

CHAPTER 27
SENIOR OFFICERS LEGAL ORIENTATION
FEDERAL LABOR-MANAGEMENT RELATIONS

Outline Of Instruction

I. INTRODUCTION.

- A. The Federal Service Labor-Management Relations Statute (FSLMRS), 5 U.S.C. §§ 7101 - 7135.

*The Congress finds that [union participation]-
safeguards the public interest,
contributes to the effective conduct of public business, and
facilitates and encourages the amicable settlement of disputes between
employees and their employers involving conditions of employment. . .
Therefore, labor organizations and collective bargaining in the civil service are
in the public interest. [5 U.S.C. § 7101].*

- B. Civilian Work Force and Unions (As of January 2001).

1. Exclusive Recognition by Agencies.

Federal Employees Represented Government Wide:	1,043,479
Decrease From 1999:	6,944
Percentage Of All Federal Employees:	61%
Percentage Represented in 1997	60%

2. Percentage of Employees Organized, by Agency.

AGENCY	PERCENTAGE REPRESENTED
Air Force	71%
Army	58%
Navy	61%

3. Exclusive Recognition by Major Unions.

UNION	EMPLOYEES REPRESENTED
AFGE	582,753
NTEU	139,302
NFFE	68,535
NAGE	45,533
ACT	22,173
IFPTE	21,885

AFGE - AMERICAN FEDERATION OF GOV'T EMPLOYEES

NTEU - NATIONAL TREASURY EMPLOYEES UNION

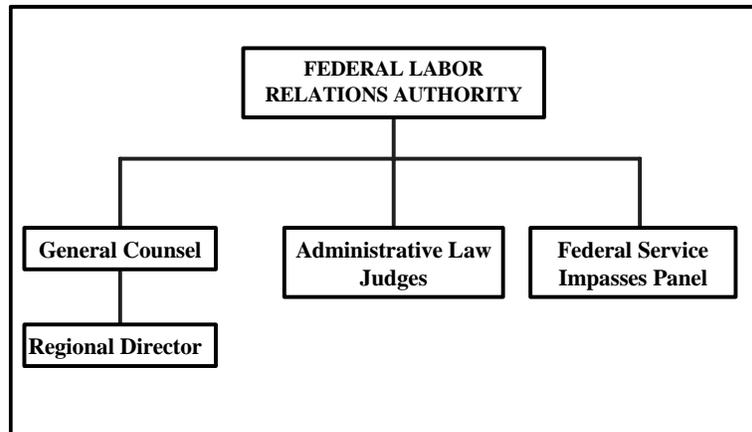
NFFE - NATIONAL FEDERATION OF FED. EMPLOYEES

NAGE - NATIONAL ASSOCIATION OF GOV'T EMPLOYEES

ACT - ASSOCIATION OF CIVILIAN TECHNICIANS

IFPTE – INTERNATIONAL FEDERAL OF PROF. AND TECH ENGINEERS

II. PROGRAM ADMINISTRATION. Who are the players?

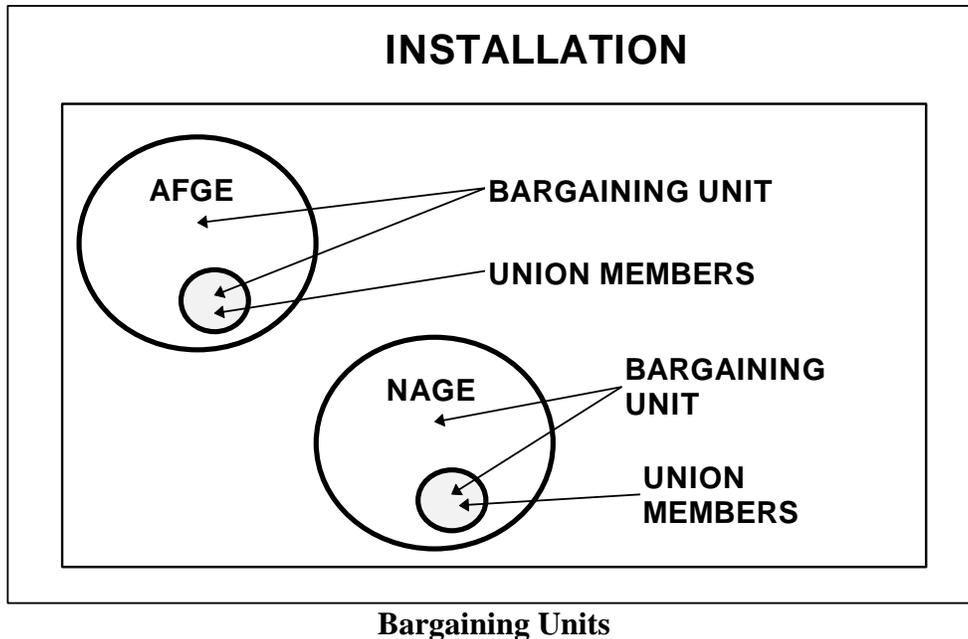


- A. Federal Labor Relations Authority (FLRA) [5 U.S.C. § 7105].
 - 1. Overall program administration.
 - 2. Important functions.
 - a. Resolves issues of negotiability.
 - b. Renders final decisions in Unfair Labor Practice (ULP) cases.
 - c. Reviews arbitration awards.
- B. General Counsel [5 U.S.C. § 7104(f)].
 - 1. Prosecutes unfair labor practices.
 - 2. Supervises Regional Offices.
- C. Regional Directors.
 - 1. Seven locations.

- a. Boston. (Includes Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Jersey, New York, Eastern Pennsylvania, Rhode Island, and Vermont.)
 - b. Washington, D.C. (Includes the District of Columbia, Maryland, and Virginia.)
 - c. Atlanta. (Includes Alabama, Florida, Georgia, Mississippi, North Carolina, Puerto Rico, South Carolina, Tennessee, and the Virgin Islands.)
 - d. Chicago. (Includes Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Eastern Missouri, Ohio, Western Pennsylvania, West Virginia, and Europe.)
 - e. Dallas. (Includes Arkansas, Louisiana, Oklahoma, Texas, and Panama.)
 - f. Denver. (Includes Alaska, Arizona, Colorado, Idaho, Kansas, Western Missouri, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, Utah, and Wyoming.)
 - g. San Francisco. (Includes California, Hawaii, Oregon, Washington, and Asia.)
- 2. Determine appropriate bargaining units.
 - 3. Investigate ULPs.
 - 4. Supervise elections.
- D. Administrative Law Judges.
- ◆ Hear ULP complaints.

III. TERMINOLOGY.

- A. Agencies of the Federal Sector. This includes any Executive branch agency, the Library of Congress, and the Government Printing Office. It excludes most agencies with law enforcement and national security missions. Agencies which are specifically excluded include:
1. The General Accounting Office;
 2. The Federal Bureau Of Investigation;
 3. The Central Intelligence Agency;
 4. The National Security Agency;
 5. The Tennessee Valley Authority;
 6. The Federal Labor Relations Authority; and
 7. The Federal Service Impasses Panel.
- B. Employee. Civilian personnel who work for the federal government. Excludes aliens or non-U.S. citizens who occupy a position outside the U.S.; members of the uniformed services; supervisors and management officials; confidential employees; foreign service employees; and employees who engage in strikes.
- C. Bargaining Unit. Employees with a similar community of interest which is appropriate for representation.



1. Factors to consider include:
 - a. Community of interest. Are the characteristics of the group of employees common enough to allow for proper representation by one union?
 - b. Effective dealings with the agency. Will there be authority at the level of organization to make decisions for the group?
 - c. Efficiency of agency operations. Is the unit size and make-up appropriate to allow for necessary interactions without duplication of effort and excessive disruption of the mission?

- D. Exclusive Representative. The union that has been elected and certified to represent the employees in a specific bargaining unit.

- F. Collective Bargaining Agreement. The contract negotiated between management and the exclusive representative.

- G. Unfair Labor Practice. A violation of the labor statute by an individual, agency, or union.

- H. Grievance. A violation of the collective bargaining agreement by any individual, agency, or union.

IV. GRIEVANCE/ARBITRATION.

- A. Every collective bargaining agreement must have a grievance procedure in which the last step is binding arbitration. A typical four-step negotiated grievance procedure might be:
 - 1. Report the grievance to the first line supervisor.
 - a. Oral complaint.
 - b. Decision within 48 hours.
 - 2. If resolution is unsatisfactory, raise the grievance with the second line supervisor.
 - a. Written complaint submitted within 72 hours of first line supervisor's denial.
 - b. Decision within 5 days.
 - 3. If resolution is unsatisfactory, elevate the grievance to the Civilian Personnel Officer or Deputy Post Commander.
 - a. Written complaint submitted within 7 days of second line supervisor's denial.
 - b. Decision within 10 days.
 - 4. If there is still no resolution, the parties will go to binding arbitration.
 - a. May be invoked by management or the union. May not be invoked by an employee.

- b. Union has the right to be present during grievance/arbitration hearings.

V. UNFAIR LABOR PRACTICES.

A. Both Agencies and Unions are prohibited from committing Unfair Labor Practices (ULPs).

- 1. Management ULPs. 5 U.S.C. § 7116(a).
 - a. Interference with Basic Employee Rights.
 - b. Discrimination to Encourage or Discourage Union Membership.
 - c. Improper Assistance to a Labor Organization.
 - a. Retaliation Against an Employee for Filing a Complaint or Giving Information.
 - b. Refusal to Negotiate in Good Faith.
 - c. Bypassing the Union.
 - d. Refusal to Cooperate at Impasse.
 - e. Enforcement of Rules in Conflict with CBA.
 - f. Otherwise Fail or Refuse to Comply with Provisions of the Statute.
- 2. Union ULPs. 5 U.S.C. §7116(b).
 - a. Interference with Basic Employee Rights.
 - b. Cause the Agency to Discriminate Against an Employee.

- c. Coerce a Union Member as Punishment, Reprisal, or for the Purpose of Impeding the Member's Work Performance.
- d. Discriminate in Union Membership Based Upon Race, Color, Creed, National Origin, Sex, Age, Civil Service Status, Political Affiliation, Marital Status, or Handicapping Condition.
- e. Refusal to Negotiate in Good Faith.
- f. Failure to Cooperate at Impasse.
- g. Call or Participate in a Strike or Work Slow Down, or Condone Such Activity.
 - (1) Picketing by Federal Employees (5 U.S.C. § 7116(b)(8)).
 - (a) Generally. Informational picketing that does not interfere with the agency's operations is not an unfair labor practice. SSA, New York, 22 FLRA 63 (1986) (may picket if it does not interfere with agency mission).
 - (b) DA Policy. Picketing interferes with Army operations. DA Msg., Clarification of DA Policy on Informational Picketing, 24 Feb. 1979. *But see Fort Ben Harrison and AFGE*, 40 FLRA 558 (1991) (commander admitted that there was no interference with mission when employees picketed in park on installation).
- h. Otherwise Fail or Refuse to Comply with Provisions of the Statute.

3. ULP Remedies.

- a. Cease and desist order.
- b. Status quo ante (SQA).

- c. Retroactive Bargaining Order.

VI. UNION ORGANIZING. HOW DOES THE UNION GET ON YOUR INSTALLATION?

A. Non-employee Union Organizer's Access to Employees.

1. No absolute right to solicit on the installation.
2. Must be able to communicate by other reasonable means. Reasonable means include: mailings, TV and radio ads, billboards, information booths at shopping centers or commuter stations, and/or employee organizer(s).

B. Employee Solicitation of Union Support on the Installation.

1. Employees may organize on the installation.
2. Organization must be during non-work times in non-work areas.
3. No disruption of work is allowed.

C. Elections.

1. Regional Director Conducts or Supervises the Election. [5 C.F.R. § 2422.23].
 - a. Notice of election is posted. [5 C.F.R. § 2422.23(b)].
 - b. Observers are appointed. [5 C.F.R. § 2422.23(h)].
 - c. Challenged Ballots Are Impounded. [5 C.F.R. § 2422.24].
2. Labor organization needs the vote of a majority of eligible employees who vote to win. [5 U.S.C. § 7111(a)].

D. Management Neutrality.

1. Management may not aid or hinder the organization effort.
2. Management may act or speak to:
 - a. Publicize elections and encourage employees to vote.
 - b. Inform employees about Government policies concerning labor relations.
 - c. Correct the record.

VII. UNION REPRESENTATIONAL RIGHTS. The union's right to be present.

A. Formal Discussions.

An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices, or other general conditions of employment. . . . [5 U.S.C. § 7114(a)(2)(A)].

1. The Rule: Management must give the exclusive representative advance notice and an opportunity to attend.

B. Investigatory Examinations. [5 U.S.C. § 7114(a)(2)(B)].

1. When an agency representative conducts an interview of a bargaining unit employee during an investigation, and the employee reasonably believes discipline may result, the employee may request a union representative (this is often referred to as the employee exercising their *Weingarten* rights).
2. Management Options.

- a. Terminate interview.
- b. Allow union representative to attend.
- c. Advise the employee that he may choose to make a statement without the union representative or end the interview. This must be done in a noncoercive manner.

VIII. COLLECTIVE BARGAINING. WHEN AND WHAT MUST MANAGEMENT NEGOTIATE?

A. When to Bargain.

- 1. Contract: Management must negotiate with a new bargaining unit or upon expiration of existing contract.
- 2. Mid-Contract: Management must continue to negotiate, when appropriate, throughout the life of the contract.
 - a. Topics addressed in collective bargaining agreement.
 - (1) Either party may refuse to bargain.
 - (1) Resolve disputes through arbitration.
 - b. Topics not addressed in collective bargaining agreement.
 - (1) Must negotiate if initiated by management.
 - (2) *New Rule:* Must also negotiate union-initiated midterm proposals that are not covered by the collective bargaining agreement. U.S. Department of the Interior and National Federation of Federal Employees, 56 FLRA No. 6 (2000).

B. Conditions of Employment Are Negotiable. [5 U.S.C. § 7102(2)].

1. Definition. "*Personnel policies, practices, and matters, . . . , affecting working conditions. . . .*" [5 U.S.C. § 7103(a)(14)].
 - a. Examples include wages and benefits not set by statute, amount charged for food, removal of vending machines from break areas, newspaper subscriptions, location of water coolers, and relocation to a windowless office.
 - b. Proposals dealing with civilian aspects of a National Guard technician's duties are negotiable. Proposals dealing with military aspects of the duties are not negotiable. AFGE Local 2077 and Michigan Air National Guard, 43 FLRA 344 (1991) (Proposals concerning military weight control program are not negotiable); NFFE Local 1655 and Illinois National Guard, 43 FLRA 1257 (1992) (Uniform allowances are negotiable when technicians are required to wear the uniform while performing civilian duties).
 2. Distinguish negotiation from agreement.
- C. Topics Precluded from Negotiation by Statute [5 U.S.C. § 7117(a)].
1. Proposals That Conflict With Federal Law Are Not Negotiable.
 - a. Statutes passed within the term of the CBA which conflict with the CBA will take effect immediately upon passage.
 2. Proposals Which Conflict With Government-Wide Regulations Are Not Negotiable.
 - a. Government-wide regulations are those which apply to the federal civilian work force as a whole and are binding upon the federal agencies and officials to which they apply
 - b. Regulations passed within the term of the CBA which conflict with the CBA will not take effect until the CBA expires.

3. Proposals Conflicting With Agency¹ Regulations for Which There is a "Compelling Need" are not Negotiable. A compelling need exists when:
 - a. The regulation is essential to mission accomplishment; or
 - b. The regulation is necessary to maintain merit principles; or
 - c. The regulation implements a mandate to the agency under law or outside authority.

4. Management Rights Are Not Negotiable [5 U.S.C. § 7106(a)].
 - a. Mission, budget, organization, number of employees and internal security.
 - b. Hire, assign, direct, lay-off, retain, suspend, remove, reduce in grade or pay, and take other disciplinary action.
 - c. Assign work, and make contracting-out determinations.
 - d. Fill positions by promotions and appointments.
 - e. Take emergency actions.

5. Permissive Topics [5 U.S.C. § 7106(b)(1)].
 - a. Staffing Patterns. (Numbers, types and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty).
 - b. Technology, Methods and Means of Performing Work.
 - c. The Rule:

¹ We must negotiate over proposals concerning conditions of employment that conflict with local or MACOM regulations.

- (1) Management can choose whether or not to negotiate over proposals concerning these topics.
- (2) Once agreement is reached on a proposal that is both a prohibited topic of negotiation under § 7106(a) and a permissive topic under § 7106(b), the rules governing permissive topics will control and the proposal may not be declared non-negotiable.

d. Impact of Executive Order 12,871 (October 1, 1993).

- (1) Language.

SEC. 2. IMPLEMENTATION OF LABOR-MANAGEMENT PARTNERSHIPS THROUGHOUT THE EXECUTIVE BRANCH. The head of each agency subject to the provisions of chapter 71 of title 5 United States Code shall: . . .

(d) Negotiate over the subjects set forth in 5 U.S.C. 7106(b)(1), and instruct subordinate officials to do the same; . . .

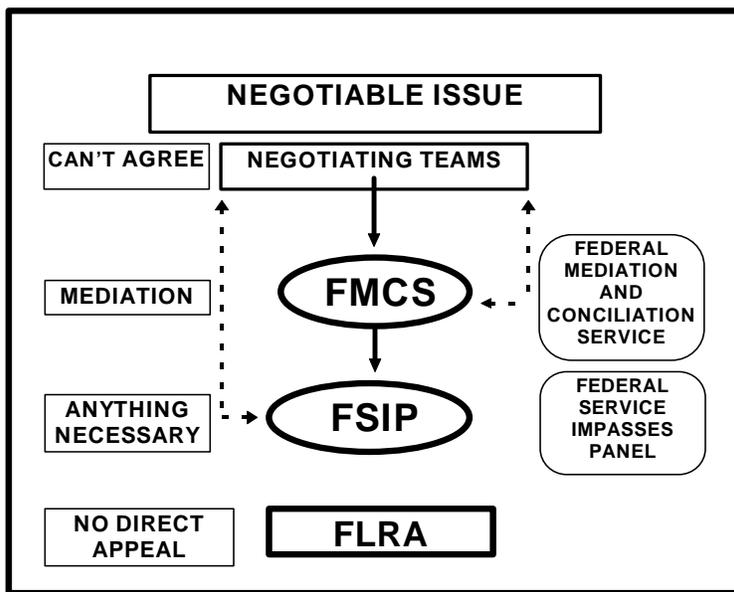
SEC. 3. NO ADMINISTRATIVE OR JUDICIAL REVIEW. This order is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right to administrative or judicial review, or any other right, substantive or procedural, enforceable by any party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

- (2) Both the federal courts and the FLRA have rejected the allegation that the Executive Order affects an election to bargain under § 7106(b)(1) that is enforceable as an unfair labor practice. *See, e.g., NAGE v. FLRA*, 179 F.3d 946 (D.C. Cir. 1999); *AFGE v. FLRA*, 204 F.3d 1272 (9th Cir. 2000); *Dep't of Commerce Patent and Trademark Office and Patent Office Professional Association*, 54 FLRA 360 (1998).

e. **Executive Order 12,781 Revoked.** On 17 February 2001, President Bush issued Executive Order 13,203, which revoked Executive Order 12,871. The Office of Personnel Management (OPM) guidance states that Executive Order 13,203 abolished both the requirement to form labor-management partnerships and the previous mandate to bargain on matters covered by 5 U.S.C. §7106(b)(1).

- 6. Impact and Implementation (I & I) Bargaining [5 U.S.C § 7106(b)(2)]. If a decision or proposal concerns a management right and consequently is non-negotiable, the agency may still be required to negotiate:
 - a. To determine the procedures management will use in the exercise of management rights (Implementation).
 - b. To lessen the impact on employees adversely affected by the exercise of management rights (Impact).

IX. IMPASSE RESOLUTION. WHAT DO YOU DO WHEN YOU CAN'T AGREE?



Impasse Resolution Process

- A. Definition of Impasse. The point in the negotiation of conditions of employment at which the parties are unable to reach agreement, notwithstanding their efforts to do so by direct negotiations and by the use of mediation or other voluntary arrangements for settlement.
- B. The Federal Mediation and Conciliation Service.
 - 1. Offers mediation assistance during negotiations impasse.

2. Limited powers to recommend actions for resolution.
- C. The Federal Service Impasses Panel [5 U.S.C. § 7119].
1. An agency of the FLRA whose function is to provide assistance in resolving negotiation impasses. If voluntary arrangements, including use of the FMCS or another third-party mediator, fail to resolve the impasse
 - a. Either party may request the services of the FSIP; or
 - b. The parties may use another form of binding arbitration if approved by the FSIP.
 2. Can impose a solution. This solution is binding upon the parties.
 3. The federal sector alternative to the private sector strike.

X. SUCCESSORSHIP AND ACCRETION.

- A. The Authority discussed a framework to determine how accretion and successorship apply when an agency reorganizes. AFGE and Navy Fleet and Industrial Supply Center, 52 FLRA 950 (1997).
1. The first step is to determine if the employees are in a new appropriate bargaining unit.
 2. If the employees are in a new appropriate bargaining unit, apply the successorship analysis.
 3. If the employees are not in a new appropriate bargaining unit, apply the accretion analysis.
- B. Successorship following reorganization. Naval Facilities Engineering Service Center, Port Hueneme, California and National Association of Government Employees, 50 FLRA 363 (1995). The gaining entity is a successor, and the union retains its status as the exclusive representative of the employees who are transferred, when:

1. An entire recognized unit, or portion thereof, is transferred.
2. The transferred employees are:
 - a. in an appropriate bargaining unit after the transfer, and
 - b. constitute a majority of such employees in such unit.
3. The gaining entity has substantially the same organizational mission as the losing entity.
4. The employees are performing substantially the same duties.
5. No election is necessary to determine representation.

C. Accretion applies when the transferred employees:

1. Are not in an appropriate bargaining unit.
2. Are functionally and administratively integrated into existing units.
3. Are appropriate to add to the bargaining unit.

D. Restructuring existing units.

1. Chain of command reorganization. Navy Base Norfolk, Virginia and NAGE, Local R4-1, 56 FLRA No. 47 (2000).
 - a. A change in an agency's chain of command does not, by itself, render an existing unit inappropriate. Rather, the FLRA will evaluate how such a change has affected each of the three criteria for appropriate units, as applied to the existing unit and any proposed, new units.

- b. If an agency reorganizes and there are competing claims of successorship, the FLRA will first evaluate the proposed bargaining units that will most fully preserve the status quo in terms of bargaining unit structure and the relationship of employees to their chosen exclusive representative. If it finds the existing unit continues to be appropriate, the FLRA will not address any petitions that attempt to establish different unit structures.
2. An agreement between unions that would change the structure of existing bargaining units by removing employees from a unit represented by one union to a unit represented by the other is not valid because it interferes with the fundamental right of employees to determine their exclusive representation, and thwarted the Authority's representation process. NAGE/SEIU, Local 5000, and SEIU and Dep't of Veterans Affairs, Washington, D.C., 52 FLRA 1068 (1997).

XI. THE COMMANDER'S ROLE.

- A. Commander's Team.
 1. Civilian Personnel Officer. This has become a limited resource due to the regionalization of CPO.
 2. Labor Counselor.
 - a. Aids in making policies and procedures for the administration of labor/management relations.
 - a. Participates in contacts with the exclusive representative.
 - b. Represents management (command) in third-party proceedings.
 - c. Renders legal advice to the management team when it is negotiating a collective bargaining agreement (CBA).
 - d. Renders legal advice on the interpretation and application of the CBA.

B. Awareness.

C. Leadership.

XII. CONCLUSION.