

**LABOR RELATIONS PRACTITIONER'S GUIDE**

**For National Guard Labor Relations Professionals**



**People First Mission Always!**

**Produced By:  
National Guard Bureau  
Labor Relations Advisory Council in conjunction with the  
Office of Technician Personnel**

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## FOREWARD

This document was developed by members of the Labor Relations Advisory Council (LRAC) for the purpose of giving the Labor Relations Specialist (LRS) reference material to assist them with their LRS duties. Each section was written, rewritten and or edited by different members, so it reads and has slightly different formatting throughout. It was initially compiled for release in 2010 and never was published. The information is good and it is a decent tool that can help a newly assigned or seasoned LRS, it is being re-released now in 2015 because many believe it adds value and guidance for the Labor Relations (LR) community.

Just a couple editors notes, as an LRS your foundational documents are 5 USC Chapter 71 (the Federal Labor Relations Statute), your states Collective Bargaining Agreement(s), and 32 USC Chapter 709 (the Technician Act). These documents are the basis of much of what you will need to be versed in to perform the technical aspects of the LRS position. Please understand that while knowing the contents of these documents is very important, much of Labor Relations is in the “Relations” aspect of your position. It is necessary to spend the time to adequately develop the relationships necessary to have a successful Labor Relations Program.

When you are assigned as the LRS you are not alone or unsupported. There are many resources available to you; the National Guard Bureau Labor Relations staff can provide assistance if needed, as well as members of the Labor Relations Advisory Council and other states LRS's. Interaction with your LRS colleagues is fully encouraged as they are the major brain trust and can sometimes be the quickest and easiest means of getting answers to your questions. Please utilize all resources that are available to assist you with your Labor Relations efforts and you will likely have a successful tenure as the LRS.

Thank you for the work you do and please feel free to send suggested improvements to [dale.a.williams.mil@mail.mil](mailto:dale.a.williams.mil@mail.mil).

CW4 Dale Williams

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Phyllis Montgomery (Rhode Island)  
Victor Marcelle (Arkansas)  
Karl Howard (Alaska)  
Jennifer Davis (Idaho)  
Delilah Gavaldon (New Mexico)  
William Phillips (Delaware)  
Clarence (CJ) Kulish (Iowa)  
Larry Dawson (Georgia)  
Scott Brinker (Arkansas, NGB)  
Lynne Krause (New York, NGB)  
Kevin Salsbury (Connecticut)  
Michael Hunt (California)

# CONDUCT MANAGEMENT

## **OVERVIEW**

The management of conduct in the workplace is critical to any organizations success. If improper behavior becomes apparent, it must be addressed in as **timely** a manner as possible to be effective. The management response (penalty) must also be as **consistent** as possible throughout the entire organization. The concept of Progressive Discipline and the table of Penalties within TPR 752 help us achieve that.

*Note:* Local Labor Agreements, State policies/procedure, Memorandums of Understanding, etc., may also need to be followed when administering discipline and adverse actions.

## **Progressive Discipline**

The use of Progressive Discipline helps supervisors address problem behavior with an appropriate response. Normally, any required corrections to behavior should be issued on a sliding scale usually starting off with a Non-Disciplinary Action (Warning, Admonishment). If these prove ineffective in correcting the behavior, a Disciplinary Action (Letter of Reprimand) must be taken. If the specific problem still exists, an Adverse Action (Suspension, Change to Lower Grade, Removal) will then have to be utilized. Employees have to know that repeated problem behavior will be dealt with more severely each instance.

*Note:* Depending on the behavior/offense, not all steps of progressive discipline need be satisfied in order to affect a disciplinary or adverse action. See TPR 752, Table of Penalties for specific instances where this may apply.

The sub paragraphs below will give you a more detailed description of each level of progressive discipline.

## **Non-Disciplinary Actions**

### ➤ **Counseling**

- Friendly, business-like exchange of information guided by the supervisor.
- A private matter with the specific purpose of improving the technician's conduct and knowledge of a particular subject.
- Discuss the facts and give the technician an opportunity to express views or provide explanations.

### ➤ **Admonishment**

- A firmer action notifying a technician to desist from a certain course of action.
- Should take place in as private an environment as possible.
- Should be in the form of the most appropriate criticism necessary to correct the technician.
- Ensure that all relevant facts have been raised.
- Should be annotated (date and subject) on the NGB Form 904-1 or computer generated supervisor's brief.

## **Disciplinary Action**

### ➤ **Letter of Reprimand:**

- Disciplinary action which makes the technician aware of a violation (e.g. improper attitude, violation of agency rules).
- Issued when a counseling and admonishment have proven ineffective, or
- When the nature of violation warrants more than counseling or admonishment, but does not warrant adverse action.
- A letter of reprimand **MUST** be cleared for procedural accuracy by the HRO before issuance.

## **Adverse Actions**

- **Suspension**
- **Change to Lower Grade**
- **Removal**

## **ROLES IN CONDUCT MANAGEMENT**

### **Labor Relations Specialist Role**

- Provide the necessary training to managers and supervisors to effectively perform conduct management at their levels.
- Assist supervisors and managers with the procedural aspects of Disciplinary and Adverse Actions.
- Ensure supervisors and managers have copies of (or access to) copies of required source documents for conduct management, i.e., TPR 752, Negotiated Agreement, Disciplinary Action templates, Douglas Factors checklist, etc.
- Try to maintain consistency of penalties across the state.
- If needed, consult with State Judge Advocate General's office for legal sufficiency reviews when processing Discipline and Adverse Actions.
- May represent the Adjutant General in disciplinary and adverse actions cases.
- May provide general or procedural guidance to affected technicians.

### **Labor Relations Specialist Must**

- Be responsive to managers and supervisors requests to affect discipline.
- Be fully versed in conduct management; know what to do and when to do it.
- Ensure Weingarten rights notification requirements are accomplished.
- Ensure all proposed actions are IAW your negotiated agreement, TPR 752 and any state specific regulations or agreements.
- Involve local unions, if required, before affecting discipline.
- Keep State Leadership abreast of current disciplinary climate.
- Involve EEO, JAG, Law Enforcement personnel if situation warrants.

### **Supervisor's Role**

- Initiates all disciplinary and adverse actions
- Ensure they know consequences of unacceptable behavior
- Respond to ALL cases; bring to employee's attention immediately – apply consistent standards
- Offer help through the Employee Assistance Program
- Remove names/personalities to minimize bias; focus on problems - not the person
- Ensure workers know expected behavior
- Know applicable labor agreement (including Weingarten responsibilities and requirements)

### **Supervisor's Must**

- ALWAYS contact the Human Resources Office prior to issuing proposed disciplinary or adverse actions
- Receive Human Resources Office approval prior to issuing original decisions on disciplinary or adverse actions
- Review proposed penalty with the deciding official
- Use the templates provided by Human Resources as guidelines for disciplinary or adverse actions
- Annotate 904-1

## **JOB AID FOR CONDUCTING DISCIPLINARY INVESTIGATIONS**

### **Inform Technicians**

Anytime a supervisor observes a disciplinary problem developing, he or she must inform the technician that their actions are improper. When the actions of the technician appear to be in violation of agency policy, regulation, or law, the supervisor will inform the individual that an investigation will be conducted to determine if disciplinary or adverse actions will be initiated.

The technician will be informed at this time of their right to present any information or evidence that supports their position. In the matter an investigation may be required based on the supervisor's observations or an allegation of misconduct brought to the attention of the supervisor.

### **Conduct Interviews**

Interview anyone who may have information about the situation being investigated. When there are witnesses to support a charge of misconduct, in accordance with TPR 752, a written statement from each witness should be secured as soon as possible; witness statements in defense of the individual being charged should be secured in the same manner. Technicians should be informed that failure to disclose material facts could result in disciplinary action and failure to answer investigator's questions may be grounds for removal. The fact that management is not able to advise a technician of specific charges does not justify his/her refusal to answer questions.

Fifth Amendment protection against self-incrimination is not infringed by orders to answer questions in an investigation when there is no likelihood of criminal prosecution.

### **Ensure Due Process**

The individual being investigated for possible misconduct charges will be afforded an opportunity to secure information or evidence in support of their defense in the same manner as the investigation conducted by management. This will be accomplished by meeting with the technician and if requested, his/her representative. The technician's right to present information or evidence in their defense will be explained during this meeting.

### **During the Interview Process**

Any interviewee may request a representative from the union if they reasonably believe that the examination may result in disciplinary action against the employee. The supervisor will meet and discuss the matter with the union representative, if requested, prior to reaching a decision concerning discipline or adverse action.

### **Review the Evidence**

Management must ensure that all evidence discovered in the investigation is considered before making a decision concerning possible discipline or adverse actions. Management must support its reasons for discipline or adverse action by a preponderance of the evidence.



## **Make a Decision**

Management must decide if the preponderance of the evidence supports the charge of misconduct. If the charge is supported by the preponderance of the evidence, then the supervisor should administer the appropriate discipline or adverse action. If the preponderance of the evidence does not support the charge, the technician should be informed that no action will be taken on the matter.

### **\*\* Important Note \*\***

Supervisors must ensure that the provisions of TPR 752 and their labor agreement are followed prior to initiating any disciplinary or adverse action. Letters of reprimand and adverse actions must be cleared by the HRO before issuance. If you have questions concerning this job or need assistance in any area of discipline or adverse action, contact your Labor Relations Specialist in HRO.

## **DISCIPLINARY AND ADVERSE ACTIONS – THE HEARING**

### **NGB Administrative Hearing Examiner System**

**\*\* See TPR 752-1: Adverse Action Appeals and the National Guard Hearing Examiner Program \*\***

### **Hearing Examiner Program**

The NGB Hearing Examiner program was established to provide a centralized register of qualified individuals to conduct administrative hearings and prepare the reports of finding and recommendations for The Adjutant General (TAG).

## **ADMINISTRATIVE INVESTIGATIONS**

When serious employee misconduct is suspected, an administrative investigation often precedes possible disciplinary action. Administrative investigations are not necessarily conducted by the LRS, however the LRS may advise supervisors on the proper conduct of an investigation. The seriousness of the misconduct is usually pretty significant or broad, and one is usually appointed by a higher authority to conduct this type of investigation. The primary purpose is to gather the facts, and usually a recommendation is provided by the investigator for the higher-level authority to take (or not take) disciplinary action. It is not conducted for the purpose of law enforcement or criminal prosecution.

The goal is to impartially gather and compile all relevant evidence. Accurate information serves the valid interests of the manager and the subject employee. A good investigation also establishes credibility and implements a careful decisional process to support the validity of the management decision. How well – or how poorly – such investigations are handled often determine whether the proper decision will be made. In most cases, the quality of the investigation is the key factor in determining if an action will stand up to review by a third party. Many good and correct management decisions have been undermined at trial by evidence of biased, sloppy, or incomplete investigation. The hearing officer, judge, or jury may believe that if the investigation was poor, the resulting decision must also be poor and vice versa.

The right to manage the workforce and take appropriate disciplinary action is supported by both statutory and case law. It is implicit in the Civil Service Reform Act when the CSRS created the requirement that an agency be able to prove that its actions “promote the efficiency of the service.” The statutory duty to “prove” necessitates the right to investigate. The right to discipline employees is reserved to management under § 7106(a)(2)(A), according to the FLRA, this includes the right to “investigate to determine whether discipline is justified” and “encompasses the use of evidence obtained during the investigation.” *Portsmouth Federal Employees Metal Trades Council and Portsmouth Naval Shipyard, 34 FLRA 1150, 1156-57 (1990).*

Employees have certain rights and responsibilities during the investigation:

- Give their full cooperation
- Provide truthful answers
- Right to Union Representation
- No attorney present unless potential criminal charges

An investigator, conducting an official work-related investigation has the right to require the full cooperation from all federal employees. The only situation in which federal employees have the right to remain silent is when they are being asked about a matter that could render them liable to criminal charges or penalties. Generally, refusal to cooperate is grounds for action, including removal. *Weston v. HUD*, 724 2d 943 (Fed. Cir. 1983).

The investigator has the right to expect truthful answers during the investigation. False answers or misrepresentations can be the basis for action, including removal. *LaChance v. Erickson*, 118 S.Ct. 753, 754 (1998); and *Cross v. Department of the Army*, 89 M.S.P.R. 62, 80 (2001). Every investigator must realize that lack of candor and falsification are different. Falsification involves an affirmative misrepresentation, and requires intent to deceive. Lack of candor may include a failure to disclose something that, in the circumstances, should have been disclosed in order to make the given statement accurate and complete. It involves an element of deception, but intent to deceive is not an element. *Ludlum v. Department of Justice*, 278 F.3d 1280 (Fed. Cir. 2002).

Don't forget that an employee is entitled to having union representation present during the investigative interview (see Weingarten Rights in this Guide). The four conditions an employee must meet are if they: 1) are a member of a bargaining unit, and 2) questioned by a representative of management, and 3) reasonably fears disciplinary action might result, and 4) asks for a representative. If all four conditions are met, you have three options: 1) grant the request; 2) discontinue the interview; or 3) offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview at all.

An attorney is only entitled to be present when the matter involves potential criminal charges. Criminal investigation is beyond scope of administrative inquiry and should be referred to proper law enforcement authority. If employee has reason to believe that information he or she provides could be used against them in a criminal prosecution, cooperation is not required, and discipline cannot be imposed refusing to respond.

The steps in conducting an investigation are:

- Analyze the allegation
- Plan the investigation
- Identify and gather evidence
- Identify critical legal issues, (ensure proper handling)
- Produce a report

When analyzing an allegation, the investigator determines what the nature of the issues are, what the rules were, who is involved, and what kind of evidence is likely available. Much of this will be provided to the investigator. When planning an investigation, it is important to develop a chronology of events, identify witnesses and potential lines of questioning, gather all available evidence: originals or authenticated (signed & dated) copies, and identify other relevant evidence. Determining the order of the investigation is a key part of the plan. The investigator will need to decide what evidence to collect and who to interview.

The investigator will have to determine the quality of the evidence if a recommendation is to be made based on the determined facts. Evidence includes that which is physical (i.e., damaged equipment), documentary (photographs, emails), oral statements, etc., and usually a significant amount can be obtained by conducting interviews. Often times a transcript of the interview is signed or a statement is written and signed by the interviewees. Evidence is weighted by the investigator and those reading the report based on if it is material, relevant and reliable. Evidence is material if it relates to one or more of the issues raised in the inquiry. It is relevant if it tends to prove or disprove a material issue raised in the inquiry. And it is reliable if it is believable. (Even if material and relevant, not all evidence is worthy of belief.)

It is usually not necessary to obtain a search warrant to retrieve items from an employee's desk or work area unless the employee has a "reasonable expectation of privacy" in the area to be searched. Consequently, in most cases the expectation of privacy does not exist. But when in doubt, get legal advice before searching. The investigator can usually obtain the record of an off-duty arrest or conviction by paying a visit to the appropriate courthouse records department, and asking to see the criminal index. When you locate the case, ask for the file. It will contain most, if not all, the information you need about the incident, including the names of witnesses and the arresting officer. Arrest records may be less accessible than conviction records. Law enforcement officers and official agency investigators are unlikely to have a problem, but HR specialists and managers may not be granted access. If this is a problem, usually the JAG or State Security Officer can obtain the necessary documents.

The report is the culmination of the investigation, and should have the following elements:

- Executive Summary
- Findings
- Conclusions
- Attachments

The executive summary should 1) have the date investigator was appointed, 2) list the nature of inquiry, 3) relate difficulties encountered e.g., unavailability of evidence or witnesses, lack of cooperation, etc., and 4) summarize the findings and conclusions. The findings should list the facts surrounding the case, listing specific persons, times, places and events. The findings should also reference the evidence, and be assembled in a logical sequence (often times placed in a binder with 15-30 tabs for each type of document). A finding should be made for each relevant fact/allegation, and the findings should tell the whole story of the matter. The conclusion will take a position, opinion or indicate the judgment reached after consideration. Attachments will include things such as the appointment letter, investigation plan, chronology, and the evidence supporting the findings. All classified material should be safeguarded and all material inappropriate to the inquiry should be eliminated.

Seven common mistakes which should be avoided are:

1. Delaying the investigation. Evidence may be lost and witness recollections may be blurred.
2. Failing to obtain sworn statements (written/signed/witnessed/dated) or depositions. Witnesses may be unavailable to testify at a later hearing.
3. Losing documents and physical evidence. If the evidence is gone, so is your case.
4. Failing to obtain both sides of the story. Without both sides you can misdirect the investigation from the beginning, and the results may not convince a third party.
5. Interviewing witnesses in a group. This invites inaccurate testimony, whether the inaccuracies are intended or not.
6. Setting out to justify preconceived guilt or innocence. Such investigations are not only biased, they are usually obviously biased and their results are unlikely to be sustained.

7. Failing to apply logic in evaluating evidence. Remember to consider basic rules of cause and effect, e.g., "if Jones shouted for help, people nearby would have heard him."

## **ALTERNATIVE DISPUTE RESOLUTION (ADR)/ MEDIATION**

**ADR** is an informal process that allows parties to discuss and develop their interests in order to resolve the underlying issues and problems in their relationship. A discussion is facilitated by a third party "neutral" who is often a trained mediator, and is there to ensure a productive dialogue. ADR allows everyone to have an active part in the decision-making process. Solutions are adopted by consensus, and normally reflect the interests of all parties. ADR encourages creative, innovative solutions, moving away from the traditional win/lose results of adversarial proceedings.

ADR resolves disputes while preserving relationships, and thereby helps create a productive working environment. ADR is widely used in society, from family disputes to intergovernmental, legal, public policy and workplace disputes. **Employment mediation** involves the use of ADR techniques to solve workplace problems and avoid formal and expensive litigation.

**Mediation** is a form of ADR that could result in a legally binding agreement that both sides have agreed to. It is used in a variety of disputes, including harassment and discrimination.

**Mediation training** can help an LRS in a variety of ways. It can provide skills to improve union relations, provide supervisors better advice when dealing with problem employees, and help the LRS coordinate solutions with a management negotiation team, among others. Training is provided by a variety of sources: **Federal Mediation and Conciliation Service (FMCS), The Justice Center of Atlanta, the USDA Graduate School**, and others. The basic mediation course is usually 40 hours long.

The state **Judge Advocate General (JAG)** office is the proponent for the NGB ADR Program IAW NGB 27-1. The regulation states TAG should appoint an "ADR Advocate" who is required to send NGB an annual report of the program for the state. Although JAG is the proponent for ADR, there are many situations where the LRS should at least be knowledgeable of the different types of ADR services, if not be a trained mediator as well.

There are several sources to obtain ADR assistance depending on the type of dispute: The FMCS and the **Federal Labor Relations Authority (FLRA)**, among others. The FMCS ADR services usually require a fee and involve training or assistance settling a dispute before the dispute is appealed outside the state. The FLRA's ADR services do not require a fee, but aren't available until the dispute is filed, or about to be filed, with the FLRA.

The **FMCS** is a federal agency whose primary mission is to promote sound and stable labor relations through mediation and conflict resolution services. The FMCS mediates collective bargaining negotiations, provides other forms of alternative dispute resolution services outside of the collective bargaining context, provides training courses to improve the workplace relationship, and refers arbitrators for settlement of contract application disputes. The FMCS can also provide customized, interactive training in negotiation, mediation, facilitation, joint problem solving, and consensus building to enhance skills, relationships and strategies for a more productive workplace. For more information, visit the FMCS website.

FMCS services are divided into three categories:

- Workplace Disputes: FMCS mediators are available to assist parties in resolving workplace-related disputes, including Equal Employment Opportunity (EEO) claims.

- **Systems Design:** FMCS can design appropriate methods and strategies to establish or improve conflict resolution within an organization.
- **Training:** FMCS offers training programs to educate organizational staff and leaders in mediation and facilitation skills. Generally, a site visit is conducted to diagnose the problems specific and develop options for improvement. Mediators apply expertise that has made FMCS the leading mediation service provider.

The **FLRA** has multiple ways to assist in bringing about the resolution of a dispute. All of the FLRA components provide “collaboration and alternative dispute resolution” program services. For more information, visit the FLRA website. Each Regional Office (RO) has a **Regional Dispute Resolution Specialist (RDRS)** who coordinates ADR services. To request ADR services, contact the appropriate RDRS or Regional Director (RD).

The FLRA has a **Collaboration and Alternative Dispute Resolution Office (CADRO)** that attempts to reduce litigation and its attendant costs by helping parties resolve their own disputes with collaboration and alternative dispute resolution and labor-management cooperation activities. Both parties must agree to use CADRO assistance. The program offers collaboration and alternative dispute resolution services in pending unfair labor practice (ULP), representation, negotiability, and bargaining impasse disputes at every step -- from investigation and prosecution to the adjudication of cases and resolution of bargaining impasses. CADRO is highly successful in achieving a full resolution of the underlying disputes or withdrawal of the pending case.

The CADRO also provides facilitation and interest-based problem solving training to assist management and labor in developing and maintaining collaborative relationships. CADRO takes a proactive approach with parties, making training materials available, providing on-site briefings with Federal sector agencies, unions, neutrals and professional organizations, and participation in seminars, conferences and meetings. In addition, CADRO provides a variety of services -- including training, forum development and meeting facilitation -- to management and labor throughout the Federal Government in support of Executive Order 13522, Creating Labor-Management Forums to Improve Delivery of Government Services.

The **Office of the General Counsel (OGC)** offers ADR services in ULP and representation cases, both before cases are filed and while cases are pending a hearing. The OGC also provides facilitation, intervention, training and education services to agencies and unions through its regional and national offices. The OGC encourages parties to meet and, in good faith, attempt to resolve labor relations disputes. To that end, the OGC offers ADR services to facilitate parties’ efforts to identify and communicate their respective issues and interests, and develop mutually beneficial resolutions to labor relations disputes.

The FLRA’s **Administrative Law Judges (ALJs)** also have settlement programs for parties who have hearings pending before an ALJ. The voluntary ULP settlement program is described in section 2423.25(d) of the Authority's regulations. Use of the program may be initiated by any of the parties to a pending ULP case in which a complaint has been issued by the General Counsel and a hearing date before a judge has been set. Nothing discussed at the settlement conference is disclosed to the judge designated to preside at the hearing if settlement efforts are unsuccessful. Generally, no evidence regarding statements, conduct, offers of settlement, and concessions of the parties made in the settlement conference is admissible in any proceedings before the judge presiding at the hearing or the Authority. Inquiries concerning the settlement judge program should be directed to the Office of Administrative Law Judges at (202) 218-7950.

The FLRA's **Federal Service Impasses Panel (FSIP) "Panel"** uses ADR techniques in resolving bargaining impasses. Staffs from the Authority Members' offices participate in interventions with CADRO staff in negotiability and other cases. Facilitation is offered to help the parties resolve their differences before the case is ruled on by the Authority. The Panel has broad statutory authority to resolve negotiation impasses over conditions of employment in the Federal sector. Once it determines to assert jurisdiction in a dispute, the Panel may recommend or direct the use of procedures for resolving an impasse through any method it deems appropriate.

If the procedure selected does not result in a settlement, the Panel may then take whatever final action is necessary to resolve the dispute, including the issuance of a Decision and Order. The Order is binding during the term of the parties' collective bargaining agreement unless the parties agree otherwise. Because the Panel believes that the voluntary resolution of impasses are superior to those imposed by a third party, after considering the parties' preferences, where circumstances warrant the Panel will select the procedure most likely to lead to a voluntary settlement. Consistent with this belief, the Panel encourages the parties to continue efforts to resolve the issues voluntarily at every stage of case processing.

# LABOR MANAGEMENT RELATIONS

## FEDERAL LABOR RELATIONS

### **I. Employee Rights**

- Form, join, or assist a labor organization
- Not form, join, or assist a labor organization
- Act as a representative for labor organization
  - Shop Steward or Chief Steward
  - Local President
  - Regional or National Representative
  - As representative, present views of labor organization to Agency head, other Officials of Executive Branch, or Congress
  - Bargain collectively through labor organization with respect to conditions of employment
  - Exercise these rights without fear of penalty or reprisal from management

### **II. Bargaining Unit**

#### **A. Definition**

A group of employees who have a common interest and are represented by a labor organization in their dealings with management.

#### **B. Exclusions**

- Supervisors
- Management officials
- Confidential employees
- Professional employees, unless a majority of professional employees vote for inclusion in the unit.
- Employees engaged in:
  - Personnel work in other than a purely clerical capacity
  - Investigators directly affecting an agency's internal security
  - Administering the provisions of Title 5, Chapter 71
  - Work that directly affects national security

**C. Definition of Supervisor** (Labor Definition as Opposed to Classification) (Chapter 71 of Title 5 of the US Code) A person who has the authority to take, or effectively recommend taking, any of the following actions with respect to at least one employee:

- Hire
- Layoff
- Promote
- Remove
- Recall
- Direct
- Discipline
- Transfer
- Adjust Grievances
- Suspend
- Assign

- Furlough
- Reward

### **III. Union Rights and Responsibilities**

#### **A. Rights**

- Exclusive representative of employees in bargaining unit and entitled to act for and negotiate collective bargaining agreements for all employees in the unit.
- Be given the opportunity to be represented at any formal discussion.
- Be given the opportunity to be represented at any meeting with unit employees in connection with an investigation if the employee reasonably believes the meeting could result in disciplinary action and the employee requests union representation. (Weingarten Discussions)
- Be given the advance notice of any proposed changes to established conditions of employment and an opportunity to negotiate over these proposed changes absent any clear and unmistakable waiver of this right.

#### **B. Responsibilities**

- Represent interests of all bargaining unit members, regardless of union membership.
- Negotiate with management in a “good faith” effort to determine conditions of employment.

### **IV. Official Time**

#### **A. Definition**

Duty time that is granted to union representatives to perform union representational functions, without charge to leave or loss of pay, when the employee would otherwise be in a duty status. Time is considered to be hours of work. IAW Office of Personnel Management (OPM) memorandum, 3 Nov 03, federal agencies are required to report the number of hours of official time used by employees to perform union-related activities. Supervisors are responsible for recording the actual official time used and the type of official time used, when completing time and attendance records. Supervisors must track total time using the following four categories: 1) negotiations (code BA); 2) Mid-term Bargaining (code BB); 3) labor-management relations (code BD); and 4) grievances and appeals (code BK).

#### **B. When is official time permitted?**

It can be permitted for representational functions such as:

- Contract or mid-term negotiations
- Representing employees who file grievances
- Any proceeding before the Federal Labor Relations Authority
- For any employee representing an exclusive representative or any employee represented by an exclusive representative in any amount the agency and the exclusive representative agree to be reasonable, necessary, and in the public interest

It is not permitted for conducting union’s internal business, such as:

- Soliciting membership
- Collecting union dues
- Any matters relating to internal management and structure of union overtime for official time is not permitted because:



- Time spent performing representational business outside an employee’s normal workday is not considered the performance of hours of work within meaning of 5 USC 5542 – 5544, the Fair Labor Standards Act, and 5 CFR 551.104 and 551.424
- Exception to overtime prohibition provides overtime on official time if the employee/representative is already on overtime duty status

## **V. Furnish Information**

### **Right to Information**

The agency is obligated to furnish to the exclusive representative, upon request and, to the extent not prohibited by law, data -

- which is normally maintained by the agency in the regular course of business;
- which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of bargaining; and
- which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors,

Unlike Freedom of Information Act (FOIA) requests, information must be provided free of charge. If you receive a request for information from a union representative, contact your Labor Relations Specialist immediately.

**Note:** The processing of information requests may be complicated by legal considerations. Evaluate the information request and determine if there are any Privacy Act implications. For example, does the request include the release of social security numbers, home addresses or names of individuals who received disciplinary action? If so, personal identifiers must be removed or redacted or not releasable.

Further, the union is required to state a “particularized need” for any information it seeks. If none is stated, you should request a clarification from the union of the need for the information in reference to its representational function. General, vague statements of the need for information are usually not sufficient to require release of the information. The need must be specific and related to the union’s representational function.

## **VI. Formal Discussion**

### **A. Definition**

Discussion between one or more representatives of the Agency and one or more employees in the unit concerning any grievance or any personnel policy or practice or other general condition of employment.

### **B. Criteria (See 10 FLRA No. 24 (1982), See also 52 FLRA No. 17 (1996))**

- Whether the individual who held the discussion is merely a first-level supervisor, or is higher in the management hierarchy;
- Whether any other management representative attended;
- Where the meeting took place;
- How long the meeting lasted;
- How the meetings were called (i.e., with formal advance written notice, or more spontaneously and informally);
- Whether a formal agenda was established for the meeting;
- Whether the employee’s attendance is mandatory; or

- The manner in which the meetings were conducted (i.e., whether the employee’s identity and comments were Noted and transcribed).

**C. What is a discussion?**

The term “discussion” in the Statute is synonymous with “meeting and no actual discussion or dialogue need occur for the meeting to constitute a formal discussion within the meaning of the Statute. See 37 FLRA No. 60 (1990).

**D. Union’s Role.**

- The opportunity to be represented at a formal discussion means more than merely the right to be present. The right to be represented also means the right of the union representative to comment, speak and make statements. See 47 FLRA No. 11 (1993).
- On the other hand, this right does not entitle a union representative to take charge of, usurp, or disrupt the meeting. See 38 FLRA No. 61 (1990).
- Comments by a union representative must be governed by a rule of reasonableness, which requires the respect for orderly procedures. See 47 FLRA No. 11 (1993).

**E. Discussions That Are Not Formal**

Work assignments; interim reviews; performance appraisals; performance counseling; counseling on conduct.

**F. Discharging Obligation**

- Give union reasonable advance notice of meeting (time, date, place, and subject to be discussed).
- Provide union opportunity to attend.

**VII. Investigative Meeting/Weingarten**

**A. Definition**

A union must be given the opportunity to be present at an examination of a unit employee by an agency representative in connection with an investigation, if:

- The employee reasonably believes the examination may result in disciplinary action; and
- The employee requests representation.

**B. Management’s Obligations**

- Stop discussion; continue investigation by other means, which do not involve interviewing bargaining unit employees.
- Temporarily stop meeting to allow union representative to attend.

**C. Union’s Role**

- Ask relevant questions
- Assist employee to answer
- Cannot answer questions, break up meeting, or prevent Agency from carrying out investigation.

**VIII. Management Rights**

**A. 5 USC 7106(a) reserves to Management the right to:**

- Determine the Agency’s mission, budget, organization, number of employees, and internal security practices;

- Hire, assign, direct, layoff, and retain employees;
- Suspend, remove, reduce in grade or pay, or discipline employees;
- Assign work, make determinations with respect to contracting out, and determine the personnel by which operations will be conducted;
- Select and appoint employees from appropriate sources; and
- Take whatever actions may be necessary to carry out the Agency mission during emergencies.

**B. Decisions to act in these areas are management’s prerogative and the union cannot negotiate on any of these rights. However, procedures for the exercise of these rights and arrangements that affect employees may be subject to negotiation.**

## **IX. Making Changes In Conditions of Employment**

### **A. Management’s Role**

When management wants to make a change that affects conditions of employment of bargaining unit employees, the union must be given **reasonable advance notice** of the proposed change. Normally, your collective bargaining agreement will outline how much, if any, specific advance notice is required with your union when making changes that affect conditions of employment of bargaining unit employees.

### **B. Recognition of Obligation**

- Does the decision produce a change or will the decision continue to use an existing way of doing things?
- Does the change affect bargaining unit employees?
- Does the change affect conditions of employment?
- Is the change de minimis (minimal)?

## **X. Contract Administration**

### **A. Definition**

How the terms of the labor agreement will be interpreted, applied, and enforced.

### **B. Collective Bargaining Agreement**

- Document that establishes the framework for labor-management relations
- Contains those working conditions mutually agreed to by union and management

### **C. Contract Interpretation Principles**

- Administer agreement consistent with the intent of the negotiated agreement.
- Language of agreement
- Bargaining history
- Past practice
- Concern condition of employment
- Clear and consistent
- Long standing
- Accepted by both parties
- Not contrary to law, regulation, collective bargaining agreement

#### **D. The Union Steward**

The union steward is an employee who serves as a representative of the union at a specific worksite. The stewards may be elected by union members or appointed by officers of the union.

#### **The steward's duties are of two kinds:**

1. Representing the union and bargaining unit employees in dealing with management. These are called representational activities and include handling grievances, policing the contract, keeping employees informed of working condition changes, and meeting with management. Stewards may be granted official time, without charge to leave, for these representational activities. The amount of time granted is negotiable.
2. Conducting internal union business such as participating in elections of union officials, soliciting membership, collecting dues and attending union meetings. The use of official time for conducting internal union business is prohibited by Title V. Such activities can only be done on non-duty time.
  - For representational activities, management should recognize that fellow union members place the steward in a position of trust and should accord the steward the cooperation and respect necessary in order for the steward to do an effective job.
  - Since stewards are responsible for representing the union and all bargaining unit employees, it is important that they have enough time to carry out representational responsibilities and have access to bargaining unit employees. At the same time, the steward, as an employee, is responsible for performing the assigned duties of his or her position. The goal in specifying a steward's activities in the contract should be to balance the steward's responsibility for representing the union and bargaining unit employees with management's primary responsibility for mission accomplishment.

#### **E. The Supervisor-Steward Relationship**

Supervisors and stewards play an extremely important role in determining whether the labor-management relationship is a good or bad one. On a day-to-day basis, it is the supervisor who has primary responsibility for administering the contract and the steward whom has primary responsibility for policing the administration. The supervisor and the steward:

- Must know the agency's personnel policies, regulations, and the contract.
- Must understand and accept each other's role.
- Are under pressure from both sides and must try to resolve problems without violating the contract or going beyond the intent of labor-management policies.

### **XI. Negotiated Grievance Procedure**

#### **A. Definition**

Grievance means any complaint:

- By any employee concerning any matter relating to the employment of the employee;
- By any labor organization concerning any matter relating to the employment of the employee;
- By any employee, labor organization, or agency concerning the effect of interpretation or a claim of breach of a collective bargaining agreement; or
- Any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.

## **B. Exclusions**

- Any claimed violation of 5 USC 7321 (relating to prohibited political activities);
- Retirement, life insurance, or health insurance;
- A suspension or removal under 5 USC 7532 (national security);
- Any examination, certification, or appointment; or
- Classification of any position that does not result in the reduction in grade or pay of an employee.

**Note:** In the National Guard, a grievance procedure may not cover Title 32 Section 709(f) actions. Such actions include reduction in force, removal, reduction in grade, suspension or furlough. A right of appeal which may exist for these actions shall not extend beyond the Adjutant General of the jurisdiction concerned.

## **C. Procedures**

- Assure union right to present and process grievances on behalf of itself or any bargaining unit employees;
- Assure an employee the right to present grievances on his/her behalf, and assure the union the right to be present during the grievance process;
- Provide for final and binding arbitration; and
- Provide for settlement of questions of arbitrability.

## **D. Grievance Handling**

- Before meeting
  - Inform union
  - Ensure privacy
  - Set the tone - questions only
    - What's the problem?
    - What are the facts?
    - Who? What? When? Where? Why?
    - What (exactly) do you want?
    - Why are you entitled to that?
    - Where in the Contract/Law/Regulation does it say that?
- Offer no resolutions at the meeting
- Investigate
  - Check the facts.
  - Check the Contract/Laws/Regulations
  - What have other grievance decisions said?
  - What have arbitrators said?
  - Is it a "true" practice?
  - What does management want to do?
  - What will it cost to fight?
- Make a timely decision (contract timeframe for grievance response)
- Be wary of partial relief.
- Is the situation grievable?
- If you agree to settle the grievance, grievance must be dropped.
- Things to avoid
  - Little or no research
  - Rubber-stamping

- Personality clashes and power struggles
- Giving the farm away to make the grievance disappear.

#### **E. The Steward's Role in Processing a Grievance.**

- One of the steward's most important roles is to handle grievances. Although the supervisor exercises certain authority over the stewards as an employee, when the supervisor and the steward discuss grievances, the steward acts as an official representative of the union.
- Stewards are trained, as are supervisors, to settle a grievance as close to the source of the dispute as is possible. Like supervisors, they have to live with any settlement reached. If they can arrive at a settlement, rather than having one imposed, both parties benefit.
- In handling grievances, stewards win or lose cases based on how carefully they have investigated the problem. This investigation may involve conducting interviews, determining pertinent dates, and getting names of witnesses. Stewards must ask questions for clarification, examine records, distinguish between fact and opinion, and decide what is relevant to the complaint. They also have to assure themselves that the grievance is legitimate.
- When a steward receives a case, he or she should determine whether a basis for the grievance exists. They should investigate to see if:
  - The contract has been violated.
  - The law has been violated.
  - Government-wide rules and regulations have been violated.
  - Agency regulations have been violated.
  - Past practices have been changed.
  - Employees are being treated unfairly.
- Just as stewards determine whether bargaining unit employees have legitimate grievances, supervisors should analyze any grievance received to determine whether there has been a violation of contract, law, regulation, past practice, or unfair employee treatment.

## **XII. Unfair Labor Practice (ULP)**

### **A. Definition**

- An alleged violation of a right protected by the Federal Service Labor-Management Relations Statute (5 USC Chapter 71)
- A ULP can be filed by an employee, the union or management.

### **B. Agency ULP Charges**

- Section 7116(a)(1)
  - "Management shall not interfere with, restrain or coerce any employee in the exercise of its rights under the Statute."
  - Threatening employees with reprisal
  - Interrogating unit employees on union activity
- Section 7116(a)(2)
  - "Management shall not encourage or discourage membership in a labor organization by discrimination in connection with hiring, tenure, promotion or other conditions of employment."
  - Failure to promote because of union activities
  - Discipline in retaliation for activity as a union representative
- Section 7116(a)(3)
  - "Management shall not sponsor, control, or otherwise assist a labor organization...."
  - Campaigning for a specific individual

- Help union organize membership drive
- Section 7116(a)(4)
  - “Management cannot discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or given any information or testimony....”
  - Transfer employee to undesirable job because he/she filed a ULP
- Section 7116(a)(5)
  - “Agency management shall not refuse to consult or negotiate in good faith with a labor organization....”
  - Implement change in condition of employment without notifying union
  - Bypass union (directly notify employees of a change without union present)
  - Unilaterally change established past practice, absent a clear and unmistakable waiver of bargaining rights
  - Refusal to bargain
- Section 7116(a)(6)
  - “Failing or refusing to cooperate in impasse procedure and impasse decisions....”
  - Refuse to provide the union official time for attendance at Impasse Panel hearing
- Section 7116(a)(7)
  - “An agency cannot enforce any rule or regulation (other than a rule or regulation implementing Section 2302 of Title V) which is in conflict with any applicable collective agreement if the agreement was in effect before the date the rule or regulation was prescribed.”
- Section 7116(a)(8)
  - “To otherwise fail or refuse to comply with any provision of the chapter.”
  - Formal discussion
  - Weingarten meeting
  - Duty to supply information

### **C. Union ULP Charges**

- Section 7116(b)(1)
  - A labor organization shall not interfere with, restrain or coerce any employee in the exercise by the employee of any right under this chapter.
  - Expelling a member from the union for filing ULP against union.
  - Suggesting to employees that they must become dues paying members in order to receive union representation.
- Section 7116(b)(2)
  - A labor organization shall not cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter.
  - Encourage agency to discipline employee due to antiunion activities.
- Section 7116(b)(3)
  - A labor organization shall not coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member’s work performance or productivity as an employee or the discharge of the member’s duties as an employee.
- Section 7116(b)(4)
  - A labor organization shall not discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or non-preferential civil service status, political affiliation, marital status, or handicapping condition.
  - Refuse to represent an employee due to race, color, creed....

- Section 7116(b)(5)
  - A labor organization shall not refuse to consult or negotiate in good faith with a an agency as required by this chapter.
  - Failure to send representatives to negotiating table who have the authority to commit union.
- Section 7116(b)(6)
  - Failing or refusing to cooperate in impasse procedure and impasse decisions.
  - Refuse to meet with mediator on issues at impasse.
- Section 7116(b)(7)
  - (A) To call, or participate in a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or
  - (B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or
- Section 7116(b)(8)
  - To otherwise fail or refuse to comply with any provision of this chapter. Use of official time for internal union business.

## **WHAT CAUSES A GRIEVANCE?**

### **General Causes**

(Not intended to be an all inclusive list)

- Self Interest (how will this change affect me)
- Authority Complex (let authority go to the head or conversely reject all authority)
- Communication Barriers (written, spoken and body language)
- Self-Justification (resent having decisions questioned and do everything to justify)
- Gut Reactions (reactions without logic may not address built in biases)

### **Specific Causes**

(Not intended to be an all inclusive list)

- **Employee:**
  - Personal problems (refer to EAP, Military One Source)
  - Unreliable/Antagonistic employees
  - Linguistic/Racial/Cultural barriers
  - Union Membership (I am immune to discipline)
- **Supervisor:**
  - Wrong attitude toward the Union
  - Weak supervisory skills
  - Unjust discipline
  - Favoritism and Inconsistency
  - Promises made to employees
  - Failure to eliminate sources of irritation
  - Unclear orders/instructions
  - Failure to keep workforce informed
  - Failure to dispel rumors
  - Failure to listen and consider employee's viewpoints
  - Incomplete knowledge of the labor contract



➤ **Shop Steward:**

- Incomplete knowledge of the labor contract
- Making unwarranted promises
- Failure to act on complaints
- Showing favoritism
- Failure to set a good example
- Playing union politics (stir it up and solve it)
- Allowing rumors to circulate

**UNFAIR LABOR PRACTICE (ULP)**

The Federal Service Labor-Management Relations Statute creates rights and obligations on the part of unions, agency management, and employees. If either union or management fails to perform its obligation to the other party in violation of the law (5 USC 7116) these violations are called unfair labor practices (ULP'S).

**Avoiding ULP's**

Understanding management's obligations under the law (5 USC 7106) and union rights under the law (5 USC 7114) minimizes the pitfalls of commonly committed ULPs. Completing the necessary Labor Relations training, utilizing the data in this guide and communicating with NGB Labor Relations contact is very beneficial. REMEMBER : There is a network of Labor Relations experts you can call.

Open communication with the union can often lead to avoiding ULP charges, allowing for settlement of disputes at the lowest level and the possibility of eliminating the filing of endless paperwork with the FLRA.

**When ULP Charge Occurs**

An agency, a labor organization, or an individual may file an alleged unfair labor practice charge with the appropriate Regional Office of the Federal Labor Relations Authority. The charge must be filed within 6 (six) months from the date the alleged unfair labor practice occurred. Forms for filing are supplied by the Regional (FLRA) office. Information required: description of the facts or events on which the charge is based, the sections of the Statute (5 USC Chapter 71) violated, and the persons to contact to investigate the matter.

**Union Filed ULP**

When the union files a ULP against the agency, they are responsible for sending a courtesy copy of the ULP charge to the facility/office they are filing against. The person named as the agency contact in the ULP charge will receive a copy of the ULP charge, before anyone else in the agency. Your agency should have a procedure in place that all ULP notifications and paper work be forwarded to HRO-LR for appropriate handling. The person named as the agency contact (usually HRO-LRS) will then receive a Official copy of the charges from the FLRA Regional Office along with a Form 75 (notice of Designation of Representative) this will have the assigned case number needed for all correspondences to the FLRA. It is not the responsibility of the person named as the agency contact, first-line supervisor or manager at a facility/office to respond to the charges or respond to an agent of the FLRA unless a Labor Relations Specialist is present. The HRO Labor Relations Specialist will request a written statement from the facility/office to develop the agency's position in response to the charge. The Form 75 (notice of Designation of Representative) will be handled by HRO-LRS to insure that future correspondence will come directly to your office. As a LRS with this data you need to investigate (who, what, when, where), research (find appropriate case law) prepare agency's witnesses.

The FLRA Regional Office will issue a letter to the charged party asking the agency to develop a description of the facts and circumstances concerning the charge. This description should include the name, addresses, and telephone numbers of potential witnesses, as well as the agency's position with respect to the allegations contained in the charge.

### **Investigation**

The FLRA Regional office may make direct contact with union officials and witnesses before receiving the agency's position of the charges. But, the Authority's Regional Office most likely will contact the agency's designated representative (as noted on Form 75) to arrange for interview of union witnesses. Interviews conducted during normal work hours of employees can be done without charge to leave, however, it is the agency's responsibility to schedule interviews at times that do not interrupt or impact the agency's mission. If necessary these interviews can be conducted by telephone.

Labor Relations specialist will be present during interviews in person or by telephone of supervisors, managers and agency's witnesses conducted by FLRA agents. This will allow the agency an opportunity to present its best case and avoid any formal complaint of failure to cooperate. There is no legal or regulatory requirement for the agency to meet with the FLRA agent but it has been successful in providing appropriate information and documentation to the FLRA investigation and sometimes the results leads to the dismissal of the ULP. After the investigation, what can you expect? After the FLRA Regional Director's Investigation of the charge, the Regional Director may take any of the following actions.

- Approve a request to withdraw the charge
- Refuse to issue a complaint
- Approve a written settlement agreement
- Issue a complaint
- Hearing
- Decision
- Remedies

### **Commonly Committed ULP's**

The most commonly committed ULP's concern management's failure to bargain with the union concerning conditions of employment for bargaining unit employees. Examples of these types of violations:

- Changing a personnel policy or procedures without first notifying the union and giving it a chance to negotiate.
- Failure by management to afford the union an opportunity to bargain on the impact and method of implementing the management change, when exercising a management right under the Statute.
- Change in a well-established past practice without bargaining with the union.

Other common ULP charges deal with failure or refusal of management officials to allow union representative to attend a formal discussion or investigative/Weingarten meeting; refusal to provide information which is necessary for the union to investigate or process a grievance; and assertions that agency management has discriminated against employees in taking various personnel actions based on union activities.

## **INTRODUCTION TO LABOR-MANAGEMENT FORUMS**

### **The Partnership or Forum Concept**

In response to never ending call to provide a more efficient and responsive government, relationships between labor and management are changing. Across the Federal Government, labor and management are forming partnerships and/or forums. By acknowledging their mutual interests and objectives, many former adversaries now work together as a united team with a common purpose and vision.

In prior years, traditional negotiation techniques were used to reach collective bargaining agreements and resolve workplace disputes. Union and management entered into talks with established, firmly held positions on issues, submitted inflated proposals, and argued vigorously. The parties exaggerated the importance of each proposal and demanded significant concessions by the other part in exchange for dropping inflated or unimportant proposals. Discussions focused on personalities and anecdotal data rather than issues. The net result of these tactics was a labor-management relationship built on acrimony, distrust, confrontation, and, worst of all, giving up control of the results of their negotiated agreement through grievance procedures or unfair labor practice (ULP) charges using the same behaviors learned while bargaining. A third party, such as an Arbitrator or the FLRA, would decide for you with a possibility of further damage to the labor-management relationship!

Many employees of the Federal Government and its unions have recognized the value of partnership or labor-management forums.

The concept of labor-management partnerships or forums is this:

Only by changing the nature of Federal labor-management relations so that managers, employees, and employees' elected union representatives serve as partners will it be possible to design and implement comprehensive changes necessary to reform government. Labor-management partnerships or forums will help Federal Government agencies to transform into organizations capable of delivering the highest quality services at the lowest cost to the American people.

**Note:** On December 9, 2009 the President signed Executive order 13522, creating Labor-Management Forums to improve delivery of government services. This Executive order now requires Management to allow pre-decisional involvement to Labor. The Executive Order required Forums be established at the level of recognition regardless of whether they are established at the National level or not. It is imperative that each LRA ensure a Labor-Management forum is established within their State.

### **A few principles of labor-management partnerships or forums in the Federal Government are**

1. The Federal workforce is valued as a full partner in substantive as well as procedural decision-making. This means that unions and agencies work together as partners to transform the way organizations are structured, work is performed, and services are delivered
2. Problems are identified and resolved through consensual rather than adversarial methods.
3. Collective bargaining promotes the public interest. It promotes partners' ability to deliver high-value goods and services to the public and fosters Federal organizations' shared values through innovative approaches.
4. Dispute resolution processes should be fair, simple, determinative, fast, and inexpensive.
5. Union effectiveness is one of the cornerstones of the productive workplace partnership.

### **Does Partnership/Labor-Management Forum Replace the Contract?**

A partnership or labor-management team agreement does not replace the Labor/Management Agreement (contract), rather it should complement it. The Council strongly encourages labor and management to continue to bargain in good faith, as required by law. A successful partnership will increase efficiency by speeding up the traditional labor / management processes, with the contract always there as the firm foundation of a good relationship.

### **Make the Partnership or Forum Work**

Time, patience, and trust are essential to making a partnership work. Here is an example of a specific approach useful in achieving a successful partnership.

### **Consensus Decision Making**

Teams arrive at the most acceptable solutions to problems by including the input and support of the entire group through consensus decision-making. This method leads to an improved level of quality in and acceptability of the decision. Consensus is reached when all members agree upon a single alternative, and each group member can honestly say:

“I believe that you understand my point of view and that I understand yours. Whether or not I prefer this decision, I support it because it was reached openly and fairly, and it is the best solution for us at this time.”

Though the consensus solution may not be everyone’s first choice, it is acceptable and understandable to everyone.

### **Tips for Reaching Consensus**

- Listen and encourage participation -pay attention to others
- Share information
- Don’t agree too quickly
- Don’t appease or vote
- Create solutions that can be supported
- Avoid arguing blindly for your own views or purposes (avoid positions)
- Seek a win -win solution
- Treat differences as strengths

**Remember:** Labor-Management Forums are required at the level of recognition as mandated by Executive Order 13522.

## SAMPLE LABOR/MANAGEMENT FORUM BYLAWS

### **Work Unit/Labor Organization Chapter**

#### **Purpose**

To investigate, study and discuss possible solutions to mutual problems affecting labor/management relations.

#### **Representation**

Union Five (5) members:

- President, Stewards, Officers, and two (2) Union Leaders.

Employer Five (5) members:

- Top management representatives, department head, two (2) Labor Relations representatives and one (1) other operating member from the departments working under the union contract.

The employer's Agency Head (TAG) and the National Representative of the union are ex-officio members.

Substitutes may be chosen by mutual consent, but it is recognized that a continuity of membership is required. The operating members from management and the two (2) representatives from the union, other than the president, business agent, and secretary-treasurer, will be rotated every twelve (12) months.

#### **Date and Time of Meetings**

Meetings shall be held once a month and they shall be limited to one and one-half hours. At the first meeting, a specific day and time shall be selected for future meetings. Every attempt shall be made to keep such a schedule, realizing that some flexibility is necessary.

#### **Meeting Agenda**

An agenda shall be submitted five (5) days prior to the meetings, to both parties. A topic not on the agenda shall not be discussed but rather shall be placed on the following month's agenda. The agenda shall include a brief description of each item to be discussed. Emergency items may be added to the agenda by mutual consent.

Discussion of agenda topics will be alternated, with the party occupying the chair exercising the right to designate the first topic.

#### **Chairing**

Responsibility for chairing meetings shall alternate each meeting between the union and management. Each party will determine whether their chair assignment will be permanent or rotate among their members.

#### **Reporting**

There shall be a Committee Secretary, not a member of the Committee, to record and distribute the minutes, prepare and distribute the agenda, and to be the recipient of subcommittee reports. Topics will be recorded as they are discussed. Any procedures or recommendations developing from these meetings will be communicated to the proper group; i.e., Operating Department, Joint Standing Committee, Negotiating Committee, etc. Drafts of the minutes of meetings will be submitted to each co-chair by the secretary for approval and submission to the other Committee members. All minutes, after Committee approval, shall be distributed to all employees; to labor, management and administrative staff.

**General Guidelines**

1. It is recognized that recommendations growing out of these meetings are not binding.
2. No grievances shall be discussed and no bargaining shall take place.
3. Topics that could lead to grievances may be discussed.
4. Each person wishing to speak shall be recognized by the Chair before speaking.
5. The Chair shall recognize a motion from either party to table a topic for further study.
6. All decisions made by the Committee, by itself and/or its subordinate entities shall be arrived at by the process of mutual consensus. There shall never be a vote taken by the Committee or any of its subordinate entities.
7. Either party may initiate a request to the Federal Mediation and Conciliation Service for assistance.
8. Each topic shall be discussed fully and action reached before proceeding to another topic. Topics requiring further study may be tabled. Where mutually satisfactory decisions are not reached, the topic shall be canceled, reverting to its proper place in the labor/management relationship - for instance, grievance procedure, negotiations, etc.

FOR THE LABOR MANAGEMENT FORUM CHAIRS

Dated:

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XXXX XXXXXX  
COL, ANG  
Management Chair

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XXXX XXXX  
President, XXXX Local XXXX  
Union Chair

## **IMPACT AND IMPLEMENTATION (I&I) BARGAINING**

Even where the decision to change conditions of employment of unit employees is protected by management's rights, there is a duty to notify the union and, upon request, bargain on procedures that management will follow in implementing its protected decision as well as on appropriate arrangements for employees expected to be adversely affected by the decision. Such bargaining is commonly referred to as "impact and implementation," or "I&I" bargaining.

### **Conditions of Employment**

Under title 5, United States Code, section 7103(a)(14), conditions of employment "means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise [e.g., by custom or practice], affecting working conditions, except that such term does not include policies, practices, and matters relating to prohibited political activities or classification to the extent such matters are specifically provided for by Federal statute.

### **Procedures**

Under title 5, United States Code, section 7106(b)(2), the procedures observed by management in exercising its reserved rights are negotiable. To qualify as a negotiable (b)(2) procedure, the proposed "procedure" must not require the use of standards that, by themselves, directly interfere with management's reserved rights or otherwise have the effect of limiting management's reserved discretion.

### **Appropriate Arrangement**

One of three exceptions to management's rights. Under title 5, United States Code, section 7106(b)(3), a proposal that interferes with management's rights can nonetheless be negotiable if the proposal constitutes an "arrangement" for employees adversely affected by the exercise of a management right and if the interference with the management right isn't "excessive" (as determined by an excessive interference balancing test).

### **Three Exceptions**

The three title 5, United States Code, section 7106(b) exceptions to the above involve (1) title 5, United States Code, section 7106(b)(1) **permissive subjects** of bargaining (e.g., staffing patterns, technology) on which, under the statute, agencies can elect to bargain, (2) **procedures management** will follow in exercising its reserved rights, and (C) **appropriate arrangements** for employees adversely affected by the exercise of management rights.

#### **1. "Permissive" Subjects Exception-**

This exception to management's rights deals with staffing patterns--i.e., with "the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty" and with "the technology, methods, and means of performing work." Under the statute such matters are, moreover, negotiable "at the election of the agency."

#### **2. "Procedural" Exception-**

Title 5, United States Code, section 7106(b)(2), dealing with procedures, really isn't an exception to management's rights as the Authority has held that a proposed procedure that "directly interferes" with a management right is not a procedure within the meaning of title 5, United States Code, section 7106(b)(2).

### **3. “Appropriate Arrangement” Exception-**

Title 5, United States Code, section 7106(b)(3) applies only if the proposal is intended to ameliorate the adverse effects of the exercise of a management right. Where such is the intent of the proposal, the Authority applies a balancing test in which it weighs the extent to which the proposal ameliorates the expected adverse effects against the extent to which it interferes with the management right and determines whether or not the specific proposal "excessively" interferes with the management right. If the interference is "excessive," the proposal isn't an appropriate arrangement and therefore is nonnegotiable. If otherwise, the proposal is a negotiable appropriate arrangement, even though it interferes with management's rights. To qualify as an "arrangement" to which it would be proper to apply the excessive interference balancing test, the proposal has to be "tailored" so that it applies only to those employees who would be adversely affected by the proposed management decision.

### **PAST PRACTICE DEFENSE HIGHLIGHTS**

Past practice is the term used to describe a pattern of workplace behavior that is sufficiently clear, of long enough duration, and well enough known to both management and union officials to constitute an unwritten rule or policy. To qualify as a bona fide past practice, such a pattern of behavior must also involve a condition of employment of bargaining unit employees, and must not conflict with applicable laws or government-wide regulations. Once established, essentially by unwritten consensus or silent toleration, a past practice becomes just as enforceable as a formally negotiated workplace rule that is placed in writing by the parties. That is, it may be enforced through application of the ULP procedures of the statute and the negotiated grievance procedure of a labor agreement.

#### **The Bottom Line...**

**Any time you are contemplating changing conditions of employment, offer the union an opportunity to discuss it. A short discussion on the front end can save weeks of headaches on the back end and help build your relationship!**

### **ARBITRATION**

The process of resolving disputes or the settling of differences between Labor and Management by referring them to a third person or persons chosen or agreed to by Labor and Management.

### **PREPARING FOR ARBITRATION**

#### **Conduction Research for Arbitration**

Although more information is provided below regarding specific subject-matter arbitrations, here is some general guidance on conducting research:

- a. Use technical representatives (i.e., labor specialist, personnelist, finance, etc.).
- b. Review applicable provisions of collective bargaining agreement.
- c. Review applicable laws, rules and regulations.
- d. Review applicable FLRA case law.
- e. Review published arbitration awards. Arbitration awards are published in services such as the following:
  - Federal Labor Relations Reporter
  - Labor Arbitration Reports (BNA)
  - Labor Arbitration Awards (CCH)
  - Government Employment Relations Report GERR (BNA)



### **Pre-Arbitration Brief**

A pre-arbitration brief is a device designed to orient the arbitrator about the arbitration to help the entire process proceed more efficiently. If used, the pre-arbitration brief should be served on both the arbitrator and the union. An example of a pre-arbitration brief is provided below. Note that includes the following information:

- a. The addresses and phone numbers of the Agency Representative, Agency Technical Advisor, and the Union President
- b. The date and location of the arbitration.
- c. Billing information.
- d. Notice that the agency reserves the right to approve or disapprove publication of the arbitration award.
- e. To whom the bill should be sent.
- f. Copies of proposed Agency exhibits.
- g. A statement of any potential issue of arbitrability (which will be discussed in more detail below).
- h. A statement of the issue. A statement of the issue will arise in virtually every arbitration. This is simply a statement of what question or issue the arbitrator has been hired to answer. Often, and not surprisingly, the Agency and the Union disagree on how the issue should be stated.
- i. Background and history of the grievance. This should be a brief statement of what the arbitration is about, and the events that lead up to the arbitration. This is meant merely to orient the arbitrator, and is not designed as an opening statement.
- j. Please Note that the use of a pre-arbitration brief is a matter of preference. It is not necessarily either expected or required - however, as always check your CBA, which may require or prohibit the submission of a pre-arbitration brief.

### **THE ARBITRATION HEARING**

#### **Sequence of Events**

There is no “script” or other guide that dictates the exact sequence of events in arbitration. Arbitrators have individual preferences, and procedures do vary. However, the typical order of arbitration is as follows:

- a. Preliminary matters.
  - submission of issues;
  - motion for sequestration of witnesses (this is often done simply by agreement of the parties per past practice);
  - requests for admission of joint exhibits;
  - requests for admission of stipulations;
  - status of settlement discussions, if any.
- b. Opening statement(s). Neither party has an obligation to give an opening statement. However, this is your first opportunity to address the arbitrator and make a first impression concerning the facts of your case without objection from anyone.
- c. Order of presentation - who goes first?
  - If the Union filed the grievance over a non-disciplinary action, the Union presents its evidence first.
  - If the Union filed the grievance over disciplinary action, management presents its evidence as to the basis of discipline first.
  - If the Management filed the grievance, management presents its evidence first.
- d. Direct and cross examination of moving party’s witnesses
- e. Opposing side presents evidence. Direct and cross examination of opposing party’s witnesses.

f. Rebuttal evidence.

g. Closing arguments. At the conclusion of the presentation of all of the evidence, the arbitrator may ask if there will be oral arguments made now or the submission of written briefs within an agreed upon number of days after the conclusion of the arbitration or both. The parties may agree not to submit written briefs if the parties desire a more quickly rendered arbitral decision.

h. Arbitrator's Decision. Consistent with time limits established in the collective bargaining agreement, the arbitrator issues a final and binding decision. Exceptions or appeals of this decision may be made under certain circumstances.

### **Post-Arbitration Brief**

An arbitration brief is a written document submitted to the arbitrator after the conclusion of the arbitration hearing that is used either as a substitute for a closing argument at the hearing, or a more detailed statement of the agency's case complimenting a closing argument. There is no universally accepted form for an arbitration brief, but a typical arbitration brief includes a fact section, and a law and argument section. The testimony elicited at the hearing, and the evidence previously submitted are drawn together in this document along with the applicable law and/or provisions of the applicable collective bargaining agreement so that the arbitrator clearly understands the agency's position in the arbitration.

### **The Arbitrator Ruled Against the Agency, Now What?**

If the arbitration concludes with an arbitral award adverse to the Agency, the question of appealing the decision inevitably will arise. The first question that needs to be answered is essentially what forum or agency has subject matter jurisdiction to hear the appeal. Depending on the facts and circumstances of the individual arbitration an appeal of the arbitral award might be filed with the Federal Labor Relations Authority, the Equal Employment Opportunity Commission, or in federal courts. If consideration is being given to filing an appeal or exceptions, please remember that the attorneys and specialists at the National Guard Bureau are available to answer your questions regarding appeals and exceptions to administrative agencies and in the federal courts.

# CONTRACT NEGOTIATIONS

## CONDUCTING NEGOTIATIONS

### **I. Introduction**

### **II. Positional Bargaining**

### **III. Interest-Based Bargaining**

#### **I. Introduction**

In the past, negotiation has been treated as either a sign of weakness, or something that we're required to do even though we really could care less for the process, and even less for the other side:

“Real men (and women) don't negotiate; especially management, and especially National Guard officers and senior enlisted, right? I mean, who does the union think they are, anyway? They should feel lucky they have a job. In fact, they should be thanking us instead of crying about all these insignificant things that just get in the way of “the mission,” right? Oh, the law says we have to...well, I guess we'll sit down and talk to them, but if they think they're getting a parking spot, they have another thing coming. Oh, that's negotiable...well, if they think they can have a break room...really? Well, I'll make them all work grave yard...TAG sets the schedule? Well, who the heck are you, I never heard of Labor Relations.”

And so it goes. The unsung hero of that inconvenient reality is a Labor Management Agreement, and a Labor Relations Program, both of which tend to go unnoticed until the union rears its ugly head. Now, there's no need to worry. Yes, negotiating with the union is something we have to do, but it doesn't have to be a painful process. The reality is that we, as humans, negotiate all the time. We are engaged in negotiation from the time we awake until we go to bed. However, the focus shouldn't be who we negotiate with, but whether we're successful in those negotiations, and that doesn't always mean that we get our way. However, effective negotiation can make the difference between a successful organization and one that is not.

What is effective negotiation? Let's take a look at the two primary negotiating tactics.

#### **II. Positional Bargaining**

Traditionally, positional bargaining is viewed as an activity in which two or more parties hold a position on a certain subject, and each vies for advantage at the other's expense. The best negotiators are those who succeeded in obtaining the largest slice of the pie, with little attention paid to whether the pie could be expanded in some way, or how the agreement ultimately affects the “losing” party.

Positional bargaining assumes that the opposing party is willing to take advantage of the negotiator (fairly or unfairly) and therefore success requires using competitive negotiation techniques, and using them more effectively than the opponent. Positional negotiators are often encouraged to prepare with the goal of manipulating, deceiving, or intimidating the opponent. Although this approach is considered outdated, it is still widely practiced. Positional bargaining tactics include the following:

- Arranging to negotiate “on your own turf”
- Composing your team in a way that balances or slightly outnumbers the “opposing party”
- Timing the negotiations to your advantage
- Locking yourself in – otherwise known as “marathon negotiating”

- Designating your demands as a “precondition”
- Always asking for more than you can get with the goal of landing somewhere in the middle
- Placing your major demands at the beginning of the agenda
- Making the other side make the first compromise as a subconscious sign of weakness
- Using two negotiators; good cop, bad cop
- Driving up the score – exploiting the other side’s weaknesses
- Appearing irrational – acting crazy
- Raising some of your demands as the negotiations progress – counter offering the counteroffer
- Claiming that you do not have authority to compromise or agree to an offer – delay tactic

While these may seem obvious, and maybe even appealing, negotiation tactics of this kind foster animosity and confrontation. They hinder progress and create adversarial relationships rather than a collaborative atmosphere. Also, when applied by inexperienced negotiators, these tactics can completely shut down the other side and drive the parties to impasse, usually destroying what little progress may have been achieved. This type of behavior may be suitable at the local used car lot, but is unsuitable for workplace settings. Positional bargaining should be avoided, and should only be applied as a last resort. After all, we’re all on the same team. Clearly, a more collaborative mode of negotiation is recommended.

### **III. Interest-Based Bargaining**

Interest-Based Bargaining is an alternative to traditional positional bargaining. It is a process of joint problem-solving that offers parties flexibility and doesn’t lock them into predetermined issues and bargaining positions. Instead, the process begins with understanding the problem and identifying the interests that underlie each side’s issues and positions.

Understanding the interests and concerns behind a position or issue can often reveal some of those interests are mutual, and that both parties are trying to achieve the same goal, just in a different way. Once the fog clears, what might have appeared to be competing interests are now common goals. Dealing with each other in this way makes it possible to generate and consider options to satisfy particular interests that may never have been considered before.

#### **The Principles of Interest-Based Bargaining**

Interest-based agreements tend to address issues in more depth than those reached using traditional techniques because they are the result of a process aimed at satisfying mutual interests by consensus, not just one side’s interests at the expense of the other. And because negotiators are dealing with each other on a different level and with mutual respect, the results usually go beyond immediate issues to address longer term interests and concerns, thus enhancing the labor-management relationship.

Interest-based bargaining captures some of the highest principles originating, but not always practiced, in traditional distributive bargaining, and makes those principles consistent parts of the process:

- Sharing relevant information is critical for effective solutions.
- Focus on issues, not personalities.
- Focus on the present and future, not the past.
- Focus on the interests underlying the issues.
- Focus on mutual interests, and helping to satisfy the other party’s interests as well as your own.
- Options developed to satisfy those interests should be evaluated by objective criteria, rather than power or leverage.

### **Where It Works Best**

Interest-based bargaining is not -- nor should it be -- a universal replacement for positional or distributive negotiating. In an appropriate setting it offers an alternative with certain advantages. Outside that setting, it will probably fail. The parties will switch back to traditional bargaining, but with increased suspicion and distrust, and their relationship may suffer additional damage. Some of the necessary components which increase the likelihood of successful negotiations are:

- Evidence of labor-management cooperation during the past contract term.
- Willingness of the parties to fully share relevant bargaining information.
- Willingness to forgo power as the sole method of "winning."
- Understanding and acceptance of the process by all participants and their constituents.

### **Is It Right For You?**

Effective interest-based bargaining begins with an orientation by trained personnel, like FMCS mediators. If participants cannot accept the principles and assumptions that underlie the process, it is highly unlikely that they will be able to follow the steps and use the techniques during negotiations.

If you wish to receive training in interest-based bargaining, please contact:

## **CONDUCTING NEGOTIATIONS FROM A COLLEGIATE PERSPECTIVE**

### **Negotiating Part 1 – Competitive or Adversarial Negotiation (Positional)**

Many of the excerpts here are from Dr. Allen, of Texas A&M University, Labor Relations Course and the Fisher and Ury Book "Getting to Yes".

Before examining competitive negotiations, it may be useful to examine in some detail the basic components of the relationship that emerges between the parties to a dispute when they seek to resolve it through negotiations. By understanding the characteristics of the relationship, you are likely to gain some insights into the choices made by negotiators to behave cooperatively or competitively. Rubin and Brown, in their excellent book entitled *The Social Psychology of Bargaining and Negotiation*, describe the bargaining relationship in terms of five elements.

**1. There are at least two parties involved.** The two parties could be individuals (e.g., . customer and salesperson when trying to determine the selling price of a product) or they could be more complex social institutions as found in union/management relationship or in peace talks like those currently involving NATO countries, Russia and Serbia.

**2. The parties have a conflict of interest with respect to one or more different issues.**

There are two major categories of conflict: single issue and multiple issue cases. In single issue conflict, there is only one issue at dispute. With respect to that single issue, the parties can be expected to have different preferences. For example, when you go out to buy a new car, your best deal might be characterized by a high trade in on your old car and a low price on the new car. A profitable deal for the sales person might cause your monthly payments to be higher by decreasing the value of your trade-in and maximizing the cost of the new vehicle. This situation represents a classic bargaining situation that can be described as a zero sum game, i.e., whatever one party gets in terms of a better deal is realized at the direct expense of the other party. In this example, the subject of bargaining is the "final value" of the deal and the conflict of interest concerns where the final agreement will be struck. While such situations do not have to be viewed as a zero-sum game, they are commonly approached that way.

In the multiple issue situation, the parties disagree on more than one issue. These situations tend to be more complex because the conflict of interest may involve the preferences for the different possible

agreements on a particular issue as in the single-issue case. For example, in a collective bargaining situation, unions and management may have a conflict of interest over the increase in wages to be granted.

Such disagreements may also arise concerning other issues the labor and management's bargaining agenda. The bargaining situation becomes more challenging as the number of issues at dispute increase. In addition to this conflict, there may also be conflict expressed in terms of a difference of opinion concerning the order of assigned to the issues by the parties involved. This has implications for the order in which items are negotiated. For example, management representatives may believe that the negotiation of a strengthened management rights clause is a top priority item whereas the union thinks its unimportant. On the other hand, the union believes that negotiations over a wage increase is the most important issue, and as a result, wants to deal with that issue before any others are addressed. Because of these different preferences, the parties may come into conflict over the priorities assigned to the various issues needing to be resolved.

**3. Regardless of the existence of prior experience or acquaintance with one another, the parties are at least temporarily joined together in a special kind of voluntary relationship.**

VOLUNTARY is the key word in this statement. At the outset of negotiations the parties to the dispute must believe that they would be better off if the conflict was resolved. It is this belief that encourages the parties to voluntarily enter into the bargaining relationship. They are free to enter the relationship. Similarly, they are free to leave it if it is subsequently determined that a mutually acceptable resolution of the disagreement cannot be reached.

In other words, for bargaining to exist, the parties must believe they are participating by choice, not by compulsion. Given this perspective, the bargainers are faced with two important and related choices. At one level, each bargainer must choose whether they should enter into and then remain in the bargaining relationship. In making this decision, each bargainer must determine whether he expects to gain more by bargaining than by not. In order for bargaining to take place, each party to the dispute must believe that they will be better off or at least no worse off relative to the situation they would be in if no agreement was reached. At a second level, each party must be able to choose from one or more possible outcomes that could resolve the dispute. Out of the list of potential solutions for the disagreement, at least one has to be better than the party's no-agreement situation. If none of the possible outcomes are better than the no-agreement alternative (in unit 5 this is referred to as a BATNA), then the parties must be able to reject the alternatives. If none of the options provide them with losses greater than the gain that can be realized by a negotiated solution, then the parties must be able to stop bargaining.

This view of the voluntary nature of the bargaining relationship can be described by stating that the parties have mixed motives toward each another. On the one hand they believe that they would be better off as a result of a negotiated solution. This suggests that they must be willing to cooperate with the other side, at least to the extent needed to reach an agreement. When they enter the bargaining relationship, the parties must believe that an agreement is possible and that they have more to gain than to lose by working with the other side to resolve the conflict. If the interests of the parties were the same, there would be little to bargain about. Conflict is more likely to be the result of a clash of interests than a mutual sharing of interests. At the same time, if the parties' interests were totally opposed to each other's interests, then it would be difficult to cooperate to the extent needed to reach an agreement. This suggests that there is a range of conflict situations that have the potential for bargained solutions. When there is too little conflict, negotiated outcomes are not needed. The parties can usually live with the status quo. When the conflict is extreme, bargained solutions are not feasible. Think about a conflict that involves a fundamental disagreement over bedrock human concerns, e.g., the abortion issue. Because of the profound and intractable differences between the parties on fundamental issues such as when life begins and whether life can be taken to protect another person's life, a negotiated solution to the abortion debate is unlikely.

**4. Bargainers are concerned with either (a) the division or exchange of one or more specific resources and/or (b) the resolution of one or more issues or problems about which the parties disagree.** Each party wants an outcome that will improve or at least not harm its status quo situation. One of the basic characteristics of a bargaining relationship is that the outcomes received by one party must be somehow related to the outcomes received by the other party to the dispute. This is known as outcome dependence. The quality of the outcomes you receive from bargaining is dependent upon the other bargainer's outcomes. In a union/management situation the wages increase negotiated by the union must have an effect on the revenues of the firm. Similarly, a broadened management rights clause has to give management greater freedom to conduct business, and at the same time, somehow restrain the rights of the union's members. The needs and interests of the union and employer are correspondent to some degree. Both sides want the company to be financially success. If it fails, owners and managers lose as do the employees who lose their jobs. At the same time interests are at least partially non-correspondent. The Union is probably looking for a wage increase larger than the employer is voluntarily willing to grant.

Similarly, management will probably want to expand its right, thereby limiting the discretion of the union, more than the union is voluntarily willing to accept. Rubin and Brown point out that where the parties' outcomes are completely correspondent as would be the case where whatever benefited party A also benefited party B, bargaining would probably not be necessary. There is simply no need for the parties to enter into a bargaining relationship. There is no conflict to be resolved. On the other hand, where bargaining outcomes are completely non-correspondent as would be the case when a gain for party A was achieved as a result of imposing a loss on party B, bargaining would be difficult. This interdependence of outcomes leads to a problem known as the "dilemma of goals." Each party would like to negotiate a settlement that is more favorable than their status quo alternative. However, as they move to such an agreement, the parties expose themselves to two risks. If they drive too hard for an outcome that maximizes their gain, the other party may be left with an outcome so unsatisfactory that they refuse to agree or even leave the relationship. However, if they do not drive hard enough for an acceptable settlement, their needs and interests may not be met while the other party receives a very good outcome. To resolve this dilemma, each bargainer must establish what is believed to be an acceptable settlement. This can be defined as one that is acceptable (i.e., better than the no-agreement alternative) while at the same time having a good chance of being accepted by the other bargainer. The challenge is to obtain the best agreement possible given the other bargainer's likely resistance.

**5. Bargaining activity usually involves the presentation of demands or proposals by one party, evaluation by the other, followed by concessions and counter proposals. These activities are sequential rather than simultaneous in nature.** To secure a bargained solution to a dispute, the parties need information about the others preferences for alternative solutions. However, only the other party to the dispute can provide much of this necessary information. This means that not only are the parties' outcomes interdependent (the previous point), their information needs are also interdependent, i.e., they are dependent of each other for the information needed to reach a negotiated solution. This is known as "information dependence." The exchange of proposals and counterproposals provides the bargainers with information about each other's preferences. Given the sequential nature of the exchange of proposals, the party receiving a proposal has an advantage (at least temporarily) by having more information about preferences than the party making the proposal.

With this information the party receiving the proposal should be able to craft a more precise bargaining position than would be possible than if the information was unavailable. The often complex and tortured way in which information is exchanged is explained to some degree by the need for information exchange to take place (you can't have bargaining without it) and restraints against providing the other bargainer all of the information it needs. These incentives and obstacles for the exchange of information lead to two

dilemmas that the parties must resolve to negotiate effectively. First, there is the "dilemma of trust." By satisfying the information needs of the other bargainer, you risk being exploited by the other side who can use that information to your disadvantage. In other words, by sharing information with the other side you might not be able to realize your bargaining objectives. You have to decide how much information to share with the other side. You also must decide how much of the information provided by the other should be believed. If you believe everything the other side has to say, you may not be able to satisfy your needs and interests. However, if you don't believe anything the other party has to say, then there is no basis for a relationship through which the conflict can possibly be resolved. Rubin and Brown point out that at some point in the relationship, each party must confront this critical problem. They have to draw some conclusions, based on the behaviors they have observed, about the other bargainer's true intentions, interests and preferences. Based on these conclusions, a decision can be made concerning how much information you are willing to share with the other side and how much of the information they provide you that you are willing to believe.

The second dilemma caused by being dependent on each other for information is known as the "dilemma of honesty and openness." Information must be exchanged for bargaining to take place. The issue concerns how honest or deceitful you will be when you provide information to the other side. If you are completely honest, there is a risk that the other side will use the information to your disadvantage. Alternatively, by being honest, you may commit yourself to a position from which it is difficult to move later in negotiations. Clearly, there are advantages associated with withholding or concealing information until a time that is most advantageous to your position. Withholding information creates the opportunity to be flexible later in negotiations. Doing so also allows you to put off the decision to be honest or deceitful to a later point in the negotiations. Rubin and Brown point out that to sustain a bargaining relationship, each party must select a middle course between the extremes of complete openness and honesty and attempts to totally deceive the other bargainer.

### **Adversarial or Distributive Negotiations**

Adversarial or distributive bargaining is based on a specific configuration of the characteristics of the bargaining relationship as described by Rubin and Brown. Rubin ("Negotiation," American Behavioral Scientist) talks about how the characteristics of the bargaining relationship force negotiators to walk a tightrope. The dilemmas created by the interdependency of the parties discussed in the preceding section push them towards the extremes of cooperation and competition. Rubin specifically discusses three tightropes:

1. While it may be tempting to press for an outcome that is most favorable to your position, by doing so you risk forcing a solution on the other bargainer that is worse than their no-agreement position. As a result, they can be driven from the bargaining table thereby precluding the problem from being resolved. Alternatively, you might be so tempted to cooperate with the other side to assure a good relationship that you settle for a poorer outcome that you could have obtained if you had been less cooperative.

2. The second tightrope involves the decisions to be open and honest or to rely on misrepresentations as part of your bargaining strategy. If you are totally open and honest, you risk being exploited by the other side. However, if you completely withhold information from the other side, they may mistrust you or even refuse to bargain with you.

3. Negotiators must walk another tightrope defined in terms of short-term and long-term gain. While it may be possible to negotiate an outcome that is very beneficial to your side (at the expense of the other side) in the short run, you risk destroying the relationship and any possibility for securing mutual gain over the long run. This is because of the continuity of the relationship that has already been discussed. For example, a short-run decision to lie to the other side could elicit feelings of mistrust that decrease the likelihood that bargained solutions can be reached in the future.



Distributive bargainers have the following characteristics:

1. Seek to maximize their own returns from the conflict resolution process in the "here and now" with relatively little concern for the longer run consequences of their behavior. In other words, they have decided to emphasize their short run gains without much regard for the long run relationship with the other side.
2. Frequently consider the need and interests of the other bargainer as being illegitimate, and therefore, tend not to give much attention to such issues while negotiating. The focus for the distributive bargainer is to gain as much as they can from the negotiations without concern for the other bargainers needs and interests and for whether the negotiated solution benefits the other bargainer as well.
3. Have flexible standards with respect to the tactics that they will employ to get the negotiated solution that they want. In other words, they may be willing to do whatever it takes to get what they want, including the use of tactics that might be considered immoral or unethical in other circumstances. If withholding information, distorting information or lying is necessary to secure their preferred outcomes, the distributive bargainer is willing to use such tactics.
4. Will behave cooperatively only to the extent that it advances their position or otherwise advances their self interests.
5. Focusing on winning the negotiations, i.e., getting the best outcome for them with little concern for resolving the problems that led to the conflict.
6. Strongly defend themselves from the bargaining tactics employed by the other side.
7. Tries to control the bargaining process.

Distributive or adversarial bargainers want to get the best deal for themselves with little concern for the concerns of the other side. Distributive bargainers are likely to believe that the interests of the other side are not legitimate, that the other bargainers probably cannot be trusted, and that it is very risky to be open and honest when dealing with the other bargainers. It can also be assumed that it is quite likely that the other bargainer holds a similar set of beliefs. It is also commonly assumed that resources are fixed (i.e., a zero-sum game).

As a result, a gain realized by one party comes at the expense of the other. The strategy and tactics of distributive bargaining have developed in response to these assumptions about the nature of the conflict and the character of the bargainers.

**The objectives of distributive bargaining.** Clearly, the objective of adversarial negotiations is to get the best deal for you. For example, if you are buying a house, you want the lowest price possible while the seller is trying to get the highest possible price for the dwelling. In unit 4, this process will be described as claiming value. Distributive bargaining is most likely to be observed when there is a conflict between two or more parties over the allocation of resources perceived to be scarce. For example, in labor/management relations, the parties commonly engage in distributive bargaining when trying to settle disputes over issues such as wages and other economic terms and conditions of employment. The term distributive bargaining comes from the perspective that there is a certain amount of value (e.g., the revenues of the company) that is fixed and can be allocated between the parties. The revenues of the firm could go to the owners of the firm as profits or to the workers as pay raises. Whatever money is distributed as profits is unavailable to distribute the workers as pay raises and vice versa. In the union/management example, the objective is use the bargaining process to distribute the revenues in a way that is most favorable to your side while the other bargainer is pursuing the same objective. While the amount of revenue is fixed, the share that can be received by each side is variable. The strategy and tactics of distributive bargaining are designed to get your side the biggest share possible. Because of this objective, there is a fundamental conflict of interest between the parties to the dispute (i.e., how the revenues are going to be divided).

**Preparation for negotiations.** The best way to talk about the strategy and tactics of distributive bargaining is to review examples that focus on the parties' preparation for this approach to bargaining. Properly preparing in advance of negotiations and developing your communication and problem-solving skills is the foundation of successful negotiations.

### **Negotiating Part 2 – Collaborative or Win-Win Negotiations**

One of the basic skills needed by managers today is the ability to negotiate effectively. In the old days, disputes among managers or between managers and subordinates could be resolved by appeals to someone higher in the organizational hierarchy. This is less likely to be the case today. Many organizations are decentralizing decision making in an attempt to become more responsive to the rapidly changing demands placed on them by their environments. At the same time, a growing number of organizations are trying to get workers more involved in decision making as part of efforts to enrich working environments and to enhance organizational performance. While such changes represent important reactions to growing competition, and changing societal values, the result is a looser organizational structure. Consequently, rules and regulations that facilitated decision making in the past, cannot survive the rapidly changing pressures for organizational change. Therefore, they are supplanted by guidelines. Job descriptions are written in vaguer terms. Levels of management are eliminated or their roles drastically revised in attempt to streamline the operations and cut costs. The result of such change is greater conflict among members of the organization at the same time the traditional approaches to conflict resolution appeals to higher level management are becoming less available and less effective.

Many of us are likely to cringe at the prospect of conflict becoming greater in our organizational homes. However, increasing conflict is not necessarily detrimental to you or the organization. In the old days, organizational theorists viewed conflict as a failure to manage effectively. It was ignored, or resolved by appeals to higher management which would impose solutions upon the parties to the conflict. Today, conflict is viewed in a different light. The contemporary view of conflict is that it is an inevitable and necessary part of organizational life. Some conflict is beneficial because it helps identify problems, that if resolved in an effective and constructive manner, will lead to a better organization. For example, a disagreement between two departments can lead to the development of new solutions to old problems. As a result, the conflict serves as a stimulus for organizational innovation and change. With this perspective, the task of the manager is not to ignore the conflict or to resolve it for his or her subordinates but to oversee its resolution through the application of effective bargaining practices. It must be emphasized that conflict handled effectively can be a positive force in the organization.

It increases the awareness of the parties to the disagreement to the problem, it motivates those involved to address the issues, and if handled constructively, conflict can enhance morale and cohesion. Members of the organization see that their relationships are strong enough to withstand the stress created by the problem and are impressed by their ability to handle the challenges facing them.

The idea that conflict is a necessary and inevitable part of organizational life that does not have to be a destructive force is based on the premise that the conflict can be handled in a constructive fashion. In our society whenever there is little reason to believe that this is likely to be the case. Historically we tended to take an adversarial approach to negotiations. We assume that any negotiations over the resolution of the conflict will be a win/loss process. As a result, it is necessary to behave competitively in order to get what we want from the discussions. Based on this perspective, negotiations usually take a rather tortured course. We state our positions in terms of demands. We limit the information that we share with the other side to that which supports our position. We are unlikely to make concessions. Remember, we think we are in a win/loss situation. As a result, whatever the other side gets represents a loss to us. We rely on threats and underscore our willingness to walk away from the negotiations if we don't get what we want. We might threaten to hurt the other side. Don't be surprised if I get all emotional and start calling you names. Because I am afraid that I am going to lose something of value, I am motivated to withhold

information, distort information, and mislead you about what I really need from the negotiations. My guess is that you are behaving in a similar manner. We can never forget the fact that negotiations involve human beings. This is easy to forget because we assume that we are dealing with some abstract other bargainer and not a human being somewhat like ourselves. We can never forget that the other bargainer has emotions, deeply held values, backgrounds and viewpoints, and can be unpredictable – just like us.

Bargaining of this nature has its applications but not when resolving organizational conflict. This approach to bargaining has a tendency to lead to winners and losers. The more powerful party tends to win and the weaker party is likely to lose, regardless of the relative merits of the dispute. This can mean that the best solution to the dispute might not be found. Consequently, the organization is diminished to some degree. There was a better solution to the problem available to the parties but because of their approach to negotiations they were unable to find it. As a result, a less than optimal solution was reached. In bargaining parlance, it is said that the parties leave something of value to the bargaining table.

While a good solution was available to them, they opted for a solution that was good for one side and bad for the other. In adversarial bargaining, the best you can usually hope for is an outcome that is mediocre. While this is better than a bad solution, it is not as good as a good solution to the problem.

I'll argue that the negative consequences associated with adversarial approaches to bargaining go beyond the inability to develop good bargaining outcomes. I'll argue that future relationships between the negotiators are also likely to suffer. How do you feel after you just got tromped at the bargaining table? Are you likely to view it as a growth experience? Will you praise the other bargainer's expertise? Will you simply write it off to experience? Will you forgive and forget? NO!! You start plotting your revenge. You will sit back and wait for an opportunity to get even. And then when the opportunity arises, you will exact your revenge. You'll get even and then some. This is a natural reaction to getting whipped at the bargaining table but it is a reaction that can tear at the fabric of organizational life. Unlike other bargaining arenas, negotiations take place between individuals who must live together after the negotiations are over. You should not forget that you have a continuing relationship with the other side that if damaged as a result of the bargaining process the other bargainer and the organization can be hurt. It is important that whatever approach to negotiations that is adopted be considerate of the interest of the people involved and the need to preserve or even strengthen their relationship. Because adversarial negotiations can be so detrimental to the individuals involved and to the organization, it was necessary to revisit our traditional approach to negotiations and develop approaches more hospitable to the needs of organizations and their members today. Win/Win negotiations is a label that has been attached to an approach to bargaining that is more likely to yield wise solutions to problems while maintaining or bettering the relationships among the individuals party to the process.

I like to use an approach to bargaining called principled negotiations. You can read about it in the book, *Getting to Yes*, by Fisher and Ury. It takes a problem solving approach to negotiations that leads to good agreements that are reached efficiently and with amicable relationships between the parties. Principled negotiations have four fundamental elements to it.

First, it recognizes that the involvement of people in the bargaining process creates problems that can interfere with getting the results that you want. Most times, negotiations is characterized by a "people problem" because you see the other bargainer's needs, interests, personality and bargaining style as an obstacle to your bargaining success.

Principled negotiations encourage you to specifically deal with your concerns about the other side and the relationship that exists between you. This is especially important in bargaining that takes place within organizations because the parties to the negotiations have to live together after the conclusion of the negotiations.

We usually entangle our concerns about the other bargainer with our discussions of the substantive issues. For example, if we don't trust the other bargainer, a "people problem" we respond by trying to protect our position by withholding information, distorting information and otherwise misrepresenting our position in the negotiations. It is likely that the other side is doing the same thing. It will be difficult for negotiations to be successful and satisfying with this approach.

Principled negotiations require that you separate the people from the problems. You need to deal with the people problems separately from the substantive issues. The key to this approach is to deal with the people problems directly and not try to bury them in the discussions over substantive issues.

For example, if you don't trust the other side, address that issue. You could work to develop a better relationship with the person so that trust can be developed. I cannot overemphasize the power of having a good relationship with the other side. If the parties know each other well and appreciate the advantages of having a good relationship, they will be able to talk effectively during the negotiations process. Also, substantive discussions may go more smoothly because one or both sides to the negotiations might be willing to make concessions or share information for the sake of the relationship.

Another approach is to discuss the lack of trust with the other side. Perhaps it exists because you don't know the other bargainers or understand their position. It might be possible to make separate arrangements to deal with the lack of trust issue. For example, if the Americans and Soviets don't trust each other enough to believe that the other side will reduce the number of weapons they have in their stockpiles, they negotiate agreements that allow for on-site inspections. With this type of side deal, trust issues do not have to be resolved but they also do not have to stand in the way of an agreement.

The second dimension of principled negotiations is the need to focus on interests and not positions. adversarial negotiations usually focus on positions. The union comes into negotiations and demands that the company provide one year notice before it introduces any new machines into the operations.

Management responds that it has a fundamental right to run the plant the way it wants including the right to introduce technological change. Both the union and management have expressed positions. Positions are the public stances taken by the parties concerning the outcome that they desire from the negotiations.

Since the problem appears to be a conflict of positions and since the goal of negotiations is to reach a decision concerning a position, it is natural to focus attention on positions. However, this typical approach frequently leads to frustrations. It is impossible to respond to the union's position with respect to technological change and give due consideration to the company's position on the management's rights issue.

However, an agreement might be more likely if the parties focused on interests. Interests are the wants, needs, desires, fears, and concerns that motivate people to behave the way they do. They are the silent movers behind the commotion represented by the positions expressed by the parties. Your position is a stance that you decide to take with the other party. Your interests are the reasons you decided to take the stance.

Why did the union want to restrict technological change? In other words what was its interest? The concern was probably job security. Certainly one way to provide greater job security is to restrict technological change but at the same time it sharply limits management's prerogatives, an interest very dear to management representatives.

What would have happened if the union went to management and said “In the face of the weakening economic conditions we have grave concerns about the security of our members’ jobs. What can be done to enhance their job security during these tough times?” Would they have gotten the same negative response that they would have gotten when they tried to restrict technological change? Not likely. The likelihood is that they would have reached some kind of agreement.

For example, in the auto industry, the union has addressed the job security issue by negotiating employment levels and then allowing the companies to do what they want to do with respect to change as long as the employment levels are respected. This approach respects the workers need for job security while giving the company the flexibility it needs to run the plant.

They could have negotiated retraining and relocation of displaced workers, job sharing, early retirements, or a number of other approaches that would enhance workers job security without impinging on management rights.

This example shows why an emphasis on interests rather than positions works so well. For every interest, there are usually several possible positions that could respond to it. Going back to the union example, it might be possible for the parties to find a position that is responsive to the union’s concern for job security without impinging upon management rights. This is harder to do when the focus of attention is exclusively on positions without understanding the interests that underlie these positions. It must be emphasized that when you look behind opposed positions for the motivating interests, you can often find an alternative position which meets your interests as well as the interest of the other side.

The most dominant interests involve basic human needs. In searing for basic interests behind a declared position look for those bedrock concerns that motivate all people such as security, economic well being, sense of belong, recognition, esteem, and control. If you can take care of such basic needs, you increase the likelihood of reaching an agreement.

How do you do this? **Preparation is the key.** Knowing what’s driving you is critical. What do you want from the negotiations and why are these outcomes important to you? It is also important that you understand the other bargainer’s interests. Studying the other side prior to bargaining is important. It is also important that you be able to talk about interests with the other side if principled bargaining is going to work.

The purpose of bargaining is to serve your interests. If you did not think you would be better off with a negotiated solution to a problem then why would you bargain. You wouldn’t. The chance of having your interests served increases when you can communicate what those interests are. If you want the other bargainer to take your interests into consideration, then you must be willing and able to explain what those interests are.

It is also important that you be able to help the other side express their interests. Use of questions about their needs is a useful approach. Putting yourself into their shoes and imaging what it is like to be there might provide you some useful insights.

Once interests are addressed and understood then the bargaining problem is to identify a position that is responsive to both sets of interest.

This takes us to the third dimension of principled negotiations. Fisher and Ury refer to it as the invention of mutual gain. This refers to the ability to invent solutions that are advantageous to both sides. Since both sides benefit from the negotiations, the term win/win negotiations is frequently applied to the process.

As I have studied the bargaining process, it has become more and more apparent that principled negotiations and problem solving are the same thing. The parties have a problem. In light of the interests that we have identified, is there a position that is acceptable to both sides. This is a problem that can be addressed by the application of problems solving techniques.

We can define the problem. We can apply problem solving techniques such as cause/effect modeling and force field analysis. Then we can generate a list of solutions that are responsive to the problem. This is where we can apply our creativity stimulating techniques such as brainstorming. We want to get as many potential solutions on the table as we can. Then we want to evaluate these alternatives to see which ones provide opportunities for mutual gain. At the same time we want to invent ways to make it easy for the other side to make the decision to agree with an option that we want.

This requires that you examine the options from the other sides' perspective and imagine how they might criticize them. Then you need to think about how you can respond to that criticism. This kind of exercise will help you appreciate the restraints under which the other side is operating. Then you can generate responses that will address the concerns that the other side is likely to raise.

In a complex situation, creative inventing is an absolute necessity. In any negotiations, it can open doors and produce a range of potential agreements satisfactory to both sides. Therefore, generate as many options as you can before selecting from among them. Invent first, decide later. Then make it easy for them to agree with your position.

The fourth dimension of principled negotiations is the need to insist on objective criteria for determining the final deal.

In short, this means that you commit yourself to reaching a solution based on principle, not pressure. This also means that you concentrate on the merits of your case, and not the toughness of the parties. Be open to reason, but not to threats.

The more you bring standards of fairness, efficiency or scientific principle to bear on a problem, the more likely you are to produce a package that is wise and fair. For example, try to rely on standards such as precedent or community practice. By so doing, you are more likely to benefit from your past experience.

Positional bargaining leads to a battle of the wills. You talk about what you will accept and what you will not. Under such circumstances, it may be difficult to reconcile differences. It is difficult to be efficient and amicable if you are tied up in a battle of wills. You are likely to be in a situation where each side expects the other side to back down. Part of the problem is that it is difficult to determine what is an appropriate settlement.

The constant battle of the wills threatens the relationship. However, principled bargaining tends to preserve the relationship because it relies on the discussion of objective standards that can be used to resolve the problem instead of using threats of force to pressure the other side to submit.

Recognize the tremendous change in attitude and behavior that is required by positional bargaining. Rather than trying to get what you want for yourself without any concern for the other side, you decide to work for a solution to the dispute that is mutually satisfying. While this takes a different attitude and relies on different negotiating skills and abilities, we know that the old adversarial approach to negotiations will not yield the wise solutions to organizational problems reached in an amicable fashion that organizations need today.

Win/win negotiations take time and effort. Good deals are not always going to come your way. Take the initiative and try a different approach. With practice, win/win negotiations will become a way of life that can yield good solutions while at the same time building good relationships.

### **Handling Difficult Bargaining Situations**

Fisher and Ury's approach, principled negotiations, has the potential to be effectively used in a wide variety of conflict situations. However, the authors' experience after the book was written indicated that it was not universally successful. The approach works best when all parties to the disagreement commit themselves to a collaborate effort to resolve the problem on terms that are acceptable to both parties because their interests have been reflected in the final outcome. Unfortunately, everybody does not share this perspective. If everyone read *Getting to Yes*, then principled negotiations would work more effectively. However, this is not the case.

There will be times when the other bargainer is unwilling or unable to adopt the principled negotiations approach. The other party may not be willing to search for mutually acceptable outcomes. They may not be open and honest with you. What if the other side withholds needed information, or, calls you a liar? They may threaten you or have temper tantrums. They may not be willing to talk about their interests or listen to you talk about your interests. They may be committed to "winning" at any cost. They just may say "no" to whatever you ask them to do. When these conditions are present, negotiations can be very difficult. You may be tempted to leave the negotiations on the assumptions that you will never get your interests addressed given the attitudes and behaviors of the other bargainer. You may get angry and frustrated, and in the process, think about abandoning principled negotiations for a more adversarial approach to conflict resolution.

While these alternatives may appear attractive, you need to be disciplined enough to realize that approaches are available to you that will allow you to reach a negotiated solution to the conflict while maintaining your commitment to a cooperative negotiating style. While the task is difficult, preserving that win/win attitude in the face of determined opposition from the other bargainer is possible. William Ury wrote the book *Getting Past No* as a sequel to *Getting to Yes*. In this book, Ury presents what he calls a breakthrough strategy that will allow you to overcome the tactics used by the difficult negotiator and reach a settlement on mutually acceptable terms.

Ury argues that the key to the breakthrough strategy is to understand why the other bargainer is being so difficult to deal with. Why will the other bargainer not be cooperative with you? By dealing with the other bargainers' underlying motivations you have a chance to move the negotiations forward. For example, the other bargainers could be angry and frustrated. In response to these emotions, they could be rigid and demanding. Why is this the case/ the other bargainers could be fearful and distrustful.

With this mind set, they may feel the need to defend themselves. It is also possible that the other bargainers engage in distributive bargaining tactics because they do not know any other way to negotiate. There are a lot of people who view life as a zero-sum game. Any position other than their preferred one is viewed as an unwanted compromise. They want to win. With this attitude, to be a winner, there must also be a loser. They may resist the exploration of outcomes that are considerate of the other bargainer's interests. For cooperative negotiations to be successful, the other bargainer must know how they will benefit from the collaborate effort. It is possible the other bargainer will resist cooperative negotiations because they do not see how they will benefit from doing so. Ury points out that to deal with such problems you must learn to deal with five issues:

1. The other bargainer's emotions
2. The other bargainer's negotiating habits

3. The other bargainer's skepticism that principled negotiations can work
4. The other bargainer's perception that he/she is more powerful, and therefore, does not have to negotiate cooperatively with you
5. Your reactions to the difficult and frustrating behaviors exhibited by the other bargainer.

### **The Breakthrough Strategy – A Five Step Process**

Ury presents a five-step approach for dealing with the challenges posed by difficult negotiators. He points out that the strategy is counterintuitive. At the time you are angry, frustrated and disappointed with the behavior of the other bargainer, the breakthrough strategy requires you to not do what may come naturally, i.e., respond in kind to the other bargainer's difficult behavior. When the other bargainer is disrespectful of your interests, you may want to assert them. When the other party tries to pressure you into doing something that you do not want to do, you might want to employ pressure tactics of your own.

If you react to the other party's tactics by becoming difficult yourself, you will be forced into distributive bargaining or you may have to end the negotiations because your interests will not be met.

Remember that you would not have entered negotiations if you did not believe that you would be better off by working with the other party to resolve the disagreement. You also initially believed that a collaborative, rather than a confrontational approach would better serve your purposes. There are strong incentives for you to expend additional effort to salvage the difficult negotiations. Ury's breakthrough strategy, while challenging to employ, offers the possibility of reaching an interest-based outcome in the face despite the unwillingness of the other bargainer to work with you in a cooperative manner.

#### **Ury describes his approach as follows:**

The essence of the breakthrough strategy is indirect action. You try to go around his resistance. Rather than pounding in a new idea from the outside, you encourage him to reach for it from within. Rather than telling him what to do, you let him figure it out. Rather than trying to break down his resistance, you make it easier for him to break through it himself. In short, breakthrough negotiation is the art of letting the other person have it your way. (p. 9)

#### **The breakthrough strategy has five steps to it. These steps are:**

1. Do not react, go to the balcony.
2. Disarm them by stepping to their side
3. Change the game by reframing the dispute
4. Make it easy for them to say yes
5. Make it hard for them to say no

This approach can be used in a wide variety of situations. While a challenging approach to implement, anyone can use it as long as they are patient and committed to reaching interest-based solutions that respond to the needs of all parties to the dispute. In the sections to follow, each step will be discussed.



### **1. Do not react, go to the balcony.**

Go to the balcony is a phrase that Ury used to describe the process of stepping back from the situation in which you find yourself in order to regain your composure and to achieve a fresh perspective.

There is a distinct possibility that you will be angry and frustrated by the attitude and behavior exhibited by a difficult negotiator. If you allow yourself to react to the other bargainer's tactics, then there is a risk that you could make things worse rather than better. Ury points out that "action provokes reaction, reaction provokes counterreaction, and on it goes in an endless argument" (p. 12).

#### **The natural reactions when frustrated by a difficult negotiator are to:**

- ✓ **Strike back.** When someone else attacks you, it is natural for you to strike back. For example, if they are rigid in their approach to negotiations, you are also rigid. This suggests that your behavior is a response to their behavior. This approach is rarely successful, i.e., provides negotiated outcomes that are acceptable to both parties. And, it can damage long-term relationships.
- ✓ **Give in.** The opposite of striking back is giving into the demands of the other bargainer. Because of the other bargainer's difficult behavior you agree to their demands just to get the negotiations finished. The problem is that such agreements are seldom satisfactory. You have also reinforced the difficult negotiator's dysfunctional behavior by giving them what they want, i.e., an agreement on their terms. You could also acquire a reputation for being a weak negotiator.
- ✓ **Break off the relationship with the difficult person.** It must be recognized that it is occasionally appropriate to end a relationship with difficult people. Avoidance can be the best approach. Ending the relationship may be better than staying in the relationship and risk fighting and exploitation. But doing so can be expensive. You could lose a client or a family could be broken up. Occasionally, the breakup of a relationship could motivate the party to work harder with you to resolve the problems. Usually, however, adoption of an avoidance strategy, especially if it becomes a way of dealing with others, means that you never learn to effectively resolve the problems you have with other people.

These responses are common but not inevitable. By reacting to the other bargainer's dysfunctional behavior, you lose sight of your ultimate goal, an interest-based outcome good for all parties to the dispute. Often, time, you sacrifice your objectivity and commitment to cooperative negotiations when you respond to the other party's difficult behavior.

Ury recommends that you go to the balcony before this happens. By doing so you may avoid the basic cycle of action and reaction that seldom leads to the cooperative resolution of conflict. By going to the balcony, you can break the cycle, thereby creating conditions more conducive to the negotiation of an interest-based settlement.

Going to the balcony means that you step back, regain your composure and view the situation as objectively as you can. Reference to the "balcony" means that you detach yourself from the situation, and then calmly evaluate the situation in which you find yourself. Suppress your natural impulse to get even or to get out. While in the balcony, think about how you can get the negotiations back on track and in the direction that you want to go.

#### **Several things need to be done while you are in the balcony.**

- ✓ **Remind yourself of what your interests really are.**

Remember, interests are the reasons that you take the positions that you do. They reflect the needs, desires, concerns and fears that motivated you to seek a negotiated solution. Ask yourself why you are bargaining. What problem are you trying to solve? With a collaborative approach you assume that you

cannot satisfy your interests unless the other party's interests are satisfied as well. Therefore, you need to make sure that you understand your interests as well as those of the other bargainer. When you think about the options available to you, think of them as examples of the types of outcomes that are responsive to your interests. The good settlement would look like these options. The other side may respond favorably to such suggestions, and as a result, you may jointly be able to identify a better option for both parties.

✓ **Revisit your BATNA (Best Alternative to a Negotiated Agreement).** In principled negotiations, a good agreement is not one that minimally satisfies your interests. A good agreement must be better than the best situation you would be in if no agreement was reached. A BATNA is your best no agreement situation. While in the balcony think about whether your BATNA is better than the agreement that is likely if you bargain to an agreement with your opponent. If an acceptable negotiated solution is unlikely, then walk away from the negotiations. Alternatively, you can think about ways to improve your BATNA. The stronger the BATNA the more assertive you can be when dealing with the other bargainer's dysfunctional attitudes and behaviors. On this important point, Ury has written: "BATNA is the key to negotiating power. Your power depends less on whether you are bigger, stronger, more senior, or richer than your opponent is than on how good your BATNA is.... If you have a viable alternative and your opponent does not, then you have leverage in the negotiation. The better your BATNA, the more power you have" (p. 21).

✓ **Decide whether you should negotiate.** Once you have clarified your interests and reconsidered your BATNA, it is then necessary to determine whether you should re-enter the negotiations. If it is unlikely that you a negotiated solution will be better than your BATNA, then terminate the negotiations. Do not let guilt or fear keep you in a situation that is not likely to yield acceptable results. Do not let the fact that you have already expended lots of time and effort in the process keep you in it. Remember from your accounting and finance classes the concept of sunk costs. However, make sure you have not overestimated the strength of your BATNA. Stay focused on your goal. The negotiated outcome should be better than your BATNA while at the same time acceptably satisfying the other bargainers' interests.

✓ **Name the game.** The other bargainer has engaged in some behaviors that have caused you to go to the balcony. It is important that you identify the tactics the other bargainer is using. By identifying the dysfunctional tactics, you will be better able to deal with them. Ury places distributive bargaining tactics into three major categories:

**1. Stonewalls:** A refusal to move from a position that has been taken. This could be an outright refusal to move from a position ("Our position cannot be changed" or "take it or leave it") or such tactics could involve "footdragging" (We'll get back with you").

**2. Attacks.** Attacks are pressure tactics that are intended to intimidate you and to make you feel uncomfortable. They are intended to make you concede in order to avoid the continued unpleasantness of the other person. An example of this approach would be a statement such as "if you don't agree with us, terrible things will happen to you." By insulting you, badgering you, and bullying you, the other bargainer hopes that you will agree to their terms.

**3. Tricks.** Tricks are tactics that are designed to fool you, and as a result, you do something that you would not normally do. For example, if you assume that the other bargainer can be trusted, a trick would take advantage of that assumption. For example, if you believe that you can believe the information provided by the other party, then you are tricked when the other bargainer gives you a false piece of information that harms you position in the negotiations. In addition to providing false information, tricks could involve claims that the bargainer does not have the authority to reach a settlement when this in fact is not the case. Any good reference on distributive tactics will include a discussion of tricks.

When dealing with tricks, you must first recognize them. For example, if you recognize that the other party is stonewalling, you are more likely to believe they really will move because their resistance is simply a tactic rather than a true position. If they attack you, you are less likely to be fearful because you

recognize that it is just a tactic that they are trying to employ. Tricks work best when the other party does not recognize them. Recognize them and let the other party know that you recognize them. When a "spotlight" is placed on the tactic, it is quite likely that the other person will stop using it.

✓ **Know your "hot buttons."** In addition to knowing what the other party is doing, it is also important to recognize how the tactics are making you feel. Is your heart pounding or are your palms sweaty? These feelings should trigger a trip to the balcony. Understand how you feel when you become angry or frustrated, belittled or berated, ignored or rejected. Know when you are likely to respond angrily and when you will be tempted to back away from conflict. Know how you feel when the other side makes you feel guilty. By recognizing your hot buttons, it will be more difficult for the other bargainer to push them.

✓ **Buy time to think.** Once you have figured out what the other bargainer has been doing to you, take the time needed to think about how to respond. The simplest way to do this during negotiations is to simply pause and say nothing. Give yourself some time to regain your composure. Count to ten (or a hundred) before you resume the discussions. Or, ask the other side to repeat what they just said. Or, you can engage in active listening. Tell the other side that you want to make sure that you understand the position that they just took. Such tactics will give you a chance to step to the balcony for at least a few seconds. Alternatively, take a time out. When in doubt, caucus. If you need more than a few seconds, take a break. A break can give both sides the opportunity to get back on track or at least not worsen the situation.

✓ **Don't make snap decisions.** Rather than immediately respond to the psychological pressure to make a decision when the other bargainer is present; go to the balcony to make the decision. It is better to insist on some time to review the matter than to make a quick decision that you might regret later. Do not let the other bargainer hurry you into a decision. Go to the balcony and make a deliberate decision that will serve your interests. In conclusion, the concern is that you may become your own obstacle to bargaining success by reacting (or over reacting) to the other bargainer's tactics. To help ensure that this does not happen, go to the balcony to get the time needed to regain control over your emotions and to plan out a strategy for future negotiations.

## **2. Disarm them by stepping to their side.**

The second step in the breakthrough strategy is to disarm the other bargainer by stepping to their side. After going to the balcony you have regained your composure and have gotten back into a problem solving frame of mind. Chances are that if you were angry, frustrated and upset, the other bargainer was probably also experiencing such emotions. Therefore, the second step of the breakthrough strategy requires you to help the other bargainer regain his composure.

**It may be necessary to diffuse the other bargainer's hostile emotions. This can be done by:**

- ✓ Getting the other bargainer to listen to your point of view
- ✓ Developing respect from the other bargainer. The other bargainer may not like you but he does need to take you seriously and treat you like a human being.

The secret to this diffusing process is counterintuitive. Think about how the other bargainer expects you to behave. If he is engaging in self-serving, adversarial bargaining, it is quite likely that the other bargainer expects you to behave likewise.

If the other side stonewalls, he probably expects pressure from you. If the other side attacks you, they probably expect you to attack back. The breakthrough strategy requires you to behave in an unexpected manner.

Instead of responding to the other bargainer's tactics in the predictable manner, do just the opposite--step to their side. Listen to them, acknowledge their points, and agree where you can. This is about the last

thing a difficult person will expect from you. In distributive bargaining situations, patterning your behavior after that of the other bargainer can work effectively. However, a counterintuitive approach is more likely to get what you want when using an integrative bargaining technique.

When you want to negotiate cooperative and the other bargainer insists on an adversarial approach, you need to reverse the dynamic. If you want them to listen to you, you begin by listening to them. If you want them to acknowledge your point of view, then you have to acknowledge theirs. To get them to agree with you, begin by agreeing with them whenever you can.

**It is all too common for negotiations to proceed like this:**

- Person A states point
- Person B thinks about response to A's point rather than listening to what was said
- Person B's response is to state his position rather than address the point made by Person A
- Because Person B did not address A's concern, Person A assumes that person B did not hear what was said and restates his position. By doing so, Person A has not addressed the position put forth by person B
- In response, Person B concludes he was not heard so he repeats his position while continuing to be unresponsive to Person
- A's concern
- The dialogue continues as if both sides are deaf. Because there is little progress, the parties become angry and frustrate.

Rather than engaging in a problem solving dialogue, many negotiations become nothing more than a series of monologues. To interrupt these monologues, you must be willing to listen. There are several techniques that can be used to move from monologues to problem solving negotiations:

- Active listening. As has been discussed before, successful conflict resolution depends on effective listening skills. Listening can be the cheapest concession you can make. We all have a deep need to be understood, including the other bargainer. By satisfying the other bargainer's need to be heard and understood, the negotiations can be turned around. Listening can be difficult. For many people, it is not really as satisfying as talking. Therefore, it takes discipline to listen to the other party instead of advocating your interests. You cannot sit there and react or plot your next move while the other bargaining is talking. Instead, you have to remain focused on what the other bargainer is saying. Listening may not be easy, but it can be valuable. It gives you:
  1. Insights into the interests and concerns of the other bargainer
  2. An opportunity to engage in a cooperative task that could be patterned in subsequent discussions
  3. An increased likelihood that the other bargainer will listen to you
  4. A way to defuses the other bargainer's anger and frustration

Listen fully, don't interrupt, provide feedback, and if the other bargainer has anything else to say, encourage them to talk by using words such as "Please go on..." or, "then what happened."

It must be emphasized that people genuinely appreciate the opportunity to talk about themselves and their concerns. Once you've heard the other bargainer out, they are less likely to react negatively to your efforts to move the negotiations forward. They are more likely to be more responsive willing to engage in problem solving. It is no coincidence that good negotiators listen more than they talk.

### **Active listening has several tactics involved with its use:**

- ✓ Paraphrase and ask for corrections. The other bargainer cannot tell if you have actually listened to them just by looking at you. You need to demonstrate that you have heard them and that you understand the meaning of what they have said. Paraphrasing means that you sum up what the other bargainer has said and repeating it back to them in your own words. This technique gives the other bargainer the feeling that they have been understood as well as the satisfaction of correcting you if you make a misstatement.
- ✓ Acknowledge the points being made by the other party. After listening to the other bargainer, the next step is to acknowledge their point of view. This may be a problem because you would not be involved in a round of difficult negotiations unless you strongly disagreed with the other bargainer. Rather than viewing this as a problem, try to view the situation as an opportunity. Acknowledging a point of view does not mean that you agree with it. It simply means that out of a range of positions, it is one of them. When you say things like "I can see how you see things" or "you have point" or "I understand what you're saying," you are simply recognizing their position but not agreeing with it. By acknowledging the validity of their position, you create a situation in which they may be more willing to listen to your side of the story. By listening, you may also be able to defuse any anger or resentment the other bargainer is experiencing.
- ✓ Acknowledging their feelings. Never forget that emotions are a critical component of the typical conflict resolution situation. Behind an attack, you are likely to see anger. Behind stonewalling behavior, you will probably see fear. Until these emotions can be defused, it is unlikely that the other bargainer will hear your arguments. The other bargainer expects you to be emotional, angry and resentful. It can be disarming to be greeted by an acknowledgment that you understand how they are feeling and whether there is anything you can do to help rather than an emotional tirade in response to their dysfunctional behavior. By saying things like "If I were in your shoes I'd be angry too" lets the other bargainer know they've been heard, understood and appreciated.
- ✓ Offer an apology. An apology can be the most powerful form of an acknowledgment. Never forget that words like "I'm sorry" can be magical. We often overlook the power of a simple apology. The other bargainer could be outraged because they feel wronged. Very often what they want is to be recognized that they have been wronged. Only when that acknowledgement has been made will the other bargainer feel comfortable enough to negotiate. In other words, the apology helps create a situation in which negotiation can take place. Don't be afraid that acknowledgement of the other bargainer's concerns will be perceived as an act of weakness. To the contrary, an apology can convey strength. Only a confident person could be so gracious. Be calm, be direct, and use the other bargainer's name when making the apology. Also, remember that apologizing for any harm you might have caused does not mean that you agree with the other bargainer's position or that you will make a concession to smooth over the situation.
- ✓ Agree whenever you can. To this point, you have listened to the other bargainer and acknowledged their position. The next step is to agree whenever you can. It is hard to continue to attack someone who is agreeing with you. The objective is to agree without conceding. You can do this by focusing on issues on which you agree. While it is natural to focus on differences, doing so can cause problems. Therefore, it may be more productive to focus on common ground. Try to accumulate "yeses". Ury argues that "yes" is another magic word. It is capable of disarming the other bargainer. Look for occasions to say "yes" without making a consensus. "Yes I agree with you." "Yes you have a point there." Also try to get "yeses" from the other bargainer. Think of a situation in which the other bargainer has criticized an argument that you have made. He claims that the "numbers" upon which you are building your argument are all wrong. Your

response could be “You think my proposal is all wrong because of the numbers I’m using?” In response, the other bargainer says “yes.” The “yes” is the start of a transformation of an antagonistic argument into a more reasonable dialogue. Each time the other bargainer says “yes” there is likely to be a reduction in tension. As the “yeses” accumulate, you are creating an environment in which the person is more likely to say “yes” to your substantive proposals.

- ✓ Pace the other bargainer's behavior. Pacing means that you pay attention to the other bargainer's body language and then mimic it. If the other bargainer leans forward, you lean forward. If the other bargainer crosses his legs, you do likewise. This is a technique that is useful when dealing with difficult people. Adapt your style to the other bargainer's behavior. When you do this, you get attuned to the other bargainer and get on the same wavelength. This should facilitate improved communications. When pacing, do not be obvious. Be subtle. If you are successful, you should be able to decrease the psychological distance between you and the other bargainer. You can also pace the language of the other bargainer. If they speak colloquially, you do so also. If the other bargainer is from a different culture, learn a few polite phrases in their native language. This shows interest and respect. People also use different “sensor languages,” depending on which sense they rely most heavily on when processing information. If the other bargainer says things “I don’t see your point” or “Let’s focus on the issue” or “I can picture what you’re saying” chances are the other bargainer is visually oriented. This is in contrast with people who use phrases like “I hear you” or “Listen to this.” Still others may use phrases like “I can’t get a feel for what you’re saying” or “I’m not comfortable with your proposal.” It will be easier for you to talk with the other bargainer if you pick up on these speech patterns and then incorporate them into your speech.

When you step to the other side, you listen to the other bargainer, acknowledge their perspectives in terms of both their positions and emotions, and agree whenever you can. Techniques such as active listening and pacing can be invaluable when trying to move from adversarial to cooperative negotiations. By doing these things, you are showing the other bargainer respect. But you are doing so indirectly.

There may be times when you want to address the concerns of the other bargainer more directly. This can be done in several ways:

- ✓ Acknowledge the person. The other bargainer expects to be treated in a certain way (rudely, crudely, inconsiderate, indifference). In other words, you are viewed as an adversary who is expected to treat them in the same way they are treating you. To overcome this problem try using the basic psychological concept of cognitive dissonance. Dissonance is simple a disagreement between pieces of information. Cognitive dissonance involves the disagreement between pieces of information or thoughts. Human beings find cognitive dissonance uncomfortable because the preference is for consistency among our thoughts and beliefs. When dissonance arises, we are motivated to resolve the inconsistency. When you acknowledge the other bargainer personally, you are acting more like a concerned friend or colleague than an adversary. You listen, you empathize, you acknowledge. Because this behavior was not expected, dissonance is created. There is an inconsistency between how they expected and the treatment they actually received. This inconsistency is psychologically uncomfortable and is a motivation of behavior. You have created a situation in which the need to bring cognitions into line. They have to change attitudes and behaviors. It is hard for them to treat you like an adversary if you are treating them like a friend or colleague. There are a couple of ways to do this:
  1. You could acknowledge the other person's competence or authority. If your problem is with your boss, preface your remarks by saying “you’re the boss” or “I respect your authority.” If the other bargainer has a big ego, view this as an opportunity, not an

obstacle. Stroke the ego. Recognize the competence. By doing so, you can disarm them. It will be difficult for them to be nasty or rude to you while you are being so respectful of them and their interests.

2. Build a working relationship. One of the best ways to acknowledge the other bargainer is to build a work relationship with them. Invite them to supper, have lunch, go out for a drink after work. Develop an understanding of hobbies, or family or whatever interests the other bargainer has. Make small talk. Always be cordial. Little gestures of good will and consideration go a long way. Ury argues that "a good working relationship is like a savings account you can draw upon in moments of trouble." Don't forget that the best time to establish a good working relationship is before trouble ever begins.

At this point in the breakthrough strategy, you have heard the other bargainer's concerns, you've acknowledged them (both substantively and emotionally), and as a result, the climate for problem solving negotiations has probably been improved. As a result, the other bargainer is more likely to listen to you. This is the time to try and get your point across to them by moving on to problem solving negotiations. This can be done in several ways:

- ✓ Express your views in a non-provocative manner. To do this you have to change the other bargainer's mindset. The standard mindset is either/or. You are right or the other bargainer is right. An alternative mindset is both/and. You can say: "I can see why you feel the way you do. It is entirely reasonable in light of your experiences. My experience, however, has been different." You can acknowledge the other bargainer's view without challenging it. At the same time, you can put forth a contrary perspective. Use of the word "but" is one of the most common ways to express disagreement. "I agree with your basic position, but . . . "Your price is too high," you respond, "but it is the highest quality available." Unfortunately, all the other side hears is "but" which translates into "I think you are wrong and here are the reasons why you are wrong."

It is not surprising that people tend to stop listening when they hear the "but." Ury contends that people are more likely to be receptive when you first acknowledge their position with a "yes" and then preface your response with the word "and." Instead of yes/but, use yes/and. When there is a complaint about your high price you say: Yes, you're right. Our price is high and that difference in price between our product and our competitor's price buys you superior quality, better reliability and better service." Even if you are in direct disagreement, you can use yes/and statements. "I can see why you feel strongly about this, and I respect that. Let me tell you, however, how this looks from my perspective." "I am in agreement with what you are trying to accomplish. What you may not have considered is this .

. ." Regardless of the specific language you use, the key is to present your view as an addition to, rather than a contradiction of, the other bargainer's point of view.

- ✓ I/You Messages. Effective negotiators understand the use of I/you statements. "I" statements talk about you and how you feel. "You" statements are focused on the other bargainer.

When you talk about yourself and your reactions to what the other bargainer is doing, you are less likely to provoke the other bargainer than if you talked about them. For example, think about a situation in which a difficult teenager has come home late in violation of the family's curfew rules. It would be tempting for the parents to say things like "you broke your word," "you're irresponsible," "you don't care about how I feel," "you never think about your family." What's the likely response? Defensiveness? Anger? Resentment? Frustration? None of these responses are likely to lead to the resolution of the underlying problem. What if the parent said: "I felt let down last night." "I was worried sick." "I even called the highway patrol to see if you had an accident" These are I-statements that describe the impact of the problem on the parent. By the use of I-statements you provide the other

person information about how you feel. Common examples of I statement include: "I feel . . ." "I get upset when . . ." "I'm not comfortable with . . ." "The way I see it . . ." When you use I statements, you do not challenge the other bargainer's views. Instead, you offer a different perspective. I-statements do not tell the other bargainer what to think, how to feel, or what to do. They are entitled to their opinion. At the same time, you are entitled to your feelings that are shared with the other bargainer through the use of I-statements. Focus the I-statements on your needs, concerns and interests rather than on the behaviors of the other person.

It is difficult for the other bargainer to disagree with how you feel. However, if you say something like "you are irresponsible in your approach to these negotiations," the other bargainer is likely to argue with you. You-statements are likely to elicit further arguments. I-statements have the potential to move the negotiations forward as you provide the other bargainer useful information.

- ✓ Stand up for yourself. Standing up for yourself does not negate your acknowledgement of the other bargainer's interests. Acknowledgement from someone who is strong is more effective than if it comes from someone perceived to be weak. The combination of seemingly opposite responses, i.e., the acknowledgment of the other bargainer's position and at the same time expressing your own views, appears to be more effective than either by itself. However, make sure that when you express disagreement you do it with the confidence that you will be able to work things out. Recognize the other bargainer's point of view. Assert your own needs, interests and concerns. Be confident enough to express your differences. Be able to express optimism that the differences can be resolved. If you do all these things, chances are you can overcome the other bargainer's hostility and lack of respect.

By stepping to the other side, you will be able to create an environment that is conducive to problem solving negotiations. Now, within this framework, it is necessary to refocus on the substantive aspect of the dispute. This can be difficult if the other bargainer still thinks that adversarial negotiating tactics will be effective. The third step of the breakthrough strategy is intended to help the other bargainer adopt a cooperative approach to negotiations,

### **3. Change the 'Game' by reframing the dispute.**

By stepping to the other bargainer's side, it is hoped that you have created an environment conducive to effective conflict resolution. While you are ready for a discussion of the parties' interests, the other bargainer is still probably thinking in terms of positions that may be good for them but not necessarily responsive to your needs. The challenge at this stage of the breakthrough strategy is to get the other bargainer involved in problem solving negotiations. To do this, the dispute must be reframed. Ury states that reframing "means recasting what your opponent says in a form that directs attention back to the problem of satisfying both sides' interests" (pp. 60-61).

When this is done, you take the other bargainer's positional statement and refocus them in a problem solving way. To do this, you act as if the other bargainer was trying to solve the problem. As a result, you can draw your opponent into a new game. Reframing builds on the notion that you can put a problem-solving framework around anything the other bargainer has to say. Ury has written:

Because your opponent is concentrating on the outcome of the negotiation, he may not even be aware that you have subtly changed the process. Instead of focusing on competing positions, you are figuring out how best to satisfy each side's interests. You don't need to ask your opponent's permission. Just start playing the new game.

**There are several techniques that can be used to reframe the negotiations:**



- ✓ Ask problem-solving questions. By asking the right questions, you can get the other bargainer to develop a different perspective on the negotiations. These questions focus attention on each side's interests, the options available for satisfying them, and the standards of fairness that should be used when deciding that a solution is good for both sides. Examples of problem-solving questions include:

1. Ask why. Rather than viewing the other party's position as an obstacle to successful negotiations, view it as an opportunity to learn more about their interests that are shaping the public positions that have been taken. Why is that important? What is the problem? Why do you want that? What are your concerns? These kinds of questions focus attention on interests rather than positions and can move you toward a problem solving approach to conflict resolution. How a question is asked can shape the other bargainer's response. If a direct question could seem confrontational, then take an indirect approach. Please help me understand what it is that you want? Could you help me understand why this is important to you?

2. Ask why not? Another indirect approach that can be used if the other bargainer is resistant to your efforts to talk about interests is to ask why something would not work. Why couldn't we do it this way? As the other bargainer explains why things could not be done in some way other than what he is proposing you can acquire valuable information about the other bargainer's interests. Even if the other bargainer does not respond to such a question, you can speculate about why the proposal is a problem. You could say something like: I understand this could be a reason why you might not want to accept my proposal, am I right? Ury points out that few people can resist the opportunity to explain to someone else where they do not understand something. If the other bargainer still will not discuss interests it may be because you are not trusted. Then you have to build the needed trust. This can be done by being willing to discuss your interests and risk being vulnerable by sharing such important information with the other party. Then, ask about his interests. Then, provide more information about your interests. Trust can be built incrementally with much risk.

3. Ask what if. Once you have an understanding of both parties' interests, then you can start exploring the options available to you that could satisfy each party's interests. "What if" is a powerful phrase that can move the discussions forward without threatening the other side. Such a question turns the negotiations into a brain storming session that can lead to the invention of mutual gain. The other bargainer's position becomes one option. Through the use of "what if" questions you can develop other options.

4. Ask for the other bargainer's advice. Again, our intention at this stage of the breakthrough strategy is to get the other side to think in terms of interests rather than positions. By asking a question such as "What would you do if you were in my position?" or "What would you suggest that I do?" you can get the other side to start thinking about the problem from your perspective. The other party could be flattered by your request for advice because you are, in effect, acknowledging his competence and status. Such a tactic can be disarming to the other side while at the same time creates the opportunity to discuss the disagreement from your perspective.

5. Ask "what makes that fair?" Instead of rejecting an unreasonable proposal put forth by the other side, ask them to explain why they think it the right thing to do. This question can initiate a conversation about the standards of fairness each side is employing during the negotiations. You could say something like: "You must have a good reason for thinking that your proposal is fair. Would you please explain the reasons to me." If the proposal is, in fact, unfair, the other bargainer might realize this as they struggle to answer your question. To start the conversation, it may be necessary for you to propose a standard of fairness. If the other bargainer rejects your proposal then ask them to come up with a better one. By discussing the different standards, you may be able to shift the negotiations from a focus on positions to outcomes that are fair to both sides.

- ✓ Reframe tactics. In addition to reframe the other bargainer's position, it may also be necessary to reframe the other bargainer's tactics. To move the negotiations forward, you will need to deal with the stonewalls, attacks, and tricks that the other person has been using. Several things can be done to reframe tactics:

1. Go around stone walls. What if the other bargainer says "take it or leave it" or insists that you make a decision immediately? These are stone walls that need to be addressed. You could simply ignore the stone wall. The other person could just be bluffing. Keep talking and act as if you did not hear the statement. If the other bargainer is serious the stone wall will be put up again. If it was just a bluff, then the other bargainer may be willing to talk about other topics.

2. Reinterpret the stone wall as an aspiration. In response to the other bargainer's strong statement (We got to have...) say something like "we all have wants and needs. Let's take a look at the full range of possibilities that area available to us." Or if they say "We have to have a deal by tonight" you can respond by saying "that would be great. We better get to work right away."

3. Take the stone wall seriously but test it. For example, if the other bargainer says "I will call you in two hours with your answer" be away from the phone in two hours. Be in a meeting or be handling an "urgent" problem. If they don't call in two hours, they were bluffing. If they believe you are uncontrollably tied up when they called, they will usually give you another chance.

4. Deflect the attack. In response to threats, insults, or blame, you need to shift the focus to the problem and away from the attack. You could simply ignore the attack. Just pretend that it did not happen. If you respond to the attack, you reinforce the use of such tactics. If the other bargainer sees no response from you, he is less likely to rely on such tactics. Remember, behaviors that are ignored or punished are less likely to be repeated than behaviors that are reinforced.

5. Reframe the attack as an attack on the problem. Attackers are usually making at least two points when they attack you. They are saying that your proposal is no good and they are saying that you are no good. You can choose which message to respond to. Ignore the attack on you and focus on the attack on the problem. Ask the other person to suggest how the problem could be solved. By choosing to pursue the more legitimate criticism, you avoid the personal assault and refocus the other bargainer's attention on the problem that you are trying to solve.

6. Reframe the attack as being friendly. With this approach you "misinterpret" the attack as being friendly rather than hostile. For example, express appreciation for the other bargainer's concern about you and the problem.

7. Reframe from past wrongs to future remedies. Use an attack as an opportunity to move from mistakes that could have been made in the past to ways to improve conditions in the future. For example, if the other bargainer criticizes you for past incidents, use this as an opportunity to ask about what can be done to make sure the problem never arises again.

8. Reframe from "you" and "me" to "we." Positional bargaining relies heavily on works like "you" and "me." "You made a mistake." You are making these negotiations more difficult than they need to be. I have the right idea while you are wasting my time." Such language heightens the differences between the parties and stands in the way of problem-solving negotiations. The objective is to get the parties thinking about mutual or shared concerns. "We have a problem. What can we do to solve it?" Ury argues that a simple and powerful way to reframe "you" and "me" to "we" is through body language. Rather than sitting across the table from each other, sit side-by-side. Rely on a document that has to be shared. While such tactics do not make conflict go away, they can underscore the belief that by working together problems can be resolved.

9. Expose tricks. Tricks are difficult to reframe. Often times the tricks work because the other bargainer has used the language of cooperation, trust, and reasonableness in order to exploit you. It is difficult to move past such tactics. However, to refocus on problem solving, the tricks must be exposed so that the other bargainer knows that you will not succumb to such tactics. There are several ways to deal with tricks

**10.** Ask clarifying questions. Look for assumptions or ambiguities that could be the basis for tricks. Identify contradictions that could develop when the other bargainer tries to be deceptive. If you become suspicious of the other side, challenge them. Ask clarifying questions and press for answers. Challenge contradictions. Hold the other bargainer accountable for the trick by making them explain what they have done. Asking questions that force accountability may be less threatening than directly raising your concerns. Rather than saying "I think you are lying to me" ask them to explain why they hold the position they have taken.

**11.** Make reasonable requests. Identify a reasonable question that the other bargainer would have to agree to if he was genuinely cooperative and not relying on tricks to get what he wants. For example, if you are negotiating with a person over the purchase of a used car and you think that he is hiding information about the car's condition, you could ask "Would you mind if I took the car to my mechanic for an inspection." If the car is in good shape, the seller probably will not mind if you have the car inspected. However, if the seller is being deceptive, then he may refuse to let you have the car inspected. If this happens, then you cannot depend on what you have been told about the car's condition by the seller.

✓ Negotiate about the rules of the game. If the other bargainer continues to be difficult by stonewalling, attacking you, and using tricks, despite your best efforts to refocus discussions in a problem-solving way, then the conversation has to be taken in a different direction. You need to talk about how the negotiations are being conducted. If you have not been successful when trying to reframe the negotiations, it is then necessary to explicitly discuss the other bargainer's behavior and their effects on the conflict resolution process.

**1.** Openly discuss the behavior. It is possible that the other bargainer is trying to see what he can get away with. State that you recognize the tactics being used and announce that the tactics are not going to work. Then insist that if the other bargainer wants an agreement, a different approach has to be taken. When doing this it is important that you do not do it in a way that will be perceived as an attack on the other bargainer. Make it easy for the other person to change tactics. Instead of saying, "you're threatening me" say it was not your intention to threaten me, was it?" If the person is being rude, offer the explanation that he must be having a bad day. Try not to be accusatory. But, make sure that the other party knows that you will not tolerate their dysfunctional behavior.

**2.** Negotiate about the negotiation. If raising your concerns does not lead to the desired change in the other bargainer's behavior then you may have to explicitly negotiate the terms under which the bargaining will continue. Be willing to negotiate about the process just like it was a substantive issue. Talk about the rules for the negotiations in terms of interests, generate options and discuss the standards that can be used to determine whether the parties' behavior is fair. As part of this process, you may have to specifically request that the other bargainer change some behaviors. Once you get an agreement on the rules, then you can start negotiating over substantive issues again hopefully in a more constructive way.

The turning point in a difficult negotiation takes place when you are able to move from positional or adversarial negotiations to problem-solving negotiation. Reframing is a critical part of this conversion process that is challenging but can be done with an understanding of bargaining dynamics and lots of patience.

#### **4. Make it easy for them to say yes by building a 'Golden Bridge'**

So far, we've gone to the balcony to regain our composure and to refocus on the "prize" (an efficient and wise agreement that does not hurt our relationship with the other bargainer). Then we stepped to their side to help the other bargainer get them back on track and ready for problem solving negotiations. Then we tried to reframe the issues. Because they are probably still holding on to some position that you find unreasonable, it is necessary to put a new frame around the other bargainer's positions and tactics. By so

doing, you can move to a problem solving approach to negotiations that builds on interests of the parties. It is at this point that you can explore the interests and the positions that might be responsive to needs and concerns of both parties. Even after you have disarmed the other bargainer and have engaged in problem-solving negotiations things can still go wrong. After you have explored the interests and discussed your options you may think you are ready to make a deal but don't relax too soon.

When you make your proposal, watch and see the response. If the other bargainer stalls, makes vague statements, delays, reneges, or flat out says "no," you know that the other bargainer is resisting a final decision. While this may be distressing, there is usually some good reason for it and it becomes incumbent upon you to overcome this resistance. Ury calls this process "building a golden bridge." In other words, make it easy for the other side to finalize an agreement.

### **Ury has identified four obstacles to reaching agreement.**

➤ The first concern is that the other side rejects your proposal because it was not his or her idea. To overcome this concern Ury recommends that you involve the other bargainer in the resolution of the problem. Instead of unilaterally pronouncing that you have found the solution to the problem, encourage the other bargainer to participate. The literature on participation in decision making suggests that meaningful involvement of the other side in decision making lead to better decisions and decisions to which the other side can commit.

With this in mind, the building golden bridges require that you encourage the full involvement of the other side in the solution. Ury recommends several approaches for securing the other bargainers participation:

- Ask the other bargainer for ideas. Ask how he would solve the problem. What the other bargainer would do if he was "king for a day" or what he would do if "he was in your shoes."
- Once you have the other bargainer ideas, build on them. This does not mean outright acceptance. It means building on the most useful aspects of them into your solution.
- You can get the other bargainer involved by asking for constructive criticism of your ideas. This can be done by using problem solving questions such as "which interests of yours are not met by this proposal?" or "in what way is this proposal unfair?" Answers to such questions can generate information that will make for a better solution.
- If the other bargainer resists your efforts to explore for a solution, provide choices or options. For example, ask whether the other bargainer would you prefer this or that? Once the other bargainer reflects an opinion, it becomes his idea. When concluding this section on approaches that will get the other bargainer involved is the forging of an agreement, Ury relied on a Chinese proverb: "Tell me and I may listen. Teach me and I may remember. Involve me and I will do it."

➤ A second obstacle to an agreement could be unmet needs perceived to exist by the other bargainer. It is quite possible that despite all your efforts to reach an agreement responsive to the other bargainer's interests, you might have overlooked some important factor that, if not addressed, will preclude agreement. While it would be easy to assume that this predicament is because the other bargainer has been irrational, inflexible or just plain ignorant, this may not be the case. It could be because you simply missed something important while working toward an agreement. To deal with this obstacle, you can put yourself in the other bargainer shoes (i.e., think empathetically) and critically thinking about the deal and whether you could accept it if you were other bargainer, and if not, why would you not be willing to accept it. A hard look at your position from the other party's perspective is likely to provide insights concerning the other bargainer's unwillingness to reach an agreement.

A common mistake is that you assume that the other side is only concerned with money. Ury recommends that you don't overlook other basic, less tangible human needs such as security and recognition. If you can recognize these basic needs at play and respond to them, you can increase the likelihood of reaching an agreement. Make sure that you do not impose a "fixed-price" assumption on your solution. At this stage of negotiations, you may be able to still sweeten the deal for the other side while maintaining your interests. One way is to look for low cost, high benefit tradeoffs. Think in terms of things you can give to the other side that would be valuable to the other bargainer but not very costly to you. In labor/management relations, for example, union security clauses would be an example. They are very valuable to the union and almost costless to the employer (if cost is measured in dollar terms).

Another approach is to use "if, then" formulas. There was a consultant who worked as an expert witness in court cases. He charges a very high fee that attorneys, especially plaintiff attorneys who usually work on a contingent fee basis, resist. When the attorneys complain, the consultant says "my normal fee for a case like this if \$10,000. However, if you lose, I'll charge you \$5000 but if you win then my fee will be \$20000." With this approach, he takes some risk out of the situation. But because he is very good at what he does, he is confident that he will get the higher fee.

➤ The third obstacle to agreement concerns the other bargainer's need to save face. Face saving is more than a procedural nicety and more than a mere "bandage" for a wounded ego. Instead, face saving is intimately entwined with the other bargainer's dignity and self-worth. If the other bargainer has to change positions to reach agreement with you, the need to save face may be at play.

Therefore, it is important for you to make it easy for the other bargainer to save face. There are several ways to do this:

- Demonstrate how the circumstances have changed. Originally the other bargainer was right, but in light of changed circumstances, another position is warranted.
- Ask for a third party recommendation. Use of mediation is an excellent way to resolve a dispute. A proposal unacceptable if it comes from you may be acceptable if it comes from a respected third party.
- Rely on a standard of fairness. This is where objective standards out of getting to yes can come into play.

Ury recommends that you help the other bargainer write his victory speech. Help the other side describe the outcome in positive terms. Anticipate how the other bargainer's audience might criticize the settlement and help identify rebuttal arguments. Make sure you let the other bargainer take the credit for the settlement if doing so would help secure an agreement.

➤ The fourth obstacle to agreement identified by Ury is that things are going too fast. It may be necessary to slow the process down and proceed in an orderly, step by step fashion in order to get an agreement. You do not want the other bargainer to get overwhelmed by the amount of work that needs to get done. You do not want them intimidated by the uncertainty of the situation. You want them to believe a settlement is possible and that progress is being made. Go slow, be optimistic, be reassuring, break big projects into little ones (e.g. let's experiment), and make sure all parties understand to what they are agreeing.

In summary, building a golden bridge involves more than just formulating a proposal that might be attractive to the other side. It also involves getting the other side involved in the idea creation process, looking beyond obvious interests like money so that the proposal can also be responsive to other basic, less tangible interests, it may mean taking other bargainer by the hand so that they are not overcome by the challenges that face them. If you can do this, you can build a bridge free of obstacles. The other bargainer can come to you in an agreement that is responsive to both sets of interests.

However, what happens if after all your efforts, the other side still won't agree? This concern takes us to the last step of the breakthrough strategy. You have to be able to make it difficult for the other bargainer to say no to your proposals. Ury encourages you to bring the other bargainer to their senses, not their knees. You do this by making it difficult for the other bargainer to not accept your proposals.

### **5. Make it hard for them to say no.**

Once again, the breakthrough strategy is counterintuitive. Despite all your efforts to present a settlement that responds to both parties' interests, the other bargainer may still resist. This is probably because the other bargainer still thinks he can win the negotiations.

Therefore, the tactical agenda at this stage of negotiations is to convince the other bargainer that they cannot win.

At this stage of the bargaining process, it may appear to you that your problem solving approach has not worked. Therefore, you might be tempted to abandon the problem solving approach and adopt an approach based on power. Rather than holding out a golden bridge, you might be tempted to try to force the OB into an agreement.

Ury points out that when you switch from problem solving to power, a number of things happen:

- You stop listening and acknowledging and start threatening
- You stop reframing the other bargainer's position and start insisting on your own
- Instead of making it easier for the other side to say yes, you justify their intransigence
- 

What is the likelihood that your shift to a power based approach will get you the agreement that you want?

### **It is not likely to work.**

The idea behind power is that you force the other bargainer to agree with you by threatening some harm. To avoid the harm, the other bargainer backs down. Ury argues that unless you have a decisive power advantage, the approach probably will not work.

How will the other side probably respond to your power tactics? Anger, hostility frustration, resentment? The use power by you is likely to cause the other bargainer to dig in and stick to their position thereby frustrating your attempts to get an agreement on your terms.

You've created a situation in which agreement is less likely because conceding now means defeat to the other bargainer. Now you've gone from situating with a win-win potential to one that could yield a lose/lose outcome. Despite these concerns, Ury still recommends the use of power if the OB cannot be enticed across the golden bridge.

Ury emphasizes that power should be used to bring the other bargainer to his senses, not to his knees in defeat.

Power has to be used subtly and in non-traditional ways to educate rather than subjugate the other side. Assume that the other bargainer has miscalculated how best to achieve his interests then focus his attention on avoiding the negative consequences of not reaching an agreement. Little effort is expended trying to impose your position on the other bargainer. Instead, you create a situation in which the other person realizes that the agreement you propose better meets his needs than his no-agreement alternative.

Ury recommends a number of tactics that rely on power to encourage the other bargainer to cross the golden bridge you have offered.

- Remind the other bargainer of the consequences associated with not reaching your agreement. This can be done by the use of reality based questions such as: “What do you think will happen if we don’t reach agreement?” This focuses attention on BATNA relative to your agreement. “What do you think I will do?” This is a way to get the OB to consider your BATNA. It can bring the OB back to reality in case he has underestimated your BATNA. “What will you do?” This is another way to get the OB to determine whether he has overestimated his BATNA.
- Warn, not threaten. This is a subtle distinction that could be easily misinterpreted. Consequently you must use this tactic very carefully. Ury points out that asking questions might not be enough to get the other bargainer to fully consider the consequences of not reaching an agreement. It may be necessary to make a direct statement concerning what will happen if an agreement is not reached. This means that before you exercise your BATNA, you let the other person know what you are going to do. You say – “Here’s what I am going to do if we don’t settle this matter.” The hope is that your opponent will take advantage of the opportunity to reconsider his refusal to negotiate. Such a statement sounds like a threat but if presented properly it will not elicit the reaction a threat would. Attach both negative consequences to the failure to reach agreement. However, Ury contends that there is an important distinction.

A threat appears subjective and confrontational while a warning appears objective and respectful. A threat is a negative promise. It announces your intention to impose pain and injury on the other bargainer. A threat specifies what you will do to the other person if he does not agree with you. In contrast, a warning is a statement describing what will happen if an agreement is not reached. It describes the objective consequences associated with not reaching agreement. The key is to avoid a confrontational tone and be respectful of the other bargainer. You simply present the information in a neutral tone and then let your opponent decide. With this approach, the OB might be coaxed back into problem solving negotiates.

- Be willing to exercise your ability to carry out your BATNA if the other bargainer ignores your warnings. Demonstrate what you plan to do. This is a way to educate the other person without actually carrying out your BATNA. You could walk out of negotiation and tell the OB to call when he is ready to bargain again. You could demonstrate you have plans in place to implement your BATNA. However, remember that the purpose of such moves is to remind the other side that you do not have to reach agreement. By so doing it is hoped that the other bargainer will see that the golden bridge affords a better outcome than his BATNA. It may be necessary to use your BATNA if the other side will not negotiate. If you do so, go forward in a non-confrontational way.
- Use the minimum power necessary. Exhaust all your options before escalate. Use power as a last resort and use it to the least degree possible. For example, if a union went on strike, it should do so peacefully. If you are an employer who locks out it employees, do hire replacement workers. And when power is exercise, make sure it is legitimate power. Do not break the law or otherwise engage in behaviors that would permanently harm the relationships.
- Be ready to neutralize the other bargainer’s exercise of his BATNA. If you are an employer and the union threatens to go on strike, be prepared to deal with the strike. If the other bargainer threatens to go over your head and talk to your boss, make sure that you talk to your boss first. Your objective is not to hurt the other side but to demonstrate the negotiation offers a better chance of reaching a favorable agreement than not negotiating.

- Bringing in a third party could also help. This can increase your leverage so that the other bargainer will negotiate. You could build a coalition, take the message to the your opponent's constituency, or bring in a mediator to help resolve the problem.

Throughout this entire process, your objective has been the same. You have tried to remind the other bargainer about the costs of not reaching agreement relative to the offer represented by the golden bridge. It is important that throughout this process you keep a good alternative on the table so that the contract between agreeing and not agreeing is obvious. By doing this it is hoped that the other person will see that his needs can best be met by crossing the bridge. With this approach, power becomes an extension of the problem solving process not a replacement for it. You exercise power to get the other bargainer back to problem solving negotiations. Ury points out that just like the best general never fights, the best negotiator never uses his BATNA.

In conclusion, with the breakthrough strategy, the idea is to turn adversaries into partners.

While it takes two to tangle, only you have to untangle tough situations by using the breakthrough strategy. You have the power to do so and to do so unilaterally. By turning adversaries into partners you assure that conflict is resolved in terms favorable to your interests.

Bargaining is more than a set of tactics to be employed effectively, at the right time. There are also a number of skills that are needed to implement the bargaining strategies and tactics. Effective negotiators are good communicators, have well-developed problem solving skills and are creative when dealing with the problems that arise during the bargaining process.

### **NEGOTIABILITY APPEALS**

Negotiability disputes occur where unions and agencies disagree over the legality of specific contract proposals or provisions. These disputes involve agency claims that a contract proposal made during bargaining involves a subject that is outside the duty to bargain under all circumstances. They also occur where an agency head disapproves negotiated contract language on the ground that it is contrary to law. Examples of these disputes include whether a proposal is contrary to a government wide regulation or whether it affects management rights set out in the Statute.

When an agency refuses to bargain over a proposal because it claims that it is not negotiable, the union may file an appeal with the Authority. There are specific regulations that govern when an agency claim of this sort triggers a right to file an appeal, and how the appeal is filed. Information that may help you if you want to file or respond to a negotiability appeal are the Authority's forms for filings, the Authority's Regulations, and the Guide to the FLRA Negotiability Appeals Process. Specific questions about appeals can be directed to the Office of Case Intake and Publication. Authority decisions in negotiability cases are appealable to the federal courts of appeal. Alternative dispute resolution of negotiability issues is available through the FLRA's Office of Collaboration and Alternative Dispute Resolution, which applies to interest based dispute resolution techniques to resolve these disputes without litigation.

Negotiability issues can also be resolved through the unfair labor practice (ULP) process. This is appropriate where the parties have both negotiability and bargaining obligation disputes. There are specific Authority regulations that explain the procedural options of parties who have a bargaining problem that includes both a bargaining obligation dispute and a negotiability dispute.



# LABOR RELATIONS REQUIRED AND SUGGESTED TRAINING

## “REQUIRED” READING FOR NATIONAL GUARD LABOR RELATIONS SPECIALISTS

- 5 USC Chapter 71 (the Federal Labor Relations Statute)
- Each individual LRS’ Collective Bargaining Agreement(s)
- 32 USC Chapter 709 (the Technician Act)
- TPR 752: Discipline and Adverse Action
- TPR 752-1: Adverse Action Appeals and the National Guard Hearing Examiner Program

## RECOMMENDED TRAINING FOR LABOR RELATIONS SPECIALIST

### **IDP Excerpt from pages 7-8:**

- ✓ **Basic Labor Relations** – This course covers the basic functions of the LRS in the federal sector to include contract negotiation, impact and implementation bargaining, handling unfair labor practice charges, grievance handling, the function of mediation/settlement agreements and a foundation in management, union and employee rights, and an introduction to case law research.
- ✓ **Discipline and Adverse Actions** – This course covers the basic functions of the LRS in the federal sector concerning the Employee Relations conduct management function of the position. Understand the difference between discipline and adverse actions, and how to apply the Douglas Factors. Learn how to write formal disciplinary and adverse actions memorandums, how to advise management on appropriate actions, and the strengths and weaknesses of a proposed action.
- ✓ **Workshops/Conferences/Symposiums** – Understand the current issues in Labor and Employee Relations by attending additional training opportunities like the annual NGB Functional Labor Relations Workshop, the Defense Employee and Labor Relations Symposium (DELRS), or other quality training events.
- ✓ **Supervisor’s Course** – Learn the current policies and procedures that govern every facet of human resources management for the National Guard. (Labor and Employee Relations has two blocks of instruction in this course.)
- ✓ **Basic Mediation / Alternative Dispute Resolution (ADR) / Problem Solving** – Learn how to mediate when two parties disagree on a course of action. This can also be helpful when coordinating management’s response to union contract proposals.
- ✓ **Negotiating Labor Agreements** – Learn the different approaches to negotiating contracts and the different steps to each approach. Learn about the importance of ground rules and the process for arriving at a signed agreement.
- ✓ **Interest-Based Bargaining** – Learn how to focus on mutual interests instead of specific positions when negotiating a contract. This approach looks beyond the positions to determine the party’s needs and looking for common ground that is much different than the traditional “win-lose” philosophy.

- ✓ **Advanced Labor Relations** –This course covers handling complex information requests, the role of the LR specialist in union elections, determining case strategy for third party appeal, writing exceptions to arbitration awards, researching case studies on unfair labor practice charges, determining negotiability of union proposals, using impasse procedures, exclusions to bargaining units, agency head review of labor contracts.
- ✓ **Communication/Presentation Skills** – Learn the basics of effective communications to help you deliver superior customer service by successfully interacting with internal and external customers. Develop flexibility when handling requests and complaints and spot and respond to important verbal and nonverbal messages.
- ✓ **Presentation Skills/Briefing Techniques** – Learn to overcome your fear of public speaking. Discover strategies to develop and organize your thoughts, learn to speak directly to the audience, field tough questions and get the most from visual aids.

**\*\*Read the NGB Labor Relations Reference Manual Upon Assignment to the LRS position!**

**LABOR RELATIONS SPECIALIST CHECKLIST**

QUESTIONS	YES	NO	REMARKS
1. Has the LRS been trained in: a. Basic Labor Relations? b. Contract Negotiations? c. Grievance and ULP Handling? d. Disciplinary/Adverse Actions (TPR 752)? e. Non-Disciplinary Actions (TPR 715)?			
2. Has training been provided to managers and supervisors in dealing with union stewards, contract provisions, grievance procedures, and conduct mgmt?			
3. Has a copy of the negotiated agreement been provided to supervisors?			
4. Is the collective bargaining agreement being monitored during the life of the union contract to prepare for future contract negotiations? Is a running list of potential issues/proposals kept in a contract file?			
5. Is the LRS monitoring adverse actions by supervisors to verify compliance with TPR 752 and timeframes? Are the official adverse action files stored in the HRO for future reference? Are Letters of Reprimand removed from the OPF upon expiration?			
6. Have employee notifications been published annually on rights to representation (Weingarten Rights)? Ref: 5 USC 7114(a)(2)(b)			
7. Is Official Time being tracked for union reps? Are supervisors entering proper Official Time Codes in T&A records, and reporting official time used to HRO? Are the Official Time Codes being verified, and reported to NGB annually? Ref: 5 USC 7131			
8. Are Bargaining Unit Status (BUS) Codes entered in DCPDS being verified for accuracy periodically?			
9. Is the LRS tracking bargaining unit employees who request union dues withheld through allotment of pay? Is the HRO notifying payroll when bargaining unit employees are temporarily promoted to a supervisory position, to ensure any dues deductions are cancelled?			
10. Is there an Administrative Grievance Procedure or Alternative Dispute Resolution (ADR) program in place for non-bargaining unit employees?			
11. Is an LR library of laws, regulations, policies and procedures maintained and updated? Is the NGB-TN website reviewed periodically for updates? Are internet resources readily available to research case law in preparation for legal proceedings?			

## MISCELLANEOUS

### THE ADJUTANT GENERAL'S "UNFETTERED" AUTHORITY TO SET WORK SCHEDULES AND HOURS

Section 709(g) of the Technician Act, gives the Secretary of the Army unfettered discretion to "prescribe the hours of duty" for National Guard technicians. Thus, the National Guard is not required to bargain any change in work schedules and hours with their employees. This provision is in direct conflict with the bargaining requirements of the Federal Employees Federal and Compressed Work Schedules Act of 1982 (Schedules Act). However, the principle of TAG's "unfettered discretion" to set work schedules and hours has been held in the Federal Appellate Courts to override the Schedules Act. *Wyoming Air National Guard v. Federal Labor Relations Authority*, 854 F.2d 1396 (D.C. Cir. 1988.). *fn.1.*

#### **Section 709(h) of the Technician Act, in relevant part, provides:**

Notwithstanding sections 5544(a) and 6101(a) of title 5 or any other provision of law, the Secretary concerned may prescribe the hours of duty for technicians. Notwithstanding section 5542 and 5543 of title 5 or any other provision of law, such technicians shall be granted an amount of compensatory time off from their scheduled tour of duty equal to the amount of any time spent by them in irregular or overtime work, and shall not be entitled to compensation for such work.

In Wyoming Air National Guard, the specific issue was whether or not the Schedules Act (a very broad piece of legislation which was passed after the Technician Act) applied to State National Guards. The DC Court of Appeals concluded that Congress intended for the Technician Act, rather than the Schedules Act, to control in that situation. The court found that the Technician Act "commits decisions regarding technician work schedules to the Secretary's 'unfettered discretion'." Furthermore, "because (the court) is unable to find any indication in the Schedules Act that Congress intended to limit that discretion, we cannot conclude that the bargaining requirement of the later statute implicitly amends or repeals the earlier enactment." Thus, the court found "that, notwithstanding the Schedules Act, the Technician Act continues to commit the establishment of technicians' work schedules to the discretion of the Secretary."

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1. (This decision from the D.C. Court of Appeals upheld the National Guard's position that The Adjutant General, through the service secretaries, has the "unfettered" authority to set work schedules and hours. The Court went further to say that the specific (The Technician Act) trumps the general (The Schedules Act), and ruled in favor of the National Guard. This is also an excellent example of the Court's understanding of the Technician Act of 1968 and the structure and function of the National Guard).

## **ADVANCED TOPICS- LABOR RELATIONS TERMS-EXPLAINED**

**ABROGATION TEST** - A test the **Federal Labor Relations Authority** (FLRA) applies in determining whether an arbitration award enforcing a contract provision affecting rights reserved to management is deficient. If the provision at issue is an “arrangement” for employees adversely affected by the exercise of those rights, an award enforcing such a provision will not be set aside unless it “abrogates” those rights – i.e., unless it leaves management no discretion at all.

**ACCRETION** - When some employees are transferred to another employing entity whose employees are already represented by a union, the FLRA will often find that those employees have "accredit" to (i.e., become part of) the existing **unit** of the new employer, with the result that the transferred employees have a new **exclusive representative** along with a new employer.

**ACTIONS DURING EMERGENCIES** - Management’s right "to take whatever actions may be necessary to carry out the agency mission during emergencies" doesn't come up in negotiability disputes very often. In cases decided thus far, the FLRA has held that this right is interfered with by proposals attempting to define "emergency" because such definitions would be inconsistent with management's right to independently determine whether an emergency exists.

**ADMINISTRATIVE LAW JUDGE (ALJ)** - An individual who conducts hearings and makes initial decisions on behalf of the Federal labor Relations Authority (FLRA). Most of the hearings are for the purpose of adjudicating unfair labor practice complaints. The decision of an ALJ is final and non-precedent setting unless one of parties files an exception to the decision with the FLRA.

**ADVERSE ACTION** - An official personnel action, usually taken for disciplinary reasons, which adversely affects an employee and is of a severity such as suspension, reduction in grade or status, or removal is warranted.

**ADVERSE IMPACT** - Change in working conditions that works to the disadvantage of employees. Depends on the occurrence of a chain of events and are not necessarily inevitable (reasonably foreseeable). Generally involves more than merely a hypothetical or speculative concern.

**AGENCY HEAD REVIEW** - A statutory requirement that negotiated agreements be reviewed for legal sufficiency by the head of the agency (or his/her designee). This must be accomplished within 30 days from the date the agreement is executed. If disapproved, the union can challenge those determinations by filing a **negotiability** petition or an **unfair labor practice** charge with the FLRA. If not approved or disapproved within that time, the agreement goes into effect and the legality and enforceability of its terms is decided in other forums (e.g., grievance or unfair labor practice proceedings).

**AGREEMENT, NEGOTIATED** - A collective bargaining agreement between the employer and the exclusive representative or labor organization. A collective bargaining agreement must contain a negotiated grievance procedure for settling disputes. [Also known as Agreement, CBA, Contract, Labor-Management Agreement or Negotiated Agreement.]

**AMENDMENT OF CERTIFICATION PETITION** - That portion of the FLRA’s multipurpose petition not involving a **question concerning representation** that may be filed at any time in which the petitioner asks the FLRA to amend the certification or recognition to, e.g., reflect changes in the names of the employer or the union.

**AMERICAN ARBITRATION ASSOCIATION (AAA)** - A private nonprofit organization that, among other things, provides lists of qualified arbitrators to unions and employers.

**APPLICABLE LAWS** - The Authority has said that “applicable laws” within the meaning of title 5, United States Code, section 7106(a)(2), include statutes, the Constitution, judicial decisions, certain Presidential executive orders, and regulations “having the force and effect of law”<sup>2</sup>

**APPROPRIATE ARRANGEMENT** - Defined as arrangements for employees adversely (detrimentally) affected by the exercise of a management right or rights contained in 5 USC 71\*(a) and (b)(1).

**APPROPRIATE UNIT (BARGAINING UNIT)** - A grouping of employees that a union represents or seeks to represent and that the FLRA finds appropriate for **collective bargaining** purposes.

**ARBITRATION** - See **ARBITRATOR**.

**ARBITRATOR** - An impartial third party to whom the parties to an agreement refer their disputes for resolution and decision (award). An *ad hoc arbitrator* is one selected to act in a specific case or a limited group of cases. A *permanent arbitrator* is one selected to serve for the life of the agreement or a stipulated term, hearing all disputes that arise during this period.

**Grievance arbitration** When the arbitrator interprets and applies the terms of the collective bargaining agreement--and/or, in the Federal sector, laws and regulations determining conditions of employment.

**Interest arbitration** When the arbitrator resolves bargaining impasses by dictating some of the terms of the collective bargaining agreement.

**ARBITRABILITY** - Refers to whether a given issue is subject to arbitration under the negotiated agreement. If the parties disagree whether a matter is arbitrable or not, the arbitrator must resolve this threshold issue before reviewing the merits of the dispute.

**ASSIGN EMPLOYEES** - A management right relating to the assignment of employees to positions, shifts, and locations.

**ASSIGN WORK** - A management right relating to the assignment of work to employees or positions.

**AUTHORITY** - See **FEDERAL LABOR RELATIONS AUTHORITY**.

**AUTOMATIC RENEWAL CLAUSE** - Many, perhaps most, collective bargaining agreements in the Federal sector have a provision, usually located at the end of the agreement, stating that if neither party gives notice during the agreement's 105-60 day **open period** of its intent to reopen and renegotiate the agreement, the agreement will automatically renew itself for a period of x number of years.

**AWARD** - In labor-management arbitration, the final decision of an arbitrator, final and binding on both parties. In very limited circumstances, either party may appeal the arbitrator's decision to the Federal Labor Relations Authority (e.g. award is contrary to law).

**BACK PAY** - Pay awarded an employee for compensation lost due to an unjustified personnel action are governed by the requirements of the Back Pay Act, title 5, United States Code, section 5596.

**BARGAINING (NEGOTIATING)** - A process--sometimes informal and spontaneous, sometimes formal and deliberate--of offer and counteroffer whereby parties to the bargaining process try to reach agreement on the terms of exchange.

**BARGAINING AGENT** - The union holding exclusive recognition for an **appropriate unit**.

**BARGAINING IMPASSE (IMPASSE)** - When the parties have reached a deadlock in negotiations they are said to have reached an impasse. The statute provides for assistance by **Federal Mediation and Conciliation Service** mediators and the **Federal Service Impasses Panel** to help the parties settle impasses.

**BARGAINING RIGHTS** - Legally recognized right of the labor organization to represent employees in negotiations with employers.

**BARGAINING UNIT** - See **APPROPRIATE UNIT**.

**BINDING ARBITRATION** - The law requires that collective bargaining agreements contain a negotiated grievance procedure that terminates in binding arbitration of unresolved grievances.

**BROOKHAVEN WARNINGS** - Even if the Union is notified that an Agency representative is going to interview a bargaining unit employee for an upcoming arbitration, and a Union representative attends this interview, this does NOT mean that “anything goes” as far as the manner of questioning. What the Agency may consider an “interview” from the Union perspective may be considered an “interrogation.” The interview of the bargaining unit member should be voluntary and non-coercive. Brookhaven warnings are designed to minimize the potentially coercive impact of an Agency interview with an employee

**BUDGET** - A right reserved to management to prescribe particular programs, operations or amounts to be included in an agency's budget.

**BYPASS** - Dealing directly with employees rather than with the **exclusive representative** regarding negotiable **conditions of employment** of bargaining **unit** employees.

**CARVEOUT** - An attempt to sever a subgroup of employees in an existing bargaining **unit** in order to establish a separate, more homogenous unit with a different union as **exclusive representative**.

**CERTIFICATION** - The FLRA's determination of the results of an election or the status of a union as the **exclusive representative** of all the employees in an appropriate unit.

**CERTIFICATION BAR** - One-year period after a union is certified as the **exclusive representative** for a unit during which petitions by rival unions or employees seeking to replace or remove the incumbent union will be considered untimely. Also see **CONTRACT BAR** and **ELECTION BAR**.

**CHALLENGED BALLOTS** - Ballots that are challenged by election observers on the ground that the person casting the ballot isn't eligible to vote.

**CHECKOFF** - See **DUES ALLOTMENT**.

**CHIEF STEWARD** - A union official who assists and guides shop stewards.

**CLARIFICATION OF UNIT PETITION** - That portion of the FLRA's multipurpose petition *not* involving a **question concerning representation** that may be filed at any time in which the petitioner (union or management) asks the FLRA to determine the bargaining unit status of various employees.

**COLLECTIVE BARGAINING** - The legal, statutory basis for the right to organize, bargain collectively, and participate through labor unions in decisions, which affect their working conditions.

**CLASSIFICATION ACT EMPLOYEES** - Federal employees--typically professional, administrative, technical, and clerical employees (i.e., "white collar" employees)--sometimes referred to a "General Schedule" employees, to distinguish them from Federal Wage System (blue collar, Wage Grade) employees.

**COLLECTIVE BARGAINING OR NEGOTIATIONS** - The performance of the mutual obligation of the employer and the exclusive representative to meet at reasonable times, to consult and bargain in good faith, and upon request by either party to execute a written agreement with respect to terms and conditions of employment. This obligation does not compel either party to agree to proposals or make concessions.

**COLLECTIVE BARGAINING AGREEMENT (CBA)** - See **AGREEMENT, NEGOTIATED**.

**COMPELLING NEED** - Test used to determine whether a discretionary agency regulation that doesn't involve the exercise of management's is a valid limitation on the **scope of bargaining**. There are three "illustrative criteria" of compelling need: (1) the regulation is essential to the effective and efficient accomplishment of the mission of the agency, (2) the regulation is necessary to insure the maintenance of basic merit principles, and (3) the regulation implements a mandate of law or other authority (e.g., a regulation) in an essentially non-discretionary manner.

**CONCILIATION** - See **MEDIATION**.

**CONDITIONS OF EMPLOYMENT (COE)** - Personnel policies, practices, and matters, whether established by rule, regulation, or otherwise [e.g., by custom or practice], affecting working conditions. It does not include policies, practices and matters relating to prohibited political activities, to the classification of any position, or to the extent the matters are specifically provided for by statute.

**CONFIDENTIAL EMPLOYEE** - An employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations. Confidential employees must be excluded from bargaining units.

**CONSULTATION** The FSLMRS provides for two types of consultation: between qualifying unions and agencies concerning agency-wide regulations and qualifying unions and those agencies issuing Government-wide regulations.

**CONTRACT BAR** - The incumbent union is protected from challenge by a rival union if there is an agreement in effect having a term of not more than three years, except during the agreement's **open period**--i.e., 105 to 60 days prior to the expiration of the agreement. See **ELECTION BAR** and **CERTIFICATION BAR**.

**CONTRACTING OUT** - A right reserved to management that includes the right to determine what criteria management will use to determine whether or not to contract out agency work.

**"COVERED BY" DOCTRINE** -A doctrine under which an agency does not have to engage in **midterm bargaining** on particular matters because those matters are already "covered by" the existing agreement.

**DECERTIFICATION** The FLRA's withdrawal of a union's **exclusive recognition** because the union no longer qualifies for such recognition, usually because it has lost a representational election.



**DECERTIFICATION PETITION** - A petition filed by employees in an existing unit (or an individual acting on their behalf) asking that an election be held to give unit employees an opportunity to end the incumbent union's exclusive recognition. Such a petition must be accompanied by a 30 per cent showing of interest and be timely filed (i.e., not barred by election, certification or contract bars).

**DE MINIMIS** - According to Black's Law is, of a fact or thing so insignificant that a court may overlook it in deciding an issue or case.

**DIRECT EMPLOYEES** - The Authority has defined this right to include discretion "to supervise and guide [employees] . . . in the performance of their duties on the job."

**DISCIPLINE** A right reserved to management that the FLRA has said includes the right "to investigate to determine whether discipline is justified. " It also "encompasses the use of the evidence obtained during the investigation."

**DOCTRINE** - A rule, principle, theory or tenet (fundamental principle) of the law; as e.g. Covered by Doctrine; Waiver Doctrine, Etc.

**DUES ALLOTMENT (WITHHOLDING, CHECKOFF)** - Dues withholding services provided by the agency to unions that win exclusive recognition or dues withholding recognition.

**DUES WITHHOLDING RECOGNITION** - A very limited form of recognition, under which a union that can show that it has 10 per cent of employees in an appropriate unit as members can qualify for the right only to negotiate a dues deduction arrangement. Such recognition becomes null and void as soon as a union is certified as the **exclusive representative** of the unit.

**DURATION CLAUSE (TERM OF AGREEMENT)** - Clause in a collective bargaining agreement that specifies the time period during which the agreement is in effect (normally three years). Where an agreement has a term greater than three years, the agreement serves as a contract bar only during the first three years.

**DUTY OF FAIR REPRESENTATION** - "An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership."

**DUTY TO BARGAIN** - Broadly conceived, it refers to both (1) the *circumstances* under which there is a duty to give notice and, upon request, engage in bargaining (see **MIDTERM BARGAINING**) and (2) the *negotiability* of specific proposals.

**ELECTION AGREEMENT** - Agreement entered into by the agency and the union(s) competing for exclusive recognition dealing with campaign procedures, election observers, date and hours of election, challenge ballot procedures, mail balloting (if used), position on the ballot, payroll period for voter eligibility, and the like. Such an agreement is subject to approval by the appropriate FLRA Regional Director.

**ELECTION BAR** - One-year period after the FLRA has conducted a secret-ballot election for a unit of employees, where the election did not lead to the certification of a union as exclusive representative. During this one-year period the FLRA will not consider any representation petitions for that unit or any subdivisions thereof. See **CERTIFICATION BAR** and **CONTRACT BAR**.

**EMPLOYEE** - The term "employee" includes an individual "employed in an agency" or "whose employment in an agency has ceased because of any unfair labor practice," but does not include supervisors and management officials or anyone who participates in a strike or members of the uniformed services or employees in the Foreign Service or aliens occupying positions outside the United States.

**EQUIVALENT STATUS** - Status given a union challenging the incumbent union that entitles it to roughly equivalent access during the period preceding an election to facilities and services (bulletin boards, internal mail services, etc.) as that enjoyed by the incumbent union.

**EXCEPTIONS TO ARBITRATION AWARDS** - Under 5 USC 7122, either party to arbitration may file with the Federal Labor Relations Authority an exception (appeal) to an arbitrator's award because the award is 1) contrary to any law, rule or regulation; or 2) on other grounds similar to those applied by Federal courts in private sector labor-management relations.

**EXCESSIVE INTERFERENCE** - A balancing test that the FLRA applies to proposals that are arrangements for employees adversely affected by the exercise of management's rights in order to determine whether they are negotiable **appropriate arrangements**. The test involves balancing the extent to which the proposal ameliorates anticipated adverse effects against the extent to which it places restrictions on the exercise of management's rights.

**EXCLUSIVE RECOGNITION** - The rights a union is accorded as a result of being certified as the **exclusive representative** of the employees in a bargaining unit include, among other things, the right to *negotiate* bargainable aspects of the conditions of employment of bargaining unit employees, to be afforded an opportunity to be present at *formal discussions*, to free *check-off* arrangements and, at the request of the employee, to be present at *Weingarten* examinations.

**EXCLUSIVE REPRESENTATIVE** - The union that is certified as the exclusive representative of a unit of employees either by virtue of having won a representation election or because it had been recognized as the exclusive representative before passage of the CSRA. See **EXCLUSIVE RECOGNITION**. A union holding exclusive recognition is sometimes referred to as the exclusive bargaining agent of the unit.

**EXTERNAL LIMITATIONS ON THE EXERCISE OF MANAGEMENT'S RIGHTS** - Discretion reserved to management isn't unfettered. Quite apart from any limitations that may be found in the collective bargaining agreement (such as an **appropriate arrangement** provision), its discretion must also be exercised in accordance with the laws and regulations that set limitations on management discretion. Only those external limitations on the exercise of certain rights can be enforced by the union under the **negotiated grievance procedure**. See **APPLICABLE LAWS**.

**FAIR REPRESENTATION, DUTY OF** - The union's duty to represent the interests of all unit employees without regard to union membership.

**FEDERAL LABOR RELATIONS AUTHORITY (FLRA, AUTHORITY)** - The independent agency responsible for administering the **Federal Service Labor-Management Relations Statute (FSLMRS)**. As such, it decides, among other things, representation issues (e.g., the bargaining **unit** status of certain employees), **unfair labor practices** (violations of any of the provisions of the FSLMRS), **negotiability disputes** (i.e., **scope of bargaining** issues), **exceptions to arbitration awards**, as well as resolve disputes over consultation rights regarding agency-wide and Government-wide regulations. The FLRA maintains nine regional offices. Also see the FLRA web page at <http://www.flra.gov/>

**FEDERAL MEDIATION AND CONCILIATION SERVICE (FMCS)** - An independent agency that provides mediators to assist the parties in negotiations. FMCS also maintains a roster of qualified private

arbitrators, panels of which are referred to the parties upon joint request. See **MEDIATION**. Also see the FMCS webpage at <http://www.flra.gov/>

**FEDERAL SERVICE IMPASSES PANEL (FSIP or Panel)** - An entity within the FLRA that resolves bargaining impasses, chiefly by ordering the parties to adopt certain contractual provisions relating to the conditions of employment of unit employees. The Panel uses many procedures for resolving impasses, including fact-finding, mediation-arbitration, final-offer interest arbitration, either by the Panel, individual members of the Panel, the Panel's staff, or by ordering the parties to refer their impasse to an agreed-upon private arbitrator who is to provide services. The Panel is empowered to "take whatever action is necessary and not inconsistent with [the Federal Service Labor-Management Relations Statute] to resolve the impasse." For more information on FSIP, see <http://www.flra.gov/>

**FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE (FSLMRS)** - Title 5, United States Code, sections 7101 - 7135.

**FINAL-OFFER INTEREST ARBITRATION** - A technique for resolving bargaining impasses in which the arbitrator is forced to choose among the final positions of the parties--rather than order adoption of some intermediate position (i.e., "split the difference").

**FORMAL DISCUSSION** - Under title 5, United States Code, section 7114(a)(2)(A), the **exclusive representative** must be given an 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 condition of employment*." (Italics added.) Under 5 USC 7114(a)(2)(A), a discussion between an agency representative(s) and a bargaining unit employee(s) concerning any grievance or any personnel policy or practice or other condition of employment which affects bargaining unit employees. The exclusive representative must be given the opportunity to be represented at these meetings.

**FREE SPEECH** - Under title 5, United States Code, section 7116(e), the expression of personal views or opinions, even if critical of the union, is not an **unfair labor practice** if such expression is not made in the context of a representational election and if it "contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions." During the conduct of an election, however, management officials must be neutral. This limited right of free speech applies to agency representatives.

**GENERAL COUNSEL** - The General Counsel of the FLRA investigates **unfair labor practice (ULP) charges** and files and prosecutes ULP *complaints*. He/she also supervises the Authority's Regional Directors who, in turn, have been delegated authority by the FLRA to process representation petitioners.

**GOOD FAITH BARGAINING** - A statutory duty to approach negotiations with a sincere resolve to reach a collective bargaining agreement, to be represented by properly authorized representatives who are prepared to discuss and negotiate on any **condition of employment**, to meet at reasonable times and places as frequently as may be necessary and to avoid unnecessary delays, and, in the case of the agency, to furnish upon request data necessary to negotiation.

**GOVERNMENTWIDE REGULATIONS** - Regulations issued by an agency bearing on conditions of employment that must be complied with by other agencies. See, also, **CONSULTATION**.

**GRIEVANCE** - TPR 752 definition – Request by an employee, or group of employees acting as an individual, for personal relief in a matter of concern of dissatisfaction which is subject to the control of agency management and relates to the employment of the employee(s)

**GRIEVANCE ARBITRATION** - See **ARBITRATOR**.

**GRIEVANCE BAR** - A claim by either party to a collective bargaining relationship that a statutory appeal was previously filed involving the same facts and theories alleged in a subsequently filed grievance.

**GRIEVANCE PROCEDURE** - A systematic procedure, devised by the parties to the agreement, by which a grievance moves from one level of authority to the next higher level until it is settled, withdrawn, or referred to arbitration. Under title 5, United States Code, section 7121, a collective bargaining agreement must contain a grievance procedure terminating in final and binding arbitration. See **NEGOTIATED GRIEVANCE PROCEDURE**.

**HIRE EMPLOYEES**. A right reserved to management to hire. See **SELECT** for a discussion of the much more frequently utilized right of management, in filling positions, to make selections for appointments from any appropriate source.

**IMPASSE** - See **BARGAINING IMPASSE**.

**I&I (IMPACT AND IMPLEMENTATION) BARGAINING** - Even where the decision to change conditions of employment of unit employees is protected by management's rights, there is a duty to notify the union and, upon request, bargain on **procedures** that management will follow in implementing its protected decision as well as on **appropriate arrangements** for employees expected to be adversely affected by the decision. Such bargaining is commonly referred to as "impact and implementation," or "I&I" bargaining, which is the commonest variety of **midterm bargaining**.

**INFORMATION** - The union, to the extent not prohibited by law (e.g., the Privacy Act), is entitled, under certain circumstances (see **PARTICULARIZED NEED**, below), to data "for full and proper discussion, understanding, and negotiation of subjects within the **scope of bargaining**." The agency must provide that information free of charge.

**INTEREST** - In **interest-based bargaining**, the concerns, needs, or desires behind an issue: *why* the issue is being raised.

**INTEREST ARBITRATION** - The arbitrator, instead of interpreting and applying the terms of an agreement to decide a grievance, determines what provisions the parties are to have in their collective bargaining agreement. Also see **ARBITRATION**.

**INTEREST-BASED BARGAINING (IBB)** - A bargaining technique in which the parties start with (or at least focus on) interests rather than proposals; agree on criteria of acceptability that will be used to evaluate alternatives; generate several alternatives that are consistent with their interests, and apply the agreed-upon acceptability criteria to the alternatives so generated in order to arrive at mutually acceptable contract provisions.

**INTERNAL SECURITY PRACTICES** - A right reserved to management by title 5, United States Code, section 7106(a)(1). The right to determine the internal security practices of an agency isn't limited to establishing "those policies and actions which are part of the Agency's plan to secure or safeguard its physical property against internal and external risks, to prevent improper or unauthorized disclosure of information, or to prevent the disruption of the Agency's activities." It also extends to safeguarding the agency's personnel.

**INTERVENTION/INTERVENER** - The action taken by a competing labor organization (intervener) to place itself as a contender on the ballot for a recognition election originally initiated by another union (petitioner). Non-incumbent intervener's need only produce a 10 per cent showing of interest to be included on the ballot.

**INVESTIGATORY EXAMINATION** - See **WEINGARTEN RIGHT**.

**JENKS RULE** - Even if it overcomes privileges, the rule is discretionary as to pre-testimony documents. You can always ask the witness if their testimony is based on any document. Likewise, at deposition you can ask about documents that might be relevant to the case generally. But asking, "describe for me each document that you reviewed in preparation for today's deposition" would be an objectionable question. *In short, the "JENKS RULE" is a rule permitting the production of a protected affidavit for purposes of cross examination.*

**LABOR ORGANIZATION** - A union--i.e., an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievances and conditions of employment.

**LAYOFF EMPLOYEES** - Right reserved to management by title 5, United States Code, section 7106(a)(2)(A).

**MANAGEMENT OFFICIAL** - An individual who formulates, determines, or influences the policies of the agency. Such individuals are excluded from **appropriate units**.

**MANAGEMENT RIGHTS** - Refers to types of discretion reserved to management officials by statute.

- to determine the mission, budget, organization, number of employees, internal security practices of the agency
- hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees; to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted; with respect to filling positions, to make selections for appointments from-- among properly ranked and certified candidates for promotion; or any other appropriate source; and to take whatever actions may be necessary to carry out the agency mission during emergencies.

**MANDATORY SUBJECTS OF BARGAINING** - Those matters that the agency must bargain over upon receipt of a union's request, such as conditions of employment not otherwise waived by the union or covered by the parties' agreement.

**MEDIATION** - Use of a third party, usually a neutral without authority to impose a settlement, to assist the parties to reach agreement.

**MED-ARB** - (mediation followed by interest arbitration). A process in which a neutral with authority to impose (or to recommend the imposition of) a settlement, first resorts to mediation techniques in an attempt to get the parties to voluntarily agree on unsettled matters, but who can later impose a settlement if mediation fails.

## **MERIT PRINCIPLES - Prohibited personnel practices and Merit Principles**

Prohibited personnel practices means actions that are taken for reasons forbidden under law. They include unlawful discrimination; improper personnel solicitations and recommendations; coercing political activity; improperly influencing employment decisions; granting improper preferences in personnel decisions; appointing relatives improperly; retaliation against whistleblowers; retaliation for the exercise of appeal or grievance rights; discrimination on the basis of conduct which is not job-related; and violations of the merit system principles.

According to the nine merit systems principles outlined in 5 USC 2301(b), agencies must:

1. Recruit qualified individuals from all segments of society and select and advance employees on the basis of merit after fair and open competition.
2. Treat employees and applicants fairly and equitably, without regard to political affiliation, race, color, religion, national origin, sex, marital status, age or disability.
3. Provide equal pay for equal work and reward excellent performance.
4. Maintain high standards of integrity, conduct and concern for the public interest.
5. Manage employees efficiently and effectively.
6. Retain or separate employees on the basis of performance.
7. Educate and train employees when it will result in better organizational or individual performance.
8. Protect employees from improper political influence.
9. Protect employees against reprisal for the lawful disclosure of information in "whistleblower" situations when they disclose waste, fraud, abuse or illegal activities.

**MIDTERM BARGAINING / NEGOTIATIONS** - Literally, all bargaining that takes place during the life of the contract. Usually contrasted with term bargaining – i.e., with the renegotiation of an expired (or expiring) contract. Midterm bargaining includes **I&I bargaining, union-initiated midterm bargaining on new matters**; and bargaining pursuant to a **reopener** clause. It excludes matters that are already “covered by” the term agreement.

**MISSION OF THE AGENCY** - A right reserved to management by title 5, United States Code, section 7106(a)(1). Although illustrative case law on this particular right is meager, it is generally recognized that the right encompasses the determination of the products and services of an agency.

**NATIONAL CONSULTATION RIGHTS (NCR)** - A union-afforded national consultation rights is entitled to be consulted on *agency-wide* regulations before they are promulgated. NCR is to be distinguished from consultation rights with respect to *Government-wide* regulations, under which a union accorded such recognition, must be consulted on proposed Government-wide regulations before they are promulgated.

**NATIONAL UNION** - Ordinarily, a union composed of a number of affiliated local unions. The Bureau of Labor Statistics in its union directory defines a national union as one with agreements with different employers in more than one state, or an affiliate of the AFL-CIO, or a national organization of employees.

**NEGOTIABILITY** - Refers to whether a given topic is subject to bargaining between an agency and the union. The FLRA makes the final decision whether a subject is negotiable or nonnegotiable.

**NEGOTIABILITY APPEAL (PETITION FOR REVIEW)** - If an agency believes that a union proposal is contrary to law or applicable regulation, or is otherwise nonnegotiable under the statute, it

may inform the union of its refusal to negotiate. 5 USC 7117 provides a right to appeal the agency's determination of non-negotiability to the FLRA.

**NEGOTIABILITY DETERMINATION** - A decision reached by the FLRA on a request for expedited review of negotiability issues. Unions in disputes with agencies concerning what matters may be collectively bargained may file negotiability appeals, technically called petitions for review. A negotiability determination may be rendered when an agency claims a matter is non-negotiable or there is no duty to bargain. Matters that involve such allegations that do not involve the actual or contemplated changes in working conditions can only be filed under the negotiability appeal procedure.

**NEGOTIABILITY DISPUTES** - Disputes over whether a proposal is nonnegotiable because (a) it is inconsistent with laws, rules, and regulations establishing conditions of employment and/or (b) it interferes with the exercise of rights reserved to management. Negotiability disputes normally are processed under the FLRA's "no fault" negotiability procedures

**NEGOTIATED GRIEVANCE PROCEDURE (NGP)** - A collective bargaining agreement (CBA) must contain a grievance procedure terminating in final and binding arbitration. (see **GRIEVANCE**, above), minus any of those matters that the parties agree to exclude from the NGP. A systematic procedure agreed to by the negotiating parties for the resolution of grievances. The negotiated grievance procedure is applicable only to employees in the bargaining unit.

**NEGOTIATION IMPASSE** - If there are no disputes over the essential obligations of bargaining, assuming the parties' have bargaining in good faith but unsuccessfully over a negotiable proposal, it is point where the parties are unable to reach an agreement.

**NON-NEGOTIABLE** - A term used to indicate the subject matter of a management change does not concern a condition of employment for affected employees, is a reserved management right or because the matter is permissively negotiable and the agency has elected not to bargain. Additionally, the term applies to a union proposal that does not concern a condition of employment for affected employees, is in conflict with law, Government-wide rule or regulation or excessively interferes with a reserved management right.

**NO-DUTY TO BARGAIN** - A term used to indicate the subject matter of a management change or union initiated proposal involves a condition of employment for affected employees that has been previously waived by the union or is covered by the parties' collective bargaining agreement.

**NUMBER OF EMPLOYEES OF AN AGENCY** - A right reserved to management by title 5, United States Code, section 7106(a) (1).

**OBJECTIONS TO ELECTION** - Charges filed with the FLRA contesting election results because of alleged irregularities in the conduct of a representational election. If the objections are sustained, the FLRA could set aside the election results and order that the election be rerun.

**OBLIGATION TO BARGAIN** -The right to bargain is affirmative; if management does nothing, the union may require negotiations over working conditions. The right to bargain is also responsive; when management changes working conditions, the changes may lead to negotiations. That obligation is fulfilled through negotiations leading to a basic agreement, mid-term bargaining, and bargaining over impact and implementation decisions made within the ambit of management rights. In order to meet this obligation, management has the duty to give the exclusive bargaining representative advance notice of the proposed implementation of decisions and provide the union with an opportunity to participate in impact and implementation bargaining. The union must then act if it is to act at all.

**OFFICE OF PERSONNEL MANAGEMENT (OPM)** - Issues **Government-wide regulations** on personnel matters that may have a substantial impact on the **scope of bargaining**; consults with labor organizations on those regulations; provides technical advice and assistance on labor-management relations matters to Federal agencies; also provides information on personnel matters to Federal agencies and the general public (e.g., this annotated glossary); exercises oversight with regard to statutory and regulatory requirements relating to personnel matters.

**OFFICIAL TIME** - Paid time for employees serving as union representatives.

**OPEN PERIOD** - The 45-day period (105 - 60 days prior to expiration of agreement) when the union holding exclusive recognition is subject to challenge by a rival union or by unit employees who no longer want to be represented by the union. The open period is an exception to the **contract bar** rule.

**ORGANIZATION** - A right reserved to management. According to the FLRA, this right encompasses an agency's authority to determine its administrative and functional structure, including the relationship of personnel through lines of control and the distribution of responsibilities for delegated and assigned duties. That is, the right includes the authority to determine how the agency will structure itself to accomplish its mission and functions.

**OPPOSITION TO EXCEPTION TO ARBITRATION AWARD** - If a party files an exception (appeal) to an arbitrator's award, the other party may oppose the exception to the Authority in accordance with 5 CFR 2425.1. Oppositions to exceptions must be filed within thirty (30) days after the date of service of the exception.

**PACKAGE BARGAINING** - A negotiating technique whereby contract proposals are grouped into a "package" usually offering substantial concessions by one party, in exchange for substantial gains. Frequently, the package proposal will be advanced with the condition that it must either be accepted as presented or rejected entirely.

**PANEL** - See **FEDERAL SERVICE IMPASSES PANEL**.

**PARTICULARIZED NEED** - The Authority's analytical approach in dealing with union requests for information under title 5, United States Code, section 7114(b)(4). Under this approach, the union must establish a "particularized need" for the information and the agency must assert any countervailing interests. The Authority then balances the one against the other to determine whether a refusal to provide information is an **unfair labor practice**.

**PAST PRACTICE (ESTABLISHED PRACTICE)** - Existing practices sanctioned by use and acceptance, that are not specifically included in the collective bargaining agreement. To qualify as an enforceable established practice, the practice has to be legal, in effect for a certain period, and known and sanctioned by management. Existing practices sanctioned by use and acceptance, which amount to terms and conditions of employment even though not specifically included in the collective bargaining agreement. In order to constitute a binding past practice, it must be established that (1) the practice must involve a condition of employment; and (2) the practice must be consistently exercised for an extended period of time and followed by both parties, or followed by one party and not challenged by the other over a substantially long duration. It should be noted that if a matter is not a condition of employment, it does not become a condition of employment either through practice or agreement.

**PERMISSIVE SUBJECTS OF BARGAINING** - There are two types of proposals dealing with so-called "permissive subjects of bargaining": proposals dealing with (1) matters covered by title 5, United States Code, section 7106(b)(1) – i.e., with staffing patterns, technology, and methods and means of



performing the agency's work, and (2) matters that are not conditions of employment of bargaining unit employees. Regarding the former, it should be noted that although an agency can "elect" not to bargain on a (b)(1) matter, the President has directed heads of agencies to instruct agency management to bargain on such matters in section 2(d) of Executive Order 12871 – This directive was rescinded by Executive Order 13203.

Regarding the latter, it should be kept in mind that, apart from the statutory exclusions from the definition of **condition of employment** found in title 5, United States Code, section 7103(a)(14), a matter may be found not be a condition of employment because (1) it deals with the conditions of employment of *non-unit employees* (e.g., a proposed procedure for filling supervisory vacancies) or (2) there is no direct connection between the matter dealt with by the proposal and the work situation or employment relationship of bargaining unit employees (e.g., a proposal authorizing unit employees to hunt on a military base when off duty). Regardless of type, once agreement is reached on a permissive subject of bargaining, that agreement cannot be disapproved by the agency head, and is enforceable under the negotiated grievance procedure.

**PERSONNEL BY WHICH AGENCY OPERATIONS ARE CONDUCTED** - A right reserved to management by title 5, United States Code, section 7106(a)(2)(B).

**PICKETING** - Demonstrating, usually near the place of employment, to publicize the existence of a labor-management dispute. This is commonly called **Informational Picketing** and is directed toward advising the public about the issue in dispute. This is specifically protected by 5 USC 7116(b) as long as the picketing does not interfere with agency operations. This is not to be confused with a "strike" as Federal employees are not permitted to strike under Federal law. Informational picketing may only be conducted outside an employee's established duty hours or the employee must be in an approved leave status.

**PROCEDURES** - Under title 5, United States Code, section 7106(b)(2), the procedures observed by management in exercising its reserved rights are negotiable.

To qualify as a negotiable (b)(2) procedure, the proposed "procedure" must not require the use of standards that, by themselves, directly interfere with management's reserved rights or otherwise have the effect of limiting management's reserved discretion.

**PROHIBITED PERSONNEL PRACTICES (SEE MERIT PRINCIPLES)**

**PROHIBITED SUBJECTS OF BARGAINING** - Includes those matters reserved as management rights pursuant to 5 USC 7106(a).

**QUESTION CONCERNING REPRESENTATION (QCR)** - Refers to a petition in which a union seeks to be the **exclusive representative** of an **appropriate unit** of employees, or in which employees in an existing unit want to decertify the incumbent union. The filing of such a petition is said to raise a question concerning representation--i.e., whether, and by whom, unit employees are to be represented. Such petitions are distinguished from petitions seeking to clarify the composition of existing units (e.g., whether certain individuals are in or out of the unit) or to amend the names of the parties to the exclusive bargaining relationship.

**RATIFICATION** - Formal approval of a newly negotiated agreement by vote of the labor organization members affected.

**REOPENER CLAUSE** - Provisions in the CBA specifying the conditions under which one or either party can reopen for renegotiation the agreement or designated parts of the agreement. Although some agreements provide for mutual consent reopeners, such reopeners are unnecessary as the parties can of course agree to reopen and renegotiate their agreement at any time, notwithstanding the contents of the agreement. The purpose of a reopener is to enable one party to *compel* the other party to renegotiate the provisions covered by the reopener.

**REPRESENTATION ELECTION** - Secret-ballot election to determine whether the employees in an appropriate unit shall have a union as their **EXCLUSIVE REPRESENTATIVE**.

**REPRESENTATIONAL FUNCTIONS** - Activities performed by union representatives on behalf of the employees for whom the union is the **exclusive representative** regarding their conditions of employment. It includes, among other things, negotiating and policing the terms of the agreement, attending partnership council meetings, being present at **formal discussions** and, upon employee request, *Weingarten examinations*.

**REPRESENTATION ISSUES** - Issues related to how a union gains or loses **exclusive recognition** for a bargaining unit, determining whether a proposed unit of employees is appropriate for the purposes of exclusive recognition, and determining the unit status of various employees.

**REPUDIATION OF AGREEMENT** - Framework developed by the FLRA to determine whether (1) the breach of the agreement was clear and patent and (2) the provision breached went to the heart of the agreement.

**REQUEST FOR INFORMATION** - In the case of an agency, to furnish to the union upon request and, to the extent not prohibited by law, data ---

- Which is normally maintained in the regular course of business;
- Which is reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining; and,
- Which does not constitute guidance, advice, counsel or training provided for management officials or supervisors, relating to collective bargaining.

**Retain Employees** - A right reserved to management. Although the rights to layoff and retain appear to be opposite sides of the same coin, the FLRA rarely mentions the right to retain when invoking the right to layoff to find nonnegotiable proposals dealing with RIF's and furloughs.

**SCOPE OF BARGAINING** - Matters about which the parties can negotiate. See **NEGOTIABILITY DISPUTES**.

**SELECT (WITH RESPECT TO FILLING POSITIONS)** - The statute reserves to management the right to make selections for appointments from any appropriate source. The right to select includes discretion to determine what knowledge, skills and abilities are necessary for successful performance in the position to be filled, as well as to determine which candidates possess these qualifications.

**SENIORITY** - Term used to designate an employee's status relative to other employees for determining order of overtime assignments (n/a to National Guard Technicians), compensatory time assignments, vacations, etc. Straight seniority is seniority acquired solely through length of service. Departmental or shop seniority considers status factors in a particular department or shop, rather than the entire agency. A seniority list is a ranking of individual workers in order of seniority.

**SHOWING OF INTEREST (SOI)** - The required evidence of employee interest supporting a representation petition. The SOI is 30 per cent for a petition seeking exclusive recognition; 10 per cent to intervene in the election; and 10 per cent when petitioning for dues allotment recognition. Evidence of such a showing can consist of, e.g., signed and dated authorization cards or petitions.

**STAFFING PATTERNS** - A short-hand expression used to refer to title 5, United States Code, section 7106(b)(1)'s reference to "the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty." Under the statute, agencies can elect not to bargain on such matters.

**STANDARDS OF CONDUCT FOR LABOR ORGANIZATIONS** - Standards regarding internal democratic practices, fiscal responsibility, and procedures to which a union must adhere to qualify for recognition. The Department of Labor has responsibility for making known and enforcing standards of conduct for unions in the Federal and private sectors.

**STEWARD (SHOP, UNION, AREA)** - Union representative in an organization to whom the union assigns various representational functions, such as investigating and processing grievances, representing employees, collecting dues, soliciting new members, etc. Stewards are usually fellow employees who are trained by the union to carry out these duties.

**STRIKE (PROHIBITED BY STATUTE)** - Temporary stoppage of work by a group of employees in connection with a labor dispute. In the Federal sector, strikes are specifically prohibited by Federal law and constitute an unfair labor practice under Section 7116(b)(7) of the Federal Service Labor-Management Relations Statute. Slowdowns, sickouts and related tactics are also prohibited by the Statute.

**SUBSTANCE BARGAINING** - concerns bargaining over whether an action by the agency to change to conditions of employment affecting employee working conditions will or will not be made. Substance bargaining rather than impact and implementation bargaining is required anytime the subject matter involves a condition of employment. When an agency has discretion under the law to change or not change employee working conditions, any bargaining concerning whether the change will be made requires substance bargaining (e.g. over the decision itself or over the procedures or appropriate arrangements concerning a decision already made if the matter concerns a management rights or is not a condition of employment).

**SUCCESSORSHIP** - Where, as the result of a reorganization, a portion of an existing unit is transferred to a gaining employer, the latter will be found to be the successor employer (thus inheriting, along with the employees, the **exclusive representative** of those employees and the collective bargaining agreement that applied to those employees) if: (a) the post-transfer unit is appropriate, (b) the transferred bargaining unit employees are a majority in the post-transfer unit, (c) the gaining employer has "substantially" the same mission as the losing employer, (d) the transferred employees perform "substantially" the same duties under "substantially" similar working conditions in the gaining entity, and (e) it is not demonstrated that an election is necessary to determine representation.

**SUPERVISOR** - Under title 5, United States Code, section 7103(a)(10), a supervisor is "an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term 'supervisor' includes only those individuals who devote a preponderance of their employment time to exercising such authority[.]" The individual need

exercise only one of the indicia of supervisory authority, not a majority of them, to qualify as a supervisor for the purposes of the statute, provided it involves the consistent exercise of independent judgment.

**UNFAIR LABOR PRACTICE (ULP)** - A violation of any of the provisions of the Federal Service Labor-Management Relations Statute. They are investigated by the General Counsel who issues a ULP *complaint* if the General Counsel concludes the charge(s) have merit, and who prosecutes the matter before an Administrative Law Judge in a fact-finding hearing and before the Authority, which decides the matter.

The most common agency ULPs are **duty-to-bargain** ULPs (usually a failure to give the union notice of proposed changes in conditions of employment and/or engage in impact and implementation bargaining), **formal discussion** ULPs, *Weingarten* ULPs, and failure-to-provide-**information** ULPs. The most common ULP committed by a union is a failure to fairly represent (see **fair representation**) all unit members without regard to union membership.

**ULP BAR** - A claim by either party to a collective bargaining relationship that a grievance was previously filed involving the same facts and theories alleged in a subsequently filed ULP.

**UNILATERAL ACTION** - Implementation of management decisions concerning personnel policies and matters affecting working conditions without providing the union advance notice of such changes in working conditions and an opportunity to negotiate to the extent permitted by law.

**UNION** - A labor organization “composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievances and conditions of employment...”

**UNION-INITIATED MIDTERM BARGAINING ON NEW MATTERS** - Absent a bargaining waiver, the union has the right to initiate, during the life of the existing agreement, bargaining on matters not “**covered by**” the agreement.

**UNIT** - See **APPROPRIATE UNIT**.

**UNIT CONSOLIDATION** - A no-risk procedure for combining existing units into one or more larger appropriate units.

**UNIT DETERMINATION ELECTION** - When (a) several petitioners seek to represent different parts of an agency, (b) the proposed units overlap, and (c) the FLRA finds that more than one of the proposed units are appropriate, it lets the employees vote for units as well as unions.

**WAIVER** - An agreement reached between union and management whereby one party voluntarily gives up rights afforded to it. For waivers to be enforceable, they must be “clear and unmistakable.” It should be noted that management cannot waive rights afforded to management under 5 USC 7106(a).

**WAIVER DOCTRINE** - A waiver of bargaining rights may be established by an expressed agreement or bargaining history. Further, any such waiver must be clear and unmistakable.

- **Expressed Agreement** - A union may contractually agree to waive its right to initiate bargaining in general by a “zipper clause,” that is, a clause intended to waive the obligation to bargain during the term of the agreement on matters not contained in the agreement or by specifying a particular subject matter that is precluded from further bargaining during the term of the agreement.

- **Clear and Unmistakable** - A waiver may also be evidenced by bargaining history when the subject of mid-term bargaining concerns matters which were discussed in contract negotiations but which were not specifically covered in the resulting contract. In this category, waiver may be found where the subject matter of the proposal offered by the union during mid-term negotiations was fully discussed and explored by the parties at the bargaining table. For example, where a union sought to bargain over a subject matter but later withdrew its proposal in exchange for another provision, a waiver of the union's right to bargain over the subject matter that was withdrawn would be found. The particular words of proposals offered during contract and mid-term negotiations need not be identical for a waiver to exist. In determining whether a contract provision constitutes a clear and unmistakable waiver, the Authority examines the wording of the provision at issue as well as other relevant provisions of the contract, bargaining history, and past practice.

**WEINGARTEN RIGHT / EXAMINATIONS** - Under title 5, United States Code, section 7114(a)(2)(B), an employee being examined in an investigation (an investigatory examination or interview) is entitled to union representation if:

- (1) the examination is conducted by a representative of the agency,
- (2) the employee reasonably believes that the examination may result in disciplinary action, and
- (3) the employee asks for representation.

**WORK STOPPAGE CONTINGENCY PLAN** - The statute prohibits Federal employees from striking against the Government of the United States. Employees can be disciplined for engaging in such action. All states should have a Work Stoppage Contingency Plan. This plan is for official use only and is available on a need-to-know basis to those individuals directly involved in developing or implementing it. Review and update the plan biennially and, following any concerted activity, revise as needed.

**WORKING CONDITIONS** - The existing environment in which employees perform their duties.

**ZIPPER CLAUSE** - An agreement provision specifically barring any attempt to reopen negotiations during the term of the agreement. [For a related term, see **Reopening Clause**.]

## **SUGGESTED WEB SITES AND SOURCES FOR LABOR RELATIONS INFORMATION**

### **“Free” General Sources for Labor Relations Information and Research**

<http://www.cpms.osd.mil/fas/>

<http://www.flra.gov/>

<http://www.opm.gov/>

<http://www.fmcs.gov/internet/>

### **More “Free Sources for Labor Law (5 USC and 5 CFR)**

<http://aflsa.jag.af.mil> - (must be signed up as an authorized user)

<http://www.law.cornell.edu/>

<http://www.gpo.gov/>

<http://gko.ngb.army.mil/Login/welcome.aspx>

### **Federal Civilian Personnel Information from Air Force, Army and NGB**

- (NGB Guard Knowledge Online)

<http://www.afpc.randolph.af.mil/>

<http://cpol.army.mil/>

<http://www.westlaw.com/>

### **Commercial Vendors for Labor and Employee Relations Information**

<http://www.lrp.com/>

<http://www.cyberfeds.com/CF3/splash.jsp>

FLRA Law and Practice by Peter Broida – Dewey Publications, Inc.

### **Publications Available**

Federal Labor Relations Reporter – LRP, Inc.

Federal Arbitration Advocate’s Handbook, LRP Publications – Celmer, Esq.

