

**The Collective
Bargaining Process
In-Depth
Part 1**

**The basic laws that cover
Collective bargaining**

Hello NWP Members and Reps;

Welcome to LR Chronicles number 31. As promised to you in LR Chronicles number 29, this, as well as the next several editions of the LR Chronicles will provide you with an in-depth explanation of the “collective bargaining process.” Collective bargaining in the federal sector is a very complex and extensive subject. Collective bargaining, from start to finish, contains many facets and nuances with which you must become familiar if you will bargain with the Agency.

While this multiple-part Chronicle is mainly geared to local-level negotiations regarding the basic watch schedule (BWS) and annual leave negotiations, it may also be used to bargain any subject and at any level. Unfortunately, we are operating under the Agency’s imposed conditions of employment (ICE), which limits bargaining at any level below the level of recognition. However, considering that we have a new Administration in the White House and a new Congress/Senate, the subjects for which you may bargain at the local level could very well be expanded. Regardless, the NATCA National Office has been delegating matters to the local level for negotiations.

In order to grasp the full effect of bargaining in the federal sector, it is necessary to understand the various laws that cover collective bargaining. These laws can be found in Title 5, Chapter 71, otherwise known as the Federal Service Labor-Management Relations Statute (FSLMRS) or “the statute.” In this first edition of the “collective bargaining process,” I will outline and explain some of the more general federal laws that cover collective bargaining. In future editions, I will explain the more specific federal laws as they relate to specific matters of bargaining as well as case law from the Federal Labor Relations Authority (FLRA).

5 USC 7103(a)(8) and (a)(12):

These two laws define a “collective bargaining agreement” as well as “collective bargaining.” 5 USC 7103(a)(8) states “*collective bargaining agreement means an agreement entered into as a result of collective bargaining pursuant to the provisions of this chapter.*” 5 USC 7103(a)(12) states “*collective bargaining means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency 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, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession.” Basically, these two laws mean the following:

- Any time NATCA and the FAA enter into negotiations, the parties are engaged in collective bargaining. When a term negotiation is completed, the parties label the agreement a “Collective Bargaining Agreement.” Local, regional, and national negotiations completed during the life of a Collective Bargaining Agreement culminate in crafting a Memorandum of Understanding (MOU).
- NATCA (the exclusive representative) and the FAA (the Agency), are collectively known as “the Parties” and must meet at reasonable times to conduct bargaining. This must be agreed to by both Parties and is normally done via a written document known as “ground rules.” (Ground rules will be explained in a future edition of the LR Chronicles;)
- The Parties must negotiate “in good faith.” (This will be explained in a future edition of the LR Chronicles;)
- The Parties may only negotiate “conditions of employment.” (This will be explained in a future edition of the LR Chronicles as part of the “duty to bargain;”)
- If an agreement is reached as a result of collective bargaining, this must be memorialized in a written document, if requested by the FAA or NATCA;
- Neither NATCA nor the FAA is required to “make a concession” or “agree to a proposal” should they determine that concession or proposal is not in their best interest.

Regarding the last bullet above, neither party is required to make a concession or otherwise agree to a proposal offered by the other party. While this will be covered in a future edition of this multiple-part LR Chronicle, in a nutshell, this means that regardless of how the proposal is crafted, even if it is 100% in compliance with all federal laws covering collective bargaining, if one party is simply not in agreement with that proposal, they are free to reject that proposal due to the fact that they just simply do not agree with the proposed language. Remember, just because something is negotiable, does not mean that the parties must agree. If the parties cannot reach agreement, they may find themselves at “impasse,” which will be discussed later in this multiple-part Chronicle.

5 USC 7114(b):

This particular law also covers “good faith bargaining” but covers much more. 5 USC 7114(b) states “*the duty of an agency and an exclusive representative to negotiate under subsection (a) of this section shall include the obligation-*

- (1) To approach negotiations with a sincere resolve to reach a collective bargaining agreement;*
- (2) To be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;*
- (3) To meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;*
- (4) In the case of an agency, to furnish to the exclusive representative involved, or to its authorized representative, upon request and, to the extent not prohibited by law, data-*

- (A) Which is normally maintained by the agency in the normal course of business;
 - (B) Which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
 - (C) Which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, related to collective bargaining; and
- (5) If agreement is reached, to execute on the request of either party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.”

Regarding number (2) above, this simply means that each Party, the Union and the Agency, must send representatives to the bargaining table that have the authority to reach agreement should a proposal be agreed upon. Number (4) (A) through (C) above is otherwise known as an “information request.” When you are preparing for your negotiations, in conducting your research, if you are ever in doubt as to whether or not you have all of the information necessary in order to allow you to conduct your negotiations, it is a good idea to submit an information request in accordance with 5 USC 7114(b)(4). For example, if the subject of negotiations is a local level BWS or annual leave MOU, you may need to submit an information request for “all FAA orders, rules, and/or regulations, at all levels,” so that you can properly prepare for and conduct negotiations for the BWS or annual leave. This information request would require the agency to give you all of their rules and regulations covering BWS and/or annual leave. The information request must be limited to the subject of the negotiations. Should you find it necessary to submit an information request, ensure that you submit it well in advance of the scheduled negotiations, so that you receive the information in time to finish your research and to submit negotiable proposals.

5 USC 7116(a)(5) and (b)(5):

These provisions of law cover what is known as an Unfair Labor Practice (ULP). A ULP is a “charge against an Agency” or a “charge against a Union” that is deemed to violate any provision of Title 5, Chapter 71. 5 USC 7116(a)(5) states “*for the purpose of this chapter, it shall be an unfair labor practice for an agency to refuse to consult or negotiate in good faith with a labor organization as required by this chapter.*”

Similarly, it is also a ULP for the Union to not bargain in good faith. 5 USC 7116(b)(5) states “*for the purpose of this chapter, it shall be an unfair labor practice for a labor organization to refuse to consult or negotiate in good faith with an agency as required by this chapter.*”

5 USC 7131:

This provision of law addresses official time for negotiations. I am only going to cover two subsections out of this law as these two sections are the only subsections that you will use in your local level negotiations. 5 USC 7131(a) states “*Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceedings*

during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.”

5 USC 7131(d) states “*Except as provided in the remaining subsections of this section –*

- (1) Any employee representing an exclusive representative, or*
- (2) In connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative, shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.”*

5 USC 7131(a) simply states that the Union can have no more negotiators on official time than the agency has on its negotiating team. However, this does not preclude the Union from having any amount of negotiators on our team, as long as they are not on official time. Official time for negotiations will also be covered in several other editions, in this multiple-part chronicle, such as ground rules and impasse proceedings.

Official time for negotiations is required to be approved by the agency, in the amount negotiated and agreed upon by NATCA and the FAA in accordance with 5 USC 7131(d)(2).

5 USC 7106:

This provision of law is entitled “management rights.” As the name implies, management does have certain rights as outlined in this section of Title 5, Chapter 71. 5 USC 7106 is divided into two (2) subsections that cover three (3) different subjects of bargaining. It is extremely important for you to know and understand all three subjects of bargaining due to the fact that it is from within this provision of law where you will craft your bargaining proposals. Each and every proposal must meet the requirements of federal law, or you run the risk of having your proposal rejected by the agency as “being outside the duty to bargain” or “interfering with management rights.” In a future edition of the LR Chronicles, I will explain the Union’s rights and options should this ever occur from the management official with which you are negotiating. This is known as a “negotiability appeal.”

The three (3) subjects of bargaining under 5 USC 7106 are:

- Prohibited;
- Permissive; and
- Mandatory

Prohibited subjects of bargaining:

Prohibited subjects of bargaining are contained in 5 USC 7106(a), which states “*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;*
 - (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.”*

Although these are entitled “prohibited” subjects of bargaining, there is still a way to negotiate these subjects. Prohibited subjects of bargaining means that the FAA cannot negotiate the SUBSTANCE of these subjects. For example, in accordance with 5 USC 7106(a)(1) above, the FAA has a right to determine the “internal security practices” of the agency. If the Union wanted to negotiate a provision regarding the agency’s decision to require FAA employees to wear identification badges, that is THEIR right to determine. The Union could not propose that “no BUE shall be required to wear an identification badge.” That proposal, as written would be determined non-negotiable because the agency has already determined that employees shall be required to wear identification badges. However, what the Union CAN and SHOULD propose are the “procedures” and “appropriate arrangements” surrounding the FAA decision to require employees to wear identification badges. These “procedures” and “appropriate arrangements” will be explained later on in this edition of the LR Chronicles.

Permissive subjects of bargaining:

Permissive subjects of bargaining are contained in 5 USC 7106(b)(1), which states “*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;”*

As the name implies, it is permissible for the FAA to negotiate the SUBSTANCE of these permissive subjects of bargaining. However, if they choose to not negotiate the SUBSTANCE of these subjects, they cannot be forced. **(Dept of Justice, INS and AFGE, Nat’l Border Patrol Council, 52 FLRA 56, 256, 260)** There was a time during the 1990s where a federal agency was required to negotiate the substance of permissive subjects of bargaining. This requirement came via an Executive Order (EO) signed by President William Clinton on October 1, 1993. The EO was entitled “Number 12871, Labor-Management Partnerships.” In part, EO 12871 stated “*the head of each agency subject to the provisions of Chapter 71, of Title 5, United States Code shall: negotiate over the subjects set forth in 5 U.S.C. 7106(b)(1), and instruct*

subordinate officials to do the same...” However, very shortly after President George W. Bush came into office in 2001, he repealed EO 12871.

That being said, there is a way to negotiate permissive subjects should the FAA elect to not negotiate the substance of these subjects. Just like prohibited subjects of bargaining, the agency is required to negotiate the procedures and appropriate arrangements surrounding, permissive subjects of bargaining, any change of working conditions meeting the definition of a “condition of employment.” (This term and all that it encompasses will be explained in a later edition of the LR Chronicles.) Procedures and appropriate arrangements are described below. An example of a permissive subject of bargaining, for example, would be directly related to the BWS negotiations that will be occurring shortly for all facilities. As per 5 USC 7106(b)(1), nothing precludes the FAA from negotiating “...*the numbers, types, and grades of employees or positions assigned to any...tour of duty.*” Therefore, if you, as the Union’s negotiator for your facility, proposed that there “*shall be seven (7) CPCs and three (3) developmentals or CPCs-in-training assigned to the day and swing shifts respectively on any given day,*” you would be well within your right to do so. However, the FAA, based on that proposal, could notify you that your proposal is a “permissive” subject of bargaining, negotiable only at the election of the agency, and one in which the agency elects to not negotiate.” This is well within their right to do so. However, if you craft your proposal as a “procedure” or an “appropriate arrangement,” the FAA MUST negotiate that proposal with you. Once again, procedures and appropriate arrangements are described below, as well as in future editions of this multiple-part LR Chronicle.

Mandatory subjects of bargaining:

These subjects of bargaining are contained in 5 USC 7106(b)(2) and (3) which states “*nothing in this section shall preclude any agency and any labor organization from negotiating –*

- (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.”*

As you saw in the explanation for “prohibited” subjects of bargaining, the plain language of “subject to subsection (b)” gives us our framework with which to craft our proposals. In other words, although management has their rights under prohibited and permissive subjects of bargaining, those rights are ALL subject to the Union’s right to negotiate procedures and appropriate arrangements surrounding the agency’s rights under law.

As you can see, it is MANDATORY for the FAA to negotiate, with the Union, any proposal crafted under (b)(2) and (b)(3), REGARDLESS of whether or not it falls under 5 USC 7106(a) or 5 USC 7106(b)(1). However, as the Union’s negotiator, you MUST know how to craft (word) your proposal so that it meets the definition and intent of a “procedure” or an “appropriate arrangement.” Determining whether a proposal is within the duty to bargain under 5 USC 7106(b)(3) is set forth in **National Association of Government Employees (NAGE) and Kansas Air National Guard (KANG), 21 FLRA 309**. The FLRA initially determines whether

or not a proposal is intended to be an “arrangement” for employees adversely affected by a management right. This will be fully explained in the next edition of the LR Chronicles. Since every single possible scenario cannot be covered regarding the BWS or annual leave negotiations, assistance is simply a phone call or an email away. When you have crafted your proposals, prior to submitting them to management, make that phone call or send that email to your RVP or your regional Labor Relations (LR) Lead. We are all here to give you any assistance that you may need.

These procedures and appropriate arrangements will be explained in future editions of the LR Chronicles when we discuss how to craft your proposals specifically related to the BWS and annual leave negotiations. Suffice it to say here that regardless of what you want or need to accomplish for your particular facility regarding BWS and annual leave negotiations, there are many ways to negotiate within the bounds of the law. As mentioned above, you’re RVP and/or your regional LR lead will assist you in every facet of your negotiations.

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