 5 CFR 2423.10.
* If the regional director refuses to issue a complaint, the charging party may seek review of that decision by the general counsel. 5 CFR 2423.11.
* The general counsel has unreviewable authority to refuse to issue a complaint. The federal courts lack jurisdiction to review the GC ruling. *Turgeon v. FLRA*, 82 FLRR 1-8059, 667 F.2d 937 (D.C. Cir. 1982); *NATCA v. FSIP*, 108 LRP 62262, 08-481 (RMC) (D.D.C. 2008).
* A regional director's failure to serve a copy of the charge on the charged party and to give it an opportunity to respond prior to the issuance of a complaint was not in accordance with FLRA regulations but did not prejudice the charged party's opportunity to present its case. *INS Western Region Office of Labor-Management Relations, Lacuna Niguel, Calif*., 103 LRP 31183, 58 FLRA 656 (FLRA 2003).
* Allegations not included in a charge may be included in the general counsel's complaint if they are closely related to events or matters complained of in the charge and those events occurred within the six month period preceding the charge. *HUD, Region X, Seattle*, 91 FLRR 1-1317, 41 FLRA 363 (FLRA 1991).

**Settlement and alternative dispute resolution**

* In 2010, the FLRA amended [5 CFR Part 2423](http://www.cyberfeds.com/CF3/servlet/CFSearchAll?searchstring=&searchscreen=%2FCF3%2Fstatsearch.jsp&destination=index.jsp%3Ftopic%3DMain%26results%3Dyes&db=STATSREGS&thesaurus=yes&sortorder=document&results=100&title=5+CFR&part=2423&restrictors=title&restrictors=part) to restore the Office of General Counsel's role in facilitating the resolution of disputes and in training and educating FLRA customers. The revisions were intended to reestablish the OGC's leadership role in providing guidance in alternative dispute resolution techniques to both parties in order to strengthen labor-management relationships and resolve disputes short of litigation. [Summary of Final Rule](http://www.cyberfeds.com/CF3/index.jsp?contentId=5001&chunkid=999918265), Federal Register, Volume 75, Number 54 (2010).
* Prior to the filing of a ULP charge by a party, at the request of both parties, a representative of OGC's regional office may assist the parties in resolving the dispute. 5 CFR 2423.1.
* Alternative dispute resolution services available from the OGC, on a voluntary basis, include facilitation, intervention, training and education. 5 CFR 2423.2.
* After the initiation of an investigation, as part of processing a ULP charge, the OGC may suggest to the parties that they may benefit from ADR services. 5 CFR 2423.2.
* Prior to issuing a complaint, the regional director may provide the parties an opportunity to enter into a bilateral informal settlement agreement. 5 CFR 2423.12 (a).
* If the charging party refuses to enter into a bilateral settlement, the regional director may enter into a unilateral settlement with the charged party and refuse to issue a complaint. The charging party may obtain general counsel review of that decision. 5 CFR 2423.12 (b).
* Failure to comply with a settlement agreement approved by a regional director is cause for reinstatement of a complaint but is not, by itself, an independent violation of the statute. *FAA, Mike Monroney Aeronautical Center, Oklahoma City, Okla.*, 92 FLRR 1-1028, 43 FLRA 1221 (FLRA 1992).
* Nothing in the statute precludes a party from agreeing to submit ULP charges to the other party for possible resolution before submitting the charge to the FLRA regional director. *Fort Sam Houston*, 82 FLRR 1-1457, 8 FLRA 394 (FLRA 1982).
* A proposal to require the parties to engage in settlement discussions before a ULP charge can be filed is a permissive matter for bargaining. *USDA Food Safety and Inspection Service*, 86 FLRR 1-1681, 22 FLRA 586 (FLRA 1986).

**Response to complaint**

* ***Broida:*** Under [5 CFR 2423.20](http://www.cyberfeds.com/CF3/servlet/GetReg?cite=5+CFR+2423.20)(b) (2009), "Absent a showing of good cause to the contrary, failure to file an answer or respond to any allegation shall constitute an admission." [*Broida Guide to Federal Labor Relations Authority Law and Practice:* Answer to Complaint](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+08:+Unfair+Labor+Practices,+Subchapter+04:+ULP+Procedures,+Section+E:+Pleadings+and+Preliminaries,+Subsection+02:+Complaint,+Part+E:+Answer+to+Complaint).
* Failure to respond to a ULP complaint within the 20 day timeframe constitutes an admission to the complaint absent extraordinary circumstances and a showing of good cause. *Federal Aviation Administration, Houston*, 108 LRP 70947, 63 FLRA 34 (FLRA 2008).

**Hearing**

* If a complaint is issued, a hearing, generally open to the public, is conducted by an administrative law judge. 5 CFR 2423.31.
* An ALJ is not bound by formal rules of evidence. It is within the judge's discretion to determine what evidence will be admitted and what witnesses will be heard. *Indian Health Service, Winslow Health Unit, Winslow, Ariz*., 98 FLRR 1-1092, 54 FLRA 126 (FLRA 1998).

**ALJ recommendations and exceptions**

* The judge issues a recommended decision which, if no exceptions are filed, becomes the final ruling of the FLRA with no precedential significance. 5 CFR 2423.41.
* A party has 25 days from the date of service of the ALJ decision to file exceptions with the FLRA. 5 CFR 2423.40.
* If exceptions are filed, the FLRA will issue a decision affirming or reversing, in whole or in part, the ALJ decision. 5 CFR 2423.41.
* In ruling on a party's exceptions to the decision of an administrative law judge, the FLRA will not consider arguments that were not made before the judge. *National Association of Air Traffic Specialists, Macon, Ga*., 103 LRP 44227, 59 FLRA 261 (FLRA 2003).
* ***Broida:*** Each party is permitted one opportunity to except to the ALJ's decision and one opportunity to reply, unless permission for further submissions has been granted by the FLRA. [*Broida Guide to Federal Labor Relations Authority Law and Practice:* Cross-Exceptions](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+08:+Unfair+Labor+Practices,+Subchapter+04:+ULP+Procedures,+Section+H:+Exceptions,+Subsection+03:+Cross-Exceptions), *citing* *Marine Corps Logistics Base, Barstow, Calif.*, 88 FLRR 1-1423, 33 FLRA 626 (FLRA 1988).
* If a party has filed exceptions to an ALJ decision it may not raise new exceptions in reply to a submission by the other party. *Marine Corps Logistics Base, Barstow, Calif.,* 88 FLRR 1-1423, 33 FLRA 626 (FLRA 1988).
* The FLRA will not overrule an ALJ's credibility findings unless a clear preponderance of all relevant evidence demonstrates that the determination is incorrect. *Defense Language Institute, Foreign Language Center, Monterey, Calif.*, 110 LRP 26994, 64 FLRA 735 (FLRA 2010).