

Executive Order Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining

Issued on: May 25, 2018

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to assist executive departments and agencies (agencies) in developing efficient, effective, and cost-reducing collective bargaining agreements (CBAs), as described in chapter 71 of title 5, United States Code, it is hereby ordered as follows:

Section 1. Policy.

- (a) Section 7101(b) of title 5, United States Code, requires the Federal Service Labor-Management Relations Statute (the Statute) to be interpreted in a manner consistent with the requirement of an effective and efficient Government.

Unfortunately, implementation of the Statute has fallen short of these goals. CBAs, and other agency agreements with collective bargaining representatives, often make it harder for agencies to reward high performers, hold low-performers accountable, or flexibly respond to operational needs. Many agencies and collective bargaining representatives spend years renegotiating CBAs, with taxpayers paying for both sides' negotiators. Agencies must also engage in prolonged negotiations before making even minor operational changes, like relocating office space.

- (b) The Federal Government must do more to apply the Statute in a manner consistent with effective and efficient Government. To fulfill this obligation, agencies should secure CBAs that:

- promote an effective and efficient means of accomplishing agency missions;
- encourage the highest levels of employee performance and ethical conduct;
- ensure employees are accountable for their conduct and performance on the job;
- expand agency flexibility to address operational needs;
- reduce the cost of agency operations, including with respect to the use of taxpayer-funded union time; are consistent with applicable laws, rules, and regulations; do not cover matters that are not, by law, subject to bargaining; and preserve management rights under section 7106(a) of title 5, United States Code (management rights).

→ Further, agencies that form part of an effective and efficient Government **should not take more than a year to renegotiate CBAs.**

This benefits the union! We would now know their timeline which is something that must be protected at all time. This gives us leverage at the table.

Time

In any negotiation, expect the most significant concession behavior and any settlement action to occur close to the deadline. That being the case, **IF YOU KNOW THE OTHER SIDES DEADLINE AND THEY DON'T KNOW YOURS THAT MEANS YOU HAVE THE EDGE.**

Their stress level will increase and they will make concessions in order to meet the deadline. Every "other side" has a deadline. If they did not have some pressure to negotiate, you would not find them. Sometimes (oftentimes) the other side acts nonchalant and the nonchalant posture is effective. It works because you feel the pressure of your own time constraints, which always appear greater than theirs. At the same time, keep in mind that deadlines are more flexible than you realize.

1. Who gives the deadlines?
2. Who imposes them?
3. The contract?
4. Internal factors at the agency?
5. External factors at agency?

Ultimately it is you who give the deadline and since this is the case, you never need blindly follow a deadline. Analyze the deadline. Since it is a product of negotiation, it might as well be negotiable.

Ask yourself;

1. What will happen if you go beyond the deadline?
2. What is the certainty of the detriment or penalty?
3. What is the extent of the punishment?
4. How great is the risk you are taking?

LEARN THE OTHER SIDES DEADLINE AND TRY NOT TO REVEAL YOUR TRUE DEADLINE. THAT IS A POWERFUL BARGAINING TOOL IN SEEKING CONCESSIONS AND THE RESOLUTION THAT YOU DESIRE.

Most concession behavior and settlements will occur at or beyond the deadline, **SO BE PATIENT!**

Patience pays so remain calm and keep alert for the favorable moment to act. **IF YOU DO NOT KNOW WHAT TO DO, DO NOTHING!**

If the situation is adversarial, make sure that you don't reveal your deadline to the other side.

You cannot achieve the best outcome quickly; you can achieve it only slowly and perseveringly. Take your time and be cool. Deadlines can work to your advantage, only if you protect it and use it properly. Deadlines that are a product of negotiations are negotiable. Therefore, even if the contract stipulates a deadline, it is still negotiable. Remember extensions?

Sec. 2. Definitions. For purposes of this order:

- (a) The phrase “term CBA” means a CBA of a fixed or indefinite duration reached through substantive bargaining, **as opposed to**
 - (i) **agreements reached through impact and implementation bargaining** pursuant to sections 7106(b)(2) and 7106(b)(3) of title 5, United States Code, or
 - (ii) **mid-term agreements, negotiated while the basic comprehensive labor contract is in effect, about subjects not included in such contract.**
- (b) The phrase “taxpayer-funded union time” means time granted to a Federal employee to perform non-agency business during duty hours pursuant to section 7131 of title 5, United States Code.

Sec. 3. Interagency Labor Relations Working Group.

- (a) There is hereby established an Interagency Labor Relations Working Group (Labor Relations Group).
- (b) **Organization.** The Labor Relations Group shall consist of the Director of the Office of Personnel Management (OPM Director), representatives of participating agencies determined by their agency head in consultation with the OPM Director, and OPM staff assigned by the OPM Director. The OPM Director shall chair the Labor Relations Group and, subject to the availability of appropriations and to the extent permitted by law, provide administrative support for the Labor Relations Group.
- (c) **Agencies.** **Agencies with at least 1,000 employees represented by a collective bargaining representative pursuant to chapter 71 of title 5, United States Code, shall participate in the Labor Relations Group.**

Agencies with a smaller number of employees represented by a collective bargaining representative may, at the election of their agency head and with the concurrence of the OPM Director, participate in the Labor Relations Group.

Agencies participating in the Labor Relations Group shall provide assistance helpful in carrying out the responsibilities outlined in subsection (d) of this section. **Such assistance shall include designating an agency employee to serve as a point of contact with OPM responsible for providing the Labor Relations Group with sample language for proposals and counter-proposals on significant matters proposed for inclusion in term CBAs,** as well as for analyzing and discussing with OPM and the Labor Relations Group the effects of significant CBA provisions on agency effectiveness and efficiency. Participating agencies should provide other assistance as necessary to support the Labor Relations Group in its mission.

(d) **Responsibilities and Functions.** The Labor Relations Group shall assist the OPM Director on matters involving labor-management relations in the executive branch. To the extent permitted by law, its responsibilities shall include the following:

- (i) Gathering information to support agency negotiating efforts, including the submissions required under section 8 of this order, and creating an inventory of language on significant subjects of bargaining that have relevance to more than one agency and that have been proposed for inclusion in at least one term CBA;
- (ii) **Developing model ground rules for negotiations** that, if implemented, would minimize delay, **set reasonable limits for good-faith negotiations, call for Federal Mediation and Conciliation Service (FMCS) to mediate disputed issues not resolved within a reasonable time, and, as appropriate, promptly bring remaining unresolved issues to the Federal Service Impasses Panel (the Panel) for resolution;**

Our strategy? Stay away from mediation (FMCS) by keeping negotiations moving so that negotiations won't springboard to the Panel.

- (iii) **Analyzing provisions of term CBAs on subjects of bargaining that have relevance to more than one agency,** particularly those that may infringe on, or otherwise affect, reserved management rights.

Such analysis should include an assessment of term CBA provisions that cover comparable subjects, without infringing, or otherwise affecting, reserved management rights. The analysis should also assess the consequences of such CBA provisions on Federal effectiveness, efficiency, cost of operations, and employee accountability and performance. **The analysis should take particular note of how certain provisions may impede the policies set forth in section 1 of this order or the orderly implementation of laws, rules, or regulations.** The Labor Relations Group may examine general trends and commonalities across term CBAs, and their effects on bargaining-unit operations, but need not separately analyze every provision of each CBA in every Federal bargaining unit;

- (iv) Sharing information and analysis, as appropriate and permitted by law, including significant proposals and counter-proposals offered in bargaining, in order to reduce duplication of efforts and encourage common approaches across agencies, as appropriate;

- (v) Establishing ongoing communications among agencies engaging with the same labor organizations in order to facilitate common solutions to common bargaining initiatives; and
 - (vi) Assisting the OPM Director in developing, where appropriate, Government-wide approaches to bargaining issues that advance the policies set forth in section 1 of this order.
- (e) Within 18 months of the first meeting of the Labor Relations Group, the OPM Director, as the Chair of the group, shall submit to the President, through the Office of Management and Budget (OMB), a report proposing recommendations for meeting the goals set forth in section 1 of this order and for improving the organization, structure, and functioning of labor relations programs across agencies.

Sec. 4. Collective Bargaining Objectives.

- (a) The head of each agency that engages in collective bargaining under chapter 71 of title 5, United States Code, shall direct appropriate officials within each agency to prepare a report on all operative term CBAs at least 1 year before their expiration or renewal date. The report shall recommend new or revised CBA language the agency could seek to include in a renegotiated agreement that would better support the objectives of section 1 of this order. The officials preparing the report shall consider the analysis and advice of the Labor Relations Group in making recommendations for revisions. To the extent permitted by law, **these reports shall be deemed guidance and advice for agency management related to collective bargaining under section 7114(b)(4)(C) of title 5, United States Code, and thus not subject to disclosure to the exclusive representative or its authorized representative.**
- (b) Consistent with the requirements and provisions of chapter 71 of title 5, United States Code, and other applicable laws and regulations, **an agency, when negotiating with a collective bargaining representative, shall:**
- (i) **establish collective bargaining objectives that advance the policies of section 1** of this order, with such objectives informed, as appropriate, by the reports required by subsection (a) of this section;
 - (ii) consider the analysis and advice of the Labor Relations Group in establishing these collective bargaining objectives and when evaluating collective bargaining representative proposals;
 - (iii) make every effort to secure a CBA that meets these objectives; and
 - (iv) ensure management and supervisor participation in the negotiating team representing the agency.

Sec. 5. Collective Bargaining Procedures.

- (a) To achieve the purposes of this order, agencies shall begin collective bargaining negotiations by making their best effort to negotiate ground rules that minimize delay, set reasonable time limits for good-faith negotiations, call for FMCS mediation of disputed issues not resolved within those time limits, and, as appropriate, promptly bring remaining unresolved issues to the Panel for resolution.

For collective bargaining negotiations, **a negotiating period of 6 weeks or less to achieve ground rules, and a negotiating period of between 4 and 6 months for a term CBA under those ground rules, should ordinarily be considered reasonable and to satisfy the “effective and efficient” goal set forth in section 1 of this order.** Agencies shall commit the time and resources necessary to satisfy these temporal objectives and to fulfill their obligation to bargain in good faith. **Any negotiations to establish ground rules that do not conclude after a reasonable period should, to the extent permitted by law, be expeditiously advanced to mediation and, as necessary, to the Panel.**

Agency can't establish a timeline unless the union agrees to do so. As stated previously, NO MEDIATION! Without FMCS involvement, the matter cannot be elevated to the Panel.

- (b) During any collective bargaining negotiations under chapter 71 of title 5, United States Code, and consistent with section 7114(b) of that chapter, the agency shall negotiate in good faith to reach agreement on a term CBA, memorandum of understanding (MOU), or any other type of binding agreement that promotes the policies outlined in section 1 of this order.

If such negotiations last longer than the period established by the CBA ground rules — or, absent a pre-set deadline, a reasonable time — the agency shall consider whether requesting assistance from the FMCS and, as appropriate, the Panel, would better promote effective and efficient Government than would continuing negotiations.

The agency needs cooperation from the union in order for the FMCS to get involved. It takes 2 to tango and the union must agree. The mediator can't mediate a dispute with just one party participating.

The statute (5 USC 7119) gives the Federal Mediation and Conciliation Service a role in the bargaining process; that is to assist parties “in the resolution of negotiation impasses.”

- (a) The Federal Mediation and Conciliation Service shall provide services and assistance to agencies and exclusive representatives in the resolution of negotiation impasses. The Service shall determine under what circumstances and in what manner it shall provide services and assistance.
- (b) If voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or any other third-party mediation, fail to resolve a negotiation impasse —
 - (1) either party may request the Federal Service Impasses Panel to consider the matter, or
 - (2) the parties may agree to adopt a procedure for binding arbitration of the negotiation impasse, but only if the procedure is approved by the Panel.

The FLRA also has affirmed that the parties must submit to mediation before FMCS or some other third-party neutral before FSIP can act.

“Of course, statutory and regulatory requirements concerning the resolution of impasses must be observed. Those requirements include the use of FMCS or other third-party mediation services to resolve negotiation impasses. See 5 U.S.C. 7119(a) and (b); 5 C.F.R. 2470.2(e), 2471.1. Consistent with these requirements, our decision here should not be read in any way to mean that an agency is free to implement a change in working conditions simply because the parties’ dispute is pending before FMCS.” Order Denying a Request for a General Ruling, 31 FLRA 1294 (1988).

Such consideration should evaluate the likelihood that continuing negotiations without FMCS assistance or referral to the Panel would produce an agreement consistent with the goals of section 1 of this order, as well as the cost to the public of continuing to pay for both agency and collective bargaining representative negotiating teams.

Upon the conclusion of the sixth month of any negotiation, the agency head shall receive notice from appropriate agency staff and shall receive monthly notifications thereafter regarding the status of negotiations until they are complete. The agency head shall notify the President through OPM of any negotiations that have lasted longer than 9 months, in which the assistance of the FMCS either has not been requested or, if requested, has not resulted in agreement or advancement to the Panel.

- (c) **If the commencement or any other stage of bargaining is delayed or impeded because of a collective bargaining representative’s failure to comply with the duty to negotiate in good faith pursuant to section 7114(b) of title 5, United States Code, the agency shall, consistent with applicable law consider whether to:**
 - (i) file an unfair labor practice (ULP) complaint under section 7118 of title 5, United States Code, after considering evidence of bad-faith negotiating, including refusal to meet to bargain, refusal to meet as frequently as necessary, refusal to submit proposals or counter-proposals, undue delays in bargaining, undue delays in submission of proposals or counterproposals, inadequate preparation for bargaining, and other conduct that constitutes bad-faith negotiating **[WE WILL NOT BE GUILTY OF ANY OF THESE OR OTHER INFRACTIONS]**; or

- (ii) propose a new contract, memorandum, or other change in agency policy and implement that proposal if the collective bargaining representative does not offer counter-proposals in a timely manner.**

THIS EXECUTIVE ORDER REFLECTS THE EXACT THING THE AGENCY DID AT THE DEPARTMENT OF EDUCATION. THEY WALKED AWAY FROM THE TABLE, BECAUSE THE UNION REFUSED TO MEDIATE AND WROTE AND IMPLEMENTED THEIR OWN CONTRACT. THAT WILL BE REVERSED THROUGH THE GRIEVANCE ARBITRATION PROCEDURE AND NOT A ULP.

- (d) An agency's filing of a ULP complaint against a collective bargaining representative shall not further delay negotiations. Agencies shall negotiate in good faith or request assistance from the FMCS and, as appropriate, the Panel, while a ULP complaint is pending.
- (e) In developing proposed ground rules, and during any negotiations, agency negotiators shall request the exchange of written proposals, so as to facilitate resolution of negotiability issues and assess the likely effect of specific proposals on agency operations and management rights. To the extent that an agency's CBAs, ground rules, or other agreements contain requirements for a bargaining approach other than the exchange of written proposals addressing specific issues, the agency should, at the soonest opportunity, take steps to eliminate them. If such requirements are based on now-revoked Executive Orders, including Executive Order 12871 of October 1, 1993 (Labor-Management Partnerships) and Executive Order 13522 of December 9, 2009 (Creating Labor-Management Forums to Improve Delivery of Government Services), agencies shall take action, consistent with applicable law, to rescind these requirements.
- (f) Pursuant to section 7114(c)(2) of title 5, United States Code, the agency head shall review all binding agreements with collective bargaining representatives to ensure that all their provisions are consistent with all applicable laws, rules, and regulations. When conducting this review, the agency head shall ascertain whether the agreement contains any provisions concerning subjects that are non-negotiable, including provisions that violate Government-wide requirements set forth in any applicable Executive Order or any other applicable Presidential directive. If an agreement contains any such provisions, the agency head shall disapprove such provisions, consistent with applicable law. The agency head shall take all practicable steps to render the determinations required by this subsection within 30 days of the date the agreement is executed, in accordance with section 7114(c) of title 5, United States Code, so as not to permit any part of an agreement to become effective that is contrary to applicable law, rule, or regulation.

Sec. 6. Permissive Bargaining.

The heads of agencies subject to the provisions of chapter 71 of title 5, United States Code, may not negotiate over the substance of the subjects set forth in section 7106(b)(1) of title 5, United States Code, and shall instruct subordinate officials that they may not negotiate over those same subjects.

Sec. 7. Efficient Bargaining over Procedures and Appropriate Arrangements.

- (a) Before beginning negotiations during a term CBA over matters addressed by sections 7106(b)(2) or 7106(b)(3) of title 5, United States Code, agencies shall evaluate whether or not such matters are already covered by the term CBA and therefore are not subject to the duty to bargain. **If such matters are already covered by a term CBA, the agency shall not bargain over such matters. [THIS IS A PROHIBITION ON THE AGENCY TO NOT BARGAIN OVER IMPACT AND IMPLEMENTATION MATTERS ALREADY CAPTURED IN THE CONTRACT. THOUGH BY STATUTE THEY HAVE THE RIGHT BECAUSE WITH TERM NEGOTIATIONS EVERYTHING IS ON THE TABLE, BY THIS ORDER THEY ARE FORCED TO NOT ENGAGE IN BARGAINING].**

However...

- (b) Consistent with section 1 of this order, agencies that engage in bargaining over procedures pursuant to section 7106(b)(2) of title 5, United States Code, shall, consistent with their obligation to negotiate in good faith, bargain over only those items that constitute procedures associated with the exercise of management rights, which do not include measures that **excessively interfere** with the exercise of such rights. Likewise, consistent with section 1 of this order, agencies that engage in bargaining over appropriate arrangements pursuant to section 7106(b)(3) of title 5, United States Code, shall, consistent with their obligation to negotiate in good faith, bargain over only those items that constitute appropriate arrangements for employees adversely affected by the exercise of management rights. In such negotiations, agencies shall ensure that a resulting appropriate arrangement does not **excessively interfere** with the exercise of management rights.

IF THE MATTER EXCESSIVELY INTERFERES WITH THE EXERCISE OF MANAGEMENT'S RIGHTS THEN BARGAINING IS NOT REQUIRED. WHO DETERMINES EXCESSIVE INTERFERENCE? THE FLRA

To determine whether a proposal is an "appropriate arrangement" under § 7106(b)(3), FLRA asks whether the proposal "excessively interferes" with management rights. National Ass'n of Gov't Employees, Local R14-87 and Kansas Army Nat'l Guard, 21 F.L.R.A. (No. 4) 24, 31 (1986) (KANG). FLRA adopted that test upon this circuit's suggestion, see *id.* (citing American Fed'n of Gov't Employees [AFGE], AFL-CIO, Local 2782 v. FLRA, 702 F.2d 1183, 1188 (D.C. Cir. 1983)), and we have repeatedly cited it with approval in reviewing FLRA decisions, see ACT II, 370 F.3d at 1221; Patent Office Prof'l Ass'n, 47 F.3d at 1221; AFGE Local 1923, 819 F.2d at 308-09. Under the test, "[a]ssuming that the proposal, as a threshold matter, suggests an arrangement for adversely affected employees, the decisionmaker must ask whether implementation of the proposed arrangement would 'impinge upon management prerogatives to an excessive degree.'" AFGE Local 1923, 819 F.3d at 308 (quoting AFGE Local 2782, 702 F.2d at 1188). As FLRA does not dispute that the reimbursement provision "is intended to ameliorate the adverse effects of the exercise of a management right, i.e., the cancellation of leave," FLRA Br. 36, the only issue is whether the provision's interference with that right is excessive.

"The determination whether an interference with managerial prerogatives is excessive depends primarily on the extent to which the interference hampers the ability of an agency to perform its core functions -- to get its work done in an efficient and effective way." AFGE Local 1923, 819 F.3d at 308-309. That inquiry involves "weighing the competing practical needs of employees and managers." KANG, 21 F.L.R.A. at 31-32. We "afford considerable deference to the FLRA's balancing of management and employee interests under its 'excessive interference' test." U.S. Dep't of Treasury, Office of Chief Counsel, *I.R.S. v. FLRA*, 960 F.2d 1068, 1074 (D.C. Cir. 1992).

Sec. 8. Public Accessibility.

- (a) Each agency subject to chapter 71 of title 5, United States Code, that engages in any negotiation with a collective bargaining representative, as defined therein, shall submit to the OPM Director each term CBA currently in effect and its expiration date. Such agency shall also submit any new term CBA and its expiration date to the OPM Director within 30 days of its effective date, and submit new arbitral awards to the OPM Director within 10 business days of receipt. The OPM Director shall make each term CBA publicly accessible on the Internet as soon as practicable.
- (b) Within 90 days of the date of this order, the OPM Director shall prescribe a reporting format for submissions required by subsection (a) of this section. Within 30 days of the OPM Director's having prescribed the reporting format, agencies shall use this reporting format and make the submissions required under subsection (a) of this section.

Sec. 9. General Provisions.

- (a) Nothing in this order shall be construed to impair or otherwise affect:
 - (i) the authority granted by law to an executive department or agency, or the head thereof; or
 - (ii) the functions of the OMB Director relating to budgetary, administrative, or legislative proposals.
- (b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.
- (c) **Nothing in this order shall abrogate any CBA in effect on the date of this order.**

FOLLOW YOUR CURRENT CONTRACT!

- (d) The failure to produce a report for the agency head prior to the termination or renewal of a CBA under section 4(a) of this order shall not prevent an agency from opening a CBA for renegotiation.
- (e) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE
May 25, 2018.

Governing Laws and Regulations

As a matter of law, the union and management are bound by all Federal laws and government-wide regulations. 5 U.S.C. 7117 (a) (1) and (2). It is an unfair labor practice for an agency to enforce any rule or regulation (other than a rule or regulation implementing 5 U.S.C. 2302 (prohibited personnel practices) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed. 5 U.S.C. 7116 (a) (7).

The Federal Labor Relations Authority has ruled that either party may waive its statutory rights, but such a waiver must be “clear and unmistakable.” See [IRS and NTEU](#), 29 FLRA 162, 166 (1987; [SSA and AFGE](#), 31 FLRA 1277 (1988); and [DOL and AFGE Local 12](#), 104 LRP 31769 (2003) (ALJ decision).

Government-wide rules or regulations are rules, regulations, or official declarations of policy that are generally applicable throughout the Federal Government and are binding on the Federal agencies and Federal officials to which they apply. National Treasury

Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, 3 FLRA 747, 754-55 (1980). Under section 7117 of the Statute, Government-wide rules and regulations bar the negotiation of, and agreement on, union proposals that conflict with them.

The only limitation on the supremacy of Government-wide rules or regulations is set forth in section 7116(a)(7) of the Statute, which makes it an unfair labor practice for an agency “to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed[.]”

Thus, under section 7116(a)(7), a Government-wide rule or regulation, which does not implement 5 U.S.C. 2302 (Prohibited personnel practices), is not controlling with respect to a conflicting provision of a collective bargaining agreement that was in effect before the date the rule or regulation was prescribed.