

Collective Bargaining Pursuant to Executive Order 14003 and 5 U.S.C. § 7106(b)(1)



The Administration's Perspective

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Executive Order 14003 and 7106(b)(1) Training and Q&A – FLRA / OPM

- Executive Order 14003, Protecting the Federal Workforce, signed by President Biden on January 22, 2021
- Section 1 of EO 14003 provides that it is “the policy of the United States to encourage worker organizing and collective bargaining”
- It is critical for workers to have their voices heard in their workplaces
- Section 4 of EO 14003 helps advance this policy objective
 - “[t]he head of each agency subject to the provisions of chapter 71 of title 5, United States Code, shall elect to negotiate over the subjects set forth in 5 U.S.C. 7106(b)(1) and shall instruct subordinate officials to do the same.”
- This supports the President’s goal to reset labor-management relations in the Executive Branch
- It is now Executive Branch policy to collectively bargain over 7106(b)(1) topics

Executive Order 14003 and 7106(b)(1) Training and Q&A – FLRA / OPM

- OPM issued EO 14003 guidance to agencies on March 5, 2021
 - <https://www.chcoc.gov/content/guidance-implementation-executive-order-14003-protecting-federal-workforce>
- OPM's guidance outlined five key principles agencies should follow:
 - Agency and union representatives will bargain over 7106(b)(1) subjects in good faith with the objective of reaching an agreement
 - In the event the parties are unable to reach an agreement, either party may seek the assistance of the FMCS as well as any other mutually agreed-upon dispute resolution process in accordance with 5 U.S.C. 7119(a) with objective of reaching agreement that addresses interests of both parties
 - If FMCS assistance does not result in an agreement, either party may take the impasse to the FSIP to resolve the impasse or to an arbitrator agreed upon by the parties under procedures approved by the FSIP.
 - Agency head review may not disapprove a FSIP ordered resolution because it concerns a 7106(b)(1) subject
 - 7106(b)(1) policy requires agencies to bargain over the substance of 7106(b)(1) subjects, whether at the union's request for midterm or I&I bargaining issues, if applicable, or during term negotiations on a new term collective bargaining agreement.

Overview of Collective Bargaining

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- These materials have been provided by the Federal Labor Relations Authority. They are intended to supplement the discussion portion of the training presentation and must be understood in the context of that discussion.
- While the slides will assist in understanding various legal issues, they do not represent legal advice or guidance. Also, since each case depends upon its own unique facts and the application of various legal precedent, they should not be relied upon to predict the legal outcome in any particular case.

The Statute:

- The Federal Service Labor-Management Relations Statute protects the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them.
- Congress, in 5 U.S.C. section 7101 found that “labor organizations and collective bargaining in the civil service are in the public interest.”

The Statute

- Section 7102 Employee Rights:
- To engage in collective bargaining with respect to conditions of employment.

When does the duty to bargain arise?

- **Term negotiations.**

- *AFGE, Interdepartmental Local 3723, AFL-CIO*, 9 FLRA 744 (1982).

- **Mid-term proposals over subjects not already bargained.**

- *U.S. Dep't of the Interior, Wash., D.C. and U.S. Geological Survey, Reston, Va.*, 56 FLRA 45 (2000); *U.S. Off. of Pers. Mgmt.*, 71 FLRA 977 (2020), appeal filed, *Am. Fed'n of Gov't Emps., AFL-CIO v. FLRA*, No. 20-1398 (D.C. Cir. argued Oct. 14, 2021).

- **Proposed changes in conditions of employment.**

- *Fed. Bur. of Prisons, FCI, Bastrop Tex.*, 55 FLRA 848 (1999).

Dep't of the Air Force, Wright-Patterson Air Force Base, 51 FLRA 1532 (1996).

Assuming it is a time when a duty to bargain exists:

- Not every topic or proposal must be bargained.
 - A. No Duty to Bargain over Unlawful Matters
 - B. No duty to bargain over matters that are contrary to government wide Regulations (Section 7117(a)(1))
 - C. No duty to bargain over matters that are contrary to agency rules for which there is a compelling need (Section 7117(a)(2))
 - Note: Existing contracts may take precedence over new government wide and agency regulations.
 - D. Limits on the right to bargain about proposals that impact non-unit members.

Statutory Limits on the scope of bargaining

- 7103(a)(14)(A) Matters relating to political activities
- 7103(a)(14)(B) Matters relating to classification
- 7103(a)(14)(C) Matters specifically provided for by Federal Statute
 - -Including 5 U.S.C. section 7106

Section 7103(a)(14)(c)

- 7103(a)(14)(C) Matters specifically provided for by Federal Statute
 - -Including 5 U.S.C. section 7106

§ 7105

(h) Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Authority may appear for the Authority and represent the Authority in any civil action brought in connection with any function carried out by the Authority pursuant to this title or as otherwise authorized by law.

(i) In the exercise of the functions of the Authority under this title, the Authority may request from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or policy directives issued by the Office of Personnel Management in connection with any matter before the Authority.

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

§ 7106

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

Section 7106 – Management Rights

- 5 U.S.C. § 7106(a) establishes management rights under the Statute. The substance of management’s decision to exercise these rights is non-negotiable.
 - Right to determine the mission, budget, organization, number of employees and internal security practices
 - In accordance with applicable laws, hire, assign, direct, layoff, retain, suspend, remove, reduce in grade or pay, discipline, assign work, contract out, determine personnel, make selections for hiring, and other action as necessary to carry out the mission during emergencies.
- Management rights are subject to § 7106(b).

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(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

5 U.S.C. Section 7106(b)

- 5 U.S.C. § 7106(b)(1) establishes permissive subjects of bargaining.
 - The parties may bargain over permissive subjects, but are not required to bargain.
- Permissive subjects:
 - numbers, types, and grades of employees or positions; on the technology, methods or means of performing work.

5 U.S.C. Section 7106(b)(2) and (3)

- 5 U.S.C. § 7106(b)(2) and (3) require an agency to bargain over procedures and appropriate arrangements when it exercises its rights under the management rights clause.
 - Commonly referred to as bargaining over the “impact and implementation” of a change.
- This bargaining is Mandatory.

Three Traditional Categories

- **Mandatory**
 - Those subjects the parties are required to negotiate.
- **Permissive**
 - Those subjects the parties may mutually agree to bargain, but are not required to bargain.
- **Prohibited**
 - Those subjects that the parties are not permitted to bargain.

More on 7106(b)(1)

- Traditionally permissive
- (b)(1) agreements are valid and enforceable. *SSA, Balt.*, 55 FLRA 1063, 1069 (1999).
- When agencies bargain (b)(1), the types and nature of proposals the Union can submit are expanded
- The covered by caveat – Once a matter is negotiated, a party can assert it has no duty to bargain again, as it already bargained.

7106(b)(1)
Decisions

David Eddy
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5 U.S.C. § 7106(b)(1)

Categories of 7106(b)(1) Matters

- Numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty
- Technology, methods, and means of performing work

Numbers, Types, and Grades . . .

Generally:

Staffing patterns, or allocation of staff, for purposes of agency's organization and accomplishment of its work.

See, e.g., 66 FLRA 639, 645.

Numbers

- Increases
- Decreases
- Maintains

See, e.g., 57 FLRA 424, 426.

Types

- Distinguishable classes, kinds, groups, or categories
- Of employees or positions
- Relevant to establishment of staffing patterns.

See, e.g., 52 FLRA 1024, 1031.

Types – Examples

- Temporary employees

52 FLRA 1024, 1034.

- Term appointments.

53 FLRA 858, 869-70.

- Dental hygienists.

52 FLRA 1024, 1031-32.

Grades

Example:

- GS Levels.

52 FLRA 1024, 1032 n.11.

Numbers, Types, and Grades of . . .

- Employees or positions
- Assigned to any:
 - Organizational subdivision
 - Work project or
 - Tour of duty

Organizational Subdivisions - Examples

Proposals/provisions:

- Involving centralization/
decentralization

54 FLRA 1302, 1306.

- Establishing staffing of
subdivisions

55 FLRA 925, 928.

52 FLRA 794, 796-802.

Work Project

Particular “job” or “task.”

37 FLRA 350, 355.

Examples:

- Supervising inmates.

55 FLRA 848, 853.

- Dental assistants’ duties.

52 FLRA 1024, 1032.

Tour of Duty

- Hours of a day (daily tour) and
- Days of an administrative workweek (weekly tour)
- That constitute employee's regularly scheduled administrative workweek.

See, e.g., 57 FLRA 424, 426
(citing 51 FLRA 386, 394).

Tour of Duty

Not “office hours.”

36 FLRA 853, 860.

Numbers, Types, and Grades – Examples

- Filling vacant position at organizational subdivision
54 FLRA 807, 812.
- Scheduling employees to 8-hour day with a ½ hour, duty-free lunch.
67 FLRA 442, 448.
- Not: *Establishing* organizational subdivision (without staffing).
52 FLRA 794, 802.

Classification vs. Numbers/Types/ Grades

- Classification matters outside the duty to bargain under 7103(a)(14)(B).

54 FLRA 1302, 1307-10.

- Without regard to 7106(b).

55 FLRA 1145, 1150.

Classification - Examples

- Establish a particular classification.

51 FLRA 637, 643-44.

- Reclassify existing positions.

45 FLRA 802, 803-04.

Not Classification

- Establishing numbers/ types/grades in agency's Philadelphia operations
- Not classifying/reclassifying existing positions, or placing incumbents into positions established by the proposals.

55 FLRA 509, 511.

Technology

Technical methods used in accomplishing or furthering performance of agency's work.

See, e.g., 62 FLRA 321, 326.

Technology – Test

Must show:

- Technological relationship of the matter addressed by the proposal to accomplishing or furthering agency's work; and
- How the proposal would interfere with the purpose for which the technology was adopted.

See, e.g., 58 FLRA 273, 275.

Technology – Examples

- Computer terminals for employees.

46 FLRA 930, 954-56.

- Certain telephone lines in employees' offices.

46 FLRA 930, 957-59.

Methods

The way in which the agency performs its work – the “how.”

See, e.g., 66 FLRA 112, 115.

Means

Any instrumentality, including an:

- Agent
- Tool
- Device
- Measure
- Plan or
- Policy

Agency uses to accomplish, or further the performance of, its work.

The “with what.”

See, e.g., 66 FLRA 112, 115.

Methods and Means – Test

Must show:

- Direct and integral relationship between agency's chosen method/means and accomplishment of agency's mission; and
- Proposal would directly interfere with the mission-related purpose for which the method/means was adopted.

See, e.g., 66 FLRA 639, 646.

Methods and Means – Additional Points

- Relative importance of agency's chosen method or means – irrelevant.

See, e.g., 66 FLRA 112, 115.

- Often turns on agency's particular mission.

Methods and Means - Examples

- Allowing Air Reserve Technicians to wear civilian clothes.

66 FLRA 499, 502.

- But: allowing Customs officers to wear cargo shorts in certain environments – not methods and means.

61 FLRA 48, 52.

Methods and Means - Examples

- At news organization, partitions, at least 5 feet high, between cubicles

59 FLRA 447, 449-50.

- Changing SSA office's workspace design.

66 FLRA 112, 115-16.

Methods and Means - Examples

- But: allowing employees to select offices without regard to workgroup assignment – not methods and means.

64 FLRA 723, 725.

Methods and Means – Examples

- Smoking policy?
- For the Indian Health Service, yes.

37 FLRA 972, 976-79.

- Evaluation of work.

62 FLRA 350, 352.

- Contractors performing work.

54 FLRA 1582, 1590.

- Establishing organizational subdivision.

52 FLRA 813, 818-19.

7106(a) and 7106(b)(1) Matters

Proposal that concerns 7106(a)
matters - not unlawful if it also
concerns 7106(b)(1) matter.

See, e.g., 57 FLRA 373, 379.

7106(a) and 7106(b)(1) Matters – Examples

Maintain specific number of particular positions at specific locations:

- Determine organization
- Also numbers/types/grades in organizational subdivision.

54 FLRA 1302, 1306.

7106(a) and 7106(b)(1) Matters – Examples

Expand, to field offices, pilot program regarding email responses to internet inquiries:

- Assign work
- Also technology of performing work.

58 FLRA 273, 274-75.

7106(a) and 7106(b)(1) Matters – Examples

Scheduling employees to a tour of duty without an unpaid lunch period:

- Assign work
- Also number of employees assigned to a tour of duty.

57 FLRA 424, 426-27.

7106(a) and 7106(b)(1) Matters – Examples

Maintain two security officers on each shift:

- Internal security
- Also number of employees assigned to tour of duty.

57 FLRA 373, 379.

7106(a) and 7106(b)(1) Matters – Examples

Maintain certain number of LPN positions at their current locations:

- Assign work
- Also numbers and types assigned to organizational subdivision.

55 FLRA 549, 550-52.

7106(a) and 7106(b)(1) Matters – Examples

Maintain, at St. Louis division,
certain staffing levels:

- Hire and assign employees
- Also number assigned to
organizational subdivision.

54 FLRA 807, 812-13.

7106(a) and 7106(b)(1) Matters – Examples

Providing intelligence officer with
secure phone line:

- Internal security
- Also technology and means of
performing work.

46 FLRA 930, 957-60.

7106(a) and 7106(b)(1) Matters – Examples

Prohibiting uniforms for National Archives research-room employees:

- Internal security
- Also methods and means of performing work.

31 FLRA 878, 880-81.

Final Points

- If proposal also concerns 7106(b)(2) or (b)(3), must bargain.

See, e.g., 48 FLRA 168, 189-92.

- If contrary to other law, can't bargain.

68 FLRA 676, 685-86.

- Agency head can't disapprove (b)(1).

61 FLRA 336, 338, 339.

Successful (b)(1)
Bargaining
TODAY

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Director

Collaboration and ADR Office



Federal Labor Relations Authority

“3 by 3”

Respect	Listen Actively	Problem Solve
Bargaining Model	Learn	Process Agreement
Policy & Law	Focus	Stakeholders



RESPECT!

- a. Respect each other
- b. Respect legitimate interests
- c. Respect ideas



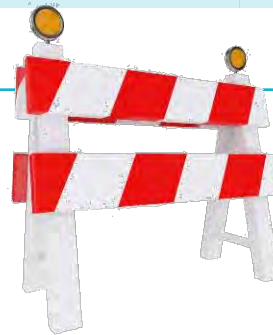
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LISTEN
ACTIVELY!

COMMON BARRIERS TO LISTENING

Prejudge	Unspoken agenda
Environment	Inattentive
Interruptions	Defensive
Time limits	Assumptions
Mistrust	Paradigms
Language	Bias



LISTEN
ACTIVELY!

ACTIVE LISTENING

Brains	Questions
Hands	Reflective
Eyes	Paraphrase
Face	Restate
Body	Summarize
Concentrate	Observe



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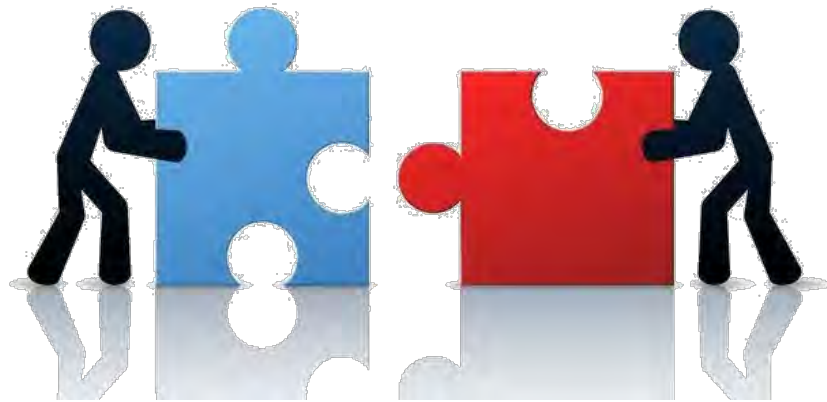


PROBLEM SOLVE



BARGAINING MODEL

1. Bargaining = interact for the purpose of achieving valuable outcomes about things that matter
2. Two bargaining models
 - a. Distributive for dispute resolution
 - b. Integrative for problem solving

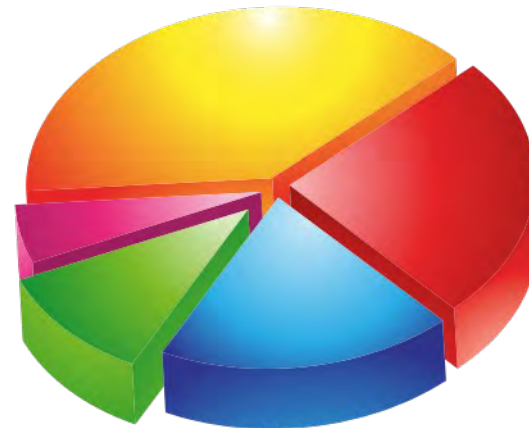


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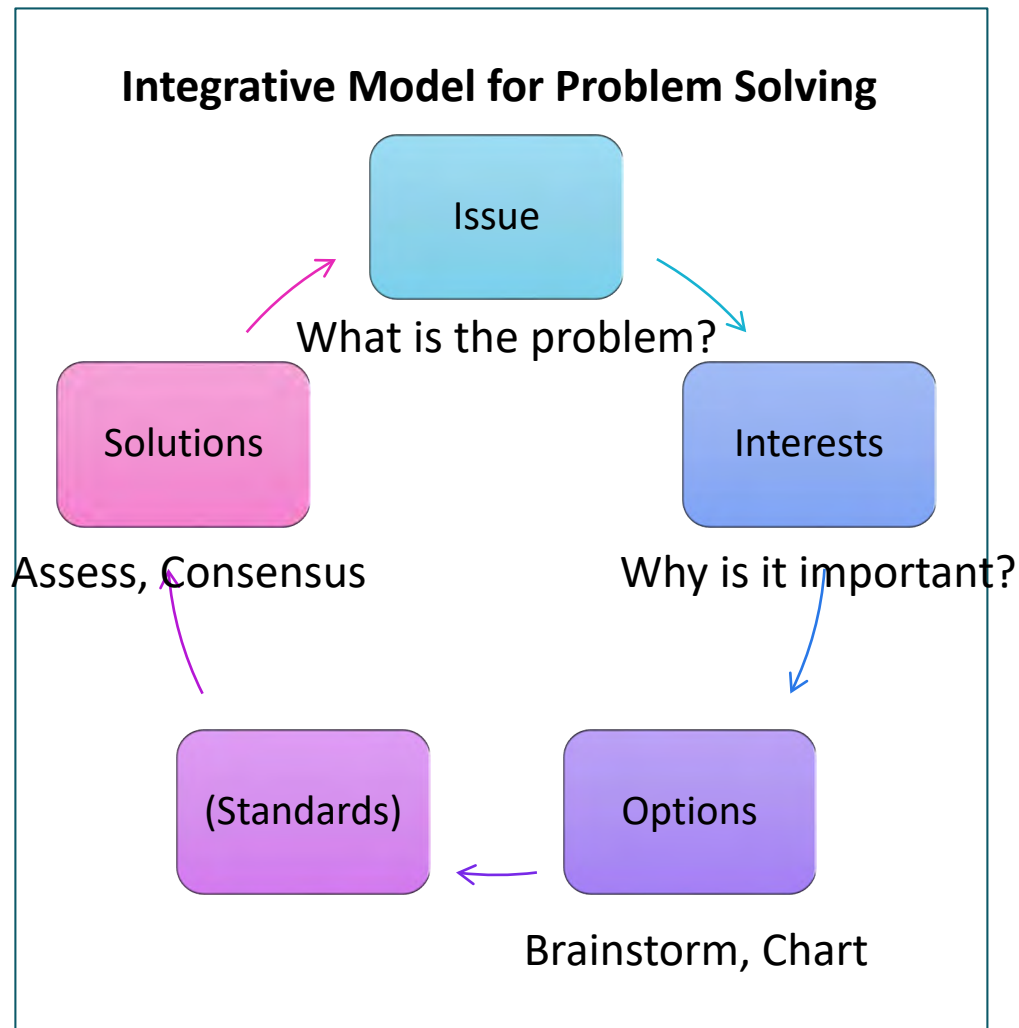


BARGAINING MODEL

Distributive Model for Dispute Resolution



BARGAINING MODEL



LEARN

- Learn before you bargain
- Learn from the bargaining process



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PROCESS AGREEMENT

Adopt a process agreement

- a. Principles
 - b. Success
 - c. Differences
 - d. Information
 - e. Educate and listen
 - f. Fully prepared
- ... and ...



PROCESS

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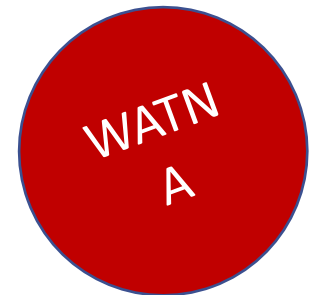


PROCESS AGREEMENT

Adopt a process agreement, con't.

g. Facilitator

h. Support even if don't prefer



AGREEMENT



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PROCESS AGREEMENT

Adopt a process agreement, con't.

- i. Training
- j. Consistent
- k. Commitment, vision,
courage



AGREEMENT



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POLICY & LAW



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ENGAGE STAKEHOLDERS



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Successful (b)(1) Bargaining

Respect	Listen Actively	Problem Solve
Bargaining Model	Learn	Process Agreement
Policy & Law	Focus	Engage Stakeholders

Thank you!

