

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Labor and Employment Law Note

To Talk or Not to Talk:

How Do You Know Whether an Issue is Negotiable?

Introduction

Management Rights

Title VII of the Civil Service Reform Act of 1978,¹ also known as the Federal Service Labor-Management Relations Statute (Statute), requires federal agencies to negotiate in good faith with labor unions recognized as exclusive bargaining representatives for agency employees.² Generally, this duty to negotiate includes bargaining with the union about issues that affect the day-to-day working conditions of bargaining unit employees.³ While the duty to bargain is very broad, it is not without limitation. This note reminds labor counselors that agencies are not required to negotiate over any matters that excessively interfere with their management rights or that conflict with federal statutes. It also explains the rules surrounding the duty to bargain over issues that conflict with government- and agency-wide regulations.⁴ Finally, because agencies and labor counselors may still have questions on whether a specific

policy or provision is negotiable, this note briefly explains the new procedures for obtaining a negotiability determination from the Federal Labor Relations Authority (Authority).

In enacting the Statute, Congress recognized that not every issue affecting conditions of employment should be negotiable.⁵ Some issues are so inherent to an agency's right to maintain control over its organization, that Congress specifically excluded them from the negotiation process. These rights have become known as "management rights," and agencies do not have a duty to negotiate over issues that interfere with them. For example, agencies have the right to determine their mission, budget, organization, number of employees, and internal security practices.⁶ Agencies also have the right to hire, assign, direct, layoff, and retain employees in their agencies,⁷ and to make decisions with respect to contracting out⁸ and filling positions.⁹

1. 5 U.S.C.A. §§ 7101–7135 (West 2000).

2. Specifically, 5 U.S.C.A. § 7114(a)(4) states that "[a]ny agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement"

An "appropriate unit" is a "grouping of employees found to be appropriate for purposes of exclusive recognition." 5 C.F.R. § 221.14 (2000). The Federal Labor Relations Authority (Authority) determines the appropriateness of any unit. 5 U.S.C.A. § 7112(a). In making this determination, the Authority generally considers whether there is a clear and identifiable community of interest among the employees in the unit, whether the unit would promote the effective dealings with the agency involved, and whether the unit promotes the efficiency of operations of the agency involved. *Id.* See Department of Trans. and AFGE Local 3313, 5 F.L.R.A. 646 (1981) (finding that certain headquarters employees and field office employees within the same agency did not constitute an appropriate bargaining unit under the three criteria in § 7112(a)).

3. The duty to negotiate in good faith includes the obligation to negotiate on any condition of employment. 5 U.S.C.A. § 7114(b)(2). Condition of employment means "personnel policies, practices, and matters . . . affecting working conditions." *Id.* § 7103(a)(14). The term does not include policies, practices, and matters related to political activities, position classifications, or matters specifically provided for by federal statute. *Id.* § 7103(a)(14)(A)-(C).

In determining what conditions of employment to discuss with exclusive representatives, labor counselors should focus on those conditions that affect the specific bargaining unit represented by a specific union representative. Agencies should not negotiate with exclusive representatives over conditions of employment concerning individuals not in the relevant bargaining unit. See *AFGE v. FLRA*, 110 F.3d 810 (D.C. Cir. 1997) (determining that a proposal trying to regulate the conditions of employment of supervisors by redefining reduction in force competitive areas was outside the duty to bargain). Similarly, agencies may refuse to bargain over issues that affect only activities occurring after duty hours. See, e.g., *Antilles Consol. Educ. Ass'n and Antilles Consol. School Sys.*, 22 F.L.R.A. 235 (1986) (holding that a proposal for access to base facilities during non-duty hours did not affect conditions of employment).

Even if a matter meets the definition of condition of employment, an agency does not have a duty to bargain over proposed changes that will have a *de minimis* effect on bargaining unit employees. See, e.g., *GSA Region 9 and NFFE Local 81*, 52 F.L.R.A. 1107 (1997) (deciding that an agency is not required to bargain over temporarily relocating a bargaining unit employee from one building to another because the effect was *de minimis*); *Department of Health and Human Servs. and AFGE*, 24 F.L.R.A. 403 (1986) (changing an employee's title, but not her duties, did not create a duty to bargain).

4. This note does not address permissive topics that an agency may elect to negotiate pursuant to 5 U.S.C.A. § 7106(b)(1) or the impact of President Clinton's executive order called "Labor-Management Partnerships" on the election to bargain. Exec. Order No. 12,871, 58 Fed. Reg. 52,201 (1993).

5. Congress recognized that a powerful union could abuse the federal government to the detriment of the public interest if it did not provide agencies with the discretion they needed on issues like agency operations, contracting out, and management rights. Major Michael R. McMillion, *Collective Bargaining in the Federal Sector: Has the Congressional Intent Been Fulfilled?*, 127 MIL. L. REV. 169, 199 (1990).

6. 5 U.S.C.A. § 7106(a)(1).

The last management right listed in the Statute gives agencies the right “to take whatever actions may be necessary to carry out the agency mission during emergencies.”¹⁰ In the past, union attempts to define the term “emergency” failed because the Authority determined that they interfered with the rights of the agencies in this area.¹¹ Recently, the Authority stated it would no longer follow this precedent. Instead it will determine whether the provision is contrary to the management right at issue.¹² If it is, then the issue will not be negotiable.

Agencies should not agree to union proposals that interfere with the exercise of their management rights.¹³ If an agency makes a management rights decision, however, it must negotiate the procedures that management officials will use when executing its decision and any appropriate arrangements needed for employees who are adversely affected by it.¹⁴ This process is commonly known as impact and implementation bargaining.¹⁵ A recent example demonstrating an agency’s duty to negotiate the impact and implementation of a management right involves the Army’s new mandatory drug-testing policy for certain civilian employees.¹⁶

As part of its right to establish internal security procedures, the Army designated certain civilian positions as subject to

mandatory drug testing because they have critical safety or security responsibilities.¹⁷ Under the Statute, the Army has no duty to bargain with unions about whether to have such testing.¹⁸ Because the drug-testing policy changes the conditions of employment for some bargaining unit employees, Army activities must give the relevant union representatives notice of any locally-developed procedures to implement the drug-testing policy and afford the union a reasonable opportunity to review the new procedures and to request bargaining.¹⁹ If a union asks to bargain, the activity must meet and negotiate implementation procedures with the exclusive representative. During the course of the negotiations, the activity may not implement the proposed changes for bargaining unit employees.²⁰ If a union does not request bargaining within a reasonable period, the activity may implement the proposed changes.

Conflicts with Federal Statutes

Not only are management rights excluded from the duty to bargain, but so are any matters that conflict with federal laws.²¹ For example, in *AFGE Local 1547 and Luke Air Force Base*, the Authority examined the negotiability of a union proposal that would require the agency to buy or reimburse bargaining

7. *Id.* § 7106(a)(2)(A). The Statute also affords agencies the right to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees. *Id.*

8. *See id.* § 7106(a)(2)(B). Agencies can also assign work and determine the personnel who will perform agency operations. *Id.* *See also* Office of Personnel Management, *Contracting Out* (visited Jan. 5, 2000) <<http://www.opm.gov/cplmr/html/CONTR.htm>> (listing negotiability cases involving the contracting out process).

9. 5 U.S.C.A. § 7106(a)(2)(C). Selections for appointments may be made from among properly ranked and certified candidates for promotion or from any other appropriate source. *Id.* While union attempts to limit the pool of eligible employees will usually fail, the Authority may find a proposal to expand the applicant pool negotiable. *See* AFGE Locals 222 and 2910 and Department of Hous. and Urban Dev., 54 F.L.R.A. 171 (1998) (finding that a proposal requiring an agency to consider applications from field office employees expands the applicant pool and does not interfere with an agency’s right to select).

10. 5 U.S.C.A. § 7106(a)(2)(D).

11. *See* NFFE Local 1655 and Department of Defense Nat’l Guard Bureau, 49 F.L.R.A. 874 (1994) (holding that a provision that defines “emergency situation” affects management’s right to take action during an emergency by limiting its authority to assess whether an emergency exists); Tidewater Virginia Fed. Employees Metal Trades Council and Norfolk Naval Shipyard, 31 F.L.R.A. 131 (1988) (determining that by defining “emergency,” a provision would preclude the agency from independently assessing whether an emergency exists and therefore interfere with management’s rights); AFGE Locals 696 and 2010 and Naval Supply Center, 29 F.L.R.A. 1174 (1987) (finding the term “emergency” nonnegotiable because it limits management’s right to independently assess whether an emergency exists).

12. *IBEW Local 350 and Department of the Army Corps of Eng’rs*, 55 F.L.R.A. 243, 245 (1999) (finding that not all definitions of “emergency” affect management’s rights and directing the agency to rescind its disapproval of a definition that allows it to act in all emergencies).

13. In the partnership situation, labor counselors may find that agencies and exclusive representatives are discussing issues involving all areas, including management rights. However, any agreements reached must still not affect the exercise of management rights.

14. 5 U.S.C.A. § 7106(b)(2)-(3). Essentially, the agency gives the exclusive representative notice of any arrangements or procedures it wants to use and affords the exclusive representative the opportunity to bargain. If the exclusive representative does not ask to bargain within a reasonable time, the agency can implement the proposed changes.

15. McMillion, *supra* note 5, at 199.

16. U.S. DEP’T OF ARMY, REG. 600-85, ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL PROGRAM, para. 5-14b (C3, 26 Apr. 1999).

17. *Id.* These positions stem from those identified in section 7 of President Reagan’s executive order on a Drug-Free Federal Workforce. Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (1986).

18. An agency’s decision to implement a drug-testing program is an exercise of the agency’s right under 5 U.S.C.A. § 7106(a)(1) to establish internal security practices. AFGE and Department of Educ., 38 F.L.R.A. 1068, 1076 (1990).

unit employees for motorcycle safety equipment that the agency required beyond state law requirements.²² The agency asserted that federal law prohibited it from buying the requested equipment unless the United States government, and not the employee, received the primary benefit of it.²³ The union responded that since it was an agency requirement to have the extra equipment, not based on any law, rule, or regulation, the use of the additional items was for the agency's sole benefit.²⁴ Ultimately, the Authority found that the proposal was outside the agency's duty to bargain because it was contrary to the federal law.²⁵ If the union had shown how the equipment would have been used in the performance of agency work or how the

equipment was essential to the transaction of official government business, then the Authority may have ruled in its favor.²⁶

Conflicts with Government- and Agency-wide Regulations

Government-wide rules and regulations also bar negotiation over union proposals that conflict with them.²⁷ If the government-wide rule or regulation is prescribed after the negotiation of a collective bargaining agreement (CBA), however, the CBA will override any conflicting provision in the government-wide rule or regulation for the term of the agreement.²⁸ When the

19. While the substance of the drug-testing policy is not negotiable, the Authority has found negotiable several issues related to such policies. Examples of issues the Authority has found to be negotiable include whether a union representative can be present at the testing, whether employees will be granted administrative leave to participate in the testing or related counseling, whether employees will be told what drugs are being tested for, whether employees can grieve the inclusion of their positions as testing designated positions, and whether an agency will help an employee get to a testing site. See *AFGE Local 1661 and Department of Justice Fed. Bureau of Prisons*, 31 F.L.R.A. 95 (1988) (addressing a proposal that requires employees being tested to "be told exactly what drug(s) or class of drugs they are being tested for"); *NTEU and Department of the Treasury Bureau of Alcohol, Tobacco, and Firearms*, 41 F.L.R.A. 1106 (1991) (discussing proposals requiring the presence of a union representative and granting administrative leave); *AFGE Local 446 and Department of Interior Nat'l Park Service*, 43 F.L.R.A. 836 (1991) (discussing proposals that allow employees to grieve the designation of their positions as sensitive for drug-testing purposes and require the agency to transport employees to an off-site testing facility).

20. See *International Fed'n of Prof'l and Technical Eng'rs Local 128 and Department of Interior Bureau of Reclamation*, 39 F.L.R.A. 1500 (1991) (stating that a proposal that delays implementation of a drug-testing program until after a satisfactory resolution of the negotiations is negotiable because it merely restates an agency's duty to bargain and essentially maintains the status quo under the Statute); *International Ass'n of Machinists and Aerospace Workers and Department of the Army, Aberdeen Proving Ground*, 31 F.L.R.A. 205 (1988), *remanded as to other matters sub no. .*, *Department of the Army, Aberdeen Proving Ground v. FLRA*, No. 88-1311 (D.C. Cir. July 18, 1988), decision on remand, 33 F.L.R.A. 512 (1988) (finding negotiable a proposal that delayed implementation of the Agency's drug-testing program until negotiations were finished with available impasse services).

The duty to maintain the status quo continues through negotiations and impasse if no agreement can be reached. If an agency fails to maintain the status quo, it will violate its duty to bargain in good faith under 5 U.S.C.A. § 7116(a)(5). However, the Authority recently decided that a failure to maintain the status quo will not automatically violate the duty to cooperate in impasse procedures under *id.* § 7116(a)(6). Now, agencies must actually fail to cooperate with an impasse procedure or decision before this violation will be found. See *Department of Justice Immigration and Naturalization Serv. and National Border Patrol Council*, 55 F.L.R.A. 69 (1999) (remanding the case to the administrative law judge to apply this new standard of review to the alleged impasse violation at issue).

An exception to the obligation to maintain the status quo exists for exigencies of agency operations. To prevail on this defense, an agency must offer affirmative proof that an "overriding exigency" existed that required immediate implementation. *Department of Justice Immigration and Naturalization Serv. and AFGE Nat'l Border Patrol Council*, 55 F.L.R.A. 93 (1999) (finding that the agency committed an unfair labor practice when it unilaterally implemented a change that allowed use of side handle batons and it could not show that the change was necessary for the agency to perform its function).

21. 5 U.S.C.A. § 7117(a).

22. *AFGE Local 1547 and Department of the Air Force, Luke Air Force Base*, 55 F.L.R.A. 684 (1999).

23. *Id.* at 685. The first statute governing safety-related equipment relied on by the agency was 29 U.S.C.A. § 668(a) (West 2000) which requires agencies to:

establish and maintain an effective and comprehensive occupational safety and health program which is consistent with the standards promulgated under section 6 [29 U.S.C.A. § 655]. The head of each agency shall (after consultation with representatives of the employees thereof) (1) provide safe and healthful places and conditions of employment, consistent with the standards set under section 6 [29 U.S.C.A. § 655]; (2) acquire, maintain, and require the use of safety equipment, personal protective equipment, and devices reasonably necessary to protect employees

The agency also relied on 5 U.S.C.A. § 7903, Protective Clothing and Equipment, which states: "Appropriations available for the procurement of supplies and material or equipment are available for the purchase and maintenance of special clothing and equipment for the protection of personnel in the performance of their assigned tasks"

24. *Luke Air Force Base*, 55 F.L.R.A. at 685. In reaching its decision, the Authority relied on the statutes cited by the agency and on Comptroller General opinions that authorized agencies to spend government funds for equipment only if "(1) the Government, rather than the employee, receives the primary benefit of the equipment; and (2) the equipment is not a personal item that should be furnished by the employee." *Id.* (citing *AFGE Council 214 and Department of the Air Force, Wright Patterson Air Force Base*, 53 F.L.R.A. 131 (1997); 63 Comp. Gen. 278 (1984)).

25. *Luke Air Force Base*, 55 F.L.R.A. at 686.

26. The union would also have had to show that the agency required unit employees to ride motorcycles on the agency's facilities or otherwise use them in the performance of their work. *Id.* at 685.

CBA expires, the government-wide regulation will usually become enforceable “by operation of law.”²⁹ A government-wide regulation may not become enforceable if a CBA requires the agency to tell the union it wants to reopen the contract before it expires and the agency fails to do so.³⁰ Labor counselors should keep these rules in mind when advising their agencies on how to implement recently issued government-wide regulations involving the use of government credit cards,³¹ smoking in federal buildings,³² conference planning,³³ and travel reimbursements.³⁴ Labor counselors should also remember that while the substance of new government-wide rules or regulations may not be negotiable, the impact and implementation of them at the local level may be.

Agency-wide rules and regulations are not afforded as much deference as government-wide regulations in the negotiation process.³⁵ While government-wide regulations are immediately enforceable unless they conflict with a current CBA,

agencies must negotiate changes made by agency-wide rules and regulations unless the agency establishes a “compelling need” for them.³⁶ To prove a compelling need,³⁷ an agency must demonstrate one or more of the following criteria:

(a) The rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of functions of the agency

(b) The rule or regulation is necessary to ensure the maintenance of basic merit principles.

(c) The rule or regulation implements a mandate to the agency . . . under law or other outside authority, which implementation is essentially nondiscretionary in nature.³⁸

27. 5 U.S.C.A. § 7117(a). Government-wide regulations are those regulations and official declarations of policy that apply to the federal civilian workforce as a whole and are binding on the federal agencies and officials to which they apply. Defense Contract Audit Agency and AFGE, 47 F.L.R.A. 512, 521 (1993).

28. 5 U.S.C.A. § 7116(a)(7). See Department of the Army, III Corps and Fort Hood, and AFGE Local 1920, 40 F.L.R.A. 636, 641 (1991).

29. *III Corps and Fort Hood*, 40 F.L.R.A. at 641 (citing Department of Defense, Defense Contract Audit Agency, and AFGE Local 3529, 37 F.L.R.A. 1218 (1990))

30. See *id.* at 641-42.

31. 65 Fed. Reg. 3054 (2000) (to be codified at 41 C.F.R. pts. 301-51, 301-52, 301-54, 301-70, 301-71, 301-76). The final Government Services Administration rule mandates the use of a government contractor-issued travel charge card for all official travel expenses unless you have an exemption. *Id.* at 3055 (to be codified at 41 C.F.R. § 301.51.1). These rules apply to official travel performed after 29 February 2000, or upon issuance of agency implementing regulations, whichever comes first. *Id.* at 3054.

32. 41 C.F.R. §§ 101.20.1-101.20.3, 63 Fed. Reg. 35,846 (1998). Effective 1 July 1998, this rule prohibits the smoking of tobacco in all interior space owned, rented, or leased by the executive branch of the federal government, and in any outdoor areas under executive branch control in front of air intake ducts.

33. 65 Fed. Reg. 1326 (2000) (to be codified at 41 C.F.R. pts. 301-11, 301-74). Effective 14 January 2000, these rules give specific guidance to minimize overall government expenses associated with conferences. One item of particular interest is the section authorizing agencies to provide light refreshments at official conferences. *Id.* at 1328 (to be codified at 41 C.F.R. § 301.74.11). Light refreshments for morning, afternoon, or evening breaks are defined to include, but not be limited to, coffee, tea, milk, juice, soft drinks, donuts, bagels, fruit, pretzels, cookies, chips, or muffins. *Id.*

34. See 65 Fed. Reg. 1268 (2000) (to be codified at 41 C.F.R. pt. 301-10) (increasing the mileage reimbursement rate for use of privately-owned automobiles on official travel from 31 to 32.5 cents per mile effective 14 January 2000); 65 Fed. Reg. 67,670 (2000) (to be codified at 41 C.F.R. pts 301-3, 301-10) (updating per diem rates and incidental expenses for official travel performed on or after 1 January 2000); and 64 Fed. Reg. 45,890 (1999) (to be codified at 41 C.F.R. pt. 303-70) (authorizing agencies to pay certain expenses related to the death of certain employees while performing official travel and the transportation of the remains of certain family members).

35. Major command (MACOM), installation, and local rules and regulations are afforded no deference. If an agency wants to institute a local policy that affects the conditions of employment of bargaining unit employees, it must give the union notice of the proposed change and an opportunity to bargain.

36. 5 U.S.C.A. § 7117(b)(West 2000). Initially, there will be a presumption that the agency has a compelling need for the agency rule or regulation until the Authority determines there is no such need. See *id.* § 7117(a)(2). However, agencies that act based on that presumption do so at their own peril because the Authority usually finds that there is no compelling need and that the agency has a duty to bargain.

37. Agencies relying on an agency-wide rule or regulation to argue they do not have a duty to bargain over a specific issue may have to prove a compelling need for the rule or regulation relied upon during a negotiability proceeding or at an unfair labor practice hearing. During a negotiability proceeding, the primary focus of the Authority will be on determining whether there is a statutory duty to bargain over a specific matter. See *infra* text accompanying notes 40-52. If the agency contends there is no duty to bargain because the issue is controlled by an agency-wide rule or regulation for which there is a compelling need, the agency will usually need to build a paper case supporting its position.

At an unfair labor practice hearing, the Authority will focus on whether a party violated its statutory duty to bargain. If the agency relies on an agency-wide regulation to justify its refusal to bargain, then it may need to present documentary evidence and witness testimony proving a compelling need at a hearing before an administrative law judge.

38. 5 C.F.R. § 2424.50 (2000).

If an agency can meet this compelling need standard, it will be exempt from the duty to bargain. Generalized and conclusory reasoning is not enough to support a finding of compelling need.³⁹ Unless the agency provides the Authority with facts and arguments bearing on those issues, it cannot judge the validity of the agency contentions.⁴⁰ If an agency cannot demonstrate a compelling need, it must give the exclusive representative notice of any proposed changes in conditions of employment for bargaining unit employees based on an agency-wide rule or regulation and afford the union the opportunity to bargain.

Negotiability Proceeding

Since its inception in 1979, the Authority has issued over 2000 negotiability decisions.⁴¹ Researching these decisions is one of the best ways to determine whether a topic is negotiable.⁴² If a proposal is negotiable, the agency has a duty to bargain with the exclusive bargaining representative until an agreement or impasse is reached. If an agency decides that a proposal is not negotiable, it can refuse to bargain.⁴³ A union that disagrees with an agency determination that a proposal is not negotiable may ask the Authority for a negotiability determination.⁴⁴ Only unions (not agencies or individuals) may file a petition for review of a negotiability issue with the Authority.⁴⁵

Last year, the Authority published negotiability procedures that agencies and unions must follow for petitions filed after 1

April 1999.⁴⁶ These procedures significantly expand the amount of information the Authority and the parties will receive during the proceedings and ensure that all participants have a complete understanding of the issue or issues in dispute. For example, once an exclusive representative files a petition for review, the Authority will now schedule a post-petition conference before the agency files its statement of position.⁴⁷

The purpose of the conference, which may be held in person or telephonically, is to ensure that the parties have a common understanding of the meaning and impact of the proposal or provision at issue; to determine whether there are any factual disputes concerning the proposal or provision; and to discuss other relevant matters, including whether the parties wish to explore alternative dispute resolution.⁴⁸

After the agency files its statement of petition,⁴⁹ the union may respond to it.⁵⁰ The new rules then allow the agency to file a reply to the exclusive representative's response.⁵¹ Either side may ask to file another submission, but the Authority is not required to grant that request.⁵² Once the parties have filed all their submissions, the Authority will have a complete record on which to issue its final decision.

From the time a petition is filed until the Authority issues a decision, either party may request assistance from the Collabora-

39. PETER BROIDA, A GUIDE TO FEDERAL LABOR RELATIONS AUTHORITY LAW AND PRACTICE 502 (12th ed. 1999).

40. *Id.* (citing AFGE Local 3804 and FDIC, Madison Region, 21 F.L.R.A. 870, 887 (1986)). This limit on the duty to bargain recognizes that within every agency there exists a governmental mission that cannot be compromised or negotiated away, in whole or in part, at the bargaining table. *AFGE Local 2953 v. FLRA*, 730 F.2d 1534, 1539 (D.C. Cir. 1984).

41. Memorandum from Joe Swerdzewski, General Counsel, Federal Labor Relations Authority, to Regional Directors, subject: Guidance in Determining Whether Union Bargaining Proposals are Within the Scope of Bargaining Under the Federal Service Labor-Management Relations Statute pt. II.C (10 Sept. 1998), available at <http://www.flra.gov/gc/b_scop_m.html>. See U.S. Office of Personnel Management, *Negotiability Determinations by the Federal Labor Relations Authority* (visited Feb. 14, 2000) <<http://www.opm.gov/cplmr/html/FLRA7997.html-ssi>> (listing summaries of negotiability determinations issued by the Authority from 11 January 1979 through 31 December 1998).

42. While Authority decisions provide agencies with guidance on what is and is not negotiable, labor counselors should remember that these are administrative decisions. The Authority may continue to follow its previous decisions on specific issues, but there is nothing that prohibits the Authority from changing its position, as demonstrated by its recent opinion involving the term "emergency" in relation to management rights. See *supra* notes 10-12 and accompanying text.

43. Agencies should notify their MACOM, Field Advisory Services, or Headquarters, Department of the Army, before declaring an issue nonnegotiable to insure agreement with this conclusion.

44. 5 C.F.R. § 2424.20. The union makes this request by filing a petition for review with the Authority. *Id.* The purpose of the petition for review is to initiate a negotiability proceeding and provide the agency with notice that the exclusive representative requests a decision from the Authority that a proposal or provision is within the duty to bargain or not contrary to law. *Id.* § 2424.22.

45. See *id.* See also *FLRA, The "Who, What, Where and How" of Negotiation Issues* (visited Aug. 9, 1999) <<http://www.access.gpo.gov/flra/17.html>>.

46. 5 C.F.R. § 2424.1. See also Memorandum from Elizabeth B. Throckmorton, Acting Director for Civilian Personnel Management and Operations, to Labor Relations Specialists, subject: Revised Negotiability Regulation—Labor Relations Bulletin #409 (8 Feb. 1999) available at <<http://www.cpol.army.mil/library/bulletins/lrb/lrb-409.html>>.

47. *Id.* § 2424.23. All reasonable efforts will be made to schedule the conference within ten days of filing the petition. *Id.* § 2424.23(a).

48. 63 Fed. Reg. 66,405 (1998) (discussing the significant changes made by the final rule).

ration and Alternative Dispute Resolution Program (CADR).⁵³ The Authority launched this program in January 1996 to provide overall coordination and support for the Authority's labor-management cooperation and alternative dispute resolution efforts.⁵⁴ Prior to the 1999 change, the CADR program was not a specific part of the negotiability process. Specific CADR procedures will depend on the case and at what juncture the parties ask for assistance. If the parties agree during the CADR process that an issue is negotiable, or the Authority issues a final decision to that effect, both sides will have the duty to bargain in good faith over the issue. Any refusal to bargain may result in the filing of an unfair labor practice by the aggrieved party.

Conclusion

The rules governing what issues agencies and exclusive representatives must negotiate are well established in the Statute and twenty years of Authority decisions. While even the most seasoned labor counselors may understand that agencies do not have to bargain over management rights or certain rules and regulations, questions may still arise. If they do, labor counselors must help the agency decide whether to negotiate. The exclusive representative may not always agree with the decision reached and, ultimately, the Authority may have to decide

the issue. Under the 1999 negotiability procedures, at least the agency can rest assured it will have an opportunity to thoroughly present its case. Major Holly Cook.

Legal Assistance Note

You Mean I Can Go To Jail Too? The Deadbeat Parents Punishment Act: Another Reason Soldiers Need To Take Family Support Obligations Seriously

Commanders and family members have many options to ensure soldiers fulfill their support obligations. *Army Regulation 608-99, Family Support, Child Custody and Paternity*, is in part a punitive regulation⁵⁵ requiring soldiers to comply with a valid court order⁵⁶ or separation agreement.⁵⁷ In the absence of either of these documents, the regulation sets out the soldier's support requirements.⁵⁸ Commanders are authorized to exercise any of the administrative, non-judicial, or judicial remedies at their disposal⁵⁹ should a soldier fail to fulfill their obligations.

Legal assistance attorneys routinely advise clients on the soldier's support obligations. They help family members deal with the command and the soldier to ensure that they receive

49. The purpose of the agency's statement of position is to inform the Authority and the exclusive representative why a proposal or provision is not within the duty to bargain or contrary to law. 5 C.F.R. § 2424.24(a). Field Advisory Services or Headquarters, Department of the Army, will file all statements of position for Army activities in negotiability proceedings. U.S. DEP'T OF DEFENSE, DIR. 1400.25-M, DoD CIVILIAN PERSONNEL MANAGEMENT SYSTEM, subch. 711, para. F.6.c(1) (25 Nov. 1996).

50. *Id.* § 2424.25. The purpose of the exclusive representative's response is to inform the Authority and the agency why, despite the agency's arguments in its statement of position, the proposal or provision is within the duty to bargain or not contrary to law, and whether the union disagrees with any facts or arguments in the agency's statement of position. *Id.*

51. *Id.* § 2424.26. The purpose of the agency's reply is to inform the Authority and the exclusive representative whether and why it disagrees with any facts or arguments made for the first time in the exclusive representative's response. *Id.* § 2424.26(a).

52. *Id.* § 2424.27.

53. *Id.* § 2424.10. See FLRA (last modified Feb. 8, 2000) <www.flra.gov> (providing further information about the CADR program).

54. FEDERAL LABOR RELATIONS AUTHORITY, ALTERNATIVE DISPUTE RESOLUTION IN THE FLRA AND THE COLLABORATION AND ALTERNATIVE DISPUTE RESOLUTION PROGRAM (CADR) (1999) (on file with author).

55. U.S. DEP'T OF ARMY, REG. 608-99, FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY (1 Nov. 1994) [hereinafter AR 608-99]. Paragraphs 2-5 (provisions regarding financial support) and 2-9 (provisions regarding child custody) are punitive. *Id.* Additionally, provisions of AR 608-99 regarding compliance with court orders on financial support, child custody and visitation, paternity, and related matters apply to family members who are command sponsored and reside outside the United States. Noncompliance with such orders may adversely affect their continued entitlement to command sponsorship during their sponsor's military assignment outside the United States. *Id.* at i.

56. *Id.* paras. 2-4a, 2-4e.

57. *Id.* para. 2-3. The Army will not involve itself in disputes over the terms or enforcement of oral financial support agreements. *Id.* para. 2-3a. Where an oral agreement exists and is being followed, the Army will not interfere. *Id.* If a dispute arises concerning an oral agreement, the Army will only require compliance with the provisions of the regulation. *Id.* From a practical perspective, oral agreements are difficult to enforce because of the inherent difficulty in determining the accuracy of their terms. However, if the parties have a written financial support agreement, the amount of financial support specified in the agreement controls. *Id.* para. 2-3b.

58. *Id.* para. 2-6 (setting forth the support amounts a soldier must provide to his family members in the absence of a court order or separation agreement).

59. See *id.* para. 1-6. Personnel subject to the Uniform Code of Military Justice (UCMJ) who fail to comply with paragraphs 2-5 or 2-9 are subject to punishment under the UCMJ, as well as to adverse administrative action and other adverse action authorized by applicable sections of the United States Code or federal regulations. *Id.*

their share of financial support. However, the Army regulation is merely an interim measure,⁶⁰ and should not be viewed by family members as the solution to their support problems.⁶¹ Family members are encouraged to rely on the Army requirements only until a court order is entered or a separation agreement is established.

Once a court order or separation agreement is in place, the soldier is required to comply with its terms. Should the soldier fail to do so, not only does the commander have the options discussed above⁶² available to him, but, in the case of a court order, the family member has additional options as well. If the soldier is at least two months in arrears,⁶³ the family member can request, through either the court that entered the order or the state child support enforcement agency, that the Defense Finance and Accounting Service (DFAS) initiate an involuntary allotment⁶⁴ or a garnishment⁶⁵ against the soldier's pay.

Both a garnishment and involuntary allotment are positive steps in the right direction. However, for soldiers who attempt to dodge their responsibilities, there are more severe penalties as well. In June 1998, President Clinton signed The Deadbeat Parents Punishment Act⁶⁶ to stiffen the penalties imposed on those who fail to take their child support responsi-

bilities seriously. This Act amends the criminal statute for failure to pay child support⁶⁷ by increasing the maximum jail sentence⁶⁸ and providing for mandatory restitution equal to the total support obligation.⁶⁹

The Act focuses on three categories of deadbeats, and sets forth differing potential punishment ranges for each. The first category is for persons willfully more than one year behind in their child support obligations for a child living in another state, or, if less than one year in arrears, who owe more than \$5000.⁷⁰ If found guilty, they may be sentenced to a fine and up to six months imprisonment.⁷¹ The second category is for persons travelling to another state, or another country, intending to avoid their child support obligation, and who are more than one year in arrears or owe at least \$5000.⁷² The third category is for persons more than two years behind on support payments for a child living in another state, or who owe more than \$10,000.⁷³ If found guilty, those persons in the second and third categories, or a person from the first category with a subsequent conviction under this Act, can be fined and imprisoned for not more than two years.⁷⁴ In all cases, whenever there is a conviction under this section, the court will order restitution in an amount equal to the support obligation.⁷⁵

60. *Id.* para. 1-5f.

61. *Id.* There are several reasons for this. First, the Army regulation is effective only against soldiers while they remain in the service; once a soldier leaves military service, the regulation is of no consequence. Family members who have relied on AR 608-99 as their enforcement mechanism may suddenly find themselves with no means of ensuring that the support continues. Moreover, the amounts required under AR 608-99 often pale in comparison with amounts ordered by civilian courts, which often use more sophisticated calculations to arrive at circumstance-specific support amounts.

62. *See supra*, note 59.

63. The soldier must be at least two months in arrears for the involuntary allotment or garnishment mechanism to apply. The arrearage must be an amount equal to two months' payment, not a support payment that is an amount less than that required for a two month period. For example, a soldier with a \$500 per month support obligation would be considered two months in arrears when the unpaid amount equaled \$1000. A soldier with a \$500 per month support obligation would not be two months' in arrears if the amount paid each month was slightly less than the full amount, until the total amount of arrearages equaled two months' obligation. *See* AR 608-99, *supra* note 55, para. 1-8a (2); 42 U.S.C.A. § 665 (West 2000).

64. AR 608-99, *supra* note 55, para. 1-8a(1)

65. *Id.* para. 1-8a(2).

66. The Deadbeat Parents Punishment Act of 1998, Pub. L. No. 105-187, 112 Stat. 618 (1998) (codified as amended at 18 U.S.C.A. § 228 (West 2000)).

67. 18 U.S.C.A. § 228(c).

68. *Id.*

69. *Id.* § 228(d).

70. *Id.* § 228(a)(1).

71. *Id.* § 228(c)(1).

72. *Id.* § 228(a)(2).

73. *Id.* § 228(a)(3).

74. *Id.* § 228(c)(2).

75. *Id.* § 228(d). The amount of restitution ordered shall be equal to the total unpaid support obligation at the time of sentencing. *Id.*

The Act also presumes that the obligor had the ability to pay the amount of support ordered by the court.⁷⁶ This is a rebuttable presumption,⁷⁷ with the burden on the soldier to show that the amount ordered was unreasonable and that he was not financially able to pay the ordered amount. From a practical standpoint, any legal assistance client with a child support order that is believed to be unfair, impractical, or difficult to comply with should take immediate action to challenge or modify the order

rather than wait until the punitive provisions of the Act come into force.

Family members and soldiers must be counseled on the provisions of The Deadbeat Parents Punishment Act. Family members need to know that there is another level of enforcement available in certain circumstances, and soldiers must be made aware of this additional, and very serious, consequence of avoiding their child support obligations. Major Boehman.

76. *Id.* § 228(b).

77. *Id.*