

Collective Bargaining I: Legal Frameworks

Introduction to Collective
Bargaining Series
Field Services & Education Dept.





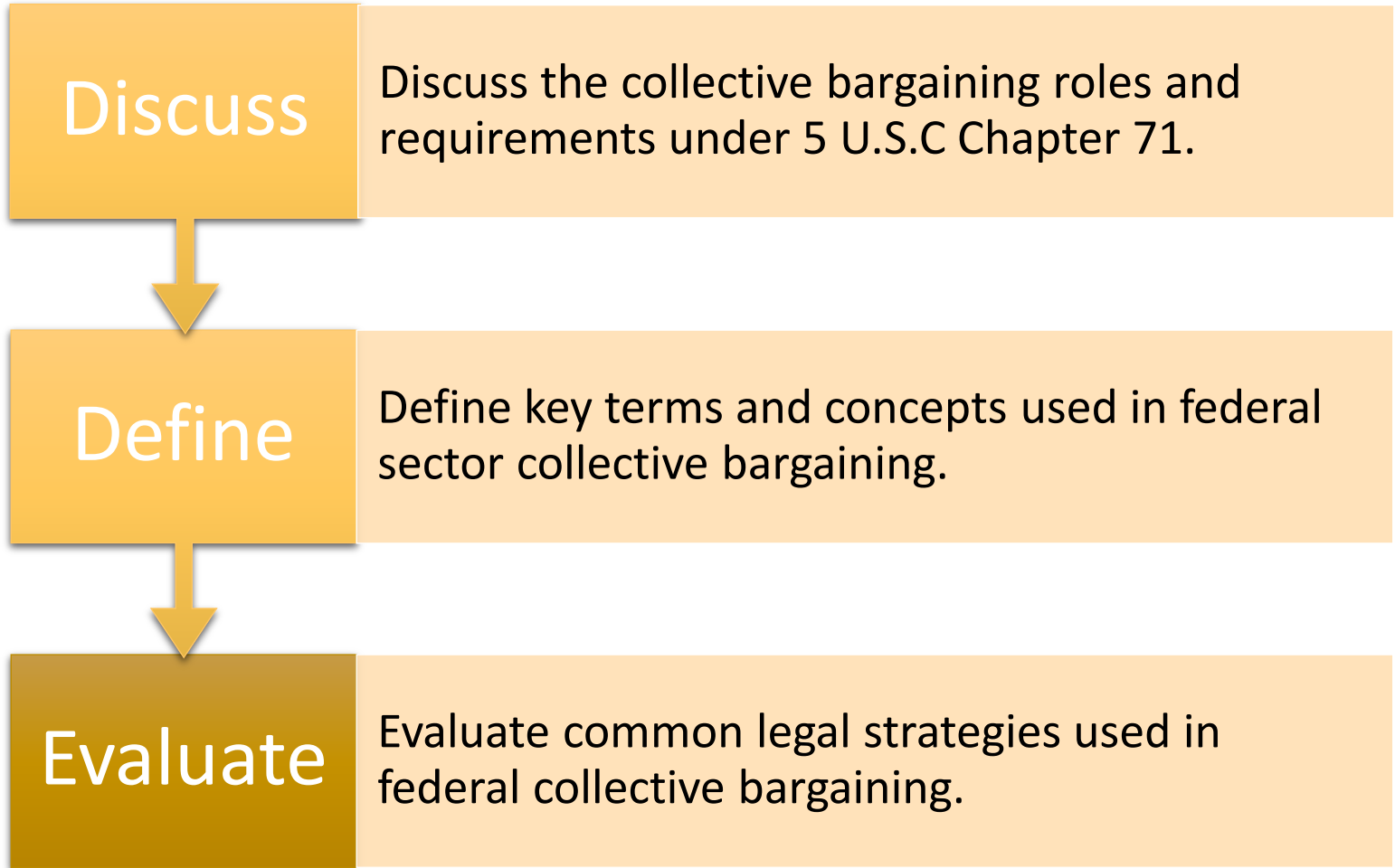
WELCOME



AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES



Objectives



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?

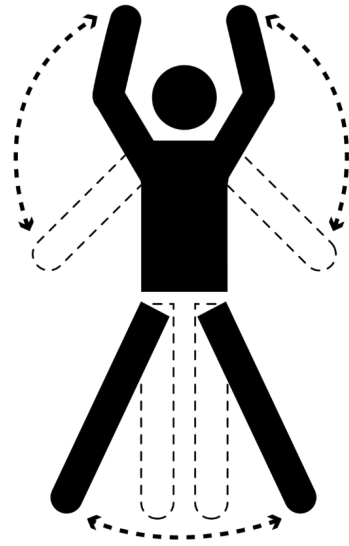


WHAT IS COLLECTIVE BARGAINING?



Exercise:

What is Collective Bargaining?



What 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.



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.



Collective Bargaining

That's what makes us a Union!



Collective Bargaining

Why do we bargain with the agency?

To determine working conditions for bargaining unit employees.



Collective Bargaining

Collective bargaining is just one type of negotiation.

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



Collective Bargaining

Bargaining is not war.

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





FEDERAL COLLECTIVE BARGAINING



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.



The Statute



The Statute

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.

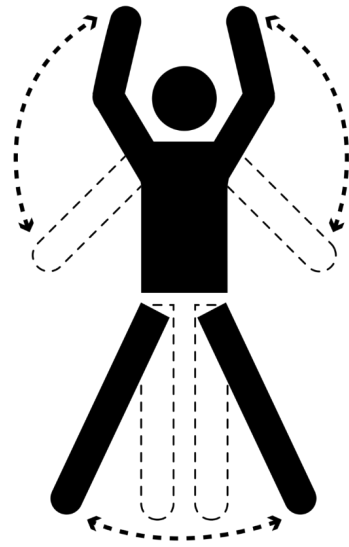


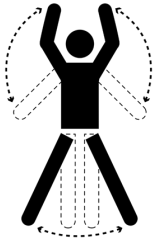
The Statute

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



Exercise: What's in the Statute?





Federal Collective Bargaining:

- 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)

...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.



INTRODUCING: The Union as the Exclusive Representative

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.)



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.”

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.

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



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.

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.**



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

...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.

...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.

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

Substance Bargaining

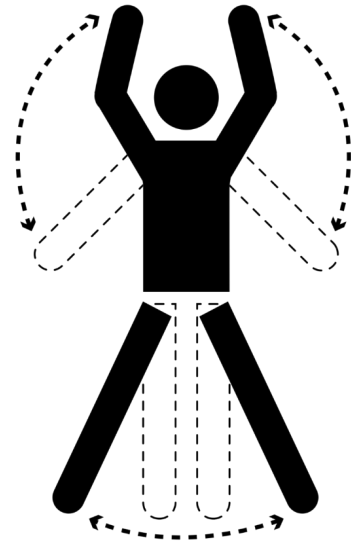
- Does NOT interfere with a management right under Section 7106(a)
- Examples include:
 - Grievance procedures
 - Official time for union representation
 - Fitness programs
 - Union recognition programs

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.

Exercise:

Substance vs. Impact and Implementation



Federal Collective Bargaining: The Process and the Players

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

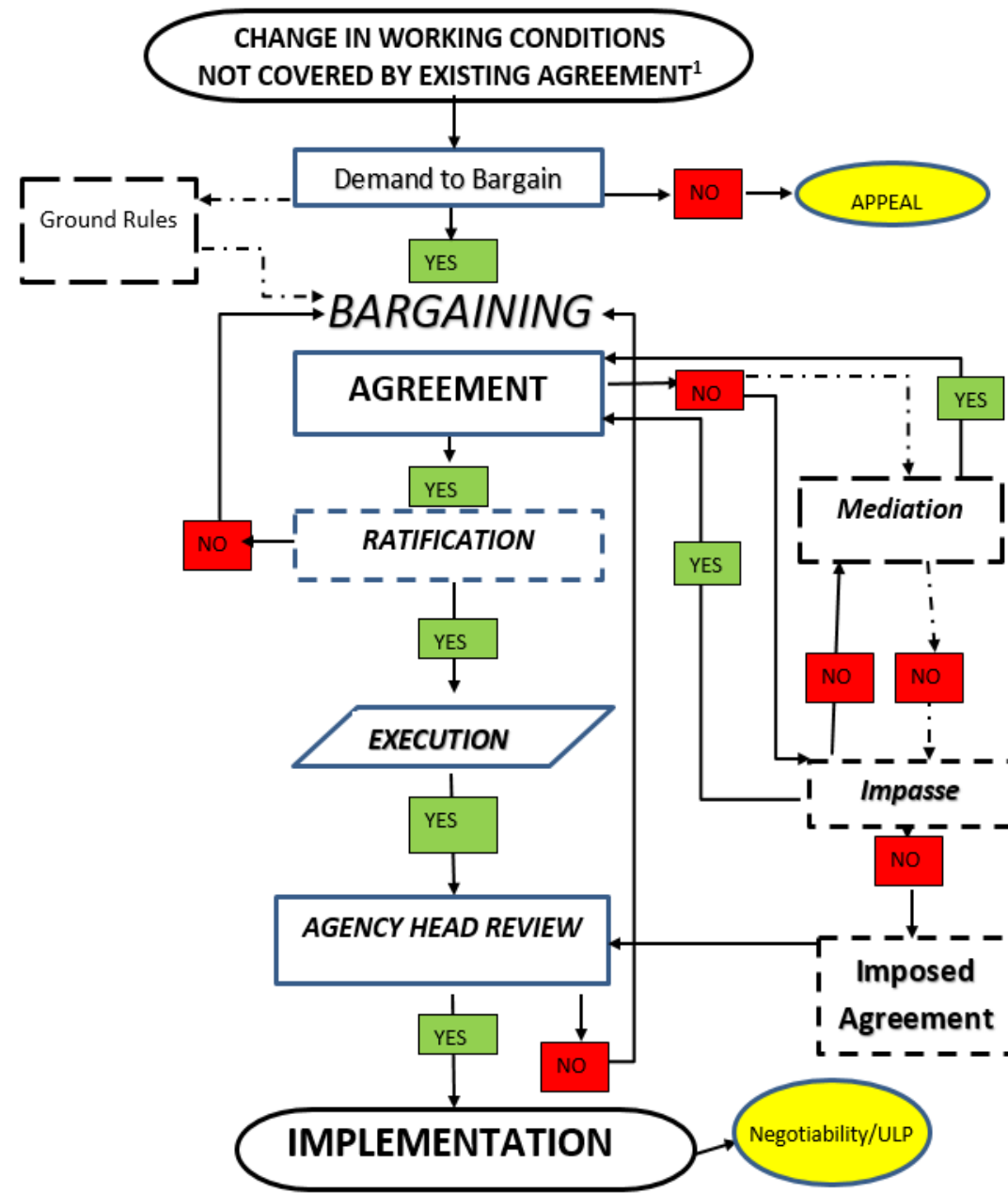
Change in working conditions (issue not covered in current contract)

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)

FEDERAL COLLECTIVE BARGAINING PROCESS



The NEUTRALS



INTRODUCING:

The Federal Labor Relations Authority

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

INTRODUCING:

The Federal Mediation and Conciliation Service



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

INTRODUCING:

The Federal Service Impasses Panel



Federal Service Impasses Panel (FSIP)

- Makes final resolution to negotiation impasses between federal unions and agencies
- Also decides disputes over alternative work schedules (5 USC 6131)
- Uses various methods, including acting as a final arbitrator
- Process is the substitution for a strike or lockout

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

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

INTRODUCING:

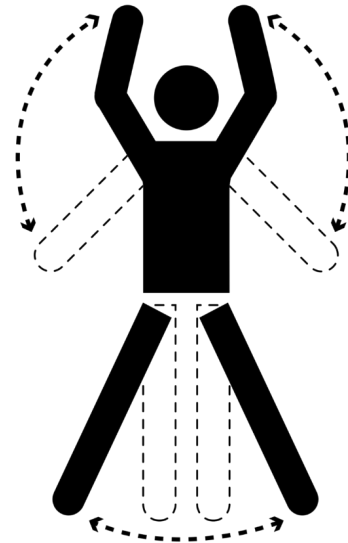
Arbitrators

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

Exercise:

Know your Neutrals



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.

BARGAINING BEGINS WITH A CHANGE

Stop Destroying
Good Federal
Jobs

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Stop Destroying
Good Federal Jobs

America
serves a Ra



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DEMAND TO BARGAIN



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)

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?

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.



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,



DEMAND to Bargain: Additional Language

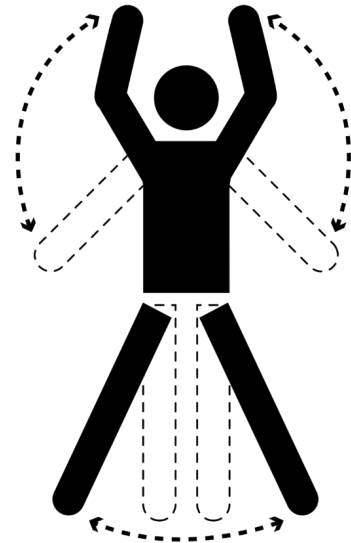
Attached is a request pursuant to the contract and 5 U.S.C. 7114 (b) (4) for information that is necessary for our collective bargaining.

Or

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

Exercise:

DEMAND TO BARGAIN



INFORMATION REQUESTS



AFGE



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



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)



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).

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

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;

The Particularized Need Test

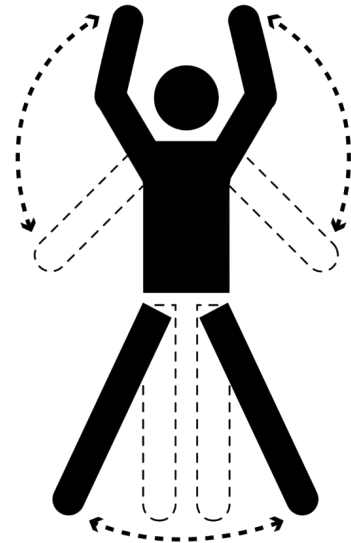
Involves what the parties must consider. When the Union requests information under the labor law, it must tell the Agency:

- **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.

Exercise:

INFORMATION REQUEST



STRATEGIC BARGAINING



Stop Destroying
Good Federal Jobs



AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

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.

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.

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



TURNING The BARGAINING PROCESSES INTO STRATEGY

1.PLAN

2.TRAIN

3.PREPARE



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.

PROPOSAL WRITING



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?

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.

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

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

Comments re: Writing Proposals

The agreement should be clear and unambiguous!

Ask yourself:

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

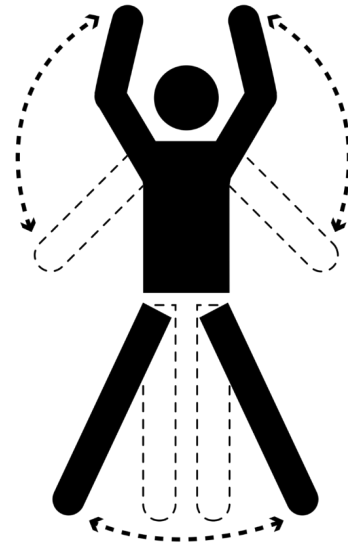
“Sec. 1. Notwithstanding the provisions of Handbook 871.3, employees may be given additional time when warranted by the circumstances.”

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

“What did you say?”

Exercise:

PROPOSAL WRITING I



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 !

Ask First—

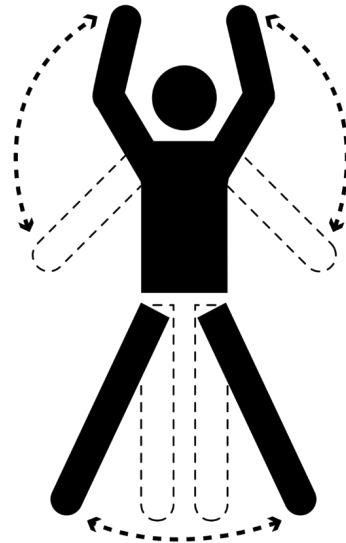
Does the Proposal Meet Unit Needs?

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?**

Exercise:

PROPOSAL WRITING II



GROUND RULES



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, ND and AFGE, 22 FLRA 612 (1986).

Ground Rules

Do we need written Ground Rules?

Writing Proposals Ground Rules

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

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

Writing Proposals Ground Rules

What do they contain, cont.

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



Ground Rules

What do they contain, cont.

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



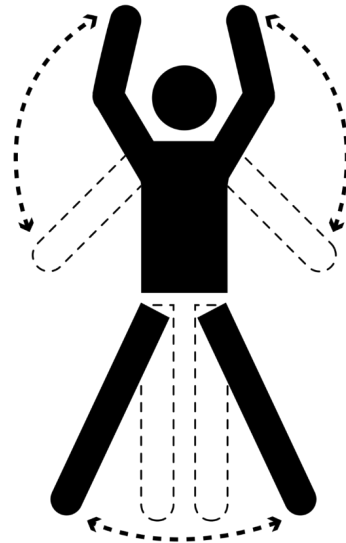
What do they contain, cont.

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

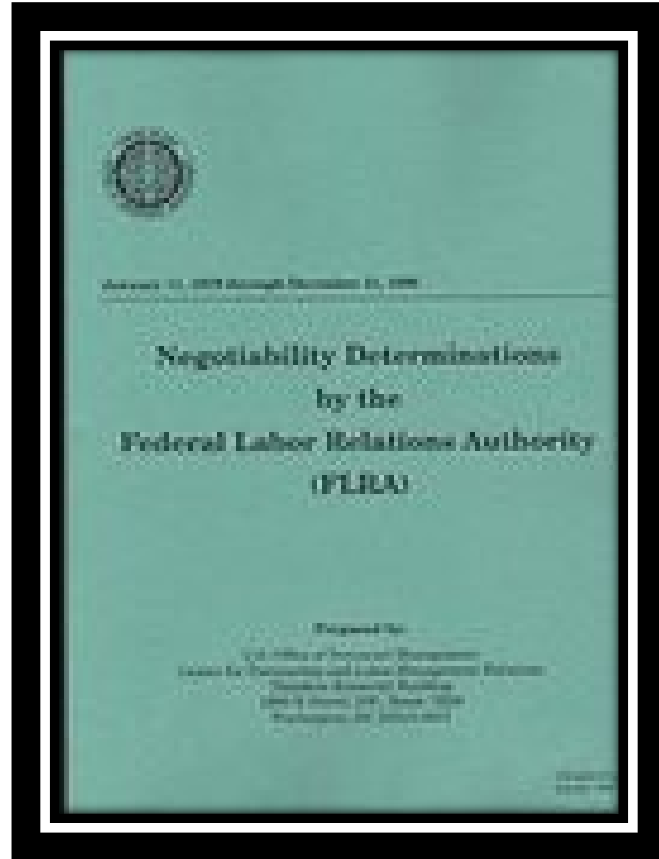


Exercise:

PROPOSAL WRITING III



NEGOTIABILITY



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.

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).

ANALYTICAL FRAMEWORKS



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.

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.

GOVERNMENT-WIDE RULES and REGULATIONS

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

5 USC §7117(a)(2)

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)

PERMISSIVE TOPIC

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

- Appropriate Arrangements
- Procedures

5 USC §7106(b)

Covered By

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

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)**

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.

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)

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

AGENCY HEAD REVIEW WILL OVERTURN

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

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).

PAST PRACTICE

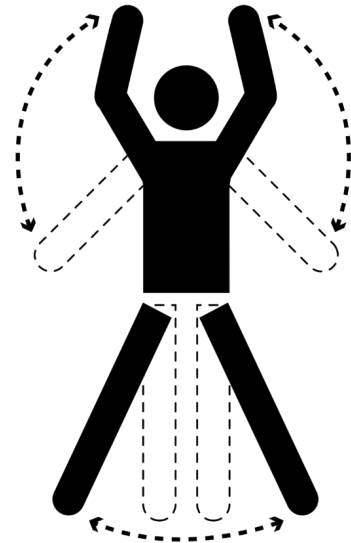
- A past practice involves a working condition that has evolved at the workplace outside of the CBA or agency regulations.
- To be considered a “past practice” the practice must be consistently followed and known to both the Agency and the employees.
- When the Agency changes a past practice, it must 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.

NOT MEETING TIMELINE FOR DEMAND TO BARGAIN

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

Exercise:

Analytical Frameworks



BARGAINING 101



Stop Destroying
Good Federal Jobs



AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

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.

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

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.

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.

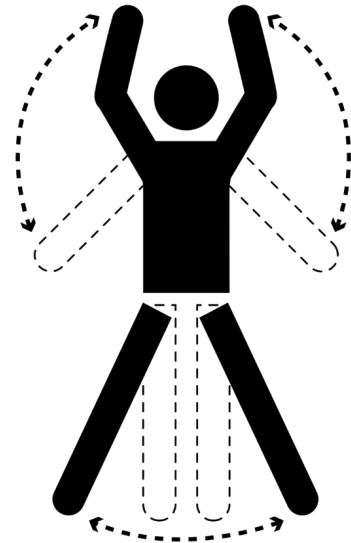
Bargaining Behavior

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!

Exercise:

MOCK BARGAINING



SUMMARY & REVIEW

