

Collective Bargaining for Power

NOW

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The NOW Collective Bargaining Series:

Executive Order 14003 and Beyond



Code of Conduct



AFGE is committed to providing an environment free from discrimination, bullying and harassment. As such, we do not tolerate discriminatory, harassing or otherwise unacceptable behavior at any of our activities, events or meetings. We expect everyone who participates in any of our activities, events or meetings to abide by the following Code of Conduct. This code of conduct does not apply to matters that are covered by the AFGE Constitution.

EXPECTED BEHAVIOR

- AFGE expects all participants in AFGE activities, events or meetings to conform to the following code of conduct:
- Respect others and their views
- Recognize and value individual differences
- Be sure you do not engage in aggressive, bullying or intimidating behavior
- Do not engage in discriminatory or harassing behavior
- If alcohol is served at an AFGE function, all participants who consume alcohol must do so responsibly and maintain proper decorum

Code of Conduct



UNACCEPTABLE BEHAVIOR

- This code of conduct is not intended to restrict free and open debate, but rather is concerned with preventing unacceptable behavior, as detailed below. Unacceptable behavior includes, but is not limited to, the following:
- Discriminatory or harassing speech or actions, including cyberbullying or cyber harassment
- Harmful or offensive verbal or written comments or visual images related to race, ethnicity, religion, color, sex, age, national origin, sexual orientation, disability, gender identity or expression, ancestry, pregnancy, or any other personal characteristic
- Inappropriate use of nudity and/or sexual images in public spaces
- Bullying or stalking
- Harassing photography or recording
- Uninvited sexual attention or contact
- Physical assault (including uninvited touching or groping)
- Real or implied threat of physical harm
- We ask you to respect our values of diversity, equity and equality and conduct yourselves at this event consistent with those values. We have designated the person identified as the first point of contact for any participants who feel they have experienced discriminatory, harassing or otherwise unacceptable behavior, please contact them if you have any concerns. Any AFGE staff person who is subjected to unacceptable behavior should also contact the designee.
- Please contact the designee, Marlin Jenkins, marlin.Jenkins@afge.org with any questions or concerns.

Agenda



- **Executive Orders:** What Happens now that they are overturned?
13836, 13838, 13839
- **OPM Rule on 13839:** What does this mean for bargaining?
- **What does the new EO 14003 say?**
- **OPM Guidance**
- **Collective Bargaining Overview – 7106(b)(1)**
- **Contracts:** When and how to go back to the bargaining table
- **Questions and Answers**

Executive Order 13839

- November 2020 OPM published a final rule in the Federal Register implementing several key provisions of President Trump's controversial executive order making it easier to fire and discipline federal workers
- OPM governmentwide rule impacts the ability to bargain Executive Order 13839 issues until the OPM wide rule is repealed
- Agencies have discretion to ignore the "clean SF-50" mandate implemented by President Trump



EO 13991 and OMB Guidance

- **Executive Order 13991 Protecting the Federal Workforce and Requiring Mask-Wearing**
- **OMB guidance**



What Does Executive Order 14003 Say?

Explanation of Executive Order 14003 Protecting the Federal Workforce

- Analysis from agency assembling all the places the Trump EOs have been inacted (collective bargaining agreements, agency wide policies, etc.)
- As soon as “practicable” revise, rescind, suspend
- Received permissive bargaining rights for the first time in 30 years



OPM Guidance Snapshot

- Agencies must rescind all unilaterally implemented EO based policies.
- Agencies with expired CBAs who implemented EOs during the pendency of bargaining must revert to prior practices.
- Agencies must withdraw all pending EO based proposals, whether at the table, FMCS, or FSIP. Must take a “hard look” to see if proposals influenced by EOs.
- FSIP imposed provisions with Trump EO language should be rescinded, revised, and suspend ***as soon as practicable***. EO 14003 neither requires nor prohibits reopening the CBA.
- In existing CBAs Agencies should address issues to rescind, revise, and suspend EO language ***as soon as practicable***. EO 14003 neither requires nor prohibits reopening the CBA.
- Schedule F is revoked.
- Agencies should engage in permissive bargaining (5 USC 7106 (b)(1)). Permissive bargaining can now proceed to impasse.



Collective Bargaining Overview



The Collective Bargaining Agreement

- All Federal Employees have some rights under law
- Once a group of Federal Employees elect a union to serve as its exclusive bargaining representative, they receive another layer of rights under law
- Every right we have that isn't granted by law is earned at the table through bargaining
- The law is floor, the least rights you can have, and you build up your rights from there through bargaining



Why Does the Agency Bargain?

- The Agency is required by law to bargain over terms and conditions of employment. They have an obligation to bargain in “good faith” (a term we will explore in greater detail later).
- But, as we will discuss, there is a great deal the Agency is not required to bargain over under law, and there are even topics over which the Agency is legally prohibited from bargaining over.
- The Agency may bargain over *more* than they are legally required to bargain over as well.



What Is the Agency Required to Bargain Over?

There are Three Types of Bargaining Subjects:

A subject matter over which the Agency has a legal obligation to bargain. If the parties cannot agree to terms over a proposal over a mandatory subject of bargaining, either party (or both parties) may submit the issue to the Federal Service Impasses Panel, where the parties may present their case for their proposal and a resolution will be imposed. 5 USC 7106 (b) (2) and (3).

Mandatory Subjects
of Bargaining



A subject matter outlined in 5 USC 7106 (b)(1) that was under the Agency's discretion to negotiate, under President Biden's Executive Order 14003, the President made the election that Agency's WILL engage negotiations over these topics.. Further, the topics outline this provision are now negotiable through impasse.

Permissive Subjects
of Bargaining



There are a number of topics which the parties are prohibited by law from bargaining over.

Prohibited Subjects
of Bargaining



MANDATORY SUBJECTS OF BARGAINING



What are Mandatory Subjects of Bargaining?

Mandatory Subjects of Bargaining are subjects (relating to terms and conditions of employment) over which the parties must bargain over, in good faith, if a proposal is furnished.

- It is illegal for the Agency to make a change to a term and condition of employment which is a mandatory subject of bargaining without first bargaining it to completion.
- It is illegal for the Agency to fail to bargain a term and condition of employment which is a mandatory subject of bargaining without demonstrating “good faith”.*

*Good faith means a serious effort to bargain honestly, sincerely and with the goal and necessary commitment to reach an agreement.



What are Terms and Conditions of Employment?

Conditions of employment means:

- All personnel policies, practices, and matters affecting working conditions, except matters relating to:
 - ✓ Political activities
 - ✓ Classification of any position; or
 - ✓ Issues specifically spelled out in Federal law.



PERMISSIVE SUBJECTS OF BARGAINING



Biden Executive Order
14003 effectively turns (b)(1)
"permissive" subjects into
mandatory subjects of
bargaining.



Permissive Subjects of Bargaining include:

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



Permissive Bargaining Examples

- What does it mean to have permissive bargaining?
 - It means agencies have to bargain over subjects like staffing, technology, methods and means of performing work, and more.
- ✓ Example: If you are chronically short-staffed, in certain departments you can now bargain over staffing levels and ratios.
- ✓ Example: If there is technology that has been deployed that affects how you do your job, you can now bargain over that.
- ✓ Example: If there have been issues with assignment of work within career ladders in your agency, you can now bargain that.
- ✓ Example: If management instituted an unfair performance rating with unrealistic metrics, you can now bargain it.



Numbers, Types & Grades

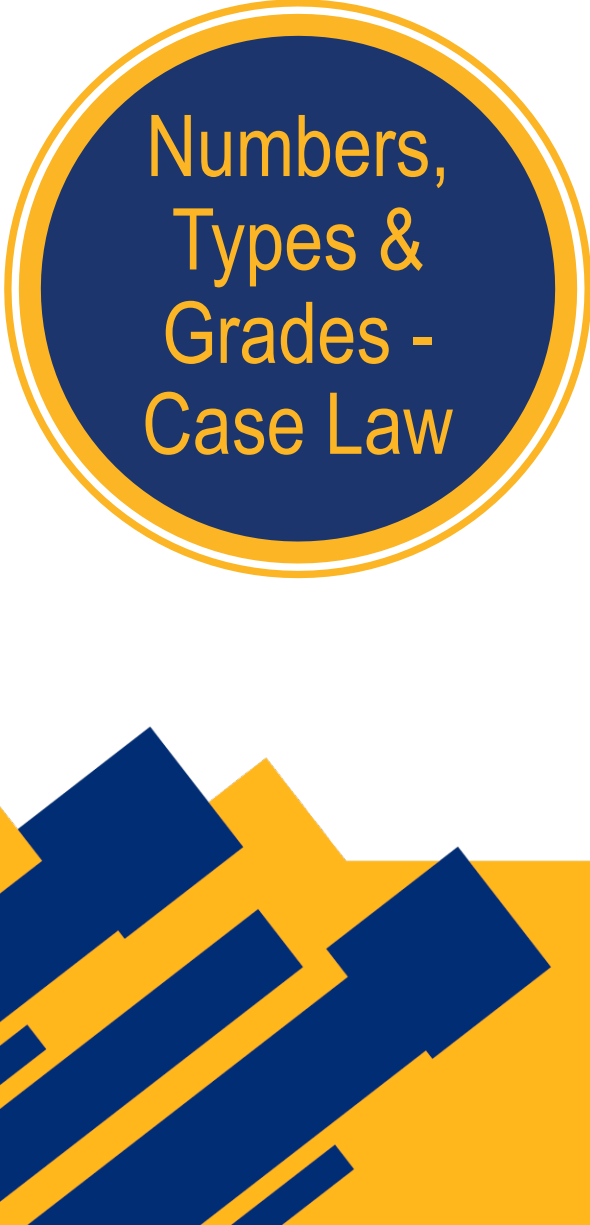
- **“Numbers”** means an increase/decrease in employees or positions;
- **“Types”** means distinguishable classes, kinds, groups or categories of employees or positions;
- **“Grades”** are classes of positions within specified ranges or rates of pay;
- **“Employees”** are individuals employed in an agency;
- **“Positions”** refers to the duties and responsibilities assigned to and performed by employees;



Numbers, Types & Grades

- *“Organizational subdivision” refers to any agency component;*
- *“Work project” means a particular job or task;*
- *“Tour of duty” refers to the hours of an employee’s workday or workweek.*





Numbers, Types & Grades - Case Law

- "Numbers, types and grades of employees" applies to the establishment of agency staffing patterns, or the allocation of staff for the purpose of an agency's organization and the accomplishment of its work. *Defense Distribution Depot*, 103 LRP 8747, 58 FLRA 368 (FLRA 2003); *DVA Medical Center, Providence, R.I.*, 101 FLRR 1-1154, 57 FLRA 373 (FLRA 2001).
- "Types" refers to distinguishable classes, groups or categories of employees or positions that are relevant to the establishment of staffing patterns. *DVA Medical Center, Lexington, Ky.*, 97 FLRR 1-1025, 52 FLRA 1024 (FLRA 1997).
- Staffing levels are permissive subjects of bargaining, and agreements on such matters are enforceable in arbitration. *Federal Aviation Administration*, 106 LRP 65070, 61 FLRA 854 (FLRA 2006). (Per EO 14003, staffing levels are now fully negotiable)
- A proposal concerns the numbers of employees assigned to an organizational subdivision regardless of whether it would increase, decrease or maintain the number of employees the agency chooses to assign. *Federal Aviation Administration*, 104 LRP 42100, 60 FLRA 159 (FLRA 2004).
- The determination of whether and which positions assigned to an organizational subdivision will be filled concerns the allocation of staff and is within the permissive scope of bargaining. *DVA Medical Center, Lexington, Ky.*, 99 FLRR 1-1080, 55 FLRA 549 (FLRA 1999).
- A proposal dictating the number of employees the agency will employ affects management's Section 7106(a) right to determine number of employees. A proposal addressing the number of employees assigned to various components of the agency is permissibly negotiable under Subsection (b)(1). *Office of Surface Mining*, 97 FLRR 1-1113, 53 FLRA 427 (FLRA 1997).
- A proposal requiring the establishment of subdivisions did not fall within the permissive area of bargaining because it did not establish the numbers, types or grades assigned to a subdivision. *Army Corps of Engineers*, 96 FLRR 1-1168, 52 FLRA 813 (FLRA 1996).
- Proposals establishing tours of duty determine the number of employees assigned to a tour of duty and are negotiable at the agency's election. *USDA, Animal Plant Health Inspection Services*, 101 FLRR 1-1160, 57 FLRA 424 (FLRA 2001). (Per EO 14003, fully negotiable, Agency election no longer required)
- A proposal determinative of the grade level of employees assigned to an organization is negotiable at the agency's election where it does not require the agency to classify or reclassify existing positions. *Defense Automated Printing Service*, 99 FLRR 1-1072, 55 FLRA 509 (FLRA 1999). (Per EO 14003, Agency election no longer required, where it does not require the agency to classify or reclassify.)



Methods, Means & Technology

- *“Method” is the way in which an agency performs its work;*
- *“Means” is any any agent, tool, device, measure, plan or policy used to accomplish the work;*
- *“Technology” is not defined in the case law;*
 - ✓ *Dictionary defines as “the machinery and equipment”*





Methods, Means & Technology - Case Law

- The legislative history of the statute indicates that the term "method" was intended to mean "how" work is performed, while the terms "means" was intended to mean "with what." *National Guard Bureau*, 99 FLRR 1-1085, 55 FLRA 591 (FLRA 1999).
- A "method" refers to the way an agency performs its work; a "means" refers to any instrumentality including an agent, tool, device, measure, plan or policy used by an agency for the accomplishment or furtherance of the performance of its work. *DVA Medical Center, Dublin, Ga.*, 100 FLRR 1-1015, 55 FLRA 1145 (FLRA 1999).
- In order for a proposal to affect the methods and means of accomplishing work, there must be a direct and integral relationship between the method or means the agency has chosen, and the accomplishment of the agency's mission. Also, the proposal must directly interfere with the mission-related purpose for which the method or means was adopted. *Defense Contract Audit Agency*, 99 FLRR 1-1127, 55 FLRA 830 (FLRA 1999).
- Proposals requiring work to be performed in one location rather than another do not impact the methods and means of performing work. *Federal Aviation Administration*, 101 FLRR 1-1017, 56 FLRA 798 (FLRA 2000).
- An agency's determination that employees must wear a uniform while performing work constitutes a decision as to the methods and means of performing work. *Bureau of Customs and Border Protection*, 105 LRP 27628, 61 FLRA 48 (FLRA 2005).
- A proposal prescribing the use of firearms concerns the means of performing work. The fact that the proposal also may be related to an agency's internal security policies does not make it any less a Section 7106(b)(1) matter. *Immigration and Naturalization Service*, 99 FLRR 1-1024, 55 FLRA 228 (FLRA 1999).
- A proposal to maintain two pieces of equipment to perform work involved the methods and means of performing work because the agency intended that the work be performed by one piece of equipment. *Western Area Power Administration*, 98 FLRR 1-1144, 54 FLRA 642 (FLRA 1998).
- A provision allowing the union to discontinue using certain equipment was enforceable in arbitration. That the award may have excessively interfered with management rights was deemed irrelevant. *Federal Aviation Administration*, 107 LRP 38321, 62 FLRA 90 (FLRA 2007).
- An agency wasn't required to negotiate a union proposal concerning the height of partitions between employee work spaces. The proposal impacted the means of performing work because supervisors had to locate employees quickly, and higher partitions would directly interfere with the mission-related purposes of lower partitions. *Broadcasting Board of Governors*, 103 LRP 53112, 59 FLRA 447 (FLRA 2003).

Agency Resistance



- Many agencies may claim proposals pertaining to 7106(b)(1) issues are non-negotiable as they have not elected to negotiate over management's rights.
- As yourself: Does my proposal containing permissive topics have the specificity required in the case law?
- If your agency claims that your proposal is non-negotiable, then contact your national representative or Field services about filing a unfair labor practice or negotiability





Bargaining Permissive Subjects

- Parties can submit a proposal over a permissive subject of bargaining to the FMCS and FSIP per President Biden Executive Order 14003 (2021).
- Once in an agreement, a provision on any permissive subject is just as enforceable during the life of the agreement as any provision on a mandatory subject.
- Once an agreement expires, mandatory subjects remain in effect and permissive subjects may expire (unless you negotiate specific terms saying that permissive subjects will continue upon expiration).





Once in an agreement, a provision on any permissive subject is just as enforceable during the life of the agreement as any provision on a mandatory subject.



PROHIBITED SUBJECTS OF BARGAINING



What are Prohibited Subjects of Bargaining?

- Proposals cannot conflict with government-wide regulations that are in effect at the time of negotiations.
- Proposals cannot be contrary to regulations at the Agency or Primary National Subdivision where the FLRA determines there is a “compelling need” for the regulation.
 - ✓ Compelling Need is when the rule or regulation is found to be essential “to the accomplishment of the mission” or “the execution of functions of the Agency...”
 - ✓ Proposals cannot be contrary to any rule or regulation that is necessary to ensure the “maintenance of basic merit principles”.



It is Illegal to Bargain Over Subjects Set by Law

Examples generally include

- **Pay**, *with exceptions*NAF + DC Government can negotiate wages**
 - ✓ (Grades allowed, through (b)(1) topics)
- **Health Insurance**, and
- **Retirement.**

However, laws leave many terms and conditions incomplete, providing for details and options that can be bargained...



Examples of Compensation Increases that CAN be BARGAINED

- Grades
- Criteria for Career Ladder Promotions
- The right to demand Temporary Promotions where there has been a change in duties
- Performance Awards
- Transportation Stipends
- Tuition Reimbursement
- Prices for Food Services
- Parking



MANAGEMENT RIGHTS AS A PROHIBITED SUBJECT OF BARGAINING



“Management Rights” also Include Staffing Decisions

Management rights that cannot be negotiated away also include staffing decisions, such as the right to:

- Hire
- Assign
- Direct
- Lay-off
- Retain employees in the Agency
- Take Disciplinary Action (including suspend, remove, reduce in grade or pay)
- Make Selections or Appointments for Filling Positions
 - (i) among properly ranked and certified candidates for promotion; or
 - (ii) any other appropriate source



But We Can Bargain Over How Management Rights are Implemented

When Management Rights are Invoked, we can Bargain (you will remember these from before):

- 1) **Procedures:** which management officials will observe in exercising any management rights (i.e., how they may be implemented, but not changing the right itself);
- 2) **Appropriate Arrangements:** for employees adversely affected by the exercise of any (management rights) authority under this section.



To Repeat



**The Agency must Bargain
over Procedures and
Appropriate Arrangements
for
Implementing the Change
and any Appropriate
Arrangements Designed to
Lessen the Adverse Impact
of the Change on
Employees.**

Under the Statute, an Agency is Obligated to Bargain over “conditions of employment “AFFECTING” bargaining unit employees. 5 U.S.C. 7104(a)(12).

This obligation encompasses bargaining over procedures by which management rights are exercised and appropriate arrangements for employees who are adversely “affected” by the exercise of those rights.

5 U.S.C. 7106(b)(2) and (3). *Dept. of Air Force, Scott AFB, IL and NAGE, Local R7-23, 35 FLRA 844 (1990).*



IMPACT AND IMPLEMENTATION BARGAINING



What is Impact and Implementation Bargaining?

- If the parties have already bargained a change to the terms and conditions of employment, or the change is not bargainable (because of non-negotiability, waiver, or emergency), the Agency still must bargain before implementing changes in conditions of employment of bargaining unit employees (as long as the change is greater than *de minimis*).
- In almost all situations, the Agency is required to maintain status quo conditions regarding the proposed change while the parties engage in Impact and Implementation (I&I) Bargaining.





I&I Bargaining Applies

- To Changes of Policy (including personnel policies, practices, and matters, even when established by rule, regulation, or otherwise, affecting working conditions).
- To Changes with a Negative or Positive Impact on terms and conditions of employment.
- The Change is an Exercise of a Management's Right
- New Management Guidance.
- A Change in Conditions Issuing from a Settlement Agreement.



WE are AFGE,
rights

Executive Orders Overturned: What Now?

Enter Goal Here



Executive Order 13836 and 13838



- Can you bargain official time, office space, etc.?
- What are you supposed to do now?
- [Field Services Guidance](#)



Case by Case Bargaining

- Not a one size fits all
- Your specific facts will guide your next steps
- Contact your AFGE District or Field Services to assist in analyzing your situation



Scenarios

Common EO Bargaining Scenarios



Is Your CBA Fully Negotiated ?

- “as soon as practicable” barrier in EO 14003 and OPM Guidance
- AFGE position is “as soon as practicable” means now

Action



1. Demand to bargain and remove all vestiges of the EO from your CBA
 2. Propose status quo from the previous CBA during the interim, because the current CBA constitutes an effectuation of the revoked Trump EOs
 3. File an information request for all employees disciplined, suspended or removed under the auspices of the EO, as a part of the review of the actions taken under the EOs
 4. Be prepared to bargain back all the rights the Trump EOs took, while insisting a return to pre-Trump EO working conditions during the negotiations
- *Contact M&O to develop organizing and public pressure campaign to encourage the Agency to return to the table.



Are you currently bargaining a mid-term or term agreement, to include FMCS or pending FSIP submissions?



 **Action**

1. Per EO 14003, demand the Agency, rescind all proposals that reflect the any aspects of the revoked Trump EOs and restart your bargaining with good-faith proposals.



Did your Agency unilaterally implement the Trump EOs?



Action

1. Per EO 14003, demand the Agency immediately, return to the pre-Trump Status quo and bargain the impact and implementation of EO 14003.



Do you have Trump EOs in your CBA through FSIP Decisions?

- “as soon as practicable” barrier in EO 14003 and OPM Guidance
- AFGE position is “as soon as practicable” means now

What is the status of your CBA? Has it passed ratification?
See OPM Guidance footnote 1

Actions



1. Demand to bargain and remove all vestiges of the EO from your CBA.
2. Propose status quo from the previous CBA during the interim, because the current CBA constitutes an effectuation of the revoked Trump EOs.
3. File an information request for all employees disciplined, suspended or removed under the auspices of the EO, as a part of the review of the actions taken under the EOs.
4. Be prepared to bargain back all the rights the Trump EOs took, while insisting a return to pre-Trump EO working conditions during the negotiations.

*Contact M&O to develop organizing and public pressure campaign to encourage the Agency to return.



Do you have a pending negotiability appeal asserting the Agency Head erred by applying Trump EOs?



Action



- FLRA has been contacting parties requiring them to send in joint statements identifying which aspects of the appeal are related to Trump EOs.
- We support this action, because it sets the table for I&I bargaining for EO 14003 and will likely result in the Union winning the appeal related to Trump EO provisions.





Best Practices - Biden Administration



How to develop a relationship with a new administration and strengthen labor management relations at your agency

- **Regularly schedule meetings**
- **Identify changes made by the prior Administration and make new political appointees aware**
- **Provide solutions to workforce issues**
- **Peer – level Professional conduct**

Questions?

