

**The Duty to Bargain Under the CAA**


**Part 2  
Contract Bargaining**

Office of Congressional Workplace Rights

Office of the General Counsel

June 2023  
Labor Management Forum

*advancing workplace rights, safety & health, and accessibility in the legislative branch*



**Welcome**

## Introduction

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## Outline

### Part 2 – Contract Bargaining

- Formal process
- Subjects of bargaining
- Negotiability process
- Impasse proceedings
- ULPs during contract bargaining

## Disclaimers

- This is not legal advice
- This is not advice on *how* to bargain
- This presentation is not comprehensive – it is a practical overview
- This meeting is not confidential
- Please ask questions! But feel free to follow-up one-on-one if you'd prefer to ask confidentially

## The Duty to Bargain

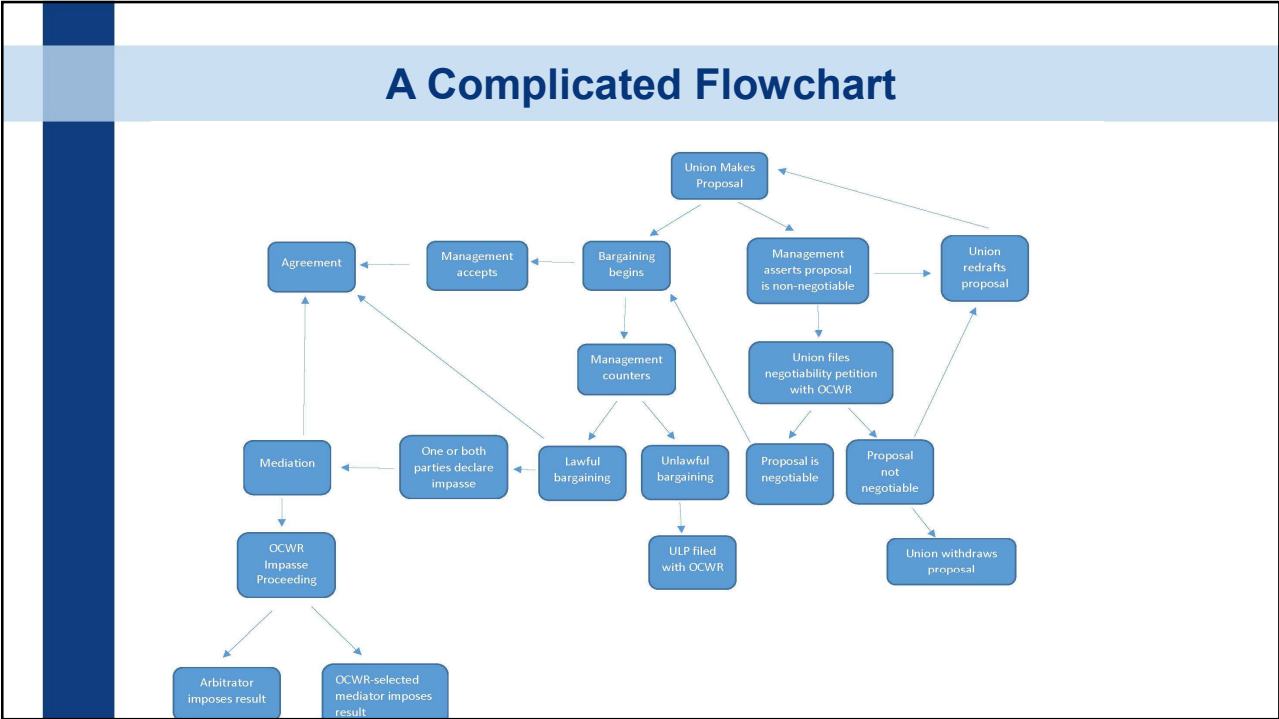
## Background

- The Congressional Accountability Act of 1995 applied the Federal Service Labor-Management Relations Statute to most employing offices of the legislative branch
- The FLRA enforces the FSLMRS for executive branch employees
- The OCWR is the FLRA of the legislative branch
- OCWR relies on FLRA interpretation of the Statute

## The Duty to Bargain in Good Faith

- Statute requires employers and unions to meet and:
  1. Approach negotiations with a sincere resolve to reach an agreement;
  2. Meet at reasonable times and convenient places as often as necessary; and
  3. Avoid unnecessary delay.
- Failure to do any of the above is an unfair labor practice, filed with the OCWR

5 U.S.C. § 7114(b)



## Subjects of Bargaining

## Three Types of Subjects of Bargaining

Each proposal falls into one of three categories:

1. Mandatory subject of bargaining:

Management must bargain over it. Union can insist to impasse. Negotiability panel calls these “negotiable.”

2. Permissive subject of bargaining:

Management can choose to bargain over it. Union cannot insist to impasse. FLRA Negotiability panel calls these “non-negotiable.” Once they are agreed upon, they are enforceable through ULP or grievance procedure.

3. Prohibited subject of bargaining:

Can be flagged as unlawful by “agency head.” Cannot be enforced in any proceeding. Also “non-negotiable.”

## What are Mandatory Subjects of Bargaining?

“All matters relating to conditions of employment are mandatory subjects of bargaining unless the Statute explicitly or by unambiguous implication vests in a party an unqualified, or ‘unilateral,’ right.”

*NTEU*, 64 F.L.R.A. 156, 158 (2009)

## What are Mandatory Subjects of Bargaining? cont'd

Remember § 7106 – Management has the right to:

- Determine mission, budget, organization, number of employees, and internal security practices;
- Hire, assign, direct, layoff, retain, suspend, remove, reduce in grade or pay, or discipline;
- Assign and contract out work;
- Select employees among properly ranked and certified candidates; and
- Take whatever actions may be necessary to carry out mission during emergencies

BUT! Union can negotiate:

- Procedures which management officials will observe when exercising rights; and
- Appropriate arrangements for adversely affected employees.

## What are Mandatory Subjects of Bargaining? cont'd

So, a proposal is a mandatory subject of bargaining if it concerns conditions of employment, AND is:

1. Not a management right; OR
2. A procedure for management to observe when exercising a management right; OR
3. An appropriate arrangement for employees adversely affected by management's exercise of its rights.

## What are Mandatory Subjects of Bargaining? cont'd

Reminder about conditions of employment:

- Defined as: “personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions[.]”
- But NOT
  - Changes related to political activities prohibited by the Hatch Act;
  - Changes related to the classification of any position; or
  - Changes specifically provided for by Federal statute.

5 U.S.C. § 7103(a)(14)

## Mandatory Subjects of Bargaining

Examples of mandatory subjects of bargaining which are not management rights:

- Grievance procedure; *FDA*, 53 F.L.R.A. 1269, 1274 (1998)
- Official time, including amount, location for using, and procedure. 5 U.S.C. § 7131(d); *Dep't of Agric.*, 62 F.L.R.A. 364 (2008)
- Office space design (unless proposal interferes with mission). *NTEU Chap. 80*, 8 F.L.R.A. 197 (1982)
- Environmental conditions like lighting, temperature, and ventilation. *IRS, Chicago*, 9 F.L.R.A. 648 (1982)
- Uniforms and dress code, though employing office has strong “internal security practices” and “means of performing work” defenses. *NTEU*, 61 F.L.R.A. 48 (2005) (finding that proposal permitting Customs employees to wear cargo shorts was negotiable)



## Mandatory Subjects of Bargaining, cont'd

Examples of procedures which are mandatory subjects of bargaining:

- How and when employees are paid. *AFGE Local 1698*, 38 F.L.R.A. 1016 (1990)
- Disciplines be based on “just cause” and consistently applied. *AFGE Local 1760*, 22 F.L.R.A. 195 (1986)
- Use of seniority and/or volunteers for reassignment or RIF, as long as management reserves right to review each employee’s qualifications. *IAM Local Lodge 830*, 20 F.L.R.A. 848 (1985)
- Whether employees receive awards and the size of the awards. *NTEU*, 27 F.L.R.A. 132 (1987)

## Mandatory Subjects of Bargaining, cont'd

Examples of appropriate arrangements for adversely affected employees which are mandatory subjects of bargaining. Note – this often comes up in unilateral implementation cases, but is also relevant to contract bargaining.

- Proposal that agency include in contract with prospective contractor an obligation to offer jobs to unit employees affected by contracting out. *AFGE Local 1827*, 58 F.L.R.A. 344 (2003)
- Progressive discipline is not negotiable, but mitigation and timeframes can be negotiable. Examples of negotiable proposals:
  - Letter of reprimand will be removed from employee’s record within 12 months of issuance;
  - Discussion with management required before discipline and employee gets 48 hour notice for discussion; and
  - Requirement that management provide reasons for adverse action in writing “at the earliest possible date.”

## What are Permissive Subjects of Bargaining?

5 U.S.C. § 7106(b)(1) allows bargaining “at the election of the agency” over:

1. Numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty;
2. Technology, methods, and means of performing work.

Neither party can insist to impasse. Once they are agreed upon, they are enforceable through ULPs or grievance procedure. Permissive subjects do not survive the life of the contract.

## Permissive Subjects of Bargaining

Examples:

- Proposal that employee who does not pass CDL driving test will remain in current grade. *Tidewater VA*, 58 F.L.R.A. 561 (2003)
- Length of lunch periods and whether they are paid or unpaid. *Travis Air Force Base*, 1 F.S.I.P. 90 (2001)
- Procedures for filling supervisory positions. *NAGE Local R1-109*, 61 F.L.R.A. 588 (2006)
- Management’s unilateral change to alternative work schedules was unlawful even though it was a permissive subject of bargaining. *Am. Forces Radio*, 59 F.L.R.A. 759 (2004)

## What are Prohibited Subjects of Bargaining?

- Anything that is non-negotiable as a management right or for another reason is sometimes called “prohibited” or “illegal” subject of bargaining
- Distinction between “prohibited” and “permissive” is important in cases enforcing a contract provision. Prohibited = unenforceable.
- Statute requires agency head to review fully-negotiated collective bargaining agreements before they go into effect. Agency head can disapprove based on prohibited provisions, but not permissive.  
*NATCA, 61 F.L.R.A. 336 (2005)*

## Negotiability Process

## Bargaining Process Basics

1. Union Makes Proposal
2. Management Responds With:
  - a. Acceptance;
  - b. Counterproposal; or
  - c. Statement that proposal is non-negotiable.

## Negotiability Appeal Procedure

If Office deems proposal non-negotiable, Union must file negotiability petition with OCWR within 15 days of Office's written statement of non-negotiability. Petition must include:

1. Statement containing exact language of proposal;
2. Statement of proposal's meaning and context;
3. A copy of all pertinent material; and
4. Statement of whether Union has also filed ULP over same issue.

If Office states non-negotiability orally, Union must ask for non-negotiability statement in writing. Can file petition 10 days later if no response.

OCWR Sub. Regs. § 2424.3, 2424.4

## Negotiability or ULP Decision

- Union may file ULP and negotiability appeal simultaneously, but must decide which to pursue. Selected procedure will continue while other is suspended. OCWR Sub. Regs. § 2424.5
- Under FLRA precedent, if parties fully litigate ULP and it's dismissed, negotiability petition is dismissed. *AFGE Council 214*, 34 F.L.R.A. 977 (1990)
- If there is a finding of a duty to bargain during ULP proceeding, proposal is negotiable. *AFGE Local 1501*, 24 F.L.R.A. 470 (1986)
- However, finding in negotiability appeal does not necessarily dictate a decision in later ULP proceeding

## Negotiability Appeal Procedure, cont'd

- Employing Office must respond to appeal within 30 days. Response must contain appropriate context and must cite to any law, rule, or regulation relied upon as a basis for the allegation and a copy of any relied-upon rule. OCWR Sub. Regs. § 2424.6
- Union must file rebuttal within fifteen days, including, if applicable, statement of why there is "no compelling need for rules or regulations to bar negotiations." OCWR Sub. Regs. § 2424.7
- OCWR may conduct a hearing to which General Counsel is not a party. Entire process is expedited. OCWR Sub. Regs. § 2424.9-10
- OCWR Board can (1) find proposal negotiable, order bargaining; (2) dismiss petition as non-negotiable; (3) find proposal negotiable on election of Employing Office, i.e., permissive. OCWR Sub. Regs. § 2424.10(b)

## What is a “Compelling Need” Determination?

- OCWR decides whether there is a “compelling need” for a regulation. If there is a compelling need, the regulation bars the proposal.
- OCWR regulations state a compelling need exists when one or more of the following is met:
  - a) The rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of functions of the employing office;
  - b) The rule or regulation is necessary to insure the maintenance of basic merit principles; or
  - c) The rule or regulation implements a mandate to the employing office or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature.

OCWR Sub. Regs. § 2424.11

## What is a “Compelling Need” Determination? cont’d

In *USMC, Quantico*, 49 F.L.R.A. 534 (1994),

- Union proposed: “All employees who are now entitled to exchange shopping privileges will continue to receive them.”
- Agency asserted that proposal conflicted with DOD directive stating “Only authorized patrons are entitled to exchange privileges.”
- DOD Directive also states “Secretaries of the Military Departments may grant deviations with regard to authorized patron privileges.”
- FLRA finds that proposal **conflicts with regulation, but is negotiable** because there is no compelling need for the regulation.
- Agency did not establish how shopping at exchange is “essential to the accomplishment of the mission.”
- Moreover, the fact that the regulation permits deviation by department secretaries demonstrates that it is not essential.

# Impasse Proceedings

## Beginning Impasse Procedures

- Filed when bargaining is occurring in good faith, but parties can't come to an agreement
- Either party or both parties jointly can file a request for an impasse proceeding
- Parties can also jointly submit a request for approval of a binding arbitration procedure
- In general, OCWR is more likely to find an impasse when parties have attempted some form of mediation

OCWR Sub. Regs. § 2471.1-3

- Note: if both parties agree to impasse, they are agreeing that proposal is negotiable and cannot object to award because proposal was permissive or prohibited. *NAGE Local R3-77*, 59 F.L.R.A. 937 (2004)

## What is an impasse?

If parties dispute the existence of an impasse, OCWR will examine “conduct of the parties from the inception of their negotiations” and analyze whether there was “disagreement as to the terms of the proposal on the table, or an unwillingness to modify them.” *Davis-Monthan Air Force Base*, 42 F.L.R.A. 1267, 1279-80 (1991)

## Possible Resolutions to Impasse Filing

1. Finding of no impasse
2. Finding of “other good cause for not asserting jurisdiction”
3. Find impasse, order arbitration. Likely to bind and impose costs on the parties.
4. Find impasse, order a hearing
  - a) Hearing is conducted by OCWR designated representative
  - b) That representative issues a report with recommendation
  - c) After report, parties can:
    1. Accept recommendations in report;
    2. Reach a settlement: or
    3. Object to the report.
  - d) If no resolution, OCWR Board can impose final result



## ULPs During Contract Bargaining

### ULPs during Contract Bargaining

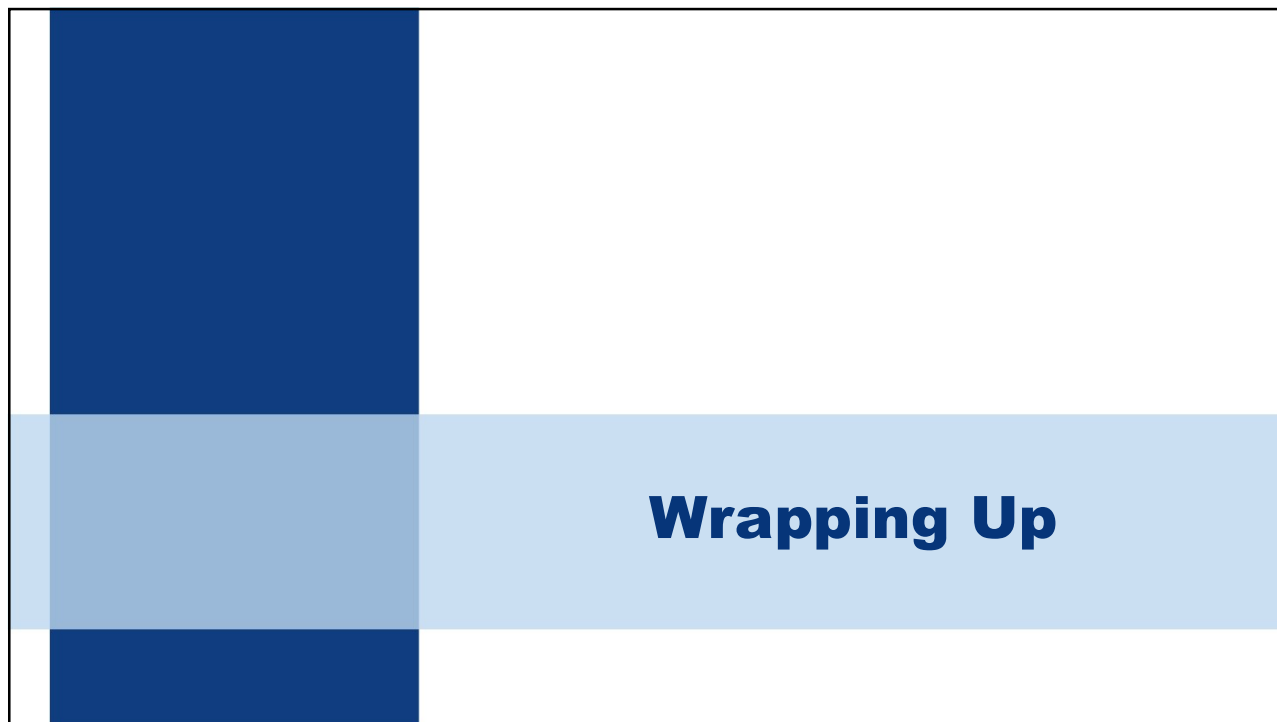
- It is an unfair labor practice for the employing office not to respond to the union's proposals, even if they are non-negotiable. *DOJ, INS*, 55 F.L.R.A. 892 (1999)
- Global bad faith contract bargaining ULPs are rare, and found analyzing totality of the circumstances. For example of bad faith conduct, see *Dep't of Air Force, Wright-Patterson*, 36 F.L.R.A. 524 (1990)
- However, individual instances of reprehensible or misleading conduct can be ULPs. For example, an agency committed a ULP by orally agreeing to several proposals in order to obtain union's agreement to other proposals, and then withdrawing agreement later. *VA, VAMC*, 32 F.L.R.A. 855 (1988)

## ULPs during Contract Bargaining, cont'd

- Statements that give the impression that bargaining over certain proposals would be futile are unlawful. *Fed. Bur. of Prisons, Bastrop*, 55 F.L.R.A. 848 (1999)
- Neither party has the right to unilaterally set dates and times for bargaining, impose deadlines on submissions, or limit caucus time, and a repeated attempt to rush bargaining in this manner may violate the Statute. *SSA*, 18 F.L.R.A. 511 (1985)

## ULPs relating to negotiability and impasse

- Once a proposal has been found negotiable through a ULP or negotiability proceeding, it is a ULP for an employing office to refuse to bargain on a materially identical proposal later. *Adjutant Gen., N.H.*, 54 F.L.R.A. 301 (1998)
- Employing office has duty to maintain status quo through negotiability and/or impasse proceedings. *DHHS*, 44 F.L.R.A. 870 (1992)
- Employing office does not have right to file negotiability appeal, but can file a ULP if union improperly asserts that management proposal is non-negotiable. *AFGE*, 4 F.L.R.A. 272, n. 1 (1980)
- It is an unfair labor practice to insist to impasse or file impasse petition over a permissive subject of bargaining. *AFGE Local 3937*, 64 F.L.R.A. 17, 21 (2009)



### Resources

- OCWR FAQs on Labor-Management Relations in the Legislative Branch: Duty to Bargain and Scope of Bargaining
  - [ocwr.gov](https://ocwr.gov) → Labor-Management Rights
- FLRA Materials
  - ULP Case Law Outline
  - Guide to Negotiability
    - [flra.gov](https://flra.gov) → Resources & Training → Guides & Manuals
- Peter Broida, *A Guide to Federal Labor Relations Authority Law and Practice* (2023)

## Preview of Coming Attractions

- Part 3 – the Duty to Bargain with a Contract in Effect
- Some time in the fall!

Questions?