

**The Collective  
Bargaining Process  
In-Depth  
Part 4**

**The obligation to  
Bargain in good faith**

Hello NWP Members and Reps;

Welcome to LR Chronicles number 34. As discussed in LR Chronicles number 32, the duty to bargain a matter comes with five (5) caveats. As a review, those caveats are:

- The matter must be a condition of employment as defined in 5 USC 7103(a)(14);
- The matter must be more than de minimis;
- The matter cannot already be “covered-by” an existing collective bargaining agreement;
- The matter cannot conflict with any federal law that applies to NATCA and the FAA; and
- The matter cannot be inconsistent with a government-wide rule or regulation.

Once it has been determined that the FAA has the obligation to bargain a matter with you, they also have an obligation to do so in good faith. This edition of the LR Chronicles will cover the obligation to bargain in good faith as well as the obligation to negotiate conditions of employment that are established by past practice. Finally, I will cover what we, as the Union, can do should the FAA abrogate their obligation to bargain in good faith with NATCA.

**Good Faith Bargaining:**

Good faith bargaining requires that neither party to a negotiation attempts to intentionally mislead the other party about important matters being negotiated.

The duty to bargain in “good faith” is covered in five (5) sections of Title 5, Chapter 71. Additionally and typical with Chapter 71 laws, the FLRA has issued case law regarding the duty to bargain in good faith. Some of this case law will be outlined below.

The first section that covers the duty to bargain in good faith is 5 USC 7114(a)(4), which states in part *“Any agency and any exclusive representative in any appropriate unit of the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement.”*

Simply stated, this section of Title 5 requires both NATCA and the FAA to bring representatives to the bargaining table with the authority to bind each respective party to a course of action, and to do so in good faith.

Two more sections of Title 5 that cover the duty to bargain in good faith, 5 USC 7116(a)(5) and 5 USC 7116(b)(5), make the refusal to bargain in good faith, an unfair labor practice (ULP). This applies to an Agency ((a)(5)), and to a Union ((b)(5)).

Another section that covers the duty to bargain in good faith is 5 USC 7117(a)(1) which states “*Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any federal law or any government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a government-wide rule or regulation.*” **(5 USC 7117 covers more requirements regarding the duty to bargain in good faith, but for the purposes of the LR Chronicles, I will not cover the remainder of this provision.)**

The attachment of the good faith requirement to permissive bargaining in the federal sector is underscored by the wording in 5 USC 7116(a)(5), which connects the good faith requirement to the process of bargaining, in contrast to 5 USC 7117, which addresses good faith in the context of the subject matter. In other words, permissive topics are not excluded from the parameters of the good faith requirement.

This law simply states that any negotiation that takes place between NATCA and the FAA cannot violate any federal law or a rule or regulation that applies to the entire federal government.

The final section that I will cover regarding the duty to bargain in good faith is found in 5 USC 7114(b). This particular section sets out three (3) broad principles governing this obligation. 5 USC 7114(b) states in part “*The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation –*

- (1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;*
- (2) 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;”*

Simply stated, each party to a negotiation in the federal sector must:

- Approach bargaining with a genuine desire to reach agreement;
- Send representatives to the negotiations that possess sufficient authority to bind their respective side;
- Be willing to meet on a reasonable schedule and at convenient places in order to conduct the requisite negotiations; and
- Not engage in unnecessary or unreasonable delays.

In deciding whether a Union or an Agency has breached the good faith bargaining obligation, the FLRA looks at the “totality of the conduct.” This threshold is directly from FLRA case law which will appear below. Additionally, the obligation to bargain in good faith extends to permissive subjects of bargaining because these subjects concern conditions of employment.

The obligation to bargain in good faith extends to all facets of the negotiations, including:

- Ground Rules;
- Substantive negotiations;
- Meeting at reasonable times and convenient places;
- Signing an agreement reached, if requested to do so by the other party;
- Participation in mediation proceedings;
- Participation in impasse proceedings.

When confronted with the assertion that a party is not bargaining in good faith, the FLRA attempts to determine the “overall pattern of conduct.” In other words, they attempt to determine whether or not a party is intent on or at least sincere about reaching agreement.

There is another form of bad faith bargaining that could be attributed to an agency, that being one of “repudiation.” An agency may be found to have bargained in bad faith if they subsequently “repudiate” a previous agreement or provision. The definition of repudiation, in accordance with Black’s Law Dictionary is “*a contracting party’s words or actions that indicate an intention not to perform the contract in the future; a threshold breach of contract.*” In accordance with FLRA case law, in order for a party to be guilty of repudiation, the intent must be “clear and patent.”

One last issue with which you must be aware regarding the duty to bargain in good faith is known as “regressive bargaining.” Regressive bargaining occurs when a proposal is advanced by a party to a negotiation stating one thing, then at a later time that party advances another proposal which can be construed to be somewhat less than what was offered previously. The definition of “regress” as per Webster’s dictionary is “*to return or revert to a former and usually worse condition.*” For example, when you are negotiating your basic watch schedule MOU, management submits a proposal that states:

*“There shall be six (6) employees assigned to the day shift, eight (8) employees assigned to the swing shift, and two (2) employees assigned to the midnight shift.”*

In response to this management proposal, you submit a proposal that states:

*“There shall be eight (8) employees assigned to the day shift, ten (10) employees assigned to the swing shift, and three (3) employees assigned to the midnight shift.”*

In response to the above proposal, management submits the following proposal to you:

*“There shall be four (4) employees assigned to the day shift, six (6) employees assigned to the swing shift, and one (1) employee assigned to the midnight shift.”*

As you can see, management regressed their previous proposal. This is an Unfair Labor Practice (ULP) for bargaining in bad faith and should be filed accordingly. If you ever think that the agency is engaging in regressive bargaining, contact your RVP or regional LR Lead. They will assist you with the best way to handle it.

Below is some case law that covers the duty to bargain in good faith:

- The mere fact that implementation of a proposal would require an agency to exercise one or more of its management rights does not, in and of itself, place the matter outside the obligation to bargain. (38 FLRA 1016)
- Insisting on taping negotiation sessions, over the objection of the other side is evidence of bad faith. (52 FLRA 339)
- Attempting to control the designation of the other party's bargaining team members as a pre-condition to negotiations is bad faith conduct. (6 FLRA 439)
- The "totality of the conduct," taken together, an unwillingness to meet, inflexibility in discussing proposals and presenting the other side with ultimatums exhibit a lack of good faith bargaining. (53 FLRA 1006)
- Simply going "through the motions" does not constitute good faith bargaining. A party does not act in good faith when it attempts to limit caucus time and refuses to resume negotiations after a break. (18 FLRA 511)
- An agency is required to send to the bargaining table representatives vested with the full authority to commit the agency to an agreement. (23 FLRA 63) (**How many times have you heard from management that "I have to check with the region" or "I have to check with HR."**)
- A series of discussions between a manager and a Union official about the physical layout of a new facility constituted collective bargaining, and consequently, the manager's refusal to sign an MOU reflecting the parties' agreement on the issues discussed, constituted bad faith. (53 FLRA 312) (**This is a NATCA and FAA case regarding a new control tower in Louisville, KY.**)
- A finding of repudiation is a finding that the party failed to meet its statutory obligation to bargain in good faith. (55 FLRA 951)
- When a breach of an agreement is found to be "clear and patent," in order to find the party repudiated the agreement, it must be determined that the provision breached goes to the heart of the agreement. (51 FLRA 858)
- Insisting that a previously agreed-upon permissive topic of bargaining be retained in a subsequent labor agreement to the point of creating impasse, constitutes bad faith bargaining. (17 FLRA 221)

### **Past Practice:**

In addition to working conditions that are established by a CBA, law, or an Agency regulation, working conditions can also be established by a "past practice." A past practice is defined as an existing practice, sanctioned by its use and acceptance that is not specifically contained in the CBA. Additionally, past practices can be enforced through the negotiated grievance procedure because they are considered part of the CBA.

In order for a past practice to be enforceable, the practice must be:

- A condition of employment;
- Legal;

- Fully recognized and accepted by both the Union and the Agency;
- In effect for an extended period of time.

It is clear, based on FLRA case law, that past practices are NOT contained within a collective bargaining agreement. Simply stated, a past practice is an existing practice sanctioned by use and acceptance, that is not specifically included in a collective bargaining agreement. Additionally, Arbitrators may use evidence of past practices to interpret ambiguous contract language.

Under FLRA case law, a matter does not ripen into a condition of employment through an extended practice. The practice itself must be a “condition of employment” for a “past practice” to be established. Management may not unilaterally alter or otherwise change a past practice without notice to and opportunity to bargain the change in practice. Even if a past practice has been deemed illegal (a violation of law), an Agency has an obligation to negotiate the cessation of the past practice. Even if a past practice may violate law or a government-wide rule or regulation, it is required for an agency to provide the Union with the appropriate notice and opportunity to bargain any change in that past practice. However, if a past practice has been deemed to be illegal, the Union may be limited in what it may negotiate. The Agency may be allowed to cease the illegal practice and the Parties must negotiate its cessation.

Below is relevant FLRA case law regarding past practices:

- Conditions of employment may be established through unwritten past practices. (53 *FLRA 1228*)
- The mere fact that a matter has been allowed to occur repeatedly over an extended period of time does not render it a condition of employment. (17 *FLRA 890*)
- The provision of bottled drinking water for employees for an extended period of time became a condition of employment through past practice. (38 *FLRA 899*)
- It does not matter whether a working condition is specified in the contract or merely a past practice which has developed over time. In either case, failure to afford the Union advance notice of an intended change constitutes bad faith bargaining. (27 *FLRA 322*)
- We have specifically held that an agency may not change unilaterally, a condition of employment established through past practice, even if the condition established by the practice differs from the express terms of the parties’ collective bargaining agreement. (36 *FLRA 567*) and (39 *FLRA 130*)
- The FLRA upheld the decision of an Administrative Judge (AJ) that the agency had an obligation to bargain with the Union over the removal of a television set from the break room after seven (7) years. The AJ stated that the use of the TV set had, over the course of many years, become an established condition of employment. (5 *FLRA 817*)
- Discontinuing the practice of allowing officers to carry their weapons between home and work was a unilateral change. Advance notice to the Union was required. (52 *FLRA 563*)
- Even where an existing practice violates the law, management must notify the Union of the intended change and entertain proposals over the impact and implementation of its decision. (34 *FLRA 635*)

- The AJ found there was a past practice of granting administrative leave for an annual athletic competition and the agency committed a ULP when it unilaterally changed the practice. (*56 FLRA No. 136*)

### **Failure to bargain in good faith:**

Now that I have discussed the FAA's obligation to bargain in good faith, including written or unwritten practices, what is your recourse if you allege that the FAA is not fulfilling their obligation to do so? There are four (4) options which you can pursue. Those options are:

- File a grievance;
- File a ULP;
- File a grievance with a ULP incorporated within the grievance; or
- File a ULP for the bargaining infraction and a grievance for the impact to BUEs.

The option you choose will depend on the circumstances of and the level of bad faith bargaining. For example, a grievance is appropriate for a violation of an agency rule or regulation and/or a collective bargaining agreement, while a ULP is appropriate for a violation of federal law. As explained earlier, the failure of an agency to bargain in good faith can be a ULP that is incorporated within a grievance. Arbitrators are authorized to rule on ULPs as part of a grievance. However, they are not necessarily compelled to do so. It all depends on the circumstances of each case.

Whenever you are faced with the agency possibly bargaining in bad faith, it is always best to contact your regional labor relations lead or your RVP prior to taking any action. They will give you the assistance that you need in order to help you choose the correct path for redress. This will be very important especially considering the fourth bullet above due to the fact that a grievance and a ULP may not be filed on the same issue. You may need assistance in separating out the issues to ensure proper wording on both the grievance and the ULP.

As you can see, there is a very high threshold in accordance with the many federal laws that cover the duty to bargain in good faith. Although I will cover documentation, as it relates to bargaining, in a future edition of the LR Chronicles, it is extremely important to document each and every conversation, correspondence, and negotiating session because you will have to "prove" your allegation to a third party. The best way to "prove" your allegation is through good, solid documentation.

Please remember that the duty to bargain in good faith does not ONLY apply to the FAA. The Union is also required by law to bargain in good faith. 5 USC 7116(b)(5) makes it an unfair labor practice against the Union, if the FAA can prove that you abrogated this obligation.

Mike Hull  
NWP LR Lead