


Slide 1



**Federal Labor Relations
Authority**

*Navigating
the
Negotiability Process*

August 16, 2017

The slide features a light blue header with the text "Federal Labor Relations Authority" in a bold, black, serif font. To the right of the text is the official seal of the Federal Labor Relations Authority, which is circular and contains a shield with a torch and a scale. Below the header, the main content area has a grey background with the title "Navigating the Negotiability Process" in a blue, italicized serif font. At the bottom right of this area, the date "August 16, 2017" is written in the same blue, italicized serif font.

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What will I learn today?



Navigating the Negotiability Process 8/16/2017

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What's on the table?



Conditions of Employment

Personnel policies, practices, and matters, established by rule, regulation, or “otherwise,” affecting working conditions.

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- 5 U.S.C. § 7103 (a)(14)

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**Exceptions to
Conditions of Employment**

- ◉ Hatch Act political activity
- ◉ Classification matters
- ◉ Matters “specifically provided for by [f]ederal statute”

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- 5 U.S.C. § 7103(a)(14)
- Hatch Act: 5 U.S.C. §§ 7321-7326
- Classification matters as defined in 5 C.F.R. § 511.101

**Do we have a
bargaining-obligation dispute
or a negotiability dispute?**



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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); agreements to bargain below level of recognition

- 62 FLRA 174, 182 (agreeing to bargain below the level of recognition is a permissive subject of bargaining)

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Negotiability Disputes 5 C.F.R. § 2424.2(c)

- ◉ Look at each proposal or provision in petition.
- ◉ Is the Agency saying **not now** or **never**?

- *E.g.*, 65 FLRA 738, 741

Negotiability Disputes 5 C.F.R. § 2424.2(c)

- ◉ **Examples of bases of negotiability claims:**
 - statutes (including Federal Service Labor-Management Relations Statute)
 - executive orders
 - government-wide rules and regulations
 - agency regulations with “compelling need”

Negotiability Disputes 5 C.F.R. § 2424.2(c)

- ⦿ Proposals: Prohibited and permissive are outside the duty to bargain
- ⦿ Provisions: Only prohibited may be disapproved by Agency head

Prior Agreements & Existing Policies

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

- Prior agreement: *e.g.*, 61 FLRA 554, 557

Bargaining-Obligation Disputes 5 C.F.R. § 2424.2(a)

- ◉ Not required to bargain under current circumstances.
 - *E.g.*, “covered by,” “de minimis”
- ◉ No ULP remedies
- ◉ Dismiss petition/portion of petition if only b-o dispute; any resolution of b-o dispute must occur in other proceedings (such as grievance or ULP)

- 5 C.F.R. § 2424.40(a) (“with 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)”)

Bargaining-Obligation Disputes

- For example:

- 1) “covered by”
- 2) “de minimis”
- 3) trying to bargain at wrong level
- 4) proposal outside the scope of the change

- See also OGC ULP Case-Law Outline

- OGC ULP Case-Law Outline available at <https://www.flra.gov/resources-training/resources/guides-manuals>

“Covered By”

- ◉ Don't have statutory duty to bargain over conditions of employment 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

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

“Covered By”: Expressly Contained In

- ◉ **“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; 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?

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

“Covered By” Doctrine Inapplicable

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

- 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

“Covered By” Examples

- ◉ 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.

“De Minimis”

- ◉ Ag 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.


- 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: 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

- ◉ Required to bargain only at “level of recognition.”
- ◉ Bargaining below = permissive subject
- ◉ 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.

- Req’d only at “level of recognition”: *e.g.*, 62 FLRA 174, 182
- Bargaining below: *Id.*
- Bargaining req’d at lower and higher level: *e.g.*, 67 FLRA 34, 37 (“an agency may not refuse to bargain merely because the matters over which the union demands bargaining are, or may be, subject to negotiations at a higher organizational level”)

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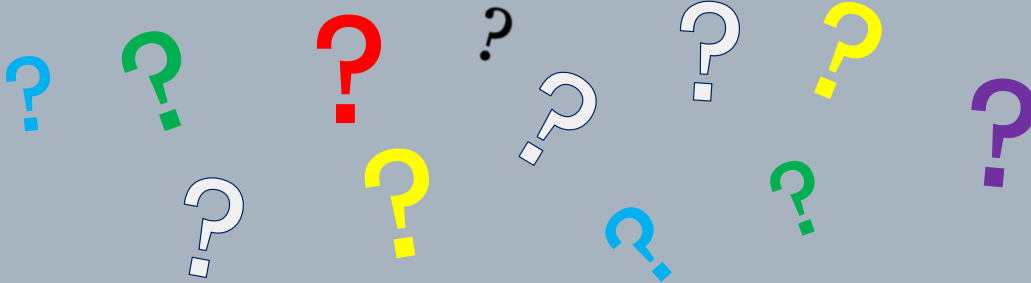


The graphic features the words "POP QUIZ!" in a stylized, hand-drawn font. "POP" is rendered in a light grey, textured, blocky font. "QUIZ!" is in a vibrant pink, cursive script. Below the text are two horizontal, wavy lines in the same light grey, textured style. The entire graphic is set against a black background and is framed by a light blue border with rounded corners.

Navigating the Negotiability Process 8/16/2017

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When do we involve the **FLRA?**



Union Files Petition for Review

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

Proposals & Provisions

- Proposal: language offered for bargaining that parties haven't agreed to — Ag has declared outside the duty to bargain
- 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

- 5 C.F.R. §§ 2424.2(c) & 2424.2(e)
- *Id.* § 2424.2(f)
- Ag-head review under 5 U.S.C. § 7114(c)

“Allegation of Nonnegotiability”

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

- 61 FLRA 97, 98 (no particular degree of specificity required)

Agency-Head Disapproval

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

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

Differences Between Proposals & 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



Union's Petition (Process): Proposals

- ◉ Solicited allegation of nonnegotiability
 - U requests (in writing), and Ag responds w/ written allegation: U **must** file within 15 days of service of allegation
 - U requests (in writing), but Ag doesn't respond: U can file at any time after 10-day period for Ag response.

- 5 C.F.R. § 2424.21

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Union asks, Agency gives Allegation of Nonnegotiability

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

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

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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					

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- 5 C.F.R. § 2424.21(b)

Union's Petition (Process): Proposals

- ◉ 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), when U requests: if Ag gives written allegation, U must file within 15 days; if Ag doesn't, U can file any time after 10-day period
 - Ag may provide unsolicited allegation before the FSIP, and the same rules apply

- 5 C.F.R. §§ 2424.11(c) & 2424.21(a)-(b); 52 FLRA 1429, 1435
- FSIP context: 50 FLRA 121, 121-22

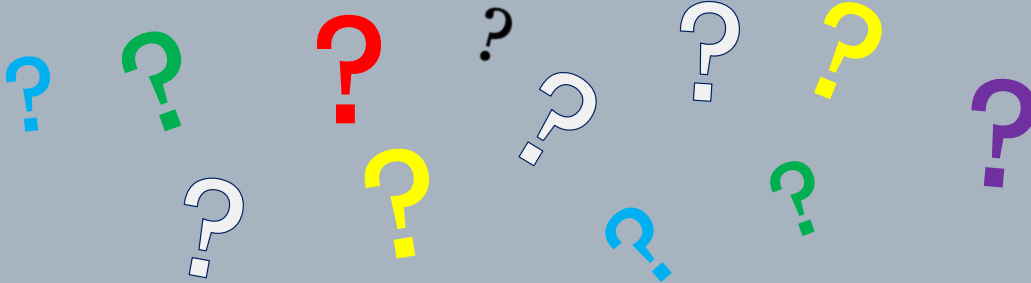
Union's Petition (Process): Provisions

- ◉ Within 15 days of service of Ag-head disapproval



- 5 C.F.R. § 2424.21(a)(2)

How do we involve the FLRA?



Sequence of Filings (Generally)

- 1) U Petition for Review
- 2) Post-Petition Conference
- 3) Ag Statement of Position
- 4) U Response
- 5) Ag Reply

Hearing Requests

- High Standard
 - *Necessary to resolve *disputed* issues of material fact.*
- Authority rarely grants hearing requests; almost always relies on documents in the record.

- Hearing Request Standard: 5 C.F.R. § 2424.31

Union's Petition: Format & Content

- Forms (including eFiling) or same info
- In proposal cases, Ag's written allegation of nonnegotiability or evidence that U requested
- In provision cases, copy of Ag-head disapproval
- Exact wording of proposals
- Special terms explained
- Copies of Ag regs/instructions
- Meaning & operation
- Supporting arguments
- Any related proceedings
- Hearing request
- Severance
- Reps' info
- Statement of service

Agency's Statement of Position (SOP)

- 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

- Agency's Statement of Position: 5 C.F.R. § 2424.24

The Union's Response

- ◉ 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

- Union's Response: 5 C.F.R. § 2424.25

The Agency's Reply

- ◉ 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 non-negotiability that could have been raised in SOP

- Agency's Reply: 5 C.F.R. § 2424.26

Other Submissions & Amicus Curiae

- ◉ Written request for permission
- ◉ Additional submissions may be filed only in “extraordinary circumstances.”
- ◉ Parties encouraged to include submission along with request
- ◉ Amicus requests will be granted only if Authority deems “appropriate.”

- Extraordinary Circumstances: 5 C.F.R. § 2424.27
- Amicus Requests: 5 C.F.R. § 2424.27

Where to File

**Chief, Case Intake and Publication
(CIP)**

Federal Labor Relations Authority

Docket Room, Suite 200

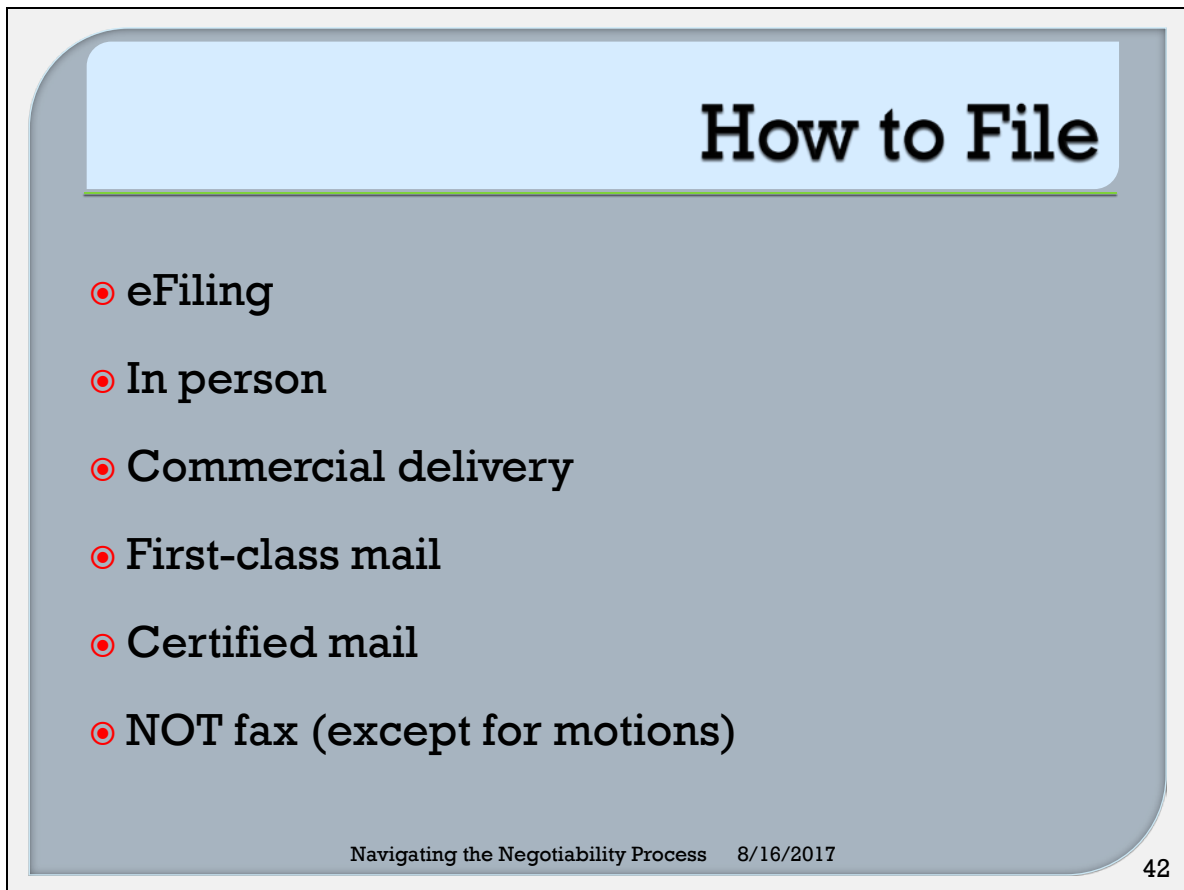
1400 K Street NW.

Washington, DC 20424-0001

Phone = (202) 218-7740

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

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How to File

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

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- How to File: 5 C.F.R. § 2429.24

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The image shows a screenshot of the FLRA.gov website. At the top left is the FLRA logo, a circular seal with a scale of justice and a sword. To its right is the text "FLRA.gov" in a large, bold, serif font, with "U.S. FEDERAL LABOR RELATIONS AUTHORITY" in a smaller, sans-serif font below it. Further right is an "RSS FEEDS" icon and a search bar with the word "Search" and a magnifying glass icon. Below this is a dark blue navigation bar with white text for "ABOUT", "COMPONENTS & OFFICES", "CASE TYPES", "DECISIONS", and "RESOURCES & TRAINING". A yellow box with a document icon and the text "eFiling Available Here" is positioned on the right side of the navigation bar. Below the navigation bar is a breadcrumb trail: "Home / Components & Offices / Offices / Office of Case Intake and Publication (CIP)". At the bottom of the slide, the text "Navigating the Negotiability Process 8/16/2017" is centered, and the number "43" is in the bottom right corner.

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The screenshot shows the FLRA eFiling System home page. At the top, there is a dark blue header with the text "FLRA" in white. Below the header is a light blue navigation bar with a "Home" button featuring a house icon. The main content area has a white background with a breadcrumb trail: "FLRA eFiling System > Home". A horizontal line separates the header from the main content. Below this, there is a "Hello" greeting in a light blue box. The main text reads: "Welcome to the FLRA Case eFiling System." followed by three links: "Not a registered user? Please click here to create a user profile.", "Already a registered user? Please click here to continue.", and "Forgot your password? Please click here.". Below this is a section titled "FAQ" with three links: "View FAQ", "Search FAQ", and "Search FAQ by Question". The final section is titled "Attachment File Types" with a link "View Allowed Attachment File Types". At the bottom of the slide, there is a footer with the text "Navigating the Negotiability Process 8/16/2017" and the page number "44" in the bottom right corner.

FLRA

Home

FLRA eFiling System > Home

Hello

Welcome to the FLRA Case eFiling System.

[Not a registered user? Please click here to create a user profile.](#)

[Already a registered user? Please click here to continue.](#)

[Forgot your password? Please click here.](#)

FAQ

[View FAQ](#)

[Search FAQ](#)

[Search FAQ by Question](#)

Attachment File Types

[View Allowed Attachment File Types](#)

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When to File

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

“Service” Required

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

- Service Requirements: 5 C.F.R. § 2424.2(g)

Additional Procedural Requirements

- ◉ Original and 4 copies of everything must be filed with Authority (except eFile).
- ◉ Table of contents if over 10 double-spaced pages (except fillable forms in eFiling).
- ◉ Signed statement of service (or eFile certification).

- Original and 4 copies: 5 C.F.R. § 2429.25
- Table of contents: 5 C.F.R. § 2429.29
- Statement of service: 5 C.F.R. § 2429.27(c)

Noncompliance with Procedural Requirements

- ◉ 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)

Bases for Dismissing Petitions

- ◉ Proposal or provision nonnegotiable
- ◉ Failure to comply with certain procedural and other requirements
- ◉ No negotiability dispute (look to each proposal/provision)
 - *E.g.*, if only bargaining-obligation dispute.

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

Bases for Dismissing Petitions

- ◉ Mootness
 - No advisory opinions.
 - 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.*, not bargaining over wording in petition
 - *E.g.*, date already passed
 - *E.g.*, parties reached agreement

- 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
- Date already passed: 58 FLRA 409, 410
- Parties reached agreement: 52 FLRA 251, 254

Bases for Dismissing Petitions

- ◉ “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.

- Grievance was directly related to petition: 56 FLRA 796, 797
- Grievance wasn't directly related: 66 FLRA 1038, 1038-39

Bases for Dismissing Petitions

- ◉ If petition seeks review of proposal/provision that has not “substantively changed” from prior petition; or
- ◉ Authority dismissed previous petition with prejudice,
- ◉ Then Authority will dismiss petition.

- Not substantially changed from prior petition: 56 FLRA 236, 237-38
- Dismissed previous petition with prejudice: 5 C.F.R. § 2424.32(d)


Collaboration & Alternative Dispute Resolution Office

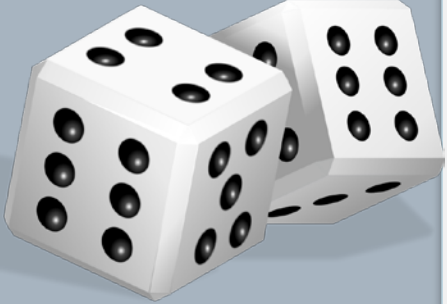


flra.gov/CADRO

CADRO@flra.gov

Ways to Resolve Negotiability Qs

- Litigate negotiability petition
- Part of ULP before ALJ or arbitrator
- CADR 



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

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- 5 C.F.R. § 2424.10 (“Collaboration and Alternative Dispute Resolution Program”)
- Arbitrators and ALJs authorized to determine negotiability issues in ULP context: 64 FLRA 443, 446-47
- Panel jurisdiction: *Carswell*, 31 FLRA 620, 624

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How to Get CADRO Assistance

1. Check box in petition
2. Request during post-petition conference

Our webpage



flra.gov/CADRO



Should We Use **CADR** ?



Why ~90% Choose CADR

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



Examples of successful issues

Navigating the Negotiability Process 8/16/2017

What to Expect

from C**ADR** 

1st Steps in CADRO Process

- Call from 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 CADR Process

○ Between sessions

- CADRO research
- Calls, email with parties
- Preparation

○ Next session(s)

Normally,

- Day-long
- By phone and/or video
- 1st: brief joint session
- Mostly caucuses
- Ground rule: mutual respect



[Subject to statutory exceptions, ...]


5 U.S.C. § 574

- (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.



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How to Prepare

for C**ADR** 

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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



Questions & Answers



Michael Wolf	Director	mwolf@flra.gov
Merritt Weinstein	Sr. D.R. Specialist	mweinstein@flra.gov
Jayne Ricco	Sr. D.R. Specialist	jricco@flra.gov

Post-Petition Conferences and Authority Decisions

Post-Petition Conference

- ◉ Authority, U rep(s), Ag rep(s)
- ◉ Normally by phone
- ◉ Parties must 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

- See 5 C.F.R. § 2424.32(d) for consequences of failure to participate.

Post-Petition Conference

- ◉ 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

“Meaning” Issues

- ◉ If parties’ agreed meaning (or U’s explanation) consistent with wording, adopt; if not, don’t.
- ◉ Provision cases – defer to parties that executed agreement, not Ag head.
- ◉ Meaning adopted by Authority will apply in other proceedings.

- 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.

Severance

- ◉ 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.
- ◉ U may request in petition or response.
- ◉ Ag may oppose; must explain why inappropriate.

- 5 C.F.R. §§ 2424.2(h), 2424.25(d).
- 66 FLRA 1038, 1040 (where no severance request, if one section of proposal is outside duty to bargain, then entire proposal is outside duty to bargain).
- Ag may oppose: 5 C.F.R. §§ 2424.24(d) & 2424.26(d).

Parties' Burdens/Failure to Meet

- ◉ Both: Create record & support arguments.
- ◉ U: Within duty to bargain, not contrary to law, or permissive; any severance request (but can reserve that until response).
- ◉ Ag: Outside duty to bargain or contrary to law; why severance is not appropriate (if U requested in petition).
- ◉ Failure to raise and support = waiver.
- ◉ Failure to respond = concession.
- ◉ Failure to support = bare assertion.

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

Authority's Decision and Order

- ◉ 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

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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.

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- 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.

**What laws does the FLRA
apply to decide whether
our proposals/provisions
are negotiable?**


Duty-to-Bargain Limitations 5 U.S.C. § 7117(a)

- ◉ Section 7117(a) defines the duty to bargain *and* limits that duty.

- ◉ No duty if inconsistent with:
 - any federal law,
 - any government-wide rule/regulation, or
 - any agency rule or regulation for which there is a compelling need.

The Statute: Most Common

friends



The image shows a stick figure with a circle for a head containing the word "You". The figure is holding a book. The book cover is light beige and features the text "THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE THE BACK PAY ACT" at the top. Below the text is a circular seal with an eagle and the words "OFFICE OF FEDERAL MEDIATION AND CONCILIATION". At the bottom of the book cover, it says "Federal Labor Relations Authority".

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Make the Statute your friend.

The Statute: Conditions of Employment

- ◉ Proposals/provisions must concern BUEs' "conditions of employment," and may not concern:
 - Hatch Act political activity
 - Classification matters
 - Matters "specifically provided for by [f]ederal statute"

- "Conditions of Employment"
5 U.S.C. § 7103(a)(14)
- Hatch Act political activity
5 U.S.C. §§ 7321-7326
- Classification matters
Defined in 5 C.F.R. § 511.101
- "Specifically provided for"
E.g., 57 FLRA 373, 383

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The Statute: Management Rights

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

- 5 U.S.C. § 7106.

Management Rights: § 7106(a)(1)

○ Right to determine agency's:

- Mission
- Budget
- Organization
- Number of Employees
- Internal-Security Practices

- Mission: 59 FLRA 159, 163; 58 FLRA 341, 342; 49 FLRA 333, 349; 22 FLRA 868, 869
- Budget: 66 FLRA 124, 125; 61 FLRA 113, 116; 47 FLRA 980, 998; 44 FLRA 18, 30
- Organization: 63 FLRA 530, 532; 58 FLRA 175, 178; 56 FLRA 444, 449
- Number of Employees: 46 FLRA 298, 316
- Internal-Security Practices: 66 FLRA 929, 931

Management Rights: § 7106(a)(2)(A), *First Part*

◉ Right to:

- Hire Employees
- Assign Employees
- Direct Employees
- Layoff Employees
- Retain Employees



- Hire: 62 FLRA 93, 94-95
- Assign: 65 FLRA 911, 913; 62 FLRA 508, 510; 61 FLRA 209, 218
- Direct: 65 FLRA 509, 511; 63 FLRA 505, 508; 63 FLRA 450, 453; 62 FLRA 15, 17
- Layoff & Retain are Separate Rights with Different Definitions: 58 FLRA 344, 345
- Layoff: 65 FLRA 911, 913
- Retain (separate from Layoff): 67 FLRA 85, 87; 60 FLRA 839, 841-42

Management Rights: § 7106(a)(2)(A), *Second Part*

◉ Right to:

- Suspend Employees
- Remove Employees
- Reduce Grade or Pay of Employees
- Take Other Disciplinary Action Against Employees

- Suspend: 19 FLRA 647, 650
- Remove: 11 FLRA 475, 482; 3 FLRA 3, 5-6
- Reduce Grade or Pay: 53 FLRA 539, 579
- Other Discipline: 65 FLRA 142, 145; 61 FLRA 341, 346; 60 FLRA 124, 127; 53 FLRA 625, 679

Management Rights: § 7106(a)(2)(B), (C), & (D)

○ Right to:

- Assign Work
- Contract Out
- Determine Personnel
- Make Selections to Fill Positions
- Carry Out Mission in Emergencies

- Assign Work: 66 FLRA 819, 823; 64 FLRA 443, 447; 63 FLRA 505, 508; 61 FLRA 97, 99
- Contract Out: 60 FLRA 595, 597; 48 FLRA 168, 204
- Determine Personnel: 61 FLRA 371, 373
- Selections/Positions: 61 FLRA 618, 622; 61 FLRA 226, 229; 56 FLRA 1046, 1048
- Mission in Emergencies: 58 FLRA 549, 551; 31 FLRA 131, 132

Management Rights: § 7106(b)

- All rights in § 7106(a) are “subject to” § 7106(b), including:
 - § 7106(b)(1)
 - § 7106(b)(2)
 - § 7106(b)(3)



Management Rights: § 7106(b)(1)
The Hybrid, First Part

- At the election of the agency, negotiate:
 - ❖ Numbers, types, and grades
 - Of employees or positions
 - Assigned to any-
 - Organizational subdivision,
 - Work project, or
 - Tour of duty

PERMISSIVE

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- Enforceable in arbitration: 62 FLRA 90, 92
- Cannot be disapproved on agency-head review
 - 61 FLRA 336, 338, 339
- If also concerns § 7106(b)(2) or (b)(3), then mandatory:
 - 62 FLRA 341, 343
- Numbers: 57 FLRA 424, 426. Types & Grades: 52 FLRA 1024, 1032 & n.11, 1034. Organizational subdivision: 55 FLRA 925, 928; 54 FLRA 1302, 1306; 52 FLRA 794, 802. Work Project: 55 FLRA 848, 853. Tour of Duty: 57 FLRA 424, 426.

Management Rights: § 7106(b)(1) *The Hybrid, Second Part*

- Technology, methods, & means of performing work

TECHNOLOGY

technical method used in accomplishing or furthering performance of agency's work

METHODS

the way agency performs its work (the "how")

MEANS

any instrumentality, including an agent, tool, device, measure, plan, or policy used by an agency for the accomplishment or furtherance of the performance of its work ("with what")

- Technology of Performing Work: 58 FLRA 273, 275
- Methods & Means of Performing Work: 66 FLRA 499, 502; 66 FLRA 639, 646; 66 FLRA 112, 115; 56 FLRA 69, 87-91. *But see* 64 FLRA 723, 725.

Management-Rights Exceptions: § 7106(b)(2) “Procedures”

- The “procedures which management officials of the agency will observe in exercising” any management right under § 7106
- Look to the case law

MANDATORY

- Must bargain *despite* effect on § 7106(a) or (b)(1) rights
- *E.g.*, 61 FLRA 209, 220 (advance notice)
- *E.g.*, 61 FLRA 327, 331-33 (requiring delayed exercise of mgmt. rights until bargaining complete)
- Cannot preclude management from assigning employees particular duties: 47 FLRA 512, 520
- Cannot substantively limit right to determine content of performance standards: 56 FLRA 1115, 1116 n.2
- Examples that were not procedures: 70 FLRA 100, 104; 68 FLRA 676, 679

**Management-Rights Exceptions:
§ 7106(b)(3) “Appropriate Arrangements”**

- “Appropriate arrangements for employees adversely affected by the exercise of any authority” under § 7106(a) or § 7106(b)(1)
- Ask:
 - Is it an arrangement?
 - If so, is it appropriate?
- Must be “tailored”
- Within duty to bargain even if it’s not a procedure

MANDATORY

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- 56 FLRA 69, 69, 86-91 (appropriate arrangements for exercise of § 7106(b)(1) rights)
- Must seek to mitigate adverse effects flowing from exercise of a management right. *E.g.*, 68 FLRA 676, 679.
- Union must identify effects or reasonably foreseeable effects flowing from management rights, and explain how they’re adverse: 21 FLRA 24, 31.
- “Tailored” to compensate/benefit adversely affected employees. *Compare* 66 FLRA 929, 940-41 (tailored), *with* 51 FLRA 1308, 1318-19 (not tailored).
- Can’t be speculative or hypothetical, *e.g.*, 59 FLRA 25, 29, but may be “prophylactic,” *e.g.*, 64 FLRA 953, 959-60.

**“Appropriateness” under § 7106(b)(3):
Proposals vs. Provisions**

**DIFFERENT TEST
for “Appropriateness”**

- ◉ Proposals = *KANG*, “excessive interference”
 - Weigh burdens on exercise of management rights against benefits to employees.



- ◉ Provisions = “abrogation”
 - Does the arrangement “waive,” or preclude Ag from exercising, affected rights?
 - *But see* D.C. Cir.: arbitrary and capricious to apply two different standards

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- Different Test: 65 FLRA 509, 512
- Weighing burdens vs. benefits: *KANG*, 21 FLRA 24, 31-32; *see also* 67 FLRA 316, 317-18
- Applying abrogation to provisions: 65 FLRA 509, 513, 515
 - *But see* 739 F.3d 13, 21 (D.C. Cir. 2014) (reversing abrogation standard in provision dispute)

Management-Rights Exceptions: § 7106(a)(2) “Applicable Laws”

- When agency claims proposal or provision affects § 7106(a)(2) rights, Authority may ask whether proposal/provision enforces an “applicable law.”

APPLICABLE LAWS

Lawfully enacted statutes (but not *The Statute*), the U.S. Constitution, controlling judicial decisions, executive orders issued pursuant to express statutory authorization, and regulations having the force and effect of law.

- *E.g.*, 61 FLRA 201, 206
- See *Dep’t of the Treasury, IRS v. FLRA*, 494 U.S. 922 (1990) (discussing the meaning of “applicable laws”)

Legal Doctrine: Sole-and-Exclusive Discretion

- Generally, if Ag has discretion over a matter, then Ag must bargain over proposals concerning that matter.
- But if Ag's discretion is "sole and exclusive," then it would be contrary to law to require bargaining over that discretion.
- Sole-and-exclusive discretion may arise from statutes or regulations.

- Generally, if discretion, Ag must bargain: 55 FLRA 1, 4-5
- Sole-and-exclusive discretion: 59 FLRA 331, 346, 351
- Under statutes, Authority examines wording & legislative history: 58 FLRA 246, 248-50
- If discretion under reg, Authority may consider interpretation of Ag that promulgated reg: 59 FLRA 331, 341-45
- See *U.S. Dep't of the Air Force, Luke AFB, Ariz. v. FLRA*, 844 F.3d 957 (D.C. Cir. 2016) (example of sole-and-exclusive discretion; no particular wording required to show Congressional intent to grant sole-and-exclusive discretion)

Agency Rules and Regulations

- Ag rules and regs = rules, regulations, and official declarations of policy that govern the resolution of matters within particular agencies.
- Generally within duty to bargain, unless Ag shows “compelling need” for rule/reg.

- Ag rules & regs: 37 FLRA 186, 193-94
- “Compelling need”: 5 U.S.C. § 7117(a)(2); Illustrative criteria: 5 C.F.R. § 2424.50
- *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.

Agency Rules and Regulations: “Compelling Need”

- ◉ Claim must be resolved in negotiability proceeding.
- ◉ 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.

- Must resolve in NG proceeding. *E.g.*, 49 FLRA 534, 542.
 - *But see* 67 FLRA 34 (compelling-need assertion cannot completely preempt bargaining process).

Government-wide Rule or Regulation

- ◉ Government-wide = Rules, regulations, and official declarations of policy that are generally applicable throughout the federal government and are binding on the federal agencies and officials to whom they apply
- ◉ Generally, if CBA preceded gov't-wide regulation, CBA governs until it expires.
 - Exception: gov't-wide regulations that implement 5 U.S.C. § 2302 (prohibited personnel practices).

- Proposal/provision cannot be inconsistent with gov't-wide rule or reg: 5 U.S.C. § 7117(a)(1)
- "Government-wide": *e.g.*, 53 FLRA 403, 416
- Generally, CBA applies if precedes gov't-wide reg: 5 U.S.C. § 7117(a)(7); 65 FLRA 817, 819
 - Reciting standard with exception: 60 FLRA 398, 399 n.6

**Reminder: Do Not Look to Prior Agreements
or Existing Policies to Determine Negotiability**

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

- Prior agreement doesn't = negotiable: 61 FLRA 554, 557

Thank you!

⦿ Questions?

⦿ Evaluations