

DELRS | 2024
Forging the DoD Workforce of the Future

The Range of Bargaining
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AGENDA

- Explore the relationship between the scope of bargaining, the duty to bargain, and defenses to the duty to bargain
- Examine the difference between proposals and provisions
- Discuss bargaining disputes

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DETERMINING THE RANGE

- Federal collective bargaining "does not and cannot cover the whole employment relationship..."
 - *DOJ and AFGE, Local 3960, 71 FLRA 660 (2020)*
- In determining the range of bargaining in the Federal sector, one must examine the relationship between:
 - The Scope of Bargaining;
 - Generally, what an agency is required to bargain over
 - Example – conditions of employment
 - The Duty to Bargain; and
 - When a party has to bargain
 - Example – when establishing a new contract or negotiating a successor agreement
 - Defenses to the Duty to Bargain
 - Example – union waives its right to bargain either in writing or by failure to act in accordance with the applicable collective bargaining agreement


Thought Exercise – What informs each of these elements?


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THE SCOPE OF BARGAINING

- Why do we have to bargain?
 - § 7103(a)(12)
 - There is a mutual obligation of union and agency representatives to meet and bargain in good faith with respect to the conditions of employment affecting bargaining unit employees
- What do we have to bargain over?
 - § 7103(a)(14)
 - Conditions of employment are personnel policies, practices and matters affecting working conditions of unit employees
 - See *Antilles Consolidated School System*, 22 FLRA 235 (1986) (*Antilles*)
- What, if any, limitations exist?
 - § 7103(a)(14)(A) – (C)
 - Carve outs – matters relating to the political activities of unions, classification of positions, provided by Federal statute
 - See *NTEU, Chapters 213 and 228 and DOE*, 32 FLRA 578 (1988)


 **Thought Exercise – What is an example of a matter provided by Federal Statute?**



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THE SCOPE OF BARGAINING (cont.)


- Whether and How
 - § 7106(a)(1) and (2)
 - So called 'prohibited subjects' are subjects that parties cannot agree to, including an agency's right to determine its mission, budget, and organization, the overall number of employees, and internal security practices (as well as hire, assign, direct, remove, etc. in accordance with applicable laws) but...
 - See *NLRBU, Local 21 and National Labor Relations Board*, Washington, DC, 36 FLRA 853 (1990)
 - § 7106(b)(1)
 - Management may elect to bargain over numbers, types, grades, or the assignment of employees to work units; technology, method, and means of accomplishing work
 - E.O. 14003 instructed agencies to negotiate over (b)(1) issues
 - § 7106(b)(2)
 - Allows unions to negotiate procedures which an agency will observe in exercising its rights
 - § 7106(b)(3)
 - Allows unions negotiable appropriate arrangements but... union proposals must not excessively interfere with managements' rights; must mitigate the adverse affects flowing from the change
 - See *Kansas Air National Guard*, 21 FLRA 24 (1986) (*KANG*)



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THE SCOPE OF BARGAINING (cont.)

- What Duties do the Parties Have?
 - § 7114 – representation rights and duties
 - (a)(4) – In good faith, the parties must negotiate a collective bargaining agreement and may determine appropriate techniques to assist in negotiations (e.g., ground rules)
- Are there any limits on what can be bargained?
 - § 7117(a)(1) – matters which are contrary to government-wide regulations
 - See *NTEU and IRS*, 61 FLRA 554 (2005)
 - § 7117(a)(2) – matters that are contrary to agency-wide rules for which there is a compelling need
 - A compelling need is one that is: 1) essential, rather than merely helpful or desirable to the accomplishment of the agency's mission; 2) necessary to ensure maintenance of basic merit principles; or 3) implements a mandate or order. See 5 CFR 2424.11
 - See *AFGE, Local 1401 and Department of the Air Force, 11th Wing, Joint Base Andrews, Md.*, 67 FLRA 34 (2012)




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FAILURES TO BARGAIN IN GOOD FAITH

- What happens if an agency doesn't bargain in good faith?
 - § 7116(a) – agency unfair labor practices
 - (a)(5) – it is an unfair labor practice if the agency fails to bargain or consult in good faith
 - See *U.S. Geological Survey, Caribbean District Office, San Juan, Puerto Rico and AFGE, Local 1503*, 53 FLRA 1006 (1997)
- What happens if the union doesn't bargain in good faith?
 - § 7116(b) – union unfair labor practices
 - (b)(5) – it is an unfair labor practice if the union fails to bargain or consult in good faith
 - See *Department of the Air Force, Edwards AFB*, 70 FLRA 554 (2018); *Local Lodge 830, IAM and Naval Ordnance Station, Department of the Navy, Louisville, KY, FLRA ALJ, 4-CO-70012* (1987)
 - *Dep't of Def., Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 40 FLRA 1211, 1218 (1991)


For a comprehensive overview of unfair labor practice issues, see the *FLRA Office of General Counsel's Unfair Labor Practice Case Law Outline* at www.flra.gov



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THE DUTY TO BARGAIN


- Term Bargaining
 - Initial collective bargaining agreement (CBA)
 - Must provide procedures for settlement of grievances, including questions of arbitrability
 - See 5 U.S.C. § 7121(a)(1)
 - Successor agreements
 - Ground Rules
 - Within the duty to bargain, upon request
 - See *AFGE, Local 12 and DOL*, 60 FLRA 533 (2010)
- Mid-Term Bargaining
 - Matters not covered by an in-place agreement
 - See *DOI, Washington, D.C. and NFFE, Local 1309*, 56 FLRA 45 (2000)
- Management-Initiated Changes
 - Changes management makes to conditions of employment of bargaining unit employees not addressed by the applicable CBA



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DEFENSES TO THE DUTY TO BARGAIN


- Attempts to Bargain at the Wrong Level
 - There is no statutory duty to bargain below the level of recognition
 - *DoD Dependents Schools and OEA*, 12 FLRA 52, 53 (1983)
- "Covered By" Doctrine
 - Legal doctrine holding that an agency does not have to engage in midterm bargaining over subjects already contained in or covered by an existing agreement
 - *Social Security Administration Headquarters and AFGE General Committee*, 57 FLRA 459 (2001)
- "De Minimis Doctrine"
 - An agency is not required to bargain over a change that has only a "de minimis" effect on conditions of employment
 - *Soc. Sec. Admin. Office of Hearings & Appeals, Charleston, S.C.*, 59 FLRA 646 (2004)
- Waiver of Bargaining Rights
 - A union may waive its right to bargain over a proposed action either explicitly through agreement or implicitly through inaction
 - *Department of the Army, Letterkenny and NFFE, Local 144602*, 60 FLRA 456 (2004)




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PROPOSALS AND PROVISIONS

- Proposal
 - A matter offered for bargaining that the parties have not yet agreed to
 - May be the subject of a negotiability dispute when an agency has declared the matter non-negotiable at the table or during proceedings before the Federal Service Impasses Panel (FSIP)
 - See *NFFE, Local 422*, 50 FLRA 121 (1995)
- Provision
 - Language that an agency and the union have agreed to include in their collective bargaining (or other) agreement, or that the FSIP has imposed
 - Subject to agency head review under §7114(c)(1)
 - Agreements on permissive subjects cannot be rejected as being contrary to law
 - *NATCA, AFL-CIO and Air Route Traffic Control Center*, 61 FLRA 336 (2005)

 **Thought Exercise – Why is this relevant to the discussion?**




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BARGAINING DISPUTES

- Bargaining disputes generally come in two forms:
 - Disputes over the duty to bargain
 - Typically resolved via unfair labor practice proceedings before the FLRA
 - May be raised via negotiated grievance procedures
 - Disputes over the negotiability of a proposal or contract provision
 - Resolved via petition to the FLRA to resolve the dispute
 - Proposals may be declared non-negotiable
 - Negotiability determinations must be approved by DCPAS
 - See DoDI 1400.25, Vol. 711
 - Provisions of an agreement can be disapproved upon agency head review
 - See 5 U.S.C. §7114(c)
 - Includes a review of Federal Service Impasses Panel and arbitrator's decisions
 - See *AFGE v. FLRA*, 778 F.2d 850 (D.C. Cir. 1985), *Customs and Border Protection*, 61 FLRA 729 (2006)

For an in-depth look at negotiability, see the *FLRA's Guide to Negotiability under the Federal Service Labor-Management Relations Statute* at www.fira.gov



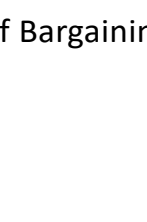
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ANY QUESTIONS



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