

NEGOTIABILITY: FILING & PROCEDURAL ISSUES

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BARGAINING-OBLIGATION OR NEGOTIABILITY DISPUTE???

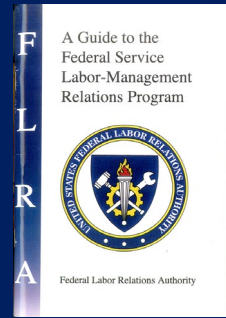
**Is the Agency saying, "not now" or
"never"?**

2

- This is a key question when evaluating a provision or proposal.

AGENDA

1. Bargaining Obligation or Negotiability Dispute?
2. When do we involve the FLRA?
3. Collaboration and Alternative Dispute Resolution Office
4. How do we involve the FLRA?
5. e-Filing
6. Bases for Dismissals and Common Mistakes
7. Questions



SUBJECTS OF BARGAINING

MANDATORY

Must bargain
E.g., 5 U.S.C.
§ 7106(b)(2) &
(3)

PROHIBITED

Cannot agree to
(law prohibits)
E.g., 5 U.S.C.
§ 7106(a)
(where no
exception
applies)

PERMISSIVE

May bargain/agree to
E.g., 5 U.S.C.
§ 7106(b)(1)

BARGAINING-OBLIGATION DISPUTE = NOT NOW

Agency claims it is not required to
bargain under *current circumstances*

5

- 5 C.F.R. 2424.2(a).

BARGAINING-OBLIGATION DISPUTES

EXAMPLES:

- (1) "covered by"
- (2) "de minimis"
- (3) Trying to bargain at the wrong level
- (4) Proposal outside the scope of the change
- (5) If there has not been a change to a condition of employment

See also FLRA's Guide to Negotiability

6

- Negotiability Guide: <https://www.flra.gov/resources-training/resources/guides-manuals>
- In the regulations effective October 12, 2023, examples were placed in the definition section found at 5 C.F.R. § 2424.2.

BARGAINING-OBLIGATION DISPUTES

- Not required to bargain under current circumstances.
 - *E.g.*, “covered by,” “de minimis,” “bargaining at the wrong level”
- No ULP remedies when deciding a negotiability proceeding with both bargaining-obligation and negotiability disputes
- Dismiss petition/portion of petition if only bargaining-obligation dispute; any resolution of bargaining-obligation dispute must occur in other proceedings (such as a grievance or ULP)

7

- 5 C.F.R. § 2424.2(a) - Bargaining obligation dispute means a disagreement between an exclusive representative and an agency concerning whether, in the specific circumstances involved in a particular case, the parties are obligated to bargain over a proposal that otherwise may be negotiable.
- Will dismiss petition/portions of petitions if it is only a bargaining obligation dispute as these resolution must occur in other proceedings (such as a grievance or ULP).
- 5 C.F.R. § 2424.40(a) (“[W]ith the exception of an order to bargain,” an Authority decision and order in a negotiability proceeding “will not include remedies that could be obtained in an unfair-labor-practice proceeding under 5 U.S.C. § 7118(a)(7).”)

“COVERED BY”

No statutory duty to bargain over matters that have already been resolved by bargaining

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?**

8

- No statutory duty where already resolved: *e.g.*, 68 FLRA 1027, 1032; 68 FLRA 580, 582
- Two-prong test: *e.g.*, 66 FLRA 213, 216

“COVERED BY”: EXPRESSLY CONTAINED IN THE AGREEMENT

“Expressly Contained in the Agreement”

- **Exact congruence of language not needed**
- **Would a reasonable reader conclude the contract provision settles the matter in dispute?**
- **Does the proposal modify or conflict with the express terms of the contract provision?**

9

- *E.g.*, 66 FLRA 213, 216; 66 FLRA 124, 126; 60 FLRA 572, 573-74

“COVERED BY”: INSEPARABLY BOUND UP WITH

“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?**

10

- *E.g.*, 66 FLRA 213, 216

DE MINIMIS

- Agency has no duty to bargain over changes that have only "de minimis" effects on unit employees' conditions of employment
- Authority looks to nature and extent of the effects, or reasonably foreseeable effects, of the change
- Number of employees not dispositive

11

- No duty where de minimis: *e.g.*, 64 FLRA 85, 89
- Look to effects, or reasonable foreseeable effects: *Id.*
- Number not dispositive: *e.g.*, 64 FLRA 166, 173
- Decisions addressing de minimis: 25 F.4th 1; 164 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

“COVERED BY” DOCTRINE INAPPLICABLE

- **At term negotiations**
- **When no agreement is in effect**
- **Where the agreement specifically contemplates bargaining**

12

- Term negotiations: *e.g.*, 68 FLRA 334, 338
- No term agreement: *e.g.*, 57 FLRA 185, 193
- Agreement contemplates: *e.g.*, 68 FLRA 580, 582-83

NEGOTIABILITY DISPUTES = NEVER

**Agency asserts it never has an obligation to bargain
over this matter/subject**

13

- 5 C.F.R. § 2424.2(c)

NEGOTIABILITY DISPUTES

PROPOSALS & PROVISIONS

Proposals: Prohibited and permissive are outside the duty to bargain

Provisions: Only prohibited may be disapproved by Agency head

14

- Proposal is any matter offered for bargaining that an agency and a union have not yet agreed to. 5 C.F.R. § 2424.2(e)
- 5 C.F.R. § 2424.2(c) - Agency declares proposal is outside the duty to bargain because it is a prohibited subject or a permissive subject about which it declines to bargain.
- Provision is contract language that an agency and a union have agreed to include in their collective-bargaining agreement. 70 FLRA 303; 72 FLRA 203, 206; 5 C.F.R. § 2424.2(f)

NEGOTIABILITY DISPUTES

EXAMPLES OF BASES FOR NEGOTIABILITY CLAIMS

- Statutes (including Federal Service Labor-Management Relations Statute)
- Executive Orders
- Government-Wide Rules and Regulations
- Agency Regulations with “compelling need”

15

- Statutes – 64 FLRA 813, 816-18; 66 FLRA 809, 814
- Executive Orders – 49 FLRA 874, 888-90
- Government-wide rules and regulations – 65 FLRA 911, 916-17
- “Compelling need” – 5 U.S.C. § 7117(a)(2)

PRIOR AGREEMENTS & EXISTING POLICIES

Prior agreement does *not* mean it is within the duty to bargain now

Nor does the fact that proposal reflects an existing Agency policy or practice (e.g., Agency regulation)

16

- 61 FLRA 554, 557 (holding that mere fact that parties agreed to provisions in a previous agreement does not demonstrate that provisions are negotiable)
- 29 FLRA 849, 861 (holding that mere fact that proposal mirrors requirements of Agency regulation does not render proposal negotiable)

REMINDERS

5 C.F.R. § 2424.2(a) and (c)

- Look at each proposal or provision to determine if the statute requires bargaining, not the CBA
- Ask if the Agency is saying "not now" (bargaining obligation) or "never" (negotiability dispute)

BARGAINING AT THE WRONG LEVEL

- Required to bargain only at the "level of recognition"
- Bargaining below = permissive subject

Note: If level of recognition is lower level of Agency, then Agency cannot avoid bargaining just because subjects also may be subject to bargaining at a higher organizational level

18

- 62 FLRA 174, 182 (citing 53 FLRA 1269, 1273-74; 12 FLRA 52, 53)
- *Id.* (citing 53 FLRA at 1274)
- 66 FLRA 978, 980-81 (citing 53 FLRA 1274)

POP QUIZ

Use the emojis to indicate whether it is:

👍 - Bargaining Obligation

👁️ - Negotiability Dispute

QUESTION 1

The Agency asserts it has no duty to bargain because the proposal requires work to be assigned to employees based on geographical considerations.

 - Bargaining Obligation

 - Negotiability

- 73 FLRA 233

QUESTION 2

The Agency asserts it has no duty to bargain because the proposal is covered by the parties' memorandum of understanding.

 - Bargaining Obligation

 - Negotiability

21

- 73 FLRA 87

QUESTION 3

The Agency asserts it has no duty to bargain because the proposal concerns a permissive subject of bargaining.

 - Bargaining Obligation

 - Negotiability

22

- 72 FLRA 421

QUESTION 4

The Agency asserts it has no duty to bargain because the proposal concerns noncompetitive temporary promotions and details that exceed 120 days.

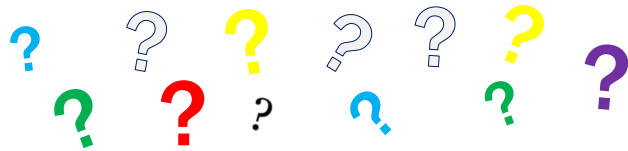
 - Bargaining Obligation

 - Negotiability

23

- 72 FLRA 749

WHEN DO WE INVOLVE THE FLRA?



UNION FILES PETITION FOR REVIEW

- Initiates process before Authority
- Only Union may file
- Process depends on whether Proposal or Provision

25

- 5 C.F.R. § 2424.22: Exclusive representative's petition for review; purpose; content; severance; service
- 5 C.F.R. § 2424.20: Who may file a petition for review
- 5 U.S.C. § 7117(c): Duty to bargain in good faith; compelling need; duty to consult

“ALLEGATION OF NONNEGOTIABILITY”

New eFilings
To start a new eFiling, please select from the list of filings below.

ARBITRATION (ARB)	+
NEGOTIABILITY (NEG)	-
PROPOSAL CASES	+
PROVISION CASES	+
REPRESENTATION (REP)	+

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

26

- No particular degree of specificity required: 61 FLRA 97, 98 (2005)

PROPOSALS & PROVISIONS

- **Proposal:** language offered at the bargaining table that parties have not agreed to — Agency has declared outside the duty to bargain
- **Provision:** contract language that Union and Agency negotiators have agreed to as part of their CBA or FSIP has imposed; disapproved on Agency-head review

27

- 5 C.F.R. § 2424.2: Definitions
 - 5 C.F.R. § 2424.2(c): Negotiability Dispute
 - 5 C.F.R. § 2424.2(e): Proposal
 - 5 C.F.R. § 2424.2(f): Provision
- 5 U.S.C. § 7114: Representation rights and duties
 - 5 U.S.C. § 7114(c): Agency-head review

AGENCY HEAD DISAPPROVAL

New eFilings
To start a new eFiling, please select from the list of filings below.

ARBITRATION (ARB)	+
NEGOTIABILITY (NEG)	-
PROPOSAL CASES	+
PROVISION CASES	+
REPRESENTATION (REP)	+

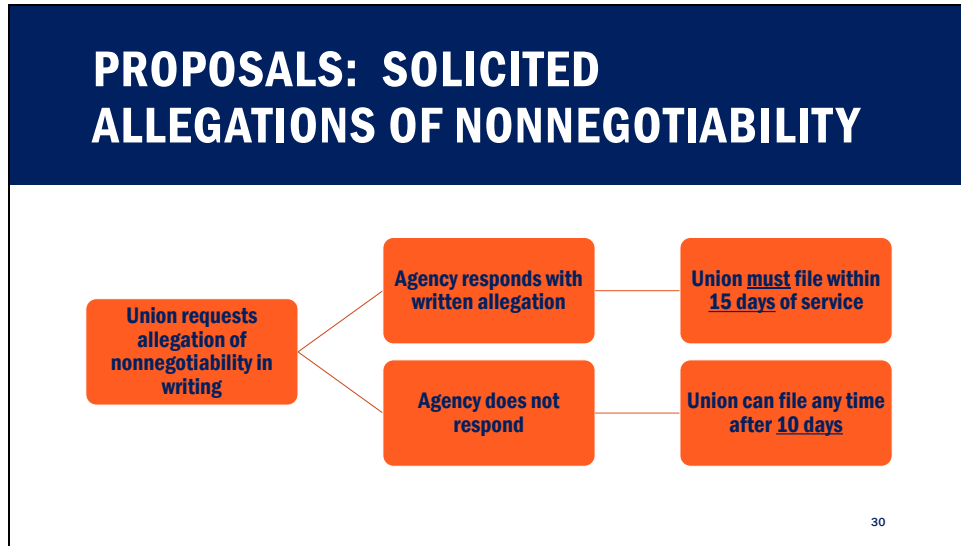
- For provisions
- Agency head says: **Contrary to law, rule, or regulation**
- **Cannot disapprove permissive**

28

- 5 U.S.C. § 7114(c)(2)
- Cannot disapprove permissive subjects: 61 FLRA 336, 339 (2005)

PROPOSALS VS. PROVISIONS



Proposal	Provision
At the bargaining table	Executed agreement or FSIP-imposed wording
Agency rep declares proposal nonnegotiable	Agency head disapproves
Can declare nonnegotiable at any time	Must disapprove within 30 days
Agency chooses whether to bargain over permissive subjects	Cannot disapprove permissive subject



- 5 C.F.R. § 2424.21: Time limits for filing a petition for review



UNION ASKS, AGENCY GIVES ALLEGATION OF NONNEGOTIABILITY

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
1	2 	3	4 	5 Filing clock starts	6	7
8	9	10	11	12	13	14
15	16	17	18	19 Petition DUE!	20	21
22	23	24	25	26	27	28
29	30					31

- 5 U.S.C. § 7117(c)(2)
- 5 C.F.R. § 2424.21(a)

UNION ASKS, AND . . .

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
1	2 	3 	4	5 	6	7
8 	9	10	11 	12 Tenth day, now what?	13 	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30					32

- 5 C.F.R. § 2424.21(b)



- 5 C.F.R. § 2424.11: Requesting and providing written allegations concerning the duty to bargain
- 5 C.F.R. § 2424.11(c): Unrequested agency allegation
- 5 C.F.R. § 2424.21(a)-(b)
- A Union has two choices for how it may respond to an unsolicited allegation: 52 FLRA 1429, 1435 (1997) (holding that union has two options for filing a timely petition for review: (1) respond to the unsolicited allegation of nonnegotiability and timely file a petition for review with the Authority; or (2) ignore the unsolicited allegation of nonnegotiability, make a written request for a written allegation of nonnegotiability from the agency, and then timely file its petition for review of the solicited allegation with the Authority)
- For FSIP context: 50 FLRA 121, 121-22 (1995)

**COLLABORATION &
ALTERNATIVE DISPUTE
RESOLUTION OFFICE**



UNION'S PETITION: PROVISIONS

Within 15 days of service of Agency-head disapproval



35

- 5 C.F.R. § 2424.21(a)(2)

WAYS TO RESOLVE NEGOTIABILITY QS

Litigate negotiability petition

Part of ULP before ALJ or arbitrator



Generally not Federal Service Impasses Panel unless
“substantively identical” to previous proposal or provision.



HOW TO REQUEST CADRO ASSISTANCE.

1. Check box in petition
2. Contact CIP
3. Contact CADRO
cadro@flra.gov
771.444.5802
4. Request during post-petition conference

The screenshot shows the FLRA.gov website header with the logo and navigation menu. The 'COMPONENTS & OFFICES' menu is expanded, showing two columns: 'COMPONENTS' and 'OFFICES'. A red arrow points from the 'COMPONENTS & OFFICES' menu item to the 'Collaboration and Alternative Dispute Resolution Office (CADRO)' link in the 'OFFICES' list.

COMPONENTS	OFFICES
The Authority	Office of Administrative Law Judges
Office of the General Counsel	Collaboration and Alternative Dispute Resolution Office (CADRO)
The Federal Service Impasses Panel	Office of Case Intake and Publication
	Office of the Executive Director
	Office of Inspector General
	Office of the Solicitor

SHOULD WE USE cADR?



FLRA COLLABORATION & ADR OFFICE, CADRO@FLRA.GOV

WHY CHOOSE cADR

- **Most often:** Reach full agreement resolving all language disputes.
- **Sometimes:** At least resolve legal questions. Finish the rest through collective bargaining.
- **Rarely:** Proceed for decision by the Authority.
- Abeyance, remains in queue
- Pragmatic
- Federal sector expertise
- Help assess risks, opportunities



WHICH IS BETTER (FOR OUR CASE)?

	Litigate	ADR		Litigate	ADR
Vindication	✓		Precedent	✓	
Neutral opinion	✓		Q of fact/law	✓	
Solve problem		✓	All/None	✓	
Control		✓	Cost		✓
Risk		✓	Speed		✓
Communication		✓	Voluntary		✓
Emotions		✓	Confidential		✓
Constituents		✓	Relationship		✓
Compliance		✓	Informed choice		✓



APPROPRIATE ISSUES FOR cADR

ALMOST ANY ISSUE CAN BE APPROPRIATE FOR ADR!

- Return to Office
- RIF procedures
- Representation duties outside of the employee's own bargaining unit
- Attorney fees
- Call back overtime
- HSPD-12 SmartIDs
- BUE access to the base galley
- Furloughs for uncommon TOD
- Disciplinary action against probationary employees
- New office locations, closing offices

WHAT TO EXPECT

from **CADR** 

1ST STEPS IN CADRO[®] PROCESS

- ◉ Explore with CADRO staff
- ◉ CIP normally sends abeyance order
- ◉ Schedule initial session



- ◉ Initial joint session
 - About 1 hour long
 - Clarify disputed language & legal concerns
 - Explore interests
 - Collect additional information
 - Answer questions
 - Schedule next session

NEXT STEPS IN CADRO PROCESS

BETWEEN SESSIONS

- CADRO research, prep
- Calls, email with parties
- Preparation



NEXT SESSION(S)

Resolve NG concerns

Normally,

- ½ or full day
- MS Teams
- Joint sessions and caucuses
- Only ground rule: mutual respect

5 U.S.C. § 574

[Subject to statutory exceptions, ...]

- (a) a neutral in a dispute resolution proceeding **shall not voluntarily disclose or through discovery or compulsory process be required to disclose** any dispute resolution communication or any communication provided in confidence to the neutral, ...
- (b) A party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication, ...
- ...
- (d) (1) The parties may agree to **alternative confidential procedures** for disclosures by a neutral.
- (2) To qualify for the exemption [from FOIA], an alternative confidential procedure under this subsection **may not provide for less disclosure** than the confidential procedures otherwise provided under this section.



HOW TO PREPARE

for CADR 



PREPARE FOR SUCCESS

- **Scope**
- **Distinguish:**
 - **Nonnegotiable**
 - **No bargaining obligation**
 - **Not agreeable**
- **Participants have:**
 - **Authority to settle**
 - **Knowledge of issue(s)**
- **Written agreement to mediate**
- **Prepare & share info**
- **Educate constituents**
- **Step back from positions, prepare to describe**
 - **The problem (i.e., the issue)**
 - **Why you care (i.e., your interests)**
- **Be ready to brainstorm creative ideas!**
- **Avoid the dreaded “oh by the way”**



PREPARE YOURSELF

- Willing to listen, ask & answer questions, explore new ideas and options
- Respectful, informal, conversational, patient
- Focus:
 - Goals, desires, fears, obstacles
 - Strengths & weaknesses
 - BATNA & WATNA





HOW DO WE INVOLVE THE FLRA?



The slide features a dark blue sidebar on the left containing the following text:

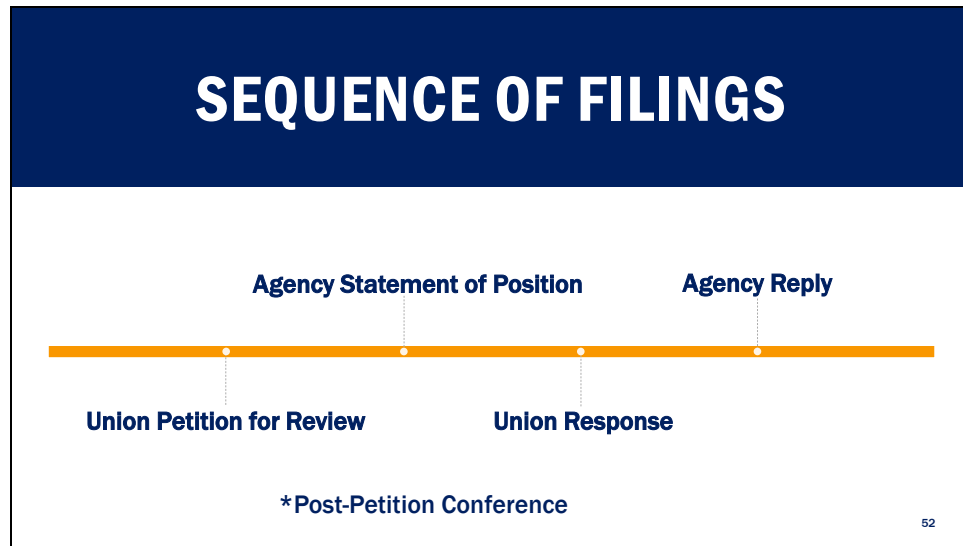
- Union Petition for Review**
- Agency Statement of Position
- Union Response
- Agency Reply

The main content area on the right contains a bulleted list of requirements:

- **Copy of Agency's written allegation/evidence that Union requested/Agency-head disapproval**
- **Exact wording of proposals/provisions**
- **Special terms explained**
- **Meaning & operation**
- **Any related proceedings**

A small number '53' is located in the bottom right corner of the slide's content area.

- Additional information is located at 5 C.F.R. § 2424.22. This section explains in detail all of the requirements the Union should follow when filing a petition for review, including the purpose of a petition for review, how to properly divide matters, the content of the petition, and how to serve other parties.



FLRA Regulations for each type of filing

- Union Petition for Review –5 C.F.R. § 2424.22
- Agency Statement of Position - 5 C.F.R. § 2424.24
- Union Response - 5 C.F.R. § 2424.25
- Agency Reply - 5 C.F.R. § 2424.26
- Post-Petition Conference - 5 C.F.R. § 2424.23

The slide features a dark blue vertical sidebar on the left side. Inside the sidebar, the text is arranged vertically: 'Union Petition for Review' at the top, followed by 'Agency Statement of Position' in a larger, bold font, then 'Union Response', and 'Agency Reply' at the bottom. The main content area is white and contains a bulleted list of three requirements. The slide number '54' is located in the bottom right corner of the white area.

- **Due within 30 days of Agency head's receipt of Petition**
- **Must contain all arguments why proposals are outside duty to bargain/provisions contrary to law**
- **Any disagreements regarding meaning & operation**

54

- Additional information is located at 5 C.F.R. § 2424.24. This section explains in detail all of the requirements the Agency should follow when filing a statement of position, including the purpose of a statement of position, the time limits for filing, the content of the statement of position, and how to serve other parties.

Union Petition for Review

Agency Statement of Position

Union Response

Agency Reply

- **Due within 15 days of receiving Agency's Statement of Position**
- **Must discuss any claims from Statement of Position that Union disagrees with**
- **Severance opportunity**

55

- Additional information is located at 5 C.F.R. § 2424.25. This section explains in detail all of the requirements the Union should follow when filing a response to the Agency's statement of position, including the purpose of a response, the time limits for filing, the content of the response, information on severance, and how to serve other parties.

The slide features a dark blue vertical sidebar on the left side. Inside this sidebar, the following text is listed from top to bottom: "Union Petition for Review", "Agency Statement of Position", "Union Response", and "Agency Reply" (which is bolded). The main content area is white and contains three bullet points. In the bottom right corner of the white area, the number "56" is displayed.

- **Due within 15 days of receiving Union's Response**
- **Created by regulation to allow Agency to respond to facts or arguments made for the first time in Union's Response**
- **May not raise new arguments/bases for non-negotiability that could have been raised in Statement of Position**

56

- Additional information is located at 5 C.F.R. § 2424.26. This section explains in detail all of the requirements the Agency should follow when filing a reply, including the purpose of a reply, the time limits for filing, the content of the reply, and how to serve other parties.

SEVERANCE

- Union may accomplish severance in its Response
- Severance results in the creation of separate proposals/provisions
- Division of proposal/provision into separate parts with independent meaning
 - Purpose is to determine whether any separate parts are within the duty to bargain or contrary to law
- **Agency can respond to severance in its Reply**

57

- The definition of severance is located at 5 C.F.R. § 2424.2(h). 5 C.F.R. § 2424.25(d) explains how the Union can accomplish severance in its response to the Agency's statement of position.

OTHER SUBMISSIONS

<u>EXTENSION OF TIME REQUESTS</u>	<u>ADDITIONAL SUBMISSIONS</u>
<ul style="list-style-type: none">• Must be received by FLRA no later than 5 days prior to due date• Must be in writing and served on other parties• Must state position of the other parties	<ul style="list-style-type: none">• May be filed only in “extraordinary circumstances”• Include written request with submission• Must serve other parties

58

Extension of Time Requests

- 5 C.F.R. § 2429.23 provides the requirements for requesting an extension of time with the Authority.

Additional Submissions

- 5 C.F.R. § 2424.27 explains the requirements for correctly filing an additional submission. Reviewing FLRA caselaw can be helpful to determine what the Authority considers extraordinary circumstances.

POST-PETITION CONFERENCE

- Conducted by telephone
- Parties must participate
- Must be knowledgeable about dispute and have authority to discuss and resolve matters
 - Meaning
 - Any disputed factual issues
 - Objections to proposals/provisions
 - Any related proceedings

59

- Information regarding post-petition conferences (PPC) in 5 C.F.R. § 2424.23. This section explains in detail how the Authority schedules PPCs, what is expected of the parties at the conference, and information about the Authority's written record of the PPC.

POST-PETITION CONFERENCE

Authority representative hosting conference will:

- Gather information about the dispute
- Facilitate discussion, seek areas of agreement, discuss modifications to wording
- Ensure that the parties have a common understanding of the meaning and impact
- Prepare written record – will NOT contain Agency legal objections

DUE DATE QUIZ

Agency Statement of Position = 30 days after Agency head receives Petition

Union Response = 15 days after Union receives Statement of Position

Agency Reply = 15 days after Agency receives Response

Extension of time = No later than 5 days prior to due date

61

Specific cites to the FLRA's Regulations regarding each particular due date

- Agency Statement of Position - 5 C.F.R. § 2424.24(b)
- Union Response - 5 C.F.R. § 2424.25(b)
- Agency Reply - 5 C.F.R. § 2424.26(b)
- Extension of Time - 5 C.F.R. § 2429.23(a)

STEPS TO DETERMINE DUE DATES

- 1. Determine the triggering event that you are filing in response to**
2. Determine the number of days that you have to file
3. Determine the first day of the filing period
4. Starting with the first day, count calendar days—including Saturdays, Sundays, federal legal holidays—until you reach the last day of the filing period
5. Does the last day fall on a Saturday, Sunday, or federal legal holiday?
 - If yes, then find the next day on the calendar that is not a Saturday, Sunday, or federal legal holiday

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67

- 5 C.F.R. § 2429.21 lists all of the steps to follow for computing due dates for filing documents with the FLRA. This section of the FLRA's Regulations can be used to calculate due dates for any document filed with the FLRA.

RK0

HOW TO FILE

- eFiling
- Commercial delivery
- Certified Mail
- First-class mail
- In person (*by appointment only)


68

- 5 C.F.R. § 2429.24 explains in detail how documents can be filed with the FLRA. This section includes an explanation of alternative filing methods for specific documents and is a good resource to review prior to filing with the FLRA.



- The FLRA website is located at www.flra.gov. Registration is required prior to filing any documents in the eFiling system. The FLRA verifies registrants prior to approval and it is recommended to complete your registration in advance of any filing deadlines.

EFILING

Register

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If you have previously started or submitted a case in the existing eFiling System, then you must continue to access and track your case at: <https://flra.quickbase.com/>. If you have any questions, please contact the appropriate eFiling contact: <https://www.flra.gov/contact-the-filing-questions>

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Email

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EFILING

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New eFilings

To start a new eFiling, please select from the list of filings below.

ARBITRATION (ARB)	+
NEGOTIABILITY (NEG)	-
PROPOSAL CASES	-

eFiling	FLRA Component/Office	
Union Petition for Review	Authority	Start new filing
Agency Statement of Position	Authority	Start new filing
Union Response to Agency Statement of Position	Authority	Start new filing
Agency Reply to Union Response	Authority	Start new filing

71

SERVICE ON OTHER PARTY REQUIRED

- Parties must serve other parties **EVERYTHING** they file with the Authority
- Union must serve Agency representative and Agency head
- Methods of Service:
 - Mail or Commercial Delivery
 - In person
 - Email (**ONLY** if other party consents)

72

- 5 C.F.R. § 2429.27 explains the requirements and options for serving other parties. Email service requires consent from the opposing party prior to using that method. Also, the FLRA's eFiling system does **NOT** automatically serve the other parties. It is the duty of the party filing with the FLRA to serve all documents on the other parties.

POP QUIZ!

November 2023						
Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
29	30	31	1	2	3	4
5	6	7	8	9	10 Veterans Day (Observed) Holiday	11 Veterans Day
12	13	14	15	16	17	18
19	20	21	22	23 Thanksgiving Day Holiday	24	25
26	27	28	29	30	1	2

- The Agency mails the Union a copy of its Statement of Position (SOP) with a postmark date of November 1 and the Union receives the Agency's SOP on November 3.
 - What is the Union's deadline to file its Response to the Agency's SOP?

November 2023						
Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
29	30	31	1 SOP Mailed	2	3 SOP Received	4 1
5 2	6 3	7 4	8 5	9 6	10 7 Veterans Day (observed)	11 8 Veterans Day
12 9	13 10	14 11	15 12	16 13	17 14	18 15
19 Sunday	20 Response due	21	22	23 Thanksgiving Day	24	25
26	27	28	29	30	1	2

December 2023						
Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
26	27	28	29	30	1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25 Christmas Day Holiday	26	27	28	29	30
31	1	2	3	4	5	6

- The Union mails the Agency a copy of its Response with a postmark date of December 4 and the Agency receives the Union's Response on December 8.
- What is the Agency's deadline to file its Reply to the Union's Response?

December 2023						
Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
26	27	28	29	30	1	2
3	4 Response mailed	5	6	7	8 Response received	9 1
10 2	11 3	12 4	13 5	14 6	15 7	16 8
17 9	18 10	19 11	20 12	21 13	22 14	23 15
24 Sunday	25 Christmas Day Holiday	26 Reply due	27	28	29	30
31	1	2	3	4	5	6

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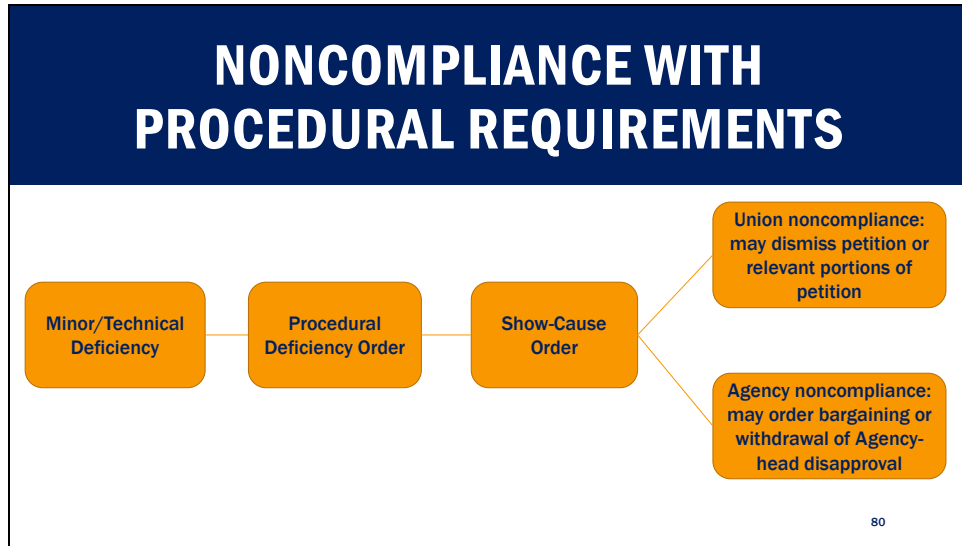
BASES FOR AN AUTHORITY DECISION

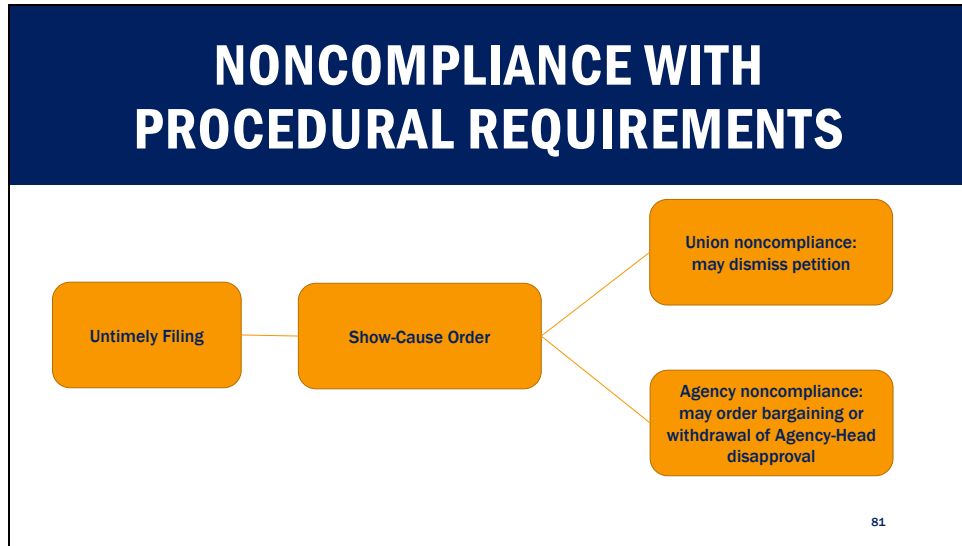
BASES FOR DISMISSING PETITIONS

- **Noncompliance with Procedural Requirements**
 - Failure to comply with certain procedural and other requirements
 - Failure to timely file
- **No negotiability dispute (look to each proposal/provision)**
 - *E.g.*, if only bargaining-obligation dispute
- **Proposal outside duty to bargain or provision is illegal**

79

- No negotiability dispute: *e.g.*, 65 FLRA 738, 741
- Bargaining-obligation dispute: 5 C.F.R. § 2424.2(a)





BASES FOR DISMISSING PETITIONS

- **Jurisdictional**
 - Mootness
 - No advisory opinions
 - 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.*, not bargaining over wording in petition
 - *E.g.*, parties reached agreement

82

- No advisory opinions: 5 C.F.R. § 2429.10
- Issues resolved: 66 FLRA 393, 393
- Not bargaining over wording in petition: 67 FLRA 280, 281-83
- Parties reached agreement: 52 FLRA 251, 254

BASES FOR DISMISSING PETITIONS

- **“Directly Related” to ULP or Grievance**
- **Generally dismiss petition if Union has filed ULP charge or grievance alleging ULP**
- **Exception in “compelling need” cases**
- **Dismissal without prejudice: Union may refile petition within 30 days of administrative resolution of ULP charge or grievance, if negotiability issue has not been resolved**

83

- **Directly Related: 5 C.F.R. § 2424.30(a)**
- **Grievance was directly related to petition: 56 FLRA 796, 797**
- **Grievance wasn't directly related: 66 FLRA 1038, 1038-39**
- **Compelling Need: 5 U.S.C. § 7112(a)(2); 5 C.F.R. § 2424.50**

BASES FOR DISMISSING PETITIONS

The Authority may dismiss a petition:

- **If petition seeks review of proposal/provision that has not “substantively changed” from prior petition; or**
- **If the Authority dismissed previous petition with prejudice**

84

- Not substantially changed from prior petition: 56 FLRA 236, 237-38; 71 FLRA 779, 780
- Dismissed previous petition with prejudice: 50 FLRA 541, 541-43 (dismissing petition based on earlier Authority decision, 50 FLRA 121, which was dismissed with prejudice)

“MEANING” ISSUES

- If parties’ agreed-to meaning, or Union’s explanation, is consistent with wording, the Authority will adopt it
- If meaning is inconsistent, Authority won’t adopt it
- Provision cases – defer to the parties’ bargaining representatives agreed-to meaning of the executed agreement at the bargaining table; not Agency-head review meaning
- Meaning adopted by Authority will apply in other proceedings, unless modified by the parties

85

- Parties agree on meaning: *e.g.*, 65 FLRA 509, 510
- Parties disagree on meaning: *e.g.*, 67 FLRA 654, 655-56; 66 FLRA 278, 278; 51 FLRA 451, 459
- Provisions: *e.g.*, 65 FLRA 509, 514
- Meaning adopted applies in other proceedings: *e.g.*, 55 FLRA 562, 564 n.9

PARTIES' BURDENS/FAILURE TO MEET

Union: Within duty to bargain, not contrary to law, or permissive; how severed proposal operates independently (in its response)

Agency: Outside duty to bargain or contrary to law

Both: Create record & support arguments

- Failure to raise and support = waiver
- Failure to respond = concession
- Failure to support = bare assertion

86

- Create record & support: 5 C.F.R. § 2424.32(a)-(c)
- Union's burden: *id.* § 2424.32(a)
- Agency's burden: *id.* § 2424.32(b)
- Waiver: *id.* § 2424.32(d)(1)
- Concession: *id.* § 2424.32(d)(2)
- Bare assertion: *e.g.*, 66 FLRA 124, 128

AUTHORITY'S DECISION AND ORDER

Proposals:

- **Dismiss petition**
- **Order bargaining**
- **If proposal concerns permissive matter, the order will say so**

Provisions:

- **Dismiss petition**
- **If mandatory or permissive, order Agency head to rescind disapproval**

AFTER THE DECISION AND ORDER

- Possible scenarios:
 - Comply
 - Timely move for reconsideration (within 10 days after service)
 - Appeal to U.S. Court of Appeals within 60 days. But can't make arguments that weren't made to Authority (except in "extraordinary circumstances")
 - Report, to the appropriate Regional Director, any failure to comply – within a "reasonable period of time" after 60-day appeal time expires

88

- Motion for reconsideration: 5 C.F.R. § 2429.17
- Judicial review: 5 U.S.C. § 7123(a)(1)
- Compliance: 5 C.F.R. § 2424.41

COMMON MISTAKES

COMMON MISTAKES

Union's Service Requirements for all filings

- Must serve the correct Agency head or designee, along with the Agency representative
- Must serve everything filed with the FLRA on the Agency

Content of the Union's Petition

- Must include language of each and every proposal
- Beware of proposals with only a bargaining-obligation dispute
- Beware of co-pending disputes (ULP, Grievance, Court, FSIP)

COMMON MISTAKES

Timing and Service of the SOP, Union Response, and Agency Reply

- These periods are not based on having a post-petition conference
- Initial conversations with CADRO do not imply that the case is in abeyance
- The date of receipt is when the U.S. Postal Service or commercial delivery service delivers the service copy, not once it has gone through mailroom security
- The Union Response and Agency Reply are 15-day periods
- Please include everything that was eFiled, including a copy of the eFiling form itself

BEST PRACTICES



For service via mail or commercial delivery, please get tracking information.



For help identifying the Agency head or designee, please contact Case Intake and Publication at (771) 444-5805.



Keep track of your deadlines. If you need additional time, please request it early!



Continue bargaining and seek mediation when appropriate.

Group Exercise

QUESTION 1

During a bargaining session over four proposals, the Agency orally states that all four proposals are nonnegotiable. Later that evening, the Union emailed the Agency requesting a written allegation of nonnegotiability.

The next day the Agency responds via email and states that proposal 1 violates management's rights, proposal 2 is covered by an existing agreement, proposal 3 is being bargained at the wrong level, and proposal 4 is contrary to 5 U.S.C. § 7121(c)(5).

Question: If the Union wants to file a negotiability petition, based on the email, what proposals involve a negotiability dispute?

Answer: Proposals 1 and 4

QUESTION 2

Using the scenario from Question 1, the Agency emails the Union a copy of its written allegation on November 8, 2023.

Question: When is the Union's deadline to file its Petition for Review?

Answer: November 24, 2023

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
29	30	31	1	2	3	4
5	6	7	8 Written Allegation	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23 Holiday	24 Petition DUE!	25
26	27	28	29	30	1	2

QUESTION 3

The Union mails a copy of its petition to the Agency on November 24, 2023. The Agency's Chief Negotiator receives the service copy on November 29, 2023. The Agency head receives its service copy on December 2, 2023.

Question: What is the Agency's deadline to file its Statement of Position?

Answer: January 2, 2024

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
26	27	28	29	30	1	2 Agency Head Rec'd
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25 Holiday	26	27	28	29	30
31	1 Holiday	2 SOP DUE!	3	4	5	6

QUESTION 4

The Agency mails the service copy of its Statement of Position to the Union on January 2, 2024. The Union receives the service copy on January 16, 2024.

Question: What is the Union's deadline to file its Response?

Answer: January 31, 2024

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
31	1 Holiday	2	3	4	5	6
7	8	9	10	11	12	13
14	15 Holiday	16 Union Rec'd	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31 Response DUE!	1	2	3

QUESTION 5

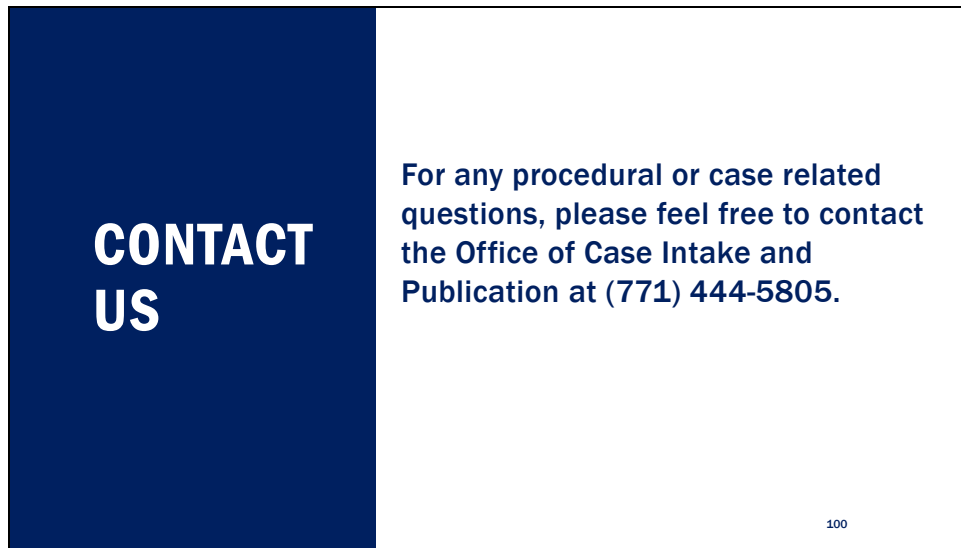
The Union mails the service copy of its Response to the Agency on January 31, 2024. The Agency receives the service copy on February 2, 2024.

Question: What is the Agency's deadline to file its Reply?

Answer: February 20, 2024

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
28	29	30	31	1	2 Agency Rec'd	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19 Holiday	20 Reply DUE!	21	22	23	24
25	26	27	28	29	1	2





**CONTACT
US**

For any procedural or case related questions, please feel free to contact the Office of Case Intake and Publication at (771) 444-5805.

100

- The Office of Case Intake and Publication can answer basic procedural questions, but cannot provide legal advice. The phone number is staffed from 9 am to 5 pm ET, Monday through Friday.

THANK YOU!

- Questions?
- Feedback? Scan QR code

