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Federal Labor Relations Authority

Collective Bargaining

*The Federal Service Labor-Management
Relations Statute*

Union's Right to Collective Bargaining

- 5 U.S.C. § 7114(a)(1)

A labor organization which has been accorded exclusive representation is the exclusive representative of the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering all employees in the unit.

Collective Bargaining

Definition

- 5 U.S.C. § 7103(a)(12)

to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached

Conditions of Employment Definition

- 5 U.S.C. § 7103(a)(14)

personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term shall not include policies, practices, and matters -

- Relating to political activities
- Relating to classification of any position; or
- Specifically provided for by Federal statute.

Antilles Consolid. Educ. Ass'n, 22 FLRA 235 (1986).

Conditions of Employment

- The Authority applies a two-prong test:
 - Whether the matter pertains to bargaining unit employees, *and*
 - Whether there is a direct connection between the matter and the work situation or employment relationship of bargaining unit employees.

Antilles Consolid. Educ. Ass'n, 22 FLRA 235 (1986).

Conditions of Employment

Non-Bargaining Unit Employees

- Proposals directly implicating non-employees – not negotiable unless proposal “vitally affects” unit employee working conditions.
- Proposals directly implicating other bargaining units – not negotiable
- Proposals directly implicating supervisors or managers – negotiable only at the election of management

AFGE Local 32, 51 FLRA 491, 507 (1995).

“Good Faith” Bargaining

- It is an unfair labor practice for an agency or union to “refuse to consult or negotiate in good faith.”
5 U.S.C. § 7116(a)(5) or § 7116(b)(5).
- Determination is based on the totality of circumstances.

“Good Faith” Bargaining

Factors to Look For

- Did the agency/union:
 - ❑ approach negotiations with sincere resolve to reach agreement?
 - ❑ have duly authorized representatives present?
 - ❑ meet as frequently as necessary?
 - ❑ avoid unnecessary delays?
 - ❑ execute/implement agreement?

5 U.S.C. § 7114(b)(1) – (5)

“Bad Faith” Bargaining

Totality of Circumstances

- Agency repeatedly delayed negotiations and insisted on onerous ground rules and concessions before it would negotiate
 - *U.S. Dep’t of the Air Force, Hdqts., Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 36 FLRA 524 (1990).*
- Agency refused to offer negotiation dates, violated ground rules on location of bargaining sessions and insisted on negotiations by e-mail instead of face-to-face
 - *U.S. DOJ, Executive Office for Immigration Review, N.Y. N.Y., 61 FLRA 460 (2006).*

“Bad Faith” Bargaining

Specific Conduct

- Insisting to impasse on a permissive subject of bargaining
 - *Sport Air Traffic Controllers Organization (SATCO)*, 52 FLRA 339 (1996).
- Refusing to bargain over a proposal that is substantially identical to a proposal the Authority has previously determined to be negotiable.
 - *Dep’t of the Air Force, U.S. Air Force Acad.*, 6 FLRA 548 (1981), affirmed sub nom. *Dep’t of the Air Force, U.S. Air Force Acad. v. FLRA*, 717 F.2d 1314 (10th Cir. 1983).

Not “Bad Faith”

- Hard bargaining/refusal to make concessions
 - *Bureau of Prisons, Lewisburg Penitentiary, Lewisburg, Pa.*, 11 FLRA 639, 642 (1983).
- Withdrawing from permissive bargaining
 - *Nat’l Ass’n of Gov’t Employees, Local R4-75*, 24 FLRA 56, 61 (1986).

Two aspects of collective bargaining

■ Duty to Bargain

- Is there a duty to bargain?
- When does the duty to bargain arise?

■ Scope of Bargaining

- If there is a duty to bargain, what must be bargained?
- Are proposals negotiable?

Duty to Bargain: When Does It 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).

■ 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).

Term Negotiations

- Upon the expiration of a collective bargaining agreement, either party may seek to renegotiate its terms, and the parties have an obligation to engage in such negotiations upon request.

U.S. Border Patrol Livermore Sector, Dublin, Cal., 58 FLRA 231 (2002); *U.S. PTO*, 57 FLRA 185 (2001).

Expired Contract

- If neither party seeks to renegotiate, then the mandatory terms of the agreement continue in effect, and the parties may rely on and enforce such provisions.
 - *U.S. Dep't of the Air Force, HQ Air Force Materiel Command*, 49 FLRA 1111 (1994); *Dep't of HHS, SSA*, 44 FLRA 870 (1992).
- Permissive terms of an expired contract remain in effect as well, but may be unilaterally terminated by either party upon proper notice.
 - *FAA, N.W. Mtn. Reg., Seattle, Wash.*, 14 FLRA 644 (1984).

Mid-term Bargaining

- Parties are obligated to bargain during the term of a collective bargaining agreement on negotiable proposals concerning matters not “contained in or covered by” the existing agreement unless the parties have waived their right to bargain about the subject matter.

U.S. Dep’t of the Interior, Wash., D.C. & U.S. Geological Survey, Reston, Va., 56 FLRA 45 (2000); U.S. INS, U.S. Border Patrol, Del Rio, Tex., 51 FLRA 768 (1996).

Proposed Changes In Conditions of Employment

- At any time, prior to making a change in a policy or practice concerning unit employees' conditions of employment, an agency is required to provide the union with notice and an opportunity to bargain over those aspects of the change that are within the duty to bargain.

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

What Both Parties Need to Ask When a Change is Proposed:

- Is there a “change?”
- Is the impact on conditions of employment *de minimis*?
- Is the proposed change “covered by the contract?”
- Did the union waive its right to bargain over the proposed change?

What is a Change?

- The determination as to whether a change in conditions of employment has occurred involves a case-by-case analysis and an inquiry into the facts and circumstances regarding the agency's conduct and employees' conditions of employment.

SSA, Office of Hearings & Appeals, Montgomery, Ala., 60 FLRA 549 (2005); 92 Bomb Wing, Fairchild Air Force Base, Spokane, Wash., 50 FLRA 701 (1995); U.S. INS, Houston Dist., Houston, Tex., 50 FLRA 140 (1995).

The *De Minimis* Test

- Unless the facts establish that the impact on bargaining unit employees is more than *de minimis*, no duty to bargain.
- The Authority looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change evident at the time the change was proposed and implemented.

U.S. Dep't of the Treasury, IRS, 56 FLRA 906 (2000); *GSA, Reg. 9, S.F., Cal.*, 52 FLRA 1107 (1997); *Dep't of Health & Human Serv., Social Security Admin.*, 24 FLRA 403 (1986).

Examples of *De Minimis* Changes

- Reduction in reserved parking spaces where employees had no problem securing alternate parking.
 - *SSA, Office of Hearings & Appeals, Charleston, S.C., 59 FLRA 646 (2004).*
- Change in policy regarding vessel boarding where evidence failed to show that overtime opportunities impacted or compensation, promotion or advancement potential impacted by differing skills required.
 - *U.S. DHS, Border & Transp. Sec. Directorate, Bureau of Customs & Border Prot., Wash., D.C., 59 FLRA 728 (2004).*
- Temporary relocation of one employee to new building, resulting in only slight inconvenience.
 - *Gen. Services Admin. Region 9, S.F., Cal., 52 FLRA 1107 (1997).*

Examples of More Than *De Minimis* Changes

- Change in work hours that resulted in loss of overtime opportunities.
 - *U.S. Customs Serv., S.W. Region, El Paso, Tex.*, 44 FLRA 1128 (1992).
- Implementation of VSIP program that would affect future career and retirement plan, and involved loss or benefit of \$25,000.
 - *U.S. Dep't of the Air Force, Air Force Materiel Command*, 54 FLRA 914 (1998).
- Local office move that resulted in some computers and telephones being inoperable, computer files not accessible, and loss of quality storage cabinets.
 - *U.S. Dep't of the Treasury, IRS*, 56 FLRA 906 (2000).

Is the change “covered by” the parties’ agreement?

- An agency is not required to bargain during the term of an agreement over matters that are “contained in or covered by an agreement.”

U.S. Dep’t of HHS, SSA, Balt., Md., 47 FLRA 1004 (1993).

“Covered By” Test

- Prong 1: Is the subject matter of the change “expressly contained” in the collective bargaining agreement? If not, expressly encompassed . . .
- Prong 2: Is the subject matter of the change “inseparably bound up with,” and plainly an aspect of, a subject covered by the agreement?

U.S. Customs Serv., Customs Mgmt. Ctr., Miami, Fla., 56 FLRA 809 (2000); *U.S. Dep’t of HHS, SSA, Balt., Md.*, 47 FLRA 1004 (1993).

Resolution of “Covered By” Disputes

- Disputes involving differing and supportable interpretations of a collective bargaining agreement must be resolved through negotiated grievance procedures.

INS & INS Newark Dist., 30 FLRA 486, 490-91 (1987)

What Must an Agency Do When it Proposes a Change in Conditions of Employment?

- Provide Union reasonable notice and opportunity to request bargaining.
- If the union requests bargaining, respond.
- Bargain to the extent required by the Statute.
- Generally, maintain the *status quo* until the bargaining process is completed.
- Cooperate with Federal Service Impasses Panel, if requested by union, prior to implementation.

U.S. DOD, Defense Commissary Ag., Peterson Air Force Base, Colo. Springs, Colo., 61 FLRA 688 (2006); U.S. DOJ, INS, Wash., D.C., 56 FLRA 351 (2000); U.S. INS, Wash., D.C., 55 FLRA 69 (1999).

What Must the Union Do to Protect its Right to Bargain?

- Timely request to bargain.
- Submit negotiable proposals.
- Bargain in good faith.
- Timely request FSIP assistance if impasse is reached.

U.S. Dep't of Labor, Wash., D.C., 60 FLRA 68, 70 (2004).

Did the Union Waive Its Right to Bargain?

- By inaction

Failure to timely request bargaining, request additional information or request an extension of time.

U.S. DOD, Def. Commissary Ag., Peterson Air Force Base, Colo. Springs, Colo., 61 FLRA 688 (2006); U.S. Penitentiary, Leavenworth, Kan., 55 FLRA 704 (1999).

Did the Union Waive Its Right to Bargain?

- By contract
 - Parties may define limitations on their bargaining rights under the Statute – i.e., time limits for requesting bargaining. *Dep't of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio*, 51 FLRA 1532 (1996).
 - Was a matter “fully discussed and consciously explored during negotiations” and whether the union “consciously yielded or otherwise clearly and unmistakably waived its interest in the matter.” See *U.S. Dep't of the Interior, Wash., D.C. and U.S. Geological Survey, Reston, Va.*, 56 FLRA 45 (2000); see also *U.S. Dep't of Treasury, IRS*, 56 FLRA 906 (2000).

Are Any of the Union's Proposals Negotiable?

- An agency may implement a change if *all* proposals on the table at the time of implementation are non-negotiable and it has otherwise bargained in good faith.
- The agency must, however, respond to the union's request to bargain over the proposals, even if all the proposals are non-negotiable.
- If the agency chooses to implement under these circumstances, then it acts at its peril. If *any* proposals are determined to be negotiable, then the agency has committed a ULP.

U.S. DOJ, INS, Wash., D.C., 56 FLRA 351 (2000); Fed. Bureau of Prisons, FCI, Bastrop, Tex., 55 FLRA 848 (1999).

Resolution of Disputes Involving Contract v. Statutory Rights

- Where one party's conduct would constitute a violation of Statutory rights and it is alleged that a contract provision permits this conduct, this must be shown by a "preponderance of the evidence."
- Such a dispute does not need to be resolved through the negotiated grievance procedure.

IRS, Wash., D.C., 47 FLRA 1091, 1110-1111 (1993).

Repudiation

- Repudiation of a collective bargaining agreement or memorandum of understanding is a ULP

Dep't of Def., Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga., 40 FLRA 1211 (1991).

Repudiation Test

- ❑ The nature and scope of the alleged breach
 - Was the breach clear and patent?
- ❑ The nature of the agreement provision allegedly breached
 - Did the provision go to the heart of the agreement?

Dep't of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Ill., 51 FLRA 858 (1996).

Scope of Bargaining

- If there is a duty to bargain, what must be bargained?
- Are proposals negotiable?
- Or are proposals non-negotiable because
 - they interfere with management rights?
 - they are contrary to law?

Scope of Bargaining

Management Rights Clause

- 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).

Scope of Bargaining

Proposals that are contrary to law

- 5 U.S.C. § 7117(a) establishes that management is not obligated to bargain over matters inconsistent with law.

Scope of Bargaining

Permissive Subjects

- 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.

Scope of Bargaining

Procedures and Appropriate Arrangements

- 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.

Appropriate Arrangements

- The proposal must be an "arrangement" for employees adversely affected by the exercise of a management right.
- The arrangement must be sufficiently "tailored" to compensate or benefit employees suffering adverse effects attributable to the exercise of management's right(s).
- Is the arrangement "appropriate" or does it "excessively interfere" with the relevant management right(s)?

Nat'l Ass'n of Gov't Employees, Local R14-87 & Kan. Army Nat'l Guard, 21 FLRA 24 (1986) (KANG).

“Arrangement”

- Proposal must seek to mitigate adverse effects "flowing from the exercise of a protected management right."

“Tailored”

- The proposal must provide "balm" to be administered "only to hurts arising from" the exercise of management rights.
- The proposal must not be so broad in sweep that the "balm" would be applied to employees indiscriminately without regard to whether the group as a whole is likely to suffer, or has suffered, adverse effects as a consequence of management action.

“Appropriate”

- The Authority weighs
 - the benefits afforded to employees under the arrangement
- against
 - the 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).

Framework for Resolving Bargaining Impasses

- When negotiations are at an impasse, either party may request assistance by the Federal Service Impasses Panel.
 - § 7119(b)(1)
- If one party timely invokes the services of the Panel, the *status quo* must be maintained to the maximum extent possible.

U.S. Immigration & Naturalization Serv., Wash., D.C., 55
FLRA 69 (1999)

Remedies

- Where change is substantively negotiable, a *status quo ante* remedy may be appropriate, absent special circumstances.
 - *U.S. DOD, Defense Commissary Agency, N.E. Reg., Groton, Conn.*, 59 FLRA 472 (2003).
- Where change is negotiable only as to impact and implementation, a stricter test is applied to justify a *status quo ante* remedy.
 - *FCI*, 8 FLRA 604 (1982).

SQA Remedy Factors

- whether, and when, an Agency notified the Union concerning the change.
 - whether, and when, the Union requested bargaining.
 - the willfulness of the Agency's conduct in failing to bargain.
 - the nature and extent of the impact upon adversely affected employees.
 - whether, and to what extent, a *status quo ante* remedy would disrupt the Agency's operations.
- FCI*, 8 FLRA 604 (1982).

Back Pay Remedy

- If the ULP resulted in a loss of pay, allowances or differentials to employees, then the affected employees may receive back pay to compensate for such losses.

Soc. Sec. Admin., Balt., Md. & Soc. Sec. Admin., Hartford Dist. Office, Hartford, Conn., 37 FLRA 278, 292 (1990)