LEADERSHIP SEMINAR (2019)

Federal Employees Workshop

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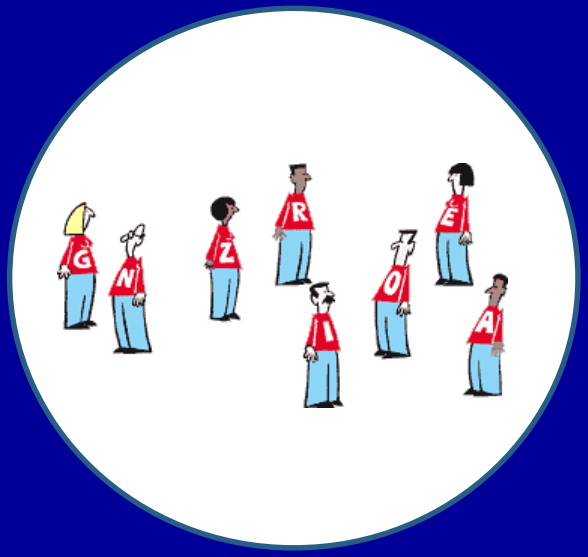
What We Will be Talking About …

- Organizing in the Federal Sector
  - Access Issues
  - Representation Process
- Executive Orders
  - The Orders, the Challenge and the Court's Decision
  - The Agencies' "Work Around"
- Collective Bargaining



Organizing in the Federal Sector

Time to step up.

Introduction

- There are two types of organizing:
  - **Internal organizing:** Getting non-members in an established bargaining unit to become members of the council's affiliated local unions; and
  - **External organizing:** Organizing unrepresented employees in an appropriate bargaining unit.
- There are two types of organizers:
  - **Employee organizers:** employees who work for the agency in the bargaining unit at issue; and
  - **Non-employee organizers:** individuals who are not employed by the agency in the bargaining unit at issue.

Access to Employees on Site

- Here are the basic statutory rules regarding soliciting union membership under the Federal Service Labor-Management Relations Statute:
  - Section 7102 of the Statute protects the right of employees to solicit union membership.
  - However, Section 7131(b) of the Statute provides that such solicitation must be performed when the employees are on a "non-duty" status.
  - An agency violates Section 7116(a)(1) of the Statute when it prohibits the solicitation of union membership during periods of "non-duty" status.

Non-Duty Time, Non-Duty Area

- What do those general rules mean for metal trades council-represented employees and their officers:
  - Union representatives and union members can talk to unorganized employees or non-members while those workers are on their paid breaks or lunch periods.
  - Where employees have been assigned periods of time during which performance of job functions is not required, union representatives and union members may speak with those employees about joining the union. *Tinker AFB*, 6 FLRA 159, 162 (1981).
  - Where employees freely discuss personal matters during work time, union representatives and union members can talk to them about joining he union.

What is Non-Duty Time?

- Focusing further on the application of these rules to daily life:
  - Union representatives and union members can talk about the union and solicit membership where there are no "common periods of employee non-work time" and where the breaks are "worked into the day[s] work schedule by individual employees" rather than management. *Department of Commerce, Bur. of Census*, 26 FLRA 311, 315, n.2, 317 (1987).
  - It does not matter if employees have to be prepared to perform work during their paid breaks. *Department of the Navy, Naval Air Station Pensacola*, 61 FLRA 562, 564 (2006)

What about Duty Areas?

- Not only can union representatives and union members solicit union membership in non-work areas during non-work time, they can also solicit in work areas absent any disruption of the agency operations." *Social Sec. Admin.*, 13 FLRA 409 (1983).
  - In that case, the union proposed to show a 12 minute film to bargaining unit employees about the union in their work areas, but during their break.
  - Management knew of union activity in work areas during non-work times but did nothing to stop it. Also, employees regularly eat, talk, play radios and even played cards in those areas during non-work time.
  - The FLRA held that an employee's right to solicit union membership extends to those work areas ....

“The Authority further concludes that an employee's protected right to solicit union membership while in a nonduty status may be exercised in a work area where the employees being solicited also are in a nonduty status, absent any disruption of the activity's operations or any other unusual circumstances. “

Social Sec. Admin., 13 FLRA 409 (1983).

A Note of Caution

- In *Department of Defense, Missile Defense Agency, Redstone Arsenal*, 70 FLRA No. 123 (May 30, 2018), the current FLRA remanded a case involving a union's request to conduct "lunch and learn" sessions for bargaining unit employees in a hallway "used as a thoroughfare and retail area where the Agency has granted access to some vendors."
  - No union represented the employees at issue; but the union represented employees elsewhere at the facility and tried to organize the employees at issue in the past.
  - The issue was analyzed under whether the agency discriminated against the union. Because the organizers were "non-employees," the question is analyzed under the Supreme Court's decision in *NLRB v. Babcox & Wilcox*.

More about that Note of Caution

- The FLRA has applied *Babcock & Wilcox* to find that an agency commits a violation of Section 7102 of the Statute when it bars non-employee union organizers access to agency property and either:
  1. The agency has a discriminatory access policy; or
  2. There are no other reasonable means for the union to communicate its message to the employees.
- The FLRA determined in *Redstone Arsenal* that there was insufficient evidence to determine the nature of the union's activities (that is, whether they were protected activities); and, there was insufficient evidence regarding the vendors.
- The case was remanded for a hearing.

Filing a Representation Petition

- Organizing a bargaining unit under the Federal Service Labor-Management Relations Statute is very similar to organizing a unit under the National Labor Relations Act.
- Both processes start with the filing of a representation petition and a showing of interest.
  - The representation petition is available at the FLRA's website, http://www.flra.gov.
  - The showing of interest is usually authorization cards, but it can also include membership applications, dues allotment forms, and petitions.
    - The showing of interest must consist of at least 30% of the employees in the proposed bargaining unit.

Describing the Bargaining Unit

- The FLRA looks to three factors:
  1. Whether the employees share a clear and identifiable **community of interest**;
  2. Whether the proposed unit would **promote effective dealings** with the agency; and
  3. Whether the proposed unit would **promote the efficiency** of agency operations.

Community of Interests

- The FLRA considers whether the employees:
  - Are part of the same organizational component of the agency;
  - Support the same mission;
  - Are subject to the same supervisory chain of command;
  - Have similar or related job duties, job titles or work assignments;
  - Are subject to the same working conditions; and
  - Are governed by the same personnel and labor relations policies administered out of the same office.

More About Community of Interests

- The FLRA will also consider:
  - Geographic proximity;
  - Unique conditions of employment;
  - Local considerations;
  - Degree of interchange between other organizational components; and
  - Functional or operational separation.

Effective Dealings

- The effective dealings criterion focuses upon the relationship between management and the employees' exclusive bargaining representative. It involves considerations including:
  - The efficient use of resources that might be derived by including other groups or units of employees;
  - The parties' past bargaining history;
  - The location and scope of authority of the personnel responsible for labor relations;
  - Any limitations on the negotiation of matters of critical concern to the employees; and
  - The level at which labor policy is set at the agency.

Efficiency of Agency Operations

- The final criterion focuses upon "the degree to which the unit structure bears a rational relationship to the operational and organizational structure of the agency."
- In other words, the effect upon the agency in terms of cost, productivity and the use of resources.

President Trump's Executive Orders

Go on the Offensive.

The Big Three

- **<u>Executive Order 13836:</u>** Developing Efficient, Effective and Cost Reducing Approaches to Federal Sector Collective Bargaining;

- **<u>Executive Order 13837:</u>** Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use; and

- **<u>Executive Order 13839:</u>** Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles.

E.O. 13836

- To develop "efficient, effective and cost-reducing approaches to bargaining," the EO would have required agencies to:
  - Strive to negotiate ground rules within 6 weeks;
  - Strive to negotiate the term agreement within 4 to 6 months;
  - Request the exchange of written proposals during bargaining;
  - Make those proposals and, if the union does not respond with counter-proposals in a timely manner, implement the proposals;
  - Refuse to bargain over permissive subjects (those matters covered by 5 U.S.C. 7106(b)(1) of the Statute); and
  - Refuse to bargain over negotiated procedures and/or appropriate arrangements that "excessively interfere" with management rights.

E.O. 13837

- To ensure "transparency, accountability and efficiency" in the use of official time, the E.O. would require agencies to, *inter alia*:
  - Refuse to agree to official time unless it is reasonable, necessary and in the public interest, which should be viewed as a union time rate of 1 hour or less;
  - Refuse to allow employees to engage in lobbying activities during paid time except in their official capacities as an employee;
  - Require employees to perform at least ¾s of their paid time performing agency work (leaving that remaining ¼ for official time); and
  - Refuse unions the "free and discounted use" of government property or other resources if it is not generally available for non-agency business).

E.O. 13837 (continued)

- Agencies must also:
  - Refuse to allow employees to be reimbursed for expenses incurred performing non-agency business (that is, while on official time);
  - Refuse to allow employees to use official time to prepare grievances and/or defending against adverse action on behalf of someone other than the employee filing the grievance or who is subject to the adverse action; and
  - Requiring advance written authorization for official time.

E.O. 13839

- To promote "accountability" and streamline removal procedures, the E.O. would, among other things:
  - Limit performance improvement plans to 30 days;
  - Eliminate the use of progressive discipline; and
  - Exclude removals of employees from the scope of the grievance procedure.

The EOs are Enjoined in Part

- The U.S. District Court for the District of Columbia issued a decision in which it enjoined key aspects of the Executive Orders, including but not limited to the following:
  - The imposition of a 25% cap on the use of official time;
  - The prohibition against employees' right to petition and communicate with Congress;
  - The ban on the use of official time to prepare and present grievances on behalf of someone other than the union representative;
  - The limitations placed upon unions' use of agency facilities (including office space, computers, furniture, etc.); and
  - The prohibition against bargaining over permissive subjects of bargaining.

More Enjoined Provisions

- The judge also enjoined the following aspects of the Executive Orders:
  - The exclusion of challenges to performance ratings and incentive pay from the scope of the negotiated grievance procedure;
  - The limitation of performance improvement periods to 30 days, with agencies alone having the discretion to apply longer periods; and
  - The direction to exclude removals from the scope of the negotiated grievance procedures.

The Agencies' "Work Around"

- Even though a court has enjoined the implementation of the Executive Orders, agencies have attempted to circumvent the court's orders in different ways.
  - The Office of Personnel Management has advised agencies to "follow the spirit" of the EOs.
  - Agencies have continued to make proposals that mirror the provisions of the EOs (for example, limiting the use of official time) during contract negotiations.
    - The agencies' representatives claim they are making the proposals at their discretion, not because of the EOs.
  - Other agencies have sought to reopen negotiations to revisit subjects covered by the EOs.

"The court's decision does not limit or otherwise modify agency of union collective bargaining rights or obligations.... This includes the agency's right to make proposals in the context of collective bargaining, including over subjects that were discussed in the executive orders, and to fashion those proposals in a manner that best reflects critical agency priorities."

OPM Guidance

Following the "Spirit" of the EOs

- In its encouragement of agencies to following the "spirit" of the Executive Orders, the Office of Personnel Management has:
  - Advised agencies to be "mindful of the policies set forth in the EOs with respect to the effective functioning of the executive branch...."
  - The particular policies are:
    - Limiting opportunity periods to demonstrate acceptable performance (before an employee is discharged);
    - Not requiring the use of progressive discipline; and
    - Ensuring that official time is authorized in amounts that are reasonable, necessary and in the public interest.

Collective Bargaining in the Trump Era

Go on the Offensive.

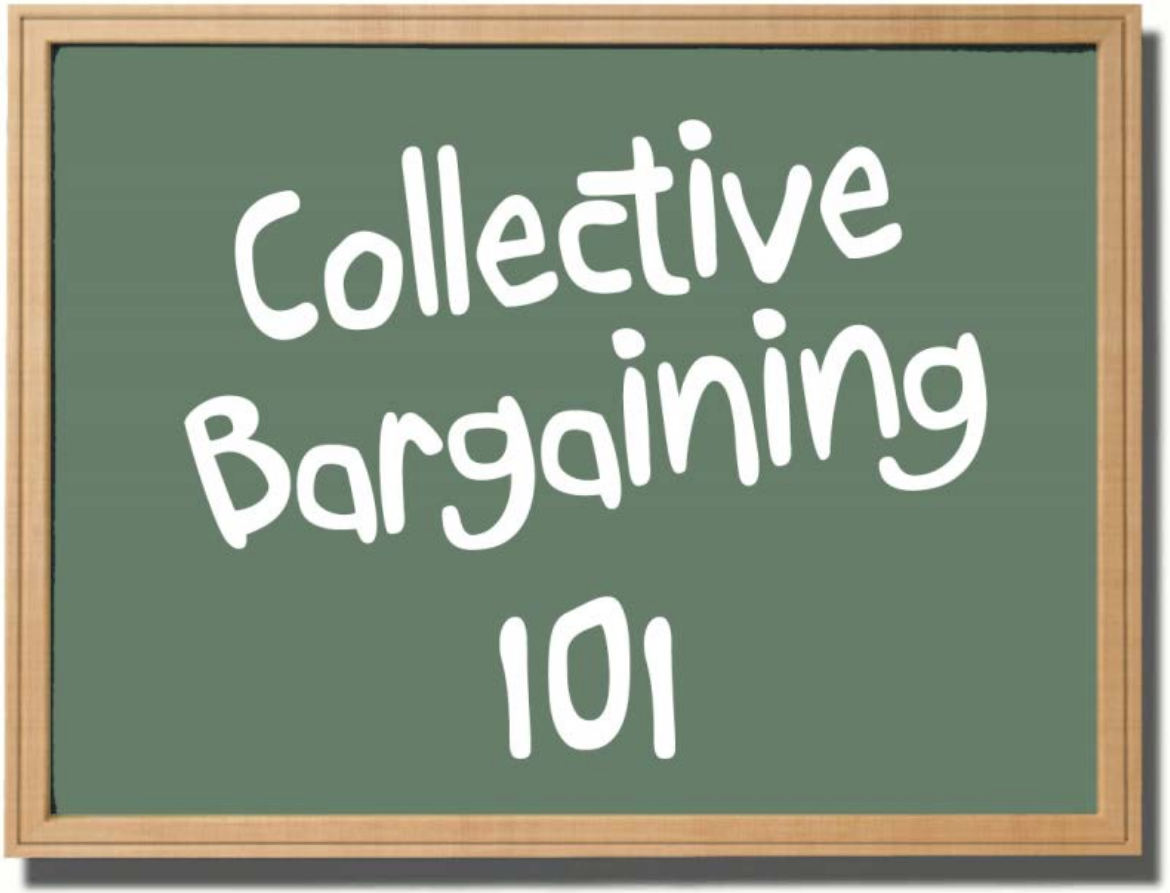
What to Expect

- Over the past year, federal sector unions have been confronted with agencies taking very aggressive bargaining stances:
  - For example, in negotiations with the NTEU, HHS made an initial proposal that eliminated **13 articles** from the collective bargaining agreement. By its last, best and final offer, HHS was proposing to delete **21 articles** from the agreement.
    - The agency's position is that it is not opposed to the subjects, just that it was not want them "dictated" by the collective bargaining agreement.
- More aggressive bargaining strategies are to be expected, because agencies know that they can rely upon the GOP-dominated, management-friendly and union-hostile FLRA and FSIP.

How to Fight Back

- Given the likelihood that federal sector unions – including metal trades councils - will continue to face more aggressive bargaining strategies, it is important that negotiating committees be prepared to fight back.
- To do so, negotiators must:
  - Understand the law governing collective bargaining in the federal sector;
  - Understand the options available to negotiators; and
  - Understand the consequences of choosing those options.

OVERVIEW



The Right/Duty to Bargain

- Section 7114(a)(1) of the Federal Service Labor-Management Relations Statute provides that a labor organization that is the exclusive representative of a bargaining unit is entitled to act for, and negotiate collective bargaining agreements on behalf of, all of the employees in the unit.
- Section 7103(a)(12) of the Statute defines collective bargaining as the obligation:

  "to meet at reasonable times and to consult and bargain in a good faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached."

When that Right/Duty Arises

- Parties are obligated to bargain over proposals concerning bargaining unit employees' conditions of employment, provided that the proposals are not inconsistent with:
  - Federal law;
  - Government-wide regulation; or
  - An agency rule for which there is a compelling need.

Types of Negotiations

- **Term:** Negotiations for a collective bargaining, whether an initial agreement or a successor agreement.
- **Mid-Term:** Negotiations over subjects not already bargained (that is matters not already "contained in or covered by" an existing agreement unless the parties waived their right to bargain over the matter).
- **Changes:** Proposed changes in conditions of employment.

Conditions of Employment

- Conditions of employment are defined to include personnel policies, practices, and matters, whether established by rule, regulation or otherwise affecting working conditions except policies, practices and matters relating to (1) political activities prohibited under Chapter 73, subchapter III; (2) classification of any position; and (3) to the extent such matters are **specifically provided for by statute**.
- Two questions when analyzing whether a proposal involves a condition of employment:
  - Does it pertain to bargaining unit employees?
  - Is there a direct connection between the matter and the work situation or employment relationship of the employees?

"Specifically Provided For"

- It is not uncommon for agency bargaining representatives to claim that a particular subject is specifically provided for by statute.
  - The fact that a statute makes a reference to a matter is not sufficient to support a finding that it is "specifically provided for by statute."
  - The statute must take away all discretion from the agency.
    - If an agency has discretion, then it must bargain over the proposal unless that discretion is "sole and exclusive."

Know Your Subjects

- Bargaining is divided into three subjects: **mandatory**, **permissive**, and **prohibited**.
  - Mandatory subjects include personnel policies, practices, and matters, whether established by rule, regulation or otherwise affecting working conditions not excluded by the Statute, as well as negotiated procedures in Section 7106(b)(2) and appropriate arrangements under Section 7106(b)(3).
  - Permissive subjects include any other matter, such as the matters listed in Section 7106(b)(1) of the Statute.
  - Prohibited subjects are those that are off-limits because they are precluded by law.

Bargaining on Those Subjects

- The bargaining rules differ with respect to mandatory subjects and permissive subjects:
  - Parties must provide notice and an opportunity to bargain over mandatory subjects of bargaining; and, parties can bargain over such subjects to impasse.
  - Parties may elect to bargain over permissive subjects (there is no requirement to bargain); and, parties **cannot** bargain a permissive subject to impasse.
    - If an employer bargains to impasse, it is a ULP.
    - If a union bargains to impasse, the employer can implement its proposed change.

Good Faith Bargaining

- Factors that are considered when determining whether a party bargained in good faith:
  - Did the party approach negotiations with a sincere resolve to reach agreement;
  - Did the party have duly authorized representatives present?
  - Did the party meet as frequently as necessary?
  - Did the party avoid unnecessary delays?
  - Did the party execute/implement the agreement upon request?
- The analysis usually focuses on the totality of the circumstances, but certain types of conduct can be bad faith bargaining by themselves (such as insisting upon a permissive subject of bargaining to impasse).

Directions During Bargaining

The Roadmap

- It is important to anticipate the direction of the negotiations as parties exchange proposals. There are four major avenues under which proposals may proceed, depending upon their substance:
  - **Non-Negotiability**
  - **Outside the Duty to Bargain**
  - **Impasse**
  - **Agreement**

"Non-Negotiability"

- During negotiations, an agency may claim that a union's proposal is "non-negotiable." In other words, the agency negotiator is claiming that a union's proposal conflicts with:
  - Management rights under Sections 7106(a) & (b)(1) of the Statute; or
  - Government wide regulations under Section 7117 of the Statute; or
  - The proposal involves matters that are excluded from conditions of employment (such as classification, political activities, or are specifically provided by law).
- Disputes over whether a proposal is non-negotiability are typically submitted to the FLRA for resolution pursuant to the process set forth in Section 7117(c) of the Statute.

"Non-Negotiability" Fixes

- If an agency declares a union's proposal to be non-negotiable, here are a few fixes:
  1. Add "The employer has determined" to the beginning of the proposal. The FLRA has ruled that this language can turn a non-negotiable proposal into a negotiable one.
  2. Revise the proposal to make it clearly negotiable.
  3. Tell management to put its assertion in writing so that the council can file a negotiability petition with the FLRA.
  4. File an unfair labor practice charge.

"Outside the Duty to Bargain"

- By contrast, an agency may claim that a matter is "outside the duty to bargain." Such claims are made often with respect to proposals that are, by way of examples:
  - Covered by an existing agreement;
  - Outside the scope of a proposed change;
  - Outside the scope of the bargaining unit;
  - Involve a waiver of statutory rights;
  - Made despite a prior waiver of the union to negotiate over the matter; and
  - Made in response to what the agency claims to be not negotiable (for example, a de minimis change).
- These disputes are resolved typically through the unfair labor practice process.

Impasse

- If the parties are unable to reach an agreement, they may end up at impasse. At that point, the proposal goes to the Federal Service Impasses Panel or FSIP.
- If the FSIP takes jurisdiction, it may could proceed in a few different ways:
  - Resumption of concentrated bargaining with mediator assistance;
  - Informal conference;
  - Mediation-Arbitration;
  - Written Submissions; and
  - Fact-finding.
- When assessing proposals, the FSIP considers: (1) demonstrated need and (2) comparability.

The Actual Bargaining

Offensive Bargaining

- When addressing a proposal or change, the union should bargain over every negotiable aspect of that proposal or proposal.
  - Don't just reject proposals outright. Consider and explore.
  - Force the employer to explain the basis for its proposal.
  - Focus not just on the substance, but also the effect (impact and implementation) of the proposal.
  - Focus on timing of changes brought about by the proposal.
- Engage in offensive bargaining but be wary of the limitations.
  - The key is to bargain hard but maintain the status quo.
  - Do not give the agency any basis to implement (such as bargaining to impasse on permissive subjects) or declaring impasse.

Offensive Bargaining (continued)

- Avoid impasse by indicating a willingness to explore the agency's proposal where the Union has stood firm in the past.
  - In so doing, explain that the union is willing to consider movement but that the agency work with the union on specific details of the proposal.
  - Keep the discussion going by:
    - formulating different ways the parties could reach agreement based upon mutual compromises and mutual benefits;
    - discussing the long term implications of proposals over the life of any future agreement, with a particular focus upon how the agency's proposal will negatively impact its operations.

Information Requests

- Agencies have a responsibility to respond to requests from unions in the context of collective bargaining negotiations.
  - Draft the information requests carefully by seeking relevant information about the negotiable terms and conditions of employment of the bargaining unit employees.
  - In addition, draft information requests seeking documents and/or information relating to agency proposals.
- Requested documents should be:
  - Maintained by the agency in the regular course of business;
  - Reasonably available;
  - Necessary for a full and proper discussion, understanding and negotiation of subjects within scope of bargaining.

More About Info Requests

- Make sure that the information request sets forth:
  - Why the information is needed;
  - What the information will be used for; and
  - How it will relate to carry out its representational responsibilities under the Statute.
- If the agency refuses to provide part or all of the information, file an unfair labor practice **and** a Freedom of Information Act request.
  - The former seeks to impose liability upon the agency.
  - The latter uses a lawful method to impose additional burdens upon the agency.

BARGAINING SHUTDOWNS

The Duty to Bargain

- Proposals concerning a shutdown's impact upon the bargaining unit employees may be negotiable and can be made during bargaining over a term agreement.
- If there is a collective bargaining agreement in place, the rules are as follows:
  - If the agreement **does** address shutdowns or lapses in appropriations, then the union should file a grievance to protest any failure to comply with those provisions.
  - If the agreement **does not** address such subjects, then the union can make a proposal during the term of the agreement.
    - This would initiate mid-term bargaining.
    - An agency must bargain during the term of an agreement over union initiated proposals concerning matters not addressed in the agreement.

What's on the Table

- Potential subjects for proposals:
  - Retroactive administrative leave for bargaining unit employees;
  - Notification procedures;
  - Pay for excepted employees (that is, requiring payment of back wages within a certain number of days once a new appropriation is enacted);
  - Lost differentials and premium pay; and
  - FEHB Payments (that is, once an appropriation is enacted, employer health premiums are promptly paid).

Conclusion

If you have any questions, you should consult with the council's attorney or with the Metal Trades Deparment.

THANK YOU!

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