GROUND RULES

Failure to bargain over ground rules proposals for impact and implementation bargaining over management proposed changes in conditions of employment is violation of §7116(a)(1) and (5). Ground rules proposals must at a minimum, be designed to further, not impede, the bargaining for which the ground rules are proposed. U.S. Department of Air Force, HQ, AFL, Wright-Patterson AFB, OH, 36 FLRA No. 86. Disagreement with an arbitrator’s interpretation of ground rules does not provide a basis on which to find an award deficient. See, e.g., U.S. Department of Veteran Affairs, Regional Office, Cleveland, OH, 47 FLRA No. 28, 47 FLRA 363, 3687 (1993).

INTERFERENCE WITH COLLECTIVE BARGAINING RELATIONSHIP

Agency management above the levels of exclusive recognition did not prevent agency management at the exclusive recognition levels from fulfilling their bargaining obligations. Defense Logistics Agency, et al., 12 FLRA No. 86.

The Department of Interior and Bureau of Reclamation interfered with protected rights of employees of the Region, the level of exclusive recognition by directing the Region to implement a limitation on travel advance that precluded the Region from fulfilling its obligation to bargain with the Union on a change in conditions of employment. Department of Interior, Washington, DC, and Bureau of Reclamation, Washington, DC, and Bureau of Reclamation, Mid-Pacific Region, 25 FLRA No. 6.

Organizational entities of the same agency not in the same chain of command as the entity at the level of exclusive recognition may commit violations of §7116(a)(1) of the Statute if they are found to have unlawfully interfered with protected rights of employees other than their own by taking action which conflicts with the bargaining relationship between the parties at the level of exclusive recognition. Philadelphia Naval Base, Philadelphia Naval Station and Philadelphia Naval Shipyard, 3 FLRA No. 4.

BYPASS

It is violative for management to deal or directly negotiate with unit employees to put pressure on the union to take a certain course of action. Department of Health, Education and Welfare, Northeastern Program Service Center, 1 FLRA No. 59 (1979), U.S. Custom Service, 19 FLRA No. 121 (1985). An agency’s action in delivering to a unit employee a decision letter on a disciplinary action when the union was known to be representing the employee and the contract allowed for such representation amounted to a bypass. McGuire AFB, 28 FLRA No. 145 (1987). Department of the Air Force.
Suggested Groundrules Governing Allegation of Non-Negotiability

1. During negotiations management will provide informal allegations of non-negotiability. Informal allegations will not be considered to be a request under the provisions of 5 CFR 2424.3, even though the union representatives may ask the management officials to supply the information listed below.

2. Only the Personnel Officer or Labor Relations Officer may make allegations of non-negotiability even at the informal stage.

3. When making the formal allegation, management will provide a full explanation as to the reasons why it believes the proposal is non-negotiable. Included will be:
   a. All of the FLRA and court case citations supporting management’s position. Copies of the cases cited will be provided to the union.
   b. All of the FLRA and court case citations relating to the issue or subject which do not support management’s position. Copies of the cases cited will be provided to the union. Management will explain why it is not applying these cases to the proposal under consideration.
   c. Full explanation as to why the proposal could not be considered to be procedures to be used by management in exercising its reserved rights under 5 USC 7106(b)(3).
   d. Full explanation as to why the proposal could not be considered to be appropriate arrangements for employees adversely affected by management’s exercise of its reserved rights under 5 USC 7106(b)(3).
   e. Full explanation of why the positive effects of the appropriate arrangements on employees outweigh any possible negative effects on management’s rights specified in 5 USC 7106(a).
   f. If management is declining to negotiate over a proposal which it claims affects matters in 5 USC 7106(b)(1), it will fully explain why it believes there will be disadvantages to bargaining over the matter as compared to the advantages of agreeing to the proposal.

4. Management will provide to the union proposed language which achieves the intent the union had in proposing the original language, but which management believes in negotiable.

5. The parties agree to meet in good faith and discuss the proposal with the intent to cure the negotiability problem and to reach agreement on the proposal until the union requests an allegation of non-negotiability from the provisions of 5 CFR 2424.3.
Sample Letter

(Fill in appropriate language in bold parenthesis)

(Director of the Agency, (date)
Personnel Officer or
Labor Relations Officer)

The (Union) and (Agency) have been discussing the proposals which are attached. The (Union) has been advised that the proposals are non-negotiable by (persons) on (dates). Those positions were not requested by the (Union) and therefore did not initiate the negotiability review procedures of the Federal Labor Relations Authority (FLRA). This letter is the (Union’s) formal request for the (Agency’s) allegation of non-negotiability under the provisions of 5 CFR 2424.3 of the FLRA regulations. So that I can fully understand your position, please provide the following information on each of the proposals:

1. Describe which portions of the attached proposals you consider to be non-negotiable.

2. If you believe the proposal is in conflict with law or government-wide regulation, provide me with a copy of the relevant portions of the law or regulation. Also, please explain specifically your belief as to how the proposal conflicts with the law or regulation.

3. If you believe that the proposal is not a condition of employment, explain the basis for your belief.

4. If you believe that the proposal conflicts with an (Agency) regulation and that there is a compelling need for that regulation, explain the nature of the compelling need.

5. If you believe that the proposal interferes with a reserved management right, cite the right with which you believe the proposal interferes. Also, describe how you reached the conclusion that the proposal would excessively interfere with your retained management rights.

6. Provide copies of any FLRA or court case which was used in reaching the conclusions described above. These copies should include any cases which lead to a conclusion different from that which you reached. Please explain why you accepted the conclusion of some cases and not others. These cases should be marked or designated as to which of the above questions it relates.
According to 5 CFR 2424.3, you have ten (10) days from your receipt of this letter to supply the requested information. I would very much appreciate receiving a reply by that time. The FLRA regulations do provide that if no reply is received within that time limit, I may appeal the matter to the FLRA without the information regarding your position. If you wish to discuss mutually agreeable procedures for the consideration of these matters, I would be happy to consider such a proposal from you.

Please advise me if I can answer any question you have about this matter.

Sincerely,

(Union Representative)

Attachments:
MEMORANDUM OF UNDERSTANDING (MOU)

BETWEEN

NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION
LOCAL XXX ARTCC

AND

FEDERAL AVIATION ADMINISTRATION
LOCAL XXX ARTCC

SECTION 1. PARTIES: This Memorandum of Understanding (MOU) is entered into by and between the representatives of the National Air Traffic Controllers Association, Local XXX (NATCA), hereinafter referred to as the “Union”, and the Federal Aviation Administration, XXX ARTCC (FAA), hereinafter referred to as the “Employer”, and collectively referred to as the “Parties.”

SECTION 2. PURPOSE: The purpose of this MOU is to establish the procedure by which the Parties will enter into and conduct negotiations regarding changes to official time for local union representatives. It is the intent of the Parties to this MOU to enter into the provisions of this document, also referred to as a “Ground Rules”, for the express purpose of determining appropriate techniques, consistent with the provisions of law and regulation, to assist in these negotiations, and to alleviate and reduce potential areas of misunderstanding and dispute.

The provisions of this MOU shall remain in effect until, by mutual written agreement, the subject negotiations are completed, to include any impasse issue being resolved via Article 7 of the NATCA/FAA Collective Bargaining Agreement dated August 1993.

SECTION 3. NEGOTIATING TEAMS: Each negotiating team will consist of one (1) Chief Negotiator and up to eleven (11) additional members at the discretion of the Chief Negotiator on official time to participate in negotiations. Only the Chief Negotiator or his/her designee shall have the authority to commit their respective principals to a course of action.

A maximum of three (3) observers shall be allowed at negotiations for either Party. Union observers shall be granted official time if otherwise in a duty status. Observers shall not speak during negotiations.

Each Party shall advise the other of the name, position, and duty location of each individual it designates as a negotiating team member and also any alternate(s), not
later than seventy-two (72) hours prior to commencing negotiations. Either team may change any of the members of its team only after written notification to the other Party.

The Employer’s team shall only consist of elements of management as defined in Article 1, Section 2 of the National NATCA/FAA Collective Bargaining Agreement dated August 1993. The Union’s team shall be designated by the principal Facility Representative.

SECTION 4. REQUEST FOR INFORMATION: The Employer agrees to furnish the Union with information in accordance with 5 USC 7114(b)4. All such information shall be provided within ten (10) working days, unless the Parties agree otherwise, in writing.

SECTION 5. OFFICIAL TIME: The Parties agree that all Union team members will be granted official time to participate in negotiating sessions. The Employer agrees to adjust the schedules of participants to allow them to appear in a duty status. For the purpose of defining official time for negotiation, “negotiations” shall mean the entire bargaining process including negotiating sessions, caucuses, development of counter-proposals, and impasse/mediation proceedings before or with the assistance of third parties.

If, as a result of actions on the part of the Employer’s team any other meeting extend beyond 3:00 PM Local, 11:00 PM, or an 8 hour tour of duty, whichever is appropriate, the Employer will be responsible for compensation in the form of overtime, compensatory time, or credit hours at the discretion of the employee.

Additionally, Union team members shall be entitled to official time for travel to and from negotiating regions, as well as travel and per diem expenses.

SECTION 6. PLACES, DATES AND TIMES OF NEGOTIATIONS: The Parties agree to conduct a minimum of 15 (fifteen) negotiating sessions before any declaration of impasse can be made, fully paid for by the Federal Aviation Administration, unless otherwise agreed to, in writing, by the Parties. The first session shall be held in Washington, DC, at the NATCA National offices. The second session shall be held in Winchester, VA. The Parties will decide location of the third, and all subsequent sessions, by alternately striking locations from a list provided by the Union until only one (1) location remains.
Specific dates for the conduct of negotiations will be based on the completion of these “Ground Rules” negotiations. The Employer shall, within seventy-two (72) hours after completion of ground rules negotiations, submit its proposal to the Union. Proposals shall be clearly labeled in a sequential manner (i.e., Union, Management 1, and so on) and include the date of submission. Proposals shall be submitted in the following manner:

1) In writing,
2) A copy provided for each team member,
3) On 3.5 Inch, High Density, Double sided floppy disk in WordPerfect 5.1 format.

Times for the negotiating sessions will alternate, the first session will be conducted from 7:00 AM until 3:00 PM, the second session will be conducted from 3:00 PM until 11:00 PM, and so on, Sunday through Thursday, until negotiations are complete, unless otherwise agreed to, in writing, by the Parties. The employer agrees to delay any changes to working conditions until such time as the bargaining process is complete.

Break periods will begin (45) minutes past each hour and extend for a fifteen (15) minute interval. Meal breaks will be from 11:45 AM to 1:15 PM Local, and 6:30 PM to 8:00 PM Local, whichever is appropriate, each day.

SECTION 7. CAUCUS: The Chief Negotiator for either Party may call a caucus at any time. The Party calling the caucus shall be entitled and/or have the option to request the other Party be excused from the room used for negotiations for the purpose of caucusing confidentially. The Caucus may be for the purpose of researching the other Party’s position, drafting counter-proposals, or any other business related to the negotiation. The Party calling the caucus shall retain the floor upon resumption of negotiations.

SECTION 8. MINUTE OF NEGOTIATIONS: Either Party may choose to have a formal record, such as a written transcript, of the proceedings. If such a record is made, the Party arranging for such a record shall bear the expense. Either party may choose to videotape any or all sessions. The Parties may share in the cost of any such record should any additional copies be produced.

SECTION 9. SUBJECT MATTER EXPERTS (SME): Either Party may request the presence of SME’s. SME’s may only participate in negotiations to the extent that their specialized knowledge and presence is necessary for full and proper discussions between the Parties. When SME services are no longer needed, either Party may request that the SME be excused.
SECTION 10. ORDER OF BUSINESS: The following order of business shall be observed by the Parties, however, it may be altered by mutual, written, consent:

1) Unfinished business from last session;
2) Agenda Items;
3) Establishing agenda for next session.

SECTION 11. COMPLETION/REOPENER OF ARTICLES: As negotiation on each section/article is completed, it shall be signed by the chief negotiators and this completion/signing shall be binding. Any closed section may only be reopened by mutual, written, consent of the Parties.

SECTION 12. NEGOTIATION IMPASSES: After full discussion of any proposal, if the Parties cannot agree on the language, either Party may declare the language at impasse.

When either Party declares an impasse verbally at the table, a written declaration containing the exact language at impasse shall be given to the other Party within twenty-four (24) hours of the verbal declaration.

All proposals declared at impasse shall be held in abeyance until negotiation of all other proposals are completed. All issues at impasse or unresolved at the close of negotiations will be handled in accordance with Article 7 of the NATCA/FAA Collective Bargaining Agreement dated August 1993.

If an agreement cannot be reached on any issue, and an impasse is declared, the Parties shall submit a joint request to the Federal Service Impasse Panel (FSIP) for assistance requesting that the Panel grant authority for resolving the matter in accordance with the provisions of Article 7 of the NATCA/FAA Collective Bargaining Agreement dated August 1993.

SECTION 13. ALLEGATIONS OF NON-NEGOTIABILITY: The Parties will make every effort to resolve issues by negotiating language which complied with established law, government-wide rules and regulations. However, any proposal which the Employer determines to be non-negotiable will be properly researched and discussed at the table prior to the issuance of a formal declaration of non-negotiability. The Parties agree to meet in good faith and discuss the proposal with the intent to cure the negotiability problem and to reach an agreement on the proposal. Such discussions shall not constitute a request for a formal declaration of non-negotiability pursuant to 5 CFR 2424.3 which must be requested by the Union in writing. In making such a written request, the Union will clearly identify it as one under the provisions of 5 CFR 2424.3.

Only the Chief Negotiator may make allegations of non-negotiability even at the informal stage.
When making the informal allegation of non-negotiability, the Chief Negotiator will provide a full explanation as to the reasons why he/she believes the proposal is non-negotiable. Included will be:

1. All of the FLRA and court case citations supporting the Employer’s position. Copies of the cases cited will be provided to the Union.

2. All of the FLRA and court case citations relating to the issue or subject which do not support the Employer’s position. Copies of the cases cited will be provided to the Union. The Chief Negotiator will explain why he/she is not applying these cases to the proposal under consideration.

3. Full explanation as to why the proposal could not be considered to be appropriate arrangements for employees adversely affected by management’s exercise of its reserved rights under 5 USC 7106(b)(3).

4. Full explanation as to why any possible negative effects on management’s rights specified in 5 USC 7106(a) outweigh any positive effect of the appropriate arrangements for employees.

5. If management is declining to negotiate over a proposal which it claims affects matters in 5 USC 7106(b)(1), it will fully explain why it feels the disadvantages to bargaining over the matter will outweigh the advantages of agreeing to the proposal.

6. Full explanation as to why the proposal does not meet the provisions of Executive Order 12871 where negotiations of 5 USC 7106 subjects is concerned.

If a decision is required of the FLRA regarding the negotiability of any matter between the Parties, once the decision is rendered, a meeting shall be arranged immediately to complete bargaining on the matter in dispute.

SECTION 14. SIGNING OF THE AGREEMENT: After the negotiation process is complete and after all matters pending before the Authority have been resolved the agreement will be reduced to writing and prepared for the signatures of the negotiating teams. No changes will be implemented until this process has been completed.

For the Union

For the Employer

Date

MBarg. • 1.23
MEMORANDUM

March 5, 1997

TO: Regional Directors

FROM: Joe Swerdzewski, General Counsel

SUBJECT: The Impact of Collective Bargaining Agreements on The Duty to Bargain And The Exercise of Other Statutory Rights

This memorandum discusses issues arising from the impact of collective bargaining agreements on the duty to bargain during the term of those agreements and on the exercise of rights under the Federal Service Labor-Management Relations Statute. This memorandum will serve as guidance to the Regional Directors in investigating, resolving, litigating and settling unfair labor practice charges where a collective bargaining agreement impacts upon the matters in dispute. It is being made available to the public to assist individuals, unions and agencies to avoid these disputes and to obtain a better understanding of the impact of a contract on the duty to bargain and the exercise of other statutory rights. This guidance reflects my views as the General Counsel of the Federal Labor Relations Authority and does not constitute an interpretation by the three-member Authority.

The Impact of Collective Bargaining Agreements is Critical to Determinations on the Duty to Bargain and the Exercise of Other Statutory Rights

Collective bargaining agreements, mutually agreed to by unions and agencies under the processes of the Statute, have a significant impact on the duty to bargain during their term. Prior to determining whether a statutory duty to bargain in fact exists over a proposed management or union action, the terms of a contract, among other things, must be analyzed under various legal doctrines developed by the Authority. These doctrines are sometimes difficult to apply to work situations at the local level where union and agency representatives interact. For example, under one legal doctrine, a contract may preclude bargaining over a proposed management detail in a situation where there would be a duty to bargain over that detail absent a specific contract article or clause.

Collective bargaining agreements also play a vital role in the exercise of other statutory rights. For example, a duty to provide information to a labor organization may be subject to conditions contained in the parties’ contract, even though those conditions are not contained in the Statute, and those conditions must be met before triggering the statutory obligation to disclose information.
Similarly, it is not uncommon for parties to confuse the difference between rights obtained through collective bargaining and rights granted by the Statute. Only in rare circumstances, for example, when a party repudiates a contract provision, is the denial of a contract right an unfair labor practice. Yet, unfair labor practice charges are sometimes filed alleging that one party has violated the Statute by not complying with a contract term.

The purpose of this memorandum is to set forth my understanding of the current state of the law on these type of issues, to explain the manner in which I believe the law should be developed in areas where the rules are not clear, and to provide guidance to the Regions to enable them to assist the parties in avoiding these types of disputes and understanding these legal concepts.
PART I.

Limitations on the Duty to Bargain During the Term of a Contract - The “Covered by” Doctrine

A. Establishment of the “Covered By” Doctrine

1. Purpose of the “Covered by” Doctrine.
2. The “Covered by” Test.

B. Investigating and Deciding “Covered By” Cases

1. First determine whether there is a duty to bargain absent the contract clause at issue.
2. Review applicable contract clauses where “Covered by” may be a viable defense.
3. A party does not waive the “Covered by” defense if it does not raise it to the union in response to a request to bargain.

C. Application of the “Covered By” Doctrine

1. The critical issue is how “Matter” is defined.
2. Authority decisions applying “Covered by” give guidance.
3. General rule in applying the “Covered by” defense.

D. Issues Affecting the Application of the “Covered By” Doctrine That Have Not Yet Been Decided

1. Contrary past practice.
2. Not reasonably contemplated.
3. Bargaining history indicates intent to bargain.

E. Strategies to Avoid “Covered By” Disputes

1. Maintain current collective bargaining agreements.
2. Ensure that the parties have a mutual understanding when negotiating contracts about what matters are bargainable during the life of the agreement.

F. Application of “Covered By” to an Expired Contract

1. The regions should initially determine whether, in fact, a contract is in existence.
2. If the region determines that there is no contract in effect, the next step is to decide whether the expired contract clauses at issue concern mandatory or permissive subjects of bargaining.
3. If the expired clauses are permissive subjects of bargaining, an agency need not be bound by those clauses

4. If the expired clauses are mandatory subjects of bargaining, the parties are bound by those provisions until and unless the parties agree otherwise or they are modified under the statute. Thus, an agency must give notice of any proposed change of an expired contract term, afford the union the opportunity to request to bargain, bargain in good faith and maintain the status quo until it has fulfilled its bargaining obligation.
   a. Duty to bargain over proposed changes in mandatorily negotiable provisions in an expired contract.
   b. Duty to bargain rests only at the level of exclusive recognition.
   c. Negotiations over a specific matter need not wait for contract negotiations.
   d. Regional office responsibilities in investigating a refusal to bargain allegation concerning an expired contract term.

PART II.

Limitations Contained in Collective Bargaining Agreements on the Exercise of Statutory Rights - The “Contract Interpretation” Doctrine

A. Establishment of the “Contract Interpretation” Doctrine

1. Purpose of the “Contract Interpretation” Doctrine.
2. The “Contract Interpretation” Test.

B. Investigating and Deciding “Contract Interpretation” Cases

1. First determine whether there is a duty to bargain absent the contract clause at issue.
2. Review applicable contract clauses where “Contract Interpretation” may be a viable defense.

C. Application of the “Contract Interpretation” Doctrine

1. Interpreting contracts discussing a non-bargaining statutory right.
2. Interpreting contracts to determine the statutory duty to bargain.

D. Strategies to Avoid “Contract Interpretation” Disputes

1. Ensure that the parties have a mutual understanding when contracts place limitations on non-bargaining statutory rights.
2. Ensure that the parties have a mutual understanding when contracts place limitations on the statutory duty to bargain.
PART III.

The Duty to Bargain Over Union-initiated Requests to Bargain During the Term Of an Agreement — “Union-Initiated Mid-Contract Bargaining”

A. The Duty to Bargain

B. Disputes over the Level of the Duty to Bargain

C. Disputes over whether the contract forecloses the obligation to negotiate over a union-initiated Mid-Contract Bargaining Request

D. Disputes over the subject matter of the Mid-Contract Bargaining Obligation

PART IV.

Difference Between of Violations of Contract Rights and Violations of Statutory Rights

A. Contract Rights are Enforceable Through Negotiated Grievance Procedures

B. Repudiation of Contract Clauses as an Unfair Labor Practice

C. Application of the Repudiation Doctrine

   1. “Clear and Patent” Breach
   2. “Heart” of the Agreement

PART V.

The Duty to Bargain Pursuant to Reopener Clauses Contained in Collective Bargaining Agreements

PART VI.

The Duty to Bargain Supplemental Agreements Below the Level of Exclusive Recognition
Memorandum

Subject: INFORMATION: LMR Guidance Bulletin No. 97-1, Bargaining Obligation for Matters "Covered By" a Collective Bargaining Agreement

Date: AUG 21 1997

From: Program Director for Labor and Employee Relations, AHR-25

Reply to: ATR of:

To: Program Director, Air Traffic Resource Management, Program, ATX-1
Program Director, Resources Management, AFZ-1
Director, Flight Standards service, AFS-1
Regional and Center LR Staffs

This memorandum: (1) clarifies the circumstances in which management must negotiate with a union over a condition of employment of bargaining unit employees; (2) emphasizes the role that the applicable collective bargaining agreement (CBA) plays in establishing conditions of employment; and (3) provides guidance on how lines of business (LOBS) are to proceed with matters deemed to be already covered by the CBA. The guidance is based on recent third-party proceedings before the Federal Labor Relations Authority (FLRA) and in the courts.

The FLRA previously held that, if a matter is covered by the terms of a CBA, management had no further obligation to bargain about the matter during the term of the CBA. Management could take action pursuant to the procedures contained in the CBA without incurring a bargaining obligation. However, the FLRA held that there was no duty to bargain only if: (1) the particular subject matter of a union proposal was specifically addressed by the CBA; or (2) the union had waived its right to bargain about that particular subject. Since bargaining waivers are not readily inferred, the FLRA rarely found that a waiver existed. In effect, the FLRA defined the "covered by" test so narrowly that bargaining almost always was required before management could act.

The U.S. Court of Appeals for the D.C. Circuit reversed the FLRA and determined that an agency does not violate the labor relations statute when it takes unilateral action on a matter covered by a CBA. Department of the Navy, Marine Corps Logistics Base, Albany, GA v. FLRA. 962 F.2d 48 (DC Cir. 1992). It found that the FLRA had committed reversible error by improperly combining two different tests in determining the existence of a bargaining obligation. (These tests are commonly referred to as the "covered by" test and the "clear and unmistakable waiver" test.) The court also held that the question of a waiver is irrelevant when the union has exercised its bargaining right. If the union

1 This bulletin provides intra-management guidance within the meaning of 5 USC 7114(b)(4)(C) and 7132(a). Its distribution is limited to supervisors and managers and necessary support staff. It is not to be disclosed to bargaining unit employees or their representatives.
has exercised that right during the negotiation of a CBA, and the bargaining results are contained in the CBA, then the question of waiver is irrelevant. The union has gotten what it bargained for.

The court dismissed as "absurd" the FLRA's overlay of the "specificity" requirement on the "Covered By" test. It criticized the FLRA's logic because: (1) it is practically impossible to craft agreement language so broad as to meet the FLRA's test; and (2) the FLRA's approach merely made the CBA the jumping-off point for future negotiations over matters it already addressed. That scenario was deemed incompatible with the statutory goal of contract stability. In summary, the court held that: (1) an agency doesn't change conditions of employment by following a labor agreement; and (2) administering an existing condition of employment does not trigger a bargaining obligation.

**Covered By" Criteria**

Subsequent to the court's decision, the FLRA determined that: (1) its prior specificity requirement could nullify the provisions of a CBA and the requirement would no longer be followed; (2) agencies should be freed from a requirement to bargain over conditions of employment already resolved by prior bargaining; and (3) unions should be protected against unilateral management changes that were not the subject of prior bargaining. US. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 47 FLRA 1004 (1993). The FLRA set forth the following three-part test in determining when a matter is covered by the terms of a CBA:

1. **"Expressly Contained"** - The first determination is whether a matter is expressly contained in the CBA. An exact congruence of language between the CBA and a subsequent union proposal is not necessary. The test is merely whether a reasonable person would conclude that the provision settles the matter in dispute.

   **Example 1:** If the CBA provides a union representative "reasonable official time," the agency is not compelled during the term of the CBA to bargain over a union's mid-term proposal that would entitle the union representative to a specific number of hours of official time.

   **Example 2:** If the CBA addresses work breaks generally, the agency need not negotiate over a proposal raised mid-term dealing with work breaks for employees in a specific category or at a specific facility. The CBA is presumed to settle the matter of work breaks across the board.

2. **"Inseparably Bound Up With"** - If the CBA does not expressly cover the matter at issue, the second determination is whether the subject is "inseparably bound up with and ... [is] plainly an aspect of... a subject expressly covered by the contract." Under this determination, the subject matter need not be expressly addressed by the CBA, so long as it is commonly considered to be an aspect of matters set forth in the CBA such that future bargaining is presumed to be foreclosed by the negotiations leading to the CBA.

   **Example 1:** If the CBA contains no language addressing the union's reliance on a table of penalties when determining appropriate actions for employees who have engaged in misconduct, such a table can be considered an aspect of disciplinary/adverse actions. If the CBA has a provision covering disciplinary/adverse actions, that provision can be presumed to forestall future mid-term bargaining on union proposals addressing such a table.
Example 2: If the CBA has a "Safety and Health" article, a union proposal raising the question of provision of a specific safety item to unit employees is automatically covered under the existing language of the CBA, even if the provision of specific safety items is not addressed.

3. "Reasonably Should Have Been Contemplated." If an obligation to bargain issue can't be resolved by applying the two determinations above, the third determination is to examine whether, based on the circumstances of the particular case, the parties should reasonably have contemplated that the CBA foreclosed future bargaining on such a matter. If the subject matter of the union's proposal is only tangentially related to a provision in the CBA, and is not a subject that could have been considered a matter within the provision's intended scope, then the subject matter is considered not covered by the CBA.

Example: If the CBA has an article on the awards program and the awards program does not include time-off awards, there would be no requirement to negotiate over a mid-term proposal from the union dealing with time-off awards. Also, asserting time-off awards is covered by another article in the CBA may be supportable if the bargaining history shows that the award provision was intended to cover the granting of time-off awards as well as the general procedural aspects normally associated with leave issues.

Conclusions:

Based on the above, when a manager is confronted with a claimed bargaining obligation by an exclusive representative, or is assessing union proposals submitted in response to a management-initiated change in conditions of employment (as in, for instance, the implementation of a new technology), the manager may decline to bargain over proposals that are covered by and/or conflict with the express terms of a CBA. Local managers should not attempt to augment the terms of a CBA without discussing the propriety of such an action with a member of the regional or national labor relations staff, as appropriate.

In assessing whether an obligation exists to engage in collective bargaining, management should also review and apply the following LMR Guidance Bulletin.

1. 93-1 (9/17/93), "Mid-Term Bargaining Obligation"  
2. 94-1 (7/94), "Negotiation of Subjects in 5 USC 7106(b)(1)"  
3. 97-1 (9/17/97), "Part Practice and the Obligation to Bargain"

Please note that the guidance above does not address, nor will the FLRA generally address, whether the agency's application of the CBA is proper. If the union raises such an issue, it should be referred to the parties' negotiated grievance procedure.

Raymond B. Thomas

Raymond B. Thomas