Labor-Management Relations in the Legislative Branch: Duty to Bargain and Scope of Bargaining Frequently Asked Questions

The Office of Congressional Workplace Rights (OCWR) administers the Congressional Accountability Act (CAA) and works to guarantee the rights provided by the CAA to employees and employing offices of the legislative branch. Pursuant to Section 220 of the CAA, 2 U.S.C. § 1351, for employees who are eligible to join a union, the OCWR investigates and processes petitions for union representation and union elections, and the OCWR Office of the General Counsel investigates and prosecutes charges alleging unfair labor practices (ULPs).

Below are answers to Frequently Asked Questions (FAQs) the OCWR receives about the duty to bargain and the scope of bargaining. For information about other labor-management relations topics, please see our FAQs on labor-management relations in the legislative branch.

The framework for the labor-management program in the legislative branch is set forth in the CAA and described in more detail in the OCWR's substantive regulations on collective bargaining and unionization. These regulations are cited in these FAQs as "OCWR Substantive Regulations."

Disclaimer: These FAQs contain general information and are not legal authority or legal advice. Particular answers may have unstated exceptions, qualifications, and/or limitations, or may become outdated due to changes in the law. For these reasons, please consult with an attorney prior to initiating any proceeding described in these FAQs.

If you have additional questions about labor-management issues in the legislative branch, please e-mail LMR@ocwr.gov.

What is "collective bargaining"?

"Collective bargaining" is the performance of the mutual obligation of the employing office and the union, which is the exclusive representative of employees, to meet at reasonable times and consult and bargain in a good-faith effort to reach agreement on personnel policies, practices, and matters affecting working conditions.

- **Collective Bargaining Agreement**

  The collective bargaining agreement, sometimes called a "master agreement," is a comprehensive legal contract that includes the negotiated terms between the parties. The collective bargaining agreement usually contains multiple topics and includes articles and sections related to hours, leave, overtime, compensatory time, working conditions, benefits, training, safety, the grievance and arbitration procedure, midterm bargaining provisions, the duration of the agreement, and other rights for workers.

- **Memorandum of Understanding**

  A memorandum of understanding is usually a single-topic agreement, often resulting from midterm bargaining or in settlement of a grievance pertaining to the entire unit.

What type of proposals can a union make during collective bargaining?

Bargaining subjects can be separated into three categories: mandatory, permissible, and prohibited. There is no referee at the bargaining table, so unions are free to make proposals on any matter affecting conditions of employment. However, an employing office is only obligated to respond to proposals that impose a "duty to bargain." Only subjects that fall into the "mandatory" category impose a duty to bargain. "Permissible" subjects can be bargained at the election of the employing office, and "prohibited" subjects are those that employing offices usually will not (and usually should not) respond to.

What types of proposals are "mandatory"?

Mandatory subjects of bargaining are generally those proposals covering any condition of employment or change in any condition of employment of bargaining unit employees. Bargaining is required if the change in the bargaining unit employee's condition of employment is more than *de minimis*, i.e., more than a trivial change. Examples of mandatory bargaining topics include overtime, parking arrangements, hours of work, seniority, assignment of office space and office moves, non-discrimination provisions, safety issues, grievance procedures, progressive discipline provisions, testing of employees, rest and lunch periods, official time and representation, definition of bargaining unit work, reorganizations, and limitations on contracting out.

What types of proposals are "prohibited"?

Matters relating to non-unit and supervisory positions are not subject to bargaining and would generally fall within the "prohibited" category; consequently, an employing office has no duty to respond to proposals involving these subjects. Similarly, proposals that are inconsistent with federal law, government-wide regulations, or employing office rules for which there are compelling needs are not subject to bargaining. This includes such topics as prohibited political activity, classification of positions, and other matters specifically provided for by federal law. Lastly, proposals affecting "management rights" are not subject to bargaining. A list of these management rights is provided in 5 U.S.C. § 7106(a) and includes such topics as determining the mission, budget, organization, number of employees, and internal security practices of the

employing office. However, even if a topic is designated as a management right, this does not preclude bargaining over procedures that the employing office will observe when exercising that right or appropriate arrangements for employees adversely affected by the exercise of that right. This is commonly referred to as "impact and implementation" bargaining. See 5 U.S.C. § 7106(b).

Are there topics that could be bargained but are not mandatory?

Yes. Topics that may be bargained but are not required to be bargained are called "permissive" subjects of bargaining. A list of permissive bargaining topics is provided in 5 U.S.C. § 7106(b)(1) and includes the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, and the technology, methods, and means of performing work. Permissive topics may be bargained at the election of the employing office, and the employing office may cease bargaining on the matter before reaching a final agreement.

What does "covered by" mean?

A proposal is outside the duty to bargain if its subject matter is covered by an existing collective bargaining agreement. There is no duty to bargain over something that has already been agreed upon in an existing collective bargaining agreement.

Can employees in the legislative branch bargain over salaries and benefits?

It is well established that federal employees in the executive branch cannot bargain over salaries and benefits because these are determined by federal statutes. There are fewer federal statutes covering salary and benefits for employees of the House and the Senate, which may allow these employees to bargain over salaries and benefits. For example, legislative branch employees have bargained for the benefit of premium pay for holiday work. The OCWR Substantive Regulations provide procedures for resolving disputes over whether a particular bargaining proposal imposes a duty to bargain or is within the scope of bargaining. Cases decided under these procedures will determine the extent to which proposals about salaries and benefits impose a duty to bargain or are within the scope of permissible bargaining.

What happens if an employing office or a union refuses to bargain over a proposal that is clearly subject to bargaining?

Refusing to bargain over a proposal that is clearly subject to bargaining is an unfair labor practice. Unfair labor practice charges are filed with and investigated by the OCWR Office of the General Counsel, and can result in a complaint being filed by the General Counsel. For a full description of these procedures, please see the ULP section of the general labor-management FAQs.

Can employees in the legislative branch strike or their unions call or participate in a strike?

No. Federal government employees, including employees of the legislative branch, are prohibited from engaging in a strike. This prohibition can be found in 5 U.S.C. § 7311, entitled "Loyalty and striking":

> "An individual may not accept or hold a position in the Government of the United States….if he— . . . (3) participates in a strike, or asserts the right to strike, against the Government of the United States …; or (4) is a member of an organization of employees of the Government of the United States … that he knows asserts the right to strike against the Government of the United States."

The prohibition is also repeated in section 2421.3(b) of the OCWR Substantive Regulations, which defines "employee" as excluding "any person who participates in a strike in violation of section 7311 of title 5 of the United States Code, as applied the CAA."

Similarly, under 5 U.S.C. § 7116(b)(7)(A) and (B), as applied by the CAA, it is an unfair labor practice for a labor organization "to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with any agency's operations" or "to condone any activity described [above] by failing to take actions to prevent or stop such activity."

Negotiability Disputes FAQs

What is a negotiability dispute?

A negotiability dispute occurs when an employing office and a union disagree over the requirement to bargain or the legality of a proposal or provision.

- **What is a negotiability dispute over a proposal?**

A proposal is any matter offered for bargaining about which there is not yet agreement. A negotiability dispute may occur when the parties to the negotiation disagree about whether the employing office is required, or permitted, to negotiate over the proposal. The union may file a petition for review with the OCWR Board of Directors if the employing office alleges that its duty to bargain does not extend to the proposed matter because: (1) it conflicts with federal law, a government-wide rule or regulation, or an agency regulation for which there is a compelling need; or (2) it concerns a "permissive" topic of negotiation (see FAQ above about permissive subjects of bargaining).

- **What is a negotiability dispute over a provision?**

A provision is created when the union and employing office agree to a proposal during negotiations. A provision can become the subject of a negotiability dispute when the head of the

employing office has disapproved the provision as allegedly contrary to law during the process of "agency-head review" under 5 U.S.C. § 7114(c). The union may file a petition for review with the OCWR Board of Directors if the head of the employing office alleges that the provision is not in accordance with law.

How are negotiability disputes resolved?

Negotiability disputes can be resolved by filing a "petition for review" with the OCWR Board of Directors using the procedures set forth in Section 2424 of the OCWR Substantive Regulations. Cases which solely involve an employing office's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained and which do not involve actual or contemplated changes in conditions of employment may only be filed as a negotiability dispute.

Alternatively, as noted earlier, refusal to bargain over a proposal that is clearly negotiable may constitute an unfair labor practice, and a dispute of this nature can be resolved by filing an unfair labor practice charge with the OCWR General Counsel. See section 2423 of the OCWR Substantive Regulations, and the ULP section of the general labor-management FAQs. An unfair labor practice charge must be filed within 180 days of the alleged failure to bargain.

- **Can I file both a negotiability petition for review and an unfair labor practice charge?**

Ordinarily, both set of procedures will not be used simultaneously. Even when the labor organization files both a negotiability petition for review and an unfair labor practice charge, the labor organization must choose between the unfair labor practice procedures or the negotiability petition procedures. The selection of forum is not dependent on whether the petition or charge was filed first. Upon selection of one procedure, further action under the other procedure will ordinarily be suspended.

How long does the union have to file a negotiability dispute?

The union has **15 days** to file a timely petition for review from the date that the employing office serves ***in writing*** its assertion of non-negotiability to the union. When the union requests the employing office to provide its written assertion of non-negotiability, if the employing office does not serve the written assertion of non-negotiability within **10 days** of the request, then the union may file a petition for review of a negotiability issue even without the written assertion.

How long does it generally take to resolve a negotiability dispute?

The regulations and section 8.06 of the OCWR Procedural Rules provide for expedited review of negotiability disputes.

Is filing a negotiability dispute free?

Yes. It is free to file a negotiability dispute.

Who may file a negotiability appeal?

The exclusive representative, i.e. the union, may file a petition for review.

Does the union need a lawyer to file?

No, the union is not required to have a lawyer, however, many choose to have a lawyer as representative. To designate a lawyer or another representative, please fill out and submit the Designation of Representative form.

What should be included in the petition for review of the negotiability issue?

Unlike the forms available for a representation petition, request for impasse, or unfair labor practice charge, there is no form for a petition for review of a negotiability issue. However, OCWR Substantive Regulation 2424.4 sets forth what should be included in a petition. Specifically, the petition must be in writing, must be dated, and must include: (1) a statement setting forth the express language of the proposal sought to be negotiated as submitted to the employing office, (2) an explicit statement of the meaning attributed to the proposal by the exclusive representative, (3) a copy of the employing office's written assertion of non-negotiability, (4) any other relevant documentary material, and (5) notification whether an unfair labor practice charge was also filed regarding the negotiability issue.

Where should I file my petition for review of negotiability?

The petition for review may be

- e-mailed to ocwrefile@ocwr.gov;
- faxed to (202) 426-1913 (limit 75 pages); or
- hand-delivered during regular business hours to the Office of Congressional Workplace Rights, John Adams Building, 110 Second Street, SE, Room LA-200, Washington, DC 20540-1999.

In addition, a copy of the petition and all attachments must be served on the head of the employing office and on the principal employing office bargaining representative at the negotiations.

What happens after the petition for review is filed?

After the petition for review is filed:

(1) Within thirty (30) days after the head of an employing office receives a copy of a petition for review of a negotiability issue, the employing office shall file a position statement;
(2) Within fifteen (15) days after the exclusive representative receives a copy of the employing office's position statement, the exclusive representative shall file a full and detailed response;
(3) The OCWR Board of Directors, in its discretion, may order a hearing; and
(4) The OCWR Board of Directors will issue a decision and an order.