
The Duty to Bargain Under the CAA
Part 3 – Midterm Bargaining
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Welcome

Introduction

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Outline

Part 3 – Midterm Bargaining

- How do contracts define midterm bargaining?
- How can a union waive its right to midterm bargaining?
- When is a proposal “covered by” the CBA?
- How are midterm bargaining obligations enforced?
- Summarizing the Duty to Bargain

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)

Summary of Midterm Bargaining

- Because the Statute is ambiguous as to whether, when, and where midterm bargaining is required, SCOTUS has left the contours of midterm bargaining up to the FLRA. *NFFE, Local 1309 v. Dep't of Interior*, 526 U.S. 86, 99 (1999).
- FLRA holds "that agencies are obligated to bargain during the term of a collective bargaining agreement on negotiable union proposals concerning matters not 'contained in or covered by' the existing agreement unless the union has waived its right to bargain about the subject matter involved."

CBA Provisions Defining Bargaining

Bargaining Procedures

- It is common for collective bargaining agreements to define how and when midterm bargaining will occur.
- For example, “Management will provide the union with written notification of any changes to conditions of employment it wishes to implement. If the union wishes to bargain over the changes, it must respond with written proposals within 7 calendar days.”

Bargaining Procedures, Cont’d

- It is also common for collective bargaining agreements to specifically state that management must bargain over certain subjects.
- For example, “If management wishes to change an employee’s tour of duty, management will bargain over that change pursuant to the terms of this agreement.” Note that this is a permissive subject which the contract has made mandatory.
- Unions can also voluntarily waive their right to bargain over certain changes during the term of the agreement. To be enforceable, the waiver must be clear and unmistakable. *IRS,* 29 F.L.R.A. 162 (1987).
- For example, “the Union agrees to waive its right to bargain over any changes to work uniforms during the term of this agreement.”

Zipper Clause

- Term in a collective bargaining agreement foreclosing or limiting bargaining during the term of the agreement.
- Example: "The parties agree that they have each had the right and opportunity to propose any lawful subject of collective bargaining and this agreement contains the parties' complete agreement on all subjects. For the duration of this agreement, neither party shall be required to bargain about any other subject or matter."
- After decades of refusing to decide, the FLRA attempted to make zipper clauses mandatory subjects of bargaining through an advisory opinion, but the D.C. Circuit found that to be arbitrary and capricious. *AFGE v. FLRA*, 24 F.4th 666 (2022).

Reopener Clause

- Term in the collective bargaining agreement allowing either party to renegotiate provisions of the collective bargaining agreement during the term of the agreement.
- Example: "The parties agree that on October 1, 2025, either party may request to reopen the contract to renegotiate a maximum of two articles contained within this agreement."
- Reopeners are mandatory subjects of bargaining. *AFGE Local 1995*, 47 F.L.R.A. 470 (1993).

Other Forms of Waiver

Voluntary Waiver

- If an employing office provides adequate notice of a proposed change to conditions of employment, a union may waive its right to bargain by declining to bargain over the change.
- Voluntary waiver must be clear and unmistakable and "is not lightly inferred." *Dep't of Air Force, Ogden*, 32 F.L.R.A. 277, 296 (1988)

Inaction

- If an employing office provides adequate notice of a proposed change to conditions of employment, a union may waive its right to bargain by failing to request bargaining in response. *U.S. Penitentiary Leavenworth, Kan.*, 55 F.L.R.A. 704 (1999).
- Whether the union's inaction amounts to waiver will depend on the circumstances. *See Bureau of Engraving & Printing*, 44 F.L.R.A. 575, 582 (1992).
- If a union declines or fails to bargain over one change, that declination does not waive the union's right to bargain over a similar change in the future. *Dep't of Air Force, Scott AFB*, 5 F.L.R.A. 9 (1981).

Bargaining History

- It is possible, though difficult, for a union to waive its right to midterm bargaining through acquiescence or other conduct during contract negotiations.
- More than mere discussion during prior negotiations is required to establish a waiver by bargaining history. Union must consciously yield or otherwise clearly and unmistakably waive its interest in the matter. *Selfridge Air Nat'l Guard,* 46 F.L.R.A. 582 (1992).
- In that case, meeting six times and failing to reach an agreement did not meet "clear and unmistakable waiver" standard.

The "Covered by" Doctrine

The "Covered by" Doctrine

Parties can refuse to bargain over a change to conditions of employment if the change is "covered by" the collective bargaining agreement.

Two-pronged test:

1. Is the matter expressly contained in parties' agreement?
   - If yes, then no duty to bargain over it.
   - If no, proceed to 2.
2. Is the matter "inseparably bound up with, and thus an aspect of, the parties' agreement"?
   - If yes, then no duty to bargain over it.
   - If no, then duty to bargain exists.

HUD & AFGE Local 3956, 66 F.L.R.A. 106 n.4 (2011)

The "Covered by" Doctrine, cont'd

The D.C. Circuit has offered some principles of construction for the "covered by" doctrine:

- "The scope of what is covered must be construed to give the parties the benefit of their bargain."
- "Application of the covered-by doctrine does not rise or fall with reference to precise scenarios that the parties may or may not have envisioned when they executed their [agreement]."
- "If a collective bargaining agreement permits the agency to implement a new policy, then the new policy is deemed covered by the agreement."

DOJ v. FLRA, 875 F.3d 667, 674-75 (D.C. Cir. 2017)

The "Covered by" Doctrine, cont'd

Example:

- CBA contained production standards for bargaining unit of employees who process passport applications.
- During a relocation, Union proposed that printers, copiers, and fax machines be spaced evenly throughout office, so all employees could access them equally.
- Agency responded that the parties already bargained production standards, and the machines' location affects production, so it's covered by the agreement.
- FLRA disagreed. Agency had not explained how location and distribution of equipment is "so commonly considered to be an aspect of employees' [productivity]" that it was covered by the production standards in the CBA.

Dep't of State Passport Servs., 66 F.L.R.A. 124 (2011)

Enforcing Midterm Bargaining Obligations

ULP vs. Grievance

- Many collective bargaining agreements incorporate statutory violations, including the duty to bargain, into the grievance procedure.
- As such, for midterm bargaining violations, parties must choose whether to file a grievance or an unfair labor practice with OCWR.
- Unlike in the private sector, ULPs and grievances over the same issue cannot be filed at the same time.
- CBA bargaining deadlines and other procedures apply in both ULP and grievance proceedings. *Dep't of Air Force*, 51 F.L.R.A. 1532 (1996).

Review of Arbitration Awards

- Arbitration awards can be appealed to OCWR. OCWR Sub. Regs. § 2425.
- On appeal, OCWR will overturn the arbitration award if it is contrary to law, based on a non-fact, or "fails to draw from the essence of the collective-bargaining agreement." This is a high burden.
- Note that this standard applies to OCWR review of all arbitration awards, not only those related to midterm bargaining.

Review of Arbitration Awards, Cont'd

FLRA recently held that an arbitrator's award fails to draw its essence from a collective-bargaining agreement if the appealing party can demonstrate that the award:

1. cannot in any rational way be derived from the agreement;
2. is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator;
3. does not represent a plausible interpretation of the agreement; or
4. evidences a manifest disregard of the agreement.

DOD Educ. Activity, Alexandria, Va., 73 F.L.R.A. 398, 402 (2022).

Review of Arbitration Awards, Cont'd

- In *Dep't of State, Passport Serv.*, 73 F.L.R.A. 631 (2023), the agency failed to timely remove a letter of reprimand from an employee's file. The arbitrator found a violation and imposed a $2,000 fine and required the agency to establish a monitoring system to protect future employees.
- Agency appealed, arguing that the remedy violated sovereign immunity and went beyond the arbitrator's authority.
- FLRA found that the fine violated sovereign immunity because it was outside the scope of the Backpay Act. Moreover, the monitoring system was outside the scope of the arbitrator's authority because it went beyond the grievant. However, FLRA found that if grievance would have been worded differently, the monitoring system would have drawn from the essence of the agreement.

Wrapping Up the Duty to Bargain

Part 1: Certification to Contract Bargaining

- Good faith bargaining is required by statute and begins upon OCWR issuing certification that union is exclusive representative of a bargaining unit.
- Upon certification, employing office must give union notice and opportunity to bargain before making changes to conditions of employment.
- Even if change is within employing office's management rights, union likely can bargain over impact and implementation of the change.
- If employing office gives union notice, and union demands to bargain, employing office must maintain status quo until parties come to an agreement or issue is resolved through impasse proceeding.

Part 2: Contract Bargaining

- Contract bargaining is a formal process, which begins with the threshold determination of whether a proposal is a mandatory or permissive subject of bargaining.
- Employing office must bargain over mandatory subjects through impasse proceedings and can refuse to bargain over permissive subjects.
- If union believes office is improperly refusing to bargain, it can file a ULP or negotiability appeal.
- Some proposals may conflict with regulations, triggering "compelling need" analysis.
- If proposal gets to impasse, OCWR can impose final result.

Part 3: Midterm Bargaining

- Employing offices have a duty to bargain with the union during the life of the contract unless the union waives its right to bargain or the desired change is covered by the contract.
- Language of contract can define scope, procedure, and enforceability of midterm bargaining.
- Union's waiver must be "clear and unmistakable" and generally occurs through a zipper clause, reopener clause, bargaining history, or inaction.
- Change can be "covered by" contract if it's "inseparably bound up with" the contract, even if it's not explicit.

Wrapping Up

Resources

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

Questions?