



Negotiability Principles & Mandatory Subjects of Bargaining

- You are at the bargaining table – Now what?
- Focus on conceptual framework, not specific subjects

Why Are the Principles Important?

- Understanding the Statute will help you determine
 - what issues you have to talk about
 - how to craft proposals and counter proposals
 - negotiating to impasse
 - grievance arbitration

3 Subjects of Bargaining

- Mandatory
 - Those an agency must bargain over
- Permissive
 - Those an agency may, but are not required to bargain over
- Other
 - Those that an agency cannot bargain over

The Substantive Scope of Bargaining

- Part I
 - Broad Conditions of Employment
- Part II
 - Limited by exceptions to conditions of employment
 - Limited by management rights, law, rule and regulation
- Part III
 - Expanded by exceptions to management rights

It's Like Math

Conditions of Employment

- exceptions to conditions of employment
- matters inconsistent with law, rule and regulation
- management rights
- +Exceptions to management rights

Mandatory Subjects of Bargaining

The Basic Bargaining Obligation

5 U.S.C. § 7114(a)(4), (b)(2)

- Negotiate in good faith
- For the purpose of arriving at a collective bargaining agreement
- Authorized representatives prepared to negotiate concerning any “condition of employment”

What are “conditions of employment?”

5 U.S.C. § 7103(a)(14)

- Broadly defined
 - Personnel policies, practices and matters, whether established by rule, regulation, or otherwise, affecting working conditions

How Do You Know If Something is a Condition of Employment?

1. Does it concern bargaining unit employees; and
2. Does it directly affect their work situation or employment relationship

Antilles Consolidated Education Association and Antilles Consolidated School System, 22 FLRA 235 (1986)

How are working conditions created?

- Contracts, MOUs, and MOAs
- Past Practice
- Law, Rule, or Regulation

Scope of Bargaining Limited

Part II

- Exceptions to Conditions of Employment
- Inconsistent with:
 - Federal Law
 - Government-wide rule or regulation
 - Agency regulation for which there is a compelling need
- Management Rights

Exceptions to Conditions of Employment

5 U.S.C. § 7103(a)(14)

- Hatch Act political activity
- Classification matters
- Matters “specifically provided for by statute”

“Specifically Provided For”

5 U.S.C. § 7103(a)(14)(c)

- Reference to a matter is not enough
- Specific to some, but not as to others
- Agency has no discretion

Inconsistent with Law

5 U.S.C. § 7117(a)

- No obligation to bargain where discretion sole & exclusive
 - Plain wording
 - legislative or regulatory history

Three Types of Laws

1. Specifically Provides for a matter
2. Discretion granted to Agency
3. Sole & Exclusive Discretion granted to an Agency

Proposal regarding wages for pilots

- Basic rates of pay may be established and revised in relation to the rates of basic pay for the same or similar work performed in the U.S. or in areas outside the U.S.

Based on 51 FLRA 333

Proposal regarding basic compensation of teachers

- The Secretary of each military department shall fix the basic compensation of teachers at rates equal to the average of the range of rates of basic compensation for similar positions in urban school jurisdictions in the U.S. of 100,000 or more population

Based on 45 FLRA 1185

Proposal regarding compensation of OTS employees

- The Director shall fix the compensation of all employees of OTS notwithstanding any other laws
 - Legislative history

Based on 47 FLRA 884

Inconsistent with an Agency Regulation

5 U.S.C. § 7117(a)(1)(2)

- The duty to bargain extends to agency regulations unless there is a compelling need for the regulation
 - Compelling need criteria 5 C.F.R. § 2424.50

Management Rights

5 U.S.C. § 7106(a)

- Nothing in the Statute, including the right to bargain, affects an agency's right to:

(a)(1) Determine its mission, budget, organization, number of employees, and internal security practices

Management Rights

5 U.S.C. § 7106(a)

(a)(2) In accordance with applicable laws --

- To hire, assign, direct, layoff, discipline and retain employees
- To assign work, contract out, and determine personnel
- To select properly ranked candidates
- To take action during an emergency

The Scope of Bargaining Expanded Part III

- Exceptions to Management Rights
 - 7106(b)(1) permissive subjects
 - 7106(b)(2) procedures
 - 7106(b)(3) appropriate arrangements

Procedures

5 U.S.C. § 7106(b)(2)

- Procedures which management will observe in exercising a management right
- Look to the case law

Appropriate Arrangements

5 U.S.C. § 7106(b)(3)

- Intended to be an "arrangement" for employees adversely affected by the exercise of a management right
 - Only matters if a management right is affected

*NAGE, Local R14-87 and Kansas Army Nat'l Guard, 21
FLRA 24 (1986)*

Arrangement

- Identify effects or reasonably foreseeable effects on employees flowing from the exercise of management's rights
- Identify how those effects are adverse
 - Speculative or hypothetical concerns not an arrangement
 - If unrelated to management's exercise of its reserved rights, not an arrangement

Arrangement

- Is it sufficiently "tailored"
 - compensating only those employees suffering adverse effects attributable to the exercise of management's rights

Appropriate

- Whether the proposal excessively interfere with the relevant management right(s)

- Weigh:

benefits afforded under the arrangement

v.

intrusion on the exercise of management's rights

Framework for Resolving Negotiability Disputes under 7106(a) and (b)

- Does the proposal affect a 7106(a) right
- Is the proposal negotiable under 7106(b)(2) or (b)(3)
- Is the proposal electively negotiable under 7106(b)(1)

HUD Council of Locals 222, Local 2910, 54 FLRA 171 (1998)

Management Rights Issues in the Arbitration Forum

- Before an arbitrator
- On exceptions to a remedy award
- Different standards apply
 - In negotiability, the issue is whether you have to bargain
 - In arbitration, you have already bargained

Enforcing a Mandatory Subject of Bargaining in Arbitration

- Remedy award affects a management right under 7106(a)
 1. Is it a remedy for a violation of either
 - An applicable law within 7106(a)(2); or
 - A contract provision negotiated pursuant to 7106(b)(1), (2), or (3)
 2. If yes, does it reconstruct

BEP, 53 FLRA 146 (1997)

Arbitrator Enforces a 7106(b)(3) Provision

- Authority asks: Does the provision enforced by the arbitrator
 1. Constitute an arrangement under 7106(b)(3); and
 2. Would enforcement of the provision “abrogate” the exercise of a management right

Customs Service, 37 FLRA 309 (1990)

Abrogation Standard

- Abrogates if as interpreted and applied by the Arbitrator, it precludes an agency from exercising a management right