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20+ FLRA PRECEDENTS UNION NEGOTIATORS MUST KNOW (*Complete*)

Collective bargaining is like a tennis match. The two players repeatedly fire the ball at one another hoping to force a mistake, get an advantage, or just tire the other out. Furthermore, the strategy changes the deeper and deeper you get into the game, e.g., from the serve, to the return, to drawing an opponent to the net, to pushing her to the line, to catching him in a corner, etc. The experienced competitor knows that a game is composed of these many different stages-whether we are talking about tennis or collective bargaining; the novice needs to learn them quickly or move to the sidelines and just watch.

FEDSMILL.com thought it might be helpful to break down the bargaining process stages that flow from a management proposal to make a midterm change in working conditions. We have identified a little more than 20 and at each one offered a comment and an excerpt from a FLRA decision that should give you a good idea of how legal precedent might be used tactically by you (or against you) at each step. We recognize that books like COLLECTIVE BARGAINING LAW FOR THE FEDERAL SECTOR break the bargaining process into as many as 75 steps and the legal traps at each, but we think that the following 20+ are a real good start towards handling even the most difficult "center court" bargaining matches.

We are going to publish this article in four parts over the next two weeks, e.g., covering five-plus stages per part. The idea behind that is to give ourselves a chance to react to any early feedback from you in response to Parts 1 & 2 and make up for any problems in the later parts. So, do not be shy about sending us a comment via the blog box below each FEDSMILL.com article.

#1- CHANGE DECISION MADE

When is a change in working conditions? FLRA has not said directly or at least not objectively. It decides on a case-by-case basis whether employees must do something different than they had to do in the past and whether it is reasonably foreseeable that the impact of that change is more than de minimis.

The determination of whether a change in conditions of employment has occurred involves a case-by-case analysis and an inquiry into the facts and circumstances regarding the agency's conduct and employees' conditions of employment. (AFGE, 65 FLRA 877)

. . . we find that the institution of the sign-out board imposed a practice that was different from what previously existed and, consequently, constituted a change in conditions of employment. (NFFE, 50 FLRA 701)

In assessing whether the effect of a change in conditions of employment is more than de minimis, the Authority looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change. (AFGE, 53 FLRA 1664)

A change can be negotiable whether it is something different than a clear past practice or no clear practice.

The standard for determining the existence of a past practice is whether a practice was consistently exercised for an extended period of time with the other party's knowledge and express or implied consent. . . .The practice must be "consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other. (AFGE, 65 FLRA 677)

And the agency is considered to have made the decision to change when it has made a "firm decision" to do something different. Good luck to practitioners on both sides of the table trying to define that moment. This is another one of those places where FLRA has not been helpful to the parties trying to follow the law.

The Judge stated that once an agency makes a firm decision to relocate, the agency has the obligation to bargain over the impact and implementation of the relocation, and that the obligation must be fulfilled prior to implementation of the change. . . in this case "it has not been established that a final decision had been made" at the time of the Union's request to bargain or that "agreement had been reached on all matters essential to make a final commitment to move." Id. at 7. Accordingly, we find that SSA was not required to bargain at the time of the Union's request to bargain. (AFGE, 47 FLRA 322)

The best rule of thumb for a union is to allege the change was made and let the subsequent investigation turn up the facts.

#2- SPECIFIC NOTICE PROVIDED

Before the agency can make a midterm change in working conditions, it must notify the union with a specific notice of the details of the change, e.g., the nature of the change, the scope of it, the certainty of it, the proposed implementation date, what the employees and/or union will lose as a result of this change. It is up to the parties to decide whether the notice can be oral or must be in writing.

. . . the notice must apprise the exclusive representative of the scope and nature of the proposed change in conditions of employment, the certainty of the change, and the planned timing of the change. Id. In this regard, the Authority has stated that "[t]he notice must be sufficient to inform the exclusive representative of what will be lost if it does not request bargaining. (AFGE, 65 FLRA 422)

. . . the Authority determined that the notice of a proposed change was insufficient where the agency failed to specify not only the expected date but the number of employees to be furloughed. (AFGE, 61 FLRA 688)

#3- BARGAINING INVOKED

The union must take some affirmative action to inform the agency that it wants to bargain about the proposed change. Unless the parties have expressed in their contract how the union invokes bargaining, e.g., via a written communication within X days, FLRA considers bargaining invoked if the union A- specifically asks for it, B- requests more information about the change to enable it to make the decision whether to bargain, or C- requests additional time decide whether to invoke. Any of those three amount to invoking bargaining, unless your contract calls for something else.

The Authority did not hold, however, that a union must submit proposals as part of a bargaining request. As the Authority has consistently held, a union may request bargaining, request additional information, or request additional time. (AFGE, 61 FLRA 688)

But make sure that you invoke bargaining at the proper level of exclusive recognition, e.g., a single local in a multi-local or nationwide unit can't invoke bargaining on behalf of the entire unit—only purely local changes. In fact, the national level of the union must invoke bargaining on changes that involve only a single employee in a single office unless the union has delegated the local the power to be its bargaining representative in certain purely local changes.

. . . contrary to the Respondent's assertions that the local representatives did not have any authority to bargain on local parking procedures, we find that Section 4(D) provides the necessary or appropriate delegation of authority to bargain at the local level. Cf. . . .,39 FLRA 1409, 1417-18 (1991) (when exclusive recognition is at national level, the Statute does not require negotiations at any other level in the absence of an agreement between the parties or other appropriate delegation of authority). (IFPTE, 58 FLRA 722)

#4- INFORMATION REQUESTED

The union has the right to request more information about a proposed change both before it decides to invoke bargaining and after it has. Unless it has negotiated for a different standard in its term contract, the union must show that there is a "particularized need" for the requested information. Normally, that means the union must identify with "specificity" "why" it needs the information, the "uses to which it will be put, the connection between the uses and its representational responsibilities.Although we do not agree with every word of it, the FLRA General Counsel, Julie Akins Clark, just issued an advice memo about how to request information and a form she recommends the parties use. Check it out

The Union thus articulated, with specificity, why it needed the information including the uses to which it will put the information, and the connection between those uses and the Union's representational responsibilities under the Statute. (CREA, 63 FLRA 515)

If you are dealing with a chronically obstructive management when making information requests, consider filing FOIA requests at the same time. Management has specific deadlines it must meet for those requests and perhaps the FOIA managers will urge LR to solve the problem so they do not have to do LR's work. If not, consider suing under FOIA a few times until management gets tired of writing the union attorney fee checks.

#5 – GROUND RULES DETERMINED

Either party is obligated to bargain over ground rules if the other asks and it is not covered by the master agreement.

As stated in the earlier decision, framework matters involve such things as number of participants for each side; location of negotiations; a schedule for negotiation meetings; the procedures for initiating, negotiating and agreeing on proposals; and the procedures to help resolve impasse. . . .The only proposals concerning ground rules which are now on the table however, are those Respondent presented to the Union which already have been found to constitute proposals which contained "substantive" as well as framework proposals and as such were not offered in good faith. (AFGE, 36 FLRA 912)

#6- PROPOSALS SUBMITTED

Unless you term contract requires you to submit formal proposals to begin the bargaining, formal proposals are not required to start bargaining. However, whether oral or written, the union's proposals must be related to the agency's proposed change, e.g., if management has proposed to revise the employee evaluation system the union can't ask for more space for its office—at least it cannot do so as part of management's obligation to bargain over the impact and implementation of its proposed change.

. . . an agency is obligated to bargain only over proposals that are reasonably related to the proposed change (POPA, 66 FLRA 247)

However, the union should be able to propose unrelated demands of its own at the same time if it informs management that it is invoking an independent right to negotiate under the union's statutory right to initiate midterm bargaining.

First, we conclude that under the Statute, agencies are obligated to bargain during the term of a collective bargaining agreement on negotiable union proposals concerning matters that are not "contained in or covered by" the term agreement, unless the union has waived its right to bargain about the subject matter involved. (NFFE, 56 FLRA 45)

#7- OBJECTIONS TO BARGAINING REVEALED

Management can assert that it does not have a bargaining obligation—even if it served notice on the union of the proposed change. The most common management objection is that the change it proposes to make (or the proposals the union submitted) is already covered by the term contract or other MOU.

COVERED-BY – While Article 18 and the critical roster program both deal with rosters, the contract language lays out the procedures for filling specific positions while the roster program addresses the impact on bargaining unit employees of eliminating certain positions. Therefore, it is the Authority's conclusion that the Arbitrator correctly determined that the critical roster program is neither expressly addressed in the terms of the parties' agreement nor inseparably bound up with the type of rosters addressed in Article 18. AFGE, 64 FLRA 559

This is a monstrously complex thing to figure out and can easily turn on who is looking at an issue. So, when management refuses to bargain for this reason, the union normally should file a ULP charge with FLRA or a ULP grievance because there is nothing to lose and a severe penalty on management to gain. Frankly, from the FEDSMILL.com perspective, both parties should agree to drop the "inseparably bound up with" criterion. It is more trouble and risk for management than it is worth.

Another objection management can raise is that the change it proposes has virtually no impact on unit employees, and therefore there is no obligation to bargain.

DE MINIMIS- In determining whether the reasonably foreseeable effects of a change are greater than de minimis, the Authority addresses what a respondent knew, or should have known, at the time of the change. . . .Further, the number of employees affected by a change is not dispositive of whether the change is de minimis. . . .It is also the case that an analysis of whether a change is de minimis does not focus primarily on the actual effects of the change. AFGE, 64 FLRA 166

This is another risky objection for management to make because, like a covered-by objection, the union has up to six months after the change to find evidence of significant impact and file ULP charges. Again, the union has nothing to lose and a severe potential penalty hangs over management's head.

A third objection management can raise is that the union's proposals are outside the scope of the change.

PROPOSALS OUTSIDE THE SCOPE- Where such a change to conditions of employment constitutes the exercise of a management right under § 7106 of the Statute, the agency is . . . obligated to bargain only over proposals that are reasonably related to the proposed change in conditions of employment. . . .An agency, therefore, is not required to bargain over proposals that go beyond the scope of a proposed change or over a matter that is conditioned on an agency bargaining over proposals that are outside the scope of an agency's impact and implementation bargaining obligation. POPA, 66 FLRA 247.

If management does assert this, the union has the option to narrow its proposals and/or file charges over management's refusal to bargain those alleged to be outside the scope. It can also initiate its own midterm changes to address the issue allegedly outside the scope.

Management can also argue that even though there normally would be an obligation to bargain before implementing the change, in the circumstances, the change is necessary to effectively perform the mission of the agency. It is called the "necessary functioning' exception.

NECESSARY FUNCTIONING -At the very least, the proponent of the necessary functioning defense must establish that the change was necessary for the agency to effectively perform its mission and that it was necessary to make the change at the time it was made. . . . as the Authority confirmed, "management must demonstrate not merely that the change is necessary to its effective functioning, but also that delaying implementation until after the impasse is resolved would undermine the effective functioning of the agency." NTEU, 568 F.3d 990

Management can raise other objections, e.g., that the change does not involve a "condition of employment," which is the only subject over which management must bargain, or even that the union somehow waived its right to bargain over the matter. But, as with the objections addressed above, when it does refuse to bargain the union has nothing to lose by filing a ULP charge with FLRA or a grievance and pursuing a substantial remedy. These can include back pay, leave restoration, restoration of the old

policy or practice, retroactive performance awards, redoing thousands of employees appraisals issued since the change, awarding hundreds of priority considerations, etc.

#8- NEGOTIABILITY OBJECTIONS REVEALED

Aside from asserting it does not have an obligation to bargain anything about the change, management can admit to a general obligation but then assert that the specific proposal(s) the union submitted violate its statutory management rights found in 5 USC 7106 and refuse to negotiate. The union has several options if management does that. They are listed below in no particular order.

FILE A NEGOTIABILITY PETITION- The union can ask for management to put its assertion in writing and then take that written assertion to FLRA to ask that it rule on whether the proposal is negotiable. This takes that proposal off the bargaining table until the FLRA rules, which normally takes the better part of a year. Ironically, there are times a union might prefer to have a single issue taken off the table and preserved for bargaining later. (But beware a management trick here. If the union ASKS for management's assertion of non-negotiability in writing, it is BOUND to take the issue off the bargaining table and send it to FLRA. Often, management will ask the union if it wants it in writing and if the union says it does, its options are closed. So, don't ask for it in writing before you have decided to go to FLRA and if management gives it to you in writing anyway send a quick e-mail response affirming that you never asked for it in writing.)

SUBMIT AN ALTERNATIVE PROPOSAL- The union can withdraw its objectionable proposal and submit a different one. For example, if management asserts that it is not obligated to bargain over the substance of which duties it assigns to which positions, the union can challenge that and then submit proposals that merely address the impact and implementation around the assignment of duties.

FILE A ULP- The union can file a ULP with FLRA or through its grievance procedure, but only if management has declared non-negotiable a proposal that is virtually identical to one FLRA has already held to be negotiable. The advantage of the ULP is that it permits FLRA to impose a remedy against management if it was wrong. Remedies are not available through a negotiability petition. The remedy might be an order that management undo the change and restart bargaining, provide back pay, or

even an order to retroactively implement the ultimate settlement over the disputed proposal. Both ALJs and arbitrators are authorized to make negotiability decisions in these circumstances.

An agency violates sections 7116(a)(1) and (5) of the Statute when it refuses to bargain over a proposal that is the same or substantially identical to a proposal the Authority has previously determined to be negotiable. . . . Additionally, an agency acts at its peril when it disapproves a negotiated provision that is not materially different from one previously found negotiable by the Authority. NTEU, 22 FLRA 821

the Arbitrator was compelled to address the merits of the negotiability issue as a necessary element in resolving the alleged violation of § 7116(a) of the Statute. NTEU, 61 FLRA 729

ASK THE FSIP TO RESOLVE- The Impasses Panel also has the power to rule on the negotiability of a proposal, but only if FLRA has already held a largely identical proposal to be negotiable.

the FSIP noted that, consistent with Carswell, it may resolve negotiability issues raised by an agency in an impasse proceeding by applying previous Authority decisions finding a substantively identical proposal negotiable. The FSIP also noted that, consistent with Yuma, it could apply Authority precedent to a substantively identical proposal even where an agency raises a legal argument before the FSIP that was not previously considered by the Authority when it rendered its negotiability decision. NTEU, 61 FLRA 729

an agency refusing to bargain on the grounds that all proposals are outside the obligation to bargain "acts at its peril " and, if any of the proposals are found to be negotiable in subsequent proceedings, then the agency will be found to have violated the Statute. AFGE, 64 FLRA 17

The final case law precedent that negotiators must know is that if they are bargaining over Alternative or compressed work schedules management cannot assert its normal 7106 rights. FLRA has said they are irrelevant to the AWS/CWS issue. Any assertion that a union AWS/CWS proposal is non-negotiable goes to the FSIP for resolution.

It is well-established that, under the Work Schedules Act, alternative work schedules for bargaining unit employees are "fully negotiable" subject only to the Work Schedules Act itself or other laws superseding it. . . .As the Authority has explained, the Work Schedules Act is intended to include within the collective bargaining process "'the institution, implementation, administration and termination of alternative work schedules[.]'" . . .The Authority has consistently held since Lowry that proposals seeking to negotiate alternative work schedules are within the duty to bargain and enforceable under the Statute. NFFE, 60 FLRA 141

#9- GOOD FAITH EXERCISED

Once bargaining begins, management must bargain in "good faith." Typically, that requires that it send a representative who is authorized to bargain to the table; avoid making proposals that are misleading, harsh, or waivers of the union's statutory rights; bargain at reasonable times; engage in quality discussions of the issues; not impose preconditions for the negotiations; avoid evasive or delaying tactics; and resist interference from higher levels of the agency

AUTHORIZED REPRESENTATIVES. . . the Authority has not so held. In this connection, although a party may rightfully insist that another party's bargaining representative be authorized to negotiate any condition of employment and reach a binding "meeting of the minds," the Statute does not require that this representative also be authorized to execute any written agreement that a party may request under § 7114(b)(5. AFGE, 64 FLRA 1171

MISLEADING STATEMENTS- Good faith bargaining during negotiations requires that neither party mislead the other as to its intentions, and it is essential that the Union and management agents do not engage in misrepresentations at the time. AFGE, 32 FLRA 855

HARSH OR EXTREME PROPOSALS- . . . we are unable to conclude that the Respondent's proposals were designed to enable the parties to fulfill their mutual obligation to bargain in good faith. The Respondent's first proposal provided that "[t]he employer [would] not be obligated to negotiate over union initiated mid-term bargaining proposals and failure to do so [would] not constitute an unfair labor practice.". . . The Respondent's second and third proposals would have required the

Union to negotiate a "zipper" clause when the MLA was renegotiated and would have limited the Union to one mid-term bargaining initiative per year until the "zipper" clause was negotiated into the MLA. The Respondent's thirteenth proposal would have waived the Union's statutory right to seek assistance from the Federal Mediation and Conciliation Service (FMCS) and the Federal Service Impasses Panel (the Panel). It strains credulity, in our view, to assert that the nature of these proposals, which would relieve the Respondent of its obligation to bargain over either or both of the Union's substantive proposals and preclude the Union from requesting third-party assistance in resolving impasses over those proposals, was such that the Respondent was privileged, consistent with its statutory obligation to bargain in good faith, to insist on bargaining over them before addressing the Union's proposals. Rather, when viewed in the context of the Respondent's actions noted above, we find that the record as a whole, including the proposals themselves, supports the conclusion that the Respondent was not bargaining, or attempting to bargain, in good faith. AFGE, 36 FLRA 524 (See Also NAGE, 46 FLRA 640)

REASONABLE TIMES- Congress has not established a collective bargaining system in which the duty to bargain exists only at the agency's convenience or desire, or only when the employer is affluent. POPA, 45 FLRA 1090

EVASIVE AND DELAYING TACTICS-With regard to his finding that the Respondent did not give the Union specific dates on which it was available to bargain after September 30, the Judge found that, while the Respondent exchanged e-mails with the Union from September 30 to March 18, the Respondent "totally ignored the Union's many requests to set a date for bargaining sessions." Id. at 10. . . . .the Judge found that the Respondent's "refusal to even discuss the scheduling of meetings for more than five months, and its evasiveness on the subject over a longer period, constituted a failure to negotiate in good faith." AFGE, 61 FLRA 460

#10- IMPASSE DECLARED

Once management declares impasse (or anything else that sounds like it is through bargaining or has nothing more to discuss) and announces its intent to shortly implement its proposal, the union has to almost immediately inform management that it intends to seek impasse assistance, that it wants management to delay implementation until impasse assistance is complete, and then actually petition for

impasse assistance. Should management implement, it may only implement its last best offer. Anything else would be a ULP.

When lawful implementation occurs because the parties have reached impasse and the union has failed to timely request the Panel's services, the changes may not exceed those encompassed by the agency's last proposal to the union. AFGE, 55 FLRA 69

Finally, unions have to petition for impasse assistance properly when approaching the FSIP.

This requires filing a fairly simple request form, on which the applicant is to state such basic information about the dispute as the identity of the parties, the issues at impasse, the positions of the parties, and an account of negotiation and mediation sessions held. See 5 CFR § 2471.1-.5 (1988). The union did not comply with these requirements, as it quite rightly concedes in its brief. It failed to provide either the required form or its substantive content, and its single brief letter to the Impasses Panel did not even request its services. Nor did the union follow the letter up even after the Air Force sent a reminder that it planned to change Porter's hours on January 10, 1982. We have no hesitation in affirming the Authority's conclusion that the union did not adequately invoke the services of the Panel, especially in light of the deference we owe the Authority's orders in these cases. AFGE, 893 F.2d 380

#11- IMPASSE JURISDICTION DECIDED

A few things can happen once either party petitions FSIP. It can decide that the parties are not at an impasse and send them back to the bargaining table to negotiate some more. We wish we could tell you objectively what constitutes an impasse, but the case law and FSIP regulations are so vague that they are virtually useless.

The Panel can refuse to deal with issues that management declares non-negotiable and force the union to either drop the proposals or select one of the many other options for getting a decision on negotiability. It can decide to take jurisdiction of the disputed issues, but send the parties to an outside private neutral who would mediate/arbitrate the dispute in lieu of the Panel. Or it can take total jurisdiction and use one of several methods it has for resolving disputes, e.g., decide the dispute based on written submissions only, conduct a mediation session of its own before issuing its decision,

assign someone from the Panel to arbitrate the case via a hearing, or simply collect the facts through a hearing and refer the record to the entire Panel for a decision.

#12- IMPASSE COOPERATION EXTENDED

While in the impasse process, the parties may not implement any portion of the proposed change that sparked the dispute unless they voluntarily agree.

An agency violates its obligation to bargain in good faith when it changes its past practice prior to the completion of bargaining.*2 See id. at 76 and cases cited therein. Accordingly, if the Respondent in this case implemented a change in conditions of employment prior to the completion of bargaining, then the Respondent violated section 7116(a)(5). AFGE, 55 FLRA 454

An agency's obligation to maintain the status quo while matters are before the Panel is not affected by the nature of the action the Panel eventually takes. In particular, an agency is obligated to maintain the status quo even if the Panel ultimately declines jurisdiction over the union's request for assistance. . . .The foregoing cases, among others, confirm that permitting an agency to implement a change in conditions of employment while a union's request for assistance is pending before the Panel would undermine the Panel's role in resolving impasses and is inconsistent with the purposes of the Statute. We find no reason to conclude differently in this case. AFGE, 46 FLRA 339

 # 13 – IMPASSE RESOLVED OR AGREEMENT REACHED

At some point in the negotiations, agreement will be reached. That can happen without FSIP involvement, during FSIP involvement, or by the issuance of a "final and binding" FSIP order. It is important to know precisely when a party can claim that both parties have reached an agreement, but FLRA has not made that as easy as it seems. FLRA holds that the parties have an agreement when they reach a "meeting of the minds."

An "agreement," within the meaning of § 7114(b)(5) of the Statute, is reached when authorized representatives of the parties come to a meeting of the minds on the terms over which they have been bargaining. . . .A meeting of the minds of the parties — which can be shown by conduct manifesting an intention to abide by agreed-upon terms —

must occur before a labor contract is created....A meeting of the minds of the parties can be shown by conduct manifesting an intention to abide by agreed-upon terms. AFGE, 64 FLRA 735

A meeting of the minds of the parties must occur before a labor contract is created. . . .[I]t can be shown by conduct manifesting an intention to abide by agreed-upon terms." 835 F.2d at 1168. Consequently, because the Arbitrator's determination of the existence of a collective bargaining agreement is a factual finding to which we defer, the Agency's contrary-to-law arguments generally provide no basis for finding the award deficient. POPA, 60 FLRA 869

In finding that there was no <meeting of the minds > on January 5, I do not believe that the Agency witnesses were lying; it appears they honestly thought they left the table that day with an agreement. But the parties' vastly divergent notes of the January 5 session speak louder than any witness' words. The discrepancies in those notes are so frequent and so substantial that they can only be interpreted as representing two contradictory understandings of the status of negotiations. AFGE, 58 FLRA 261

Probably the safest approach is to specify in your ground rules that when the parties have jointly initialed the last article, section, etc. of an agreement that is the moment when the parties agree that they have a meeting of the minds. While an agreement might be formally executed later, perhaps by the ranking management and union leaders of the bargaining unit, do not agree that anyone outside the bargaining table participants must sign or initial in order to establish a meeting of the minds. Doing so, likely makes everything you have agreed upon subject to the approval of people who never came to one bargaining session.

In any event, if the parties had to get a Panel order, it is final and binding. It may not be appealed on the basis that the Panel made the wrong decision, but it can be appealed if either party thinks the Panel has ordered it to do something illegal.

#14- AGREEMENT PUT IN WRITING AND SIGNED—OR NOT

If either party demands that the agreement be put in writing and signed, then the other party is obligated to do so.

But nothing stops the parties from keeping the agreement between them oral or in the record of proposals exchanged but not signed.

The Authority has held that, "[a]lthough parties are required, on request, to reduce to writing any oral agreement they have reached, the fact that an agreement need only be reduced to writing when requested implies that a written agreement is not always necessary." … (holding that oral, and even "tacit," agreements may be binding upon the parties). Thus, an agreement need not be reduced to writing in order to bind the parties. 64 FLRA 1171

#15- AGREEMENT RATIFIED

Unions have a right to ratify a term or midterm agreement so long as they comply with the FLRA rules outlined below.

As the Judge found, a union is entitled under the Statute to condition the execution of an agreement arrived at through collective bargaining upon ratification by its members provided: (1) the employer has notice of the ratification requirement and (2) there is no waiver of the right by the union. For example, Department of the Air Force, Griffiss Air Force Base, Rome, New York, 25 FLRA 579, 592 (1987).*1 We also agree with the Judge's conclusion that, in this case, the Respondent had notice that agreements with the Union were subject to ratification *2 and the Union did not waive its right.*3 Accordingly, by refusing to reopen negotiations over the MOU and by implementing the MOU that was rejected in the ratification vote, the Respondent violated section 7116(a)(1) and (5) of the Statute. AFGE, 46 FLRA 1404

Once ratified, the parties can move to execute the agreement.

#16- EXECUTION DATE SET

Parties are free to set the date on which they officially execute an agreement. Execution starts the 30-day clock running on agency head approval.

The Authority held that "the date of execution that triggers the time limits for agency head review … relates to the date on which no further action is necessary to finalize a

complete agreement, not the dates on which agreement is reached as to individual pieces of that agreement." POPA, 41 FLRA 795

Where a contract is produced via an FSIP decision, the date of the final and binding Panel order normally is considered the date of execution.

Under these circumstances, the date the arbitrator served the contract on the parties was the date of execution. MMP, 36 FLRA 555

And for automatically renewing agreements, the Authority has set the following rule:

For automatically renewing collective bargaining agreements, the execution date (for purposes of triggering the time limits for agency head review) was the date on which no further action was necessary to finalize a complete agreement. NAGE, 47 FLRA 937

#17- EFFECTIVE OR IMPLEMENTATION DATE SET

The parties are free to set the effective date of the agreement, and it can be set several months in the future of even make the agreement retroactive to an earlier date.

Nothing in § 7114(c) of the Statute precludes parties from agreeing to give retroactive effect to the provisions of any agreement reached that have been properly subjected to agency-head review. NAGE, 45 FLRA 910

Setting the date can be tricky because the parties do not yet know whether it will be approved or when. One approach is to set it for X days after agency head approval.

#18- TERMINATION DATE, REOPENERS AND SUPPLEMENTS

There is not much to worry about when setting agreement termination dates. The only exception would the FLRA's current (and FEDSMILL.com believes incorrect) reading of the law is that if the agreement contains any permissive clauses either side can unilaterally end them once the agreement terminates. That can lead to chaos, which suggests the following case excerpt is and important rule.

While the initial termination date of the agreement was in 1999, the parties agreed that the agreement would remain in effect until a new agreement was negotiated. This continuation would include provisions concerning permissive bargaining subjects, unless a party notifies the other that it will no longer be bound by those permissive provisions. AFGE, 55 FLRA 201

Closely related to the agreement termination date issue is the roll of a provision allowing either party to reopen a portion of the larger agreement during the term of that agreement.

Finally, we find that the proposals at issue here are similar to reopener proposals, which both the Authority and the National Labor Relations Board have found to be mandatory subjects of bargaining. . . .Like the instant proposals, reopener proposals seek bargaining over matters that are "covered by" a collective bargaining agreement. In fact, the instant proposals appear more likely to further the statutory purpose of contractual repose — which, as discussed above, is one of the policies behind the "covered by" doctrine — than are many reopener proposals. In this connection, while many reopener proposals seek to open a contract as to entire subjects, the instant proposals would permit reopening as to only those aspects of subjects that are not expressly addressed in the contract. NTEU, 64 FLRA 156

Supplemental agreements are different because normally they suggest that someone other than the single employer and sole union bargaining team are going to negotiate with the results that there will be multiple contract on the same issue, e.g., on local telework arrangements. Often these supplemental agreements arise when the parties try to delegate to local parties below them the power to resolve certain bargaining questions. They can do that, but supplementals are normally considered permissive, not mandatory, subjects of negotiations.

Applying this analysis, if a proposal for more than one collective bargaining agreement is a permissive subject, then the party receiving the proposal has a unilateral right to negotiate one contract. We hold that the Respondent's proposal to negotiate separate agreements within one bargaining unit is a permissive subject of bargaining, because the Statute provides exclusive representatives a right to negotiate with "an agency." In short, the case law and the Statute indicate that there are certain features of collective

bargaining that any party may rely on. One such feature is that the basic bargaining relationship is between one union and one employer. AFGE, 53 FLRA 1269

#19- AGENCY HEAD APPROVAL

Once the parties have executed the agreement, the agency head has the right to approve or disapprove the agreement. The approval decision applies to the entire agreement; if the agency head objects to only one clause in a multi-page agreement, the entire agreement is considered disapproved.

If the agreement is disapproved, management cannot move forward to implement any midterm changes that led to the negotiations because there is not yet any agreement. The union has the right to challenge management's decision to FLRA and then the courts. Or, it can agree to renegotiate the agreement–and if it chooses this option it can insist on renegotiating the entire agreement, not just the disapproved portion. Or it can agree to sever the disapproved portion from the rest of the contract, challenge that to FLRA or send it back to the bargaining table, and implement the approved portions of the agreement. Or, it can file a ULP charge against the agency if the disapproved provision has already been found to be negotiable in another case. A ULP decision could result in penalties against management such as an obligation to retroactively implement the agreement.

Additionally, an agency acts at its peril when it disapproves a negotiated provision that is not materially different from one previously found negotiable by the Authority. NTEU, 22 FLRA 821

Where the parties have agreed to have local supplemental agreements, current FLRA case law permits them to set the approval procedures.

Therefore, while Congress has provided in section 7114(c)(2) that 30 days is sufficient time to accomplish review of a collective bargaining agreement, under section 7114(c)(4) the parties to the controlling national agreement or the agency by regulations, may prescribe an approval procedure, including a different time limit, for review of local agreements. A time limit established under section 7114(c)(4) supplants the 30-day time limit contained in section 7114(c)(2) of the Statute which otherwise would apply. Where, however, neither the controlling agreement nor agency regulations prescribe any time

limit for completion of review by the agency head or a designee, the time limit mentioned in section 7114(c)(2) and (3) applies. NTEU, 23 FLRA 720

#20- IMPLEMENTATION

Once the agreement is approved, it can be implemented. However, a union would be wise to protect itself against two possible management actions. The first is that management can declare a provision of an already approved agreement to nonetheless be illegal and refuse to enforce that provision. It can do that as early as day one of a new agreement. If it does, it gets the advantage of being able to implement its proposed midterm change because it still has an agreement, while essentially voiding a clause it never liked, but agreed to in order to get an agreement.

Consequently, because the Agency's disapproval of the Panel's Order was untimely served on the Union, the order became binding on the parties unless it is contrary to the Statute or any other applicable law, rule or regulation. A question as to the validity of such a provision may be raised in other appropriate proceedings (such as grievance arbitration and unfair labor practice proceedings) and, if the agreement provision is found to be in violation of the Statute or any other applicable law, rule or regulation, it would not be enforceable but would be void and unenforceable. 56 FLRA 119

The second possibility is that the employer agrees that a clause is perfectly legal, but simply decides not to follow it. That is called repudiation of an agreement and something more serious than a simple contract violation.

Repudiation is: (1) a clear and patent breach of a provision; that (2) goes to the heart of the parties' agreement. AFGE, 64 FLRA 355

One way to protect against a declaration of an unenforceable or illegal provision is to build in a poison pill, e.g., a penalty against management should it declare a provision of an approved agreement illegal. Much the same approach should be considered to deal with a repudiation. Demand a contract provision that raises management's potential liabilities should an arbitrator or FLRA find management guilty of a repudiation. That could range from requiring management to pay the full cost of the arbitration to early termination of the full agreement at the union's option.