

Variable Duty to Bargain [29]

NOTE: The content of this document has not been reviewed by legal counsel, nor does it represent a consensus view of the Design Team or indicate any kind of preference among options presented to the Senior Review Committee.

Summary Description:

- The labor-management relations program within DHS would be administered by a three-member panel that would replace the FLRA and FSIP for most labor relations disputes.
- Management's duty to bargain over the impact and implementation of its decisions would be linked directly to mission needs. As management's need to act escalates in response to national security threats or other operational requirements, its duty to bargain and its obligation to follow contractual limitations would diminish.
- Negotiations would take place under strict time limits and the Secretary would have the right to set aside third-party impasse decisions if they would interfere with the accomplishment of the agency's mission. Management would work collaboratively with unions to develop agency regulations and policies but there would be no duty to bargain over these matters.

Key Features:

Internal Administration

- The FLRA and FSIP would be replaced by an internal DHS labor panel made up of three members. One member would be appointed by the Secretary; one by the DHS unions; and one by labor and management. The panel would adjudicate labor-management disputes currently handled by the FLRA and FSIP with the exception of union elections, which the FLRA would continue to conduct. If the volume of cases makes a single panel impractical, then multiple panels could be created on a geographic basis and/or for particular organizations.
- The panel would operate under time limits for adjudicating all matters under its jurisdiction (e.g., 30-45 days)
- Panel decisions would be final and binding and subject to judicial review under the Administrative Procedures Act.
- The Secretary or his designee could set aside the panel's impasse decisions if they would have an adverse affect on the agency's ability to carry out the mission. Such a decision would not be judicially or administratively reviewable.

Negotiations

- Management's bargaining obligation would vary depending on national security requirements and operational needs. As management's need to act increases, its bargaining obligations would decrease.
- For example, working conditions could be changed and contracts bypassed without bargaining in situations where the agency must respond to a serious national security threat or meet critical operation needs. If the threat was less serious, the agency might bargain impact and implementation before making changes but only if time permits. If not, post-implementation bargaining would be permitted. Under ordinary conditions, the current scope and duty to bargain would apply.
- The Secretary or his designee would decide when to suspend or modify normal bargaining rules and this determination would not be subject to third-party review.

Variable Duty to Bargain [29]

- Variations in the duty to bargain could result from agency-wide threats or purely local conditions that demand immediate action.
- Agency-wide regulations would be non-negotiable but, through labor-management councils, unions would have a pre-decisional role in developing regulations and policies at the departmental and directorate levels. Agreements between the agency and the unions at these levels would bind local bargaining units.
- There would be strict time limits for all negotiations (e.g. no more than 20 days for mid-term bargaining and 60 days for term agreements).

Bargaining Unit Structure

- Bargaining units would be determined based on what is the *most appropriate* unit.

Sub-options:

The members of the labor relations panel could be appointed exclusively by the Secretary.

Given the number of unionized workers within DHS, there could be more than one labor relations panel to hear labor-management disputes. Panels could be regionally based or connected to particular DHS organizations (e.g., CBP).

Time frames for bargaining (20 days for mid-term bargaining and 60 days for term agreements) could be adjusted up or down or even made negotiable up to some pre-defined limit (e.g., no more than 90 days).

The system could require national-level bargaining over agency-wide personnel policies and rules rather than allowing only for pre-decisional union involvement.

Relation to Other Options:

This option would work best in combination with:

- Pay and classification options that provide management significant discretion over pay setting and adjustment.
- Adverse action and appeals options that narrow the range of appealable decisions actions and create internal panels to adjudicate disciplinary and performance-based actions.

Implications (This section contains "possible advantages/benefits" and "possible problems/ challenges" and "other implications" suggested by design team members. The views expressed in these "implications" represent the opinions of one or more members of the design team and therefore reflect sometimes opposing points of view. These opinions do not reflect the collective judgment of the entire design team on any of the issues addressed, nor have they been reviewed by legal counsel.):

Possible Advantages/Benefits

- Mission needs are assigned the highest priority and key management decisions could be implemented without delay
- Management could gain the flexibility needed to respond to existing and emerging security threats while the right to bargain collectively would be preserved
- Could dramatically reduce the time it takes to resolve labor-management disputes and negotiate agreements
- Offers unions meaningful pre-decisional involvement on a wide variety of agency-wide issues in

Variable Duty to Bargain [29]

exchange for flexibility on bargaining

- Simplifies and shortens the process for issuing agency regulations and policies
- Bargaining units could be more effectively and efficiently tailored to meet changes in the agency's structure
- Provides for arbitration of grievances

Possible Problems/Challenges

- Bargaining obligations that vary depending on national security conditions and mission needs may be difficult to define and more complex to administer than existing rules and practices; there are no standards set out for "mission needs" relative to the duty to bargain, which invites judicial construction
- Unions will resist limits on current scope and duty to bargain and any system that makes DHS regulations nonnegotiable and gives the Secretary discretion to waive bargaining obligations and contracts; unions will maintain that such systems lack credibility, independence and objectivity.
- "Most appropriate unit" standard has no precedence in law; concerns were also raised about its impact on employee self-determination.
- Eliminating the FLRA General Counsel function may have a chilling effect on the filing of meritorious ULPs if the charging party lacks the resources to prosecute its own case.
- Places pressure on national unions to undercut authority of union locals and local agreements
- The concerns that led to suggesting a new "most appropriate" unit standard might also be resolved by supporting consolidation of smaller units
- Reduces the scope of management's discretion to bargain.
- Making dues allotments and official time available only to the extent negotiated by the parties will likely be viewed by unions as an unwarranted curtailment of current statutory rights.

Other Implications

- The provisions of this option will have to be reviewed for consistency with the Homeland Security Act.

Costs

- Some of the costs currently borne by FLRA and FSIP to administer the labor relations program will shift to DHS as part of creating an internal labor relations panel or panels.

Evaluation in Terms of Guiding/Design Principles:

Mission Centered

- Reduces bargaining obligations -- and burdens on management -- as mission needs rise
- Expedited bargaining and better, more efficient dispute resolution will allow management and labor to devote more time to mission needs

Performance Focused

- Provides management ample flexibility to get the job done when it matters most
- Pre-decisional union involvement in agency decision-making enhances organizational performance and effectiveness.

Contemporary and Excellent

- Both flexibility and employee involvement are necessary ingredients for optimal organizational

Variable Duty to Bargain [29]

performance. This option strikes the right balance between these essential components of a contemporary and excellent labor relations system.

Generate Trust and Respect

- Greater management authority over workplace decisions along with more flexibility over collective bargaining will test employee trust in the new system

Based on Merit System Principles and Fairness

- Seeks a fair, equitable balance between management's need for flexibility and the employees' interest in having a voice in the workplace
- The obligation to bargain in good faith is preserved along with appropriate legal sanctions for violating union and employee rights

Detailed Description By System Component and System Element

L		Labor Relations System
System elements:		Summary description:
1	Administration	<ul style="list-style-type: none"> • The FLRA and FSIP would be replaced by an internal DHS labor panel made up of three members. One member would be appointed by the Secretary; one by the DHS unions; and one by labor and management. The panel would adjudicate negotiability claims, bargaining impasses, unfair labor practice charges, arbitration exceptions, and unit determinations. The FLRA would continue to conduct union elections. • More than one panel could be created to accommodate the large number of unionized workers in DHS. These panels would be appointed as described above but would be established regionally and/or within particular organizations. • The panel would operate under time limits for resolving all matters within its jurisdiction and would render decisions after a hearing or upon a written record. • Panel decisions would be judicially reviewable under the APA. • The Secretary or his designee could set aside the panel's impasse decisions if they would have an adverse affect on the agency's ability to carry out the mission. Such a decision would not be judicially or administratively reviewable.
2	Employee rights	<ul style="list-style-type: none"> • Right to form and join unions and to bargain collectively except where prohibited under applicable law or Executive Order.
3	Union rights & obligations	<ul style="list-style-type: none"> • Status quo, except that disputes over information sought by the union could be adjudicated by the labor relations panel outside the context of a ULP charge (e.g., management could assert that the request is unduly burdensome, protected from release by national security concerns, covered by information in the union's possession, etc).
4	Management rights	<ul style="list-style-type: none"> • National security and pay determinations added to list of prohibited subjects of bargaining.
5	Bargaining unit	<ul style="list-style-type: none"> • Bargaining units defined by what is the "most appropriate unit." • The labor relations panel will review and adjudicate unit determinations. • The FLRA will continue to oversee and conduct union elections.
6	Negotiations	<ul style="list-style-type: none"> • Mutual, obligation to bargain in good faith over matters affecting working

Variable Duty to Bargain [29]

L Labor Relations System		
System elements:		Summary description:
		<p>conditions.</p> <ul style="list-style-type: none"> • Management's bargaining obligation would vary depending on national security requirements and operational needs. As management's need to act increases, its bargaining obligations would decrease. • Management could act without bargaining at all or bypass contract provisions where DHS must respond to a serious national security threat or meet critical operation needs. If the threat was less serious but still genuine, post-implementation bargaining would be permitted. Under ordinary conditions, the current scope and duty to bargain would apply. • The Secretary or his designee would decide when to suspend or modify normal bargaining rules and this determination would not be subject to third-party review. • Variations in the duty to bargain could result from agency-wide threats or purely local conditions that demand immediate action. <ul style="list-style-type: none"> • There would be strict time limits for all negotiations (e.g. no more than 20 days for mid-term bargaining and 60 days for term agreements). • Agency-wide regulations would be non-negotiable but unions would have a pre-decisional role in developing personnel policies at the department and directorate levels. Agreements between the agency and the unions at these levels would bind local bargaining units. • Pre-decisional union involvement would come via labor-management councils at the national and directorate levels. The scope and composition of such councils would be determined by the parties.
7	Unfair labor practices	<ul style="list-style-type: none"> • The labor relations panel or panels would investigate and adjudicate unfair labor practice claims. • The charging party would be responsible for proving its own unfair labor practice allegations; there would be no entity comparable to the FLRA's Office of General Counsel to act as prosecutor.
8	Grievance/ arbitration	<ul style="list-style-type: none"> • All contracts must contain grievance provisions that end in binding arbitration. • Contracts must provide for speedy resolution of all matters covered by the grievance procedure; all actions would be subject to a regulatory time limit (e.g., 60-90 days from date of grievance to arbitration decision).
9	Dues allotments	<ul style="list-style-type: none"> • Negotiated by the parties.
10	Official time	<ul style="list-style-type: none"> • Negotiated by the parties.
11	Evaluation	<ul style="list-style-type: none"> • Surveys of managers, union representatives and employees to gauge satisfaction with new system and to elicit suggestions for improvement. • Assessment of results achieved through changes in the LR system with a special emphasis on mission accomplishment, quality improvements, productivity and efficiency gains, cost savings and cost avoidance, improvements in labor-management relations, and effective dispute resolution.