

## National-Level Bargaining (31)

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:

Under this option, collective bargaining will be limited solely to negotiations of labor agreements at the national level. The option also significantly reduces the union's right to negotiate during the term of a collective bargaining agreement. The parties will be encouraged to develop collaborative relationships where issues could be discussed and resolved without the legality, formality, and enforcement tools associated with collective bargaining. Issues resolved collaboratively are not necessarily limited to subjects of bargaining.

This option will replace the Federal Labor Relations Authority (FLRA) and establish a single authority and process to adjudicate issues of negotiability, impasse, unfair labor practices, and unit clarifications. The DHS labor panel will take over all functions currently performed by the FLRA. There will not be further judicial review of the Office's final decisions except for claims under the Administrative Procedures Act of arbitrary and capricious decisions. It is expected that the panel will be funded by DHS appropriations but operate independently of management, similar to an Office of Inspector General.

### Key Features:

- National Contractual Bargaining. Under this option, collective bargaining will be limited solely to negotiations of labor agreements at the national level; unions will be able to negotiate working conditions but only within the confines of national labor agreements. Bargaining over "impact and implementation" will take place only upon mutual agreement or when ordered by the DHS labor panel which will replace the FLRA.
- Zipper Clause. The sole obligation to mandatory bargaining will be term contract expiration.
- Elimination of Formal Discussions. This option will provide for enhanced employer-employee communication and participation in workplace decisions by eliminating the requirement that union representatives be present at all "formal discussions" with management. Bypasses of the union would continue to constitute an unfair labor practice.
- Informal Pre-Decisional Input. This option will promote the establishment of informal systems to provide employees at all levels an opportunity to informally discuss and submit ideas to improve operational effectiveness and workplace conditions. This will avoid the rigid and often adversarial process of impact and implementation bargaining at the local level and open new avenues of communications.
- Union Security/Official Time: Unions that have substantial support (a vote of 60% or more of the unit) would be able to impose a service fee on all represented employees. Without this level of support, official time may be negotiated not to exceed 50% for an individual in any month.

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- **Internal Labor Relations Panel:** A labor relations panel replaces the FLRA and resolves all labor controversies including negotiability, impasse, ULPs, and unit determinations. The Secretary may set aside panel decisions in rare cases for national security reasons. The panel is made up of 3 part-time members -- two appointed by the Secretary and one by unions. The panel has authority to proactively intervene in negotiations to order mediation or mediation/arbitration and set deadlines for completion of bargaining.

### Sub-options:

**Sub-option 1.** This option could include or exclude any portion of DHS currently covered by collective bargaining agreements. It could be limited by occupation such as law enforcement, inspections personnel or those with national security responsibilities as determined by the Secretary.

**Sub-option 2.** This option could be modified with a provision to allow out-of-cycle union or management requests to renegotiate contract provisions either at specific times or at the mutual request or the request of either party. This may be beneficial to both the union and management in terms of flexibility.

**Sub-Option 3.** This option could be amended to allow for some local bargaining in specific locations where working conditions are significantly different and unique from the rest of the bargaining unit.

**Sub-Option 4.** Provide express procedures for management to act before completion of bargaining even in non-emergencies.

**Sub-Option 5.** Provide express procedures for management to act in emergencies without respect to bargaining obligations or contract provisions together with procedures to guard against abuse.

**Sub-Option 6.** Other modifications that would be necessary to ensure that all DHS managers can carry out agency missions while allowing employees to bargain collectively.

### Relation to Other Options:

- Negotiated grievance procedure and arbitration provisions should be consistent with adverse actions/appeals system.
- A determination must be made whether performance ratings that affect pay should be part of the negotiated grievance procedure.

**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

- Collective bargaining responsibilities would not impede mission accomplishment.
- Official time costs are reduced.
- Local level communication and decision-making are maintained.
- The time and resources devoted to Labor Management disputes is reduced.

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- While management gains greater flexibility to act, the essential right to collectively bargain is maintained.
- Communication with employees is enhanced.
- Management has greater accountability for workplace decisions.
- Decisions are made more quickly.

### Possible Problems/Challenges

- Legal and/or regulatory hurdles to establishing a mandatory activity fee for non-members.
- Elections would be required to establish a single representative for units now represented by multiple unions; several existing unions would lose their exclusive recognition.
- Could make term contract negotiations significantly more critical which in turn might result in more impasses; could result in significantly longer and more detailed labor agreements.
- Unions will resist limits on current scope and duty to bargain and oppose giving the Secretary discretion to waive bargaining obligations and contracts; unions will likely maintain that such systems lack credibility and/or violate Homeland Security Act requirement for collective bargaining.
- "Most appropriate unit" has no precedence in law; concerns were also raised about its impact on employee self-determination.
- Reduces the scope of management's discretion to bargain.
- Allowing management to bargain contract changes at any time during term of agreement could undermine stability of labor-management relationship and is inconsistent with notion of term agreement.
- Organizationally dispersed bargaining units might cease to be effective if moved to national-level of bargaining.
- Mandatory dues requirement might be seen as unfair and is a radical departure from current system.

### Other Implications

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

### Cost

- Significant cost associated with establishing a DHS Panel and administrative structure to manage LR program.
- Savings through reduced official time and reduction/elimination of midterm bargaining.

### **Evaluation in Terms of Guiding/Design Principles:**

#### Mission Centered

Recognizing the profound and serious nature of the DHS mission, the agency must have a system in place capable of making rapid decisions. The expedited resolution of negotiability, impasse, ULPs, unit clarifications and union grievances is a critical element of this option.

Limiting collective bargaining to the national level, management will have the flexibility to quickly implement needed workplace changes in support of the mission. Managers and employees will have a clear and understandable contractual framework from which to base workplace decisions and disputes over

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negotiability will be greatly reduced.

Management may implement needed changes (consistent with the provisions of the current contract), without the requirement to bargain in advance and without threat of a grievance or unfair labor practice which could result in the delay of necessary changes.

### Performance Focused

Unions would be fully funded and able to provide quality, professional representation upon obtaining the support of 60% of bargaining unit members. Parties would have the ability to resolve issues with a minimum of process and third-party input. Failure to mutually resolve issues would invite intervention from DHS panel.

### Contemporary and Excellent

This option is clearly a significant departure from deep-rooted tradition. It provides for expedited decision making and flexibility. It reflects a modern, practical approach which recognizes the seriousness of the DHS mission but allows for innovative structures for improving performance and resolving workplace disputes.

### Generate Trust and Respect

This option will build and sustain a high level of respect and trust among all DHS employees by providing opportunities for employees and managers to deal with workplace issues in a non-confrontational manner. Disputes will be handled in a transparent fashion by the internal panel and decisions will be rational and based on the DHS mission.

### Based on Merit System Principles and Fairness

This option provides safeguards for union representatives by maintaining enforcement tools in cases of management's failure to bargain in good faith or in instances of contract violations. Due process in the handling of grievances is preserved and an efficient and expeditious process is established for the resolution of disputes. Dispute resolution mechanisms are flexible to allow for ADR or other face-to-face systems as mutually agreed upon.

### **Transition & Implementation:**

- DHS Panel must be appointed, trained and staffed properly.
- Bargaining units must be clarified; some will require elections.

**Detailed Description  
By System Component and System Element**

L		Labor Relations System
System elements:		Summary description:
1	Administration	<ul style="list-style-type: none"> <li>• Internal DHS Panel – 3 outside members.</li> <li>• 2 Members Appointed by Secretary; 1 member appointed by Unions.</li> <li>• Would handle all collective bargaining appeals – negotiability, impasse, failure to bargain charges.</li> <li>• Mediator/Arbitrator can be appointed at any time by panel, without request by parties, and deadline can be set for completion.</li> <li>• Board would also resolve ULPs, and appeals/exceptions to arbitration decisions.</li> <li>• Secretary may set aside decisions in rare occasions upon determining Board decision would compromise national security.</li> <li>• DHS Panel may be guided, but not bound by, federal sector case law</li> <li>• Criteria for panel members will be expertise in labor relations or labor economics.</li> <li>• Pool of potential panel members includes scholars, authors, academics, arbitrators, former public sector officials.</li> <li>• Part time employment; compensated on per diem basis.</li> </ul>
2	Employee Rights	<ul style="list-style-type: none"> <li>• Right to fair and competent representation.</li> <li>• Right to engage in union activity without reprisal.</li> <li>• Retain Weingarten right.</li> <li>• Weingarten right recast as an employee right rather than union right.</li> </ul>
3	Union Rights and Obligations	<ul style="list-style-type: none"> <li>• <i>Status quo</i> except that management obligation to provide information is simplified and relaxed.</li> <li>• Add duty of “competent” representation.</li> <li>• DHS regulations to recognize “protected activity” for employees participating in the labor-management process.</li> <li>• Relevant and necessary information will be disclosed upon request to the extent the collecting and compiling of information is not unduly burdensome and disclosure does not violate the Privacy Act. A DHS security manager will be able to exclude information from being released when release is contrary to the agency’s national security interests. This decision is not subject to challenge or review.</li> <li>• Unions to remain routine users under the Freedom of Information Act.</li> </ul>
4	Management Rights	<ul style="list-style-type: none"> <li>• Prohibited subjects of bargaining: currently permissive and prohibited subjects (7106(a) and (b)(1); national security/operational needs, and pay setting.</li> </ul>

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		<ul style="list-style-type: none"> <li>To negotiate pay would require Congress to participate in negotiations due to the authorization/appropriation process (separation of powers issues).</li> </ul>
5	Bargaining Unit	<ul style="list-style-type: none"> <li>"The Most Appropriate Unit" is the standard.</li> <li>Level of recognition is no lower than major organizational unit (e.g. CBP, ICE, Coast Guard, FEMA).</li> <li>Election and certification/decertification procedure developed by policy.</li> <li>Elections held to establish an exclusive representative for each currently organized major component.</li> </ul>
6	Negotiations	<ul style="list-style-type: none"> <li>Collaboration at or below major organizational component level.</li> <li>Joint Mgt-Labor Work Teams.</li> <li>Pre-Decisional involvement; not restricted to subjects of bargaining.</li> <li>Term bargaining on traditional conditions of employment (notice to DHS panel prior to negotiation).</li> <li>Midterm Bargaining only by mutual agreement or when ordered by DHS Panel.</li> <li>DHS Panel may intervene, appoint a mediator-arbitrator, and impose deadlines when (either type) bargaining is not progressing satisfactorily</li> <li>FMCS optional.</li> <li>Continues current exclusions from collective bargaining (e.g. Secret Service, TSA).</li> <li>Major organizational components have flexibility to design systems to conduct collaboration and pre-decisional involvement.</li> <li>Management flexibility to implement not held hostage by midterm bargaining; post-implementation bargaining acceptable.</li> <li>Composition, scope, procedures and authority of collaborative body left to parties.</li> </ul>
7	Unfair Labor Practices	<ul style="list-style-type: none"> <li>Resolved by DHS Panel.</li> <li>Reduced in number of potential violations to: Failure to bargain in good faith; Promoting or sponsoring a competing labor organization. (management); Retaliation for protected activity; and Work stoppage or other job action (union).</li> <li>Court review for arbitrary, capricious or violation of law.</li> <li>Eliminates concept of formal discussion as a ULP; bypass considered a failure to bargain in good faith violation.</li> <li>Bypass occurs when a management agent deals directly with unit employees on a negotiable matter without giving the union an opportunity to represent the employee(s), e.g., agreeing with employees to change negotiated work schedules policy without.</li> </ul>
8	Grievances – Arbitration	<ul style="list-style-type: none"> <li>Required in term agreements.</li> <li>Binding arbitration.</li> </ul>

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		<ul style="list-style-type: none"> <li>• Exceptions decided by panel.</li> <li>• Need to flesh out appeal rights for arbitration with EEO claims.</li> </ul>
9	Dues Allotments	<ul style="list-style-type: none"> <li>• Upon vote of 60% of bargaining unit, union may impose mandatory service fee to all represented employees.</li> <li>• Without 60% support of mandatory fee, default to current voluntary system with negotiated process for revocation.</li> <li>• Ability to impose mandatory fee linked to major reduction in official time.</li> </ul>
10	Official Time	<ul style="list-style-type: none"> <li>• In units with mandatory service fees, official time limited to face-to-face negotiations and appearances before third parties.</li> <li>• In units without mandatory fees, official time may be negotiated in term agreements not to exceed 50% in one month.</li> <li>• Linking mandatory fees to reduced official time promotes competent representation and relieves agency of hidden costs.</li> </ul>
11	Evaluation	<ul style="list-style-type: none"> <li>• Five-year evaluation to assess how LR program:             <ol style="list-style-type: none"> <li>1) affects DHS ability to meet mission requirements;</li> <li>2) serves the public interest;</li> <li>3) contributes to a high-functioning organization;</li> <li>4) affects morale and productivity; and</li> <li>5) contribute to direct and hidden costs</li> </ol> </li> <li>• Possible evaluators may include GAO, MSPB, NAPA, academic institutions, and private-sector consultants.</li> </ul>