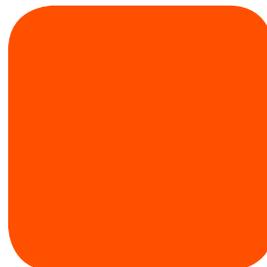
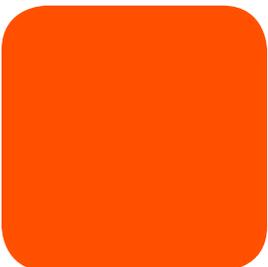


AFGE Collective Bargaining Manual



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Agreement

This Agreement
payment service

INTRODUCTION

Employees join unions in the federal sector for the same reasons that people join unions in the private sector: they want to participate in setting their own working conditions, including pay and job security. In the federal sector, the law controls more of the working conditions, pay, and job security issues than is the case in the private sector, but the difference is one of degree. The purpose of this manual is to guide locals and bargaining councils in obtaining the best contract provisions, with the greatest amount of member participation, with the greatest side benefits, while recognizing that some problems can be better dealt with in other forums.

Unions—private sector as well as federal sector—rely on a variety of tools to serve their members. These can be summarized as mobilization, legislation, negotiation and litigation. It is critical to keep in mind that different problems can be best attacked by different methods. There is a major difference between saying that a particular issue is outside the scope of bargaining and saying that the union is unable to successfully deal with it.

The challenge to the union at all levels is to carry out a bargaining strategy that succeeds in achieving the highest priorities of the employees, with as little wasted effort as necessary, and in a way that the employees' actual participation in the process is high and the union's non-bargaining resources and goals are involved.

These factors all work together. Negotiations that focus on the highest priority problems for the employees are more likely to be successful than negotiations that address 150 minor issues, many of which are of minimal importance to the bargaining unit. The very decision to determine employee priorities begins the process of employee involvement. The more employee involvement, the greater the pressure on management to agree to the union's demands.

Federal collective bargaining can be challenging. Applying the various legal concepts in real-world situations necessarily engages a wide range of knowledge, creativity, and experience. The goal of this manual is to provide the union negotiator with the necessary skill and confidence to overcome possible attempts by management to avoid making improvements in the work environment.

Expert negotiators develop their abilities over time. The following is a list of important skills and attributes to be effective in the collective bargaining process:

- **Facts.** Know what you can and cannot do under the law. Understand what your members want and what they will support. Recognize your strengths and weaknesses, as well as the strengths and weaknesses of the agency. Plan accordingly. Preparation is essential to successful bargaining. A lack of planning can lead to disaster.
- **Patience.** Negotiations is a process involving people attempting to forge an agreement (or not). Recognizing when someone needs more encouragement to understand your position versus a stonewalling tactic may take more time than expected.
- **Temperament.** Effective negotiators come with different styles and perspectives. To be effective, however, requires self-awareness of your own capabilities and an ability to regulate your emotions to

accomplish the goal of coming to an agreement.

- **Goals:** The goal of an effective negotiator is to accomplish the task of coming to an agreement that meets the needs of your membership. It is not to have everyone else do it the same you would. You have to be prepared to deal with personalities and agendas that may be much different than your own.
- **Ability to convince.** Union leaders do not have management's authority to compel someone to perform as requested. Their effectiveness depends on their ability to convince their members and the employer on a mutual agreement and/or solution.
- **You are going to make mistakes.** The important thing is how you learn and recover from your mistakes.
- **Federal law is not a mandate to agree.** The federal collective bargaining law does not require labor and management to come to an agreement. It mandates that the two parties have to talk with each other. To be effective, you have to convince the other side that an agreement will work for both parties.



WHAT IS COLLECTIVE BARGAINING?

As with many industries, the relationships between U.S. federal agencies and their employees have a long history of conflict and struggle. In 1835 workers at the Washington, D.C. Navy Yard walked off the job in a strike for the 10-hour day. The agency prevailed and the strike failed. The next year, workers at the Philadelphia Navy Yard won a 10-hour work day after a strike lasting several weeks. The workers organized as a union in Philadelphia. The result of the strike was that the 10-hour day was put into place in all the Navy Yards with unionized workers (at the time, this included Pennsylvania, New York and Maryland). However, workers without a union in D.C., New Hampshire, Massachusetts, Rhode Island, Virginia and North Carolina continued to work a 12 to 14-hour day. This situation continued with the ongoing threat of strikes and disruptions until 1840 when President Van Buren issued an Executive Order stating establishing a 10-hour day for all federal craft workers.

Over the next 20 years, private shipyards introduced an 8-hour work day in response to strikes and union organized labor actions. Federal shipyards suffered from being unable to retain the best qualified workers. At the same time, federal employees doing the same work in the same geographic location encountered significant differences in pay. Agencies competed with each other for personnel, and workers would migrate to those agencies which paid a higher rate. Ongoing problems and a lack of central coordination weakened the capacity of the government to provide a consistent level of quality service to the public. It became clear that unionized workers who negotiated an agreement with their agency over working conditions achieved a higher level of public service, productivity, and employee morale.

This history led to the creation of a federal law to address the need for a formal labor-management relationship. President Kennedy signed Executive Order 10988 in 1962, giving federal employees the right to engage in collective bargaining through labor organizations of their choice. President Nixon expanded these rights in 1969, and less than a decade later, Congress enacted the Civil Service Reform Act of 1978, which formally recognized the benefits provided by federal unions. As one supporter stated, *“A well balanced labor relations program will increase the efficiency of the Government by providing for meaningful participation of employees in the conduct of business in general and the conditions of their employment.”* Rep. William Clay (January 26, 1977). Commonly referred to as the Statute; the law regulating labor-management relations is also referred to as Title 7 of the Civil Service Reform Act, the Federal Labor Management Relations Statute, and Chapter 71 of Title 5 U.S. Code.

Collective bargaining is a mechanism that is recognized by law that is necessary for good government. Collective bargaining is when two parties come together to bargain for the interest of the entities that they represent. The union’s primary objective in bargaining is to obtain better working conditions. Collective bargaining is not an intrusion nor a necessary evil (as some may think), but a process codified into law so that agencies and their unions are able to address problems and conflicts in a consistent and effective manner. For the federal sector, the definition of collective bargaining is found in Title 7 of the Civil Service Reform Act:

5 USC 7103(a)(12)

“Collective bargaining” means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in good-faith effort to reach

agreement with respect to the conditions of employment affecting such employees and to execute if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession;

In recognition of these benefits provided by collective bargaining, Chapter 71 of the Federal Service Labor Management Relations Statute succinctly states:

5 USC 7101

- (a) The Congress finds that—
 - (1) experience in both private and public employment indicates that the statutory protections of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—
 - (A) safeguards the public interest.
 - (B) contributes to the effective conduct of public business, and
 - (C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and
 - (2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.



THE STATUTE

INTRODUCTION

Federal sector labor relations are based on legal rights and responsibilities given to management, employees, and their union representatives. The Federal Service Labor Management Relations Statute (the Statute) is the legal foundation of U.S. federal labor relations. Under the Statute, federal collective bargaining is a complex process that requires union representatives to know as much about the law as their management counterparts. The Statute governs the relationship between the agency management and the union, and establishes mechanisms for union representational duties, collective bargaining, unfair labor practice determinations, management rights, and related matters. The Statute defines and lists the rights of employees, labor organizations, and agencies so as to reflect the public interest demand for the highest standards of employee performance and the efficient accomplishment of Government operations. Specifically, the Statute requires that its provisions “*should be interpreted in a manner consistent with the requirement of an effective and efficient Government.*” 5 U.S.C. §7101(b).

The Statute describes the roles and obligations of various organizations in federal collective bargaining, including the union as the Exclusive Representative, Federal Labor Relations Authority (FLRA), Federal Services Impasse Panel (FSIP), and the Federal Mediation and Conciliation Service (FMCS). It is a living document that has been continually clarified and updated through thousands of decisions from the Federal Labor Relations Authority and judicial opinions. The legal framework for federal collective bargaining is defined in the Statute and through decisions issued by the FLRA and federal courts. This section will briefly introduce the different components of federal collective bargaining as outlined in the Statute, beginning with an introduction to the agency with the primary responsibility for administering federal labor relations.

Federal Labor Relations Authority (FLRA or the Authority)

The Federal Labor Relations Authority (FLRA) is an independent administrative federal agency created by Title VII of the Civil Service Reform Act of 1978 (also known as the Federal Service Labor-Management Relations Statute or simply, the Statute). The Statute establishes distinct components within the FLRA, including the Authority, the Office of the General Counsel of the Authority, and the Federal Service Impasses Panel (FSIP). Presidential appointees lead each of these three components. The FLRA structure also includes an Office of Administrative Law Judges (ALJs). The mission of the FLRA is to carry out five (5) primary statutory responsibilities as efficiently as possible. Those five primary responsibilities are:

1. Resolving complaints of unfair labor practices (ULPs)
2. Determining the appropriateness of units for labor organization representation (REP)
3. Adjudicating exceptions to arbitrators’ awards (ARB)
4. Adjudicating legal issues relating to the duty to bargain (NEG)
5. Resolving impasses during negotiations (Impasse)

The Authority, Office of the General Counsel, and FSIP maintain their respective headquarters offices in Washington, D.C.

The Authority is a quasi-judicial body with three full-time members who are appointed for five-year terms by the President with the advice and consent of the Senate. One member is designated by the President to serve as Chairman of the Authority and as the Chief Executive and Administrative Officer of the FLRA. The Authority adjudicates unfair labor practices disputes, issues raised by representation petitions, exceptions to grievance arbitration awards, and resolves negotiability disputes raised by the parties during collective bargaining. The Authority also assists Federal agencies and unions in understanding their rights and responsibilities under the Statute through statutory training of parties.

EXCLUSIVE REPRESENTATIVE

FLRA provides federal unions with specific rights and duties under Section 7114 of the Statute. The key requirement is that the labor organization has been accorded recognition as the exclusive representative for the employees in a bargaining unit. Only the union, with its status as the exclusive representative for the bargaining unit employees, can bargain an agreement over conditions of employment with the employer. This primary right distinguishes the union from other associations or organizations that may serve or represent employees.

Federal Service Impasses Panel (FSIP or the Panel)

The Panel resolves impasses between federal agencies and unions representing federal employees arising from negotiations over conditions of employment under the Federal Service Labor-Management Relations Statute and the Federal Employees Flexible and Compressed Work Schedules Act. If bargaining between the parties, followed by mediation assistance, does not result in a voluntary agreement, either party or the parties jointly may request the Panel's assistance. Following a preliminary investigation by its staff, the Panel may determine to assert jurisdiction over the request. If jurisdiction is asserted, the Panel has the authority to recommend and/or direct the use of various dispute resolution procedures. These include informal conferences, additional mediation, fact finding, written submissions, and mediation-arbitration by Panel Members, the Panel's staff, or private arbitrators. If the parties still are unable to reach a voluntary settlement, the Panel may take whatever action it deems necessary to resolve the dispute, including the imposition of contract terms through a final action. The merits of the Panel's decision may not be appealed to any court.

Federal Mediation and Conciliation Service (FMCS)

The FMCS provides free mediation services in contract negotiation disputes between employers and their unionized employees. While the use of FMCS is voluntary in the federal sector, FMCS serves as a gatekeeper to the FSIP. If federal parties are unable to resolve their dispute using FMCS services, they can request that FSIP consider the matter or they can agree to binding arbitration. FSIP must approve the arbitration procedures. FMCS maintains a list of over 1,400 independent arbitrators who can hear and decide disputes over collective bargaining. However, not all arbitrators on this list have experience in the federal sector.

CONDITIONS OF EMPLOYMENT

Under the Statute, unions can bargain the conditions of employment of unit employees. The definition of Conditions of Employment under the Statute is very broad:

5 USC 7103(a)(14)

“conditions of employment” means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute

Let’s explore how the law defines policies, practices and matters.

Policies and other matters

Policies are formal written rules such as a merit promotion plan or procedures for assigning overtime while practices are patterns of behavior that have been followed long and consistently enough to become unwritten rules. An established rule on personnel matters that applies to bargaining unit employees is considered a condition of employment under the Statute. Other matters affecting working conditions may also constitute conditions of employment. Such “other matters” may address a variety of workplace features, such as parking arrangements, office moves and design, safety issues, reorganizations, etc.

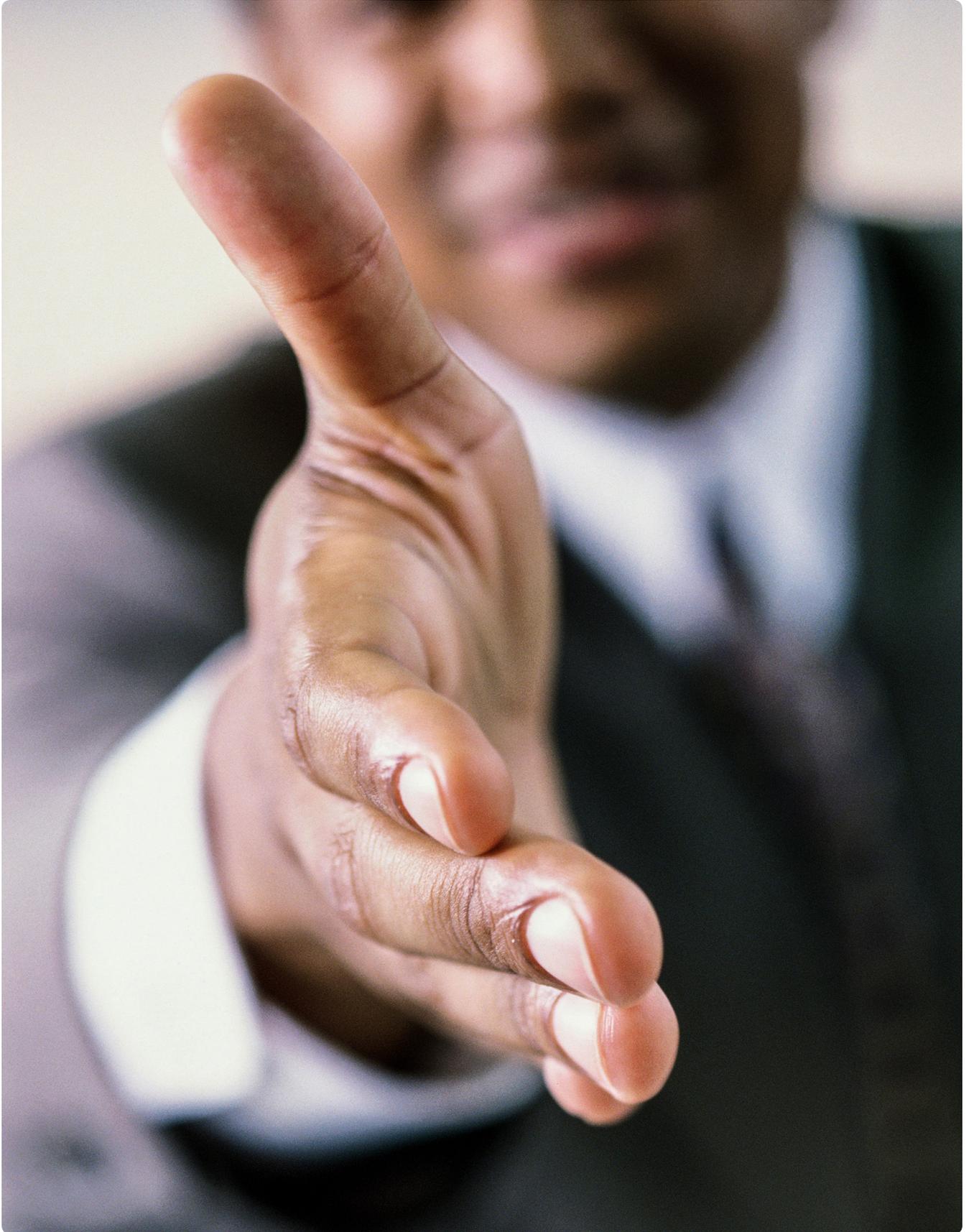
Matters not considered a condition of employment

There are several situations when the union and the agency could bargain over matters that are outside the legal definition for conditions of employment, such as proposals involving supervisors or unrepresented employees. While it is not unlawful to bargain and come to agreement on subjects which are not conditions of employment, a union cannot insist on taking the issue to impasse if the negotiations break down.

The Authority has found that matters directly implicating conditions of employment of supervisors are outside the duty to bargain. However, if the parties agree to include such matters in a collective bargaining agreement, the provisions are not subject to section 7114(c) agency head disapproval. Similarly, such clauses are enforceable in arbitration. An agency can choose to bargain an agreement on a contract proposal that directly implicates the working conditions of its supervisors because these proposals address permissive subjects of bargaining. Once an agency and a union agree to such a proposal, it is enforceable provided that it is otherwise consistent with the Statute.

SUBJECTS OF BARGAINING

The Statute and the FLRA case decisions have gone into great detail in determining what topics are open and/or limited in federal collective bargaining. Generally speaking, there are subjects for bargaining (work schedules, leave, representation, grievance procedure, etc.). Subjects for bargaining



are either narrowed in the scope in which they may be bargained or subject to substantial scope of bargaining. This is determined if the matter/subject being bargained is the exercise of a management right which restricts bargaining to the more limited “appropriate arrangements” and “procedures” scope of bargaining.

All possible bargaining subjects fall into three categories:

(1) Mandatory

Mandatory subjects of bargaining are subjects that, upon request, a party must bargain over. If a proposal is within the mandatory scope of bargaining, management cannot legally refuse to bargain over it and the Federal Services Impasses Panel can impose it on the parties. Procedures and appropriate arrangements are mandatory subjects of bargaining (unless they are contrary to another federal statute).

(2) Permissive

With a permissive subject of bargaining, the parties are permitted to bargain over matters although they are not required to do so. Under the Statute (5 USC 7106(b)(1)) bargaining is permitted at the election of the agency on the following topics:

- The numbers, types and grades of employees or positions assigned to any organizational subdivision, work project or tour of duty.
- The technology, methods and means of performing work.

If an agency elects to bargain on a permissive subject, the agency may cease bargaining on the matter at any time prior to reaching a final agreement. The union cannot file an unfair labor practice if the agency ends bargaining on a permissive subject prior to the final agreement. Other permissive topics include issues related to union representation, such as the number of stewards the union will have.

(3) Illegal or prohibited

Prohibited subjects of bargaining are subjects that the parties cannot agree to simply because the law prohibits them from doing so. As an example, parties cannot agree to matters that prevent an agency from exercising a management right underneath the Statute. As an example, proposal to have all work assigned by the union officers instead of the agency would be clearly illegal. However, this does not prohibit bargaining over the procedures for how the Agency will implement a change or bargaining over appropriate arrangements designed to lessen the adverse impact on employees from the Agency exercising a management right (both procedures and appropriate arrangements are mandatory topics of bargaining as discussed).

There are three matters that are expressly excluded from the definition and are not subject to collective bargaining:

1. Prohibited political activities (i.e., violations of the Hatch Act)
2. The classification of any position (this is determined by the Office of Personnel Management)
3. Matters specifically provided for by federal statute.

Management Rights and Subjects of Bargaining

The Statute gives management significant rights, the majority of which are included in 5 USC Section 7106(a). The majority of subjects that affect working conditions also affect management authority in section 7106(a) areas.

§ 7106. Management rights

- (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--
 - (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and
 - (2) in accordance with applicable laws--
 - (A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;
 - (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;
 - (C) with respect to filling positions, to make selections for appointments from--
 - (i) among properly ranked and certified candidates for promotion; or
 - (ii) any other appropriate source; and
 - (D) to take whatever actions may be necessary to carry out the agency mission during emergencies.
- (b) Nothing in this section shall preclude any agency and any labor organization from negotiating--
 - (1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;
 - (2) procedures which management officials of the agency will observe in exercising any authority under this section; or
 - (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

Two exceptions that the FLRA has determined to the management rights under 5 USC 7106(a) include:

- Negotiation of alternate work schedules under the *Flexible and Compressed Work Schedules Act* (5 USC 6101, 5 USC 6106, 5 USC 6120-6133).

- Negotiation of official time for union representatives under 5 USC 7131 (includes using official time for collective bargaining)

The FLRA and the courts also have more restrictive reading on section 7106(a) through the elements of subsection (b). In addition to the permissive topics under section 7106(b)(1), the FLRA and courts have interpreted section 7106(b)(2) and 7106(b)(3) to state that negotiations are mandatory for both the *procedures* by which management rights will be exercised, as well as the *appropriate arrangements* for employees adversely affected by management's action.

Union negotiators should determine whether the proposal or provision is negotiable as a procedure or as an *appropriate arrangement* when a management right under 5 USC 7106(a) is involved. Management's decision-making authority is non-negotiable, but, as explained below, procedures and arrangements are negotiable if they meet certain tests.

Procedures

An agency has a duty under 5 USC 7106(b)(2) to bargain on negotiable procedures that management will observe in exercising its reserved rights. A negotiable procedure is one that does not directly interfere with a management right. In general, management rights determine *what* management can do while the procedures describe *how* management will implement these actions. See *Wright-Patterson Air Force Base*, 2 FLRA 604, 80 FLRR 1-1199, (1980) affirmed sub nom. *DOD v. FLRA*, 659 F.2d 1140 (D.C. Cir. 1981), 81 FLRR 1-8011, cert denied 455 U.S. 945 (S. Ct. 1982).

Appropriate arrangements

An agency has a duty under 5 USC 7106(b)(3) to bargain on appropriate arrangements for employees who may be adversely affected by the exercise of a management right. An appropriate arrangement must meet two threshold conditions:

- A reasonably foreseeable adverse effect flowing from a management action has been identified.
- The arrangement proposed must be tailored to benefit or compensate employees suffering (or reasonably expected to suffer) the adverse effect.

An appropriate arrangement is one that does not 'excessively interfere' with a reserved management right. Excessive interference is something more than direct interference. A proposal or contract provision that interferes with a right of management is considered negotiable if it does not significantly hamper the ability of an agency to get its job done. See *Minerals Management Service v. FLRA*, 969 F.2d 1158 (and other consolidated cases) (DC Cir. 1992), 92 FLRR 1-8030; *INS v. FLRA*, 975 F.2d 218 (5th Cir. 1992), 92 FLRR 1-8041.

Procedures and Arrangements = Impact and Implementation (I & I) Bargaining

The process of negotiating over the procedures and arrangements is commonly referred to as impact and implementation bargaining or "I & I bargaining". While this term does not appear anywhere in the Statute, agency and union bargaining representatives have adopted this phrase as a common term of art to describe procedures and arrangements bargaining. Union negotiators need to determine whether the proposal or provision is consistent with applicable rules and regulations in bargaining over procedures and appropriate arrangements.

An agency that prevents I & I bargaining (over procedures and arrangements) violates its duty to negotiate in good faith with the union under 5 USC 7116(a)(5). The union can file an unfair labor practice (ULP) charge with the FLRA against an agency for refusing to bargain over procedures and arrangements. Such a refusal may also be construed by the Authority as a violation of the agency's duty to negotiate with the union before implementing a substantive change in the conditions of employment under 5 USC 7116(a)(5).

Changes in Conditions of Employment that do not involve a Management Right

While many changes in the condition of employment may involve a stated management right, not all changes proposed by the agency fit this criteria. Employee parking arrangements and fitness program opportunities are two examples of how a management-initiated change does not fit the criteria of a management right under the Statute. In the event that these changes are more than minor changes (referred to under the Statute as de minimis changes), the union has the right to bargain over the substance of the change not just the procedures or appropriate arrangements. In situations where a management right is not affected, the union can effectively bargain to stop the proposed change and is not limited to determining how it will occur.

GOOD FAITH BARGAINING

The duty to bargain in good faith exists regardless of whether there is a contract. Management must deal with the union. Under the law governing bargaining in the federal sector, management is obliged to bargain with the union concerning the employees the union represents. The Statute cites the need for good faith in its definition of collective bargaining:

“collective bargaining” means the performance of the mutual obligation of the representatives of an agency and the [union] to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment . . . 5 U.S.C. § 7103(a)(12).

This duty to bargain in good faith, however, does not compel either management or the union to agree to a proposal or to make concessions. Good faith requires that the negotiators act in a way that reflects a sincere intent to reach a mutually satisfactory agreement. Subjective good faith is absolutely necessary, but it is not sufficient. That is, the negotiators must not only want to reach agreement, but their actions must be consistent with that intent. It only requires bargaining on a topic so that the parties can try to reach a position both parties are willing to accept.

7114 Representation rights and duties

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—

- (1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;
- (2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;
- (3) to meet at reasonable times and convenient places as frequently as may be necessary,

- and to avoid unnecessary delays;
- (4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—
 - (A) which is normally maintained by the agency in the regular course of business;
 - (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
 - (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and
 - (5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.

The FLRA considers the totality of the circumstances at the table and away from it when making a determination whether a party has fulfilled its bargaining obligations. The Statute and case law precedents establish the criteria. The following are commonly cited violations for bad faith bargaining:

- (1) Limiting available meeting times and decreasing the frequency of meetings.
- (2) Using a “take-it-or-leave-it” bargaining strategy or style.
- (3) Using tactics that delayed bargaining efforts.
- (4) Making unilateral changes prior to the completion of bargaining.
- (5) Denying access to reasonable and necessary information.
- (6) Violating the ground rules.
- (7) Presenting counterproposals that border on waivers of statutory rights.
- (8) Being unprepared or unwilling to explore and discuss each position.
- (9) An unwillingness to meet, inflexibility in discussing proposals and presenting the other side with ultimatums.
- (10) Attempts to limit caucus time.
- (11) Cancelling bargaining sessions or repeatedly leaving early.
- (12) Sending unauthorized representatives to the bargaining table.

This list is not all inclusive. Good faith bargaining is a general term used to describe the bundle of do's and don'ts that control the interplay between union and management negotiators. When one side or the other deviates from the principles of good faith bargaining, this conduct can lead to a charge of an unfair labor practice (ULP).

If management is bargaining in good faith, it will openly articulate the interests that it seeks to serve at the same time. With both parties open about their interests, and both parties willing to find a solution that meets all the interests of both of them, it will almost always be possible to find a mutually acceptable solution. That is what good faith bargaining is.

Good faith bargaining takes at least a little time, plus a lot of effort. You really have to listen to the other side, and really need to analyze alternatives to reaching your objectives. But, in fact, this time is measured in minutes and hours, or at worst, days, and has results that are meeting your objectives. It is time and effort well spent.

AGENCY HEAD REVIEW

When the union and agency have come to an agreement, and after the union members have voted to approve the agreement (a recommended process known as ratification), the agreement is considered to be executed. Under the Statute, the agreement still has one additional step, which is the agency head review. Section 7114(c) of the Statute states that the agency head, or the person to whom this authority has been delegated, has the right to disapprove any provision of the agreement that conflicts with law, rule or binding regulation. The agency head has 30 days to review and approve the agreement after it is executed. If the agency head does not approve or disapprove the agreement within 30 days, the agreement becomes binding on the agency and the union. The agency head review process is limited to identifying and rejecting contract provisions that conflict with law or government-wide regulations. If a provision is disapproved, the union has several options, including:

- Accept the new contract that does not include the provision disapproved by the agency head.
- Appeal the decision to the FLRA.
- Return to the bargaining table to renegotiate the disputed provision and other provisions within the contract, as needed.
- File a grievance or ULP if it has reason to believe that the Authority has already ruled on issues similar to the disputed provision.

IMPASSE PROCESS

An impasse is that point in negotiations at which the parties are unable to reach agreement. The FLRA will consider the parties' entire course of conduct throughout negotiations to determine whether an impasse exists. The FLRA states that an impasse has occurred if:

- The parties have bargained in good faith
- They have exhausted all prospects of reaching an agreement (see *Customs Service*, 16 FLRA 198, 84 FLRR 1-1701 (1984)).

The Statute provides for the assistance of the Federal Mediation and Conciliation Service (FMCS) and the Federal Service Impasses Panel (FSIP) in resolving an impasse dispute. An arbitrator can also be used if agreed to by both parties and the FMCS.

FMCS

The FMCS will make itself available to help federal parties attempt to reach agreement voluntarily under Section 7119 of the Statute. The parties can request FMCS mediation either jointly or separately by submitting FMCS Form F-53 in accordance with FMCS regulations. Once the FMCS determines that there is a need for mediation, it uses its best efforts to assist the parties in reaching an agreement. The parties have a duty to participate fully in settlement discussions arranged by the FMCS. However, the FMCS has no authority to compel the parties to come to an agreement. If the parties are unable to reach agreement through facilitated mediation, FMCS will, if asked, inform the FSIP that the parties are still at impasse.

FSIP

Either party may request the FSIP to consider the dispute when the parties' voluntary settlement discussions, including the use of the FMCS, fail to resolve the impasse. Upon receiving the request for assistance, the FSIP will investigate the dispute and will either:

- Decline to exercise jurisdiction over the matter on the ground that no impasse exists, or
- Assist the parties in resolving the dispute through whatever methods and procedures the FSIP considers appropriate.

An agency will be found guilty of violating 5 USC Section 7116(a)(6) if it refuses to cooperate in FSIP procedures or fails to implement a panel decision after the FSIP has already become involved in a dispute. While FSIP decisions are final for the parties, the decision rendered by the FSIP is still subject to agency head review to determine if there is a violation of applicable law, rule or regulation. If the agency head disapproves the provision ordered by FSIP, the union may challenge the disapproval by filing a negotiability appeal or a ULP complaint. The agency may be found to have committed a ULP if the FLRA determines that the agency head's disapproval is incorrect.

Implementation of Changes during Impasse

With only a few exceptions, an agency must maintain the *status quo* (the existing conditions of employment prior to the proposed change) until the bargaining is completed. There are only two situations when bargaining is completed:

- The parties reach agreement, or
- The impasses procedure has ended.

When the parties reach impasse in the negotiations, the agency must decide if it can implement the change at issue or if it is required to maintain the *status quo*. Whether or not the *status quo* must be maintained depends on several conditions:

- Whether the agency has given the union a reasonable opportunity to seek assistance from the FMCS or FSIP.
- Whether the union has timely requested third-party assistance.
- Whether the implementation of the change is consistent with the necessary functioning of the agency.

There is a duty to maintain the status quo while a matter is pending before the FSIP. Once the FSIP

submits an order, the requirement to maintain the status quo ends. It is important to note that the agency is not violating the Statute if it unilaterally implements a change (that is the subject of the impasse) because it is unaware that the union requested assistance from FSIP or if the agency is required by law to implement the change.

COLLECTIVE BARGAINING AND OFFICIAL TIME

The agency has one potential advantage over the union with regard to collective bargaining. Agency staff, including labor relations specialists, attorneys and supervisors, can be easily assigned to assist with the collective bargaining process whereas the rank and file employees who serve as elected officers for their union would need to use leave or unpaid time to participate in the collective bargaining process. Congress recognized this inherent imbalance of power and enacted Section 7131 in the Statute. It provides that a union engaged in collective bargaining is entitled to have an equal number of negotiators on paid (i.e., “official”) time during negotiations and impasse proceedings. In subsequent decisions, the FLRA has determined that the number of negotiators in excess of the number management sends is also subject to negotiation, as is the amount of paid time union negotiators will be permitted to prepare for bargaining (AFGE and EPA, 15 FLRA 461 (1984)).



FEDERAL COLLECTIVE BARGAINING PROCESS

THE CHANGE

The first step in the collective bargaining process is a proposed change in working conditions that is not covered by an existing agreement. There are three situations when a proposed change in working conditions is not covered:

1. There is no agreement in place between the union and the agency (no contract).
2. The current agreement has ended (contract has expired).
3. The proposed change is not included in the current agreement (issue is not covered under the contract).

Either party can request bargaining once a change occurs under one of these situations. Collective bargaining is fundamentally a process by which a change is proposed, reviewed, discussed, debated, modified, enacted, and/or rejected.

As a first step, both the agency and the union should review the current collective bargaining agreement (CBA) to see how the proposed change will affect the terms of the contract unless there is no contract in existence between the two parties. The union should also solicit feedback from the affected members of the bargaining unit on how they may be impacted by the proposed change.

NOTIFICATION

Management must notify the union of changes that will have more than a minimal impact on the working conditions of one or more employees and provide the union with the opportunity to bargain over those aspects of the change that are within the duty to bargain (see *INS, Border Patrol, Del Rio, TX and AFGE National Border Patrol Council*, 47 FLRA 225 (1993)). Upon receiving notice of a change, the union has several options:

1. Take no action, give up their right to bargain and accept the change as is.
2. Request a briefing on the proposed change to determine if the issue should be bargained.
3. Demand to bargain the proposed change on behalf of the bargaining unit.

No Action

The first option will occur if the union either ignores the notice, disregards the timeframe for response, or if the union leadership determines that the change will have a positive or minimal impact on the bargaining unit. If there is any doubt on what the change is and/or how it will impact the bargaining unit, the union should request a briefing.

Briefing Request

The union should request a briefing from the agency to learn more about the proposed change. The briefing process can be informal or it could be negotiated as a requirement of the collective bargaining agreement. In either situation, a briefing is a useful tool for both the agency and the union to assess the impact that the change will have on the bargaining unit. If the agency has no contractual obligation to provide a briefing and refuses to offer additional information, the union can file a formal information request.

Demand to bargain

If the union chooses to file a demand to bargain (either after the briefing or without a briefing), the request must be provided within the timeframe designated in the current collective bargaining agreement (CBA). If there is no specific contractual timeframe provided, the union has to respond within a reasonable timeframe that is typically provided in the notification by the agency.

The agency must respond to acknowledge that the union has submitted a demand to bargain request. If the agency fails to respond to acknowledge the union's request and implements the change, the union can file a ULP complaint with the FLRA.

BARGAINING

The agency and the union can begin bargaining by establishing ground rules on the bargaining process. These rules can include the time and location of negotiations, caucus arrangements, and official time for bargaining team members, etc. Ground rules are recommended and may be a requirement of the current collective bargaining agreement. While not recommended, it is allowable for the parties to proceed directly with bargaining by exchanging one or more proposals. Proposals must be submitted in a timely manner and management is obliged to respond to the proposals before implementing a change. Bargaining will continue until an agreement or impasse occurs.

AGREEMENT

Once the parties agree on a proposal at the table, each side will need to sign and date a tentative agreement on the proposal. The tentative agreement (TA) on each subject of bargaining moves the agreement from a proposal on how a change can be implemented to a provision of a collective bargaining agreement.

RATIFICATION

Ratification is the formal approval of a new negotiated agreement by a vote of the union members in the collective bargaining unit represented by the union. While this process is not mandatory, it is highly recommended. This process engages the union members directly in the collective bargaining process and keeps them (and indirectly non-members) informed on what actions the union is taking to improve or protect their working conditions. An agency must allow for ratification by the union members, as long as it is informed of the union's intent early in the bargaining process. *See Griffis Air Force Base and AFGC Local 2612*, 25 FLRA 579 (1987); *SSA and AFGC Council 220*, 46 FLRA 1404 (1993).

If the union members vote down the agreement, the union should return to bargaining. To avoid this situation, ongoing communication with the union membership before, during and at the conclusion of bargaining is recommended.

EXECUTION

When the union and agency have come to an agreement, and after the union members have ratified the agreement, the language within the agreed upon contract provision is considered to be executed.

AGENCY HEAD REVIEW

As discussed previously, the Statute allows for the agency head to disapprove any provision of the

agreement that conflicts with law, rule or binding regulation. The agency head has 30 days to review and approve the agreement after it is executed.

IMPLEMENTATION

Once the contract provision has been approved by the agency head or the agency head has not responded within 30 days after the execution of the agreement, the agreement is considered to be fully implemented and is binding on both parties for the term of the agreement.



PREPARING TO BARGAIN

Preparation is the key to successful negotiations. The following is a list of steps the union should take to prepare for collective bargaining.

1. **Determine the union's primary interests in the impending negotiations.**
 - Interview the affected members and key stakeholders to determine their interests and recommendations. Although Local's might use surveys to assist in this process, it is essential to speak directly with key managers to get a clear indication of what is happening with the organization and what adjustments may be necessary to avoid problems now and in the future.
 - Review the contract and the contract administration history (e.g., grievances, arbitrations, chronic problems) to identify needed changes and/or improvements.
 - Review developments in federal labor relations and human resources to identify key trends and significant decisions.

2. **Develop the bargaining teams.**
 - Identify those who will attend negotiating sessions at the table (table team) and those who will provide support, communication and guidance away from the table (support team).
 - Members should be selected on one or more of the following attributes:
 - o Knowledge of personnel policies and practices. This includes familiarity with applicable laws, agency policies, and decisions. Understanding the rationale behind the policies is most important.
 - o Knowledge of day-to-day operations. This includes recognition of how policies are implemented (or not implemented), how proposals will or will not work in the work environment, and what problems may be associated with a proposal.
 - o Knowledge of member needs. The bargaining team should reflect the diversity of the workplace so that all unit interests are represented. Individuals with a high level of awareness of how rank and file members feel about the working conditions can provide essential feedback on what proposals will or will not work.
 - o Knowledge of labor relations. This includes the decision of program authorities such as the FLRA, as well as a solid understanding of labor-management relations (LMR) principles and practices.
 - o Bargaining experience. Individuals with bargaining experience will be invaluable at assisting others with less experience at the table.
 - o Writing ability- drafting. Individuals with the ability – and preferably experience - to draft clear, enforceable language that accurately reflects the parties' agreement.
 - o Writing ability – notes. Accurate notes are essential to keeping negotiations on track. They can also be extremely useful in dealing with later disputes over the intended meaning of various contract provisions.
 - All team members should be emotionally stable and capable of performing under pressure. Individuals who tend to be quick tempered, thin-skinned or have an obvious need for attention or ego satisfaction are not good candidates for the bargaining teams. The team needs to have

members who are able to project a positive attitude toward the collective bargaining process.

- Choose a chief negotiator who has the authority to make binding commitments for the union. In addition to the above characteristics, the following attributes are highly desirable:
 - o Influence with the union leadership and the chief executive;
 - o Knowledge of both the operations and labor relations;
 - o The ability to think quickly;
 - o Respect from both sides of the table;
 - o The ability to communicate effectively.
- Establish a policy of team discipline.
 - o The chief negotiator should be the only person to speak on behalf of the team, unless she or he specifically authorizes another member to comment, raise a question, make or respond to a proposal. All communication from the team should come through the chief negotiator.
 - o Team members should not indicate impatience with, disbelief in, or disagreement with anything the chief negotiator says at the table. Doing so will indicate to management that there is a split in the team's solidarity, which will undercut the ability of the union to sell a proposal and make a favorable agreement for the union.
 - o If the team member has a strong disagreement with the position of the chief negotiator or needs to communicate something to the chief negotiator, she or he should pass a note to the negotiator requesting a private caucus with the members of the negotiating team.
 - o The caucus is the appropriate forum to discuss and debate negotiation strategies behind closed doors. The team should present a united front at both communications at the table with the agency and with the bargaining unit. Disagreements need to be heard and discussed, but to avoid the appearance of having a fragmented union, they should be handled privately by the negotiation team.

3. Develop the union's macro objectives for impending negotiations.

- Determine, based on your assessment of organizational interests, specifically what you intend to accomplish in the negotiations. For example, your objective may be to obtain more pre-decisional involvement.
- Develop objectives that reflect a good understanding of what is happening in the organization, what changes and challenges it faces and what is actually attainable.

4. Identify the agency's primary interests as accurately as possible.

- Use sources within the agency, including prior statements by the other party, previous negotiation, published comments, bargaining trends, news accounts, etc.
- Check with other AFGE locals, councils and districts, who may have knowledge/experience with similar issues.

5. Identify the current contract articles and new topics that you expect to address in the negotiations.

- Include both those that your union intends to raise and those you expect the agency to address.

- Research the agency's interests to pinpoint likely proposals and how these have been addressed in prior negotiations or agency initiatives.
6. **Analyze the expiring contract articles and new topics you foresee addressing in the negotiations.**
 - Assess the negotiability of the provisions contained in the expiring agreement. Determine if provisions are outside the duty to bargain, either because they conflict with applicable law, government-wide regulations, management rights under 7106(a), or because they are permissively negotiable.
 - Review similar provisions in other federal labor agreements. This is useful if you are dealing with relatively new or novel bargaining issues. See AFGE CaseTrack and other resources to find recommended language that may fit your bargaining situation.
 - Review relevant FSIP decision patterns on each issue. See www.flra.gov/fsip for case decisions.
 - Perform a cost/benefit analysis on your proposals. This approach can be useful in negotiations or in impasse proceedings.
 7. **Establish a bargaining strategy.** Simply put, strategy is the process of thinking through the key factors surrounding the negotiations and figuring out what is likely to be the best approach to achieving the union's goals. The strategy is a guideline for negotiations. It can be changed and adapted as needed. A coherent bargaining strategy should include:
 - Specific objectives and bottom lines for each topic.
 - Assessment of the agency's priorities. This will help determine where compromises and trade-offs are likely to be effective.
 - A general plan for achieving the stated objectives. For example, start with low-priority items to obtain agreement and momentum, but link high priority items to topics highly valued by the agency to generate compromise.
 8. **Develop a bargaining book.** The bargaining book is a useful reference source during negotiations and should include information, such as:
 - Bargaining strategy
 - Expiring agreement provisions
 - Memorandums of understanding (MOUs)
 - Agency proposals
 - Union proposals
 - Bargaining session notes
 - Tentative Agreements
 9. **Identify and negotiate ground rules.**

Ground rules can be extremely important in determining whether your negotiations achieve your objectives. Make sure the ground rules reflect your overall strategy, resources, and organizational limitations and needs.

10. **Attend to logistics.**

While some of the logistics will be determined during the ground rules negotiations, the union bargaining team should also be prepared to address its own internal needs, such as:

 - Space
 - Equipment
 - Travel
 - Facilitation or mediation assistance
 - Printing
 - Distribution
 - Internal subject matter experts

11. **Train the bargaining team.**

Prior to negotiations, the bargaining team should attend collective bargaining courses that are available through AFGE national, districts, and councils. Bargaining team members not only gain more knowledge and skills through the training, but it is also an important forum to network with other AFGE local leaders who can share relevant information and best practices.

12. **Allocate necessary funds.**

There are many direct and indirect costs involved in bargaining preparation, including travel and training. Establishing a basic budget for negotiations will ensure that the union will have adequate resources to be well prepared.



MID-TERM BARGAINING

Negotiations will typically occur every three or four years when the current collective bargaining agreement expires. During the life of the contract, management may propose changes to policies not controlled by the contract. These changes are typically when the agency exercises its management rights under the Statute. Management must notify the union that it intends to make a change in personnel policies, practices, or working conditions involving bargaining unit work or positions or a change from past practice. To be a past practice, it must be a practice that is consistently exercised over an extended period of time and followed by both parties, or followed by one party and not challenged by the other.

Mid-term bargaining should occur as follows:

1. Management notifies the union of a change
2. The union request a briefing and bargaining
3. The union submits an information request as needed
4. The union submits a timely demand to bargain.



DEMAND TO BARGAIN

Before making any demand to bargain, check the current collective bargaining agreement for procedures or restrictions that the parties have already agreed to use. Follow the contract's provisions carefully so that the union does not make any errors that result in waiving the right to bargain. A generalized demand to bargain would read as follows:

Local ____ hereby demands to bargain on the proposed changes identified in the attached notice from management. Presuming information requests are timely responded to, we propose that bargaining begin at 9:00 a.m. four weeks from today. Until we have considered the matter more thoroughly, we propose that the policy addressed by the attached notice be left unchanged. We may provide additional proposals later.

If the union had not even been notified of the proposed change before it went into effect, your bargaining notice should contain a demand that the change be rescinded pending completion of bargaining. Whether or not management complies with this demand, file a grievance or unfair labor practice charge challenging the original unilateral action. Here is another example of a generic demand to bargain:

Dear [Management representative]:

Pursuant to Article ____, Section ____ of our collective bargaining agreement, this constitutes notice that AFGE Local/Council ____ demands to negotiate over the procedures to be used to implement furloughs of bargaining unit employees prompted by the sequestration, as well as appropriate arrangements for those employees who are adversely affected.

Attached is a request pursuant to the contract and 5 U.S.C. 7114 (b) (4) for information that is necessary for our collective bargaining.

Or

Attached are the union's initial proposals. We reserve the right to make additional proposals during the course of these negotiations.

The union proposes to meet [date, time, place]. Our bargaining team will consist of [names].

We are aware of the serious nature of the current circumstances and appreciate the need for prompt action. I look forward to receiving your response and to efficient and productive negotiations.

Sincerely,

Council/Local President

INFORMATION REQUESTS

The agency has a built-in advantage to negotiating changes in the condition of employment in that they have the clear authority to plan and implement these changes. To balance this advantage, the union is provided a legal opportunity to gather information on how and why the agency is proposing a change so it can effectively represent the employees in the collective bargaining process.

Legal Requirements

The agency's obligation to supply information to AFGE is governed by three federal statutes, the Statute, the Freedom of Information Act, and the Privacy Act.

5 USC Chapter 71

The Statute gives the union access to information relevant and necessary to carry out its duties as exclusive representative:

7114 Representation rights and duties

- (b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—
 - (1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;
 - (2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;
 - (3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;
 - (4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—
 - (A) which is normally maintained by the agency in the regular course of business;
 - (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
 - (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and...

This obligation does not extend to data that is guidance, advice, counsel, or training provided for management officials or supervisors, relating to bargaining. Failure to provide information that meets

the criteria of 5 USC 7114(b)(4) is an Unfair Labor Practice.

The Freedom of Information Act (FOIA)

FOIA gives members of the public access to a great deal of information concerning the operations of the government. When you want to get documents from management, and there is reason to doubt that management will be cooperative, you should request the material under both the Freedom of Information Act (FOIA) and Title VII. There are several reasons for including the FOIA as a basis for the information request:

- The FOIA covers some documents which the agency does not have to disclose under Title VII.
- The agencies take far more seriously their responsibilities under the FOIA than they may do under Title VII.
- Even if a document turns out to be exempt from disclosure under the FOIA, the agency has to at least admit its existence.
- There are enforceable deadlines for compliance with FOIA requests.

The biggest drawback to using the FOIA is that under certain circumstances, you can be charged for search time and for duplication. Some managers may find an irresistible temptation to discourage use of the FOIA by threatening improper charges.

Two additional points should be kept in mind.

- First, if a document is releasable under both the FOIA and the labor relations law, and the agency wants to charge you under the FOIA, the agency will tell you take it instead under the labor relations law.
- Second, the agency might admit the existence of a particular document but claim it is exempt from disclosure under the FOIA, but might still have to disclose it under the labor relations law.

In either event, the main benefits to using the FOIA are: it forces management to admit the existence of documents which management might deny existed if the request were made under the labor law only; and the union does not have to limit its request by excluding documents that constitute internal management guidance on labor relations matters.

The Privacy Act gives individuals access to information about themselves that is collected and maintained by the government, but also may act to bar disclosure under the other two statutes.

Terminology and Requirements

Union negotiators need to be aware of the terminology for information requests that is used in the Statute.

- **Data**

There is no definition of “data” in the Statute, therefore the information requested is not limited only to documents, but can also be in the form of answers to specific questions, video tapes, cash register receipts, etc. Data may even require the agency to create a new document if the agency possesses the information needed to create the document.

- **Normally maintained**

Data must be “normally maintained” by the agency. Data is normally maintained if the agency actually possesses the data and maintains possession in the regular course of business. This includes handwritten “memory joggers” written and maintained by a supervisor at the instruction of his supervisor and were “normally maintained.” The statute does not require that the information requested be maintained completely in one location.

- **Burdensomeness of compliance**

The burden upon the agency of complying with a 7114(b)(4) request may relieve it of the obligation to provide the requested information. The FLRA has held that information need not be disclosed which is available only through “extreme or excessive means.” Determining whether extreme or excessive means are required to retrieve requested information requires a case by case analysis.

- **Necessary**

The agency must provide all requested information which is “necessary for a full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining.” The Civil Service Reform Act requires the agency to furnish information that is “necessary” for the union to carry out “the full range of union responsibilities in both the negotiation and the administration of a labor agreement”. Such responsibilities include pursuing grievances, negotiating working conditions and other general representational responsibilities.

- **Particularized Need**

A union must demonstrate a “particularized need” for the information. Showing a particularized need requires more than mere usefulness or conclusory or bare assertions that the information is needed. In the request, itself, unions must articulate with specificity:

- (A) Why the information is needed;
- (B) The uses to which the union will put the information; and,
- (C) The connection between these uses and the union’s representational responsibilities.

Unions do not have to reveal strategies or a grievant’s identity in making this showing. Once the particularized need is shown, an agency must either respond with the requested information or may express a countervailing interest in non-disclosure. Agencies must articulate their anti-disclosure interests with specificity. Conclusory statements are not good enough.

If such anti-disclosure interests, the parties are expected to discuss the matter to determine if the union’s need for the information can be met along with the agency’s concerns about disclosing

the information. Thus when drafting information requests, specify why you want the information. The requested should be related to a grievance or investigation to determine if you want to file a grievance or negotiations, with an explanation as to why it is needed. Explain what you will do with the information and finally a statement that the union will use this information to fulfill its representational responsibilities under the statute.

- **Costs**

The agency must pay the costs associated with supplying the information requested under 7114(b)(4). The agency may assert “extreme or excessive” but that is subject to the “extreme or excessive” test.

One key distinction between information requested under 7114(b) (4) and FOIA is that under FOIA the agency may collect fees for providing information.¹

The following are eight steps for developing an effective Request for Information :

1. **Know** the law and quote it correctly:
This is an information request filed under the provisions of 7114(b)(4).
2. Tell them **why** you want it.
3. Tell them **how** you are going to use it.
4. Tell them how you would be **harmed** if you don't get it.
5. Tell them how you would be **helped** if you get it.
6. Tell them what you want **in detail**.
7. Give them the **dates** that you want the information.
8. State: *If you do not understand any portion of this request and/or if you have any questions, please contact me at ____ by the time I leave the office at ____.*



¹ Bill Wetmore, NVAC Executive Vice President (NVAC New Presidents Training, Roanoke, VA, May 2015),

PROPOSAL DEVELOPMENT

Developing effective bargaining proposals requires preparation. The main components of preparation include finding out what members need and mobilizing them to fight for it, collecting information about the employer and the agency, studying the current contract, developing proposals, and crafting evidence and arguments to support the proposals.

The following is a five step process to develop clear and useful proposals for federal collective bargaining.

- 1. Define the issue or problem.** Survey the membership and review past grievances to learn what the issue or problem is that needs to be addressed in the contract. For example, the members may want to focus on expanding or improving the telework provision in the agreement.
- 2. Define the goal for the union.** Before developing any proposal to address a specific problem, the union needs to identify what it wants to achieve on behalf of the membership. A proposal will be aimless if it is not intended to achieve a set objective to improve or address a problem related to a condition of employment.
- 3. Determine the specific principles that the union wants to address.** Problems and issues arise out of the ongoing relationship between the agency and the bargaining unit. While details are important in crafting a solution, there is often a larger dynamic at work that the proposal and the bargaining process should work to address. This dynamic involves the main principles that should guide the relationship between the two parties such as fairness, respect, professionalism, accountability, and/or convenience. Understanding how employees feel about the problem/issue and how they have been affected will help the union identify the specific principles that bargaining should address.
- 4. Prioritize principles.** After identifying the different principles involved, it is important to recognize the main principle that needs to be addressed for the specific problem/issue. For example on the issue of telework, the principle of respect may be more important to the members than the convenience of being able to work from home two days a week. This may lead to the union developing a proposal to have telework approved more easily as opposed to the current system that requires additional paperwork and oversight for the employees who request telework. Prioritizing the main principles in a series of proposals allows the Union to organize the negotiation process around a series of themes that makes it easier to sell proposals to the agency and to explain to the bargaining unit what you are trying to accomplish at the table. As an example, several proposals on diverse topics such as parking, disciplinary process, awards, and office relocation could be grouped under the theme of workplace fairness.
- 5. Write the proposal language.** Clear communication is critical when drafting a contract proposal. Language is the key element in communication that can either make a complex issue understandable or make a simple issue complicated.

Use the following guidelines to create strong and effective proposal language:

- *Focus on one issue at a time.* Do not try to address multiple problems in one proposal or attempt to solve other problems not identified by the agency or the membership.

- *Be clear.* Make sure that others understand what you mean when they read the language. Have members of the bargaining team review and provide feedback on your proposals before sending it to the agency. Consult with someone who has good editing skills to find grammatical errors.
- *Give enough detail so the reader understands what you mean.* Gather examples and descriptive language to explain and reinforce your proposal.
- *Write in complete sentences.* Avoid either acronyms or bullet lists or, on the other extreme, lengthy sentences with long, legalistic wording. Use gender-neutral language and be precise in use of numbers and units of time.
- *Organize the content of the proposal.* Use headings where possible to clearly state the issue that the proposal addresses. Whenever possible, use and amend current language in the contract to be consistent and to clarify earlier versions that may lead to different interpretations.



GROUND RULES

In most cases it is a good idea to negotiate a memorandum that sets out the ground rules for the substantive negotiations. A lot depends on your overall relationship with management. Depending on your agency, a contract may contain the ground rules both for mid-term bargaining and for bargaining to replace the contract.

Ground rules negotiations often set the tone for the actual bargaining on the matters at hand. It is far better to allow the beginning of substantive negotiations to be delayed while the Federal Services Impasse Panel (FSIP) handles your impasse over ground-rules than to agree to management ground rule proposals which will disadvantage the union in the negotiation of the contract.

Not everyone uses written ground rules. There are times when the union and management genuinely trust each other, and both know the other will bargain in good faith. Still, even here, to avoid misunderstandings, it makes sense to at least write a memo to the other side, beginning: “This is to confirm that . . .” and filling in the details of the understanding.

1. Bargaining schedule

You do not have to obtain management’s agreement to bargain. That obligation is imposed by law and includes the obligation to bargain at reasonable times and places.

Begin with a memo to management, proposing that the parties meet at a specified time, date and place, and requesting alternatives if those are not acceptable. If management responds in good faith, the parties will quickly find a mutually acceptable time and place.

If management either ignores your request, or if it suggests an absurd alternative, show up at the time and place you suggested and, if management fails to appear, file an unfair labor practice charge. Management’s conduct is, by definition, an illegal failure to meet at reasonable times and places. Chapter X of this manual discusses filing unfair labor practice charges.

Normally, a ground rules agreement will not only set out the schedule for actually bargaining, but will also provide for exchanging proposals before the first meeting.

2. Number of negotiators; official time

The union has the right to unilaterally determine the number of members on its own negotiating team. We have to bargain with management over how many of the union bargaining team members will be on official time (keeping in mind that we are automatically entitled to at least as many members on official time as there are members of the management negotiating team.)

What if management says that it only needs one or two people? Even though management is probably bluffing, there is no need to waste a great deal of time in discussions. Inform management of the benefits of diversity, and if that doesn’t work, declare the issue to be at impasse. The FSIP will then decide how many members of the union negotiating team will be on official time.

In addition to official time for the bargaining team members during actual negotiations, it may be

necessary to negotiate preparation time (including time for meetings with employees), shift changes or differentials, and travel and per diem. While this issue can be a difficult one to negotiate with the agency, given their concern over time away from work, it is an essential for the union to have adequate time to prepare for negotiations to avoid a bargaining in bad faith ULP complaint.

3. Identity of the negotiators

By and large, each side has total control over who will serve on its negotiating team. Neither side can refuse to bargain just because it doesn't like a particular person on the other side. Two obvious exceptions are that the union team cannot have any managers, and the management team cannot have any member of the bargaining unit (whether or not that employee is a dues-paying member of the union).

4. Meeting rooms; equipment

It is stupid to try to bargain in a room that is small, ill-lit, ill-ventilated, or either too hot or too cold. It is equally stupid to try to bargain when the union does not have an adequate place to caucus, or where normal equipment is unavailable. Ground rules often address these issues.

5. Publicity

While there are different tactics that negotiators use during bargaining, it is recommended that the union not agree to restrictions on publicity. One of the greatest factors handicapping negotiations is management's ability to be obnoxious at the bargaining table, but appear reasonable to the people in the workplace. We must reserve (and exercise) the right to accurately report on management's conduct, behavior and positions. This should not be discussed in the ground-rules.

6. Definition of impasse

An impasse is that point in negotiations at which the parties are unable to reach agreement. In practice, "impasse" is a term of art. If the agency says no to a proposal does not necessarily mean that the parties are at impasse. It often indicates that the union needs to either modify its proposal or convince/bargain with the agency to accept the proposal. As such, the term impasse does not need to be separately defined in any agreement of the parties. An impasse exists when further bargaining would not produce progress toward an agreement. The FSIP will determine if there is an actual impasse.

7. Breaks and caucuses

As a practical matter, there is no way to stop a party from taking a break or a caucus at any time. If management says, "Your new proposal looks good, but we need a half hour in private to go over it," you're not going to object. Thus, there is absolutely no reason to define, in writing and in advance, when breaks will occur and when caucuses may be taken.

8. Handling negotiability disputes

Some locals have been tricked into accepting a ground rule on handling negotiability disputes that results in a waiver of the union's control of the timing of negotiability appeals. In some cases, the entire right to challenge negotiability claims has been forfeited because the local did not know that the ground rule in effect created deadlines. The union should absolutely refuse a ground rule that says that management will put negotiability allegations in writing, or when they will do so.

At the same time, it might be useful to have an agreement in advance that if there are any pending negotiability cases at the point when everything else has been agreed to, the contract will be signed subject to reopening if the FLRA rules in our favor on negotiability. Of course, depending on the situation, you may want the contract completion to not occur until the negotiability dispute subjects have been resolved.

If you have any questions in this area, talk to your National Representative or Council office, who will bring the issue to the AFGE Labor Relations Specialists for additional guidance, if necessary.



ANALYTICAL FRAMEWORKS

Federal collective bargaining can be a complex process given the numerous requirements and interpretations that come from the Statute and the large volume of legal cases on this topic. Between negotiability appeals, ULPs and grievances, thousands of cases have made their way through the FLRA and the Court of Appeals to find resolution. Experienced federal negotiators have learned to make sense of these often complex legal decisions by using what is known as “analytical frameworks”.

Simply put, analytical frameworks are the tools that give both union and agency negotiators a common understanding of how to interpret how FLRA case law on subjects and situations that may occur in federal collective bargaining. Each analytical framework relates to a specific situation that may arise in bargaining, similar to how a carpenter will use a hammer and nails to connect boards together or a saw to cut a board in half. Just as you need multiple tools to build a house, it may be necessary to use multiple analytical frameworks in the process of bargaining an agreement. This section reviews a series of common analytical frameworks you may encounter in bargaining so you can identify the appropriate actions to take as a union negotiator.

Just as technology has changed the tools that are used to build houses, the analytical frameworks the federal negotiators use can change as well. While this section will review the common analytical frameworks used in federal collective bargaining, it is important to know where and how to research the existing case law before you bargain to see if there are any updates or changes.

In many situations, the agency uses an analytical framework as a reason to say no to bargaining. Using one or more FLRA analytical frameworks gives the agency a reasonable defense against a charge of bad faith bargaining. Union negotiators need to recognize when this argument has merit and when it does not. Union negotiators need to be able to call the bluff of an agency representative who falsely claims that the agency does not have a duty to bargain when, in fact, it does. In some situations, the agency may simply be uninformed of the proper application of the analytical framework or it may be deliberately using this approach to prevent negotiations. In the latter situation, this can lead to a potential negotiability appeal, ULP charge or grievance filed by the union. In many situations, the union may be able to modify its proposal to meet the requirements of the analytical framework and the agency would need to bargain over the merits of the proposal.

CONTRARY TO GOVERNMENT-WIDE RULES AND REGULATIONS

The agency may state that it is not obligated to bargain because a proposal is inconsistent with government-wide rule or regulation. The Statute refers to good faith bargaining and its relationship to government-wide rules and regulations, under Section 7117(a). The principal government-wide rules and regulations that limit bargaining are those promulgated by the Office of Personnel Management (OPM), the General Services Administration (GSA), the Department of Labor (DOL), and the General Accounting Office (GAO). Through its case law and interpretations, the FLRA has demonstrated that the Statute does not prevent bargaining over matters addressed in law or government-wide regulation. As long as the proposal does not conflict with the law or government-wide regulation, and the law or government-wide regulation does not take away the agency’s discretion over the matter addressed in the proposal, the matter can be negotiated. Both parties should carefully examine the wording of the law and government-wide regulation, including reviewing the associated legislative history or legal explanations that document their intended purpose. However, the FLRA has stated that avoiding

negotiations over matters addressed in government-wide law or regulation without exploring whether it can be negotiated unnecessarily limits the scope of bargaining under the Statute.

MANAGEMENT RIGHT VIOLATION

A common statement made by agency representatives when approached by the union to bargain over a change in the workplace is that the matter is outside the scope of bargaining because the proposal would excessively interfere with management rights. The management rights clause in the Statute, section 7106(a)(1) and (2), describes matters which are outside the scope of bargaining. It is important to note that the exercise of these management rights are “[s]ubject to subsection (b)” of section 7106, which deals with appropriate arrangements for employees adversely affected by the exercise of a management right and the procedures the agency will use to exercise its management right.

Some issues, such as negotiating ground rules, are not a violation of management rights. If the matter to be bargained does not directly affect a management right, the agency and the union are required to fully bargain on its substance. This means, in effect, that the union may be able to convince management not to proceed with the matter at all, as opposed to bargaining on how the change will occur or bargaining to minimize the harm it may do to employees. Bargaining over non-management right issues is commonly referred to as substance bargaining.

The majority of agency-implemented changes that affect employees’ working conditions will involve one or more of the management rights described in the Statute. As discussed earlier, proposals that involve management rights are within the scope of bargaining if they concern appropriate arrangements and procedures (a.k.a., impact and implementation) under section 7106(b)(2) and (3) of the Statute. We will discuss both types of bargaining proposals in more detail below.

PROPOSALS CONCERNING APPROPRIATE ARRANGEMENTS

The majority of disputes over whether a proposal is negotiable or not center initially around whether the proposal interferes with a management (section 7106 (a)) right or an elective (section 7106(b) (1)) right, and if it does, whether the proposal constitutes an appropriate arrangement. The FLRA has stated that both the agency and the union are often missing the opportunity to resolve problems in the workplace because they do not focus on creating appropriate arrangement proposals.

The FLRA uses several tests to determine whether a proposal is an arrangement that is appropriate:

1. Duty to Bargain Section for Appropriate Arrangements for Employees Adversely Affected by the Agency Exercising a Management Right

Prior to bargaining over negotiable proposals, there must be a statutory duty to bargain. There are three situations when there is a duty to bargain:

- During term negotiations, all proposals within the scope of bargaining under the Statute are bargainable.
- During union initiated bargaining during the term, or after the expiration, of a contract, proposals that are within the Statute’s scope of bargaining are subject to bargaining.
- When management makes a change in a condition of employment, the duty to bargain over appropriate arrangements is triggered if the change has more than a de minimis impact on

employees' working conditions.

Once there is such a duty to bargain, however, the scope of that bargaining remains constant.

2. What is an Appropriate Arrangement?

The FLRA (the Authority) initially determines whether the proposal is intended to be an “arrangement” for employees adversely affected by the exercise of a management right. An arrangement must seek to mitigate adverse effects “flowing from the exercise of a protected management right.” The adverse effect need not flow from the management right that a given proposal affects. The claimed arrangement must also be sufficiently “tailored” to compensate or benefit only employees suffering adverse effects attributable to the exercise of management’s right(s). Section 7106(b)(3) brings within the scope of bargaining proposals that provide “balm” to be administered “only to hurts arising from” the exercise of management rights. However, proposals that are so broad that they would apply to employees indiscriminately whether or not they will suffer, or have suffered as a consequence of the specific management action would be considered outside the scope of bargaining. The proposal has to be designed to help employees that will be hurt by the exercise of a specific management right or could reasonably be expected to be harmed by the exercise of this same management right. In other words, you can’t use one management initiated change that could harm two people as a way to open up bargaining for everyone else.

If the proposal is an arrangement that is sufficiently tailored, the Authority then determines whether it is appropriate, or whether it is inappropriate because it excessively interferes with the relevant management right(s). In doing so, the Authority weighs the benefits afforded to employees under the arrangement against the intrusion on the exercise of management’s rights. It is significant to recognize that an appropriate arrangement, by definition, directly interferes with a reserved management right. Indeed, the concept of appropriate arrangements only comes into play when a proposal directly affects a management right. If a proposal does not directly affect a management right and is otherwise within the statutory duty to bargain, it is negotiable. Accordingly, Congress and the Authority have not made management rights sacrosanct, but rather have created a system where some proposals may indeed be negotiable even though they interfere with and restrict management in the exercise of its rights. The key is for the parties to develop proposals that, although they may place limitations on management rights, nonetheless are negotiable because they are appropriate arrangements.

3. Developing Appropriate Arrangement Proposals

Some agencies declare proposals nonnegotiable as directly interfering with reserved management rights without attempting to explore with the union why the agency has taken that position and how the proposal at issue could be modified so as to result in further bargaining. Rather, it is not until there is an allegation of non-negotiability and the filing of either an unfair labor practice charge or negotiability appeal with the FLRA that the concept of negotiability is addressed. Again, remember, the concept of negotiability is not that “the agency does not agree with the union’s proposal,” but rather that “the agency has no obligation to discuss that proposal with the union because the agency believes it is nonnegotiable.” Too often, the parties spend more time and effort arguing over whether they should be bargaining rather than actually bargaining over the matter at issue. To avoid this situation, union negotiators should use the following process:

- **Identify the Management Right Being Exercised**

If bargaining in response to a proposed management action, first determine whether the management action at issue constitutes the exercise of a management right under section 7106 of the Statute. If the action is not the exercise of a management right, the union may develop proposals that conflict with the proposed action as long as they are otherwise within the statutory scope of bargaining. If the action is associated with a management right, identifying the particular management right at issue will assist the union in developing proposals that are arrangements and that are appropriate.

If bargaining a term agreement, it also is necessary to identify the management right that is causing the harm that the appropriate arrangement proposal is attempting to alleviate. Although there is no impending action, as in unilateral change bargaining, the test used by the Authority to determine whether a proposal is an appropriate arrangement is the same.

- **Identify the Adverse Affect**

After obtaining appropriate notice of the proposed exercise of a management right that triggers a statutory duty to bargain, the union should initially identify the adverse affects or reasonably foreseeable adverse affects on bargaining unit employees that flow from the exercise of that management right. This requires the union to understand what the proposed management action involves and exactly how it will adversely affect unit employees. This initial identification is crucial since it is this adverse affect which is targeted to be lessened by the appropriate arrangement proposals to be presented by the union.

Any “arrangements” proposal must be directed at the harm created by the management right that is being exercised. The ability to create a meaningful negotiable appropriate arrangement is increased if the adverse affect is initially identified. This step should be done prior to drafting any proposals. If the union cannot identify the adverse affect created by the exercise of a management right, the union most likely will find it difficult to successfully explain why its proposal is an arrangement and why that arrangement is appropriate. Proposals that address purely speculative or hypothetical concerns or are otherwise unrelated to management’s exercise of its reserved rights are not arrangements and would not make it through an FLRA negotiability review. In term negotiations, there still is the requirement to identify the harm which adversely affects employees which renders the proposal an arrangement.

- **Identify Adversely Affected Employees**

A proposal is an arrangement only if it is intended to alleviate the adverse affect on employees affected by the exercise of that management right. The proposal must be sufficiently “tailored” to compensate or benefit only those employees suffering adverse effects resulting from the exercise of a management right. Care must be taken to include within the coverage of the proposal only those employees that have been or reasonably could be negatively affected by the management action.

- **Develop Meaningful Proposals That Are Appropriate**

A proposal that is an arrangement (intended to alleviate the adverse affects of the exercise

of a management right on those employees impacted) must not excessively interfere with any management right. A proposal may affect a management right which is not the same right that management exercised in causing the adverse affect. In other words, the adverse affect, which a proposal attempts to alleviate, needs not flow from the same management right that a given proposal affects. For example, management may give notice that it intends to make a change by exercising its management right to determine its internal security practices. The union proposal intended to alleviate the adverse affect on employees by the exercise of that management right (internal security practices), however, it may also directly interfere with a different management right, such as the right to assign employees.

The key to crafting a successful proposal is to determine whether the proposal is appropriate or whether it is inappropriate because it excessively interferes with a management right. All negotiable appropriate arrangements interfere to some extent with a management right. The critical factor in determining whether a proposal excessively interferes with a management right is the extent to which the proposal's benefits to harmed employees outweighs the limitations it places on the management right. To be successful in bargaining over appropriate arrangements, the union must develop a proposal that benefits employees to a greater extent than the proposal restricts the agency's management right.

PROPOSALS CONCERNING PROCEDURES

Procedures which management officials observe in exercising any authority under the Management Rights section of the Statute are negotiable. The FLRA has held that, unlike appropriate arrangements, proposals on procedures cannot "directly interfere" with a management right. This interpretation requires the union to clearly argue that the proposal is simply discussing the procedures without interfering with a management right.

PERMISSIVE TOPIC THE AGENCY HAS DECIDED NOT TO BARGAIN

Management may elect to bargain over permissive subjects at their discretion. Even if management elects not to bargain over a permissive subject, appropriate arrangements and procedures concerning those elective rights are within the scope of bargaining.

Management does have the right to terminate bargaining at any time on a permissive subject. The impasse process does not apply to a situation when a permissive topic is being negotiated.

COVERED-BY

The process of collective bargaining often allows the parties to anticipate future changes and create procedures and arrangements in the collective bargaining agreement on how to deal with them. Unions are not entitled to engage in impact and implementation (appropriate arrangements and procedures) bargaining over a change in the manner in which the change is to be implemented if this issue is already addressed in the collective bargaining agreement. As an example, a union would not be entitled to bargain over a change involved in an employee's overtime assignment if the procedures for making those assignments were included in the existing contract. The theory behind the covered-by doctrine is that the parties should not have to engage in further negotiation over matters they have already settled, or to say it another way; a deal is a deal. There are situations when the covered-by legal framework can get more complicated, such as when a topic was specifically excluded from negotiations.

The FLRA uses a 3-prong test to determine whether a matter is contained in or covered by a collective bargaining agreement. As a general rule, it is difficult for the union to argue that that proposal should be bargained if the contract has language in it discussing the topic. Below is a brief description of the 3-prong covered-by test:

Prong 1: *Expressly contained.* The initial determination is whether a reasonable reader of the CBA would conclude that the current contract covers the matter in dispute.

Prong 2: *Inseparably bound up with.* If the provision does not expressly cover the matter, the next step is to determine if the matter of the proposal would be commonly considered to be an aspect of the matter covered in the contract provision that the negotiations are presumed to have ended further bargaining over the matter, regardless of whether it was expressly articulated in the provision.

Prong 3. *Reasonably should have contemplated.* In this situation, after the first two prongs have not been met, the circumstances of each case are examined to see if the parties should have reasonably been expected to contemplate that the agreement would have foreclosed further bargaining in this exact instance. If the matter is only tangentially related to the provisions of the agreement and not something should “have been contemplated as within the intended scope of the provision”, the subject matter would not be covered-by.

WAIVERS

It is important that the union not agree to give up its statutory right to bargain over changes that occur while the contract is in place. Management may attempt to obtain this agreement from the union at the bargaining table by proposing a “zipper clause”. The zipper clause is intended to waive the obligation to bargain during the term of the agreement on matters not contained in the agreement. The following language is recommended by AFGE to insert in the contract to clearly state that the union does not give up its right to bargain:

Section 4.0 **Waivers**

Nothing in this Agreement shall be deemed to waive either Party’s statutory rights unless such waiver is clear and unmistakable.

Locals and councils should be very careful not to waive any of their statutory rights. *Customs Service, Northeast Region and NTEU*, 38 FLRA 770, 784 (1990). Waivers can be inadvertent, yet still “clear and unmistakable.” Assistance is available from AFGE National Representatives and staff of the Field Services and Education Department at the National Office. Contact your District or Council office for advice on any questionable proposals.

AGENCY HEAD REVIEW WILL OVERTURN

The agency can allege during negotiations that the agency head will overturn the proposal that is being bargained at the table. As discussed previously, the agency head review process is limited to identifying and rejecting contract provisions that conflict with law or government-wide regulations. The union should request the copy of the law or government-wide regulation that the proposal may conflict with and either demonstrate that the proposal is not in conflict or modify the proposal to address the potential conflict.

DE MINIMIS

The agency may state that it does not have the duty to bargain over a matter because it is *de minimis*. The Latin term, *de minimis*, has been defined by the FLRA as a matter that has no appreciable effect on working conditions. Management only needs to bargain over changes that are more than *de minimis*. The FLRA and the courts have determined that a *de minimis* is not limited to the number of people affected by the matter. The union will need to demonstrate that the matter will have an appreciable effect on the working conditions as measured by economic and personal hardship, or other impacts.

To determine whether a change is *de minimis* or not, the FLRA will consider the following aspects:

- The overall size of the bargaining unit is irrelevant.
- The FLRA will consider the size of the bargaining unit, but this is not a controlling factor.
- The duration of the change can be an important factor.
- The reasons for the change will be taken into account by the FLRA.

NOT MEETING THE TIMELINE FOR THE DEMAND TO BARGAIN

Once it has received adequate notice of an intended change, the union must request impact and implementation bargaining in a timely manner or lose its right to negotiate on the announced change. Failure to clearly request negotiations may result in a finding by the FLRA that the union has waived its right to bargain. Waiting until the last minute before an intended change to request bargaining can result in a finding that the union has waived its right to bargain. The FLRA has found that a demand to bargain can take several forms, including:

- An outright demand to bargain notice.
- The provision of proposals in writing.
- A request for further information.
- A request for further time to study the matter – particularly if it is a complicated or significant issue, or if the union was given short notice.

AGENCY RULES AND REGULATIONS: COMPELLING NEED

If a union does not represent a majority of an agency's employees and is involved in negotiations, the agency may raise its own internal regulations as a means to bar negotiations on proposals that conflict with those regulations. The bar is limited to regulations issued by the agency at the national level or by a "primary national subdivision". In many cases, AFGE locals who bargain with local agency representatives on changes to their workplace conditions at their facility are not affected by this legal framework as the regulations under discussion have been issued at the component level and were not issued by either the primary national subdivision or the agency. For example, a local union who is bargaining with the Garrison Commander at Ft. McCoy about a new requirement for employee parking is not affected by a regulation issued at the national level (Department of Defense) or the primary national subdivision (Army).

If the union is bargaining with the agency at the national level and/or primary national subdivision level and the agency asserts that the proposal is in conflict with its rules and regulations, the union can file a negotiability appeal with the FLRA. The agency will need to prove that it has a "compelling need" for its regulation. The compelling need for the agency regulation must meet one or more of the following

requirements:

- The regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or execution of the functions of the agency, in a manner that is consistent with the requirements of an effective and efficient government.
- The regulation is necessary to ensure the maintenance of basic merit principles.
- The regulation implements a mandate under law or other outside authority, and implementation is nondiscretionary.

See Part 2424.50 of the FLRA's (the Authority) Regulations. In general, it has proven difficult for agencies to pass the compelling need test established by the FLRA.



NEGOTIABILITY APPEALS

Disputes regarding the negotiability of a proposal can be submitted to the FLRA for adjudication. These disputes, referred to as ‘negotiability appeals’, can be complex. Most importantly, if done incorrectly, a negotiability appeal case can lead to a negative ruling that not only affects the plaintiff, but could restrict the scope of bargaining for the entire federal sector. For this reason, AFGE strongly recommends that a negotiability appeal be developed and submitted only by experienced union bargainers who serve as either a District National Representative or as a Labor Relations Specialist in the AFGE Field Services and Education Department. See Appendix F for an example of a negotiability appeal decision.

If you encounter a situation that requires a negotiability appeal, make sure to clearly identify the analytical framework that the agency is using to prevent bargaining. If possible, first attempt to change the proposal so that it falls within the scope of bargaining. If this is not an option, please contact your District or Council office to notify them that you will need to file a negotiability appeal.

The FLRA strongly recommends that the parties only use litigation as a last resort and instead use the following steps to further discuss the dispute in an attempt to return to the process of collective bargaining:

1. Draft Proposals Clearly and Plainly

Some negotiability disputes arise because the parties have different interpretations of the proposed language. Indeed, the Authority decides upon the meaning of a proposal before it decides negotiability cases. Prior to curtailing negotiations because of a negotiability dispute, the union should ask the agency to present its interpretation of the proposal and describe how the agency perceives the proposal will impact its operations.

2. Do Not Confuse the Concept of Negotiability with the Merit of the Proposal

No party is required to agree to any proposal. Merely because a party may deem a proposal without merit does not render that proposal nonnegotiable. Should a party deem the proposal unacceptable on its merits, the proper forum to discuss the merit of the proposal is the collective bargaining process, not through litigation.

3. Unions Should Curtail Bargaining Based on a Dispute over Negotiability Only as a Last Resort

The collective bargaining process is better served if the parties are able to discuss the negotiability issues and move forward in their negotiations by addressing the negotiability concerns and the concerns which prompted the proposal in the first instance. Resort to litigation before a third party should only be invoked when the parties have a legal issue that requires a definitive legal answer, rather than a dispute caused, in whole or in part, by a breakdown in communications or a non-productive labor-management relationship.

4. Determine Whether the Agency Believes the Entire Proposal or Just a Portion or Phrase of the Proposal Is Nonnegotiable

Sometimes an agency may assert that a proposal is outside the scope of bargaining when their objection pertains only to a specific segment of a proposal, or even one word. If this fact is communicated between the parties, they may be able to continue bargaining over the matter while

avoiding the issue of negotiability. Again, do not confuse the merits of a proposal with its negotiability. The key is to continue communicating and bargaining rather than stopping the process with litigation.

5. Explore Why the Agency Believes the Proposal Is Nonnegotiable

Communicating over what specific action the agency believes the proposal would prohibit or unduly impede the agency from undertaking could alleviate any misunderstandings among the parties over the meaning of the proposal. For example, if the agency asserts a proposal would preclude the agency from taking a certain action and the union's intent was not to preclude that action, the proposal may be modified to resolve, what in essence is, a communication problem and not a negotiability dispute. Similarly, sometimes adding a phrase or clause alleviates the reasons why an agency believes a proposal to be nonnegotiable.

6. Discuss the Purpose of the Proposal

Sometimes, there is no disagreement over the purpose of the proposal, but the parties disagree as to the manner in which that purpose is to be effectuated by the proposal. It may be possible to draft alternative proposals which achieve the same goal but which avoid negotiability issues. Again, the goal is to continue talking and bargaining, rather than terminating the process with litigation.

7. Ensure There Is Agreement on the Meaning of the Proposal and an Understanding Why the Agency Believes the Proposal to be Nonnegotiable before Exploring Litigation Alternatives

If all else fails, do not leave the table until both parties have a common understanding over the intent and meaning of the proposal and the reason why the agency believes it to be nonnegotiable. Agreeing on the intent and meaning of the proposal, and articulating the reasons why non-negotiability is alleged, may result in resolution of the negotiability dispute and will expedite any litigation process, if invoked.



RESOURCES AND RESEARCH

Federal collective bargaining often requires a great deal of research and is made easier by obtaining the necessary assistance from experienced union negotiators. The following is a preliminary list of resources to assist you in preparing for collective bargaining:

AFGE Bargaining for the Future

Bargaining for the Future is a compilation of key contract articles with recommended language. With each article, AFGE Labor Relations Specialists have identified whether the proposed language falls into the category of 'contract minimum' or 'contract objective.' Bargaining for the Future provides not only language (and options) but it also provides the reader with backup information in order for the reader to understand the context and background to the language.

AFGE CaseTrack: www.afge-casetrack.org

AFGE has created an online database of AFGE contracts, grievances and arbitrations. AFGE CaseTrack is an entirely web-based application built on the latest internet technology. With this Grievance Tracking System, there is no need to install multiple copies on different computers or synchronize data between machines. All data is instantly updated on the server allowing users to get up to-the-minute reports and case information online at any time.

For security purposes, no one from the local can register as a user until the Local President has registered as a Local Administrator. To do so, Local Presidents should email name, address, preferred email address, and desired username and password to casetrack@afge.org. Pick a username and password. Your password should have at least six characters and at least one special character (#). This improves the security of the system. Also, please use personal rather than government email. Once the Local President has been approved as a Local Administrator, she or he can approve other users in your Local. If Local Presidents wish, they can designate one or more additional Local Administrators to help. The Local President should send a non-government email with the necessary information to casetrack@afge.org.

AFGE National Representatives

Each AFGE District has several National Representatives who can serve as a resource and/or assist AFGE locals on collective bargaining. The National Representatives serve under the direct supervision of the National Vice President (NVP) for that District.

AFGE Council Office

Many agencies have AFGE Bargaining Councils whose elected officers and staff can provide assistance on collective bargaining.

AFGE Field Services and Education Department

The Field Services team is tasked specifically with assisting bargaining councils and nationwide locals with developing campaigns for growth and strength, to bargain the strongest contracts in the labor movement. Field Services helps national locals and bargaining councils identify and realize goals in:

- Overall federal employment standards

- Their labor management relationship
- Contract language
- Outreach within the bargaining unit and throughout the community
- Membership growth.

Field Services is also responsible for the implementation of AFGE's workplace representation strategy which includes, but is not limited to, direct support in:

- Term contract negotiations
- Mid-term bargaining
- Contract enforcement
- Exercising national consultation rights
- Developing and implementing Strategic plans to strengthen national locals and councils.

CyberFeds®: www.cyberfeds.com.

In addition to providing a wealth of case information and reports, cyberFEDS® is the exclusive Web source for instant searchable access to the latest editions of Broida's and Hadley's:

- A Guide to Federal Labor Relations Authority Law and Practice
- A Guide to Merit Systems Protection Board Law and Practice
- A Guide to Federal Sector Equal Employment Law and Practice

A subscription for cyberFeds is \$686 per user on an annual basis. A discounted rate of \$600 is available for two-year or three-year contracts.

Fedsmill: www.fedsmill.com

FEDSMILL is designed for union representatives and the employees they represent. It will present tips on how to enforce and expand their rights, highlight new developments in law and practice, and challenge some of the accepted wisdom, legal and otherwise, about how unions, federal employees, and management should interact.



APPENDIX A: Glossary of Terms

INTRODUCTION TO FEDERAL COLLECTIVE BARGAINING

GLOSSARY OF TERMS

| TERM | DEFINITION | SOURCE |
|--------------------------|---|-----------------------|
| AAA | American Arbitration Association. An organization that provides independent arbitrators for dispute resolution. | www.adr.org |
| Agency Head Review (AHR) | If the union and an agency reach, or the FSIP imposes, a written agreement, then the parties must submit that agreement to the agency head. The agency head then determines whether the agreement is consistent with law. If the opinion of the agency head determines that one or more of the provisions is contrary to law, then he or she will disapprove the entire agreement in writing. | 5 U.S.C 7114 (c) |
| Agreement | Collective Bargaining Agreement (see definition below). | |
| Analytical Frameworks | Interpretations of the Statute (5 USC Chapter 71) through tests, elements, and concepts. | |
| Appropriate Arrangements | A proposal intended to be an arrangement for employees adversely affected by the exercise of a management right. An <i>arrangement</i> must seek to mitigate adverse effects or the possibility of an adverse effect from the exercise of a protected management right. It must seek to mitigate adverse effects flowing from the exercise of a protected management right and must be tailored to compensate or benefit employees suffering adverse effects attributable to the exercise of a management right. The appropriateness of a proposal is determined by whether the Authority considers the proposals benefit to outweigh the burden on management’s ability to exercise their rights. Agencies must negotiate with the Union over proposals that are appropriate arrangements for employees who are adversely affected by the exercise of management rights. | 5 U.S.C. 7106 (b) (3) |

| TERM | DEFINITION | SOURCE |
|---------------------------------------|--|------------------------|
| the Authority | Federal Labor Relations Authority (<i>see FLRA definition below</i>) | |
| Bargaining Obligation Dispute | Disagreement between the union and an agency concerning whether, in specific cases, the parties must bargain over a proposal that may be otherwise be within the scope of bargaining. | |
| Bargaining team members | Persons designated by the Union to conduct negotiations | |
| Bargaining unit | The part of an Agency for which the Union has been certified as the exclusive representative. | |
| Bargaining unit member | A member of the bargaining unit. May or may not choose to be a member of AFGE but will be represented in collective bargaining. | |
| Case law | Court and administrative precedent | |
| Collective Bargaining Agreement (CBA) | An agreement entered into as a result of collective bargaining pursuant to the provisions of this Chapter (Chapter 71). This includes more than the basic contract. It includes any written or oral agreements between the Union and the Agency. | |
| Collective Bargaining | Narrow sense: negotiations between agency and the union to reach agreement on conditions of employment. Broad sense: negotiations & other activities related to representing workers: complaints, committees, informational picketing, etc. to reach agreement on conditions of employment. | |
| Conditions of Employment | <p>Means personnel policies, practices and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices and matters – relating to political activities prohibited under subchapter III of Chapter 73 of Title 5, relating to the classification of any position; or to the extent such matters are specifically provided for by Federal statute.</p> <p>The physical, environmental and operational features affecting daily work lives.</p> | 5 U.S.C. 7103 (a) (14) |

| TERM | DEFINITION | SOURCE |
|------------------|---|--|
| Conflict/Dispute | Negotiations, impasses, complaints/grievances/arbitrations, ULPs, negotiability appeals, etc | |
| Compelling Need | The agency statement that a rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of functions of the agency or primary national subdivision in a manner that is consistent with the requirements of an effective and efficient government. The rule or regulation is necessary to ensure the maintenance of basic merit principles. The rule or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature. | 5 CFR 2424.50 |
| Counter | Contractual language developed in response to other party's proposal on a specific article. | |
| Covered by | A matter contained in an existing collective bargaining agreement. If a matter is 'covered by' an existing collective bargaining agreement, management has no further obligation to bargain over that matter. | |
| De Minimis | A Latin term meaning ' <i>of minimum importance</i> '. An agency is not required to bargain over a change that has only " <i>de minimis</i> " effect on conditions of employment. When determining whether a change has only a de minimis effect, the Authority looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change on bargaining-unit employees' conditions of employment. The number of people affected by the change is not a determining factor on whether the change is <i>de minimis</i> . | Guide to Negotiability Under the Federal Service Labor-Management Relations Statute FLRA – 2013. |
| Designee(s) | The person or persons authorized by the Union to speak or act for the Union. | |
| Employer/Agency | The employer organization that has been identified as the Union's counterpart within the government. | |

| TERM | DEFINITION | SOURCE |
|--------------------------|---|------------------------|
| Exclusive Representative | The Union; the only entity that can speak for one or more members of the bargaining unit. | 5 U.S.C. 7103 (a) (16) |
| Fact Finding | Part of the impasse procedures where parties clarify proposals and present supportive data. | |
| FLRA (the Authority) | <p>Federal Labor Relations Authority. Responsibilities include:</p> <ul style="list-style-type: none"> • Defining appropriate units, creating or modifying bargaining units. • Investigating and prosecutes charges of Unfair Labor Practices (ULPs) against agencies, individuals, and unions. • Determines whether language can be negotiated and put into an agreement (negotiability appeal) • Decides if arbitration awards are legal. | www.flra.gov |
| FMCS | Federal Mediation and Conciliation Service. FMCS promotes sound labor-management relations by providing mediation assistance in contract negotiation disputes between employers and their unionized employees. | www.fmcs.gov |
| FSIP | Federal Services Impasse Panel. FSIP decides which language goes into a CBA, when the Parties cannot agree after negotiating and mediation assistance. Must defer on issues presented that raise ULP allegations; or, negotiability issues of first impression. | www.flra.gov/fsip |
| Ground Rules | Procedures and protocols that the parties will follow in negotiating a collective bargaining agreement. Ground rules are a mandatory subject of bargaining if either party wants them. | |
| Impasse | The point in the negotiation of conditions of employment at which the parties are not able to reach agreement, notwithstanding their efforts to do so by direct negotiations and by the use of mediation or other voluntary arrangements for settlement. | |
| Initial | This proposal should include all goal areas identified for this round of bargaining. | |

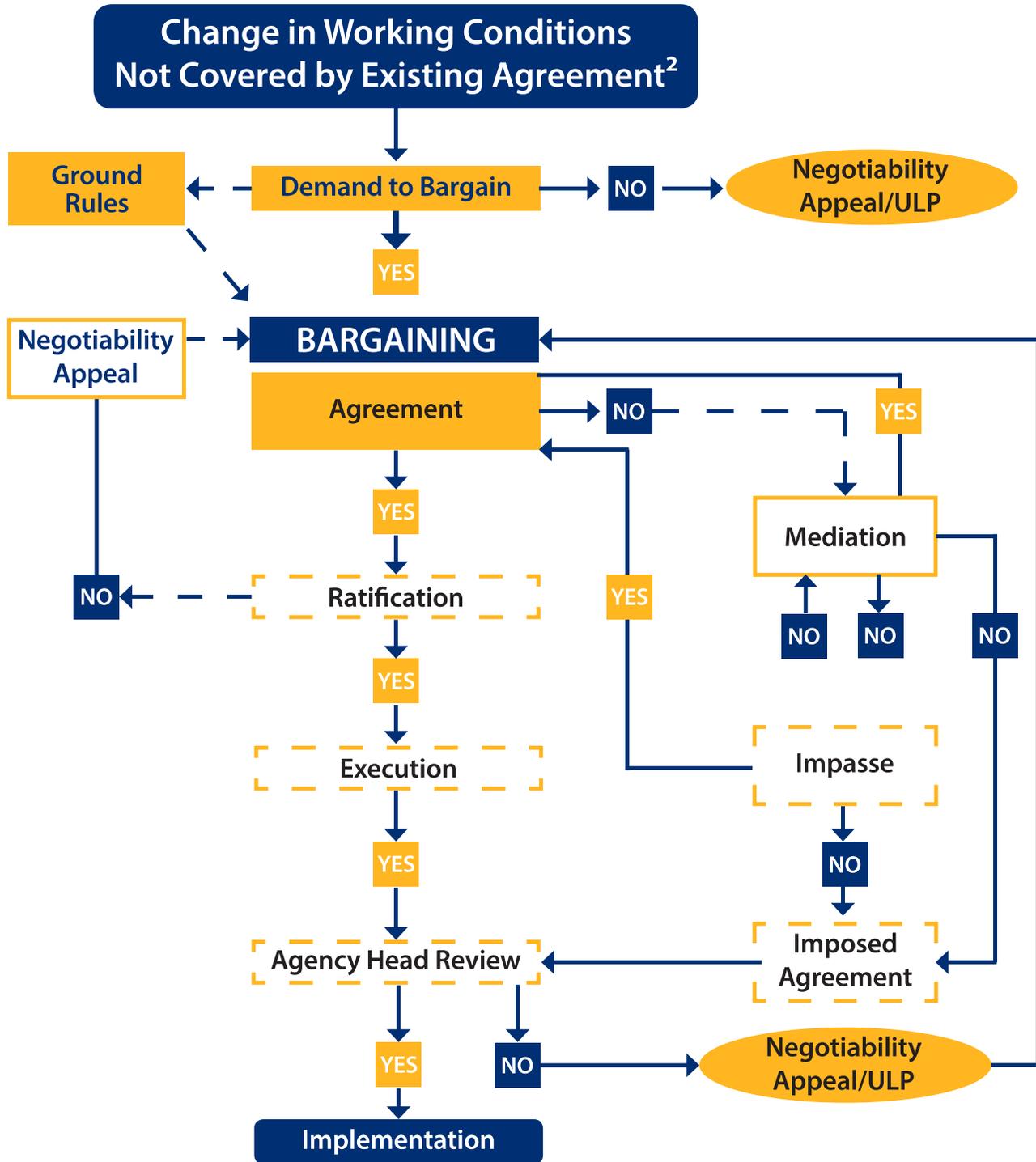
| TERM | DEFINITION | SOURCE |
|----------------------------------|---|--------|
| Interest Dispute | A dispute over what an agreement between two parties (i.e., labor and management) will provide. | |
| Local supplemental | A local supplemental is an agreement between the AFGE local and its local agency counterpart on issues that are not covered by a Master Labor Agreement, i.e., policies, procedures and directives at the facility level or national level. | |
| Management right | Management rights under §7106 (a) include nineteen rights that management can choose to exercise. | |
| Mandatory Subjects of Bargaining | Subjects, that upon request, a party must bargain over. Subjects include, among other things, procedures and appropriate arrangements. | |
| Master Labor Agreement | All agency locations are obligated to this type of labor contract. It can be assisted by having separate local supplemental agreements. | |
| Means | How an agency conducts its work. | |
| Mediation | Use of an outside agency to expedite bargaining or resolve an impasse situation. | |
| Methods | What the agency uses to conduct its work. | |
| Negotiability Appeal | The union can file a negotiability appeal when the agency claims that a proposal is outside the statutory duty to bargain or a contract has been disapproved by an agency head. | |
| Negotiability Dispute | A disagreement between the union and the agency concerning the legality of a proposal or provision. | |
| Neutrals | Agencies & individuals involved in resolving collective bargaining disputes, but are not union or management. Includes FLRA, FMCS, FSIP, arbitrators and courts. | |
| Nonnegotiable | Proposals outside the duty to bargain and provisions that are contrary to law. | |
| Non-Term Agreement | MOU, MOA, LOA, “midterm” Agreement, anything that doesn’t have an expiration date. | |

| TERM | DEFINITION | SOURCE |
|-----------------------------------|---|--|
| Particularized need | Parameters the Union must meet to request data. The data must be normally maintained by the agency in the regular course of business and reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining. | |
| Permissive Subjects of Bargaining | Matters that the parties are permitted to bargain but are not required to do so. Agency heads cannot disapprove agreements based on permissive subjects of bargaining. | |
| Procedures | Mandatory subject of bargaining. Agencies must bargain over procedures, even if they affect management rights. | 5 U.S.C. 7106 (b) (2) Guide to Negotiability Under the Federal Service Labor-Management Relations Statute Page 51 FLRA - 2013 |
| Prohibited Subjects of Bargaining | Subjects that the parties cannot agree to bargain because they are prohibited by law. | |
| Proposal | Any matter offered for bargaining that the parties have not agreed to. | |
| Provision | Contract language that an agency and a union have agreed to include in their collective bargaining agreement or that FSIP has imposed as part of their agreement. | |
| Ratification | The Union is entitled under the Statute to condition the execution of an agreement arrived at through collective bargaining upon ratification by its members provided: (1) the employer has notice of the ratification requirement and (2) there is no waiver of the right by the Union. | |
| Request for information | The Federal Service Labor Relations Statute provides for agencies to furnish labor organizations with data/information related to collective bargaining upon request. | 5 U.S.C. 7114 (b) (4) |
| Tangible | Substantive issue that can be negotiated and usually reduced to writing. | |
| Team | Members chosen to conduct bargaining on behalf of all members of the bargaining unit. | |

| TERM | DEFINITION | SOURCE |
|-------------------------------|--|--------|
| Tentative Agreement (TA) | An interim agreement reached on a specific issue, subject to change as new agreements are added. | |
| Term Agreement | Contract, Master Agreement, sometimes referred to as the “controlling” agreement, any agreement that has an expiration date. | |
| the Statute | The Federal Service Labor-Management Relations Statute, 5 U.S.C., chapter 71, the labor law. Also referred to as Title 5. | |
| Unfair Labor Practices (ULPs) | <p>With regard to collective bargaining, ULPs can be filed when there is a dispute about whether there is or is not an obligation related to bargaining (at all, provide data, etc.).</p> <p>The FLRA investigates and prosecutes or dismisses the charge.</p> | |
| Union member | An employee of the bargaining unit who has voluntarily decided to the Union by signing up on the appropriate form and paying dues to the Union. | |

APPENDIX B:

Process Flowchart: Federal Collective Bargaining



² 1. No agreement in effect on working conditions (no contract), 2. End of agreement (expired contract), 3. Change in working conditions (issue not covered in current contract).

APPENDIX C:

COMMON FORMS USED IN COLLECTIVE BARGAINING

- Notice to Federal Mediation and Conciliation Service (Form F-53)
- Federal Services Impasse Panel: Request for Assistance
- Federal Labor Relations Authority: Charge Against an Agency

FMCS Form F-53
Revised 5-92

Form Approved
OMB No. 3076-0005

FEDERAL SECTOR LABOR RELATIONS NOTICE TO FEDERAL MEDIATION AND CONCILIATION SERVICE

Mail
To: Notice Processing Unit
FEDERAL MEDIATION AND CONCILIATION SERVICE
2100 K Street, N.W.
Washington, D.C. 20427

THIS NOTICE IS IN REGARD TO: (MARK "X")

- ① AN INITIAL CONTRACT (INCLUDED FLRA CERTIFICATION NUMBER) # _____
 A CONTRACT REOPENER REOPENER DATE _____
 THE EXPIRATION OF AN EXISTING AGREEMENT EXPIRATION DATE: _____

OTHER REQUESTS FOR THE ASSISTANCE OF FMCS IN BARGAINING (MARK "X")

② SPECIFY TYPE OF ISSUE(S) _____

REQUEST FOR GRIEVANCE MEDIATION (SEE ITEM #10) (MARK "X")

③ ISSUE(S) _____

④ NAME OF FEDERAL AGENCY _____ NAME OF SUBDIVISION OR COMPONENT, IF ANY _____

STREET ADDRESS OF AGENCY _____ CITY _____ STATE _____ ZIP _____

AGENCY OFFICIAL TO BE CONTACTED _____ AREA CODE & PHONE NUMBER _____

⑤ NAME OF NATIONAL UNION OR PARENT BODY _____ NAME AND/OR LOCAL NUMBER _____

STREET ADDRESS _____ CITY _____ STATE _____ ZIP _____

UNION OFFICIAL TO BE CONTACTED _____ AREA CODE & PHONE NUMBER _____

LOCATION OF NEGOTIATIONS OR WHERE MEDIATION WILL BE HELD

⑥ STREET ADDRESS _____ CITY _____ STATE _____ ZIP _____

⑦ APPROX. # OF EMPLOYEES IN BARGAINING UNIT(S) >> _____ IN ESTABLISHMENT>> _____

⑧ THIS NOTICE OR REQUEST IS FILED ON BEHALF OF (MARK "X") UNION AGENCY

⑨ NAME AND TITLE OF OFFICIAL(S) SUBMITTING THIS NOTICE OR REQUEST _____ AREA CODE AND PHONE NUMBER _____

STREET ADDRESS _____ CITY _____ STATE _____ ZIP _____

*FOR GRIEVANCE MEDIATION, THE SIGNATURES OF BOTH PARTIES ARE REQUIRED:**

⑩ SIGNATURE (AGENCY) _____ DATE _____ SIGNATURE (UNION) _____ DATE _____

*Receipt of this form does not commit FMCS to offer its services. Receipt of this form will not be acknowledged in writing by FMCS. While use of this form is voluntary, its use will facilitate FMCS services to respondents. Public reporting burden for this collection of information is estimated to average 10 minutes per response, including time for reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to FMCS Division of Administrative Services, Washington, D.C. 20427, and to the Office of Management and Budget, Paperwork Reduction Project, Washington, D.C. 20503

For Instructions, See Back

Instructions

Complete this form, please follow these instructions

- In **Item #1.** Check the block and give the date if this is for an existing agreement or reopener. The FLRA Certification number should be provided if available. If not known, please leave this item blank. Absence of this number will not impede processing of the form.
- In **Item #2.** If other assistance in bargaining is requested please specify: e.g., impact and implementation bargaining (I&I) and/or mid-term bargaining and provide a brief listing of issues, e.g., smoking, Alternative Work Schedules (AWS), ground rules, office moves, or if desired, add attached list. This is only if such issues are known at time of filing.
- In **Item #3.** Please specify the issues to be considered for grievance mediation. Please refer to FMCS guidelines for processing these requests. **Please make certain that both parties sign this request!**
- In **Item #4.** List the name of the agency, as follows: The Department, and the subdivision or component. e.g., U.S. Dept. of Labor, BLS, or U.S. Dept. of Army, Aberdeen Proving Ground, or Illinois National Guard, Springfield Chapter. If an independent agency is involved, list the agency, e.g., Federal Deposit Insurance Corp. (FDIC) and any subdivision or component, if appropriate.
- In **Item #5.** List the name of the union and its subdivision or component as follows: e.g., Federal Employees Union, Local 23 or Government Workers Union, Western Joint Council.
- In **Item #6.** Provide the area where the negotiation or mediation will most likely take place, with zip code, e.g., Washington, D.C. 20427. The zip code is important because our cases are routed by computer through zip code, and mediators are assigned on that basis.
- In **Item #7.** Only the approximate number of employees in the bargaining unit and establishment are requested. The establishment is the entity referred to in item 4 as name of subdivision or component, if any.
- In **Item #8.** The filing need only be sent by one party unless it is a request for grievance mediation. (See item 9)
- In **Item #9.** Please give the title of the official, phone number, address, and zip code.
- In **Item #10.** Both labor and management signatures are required for grievance mediation requests.

NOTICE

SEND ORIGINAL TO FMCS
SEND ONE COPY TO OPPOSITE PARTY
RETAIN ONE COPY FOR PARTY FILING NOTICE

**FEDERAL SERVICE IMPASSES PANEL
REQUEST FOR ASSISTANCE**

INSTRUCTION: File an **original and one copy** of this request (including attachments) with the Executive Director, Federal Service Impasses Panel, 1400 K Street, NW, Washington, DC 20424-0001. Also serve a copy of the request (with attachments) on the other party to the dispute and on the mediator, and submit a written statement of such service to the Executive Director. Telephone number (202) 218-7790; Fax Number (202) 482-6674.

Form Approved:
OMB No. 3070-0007

Date: _____

1. This is a request to the Panel, filed under title 5 of U.S. Code and the Panel's regulations to: (Check One)
 - (a) Consider a negotiation impasse.
 - (b) Approve a joint request for a binding arbitration procedure to resolve a negotiation impasse.
 - (c) Consider an impasse resulting from an agency determination not to establish or terminate a compressed work schedule under the Federal Employees Flexible and Compressed Work Schedules Act.
2. (a) Name of Agency _____
 (b) Address _____
 (c) Person to Contact _____ Title _____
 (d) Phone No. _____
 (e) Fax No. _____
3. (a) Name of Labor Organization _____
 (b) Address _____
 (c) Person to Contact _____ Title _____
 (d) Phone No. _____
 (e) Fax No. _____
4. Description of Bargaining Unit _____

5. Number of Employees in Bargaining Unit _____ Date Labor Agreement Expires _____
6. (a) If term 1(a) is checked, attach information containing (1) the issues at impasse and requesting party's summary position thereon; (2) the number, length, and dates of negotiation and mediation sessions held; (3) the name and address of the mediator; and (4) the FMCS case number, if known.



UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
CHARGE AGAINST AN AGENCY

FOR FLRA USE ONLY

Case No.

Date Filed

| | | | |
|--|-----|---|-----|
| 1. AGENCY AGAINST WHICH CHARGE IS BROUGHT | | 2. CHARGING PARTY | |
| a. Name of Charged Agency (include address, city, state, & ZIP) | | a. Name of Charging Party (include address, city, state, & ZIP) | |
| b. Agency Representative (include name, title, address) | | b. Charging Party Representative (include name, title, address) | |
| tel. | fax | tel. | fax |
| e-mail | | e-mail | |
| 3. BASIS OF THE CHARGE | | | |
| a. Set forth a clear and concise statement of the facts constituting the alleged unfair labor practice, including date and location of the particular acts. | | | |
| b. Which subsection(s) of 5 U.S.C. 7116(a) do you believe the Agency has violated? (1) <input checked="" type="checkbox"/> (2) <input type="checkbox"/> (3) <input type="checkbox"/> (4) <input type="checkbox"/> (5) <input type="checkbox"/> (6) <input type="checkbox"/> (7) <input type="checkbox"/> (8) <input type="checkbox"/> | | | |
| c. Have you or anyone else raised this matter in any other procedure? No <input type="checkbox"/> Yes <input type="checkbox"/> If yes, where? | | | |
| <input type="checkbox"/> Grievance Procedure <input type="checkbox"/> Federal Mediation and Conciliation Service <input type="checkbox"/> Federal Service Impasses Panel <input type="checkbox"/> Equal Employment Opportunity Commission <input type="checkbox"/> Merit Systems Protection Board <input type="checkbox"/> Office of Special Counsel <input type="checkbox"/> Other Administrative or Judicial Proceeding <input type="checkbox"/> Negotiability Appeal to FLRA <input type="checkbox"/> Other _____ | | | |
| 4. DECLARATION | | | |
| I DECLARE THAT I HAVE READ THIS CHARGE AND THAT THE STATEMENTS IN IT ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF. I UNDERSTAND THAT MAKING WILLFULLY FALSE STATEMENTS CAN BE PUNISHED BY FINE AND IMPRISONMENT, 18 U.S.C. 1001. | | | |
| THIS CHARGE WAS SERVED ON THE PERSON IDENTIFIED IN BOX 1b BY [check all appropriate boxes] | | | |
| <input type="checkbox"/> In Person <input type="checkbox"/> 1st Class Mail <input type="checkbox"/> Fax <input type="checkbox"/> Commercial Delivery <input type="checkbox"/> Certified Mail <input type="checkbox"/> e-mail (see reverse) | | | |
| Type or Print Your Name | | Your Signature | |
| | | | |
| | | Date | |

INSTRUCTIONS FOR COMPLETING FORM 22:**General**

Use this form if you are charging that a federal agency committed an unfair labor practice under paragraph (a) of section 7116 of the Federal Service Labor-Management Relations Statute. File an original form with the appropriate Regional Director, Federal Labor Relations Authority. If you do not know that address, go to the FLRA's website at www.flra.gov or contact the Office of the General Counsel, Federal Labor Relations Authority, (202) 218-7910. If filing the charge by fax, you need only file a fax-transmitted copy of the charge (with required signature) with the Region. You assume responsibility for receipt of a charge. A charge is a self-contained document without a need to refer to supporting evidence and documents that are also submitted to the Regional Director along with the charge. If filing a charge by fax, do not submit supporting evidence and documents by fax. See 5 C.F.R. Part 2423 for an explanation of unfair labor practice proceedings and, in particular, §§ 2423.4 and 2423.6, which concern the contents, filing, and service of the charge and supporting evidence and documents.

Instructions for filling out each numbered box

- #1a.** Give the full name of the agency, and component if applicable, you are charging and the mailing address, including the street number, city, state, zip code. If you are charging more than one agency or component with the same act, file a separate charge for each agency or component.
- #1b.** Give the full name, title, and other contact information for the agency's representative. Be as specific and as accurate as possible.
- #2a.** Give the full name of the union or individual filing the charge and the mailing address, including the street number, city, state, zip code. If the union is affiliated with a national organization, give both the national affiliation and local designation.
- #2b.** Give the full name, title, and other contact information for you or your representative. Providing all available contact information, especially e-mail addresses, will assist the investigation of your charge.
- #3a.** It is important that the basis for the charge be *brief and factual*, rather than opinion. Describe what happened that constitutes an unfair labor practice, who did it, where it occurred and when.
 -Give dates and times of significant events as accurately as possible.
 -Give specific locations when important, e.g., "The meeting was held in the auditorium of Building 36."
 -Identify who was involved by title, e.g., "Chief Steward Pat Jones" or "Lou Smith, the File Room Supervisor."
 -Tell what happened, in chronological order.
- #3b.** Identify which one or more of the following subsections of 5 U.S.C. 7116(a) has or have allegedly been violated. Subsection (1) has already been selected for you because a violation of (2) through (8) is an automatic violation of (1). List all sections allegedly violated:
 7116(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency-
 (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
 (2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;
 (3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;
 (4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;
 (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;
 (6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;
 (7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or
 (8) to otherwise fail or refuse to comply with any provision of this chapter.
- #3c.** If you or anyone else that you know of has raised this same matter in another forum, check the appropriate box or boxes.
- #4.** Type or print your name. Then sign and date the charge attesting to the truth of the charge and that you have served the charged party (individual named in box #1b). Check the box or boxes for all the methods by which you served the charge. You may serve the charge by e-mail only if the Charged Party has agreed to be served by e-mail.

APPENDIX D:

CASETRACK: Ground Rules

Attention: This document is an education tool to aid in the preparation of contract proposals. It is not intended to be submitted as a Union proposal in this form.

“Bargaining for the Future”

Ground Rules

[Ground rules state the procedures and protocols that the parties will follow in negotiating a collective bargaining agreement. They are not necessary; contracts can and have been successfully negotiated without them. Generally, the parties that can forego written ground rules are those with a great deal of trust between them. The union would have to be confident based on experience that its ability to bargain (including official time, travel expenses, time for negotiations, etc). will be assured. Since most parties do not enjoy this level of security, written ground rules are strongly suggested.

A proposal that there be ground rules before the parties engage in substantive negotiations is itself a mandatory subject of bargaining. AFGE and EPA, 15 FLRA 461 (1984); AFGE Local 12 and DOL, 60 FLRA 533 (2004). However, parties cannot be required to engage in ground rules negotiations until they know the scope of the proposals or changes to an existing contract the other party wishes to make. Ground rules will often establish a set date for the exchange of proposals. All the other terms of the ground rules are set before that date. However, unless the union knows which provisions an agency wants to change, it cannot make an informed decision on how much time should be allocated for preparation or for bargaining. So, a proposal to complete ground rules negotiations before the parties have an understanding of the scope of the other party’s proposals would be a permissive subject of bargaining, since it would require waiving a party’s rights. Such a rule could require the union to make its proposals before it understood all the changes in conditions of employment the agency was proposing. While having ground rules at all is a mandatory subject of bargaining, certain procedures in the ground rules that would require a waiver of one party’s statutory rights are permissive.

How a Local or Council handles this matter should be based on its experience with the agency. For a first contract, the union can expect a comprehensive list of articles or subjects to be on the table. It should make decisions on the time and resources it will need for bargaining on that basis, and it would probably be fine to negotiate the ground rules before receiving the agency’s substantive proposals. Sometimes there are preliminary discussions between the parties prior to renegotiation of an agreement, and the union will gain an understanding of the scope of the changes the agency will seek. In that case, it would also probably not harm the union to set the ground rules before receiving the agency’s proposals.

In other situations, the union may need to protect itself from agreeing in advance to ground rules that provide inadequate time and resources for negotiations. There the union should require that the parties let each other know the scope of the changes each plans to propose before ground rules negotiations can begin. This would not require that complete proposals of all desired contract language be provided. A list of the articles and sections that a party wishes to address would be sufficient. Ground rules negotiations could begin after that type of exchange, since the union could gauge what it will need for bargaining that scope of subjects.

Ground rules should be as comprehensive as the union feels is necessary. Management may object to some proposed ground rule as trivial. The union needs to make its own assessment of what is needed and what is not. The Contract Minimum language presents a comprehensive set of proposals. Local and councils can determine for themselves what is needed in their bargaining relationship.

Ground rules are usually adopted in the form of a Memorandum of Understanding between the parties.]

MEMORANDUM OF UNDERSTANDING GROUND RULES

Option 1

No later than [Date], each Party will notify the other in writing of those provisions of the current collective bargaining agreement that it wishes to change, supplement, or eliminate. The Parties will commence negotiations for additional ground rules no later than __ days after that.

Option 2

Section 1.0 Preamble

Section 1.1 [Contract Minimum]

This Memorandum of Understanding (MOU) is entered into by and between [Local or Council], hereinafter referred to as the Union, and the [Name of the Agency], hereinafter referred to as the Agency. Together, they are referred to as the Parties.

Section 1.2 [Contract Minimum]

This MOU shall govern the procedures for negotiating a [Master] Collective Bargaining Agreement between the Parties to cover the bargaining unit as certified by the Federal Labor Relations Authority in Case No. _____.

Section 2.0 Terms and Conditions of Employment Pending Negotiations

Section 2.1 Continuation of Current Conditions on Employment [Contract Minimum]
[To be used in ground rules for the renegotiation of an existing agreement]

The current Collective Bargaining Agreement between the parties shall remain in effect until a new Agreement goes into effect.

[The FLRA has ruled that upon the expiration of a contract, either party may seek to renegotiate any or all of its terms, and the parties are obligated to engage in any requested bargaining. Border Patrol and AFGE National Border Patrol Council, 58 FLRA 231 (2002). The most common practice in the federal sector is that the parties will continue to abide by the existing collective-bargaining agreement until the negotiations for the replacement agreement are completed. In all cases, mandatory subjects of bargaining survive the expiration of a contract unless the parties agree otherwise. AFGE Local 3911 and EPA, 56 FLRA 480 (2000); Air Force and NFFE Local 997, 4 FLRA 22 (1980).

However, if parties have negotiated over a matter that is a permissive subject of bargaining under 5 U.S.C. 7106 (b) (1), either party may notify the other that it will no longer be bound by that provision in the expired agreement. Patent and Trademark Office and POPA, 53 FLRA 858 at 873 n.13 (1997). Similarly, a waiver by either party of its statutory rights is also a permissive subject of bargaining, and any such waiver does not survive an expired contract if that party wishes to reassert its statutory right. FAA and PASS, 15 FLRA 407, 410 (1984); SSA and AFGE Local 3937, 43 FLRA 549 (1991). The current Agreement might contain a waiver of the union's bargaining rights. For example, a provision in the Governing Laws and Regulations article may allow the agency to implement any agency regulations

during the life of the agreement without bargaining. Any such waivers should be withdrawn by the union once the current contract expires. This is accomplished by a simple letter to the agency, asserting the union's right under law to require negotiations before any agency regulation, no matter the level from which is issued, can go into effect.

The Contract Minimum language makes a distinction between maintaining the contract and maintaining conditions of employment contained in that contract. Maintaining the contract is another way of agreeing to extend the contract, including all terms, permissive, mandatory, and in conflict with governmentwide regs that may have been issued during the stated term. Maintaining the conditions of employment is not by agreement of the parties, it's by law. It is an unfair labor practice to unilaterally change any conditions of employment without negotiating in good faith. But this applies only to mandatory subjects of bargaining. The Contract Minimum language would also capture any provisions all of the old agreement that were permissive subjects.

Section 2.2 Changes in Conditions of Employment [Contract Minimum]

[May be used for the negotiation of a first agreement or the renegotiation of the existing agreement]

Except when necessary to the functioning of the Agency, no existing condition of employment may be changed prior to completion of the parties' statutory duty to bargain.

[Normally, it would be an unfair labor practice for the agency to implement any change without fulfilling its obligation to bargain. However, the Authority allows an agency to implement unilateral changes in matters affecting employment if it is "necessary for the functioning of the agency." INS and AFGE National Border Patrol Council, 55 FLRA 892, 904 (1999). The bar is set rather high for meeting this test. The Authority said that "a party of serving this defense must establish, with evidence, that its actions were in fact consistent with the necessary functioning of the agency, such that a delay in implementation would have impeded the agency's ability to effectively and efficiently carry out its mission."]

A. Any proposed changes to existing conditions of employment will be included in the parties' negotiations for a term agreement. Except in the case of an emergency, or when necessary for the functioning of the Agency, no change may be made prior to completion of those negotiations, absent mutual agreement of the parties.

[The advantage of including this provision in the ground rules is that it prevents the agency from implementing changes based on the exercise of their 7106 Management Rights before conclusion of negotiations for a basic agreement. This creates an incentive for management to expedite the negotiation process. A provision like this has been included in some ground rules for AFGE Master Agreements. However, most agencies will be very reluctant to agree to this provision and we think it would take extraordinary evidence in the parties' relationship to convince the Impasses Panel to adopt it.]

Section 3.0 Preparation [Contract Minimum]

Option 1

[Number] Union representatives will each be allocated ___ hours of official time between the date these Ground Rules are executed and [Date] to prepare initial contract proposals. The Union will designate which representatives will work on this task.

Option 2

A bank of ___ hours of official time will be available to the Union between the date these Ground Rules are executed and [Date] to prepare initial contract proposals. The Union will designate which representatives will work on this task.

[Much of the work for preparing initial contract proposals should be done well in advance of the negotiation of ground rules. The union needs to work with the bargaining unit employees in determining their priorities, review the experience under the existing contract in order to determine what areas need revision or replacement, and review materials prepared by the National Office as bargaining guidance. However, there is a clear need for time to write the actual contract proposals. Whether the union obtains a set amount of time for a set number of representatives, or utilizes a bank depends upon the needs of that particular Local or Council. The total amount of time that is needed will vary according to the scope of the upcoming negotiations.]

Section 4.0 Initial Proposals [Contract Minimum]

On [Date] the Parties will exchange their initial proposals. The proposals will be provided in both electronic form and in hard copy. The Union's proposals should be sent to [Name and Position], and the Agency's proposals should be sent to [Name and Position].

[Agencies sometimes propose that the union will submit its proposals to the agency first and then the agency will reply with any proposals of its own. Locals and Councils should not allow this. In term negotiations, each party makes its own initial proposals without regard to what the other proposes. During the substantive bargaining the parties will respond to each other's proposals in an effort to convince the other side to agree to its position. But, if the parties are going to engage in ground rules negotiations without first learning of the scope of the other party's proposals, there is no reason not to have the parties exchange proposals simultaneously.]

Having the other side's proposals in electronic form makes it easier to store all the proposals in order to keep a more complete bargaining history, and to draft counter proposals through editing in a word processing program.]

Section 5.0 Bargaining Procedures

Section 5.1 Representatives [Contract Minimum]

Option 1

A. Each Party shall designate its own representatives. The Union will have at least as many representatives on its negotiating team on official time as the Agency, but no less than ___. The Union negotiators will be on official time for all time spent in negotiations, including negotiating sessions, caucuses, mediation, and impasse resolution procedures, and travel to and from any of the above.

Option 2

A. Each Party shall designate its own representatives. The Union's bargaining team will have ___ members. The Union's bargaining team may include employees who are members of the Union, Union officers or other representatives, and/or Union staff. All members of the Union's team who are employed by the Agency will be on official time for all aspects of the negotiations, including negotiating sessions, caucuses, mediation, and impasse resolution procedures, and travel to and from any of the above.

Optional addition to either of the above

Each Party may designate one individual to serve as its note taker/scribe, in addition to the team members provided in Section A above. The Union note taker/scribe will be on official time for all time spent in negotiations, including negotiating sessions, caucuses, mediation, and impasse resolution procedures, and travel to and from any of the above.

[5 U.S.C. 7131 (a) provides,

Any employee representing an exclusive representative in the negotiation of a collective-bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceedings, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

However, section 7131 (d) states,

Except as provided in the preceding subsections of this section --

- (1) any employee representing an exclusive representative, or
- (2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative, shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

Under the latter provision, the FLRA ruled that the number of union negotiators who will be on official time, beyond the minimum provided in section 7131 (a) is a mandatory subject of bargaining. AFGE and EPA, 15 FLRA 461 (1984). The number of negotiators the Union needs will depend on the particular circumstances of each Local or Council.

Good notes during negotiating sessions are invaluable to the bargaining team. They can be used to resolve conflicts over what the parties may have agreed to or not, and also will recount the intent of a proposal should there be any disputes during the life of the agreement. Taking notes usually requires the full attention of an individual. Negotiating teams often find it useful to designate one of its members as being responsible for taking comprehensive notes. In that case, it may be useful to provide that role specifically in the ground rules.

Proposals that the Parties to negotiations be permitted to have personnel present to provide information, take notes and to observe the negotiations on official time are mandatory subjects of bargaining. National EPA Council and EPA, 16 FLRA 625 (1984).]

B. Each Party will designate a Chief negotiator and an alternate Chief Negotiator who may act in the absence of the Chief Negotiator.

C. Each team may designate up to __ alternates, who will participate in the negotiations in the absence of any other team member.

D. The Parties will inform each other of its negotiating team members __ days prior to each negotiating session. The name, title, e-mail address, and telephone number of all negotiating team members will be provided.

E. Travel orders necessary for Union negotiating team members to attend any negotiating sessions, mediation, or impasse resolution proceeding will be issued no later than __ work days prior to the date of travel. Travel orders will include a travel authorization number, a budget code, directions, contact information, and check-in time for the hotel, and any other necessary specific travel information.

[Section 5.1 E should reflect the practices in the particular agency.]

F. The Chief Negotiators may, through mutual agreement, permit observers to attend the negotiating sessions. These observers will not participate in discussions and will otherwise abide by all ground rules agreed to by the Parties.

[Observing the negotiations is a useful training tool for new management or union representatives. Normally, the union should not object to the presence of this type of observer. However, beware of the use of “observers” to supplement the agency’s bargaining team. Under no circumstances should the union agree to allow higher level management officials to observe the negotiations. If a higher level manager wishes to be in on the negotiations, then that person should be on the agency’s team.]

G. The Chief Negotiators may, through mutual agreement, permit subject matter experts to attend the negotiating sessions for the purpose of presenting information that will help the parties to resolve issues. They will leave the negotiating session as soon as their presentation to the negotiating teams is finished.

H. The Agency will pay the travel and per diem expenses of all Union negotiating team members, including alternates who attend in place of a team member, for all negotiating sessions, mediation, or impasse resolution proceedings.

[Agencies often resist proposals that they will pay all of the travel and per diem expenses of the union’s bargaining team. Making the union pay all or part of its expenses can pressure the union into making a deal sooner than it would prefer. Requiring the agency to pay these expenses better balances the power between the parties. This language is included as a Contract Minimum rather than a Contract Objective since Local and Councils should make every effort to include this language in their ground rules.]

Section 5.2 Bargaining Schedule

[The schedule the parties will follow for bargaining will depend on many factors. The Agency may be eager to conclude negotiations, or it might be in no hurry. Concerns about workload or budget might drive the agency's desired bargaining schedule. The union also has varying concerns and interests. Sometimes the union wants an aggressive schedule, e.g. for bargaining a first contract or replacing an agreement that is very dissatisfactory. Other times the union would prefer to stretch negotiations out in order to protect a good contract or avoid a particular political consideration. Parties may prefer bargaining for several consecutive weeks at a time. Or, they might prefer to bargain for only one week at a time, particularly when the union negotiators would rather not be away from home for long stretches. Similarly, parties might prefer to bargain, say, every other week, and others would rather bargain only one week per month.]

Parties will often place artificial deadlines on themselves, in an attempt to create pressure akin to a strike deadline in the private sector. This might or might not suit the union's objectives. If a deadline or a set number of bargaining sessions is to be used, it must be realistic. Providing that an entire comprehensive agreement will be renegotiated within a few bargaining sessions is a prescription for failure. The parties need sufficient time to consider and discuss their issues in an attempt to reach agreement.

For these reasons, AFGE cannot designate any particular schedule as minimum language and others as objectives to which the Union should aspire. "Bargaining for the Future" presents several options equally, with explanations of the advantages and disadvantages of each.]

Option 1

The parties will begin negotiations on [Date], and bargain each work day until a final agreement is reached or until either Party declares an impasse. No negotiations will be held on Federal holidays. The Chief Negotiators may agree to call a recess in the negotiations when needed, and will agree on the length of the recess.

[This option can work best when all negotiators are in the same location and overnight travel will not be needed. It requires both parties set aside long blocks of time to complete the negotiations. It is the most aggressive bargaining schedule. It makes the negotiation of the collective bargaining agreement a very high priority for both sides. However, it is not realistic to expect that many agencies will be able to accommodate such a schedule. The agency's own negotiators have numerous demands on their time, and those employees who serve on the union's bargaining team may not be able to be released from their duties for lengthy periods. This schedule also does not build in periods of "downtime" in which the parties can consider alternatives and counterproposals and also recover from the pressures of negotiations.]

Option 2

The parties will begin negotiations on [Date] and bargain each work day for the rest of that week. Thereafter, the parties will meet for negotiations every other week and bargain for five consecutive workdays. No negotiations will be held on Federal holidays. The schedule will continue until a final agreement is reached, or until either Party declares an impasse.

[This aggressive schedule also requires a significant commitment of time. However, the pressures are reduced since all negotiators can return to their regular duties every other week. There is some built in “downtime.” But, if any of the negotiators must travel overnight, this schedule would be very expensive in terms of travel costs.]

Option 3

The parties will travel to the site of negotiations on Monday, [Date]. Negotiations begin the next day and will continue for the next three (3) consecutive workdays. The parties will return home on Friday, [Date]. Thereafter, negotiations will resume on this same travel and bargaining schedule every month/ every other month until a final agreement is reached, or until either Party declares an impasse. The Chief Negotiators will set the precise dates for negotiations in order to accommodate scheduling conflicts and Federal holidays.

[Option 3 maintains negotiations on a regular schedule. It enables the parties to build a routine and provides ample “downtime.” However, negotiating only three days at a time can’t make it very difficult to maintain momentum and can result in a very long total time of negotiations.

Option 3 minimizes the time negotiators will spend away from home, which is often preferred by members of both negotiating teams.]

Option 4

The parties will travel to the site of negotiations on Monday, [Date]. Negotiations begin the next day and will continue for the next eight (8) consecutive workdays. The parties will return home on Friday, [Date]. Thereafter, negotiations will resume on this same travel and bargaining schedule every month/ every other month until a final agreement is reached, or until either Party declares an impasse. The Chief Negotiators will set the precise dates for negotiations in order to accommodate scheduling conflicts and Federal holidays.

[There is often considerable advantage to negotiating two (2) weeks at a time over only bargaining one week at a time. The parties are able to gain momentum which can lead to more agreements in a faster time. It requires longer stays away from home, which can be debilitating on the negotiators. However, that factor could create additional incentive to reach agreements faster, in order to return home sooner.

There are, of course, many other bargaining schedules that can be used. In determining the best schedule, the union must consider all its interests. Locals should contact their District Office, and Councils should contact the Field Services and Education Department at the National Office for advice or assistance.]

Section 5.3 Responsibility of the Chief Negotiators [Contract Minimum]

The Chief Negotiators are responsible for:

- A. Maintaining order during all discussions;
- B. Calling for Caucuses;

- C. Scheduling meal periods;
- D. Determining the starting and quitting times for all negotiating sessions;
- E. Initialing and dating agreed-to sections and articles. Each side will maintain a copy of all such initialed provisions;
- F. Maintaining any necessary communication between the Parties between negotiating sessions.

Section 5.4 Bargaining Procedures [Contract Minimum]

- A. All proposals will be provided in electronic format and in hard copy. Proposals will be identified as either Union or Agency, and numbered successively. As each proposal is taken up, the party offering that proposal will explain it, and will, at a minimum, provide the meaning and objectives of the proposed language. There will be ample opportunity for questions and answers, additional information, and other discussion. The parties will follow this procedure in a good-faith effort to reach agreement.
- B. Both parties will strive to make the language in the collective bargaining agreement as clear, simple, and understandable as possible. The Parties will attempt to draft it so that all bargaining unit employees and supervisors will understand and recognize the responsibilities of the Agency, the Union, and the employees.

Option 1

- C. As sections are agreed to, the Chief Negotiators will initial and date two copies of the proposal. Each Chief Negotiator will retain one copy. When agreement is reached on an entire article, the Chief Negotiators will sign and date two copies of each page. Each Chief Negotiator will retain a copy. The Chief Negotiators are jointly responsible for ensuring that the signed article is consistent with any previously initialed sections of that article.

[Note that this technique of negotiating, while broadly adopted by Parties, is a permissive subject of bargaining. It is not likely that an Agency will resist such a proposal, but if the Agency does, the Union cannot bargain to impasse over it.]

Option 2

- C. When agreement is reached on an article, the Chief Negotiators will sign and date two copies of each page. Each Chief Negotiator will retain a copy.

[Whether parties keep track of agreed-upon sections or only completed articles is up to the parties. There is no absolute advantage for either practice. What is important is that there be documentary evidence of whatever agreements are reached.]

- D. Once a section/article is initialed/signed, it will not be subject to further discussion unless there is a mutual agreement by the Chief Negotiators to reconsider or revise the agreed-upon language.
- E. Recording devices, including, but not limited to cell phones and tape recorders will not be used in the negotiations, nor will verbatim transcripts or formal minutes of the proceedings of any negotiation session be made, unless specifically agreed upon in writing by the Chief Negotiators.

[The use of a recording device in a negotiations session is a permissive subject of bargaining on the part of both the agency and the union. Neither could require it without mutual consent. The FLRA adopted the position of the National Labor Relations Board in finding that “the presence of a recorder during contract negotiations has a tendency to inhibit ... free and open discussion ...” SATCO and Edwards Air Force Base, 52 FLRA 339 at 351 (1996), quoting NLRB v Bartlett-Collins Co., 639 F.2d 652 at 656 (10th Cir. 1981). The parties at the bargaining table need to feel free to express themselves openly and honestly. The use of formal minutes of bargaining sessions leads to argument and dispute over the minutes themselves, and distracts the parties from the substantive negotiations.]

F. Either Party may call a caucus at any time and will leave the negotiating room to caucus at a suitable site provided by the Agency. There is no limit on the number of caucuses which may be held, but each party will make every effort to restrict the number and length of caucuses.

Section 6.0 Facilities

Section 6.1 [Contract Minimum]

Negotiations will be held in a suitable meeting room provided by the Agency at a mutually agreed upon site. The Agency will furnish the Union negotiating team with a caucus room, such as a conference room or other private meeting space which is in close proximity to the negotiation room.

[This language does not specify the location of negotiations. Many parties find it useful to state the location of the negotiations in the ground rules. Some negotiations are conducted entirely at one site. Others will change the location periodically or in a rotation during the negotiations. Some negotiations are conducted at the workplace or another agency facility. Others are conducted at neutral sites, like a hotel. Each Local and Council must determine for itself which arrangement is best. However, there must be a mutual agreement on the location for bargaining. Do not allow the agency to dictate where bargaining will take place.

Some Locals and Councils have found it necessary to specify that there be sufficient electrical outlets in the bargaining and caucus rooms for computers and peripherals.

It normally should not be necessary to specify that the meeting room be adequately lit, warmed, cooled or ventilated. However, if the union suspects that there may be problems in this regard, then include that statement in the ground rules.]

Section 6.2 [Contract Minimum]

The Agency will provide the Union negotiating team with customary and routine office equipment, supplies, and services, including but not limited to computer(s) with Internet access, telephone(s), desks and/or tables and chairs, office supplies, and access to at least one printer and one photocopier.

[This list of equipment and services can be modified, depending on the needs of the union. In many cases, employees are provided with laptop computers by the agency for the performance of their duties. That might eliminate the need for a separate computer to be used during the negotiations.]

Option

The Agency will provide the Union negotiating team with a copy of the current version of Title 5, Code of Federal Regulations and the Agency’s regulations.

[Internet access often makes hard copies of these regulations unnecessary, but the union should decide how useful these will be.]

Section 7.0 Negotiability

Section 7.1[Contract Minimum]

If either Party alleges that it is not obligated to negotiate on a particular proposal, the Parties will explore alternative language that will achieve the purpose of the proposal and would not render the proposal outside the scope of bargaining. If the Parties are not able to agree on such language, each Party is free to take appropriate action.

[Negotiability refers to a dispute over whether a Party has an obligation to negotiate at all over a proposal made by the other Party. Generally speaking, if a Proposal is within the scope of bargaining under the Statute, then there is a duty to bargain in good faith over it. See the separate discussion in “Bargaining for the Future” entitled, “Scope of Bargaining.”

Obviously, the objective in collective bargaining is to achieve contract language that protects and improves the rights, benefits and working conditions of bargaining unit employees and the union. If a particular proposal the union makes is worded in such a way as to render it outside the scope of bargaining, then the union’s priority must be to first determine if the proposal can be re-worded to put it inside the scope of bargaining, while still achieving the union’s original intent. If the parties can agree on such language, the union should consider it a success. If they cannot, then the union must determine whether it wants to litigate to determine whether there is in fact an obligation to negotiate over the union’s proposal.

The Federal Labor Relations Authority has the statutory role of deciding whether a proposal is within the scope of bargaining. This type of case is described as a Negotiability Dispute. The law and the FLRA’s regulations give the union a great of control over the process of deciding such disputes. The union must be very careful not to waive any of its rights in this regard when negotiating ground rules.

5 CFR 2424.21 provides that the time limit for filing a Negotiability Appeal (referred to as a Petition for Review) begins either (1) when an agency makes a written allegation that the union’s proposal is not within the duty to bargain; (2) the Agency Head disapproves a provision of a collective-bargaining agreement under 5 U.S.C. 7114 (c); or (3) when the agency does not reply to the union’s written request for the agency’s position on whether a proposal is within the scope of bargaining, within 10 days after the agency receives that request. If the agency gives the union a written statement concerning scope of bargaining without the union requesting such a statement in writing, then that statement of the agency is considered a “unsolicited allegation” and has no effect on the deadline for filing a Petition for Review. However, if there is a ground rule that addresses such a written statement by the agency or the time in which that statement would be produced that ground rule could be considered by the FLRA as a waiver of the union’s rights. This could result in the union’s forfeiting its right to contest the agency’s position.

The union must not agree to any language in the ground rules that says that management will put negotiability allegations in writing, or when they will do so. The union must retain control over whether and when the FLRA appeal process will be utilized. The Contract Minimum language makes a vague mention of the Parties’ being free to take appropriate action. This does not waive any of the union’s rights.

Sometimes the agency does not take any position on whether a particular provision is within the scope of bargaining. Rather, they just decline to address it at all. Then, when some provisions are submitted to the Impasses Panel, the agency suddenly claims that that proposal is contrary to law or otherwise outside the scope of bargaining. The Panel declines jurisdiction on that provision because of the dispute, or worse, rules in favor of the agency on that section. Locals and Councils should avoid this by insisting that the agency discuss and negotiate over all its proposals. If the agency tries to ignore any proposal, that is bad faith bargaining. The union should file an unfair labor practice charge.]

Section 7.2 [Contract Minimum]

[Decisions by the Federal Labor Relations Authority on Negotiability Appeals usually take one year or more. Either side that is dissatisfied with the FLRA's decision may seek judicial review. Thus, these disputes take a very long time to finish. The parties should determine in the ground rules what will happen to the rest of the agreement if there are any negotiability appeals pending. One option is that a pending negotiability appeal would delay a final agreement. The entire contract would be held up until there was a final determination on the negotiability appeal. The party that would prefer to postpone the conclusion of negotiations as long as possible would choose this option. Also, parties often argue that agreeing to one provision of the contract might come at the cost of a concession in another part. Until it is determined whether a proposal is within the scope of bargaining, parties cannot adequately gauge whether to trade one provision for another.

Another option would be to allow the rest of the agreement to go into effect while any negotiability appeals are pending. This would bring the bulk of the negotiations to conclusion much more quickly. Remember that in this type of litigation, if the Authority finds the proposal to be within the scope of bargaining, it does not order the parties to adopt it. It only requires that the parties negotiate over that proposal, at the union's request. So even if the union is successful in the appeal, additional negotiations would be necessary in order to add that provision to the contract. An exception to this would be in the case where the agency head disapproves a provision in its 7114 (c) review. In that case, if the Authority found that the proposal was within the scope of bargaining, it would order that that provision be included in the parties' agreement.

Of course, the union may also declare a proposal by the agency outside the scope of bargaining. The Negotiability Appeal process is not available to the agency in such circumstances. If the agency wished to challenge the union's position it would have to file an unfair labor practice charge alleging bad faith bargaining. This type of case can also take a year or more to decide, with judicial review available to the loser. Because these disputes are much less common, agencies usually do not consider addressing them in the ground rules. If the agency does not raise it, the union should not raise it either. However, if the agency wishes to protect its rights in such a case, Option 1 below contains language that the union could safely include.

Finally, any proposal to "sever" provisions of the contract and allow some to take effect while others are subject to litigation, such as described in Option 1, is a permissive subject of bargaining. If either party declines to allow this, the other party may not negotiate to impasse over such a proposal. See Patent and Trademark Office and POPA, 06 FSIP 109 (2007).

Since there are conflicting reasons for preferring one option over another, AFGE cannot designate any particular choice as minimum language and others as objectives to which the Union should aspire. "Bargaining for the Future" presents the options equally.]

Option 1

A. If the Union files a negotiability appeal with the FLRA, and the Agency withdraws its allegation of non-negotiability or the FLRA rules that the union proposal or a portion of the proposal is negotiable before a final agreement has been reached, the parties will commence negotiations on the proposal or portion of the proposal within __days of receipt of the FLRA decision.

B. A pending negotiability appeal before the FLRA will not delay a final agreement. The Parties will make every attempt to reach agreement on all other provisions in that Article and will initial/sign the Article once that agreement is reached. If the Agency withdraws its allegation of non-negotiability or the FLRA rules that the Union proposal or a portion of the proposal is negotiable after a final agreement has been reached, the Parties will reopen the entire Article related to the proposal and commence negotiations. Upon agreement, the Article will replace the previously agreed-upon Article.

C. If the Union chooses to file a Petition for Review following the Agency Head's disapproval of a provision of the contract under 5 U.S.C. 7114 (c), the Union may choose to have the rest of the Agreement go to affect pending resolution of the appeal. If the Agency withdraws its allegation of non-negotiability or the FLRA rules that the Union proposal or a portion of the proposal is negotiable, then that proposal or portion of the proposal will be placed back into the Agreement.

D. If the Agency files an unfair labor practice charge over a Union allegation that it has no duty to bargain over a particular proposal, and the Union withdraws its allegation or the FLRA rules that there is a duty to bargain over the Agency proposal or a portion of the proposal before a final agreement has been reached, the parties will commence negotiations on the proposal or portion of the proposal within __days of receipt of the FLRA decision.

E. A pending unfair labor practice charge filed by the Agency over a Union declaration that it has no duty to bargain over an Agency proposal will not delay a final agreement. The Parties will make every attempt to reach agreement on all other provisions in that Article and will initial/sign the Article once that agreement is reached. If the Agency withdraws its allegation or the FLRA rules that there is a duty to bargain over the proposal after a final agreement has been reached, the Parties will reopen the entire Article related to the proposal and commence negotiations. Upon agreement, the Article will replace the previously agreed-upon Article.

Option 2

Negotiations will not be concluded pending a negotiability appeal filed by the Union or an unfair labor practice charge filed by the Agency over a Union allegation that there is no duty to bargain over a proposal by the Agency.

Section 8.0 Impasse Resolution

[Since federal employees are prohibited by law from striking, Congress included a means for resolving negotiations impasses in place of a strike or lockout. The Federal Service Impasses Panel (FSIP, or the Panel) is given the authority to "take whatever action is necessary and not inconsistent with [5 U.S.C. Chapter 71] to resolve the impasse." 5 U.S.C. 7119 (c) (5) (B) (iii). The term "impasse" is not defined in the Statute. Rather, this term has its normal definition; an impasse exists in bargaining when one party makes a proposal and the other party does not agree to it, but does not have any new proposal to offer

in response. That proposal is then considered to be at impasse. The impasse is broken whenever either party offers something new on that subject. If it is not broken, the parties move on to another subject.

“Impasse” also refers to the situation in which agreement has been reached on most items, but a few (sometimes more than a few) items still remain unresolved. That is the point at which the statutory impasse resolution procedures are utilized. Before either party can request assistance from the FSIP, the parties must first seek mediation assistance from the Federal Mediation and Conciliation Service (FMCS). If mediation is unsuccessful in resolving all the outstanding issues, then either or both parties can request intervention by the FSIP. The Panel has discretion over whether it will assert jurisdiction in a case. The Panel could hear from the Parties and then send them back to negotiation, either with or without FMCS assistance. Or, the Panel could accept jurisdiction and choose any of the number of ways to resolve the parties’ impasse, including approving a request by one or both of the parties to submit the matter to outside arbitration.

The Statute and the FSIP’s regulations stipulate the procedures for requesting Panel assistance, there is no need for additional language on this subject in the ground rules. However, provisions about how negotiation impasses will be resolved are often included in ground rules. The union must be careful not to waive any of its rights. The union has a statutory right to request assistance from the FSIP at any time. If that request is premature, the Panel will in all likelihood decline jurisdiction.]

Either or both Parties may declare an impasse and submit unresolved matters to the Federal Service Impasses Panel in accordance with the Panel’s regulations.

Option

The Parties will request that the Panel resolve the impasse through interest arbitration with an outside arbitrator.

[Many Councils and Locals have found it to be beneficial to bring impasse disputes to an outside arbitrator rather than to the Panel itself. However, 5 U.S.C. 7119 (b) (2) states that parties may use such a procedure only when it has been approved by the Panel. Just as in grievance arbitration, the parties would pay all fees and expenses of this outside arbitrator. Councils and Locals should consider this cost in deciding whether to include this provision in the ground rules proposal.

Agencies have agreed to this proposal only very rarely. The Impasses Panel has been extremely reluctant to order that parties submit the dispute to an outside arbitrator. So, obtaining this provision in the ground rules is a long shot, at best.]

Section 8.0 Impasse Resolution [Contract Objective]

Section 8.1

Once all proposals have been discussed and the Parties cannot reach a final agreement, and after assistance from the Federal Mediation and Conciliation Service (FMCS), the Parties will employ the services of a neutral third party to use a combination of mediation and arbitration techniques to resolve any impasses. The work of the neutral third party will include hearings on issues in dispute and the preparation of a written Factfinder’s report with recommendations. The Parties will request FMCS

to provide a list of seven (7) arbitrators, and the parties will strike names alternatively until one name remains. That person will be selected as the mediator/Factfinder. The Parties will split all associated costs equally.

Section 8.2

Upon receiving the Factfinder's decision, the Parties will resume negotiations in an attempt to come to final agreement. Any issues that still remain unresolved will be submitted jointly to the Federal Service Impasses Panel (FSIP), in accordance with its regulations. The Parties will share the advisory arbitrator's decision with the FSIP.

Section 8.3

Neither Party will request assistance from the FSIP prior to receipt of the advisory arbitrator's opinion.

[Some parties have found it helpful to have an outside arbitrator review items that are at impasse and offer suggested resolutions, prior to submitting the impasse to the FSIP. The advisory arbitrator's or Factfinder's decision could be influential and encourage one or both sides to revise its position if they believe that this could ultimately be the way the dispute is resolved.

5 U.S.C. 7119 (b) (1) gives either party the right to request assistance from the FSIP after mediation from the FMCS or another outside mediator fails to resolve the impasse. Since it would require the waiver of a statutory right, the Contract Objective proposal would be a permissive subject of bargaining. This proposal itself could not be bargained to impasse. If the union chooses to make this proposal it would have to convince the agency that it serves the interests of all parties well.]

Section 9.0 Ratification, Execution, and Agency Head Review

Option 1

Section 9.1

A. After all Articles and Sections have been disposed of by the Parties in accordance with Section 5.4C, the contract will be considered to have been executed. The contract will then go before the Agency Head for review as required by law, and the Union will submit the contract for ratification. Both the Agency Head and the Union will have the same 30-day period for these functions. If the Union does not ratify the contract the Parties will return to the bargaining table within ___ days, or the Agency may declare an impasse in accordance with Section 8.0.

B. If the Agency Head has not acted within 30 days, then the contract will be considered to be effective on the 31st day, unless the Union has completed its ratification process in the interim and the contract is not ratified. If the Union does not complete the ratification process within 30 days, then the Agreement will go into effect on the 31st day.

[This option provides for simultaneous Agency Head Review and ratification by the union. The intent is that the statutory Agency Head Review process (5 U.S.C. 7114(c)) begin immediately upon the parties' negotiating teams finishing their bargaining. Agencies have been known to string out the start of Agency Head Review by insisting on extensive and unnecessary proof reading, or making themselves unavailable for a formal signing by the chief negotiators. This option would not require anything beyond completion of the negotiating process on each party's proposals. Once bargaining on all the proposals

is done, the contract is considered to have been executed.

Locals and councils should note that because this option does not require that the ratification process is not completed before Agency Head Review, the proposal may be considered to be outside the scope of bargaining as contrary to law. 5 U.S.C. 7114 (c) (2) provides that “The head of the agency shall approve the agreement within 30 days from the date it is executed ...” A contract is not executed until both parties at the table express their acceptance. Any contract that is to be submitted to the union’s membership for ratification is conditional on the membership’s acceptance. So, the contract may not be considered to have been “executed” until the union completes the ratification process and informs management that it was accepted. See, Air Force Materiel Command and AFGE Council 2124, CH-CA 60398 and CH-CO-60608 (1998) (ALJ Decision).]

Option 2

A. After all Articles and Sections have been disposed of by the Parties in accordance with Section 5.4C, the Union will have ___ days to complete its ratification process. The Union’s Chief Negotiator will notify the Agency’s Chief Negotiator of the outcome of the ratification process. Once the Agreement is ratified, it will be considered to have been executed on the day the Union informs the Agency. This will begin the statutory Agency Head Review period.

B. If the agreement is not ratified, the Parties will return to negotiations within ___ days to attempt to resolve the unsettled issues, or the Agency may declare an impasse in accordance with Section 8.0.

C. If the Agreement is not ratified and the Parties return to negotiations, the Union will identify the Article(s) it wishes to change. If agreement is reached, the revised Article(s) will be submitted by the Union for ratification once more. If the Agreement is not ratified in this second vote, the Parties agree to proceed to impasse resolution. If the Agreement is ratified, it will be considered to have been executed on the day the Union informs the Agency. This will begin the statutory Agency Head Review period.

[The union has a right to condition the execution of an agreement on ratification by its members, provided that agency has notice of the ratification requirements and there is no waiver of this right by the union. SSA and AFGE Council 220, 46 FLRA 1404, 1414 (1993) (ALJ Decision); Ft. Hood and NFFE, 51 FLRA 934, 938, n.7 (1996). The union cannot be required to negotiate over any agency proposal that it would not submit the completed agreement to a ratification vote by the members. Where the membership rejects a contract, the agency is obligated to resume negotiations absent a showing that the union has clearly and unmistakably waived its right to reopen contract negotiations. This, of course, does not require agency to agree to any proposals that the union might make to change provisions of the agreement that was submitted for ratification. If the parties cannot agree on replacement language, then the matter may be submitted to the FSIP. Note that only language that is agreed to by the parties may be subject to a ratification vote. See, Air Force Materiel Command and AFGE Council 2124, CH-CA 60398 and CH-CO-60608 (1998) (ALJ Decision).

The above provision would require that any language that is revised after a failed ratification vote would be submitted to the membership once more for ratification. If it fails a second time, then the Parties would move on to impasse resolution. This is for the sake of moving to a timely conclusion of negotiations. There is no legal requirement however, that limits the union to only submitting language

to the membership twice.

Because this option has the ratification process completed prior to Agency Head Review, there is no doubt that it is within the scope of bargaining.

Councils and Locals are encouraged to submit completed collective bargaining agreements to the membership for ratification, but this is not required by the AFGE National Constitution. Council or Local constitutions may include this requirement. If the contract is not going to be submitted for ratification, then the above section is not needed.]

9.2 [Contract Minimum]

A. Once the Agreement is executed, the Agency will have 30 days to complete Agency Head Review pursuant to 5 U.S.C. 7114 (c).

B. If the Agency Head disapproves the Agreement, the Agency's Chief Negotiator will notify the Union's Chief Negotiator immediately, including which particular provisions were found to be contrary to law, rule, or regulation, as well as the particular law, rule or regulation that the Agency Head claims was violated. The Chief Negotiators will then meet promptly to arrange negotiations in an effort to reach agreement. If negotiations are resumed, the Parties will request that the Agency Head's designee who reviewed the Agreement provide an explanation in order to expedite and facilitate clarifications or change is the Parties may be willing to accept in order to resolve the disapproval. In the alternative, the Union may decline further negotiations and instead take appropriate legal action, including submitting to the disputed issues to the Federal Labor Relations Authority and/or the appropriate court, as provided by law. If a disapproved provision is found to be within the scope of bargaining, it shall automatically become part of the Agreement and go into effect immediately.

Section 10.0 Effective Date of the Agreement

Section 10.1 [Contract Minimum]

The Agreement will go into effect on the date it is approved by the Head of the Agency, in accordance with law and these Ground Rules.

Section 10.2 [Contract Minimum]

If the Head of the Agency takes no action within 30 days after the Agreement is executed, it will go into effect upon the 31st day.

Section 10.3 [Contract Minimum]

The effective date will be clearly stated on the cover page of the Agreement.

[Section 10.0 reflects the requirements of 5 U.S.C. 7114 (c) (2) and (3). It is very important for the Agreement to state clearly its effective date. All too often, the precise effective date is left vague by the parties. The effective date determines the timing of a contract bar for a raid from another union, and determines the timeliness of requests to renegotiate. It is most easily determined by putting it right on the cover.]

Section 10.4 [Contract Minimum]

Once the Agreement has been approved, or 30 days have passed without action by the Agency Head, the Chief negotiators will proof read the contract and prepare it for publication.

Section 11.0 Interim Agreement [Contract Minimum]

[When the bargaining unit is new and the parties are going to bargain a first contract, the negotiations process can be lengthy. Employees will require a very basic agreement providing some level of protections while the contract negotiations continue. The following provides a “bare bones” agreement that should be in effect for this interim period. It keeps provisions very simple and to a minimum; it is far less comprehensive than a term collective bargaining agreement should be. However, basic protections like a grievance and arbitration process, and a process for dues withholding, as well as official time for union representation issues that arise during the term bargaining would be in place. Including an interim agreement in the ground rules would be a mandatory subject of bargaining.]

Section 11.1

Pending completion of the Collective Bargaining Agreement between the parties, the Parties will be governed by an interim agreement as follows:

Section 11.2 **Rights of the Parties**

Each Party retains its rights that are included in the Federal Labor Management Relations Statute, i.e., 5 U.S.C. Chapter 71.

[This section does not specify the rights of the union or the agency. It simply acknowledges each party’s statutory rights. The intent is to avoid protracted negotiations over defining these rights or convincing one party or the other to waive any rights.]

Section 11.2 **Union Representatives**

The Union will notify the agency of its designated representatives.

Section 11.3 **Dues Withholding**

A. The Agency will process authorizations to withhold amounts for union dues and union member programs when such authorizations (SF 1187) are submitted by employees who are in the bargaining unit. The withholding amounts will be implemented within 2 pay periods after the pay period in which they are submitted. Aggregate remission of dues authorized will be made to the union.

B. If an employee wishes to cancel such authorizations, the employee will submit the necessary form (SF 1188) to the agency. The request will be honored, provided the form is submitted between 45 and 30 days from the anniversary of the employee’s dues withholding authorization.

Section 11.4. **Negotiated Grievance Procedure**

A. Employees, the Union, or the Agency may file grievances alleging a violation of law, regulation or this Agreement.

B. In accordance with 5 U.S.C. 7121 (c), the following matters are not grievable and are specifically excluded from the coverage of this Article:

1. Any claimed violation of Subchapter III of Chapter 73 of Title 5, United States Code, relating to prohibited political activity;

2. Retirement, life insurance or health insurance;
3. A suspension or removal under Section 7532 of Title 5, United States Code, concerning national security;
4. Any examination, certification, or appointment;
5. The classification of any position which does not result in the reduction in grade or pay of an employee.

[This interim grievance procedure does not exclude any matters beyond what is excluded by law. While the “Negotiated Grievance Procedure” article in Bargaining for the Future also advises locals and councils not to agree to any other exclusions in order to make the article as comprehensive as possible, the goal here is simplicity. However, the overall intent of the interim agreement is get protections in place during a possibly lengthy negotiation period. Locals and councils should very seriously consider adding some additional exclusions that management proposes if that is the price of getting the interim agreement in place. Keep in mind that Section 11.7 below makes it clear that the terms of the interim agreement will not serve as any precedent for future negotiations over the term agreement.]

C. An aggrieved bargaining unit employee affected by a prohibited personnel practice under Section 2303 (b) (1) of Title 5, United States Code, may raise the matter under the appropriate statutory appeal procedure or this Agreement, but not both. A bargaining unit employee shall be deemed to have exercised his/her option under this provision at such time as the bargaining unit employee either initiates an action under the applicable statutory appeal procedure, or files a grievance in writing under this Agreement, whichever comes first.

D. An aggrieved bargaining unit employee affected by matters covered under sections 4303 and 7512 of Title 5, United States Code, may raise the matter under the appropriate statutory appeal procedure or this Agreement, but not both. A bargaining unit employee shall be deemed to have exercised his/her option under this provision at such time as the bargaining unit employee either initiates an action under the applicable statutory appeal procedure, or files a grievance in writing under this Agreement, whichever comes first.

E. Representation

Any bargaining unit employee or group of employees may present a grievance covered by the terms of this Agreement. The Union as exclusive representative, or its designated representative, shall be the only representative used by a bargaining unit employee or group of employees, except that a bargaining unit employee may represent himself or herself.

F. Procedures

1. Employees and supervisors are encouraged to resolve any disputes informally as early as possible.
2. Procedure for Grievances by or on Behalf of Individual Bargaining Unit Employees
 - Step One. A grievance must be filed in writing with the employee’s immediate supervisor, or the lowest level Agency official with authority to resolve the grievance, within thirty (30) calendar days of the act or occurrence giving rise to the grievance or from the date on which the bargaining unit employee knew, or had reason to know, of the act or occurrence. The grievance will be signed by the employee and the representative, if any. The supervisor will

respond in writing within fourteen (14) calendar days from receipt of the grievance. The response will set forth the reasons the supervisor reached his/her conclusions, and the name and title of the designated reviewing official to which the grievance may be referred if it is not resolved at this step.

Step Two. If the grievance is not resolved at Step One, it may be submitted to the reviewing official designated in the Step One decision. The Step Two grievance must be submitted in writing within fourteen (14) calendar days from receipt of the Step One decision. Prior to issuing his/her decision and, if requested by the Union or the grieving bargaining unit employee, the reviewing official will meet with the grievant and his/her Union representative to discuss the grievance. The reviewing official will render a written decision within fourteen (14) calendar days from receipt of the grievance, or within seven (7) work days from the conclusion of the meeting, whichever is later. If the decision does not grant the relief requested, the decision will state the right of the Union to pursue the grievance to arbitration under Section 11.5 of this Interim Agreement.

3. Failure to meet time limits

The failure of either party to meet a time limit concedes the grievance and the requested remedy.

4. Procedure for Grievances by the Union or the Agency

Step One. A grievance by the Union must be filed with the Agency's Labor Relations Officer within thirty (30) calendar days of the act or occurrence giving rise to the grievance or from the date on which the Union knew, or had reason to know, of the act or occurrence. A grievance by the Agency must be filed with the Union's President within thirty (30) calendar days of the act or occurrence giving rise to the grievance or from the date on which the Agency knew, or had reason to know, of the act or occurrence. If the grieving party requests, the parties shall meet to discuss the grievance. The responding party will render a written decision within fourteen (14) calendar days from receipt of the grievance, or within seven (7) work days from the conclusion of the meeting, whichever is later. If the decision does not grant the relief requested, the decision will state the right of the grieving party to pursue the grievance to arbitration under Section 11.5 of this Interim Agreement.

Section 11.5 Arbitration

A. Applicability

Any grievance under the terms of this Agreement which is not resolved may be subject to binding arbitration. Arbitration may be invoked only by the Union or the Agency.

B. Procedures

1. Either the Union or the Agency may invoke arbitration by sending written notice to the other party within thirty (30) calendar days following the receipt of the final decision under Article 3. The notice shall identify the grievance and be signed and dated by an authorized representative on behalf of the party submitting the matter to arbitration. Failure to invoke arbitration within the time specified shall waive the right to seek arbitration.

C. Designating an Arbitrator

1. When either party invokes arbitration, the Parties will request a list of 7 arbitrators from the Federal Mediation and Conciliation Service. The Parties will strike names alternately, and the one remaining will be the designated arbitrator.

2. The Parties will jointly communicate with the arbitrator to schedule a hearing on the case as promptly as practicable.

D. Fees and Expenses

All fees and expenses charged by the Federal Mediation and Conciliation Service or the arbitrator will be split equally between the parties.

Section 11.6. Official Time

Representatives of the Union will receive a reasonable amount of official time for the performance of representational duties. Representatives will arrange for release from their duties with their supervisors. Such release will not be withheld arbitrarily.

[As noted before, the Interim Agreement is designed to be simple. This provision is far less comprehensive than the Official Time Article in “Bargaining for the Future.” It may be that its brevity will create problems in administration. The hope is that the Interim Agreement is only in place for a relatively short time. Any problems with official time should create an incentive to conclude the negotiations for the term agreement.]

Section 11.7 Effect on Future Negotiations

The terms of this Interim Agreement are not precedential and may not be relied upon by either Party as justifying the same or similar terms in subsequent negotiations.

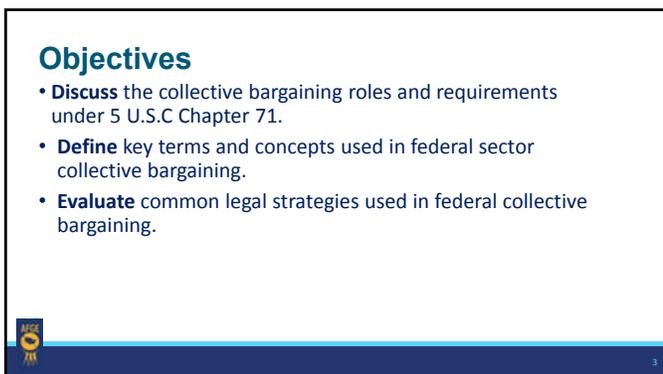
Section 11.8 Duration

This Interim Agreement will remain in effect until the effective date of the collective bargaining agreement to be negotiated by the Parties.

APPENDIX E: Power Point







Introductions

- 1 • Have you been involved in bargaining?
- 2 • Have you taken any training programs on negotiation or collective bargaining?
- 3 • Have you ever been involved in negotiations or assisted someone with their negotiations as a union representative?



4



What's is Collective Bargaining?

•Exercise:



6

What's is Collective Bargaining?

- Write down five (5) words that define the term *collective bargaining*.
- The descriptions can be benefits, attributes, synonyms, etc..
- At your table, share your descriptors and create a seven (7) word consensus definition for *collective bargaining*.



7

COLLECTIVE BARGAINING IS:

General:

- Collective bargaining is a process designed to manage conflict and produce a consensus document outlining the work relationship among the parties (agency and union).

AFGE Council 238

- Collective bargaining is the preferred, statutorily established, method for employees to participate in making the decisions that affect their working conditions. It is the most effective form of pre-decisional involvement there can be. In collective bargaining there is an equal partnership between management and the employees, speaking through their union representatives, at least as to the matters the law requires be bargained.



8

Collective Bargaining

That's what makes us a Union!



9

Why do we bargain with the agency?

To determine working conditions for bargaining unit employees.



10

Collective bargaining is just one type of negotiation.

We negotiate every day of our lives. It is part of living together as social beings.



11

Bargaining is not war.

The object is not to defeat the other side.
The object is to reach a DEAL.



12



Federal Labor Relations Authority

[5 U.S.C. 7 Collective bargaining means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees at an appropriate unit in the agency to meet at reasonable times and to consult and bargain in good-faith effort to reach agreement with respect to conditions of employment affecting such employees and to execute if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make concession.

103(a)(12)]:



14

The Statute



15

The Civil Service Reform Act of 1978 included a title that added Chapter 71 to Title 5 U.S. Code. This is commonly referred to as *the Statute* in labor relations parlance.



16

The Statute sets the basic rules for conducting labor-management relations in the Federal sector.



17

Exercise:
What's in the Statute?



18

Federal Collective Bargaining: SPEAKING The Language, Knowing the Players...



- Bargaining unit
- Conditions of employment
- Exclusive Representative
- Designee(s)
- Employer/Agency
- Neutrals: FMCS, FLRA, FSIP, Arbitrators
- Union Member
- Bypass
- Bargaining unit member
- Bargaining team members
- Chief Negotiator (Chief Spokesperson)
- Subject Matter Expert (SME)



19

...Means What?

- **Bargaining unit** = The part of an Agency for which the Union has been certified as the exclusive representative.
- **Conditions of employment** = Aspects of the bargaining unit's work life that are related to the employment relationship. An agency is not required to negotiate on such aspects that affect supervisors, managers, or others outside the bargaining unit.



20

INTRODUCING: The Union as the Exclusive Representative



21

Exclusive Representative

- The Union,
- Upon being certified as such,
- Has the sole legal right and duty to represent employees in the bargaining unit
- On matters concerning their conditions of employment.
- And must abide by DOL standards for democratic procedures (elections, etc.)



22

2 Kinds of “Members”

- 1 • **Bargaining Unit** is the description of the positions the **Union** must represent as a group. A person whose position is in that description is a **“member of the bargaining unit”**
- 2 **The Union** is AFGE. A person who joins AFGE is a **“Union member.”**



23

Why does it matter?

- 1 • Unit members are treated alike on matters covered by a Collective Bargaining Agreement (CBA) or affecting Conditions of Employment (COE). Unit members have no ability to participate in internal Union decisions.
- 2 • On matters not covered by a CBA or affecting COEs, union members can be given different treatment than non-members of the union. Union members have the right, among others, to vote in elections and on ratification on a CBA.



24

The Union is the only entity that can speak for one or more members of the bargaining unit.

This carries important legal requirements, for the Union and the Employer as well



25

Q: What if the interests of 2 bargaining unit members or groups conflict?

A: The Union's is required to represent the bargaining unit as a whole/group.



26

For the Union:

The Union must abide by DOL standards for democratic procedures within the bargaining unit, including not discriminating against non-members.

For the Employer:

The Employer must deal with the Union.

It is illegal for the employer to "deal directly" with employees on bargaining unit issues.



27

SPEAKING The Language, Knowing the Players...(cont'd)

- **“Authorized” Representative** = the person or persons authorized to speak or act for the Union or the Agency. The authorized representative (or “designee”) must have authority to make decisions at the table.
- **Employer/ Agency** = the employer organization that has been identified as the Union’s counterpart within the government.
- **Neutrals**
 - = Federal Mediation and Conciliation Service
 - = Federal Labor Relations Authority
 - = Federal Service Impasses Panel
 - = Arbitrators
 - = Courts



28

...Means What? (cont'd)

- **Union member** = person who pays dues and is accepted as a member; dues are paid through payroll deductions or directly to the Union.
- **Bargaining unit member** = Person who occupies a position in the bargaining unit, whether or not a union member.
- **Bargaining team members** = Persons designated by the Union to conduct negotiations.



29

...Means What? (cont'd)

- **Chief Negotiator/ Spokesperson** = person who chairs the Union’s bargaining team in caucuses and during negotiation sessions; authorized to “sign off” on agreements, send and receive correspondence, etc.
- **Subject Matter Expert (SME)** = person who is accepted by both parties as being able to explain laws, regulations, or policies in a specified area.



30

Management Rights and Bargaining: Substance vs. Appropriate Arrangements and Procedures



31

Substance Bargaining

- Does NOT interfere with a management right under Section 7106(a)
- Examples include:
 - Grievance procedures
 - Official time for union representation
 - Fitness programs
 - Union recognition programs



32

APPROPRIATE ARRANGEMENTS and PROCEDURES Bargaining

- Management rights are directly affected
- Bargaining allowed under **Section 7106(b)((2)-(3)**
- Commonly referred to as **“Impact and Implementation (I and I)”** bargaining
- Examples include reorganization, promotions, contracting out, RIFs, new assignments, etc.



33

Exercise:
Substance vs. Impact and Implementation



34

Federal Collective Bargaining:
The Process and the Players



35

Federal Collective Bargaining
When does this occur?

- 1 | No agreement on working conditions in effect (no contract)
- 2 | *End of an agreement on working conditions (expired contract)*
- 3 | *Change in working conditions (issue not covered in current contract)*

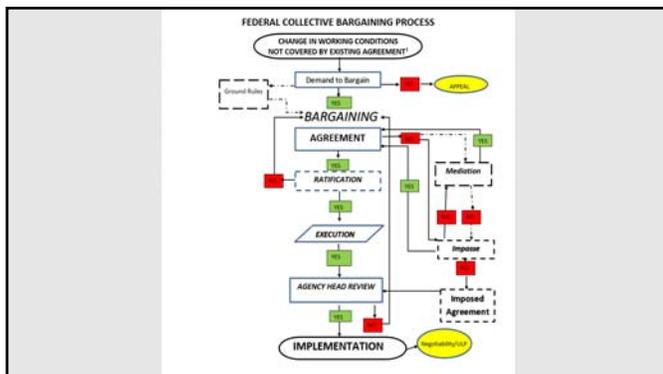


36

Federal Collective Bargaining Types of Agreements

- Master Labor Agreement (MLA)
 - National recognition
 - Consolidated Units
- Local Agreement
- Local Supplemental Agreement (only if the MLA allows)
- Memorandum of Agreement (issue specific)





The NEUTRALS



INTRODUCING:
The Federal Labor Relations Authority



40

Federal Labor Relations Authority (FLRA)

- Oversees representation elections
- Resolves negotiability disputes
- Stops unfair labor practices by either agencies or unions
- Patterned like the National Labor Relations Board in the private sector



41

INTRODUCING:
The Federal Mediation and Conciliation Service



42

Federal Mediation and Conciliation Service (FMCS)

- Provides assistance to parties in resolving negotiation impasses or other disputes
- Trains parties in cooperative practices for bargaining
- Has no authority to impose anything on the parties
- Provides lists of available arbitrators upon request



43

INTRODUCING: The Federal Service Impasses Panel



44

Federal Service Impasses Panel (FSIP)

- Makes final resolution to negotiation impasses between federal unions and agencies
- Also decides disputes over alternative work schedules
- Uses various methods, including acting as a final arbitrator
- Process is the substitution for a strike or lockout



45

Examples of FSIP Options

- The FSIP can require more bargaining, and/or more mediation
- The FSIP can require fact finding and written submissions to aid the FSIP in its final determination.
- ** The FSIP can require final offers from both sides, and may impose a settlement



46

In view of what you know about the powers of the FSIP, what are the implications for you as a negotiator when considering impasse?



47

**INTRODUCING:
Arbitrators**



48

Arbitrators

- Settle grievances over contract interpretation and alleged violation
- Self employed
- May settle “interest disputes (setting terms of the contract) when directed by FSIP
- Union and management pay arbitrators by the day for each grievance



49

Exercise:

Know your Neutrals



50

Review Day One

- 5 U.S.C. Chapter 71 is The *Statute*. The Statute governs how labor relations and collective bargaining work in the Federal government.



51





CHANGE in CONDITION OF EMPLOYMENT

The Union should request answers from the Agency on the following key questions:

1. **What** do you want to **do**?
2. **Why** do you want to **do it**?
3. **Who** is it going to **affect**?
4. **How** is it going to **affect** them?
5. **When** do you want to get it **done**?

DEMAND to Bargain

IT'S ABOUT THE MEMBERS!

- Who is affected?
- What are their concerns?
- What do they expect the Union to do?
- How can the Union help them?

COMMUNICATE, COMMUNICATE, COMMUNICATE!

- SURVEYS
- UPDATES (UNION MEETING, 1 on 1, newsletter)



55

DEMAND to Bargain

- Inform management of the Union's intent to bargain
- Check current contract's requirements and follow them carefully
 - Time limits
 - Who receives the request?
 - Submit proposals at the same time?



56

DEMAND to Bargain: EXAMPLE

Dear [Management representative]:

Pursuant to Article ____, Section ____ of our collective bargaining agreement, this constitutes notice that AFGE Local/Council ____ demands to negotiate over the procedures to be used to implement furloughs of bargaining unit employees prompted by the sequestration, as well as appropriate arrangements for those employees who are adversely affected.



57

DEMAND to Bargain: EXAMPLE

The union proposes to meet [date, time, place]. Our bargaining team will consist of [names].

We are aware of the serious nature of the current circumstances and appreciate the need for prompt action. I look forward to receiving your response and to efficient and productive negotiations.

Sincerely,



58

DEMAND to Bargain: Additional Language

Attached is a request pursuant to the contract and 5 U.S.C. 7114 (b) (4) for information that is necessary for our collective bargaining.

Or

Attached are the union's initial proposals. We reserve the right to make additional proposals during the course of these negotiations.



59

Exercise:

DEMAND TO BARGAIN



60



Under 5 U.S.C., §7114(b):
“The duty of an agency and an exclusive representative to negotiate in **good faith** under subsection (a) of this section shall include the obligation—

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—
(A) which is normally maintained by the agency in the regular course of business;
(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and

DATA

- No definition in Statute. Includes:
 - Documents
 - Video Tapes
 - Cash register receipts
 - Answers to specific questions



64

NORMALLY MAINTAINED

- Agency must possess the data.
- Maintains possession in regular course of business
- Not necessarily in just one location
- Not necessarily in a “system of records”

NOTE: the term “system of records” means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;]

5 USC § 522a – Records Maintained on Individuals (The Privacy Act)



65

DEGREE OF BURDEN

- Burden of complying with Union’s request may relieve agency of obligation to provide data
- Need not be disclosed if it is available only through “extreme or excessive means”

NOTE: Determining whether extreme or excessive means are required to retrieve available data requires case-by-case analysis of relevant facts and circumstances. Such facts and circumstances include the efforts required to make the documents available, including costs and displacement of the agency’s workforce.

See Fed. Bureau of Prisons, Wash., D.C., 55 FLRA 1250, 1255 n.9 (2000).



66

NECESSARY

- Necessary for the union to carry out “the full range of Union responsibilities in both negotiations and administration of a labor agreement”
 - Pursuing Grievances
 - Bargaining
 - Other representational activities



67

The Particularized Need Test

- Section 7114(b)(4), has been restricted by the FLRA's **particularized need** test.
- Involves how the parties handle a Union's request:
 - Both parties have a **duty to discuss** in detail a dispute about requested information
 - The parties must **try to resolve the dispute**, compromising when appropriate;



68

The Particularized Need Test

Involves what the parties must consider. When the Union requests information under the labor law, it must tell the Agency:

- **The purpose for requesting the information;**
- **The uses to which the Union will put the information; and**
- **How the purpose relates to the Union's role as the exclusive representative. 5 USC §7114(b)(4)**

This test does not apply if information is requested under the Freedom of Information Act (FOIA) or is a separate contractual right of the Union.



69

Exercise:
INFORMATION REQUEST



70

Strategic Bargaining



71

STRATEGIC BARGAINING 

- Strategic bargaining is a process which can be customized to fit the experience level of the bargaining team.
- It builds other disciplines and doctrines used by organized labor to influence a successful outcome for the bargaining unit employees.



72

STRATEGIC BARGAINING



- Can be applied to both term and mid-term negotiations.
- Systems and structures can be used in legislative grassroots mobilization efforts.
- Encourages activism and involvement by members.



73

STRATEGIC BARGAINING



1. Identifying Goals
2. Bargaining Team Committees
 - Communications/Community Outreach
 - Organizing
 - Legislative
 - Research
 - Notes and Record Keeping
3. Pre-Bargaining Preparation and Training
4. Research
5. Contract Proposal Preparation



74

TURNING The BARGAINING PROCESSES INTO STRATEGY



1. PLAN
2. TRAIN
3. PREPARE



75

STRATEGIC BARGAINING vs. REACTIVE BARGAINING



- Reactive bargaining makes it difficult to enact bargaining support structures.
- Efforts are rushed.
- Research and outreach for information is limited
- Management often dictates or controls when and how bargaining is done.



76



77

BEFORE YOU WRITE

- What is the issue?
- What is the goal of the Union on this issue?
- What is the important principle/value behind what the Union is asking for?
- How important is this issue to the Union?



78

Guidelines for WRITING PROPOSALS

- Focus on one issue at a time.
- Be clear.
- Give enough detail so the reader understands what you mean.
- Write in complete sentences.
- Organize the content of the proposal.



79

**When preparing proposals,
always consider how a 3rd
party neutral may respond to
your proposal**



80

**Simply stating that you
“want it,”
or that “it is justified,”
Will Not Get What You Want!**



81

Comments re Writing Proposals

The agreement should be clear and unambiguous!

Ask yourself,

Does someone who wasn't in the negotiations understand what the proposed language means ?



82

“Sec. 1. Notwithstanding the provisions of Handbook 871.3, employees may be given additional time when warranted by the circumstances.”

“Sec. C.2.(iii). Practices that are appropriate and legal may continue, subject to local determination.”

“What did you say?”



83

Exercise:

PROPOSAL WRITING I



84

Contract Language is not “One Size Fits All”

Contract language should be written to fit your bargaining unit!
Do not borrow other agency language just because it “looks good”

- Different organizations have different cultures and priorities; and,
- There are different levels of experience and trust in different organizations !



85

Ask First— Does the proposal Meet Unit Needs?

THEN, ask—

- 1) Whether anyone else has similar language?
- 2) Do you have the facts to support the proposal?
- 3) Can you answer management’s questions?

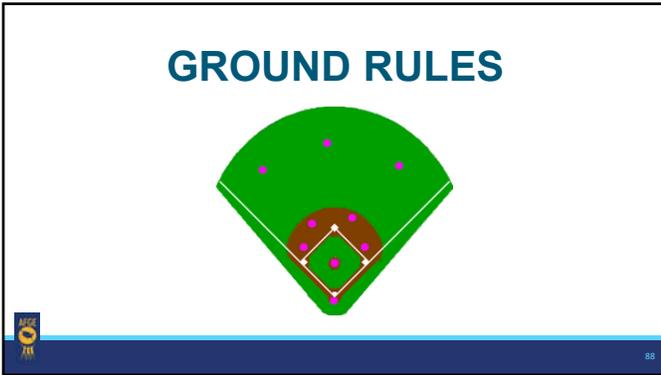


86

Exercise: PROPOSAL WRITING II



87



Ground Rules

Ground Rules state the procedures and protocols that the parties will follow in negotiating a collective bargaining agreement.

Ground Rules

Creating ground rules is a mandatory subject of bargaining if either party wants them.

VA Medical Center, Fargo, SD and AFGE, 22 FLRA 612 (1986).

Ground Rules

Do we need written Ground Rules?



91

Writing Proposals Ground Rules

- Depends on level of experience and trust
- Useful in Most Cases



92

Ground Rules

What do they contain?

- Status of current contract during bargaining
- Mgmt-initiated changes during bargaining
- Union team's preparation
- Timing, format for proposals



93

Writing Proposals Ground Rules

What do they contain, cont.

- Size of Union bargaining team
- Alternates
- Note takers
- Observers
- Subject Matter Experts



94

Ground Rules

What do they contain, cont.

- Site of negotiations
- Travel & per diem expenses
- Bargaining Schedule
 - Daily schedule
 - Length of sessions
 - Frequency of sessions



95

What do they contain, cont.

- Behavior at the table
- How to signify agreement
- Facilities to Union
- Effect of Negotiability Appeals
- Ratification
- Impasse Resolution
- Execution
- Agency Head Review



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Exercise:
PROPOSAL WRITING III



97

NEGOTIABILITY



98

Are Any of the Union's Proposals Negotiable?

- An agency may implement a change if all proposals on the table at the time of implementation are non-negotiable and it has otherwise bargained in good faith.
- The agency must, however, respond to the union's request to bargain over the proposals, even if all the proposals are non-negotiable.



99

Are Any of the Union's Proposals Negotiable?

If the agency chooses to implement under these circumstances, then it acts at its peril. If any proposals are determined to be negotiable, then the agency has committed a ULP.

U.S. DOJ, INS, Wash., D.C., 56 FLRA 351 (2000); Fed. Bureau of Prisons, FCI, Bastrop, Tex., 55 FLRA 848 (1999).



100

ANALYTICAL FRAMEWORKS



101

ANALYTICAL FRAMEWORKS

Analytical frameworks are tools that give agency and union negotiators a common understanding of how to interpret FLRA case law on subjects and situations that may occur in bargaining.



102

ANALYTICAL FRAMEWORKS

The agency often uses an analytical framework to say no to bargaining.

You need to know when the agency is misinformed, bluffing, or are using the correct interpretation.



103

GOVERNMENT-WIDE RULES And REGULATION

The agency is not obligated to bargain because a proposal is inconsistent with a government-wide rule or regulation.

5 USC §7117(a)(2)



104

Management Right Violation

The agency is not obligated to bargain over a proposal that excessively violates their management rights.

- Appropriate Arrangements
- Procedures

5 USC §7106(b)(2) and (3)



105

PERMISSIVE TOPIC

The agency is not obligated to bargain over a proposal on a permissive topic.

- Appropriate Arrangements
- Procedures

5 USC §7106(b)



106

Covered By

An Invention for Agencies to Avoid Further (“Midterm”) Bargaining



107

Can MGT avoid bargaining over changes it proposes to make?

- In 1993, the FLRA invented the “covered by” framework because agencies complained they had to negotiate constantly.
- The test says: If a matter is “covered by” a CBA, there is no statutory requirement for management to bargain “further” on that matter with the Union during the term of the CBA. The Union had its chance to bargain, and the Agency is free to make changes without bargaining if the “matter” is covered by the [term] CBA. 5 USC §7117(b)(1)



108

The two-prong test of the “Covered By” Analytical Framework

- **Prong 1:** If the agreement expressly encompasses the matter, the matter is “covered by” the agreement.
- **Prong 2:** If not, the FLRA determines whether the matter sought to be bargained is an aspect (“inseparably bound up with”) of matters already negotiated. If it is, the matter is “covered by” the agreement. The analysis under Prong 2 will, as deemed necessary, consider the parties, the bargaining history, or intent, as components of the record evidence.



109

Avoiding “Covered by”

- A proposal that the agency waive the second prong of the “covered by” defense is a mandatory subject of bargaining.
- [NTEU and U.S. Customs Service](#), 64 FLRA 156 (2009)



110

Avoiding “Covered by”

“Either Party may propose changes in conditions of employment during the life of the Agreement which are not already covered specifically by the Agreement.”

Proposal in “[Bargaining for the Future](#)” for the Mid-Term Bargaining Article



111

AGENCY HEAD REVIEW WILL OVERTURN

The agency head review is limited to identifying and rejecting provisions in conflict with government-wide regulations and rules.



112

DE MINIMIS

- The FLRA has defined matters that have not appreciable effect on working conditions as de minimis.
- The agency is not obligated to bargain over a de minimis matter.

General Services Administration, Region 9 and NFFE Local 81, 52 FLRA 1107 (1997).



113

PAST PRACTICE

- A past practice involves a working condition that has evolved at the workplace outside of the CBA or agency regulations.
- To be considered a "past practice" the practice must be consistently followed and known to both the Agency and the employees.
- When the Agency changes a past practice, it must give the Union notice and allow bargaining if there is a timely demand to bargain.
- Either party can request bargaining to change existing past practice.



114

NOT MEETING TIMELINE FOR DEMAND TO BARGAIN

- What is a “demand to bargain”?
- What does “timely” mean?
- CBA vs. “reasonable”



115

Exercise:

Analytical Frameworks



116

BARGAINING 101



117

TYPES of BARGAINING

- Traditional Bargaining: Proposals are adopted that each party believes will meet its needs, regardless of the effect on the other party. Deceit and manipulation are expected.
- Interest-based Bargaining (IBB/"win-win"/principled bargaining/etc.): Problems are discussed and solutions are sought that meet the underlying common interests of both parties. Open and honest dialogue is required.



118

Note Taking

- Good note taking is critical!
- Maintain copies of all proposals and notes
- Separate proposals by Article, organized by date presented
- Maintain a separate file of notes on table discussion on core issues



119

Chief Negotiator

- The Chief Negotiator serves as the spokesperson for their bargaining team.
- This enables a cohesive - directed strategy
- Statements by other team members will be delegated in order to maintain consistent positions and strategy.
- Team members may be asked to speak on specific issues on a pre-determined basis.



120

Caucuses

- If either side needs a break to discuss an issue with their team they may ask for a caucus (break).
- A caucus request can be made by team members by passing a note or using a pre-planned signal to their Chief Negotiator.
- Caucuses can be a valuable tool for checking facts and regrouping arguments.
- Call a caucus if there is confusion at the table .
- Excessive caucuses can show the team is not prepared.



121

Bargaining Behavior

Always, always, always....

- Present a united front at the table. No team member should be allowed to undercut any other member in front of management.
- Request a caucus if you disagree with what is happening!



122

Exercise:

MOCK BARGAINING



123





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