The Collective
Bargaining Process
In-Depth
Part 2

When and why
Bargaining is required

Hello NWP Members and Reps;

Welcome to LR Chronicles number 32. In the last edition, I explained some of the laws that cover collective bargaining. As I stated in that edition, there is much more law to be covered for a full understanding of the bargaining process and to prepare for local level negotiations regarding the basic watch schedule (BWS) and annual leave. I will outline the remaining laws in this, as well as future editions of the LR Chronicles in order to ensure that you have all of the information necessary to be able to conduct your local level bargaining.

Prior to reviewing the information in this edition, there are two important issues that must be understood. The first is the fact that your local level negotiations should result in written agreements. As I stated in the last edition, it is required that *"upon request of either party,"* any and all negotiations result in a *"written document outlining the provisions agreed upon."* You are taking a chance if you agree to incorporate your "alleged" agreement in a local order, SOP, or other local level document that the FAA can change at any time.

The second issue is the fact that you can and should conduct both the BWS and annual leave negotiations simultaneously. One is not dependent on the other. Please keep in mind that it may be necessary to borrow from one, while negotiating the other. If you have issues that could cross-over from one to the other, you should be negotiating them at the same time.

Beginning with this edition, and for the next several editions of the LR Chronicles, I will explain the process of how bargaining is required and conducted. I will explain when and why bargaining is required and take you through the actual bargaining process, from beginning to end. I will also place the different steps and the sequence of bargaining in a logical order so that it will be easy to understand.

You must be clear as to what, if anything, you may or may not negotiate at the local level. The first step in the bargaining process is to determine whether or not the FAA is required to bargain with you at the facility level. This is otherwise known as bargaining "below the level of exclusive recognition."

Level of Recognition for Bargaining:

In accordance with case law issued by the Federal Labor Relations Authority (FLRA), it is well established that an Agency (FAA) is only required to bargain with an exclusive representative (NATCA) at the "level of exclusive recognition." To negotiate "below" the level of exclusive

recognition can only be done at the election of the Agency." This is known as a "permissive" subject of bargaining" in accordance with 5 USC 7106(b)(1). (See LR Chronicles number 31). In the case of NATCA and the FAA, the level of exclusive recognition resides at the national level in Washington, DC.

During negotiations for our collective bargaining agreement (CBA) in 1997 and 1998, the FAA elected to agree (permissively) to local and regional level negotiations for all issues. During the negotiations in 2005 and 2006, the FAA elected to bargain below the level of exclusive recognition only for certain issues including:

- Basic watch schedule;
- Annual leave;
- Recognition and awards program;
- Overtime

The FAA did not agree to bargain at the regional level for any issue. In other words, in accordance with the imposed conditions of employment (ICE), all bargaining must take place at the national level, except for those issues where they have elected otherwise. This is what gives you, at the local level, the right to negotiate your respective BWS and annual leave MOUs.

Below, is some relevant case law issued by the FLRA regarding bargaining below the level of exclusive recognition:

- The request to bargain must come from the level of exclusive recognition. *(16 FLRA 80)* **(This does not include any issue mentioned above due to the fact that the FAA already agreed to bargain those subjects below the level of exclusive recognition.)**
- There is no statutory requirement that a Party bargain below the level of recognition. It is however, a permissive matter. *(53 FLRA 1269)*
- A mandatory bargaining obligation exists only at the level of recognition. Bargaining below the level of recognition is permissive. *(62 FLRA 174)* **(Again, this does not include BWS or annual leave negotiations)**
- Proposals to bargain local level agreements (i.e., those below the level of recognition, such as local supplemental agreements where there is a national level recognition) are permissive. Such agreements are not found under 5 USC 7106(b)(1), but are permissive nonetheless because they would involve a waiver of a Party's rights under Title 5, Chapter 71. *(53 FLRA 1269)* and *(54 FLRA 630)*

<u>Duty to bargain:</u>

Once it is determined that the FAA must bargain with you at the facility level, the next step is to determine what they are required to bargain. The FAA has a contractual requirement (a requirement that was even carried into the white book) to bargain both BWS and annual leave with you at the local level. Therefore, they are obligated to fulfill that requirement. However, this requirement comes with a few caveats with which you must be aware:

- The subject of negotiations must be a "condition of employment" (5 USC 7103(a)(14));

- The subject matter must be “more than de minimis;”
- The subject matter must not already be “covered-by” the collective bargaining agreement (CBA);
- The subject matter cannot conflict with any Federal law that applies to NATCA and the FAA; and
- The subject matter cannot be inconsistent with any Government-wide rule or regulation.

Conditions of Employment:

Bargaining in the federal sector is restricted to those matters that are conditions of employment. The definition of a condition of employment is very broad in nature and is found in 5 USC 7103(a)(14), which states *“Conditions of employment means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters-*

(A) Relating to political activities prohibited under Subchapter III of Chapter 73 of this title;
(B) Relating to the classification of any position; or
(C) To the extent such matters are specifically provided for by federal statute;”

In addition to this definition found in law, the FLRA has issued its “interpretation” of a condition of employment in case law that they have issued. They have consistently held that a matter is a condition of employment *“if it has a direct relationship with an employee’s work situations or employment relationships.”* When dealing with bargaining proposals as they relate to conditions of employment, the FLRA will consider two (2) main issues, in order to determine whether or not those proposals are consistent with the definition and case law above. Those two issues are:

- Whether the proposal deals with bargaining unit employees (BUEs); and
- The nature and extent of the effect of the matter on the working conditions of BUEs, and whether or not a direct link exists between the proposal and the work situation.

As you can see, the scope of the FAA’s bargaining obligation is limited. For example, the FAA is not obligated to negotiate over a proposal that affects the conditions of employment of members of other bargaining units or supervisory personnel under certain circumstances. **(See case law below)** However, the FAA may bargain over proposals, at their election, that directly implicate the conditions of employment of supervisory personnel because those proposals are considered permissive subjects of bargaining. Lastly, a condition of employment may be established through unwritten past practices. (I will explain this later)

The following, represents some case law issued by the FLRA regarding conditions of employment:

- General criteria or procedures for choosing individual seating assignments within the office are negotiable conditions of employment. *(36 FLRA 655)*
- Proposals that affect some individuals outside of the bargaining unit may be negotiable if the matter “vitally affects” the conditions of employment of bargaining unit employees. *(44 FLRA 1405)*

- The mere fact that a proposal has some "fallout" on non-unit employees does not render that proposal non-negotiable, although a proposal primarily aimed at non-unit employees does not involve conditions of employment. *(11 FLRA 475)*
- Where a law is general in nature, it will not remove a subject or topic from the definition of conditions of employment. *(27 FLRA 132)*
- If an agency contends that a matter is not a condition of employment because it is contained in law, it must; a) identify the statute involved, and b) explain why the statute removes the matter from the obligation to bargain. *(93 FLRR 1-8004)*
- If a law generally establishes a matter, but leaves elements of it to agency discretion, that matter may be negotiable. *(27 FLRA 132)*

De Minimis:

The FAA is required to bargain over the impact and implementation of a change in bargaining unit employees' conditions of employment provided the change has more than a de miminis effect. The De Minimis test applies to all changes in conditions of employment, whether they are substantively negotiable or result from the exercise of a non-negotiable management right.

De Minimis is a Latin term that means *"trifling," "minimal," or "insignificant."* As mentioned above, in order for the FAA's bargaining obligation to trigger, the matter in question must be "more than de minimis." Although the FAA may "allege" that a matter is only de minimis, the final decision on whether or not it actually is, rests with the FLRA.

Below is some case law regarding the de minimis standard:

- While technically constituting a change, some modifications in the work environment are so small or inconsequential that no advance notice to the Union is required. *(15 FLRA 922)*
- In assessing whether the effect of a decision on conditions of employment is more than de minimis, the FLRA looks to the nature and extent of either the effect, or the reasonably foreseeable effect of the change. *(103 LRP 34789)*
- The removal of a water cooler had more than a de minimis impact. *(37 FLRA 25)*
- The fact that a change affects only one employee will not necessarily render it de minimis. *(60 FLRA 620)*

Over the past several years, the FAA has broadened the scope of the de minimis doctrine. As a result, the FAA has made a practice of having a knee-jerk reaction to many NATCA proposals by claiming that the proposed change has a de minimis impact upon the bargaining unit. They have used this to allege that there is no bargaining obligation. If the FAA attempts to assert that a matter is "de minimis" during your negotiations, you should contact your RVP or regional LR Lead.

Covered-by Doctrine:

Regardless of whether or not a change involves a reserved management right, the FAA does not have an obligation to bargain prior to making a change in working conditions, if the subject matter is "covered-by" the CBA.

"Covered-by" is meant to be a defense to an alleged failure to satisfy a bargaining obligation. The FAA is not required to bargain over a proposal that is already "covered-by" the existing CBA. Much like the "de minimis standard," the FAA may declare a matter "covered-by" and refuse to negotiate that matter. Once again, the final decision on whether or not a matter is covered-by the existing CBA rests with the FLRA. In order to determine whether a matter is covered-by, the FLRA applies a two-prong test:

- Is the matter "expressly contained" in the CBA; and
- Is the matter "inseparably bound up with" and thus plainly an aspect of an issue covered by the CBA.

Only the first prong of this two-prong test applies to bargaining between NATCA and the FAA! In analyzing the first prong, it is necessary to determine if the item being discussed could have been "reasonably considered" during negotiations for the CBA. For example, overtime is covered in the CBA and the Agency will routinely assert that any discussion regarding overtime is "covered-by" the CBA. If the agency is installing a major piece of equipment at your facility that may require mandatory overtime over a protracted period of time, then you may argue that this was beyond the scope of what could have been reasonably considered at the bargaining table during negotiations for the CBA. The impact of the mandatory use of overtime over a protracted period of time can and should require procedures and/or appropriate arrangements in order to mitigate the impact or adverse affect. Once again, if the FAA attempts to assert that a matter is "covered-by," you should contact your RVP or regional LR Lead.

Relevant case law issued by the FLRA regarding the "covered-by doctrine" appears below:

- The covered-by doctrine operates to prevent bargaining, not require it. *(57 FLRA 459)*
- The covered-by doctrine does not only apply to term agreements. If the parties have negotiated a memorandum of understanding or similar agreement on a particular subject, it may also serve to preclude bargaining on that subject. *(60 FLRA 68)*
- If the subject matter in dispute is only tangentially related to the agreement provision and not a subject that should have been contemplated as within the scope of the provision, it is not covered-by the agreement. *(56 FLRA 906)*
- Where a dispute concerns only an Agency's contractual duty to bargain rather than a statutory duty, the covered-by doctrine does not apply. *(57 FLRA 934)* **(This is a perfect example of your local level BWS and annual leave negotiations, due to the fact that the obligation to bargain those subjects is a contractual obligation.)**
- Under prong 1 of the covered-by doctrine, a proposal will be found to concern a matter expressly contained in the agreement only if it would have the effect of conflicting with or modifying the agreement. *(61 FLRA 437)*

This edition of the LR Chronicles is meant to give you the basic principles of when and why bargaining is required. If there are any questions concerning this edition, please contact your regional Labor Relations Lead or your RVP.

Mike Hull
NWP LR Lead