Federal Labor Relations Authority

Comprehensive Negotiability Training

July 22, 2015
Segment 1

Terms & Concepts
Proposals & Provisions

• Proposal — language offered for bargaining that parties haven’t agreed to – Ag has declared outside the duty to bargain. 5 C.F.R. §§ 2424.2(c) & 2424.2(e).

• 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 under § 7114(c). Id. § 2424.2(f).
“Meaning” Issues

- If parties’ agreed meaning (or U’s explanation) consistent with wording, adopt; if not, don’t. *E.g.*, 67 FLRA 654, 655; 66 FLRA 278, 278; 65 FLRA 509, 510; 51 FLRA 451, 459.

- Provision cases – defer to parties that executed agreement, not Ag head. *E.g.*, 65 FLRA 509, 514.

- Meaning adopted by Authority will apply in other proceedings. *E.g.*, 55 FLRA 562, 564 n.9.
Subjects of Bargaining

- **Mandatory**
  - Must bargain
  - *E.g.*, § 7106(b)(2) & (3)

- **Prohibited**
  - Cannot agree to (law prohibits)
  - *E.g.*, § 7106(a) (where no exception applies)

- **Permissive**
  - May bargain/agree to
  - *E.g.*, § 7106(b)(1); agreements to bargain below level of recognition, *e.g.*, 62 FLRA 174, 182
Negotiability Disputes: “Never”
5 C.F.R. § 2424.2(c)

- Proposals: Prohibited and permissive are outside the duty to bargain

- Provisions: Only prohibited may be disapproved by Ag head

- Examples of bases for negotiability claims: statutes (including FSLMRS), executive orders, gov’t-wide rules and regs, Ag regs with “compelling need”

- Look at each proposal or provision in petition, e.g., 65 FLRA 738, 741
Bargaining-Obligation Disputes: “Now”
5 C.F.R. § 2424.2(a)

- Not required to bargain under **current circumstances**.
  - *E.g.*, “covered by,” “de minimis,” bargaining below level of recognition

- No ULP remedies. *Id.* § 2424.40(a).

- Dismiss petition/portion of petition if **only** these disputes; any resolution must occur in other proceedings (such as grievance or ULP).
“Allegation of Nonnegotiability”

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

Ag head says: Contrary to law, gov’t wide rule or regulation

Cannot disapprove permissive
Sequence/Filings (Generally)

- U Petition for Review
- “CADRO” & Post-Petition Conference
- Ag Statement of Position
- U Response
- Ag Reply
Parties’ Burdens/Failure to Meet

- Both: Create record & support arguments. 5 C.F.R. § 2424.32(a)-(b).

- U: Within duty to bargain, not contrary to law, or permissive; any severance request (but can reserve that until response). *Id.* § 2424.32(a).

- Ag: Outside duty to bargain or contrary to law; why severance is not appropriate (if U requested in petition). *Id.* § 2424.32(a)-(b).

- Failure to raise and support = waiver. *Id.* § 2424.32(c)(1).

- Failure to respond = concession. *Id.* § 2424.32(c)(2).

- Failure to support = bare assertion. *E.g.*, 66 FLRA 124, 128.
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. 5 C.F.R. § 2424.2(h).

- U may request in petition or response. Id. §§ 2424.22(c) & 2424.25(d).

- Ag may oppose; must explain why inappropriate. Id. §§ 2424.24(d) & 2424.26(d).
Hearing Requests

- High standard: *Necessary* to resolve *disputed* issues of *material* fact. 5 C.F.R. § 2424.31.

- Authority rarely grants hearing requests; almost always relies on documents in the record.
Other Avenues for Resolving Negotiability

- ALJs and grievance arbitrators: May when resolving duty-to-bargain questions. *E.g.*, 64 FLRA 443, 446-47.

- Not FSIP or interest arbitrators (unless “substantively identical” to previous proposal/provision). *E.g.*, 31 FLRA 620, 624.
The Negotiability Process
Union Files Petition for Review

- Initiates process before Authority.
- Only U may file.
- Process depends on: proposal or provision.
Solicited allegation of nonnegotiability

- U requests (in writing), and Ag responds w/ written allegation: U must file within 15 days of service of allegation. 5 C.F.R. § 2424.21(a).

- U requests (in writing), but Ag doesn’t respond. U can file petition at any time after 10-day period for Ag response. Id. § 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), if Ag gives written allegation, U must file within 15 days; if Ag doesn’t, then U can file any time after 10-day period. *Id.* §§ 2424.11(c) & 2424.21(a)-(b); 52 FLRA 1429, 1435.
  - Ag may provide unsolicited allegation before the FSIP, and same rules apply. *50 FLRA* 121, 121-22.
Within 15 days of service of Ag-head disapproval. 5 C.F.R. § 2424.21(a)(2).
Union’s Petition: Format & Content

- Forms (including eFiling) or same information
- In proposal cases, where Ag gave written allegation, copy of that allegation; where Ag did not give written allegation, evidence U requested one
- In provision cases, copy of Ag-head disapproval
- Exact wording
- Special terms
- Copies of Ag regulations/instructions
- Meaning & operation
- Supporting arguments
- Any related proceedings
- Hearing request
- Severance
- Reps’ info
- Statement of service
Voluntary. 5 C.F.R. § 2424.10.

Interest-based

Suspends process
Post-Petition Conference

- Authority, U rep(s), Ag rep(s)

- Normally by phone

- Parties must participate (see 5 C.F.R. § 2424.32(d) for consequences of failure to 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
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
Agency’s Statement of Position (SOP)  
(5 C.F.R. § 2424.24)

- 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
The Union’s Response
(5 C.F.R. § 2424.25)

- 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
• 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 nonnegotiability that could have been raised in SOP
Other Filings & Amicus Curiae Petitions

- Written request for permission

- Additional submissions may be filed only in “extraordinary circumstances.” 5 C.F.R. § 2424.27.

- Parties encouraged to include submission along with request

- Amicus requests will be granted only if Authority deems “appropriate.” Id. § 2429.9.
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)
5 C.F.R. § 2429.24:

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

- For eFiled: Any calendar day (including Saturdays, Sundays, and holidays) or time (by midnight Eastern Time), but don’t have to on weekends/holidays

- For in-person: Monday through Friday (not holidays), 9 a.m. to 5 p.m. Eastern Time
“Service” Required

- Parties must serve other parties with copies of everything they file with Authority. 5 C.F.R. § 2424.2(g).

- U must serve Ag head (in addition to principal Ag bargaining rep). Id.

- Methods:
  - Certified mail
  - First-class mail
  - In person
  - Email (ONLY if other party consents)
  - NOT fax (except service of motions)
Additional Procedural Requirements

- Original and 4 copies of everything must be filed with Authority (except eFile). 5 C.F.R. § 2429.25.

- Table of contents if over 10 double-spaced pages (except fillable forms in eFiling). Id. § 2429.29.

- Signed statement of service (or eFile certification). Id. § 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)
• 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
Possible scenarios:

- Comply
- Timely move for reconsideration (within 10 days after service). 5 C.F.R. § 2429.17.
- Appeal to U.S. Court of Appeals within 60 days. 5 U.S.C. § 7123(a)(1). But can’t make arguments that weren’t made to Authority (except in “extraordinary circumstances”). Id. § 7123(c).
- Report, to the appropriate RD, any failure to comply – within a “reasonable period of time” after 60-day appeal time expires. 5 C.F.R. § 2424.41.
Segment 3

**Bases for Dismissing Petitions**
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.*, 65 FLRA 738, 741)
  - *E.g.*, if only bargaining-obligation dispute. 5 C.F.R. § 2424.2(d).
Bases for Dismissing Petitions

Mootness

- No advisory opinions. 5 C.F.R. § 2429.10.
- 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.*, 66 FLRA 393, 393.
  - *E.g.*, not bargaining over wording in petition. 67 FLRA 280, 281-83.
  - *E.g.*, date already passed. 58 FLRA 409, 410.
  - *E.g.*, 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.
  - See, e.g.:
    - 56 FLRA 796, 797 (grievance was directly related to petition);
    - 66 FLRA 1038, 1038-39 (grievance wasn’t directly related).
Bases for Dismissing Petitions

- If petition seeks review of proposal/provision that has not “substantively changed” from prior petition, *e.g.*, 56 FLRA 236, 237-38, and

- Authority dismissed previous petition with prejudice, *e.g.*, 5 C.F.R. § 2424.32(d),

- Then Authority will dismiss petition.
Segment 4

Substantive Issues
Personnel policies, practices, and matters, established by rule, regulation, or "otherwise," affecting working conditions. 5 U.S.C. § 7103 (a)(14).

Exceptions:

- Hatch Act political activity (Id. §§ 7321-7326)
- Classification matters (as defined in 5 C.F.R. § 511.101)
- Matters "specifically provided for by [f]ederal statute" (5 U.S.C. § 7103(a)(14))
“Specifically Provided For”

- Reference to matter not enough
- **Ag has no discretion**
- Example where established: 57 FLRA 373, 383 (wage rates for GS employees)
- Example where not established: 56 FLRA 664, 665-66 (law concerning Ag’s optical and dental plan preserved Ag’s discretion to negotiate over that matter).
Conditions of Employment

- 2-prong “Antilles” test:
  - Does matter pertain to bargaining-unit employees? *And*
  - Is there a “direct connection” between the matter and the work situation or employment relationship of the unit employees?

- 22 FLRA 235, 236-37.
Non-Bargaining-Unit Employees

- Four groups of non-unit personnel:
  1) employees in other bargaining units;
  2) supervisors;
  3) non-supervisory employees not in any bargaining unit; and
  4) non-employees.

Employees in Other Bargaining Units

- If proposal *directly determines* conditions of employment of employees in other units: prohibited subject (principle of exclusive recognition). 65 FLRA 1052, 1054.
• Proposals that directly implicate supervisors’ conditions of employment = permissive subjects.

• So can’t be disapproved by Ag head, *e.g.*, 61 FLRA 336, 339, and enforceable in arbitration, *e.g.*, 52 FLRA 677, 682.
Proposals directly implicating working conditions of non-employees or employees not in any bargaining unit = outside duty to bargain unless they “vitaly affect” unit employees’ conditions of employment. *Cherry Point*, 952 F.2d at 1442-43. But permissive subjects.

Is the proposal’s effect on unit employees’ conditions of employment “significant and material, as opposed to indirect or incidental”? *E.g.*, 64 FLRA 723, 727; 58 FLRA 344, 348.
Management Rights: General Principles

- 7106(a)(2) – limited by “applicable laws”
- 7106(a)(1) – not limited by “applicable laws”
- 7106(b)(1) - All include right to not act
- All limited by 7106(b)(2) and (3)
- Proposal/provision may involve more than one right – Authority addresses only those raised
• Case by case. *E.g.*, 58 FLRA 341, 342.

• What mission includes/doesn’t include. *E.g.*, 59 FLRA 159, 163.

• Generally not “how carried out.” *E.g.*, *id*.

• But when part of mission = serve public, proposals/provisions regarding hours office is open may affect. *E.g.*, 49 FLRA 333, 349; 22 FLRA 868, 869.
Budget (§ 7106(a)(1))

- Affected if either:
  - (1) Proposal/provision prescribes particular programs to be included in budget, or amount to be allocated in budget; or
  - (2) Ag makes “substantial demonstration that an increase in costs is significant and unavoidable and is not offset by compensating benefits.” *E.g.*, 61 FLRA 113, 116.

- Increase in costs, by itself, not enough. 66 FLRA 124, 125.

- Second part of test looks at the proposal or provision relative to organizational level to which it applies. 44 FLRA 18, 30.
Organization (§ 7106(a)(1))

- Determine Ag’s administrative and functional structure, including relationship of personnel through lines of authority and distribution of responsibilities for delegated and assigned duties. *E.g.*, 63 FLRA 530, 532.

- Includes rights to determine how organization will be divided up into sections, *e.g.*, 58 FLRA 175, 178, and where, geographically, Ag will operate, *e.g.*, 56 FLRA 444, 449.
Number of Employees in Agency (§ 7106(a)(1))

- Total number actually employed. *E.g.*, 46 FLRA 298, 316.

- Different from numbers of employees assigned to organizational subdivisions, work projects, or tours of duty under § 7106(b)(1). *E.g.*, *id.* at 316-17.
Internal Security (§ 7106(a)(1))

- Determine policies and practices that are part of Ag’s plan to secure or safeguard its personnel, physical property, or operations against internal and external risks. *E.g.*, 66 FLRA 929, 931.

- Ag must show link, or reasonable connection, between its security objective and agency policy or practice designed to implement that policy/practice, and that proposal or provision conflicts with policy/practice. *E.g.*, *id*.

- Authority doesn’t review merits of Ag’s policy/practice. *E.g.*, *id*. 
Hire Employees (§ 7106(a)(2)(A))

• Includes right to decide whether to fill positions. *E.g.*, 62 FLRA 93, 94-95.
Assign Employees (§ 7106(a)(2)(A))

- Is the right to assign employees to positions. *E.g.*, 62 FLRA 508, 510.

- Both initial hiring and post-hiring, such as reassignments, temporary assignments, or details. *E.g.*, 65 FLRA 911, 913.

- Also duration of assignments. *E.g.*, 61 FLRA 209, 218.

- Determine qualification and skills needed for positions, and judge whether particular employees possess them. *E.g.*, 62 FLRA 508, 510.
Direct Employees (§ 7106(a)(2)(A))

- Supervise employees and determine quantity, quality, and timeliness of work. *E.g.*, 65 FLRA 508, 511.

- Establish performance standards and evaluate/hold employees accountable under those standards. *E.g.*, 63 FLRA 450, 453.

- Select particular methods of supervision (*e.g.*, spot checks). *E.g.*, 62 FLRA 15, 17.

- NOT the right to decide whether to reward performance that’s already been evaluated. *E.g.*, 63 FLRA 505, 508.
Layoff & Retain Employees (§ 7106(a)(2)(A))

- Separate rights. See 58 FLRA 344, 345.

- Layoff = Includes right to conduct reduction in force and decide what positions to abolish & retain. E.g., 65 FLRA 911, 913.

- Retain = Establish policies or practices that encourage or discourage employees from remaining employed by Ag.
  - E.g., voluntary-separation-incentive pay, e.g., 67 FLRA 85, 87, or substitutes for special rates, e.g., 60 FLRA 839, 841-42.
Suspend, Remove, Reduce in Grade or Pay (§ 7106(a)(2)(A))

- Suspend employees. *E.g.*, 19 FLRA 647, 650.

- Remove = *e.g.*, determining which positions to vacate, *e.g.*, 11 FLRA 475, 482, or sequence of vacating positions, *e.g.*, 3 FLRA 3, 5-6.

- Reduce in grade or pay = *e.g.*, Ag’s right to take actions against employee for a particular offense. *E.g.*, 53 FLRA 539, 579.
Discipline (§ 7106(a)(2)(A))

- For both performance- and nonperformance-related conduct. *E.g.*, 65 FLRA 142, 145.

- Investigate and determine appropriate investigative techniques. *E.g.*, 60 FLRA 124, 127.

- Decide which evidence to rely on. *E.g.*, 61 FLRA 341, 346.

Assign Work (§ 7106(a)(2)(B))

- Determine particular duties to be assigned, when work assignments will occur, and to whom/what positions assigned. *E.g.*, 66 FLRA 819, 823.

- Establish qualifications and skills, decide whether employees meet them. *E.g.*, 61 FLRA 97, 99.

- Does not include decision whether to reward performance. *E.g.*, 63 FLRA 505, 508.

- Not affected merely because proposal/provision requires Ag to take some action. *E.g.*, 64 FLRA 443, 447.
Contract Out & Determine Personnel
(§ 7106(a)(2)(B))

• Contract out = affected by proposals/provisions that delay contracting out, *e.g.*, 60 FLRA 595, 597, or require cost study beforehand, *e.g.*, 48 FLRA 168, 204.

• Determine personnel = decide employees to whom work will be assigned. *E.g.*, 61 FLRA 371, 373.
Make Selections to Fill Positions
(§ 7106(a)(2)(B))

- Select from: (1) among properly certified candidates for promotion; or (2) any other appropriate source.

- Decide qualifications, skills, and abilities needed for position and determine whether applicants have those. *E.g.*, 61 FLRA 618, 622.

- Affected by proposals that limit sources of selection. *E.g.*, 56 FLRA 1046, 1048.

- Proposals that *expand* sources of selection do not affect. *E.g.*, 61 FLRA 226, 229.
Carry Out Mission in Emergencies (§ 7106(a)(2)(B))

- Includes rights to:
  - Independently assess whether emergency exists; and
  - Decide what actions are needed to address it. *E.g.,* 58 FLRA 549, 551.

- Examples: proposals/provisions that define “emergency,” *see* 55 FLRA 243, 245, and proposals/provisions that preclude management from acting until a particular individual declares an emergency, *e.g.,* 31 FLRA 131, 132.
Section 7106(b)

- All rights in § 7106(a) = “subject to” § 7106(b)

- Three parts:
  - § 7106(b)(1)
  - § 7106(b)(2)
  - § 7106(b)(3)
Section 7106(b)(1)

- Permissive (“at the election of” the Ag). *E.g.*, 62 FLRA 90, 92.


- Enforceable in arbitration. *E.g.*, 62 FLRA 90, 92.

- Trumps § 7106(a) – lawful despite effect on (a) rights. *E.g.*, *id*.

- If also concerns § 7106(b)(2) or § 7106(b)(3), then mandatory (must bargain). *E.g.*, 62 FLRA 341, 343.
Numbers = increase, decrease, or maintain in organizational subdivision, work project, tour of duty. *E.g.*, 57 FLRA 424, 426. (Different from “number” in § 7106(a)(1).)

Types = distinguishable classes, kinds, groups, or categories of employees or positions that are relevant to establishment of staffing patterns. *E.g.*, 52 FLRA 1024, 1032, 1034.

Grades = for example, GS levels. *E.g.*, *id.* at 1032 n.11.
Organizational subdivision. Examples = proposals/provisions:
- Involving centralization/decentralization within agency. *E.g.*, 54 FLRA 1302, 1306.
- Staffing of subdivisions (but not establishing subdivisions). *E.g.*, 52 FLRA 794, 802.

Work project = “particular job” or “task.” 55 FLRA 848, 853.
- Example: Supervising inmates. *Id.* at 853-54.

Tour of duty = the hours of a day (daily tour) and days of an administrative workweek (weekly tour) that constitute an employee’s regularly scheduled administrative workweek. 57 FLRA 424, 426.
Technology of Performing Work

- Technology = the technical method that will be used in accomplishing or furthering the performance of the Ag’s work. *E.g.*, 58 FLRA 273, 275.

- Must show:
  - The technological relationship of the matter addressed by the proposal/provision to accomplishing or furthering performance of Ag’s work; and
  - How the proposal/provision would interfere with the purpose for which the technology was adopted.
Methods and Means of Performing Work

• Method = the way in which Ag performs its work – the “how.”
• Means = any instrumentality – including an agent, tool, device, measure, plan, or policy – that agency uses to accomplish, or further the performance of, its work – the “with what.”
• Ask:
  o (1) is there a direct or integral relationship between the Ag’s chosen method/means and the accomplishment of the Ag’s mission?; and
  o (2) does the proposal/provision directly interfere with the mission-related purpose for which the method/means was adopted? *E.g.*, 66 FLRA 639, 646.
• Relative importance irrelevant. *E.g.*, 66 FLRA 112, 115.
• Examples: 66 FLRA 499, 502; 56 FLRA 69, 69, 87-91; *but see* 64 FLRA 723, 725.
Section 7106(b)(2) – “Procedures”

- Mandatory subjects – must bargain, even if affect § 7106(a) or § 7106(b)(1)

- Look to Authority precedent

- Examples:
  - Requiring advance notice of certain agency actions. *E.g.*, 61 FLRA 209, 220.
  - Requiring management to delay exercise of rights pending completion of bargaining or appellate processes. *E.g.*, 61 FLRA 327, 331-33.

- But see:
  - Precluding management from assigning employees certain duties. *E.g.*, 47 FLRA 512, 520.
  - Substantially limiting right to determine content of performance standards. *E.g.*, 56 FLRA 1115, 1116 n.2.
“Appropriate arrangements for employees adversely affected by the exercise of any authority” under § 7106.

Mandatory subjects – must bargain, even if affect § 7106(a) or § 7106(b)(1). E.g., 66 FLRA 929, 940-41; 56 FLRA 69, 86.

Within duty to bargain even if it’s not a procedure under § 7106(b)(2).
Appropriate Arrangements

“KANG” 2-part test:

- Arrangement?
- Appropriate?

21 FLRA 24, 31.
• Must seek to mitigate adverse effects flowing from exercise of a management right. *E.g.*, 68 FLRA 676, 679.

• U must identify effects or reasonably foreseeable effects that flow from management rights, and how they’re adverse. *E.g.*, 21 FLRA 24, 31.

• Can’t be speculative or hypothetical. *E.g.*, 59 FLRA 25, 29.

• Proposal/provision must be “tailored” to compensate/benefit employees suffering adverse effects due to management right. *Compare* 66 FLRA 929, 940-41 (tailored); *with* 51 FLRA 1308, 1318-19 (not tailored).

• But may be “prophylactic.” *E.g.*, 64 FLRA 953, 959-60.
Is Arrangement “Appropriate”?  

- Test different for proposals and provisions? *E.g.*, 65 FLRA 509, 512.

- Proposals = “excessive interference”
  - Weigh burdens on exercise of management rights against benefits to employees. *E.g.*, 21 FLRA 24, 31-32; see also 67 FLRA 316, 317-18.

- Provisions = “abrogation”
  - Does the arrangement “waive,” or preclude Ag from exercising, affected rights? *E.g.*, 65 FLRA 509, 513, 515. *But see* 739 F.3d 13, 21 (D.C. Cir. 2014) (reversing abrogation standard in context of negotiability provision).
“Applicable Laws”

- Limitation on § 7106(a)(2), but not § 7106(a)(1), rights.

- Include:
  - Statutes (but NOT the FSLMRS)
  - U.S. Constitution
  - Judicial decisions
  - Executive orders
  - Regulations having the “force and effect of law”:
    - Affect individual rights and obligations;
    - Promulgated under explicit or implicit delegation of legislative authority by Congress; and
    - Promulgated in accordance with procedural requirements imposed by Congress. *See* 61 FLRA 201, 206.
Agency Discretion

- Generally, if Ag has discretion over a matter, then Ag must bargain over proposals concerning that matter. *E.g.*, 55 FLRA 1, 4-5.

- But if Ag discretion is “sole and exclusive,” would be contrary to law to require bargaining over matters within discretion. *E.g.*, 59 FLRA 331, 346, 351.
Sole & Exclusive Discretion

- Authority examines plain wording and legislative history of statute or reg. *E.g.*, 58 FLRA 246, 248-50.

- Examples = “without regard to the provisions of any other law” or “notwithstanding any other provision of law.” *E.g.*, 47 FLRA 884, 895.
Agency Rules and Regulations

- Ag rules and regs = rules, regulations, and official declarations of policy that govern the resolution of matters within particular agencies. *E.g.*, 37 FLRA 186, 193-94.

- Generally within duty to bargain, unless Ag shows “compelling need” for rule/reg. 5 U.S.C. § 7117(a)(2).
  - *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.
“Compelling Need”


- 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.
• Prior agreement doesn’t mean it’s within the duty to bargain now. *E.g.*, 61 FLRA 554, 557.

• Nor does the fact that proposal reflects an existing Ag policy or practice (*e.g.*, Ag regulation).
Bargaining-Obligation Disputes

- For example:
  - (1) “covered by”
  - (2) “de minimis”
  - (3) trying to bargain at wrong level

- See also OGC ULP Case-Law Outline
Don’t have statutory duty to bargain over conditions of employment that have already been resolved by bargaining. *E.g.*, 68 FLRA 580, 582.

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? *E.g.*, 66 FLRA 213, 216.
“Covered By”

“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.
“Covered By”

“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.
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.
“Covered By” Doctrine Inapplicable

- At term negotiations. *E.g.*, 68 FLRA 334, 338.

- When no term agreement is in effect. *E.g.*, 57 FLRA 185, 193.

- Where the agreement specifically contemplates bargaining. *E.g.*, 68 FLRA 580, 582-83.
“De Minimis”

- Ag has no duty to bargain over changes that have only “de minimis” effects on unit employees’ conditions of employment. *E.g.*, 64 FLRA 85, 89.

- Authority looks to nature and extent of the effects, or reasonably foreseeable effects, of the change. *E.g.*, *id*.

- Number of employees not dispositive. *E.g.*, 64 FLRA 166, 173.
“De Minimis”

Examples of decisions addressing this doctrine:

- 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.” 62 FLRA 174, 182.

- Bargaining below = permissive subject. *Id.*

- 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. 67 FLRA 34, 37.
Questions,
Feedback,
&
Thank You For Participating