



Federal Labor Relations Authority

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Comprehensive Negotiability Training

July 22, 2015

Segment 1

2

Terms & Concepts

Proposals & Provisions

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- Proposal — language offered for bargaining that parties haven't agreed to — Ag has declared outside the duty to bargain. 5 C.F.R. §§ 2424.2(c) & 2424.2(e).
- Provision — contract language that U and Ag negotiators have agreed to as part of their CBA or FSIP has imposed; disapproved on Ag-head review under § 7114(c).
Id. § 2424.2(f).

“Meaning” Issues

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- If parties’ agreed meaning (or U’s explanation) consistent with wording, adopt; if not, don’t. *E.g.*, 67 FLRA 654, 655; 66 FLRA 278, 278; 65 FLRA 509, 510; 51 FLRA 451, 459.
- Provision cases – defer to parties that executed agreement, not Ag head. *E.g.*, 65 FLRA 509, 514.
- Meaning adopted by Authority will apply in other proceedings. *E.g.*, 55 FLRA 562, 564 n.9.

Subjects of Bargaining

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- **Mandatory**
 - Must bargain
 - *E.g.*, § 7106(b)(2) & (3)
- **Prohibited**
 - Cannot agree to (law prohibits)
 - *E.g.*, § 7106(a) (where no exception applies)
- **Permissive**
 - May bargain/agree to
 - *E.g.*, § 7106(b)(1); agreements to bargain below level of recognition, *e.g.*, 62 FLRA 174, 182

Negotiability Disputes: “Never”

5 C.F.R. § 2424.2(c)

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- **Proposals:** Prohibited and permissive are outside the duty to bargain
- **Provisions:** Only prohibited may be disapproved by Ag head
- **Examples of bases for negotiability claims:** statutes (including FSLMRS), executive orders, gov’t-wide rules and regs, Ag regs with “compelling need”
- **Look at each proposal or provision in petition, e.g., 65 FLRA 738, 741**

Bargaining-Obligation Disputes: “Now”

5 C.F.R. § 2424.2(a)

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- Not required to bargain under current circumstances.
 - *E.g.*, “covered by,” “de minimis,” bargaining below level of recognition
- No ULP remedies. *Id.* § 2424.40(a).
- Dismiss petition/portion of petition if only these disputes; any resolution must occur in other proceedings (such as grievance or ULP).

“Allegation of Nonnegotiability”

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- For proposals
- Ag says: Outside the duty to bargain
- No particular degree of specificity required

Agency-Head Disapproval

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- For provisions
- Ag head says: Contrary to law, gov't wide rule or regulation
- Cannot disapprove permissive

Sequence/Filings (Generally)

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- U Petition for Review
- “CADRO” & Post-Petition Conference
- Ag Statement of Position
- U Response
- Ag Reply

Parties' Burdens/Failure to Meet

- Both: Create record & support arguments. 5 C.F.R. § 2424.32(a)-(b).
- U: Within duty to bargain, not contrary to law, or permissive; any severance request (but can reserve that until response). *Id.* § 2424.32(a).
- Ag: Outside duty to bargain or contrary to law; why severance is not appropriate (if U requested in petition). *Id.* § 2424.32(a)-(b).
- Failure to raise and support = waiver. *Id.* § 2424.32(c)(1).
- Failure to respond = concession. *Id.* § 2424.32(c)(2).
- Failure to support = bare assertion. *E.g.*, 66 FLRA 124, 128.

Severance

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- Division of proposal/provision into separate parts with independent meaning, for purpose of determining whether any separate parts = within duty to bargain/contrary to law. 5 C.F.R. § 2424.2(h).
- U may request in petition or response. *Id.* §§ 2424.22(c) & 2424.25(d).
- Ag may oppose; must explain why inappropriate. *Id.* §§ 2424.24(d) & 2424.26(d).

Hearing Requests

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- High standard: *Necessary* to resolve *disputed* issues of *material* fact. 5 C.F.R. § 2424.31.
- Authority rarely grants hearing requests; almost always relies on documents in the record.

Other Avenues for Resolving Negotiability

- ALJs and grievance arbitrators: May when resolving duty-to-bargain questions. *E.g.*, 64 FLRA 443, 446-47.
- Not FSIP or interest arbitrators (unless “substantively identical” to previous proposal/provision). *E.g.*, 31 FLRA 620, 624.

Segment 2

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The Negotiability Process

Union Files Petition for Review

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- Initiates process before Authority.
- Only U may file.
- Process depends on: proposal or provision.

Union's Petition (Process): Proposals

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- Solicited allegation of nonnegotiability
 - U requests (in writing), and Ag responds w/ written allegation: U **must** file within 15 days of service of allegation. 5 C.F.R. § 2424.21(a).
 - U requests (in writing), but Ag doesn't respond. U can file petition at any time after 10-day period for Ag response. *Id.* § 2424.21(b).

Union's Petition (Process): Proposals

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- Unsolicited allegation of nonnegotiability
 - U doesn't request, but Ag gives (in writing). Two options. U can:
 - (1) file petition, but it must do so timely (within 15 days); or
 - (2) not file petition and later request written allegation if U wants to pursue an appeal. In (2), if Ag gives written allegation, U must file within 15 days; if Ag doesn't, then U can file any time after 10-day period. *Id.* §§ 2424.11(c) & 2424.21(a)-(b); 52 FLRA 1429, 1435.
 - Ag may provide unsolicited allegation before the FSIP, and same rules apply. 50 FLRA 121, 121-22.

Union's Petition (Process): Provisions

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- **Within 15 days of service of Ag-head disapproval.
5 C.F.R. § 2424.21(a)(2).**

Union's Petition: Format & Content

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- Forms (including eFiling) or same information
- In proposal cases, where Ag gave written allegation, copy of that allegation; where Ag did not give written allegation, evidence U requested one
- In provision cases, copy of Ag-head disapproval
- Exact wording
- Special terms
- Copies of Ag regulations/instructions
- Meaning & operation
- Supporting arguments
- Any related proceedings
- Hearing request
- Severance
- Reps' info
- Statement of service

CADRO (Collaboration & ADR Office)

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- **Voluntary. 5 C.F.R. § 2424.10.**
- **Interest-based**
- **Suspends process**

Post-Petition Conference

22

- Authority, U rep(s), Ag rep(s)
- Normally by phone
- Parties must participate (*see* 5 C.F.R. § 2424.32(d) for consequences of failure to participate)
- Party reps must be knowledgeable about dispute and have authority to discuss and resolve matters. Includes:
 - Meaning
 - Any disputed factual issues
 - Objections to proposals/provisions
 - Any related proceedings

Post-Petition Conference

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- **Authority rep will:**
 - Gather factual information about the dispute (including meaning and impact of proposals/provisions)
 - Facilitate discussion, seek areas of agreement, discuss modifications to wording
 - Decide issues concerning requests for extensions (but not waivers) of time
 - Prepare written record (served on parties) – will not contain Ag legal objections; Ag must make in statement of position

Agency's Statement of Position (SOP) (5 C.F.R. § 2424.24)

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- **Within 30 days of Ag head's receipt of petition**
- **Forms (including eFiling) or equivalent**
- **Must contain all arguments why proposals outside duty to bargain/provisions contrary to law**
- **Any disagreements regarding meaning & operation**
- **Any disagreements regarding severance**

The Union's Response (5 C.F.R. § 2424.25)

25

- Within 15 days of receiving Ag's SOP
- Forms (including eFiling) or equivalent
- Must discuss any claims from SOP that U disagrees with
- If not previously provided:
 - Copies of Ag regs
 - Any requests for severance

The Agency's Reply (5 C.F.R. § 2424.26)

26

- Must file within 15 days after Ag receives copy of U's response
- Forms (including eFiling) or equivalent
- Created by regulation to allow Ag to respond to facts or arguments made for the first time in U's response
- May not raise new arguments/bases for nonnegotiability that could have been raised in SOP

Other Filings & Amicus Curiae Petitions

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- Written request for permission
- Additional submissions may be filed only in “extraordinary circumstances.” 5 C.F.R. § 2424.27.
- Parties encouraged to include submission along with request
- Amicus requests will be granted only if Authority deems “appropriate.” *Id.* § 2429.9.

Where to File

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**Chief, Case Intake and Publication (CIP)
Federal Labor Relations Authority
Docket Room, Suite 200
1400 K Street NW.
Washington, DC 20424-0001**

Phone = (202) 218-7740

Fax = (202) 482-6657 (only motions)

How to File

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5 C.F.R. § 2429.24:

- eFiling
- In person
- Commercial delivery
- First-class mail
- Certified mail
- NOT fax (except for motions)

When to File

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- For eFiled: Any calendar day (including Saturdays, Sundays, and holidays) or time (by midnight Eastern Time), but don't have to on weekends/holidays
- For in-person: Monday through Friday (not holidays), 9 a.m. to 5 p.m. Eastern Time

“Service” Required

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- Parties must serve other parties with copies of everything they file with Authority. 5 C.F.R. § 2424.2(g).
- U must serve Ag head (in addition to principal Ag bargaining rep). *Id.*
- Methods:
 - Certified mail
 - First-class mail
 - In person
 - Email (ONLY if other party consents)
 - NOT fax (except service of motions)

Additional Procedural Requirements

- Original and 4 copies of everything must be filed with Authority (except eFile). 5 C.F.R. § 2429.25.
- Table of contents if over 10 double-spaced pages (except fillable forms in eFiling). *Id.* § 2429.29.
- Signed statement of service (or eFile certification). *Id.* § 2429.27(c).

Noncompliance with Procedural Requirements

33

- **Minor/technical – Authority will allow party to correct mistake (by deficiency order)**
- **But failure to file timely – dismiss petition with prejudice (after show-cause order)**
- **Failure to respond to Authority order:**
 - **Dismiss petition (for U failure)**
 - **Order bargaining or withdrawal of Ag-head disapproval (for Ag failure)**

Authority's Decision and Order

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- **Proposals:** Either dismiss petition or order bargaining
- **If proposal is permissive matter, order will say so**
- **Provisions:** Either dismiss petition or, if mandatory or permissive, order Ag head to rescind disapproval

After the Decision and Order

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Possible scenarios:

- **Comply**
- Timely move for reconsideration (within 10 days after service). 5 C.F.R. § 2429.17.
- Appeal to U.S. Court of Appeals within 60 days. 5 U.S.C. § 7123(a)(1). But can't make arguments that weren't made to Authority (except in "extraordinary circumstances"). *Id.* § 7123(c).
- Report, to the appropriate RD, any failure to comply – within a "reasonable period of time" after 60-day appeal time expires. 5 C.F.R. § 2424.41.

Segment 3

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Bases for Dismissing Petitions

Bases for Dismissing Petitions

37

- Proposal or provision nonnegotiable
- Failure to comply with certain procedural and other requirements
- No negotiability dispute (look to each proposal/provision, *e.g.*, 65 FLRA 738, 741)
 - *E.g.*, if only bargaining-obligation dispute. 5 C.F.R. § 2424.2(d).

Bases for Dismissing Petitions

Mootness

- No advisory opinions. 5 C.F.R. § 2429.10.
- Jurisdictional – burden on party arguing
- But Authority may raise “sua sponte”
- Issues that led to filing of petition resolved, or no longer a dispute between the parties. *E.g.*, 66 FLRA 393, 393.
 - *E.g.*, not bargaining over wording in petition. 67 FLRA 280, 281-83.
 - *E.g.*, date already passed. 58 FLRA 409, 410.
 - *E.g.*, parties reached agreement. 52 FLRA 251, 254.

Bases for Dismissing Petitions

39

- “Directly Related” to ULP or Grievance
 - Generally dismiss petition if U has filed ULP charge or grievance alleging ULP.
 - Exception in “compelling need” cases.
 - Dismissal without prejudice: U may refile petition within 30 days of administrative resolution of ULP charge or grievance, if negot issue has not been resolved.
 - *See, e.g.:*
 - ✦ 56 FLRA 796, 797 (grievance was directly related to petition);
 - ✦ 66 FLRA 1038, 1038-39 (grievance wasn’t directly related).

Bases for Dismissing Petitions

40

- If petition seeks review of proposal/provision that has not “substantively changed” from prior petition, *e.g.*, 56 FLRA 236, 237-38, and
- Authority dismissed previous petition with prejudice, *e.g.*, 5 C.F.R. § 2424.32(d),
- Then Authority will dismiss petition.

Segment 4

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Substantive Issues

Conditions of Employment

42

- Personnel policies, practices, and matters, established by rule, regulation, or “otherwise,” affecting working conditions. 5 U.S.C. § 7103 (a)(14).
- Exceptions:
 - Hatch Act political activity (*Id.* §§ 7321-7326)
 - Classification matters (as defined in 5 C.F.R. § 511.101)
 - Matters “specifically provided for by [f]ederal statute” (5 U.S.C. § 7103(a)(14))

“Specifically Provided For”

43

- Reference to matter not enough
- Ag has no discretion
- Example where established: 57 FLRA 373, 383 (wage rates for GS employees)
- Example where not established: 56 FLRA 664, 665-66 (law concerning Ag’s optical and dental plan preserved Ag’s discretion to negotiate over that matter).

Conditions of Employment

44

- 2-prong “*Antilles*” test:
 - Does matter pertain to bargaining-unit employees? *And*
 - Is there a “direct connection” between the matter and the work situation or employment relationship of the unit employees?
- 22 FLRA 235, 236-37.

Non-Bargaining-Unit Employees

45

- Four groups of non-unit personnel:
 - 1) employees in other bargaining units;
 - 2) supervisors;
 - 3) non-supervisory employees not in any bargaining unit; and
 - 4) non-employees.
- *Cherry Point*, 952 F.2d 1434, 1442 (D.C. Cir. 1992).

Employees in Other Bargaining Units

46

- If proposal *directly determines* conditions of employment of employees in other units: prohibited subject (principle of exclusive recognition). 65 FLRA 1052, 1054.

Supervisors

47

- **Proposals that directly implicate supervisors' conditions of employment = permissive subjects.**
- **So can't be disapproved by Ag head, e.g., 61 FLRA 336, 339, and enforceable in arbitration, e.g., 52 FLRA 677, 682.**

Non-Employees/Employees Not in *Any* Unit

48

- Proposals directly implicating working conditions of non-employees or employees not in any bargaining unit = outside duty to bargain unless they “vitaly affect” unit employees’ conditions of employment. *Cherry Point*, 952 F.2d at 1442-43. But permissive subjects.
- Is the proposal’s effect on unit employees’ conditions of employment “significant and material, as opposed to indirect or incidental”? *E.g.*, 64 FLRA 723, 727; 58 FLRA 344, 348.

Management Rights: General Principles

49

- 7106(a)(2) – limited by “applicable laws”
- 7106(a)(1) – not limited by “applicable laws”
- 7106(b)(1)
- All include right to not act
- All limited by 7106(b)(2) and (3)
- Proposal/provision may involve more than one right – Authority addresses only those raised

Mission (§ 7106(a)(1))

50

- Case by case. *E.g.*, 58 FLRA 341, 342.
- What mission includes/doesn't include. *E.g.*, 59 FLRA 159, 163.
- Generally not “how carried out.” *E.g.*, *id.*
- But when part of mission = serve public, proposals/provisions regarding hours office is open may affect. *E.g.*, 49 FLRA 333, 349; 22 FLRA 868, 869.

Budget (§ 7106(a)(1))

51

- **Affected if either:**
 - (1) Proposal/provision prescribes particular programs to be included in budget, or amount to be allocated in budget; or
 - (2) Ag makes “substantial demonstration that an increase in costs is significant and unavoidable and is not offset by compensating benefits.” *E.g.*, 61 FLRA 113, 116.
- **Increase in costs, by itself, not enough. 66 FLRA 124, 125.**
- **Second part of test looks at the proposal or provision relative to organizational level to which it applies. 44 FLRA 18, 30.**

Organization (§ 7106(a)(1))

52

- Determine Ag's administrative and functional structure, including relationship of personnel through lines of authority and distribution of responsibilities for delegated and assigned duties. *E.g.*, 63 FLRA 530, 532.
- Includes rights to determine how organization will be divided up into sections, *e.g.*, 58 FLRA 175, 178, and where, geographically, Ag will operate, *e.g.*, 56 FLRA 444, 449.

Number of Employees in Agency (§ 7106(a)(1))

53

- Total number actually employed. *E.g.*, 46 FLRA 298, 316.
- Different from numbers of employees assigned to organizational subdivisions, work projects, or tours of duty under § 7106(b)(1). *E.g.*, *id.* at 316-17.

Internal Security (§ 7106(a)(1))

54

- Determine policies and practices that are part of Ag's plan to secure or safeguard its personnel, physical property, or operations against internal and external risks. *E.g.*, 66 FLRA 929, 931.
- Ag must show link, or reasonable connection, between its security objective and agency policy or practice designed to implement that policy/practice, and that proposal or provision conflicts with policy/practice. *E.g.*, *id.*
- Authority doesn't review merits of Ag's policy/practice. *E.g.*, *id.*

Hire Employees (§ 7106(a)(2)(A))

55

- Includes right to decide whether to fill positions.
E.g., 62 FLRA 93, 94-95.

Assign Employees (§ 7106(a)(2)(A))

56

- Is the right to assign employees to positions. *E.g.*, 62 FLRA 508, 510.
- Both initial hiring and post-hiring, such as reassignments, temporary assignments, or details. *E.g.*, 65 FLRA 911, 913.
- Also duration of assignments. *E.g.*, 61 FLRA 209, 218.
- Determine qualification and skills needed for positions, and judge whether particular employees possess them. *E.g.*, 62 FLRA 508, 510.

Direct Employees (§ 7106(a)(2)(A))

57

- Supervise employees and determine quantity, quality, and timeliness of work. *E.g.*, 65 FLRA 508, 511.
- Establish performance standards and evaluate/hold employees accountable under those standards. *E.g.*, 63 FLRA 450, 453.
- Select particular methods of supervision (*e.g.*, spot checks). *E.g.*, 62 FLRA 15, 17.
- NOT the right to decide whether to reward performance that's already been evaluated. *E.g.*, 63 FLRA 505, 508.

Layoff & Retain Employees (§ 7106(a)(2)(A))

58

- Separate rights. *See* 58 FLRA 344, 345.
- Layoff = Includes right to conduct reduction in force and decide what positions to abolish & retain. *E.g.*, 65 FLRA 911, 913.
- Retain = Establish policies or practices that encourage or discourage employees from remaining employed by Ag.
 - *E.g.*, voluntary-separation-incentive pay, *e.g.*, 67 FLRA 85, 87, or substitutes for special rates, *e.g.*, 60 FLRA 839, 841-42.

Suspend, Remove, Reduce in Grade or Pay (§ 7106(a)(2)(A))

59

- Suspend employees. *E.g.*, 19 FLRA 647, 650.
- Remove = *e.g.*, determining which positions to vacate, *e.g.*, 11 FLRA 475, 482, or sequence of vacating positions, *e.g.*, 3 FLRA 3, 5-6.
- Reduce in grade or pay = *e.g.*, Ag's right to take actions against employee for a particular offense. *E.g.*, 53 FLRA 539, 579.

Discipline (§ 7106(a)(2)(A))

60

- For both performance- and nonperformance-related conduct. *E.g.*, 65 FLRA 142, 145.
- Investigate and determine appropriate investigative techniques. *E.g.*, 60 FLRA 124, 127.
- Decide which evidence to rely on. *E.g.*, 61 FLRA 341, 346.
- Decide penalty. *E.g.*, 53 FLRA 625, 679.

Assign Work (§ 7106(a)(2)(B))

61

- Determine particular duties to be assigned, when work assignments will occur, and to whom/what positions assigned. *E.g.*, 66 FLRA 819, 823.
- Establish qualifications and skills, decide whether employees meet them. *E.g.*, 61 FLRA 97, 99.
- Does not include decision whether to reward performance. *E.g.*, 63 FLRA 505, 508.
- Not affected merely because proposal/provision requires Ag to take some action. *E.g.*, 64 FLRA 443, 447.

Contract Out & Determine Personnel (§ 7106(a)(2)(B))

62

- Contract out = affected by proposals/provisions that delay contracting out, *e.g.*, 60 FLRA 595, 597, or require cost study beforehand, *e.g.*, 48 FLRA 168, 204.
- Determine personnel = decide employees to whom work will be assigned. *E.g.*, 61 FLRA 371, 373.

Make Selections to Fill Positions (§ 7106(a)(2)(B))

63

- Select from: (1) among properly certified candidates for promotion; or (2) any other appropriate source.
- Decide qualifications, skills, and abilities needed for position and determine whether applicants have those. *E.g.*, 61 FLRA 618, 622.
- Affected by proposals that limit sources of selection. *E.g.*, 56 FLRA 1046, 1048.
- Proposals that expand sources of selection do not affect. *E.g.*, 61 FLRA 226, 229.

Carry Out Mission in Emergencies (§ 7106(a)(2)(B))

64

- Includes rights to:
 - Independently assess whether emergency exists; and
 - Decide what actions are needed to address it. *E.g.*, 58 FLRA 549, 551.
- Examples: proposals/provisions that define “emergency,” see 55 FLRA 243, 245, and proposals/provisions that preclude management from acting until a particular individual declares an emergency, *e.g.*, 31 FLRA 131, 132.

Section 7106(b)

65

- All rights in § 7106(a) = “subject to” § 7106(b)
- Three parts:
 - § 7106(b)(1)
 - § 7106(b)(2)
 - § 7106(b)(3)

Section 7106(b)(1)

66

- Permissive (“at the election of” the Ag). *E.g.*, 62 FLRA 90, 92.
- Ag head cannot disapprove agreements unless otherwise unlawful. *E.g.*, 61 FLRA 336, 338, 339.
- Enforceable in arbitration. *E.g.*, 62 FLRA 90, 92.
- Trumps § 7106(a) – lawful despite effect on (a) rights.
E.g., *id.*
- If also concerns § 7106(b)(2) or § 7106(b)(3), then mandatory (must bargain). *E.g.*, 62 FLRA 341, 343.

Numbers, Types, & Grades . . .

- Numbers = increase, decrease, or maintain in organizational subdivision, work project, tour of duty. *E.g.*, 57 FLRA 424, 426. (Different from “number” in § 7106(a)(1).)
- Types = distinguishable classes, kinds, groups, or categories of employees or positions that are relevant to establishment of staffing patterns. *E.g.*, 52 FLRA 1024, 1032, 1034.
- Grades = for example, GS levels. *E.g.*, *id.* at 1032 n.11.

... Assigned to Organizational Subdivision, Work Project, or Tour of Duty

68

- Organizational subdivision. Examples = proposals/provisions:
 - Involving centralization/decentralization within agency.
E.g., 54 FLRA 1302, 1306.
 - Staffing of subdivisions (but not establishing subdivisions).
E.g., 52 FLRA 794, 802.
- Work project = “particular job” or “task.” 55 FLRA 848, 853.
 - Example: Supervising inmates. *Id.* at 853-54.
- Tour of duty = the hours of a day (daily tour) and days of an administrative workweek (weekly tour) that constitute an employee’s regularly scheduled administrative workweek. 57 FLRA 424, 426.

Technology of Performing Work

69

- Technology = the technical method that will be used in accomplishing or furthering the performance of the Ag's work. *E.g.*, 58 FLRA 273, 275.
- Must show:
 - The technological relationship of the matter addressed by the proposal/provision to accomplishing or furthering performance of Ag's work; and
 - How the proposal/provision would interfere with the purpose for which the technology was adopted.

Methods and Means of Performing Work

70

- Method = the way in which Ag performs its work – the “how.”
- Means = any instrumentality – including an agent, tool, device, measure, plan, or policy – that agency uses to accomplish, or further the performance of, its work – the “with what.”
- Ask:
 - (1) is there a direct or integral relationship between the Ag’s chosen method/means and the accomplishment of the Ag’s mission?; and
 - (2) does the proposal/provision directly interfere with the mission-related purpose for which the method/means was adopted?
E.g., 66 FLRA 639, 646.
- Relative importance irrelevant. *E.g.*, 66 FLRA 112, 115.
- Examples: 66 FLRA 499, 502; 56 FLRA 69, 69, 87-91; *but see* 64 FLRA 723, 725.

Section 7106(b)(2) – “Procedures”

71

- **Mandatory subjects** – must bargain, even if affect § 7106(a) or § 7106(b)(1)
- **Look to Authority precedent**
- **Examples:**
 - Requiring advance notice of certain agency actions. *E.g.*, 61 FLRA 209, 220.
 - Requiring management to delay exercise of rights pending completion of bargaining or appellate processes. *E.g.*, 61 FLRA 327, 331-33.
- **But see:**
 - Precluding management from assigning employees certain duties. *E.g.*, 47 FLRA 512, 520.
 - Substantially limiting right to determine content of performance standards. *E.g.*, 56 FLRA 1115, 1116 n.2.

Section 7106(b)(3) – “Appropriate Arrangements”

72

- “Appropriate arrangements for employees adversely affected by the exercise of any authority” under § 7106.
- Mandatory subjects – must bargain, even if affect § 7106(a) or § 7106(b)(1). *E.g.*, 66 FLRA 929, 940-41; 56 FLRA 69, 86.
- Within duty to bargain even if it’s not a procedure under § 7106(b)(2).

Appropriate Arrangements

73

“*KANG*” 2-part test:

- Arrangement?
- Appropriate?

21 FLRA 24, 31.

Arrangements

74

- Must seek to mitigate adverse effects flowing from exercise of a management right. *E.g.*, 68 FLRA 676, 679.
- U must identify effects or reasonably foreseeable effects that flow from management rights, and how they're adverse. *E.g.*, 21 FLRA 24, 31.
- Can't be speculative or hypothetical. *E.g.*, 59 FLRA 25, 29.
- Proposal/provision must be "tailored" to compensate/benefit employees suffering adverse effects due to management right. *Compare* 66 FLRA 929, 940-41 (tailored); *with* 51 FLRA 1308, 1318-19 (not tailored).
- But may be "prophylactic." *E.g.*, 64 FLRA 953, 959-60.

Is Arrangement “Appropriate”?

75

- Test different for proposals and provisions? *E.g.*, 65 FLRA 509, 512.
- Proposals = “excessive interference”
 - Weigh burdens on exercise of management rights against benefits to employees. *E.g.*, 21 FLRA 24, 31-32; *see also* 67 FLRA 316, 317-18.
- Provisions = “abrogation”
 - Does the arrangement “waive,” or preclude Ag from exercising, affected rights? *E.g.*, 65 FLRA 509, 513, 515. *But see* 739 F.3d 13, 21 (D.C. Cir. 2014) (reversing abrogation standard in context of negotiability provision).

“Applicable Laws”

76

- Limitation on § 7106(a)(2), but not § 7106(a)(1), rights.

- Include:
 - Statutes (but NOT the FSLMRS)
 - U.S. Constitution
 - Judicial decisions
 - Executive orders
 - Regulations having the “force and effect of law”:
 - ✦ Affect individual rights and obligations;
 - ✦ Promulgated under explicit or implicit delegation of legislative authority by Congress; and
 - ✦ Promulgated in accordance with procedural requirements imposed by Congress. *See* 61 FLRA 201, 206.

Agency Discretion

77

- Generally, if Ag has discretion over a matter, then Ag must bargain over proposals concerning that matter. *E.g.*, 55 FLRA 1, 4-5.
- But if Ag discretion is “sole and exclusive,” would be contrary to law to require bargaining over matters within discretion. *E.g.*, 59 FLRA 331, 346, 351.

Sole & Exclusive Discretion

78

- Authority examines plain wording and legislative history of statute or reg. *E.g.*, 58 FLRA 246, 248-50.
- Examples = “without regard to the provisions of any other law” or “notwithstanding any other provision of law.” *E.g.*, 47 FLRA 884, 895.

Agency Rules and Regulations

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- Ag rules and regs = rules, regulations, and official declarations of policy that govern the resolution of matters within particular agencies. *E.g.*, 37 FLRA 186, 193-94.
- Generally within duty to bargain, unless Ag shows “compelling need” for rule/reg. 5 U.S.C. § 7117(a)(2).
 - *But* “compelling need” does not apply if U “represents . . . a majority of employees in the issuing agency or . . . subdivision” to whom the rule/reg applies. *Id.* § 7117(a)(3); *see* 68 FLRA 407, 408-09.

“Compelling Need”

80

- Claim must be resolved in negotiability proceeding. *E.g.*, 49 FLRA 534, 542. *But see* 67 FLRA 34 (compelling-need assertion cannot completely preempt bargaining process).
- Test under 5 C.F.R. § 2424.50:
 - Essential, not merely helpful or desirable, to accomplishment of mission or execution of functions of Ag or primary national subdivision in a manner that’s consistent with requirements of effective and efficient government;
 - Necessary to ensure maintenance of basic merit principles; or
 - Implements a mandate to the Ag or primary national subdivision under law or outside authority, which implementation is essentially nondiscretionary in nature.

Prior Agreements & Existing Policies

81

- Prior agreement doesn't mean it's within the duty to bargain now. *E.g.*, 61 FLRA 554, 557.
- Nor does the fact that proposal reflects an existing Ag policy or practice (*e.g.*, Ag regulation).

Bargaining-Obligation Disputes

82

- For example:
 - ✦ (1) “covered by”
 - ✦ (2) “de minimis”
 - ✦ (3) trying to bargain at wrong level
- *See also* OGC ULP Case-Law Outline

“Covered By”

83

- Don't have statutory duty to bargain over conditions of employment that have already been resolved by bargaining. *E.g.*, 68 FLRA 580, 582.
- Two-prong test:
 - ✦ (1) Is subject matter expressly contained in the agreement?
 - ✦ (2) If not, is the subject matter inseparably bound up with, and thus plainly an aspect of, a subject expressly covered by the agreement? *E.g.*, 66 FLRA 213, 216.

“Covered By”

84

- “Expressly Contained in the Agreement”
 - ✦ Exact congruence of language not needed.
 - ✦ Would a reasonable reader conclude that the contract provision settles the matter in dispute?
 - ✦ Does proposal modify or conflict with the express terms of the contract provision?
 - ✦ *E.g.*, 66 FLRA 213, 216; 66 FLRA 124, 126.

“Covered By”

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- “Inseparably Bound Up With”
 - ✦ Matter in proposal must be more than tangentially related to a contract provision
 - ✦ Is the matter so commonly considered to be an aspect of a matter in the parties’ agreement that negotiations can be presumed to have foreclosed further bargaining?
 - ✦ *E.g.*, 66 FLRA 213, 216.

“Covered By”

86

- Examples of proposals covered by agreement:
 - ✦ *E.g.*, 67 FLRA 482, 484-87; 66 FLRA 213, 218; 62 FLRA 174, 178-79; 56 FLRA 798, 803-05.

- Examples of proposals not covered by agreement:
 - ✦ *E.g.*, 68 FLRA 580, 582-83; 66 FLRA 124, 126; 64 FLRA 879, 882-83.

“Covered By” Doctrine Inapplicable

87

- At term negotiations. *E.g.*, 68 FLRA 334, 338.
- When no term agreement is in effect.
E.g., 57 FLRA 185, 193.
- Where the agreement specifically contemplates bargaining. *E.g.*, 68 FLRA 580, 582-83.

“De Minimis”

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- Ag has no duty to bargain over changes that have only “de minimis” effects on unit employees’ conditions of employment. *E.g.*, 64 FLRA 85, 89.
- Authority looks to nature and extent of the effects, or reasonably foreseeable effects, of the change. *E.g.*, *id.*
- Number of employees not dispositive. *E.g.*, 64 FLRA 166, 173.

“De Minimis”

89

- Examples of decisions addressing this doctrine:
 - ✦ 64 FLRA 166, 173-74
 - ✦ 64 FLRA 85, 89-90
 - ✦ 60 FLRA 315, 318
 - ✦ 60 FLRA 169, 175-76
 - ✦ 59 FLRA 728, 728-29
 - ✦ 59 FLRA 646, 654-55
 - ✦ 21 FLRA 580, 585-86

Bargaining at Wrong Level

90

- Required to bargain only at “level of recognition.”
62 FLRA 174, 182.
- Bargaining below = permissive subject. *Id.*
- Note: If level of recognition is lower level of agency, then can't avoid bargaining just because subjects also may be subject to bargaining at higher level.
67 FLRA 34, 37.

THE END

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***Questions,
Feedback,
&
Thank You For Participating***