Guide to the Federal Labor Relations Authority Negotiability Appeals Process

TABLE OF CONTENTS

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This information is intended to be used as a general guide to the negotiability appeals regulations of the Federal Labor Relations Authority (FLRA or Authority). If you want more information, you should read the regulations themselves, which are found in title 5 of the Code of Federal Regulations, starting with section 2424.1. The regulations are binding, so if you have any question about something after you read this guide, you should double-check the matter by taking a look at the regulations. You can also get information about the Authority's procedures by calling the Case Control Office at 202-482-6540.

The negotiability appeals process has been set up to resolve disagreements between the union and the agency about whether proposed or negotiated contract language is legal or negotiable. Other procedures may be more appropriate for other kinds of disputes. For example, if the agency states that it will not bargain over a particular subject matter, regardless of the wording of the proposal, the dispute may be handled through unfair labor practice (ULP) procedures. If the agency simply disagrees with the proposal, and doesn't question the legality of it, the dispute may be better addressed through mediation or the Federal Service Impasses Panel (FSIP). Sometimes the agency will raise more than one objection to a proposal, and the union will need to evaluate the procedural options to decide where it wants to seek a resolution.

When the union must file a petition for review about a proposal

When a union puts forward a contract proposal for bargaining, and the agency says it's non-negotiable, the union can start the appeal process by filing a petition for review with the FLRA's Case Control Office.

There are several things that the parties should know about what can prompt the proper filing of a negotiability appeal:

- if the union writes to the agency and asks for what's called an "allegation of non-negotiability," and the agency responds with the allegation in writing, the union has 15 days from the date of service of the allegation to file the petition at the FLRA headquarters in Washington, D.C.;

- if the union writes to the agency and asks for an allegation of non-negotiability, and the agency does not respond within ten days of receipt of the union's request, the union may do one of two things:

  (1) ignore the agency's silence and not file a petition, or

  (2) file the petition at any time after the agency's written response should have been given;

- if the agency states that something is non-negotiable, without being asked for its opinion by the union in writing, the union may file its petition, but it does not have to — it may keep on negotiating, since it did not ask for an allegation of non-negotiability;

- if the agency only says the proposal is non-negotiable orally, and not in writing, the union does not have to file its petition — it may keep on negotiating, since the allegation of non-negotiability must be in writing before a petition can be filed.

Filing a petition when a provision has been disapproved

Under limited circumstances, a negotiability appeal may also be filed after the local union and agency have agreed on the contract language that they expect will be included in the collective bargaining agreement. Under federal labor law, agreed upon contract language has to be reviewed by the agency head, who determines whether in his or her opinion the agreed upon language is legal. If the agency head views the negotiated provisions as illegal, he or she will issue a letter that disapproves the questioned contract provisions. The union must file a petition for review within 15 days of service of the disapproval letter in order to appeal the agency head's determination.

How the union files its petition and what must be included

The union may file its petition in one of two ways. It may (1) use a form that is provided by the Authority's Case Control Office or from its website, www.flra.gov, or (2) use plain paper, and give the same information that the form requests. Although the union does not have to use the form, it may be easier to do so, and will remind the union to give all the needed information. If the union doesn't give all the information that is needed, it's appeal may be dismissed. Even if the union chooses to use plain paper, the form can serve as a useful guide.

Basically, in its petition, the union has to give the exact wording of the proposal or provision that has been declared non-negotiable, and it has to explain the meaning. If there are any special terms that would not be familiar to people who don't work at the agency, the union must explain the terms. Also, the union is required to explain how the proposal works and what impact it would have. The union must list any laws, regulations or cases that support its argument. The union should provide a copy of any materials that the Authority would not be able to get from the law

library or other public source. The union should provide copies of agency regulations, orders or directives. If the union wants to divide the proposal or provision so that only those specific parts that are illegal are struck down, it may ask for "severance" of the parts that can stand alone. If the union does ask for severance, it must explain how the subparts work on their own. In addition, the petition must include the names, addresses, telephone numbers and fax numbers of the union and agency representatives.

The union must mail or deliver a copy of the petition to the agency head and the chief negotiator for the agency. The union should review the Authority's regulations to learn the acceptable methods for providing — or "serving" — the agency with documents.

After the petition is filed: the post-filing conference

After the petition is filed, the Authority will fax to the parties a notice of a date and time of a conference that is called a "post-filing conference." This conference will usually be set within ten days of receipt of the petition for review. The Authority sets up the conference almost immediately after the petition is filed, which is why the union is asked to include in the petition the parties' names, telephone numbers and fax numbers. Post-filing conferences will normally be held by telephone, so the notice of the post-filing conference will include a toll-free number and instructions on how to make the call. The parties must participate in the telephone conference. If the designated union or agency representative is not available, another person should be chosen to handle the call. Changes in the date and time of the conference will not be made with any frequency. In those unusual circumstances where a change is needed, the request should be made to the Case Control Office at least five calendar days prior to the scheduled conference. Whoever participates for the union and agency must be prepared to talk about the contract proposal or provision. This means that the union has to be able to explain everything

in its petition, and the agency has to be able to explain why it declared the matter non-negotiable. If the agency contends that it does not have to bargain about the contract proposal, regardless of its specific wording, it may raise that at the conference.

The Authority representative will discuss the negotiability appeal in detail with the union and the agency during the post-filing conference. If the parties are interested in getting mediation or interest-based bargaining help from the Authority's alternative dispute resolution specialists, the case will be put on hold to give the parties time to get help from the Collaboration and Alternative Dispute Resolution (CADR) office of the FLRA. If the parties don't want to try alternative dispute resolution, the appeal process will proceed. The parties will be asked during the conference to provide any information that the Authority representative thinks is necessary or useful. The Authority representative will prepare a summary of the conference, send a copy to the parties, and file it in the official record.

After the post-filing conference: the agency's statement of position

After the post-filing conference is held, the agency files its statement of position. This must be filed within 30 days of the agency head's receipt of the union's petition for review, unless the Authority or its representative has granted an extension of time. The agency may use a pre-printed form provided by the Authority's Case Control Office, or it may use plain paper and provide the same information that is requested on the form. Again, using the form may be the best way to ensure that the agency provides all the information that is needed. If the agency doesn't provide everything that is required under the regulations, the Authority could issue a bargaining order or order the agency head to withdraw its disapproval.

The statement of position is designed to give the agency a chance to explain its reasons why the contract language — either a proposal or a provision — is illegal or outside the obligation to bargain. The agency must state what it views as the meaning or impact of the contract language, if it disagrees with the union's statement as to meaning or impact. It is required to set out all of the reasons it has for stating that the contract language is non-negotiable, such as management rights or inconsistency with law or regulation. If the agency disagrees with the union's request for severance, or if it thinks severance is proper, it should give all the reasons for its position. The agency must mail or deliver its statement of position to the union representative.

The union's response to the agency's statement of position

Within 15 days of receiving the agency's statement of position, the union must file a response. This may be done on a form or on plain paper. The union must give reasons why the agency's arguments are incorrect. If the agency claims that the proposal or provision violates management rights, the union is required to identify and explain any exceptions that apply, such as that the proposal or provision is an electively negotiable topic, a negotiable procedure or a negotiable appropriate arrangement. If the agency has made bargaining obligation claims, the union should respond to those. Essentially, the union should answer the agency's arguments. In addition, the union may ask for severance, if it has not already done so. The union must mail or deliver a copy of the response to the agency head and the agency's representative.

The agency's reply

The agency may file a reply to the union's response, if the union has raised new arguments. For example, if the union says that the proposal or provision does not violate management rights because it is electively

negotiable or is a procedure or appropriate arrangement, the agency may state why it disagrees with that. Similarly, if the union requests severance for the first time in its response, the agency may reply to that with its own arguments. The agency is not supposed to raise anything new, and should limit its reply to things that the union put in its response.

Bargaining obligation disputes

Sometimes an agency states that a proposal is non-negotiable even when it is legal. This is called a "bargaining obligation dispute," which occurs when the agency states that (1) there is "no obligation to bargain" because the proposed contract language is already covered by or included in an existing collective bargaining agreement; or (2) the union has waived its right to bargain; or (3) an agency-initiated change is too minor to require bargaining. An agency is asked to raise this kind of claim at the post-filing conference, but may wait to raise this assertion until filing its statement of position.

A bargaining obligation dispute can be processed in a couple of ways. A union may have filed a grievance or unfair labor practice charge against the agency for refusing to bargain. If it has done that, the Authority will dismiss the petition for review because the general question about the obligation to bargain will be decided in another way. As an alternative to filing a grievance or ULP, the union can ask the Authority to resolve the bargaining obligation dispute as a part of the negotiability appeal. If the Authority agrees that there is an obligation to bargain, it will not order unfair labor practice type of remedies in a negotiability appeal. The Authority will inform the parties of its decision at the same time that it determines whether the proposal is negotiable or legal.

Additional fact-finding and resolution of the case

After all the papers are filed, the Authority can resolve the case in a number of ways. If the papers give a complete picture, the Authority can simply make a decision based on the written materials. If it needs to, however, the Authority can ask for more materials, including answers to specific questions from the Authority's representative. In addition, the Authority can refer the case to a fact-finder, such as an administrative law judge. If fact-finding procedures occur, both parties have to cooperate and respond to the orders and requests of the Authority and its representatives. If either party doesn't respond timely and fully, that party might have its arguments disregarded.

After all fact-finding is complete, the Authority will issue a decision. If the proposal is negotiable or there is a duty to bargain, the Authority will issue a decision and order the agency to bargain or to withdraw its agency head disapproval. If the proposal or provision is electively negotiable, the Authority will say so. If the proposal or provision is non-negotiable, or there is no duty to bargain, the Authority will dismiss the petition. Whatever the Authority's decision might say, the parties are obligated to obey Authority orders. If an agency does not follow the Authority's order to bargain within 60 days, the union can report non-compliance to the Regional Director in the area of the country where the agency is located.

Appeal rights

If either party disagrees with the Authority, it can file an appeal in the United States court of appeals. The appeal must be filed during the 60 day period beginning on the date on which the order was issued.

Questions and Answers

Common questions and answers about the Authority's procedures for resolving negotiability disputes follow:

Q. What is a proposal?
A. A proposal is contract language that has not yet been agreed to by the parties. In this context, a proposal is the subject of a negotiability appeal.

Q. What is a provision?
A. A provision is contract language that has been agreed to by the local union and agency, to be a part of their collective bargaining agreement. However, the provision can be disapproved as illegal by the agency head during the 30 day review period after the local parties sign the contract. In this context, a provision is the subject of a negotiability appeal.

Q. What prompts the filing of a negotiability appeal/petition for review?
A. Several things do: 1) the union asks for a written allegation of non-negotiability and receives the agency's written allegation; 2) the union asks in writing for a written allegation of non-negotiability, and the agency does not reply within ten days of receipt; 3) the union does not ask for an allegation of non-negotiability, but receives an unsolicited, written allegation, which creates the option for the union to file an appeal; or 4) the agency head declares contract provisions to be contrary to law.

Q. How much time does the union have to file a petition for review?
A. The time limits depend upon what prompts the filing of the petition. The union has to file within 15 days of the date of service of a requested, written allegation of non-negotiability, or, if the agency does not respond to a written request for an allegation of non-negotiability, the union may file at any time after ten days from the

agency's receipt of the request. If the agency provides an unrequested allegation of non-negotiability, the union has a choice: it may ignore it, or it may file within 15 days of the date of service. If the agency head disapproves a provision, the union must file within 15 days of the date of service of the disapproval letter.

Q. Where is the petition filed?
A. At the Federal Labor Relations Authority, Case Control Office, 607 14th Street, N.W., Washington, D.C. 20424.

Q. Can the petition be filed by fax?
A. No.

Q. Does the union have to give the agency copies of the petition?
A. Yes. The union has to mail or deliver a copy of the petition to both the head of the agency and the chief negotiator who represented the agency at the bargaining table.

Q. What information goes into the petition for review?
A. The exact language of the proposals or provisions in question; a statement of the meaning of the proposals or provisions; an explanation of how the disputed language would operate and what impact it would have; an explanation of any special terms or initials; and a request for severance. Forms for the petition are available from the Authority.

Q. What does severance mean?
A. Severance is asked for by the union when it thinks that parts of a proposal or provision can stand alone even if other parts are found to be illegal or outside the obligation to bargain. The union must explain how the separate parts of the proposal or provision can be meaningful if they are allowed to stand.

Q. What happens after the petition for review is filed?
A. The parties will receive notice of a conference that they will be required to attend, which will be set for a specific time and date, usually within ten days after the petition is received.

Q. What if a party's representative is unavailable at the time and date of the post-filing conference?
A. The party should make every effort to get a substitute who is familiar with the case. On very rare occasions, a conference can be rescheduled. The party who needs the change should contact the other side to get its position on the postponement. If the union and agency agree about a postponement, they should present alternative dates and times along with a written request for a postponement. If the parties do not agree, one side can still ask for a postponement. The Authority can deny a request for a postponement, even if both sides agree, if there is not a good reason for a postponement. Absent extraordinary circumstances, a request to reschedule must be received by the Authority no later than five calendar days before the scheduled conference date.

Q. What happens at the post-filing conference?
A. The conference will be led by a representative of the Authority who will ask the union for any information that is needed. The agency will be asked to give all of its reasons for its position that the proposal or provision is non-negotiable. The conference will focus on what the contract proposal or provision means. Either the union or the agency, or both, may be asked to provide specific information. The parties will be offered the chance to participate in the Authority's voluntary alternative dispute resolution program, which can include mediation. The Authority's representative will prepare a written summary of the conference which will become part of the official record.

Q. What happens after the post-filing conference?
A. The agency has to file its statement of position.

Q. When is the agency's statement of position due?
A. Within 30 days after the agency head receives the petition for review, unless the Authority or its representative grants a request for an extension of time.

Q. What is the agency's statement of position?
A. This document is filed on a form or on plain paper, and it gives the agency's position on why the proposals or provisions are non-negotiable or are not within the agency's obligation to bargain. The agency must give its interpretation of the meaning and impact of the proposal or provision if it is different from the union's. The agency has to set forth all the reasons for its opinion about the contract language, such as management rights, or inconsistency with law or regulation. If the agency contends that it doesn't have to bargain, it must state the reason, such as, the topic is covered by the parties' collective bargaining agreement or a change in conditions of employment is too minimal to require bargaining.

Q. Where is the statement of position filed?
A. At the FLRA's Case Control Office in Washington, D.C.

Q. Must the union respond to the agency's statement of position?
A. Yes.

Q. When must the union respond to the agency's statement of position?
A. Within 15 days after the union receives the statement.

Q. What should be included in the union's response to the statement of position?
A. The union should state all the reasons why the agency is incorrect, including factual and legal matters. If the agency raises management rights, the union should raise any exceptions to management rights, such as elective negotiability, or negotiable procedures or appropriate arrangements. If the union thinks the agency's arguments are wrong, it should explain why it thinks the proposal or provision does not conflict with the law.

Q. Can the agency reply to the union's response?
A. Yes. The agency can file a reply.

Q. When is the agency's reply due?
A. Within 15 days after the agency receives a copy of the union's response to the statement of position.

Q. What should be included in the agency's reply?
A. The agency's reply should be limited to responding to the new matters raised in the union's response. The agency should give all of the reasons why the union's arguments are not correct. If the union has asked for severance and the agency disagrees, it should explain why it thinks severance is inappropriate.

Q. Why is there an agency reply when the federal labor statute sets out only three steps — the petition, the statement of position, and the response?
A. The Authority recognizes that the union might not raise some arguments until after it has the benefit of reading the agency's statement of position. Allowing the agency to file a reply to new material is fair, just like the union has the chance to file a response to the agency's arguments.

Q. Are there any other filings permitted, after the agency reply?
A. If either party makes a written request and shows extraordinary circumstances for filing a supplemental or additional document after the four filings described above, the Authority can grant permission to do so.

Q. Will there be a hearing?
A. There may be, but not typically. Either party can ask for a hearing, and should give the reasons for its request. However, the Authority does not have to hold a hearing, even if both parties want one.

Q. If there is no hearing, how does the Authority find out what the facts and arguments are?
A. The Authority relies most on the documents that the parties file. However, the Authority can ask for additional information through written questions or a fact-finding conference.

Q. If the agency claims in its response that it won't negotiate because the contract language is not within its obligation to bargain, on the basis that it's already covered by the collective bargaining agreement or for some other reason, how will that be resolved?
A. There are several options. If it's timely, a union could file a grievance or unfair labor practice charge regarding the agency's refusal to bargain. If that happens, unless the agency has argued that it has a compelling need for an agency regulation that is counter to the contract language, the Authority will dismiss the petition for review, without prejudice to it being refiled later. The bargaining obligation question would get resolved in another forum. However, if the union does not file an unfair labor practice charge or a grievance that claims an unfair labor practice, the Authority will decide the agency's defense on the bargaining obligation, as well as the legality of the disputed language. The filing of a negotiability appeal does not stop or change the time limits for filing a grievance or ULP charge.

Q. Why is a case treated differently when a compelling need argument is raised?
A. A federal court has ruled that if an agency raises an argument that disputed language is non-negotiable because it conflicts with an agency regulation for which there is a compelling need, that claim needs to be decided before an unfair labor practice determination can be made. As a result, the negotiability case will proceed, even if an unfair labor practice charge or grievance has been filed.

Q. Do the parties have to use the forms provided by the Authority?
A. No, but their use is encouraged. If the parties do not use the forms, they must provide all of the information that is required by the regulations and referred to on the forms.

Q. What happens if a party does not comply with the regulations or requirements?
A. If non-compliance is minor or technical, the Authority can give the party a chance to correct the mistake. However, if the union or the agency does not comply in an important way, it can count against the non-complying party and it may affect its case. If a union doesn't cooperate or comply, it could have its petition dismissed. If an agency doesn't cooperate or comply, it could be ordered to bargain or to withdraw disapproval of a contract provision.

Q. What are the responsibilities of the parties to support their cases?
A. The union has the responsibility to make and support its arguments, and the agency has the responsibility to make and support its arguments. Both parties must respond to what the other side is arguing. If a party fails to respond, it could be viewed as agreement with the other side. If a party doesn't set out an argument or give support for its viewpoint, it may adversely affect its case — even if the argument or support, if made, would have changed the outcome.

Q. How will the Authority set out its decision?
A. The Authority will issue a written decision that explains its ruling. If it finds something to be legal and within the obligation to bargain, the Authority will issue an order to bargain about the proposal or an order to rescind disapproval of the provision. If the Authority decides that something is electively negotiable, it will state that determination. If the Authority decides that a proposal or provision is non-negotiable because it's illegal or there is no duty to bargain, it will dismiss the petition.

Q. What happens if an agency does not comply with an order to bargain or to rescind disapproval?
A. The union should bring the agency's non-compliance to the attention of the Regional Director within a reasonable period of time after the 60 day period to appeal to court has passed. The Authority will then look into the matter and take reasonable steps to be sure that the agency complies.

Q. What happens if a party does not agree with the Authority's decision?
A. The party that disagrees with the Authority's final order can file an appeal during the 60 day period beginning on the date that the order was issued. The appeal is filed in a United States court of appeals.